THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2011/0017

BETWEEN:

[1] LENNOX LINTON
[2] ISLAND COMMUNICATIONS CORPORATION LTD.
[3] RAGLAN RIVIERE

Appellants

and

KIERON PINARD-BYRNE

Respondent

Before:

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Fraser and Mr. Duncan Stowe for the First and Second Appellants
Dr. William Riviere for the Third Appellant
Mr. Anthony A. W. Astaphan, SC and Ms. Hazel Johnson for the Respondent

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2012: May 2;
2013: March 25.

Civil appeal – Defamation – Libel – Slander – Distinction between – Words complained of contained in internet article and radio broadcast – Justification – Fair comment – Qualified privilege – Whether or not there was publication of material posted on website

The respondent, a chartered accountant by profession, commenced legal proceedings in the court below against the appellants, alleging defamation of character. The first appellant had called in to a live radio programme and made certain statements about the respondent in relation to a matter which, at the time, was the subject of much discussion in the Commonwealth of Dominica. The radio station which aired the programme was owned and operated by the second appellant. The first appellant had also authored an internet article on the very same topic of discussion, which mentioned the respondent. The third appellant operated the website on which the article was posted. The statements made

over the airwaves as well as the contents of the internet article together comprised the words complained of by the respondent.

The first appellant's statements suggested that the respondent lacked integrity, had acted dishonestly and deceived the Dominican public by using the offices that he held and the functions that he performed in relation to a company set up to undertake the construction of a hotel in Dominica, to enrich himself.

The learned trial judge found that the words complained of ascribed to the respondent criminal and professionally discreditable conduct, had the effect of lowering him in the eyes of the public, and were defamatory of him. He found that the words complained of were not justified, were not fair comment on a matter of public interest, and did not attract qualified privilege. Judgment was accordingly entered for the respondent and the learned judge awarded damages and costs to the respondent, to be paid by each of the appellants.

The appellants appealed to this Court on several grounds, from which the following main issues for consideration were distilled: whether or not the words complained of were defamatory; whether, judging from the evidence in the court below, the appellants should have been able to rely on any of the defences of justification, fair comment or qualified privilege; whether the words complained of constituted libel or slander; and whether there had in fact been publication of the words complained of in the internet article.

Held: allowing the appeal, dismissing the respondent's counter appeal, and awarding the appellants prescribed costs here and in the court below in accordance with rules 65.5 and 65.13 of the Civil Procedure Rules 2000, that:

1. The words complained of were defamatory of the respondent.

2. The appellants were not justified, based on the evidence adduced in the court below, in speaking, writing, broadcasting or publishing the words complained of.

3. Although the words complained of did relate to a matter of public interest, they were imputations of fact and not comment and no attempt was made by the appellants to establish their truth. The learned judge therefore rightly held that the words complained of did not constitute fair comment on a matter of public interest.

   Tse Wai Chun Paul v Albert Cheng [2001] EMLR 31 applied.

4. The first appellant did in fact undertake an extensive investigation of the issues which he spoke about during the radio broadcast and in the internet article. It was therefore not open to the learned judge to make the finding that the first appellant did not make any enquiries and that this factor weighed heavily against him being able to rely on the defence of qualified privilege. The words complained of were not actuated by malice towards the respondent, but only by strong sentiments held by the first appellant on the respondent's involvement in the Layou river hotel project. On the evidence, it does appear that the first appellant honestly believed in the truth of the conclusions that he reached and in the words that he spoke and

wrote about the respondent. Accordingly, the speaking, writing and publishing of the words complained of were done in circumstances which attracted qualified privilege.

Reynolds v Times Newspapers Ltd and Others [2001] 2 AC 127 applied.

5. The writing and publishing of defamatory words on an internet website constitute libel, while the speaking of defamatory words on a live radio broadcast constitutes libel when the broadcast is recorded for rebroadcast and, even if it constitutes slander and not libel, is equated with libel when it is slander actionable per se because the words impute the commission of a crime by the respondent or disparages him in his office, profession, calling, trade or business.

6. The words complained of in the radio broadcast were published by the first and second appellants in Dominica, while the words complained of in the internet article were published in Dominica by the first and third appellants.

JUDGMENT

[1] MICHEL JA: The term economic citizenship was introduced into the Dominican vocabulary in 1991 when the Government of the Commonwealth of Dominica entered into an agreement with a Taiwanese national, Ms. Grace Tung, to develop and build a hotel on the bank of the Layou River in Dominica. A company called Oriental Hotel (Dominica) Limited (hereafter "OHDL") was incorporated in Dominica to undertake the hotel project. The shareholders in the company were investors from Pacific Rim countries who were expected to be made citizens of the Commonwealth of Dominica and given Dominican passports as part of the return on their investment. Although several investors did buy shares in the company and construction of the hotel commenced in 1995, construction was discontinued the following year, after several millions of dollars were expended, and the project was eventually given up as a failure, with several shareholders losing their investment.

[2] The economic citizenship programme and the project through which it was to be introduced into Dominica were mired in controversy from the very beginning. The government of the day was much criticised over the project and Grace Tung, with whom the government had contracted, also became the subject of much criticism.

