THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL)

SUIT DOMHCV2014/0210

BETWEEN:

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| Hon. Roosevelt Skerrit | Prime Minister and Minister for Finance, Foreign Affairs and Information Technology |
| Hon. Levi Peter | Attorney General |
| Hon. Ian Douglas | Minister for Tourism and Legal Affairs |
| Sen. the Hon. Alvin Bernard | Minister for National Security, Immigration and Labour (Ag) Minister of State in the Ministry of Foreign Affairs |
| Hon. Julius Timothy | Minister for Health |
| Hon. Petter Saint-Jean | Minister for Education, Human Resource Development |
| Hon. Rayburn Blackmoore | Minister for Public Works, Energy and Ports |
| Hon. John Collin McIntyre | Minister for Employment, Trade, Industry and Diaspora Affairs |
| Hon. Reginald Austrie | Minister for Lands, Housing, Settlements and Water Resource Management |
| Hon. Matthew Walter | Minister for Agriculture and Forestry |
| Hon. Ashton Graneau | Minister for Carib Affairs |
| Hon. Gloria Shillingford | Minister for Social Services, Community |

Development and Gender Affairs

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| Hon. Kenneth Darroux | Minister for Environment, Natural Resources, Physical Planning and Fisheries |
| Hon. Justina Charles | Minister for Culture, Youth and Sports |
| Hon. Ambrose George | Minister for Information, Telecommunications and Constituency Empowerment |
| Hon. Johnson Drigo | Parliamentary Secretary in the Ministry of Public Works, Energy and Ports |
| Hon. Ivor Stephenson | Parliamentary Secretary in the Ministry of Lands, Housing, Settlements and Water Resource Management |
| Hon. KelverDarroux | Parliamentary Secretary in the Office of the Prime Minister |

Claimants

AND

LENNOX LINTON

First Defendant

WEST INDIES COMMUNICATIONSENTERPRISES LIMITED

(A company registered under the laws of Dominica)

Second Defendant

Before: The Hon. Madam Justice M E Birnie Stephenson

Appearances:
Mr Anthony W Astaphan SC, Mr Alick C Lawrence SC instructed by Mr Lennox Lawrence for the Claimants
Mr J Gildon Richards for the defendants

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2016: February 18
2017: April 27

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RULING

[1] Stephenson J: In *Walsh v Misseldine* [1], it was held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of a particular case in the light of the overriding objective, take into account all the relevant circumstances and make a broad judgment after considering the available possibilities: there are no hard and fast theoretical circumstances in which the court will strike out a claim or decline so to do.

[2] This is an application brought by the claimants to this action to strike out the defendants' statement of defence, on the grounds that the defence discloses no reasonable ground of defence to the claim with any prospect of success.

[3] The claimants contend that the defence filed by the defendants does not disclose any proper, viable or sustainable defences of justification, fair comment or qualified privilege. Further, their witness statements and documents filed, which they seek to rely on do not contain adequate or proper material of facts or evidence. The claimants also contend that the evidence which the defendants seek to rely on contain irrelevant and inappropriate material and/or are abuses of the processes of court.

The Claim

[1] [2000] CPLR 201, CA

[4] The claimants were at all material times, the ministers of the Government of the Commonwealth of Dominica and were all members of cabinet. The first named defendant was at all material times, the political leader of the United Workers Party and likewise, the second named defendant is the owner of the radio station broadcasting as Q95.

[5] The claimants seek damages against the defendants in respect of the publication, broadcast, rebroadcast and republication on radio and via the internet of defamatory words concerning them which was outlined in the claimants' statement of claim which reads as follows:

> *"There can be no honor in a government that harbors rapist ministers, and uphold extortion of sexual services from young people seeking the facilitation of ministers for their personal development assistance from the public purse. Tell them I say that. And tell them to quote me correctly*
>
> *I want the ladies to come forward because Lennox Linton loves you and you know that. I want the ladies of Dominica to come forward. Come forward and come closer, draw nearer, let them know that Lennox Linton loves the ladies of Dominica, all of them and he is upset when ministers of government have to prostitute our young women for public assistance from the public purse. They know what am talking about and I am not afraid to say it. We cannot build a strategy for development for Dominica on a platform of lies.*
>
> *There is a report in the police station filed on the 19th of June 2013, by a young lady who was seeking assistance from a minister of government, who ask her to come to his home and who at his home at 12:15hrs that day 19th of June 2013 tried to force himself on her and there are hypocrites in this government who condone that. They have their people all around the country telling lies about Lennox Linton don't like women. I love you all and you know that and I will stand*

*for you. I will stand for your pride I will stand for your dignity and never again in the governance affairs of Dominica will our young people have to suffer those indignities. That is my pledge that is what I stand for. Because you know when we relentlessly condone this disgraceful ministerial conduct, where will we find the moral authority to ensure protection of our young people in particular from sexual abuse. Is it any wonder that we have gone nowhere very fast in resolving this national crises notwithstanding nonstop lip service from all quarters."*[2]

[6] The claimants in their statement of claim allege that the said words complained of in their ordinary and natural meaning were meant and were understood to mean that:

"The *claimants as Ministers have intentionally and knowingly harboured and protected ministers, which include themselves and have themselves, in fact, raped and extorted sexual favours from young women who have sought public assistance from the Government of the Commonwealth of Dominica*.

That the claimants collectively and individually have committed and are guilty of committing the grave criminal offences of rape and extortion which are punishable by fine and imprisonment"[3]

[7] The first named defendant in his defence filed on 21st July 2014 admitted that on the day and date mentioned in the claim, he published the statement complained of. The first named defendant contended, however, that "*the statement presented was only part of his address to the youth at that rally and it does not show the full or true context and circumstances in which it was made"*[4]*.*

[8] The defendant went on to plead that *"in so far as the statement complained of consists of expressions of opinion, they are <u>fair comment</u> on <u>a matter of public interest and without</u>*

[2] Paragraph 4 of the Statement of Claim filed here in on the 18th June 2014
[3] Paragraph 6 Statement of Claim ibid
[4] Paragraph 5 of the Defence

*malice. In so far as the words complained of consist of statement of facts they are true in substance and in fact"*[5]*.*

[9] The first named defendant pleaded further or in the alternative that *"the said words complained of were published on an occasion of qualified privilege and without malice"*[6]*.*

[10] The first named defendant also contended in his defence that …"*considering the context and the circumstances of the publication, the words complained of are capable of broader meaning than the meaning ascribed to them by the claimants"*[7]

[11] The defendants throughout their defence state that …"*the statement complained of was fair comment on a matter of public interest and or on an occasion of qualified public privilege". (emphasis mine)*

[12] The claimants filed a reply to the defence and the pleadings were closed. Witness statements have been filed and exchanged and disclosure executed. Thereafter the claimants made the application currently before the court.

The Application:

[13] At the heart of the criticism brought by the claimants to the defendants' case is the inadequacy of the defence and the evidence which the defendants seek to rely on. The claimants contend that the defence, evidence and documentary evidence filed by the defendants:

(i) discloses no reasonable defence to the claimants' claim in that, among other things, the purported defences do contain proper or adequate material facts or evidence, neither does it address or answer the specific complaints made and pleaded by the claimants;

[5] ibid
[6] Paragraph 9 of the Defence
[7] Paragraph 13 of the Defence

(ii) does not disclose any proper, viable or sustainable defences of justification, fair comment or qualified privilege;

(iii) contains irrelevant, inadmissible and inappropriate material;

(iv) are abuses of the process of the court;

(v) are premised exclusively on inadmissible evidence (the complaint), hearsay and repetition;

(vi) that the complaint and hearsay are not admissible, and that the repetition of allegations is not a defence to a claim for libel;

(vii) relies on an alleged complaint which is not evidence of the material or underlying facts, and in any event, do not address or prove the allegation that Ministers raped or extorted sexual favours from young people or women in exchange for assistance from the public purse;

(viii) no particulars or evidence of the serious allegation have been provided by the defendants;

(ix) the alleged complaint relied on by the first defendant is, in any event, wholly irrelevant as it does not address the allegations against the claimants.

