IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

CLAIM NO. NEVHCV2010/0184

Between

ANTHONY MICHAEL PERKINS — Claimant

And

LEEWARDS MEDIA GROUP LTD. — Defendant

Appearances:
Mr. Theodore Hobson for the Claimant Ms. F. Hobson with him
Mrs. Angela Cozier for the respondent

2012 March 20,22 April

JUDGMENT

[1] The Claimant who is a Civil Engineer by profession was a Minister of Government in the Nevis Island Administration (NIA) from September 2001 to July 2006 when the Concerned Citizen Movement (CCM) party formed the Government.

[2] The Claimant, then had the portfolios of Ministry of Infrastructural Development, Planning, Environment, Natural Resources and Works assigned to him.

[3] The Claimant testified under cross examination that the Ministry of Works was assigned to him in 2003.

[4] Prior to becoming a minister he was Project Manager from 1996 to 2001 in the NIA. The Claimant also occupied the post of Director of Public Works Department (PWD).

[5] The CCM government undertook a reconstruction of a section of the island main road from Five Turnings, Cotton Ground to the Vance Amory Airport, estimated to be about three and a half miles. The reconstruction of the road was done by Professional Technologies Ltd. (PROTECH). The work began in early 2000 and was completed in or about late 2003.

[6] During the pendency of the work the Claimant was Minister of Works, under whose portfolio the road construction was.

[7] In its issue of 16th July to 22nd July 2010 the Defendant in its newspaper printed and published the following words of the Claimant **"How many poor people who rooted for Michael Perkins in St. Paul's expected to see this man waste their own Tax payers money to the tune of Ten Million Dollars and then explain it away as an honest mistake. The people of New York Town Hall meeting simply asked what the Nevisian people are wondering: Why do we have to dodge pot holes while driving on the most expensive piece of road in Nevis? Michael Perkins has stated that the overpayment was an honest mistake. This raises the other questions relating to who (sic) the overpayment was made to (sic) and whether there is a possibility of fraud involved in such an overpayment. In any event after such mistake why would anyone support a candidate who has admitted to wasting US $10,000,000.00 during his term in government office."**

[8] On 13th December 2010 the Claimant filed a statement of Claim in which he alleges that-

"in its natural and ordinary meaning the words meant and were understood to mean:-

(a) that the Claimant was responsible for the tax payers paying US $10,000,000.00 on a badly constructed road and an unwarranted and even fraudulent payment to some third part or others

(b) the Claimant was in some conspiracy with others to defraud the tax payers of the country out of US $10,000,000.00

(c) that the Claimant was incompetent and was unworthy to be elected as a representatives (sic) of the people in the 2001elections and in the upcoming local elections."

[9] In the alternative by way of innuendo the Claimant alleges that the said words meant and were understood to mean:

(i) That the Claimant was incompetent project manager and a Minister of Communications and works and was an unscrupulous scoundrel unworthy to be elected as a representative of the people in the upcoming local elections

(ii) That he has somehow benefited by the orchestration of the fraudulent conspiracy with others to defraud the country of US $10,000,000.00

(iii) That he abused and betrayed his position as an Honourable Member of the Nevis Island Assembly and a Minister of Government and was not worthy of being a member of the Assembly then or in the future.

[10] The Claimant alleges that by reason of allegations that he has been gravely injured in his character and reputation and has been brought into public scandal, odium contempt and has suffered damages.

[11] Learned Counsel, Mrs. Cozier, for the defendant, on a preliminary point, submitted that paragraphs 6 and 7 of the Claimants Statement of Claim should be struck out.

[12] Learned Counsel also submitted that paragraphs 7 and 8 of the witness statements of Ernestine Rawlins and paragraphs 8 and 9 of Calvin G. Jones' witness statement should be struck out.

[13] Mrs. Cozier argued that paragraphs 6 and 7 of the Statement of Claim are unsupported by any particulars as the Claimant has failed to plead any and therefore it is an abuse of the process of the court.

[14] In her Skeleton arguments, Mrs. Cozier referred to **Slim v Daily Telegraph Ltd.**[1] Where Salmon LJ. opined:

> "A "true" n "legal" innuendo is a meaning which is different from the normal and natural meaning of the words, and defamatory because of special facts and circumstances known to those to whom the words are published. The ordinary meaning and innuendo give rise to different causes of action and, accordingly must be separately pleaded."

[15] Learned counsel also quoted from **Gatley on Libel and Slander**[2] the learned authors instruct us as follows:-

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[1] 1968 1 All ER 1497

[2] 10 Edition at paragraph 3To 3.19

"Such facts have also been referred as "added", "extraneous" or "special" facts or "something outside the words" They may, for instance, be the circumstances of the publication, any accompanying gestures or expression or tone of voice, a slang or technical meaning or that of a foreign language or some additional fact which would allow those who knew i.e.- to read the defamatory meaning into the words published. The key point is that the matter is not one of general knowledge. Thus to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel, but not for anyone who did not."