[3] Enter Kieron Pinard-Byrne.

[4] The respondent in this appeal, Kieron Pinard-Byrne, is a chartered accountant who emerged as a central figure in the controversy. He was the resident partner in Dominica of the firm of Coopers & Lybrand, who were the auditors of OHDL from 1991 to 1997; he is the managing partner of KPB Chartered Accountants, who took over from Coopers & Lybrand as the auditors of OHDL; he was also the company secretary of OHDL and the owners' representative of the shareholders of OHDL. The respondent had also been (about the same time) the liquidator of Fort Young Hotel Limited, whose operating assets were sold to Grace Tung.

[5] Public discourse on the controversial economic citizenship programme and the Layou hotel project continued through the 1990s and did not abate at the dawn of the new century, despite two changes in government brought about by general elections in 1995 and in 2000.

[6] On 26th February 2002, the first appellant (Lennox Linton) called in to a live radio programme on a local radio station owned and operated by the second appellant (Island Communications Corporation Ltd.) and said of and concerning the respondent:

> "So no one will challenge him face to face even as he plays the race card to perfection he talks in a phobia to perfection, he mercilessly insults the intelligence of Dominicans from whose passports he has become a major beneficiary. Tonight he is doing it again…
>
> "When you go back to that record of deception in the 1999 Report and Accounts where they tell you all sorts of stories about the reengineered citizenship Programme of the Government that caused problems for Dominicans in Canada and so on, all these statements are not borne out by the facts.
>
> "What Mr. Byrne and Company must do is present to the people of Dominica incontrovertible evidence of a revenue stream and you asked the question to IDM that is independent of economic citizenship investment. That is important because I will put it to the promoters that the company IDM was set up specifically to find some clever way of

> purchasing the Layou River Hotel property in the name of a company owned and operated by grace Tung. That is what I am putting to them.
> "In other words they got a cheque and it was time to distribute the money to the shareholders who had invested in that company. But interestingly, when the statement of account was presented by Coopers and Lybrand it did not carry 1st of February as the Chairman of Fort Young claimed as the date of the sale. It carried the 4th of February. Again the significance of the 4th of February date is that, that is the date on which International Development and Management was incorporated in Dominica. Therefore the 1st of February did not exist and they could not have bought anything on the 1st of February."

[7] The first appellant also wrote the following words of and concerning the respondent in an article entitled "Professional Conduct Procedure – The KPB Version", which article was posted in May 2002 on a website operated by the third appellant (Raglan Riviere) and which remained on the website from May 2002 until about September 2003 when the respondent instituted proceedings against the appellants in the High Court:

> "Self styled Owners Representative Keiron [sic] Pinard-Byrne must know that the record of squander mania and crass deception presented in the Layou 5 Star Hotel accounts speaks for itself. It was audited by KPB Chartered Accountants of which Mr. Keiron [sic] Pinard-Byrne is Chairman and CEO. It formed part of the Directors Report to the shareholders which Mr. Pinard-Byrne signed as Secretary to the Board…
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> "As Owners Representative Mr. Byrne confirms in the audited statements that he received over 300 thousand dollars for his services to the shareholders of Oriental Hotel (Dominica) Ltd. His actual share of the audit payment and "administrative expenses" of Oriental Hotel have not been disclosed. The hundreds of thousands of dollars he must have cashed in from Dominican passport money siphoned through International Development & Management (IDM) have not been disclosed either.
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> "This paragon of great Irish virtue has said publicly that he became involved with the Layou River Economic Citizenship Programme as Owner's Representative of the shareholders of Oriental Hotel in 1995. At that time he claims, he was merely acting on behalf of Coopers & Lybrand. He also disclosed that the last shareholders meeting of Oriental Hotel was held in 1994. How then was Mr. Byrne appointed owner's representative? And who made the appointment? Keep in mind that shareholders of Oriental Hotel resident in Dominica have publicly expressed their dissatisfaction with the conduct of this gentleman and have rejected suggestions that he represents them.

> "Notwithstanding Mr. Byrne's assurances that he only became involved in 1995, Government records indicate that as far back as 1993 he was having audiences with shareholders in his Roseau office and traveling to Hong Kong to clarify issues of concern.
>
> "What he would love to hide from the public is the fact that he was up to his ears in service to the Grace Tung group of companies at the very same time that he was liquidator of the Fort Young Hotel whose operating assets were sold to the Chinese immigrant in a web of intrigue."

[8] In 2003, the respondent instituted proceedings against the appellants for defamation of character, alleging several counts of defamation. The case came before Lewis S. Hunte J [Ag.] on 13th February 2006 for a determination of the preliminary issue as to whether the words complained of were capable of bearing the defamatory meanings ascribed to them in the statement of claim. In a ruling delivered on 10th April 2006, Hunte J [Ag.] determined that the words contained in paragraphs 6 and 7 above were capable of bearing the defamatory meanings ascribed to them.

[9] For ease of reference, the quoted words from the radio broadcast and the internet article shall be referred to as "the words complained of" (whether with reference to one or both sets of words).

[10] Pursuant to an order of Justice Anthony Ross, QC dated 17th October 2007, the respondent filed an amended statement of claim in which he pleaded as being defamatory of him only the words complained of (allegedly published by the first appellant and the second or third appellant).