(x) the purported defence wholly fails to address the words complained of by the claimants or to disclose a defence to the allegations;

(xi) discloses hopeless defences and a trial would be a disproportionate waste of resources and costs.

The Court's Power to Strike – Summary Judgment

[14] The courts have power to terminate proceedings at an early stage where either the claimant or defendant has no prospect of success, without putting the other party to the expense and delay of a full trial of the proceedings. Striking out means the court ordering

written material to be deleted so that it may no longer be relied upon. The court may strike out a statement of case either in part or in its entirety. A statement of case is defined in CPR 2.3[8].

[15] Rule 26.3 (1) of the CPR 2000 provides for the power of the court to strike out a statement of case and states as follows:

> "*In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that -*
>
> (a) *...*
>
> (b) *the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*
>
> (c) *the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
>
> (d) *the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8 or 10".*

[16] The striking out of a statement of case which includes a defence[9] is a draconian step which a court would only take in exceptional circumstances. In the often quoted case of Baldwin Spencer v The Attorney General of Antigua and Barbuda et al[10] it was stated that:

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[8]"statement of case" means – (a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court;

[9]See part 2.4 of CPR 2000

[10](Civil Appeal No. 20A of 1997)

*"This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court .... Striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court".*[11]

[17] In the Court of appeal case of Tawney Assets Limited v East Pine Management *et al,*[12]it was stated that:

"*The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial".*[13]

[18] If the court exercises its power to strike out, then consideration must also be given to the power of the court to give summary judgment on a claim, or on a particular issue as provided for under rule 15.2 of the CPR which states:

*"The court may give summary judgment on the claim or on a particular issue if it considers that the -*

(a) *Claimant has no real prospect of succeeding on the claim or the issue; or*

[11]Per Byron CJ at paraXXX
[12](BVI High Court Civil Appeal No. 7 of 2012)
[13]Per Justice of Appeal (AG) I D Mitchell QC at para 22

(b) *Defendant has no real prospect of successfully defending the claim or the issue*.

[19] The case of Swain v Hillman,[14]which has also been quoted and followed in our courts on numerous occasions provides some guidance to the court in considering an application for summary judgment. It was held, that what should be shown is that the claim or defence has "no real prospect of being successful or succeeding", and that the word "real" implies that there is a "realistic" as opposed to a "fanciful" prospect of success.

[20] In Lucita Angeleve Walton (nee Lucita Angeleve De La Haye) et al v Leonard George De La Haye[15], the court of appeal stated that:

> "*Summary judgment should only be granted by a court in cases where it is clear that a claim on its face obviously cannot be sustained or is in some other way an abuse of the process of the court. What must be shown is that the claim or defence has no real prospect of success*."

[21] In the case of ED & F Man Liquid Products Ltd v Patel and another[16], it was held that the test in a summary judgment application is where there is no reasonable prospect of success, and in such applications the burden of proof falls upon the applicant; that is, the person who is attacking the claim or defence.

[22] In the case of Swain –v- Hillman[17] and in the case of Three Rivers District Council –v- the Bank of England[18], it was held that a respondent to a summary judgment

[14][2001] 1 All ER 91
[15] BVIHAP2014/0004
[16][2003] EWCA Civ 472

[17] [2001] 1 All E R 91

application is not required to prove his case to a high standard. It will suffice to show that his case may succeed even though it is improbable.

[23] In applications such as the one in the case at bar, the court will determine questions of law on such applications if it is satisfied that the point is clear: Re:Silverton Ltd v Harvey[19] , therefore, the court will examine the evidence before it ,not for the purpose of making findings of fact, but only to determine whether a triable issue is disclosed: Re: Wickstead v Browne[20]

The C**laimants'** Submissions

[24] Learned Senior Counsel Anthony Astaphan on behalf of the claimants submitted that the pleadings are closed, case management has taken place and all the evidence is on record and therefore in the circumstances, the court is in good position to decide whether there is any defence which ought to go to trial and whether or not the defendants' defences are hopeless.

[25] Learned Senior Counsel submitted that the defendant is required by law to do the following:

i. set out all the facts on which he relies to dispute the claim; such statement must be as short as practicable, and must address the allegations in the statement of

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[19][1975] 1 NSWLR 659 at 665.

[20](1992) 30 NSWLR 1 at 9.

claim making clear whether they are admitted; denied, or not admitted and stating the reasons for resisting the allegation;[21]

ii. give particulars if he raises the defences of justification and/or fair comment;[22]

iii. plead or disclose material facts of responsible journalism;[23]

iv. provide evidence to establish or support the charges of criminality made by the first named defendant;

v. to plead the material facts and lead evidence which is capable of establishing the defences of justification, fair comment or qualified privilege.

[26] It was submitted that the defendants have no case or defence on the pleading or evidence and that their case is entirely hopeless. Learned Senior Counsel submitted that what has been produced by the defence is incapable of establishing a proper defence to the claim.

[27] Learned Senior Counsel Astaphan for the claimants contended that the following words included in the first defendant's statement are all statements and imputations of fact and it is clear and that they are not comments.

> *"…all of them and he is upset when ministers of government have to prostitute our young women for public assistance from the public purse. They know what I am talking about and I am not afraid to say it. We cannot build a strategy for development for Dominica on a platform of lies. … There is a report in the police station filed on the 19th of June 2013, by a young lady who was seeking assistance from a minister of government, who asked her to come to his home and who at his home at 12:15hrs that day 19th of June 2013 tried to force himself*

[21] See Part 10.5 of CPR 2000
[22] See Part 69.3 of CPR 2000
[23] The plea of qualified privilege will be struck out if a defendant fails to plead of disclose material facts or responsible journalism. **Re: Dr Ralph Gonsalves –v- Edwardo Lynch et al SVGHCV2002/0406** and the judgment of the Court of Appeal CA 18 of 2005 (SVG) (**The Ewardo Lynch Case)**

*on her and there are hypocrites in this government who condone that … I will stand for your pride, I will stand for your dignity and never again in the governance affairs of Dominica will our young people have to suffer those indignities. ... Because you know when we relentlessly condone this disgraceful ministerial conduct, where will we find the moral authority to ensure protection of our young people in particular from sexual abuse."* [24]

[28] Learned Senior Counsel also submitted that the first named defendant made reference to and relied on a single report which does not warrant or justify the charge of rape or extortion, or the description of rapists against all of the ministers (the claimants). Mr Astaphan SC made reference to the Witness Statement of the defendants' witness,Henslyn Thomas.

