

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim NO: SLUHCV 2005/0543

BETWEEN:

EARL HUNTLEY

Claimant

AND

(1) RICK WAYNE
(2) STAR PUBLISHING COMPANY (1987) LIMITED

Defendants

2010: July 12, 13th,
2012: January 31st.

Appearances: Mr. Dexter Theodore for the Claimant
Mr. Peter I. Foster and with him Ms. Diana Thomas

Judgment

[1] WILKINSON J: The Claimant filed his claim form and statement of claim on August 2nd 2005, and therein he sought the following relief:

- (i) An injunction to restrain the Defendants by themselves, their servants or agents or otherwise from further publishing or causing to be published the said or similar words defamatory of the Claimant.
- (ii) Damages.
- (iii) Interest thereon at such rate as the Honourable Court shall deem fit.
- (iv) Such further or other relief that the Court deems fit.
- (v) Costs.

[2] The statement of claim as amended on January 23rd 2006, did not change the relief sought. It alleged that the Claimant was a former Ambassador for Saint Lucia

to the United Nations for the period September 14th 2001, to September 13th 2003, and the Ambassador for Saint Lucia to the Caribbean Community for the period September 14th 2003, to September 13th 2004.

- [3] It was alleged that the Second Defendant operated a business web-site at <http://www.stluciarstar.com/> with a link thereon to a discussion board at <http://www.tropicaltraveller.com/cgi-bin/ubbcgi/ultimatebb.cgi?ubb=gettopic,f=1:t=003193> and the First Defendant was the administrator of the discussion board.
- [4] The Claimant alleged that a statement published on the discussion board on August 3rd 2004, at 10.55 p.m. by a person using the pseudonym or avatar "Boss Hoss" was defamatory. He further alleged that the statement was understood to mean him as he was identifiable as the person referred by name and office. He also alleged that a large but unquantifiable number of readers had read the statement.
- [5] He said that in their natural and ordinary meaning the words complained of meant and were understood to mean:
- (a) that the Claimant is guilty of receiving a bribe;
 - (b) that the Claimant is guilty of corruption;
 - (c) that the Claimant is a thief;
 - (d) that the Claimant is guilty of a serious criminal offence punishable by imprisonment in the island of Saint Lucia;
 - (e) that the Claimant is guilty of dishonesty in the discharge of his office as Ambassador for Saint Lucia, and/or
 - (f) that the Claimant was unfit to hold the office of Ambassador for Saint Lucia.
- [6] Further in the alternative, by way of innuendo, the words meant and were understood to mean that the Claimant had committed an act of corruption in the discharge of the duties of his office, or had committed some corrupt or other fraudulent or dishonest act in connection with a person called Barlett who paid the

Claimant a bribe with which the Claimant purchased a Jaguar motor-car. The Claimant set out the particulars on which he relied.

Particulars

- (a) the Claimant repeated paragraph 1 of the statement of claim and relied on the fact the words “kick back” in the context in which they were published in relation to the Claimant imports that the Claimant is corrupt or a person involved in corruption in the discharge of the duties of his office, and/or is involved with a corrupt person called Bartlett who paid the Claimant a bribe in pursuance of a secret agreement entered into between them in New York.
- (b) The Claimant relies on the fact that the slang and/or Creole words “bobol”, “bobolist”, “kick back” and “voleur” import that the Claimant is corrupt or involved in corruption and/or is involved with a corrupt person who paid him a bribe and/or that he is a thief.
- (c) The Claimant invites the court to infer that the readers of the words, in particular the Saint Lucian readers, are familiar with the said meanings of the words “bobol”, “bobolist”, “kick back”, and “voleur” and understood the words complained of.

[7] By reason of the publication of the words the Claimant alleged that he had been seriously injured in his character, credit, reputation and in the way of his office as Ambassador for Saint Lucia. He had also been brought into doubt, public scandal, odium and contempt.