[11] The first and third appellants filed amended defences on 13th December 2007 denying that the words complained of bore the defamatory meanings ascribed to them in the amended statement of claim and also pleaded justification, fair comment and qualified privilege. The first appellant also contended that the words complained of were not actionable without proof of special damage, in other words, that the words (if defamatory) were slanderous and not libellous, while the third appellant referred to a disclaimer on his website as being exculpatory of him,

though he never pursued this issue at the trial of the matter or the hearing of the appeal.

[12] The second appellant did not file a defence, as did the first and third appellants, but counsel for the first appellant has represented the second appellant in all respects (both here and in the court below) as if the amended defence filed on behalf of the first appellant was also filed on behalf of the second appellant. The case has proceeded throughout on this basis, with no objection taken by any of the parties to the case or by any of the judges who dealt with the case and I will adopt the same posture in this judgment.

[13] The case was tried by Justice Brian Cottle, who delivered judgment on 22nd March 2011. The learned trial judge found that the words complained of ascribed to the respondent criminal and professionally discreditable conduct, that they had the effect of lowering the respondent in the esteem of the public, and that they were defamatory of him. The learned trial judge also found that the words complained of were not justified, they were not fair comment on a matter of public interest, and they did not attract qualified privilege. He accordingly gave judgment for the respondent against all three appellants and awarded damages and costs to the respondent to be paid by each of the appellants.

[14] The appellants appealed against the judgment of the trial judge and listed 40 grounds of appeal. The respondent in turn filed notice of counter appeal, appealing against the order and award of damages. The respondent had 4 grounds of appeal, 3 alleging error and misdirection by the learned trial judge in failing to consider a number of factors in determining the award of damages and 1 ground simply alleging that the award is wholly inadequate.

[15] In preparing for the hearing of the appeal, the parties generated an impressive quantity of documents, including detailed skeleton arguments and numerous judicial and some statutory authorities.

[16] The appeal was heard on 2nd May 2012, with oral submissions made by counsel on behalf of the parties to augment the skeleton arguments filed by them.

[17] Upon examination of the appellants' 40 grounds of appeal, the skeleton arguments filed and the oral submissions made on their behalf, and the respondent's responses to these grounds of appeal, skeleton arguments and oral submissions, the task of the Court of Appeal really comes down to determining six issues: firstly, whether the words complained of were defamatory of the respondent; secondly, whether there was justification for the appellants to have spoken, written, broadcasted or published the words of or concerning the respondent; thirdly, whether the words complained of constituted fair comment on a matter of public interest; fourthly, whether the speaking, writing, broadcasting or publishing of the words were done in circumstances which attracted qualified privilege; fifthly, whether the speaking, writing, broadcasting or publishing of the words constituted libel or slander; and sixthly, whether the words complained of were in fact published by the appellants in the Commonwealth of Dominica.

[18] In his oral and written submissions on the first issue, learned counsel for the first and second appellants attempted to make heavy weather of some slips made by the learned trial judge in his written judgment, for instance, referring to the title of the internet article as indicating that it (meaning the title) was aimed at disparaging the respondent by way of his profession, when in fact he was dealing not with the internet article but with the radio broadcast; and, yes, there were some other factual inexactitudes contained in the judgment. The fact is though that Hunte J [Ag.] – in ruling on the preliminary issue – determined that the words complained of were capable of bearing a defamatory meaning (which ruling was not appealed) and the learned trial judge made a finding of fact that the words were defamatory of the respondent. There was ample evidence on the basis of which the trial judge could have made and did make this finding of fact and the Court will not disturb his finding.

[19] In terms of the defence of justification, the appellants allege (in essence) that the alleged defamatory imputations in respect of which they were sued were substantially true, but – save for stating some general facts which do not prove the truth of the strong and serious allegations made against the respondent – the appellants never led any evidence which even came close to proving the allegations made against the respondent in the words complained of. It has of course been judicially established[1] that the burden of proving that defamatory imputations are substantially true rests on the party asserting their truth, so it would, in the present case, have been for the appellants to establish the truth of the imputations made against the respondent. There is not, therefore, any basis upon which this Court can overturn the finding of the learned trial judge that there was no justification for speaking, writing, broadcasting or publishing of or concerning the appellant the words complained of.

[20] In terms of the defence of fair comment, the law is that it is a defence to an action for defamation that the words complained of are fair comment on a matter of public interest. To succeed in the defence, a defendant must show that the words are comment and not statements of fact. However, an inference of fact from other facts referred to may amount to a comment. The defendant must also show that there is a basis for the comment contained or referred to in the published words and that the comment is on a matter of public interest, meaning that the matter has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern. The defence is defeated though if it is established that the comment was actuated by malice.

