

**THE EASTERN CARIBBEAN SUPREME COURT**  
**IN THE HIGH COURT OF JUSTICE**  
**ANTIGUA AND BARBUDA**

**CLAIM NO. ANUHCV2008/0058**

**BETWEEN:**

**AZIZ HADEED**

**Claimant**

**And**

**PHILLIP ABBOT**

**Defendant**

**Appearances:**

Mr. Roger Forde Q.C. and with him Mr. Dexter Wason for the Claimant

Mr. Anthony Astaphan S.C. and with him Mr. Ralph Francis for the Defendant

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**2010:**

**2010: 12, October**  
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**JUDGMENT**

**INTRODUCTION<sup>1</sup>**

1. **Harris, J.:** By Claim Form filed on January 29, 2008, and the Further Amended Statement of Claim (also referred to as the 'statement of claim') filed on May 13, 2009, the Claimant Aziz Hadeed claims against the Defendant Phillip Abbott, damages, including aggravated damages and exemplary damages<sup>2</sup> for defamatory statements published of and concerning him by the Defendant

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<sup>1</sup> This is a substantial reproduction from the statements of claim and submissions of the parties.

<sup>2</sup> The Claimant will not be pursuing his claim for exemplary damage.

in an e-mail posting of a Power Point presentation on the Google Groups "Taking Sides" Group on December 15, 2007. The Claimant also seeks an injunction restraining the Defendant by himself or by his servant or agents or otherwise from repeating and/or publishing the said words contained in the Power Point Presentation or any similar words with the like effect

2. The Defendant by way of Further Amended Defence admits to having published the offending words, but denies that he did so maliciously. The Defendant further denies that the words in their ordinary and natural meaning meant and were understood to have the meanings the Claimant ascribes to them in his Statement of Claim and pleads further and alternatively that in so far as the offending statement contained comment or expressions of comment, they constituted fair comment on a matter of public interest.

3. The Claimant is a prominent and well known businessman in Antigua and Barbuda and a former Senator and Minister of State in the Office of the Prime Minister. On December 15, 2007. He alleges that the Defendant maliciously published on the Google Groups, *Taking Sides* Group, an e-mail concerning the Claimant, he aded "Citizens Against Hadeed Greed", with an attachment containing a Power Point Presentation which contained the Following Statements:-

1. **It is not time Antigua and Barbudans take a stand? Our Prime Minister seems ready to, are the people going to stand with him or are they going to stand with Hadeed and the UPP Ministers who are standing with Hadeed? It is time we as a people tell our elected Representatives what we want from them. I am proud of the stand taken by P.M. Baldwin Spencer;**

2. **Baldwin Spencer's 155 Million Dollar Sunshine Question: Is this the People's Government, or is it Hadeed's Government?**

3. **Who gives a dam about the People?**

- **Under the ALP, Hadeed secured his billion dollar electricity gravy train against the wishes of the Tender's Board and notwithstanding the fact that his bid was 40% higher than the other contender.**

- Under the UPP, Hadeed is moving the Court for his right to “substantial benefit” on another sweetheart electricity deal that will cost rate payers 155 million dollars or 148% more than they would have to pay if the Cabinet chooses the other contender
  - They live well, we catch hell!
4. **Stop The Hadeed Greed. You are paying the highest electricity rates in the civilized world. From these rates, the Hadeed’s made over 30 million dollar in profits every year. It’s Time for Action. Say a Loud “No” To Hadeed’s Planned 155, Million Dollar Rip-Off.**
  5. **How Hadeed Loves Antigua and Barbuda. While the people of Antigua and Barbuda continue to pay the highest electricity rates in the Caribbean and while APUA gallops merrily to hell in a hand basket, Hadeed’s supply of electricity to APUA makes over 30 million dollars in profits every year. Outrageous? “Only in Antigua”.**

CLAIMANT’S CASE<sup>3</sup>

4. The Claimant contends that the statement published by the Defendant are false and that there is no question that they were published by the Defendant of and concerning him personally, as the Defendant attached photographs of the Claimant on each and every page of the Power Point Presentation.
5. The Claimant contends further that the Defendant knew or should have known, but failed to indicate in the said Power Point Presentation that it is the Antigua Power Company Limited (APC) and not the Claimant who had entered into a contract with the Antigua Public Authority (“APUA”) to provide electricity to the APUA under the ALP Government. It is the Claimant’s further contention that the Defendant failed to point out in the said Power Point Presentation that the APC is a Limited liability company and is a separate and distinct legal entity from the Claimant.