[8] The Defendants in their joint defence signed by the First Defendant and Mae Wayne as managing director of the Second Defendant set out several defences. Firstly, they denied that they published or caused to be published or participated in the publication of the words complained of, secondly they said that if there was publication then pursuant to section 1 of the Defamation Act 1996 (England) they were not responsible; thirdly, if the words were found to be have been published they did so innocently not knowing or having grounds to suspect that the posting was defamatory; fourthly, they denied that the words bore the meanings attributed to them; fifthly, even if the words were defamatory then they were protected as being fair comment, and sixthly, the words were protected by qualified privilege.

Particulars were provided to support the pleadings of fair comment and qualified privilege.

- [9] The Defendants' denied the allegation of injury to the reputation of the Claimant in the way of his office and that they either threatened or intended further publication of the words.

The evidence:

- [10] The Claimant was a public servant who worked in the Ministry of Foreign Affairs holding various posts from 1979 to 2004 and towards the later part of his service he was Ambassador for Saint Lucia to the United Nations at New York for the period September 14th 2001, to September 13th 2003 and thereafter the Ambassador for Saint Lucia to the Caribbean Community for the period September 14th 2003, to September 13th 2004.
- [11] By an indenture dated September 24th 1982, the Helenites Association of St. Lucia (hereinafter "the Association") purchased from YOUNG ISRAEL OF RUBY INC., a portion of land together with a building thereon (hereinafter "the Helenites Building") at 438 East 49th Street, Brooklyn, New York for fifty four thousand United States dollars (US\$54,000.00) and also entered into a mortgage arrangement with YOUNG ISRAEL OF RUBY INC. for the sum of thirty four thousand United States dollars (US\$34,000.00). By various social and other activities, the Association raised funds to make payments against the mortgage.
- [12] At 1990 an assessment was carried out on the Helenites Building by the City of New York, its classification changed and it was found to be in arrears of taxes for the period 1982 to 2000. Whereas the Helenites Building was purchased for fifty four thousand United States dollars (US\$54,000.00), on assessment the building was valued at forty five thousand dollars (\$45,000.00) and the land at sixty seven thousand United States dollars (US\$67,000.00). The Association had difficulty meeting the taxes assessed through its activities and there was initially a plan to sell the Helenites Building and then there was expressed the sentiment that there

was a need to retain the Helenites Building for the benefit of the Saint Lucian community at New York. The Government of Saint Lucia paid off the tax arrears.

- [13] By an indenture dated December 3rd 1999, the Association transferred ownership of the Helenites Building to the Government of Saint Lucia.
- [14] Taxes went into arrears once again for approximately thirty one thousand United States dollars (US\$31,000.00) and this was paid by a debt collector who acquired a lien on the Helenites Building and he threatened foreclosure.
- [15] The Claimant entered into a transaction with Mr. Michael Bartlett to raise funds to avoid the threatened foreclosure. The transaction between the Claimant and Mr. Bartlett generated public discussion.
- [16] On August 3rd 2004, between 9.00 a.m. -10.00 a.m. the Claimant held a press conference and said:

" Over the last few weeks in the chat room of the Star Newspaper, there have been wild allegations and false statement with regard to a property known as the Helenites Centre in Brooklyn...in the host of the DBS TV Programme, Talk, as well as the Star Newspaper of Friday July 30th 2004 making allegations of a major scandal surrounding that property; and in the Mirror Newspaper also of Friday July 30th calling on the Government to explain the situation...A member of one of the Association of the Council, Mr. Michael Bartlett of Helenites who had had a long association with the building, then offered to raise a loan to pay the lien and repair the building for rental, with the proceeds from the rental of the building going to repay the loan. This would involve transferring the title of the property to him so that the loan could be raised on the property. I agreed to do this on the clear understanding that it would be a temporary transfer and that the Government of St. Lucia would continue to remain the legitimate owner of the property. There is therefore a signed agreement attesting that the transfer of title to the property is a temporary arrangement that this arrangement was entered into to facilitate a mortgage on the property undertaken by Michael Bartlett and that the loan was to be used for the Centre in the manner I have already outlined, that the title would be transferred back to Government once the loan was repaid, and that the Centre was responsible for the loan repayments... Unfortunately the advances in modern technology – specifically internet chat-room – have only given them another stage to perpetuate this deplorable attitude on a

larger scale than a small island. While they hide behind the anonymity of an internet chat room, the owners of such chat rooms should be aware that the anonymity of their participants does not absolve these owners as well as the internet service providers from responsibility from libelous and slanderous statements made in these chat rooms".