Mrs. Cozier also referred to **Rules 26.1 (2) (1) and 2 (1) (2) J**[3]

[16] I have difficulty in understanding how these rules are relevant or applicable to the application to strike out part of the Claimant's Statement of case on the ground that it was not specifically pleaded.

[17] In paragraph 6 of the Claimant's statement of claim he pleads:
By way of Innuendo, "the words meant and were understood to mean:-

(i) That the claimant was an incompetent Project Manager and a Minister of Communication of works and was unscrupulous scoundrel unworthy to be elected as a representative of the people in the upcoming local elections.

(ii) That he has somehow benefited by the orchestration of the fraudulent conspiracy with others to defraud the country of US $10,000,000.00.

(iii) That he abused and betrayed his position as an Honourable Member of the Nevis Island Assembly and a Minister of Government and was not worthy of being a member of the Assembly then and in the future."

[18] I ruled that an innuendo can only arise from the words complained of. In paragraph 6 (referred to above) the Claimant pleaded the words as he understood them to mean . In my opinion the Claimant has pleaded the innuendo and therefore the application by Mrs. Cozier to strike out the innuendo as pleaded was refused.

[19] In his witness statement the Claimant says that he lives at Craddock Road Charlestown Nevis with his wife of 13 years and their two sons Rraheem and Demetri ages 12 and 5 years respectively.

[20] In 1991 he graduated from the Florida Agricultural and Mechanical University College with a Bachelor of Science Degree in Civil Engineering.

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[3] Civil Procedure Rules 2000

[21] From 1991 to 1994 he was employed as Civil Engineer at Public Works Department Nevis. He served as Director of Public works from 1994 to 1996 and from 1996 to 2001 he was Project Manager of the Nevis Island Administration.

[22] From September 2001 to July 2006 he served as an elected Minister in the Nevis Island Administration. He also served as a nominated Senator in the Federal Parliament of St. Kitts and Nevis from June 2000 until January 25, 2010.

[23] The Claimant pursued a Masters (degree) in Business Administration (MBA) General Management at the Metropolitan College Manhattan in 2008.

[24] The Claimant was candidate for the Concerned Citizens Movement (CCM) party in July 2006 local elections in which he lost the seat which he had held and in which the CCM lost government it had held for some 14 years.

[25] The Claimant spoke at a public meeting on the political platform of CCM sometime in 2009. He spoke on the issue of the construction of a section of the Island Main road from Vance Amory International Airport and Five Turnings at Cotton Ground.

[26] At that meeting the Claimant gave an explanation of why there were cost overruns on the project and pointed out reasons such as changes in the design construction which resulted in an increased scope of works and on site problems experienced, a water-logged of approximately half mile section of the road way caused by a high water table.

[27] Mr. Perkins said that a very important fact which contributed to the cost overruns was that whereas Public Works Department was to supply certain services or imputs to the contractor during the construction, this arrangement turned out to be too much of an undertaking for PWD. The government had no choice but to instruct the contractor to carry out all of the works. The original contact price for the work that the contractor was required to carry out was EC$10.5 million. The original costs incurred as a result of design changes mitigated against some of the problems encountered and the value of the contractor having to take over the work inputs of the PWD resulted in an overall contract value of around EC$19 million. Of this final contract sum of approximately EC$19 million, the amount that would constitute cost overrun from an engineering and financial standpoint may have amounted to about EC$3 million.

[28] In 1999 the NIA received bids for the reconstruction of about 10.5 miles of road. The lowest bid was EC$54 million, about approximately EC$5.4 million per mile. At the time Government had access to EC$23 million of loan funds from CDB.

[29] The project was then rearranged and split in two segments a 3.5 mile section from the airport to Cotton Ground. This segment which was the subject of the commentary which the complainant says libelled him. The other segment was a 7 mile section from Cotton Ground to Market Shop.

[30] The claimant says the cost of the road works from Market Shop to Cotton Ground was $29 million EC and from Cotton Ground to the airport $19 million EC at total cost of $48 million EC.

[31] According to the Claimant this clearly shows that the government was able to realize savings of EC $6 million over the lowest tender scenario. In the case of cost of the section of the roadway, $19 million spent on the 3.5 mile section was consistent, according to the Claimant, with the expected cost at the time, that is, this section cost about $5.4 EC million per mile.

[32] The Claimant says that during the speech at the political meeting in Prospect in 2009, he said that he suggested that he was not pleased with the final quality of work done by PROTECH when compared with the work of the other contractors for the other sections of the Island Main road.