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<sup>3</sup> The ‘claimant’s case’ is a substantial reproduction of his statement of case and submissions filed in this matter.

6. The Claimant contends that in their ordinary and natural meaning, the words published by the Defendant meant and were intended by the Defendant to mean that:
  1. The Claimant was a greedy person and /or that he is a person who practices greed as a way of life.
  2. Under the former ALP Government, the Claimant had greedily secured for himself One Billion Dollars from the Government Contract to provide electricity to the APUA.
  3. The Claimant benefited personally from this very lucrative contract at the expense of the people of Antigua and Barbuda who had to pay very high electricity rates as a consequence.
  4. Under the current UPP Government, the Claimant greedily sought to secure for himself another contract valued at One Hundred and Fifty Five Million Dollars, which also have been at the expense of the people of Antigua and Barbuda who would have had to pay very high electricity rates as a result.
  5. That the Claimant has unfairly inflated the cost of providing electricity to the APUA and has as a result acted dishonestly, and has cheated, tricked and exploited the people of Antigua and Barbuda.
  6. That during the time the Claimant served as a member of the Cabinet of Antigua and Barbuda, he had knowledge or access to his Ministerial colleagues and /or information about the Government's procurement and other needs which were not available to other business persons or members of the public, and that he used the said knowledge accessed, and .or information to secure for himself an undue and unfair advantage.
7. The Claimant further contends that the words published by the Defendant in the Power Point Presentation reflect badly on his character and reputation and tend to lower him in the estimation of right thinking people in Antigua and Barbuda generally. The Claimant states that he has suffered

much embarrassment as a result of the words complained of, and his reputation and character in the business community and the larger community of Antigua and Barbuda has been greatly injured, and he has been brought into ridicule and contempt.

8. It is settled Law that for words published of and concerning a person to be defamatory, the words in their ordinary and natural meaning must tend to bring that person into hatred, ridicule or contempt, or to lower that person in the estimation of right thinking persons in the community generally<sup>4</sup>. "Right thinking person's" are those who are neither unusually suspicious nor unusually naïve and who do not always interpret the meaning of words as a lawyer would as they are not "*inhabited by a knowledge of the rules of construction*"<sup>5</sup>. In **Kenny D. Anthony v Vaughn Lewis SLUHCV 2000/0411** at paragraph 52, Edwards J described such persons as "ordinary persons" who are fair minded and reasonable.
9. It is submitted by the claimant that in construing the natural and ordinary meaning of the offending words published by the Defendant in the instant case, the entire Power Point Presentation must be taken into account.
10. The Defendant contends in his Witness Statement that the Claimant is aware that in the power Point Presentation he did not speak of him personally but instead in his capacity as head of the Hadeed Group, and that "*all those who followed the issue of supply generation are aware of this*". The claimant contends that despite this assertion of the Defendant, the fact is that nowhere in the Power Point Presentation did the Defendant indicate that he was referring to the Claimant other than personally, and there is no evidence before the Court to support the Defendant's assertion that "*all those who followed the issue of supply generation*" are aware that he was not referring to the Claimant personally.
11. *A fortiori*, on each and every page of the Power Point Presentation, the Defendant posted a very visible photograph of the Claimant which, it is submitted by the claimant, puts it beyond doubt that the offending words in the Power Point Presentation were referable to the Claimant personally and not in a representative capacity.

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<sup>4</sup> **Gatley on Libel and Slander, 8<sup>th</sup> Edition (1981) para 4 at p 21.**

<sup>5</sup> **Lewis v Daily Telegraph Ltd. [1964] A.C 234, AT 235** per Lord Reid.