- [17] On the same day, August 3rd 2004, at 10.55 p.m. there was posted on the discussion board found at <http://www.tropicaltraveller.com/cgi-bin/ubbcbgi/ultimatebb.cgi?ubb=gettopic;f=1> the words complained of by an anonymous person under the pseudonym or avatar of "Boss Hoss". The profile of "Boss Hoss" on the discussion board showed that he/she had posted one hundred and seventy (170) items prior, was located at Saint Lucia, and had registered on the discussion board at October 2003. "Boss Hoss" was member #1822. Boss Hoss posted:

" I am so happy for the star discussion board. It can make a moo moo talk. The people hearare (here are) very intelligent and they have x-ray vision and see through all the bull shit the voluers and bobolist try to block their eyes with. (I eh call anybody name!) When we catch them in their bobol even when they do it in new york (New York) they want to pretend to be indignant and threaten to sue people.

Let them interfer(e) with Rick Wayne he will be their undoing. Take care he is not the one they will have to beg to intercede with the st lucian (St. Lucian) people on their behalf when they finally gets whats coming to them.

But how can an ambassador screw up such a simple matter? Who gave the permission to make secret agreement with anybody? When was this agreement made? I hope they had the sense to date it prior to the first board posting on this topic.

All how you cut it, this stinks and what Huntley gave as his explanation does not absolve him of wrong doing as far as I am concerned.

If he is not experience enough to know that this matter should not have been dealt with as a private affair between himself and one other party who more likely than not is a friend of his then he should not be ambassador to anywhere.

Furthermore as of tonight I have fired him as my ambassador. He can be his friends ambassador but for me he has the legitimacy of a pee-pee in

my poo-poo speaker of the house. Hopefully he'll do likewise and fade away quietly.

But I would never never ever call him a BOBOLIST. I would never never ever ever call him a dirty rotten VOLEUR. I would never never ever ever SAY THAT HE GOT A KICK BACK FROM BARTLETT TO BUY A JAGUAR MOTOR CAR AND FIX ALL THEM ROTTEN TEETH HE HAD IN HIS MOUTH.

You think I would ever say something like that, Boy, I would never ever say things like that."

The posting remained posted until about May 5th 2005 according to the Claimant.

- [18] A few minutes after Boss Hoss posting, a person with the pseudonym or avatar "Eternallyisis" posted:

"Eternallyisis
Member posted August 03, 2004 11.49PM
Member #1069

His backlash at the Star discussion board merely intensifies the measure of his obvious guilt in this matter.

One question Mr. Huntley, what is with the CIA tactics? too many politicians go around with the idea that "what people don't know won't hurt them."

- [19] During the month of August 2004, the Prime Minister in a statement to Parliament said:

"Our Government is concerned with ensuring that these arrangements were undertaken in an appropriate manner and that neither the Government nor the people of Saint Lucia would have been compromised as a result."

- [20] There were disclosed articles published in the Star newspaper, a press release of the UWP dated July 27th 2004, the transcript of a statement made by the Prime Minister in Parliament, and a copy of a suit filed at New York by the Government of Saint Lucia against Mr. Michael Bartlett. None of these included publication of Boss Hoss' statement. The Claimant admitted that the statement was not repeated elsewhere by the Defendants.

[21] By letter dated August 24th 2004, the Government of Saint Lucia appointed Justice Albert Matthew to conduct an investigation into the circumstances relating to the Helenites Building and in a report dated October 25th 2004, he said:

" 70. I find no evidence of any criminal intent by any of the parties, and consequently there cannot be any conduct which constitutes criminal intent. I shall define corruption for the purpose of the report as reprehensible conduct short of criminal misbehavior. I would include underhand behavior or conduct from which a party gains or expects to gain financial or other reward. It is my opinion that none of the parties involved in these matters can be said to be guilty of corruption. In Schedule 4 of the report, the Accountant of the Mission shows how the amount of \$150,000. was expended.