[33] Mr. Perkins says that he also thought in retrospect that the arrangement made for PWD to be involved in the project at the level intended was simply too much for PWD at the time. He says that he likened those areas of dissatisfaction and shortcomings as to someone making an "honest mistake".

[34] Mr. Dwight Cozier in his witness statement says that he is a Minister of State in the Nevis Island Administration with responsibility for Trade and Import and Export control among others. He is the Chairman of the Board of the Second named defendant.

[35] Mr. Cozier says in his witness statement that towards the end of 2009 or early 2010, the Claimant decided publicly to throw his hat in the ring and contest the Nevis Island elections due in 2011, as the representative for CCM in St. Paul's parish which he had represented between 2001-2006, seeking re-election to the position on what he declared was his sterling past performance.

[36] During the course of the campaign, and sometime early in 2010, the Claimant took part in a political meeting, along with others of the CCM party who were also seeking election and or re election.

[37] At that particular political meeting, the Claimant spoke the following words which were recorded at the time and upon which recording and transcript the Defendant company intends to rely at the trial of this matter-

> "I am disappointed in the quality of work that we got in the phase of roadwork from Cotton to Newcastle. That is something I, am disappointed about. But I have also said to you that in terms of cost overruns, in that project that those were the things that can easily be explained and you cannot run from the fact that we did a project and that at the end of the day, the quality was not the best, ladies and gentlemen.

[38] For years I have said that and I have never run away from that because I have to be honest with myself. I was the Minister of Works. It happened under me but Ladies and gentlemen, that is what you call a mistake in probably the choice of a contractor but that is an honest mistake. There is nothing underhanded about it."

[38] At paragraph 10 of his witness statement, Mr. Dwight Cozier says:-

> "In short, the Claimant admitted publicly at the political meeting in question to the following:-
>
> (a) That he was the minister directly responsible for the oversight of the construction of that particular road.
>
> (b) That the road was badly done and he was disappointed.
>
> (c) That there was nevertheless a cost overrun on the road which turned out to be in the amount of approximately EC10,000,000.00.
>
> (d) But that it was an honest mistake."

[39] Mr. Cozier in his witness statement says that the Claimant's cavalier dismissal of gross overspending of public monies in the construction of a poorly done road as an "honest mistake" generated a great deal of outrage in Nevisians both in Nevis and abroad.

[40] Indeed, where the Claimant and other politicians of the CCM took their campaign to New York to residents abroad, the Claimant was confronted there with this comment and asked by persons present for an explanation. The Claimant refused at that forum to give any proper explanation or indeed any explanation at all, for his comment and instead walked out of the meeting, a fact of which the Defendant

company was reliably informed. This claimant denied in cross examination that he walked out of that meeting.

[41] The section of road in question is extensively pot holed and bumpy even after it was reconstructed by the Claimant's ministry during his term as Minister of Works for Nevis Island Administration between 2001 and 2006.

[42] According to the Defendant it was against this backdrop of increasing outrage that the commentary was written. The following paragraphs of the Defendant's witness statement are to my mind the form of pleadings.

[43] Contrary to what the Claimant is alleging the words complained of were not libellous and therefore they cannot mean and cannot be understood to mean that the Claimant was responsible for the fraudulent payment of (US) $10,000,000.00 to either a third party or to others or that the Claimant conspired with others to defraud the tax payers of the country out of (US) $10,000,000.00 as the claimant contends.

[44] Also the words complained of cannot mean or understood to mean in the alternative by way of innuendo that the Claimant is an unscrupulous scoundrel and that he has somehow benefited by the orchestration of the fraudulent conspiracy with others to defraud the country of (US) $10,000,000.00 as the Claimant contends.

[45] Rather the trust of the commentary as it concerns the Claimant is encapsulated in the headling title of the article **"NRP TAKES THE TRUTH TO NEW YORK"** as well as in the final sentence of the words complained of by the claimant as follows:

> **"In any event, after such an admission, why would anyone support a candidate who has admitted to wasting $10,000,000.00 during his term of office."**

[46] According to Mr. Cozier, clearly by admitting that there had been a cost overruns of $10,000,000.00 of public funds on a badly done road under his watch, himself a civil engineer who should have known better the claimant is admitting to his own incompetence while in public office. Consequently, there was no libel of the Claimant by the Defendant Company.

[47] The Defendant claimant says that it was during the Claimant's visit to New York City that the question of the admission to making an honest mistake involving cost overruns arose.

[48] Mr. Cozier says research conducted by the Defendant company revealed that the said overruns amounted to EC $10,000,000.00. This was clearly a matter of public interest to be reported on by the Defendant company's newspaper. The research raised several questions which were presented in the report. Accordingly none of the questions raised were libellous or were intended to be libellous of the Claimant.