[29] It was also submitted on behalf of the claimants that the defence, evidence, and documents filed by the defendants in the matterdisclose no reasonable defence or defences which have any reasonable prospects of success and that in the circumstances, the defence ought to be dismissed for the following reasons that they:

i. are premised exclusively on inadmissible evidence (the complaint), hearsay and repetition. That a complaint and hearsay are not admissible evidence, and further that the repetition of allegations is not a defence to a claim for libel;
ii. rely on an alleged complaint which is not evidence of the material or underlying facts, and in any event, does not address or prove the allegation that Ministers raped or extorted sexual favours from young people or women in exchange for assistance from the public purse. It

[24] See Paragraph 3 of the Learned Senior Counsel's Speaking notes

was further contended that no particulars or evidence of the serious allegation has been provided by the defendants.

iii. rely on an alleged complaint which is in any event wholly irrelevant as it does not address the allegations against the claimants.

[30] Therefore, learned senior counsel Astaphan submitted, the defence wholly fails to address the words complained of by the claimants or to disclose a defence to the allegations, further, that the defence discloses hopeless defences and a trial would be a disproportionate waste of resources and costs and therefore the case the defence ought to be struck out and the matter adjourned for assessment of damages.

Meaning

[31] Before I consider the claimants submissions further, I would first address the issue of meaning:

[32] The claimants relied on the ordinary and natural meaning of the words complained of and contended that they were meant and understood to mean that:

> "The *claimants as Ministers of Cabinet have intentionally and knowingly harboured and protected ministers, which include themselves and have themselves in fact raped and extorted sexual favours from young women who have sought public assistance from the Government of the Commonwealth of Dominica*."

[33] The claimants contended that the ordinary meaning of the first defendant's words were that the claimants collectively and individually have committed and are guilty of committing the grave criminal offences of rape and extortion which are punishable by fine and

imprisonment"[25] and they rely on the words of Justice Gertel Thom who in the Edwardo Lynch Case[26]said that:

> *"… the natural and ordinary meaning of the words include the inferential meaning which the words will convey to the mind of the ordinary reasonable man."*[27]

[34] In that case, Justice Thom went on to apply the test as laid down in the case of Charleston –v- News Group Newspaper[28]that is:

> *"The law adopts a single standard for determining whether statements are defamatory and that is the ordinary reader of the publication or listener … the question defamatory or not must always be answered by reference to the response of the ordinary reader of the publication …"*

[35] Learned Senior Counsel Astaphan quoted the words of Lord Reid in the Rubber Improvement Ltd and another –v- Daily Telegraph case[29] when he said:

> " What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of word. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief and a murderer. But more often the sting is not so much in the words themselves as to what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning"[30]

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[25] Paragraph 6 Statement of Claim ibid
[26] Op Cit
[27] Ibid para 36
[28] (1965) 2 All E R 313 at 319
[29] [1964] AC 234 at page 258
[30] Learned senior counsel asked the court to replace the words "thief" and "murderer" with the words "rapist extortionists and harbourers"

[36] Mr. Astaphan S.C. submitted that the first named defendant relied on a single complaint and did so not to indicate his concern, but to condemn all the ministers in spite of the fact that allof the ministers were named or implicated by the complainant. He said that the words were clear statements of facts and were specific.

The C**laimants'** Submissions on the D**efendants'** Defence and Case

[37] Learned Senior Counsel Mr Astaphan asserted that the first named defendant relied on vague, unparticularised and wholly unsubstantiated allegations that several women have alleged rape and extortion against the claimants alleging same to be a public concern. Learned Counsel submitted that no particulars have been provided as is required and that the evidence as contained in the witness statement of Miss Henslyn Thomas is not evidence of any fact.

[38] Learned Senior Counsel Anthony Astaphan proceeded to further review the evidence adduced by first defendant and submitted that the first defendant:

a. relied solely on a single complaint made against a single minister and also on vague unparticularised "multiple complaints and allegations which he contended are inadmissible";
b. sought to address "context" but that he has failed to plead the alleged facts of the context.
c. sought to allege that the words complained of were comments, when in fact, they were misrepresentations of an allegation made by him and that he sought to rely on a single complaint and unspecified 'public concerns expressed in the media'. That this is not evidence of facts alleged in the complaint and that the said words are inadmissible and is hearsay evidence which he will not be able to rely on at trial.

[39] Learned Senior Counsel Astaphan pointed out that the first named defendant sought in his defence to set out facts relied on by him which are not facts of any alleged rape, extortion or harbouring as alleged or at all. Mr Astaphan pointed out that the only fact is that there was a complaint made by a single person, which was not evidence of that allegation against the one person it was made against, far less all the claimants in the case at bar and that this complaint cannot be distorted to justify the allegations made.

[40] Mr Astaphan SC asserted that the paragraph 8 of the defence is impermissible on the grounds that the complaints and allegations were unparticularised and are inadmissible and further that the defendants' assertions in the said paragraph were irrelevant and inadmissible. Learned Counsel submitted that *'the question is, what is the defendant's duty, not what he thinks to be his duty"* reference was to the decisions in the following cases:

i. Whitley –v- Adams [31]
ii. EdwardoEdwardo Lynch Case[32]
iii. Stuart –v- Bell[33]
iv. Kieron Pinard Byrne –v- Lennox Linton[34]

[41] As it regards paragraph 12 of the defence, it is contended by learned Senior Counsel Astaphan that the first named defendant sought to resile from the specific charge he made of 'rape, extortion and harbouring' and that he sought to rely on a "reasonably suspected"defence. Learned Counsel submitted that there is no factual or legal basis for this and that the first named defendant has not pleaded any material facts to warrant the alleged suspicion.

[31](1863) 15 CB (NS) 392 t 412
[32] Op cit
[33] [1891] 2 QB 341 @ 349
[34] [2016] EMR 4

[42] It was further contended, by the claimants that the statements complained of were broadcasted over the radio and it is unknown the number of persons who would have heard the statements and that the first named defendant contends that they were questions, and further that these specific charges were never previously brought to the attention of the claimant.

[43] Learned Senior Counsel also submitted that the first defendant suggestion that the recent complaint was evidence of the alleged facts, is not so, that the complaint wasmerely evidence that a complaint was made.

[44] Learned Senior Counsel on behalf of the complainants, contended that the defendants' defence was hopeless because the first defendant failed to plead that the full particulars of the acts and conduct of the claimants, that would show that they had committed the specific acts[35]. Further, that the first defendant failed to plead any objective fact or conduct committed by the claimants.[36]

[45] Counsel for the claimants also contended that the complaint relied on by the first named defendant is not evidence that the allegation made was true.[37]Mr Astaphan SC also submitted that the defence is impermissible on the repetition rule that is, it is no defence to an action in defamation for a defendant to prove that he was merely repeating what he has been told[38].

[46] Another criticism leveled at the defence is that the defendants have failed to confront the claimants' case and have in fact pleaded an entirely irrelevant case. Also, that

[35] Re: Lord Ashcroft –v- Foley op cit, Musa King –v- Telegraph Group [2004] EWCA Civ 613 at paras 21 & 22
[36] Re: Blackman et anor –v- Nation Publishing o. (1999) 55 WIR 43 at 47; Re: Radu –v- Houston [2009] EWHC 398 (QB)
[37] Re: R-v-Lilleyman (1896) 2 QB 167 and Galloway –v- Telegraph Group Ltd [2006] EMLR 221
[38] Re: Stern –v- Pipr (CA) (1996) WLR 715, Ashcroft –v- Foleu[2012] EMLR 25.

the defendants have failed to plead any fact remotely capable of establishing a defence of qualified privilege.

[47] It is the claimants' contention that the defences justification and qualified privilege as presented are doomed and are entirely hopeless.