[21] The learned trial judge, in addressing the defence of fair comment, referred[2] to the case of Tse Wai Chun Paul v Albert Cheng[3] in which Lord Nicholls of Birkenhead N.P.J. listed the ingredients of the defence of fair comment as follows – (1) the comment must be on a matter of public interest; (2) the comment must be recognisable as comment, as distinct from an imputation of fact; (3) the comment

[1] McDonald's Corpn v Steel,(31st March1999, unreported), CA.
[2] At para. 24 of his judgment.
[3] [2001] EMLR 31.

must be based on facts which are true or protected by privilege; (4) the comment must indicate, at least in general terms, what are the facts on which the comment is being made; and (5) the comment must be one that could have been made by an honest person and be germane to the subject matter criticised. The learned trial judge went on to state[4] that "[t]he absence of any of these ingredients means that the defence of fair comment is not made out."

[22] The learned trial judge appeared to have hurried somewhat to reach his conclusion that none of the five ingredients were present on the facts of this case, because he got there quite quickly and without detailed analysis. I propose to take a less hurried approach in examining his conclusion on the absence of any of the five ingredients.

[23] As to the first of the five ingredients, the learned trial judge did find "that the issue of the economic citizenship program and the [i]ssue of the Layou River hotel project were matters of public importance."[5] He held though that this would not avail the appellants because the claim against them was that they made and published statements of fact which were defamatory of the respondent by way of his profession and by way of accusing him of criminal conduct. Although this conclusion does rule out the presence of the second ingredient of the defence of fair comment, it does not however rule out the first ingredient, that the statement alleged to be comment was indeed on a matter of public interest, which ingredient appears to be indisputably present on the facts of this case.

[24] As to the second ingredient, the learned trial judge rightly found (on the evidence before him) that the words complained of were statements of fact made by the first appellant and published by the second or third appellant. Indeed, the first appellant (under cross-examination by counsel for the respondent) testified that he came to certain conclusions on the basis of his investigations on the issues concerning the economic citizenship programme and the Layou hotel project,

[4] In para. 25 of his judgment.
[5] See para. 32 of the learned judge's judgment.

which conclusions he regarded as findings of fact, and that the statements he made which are the subject of this case were made as a result of the conclusions he arrived at from his investigations. It is clear, therefore, that – even from his own admissions – the statements made by the first appellant and published by the second or third appellant were imputations of fact. It is also clear that no attempt was made by the appellants to establish the truth of the statements. The second ingredient of the defence of fair comment was not therefore present on the facts of the case.

[25] The three other ingredients of the defence of fair comment are all based on the words complained of being comment and not fact. Having agreed with the finding of the learned trial judge that the words complained of were imputations of fact and not comment, it would serve no useful purpose to dwell on the presence or absence of these other ingredients, including the question of malice in the context of fair comment.

[26] The conclusion reached by the learned trial judge – hurried though he might have been in reaching there – was correct, except for the fact that the subject matter of the words complained of was a matter of public interest, as indeed he found in addressing the defence of qualified privilege at paragraph 32 of his judgment.

[27] In terms of the defence of qualified privilege, the authors of Gatley on Libel and Slander[6] state that:

> "There are circumstances in which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue. In such cases a person is protected if the statement was 'fairly warranted by the occasion' (that is to say, fell within the scope of the purpose for which the law grants the privilege) and so long as it is not shown that the statement was made with malice, *i.e*. with some indirect or improper motive or knowing it to be untrue, or with reckless indifference as to its truth."[7]

[6] (10th edn., Sweet & Maxwell 2004).
[7] para. 14.1.

[28] There are different classes and different sources of qualified privilege, but the class and source of qualified privilege which this case concerns is qualified privilege accorded at common law to statements made to the public at large through the media.

[29] The statement of the defence of qualified privilege (quoted from Gatley on Libel and Slander) gives rise to the question as to what is the purpose for which the law grants the privilege?

[30] A reading of the cases from the UK and other Commonwealth countries would indicate that the purpose for which the law grants the privilege, certainly in the case of the media and its coverage of or reporting on matters of public importance, is to permit the media to carry out its primary function of disseminating information to the public on matters of public interest without running the risk that - because of innocent factual misstatements – the owners, operators, employees and/or contributors to the media would become liable in damages and otherwise to any person who felt aggrieved by the information disseminated. At the same time, the common law continued to seek to protect the reputation of persons (including public figures) from unwarranted attack. The balance to be struck between these two competing objectives of the common law is to be found in the concept of responsible journalism, so that the defence of qualified privilege is available to the media if the author and/or publisher of the information in the media conformed to the standard of responsible journalism.

[31] Following the judgment of the House of Lords in the case of Reynolds v Times Newspapers Ltd and Others,[8] it is now established that the protection accorded by the defence of qualified privilege to statements made to the public at large through the media, does not just depend on whether the maker (or other publisher) of the statement acted without malice, but it depends too on the extent to which the maker (or other publisher) of the statement has made proper investigations prior to making and/or publishing the statement.

[8] [2001] 2 AC 127.

[32] The House of Lords held in the Reynolds case that the defence of qualified privilege is available where (a) the publisher was under a duty (legal, moral or social) to those to whom the material was published (which could be the general public) to publish the material in question and (b) those to whom the material was published had an interest to receive that material – "the duty-interest test". The House also held that "the duty-interest test" was to be applied having regard to all of the relevant circumstances, including those enumerated by Lord Nicholls of Birkenhead[9] as follows:

(1) the seriousness of the allegation;

(2) the nature of the information and the extent to which the subject matter was a matter of public concern;

(3) the source of the information;

(4) the steps taken to verify the information;

(5) the status of the information;

(6) the urgency of the matter;

(7) whether comment was sought from the claimant;

(8) whether the article contained the gist of the claimant's side of the story;

(9) the tone of the article;

(10) the circumstances of the publication, including the timing.