[49] Finally, the Defendant company says that at any rate, the question whether or not the Claimant was incompetent in the circumstances of this case is fair comment on a matter of public interest, namely his conduct during the previous term of Government, especially bearing in mind that he was at all times a public figure and offering himself up for re-election as a government minister. Again, according to the defendant, there was no libel of the Claimant by the Defendant company.

[50] In cross-examination the Claimant said on oath that he has been a civil engineer for 22 years. I make the observation that having regard to the cross-examination of the claimant. I am at a lost as to the reason counsel for the defendant objected to the admission of claimant's qualifications in evidence, as there was a great deal of cross examination of the claimant's qualifications by Mrs. Cozier. Was that in an effort to discredit him being a Civil Engineer? I think not because it was suggested to Mr. Perkins that he being a Civil Engineer with local knowledge was negligent.

[51] The Claimant said that the increase value of the work was brought about for a number of reasons including changes to the design of the road. One major change was as a result of a decision made to raise the final level of the road over about 2/3 of its 3 ½ mile length because of a high water table in particular section of the road. That design change involving 2/3 miles of road would have been in excess of $2.5 million.

[52] The Claimant explained in cross-examination that the contract was signed for $10.4 million. That was the price for the contractor to do certain aspects of the road. Public Works Department was mandated to provide some of the base materials and to use its asphalt plant to produce asphalt. The value of these items was included in the $10.4 million. The value of PWD's contribution was about $3.4 million. During the contract a decision was taken that PWD would be unable to supply the asphalt. As a result the contractor was made to take over all of PWD's responsibility.

[53] The claimant said on oath that he has never ever said or admitted to saying that there was $10 million mistake or that there was an overpayment. The claimant

denied in cross-examination that he was negligent as minister responsible for the work in not properly overseeing the payment of monies. Mr. Perkins explained that as a minister responsible for the project there are certain things in place and the holders of certain positions including the project manager, the Permanent Secretary, the treasury, the legal department. All these players, in his opinion, are responsible to ensure that all the checks and balances are in place to ensure that payments under government contracts are properly made.

[54] The claimant also denied that as a local engineer he ought to have known of the existence of the water table before the project of rebuilding the road had begun and therefore he was negligent in not taking that into account when the estimate was done for the rebuilding of the road. The claimant said that it was not until the excavation of the road was done that it became evident of the extent of the water log and it was not possible to estimate this before the actual work had begun.

[55] I accept the claimant's testimony that he never said that there was a cost overruns and that was an honest mistake. What the claimant said in his speech which the defendant reproduced as part of its defence was that:-
He said, inter alia:

> "I was the Minister of Works. It happened under me but I can't say that I love what I see in the end. Ladies and gentlemen, **this is what you call, a mistake in probably the choice of a contractor, but that is an honest mistake. There is nothing underhand about that.**

[56] It is quite clear in my mind and should be so to any objective and honest reader, that the claimant was saying that there was an honest mistake in the choice of the contractor and nothing else. So for the defendant to say in his commentary in the article "...for Michael Perkins in St. Paul expected to see this man waste their own tax payers' money to the tune of ten million dollars and then explain it away as honest mistake?.."
The claimant never said or explained that ten million dollars was an "honest mistake". One cannot invent a story, which in my view the defendant has done, and comment on what he has invented and put it forward as fair comment.

[57] In paragraph 10(1) under particulars of the defence, the defendant asserts that the statements of claim (i.e. in reference to the words complained of) "the statements of fact, that they are true in substance and in fact and insofar as they consist of expressions of opinion, they are fair comment (namely there is a possibility of fraud involved in such a massive cost overrun when the extremely poor quality of the road is considered) on the said facts and clearly a matter of public interest".

[58] I have said and I reiterate that the words complained of are not true in substance or in fact.

[59] In paragraph 10(H) under particulars of facts, the defendant asserts that the words it published were the words of the claimant himself save that an error had been made in the publication of the commentary stating that the claimant had made an honest mistake of$10,000,000.00 USD as opposed to $10,000,000.00 ECD. I make some comments on this aspect of the defence. The claimant's solicitor wrote the defendant's solicitor demanding an apology and retraction of the story. The Defendant's Solicitor responded by saying the amount was not US$10 million but EC$10 million, but stubbornly refused to retract the allegation and an apology for the libel. In other words, the defendant stood its grounds that there was no libel on the claimant. As I have said above that the words attributed to the claimant were never spoken by him and therefore untrue.