71. Acts of impropriety would include incorrectness or improper conduct and misfeasance may be defined as the wrongful exercise of lawful authority. It appears clear from the evidence that there are acts of impropriety and or misfeasance.

72. The Ambassador most concerned in these matters has unsolicitedly sought to give reasons why the Government of St. Lucia was not approached for the monies required for the Centre and why a loan was raised in New York by a private individual for the purpose. He admitted that he did not seek clearance from the Authorities in St. Lucia because as Ambassador he has plenipotentiary powers and he acted under those powers. I am of the view that the Ambassador was misguided...

83. Full blame for the transfer of title to the Centre and the facilitation of the mortgage for \$150,000.00 must be placed squarely and firmly on the shoulders of the Ambassador. He acted without authority in several respects. One employee at the Mission told me that the decision to transfer the property and to enter into the mortgage had to be made from the office of the Mission and only the Helenites Association had to be consulted. I reject that notion. The Government of St. Lucia is the supreme authority in all of this and they had to be consulted and give their approval.

84. ...

85. The acts of impropriety and/or misfeasance that I find include the transfer of title to the Centre from the Government of St. Lucia to Michael Bartlett without the knowledge of the Government; the facilitation of a loan over the property without the approval of the Government; and the engagement of real estate agents in respect of the redevelopment of the Centre, again without the knowledge of the Government of St. Lucia."

- [22] There was subsequently filed suit Index No.16710/05 by the Government of Saint Lucia against Mr. Michael Bartlett in the Supreme Court of the State of New York County of Kings seeking that the court grant the Government a judgment awarding title and possession of the Helenite Building, and ordering that Mr. Bartlett transfer title of the Helenite Building to the Government, pay costs and other disbursements.
- [23] The usual protocol letter in a defamation claim was issued at July 30th 2005, four (4) days short of the one (1) year anniversary of the publication of the words complained about. The letter had the names of both Defendants on it, but it was unclear to the Court whether the letter was to both Defendants or whether it was meant for the First Defendant in care of the Second Defendant. It simply stated with "Dear Sir". The letter said that it required as a matter of urgency a full and unequivocal retraction and apology in terms approved by the Claimant's attorney-at-law, and an undertaking not to repeat the allegation. This suit was filed three (3) days later, one (1) day short of the one (1) year anniversary of the publication of the words complained about.
- [24] The First Defendant is a director and employee of the Second Defendant. He is also the host of the television talk show "Talk". He described himself as "moronic" about the internet and matters posted on the discussion board under his name or as "Administrator". Items posted are that which he dictated to other persons for posting on his behalf. He had in the past given instructions for matters posted on the discussion board to be deleted. He occasionally worked with the editorial team on deciding which matters should be removed from the discussion board because of obscenity, complaints or they contained defamatory statements.
- [25] The First Defendant dictated and there was posted on the discussion board on a date not decipherable to the Court, the following:

"Author Topic: Board Management

Rick Wayne
Administrator
Member #153

Predictably, I will be castigated by the morons who insist on abusing this service. I've been there before, remember? On two previous occasions I was forced, after due warnings, to wipe out the whole slate. The jackass droppings simply had become too much to bear. Some chose to attack me on the basis that I, of all people, had set out to deny others their freedom to anonymously abuse their targets by name. Some of you seem to believe that the right to freedom of speech I've so often defended includes your mindless poison-pen rantings. Well, think again. If you're going to write judgmentally about someone's personal or professional life, only to be nasty and for no other reason, then why do you insist on hiding behind some fake name? Be man or woman enough to allow the other party a chance to respond. Interesting, isn't it, that the person who wrote the piece that moved Earl Huntley to sue me cannot discover the courage to own up in my defense, even though what was written can in no way be considered defamatory in the circumstances. Obviously the opportunity offered St. Lucians by this board is unappreciated. See the number of constructive writers who have abandoned ship. The list is long. And now enough is enough. I have once again wiped out the board. Moreover, if there is no improvement after that I too will abandon ship and let the ballsless cretins take their droppings elsewhere!

When you are surrounded by glass you learn how to deal with stone throwers ---

That's a Rick Wayne quote folks!!!"

