EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

HCVAP 2010/041

BETWEEN:

PHILLIP ABBOTT

Appellant

and

AZIZ HADEED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Tyrone Chong, QC	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan, SC and Mr. Ralph Francis for the Appellant
Mr. Roger Forde, QC for the Respondent

2012: October 30;
2013: January 28.

Civil appeal – Defamation – Libel – Fair comment on a matter of public interest – Alleged defamatory statements made by appellant found to be comment on matter of public interest in court below – Whether learned trial judge erred in applying incorrect test in determining fairness of such comment – Whether learned judge erred in making finding that defence had proven substratum of fact on which comment was based –Whether opinion evidence is admissible as proof of facts on which comment is based

During the course of an ongoing debate about options available to the Government of Antigua and Barbuda for the expansion of the country's electrical generating capacity, the appellant, on 15th December 2007, sent an email containing a PowerPoint presentation as an attachment, headed "Citizens Against Hadeed Greed", which was posted on the Google Groups "Taking Sides" group. This presentation included photographs of the respondent on every page and contained statements about the respondent. The respondent brought an action against the appellant in the court below, alleging that the statements made in the email attachment were defamatory of him and that they were made maliciously since the appellant was aware that the contracting party for the supply of power was Antigua Power Company Limited (a company in which the respondent held a controlling interest) and not

the respondent personally. The appellant's main defence was that the statements comprised fair comment on a matter of public interest. The learned judge found, inter alia, that the words were capable of certain meanings attributable to them by both the parties; that the words complained of comprised both comment and fact; that the subject was one of public interest and that the defendant had not acted maliciously. He concluded however, that the comment went beyond the realms of fair criticism and awarded the respondent damages of EC$8,000.00 and prescribed costs.

Both the appellant and respondent appealed the judgment of the court below. The appellant contends that the learned trial judge erred because, having found that certain statements were comment on a matter of public interest, he wrongly applied a further test in determining the fairness of such comment. The respondent cross appealed on the ground that the learned judge erred in making the finding that the appellant had proven the substratum of fact on which the comment was based.

Held: allowing the appeal and dismissing the cross appeal and awarding costs of this appeal and in the court below to the appellant, that:

1. The statements complained of by the respondent were comment on a matter of public interest as found by the trial judge.

2. The touchstone in determining whether a comment is fair is objective, namely whether the maker of the comment had an honest belief in the view that he has expressed. Provided that the views expressed are honestly held and are germane to the subject matter on which it is made, it matters not how prejudiced or exaggerated they are. Although the learned trial judge made no specific finding on whether the appellant honestly held the views he had expressed, his finding that there was no malice implies that he found that the views were honestly held as the test for malice is the lack of honesty.

3. However, in determining whether the comments were fair, the learned judge erred in principle as he applied an incorrect subjective value judgment as to fairness, rather than the objective test, which is not justified on the authorities.

   Tse Wai Chun Paul v Albert Cheng [2001] EMLR 31 applied; Reynolds v Times Newspapers Ltd. and others [2001] 2 AC 127 cited.

4. Notwithstanding the substantial abolition of the hearsay rule by English Civil Evidence Act 1995 that has been incorporated into the laws of Antigua and Barbuda, a distinction remains between evidence of opinion and evidence of fact. It is not open to a defendant to discharge the burden of proof of the substratum of fact on which his comments are based by reference to opinion evidence. This burden can only be discharged by reference to evidence of fact which may now include hearsay evidence.

   Shenkman v O'Mally (1956) 157 NYS (2d) 290 cited.

JUDGMENT

[1] CARRINGTON JA [AG]: The respondent, Mr. Aziz Hadeed, is the scion of the Hadeed family in Antigua. This family appears to be involved in many commercial enterprises on that island. Mr. Hadeed has also held political office as a minister in the Government of Antigua and Barbuda.