[60] Mr. Cozier on behalf of the defendant said on oath that he researched the matter and came up with the figure of $10 million overrun. If indeed he came up with the figure $10 million, how did he honestly mistake $10 million EC for $10 million US? I am of the view that he is not truthful when he said that he researched the matter. If he did in fact do the research, then it could not have been an honest mistake but he deliberately quoted as a US figure in order to make the situation appear to be worse than it really was. In that regard the defendant was malicious.

[61] In my judgment I accept that a rival political opponent is entitled to damage the reputation of his opponent but this can only be done by legitimate means. For example, the politician can say that his opponent is a drunkard, a womanizer etc. in order to damage his reputation in the eyes of his constituents. But these must be facts, be absolutely true and be able to be substantiated by evidence. If not, he will stand the consequences in libel, if untrue or unable to be substantiated by evidence. I am fortified in my judgment in saying that in a real world no political opponent would laud his opponent praises because if he does so, he is quoting defeat by his opponent.

[62] Mrs. Cozier for the defendant submitted that the defendant has pleaded that the words published consisted of statements of facts that are true in substance and fact and that insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest.

[63] The claimant in his evidence has admitted that he was a public figure and that overspending of $10 million dollars is worthy of comment in the public interest. However, the claimant has never admitted overspending of $10 million dollars or for that matter denied that there was an overspending. In the interest of fairness I think I should have referred to the other parts of the claimant's speech in which he said that there were costs overrun. In his speech he said:-

> "But I have also said to you that in terms of cost overruns in that project those were things that can easily be explained and you cannot run away from the fact..."

[64] That was the extent of the claimant's comment at that meeting, which the defendant has reproduced on the issue of costs overrun. He never mentioned a figure nor did he say that the costs overrun were an honest mistake. I have ruled above that the words attributed to the claimant were not true and could not be fair comment.

[65] In **Gatley on Libel and Slander**[4] the learned authors had this to say:

> "Defamation is committed when the defendant publishes to a third person words or matter containing an untrue imputation against the reputation of the claimant."

Having regard to the publication of the defendant, I have absolutely no doubt that it was an untrue imputation against the reputation of Mr. Perkins and therefore libellous.

[66] In my considered opinion, to ask the question after the allegation if there was an overrun in expenditure and then to go on to make the statement "This raises the questions relating to who the overpayment was made to and whether there is a possibility of fraud in such an overpayment", notwithstanding that this was in the form of a question, it would excite the minds of the readers that the claimant was involved in some kind of fraud in the overpayment as alleged by the defendant.

[67] If the claimant was involved in some kind of fraud then it stands to reason that the claimant would be a beneficiary because of the fraud as no one, in my view, who is involved in a fraud would do so without that one benefitting from that fraud.

[68] Throughout the submission of the learned counsel for the defendant, she makes the submission that "Michael Perkins has stated that the overpayment was an honest mistake". I am unable to see in that statement that the claimant has in fact

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[4] **10 Edition at paragraph 1.3**

said that the overpayment was an honest mistake. I must reiterate that nowhere has the claimant said any such thing.

[69] Learned counsel for the defendant in her written submission argued that in determining the natural and ordinary meaning of the words complained of, the court must have regard to the decided case law. Learned counsel, Mrs. Cozier, referred to the judgment of **Blenman J in Abraham Mansoor v Glenville Radio Limited et al** [5] where she quoted from Lord Nicholas in **Bonnick v Morris and others**[6]. She said:-

> "The court should give the article the natural and ordinary meaning it conveyed to the ordinary reasonable reader...reading the article once. The ordinary reasonable reader is not naïve, he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole and eschew over elaborate analysis and also, too literal an approach".

[70] In my considered opinion the ordinary reasonable man on the mini bus from Charlestown to Newcastle reading the article must come to the conclusion that the claimant was involved in some conspiracy to defraud the tax payers of their monies as was articulated in the witness statements of Ernestine Rawlins and Calvin Jones. The latter said on oath in cross-examination that the impugned article sounded as though he was accused of stealing money. The former said in cross-examination that the article sounded as though the claimant has used money for his own benefit.

[71] Mrs. Cozier argued that in determining the natural and ordinary meaning of the words complained of, the court must have regard to the words in the commentary as a whole.

[72] Mrs. Cozier in her skeleton arguments contended that :-

> "At the end of the day, for one reason or the other, the claimant admitted both at court and in his witness statement that there was a cost overruns on that project of approximately 9 million dollars, a massive cost overruns by any standard".

Neither in the witness statement nor before the Court did I understand the claimant to be saying there was a cost overrun of approximately 9 million dollars. In his witness statement the claimant said:-

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[5] ANUHCV 2004/0408
[6] 2003 1 AC P. 301

"The original contract price for the work that the **contractor** was required to do was $10.5 million. The additional costs incurred as a result of design changes, mitigating against some of the problems encountered and the value of the contractor having to take over the work inputs of the PWD, resulted in an overall contract value of around EC$19 million dollars. Of this final contract sum of around EC$19 million, the amount that would constitute a cost overrun from an engineering and financial standpoint may have amounted to about EC$3 million".