- [26] The Second Defendant is the owner of the website www.stluciarstar.com which has a link to the discussion board at <http://www.tropicaltraveller.com>. According to the First Defendant a decision was made by the Second Defendant to establish the discussion board and a computer expert established it. It's at this discussion board that the words complained of were posted by "Boss Hoss".
- [27] While the First Defendant described himself as "moronic" about the internet, Ms. Nicole Mc Donald, a journalist who has been employed with the Second Defendant for over ten (10) years, described herself as tech and internet savvy with about fifteen (15) years experience in this regard. She was part of the editorial team that would review postings brought to the editorial team's attention by reporters, and the editorial team would make a decision whether to remove or

not remove postings from the discussion board. There were occasions when the First Defendant dictated to her statements to post on his behalf on the discussion board. The postings she said were automatically removed every six (6) months. This statement was contradicted by the fact that the posting by Boss Hoss though posted at August 3rd 2004, was available up to at least May 5th 2005.

[28] There was no record of either the First Defendant or the Second Defendant receiving any complaint about the posting by Boss Hoss from the Claimant prior to the protocol letter at July 30th 2005.

[29] According to the First Defendant the discussion board no longer exists and was removed as part of the restructuring process of the Second Defendant.

Issue:

1. Whether the Defendants are liable for the posting by Boss Hoss.

Law:

[30] According to Gatley¹

"The gists of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. In determining whether words are defamatory there are two stages, first to decide on what they mean, and then to decide on whether that meaning is defamatory. From a technical point of view "imputation" is to be preferred to "meaning: since extrinsic facts, whether or not they are generally known, may give rise to implications which go beyond the "meaning" of the words in their ordinary sense...Words are not defamatory merely because their publication has a damaging effect on the claimant's reputation; there has to be a statement of fact or expression of opinion or imputation conveyed by them which will have this effect.

To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency, so there is a cause of action even if the words were not believed by the audience."²

¹ Gatley on Libel and Slander, 10th edition.

² Ibid para. 2.1

- [31] Defamation via the internet is a growing area. One of the earliest cases **Godfrey v. Demon Internet Ltd**³ dealt with the issue of internet service providers (ISPs). The allegation in this case is of libel via a discussion board on the internet and this is distinguishable from the role of an internet service provider (ISP).
- [32] Three (3) recent cases at England are particularly instructive to the Court as they address the issue of alleged libelous postings on a discussion board. They are **Nigel Smith v. ADVFN Plc and others**⁴ (Justice Eady), **Nigel Smith v. ADVFN Plc and others**⁵ (Justice Tugendhat) and **Smith v. ADVFN Plc & Ors**⁶ (court of appeal). The court of appeal⁷ said that it was pertinent to note that both Eady J. and Tugendhat J. were judges of very great experience in the field of defamation.
- [33] The Court could do no better in the description of what a discussion board is than adopting the description of Mr. Justice Eady in **Nigel Smith v. ADVFN Plc and others**⁸. In that case, Mr. Smith who was known on-line by the avatar "Anomalous" was successful sometime before late 2005 in setting up an action group to recover compensation for investors in a fraudulently conducted company. Knowing of that success, investors in another company called Langbar International Limited approached him for help following the discovery of what was alleged to be serious fraud in the conduct of that company. Those approaches were made via the bulletin boards on a financial information website of a company whose website was ADVFN.com. Some days thereafter the appellant set up the Langbar Action Group website, he said it had grown to about four hundred and fifty (450) members. His efforts to secure compensation for them did not meet with universal approval, with the result that a group of shareholders and others whom he described as "the malcontents" openly and vociferously opposed his action. Their disaffections were "posted" on the ADVFN Langbar bulletin boards, usually under

³ [2000] # WLR 1020

⁴ [2008] EWHC 1797 (QB)

⁵ [2010] EWHC 3255 (QB)

⁶ [2011] EWCA Civ. 1552

⁷ Ibid. para. 2.

⁸ [2008] EWHC 1797 (QB)

a pseudonym or an avatar⁹. Mr. Smith responded to many of the postings, he called people liars and threaten libel actions. One defendant, Mr. Tuppen posted the following:

"Assuming I am not being taken in by a complete load of bullocks! Then: Anomalous behavior is unacceptable good luck to all victims!!!"