[48] It is contended that the defence of qualified privilege as pleaded by the defence is alsodoomed to failure in that, the reliance on the subject matter being of public importance is not the law or proper basis for this defence. The claimants also contended that the test is not the nature of the subject matter, but whether the defendants acted responsibly. Further that, the importance of the subject matter is not a valid basis for the defence of qualified privilege.[39]

[49] Learned Senior Counsel Astaphan further submitted that the defendants' contention that the matter is of importance will fail because:

i. the allegation was made almost a year before the first defendant's statement was made;
ii. the defendant grossly exaggerated the complaint made by branding all the claimants as criminals;
iii. that there is no material particulars or evidence to show that the defendant did anything to ascertain whether there was any truth in the allegation;
iv. that the first defendant's alleged belief is irrelevant and meaningless[40];
v. that the defendants' contention that the persons to whom the words were published had a sufficient common interest corresponding with the moral and or social duty of the first named defendant to inform them of the misconduct of the government

[39] Re: Kieron Pinard Byrne –v- Lennox Linton [2016] EMLR 4, Galloway –v- Telegraph Group Ltd [2006] EMLR and the Edwardo Lynch Case.
[40] The Edwardo Lynch Case op cit and the Pinard Byrne Case op cit

ministers and in the government[41]is bad in law on the grounds that defendant so exaggerated the allegation that any possible defence on the ground of qualified privilege will fail[42].

vi. the defendants in their defence sought to water down the meaning of the words uttered by the first named defendant which is an interpretation which is "utterly strained and misconceived interpretation."[43]

vii. that the first defendant's words condemn all the claimants as rapists and harbourers based on the single complaint and the alleged knowledge and failure of the claimants. That in this regard there are no particulars or evidence that the complaints knew of the allegation and further that there is a signed statement of the complainant that she did not want the matter pursued.[44]

viii. that the first named defendant's alleged belief is not relevant or permitted;

ix. that the complaint is not evidenced that the allegations are true or factual;

x. that the defendants in their defence have sought to reverse the burden of proof and is in breach of the rule emanating from Musa –v- King[45]

'*(10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.'*

The C**laimants'** Criticism of the First Defen**dant's** Witness Statement

[50] The claimant contends that the first named defendant in his witness statement repeats the statements made in his defence, and in his witness statement he has failed to

[41] See Para 11 of the Defence filed on the 2 January 2014
[42] Re: Galloway –v- Telegraph Group Ltd op cit
[43] See paragraph 16.12 of the claimants speaking note
[44] See Volume 2 of the trial bundle at page 190
[45] [2004] EWCA 613 at para 21-22 per Lord Justice Brooke

provide any evidence which can provide reasonable grounds for defending the claim at trial. That:

I. the reference to complaints of girls does not provide evidence of alleged conduct or acts and they are wholly unparticularised and inadmissible;

II. his statement of his belief is not, in fact, admissible or proper.

*"… the question does not depend on the defendant's belief, but on whether he was right to be mistaken or that belief"*[46]

III. he relied on his assumption that the complaint made to the police was reported to the claimants which assumption was entirely speculative on his part and that he failed to make any enquiriesto the Chief of Police or anyone else. That the speculation was baseless on the grounds that the complainant said she did not want the matter pursued.

IV. he claims he believes that the statement was true and that he had taken steps to verify the information which was part of the public record, however the claimants contended that there was no information that the claimants raped or extorted sexual favours in exchange for assistance from the State as alleged or at all; or harboured those who committed these acts or that he made any inquiries, to ascertain whether in fact the claimants raped or extorted sexual favours or harboured any Minister who had done so;

V. there is no evidence of any act or conduct by the claimants which could give rise to the collective charge of rape, extortion or harbouring which puts an end to the purported defences of justification and fair comment.

[46]Re: Stuart –v- Bell [1891] 2 QB 341 at 349,

The Defendant's Submissions in Opposition to the C**laimants'** Application to Strike

[49] Learned Counsel Mr Gildon Richards on behalf of the defendants, contended that the defendants plead and rely on the defences of qualified privilege, fair comment, and justification.

[50] It was submitted that the defendants have complied substantially with the requirements and provisions of section 10.5 of CPR 2000.

[51] Learned Counsel Mr Richards submitted that the claimants' submissions as to the meanings of the words complained of must be viewed with caution as there is alternative meaning produced by the defendants, and in the circumstances of the case at bar, there has been no judicial pronouncement of the meaning of the words.

[52] That an application should be made to the judge in chambers pursuant to section 69.4 of CPR 2000 which provides for an application and for ruling on the meaning of the words complained of. That there is no such application before the court and in the circumstances of the case at bar no meaning should be ascribed to the words complained of.

[53] Learned Counsel Mr Richards made the following submissions regarding the court's power to strike and asked thecourt to take the following dicta into consideration when considering the application:

> "On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. [*See Morgan Crucible Co. plc v Hill Samuel & Co. Ltd [1991] Ch* ***295 per Slade L.J .: "On an application to strike out a pleading under***

*RSC, O 18, r 19(1)(a) [ comparable to rule 26.3 (1) of our CPR 2000], no evidence is admissible and since it is only the pleading itself which is being examined, the court is required to assume that each and every one of the facts pleaded (unless manifestly incapable of proof) is true and will be capable of proof at the trial. In some instances, the court may regard the assumption as somewhat unrealistic, but it nevertheless has to be made."]* "Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny." *[See Bank of Credit and Commerce International (Overseas) Ltd (in liq.) & Ors v Price Waterhouse and another [1988]* ***B.C.C. 617 at 620]"***[47]

And

*"I understand that it has become the practice in actions for defamation to consider at the outset of the trial whether some parts of the defence should be struck out on the basis that it has become apparent that some of the matters pleaded are not going to be supported by evidence. I can understand that in an appropriate case this is a sensible course which is likely to shorten the trial.*

*On the other hand, there may be cases where a defendant pleads some matter which he believes to be true but which he may still be unable to prove by admissible evidence otherwise than by eliciting an answer in cross-examination. Each case will have to be considered on its own facts.*

[47] Per Edwards JA in Global Custody NV –v- Y2K Finance Inc, HCVAP 2008/022at paragraphs 13 & 14

*I am satisfied that the right approach is to consider whether or not the defendant's case in relation to a particular passage is incurably bad. The power to strike out a case is a draconian remedy which is only to be employed in clear and obvious cases I have already set out a wide variety of evidence which a defendant may be able to rely upon at the trial. I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."*[48]

[54] Counsel for the defendants contended that the defence or part thereof discloses a sufficient defence which should be tested at the trial of this matter. Further, that the claimants' suggestion that the defence does not answer the specific defamatory words, meaning or claims pleaded is unreasonably pre-emptive. [49]

The defence of Qualified Privilege:

[55] Learned Counsel Mr Gildon Richards submitted that upon a proper consideration of the defence and the witness statement of the first defendant, one would see that sufficient facts have been pleaded to support the defence of qualified privilege.