12. The claimant submits that the words in their ordinary and natural meaning meant and were understood by right thinking persons in Antigua and Barbuda generally, that the Claimant was a greedy and dishonest man who had tricked and exploited the people of Antigua and Barbuda by securing for himself contracts under the ALP Government to provide electricity to APUA at unfairly inflated costs, which costs resulted in huge profits for himself at the expense of the people of Antigua and Barbuda who suffered as a result due to the high electricity bills that they were forced to pay.
13. It is further submitted that the words in their ordinary and natural meaning meant and were understood to mean by right thinking persons in Antigua and Barbuda, that the Claimant was also greedily seeking for himself a similar contract under the UPP Government, and at the material time, had used the information he had access to as a member of the Cabinet of Antigua and Barbuda to greedily secure for himself unfair advantages.
14. Based therefore on the ordinary and natural meaning of the words in the Power Point Presentation the Claimant invites the court to find that the words were defamatory of the Claimant, as they would tend to bring him into hatred and contempt, or to lower him in the estimation of right thinking persons in Antigua and Barbuda generally, who would naturally resent the fact that the Claimant's greed, unfair and dishonest behavior and practices have resulted in them footing the bill in high electricity rates.
15. The Defendant pleads in his defense that to the extent that the offending words contained comment or expressions of comment, they constituted fair comment on a matter of public interest. It is submitted by the claimant that the Defence of Fair Comment is not available to the Defendant as the Offending words in the Power Point Presentation are not comment but are statement of fact which are defamatory and false and actuated by malice.
16. It is settled law that for a comment to be fair, it must be based upon true facts in existence when the comment was made<sup>6</sup>. Citing further authority Council for the claimant submits that Edwards J

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<sup>6</sup> Cohen v Daily Telegraph Ltd. [1968] 1 W.L.R 916.

puts it this way in Kenny D Anthony v Vaughn Lewis supra at paragraph 76:- “A comment is a statement of opinion on facts, which are true and burden of proof is on [the Defendant] to prove that the comments were fair”. Further, Council for the claimant submits that In Joynt v Cycle Trade Publishing Co. [1904] 2KB 292 at 292, Kennedy J made the point that one cannot invent untrue facts about a person and then comment upon them.

17. It is submitted by the claimant that the offending words published by the Defendant in the Power Point Presentation are untrue statements of facts. The Claimant says he did not enter into any contracts to provide electricity to the APUA either under the ALP Government or the UPP Government; he did not unfairly inflate the cost of providing electricity to APUA; and he did not act dishonestly or cheat , trick or exploit the people of Antigua and Barbuda into paying high electricity rates.
18. The Claimant further submits that the Defendant published the offending words with actual malice as the Defendant by his own admission in his Witness Statement concedes that he knew that the Claimant and the Antigua Power Company are separate and distinct legal persons.

#### DEFENDANT’S CASE<sup>7</sup>

19. Save that the Defendant denies that he acted maliciously the Defendant admits that he published the subject statement set out in paragraph 3 of the Further Amended Statement of Claim (“amended statement of claim”). The statements he contends, formed part of and were spoken within the context of an ongoing public debate on national radio and the media on a matter of great public concern concerning the Claimant’s appointment to the Cabinet of the Government of Antigua and Barbuda and the inevitable or appreciate of undue influence or a conflict of interest which arose or may arise whenever companies owned and/ or controlled by the Claimant and his immediate family secures, obtained or procures business, contracts, and agreements from the government or companies and statutory Boards controlled by the Government of Antigua and Barbuda.

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<sup>7</sup> This is a substantial reproduction of the defendant’s statement of case and counsels submissions filed in this matter.

20. Further, the defendant specifically denies that he acted maliciously as alleged in paragraph 3 of the Further Amended Statement of Claim and, in relation to the alleged particular of malice, states

1. *"Paragraph 3 (a) to (c): It is a notorious fact that the Claimant owned the substantial or a significant shareholding in APC and / or controlled and/ or was capable of controlling the affairs and /or decisions of APC. Accordingly, the Defendant was under no duty to make inquiries.*
2. *Paragraph (d): The Defendant makes no admission in relation to paragraph 3 (d) as he does not know whether the Claimant "engaged in any negotiations" as alleged or at all. But in any event, this allegation is irrelevant because the Claimant does not himself have to negotiate for his companies or companies in which he and his family have a vested personal and financial interest."*

21. The defendant denied that in their natural and ordinary meaning the said words, in their proper context, bore or were capable of meaning the meaning or any of the meanings pleaded in the amended Statement of Claim. The defendant submits that in their natural and ordinary meaning and context the said words bore and were understood to bear the following meanings:

1. *"The Claimant and /or the company owned and/or controlled by the Claimant and his immediate family called Antigua Power Company Limited controls the supply of electricity generation to APUA.*
2. *Following the 2004 General election the Prime Minister and Minister responsible for APUA started publicity that APUA should supply its own power generation. As a result, a decision was made by the Cabinet to Antigua and Barbuda for APUA to purchase its own generators.*
3. *The Claimant and/ or the Company owned and /or controlled by the Claimant and his immediate family sought to supply APUA with Wartsila engines and visited and /or*

*sent senior officers and their Attorney at Law to visit Wartsila in Finland at various times. At the material time it was not public knowledge that the APUA wanted to purchase Wartsila engines.*

4. *The Claimant, then a Senator and Minister of Government, made it plain to the previous Board of Directors of the APUA that he would never allow the Board to proceed with a contemplated plan or project for energy diversification. Shortly thereafter, the entire Board was unceremoniously removed.*
5. *The Claimant, as a member of the Cabinet of Antigua and Barbuda, had knowledge or access to his Ministerial colleagues and/ or information about the Government's procurement and other needs which were not available to other business persons or members of the public thereby securing for him and the companies owned and controlled by him and his immediate family an undue and unfair advantage.*
6. *The control of electricity generation has led to rising rates for consumers."*

22. This, contends the defendant, is a classic case of fair comment on a matter of great public interest. The words published by the Defendant are not in dispute. The Defendant relies on two defences. The first is that in context the words are not defamatory. The second is the defence of fair comment.

23. The Claimant's answer to the Defendant's case of fair comment includes the allegation of malice; that the beneficiary of the arrangements and proposals for APUA and the joint venture of which APC is an integral part, was APC and not the Claimant. The Claimant was and is a Director and shareholder of APC.

24. The Claimant, avers the defendant, is manifestly a public figure. He was a Minister of the Government and person with great commercial and economic influence in the State of Antigua and Barbuda as a director and shareholder of the Hadeed Group of Companies, which had extensive

economic ties with the Government. His presence in the Cabinet created the public perception of a conflict of interest. And Don Mitchell QC in a tribunal concerning the subject matter of the allegations referred to in this matter; found as a matter of fact that this conflict existed. The Claimant, says the defendant, was therefore subjected to public scrutiny and criticism.

25. The defendant contends that the Claimant is a well known public figure in Antiguan politics and business. He is Chairman, Director and Shareholder of the Hadeed Group of Companies, and is known as the face and standard bearer of the Hadeed Group of Companies and Family. Prior to the 2004 General Election he was closely affiliated with the Antigua Labour Party but switched allegiance just before the date of the General Election.

26. The Defendant is a citizen and taxpayer of Antigua and Barbuda. He is also a member of the Concerned Citizen Group, which met in 2005 with the Prime Minister of the Cabinet of Antigua and Barbuda. The Defendant and Concerned Citizens Group met with the Prime Minister of Cabinet of Antigua and Barbuda to express their concerns and outrage at the arrangements with APC and high electricity rates.

#### Factual Background and Context as alleged by the defendant

27. The defendant contends that there was great public concern and debate between 2005 and 2007 concerning APC's domination of Power generation and substantial if not excessive gains made by APC and rates paid by consumers and ratepayers of APUA. Officers of APUA produced an analysis of the loan proposals from APC and the PRC, the two contenders for the subject generation contracts it is said, for the supply of additional generation power. This he says shows that APUA and rate payers would have had to pay in excess of 155 Million Dollars more if the Cabinet and APUA agreed to accept claimant's APC's loan proposals instead of those from the PRC.

28. There was also great public concern and debate in relation to and concerning the public and manifest dispute between APC, and the Prime Minister and Cabinet testifies the defendant. This dispute concerned the determination of APC to APUA to the purchase of three additional

generators for phase 2 of the joint Venture. Equally determined, and public, says the defendant, was the Prime Minister's response to APC. In one of his public statements the Prime Minister in addressing the power generation and load shedding problems in the state said that "*when ambition turns to greed it must be condemned*". This public dispute led to the Government refusing to allow generators to be unloaded at Crabbs and to litigation by APC.

29. Prior to making his Statements on the 15<sup>th</sup> December 2007 the Defendant says he had in his possession and did read:

- i. The APUA Analysis
- ii. The Don Mitchell QC Report
- iii. The Documents given to him by the Claimant.
- iv. News Papers articles some of which were disclosed by him.