[2] Antigua and Barbuda, in common with many other countries in the Eastern Caribbean, is going through the development pains that can be expected of a relatively young country. It is apparent from these proceedings that a significant issue with which the country had to deal around 2007 was the capacity to generate sufficient electrical power to meet its needs. The options available to the government for increasing capacity appeared to have been either that the government should accept a loan from the People's Republic of China ("PRC") for the acquisition of new equipment or a bid from Antigua Power Company Limited ("APC"), a company controlled by the Hadeed family, for the supply of power generation equipment. APC at the material time had an existing agreement under which it generated and supplied power to the relevant public body, the Antigua Public Utility Authority ("APUA"), for distribution to consumers.

[3] As each of these options would have had some impact on the cost of electricity to consumers in Antigua and Barbuda, the matter quite understandably attracted the attention of the public in the country with strong positions being taken in respect of each option. It was during the course of this ongoing debate that the appellant,[1] on 15th December 2007 sent an email of a PowerPoint presentation headed "Citizens Against Hadeed Greed" that was posted on the Google Groups "Taking Sides" group. This presentation, which gave rise to these proceedings, included photographs of the respondent on every page.

[1] The defendant in the proceedings below.

[4] The presentation contained the following statements:-

> "1. [Is it] not time Antigua[ns] 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 [sic] 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 … 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 civilised 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 handbasket, Hadeed's supply of electricity to APUA makes over 30 million dollars in profits every year. Outrageous? Only in Antigua".

[5] The respondent commenced proceedings in the High Court of Justice claiming that the above words were defamatory and that the statements were made maliciously in that the appellant was aware that the contracting party for the supply of power was APC, and not the respondent personally. He claimed damages against the appellant. The appellant did not deny publishing the impugned words

but raised defences that the words were not capable of being defamatory or alternatively that they constituted fair comment on a matter of public interest.

[6] The claim came up for trial before Harris J who quickly disposed of the defendant's first line of defence, namely that the words were not capable of being defamatory and made findings about the meanings of the words. These findings were not the subject of the appeal before this Court.

[7] The main defence to the claim, however, was that the statements comprised fair comment on a matter of public interest. The learned judge found that the words were capable of certain meanings attributable to them by both the parties; that the words complained of comprised both comment and fact; that the subject matter of the statement was one of public interest; that the substratum of fact on which the comment was made had been proven; and that the defendant had not acted maliciously. He concluded, however, that the comment went beyond the realms of fair criticism and awarded the respondent damages of EC$8,000.00 and prescribed costs. Both the appellant and the respondent have appealed the decision, but each has done so on fairly narrow grounds.

[8] The appellant contends that the learned judge erred because, having found that certain statements were comment on a matter of public interest, he wrongly applied a further test in determining the fairness of such comment. The respondent cross appealed on the ground that the learned judge erred in making the finding that the defence had proven the substratum of fact on which the comment was based.

[9] The learned trial judge correctly approached the issue of fair comment, after having reminded himself of the relevant legal principles and making his findings on the meaning of the impugned words, by analysing the statements in issue to

determine which were statements of fact and which were comments. As Barrow JA stated in Vaughn Lewis v Kenny Anthony:[2]

> "A cardinal requirement that must be met for the defence of fair comment to succeed is that the words complained of must be comment and not fact. If they are statements of fact and not comment the defence fails."

[10] Mr. Astaphan, SC for the appellant argues that the learned judge was dealing with a simple case of fair comment on a matter of public interest. Mr. Forde, QC for the respondent argues that this is a simple case that the appellant was not able to prove the truth of the facts which underlie the comment. I simply note that matters involving this plea may not be as simple as they appear to these experienced counsel as, as recently as in Joseph and others v Spiller and another,[3] the English Supreme Court concluded that the whole area of the defence of fair comment on a matter of public interest demands consideration by the Law Commission.

[11] In Joseph v Spiller,[4] Lord Phillips of Worth Matravers PSC, who delivered the main judgment of the Supreme Court, stated that:

> "[the] elements [of the defence of fair comment] were and still are: the statement in issue is comment and not fact; the matter in respect of which the comment is made is a matter of public interest; where that matter consists of facts alleged to have occurred, the facts are true; the comment is 'fair'; the statement is not made maliciously."