[56] Learned Counsel submitted that in the traditional sense, the proper first question is not whether there was a duty giving rise to qualified privilege? But, whether the occasion was one that attracted the privilege? Mr Richards urged the court to consider that in the traditional old sense the appropriate first question is, whether there was a public interest in knowing the statement published and the second,

[48] Per Neil LJ McDonald Corporation et al –v- Steel[1995] 3 ALL E R 615 at pages 612 – 622 as quoted by Thom J in the Gonzalez case.
[49] See Paragraph 7.2 of the defendants written submissions filed on the17 February 2016

whether the interest and the material attracted the privilege.[50]Re: Jameel –v- Wall Street Journal Europe Sprl [51]

[57] Mr Richards also submitted as follows:

a. that the question whether the first named defendant did what he ought to have done to avail himself of the defence of qualified privilege depends on the circumstances of the case. Re: Reynolds –v- Times Newspaper Limited [52].
b. that a close examination of the cases cited by the claimants' in support of their application do not support a grant of the relief sought at this stage, but at the full trial of the issues or after determination of the meaning of the words complained of.
c. that the Edwardo Lynch case was different from the case at bar in that, in that case, the words were already determined as being defamatory and the defendants, in that case, did not admit the publication and gave no explanation as to why and the court was in a better position to consider the circumstances of the case. That, in the circumstances of that case, the court ruled that the defences of fair comment and qualified privilege could not stand.[53] Further, that the circumstances of the case at bar, the claimants only allege that the defence as pleaded is bad that this is not a circumstance where the defendants do not admit the publication. That the first named defendant *"to the extent that he may not have satisfied all the factors of responsible journalism, which in the circumstances he denies, has provided a reasonable explanation."*[54]

[50] See Para 9.1 of the defendants submissions ibid
[51] 1 AC 359; 2006] UKHL 44 at para 46
[52] Op cit
[53] See paragraph 9.4 -9.5 of the defendants' submissions op cit.
[54] See para 9.5 of the defendants' submissions ibid

[58] Mr Richards further submitted that the question whether or not the defence is bad or not depends on the full circumstances of the evidence which should be examined and determined at a full trial by a judge as urged in the Reynolds case.

[59] Mr Richards submitted that even though publication is admitted by the first defendant, it does not necessarily follow that the defendants are liable he said that to "*arrive at this blunt conclusion is to render nugatory, the various defences to allegations of defamation; because the defences only become alive where publication is defamatory*.[55]"

Responsible Journalism and the Reynolds Defence

[60] Counsel for the defendants contended that the "Reynolds public interest defence**"** is available to the defendants in the case at bar. It is his contention that this defence which the defendants seek to rely on is available to them because that defence is now more easily available to those who publish defamatory interest to the world at large. Re: Seaga **–**v- Harper[56].

[61] Mr Richards submitted that the principle of "responsible journalism" as enunciated in the Reynolds case was not intended to limit or displace the elements of traditional common law principle on which the defence of qualified privilege is originally founded. Learned Counsel encouraged the court to consider the list of factors of responsible journalism itemised by Lord Nicholls in the Reynolds case and use these items as the measure in the given circumstances; and that the court would find that the defendants would be entitled to rely on the defence as proffered even if they would not have been able to use the said defence in the traditional sense.

[55] Ibid paragraph 9.7
[56] 72 WIR 323 at page 328 f

[62] Mr Gildon Richards submitted that the extent of steps to be taken by the defendants and degree of care to be exercised, depend on all the circumstances of the case and therefore the issue whether the defence is available must be considered according to those circumstances.

[63] Learned Counsel in his submissions listed the items as identified by Lord Nicholls which should be considered, whether there was responsible journalism and contended that the first defendant was expected, according to the circumstances to take active steps, beyond a mental assessment, in regard to only three that is numbers IV, VII and VIII.

1.1. Learned Counsel stated that the principle of responsible journalism requires consideration of the following factors by the publisher:

i. The seriousness of the allegation ....;
ii. The nature of the information and the extent to which the subject matter is a matter of public concern;
iii. The source of the information;
iv. The steps taken to verify the information;
v. The status of the information;
vi. The urgency of the matter;
vii. Whether comments were sought from the plaintiff/claimant;
viii. Whether the article contained the gist of the plaintiff's side of the story;
ix. The tone of the article;
x. The circumstances of the publication, including the timing;

Reynolds v Times Newspaper Ltd[57]

[57][1999] 3 WLR 1010 at p. 1027 C-E;

[58]Seaga v Harper[59]

[64] Learned Counsel Richards submitted that in the circumstances of the case at bar, the first named defendant was only required to take active steps as it regards the following:

a. to verify the information;
b. to seek statements from the claimants;
c. whether the article contained the gist of the claimant's side of the story.

[65] It was contended that the first named defendant took steps to verify the information, which included his previous statement, query, and request for a response and action made to the claimants on radio,(a previous publication), which is stated in his pleading and witness statement. Further, that the first named defendant mentioned the name of the fifth named claimant urging that something be done by the other claimants.

[66] It was further submitted that the first named defendant gave the claimants ample opportunity to address the issue and provided reason in his defence as to why he did not approach the claimants more directly. Learned Counsel placed reliance on the statement of Lord Nicholls in the Reynolds casewhen he said***"... an approach to the plaintiff will not always be necessary".***[60]It was further submitted that whether or not the steps as set out in Reynolds was sufficiently pursued depends on all the circumstances of the case which should be examined with the other factors at trial.

[58]2008 UKPC 9; 72 WIR 323 at 329 f et seq
[59] Defendants submissions paragraph 9.12
[60] See page 19 paragraph 19.13 of the Defendants' submissions

[67] Mr Richards submitted that the consideration and application of the principle of reasonable journalism in Seaga –v- Harper[61]occurred when the court had before it all the evidence which included evidence in cross-examination and noted that it was stated in that judgment that ***"The Judge went on to examine the evidence in light of the guidelines ... He considered the evidence in detail..."***[62].

[68] Learned Counsel urged the court to consider the dicta of Lord Carswell in the Seaga –v- Harper[63] judgment when he said:

> *"The third matter debated since Reynolds' case and now specifically dealt with by the House of Lords in Jameel's case, is how the factors set out by Lord Nicholls in describing responsible journalism in Reynold's case should be handled. They are not like statute, nor are they a series of conditions each of which has to be satisfied or test which the publication has to pass. As* ***Lord Hoffman said in Jameel's case (at [56]), in the hands of a judge*** *hostile to t****he spirit of Reynold's case, they can become ten hurdles at any*** *of which the defence may fail. That is not the proper approach. The standard of the conduct of the publisher of the material must be handled in a practical manner and have regard to the practical realities (at [56]). The material should, as Lord Hope of Craighead said, (at [107] – [108]) be looked at as a whole, not dissected or assessed piece by piece without regard to the whole context."* [64]

[69] Learned Counsel Mr Gildon Richards urged the court to apply the approach adumbrated in theReynolds case[65] by Lord Nicholls and to consider that when all

[61] Op cit
[62] Ibid paragraph 14
[63] Op cit
[64] Seaga –v- Harper page 330 to331 a-c
[65] Op cit

of the circumstances are taken into consideration in this case, in assessing the extent of responsible journalism employed by the first named defendant, the court would find that the first named defendant did enough to establish a sufficient defence of qualified privilege to be properly and fully considered at trial.

[70] Mr Richards further submitted that when the following circumstances are taken into consideration the matter ought to be dealt with at trial:

*a.* that the claimants were best positioned to have prior knowledge of the allegation Miss Thomas' report and statement which prompted the first named defendant to address the report;

*b.* that the claimants had ample time to file a reply to the defence denying the disclosure made in the defence which they failed to do;

*c.* that fifth named claimant should have filed a statement addressing the contents of Miss Thomas' report and where he would address the statement alleging misconduct against him: and

*d.* that the claimants have not stated that after the disclosure that they took any steps.