30. The Defendant relied on i and ii above in his Further Amended Defence. Additionally, these documents were listed on his list of documents. The Claimant filed a reply and witness statement by at no time did object to the documents or any part or traverse or plead any contrary response to the APUA analysis and the Don Mitchell QC Report. Instead, his Council cross examined the Defendant at length on them and conceded that he was not questioning "the authenticity" of the documents. These facts argue Council for the defendant, Mr. A. Astaphan; preclude the Claimant from denying the existence of these documents, and asserting that the Defendant was not entitled to rely on them on the 15<sup>th</sup> December 2007.

31. Further, contends the defendant, the undisputed evidence, as admitted by the Claimant is that:

1. APC's Contracts,
2. The proposals from APC and the PRC,
3. APC's dominant of power generation,
4. The Prime Minister's stand and move to the PRC,
5. The APUA Analysis, and
6. Don Mitchell QC Report;

Were vigorously publicly discussed and debated in the media and on radio prior to the 15<sup>th</sup> December 2007. Extracts from the documents were read on radio. [See paragraphs 12, 14 and 15

of the Defendants witness statement<sup>8</sup>]. These, contend Mr. Astaphan, are therefore admitted facts, which formed part of the context of the statement published on the 15<sup>th</sup> December 2007 by the Defendant.

### The Trial and Case as contended by the defendant

32. The Claimant led no evidence of the extent of publication or damage to his reputation or to show that the APUA analysis or findings by Don Mitchell QC were false.
33. However, the defendant contends that in direct contrast to the Defendant and his witness, the Claimant was manifestly not a witness of truth. On many occasions he prevaricated and contradicted himself. On other Occasions, the Claimant sought to bob and weave in order to avoid inevitable answers. He made admissions only when he had no alternative. A significant admission made by the Claimant, noted Mr. Astaphan, was that the claimant remained a shareholder and continued to receive profits and dividends from APC while a Minister of Government. Another significant admission was that the Claimant had a financial interest in and profited from APC's gain and profits<sup>9</sup> while still a Minister. These admissions are important contends the defendant because this financial entitlement and interest existed prior to December 2007, and formed the basis not only for Don Mitchell's criticisms but the public debate, and Defendant's December 15<sup>th</sup> 2007 statements.
34. Mr. Astaphan, for the defendant, observed that during cross examination the Claimant sought to deny, vaguely, that he was the head, symbol and standard bearer of Hadeed family and Group of Companies or was in any involved in APC's affairs while a Minister. But this denial contradicts that the Defendant evidence at paragraph 9, 11, 18, 21 and 22 of his witness statement, where he repeatedly referred to the Claimant as the Hadeed, as the Hadeed Group of Companies and family. However, he was not cross examined on these paragraphs of his witness statement.

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<sup>8</sup> There was no cross-Examination on these paragraphs.

<sup>9</sup> He also admitted he had an interest in APC's profitability.

35. The defendant contends further that the Claimant's denial also frontally contradicts findings of Don Mitchell, QC, which were never challenged, the Claimant's participation at the meeting of the Cabinet with the Concerned Citizens Group and his manifest intrusion at the APUA Board meeting with Caribbean Power and Mr. Bob Tillotson<sup>10</sup>. It also contradicts the public statements he made on behalf of the Hadeed family in April 2004 some weeks after the 2004 election.

The Findings of Fact as contended by the defendant

36. The Defendant submits that in order to succeed on his fair comment defence, he was only required to establish some of the facts upon which he relied, and which were in the public domain on or before the 15<sup>th</sup> December. The Following are some of the important facts which he contends were proved at the trial:

1. The Claimant was the face and standard bearer of the Hadeed Family and Group of Companies<sup>11</sup>;
2. The First two APC contracts with APC were and are profitable;
3. The proposals for phase 2 or the additional generators have the potential for greater profit<sup>12</sup>;
4. The Claimant was a director<sup>13</sup> and remained a shareholder in APC while a Minister of Government
5. As Shareholder the Claimant benefitted from profits and dividends and had an interest in the profitability of APC<sup>14</sup> while a Minister of Government.

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<sup>10</sup> See the evidence of Rolston Potter and Bob Tillotson

<sup>11</sup> The Defendant was not crossed-examined on this aspect of his witness statement.

<sup>12</sup> The Claimant's evidence was that APC will lose if and only if APUA is not part of the joint venture

<sup>13</sup> There is no evidence of resignation.