At paragraph 4 of the judgment, Lord Phillips stated that the defendant bears the burden of proving all the above elements save the lack of malice; the claimant bears the burden of proving that the defendant acted maliciously. At paragraph 105, he added a further requirement that the comment should identify at least in general terms the facts on which it is based.

[12] The learned judge commenced his analysis of the statements made by the appellant by stating that these words are substantially imputations of fact. Not

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[2] Saint Lucia High Court Civil Appeal No. 2 of 2006 (delivered 14th May 2007, unreported) at para. 31.

[3] [2010] 3 WLR 1791.

[4] At para. 83.

unnaturally, Mr. Forde, QC, notwithstanding that there was no cross appeal against this finding, seized on this statement in the judgment and argued that this finding negates the defence of fair comment entirely and, in the circumstances of the instant case where justification was not pleaded as an alternative defence, it puts paid to the appellant's case.

[13] There appears to be authority that an inference of fact may be treated as a comment. The learned authors of Gatley on Libel and Slander[5] cite the following passage from the judgment of Field J in O'Brien v Marquis of Salisbury:[6]

> "Comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him … and from which his conclusion can be reasonably inferred … . If, although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment … ."

I find it conceptually difficult to reconcile the two concepts of fact and comment as the court did in O'Brien v Salisbury and consider the reasoning somewhat circular. Nevertheless, I accept that any conclusion or inference arising from primary fact, notwithstanding that it is put forward as a statement of fact itself, is nothing more than comment.

[14] Moreover, the judge's statement about imputations of fact has to be read in the context of his judgment. He follows this statement with his analysis of the statement itself in which he specifically points to phrases which he finds to be statements of fact and those which he finds to be comment or mixed comment and fact. In the light of this analysis, it seems clear that the word "substantially" in his phrase "substantially imputations of fact" has to be given weight and that the judge did not mean that all statements made by the appellant were statements of fact but merely that a significant amount of what he said comprised statements of fact with

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[5] Philip Lewis, M.A.: Gatley on Libel and Slander (8th edn., Sweet & Maxwell 1981).

[6] (1889) 54 JP 215 at 216.

the rest being comment. We therefore cannot accept this submission by Mr. Forde, QC.

[15] Nevertheless, it remains a valid criticism that the learned judge regrettably did not distinguish in the clearest terms the statements which (a) he had found to be capable of defamatory meaning and (b) which constituted comment. As this is, in the words of Barrow JA in the Kenny Anthony case, a cardinal requirement of a defence of fair comment, a trial judge should resist the temptation to be less than fully clear in stating his findings on what constitutes the relevant comment. A close examination of his judgment, however, shows that he appears to have found that the material comments were "Hadeed Greed", "who gives a dam [sic] about the People" and "Planned … Rip-Off." There is no cross appeal against the finding that these statements constitute comment rather than fact.

[16] The thrust of Mr. Forde, QC's argument on the cross appeal was that the learned judge erred in finding that the appellant had discharged the burden of proving that the substratum of fact on which he made his comment was true. The learned judge found that the proof of the substratum of fact referred to in the appellant's statements and on which the comment was made was to be found in the report of Don Mitchell, QC ("the Mitchell Report") and analysis of APUA that were admitted into evidence and that the evidence in these documents was not rebutted by the respondent.

[17] The Mitchell Report was admitted into evidence and given "great weight" by the learned trial judge. It is a report entitled "Report to the Cabinet of Antigua and Barbuda in Respect of the Public Utility Authority". It states that the writer had been requested to conduct an investigation into the conduct of the Commissioners of the Public Utility Authority who had been appointed on 1st June 2004.