Distinguishing the Pinard Byrne Case from the Case at bar

[71] Mr Gildon Richards submitted that the claimants were misguided when they sought to equate the circumstances of this case to that of Pinard Byrne[66] for the following reasons:

a. The statement in the Pinard Byrne Case was a spontaneous utterance whereby in the case at Bar the first named defendant had earlier through the medium of the radio, put to the complaints, the existence of Miss Thomas' report with a view of obtaining a response from them;

[66] Op cit

b. that in the case at bar, there is evidence of a police complaint being made and an investigation conducted and an accusatory statement being made by Miss Thomas;

c. that in the Pinard Byrne Case, there was a determination of the words complained of which has not occurred in the current matter.

d. that in the Pinard Byrne Case, the courts finding was that there was no attempt made by the defendant before the publication of the statement to seek comment from the claimant, however in the current case the first named defendant has sought comment from and action by the claimants through the medium of the radio;

e. that in the case at bar, the information in the complaint, statement recorded and report from Miss Thomas was material which a reasonable public would have been interested, and that when one considered the specific request to address related issues at the rally in St Joseph, then the first named defendant as leader of the opposition had a duty, moral and social to publish it to persons who had a reciprocal interest in receiving it;

[72] Mr Richards submitted that a close examination of the case at bar, in comparison with the factual and legal circumstances of the Pinard Byrne case, the first named defendant would have substantially satisfied the test laid down by the Reynolds case and in the circumstances of the case, the Justice would require that the defendants be given a fairopportunity to examine at the trial whether or not the claimants had knowledge of the report prior to the publication.

[73] The defendants urged the court to find that they have adequately pleaded and adduced evidence to support the defence of qualified privilege for trial.

Fair Comment

[74] Learned Counsel Mr Richards made reference to Part 69.3of CPR 2000 which provides:

> *"A defendant (or in the case of a counterclaim the claimant) who alleges that –*
>
> *(a) In so far as the words complained of consist of statement of facts, they are true in substance and in fact; and*
>
> *(b) In so far as they consist of expressions of opinion, they are fair comment on a matter of public interest; or*
>
> *(c) Pleads to the like effect;*
> *must give particulars stating –*
>
> *i. which of the facts complained of are alleged to be statements of fact; and*
>
> *ii. the facts and matters relied on in support of the allegation that the words are true.*

and submitted that the defendants have pleaded the facts as required by the rules and entreated the court to follow the approach used by the court in McDonald Corporation et al –v- Steel[67].

[75] Learned Counsel Mr Richards submitted that the question of whether ***"The alleged particulars are not fact or material fact but mere repetitions"*** *is a question not for the claimants to state, but for the court to decide at trial when all the evidence has been*

[67] Op cit

*adduced, documents seen and cross examinations completed then thefull circumstances would be seen.*

[76] Learned Counsel for the defendant further submitted that the meanings ascribed to the words by the claimants have been denied by the defendants and they have provided an alternative meaning. That it has not been determined whether the words complained of were allegations of facts as asserted by the claimants, or whether the words consisted of opinion as asserted by the defendants.

[77] Learned Counsel Richards submitted that the words which the claimants contend are statements of fact uttered by the first named defendant are in fact a statement of opinion by the first defendant and that when the words are construed contextually in light of the larger body of facts and circumstances, this will be shown.

[78] In support of this aspect of his submission,Counsel relied on the learning in Gatley on Libel which stated:

> "*It has been noted that words which are taken by themselves may appear to be allegation of fact but may be shown by the context to be mere expression of opinion or argumentative inference."*
>
> *So the context may show that the defendant in alleging that a public man has been guilty of some disgraceful or dishonorable conduct or has been actuated by corrupt or dishonorable motive bases his allegation on fact which he truly states or clearly refers to."*[68]

[79] Counsel entreated the court that this consideration should be left to trial. Learned Counsel submitted that the defendants have complied with the relevant rules and principles, and that the defendants have a sufficient defence of qualified privilege and in

[68] Page 296 at paragraph 709

the circumstances the defence should not be struck out as prayed by the claimants, and that the matter should go to trial.

Courts Considerations:

[80] A statement of defence may be struck out on the ground that it fails on its face to disclose a defence that is sustainable in law.[69]

[81] I have given careful consideration to the written and oral submissions made by the parties in this matter and I have made a finding that effectively disposes of this application.

[82] In the Anguilla Case of Robert Conrick v Ann Van Der EIst[70]Rawlins J stated that

> "*It is onlywhere a statement of case does not amount to a viable claim or defence, or is beyond cure that the court may strike out".*

[83] In the case at bar, the court is therefore required to determine whether the defence filed is bound to fail, and in that regard, the court is only concerned with the defence which it is alleged, discloses no reasonable ground for defending the claim and that it has no real prospect of success.

[84] It is noted that this application comes after discovery has been made and the witness statements have been filed and it is accepted that a review of these puts the court in a better position to assess the viability of the defendants' defence. At this stage, the court's concern is to determine whether the defence as pleaded discloses any ground for defending the matter and whether there is any real prospect of it succeeding should the

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70 AXAHCV2001/0002 (Unreported)

matter proceed to trial. I am cognizant of the fact that the court is not required to take an in depth look at the facts of the case or to mount a detailed inquiry into the facts of the case.

[85] To strike out the defence would result in the judgment being entered in favour of the claimants and will deprive the defendants of their normal entitlement to full trial. It is, therefore, necessary for the court to have a "high degree of confidence" that the case would not succeed at trial.

Real Prospect of Successfully Defending the Case

[86] In Swain –v- Hillman[71]it was held that these words needed no amplification. Lord Wolf said that the words "speak for themselves … the word "real" distinguishes fanciful prospects of success … (it directs) the court to the need to see if there is a realistic as opposed to a "fanciful" prospect of success". This has been adopted and applied by the courts in our jurisdiction. It has been said that "if a party to a case has a case which is bound to fail it is in the party's best interest to know as soon as possible. This is to be balanced against the defendant's right to have his defence properly considered. In his judgment in Swain –v- Hillman[72] Lord Wolf stated that this does not mean that the need for a trial will be dispensed with where there are issues which should be investigated.

[87] It is to be noted that the defendants are required to have a case which is better than merely arguable and the overall burden rests on the applicant on a balance of probabilities.

[88] As stated earlier a perusal of the defence filed discloses that the defendants pleaded the following defences to the claim:

*(i) fair comment on a matter of public interest and without malice.*
*(ii) words complained of consist of statement of facts they are true in substance and in fact*

[71] [2001] 1 ALL E R 91
[72] ibid

*(iii) were published on an occasion of qualified privilege and without malice*

*(iv) the words complained of are capable of broader meaning than the meaning ascribed to them by the claimants*

(v) *fair comment on a matter of public interest and or on an occasion of qualified public privilege*

[89] I will now address the defences pleaded by the defendants and consider and assess each of them in order to see whether there is a real prospect of any of them succeeding.

[90] I will examine the defences as pleaded and identified and the evidence adduced by the defendants in an effort to ascertain whether or not they have a defence that ….

MEANING

[91] In the case of France –v- Bryant Simmons[73]as quoted by Thom J in the Edwardo Lynch Case (at page 16). C.J. Robothom said:

*"The decision as to whether the words are capable of a defamatory meaning is a question of law for the judge. What is the particular defamatory meaning is a question of fact and the words alleged to be defamatory must be read in the context."*

[92] I paused to note that I find these words helpful in assessing the words complained of and not that, though I am not making a finding of whether or not the words were defamatory, it is important to note that there is quite a bit of information before the court in the witness statements files which are to stand as the evidence in chief of the witness, and the documents which the parties seek to rely on are before the court. Therefore an assessment can be made as to the quality of the case that either party is seeking to rely on.