[73] Quite clearly and unequivocally the claimant is saying in his witness statement that the cost overrun was EC$3 million. As a matter of fact, at trial regarding the two amounts appearing in that paragraph (9) of his witness statement $10.5 million and $19 million, I asked the claimant to explain. He took time to do so and stressed that EC$10.5 million was initially the amount to go to the contractor. He also explained that the costs for asphalt etc which were to be borne by PWD were taken over by the contractor. In my considered opinion, for learned counsel for the defendant to contend that the claimant admitted in his witness statement and at court that there was a cost overrun of EC$9 million, unless she is mistaken, is disingenuous to say the least.

[74] Mr. Hobson, learned counsel for the claimant, in his written skeleton submission contended that the defendant in response has in effect stated that the words complained of are true and fair comment on a matter of public interest. Indeed, in my opinion, the claimant at the time the article was published was a public figure and the article published could be regarded as fair but I wish to address two things so far as the article is concerned.

[75] The first point I wish to make is that because the article appeared under the banner "Commentary", it does not necessarily mean that it is a comment because to say as the defendant insisted and its counsel throughout her submission also insisted "Michael Perkins has stated that the overpayment was an honest mistake". This was not a comment. The defendant was attributing to the claimant that he had stated the overpayment was an honest mistake. This was a question of fact. What followed from that was a comment i.e. "this raises other questions relating to who the overpayment was made, whether there is a possibility of fraud involved in such an overpayment". This was, to my mind, an invention of the defendant as I have said above in that the claimant never said that, so there was no fact on which to base that comment.

[76] In **Albert Cheng v Tse Wai Chun**[7] Lord Nicholls of Birkenhead opined:

> "Would a fair minded man holding strong views, obstinate views, prejudiced views, have been capable of making this comment? If the answer to this is yes then your verdict in this case should be a verdict for the defendants".

In my jury mind I say a resounding no that a fair minded man holding strong, obstinate or prejudiced political views could not make that comment because there was no basis for him to make that comment as the facts did not exist for him to do so. I say this because the claimant never admitted or said that the overpayment was an honest mistake. Neither did he say at any time that there was an overpayment or that it was 10 million dollars. This is so because the defendant had the speech before it when the article was written as he had said.

[77] This brings me to another point which Mr. Hobson has addressed in his written submission that Dwight Cosier said that he was the Chairman of the defendant company. He was written to by solicitor for the claimant inquiring who was the author of the impugned article. He told the court that he did not know who wrote the commentary, yet he said that the author had left the company and was out of the country. He also said to the court that he did not even know if the author of the commentary was the editor. Mr. Hobson expressed the view that having regard to answers given by the defendant it must be assumed that he was the author of the commentary. I am sympathetic to that view. I am fortified in this view having regard to the fact that the defendant testified that he did the research and confirmed that the overrun was $10 million. Did he do the research for himself to pen the article or for someone else to do so? In any event he would have known who was the author. I therefore come to the conclusion that he was the author of the article.

[78] I have found as a fact that the claimant never said that the overpayment was an honest mistake or for that matter that there was an overpayment..

[79] In the written submissions of Mrs. Cozier she submitted that:-

> "In the case at bar, it is respectfully submitted that the words complained of by the claimant in the commentary are clearly words which the commentator believed to be fair based on the admission by the claimant at the public political meeting that he made an honest mistake when he referred to the massive cost overrun on the road in question and based. On his later research of documents evidencing the amount of cost overruns".

[80] The comment by the defendant, in my judgment, could not be believed to be fair by him because it was not based and could not be based on any admission by the

[7] **(2000) HCFA 339 at 360**

claimant. Moreover, the defendant testified in court that he did not hear the whole speech by the claimant because he was in his car. He heard part of the speech, he drove off then he verified the speech in his research by police report of the meeting including private tape of the meeting. Having regard to the testimony of Mr. Cozier, he as an intelligent man, he could not have honestly believed in the accuracy of what the claimant had said at that meeting at the time the defendant penned the 'comment' because the defendant would not have had first information of what was said, even though it subsequently turned out to be accurate because in my considered opinion, at the time of publication of the article, he must hold that honest view.

[81] In my judgment, even if fair comment is available to the defendant, which in my view it is not, it will not avail the defendant because it would have been actuated by malice.