"Anomalous and people like him (Godfrey vs. Demon springs to mind) eventually destroy the internet with absurd actions like this. My wipers scraped better things from my car windscreen tonight than this dickhead Anomulus."

"I believe that as others have said Anomalous and others are conspiring to extort money from individuals they have threatened. DO NOT PAY ANYTHING to solicitors named on 19/04/2007 @12.37 [Edwin Coe]...DO NOT PAY ANYTHING TO ANYONE WITHOUT TALKING TO THE POLICE/LAWYERS. Take good care."

"I do not like people demanding money with threats from people who can possibly ill afford the sums asked for. I have therefore contacted the police naming Nigel Smith – together with his home address as a possible crook demanding money under duress"

Mr. Smith filed in excess of thirty five (35) suits with more apparently waiting to be filed. It was Mr. Smith's case that there was a hate campaign that amounted to cyber-bullying being waged against him as the messages stacked up on the ethereal bulletin board. As they stacked up, he suggested there was a profusion of defamatory statements being published about him. Justice Eady said:

"The nature of bulletin boards

13. It is necessary to have well in mind the nature of bulletin board communications, which are a relatively recent development. This is central to a proper consideration of all the matters now before the court.

14. This has been explained in the material before me and is, in any event, nowadays a matter of general knowledge. Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the

⁹ Facts cited from the court of appeal case [2010] EWCA Civ.657

subject matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take".

15. The participants in these exchanges were mostly using pseudonyms (or "avatars"), so that their identities will often not be known to others. This is no doubt a disinhibiting factor affecting what people are prepared to say in this special environment.
16. When considered in the context of defamation law, therefore, communications of this kind are much more akin to slanders (this cause of action being nowadays relatively rare) than to the usual, more permanent kind of communications found in libel actions. People do not often take a "thread" and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it.
17. It is this analogy with slander which led me in my ruling of 12 May to refer to "mere vulgar abuse", which used to be discussed quite often in the heyday of slander actions. It is not so much a defence that is unique to slander as an aspect of interpreting the meaning of words. From the context of casual conversations, one can often tell that a remark is not to be taken literally or seriously and is rather to be construed merely as abuse. That is less common in the case of more permanent written communication, although it is by no means unknown. But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious...
23. Many would be surprised to see any of this made the stuff of libel proceedings – the object of which is to restore reputation. Most people would know what was being referred to in these exchanges and make up their minds about Mr. Smith's behavior...
27. Rather laboriously, in his particulars of claim against Mr. Love, Mr. Smith attempts to define "appalling" by reference to "someone who acted in manner that causes dismay, horror or revulsion to others." Yet the remarks on the bulletin board by these multiple defendants were not simply made in a vacuum. Any reader would know the context and recognize the conduct on Mr. Smith's part which was being characterized as "appalling" and be able to form his or (her) own view of it. This means Mr. Smith's reputation in the eyes of such a person is likely to depend primarily on what he himself has done,

and is known to have done, rather than on what others are saying about it...(My emphasis)

108 . I would not suggest for a moment that blogging cannot ever form the basis of a legitimate libel claim. I am focusing only on these particular circumstances..."

[34] In another **Nigel Smith v. ADVFN Plc and others**¹⁰ Justice Tugendhat said:

"19. In a claim for defamation on the internet the claimant has to prove that there has been publication: Al-Amoudi v. Briscard [2006] EWHC 1062 (QB); [2007] 1 WLR 113. This can be difficult to do. If it is not done, or if the number of publishees who can be proved to have read the words complained of is very small, then that can be one of the factors which may lead a court to conclude that there has been no real and substantial tort alleged (Jameel v. Dow Jones & Co. [2005] QB 946). The court may then strike out the claim as an abuse of process. Other factors which may lead the court to this conclusion include the low level of seriousness of any alleged defamatory meaning(s) relied on, and the failure to identify any substantial damages that the claimant either has suffered, or is likely to suffer. (My emphasis)

20... It is to be recalled that to defeat a defence of honest comment a claimant has to establish, not that the defendant was motivated by spite, but that he did not genuinely hold the view that he was expressing: Tse Wai Chun Paul v. Albert Cheng [2001] EMLR 777, Gatlery para. 12.25.