[93] In the case at bar the claimants are seeking to rely on the ordinary and natural meaning of the words complained of, and considering the words complained of in their

[73]C A No 2 of St Kitts and Nevis

context against the background that the court is in a position where it would be able to acquire a pretty good grasp of the circumstances and background of the case, more so that if it was only the statements of case before the court.

[94] The court is also in a good position to assess the defendants' prospects of succeeding with the defences he has pleaded.

[95] In giving the words its ordinary and natural meaning, the court should give the words the meaning which they would have conveyed to the ordinary reasonable person reading or hearing the words. It is important not to give it an over elaborate legalistic analysis on the one hand, and on the other hand, the approach should not be too literal. Re: Jeynes –v- News Magazines[74]; Jameel –v- Wall Street Journal Europe SPRL [75]

[96] The question as to the meaning of the words complained of is to be ascertained by making reference to the material before the court by looking at the words spoken at the public meeting by the first named defendant. If the court is to say that these words and in the context where they were spoken may properly be held to contain the general charge of criminal activity.

[97] Applying the tests laid down,in the decided cases and upon examining the words complained of, I find that the ordinary reasonable listener hearing the words as spoken by the first named defendant would understand him to mean that the claimants, all of them, are guilty of committing a grievous criminal offence of rape and of harbouring rapists. These are criminal offences that are punishable by imprisonment and are therefore actionable per se.

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[74][2008] EWCA Civ. 130
[75][2003] EWCA 1694.

[98] In determining what is defamatory, it is necessary to consider the notional single meaning that the words convey. Based on the cases read, the meaning of the words complained of is to be decided on the material before the court.

[99] The court is not required to choose between meanings advanced by each of the parties. The court must come to its own conclusion as to what the words complained of mean. Over analysis of the words complained of should be avoided.[76]

[100] In the case at bar the defendant pleads context it is therefore for him to adduce evidence of that context and if he has not, it is not for the court to speculate on the context of the statements.

[101] The question as to the meaning of the words complained of is to be ascertained by making reference to the material before the court. This is achieved by looking at the words spoken at the public meeting by the first named defendant. If the court is to say that these words in the context where they were spoken may properly be held to contain the general charge of criminal activity, then it seems clear that the words so import.

[102] I find that the words complained of clearly convey the impression that some or all of the ministers of government are rapists. Further, that the government ministers individually and/or collectively harbour rapist ministers.

[103] The words also convey the meaning that the government ministers either individually or collectively uphold extortion of sexual services from young people seeking their assistance; that ministers of government either individually or collectively prostitute young women in Dominica for public assistance from the public purse.

[76] Re: Jeyes Case op cit

[104] In short, the words uttered by the first named defendant in their ordinary and literal sense convey the message that the claimants are guilty of the commission of the criminal offences of rape, harbouring criminals and encouraging prostitution, all of which are offences punishable by terms of imprisonment and are therefore actionable per se. The claimants are not required to plead or adduce evidence of special damage in the circumstances of this case.

[105] It is noted that in his defence the first named defendant seeks to rely on an allegation made by a single young lady. Now that was an allegation, there were no criminal charges preferred on any of the claimants or criminal convictions forthe said offence or any offences. It is for the defendant to produce such evidence in order for the court to accept, on at least the balance of probabilities. It is, therefore, clear on the face of the pleadings, witness statements and documents disclosed that the defendants' defence of justification will fail; it really has no chance or probable success.

Fair comment

[106] The defendant in his defence has raised the defence of fair comment. Fair comment on a matter of public interest provides a completedefence to liability in defamation. "It is important to preserve the fundamental right to freedom of expression, and the defence is available to all who comment fairly on all matters which may be said to be the legitimate concern of the public."[77]

[107] A person seeking to rely on this defence is required to prove on a balance of probabilities that:

(i) the matter commented on was one of public interest; Matters of public interest includes the public conduct of those who hold public office or

[77] Commonwealth Caribbean Tort Law by Gilbert Kodilyne (5th Ed) at page 275-276

positions of public trust and anything which may invite comment or challenge public attention;[78]

(ii) the statement in issue must be comment or opinion and not a statement of fact;

(iii) the comment must be based upon true facts;

(iv) the comment must be honestly made. Even if the opinion is biased, prejudiced exaggerated or irrational it must be a genuine opinion; Honest means genuinely held;

(v) the comment must not be actuated by malice, that it there should not be a corrupt or wrong motive or making use of the occasion for some indirect purpose. Where the claimant wants to allege malice it is on the claimant to so prove;

[108] The defendant essentially submits that the words which the claimant seeks to treat as allegations of fact are just mere opinion true or not when construed contextually in light of the larger body of facts and circumstances.

[109] It is important for the court to ascertain if the statement complained of is comment or opinion or a statement of fact,because to succeed in this defence the defendant must show that the words were comment and not statements of fact. Further, the defendant must also show that there was basisof fact for the comment.

[110] The case *O'Brien v Salisbury*[79] Fields J offers some guidance where the distinction between fact and comment was put as follows;

> "If a statement in words of fact stands by itself naked, without reference either expressed or understood to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words

[78] Gatley
[79](1889) 54 JP 215

were addressed, there would be little, if any room for the inference that it was understood otherwise than as a bare statement of fact..."[80]

[111] The question then, is whether or not the statement complained of are indeed comments and if so do they meet the requirements of the defence of fair comment by being supported by particulars or being supported by facts?

[112] In ruling that the words complained of were all statements of fact incapable of being considered as comment, Thom J in the Edwardo Lynch case applied the principles outlined in Gatley and the findings of the court in the following cases that the words complained of were held to be allegations of fact and not comment:

(i) London Artist –v- Littler[81]where the defendant at a press conference published a letter he had written to the plaintiffs stating that the plaintiff had participated in a plot to end a play he was producing by arranging for the four leading players to give notice of their intention to leave the play. The court in that case held *inter alia* that the allegation of a plot was a statement of fact defamatory of the plaintiffs and was not reasonably capable of being considered as comment.

(ii) LearieCurasco –v- Neville Cenac where it was held that a statement that shortly after taking office that the respondent had acquired vast properties in a suspicious or dubious manner was held to be a statement of fact;

(iii) Kenny Anthony –v- Peter Josie[82]it was held that the words *" he said he lost the money in Trinidad at the airport because he went to urinate. You think George Odlum can ever trust if that really happen if it really happen …".*

[80] Ibid 216
[81] [1969] 2 QB 375
[82] No. 144 of 1997 St Lucia (Unreported)

[113] The impugned statements in The Edwardo Lynch case were *"Now some time ago, I mentioned on this programme that the Prime Minister, with his mother, wife and daughter, they went to Rome to see the Pope …. a claim was submitted to the Treasury and the airline has already collected for the tickets. The tickets only; it doesn't include food, it doesn't include hotel bills, it doesn't include internal transportation. The tickets for the family to go to Rome are ladies and a gentleman was not much, was not much, $41,000.00…. The airline tickets for the Prime Minister and his family to go to Rome, $41,000.00 and the taxpayers of St Vincent and the Grenadines has to pay that"*

[114] Having considered the submissions both oral and written of counsel for both the claimants and defendants and havinggiven due consideration to the authorities cited, it is my finding that the impugned statements in the case at bar are statements of fact and not comments as asserted by the defendants, and in the circumstances, the defence of fair comment as presented by the defendants has no prospect of success.