6. Don Mitchell's findings of a conflict of interest on the part of the Claimant and more specifically his objections to proposals for power generation in the Cabinet.
7. The Claimant never challenged the Don Mitchell report in Court.
8. The finding by APUA Officers that the APC Loan Proposals will cost ratepayers 155 Million Dollars more than the proposals from PRC.
9. The Claimant had access to the APUA Analysis well before and therefore knew of its contents more specifically the findings and recommendations made by officers of the APUA. However, he never questioned or objected to its contents.'
10. At this time the Claimant was a Minister and major shareholder in APC.
11. The Claimant's participation wearing "two hats" at a meeting between the APUA and Caribbean Power regarding wind energy<sup>15</sup>.
12. The Claimant approached the Defendant during a 2005 meeting between the Cabinet and Concerned Citizens Group where APC and power generation were being discussed.
13. The Claimant promised<sup>16</sup> The Defendant documents which he said will show the Defendant that the APC deal is the best deal. The Claimant delivered the documents to the Defendant's home the following Saturday.
14. The Prime Minister's Stand. His refusal to allow power generation to be dominated by APC and determination to seek alternative power from the PRC.
15. The Prime Minister and Cabinet did not give approval for phase 2 of the APUA/APC Joint Venture or to APC importing or loading three additional generators at Crabbs.
16. The Government forcibly prevented APC from unloading the three generators at Crabbs.
17. APC moved the Court prior to the 15<sup>th</sup> December 2007.
18. APC lost the case at the High Court<sup>17</sup>.

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<sup>14</sup> Admitted during cross-examination.

<sup>15</sup> See the evidence of Potter and Tillotson and letter written to Prime Minister by Tillotson.

<sup>16</sup> The Claimant's evidence that he was asked to do so by the Prime Minister is patently false

<sup>17</sup> Those fact followed the December 15<sup>th</sup> Statements.

37. It is accepted that the admissibility of documents in civil proceedings is governed by the Civil Evidence Act 1995 of the UK. The savings provision of the Old Evidence Act of Antigua and Barbuda allows it.

38. The defendant submits; It is accepted that in certain circumstances hearsay evidence is admissible to prove a fact in issue. However, it is submitted that the issue of the weight of evidence is more important than its admissibility. Indeed, in any Trial the Judge has before him a plethora of admissible evidence but he must weigh the evidence in making findings and fact. For example, one witness may give two conflicting statements. Each statement is admissible by the Judge must determine what weight, if any, to place on each statement.

### THE ISSUES

39. The broad issues that arise for the Court's determination are:

- (1) Whether the words are capable of being defamatory;
- (2) Whether the words were defamatory in the circumstances;
- (3) Whether the words were defamatory of the claimant;
- (4) Can the claimant avail himself of the defense of fair comment ;
- (5) To what remedies, if any, is the claimant entitled?

40. In the end, after determining the 'preliminary' issues, the remaining issue to be determined is whether or not the statement was a fair comment.

### FINDINGS/CONCLUSION

41. But before I deal with that issue let me dispose of the other issues before the court. That the words are capable of being defamatory, is in my view not debatable. The meaning ascribed to the words by the Claimant at paragraph 4 of his further amended statement of claim however, is not in my view as extensive as suggested. I ascribe the meaning to the words set out in the Further Amended Statement of Claim at para 4( c) - (f) and those meanings set out in para 8 of the "further amended Defence".

42. The words spoken are directed at the Claimant and the Company of which he admits his own 20%.
43. As to the availability of the Defence of fair comment. I accept the submissions on the law of both Council on this point and commend it to the reader. I accept the law that members of the public are entitled to comment freely and fairly on matters of Public interest. Their comments however, must be on facts that exist and should be without Malice. To avail oneself of this defence the comment must be on a matter of public interest. There is no doubt in the view of the Court that upon the evidence, the subject matter was of Public interest; great public interest even.
44. The comment must also be recognizable as a comment as opposed to an imputation of fact. Whether the statement is comment or fact can depend on context. Referring to the closing submission of Mr. Astaphan for the Defendant there cited is the dicta of Ferguson J. in the New South Wales case of Myerson v Smith's weekly (1923) 24S.R. (M.S.W) 20 AT 26 as follows: "*to say that a man's conduct was dishonorable is not comment, it as a statement of fact. To say that he did certain specific things and that his conduct was dishonorable is a statement of fact coupled with a comment. "Further, I accept as the law that comment may be made, if the matter is already before the public, without setting out the facts on which the comment is based - provided the subject matter of the comment is plainly stated"*<sup>18</sup>.
45. I accept also that the statement must indicate what the facts are on which the comment is made. The question before me on this issue is what are the facts relied on and whether there is "*sufficient subject matter upon which to make comment*"<sup>19</sup>.
46. Turning to Bundle 3 from page 4-10 where to the offending statements are set out, I attempt to ascertain from them statements of fact and determine whether those facts (if any) were true.
47. The Claimant has set out its case in its statement of Claim. More particularly he has set out in para 3, the offending words<sup>20</sup>.