21. ...Nor does Mr. Smith say anything to strengthen his case on the number of publishees, or damage to his reputation whether under the pseudonym "Anamolous" or under his real name."

[35] Fair comment as a defence is only available in relation to matters of public interest. Further, what constitutes a matter of public interest rest entirely with the Court and so too whether a reasonable person might consider the comment to be fair comment. Matters which generally fall into the category of public interest are the government, conduct and speeches of persons in public offices and affairs, trade unions, the police, works of art, books, plays, television and other broadcast.

[36] According the Gatlery¹¹ :

¹⁰[2010] ECHC 3255 (QB)

¹¹Gatlery on Libel and Slander, 10th edition.

"12.2 **The element of the defence.** To succeed in the defence the defendant must show that the words are comment and not a statement of fact. However, an inference from fact from other facts referred to may amount to a comment. He must also show that there is a basis for the comment, contained or referred to in the matter complained of. Finally, he must show that the comment is on a matter of public interest, one which has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern. If the claimant can show that the comment was actuated by malice, he will defeat the plea. It is not enough, however to show that the comment was prejudiced or exaggerated or "unfair" in the ordinary sense of the word.

12.8 Construction. While some indication of the supporting facts is necessary the ultimate question on whether words are comment or fact is how they would strike the ordinary, reasonable reader ... It has been said that comment is often distinguished by use of metaphor but a jury is not obliged to treat a simile as comment. ..

12.9 Context. ... What is necessary is that language must be used which conveys to the reader who has not read the article which is the subject of criticism, that the defendant is commenting on what the writer of the article has said, rather than recounting what he has said. Where the claimant had launched a barrage of publicity about her relationship with a prominent politician and his attitude to their child, a hard-hitting article in the defendant newspaper which referred to the publicity and questioned her motives could only have been regarded by the ordinary reader as comment rather than an objective statement of fact capable of verification." (My emphasis)

Findings:

- [37] It is unfortunate that the Claimant did not seek the assistance of the Court by way of a **Norwich Pharmacal**¹² order and therefore up to date of trial the person who posted the words as Boss Hoss was not disclosed to the Court. In **Norwich Pharmacal v. Customs and Excise**¹³ it was established that a party may obtain an order for disclosure of the identity of the publisher of a defamatory statement.
- [38] The Court having regard to the evidence of Ms. Mc Donald who described herself as tech and internet savvy has no doubt that the discussion board was owned by the Second Defendant, and that although the First Defendant, to use his own word

¹² Ibid

¹³ [1974] A.C. 133

was "moronic" about the internet, he issued instructions for the control of the discussion board. His instructions would include when to delete postings or delete all postings from the discussion board and which he did on no less than two (2) occasions, and he dictated statements for posting on his behalf. The posting cited above, demonstrates his ability to give instructions to delete postings on the board or to issue instructions to close it down. There is no evidence that anyone else wielded this much power over the discussion board. It's the Court's view that the First Defendant's was the administrator of the discussion board.

- [39] There is no denying that Boss Hoss' posting referred to the Claimant. It did so by name and office.
- [40] Looking at the posting the Court has observed that the words "BOBOLIST", "VOLEUR", "KICK BACK" are capitalized. It is accepted protocol by many users of the internet that when a word is set out in capital letters, the word is being shouted at the reader. "Boss Hoss" undoubtedly wanted to get the attention of his readers/publishes. No chance of missing his posting.
- [41] The Court accepts the Claimant's interpretation that the words "BOBOLIST", "VOLEUR", and "KICK BACK" can impute something negative to the Claimant's character and these would include corrupt, dishonest, thief and bribe whether used singularly or together. That being the case, the words in the Court's view, in the proper context, could be defamatory.
- [42] This brings us to the manner of or place of the posting of the words by Boss Hoss. Neither the court of appeal nor Tugendhat J had any quarrel with Eady J's description of postings on a discussion board as being (a) read by relatively few people, most of who share an interest in the subject matter, (b) that postings were like contributions to a casual conversation (the analogy being to people chatting at a bar) which people simply note and move on, (c) often are uninhibited, casual and ill-thought-out, (d) there was usually a certain amount of repartee, "give and take", (e) participants under avatars were disinhibited in what they chose to say, (f) the

communications of this kind were more “akin to slanders” than to the usual, more permanent kind of communication found in libel actions, and (g) were often “mere vulgar abuse”.