Qualified Privilege

[115] The defence of qualified privilege is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the maker, to communicate them to the recipients who have a matching interest or duty to receive them even though they maybe defamatory so long as they are made without malice; that is to say honestly and without any indirect of improper motive. It is the occasion on which the statement is made which carries the privilege, and under traditional common-law, there must be a reciprocity of duty and interest.

[116] When the defence of qualified privilege has been raised, it will fail if the defendant's main motive in communicating the information was vindictiveness or a need to put down hurt, or injure the person being defiled rather than fulfill a duty or need to communicate information. There will have to be a finding of actual malice for this defence to fail.

[117] This brings me to the question - can I find actual malice from the statements of case before the court and from the witness statements so as to hold that the defence of qualified privilege as presented by the defendants will not succeed, or is fanciful or without a reasonable prospect of success?

[118] The question is whether or not what can be referred to as the Reynolds Defence is available to the defendants in the case at bar.

[119] Learned Counsel Gildon Richards quite correctly submitted that the entire circumstances would be considered and all matters are to be ventilated to whether the question of qualified privilege is available to the defendants. Learned Counsel submitted that the defence is available to the first defendant who published information which was of public interest and that the statement complained was made within the confines of responsible journalism. That the conditions for responsible journalism have been satisfied.

[120] Did the first named defendant in the case at bar show the requisite case to found qualified privilege? Can the court answer this question without a full ventilation of the issues? Did the first named defendant have a duty to make the publication that he made and did the public have an interest in receiving it? Did the first named defendant behave in accordance with the tenets of responsible journalism?

[121] The thrust of the defence of qualified privilege is that the public had a right to know the information. It is therefore incumbent upon me to ask whether the defendants were under a duty to convey to the listeners at the rally, on the radio and the rest of the world via the world wide web the information which the first named defendant sought to convey about the claimants that is, the ministers of the Government of The Commonwealth of Dominica.

[122] Did the defendants have the obligation irrespective of the truth or falsity of the statements made?

[123] In the case of Loutchansky –v- Times Newspapers Limited[83], Phillip LJ had this to say

> *"… At the end of the day the court has to ask itself the single question whether in all the circumstances the duty interest test or the right to know test has been satisfied so that qualified privilege attaches"*

[124] In considering the defence of qualified privilege (the Reynolds Defence), it is important for me to concentrate on the facts at hand and ask myself the question - was the first named defendant "fully and fairly and disinterestingly reporting the content of the statement made by Miss Henslyn Thomas to the police?"

[125] The role of the judge in determining the question of whether the publication was made on an occasion of privilege was outlined in Hebditch –v- MacIlwaine[84]. The defendant in the case at bar stated that he invited comment from the claimants regarding the complaint that was made,however, I ask myself, was that enough to discharge his burden of responsible journalism?

[126] In light of the decisions in the Reynolds case and in the Al-Faquh –v- HH Saudi Research and Marketing (UK) Ltd[85]it is my duty to balance between the right of freedom of speech on the one hand and reputation of individuals on the other hand. This balance is fact sensitive and should be carried out in accordance with the approach adumbrated in the Reynolds case. That is:

> *"1. the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true.*

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[83] (Nos. 2-5) [2005] EWCA 1805, [2002] QB 783 at para 23
[84][1891-94] All ER Rep 444

[85] [2001] EWCA 1634 at para 52

*2. the nature of the information, and the extent to which the subject-matter is a matter of public concern.*

*3. the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories.*

*4. thesteps taken to verify the information.*

*5. thestatus of the information. The allegation may have already been the subject OT an investigation which commands respect.*

*6. theurgency of the matter. News is often a perishable commodity.7. whethercomment was sought from the defendant. He may have information others do not possess or have not disclosed. An approach to the defendant will not always be necessary.*

*8.whetherthe article contained the gist of the plaintiff's side of the story.*

*9. thetone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.*

*10. thecircumstances of the publication, including the timing."*

[127] Having examined the statements of case and the witness statements filed in this case, I find that the defendant not only reported or repeated what was alleged, but he adopted and embellished what was alleged. There was no allegation that the ministers of government had raped anybody. Also, the young lady who the defendant referred to as the virtual complainant expressed a desire not to proceed with her allegations, which in the circumstances of the case means the allegation remained what it was,an allegation, not a proven fact.

[128] The thrust of the first named defendant's statement was that the ministers were rapists and harbourers of rapists. I find that the defendant's statements were allegations of facts and not an opinion, and in the circumstances of the case at bar, the defendants' defence of

qualified privilege has no prospect of succeeding and the defendant in this regard is therefore struck out. The Reynolds defence is not available to the defendants.

[129] I find that the words uttered and published convey the following meaning to reasonable and fair-minded listeners:

(i) That there are rapist ministers in the government;

(ii) That the government have been harbouring and protecting rapist ministers which include themselves;

(iii) That the ministers of the government extort sexual services from young people seeking the facilitation of ministers for their personal development assistance from the public purse;

(iv) That ministers of government prostitute the young women for public assistance from the public purse;

[130] Applying the law as stated to the case at bar, have the defendants established on a balance of probabilities in the statements of case, witness statements that they acted in the accordance with the tenets of responsible journalism and that they had a duty to publish the words complained of and the public had an interest in receiving it. What has the defendants pleaded in support of this defence? Was there a reliable source of information given? Is there any evidence presented that there was a proper attempt to verify the information?

[131] To my mind, the statement made by the first named defendant went beyond reporting what was reported to the police. He went on to make independent allegations and inferences by calling all the ministers of government (the claimants) “rapist ministers” and referring to the Government as one which harboured rapist ministers and upheld extortion of sexual services from young people seeking the facilitation of government assistance,

and in all the circumstances of this case I am of the view that the defence of Qualified Privilege would not succeed.[86]

[132] I also hold that the defences proffered by the defendants when reviewed are all incapable of succeeding. It is noted that this matter is at such a stage where one can reasonablyassess the case for both parties having filed their witness statements and documents, which essentially place sufficient material relating to the trial of the case before the court to allow an assessment to be done regarding the possibility of the success of the defences proffered.

[133] The words uttered by the first named defendant and broadcasted and rebroadcasted by the second named defendants are seriously defamatory of the claimants.

[134] It is noted, that the fact that a subject may be of public interest does not automatically make publication of it qualified. Lord Hobhouse in Reynolds case stated that "*The publisher must show that the publication was in the public interest and he does not do this by merely showing that the subject matter was of public interest."*[87]

[135] For these reasons, I shall strike out the defence filed by the defendants herein as being unsustainable and without merit and an abuse of process of court.

[136] In defamation proceedings where the defence is struck out, the claim is amenable to summary judgment procedure pursuant to CPR Part 12.5 as was held in Matthew Thomas –v- Dr Ralph Gonsalves[88]

[137] Having decided that the defence is to be struck out. Upon consideration of the statement of case and the witness statements filed by the claimants in this matter and

[86] Al Faqih op cit
[87] At page 1060 paragraph D
[88] SVGHCVAP2014/0009 Per CJ Perreira at paragraph 17

applying the legal test as laid out in Part 15[89] of CPR, it is clear that the defendants do not have a real prospect of successfully defendant the claim brought against them and I therefore enter judgment in default against them on the whole of the claim with damages to be assessed.

[138] The matter will now be fixed by the court office for the assessment of damages. Because this matter commenced by claim form, I will, therefore, order that damages and costs to be assessed by the Master.

[139] I wish to thank Counsel on both sides for their very helpful submissions in this matter.

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M E Birnie Stephenson
High Court Judge

[89] Op cit