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<sup>18</sup> Justice Eady *Lowe v Associated Newspapers Ltd.* [2007] WLR 595 (610).

<sup>19</sup> *Kemsly v Foot* [1952] AC 345 (357)

<sup>20</sup> See also Trial Bundle 3 pp4 – 10.

48. These words are substantially imputations of fact.
49. Taking clause 3 of the amended statement of claim, more particularly Cl. 3(a); there is no statement of fact in that statement.
50. Under Cl. 3(b), again there is no statement of fact there. Neither is there in the question posed in Cl. 3(c) which reads; *"who gives a damn about the people"* . Under the first bullet paragraph of Cl. 3(c), is a statement of fact which reads as follows; *"Under the ALP, Hadeed, secured his billion dollar electricity gravy train against the wishes of the Tenders Board and notwithstanding the facts that his bid was 40% higher than the other contender"*.
51. Under the second bulleted paragraph is what is another, substantially, statement of fact. The fourth bullet paragraph; *"They live well, we catch hell"* is a comment.
52. The statement of claim at pp 92 of TB 3, goes on to chronicle the offending words at clause "(a)" of that page, as what in my view is a mix of comment – "Stop the Hadeed Greed" – and assertion of fact – "You are paying the highest electricity rates in the world..." - all rolled up as it were, in one statement.
53. Further still, at page 92 of Trial Bundle 3, the statement of claim at clause "(b)" contains mixed fact and comment.
54. The facts required to be established as true include; (i) That the claimant's bid was 40% higher than the other contender; (ii) That the claimant is trying to secure another electricity deal that will cost the rate payer \$155m. or 148% more than they would have to pay if cabinet chose another contender; (iii) That Antiguans are paying the highest electricity rates in the civilized world; (iv) That from these rates the claimant makes over \$30m. a year, ((v) That he had Cabinet insider advantage as alleged and reproduced in para. 21(5) above.
55. Has the defendant proved these substratums of facts? He submits that he has done so. He submits that the proof of these facts are found in (i) the APUA Analysis, (ii) the Don Mitchell Q.C. report, (iii) the documents given to him by the claimant, (iv) Newspaper articles and his own observations.

56. Mr. Astaphan for the Defendant seeks to have the assertions, findings and/or conclusions found in the five sources of information referred to above, admitted as evidence in support of the truth of the facts relied upon. He cites the text; Documentary Evidence 9<sup>th</sup> Edit. Hollander Q.C. that posits that it is for what in effect is, the claimant in this case, to apply for leave to call and cross examines the maker of the documents or here say statements. Further, Messrs Hollander Q.C. states that the service of the required notice of intention to adduce here say evidence, does not render the evidence inadmissible, but, for the most part goes to the weight of the evidence<sup>21</sup>. The said notice was not filed and served on the claimant in this case.
57. The Don Mitchell Q.C. report and the APUA analysis carry much weight in my view. They both came into existence in what appears to be neutral and objective circumstances. The Mitchell report would have been tested under the rigors of a tribunal hearing. Further, neither document nor their contents have been impugned either at this trial or before<sup>22</sup>. There is no sufficient evidence, including the evidence elicited in cross examination of the defendant, to contradict the evidence contained in the 'report' and the 'analyses. I accept the evidence of the two witnesses of the claimant – Rolston Potter and Robert Tillotson - over that of the case for the claimant on which they are in conflict<sup>23</sup>. The substratum of fact disclosed in the offending statement, along with the facts forming the wider context are in the court's view, substantially proved
58. The evidence of the claimant, even taken at its highest, does not negate all the elements of the defense of fair comment. Upon the proved facts the defendant commented. Was his comment fair ? Was his reference for instance, to the "greed" and "greedy", fair? Having established that the defendant did publish of the claimant defamatory statements, having also established the substantial truth of the facts relied on to found the defence of 'fair comment'; were the comments thereto expressed, within the limits of fair comment. Verity C.J. in Clapham v Daily Chronicle[1944] LRBG 71, Supreme Court, British Guiana, stated the law thus; *"Exaggeration, even gross exaggeration, in the expression of one's views does not necessarily destroy the protection afforded those who are at liberty to criticize the public acts of another, although this may be so where*