[18] The Antigua Public Utility Authority analysis was also admitted into evidence and given great weight by the learned trial judge. This is contained in a document headed "Analysis of Proposals Planned to Expand APUA's Generating Capacity"

prepared by Messrs. Roger Tonge, Alan Williams, Carl Samuel and Casford King. It indicates that it is a presentation that "assesses the viability of two proposals that are geared to expand the electrical generating capacity at APUA" and states that the two offers to be discussed are: "A proposed joint venture (JV) between Antigua Power Company (APC) and APUA for a 50.9 Megawatts (MW) of power" and "a loan from the People's Republic of China (PRC) for a 30MW power plant."

[19] Mr. Forde, QC for the respondent makes two principal submissions in support of his cross appeal: firstly, he argues that the appellant did not distinguish between the Hadeed group of companies, and particularly APC, and the respondent personally in his comment and secondly, he argues that the judge failed to identify which parts of these documents he found to be true and that in any event the statements made in these documents can only be regarded as original evidence, i.e. evidence of the fact that Don Mitchell, QC and APUA came to certain conclusions, but not as evidence of the truth of the conclusions made in the documents.

[20] The first argument is foreshadowed in the respondent's statement of claim and in his Reply in that the respondent relied on the distinction between him and APC as evidence of malice. In his defence, the appellant denied malice and pleaded in response that the respondent was at all material times a director or person who owned or partly owned and/or controlled and/or spoke on behalf of the Hadeed Group of companies which included the APC. The respondent in his Reply joined issue with this averment.

[21] The issue whether the statements should have referred to the company or to the respondent therefore arose in the context whether the respondent himself had proven malice. The learned trial judge held that malice had not been proven. The respondent did not cross appeal against this finding. There is therefore no need for this court to deal with this submission. In any event, in the circumstances that the

respondent was the acknowledged mind of the company, the situation appears to be analogous to that in Kemsley v Foot[7] where Lord Porter observed that:

> "Nevertheless, libel must reflect upon a person and Lord Kemsley is held up as worthy of attack on the ground that he is a newspaper proprietor who prostitutes his position by conducting his newspapers or permitting them to be conducted in an undesirable way".

The defence could therefore be made equally with respect to comment about the controlling mind of the company as about the company itself.

[22] Mr. Forde, QC's second submission requires closer examination. In Joseph v Spiller at paragraph 96, Lord Phillips of Worth Matravers PSC approved the statement of Lord Porter in Kemsley v Foot that the comment should be supported by at least one relevant particular of fact that has been proven to be accurate. This suggests that the defendant, as the person on whom the burden of proving the accuracy of the substratum of fact on which he relies, must point to specific matters of fact on which he relies.

[23] The judgment of the court below states that the respondent did not '[question] the authenticity of' the Don Mitchell, QC and the APUA analysis. At paragraphs 56 of his judgment, the learned trial judge indicates that the appellant sought to have these documents admitted into evidence in support of the truth of the facts relied upon, i.e. as hearsay evidence and not merely as original evidence.

[24] The learned trial judge found that these reports carried great weight and that they had come into existence in what appears to be neutral and objective circumstances. He found that neither the documents nor their contents had been impugned either before or at trial and that there was no sufficient evidence to contradict the evidence in the report and analysis. He concluded that the substratum of fact disclosed in the offending statement along with the facts forming the wider context were substantially proved. It appears clear that the learned judge accepted the submission of counsel for the defendant that the

[7] [1952] AC 345 at 355.

documents were being admitted as evidence in support of the truth of the facts relied upon.

[25] It would appear from the notes of evidence that, during the course of the trial, the respondent did not object to the admission of the report and the analysis as evidence of the truth of their contents. In closing submissions, however, the respondent attacked their contents as not having been the subject to independent verification. However, as Mr. Astaphan, SC pointed out, the respondent did not seek to call the makers of the documents if he disputed the truth of their contents, nor did he lead any evidence to contradict the statements therein.

[26] A defendant who raises a defence of fair comment must prove the truth of the underlying facts on which he bases his comment. The question that arises in this case is: how is that onus discharged?