Lord Nicholls also said that:

> "This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case."[10]

[33] This appeal – like the appeal in the Reynolds case – "concerns the interaction between two fundamental rights: freedom of expression and protection of reputation."[11] The determination of which of these two fundamental rights will

[9] At p. 205A-C of the judgment.
[10] At p. 205C.
[11] per Lord Nicholls of Birkenhead at p. 190H.

prevail over the other in any given case is a very critical one and merited full and proper consideration by the trial judge, including a thorough analysis of the evidence in the case. This clearly was not done by the learned trial judge. The learned trial judge paid short shrift to it in his judgment and made what may be described as a summary determination (without giving reasons for so doing) that:

> "I have no difficulty in coming to the conclusion that the failure by the first defendant to make any enquiries of the claimant and the third defendant's failure to make any enquiries at all are factors which weigh heavily against them being able to rely on privilege in the sense of the Reynolds case."[12]

[34] The uncontroverted evidence of the first appellant[13] was that:

(1) "Between 1995 and 2002, I conducted thorough investigation on the Layou River Economic Citizenship Programme."

(2) "In making my comments both on radio and on the mentioned internet article … I relied primarily upon official documents evidencing the transactions referred to in the words complained of and at all times spoke in direct response to what I considered to be incomplete and/or misleading information about the programme coupled with distasteful and highly disrespectful utterances against the native population placed on the public record by the Claimant" and "I exercised due care in obtaining and verifying the factual information contained in the words complained of and relied on the entirety of the documentation researched prior to speaking the words complained of".[14]

[35] Under cross-examination by counsel for the respondent[15] the first appellant testified that in the course of his investigations he did interview the respondent at least once. He testified as well that in the course of his investigations he looked at a host of documents that he "read through time and time again and tried to make sense of as [he] sought to be responsible in helping the public better understand

[12] At para. 30 of the learned judge's judgment.
[13] The first defendant in the court below.
[14] See paras. 3 and 19 of the first appellant's witness statement.
[15] The claimant in the court below.

what happened at Layou."[16] He listed several of the documents that he looked at and read through. He also testified that he read the explanations contained in articles published by the respondent in the Chronicle newspaper.

[36] Under further questioning by Counsel for the respondent, the first appellant testified that he came to certain conclusions on the basis of the investigations that he had carried out, which conclusions he regarded as findings of fact, and that the statements he made which give rise to this case were as a result of the conclusions he arrived at from his investigations.

[37] It was the uncontroverted evidence of the first appellant, both in his witness statement and under cross examination, that his statements of and concerning the respondent were responses by him to statements made by the respondent on radio, on television or in newspaper articles either written by the respondent or written by others quoting or reporting statements by the respondent. It was also his evidence that the words complained of which were broadcast on the second appellant's radio station were spoken by him (the first appellant) on a call-in radio programme on which the respondent was the in-studio guest and on which he (the respondent) had made statements which he (the first appellant) was responding to and which, of course, the respondent – as the in-studio guest – would be able to respond to contemporaneously or immediately after the words were spoken.

[38] It is clearly apparent from a review of the evidence of the first appellant, that he did in fact undertake an extensive investigation of the issues concerning the economic citizenship programme and the Layou hotel project which was to be established by means of the economic citizenship programme. It is also apparent from the evidence of the first appellant that the respondent had not been specially selected by him for criticism in relation to the programme and the project. Under cross-examination, he testified that when the respondent took issue with the statements made by him of and concerning the respondent and threatened to sue him, he (the first appellant) responded by saying that he was not afraid of a defamation suit

[16] See p. 217 of the Transcript of Trial Proceedings for Monday, 27th September 2010.

because he had 'consistently spoken truth to power with respect to the Layou Economic Citizenship and matters connected therewith' and he is 'not concerned with Mr. Pinard-Byrne personally but rather with the non-performance of the citizenship programme and that [he] would be happy to represent [his] position in the Court.'[17]

[39] It also emerged from the cross-examination of the first appellant that he had publicly and strongly criticised other leading personalities in relation to the economic citizenship programme and the Layou hotel project, including Ms. Grace Tung and officials of the Government of the Commonwealth of Dominica, and that he felt very strongly about the handling of the programme and project by those concerned with it. It also emerged that it was the respondent who 'thrust himself into the vortex of political controversy' in relation to the economic citizenship programme and the Layou hotel project by becoming the spokesman for and defender of those involved in the handling and implementation of the programme and project, in which capacity he made several public statements and wrote or contributed to several newspaper articles, including statements critical of the first appellant, the Prime Minister and members of the Government of Dominica between 1995 and 2000, and other Dominicans who were critical of the programme and project.