[82] In **David Carol Bristol v Dr. Richardson St. Rose**[8] Rawlins JA (as he then was) opined:-

> "The test of express malice requires the claimant to prove that the defendant did not honestly believe that the words were true because the defendant was aware that they were not true or was indifferent to their truth or falsity. Express malice arises as a question of fact which is to be drawn and inferred, inter alia, from the contents and source of the statements and the circumstances in which the statements were made. A defendant might be indifferent to their truth or falsity where he took no investigative steps to ensure their truth when he could have done so".

[83] In this regard learned counsel for the claimant, Mr. Hobson, pointed out the defendant said that he did research and found out that the cost overrun was $10 million. What is interesting according to Mr. Hobson was that he did not see or read the summary sheets which would have provided a breakdown of the variation of the additional work which was attached to the variation No. 2 Road Improvement Management Project (RIMP) phase 1 document which clearly indicated on the face of the document and which would have been important information regarding the project and the additional work.

[84] With reference to the statement which the defendant alleged that the claimant made at Prospect in 2010, Mr. Hobson submitted there is nothing in that statement which any intelligent and fair minded reader could deduce that "it raises other questions relating to who the overpayment was made to (sic) and whether there

[8] Civil Appeal No. 16 of 2005 St. Lucia

was a possibility of fraud involved in such an overpayment. In any event after such mistake why would anyone support a candidate who has admitted wasting US$10,000,000.00 during his term in office".

[85] I have already said that nowhere did the claimant in that statement admit that there was an overpayment nor has he admitted to wasting US$10,000,000.00. I reiterate that one cannot invent what he believes to be facts and then comment on those invented facts and say it is fair comment. In the premises the comment cannot be fair and made in good faith.

[86] In **Hunt v Star Newspaper**[9] Fletcher-Moulton LJ said:

> "In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with facts that the reader cannot distinguish between what is report and what is comment. The justice of this rule is obvious. If the facts are stated separately and the comment appears as inference drawn from those facts, any injustice that it might do will be to some extent negative by the reader seeing the grounds upon which the unfavourable inference is based".

[87] As I have indicated above, the defendant could not have an honest belief in the comment that he made when he made the said comment with the knowledge of what the claimant had said quite clearly that the choice of the contractor was an honest mistake. "...that is what you call a mistake in probably the choice of contractor, but that is an honest mistake.."

[88] The claimant never said that the overpayment was an honest mistake. In **Albert Cheng**[10] (supra) Lord Nicholls of Bikenhead said:

> "To summarise, in my view, a comment which follows within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touch stone. Activation by spite, animosity, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive does not itself defeat the defence".

Malice

[89] Mr. Hobson in his skeleton arguments submitted that there is evidence of malice of the defendant towards the claimant. He referred to an article in the Leeward Times

[9] [1908] 2 KB 309
[10] At page 360

of the 1st – 7th April 2005 where the photograph of the claimant was juxtaposed between the photographs of two of what he termed "notorious" sons of Saddam Hussein with an article, part of which read:-

> "...human rights activists would be well advised to remind Minister Perkins how Saddam's two sons reviled their critics before disappearing them".

I suppose he meant bringing about their disappearance.

[90] Mr. Hobson contended that further evidence of spite and malice was also demonstrated in an article in the said paper of 23rd – 30th June 2005 that the defendant wrote of the claimant accusing him of enriching a colleague, Theodore Hobson, by somehow orchestrating the purchase of lands from him by government at an enhanced price. In cross-examination at trial, the defendant admitted that the claimant was not the Minister of Lands and was not a member of the Nevis Housing and Land Development Corporation which purchased the land from Mr. Hobson. Although both issues referred to by Mr. Hobson occurred some years ago, in my opinion, they do tend to support the allegation of malice by the claimant.

[91] Another issue touched upon by Mr. Hobson was the apology which the claimant demanded from the defendant by way of a letter dated 16th August 2010. The defendant published in three issues of its paper, a so called apology, according to learned counsel for the claimant.

[92] The defendant stubbornly refused to retract the libellous statements against the claimant except to say that there was an error with reference to the currency i.e. it should have read EC$10 million instead of US$10 million.

[93] A defendant may rely in mitigation of damages on the fact that he has made an adequate apology to the claimant for the publication of the matter complained of.[11] The claimant in his witness statement said of the apology:-

> "...the response of the defendant which was published in the said Leeward Times did nothing to ease the original assault on my character and reputation but to my mind made it worse".

Damages

[94] General damages serve three functions: "to act as a consolation to the claimant for the distress he suffers from the publication of the statement, to repair the harm to

[11] See Gatley on Libel and Slander 10th ed para 29.1

his reputation and as vindication of his reputation".**(Gatley on Libel and Slander[12]).**

[95] Aggravated Damages – The conduct of the defendant, the conduct of the case and his state of mind are matters which the claimant may rely on as aggravating the damages.