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<sup>21</sup> See also A Practical Approach to Civil Procedure 4<sup>th</sup> edit. Stuart Sime, pp 328 para 30.4.2 – 30.4.4.

<sup>22</sup> The defendant was vigorously cross examined by learned Queen's Counsel, Mr R. Ford, on the APUA analysis. No alternative perspective was sufficiently established before the court.

<sup>23</sup> The evidence of the two witnesses in any event were not in my view central to the case for the defendant.

*comment 'passes out of the domain of criticism itself' to use the words of Collins MR in Mc Quire v Western Morning News*<sup>24</sup> ”

59. In the Court's view, notwithstanding the proof of the factual substratum, the defendant's comments approached that of invective. I conclude however, that the words cannot be properly described and in fact fall just short of personal invective properly and legally defined. Let me state here that the claimant has not proved malice in this matter. However, the defamatory comment 'passes out of the domain of criticism itself'. Words such as '*who gives a damn about the people*'; "*...planned ...rip off*"; "*stop the Hadeed greed*" are simply unnecessary to adequately and forcefully, even colorfully exercise ones constitutional right of freedom of expression and comment publically on issues of obvious public importance such as the public issue in this matter. There can be at times, a thin line between astuteness and impropriety or even unconstitutionality. Comments on facts that can fall on either side of that line, at the very least, out of an abundance of caution, are best made with less exaggeration rather than more. On the proved facts, the comments actually published were not a fair assessment of the claimant and his professional and commercial endeavors in the commercial environment of Antigua and Barbuda and caused him some measure of loss to his reputation.

## DAMAGES

60. The essential aim of an award of damages in a defamation action is to compensate the claimant for the injury to his reputation. Damages are special and/or General. No special damages are pleaded in this matter. Further, as noted by Senior Council for the defendant, no evidence has been led as to any damage – injury to feelings, natural grief and distress. Further, the court notes that there is no proved evidence of any kind of high handed, oppressive, contumelious behavior of the defendant resulting in increased mental pain and suffering caused by the defamation.<sup>25</sup>

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<sup>24</sup> [1903] 2 KB 100, pp 109.

<sup>25</sup> For the considerations entered into in awarding damages see *McCarey v Associated Newspapers Ltd.* (No 2) [1965] 2 KB 86, pp104, per Pearson LJ; see also *Commonwealth Caribbean Tort*, Kodilyne, 3<sup>rd</sup> edit. Pp 291.

61. However, the law presumes that the claimant's reputation would have suffered some damage, and for this the court would award general damages.<sup>26</sup>

62. In arriving at the general damages the court has taken into account several factors including, the extent of the publication and accessibility to the larger public, the social status of the claimant, the conduct and demeanor of the defendant during the trial, the deliberate publication of the statement, the absence of malice on the part of the defendant, the proof of the substratum of facts, the public's knowledge of its culture of a propensity to make cavalier and unsubstantiated public statements.

### ORDER

63. For the reasons provided above, IT IS HEREBY ORDERED AS FOLLOWS:

- I. Judgment for the Claimant;
- II. General Damages of EC\$8000.00;
- III. Interest pursuant to the Judgment Act only<sup>27</sup>;
- IV. An injunction restraining the Defendant by himself or by his servants or agents or otherwise howsoever, from repeating and/or publishing the said words or any of them<sup>28</sup>.
- V. Prescribe the Costs payable by the Defendant to the Claimant.



.....  
DAVID C HARRIS  
HIGH COURT JUDGE  
ANTIGUA and BARBUDA

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<sup>26</sup> Ibid.,

<sup>27</sup> The court has considered the discretionary Supreme Court Act interest and disallowed it.

<sup>28</sup> The injunction as set out in the statement of claim is not granted in its entire terms so as not to unduly fetter the defendant's constitutional capacity to engage in fair comment on the same issue of public interest.