[27] At common law, the rule was that hearsay statements could not be admitted as proof of the truth of the assertions made therein. Hearsay, as defined in the English Civil Evidence Act 1995, which has been incorporated into the laws of Antigua under the Antiguan Evidence Act, is "a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated". In Myers (James William) v Director of Public Prosecutions,[8] the House of Lords stated that the purpose of the rule was to prohibit the statements from being accepted as evidence of the truth of that which was asserted notwithstanding that no better evidence of the facts stated is to be obtained and indicated that this rule applied equally to documents as to oral statements. The Civil Evidence Act 1995, section 1, provides that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. This has abrogated the common law rule against hearsay so that statements can be admitted to prove the truth of the assertions stated therein. However, section 14

[8] [1965] AC 1001, 1024.

provides that nothing in the Act affects the exclusion of evidence on grounds other than it is hearsay.

[28] The common law drew a distinction between evidence of fact and evidence of opinion. I agree with the statement made by the authors of Phipson on Evidence[9] at paragraph 37-01 that at common law, subject to certain exceptions, opinion evidence is inadmissible as proof of material facts. The well-known exception is that the courts will accept the evidence of expert opinion, i.e. opinions that are the result of competence acquired by specialised study or experience. However, at common law, even the admissibility of expert evidence did not detract from the requirement that the primary facts on which the opinion is based must be proven by independently admissible evidence if the expert does not have personal knowledge of such facts: see the discussion of this point by Megarry J in English Exporters (London) Ltd. v Eldonwall Ltd.[10]

[29] It follows that opinion evidence, even expert opinion, is not admissible as evidence of fact even under the Civil Evidence Act 1995 and therefore cannot be sufficient to discharge the burden on a defendant to prove the substratum of fact. The learned authors of Gatley on Libel and Slander[11] at paragraphs 715-716 appear to agree with this conclusion as they state, citing Shenkman v O'Malley,[12] "Comment based on matters of opinion only, which may or may not be true, equally affords no defence." In Davis v Shepstone,[13] the Privy Council dealt with a case in which a newspaper had reported on certain allegations of misconduct of a public official and then subsequently published another article commenting on such alleged conduct on the assumption that they were true. The official sued in libel and at the trial, it was proven that there was no factual basis to the first allegations of misconduct. The "facts" on which the comments were made were

[9] M.N. Howard: Phipson on Evidence (15th edn., Sweet & Maxwell 2003).
[10] [1973] Ch 415, 420-422.
[11] Philip Lewis, M.A.: Gatley on Libel and Slander (8th edn., Sweet & Maxwell 1981).
[12] (1956) 157 NYS (2d) 290, 295.
[13] (1886) 11 App Cas 187.

contained respectively in a letter from a bishop and a report from a Mr. Watson who was connected with the staff of the newspaper, both of whom had spoken to persons who alleged the misconduct. Their Lordships upheld the award of damages on appeal. Although this case may well be decided differently post the Civil Evidence Act 1995, it illustrates that the second publication could not merely rely on the statements in the first publication without proof, by the means available at that time, of the primary facts on which the first report relied.

[30] On the state of the authorities, therefore, it would appear that it is not sufficient for the appellant merely to have based his comments on opinions expressed in the Don Mitchell, QC report or in the APUA analysis. The statutory exception to the hearsay rule, however, would mean that those parts of the reports and analysis that purported to report fact, and not merely opinion, could be relied upon to prove the truth of the primary facts on which the comments were made. The mere fact that these reports had already been in the public domain and their accuracy had not been challenged by the respondent either before or during these proceedings, as indicated by the trial judge, does not assist the appellant on whom the burden of proof lies to prove the truth of the substratum of fact if those reports consist only of opinion.

[31] The learned judge found that the substratum of fact that the appellant was required to establish as true included (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 civilised world; (iv) that from these rates the claimant makes over $30m a year; (v) that he had Cabinet insider advantage in that 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 thereby securing for him and

companies controlled by him and his immediate family an undue and unfair advantage. Neither party appealed against this finding.