[40] In the circumstances, that the issues addressed by the first appellant in the statements made and written by him – from which statements the words complained of were extracted – concerned matters of public interest to the people of Dominica is beyond doubt. That the first appellant undertook extensive investigations into the economic citizenship programme and the Layou hotel project and publicly and passionately wrote and spoke about his investigations and the conclusions he drew from them are equally beyond doubt. That the respondent became a central figure and lead spokesman on the project and the programme, including explaining and defending his own involvement in them, does not permit of any doubt. That the first appellant was publicly and strongly critical of

[17] See p. 241 of the Transcript of Trial Proceedings for Monday, 27th September 2010.

the respondent and other central figures involved in the programme and the project does not leave any room for doubt. That the making by the first appellant of the statements which contained the words complained of were as a result of conclusions reached by him, based on his investigations, were put beyond doubt by the testimony of the first appellant under cross-examination.

[41] On this evidence, it was not open to the learned trial judge to make the finding that he did[18] about the failure of the first appellant to make any enquiries of the respondent and the consequential finding that this factor weighed heavily against him being able to rely on privilege in the sense of the Reynolds case. In any event, this finding by the learned trial judge is against the weight of the evidence in the case. It was also not open to the trial judge to treat the fact that the issues of the economic citizenship programme and the Layou hotel project were matters of public importance and 'indeed they were the subject of hot political controversy' as being of no consequence because 'that is not what the present case concerns.' In fact, the pleadings and the evidence reveal that this is exactly what the present case concerns, because it forms the background against which and the context within which the words complained of were spoken and written by the first appellant.

[42] It is also apparent that the approach taken by the learned trial judge in paragraphs 33 to 35 of his judgment was likely to lead him into error. The trial judge accepted that the subject matter on which the first appellant spoke and wrote the words complained of was in fact a matter of public importance, but then proceeded to focus on the absence of complaint by the first appellant to 'the authorities' and on the first appellant not referring the conduct of the respondent to 'any body with responsibility for oversight of the conduct of chartered accountants in their profession', and on the fact too that some of the criticisms of the respondent by the first appellant contained in the words complained of might amount to accusations of criminal conduct, as being determinative of the duty-interest test propounded by Lord Nicholls of Birkenhead in the Reynolds case.

[18] At para. 30 of his judgment.

[43] The conclusion arrived at by the learned trial judge that the words spoken and written by the first appellant and published by the second and third appellants (from which were extracted the words complained of) were not subject to qualified privilege is not therefore a finding justified by the evidence given in this case and the law applicable to this case and cannot therefore be supported and sustained.

[44] I find that the words complained of – although strong in their criticism of the respondent and not proven by the appellants to be true – were spoken and/or written by the first appellant and published by the second and/or the third appellant following extensive investigations by the first appellant and were not proven to have been actuated by malice towards the respondent, but only by strong sentiments held by the appellants, in particular, the first appellant, on the handling by and involvement of the respondent and others in the economic citizenship programme and the Layou hotel project. It appears from the evidence that the first appellant did honestly believe in the truth of the conclusions that he reached and the words that he spoke and wrote concerning the whole affair, including the words spoken and written by him about the respondent.

[45] The next issue to be addressed is the question of whether the alleged publication by the appellants of the words complained of (by means of a radio broadcast and/or a web posting) constituted libel or slander. The relevance of the question is as a result of the pleading by the first appellant[19] that the words complained of were not actionable without proof of special damage because their publication constituted slander and not libel.

[46] There is a lurking doubt in the literature on defamation as to:

(1) Whether there is a tort of defamation which manifests either in the spoken word or other transient form, when it is classified as slander, or in the written word or other permanent form, when it is classified as libel?

[19] In the amended defence of 13th December 2007.

(2) Whether there are two torts – libel and slander – which come under a branch of the law of tort referred to as defamation, but with defamation not itself being a tort?[20]

(3) Whether there is the tort of defamation, which itself comprises two other torts of slander and libel?

[47] The law as I understand it is that defamation is a tort, as is slander or libel, and a person can institute civil proceedings against another person for defamation, which is provable by evidence of either slander or libel; or for slander, requiring proof of defamation by the spoken word or other transient form of communication; or for libel, requiring proof of defamation by the written word or other permanent form of communication.

[48] Over time, the classification of defamatory words into the categories of libel and slander was adjusted, from the starting point of slander referring to defamation by the spoken word and libel referring to defamation by the written word, with the category of libel expanding at the expense of its more ephemeral sibling. So that the spoken word captured in some permanent form, like a recording of a speech or song for instance, came to be classified as libel and not slander. In due course, the classification of words into the categories of libel and slander increasingly came to be determined not by the mode of their communication (referring to the spoken or written word) but by their probable life span in the medium through which they were communicated. So that the more enduring are the words in the medium through which they were communicated, the more likely it is that they would be classified as libel, even if they were communicated in the mode of speech rather than text.

[20] The best analogy I can find is with the concept of homicide in the criminal law. Homicide is not a crime, but there are crimes like murder and manslaughter which come under a branch of the criminal law referred to as homicide.