[43] The significance of saying that the posting on a discussion board was in general akin to slander is that slander is only actionable if a claimant can prove special damage arising as the direct natural and reasonable result of the publications of the words.¹⁴

[44] This brings us to the context of the publication. As the Court understands defamation, one of the considerations to which the Court must have regard is the context in which the words were posted.

[45] It is the evidence that the Claimant by his own actions unwittingly or not, triggered what the Court believes could be described as a “storm” which appeared to occupy the press media, the Opposition, saw the Prime Minister making a statement in Parliament about the his actions, saw the Claimant calling a press conference to deliver a statement on the issue, saw the setting up of an independent inquiry under Justice Albert Matthew, and ended with no less than the Government of Saint Lucia having to file suit against Mr. Bartlett to recover the Helenite Building.

[46] To the Court the context of the words would be all that occurred concerning the Helenite Building from approximately when the Claimant and Mr. Bartlett entered the transaction at or about April 2003, which saw the title to the Helenite Building being transferred to Mr. Bartlett until the Claimant’s press conference on August 3rd 2004, and wherein he sought to explain his actions concerning the Helenite Building. The posting on the discussion board occurred on the same day, August 3rd 2004, a few hours after the Claimant’s statement. Further, that the context is to be narrowed to this period can be seen from the posting itself when Boss Hoss says: “*All how you cut it, this stinks and what Huntley gave as his explanation does*

¹⁴ Gatley, Ibid. para. 4.1.

not absolve him of wrong doing as far as I am concerned." It's the Court's view that matters occurring after that date including the findings of Justice Matthew have no bearing on the context in which the Court must examine the words. .

- [47] According to Justice Tugendhat and the authorities cited by him, where the claim is for publication on the internet, there is a burden on the Claimant to prove publication. The Court was only shown one (1) posting by "Eternallyissis" after the posting of Boss Hoss and Eternallyissis makes no reference to Boss Hoss posting and so it appears like Justice Eady said "chatting in a bar." The Claimant did not address the issue of number of publishees but rather asked the Court to adopt his position of an unquantifiable number. Unfortunately, this is not what the authorities tell us is the law.
- [48] Being guided by Justice Eady, the Court adopts the highest classification offered by Justice Eady for a posting on a discussion board, and declares Boss Hoss' posting to be at best that of slander.
- [49] Having determined that the highest that that Court is prepared to classify Boss Hoss' posting is that of slander, the Court looks for special damage and there was no evidence of any.
- [50] It's the Court's view that the Claimant's claim must fail.
- [51] Should the Court be wrong in following Justice Eady, then the Court believes that the Defendants should succeed on the plea of fair comment. Once again keeping to the context at the time of the posting, the Court does not believe that it is called upon to do any more than to find that the matter of the Helenite Building was of public interest and the Court so finds. Matters supporting this finding are (a) the Helenite Building was the Government of Saint Lucia property, (b) the Claimant's office as Ambassador for the State of Saint Lucia, (c) there was a transfer of title of the Government's property by the Claimant, (d) the Claimant's need to call a press conference to "clear the air", (e) the Prime Minister's need to make a statement in Parliament, and (f) the Government being sufficiently moved by events triggered

by the Claimant to ask Justice Matthew by letter dated August 24th 2004, to conduct an inquiry, and this was shortly after the Claimant's own press conference.

[52] It is the Court's view that the Claimant has not shown that the posting on the bulletin board was in the context motivated by spite.

[53] For the reasons cited, the Claimant's claim must fail.

[54] It is ordered:

1. The Claimant's claim is struck out.
2. The Claimant is to pay the Defendants costs in the sum of \$7,500.00

Rosalyn E. Wilkinson
High Court Judge