[32] Mr. Forde, QC, in his oral submissions, complained that the judge's finding was merely that the facts were "substantially proven" and that this is not sufficient. Regrettably, this is another instance in which the learned judge's findings could have been more specific as he was required to indicate which facts the appellant had proven that would support the comments that he made. The general statement that the substratum of fact was substantially proven must, however, be read in the context of paragraph 54 of the judgment in which the learned judge identified the facts which were required to be established as true to support the matters which he had identified in the previous paragraphs to be comment and also the statements of the law in Kemsley v Foot that were recently approved in Joseph v Spiller that it was not necessary to prove all the alleged facts but only those that are sufficient to demonstrate the truth of the factual basis on which the comments are made.

[33] The underlying facts which the defendant must prove must be relevant to the comments which are being impugned. In the instant case, the comments of "greed", "not giving a dam [sic]" and "planned … rip-off" are sufficiently general that they could be referable to any fact or combination of facts that the appellant had alleged to be true and forming the basis of his comment. The fact therefore that the appellant did not put the Tenders Board report into evidence, as Mr. Forde, QC submitted, did not mean that he could not prove the substratum of fact on which his comment was based from other documents which were put into evidence, as was found by the learned judge.

[34] The learned judge found that the substratum of fact had been substantially proven in the Mitchell report and the APUA analysis. As this involves making inferences from documents, we are as well placed as the trial judge to examine these

documents to see if they do actually prove these facts: see Saunders v Adderley.[14]

[35] I have examined the Mitchell report and the APUA analysis which were relied on by the judge. The Mitchell report[15] purports to give a factual account of the role of the respondent in the attempt by APUA to acquire the Vortek generators and the offer by his company to provide alternative generators and concludes that the respondent did not take special care to avoid confirmation of the public suspicion that he may have acted in his private interest in conflict of his duty to the government. The report does not conclude that he did act in such conflict of interest because that was not part of the remit of the author.

[36] The APUA analysis indicates the cost of the alternative proposals by the PRC and APC and then provides a comparative analysis of these costs and concludes that the Antigua Power Company proposal will cost $155 million more than the Chinese proposal over the life of the respective loans.

[37] The basis of the comment that the respondent's bid (or more accurately his Company's bid) was 40% higher than another tenderer appears to be in a statement from the Hon. Gaston Browne, a member of Parliament who was formerly associated with the ruling party, dated 25th July 2006. Mr. Browne's article comprises largely comment such as:

> "The level of discount offered confirms that APC is making extortionate profits on the existing power generation contract …"

and

> "This is not surprising since the Chinese firm Complant had successfully bid for power generation in 2003 at 5.2 cents per kilowatt hour but mysteriously lost the bid to APC at a whopping 7.2 cents per kilowatt hour (40% more than Complant) after the Hadeeds (APC) sued the then ALP Government and an out of court settlement was agreed to …"

and:

> "… as evidenced by the existing power contract in which I understand the APC is netting EC$18 million annually. If the generation of 27 megawatts

[14] (1998) 53 WIR 15 at 21a.

[15] Pp. 15 et seq.

> of power is providing a net profit of EC$18M annually then, the new deal will net the Hadeeds (APC) a further 22 million dollars in profits annually."

[38] Having reviewed these documents, it appears to me that the majority of the evidence put forward by the appellant to prove the truth of the substratum of fact of his comment was opinion evidence. Nevertheless, I find that both (a) the statement that the APC proposed contract would cost $155 million more than the alternative proposal, which, while correctly a conclusion itself could be treated as an inseparable mixture of fact and inference, and (b) the record in the Mitchell report on the conduct of the respondent with respect to the proposed purchase of the Vortek generators, can be classified as statements of fact which have been proved by hearsay evidence as is permitted by the Civil Evidence Act 1995.

[39] Mr. Astaphan, SC submitted that the respondent did not lead any evidence showing that these reports were not true. He did not need to. The onus of proof was and remained on the appellant to prove the truth of the underlying facts and the respondent was always entitled to challenge the appellant's ability to discharge that burden and to argue that the evidential burden never shifted to the respondent in the circumstances. Mr. Astaphan, SC in his written submissions emphasised facts that were proved at the trial and included among them facts brought out in cross examination of the respondent, documents delivered to the appellant by the respondent and the result of the APC court proceedings against the government. These appear to be matters that arose or came to the attention of the appellant after he had made the comments. He therefore cannot rely on these facts in support of a defence of fair comment.

[40] If the only fact in the substratum that the judge has indicated, and which the respondent has not disputed on appeal, is that the APC proposal is expected to cost $155 million more than the rival proposal, is the comment nonetheless fair?

[41] I start by saying that all comment is not necessarily fair and so the matter does not end by merely proving comment based on proven fact. In Tse Wai Chun Paul v

Albert Cheng[16] Lord Nicholls of Birkenhead NPJ indicated that the touchstone in determining whether a comment is fair is the honesty of the defendant in his belief in the view that he has expressed. Provided that the views expressed are honestly held and are germane to the subject matter on which it is made, it matters not how prejudiced or exaggerated they are. At paragraph 24, he stated that honesty is to be determined objectively. Indeed in Joseph v Spiller at paragraph 117, Lord Phillips, with the authority of the UK Supreme Court, has in fact renamed the defence "honest comment". In Reynolds v Times Newspapers Ltd.[17] Lord Nicholls of Birkenhead indicated that:

> "Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury."

[42] The learned trial judge made no specific finding whether the appellant honestly held the views he expressed. However, his finding that there was no malice implies that he found that the views were honestly held as "malice covers the case of the defendant who does not genuinely hold the view he expressed."[18]

[43] The issue then is whether, objectively, the comments that the respondent was greedy or not giving a damn or ripping off the public was relevant to the underlying fact that his company's proposal to APUA was considerably more expensive than his rival's and his conduct in relation to the proposed purchase of the Vortek generators. I believe that an honest but prejudiced critic could hold such view.

[44] The appellant was found to have defamed the respondent by his comments because, in the words of the learned trial judge, the words used were "unnecessary" and "passed out of the domain of criticism itself" and therefore were not "a fair assessment of the claimant". I find that in making these findings, the learned judge erred in that he failed to apply the objective tests of honesty and

[16] [2001] EMLR 31 at paras. 20 and 79.

[17] [2001] 2 AC 127 at 193E.

[18] Per Lord Nicholls in Tse Wai Chun Paul v Albert Cheng [2001] EMLR 31 at para. 24.

relevance but applied an incorrect subjective value judgment as to fairness which is not justified on the authorities. In the words of Mr. Astaphan, SC, the learned judge hobbled the defence of fair comment impermissibly.

[45] For the above reasons, I would therefore uphold the appeal and dismiss the cross appeal and award costs of this appeal and in the court below to the appellant. The appellant's notice of appeal did include a ground of appeal criticising the award of prescribed costs by the court below. However, as neither counsel addressed this live issue in his written or oral submissions, I am prepared to treat this ground as having been abandoned. The appellant shall therefore have his costs of this appeal in the sum of EC$5,360.00, being two thirds of the prescribed costs of EC$8,000.00 awarded in the court below pursuant to CPR Part 65.13.

[46] Following from the outcome of this appeal there is strictly no need for me to address the final issue of damages. However, for completeness, I would add that I do not agree with Mr. Astaphan, SC's submission that the learned trial judge took into account irrelevant matters in determining the quantum of the award of damages. Lord Esher's statement in Praed v Graham is authority for the fact that the judge (as the arbiter of damages in place of the jury) is entitled to take into account the conduct of a defendant from the date of publication of the libel up to the date of the delivery of judgment including his conduct before and during the trial. I am satisfied therefore that there was no error on the face of the judgment with respect to the award of damages.

John Carrington
Justice of Appeal [Ag.]

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Tyrone Chong, QC
Justice of Appeal [Ag.]