[49] In the age of electronic communication (in which communication by email and via the internet generally has virtually supplanted the handwritten or typewritten letter transmitted to the addressee by hand or via the post office) there has been further adjustment in the categorization of defamatory words or other material as libel and not slander, with communication via the internet – even in the transient form of downloaded and deleted email – being regarded as libel and not slander. Although I have not been able to locate any judicial authority which definitively pronounces that the publication of defamatory words via the internet constitutes libel and not slander,[21] this does appear to be the direction in which the law is going and, in fact, all counsel in the present case evidently accepted that the internet article – if proven to have been defamatory and published – would constitute libel and not slander.

[50] There is a further adjustment made in the categorisation of defamatory words published of another as being libel or slander, and that is in the case of words published in the course of a radio broadcast. Significantly though, this adjustment was made in the United Kingdom and other Commonwealth countries not by case law but by statute. In the UK, the adjustment was commenced by the Defamation Act 1952 and completed by the Broadcasting Act 1990, by virtue of which defamatory words published on all radio broadcasts in the UK would (it seems) be treated as libel and not slander. The fact that legislation was required to make this adjustment is a clear indication – as is the absence of any authoritative judicial pronouncement on the issue – that it was necessary to pass legislation to effect this adjustment, and so the adjustment does not exist outside of a legislative provision. In Dominica, therefore, where there is no similar legislation, the law remains that publication of defamatory words via a radio broadcast (without more) would constitute slander and not libel.

[51] The appellants argue that if this is the case (which they submitted that it is) then the appeal against the judgment, with respect to the alleged defamation contained

[21] The case of Godfrey v Demon Internet Ltd [2001] QB 201 comes closest.

in the radio broadcast, should be allowed because the case which was brought against the appellants was a case of libel and not slander.

[52] The Court cannot, however, go along with the appellants on this submission, for the following reasons:

Firstly, the respondent instituted and pursued proceedings against the appellants for the tort of defamation, and not for libel or slander, and if it is determined that the respondent was defamed by the appellants via a radio broadcast, then the cause of action in defamation would have been made out by the respondent (as the claimant in the court below).

Secondly, although libel is actionable per se and slander is actionable only upon proof of special damage, this is of no consequence where the words complained of impute a crime for which the claimant can be made to suffer physically by way of punishment or where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication. The learned trial judge found that the words complained of not only imputed the commission by the respondent of a serious crime, but they also disparaged him in his profession as an accountant. I can find no fault with the trial judge's findings on these issues, particularly with respect to the disparaging of the respondent in his profession. It is also worthy of note that dicta from Bowen, LJ in the English case of Ratcliffe v Evans[22] (going as far back as 1892) equated actions for slander actionable per se with actions for libel.

Thirdly, there is judicial authority for the proposition that if the radio broadcast in which the words complained of were published was recorded, then this will result in a degree of permanence of the publication so as to constitute it as libel and not slander.[23] There is a dearth of English judicial authority on this issue, because the issue has been dealt with by statute in England since 1952, but the proposition has been treated – certainly in the texts on libel and slander – as being settled. In

[22] [1892] 2 QB 524.
[23] Olowo v Att-Gen [1972] E.A. 311.

the present case, there was uncontroverted evidence that the radio broadcast in issue was recorded, and indeed repeated, so that it can, on account of this, be regarded as libel and not slander.

For any or all of these three reasons, the submission(s) of the appellants for the appeal against the judgment to be allowed on the basis that defamatory words published on the radio constitute slander and not libel are without merit.

[53] The final issue to be addressed (arising from the appellants' 40 grounds of appeal) is the question of whether there was publication of the words complained of in the radio broadcast on the second appellant's radio station and in the article posted on the third appellant's website.

[54] Publication would normally be considered to have taken place when the defamatory words were communicated to a third person, meaning a person other than the claimant or defendant in the defamation action, while communication would normally be considered to have taken place when the words were heard or read by the third person.

[55] The present case concerns words spoken in the course of a radio broadcast and words written in an article posted on a website. In the case of a radio broadcast, it has long been established that publication takes place once the broadcast is heard by any third person, whilst in the case of an internet article, it has only recently been established in the case of Godfrey v Demon Internet Ltd[24] that publication takes place when a third person accesses the site where the material is posted and he (the third person) reads the material.

[56] Of course, equally relevant in a defamation action as the issue of the mode of publication of the defamatory material is the issue of the place of publication, because proceedings for defamation can only be pursued in the jurisdiction in which the defamatory material is published.

[24] [2001] QB 201.

[57] The case of Bata v Bata[25] is generally cited as the authority for the proposition that the tort of defamation is committed in the place where the publication of the defamatory material was received by the hearer, reader or viewer. For radio broadcasts, publication would be considered to have taken place in the jurisdiction(s) where the broadcast was heard. In terms of the internet, the issue was addressed by the Australian High Court in the case of Dow Jones & Co Inc v Gutnick[26] where the court examined extensively several of the issues involved in the internet publication of defamatory material and concluded that publication of internet content (whether words and/or images) takes place in the jurisdiction(s) where the content is downloaded from the website where it is posted. Both the reasoning and the conclusion in Dow Jones are likely to be applied by the courts in the Commonwealth and it can be considered as having settled (for the time being at least) the issue of the place of publication of internet content.