> "It is well established that in cases where the damages are at large...the judge can take into account the motives and conduct of the defendant where they aggravate the injury done to the claimant"**(Gatley on Libel and Slander supra).**

[96] Mr. Hobson in his skeleton submissions referred to **Cassell and Co Ltd. v Broome[13]**. Lord Reid said:

> "It has been long recognized that in determining what sum within the bracket should be awarded, a jury or other tribunal is entitled to have regard to the conduct of the defendant. He may have behaved in a high handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at trial have aggravated the jury by what they say. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation".

[97] In the instant case the defendant has refused to offer a genuine apology to the claimant. Instead, he persisted with his defamatory statement claiming that it was fair comment. I am satisfied in my mind that the defendant was motivated by malice. From the whole tenor of the article, his intention was to unlawfully damage the claimant, his political opponent, in order to prevent him from winning his sear in the upcorning elections. As I said above, in my opinion, he is entitled to do so but only by legitimate means.

[98] In awarding damages to the claimant, I am of the view that I am entitled to go to the top. For this purpose I examine awards made by courts in the region. In **J.N. France and Fitzroy Bryant v Kennedy Alphonse Simmonds[14]**. The respondent was then Prime Minister of St. Kitts and Nevis. He acquired a boat for ferry services from St. Kitts to Nevis. An article penned by the second named appellant under the banner "Simmonds Come Clean" suggested that the boat was a gift to the people of the Federation whereas the respondent was saying that the boat was purchased for $1 1/2 million. The article also "warned" Simmonds to come clean about the $1 1/2 million. Clearly the article by implication was saying that the boat

[12] At paragraph 9.2
[13] (1972) 1 All ER p 825
[14] (1990) 38 WIR 172

was a gift whereas Dr. Simmonds was saying it cost $1 1/2 million and therefore he pocketed the $1 1/2 million. At first instance Dr. Simmonds was awarded $75,000.00 as damages (that was in 1985). The Court of Appeal and the Privy Council upheld the award.

[99] In **Basdeo Panday v Kenneth Gordon**[15] the appellant was at the time Prime Minister of Trinidad and Tobago. He made a speech which was carried on television. In that speech he referred to the respondent as a pseudo racist. "So I say the pseudo racists who have divided the society to maintain political power and even now are doing so in the hope of political survival. The Ken Gordon who wants to maintain his monopolistic advantage over his competitors in the media..." The respondent was awarded $600,000.00 which was upheld by the Court of Appeal of Trinidad and Tobago. The Privy Council reduced that figure to $300,000.00.

[100] I make two observations, this award was in 2004 and I bear in mind that the parity of the Eastern Caribbean dollar was at the time and still is higher than the Trinidad and Tobago dollar.

[101] Finally I refer to the case of **Earl Asim Martin v Democrat Printing Co. and Lorna Callender**[16]. In an article published in the Democrat in which the following words appeared:

> "That Asim has been complaining that Muddada and Clerk can't say anything bad about him because they involve in the drug trade too but Muddada say he ain't taking no jail for Asim!"

[102] Belle J. in awarding damages to the tune of $170,000.00 against the defendants said:

> "I award this sum to reflect the aggravated nature of the damage caused to the claimant in light of the defendants' apparent malice demonstrated by their failure to make a proper apology or to acknowledge the false imputation in the article".

I am of the opinion that this was a vicious attack on the professional integrity of the claimant.

[103] In my judgment, for the defendant to say that there was a cash overrun of $10 million and to say that the claimant admitted to a cost overrun is to say in effect, without any lawful justification, that the claimant is an incompetent civil engineer.

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[15] P.C. No. 35 of 2009
[16] Claim No. SKBHCV 2004/0136 St. Christopher and Nevis

To suggest that the claimant was involved in a fraudulent expenditure of $10 million and imply that he benefited from the fraud is a very serious and malicious attack on the professional reputation of the claimant.

[104] The claimant testified that since the publication of the article he has been unable to secure employment. He was however unable to prove that as a result of the article he is unsuccessful in his quest for employment.

[105] However one has to be realistic in one's approach to the problem. The claimant is a member and supporter of the party in opposition. I am cognisant of the political tribalism which is practised throughout the region. The claimant being a member and supporter of the opposition, in my opinion, he does not stand "a snowball's chance in hell" of securing employment with government and the availability of employment in his field in the private sector in Nevis is very limited or non-existent.

[106] In my judgment, the libel in the instant case is worse than the libels in Basdeo Panday (supra), Dr. Kennedy Alphonse Simmonds (supra) and Earl Asim Martin (supra).

[107] In light of the foregoing I award the claimant $250,000.00 in damages against the defendant.

[108] Costs to the claimant on a Prescribed Costs basis.

A.J. Redhead
High Court Judge