[58] Although the appellants appeared to have put in issue in this appeal the question of whether there was publication in Dominica of the words admittedly spoken by the first appellant on a live radio broadcast on the second appellant's radio station, this seemed to have been abandoned in the oral submissions made on behalf of the appellants at the hearing of the appeal. In any event, if the question had been pursued it could only have yielded one response, and that is that the words spoken by the first appellant on a live radio broadcast on the second appellant's radio station were indeed published in Dominica at the time that the words were spoken. And this not only on the basis of the pleadings and the evidence that the radio station on which the words were spoken was a popular radio station in Dominica which had a large listenership, but even too from the fact that the words were spoken by the first appellant as a caller to a live radio programme on which there was not only an in-studio guest who was the claimant in the court below, but there was also the host of the programme, who would himself have been a third person to whom the words were published.

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[25] [1948] WN 366.
[26] [2002] HCA 56..

[59] The first and third appellants have submitted and maintained that there is no evidence that the words complained of in the internet article were published in Dominica. Publication of the words in the jurisdiction (Dominica in this case) would of course have to be proved by the claimant in a defamation action in order to succeed against a defendant who posts material or submits material for posting on a website.

[60] On the facts of the present case, there was in my view a live issue as to whether or not it was proved at the trial that any person downloaded the internet article in Dominica. The respondent's witness, Parry R. Bellot, in a witness statement loaded with hearsay and opinion evidence, seemed to have said everything other than that he downloaded the first appellant's article in Dominica from the third appellant's website. He also said quite a lot under cross-examination, sometimes unrelated to the questions asked of him, but did not say that he downloaded the internet article in Dominica.

[61] It was a critical element of the respondent's case in the court below that he established that the internet article was published in Dominica to a person other than himself or the appellants, which would be established by proving that a third person had downloaded the article in Dominica from the third appellant's website. The respondent did not expressly do so. Instead, the court was invited to infer that the article was downloaded in Dominica because the website on which the article was posted is on the World Wide Web and the World Wide Web has millions of users who have free and open access to the content of the website, and because Mr. Bellot gave evidence (via his witness statement) that he resided in Dominica and that he read the article written by the first appellant and published on the third appellant's website.

[62] The learned trial judge appeared to have accepted the respondent's invitation to infer that Mr. Bellot had in fact downloaded and read the internet article in Dominica and so he found that there was publication of the article in Dominica.

[63] I differ with the learned trial judge on this finding. I also place no significance on the fact that Mr. Bellot was never questioned at the trial by counsel for the defendants in the court below as to whether he had downloaded and read the article whilst he was in Dominica, or that it was never put to him at the trial that he was not in Dominica when he read the article. The submission on this by counsel for the respondent appeared to be an attempt to invert the burden of proof and to put the onus on the defendant in a defamation action to prove that the publication of the defamatory statement did not take place within the jurisdiction. It was for the respondent (as the claimant in the court below) to prove publication in Dominica and not for the appellants (as the defendants in the court below) to disprove it. I would therefore have reached a different conclusion to the trial judge on this issue, having regard to the onus and burden of proof on the claimant to have established one of the critical elements in a defamation action (that is, that there was publication of the defamatory material in the jurisdiction in which the defamation action is instituted) but I cannot say that it was not open to the trial judge on the evidence before him to have made the inference that he did and to have arrived at the conclusion that he did. I cannot therefore disturb the trial judge's finding on this issue, although I would not myself have made this finding.

[64] Having thus exhausted my consideration of the six issues I set out for determination in paragraph 17 above, my answers to the six questions posed are as follows –

(1) The words complained of were defamatory of the respondent;

(2) There was no justification on the evidence adduced in the court below for the appellants to have spoken, written, broadcasted or published the words complained of;

(3) The words complained of did not constitute fair comment on a matter of public interest;

(4) The speaking, writing and publishing of the words complained of were done in circumstances which attracted qualified privilege;

(5) The writing and publishing of defamatory words on an internet website constitute libel, while the speaking of defamatory words on a live radio broadcast constitutes libel when the broadcast is recorded for rebroadcast and, even if it constitutes slander and not libel, is equated with libel when it is slander actionable per se because the words impute the commission of a crime by the respondent or disparages him in his office, profession, calling, trade or business.

(6) The words complained of in the radio broadcast were published by the first and second appellants in Dominica, while the words complained of in the internet article were published in Dominica by the first and third appellants.

[65] The responses to these six questions mean that – despite the several findings in the course of this judgment adverse to the appellants' appeal – the grounds of appeal which challenge the judge's conclusions on the defence of qualified privilege (in particular, grounds 20, 26 and 28) are upheld, with the result that the judge's order giving judgment in favour of the respondent is overruled and the orders for the payment of damages and costs by the appellants to the respondent are quashed.

[66] Of course, the respondent's counter appeal challenging the sufficiency of the award of damages is rendered nugatory by the quashing of the award of damages to the respondent.

[67] The appeal is accordingly allowed and the counter appeal is accordingly dismissed.

[68] The appellants having succeeded on their appeal and the respondent not having succeeded on his counter appeal, the appellants are entitled to their costs, here

and in the court below, which costs shall be prescribed costs in accordance with rules 65.5 and 65.13 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

Mario Michel
Justice of Appeal

I concur.

Janice M. Pereira
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal