**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**(CIVIL DIVISION)**

**ANTIGUA AND BARBUDA**

**ANUHCVAP2023/0024**

**BETWEEN:**

**VERE BIRD III**

Appellant

**and**

**GASTON BROWNE**

Respondent

**Before:**

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| The Hon. Mde. Margaret Price Findlay | Chief Justice [Ag.] |
| The Hon. Mde. Vicki Ann Ellis | Justice of Appeal |
| The Hon. Mde. Esco Henry | Justice of Appeal |

**Appearances:**

Mr. Ruggles Ferguson KC with him Ms. Luann De Costa for the Appellant
Mr. Jarid A. Hewlett for the Respondent

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2024: April 30;
2025: September 17.

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*Civil Appeal – Defamation – Whether the learned judge erred in law and reversed the declaration made by the master that the appellant was the subject of a Cabinet Decision for the sale of one acre of Crown lands to him at a concessionary rate – Separation of powers doctrine – Whether the judge erred in law by breaching the constitutional separation of powers doctrine by going behind the Official Minutes of Cabinet duly signed by the Cabinet Secretary – Defences of truth and fair comment – Whether the judge erred in fact or in law in arriving at her determination in relation to the defence of justification or fair comment – Malice – Whether the judge erred in concluding that the respondent was not actuated by malice when he published the impugned statements – Whether judge erred by approaching the trial as if it were a judicial review hearing and not a defamation claim*

This is an appeal against a judgment of the learned High Court judge dismissing the appellant's claim in defamation against the respondent, the Honourable Mr. Gaston Browne, the current Prime Minister of Antigua and Barbuda. The appellant and the respondent are both politicians in the State of Antigua and Barbuda. It is a matter of record that at all relevant times the respondent held the office of Prime Minister of the State. The appellant is a legal practitioner practicing law in the State since May 2001. He is also the Chairman of the Antigua and Barbuda True Labour Party and was an unsuccessful candidate in the national general elections held in 2014 and 2018. In November 2019, Mr. Browne published statements on the social media networking platform Facebook to which Mr. Bird took offence alleging that they were defamatory of him. At his behest, Mr. Bird's solicitor wrote to Mr. Browne demanding that he retract the statements and offer compensation to him. The letter before action bore no fruit. Consequently, on 12th December 2019, Mr. Bird filed a claim against Mr. Browne in the High Court in Antigua and Barbuda seeking damages for defamation, an injunction restraining Mr. Browne from broadcasting the said defamatory words or similar words, interest at the statutory rate, and costs. The claim was amended on 20th October 2020.

Mr. Browne filed an amended defence on 30th October 2020. He advanced two defences – justification and fair comment. At the end of a trial which took place on 1st March 2023, the learned judge found that Mr. Browne had established both defences and she wholly dismissed the claim and awarded him prescribed costs.

Mr. Bird, being dissatisfied with the decision of the learned judge, filed his appeal on 9th June 2023 in which he set out sixteen grounds of appeal. In summary, Mr. Bird contended that the learned judge erred in fact and in law in concluding that Mr. Browne was entitled to rely on the defences of truth and fair comment in that the decision goes against the weight of the evidence and runs contrary to certain findings of fact made by her and reversed findings of law made by another judicial officer; the learned judge erroneously placed the onus on him to lead certain evidence; and she failed to have regard to relevant matters including well-established principles of law and conventions and took into account irrelevant considerations and inadmissible material.

The issues for determination on appeal can be adequately condensed as follows: (1) Whether the learned judge erred in law and reversed the 7th October 2020 declaration of Drysdale M that it was recorded in the Official Minutes of Cabinet that the appellant was the subject of a Cabinet Decision for the sale of one acre of Crown lands to him at a concessionary rate; (2) Whether the learned judge failed to appreciate certain principles of law and conventions and erred in law by breaching the constitutional separation of powers doctrine by going behind the Official Minutes of Cabinet duly signed by the Cabinet Secretary; (3) Whether the learned judge in determining this case approached it from the perspective of a judicial review of a Cabinet Decision and not a defamation claim; and (4) Whether the learned judge erred in fact or in law in arriving at her determination in relation to the defence of a) justification or b) fair comment.

**Held:** Dismissing the appeal; affirming the orders of the learned judge; and ordering that the appellant shall pay the costs of this appeal to the respondent to be assessed, if not agreed within 21 days of today's date, that:

1. In relation to appeals against findings of fact, the appellate court's function is limited to assessing whether the judicial officer correctly advised himself as to the applicable legal principles and applied them appropriately in arriving at the findings of fact. If the appellate court is satisfied that the learned judge was entitled on the evidence to make the findings that he made, they will not be disturbed. Similarly, it is trite law that an appellate court would interfere with a finding of law by a lower court only if the wrong principles of law were considered and applied or if the learned judge failed to consider some relevant legal principle which leads the court to make a decision that is wrong.

   **St. Kitts Marriott Resort v Deborah Stevens** SKBMCVAP2016/0001 (delivered 30th October 2020, unreported) followed.

2. The finding by the learned master in the order dated 7th October 2020 that the appellant was the subject of a Cabinet decision for the sale of one acre of Crown Lands to him at a concessionary rate, is a finding of fact. The finding by the trial judge in her judgment dated 27th April 2023 that the Cabinet Decision was a Cabinet Creeper and not a real decision of Cabinet, is also a finding of fact which the appellant argues is a contrary declaration to the master's order and thereby the judge erred in law by reversing the master's decision, when she was not sitting as an appellate court and had no jurisdiction to overturn that finding. It is pellucid that the findings of the two judicial officers are not at variance. The master deliberately and prudently refrained from entertaining any contention that the Cabinet Decision was not valid or legitimate. Therefore, the finding by the learned trial judge that it was a creeper did not implicitly or expressly go contrary to any finding made by the master. The appellant's contention that the learned trial judge reversed the master's October 2020 order and thereby wrongly assumed the role of an appellate court is therefore not made out. Furthermore, the appellant's contention that the learned judge relied on inadmissible hearsay evidence from the respondent to ground her decision that the Cabinet Decision was not legitimate is not made out. The Court may not properly entertain the appellant's belated complaint that hearsay evidence was admitted and relied on by the learned trial judge when he opted not to object to that evidence in the court below. It was open to the learned trial judge on the evidence to make the findings of fact that she did; she committed no error of law or fact in arriving at her conclusion and there is accordingly no basis for interfering with it. Accordingly, this ground of the appellant's appeal is dismissed.

3. To succeed in a claim of defamation a claimant is required to prove that the defendant has published material about him to another person or other persons which tends to lower him in the estimation of right-thinking members of the society. In determining whether the defence of truth is available, the trial judge must evaluate all the evidence. In construing the meaning of the words, the court will give them their natural and ordinary meaning. To defeat an action for defamation, a defendant who raises a defence of truth must prove either that every impugned libelous statement made by him is truthful or substantially true. The defence will also succeed if the defendant can show that when taken as a whole, the publication was

materially true if, when the truth of the remaining imputations is considered, the words not proven to be true do not damage the claimant's reputation substantially.

Section 20 of the **Defamation Act**, Act No. 7 of 2015 applied; **Lewis v Daily Telegraph Ltd** [1964] A.C. 234 considered.

4. It is settled law that the defence of truth is established through proof of the facts or imputations asserted in the impugned publication. The judicial officer charged with determining whether the defence is made out, is obliged to evaluate the publication and decide whether the defendant has proved the truth of the statements in it which are defended as facts or the truth. From the inception of his suit, the appellant raised the issue of legitimacy of the Cabinet Decision as a critical plank of his defamation case and likewise, from the outset the respondent relied on assertions of improper procedure and illegitimacy to undergird his defence of truth. It therefore cannot be gainsaid that it was incumbent on the learned judge to assess the evidence and decide as a matter of fact whether the procedure by which the Cabinet Decision was made was irregular and invalidated the Cabinet Decision. Additionally, she was duty bound to decide whether the Cabinet Decision was rendered illegitimate due to an error or irregularity in the procedure so as to afford a defence of truth to the respondent. This latter issue involved a question of mixed law and fact in that the findings of fact on the evidence would inform the conclusion of whether the defence of truth was made out to the legal standard.

   Section 20 of the **Defamation Act**, Act No. 7 of 2015 applied.

5. It is trite and settled law that the principal test for admissibility of evidence in court is relevance based on its probative value. The more probative the evidence, the more relevant and likely it is to be admissible. Therefore, in answering whether evidence about the internal workings of Cabinet is inadmissible because it violates the separation of powers doctrine and collective responsibility of Cabinet colleagues, the sole consideration is whether such evidence is relevant. In the case at bar, the appellant's case was hinged entirely and purely on the presentation of the Cabinet Decision to prove its legitimacy while the respondent relied on oral testimony about the Cabinet's protocols and procedures, knowledge about which he was seized having been a member of Cabinet at the material times. To exclude the respondent's account on the ground of separation of powers, breach of oaths of secrecy and confidentiality and violation of the principle of collective responsibility would engage the exercise of judicial discretion with respect to the central question of admissibility of the evidence. Such exercise always necessitates giving effect to the overriding objective of the CPR to do justice as between the parties. Additionally, a cardinal principle of law and feature of the administration of the justice system is that the court retains exclusive jurisdiction to control the evidence to be given at a trial. This is achieved by issuing appropriate directions at a case management or pre-trial review conference or on application by a party before or during the trial. In the present case, the appellant at no time before or during the trial made any application to strike out any part of the respondent's pleadings or witness statement on the ground of inadmissibility due to objectionable hearsay; breach of the

separation of powers doctrine; breach by the respondent of his oaths of secrecy or confidentiality; or violation of Cabinet collective responsibility. Further, he made no such submissions before the learned trial judge. In the circumstances, the learned trial judge was entitled to presume that the appellant had no objections to any of the material laid out in the respondent's Amended Defence or his witness statement or his oral testimony. More fundamentally, an appellant is not at liberty to raise a legal argument on appeal that was not made in the court below. Since Mr. Bird took no exception to those matters and did not object to any hearsay evidence in the court below, he may not advance those arguments successfully as a basis for his appeal.

**Halsbury's Laws of England**, Vol. 12 (2020) applied.

6. As to the challenge by the appellant to the judge's findings that the appellant was entitled to rely on the defence of truth, the articulation of the applicable legal principles by the learned judge as it relates to what is required to establish the defence of truth, is unassailable. To the extent that the appellant takes issue with the judge's identification and reproduction of the relevant law, such submissions are not borne out. Contrary to Mr. Bird's contentions, the learned judge applied the relevant legal principles to the underlying facts as proved and in each instance correctly, reasonably and justifiably held that while the words have the defamatory effect as ruled by the learned master (and by her in relation to the term 'cabinet creeper'), the defence of truth was available to the respondent. In arriving at this determination, the learned judge not only considered the learned master's ruling as to the natural and ordinary meanings of the impugned statements, she applied them appropriately to the extent that they are applicable. The appellant's contention to the contrary is not made out. Furthermore, it cannot be said that the judge took into account irrelevant considerations by placing significance on the fact that the appellant had shown that he notified Cabinet that he did not wish to exercise the option to purchase Crown lands at the concessionary rate. The learned judge was entitled to take that matter into consideration in determining whether the defence of truth was available in respect of the imputations regarding the appellant's involvement in obtaining the decision. There was more than sufficient evidence on which the learned judge was entitled to rule as she did on the defence of truth. In the circumstances, the appellant's appeal in relation to the judge's findings with respect to that defence is dismissed.

7. A defendant who mounts a defence of fair comment in a defamation suit would succeed if he proves that the facts or allegations of facts on which the comments are based are true and that the comments about those facts are fair. He is also required to show that the impugned words are comments on a matter of public interest and not facts. The appellant ~~5haracteri~~ criticized the learned judge on what has been ~~5haracterized~~ characterized as errors in applying the law. The learned judge correctly applied the legal principles enunciated in **Silkin v Beaverbrook Newspapers** when she found that the posts constituted fair comment on a matter of public interest that were honestly held by the respondent and grounded in the truth of the facts outlined in the posts which she ruled were substantially true. The

learned judge did not err in the evaluation exercise by finding that the defence of fair comment was available to the respondent in respect of those posts.

Sections 21 and 22 of the **Defamation Act,** Act No. 7 of 2015 considered; **Reynolds v Times Newspaper Ltd and others** [2001] 2 AC 127 applied; **Silkin v Beaverbrook Newspapers Ltd** [1958] 1 WLR 743 applied; **Spiller and another v Joseph and others** [2010] UKSC 53 applied.

8. Proof that a defendant was actuated by malice would defeat a defence of fair comment. Express or actual malice refers to ill will or spite directed at the claimant or an indirect or improper motive in the defendant's mind which is the primary or only motive for the impugned publication. It is established by proof that the defendant did not honestly hold the opinion expressed in the publication. It is for the claimant to prove that the defendant was actuated by malice in making the publication. On the issue of malice, the learned judge cannot be faulted in her articulation of the law governing the nature and effect of malice. The Court agrees with the learned judge's conclusions for the reasons she outlined in the judgment and therefore would not interfere with the judge's determination that Mr. Browne was not actuated by malice when he published the impugned statements and would dismiss the related grounds of appeal.

   **Halsbury's Laws of England** Vol. 32 (2023) applied.

9. As to the appellant's criticism that the judge erred in her approach to the trial in that she treated it as a judicial review hearing and not as a defamation claim, this is not borne out by the record. The learned judge did not conduct a review of the Cabinet Decision akin to the procedure utilized in a judicial review action. Her approach to the competing evidence and submissions on the point were in conformity with the applicable CPR rules and other procedural rules applicable to the hearing and disposal of civil claims. Accordingly, this ground of appeal fails.

## JUDGMENT

### Introduction

[1] **HENRY JA [AG.]**: In this appeal, the appellant Mr. Vere Bird III appeals against a judgment of the learned High Court judge dismissing his claim in defamation against the respondent the Honourable Mr. Gaston Browne, the current Prime Minister of Antigua and Barbuda (also referred to as "the State"). The learned judge found that the respondent was entitled to rely on the defences of fair comment and truth which provided complete defences to the claim. Mr. Bird challenges several findings of law

and fact in his appeal which raise the central issue of whether the learned judge erred in finding that Mr. Browne's defences were made out.

[2] The appellant and the respondent are both politicians in the State of Antigua and Barbuda. It is a matter of record that at all relevant times the respondent held the office of Prime Minister of the State. The appellant is a legal practitioner practicing law in the State since May 2001. He is also the Chairman of the Antigua and Barbuda True Labour Party and was an unsuccessful candidate in the national general elections held in 2014 and 2018.

[3] It is not disputed that in November 2019, Mr. Browne published statements on the social media networking platform Facebook to which Mr. Bird took offence alleging that they were defamatory of him. At his behest, Mr. Bird's solicitor wrote to Mr. Browne demanding that he retract the statements and offer compensation to him. The letter before action bore no fruit. Consequently, on 12th December 2019, Mr. Bird filed a claim against Mr. Browne in the High Court in Antigua and Barbuda seeking damages for defamation, an injunction restraining Mr. Browne from broadcasting the said defamatory words or similar words, interest at the statutory rate and costs. The claim was amended on 20th October 2020.

[4] Mr. Browne filed an Amended Defence on 30th October 2020. He advanced two defences – justification and fair comment. He asserted that Mr. Bird was a man of bad character who was held in low esteem by the public and could therefore not establish that his reputation or character had been damaged by the publications about which he complained. He denied Mr. Bird's claim that the publications were actuated by malice.

[5] At the end of a trial[1] the learned judge found that Mr. Browne had established both defences and she wholly dismissed the claim and awarded him prescribed costs.[2]

[1] Which took place on 1st March 2023.
[2] By judgment delivered on 27th April 2023 ("the High Court judgment").

[6] Mr. Bird being dissatisfied with the decision of the learned judge filed his appeal on 9th June 2023. Sixteen grounds of appeal were set out in the Notice of Appeal, some of which contained multiple limbs. In summary, Mr. Bird contended that the learned judge erred in fact and in law in concluding that Mr. Browne was entitled to rely on the defences of truth and fair comment in that the decision goes against the weight of the evidence and runs contrary to certain findings of fact made by her and reversed findings of law made by another judicial officer; the learned judge erroneously placed the onus on him to lead certain evidence; and she failed to have regard to relevant matters including well-established principles of law and conventions and took into account irrelevant considerations and inadmissible material.

[7] Mr. Browne countered that the learned judge's decision is grounded in the law and supported by the evidence adduced at trial and is therefore unassailable. He submitted that the appeal should be dismissed with costs.

[8] For the reasons set out in this judgment, the appeal is dismissed. The learned judge's order is affirmed and Mr. Browne shall have his costs of the appeal assessed if not agreed.

[9] **Grounds of Appeal**

It is instructive to outline the grounds of appeal. They are:

> "1. The Learned Judge erred in law in holding that the Respondent was entitled to rely on the defences of fair comment and truth which provided complete defences to the defamatory words spoken by the Respondent, and in particular after pronouncing:
>
> i. That post #1 [which included a reference that the Appellant his father (sic) "concocted" a deal to seal (sic) him (the Appellant) land at a parliamentary rate] clearly imputes to the Claimant (Appellant) that not having been entitled to rates for land sale attributable to a parliamentarian, that he **clandestinely and by**

**means of corrupt practices** was able to attain a parcel of land – **see para16**;

ii. That post #2 again imputed to the Appellant that **he was able to manipulate the Cabinet confirmation process** and obtain by corrupt means land to which he was not entitled – **see para 16**;

iii. The utterances of the Respondent was likely to be understood by the reasonable and right thinking member of society **as libelous** in all the circumstances – **see para17**.

2. The Learned Judge erred in law when she effectively, and, without due authority, reversed the 7th October 2020 declaration of Drysdale J. that "it was recorded in the Official Minutes of Cabinet that the Claimant (Appellant) was the subject of a Cabinet Decision for the sale of one acre of Crown lands to him at a concessionary rate", in that:

i. The Learned Judge went on to hold that the Cabinet decision was a "creeper", meaning that it was not a valid Cabinet Decision;

ii. The Learned Judge accepted the inadmissible hearsay evidence of the Respondent to pronounce on the validity of the Cabinet Decision; and

iii. The Learned Judge wrongly assumed the role of the Appellate Court in reversing the holding of Drysdale J. by effectively holding that there was no Cabinet Decision to sell land to the Appellant, and therefore the same ought not to have been recorded in the Official Minutes of Cabinet, the purported decision being a "Cabinet Creeper".

3. The Learned Judge erred in law by wrongfully breaching the well-established constitutional separation of powers doctrine, by going behind the Official Minutes of Cabinet duly signed by the Cabinet Secretary and holding:

i. That the decision was not a valid Cabinet Decision but a "Cabinet Creeper"; and

ii. Cabinet did not authorize the sale of land to the Appellant at the same concessionary rate for parliamentarians.

4. In going behind the Official Minutes of Cabinet duly signed by the Cabinet Secretary, and declaring a "Cabinet Creeper" as opposed to accepting a valid

Cabinet Decision, the Learned Judge failed to appreciate certain well-established principles of law and conventions:

i. That the judicial and executive arms are co-equal arms of the State;

ii. That the Judiciary has no power to set aside the policy making decisions of Cabinet;

iii. That Cabinet is solely responsible for the sale of Crown lands;

iv. That Cabinet sets the price for Crown lands unless it delegates same to some other authority;

v. That Cabinet where it sees fit, may sell land at special prices to citizens and even, in some cases allocate land without consideration;

vi. That in determining the price at which to sell the land to citizens, Cabinet is in no way restricted or limited by its policy on the sale of land to Parliamentarians;

vii. That Cabinet operates on the basis of collective responsibility;

viii. That the Respondent is bound by the decisions of Cabinet and is estopped from coming to the Court, to seek – in this case some 20 years later – to impugn the decision of his own Cabinet, more so, in a self-seeking manner using hearsay and inadmissible evidence;

ix. That as a member of Cabinet, the Respondent is bound by an oath of secrecy, which he has violated by virtue of his own evidence in Court;

x. That as a member of Cabinet, the Respondent is also bound by an oath of confidentiality, which he has violated by his very evidence in Court; and

xi. That a Court has to accept the duly signed minutes of Cabinet as reflecting the proceedings and decisions of Cabinet.

5. The Learned Judge erred in law by treating the matter more in the nature of judicial review of a Cabinet Decision rather than as a defamation claim in which the Cabinet Decision to sell land to the Appellant ought to have been accepted as a matter of fact rather than of review,

6. In arriving at her decision, the Learned Judge failed to take into consideration the 30th March 2021 ruling of the Learned Master declaring that the words complained of were capable of bearing the meanings set out in the statement

of claim, including that the **Appellant is a thief, a crook and a corrupt politician**. The evidence in this case does not support any conclusion that the Appellant is a crook, a thief, a corrupt politician or he derived a benefit from a crooked cabinet deal, or that he had defended (sic) the State of Antigua and Barbuda of its Crown lands by getting an acre of land at a concessionary rate of $25,000.00. In fact, the clear uncontroverted evidence in this case is that the Appellant did not purchase the lands despite the approval by the Cabinet in his favour.

7. The Learned Judge erred in law when she held that the defence of truth is available to the Respondent in relation to the words "Yet, he (the Appellant) and his father **concocted a deal** to sell him land at the parliamentary rate". (**our emphasis**)

8. The Learned Judge erred in law by holding that that (sic) the defence of truth is available to the Respondent in relation to the words "You claim that you didn't get the land, but you cannot refute the decision to sell you the land at the concessionary rate for which **you were not eligible**". Nothing stops Cabinet from determining a price for the Appellant, whether it is below, equal to, or above the parliamentary rate. (**our emphasis**)

The Learned Judge erred in law by placing the onus on the Appellant to lead evidence that he was in fact entitled to the concessionary rate rather than accepting the fact that Cabinet had granted him the concessionary rate and it was not the function of the Court to question or inquire into the reasons for Cabinet so doing. (**our emphasis**)

The Learned Judge erred in law and took into account totally irrelevant considerations when she placed significance on the fact that in sixteen (16) years the Appellant did not produce a "scintilla of evidence" that his decision to not accept the option to purchase had been in any form conveyed to Cabinet, instead of the onus being on Cabinet to reverse the decision if it considered it to have been improper in all the circumstances.

The Learned Trial Judge erred in law in holding that the Cabinet Decision had not been made within the parametres (sic) of proper procedure, again relying on the self-serving, inadmissible, hearsay evidence of the Respondent, done in breach of his oath of secrecy and confidentiality, and in violation of the collective responsibility principle of Cabinet.

12. The Learned Trial Judge erred in law in holding that the defence of truth was available to the Respondent in relation to the statement, "Thanks to the vigilance of our public servants the **crooked land deal** was not effected". In doing so the Learned Judge relied on:

i. The self-serving, inadmissible, hearsay statements of the Respondent without more, entirely speculative and opinionated without a shred of supporting evidence; and

ii. The lack of knowledge of the Appellant of the specific procedure to have a matter laid before the Cabinet and how the decision had been obtained, matters generally not within the knowledge of laymen. Submissions to Cabinet and decisions of Cabinet are matters within the peculiar knowledge of Ministers and their supporting technocrats.

13. In relation to the Cabinet decision, the Learned Judge erred in law by:

i. Placing the onus on the Appellant to prove that the genesis of a duly recorded Cabinet decision was genuine, again wrongly going behind that decision while ignoring the plausible explanation of the Appellant;

ii. Finding it entirely appropriate for the Defendant to question the origins of the Cabinet Decision "knowing full well that there was no supporting information as to its appearance..."

iii. Attaching significance to the alleged approach to the Respondent by the father of the Appellant for support of the intended application to Cabinet. Taken at its highest there is absolutely nothing wrong with a Cabinet colleague approaching the other for support of an impending Cabinet decision. In fact, it ought to be quite natural to do so, and it demonstrates leadership and initiative on the part of the colleague Minister. Nothing in the evidence suggests that the (sic) either the Appellant or his father (then a Cabinet Minister) approached the Respondent to commit fraud or engineer a "Cabinet creeper".

iv. Holding that the Cabinet Decision was a "creeper", and that the Respondent was entitled to rely on the defence of truth, by publishing the words, "**I was even told by my colleague who served in the Cabinet that the decision was a Cabinet creeper**". Again, inadmissible hearsay evidence.

14. On the defence of fair comment, the Learned Judge erred in law by:

i. Failing to take into consideration the omission of the Respondent to properly set out the relevant facts in his pleadings upon which his fair comment defence was based;

ii. Wrongly holding that once the Court is satisfied that his comment and opinion was on the sole truthful fact that the Appellant had been the beneficiary of a Cabinet Decision to be sold land at a rate that was traditionally extended to parliamentarians, then the Respondent could avail himself the defence of fair comment;

iii. Wrongly holding that the words "**Crooked Vere**, kindly explain to the people what made you eligible for land at a parliamentary rate" are protected by the defence of fair comment; (**our emphasis**)

iv. Wrongly concluding that the Respondent had issued his opinion as to the nature of the behaviour of the Appellant by calling him "crooked" in all of the circumstances can be "understood as an inference from supporting facts";

v. Wrongly advancing that the use of the adjective "crooked" to the name of the Appellant satisfies the Court that as "pungent and offensive" as the term may be that this was the opinion of the Defendant on the actions of the Appellant of which he had already complained;

15. In relation to the Appellant's contention of malice, the Learned Judge erred in law by:

i. Holding that the defence of fair comment was not defeated by malice in all of the circumstances of this case;

ii. Holding that the use of the term "crooked Vere" was not "utterly disproportionate to the facts";

iii. Holding that "all that the (Respondent) said" was based on a truthful interpretation of what had transpired;

iv. Holding that the Appellant had not proven on a balance of probability that the Respondent was actuated by malice which would have the effect of defeating the plea of fair comment;

16. The decision of the Learned Judge goes against the weight of the evidence in that:

i. The Learned Judge failed to take into account that the September 2003 decision of the Cabinet was never reversed and remains a valid and subsisting decision;

ii. The Learned Judge admitted inadmissible hearsay, self-serving evidence to attack the validity of the Cabinet Decision and encroach upon the domain of the Executive;

iii. Without the inadmissible hearsay evidence there would be no basis to impeach the duly record [sic] Cabinet Decision;

iv. The entire adverse decision of the Learned Judge turns on the inadmissible hearsay evidence categorizing the duly recorded Cabinet Decision as a "Cabinet creeper".

v. The Appellant was not a member of Cabinet and was therefore in no position to influence the decision, one way or another, the [sic] sell land to him at a special concessionary rate.

vi. Assuming but not conceding that the court could lawfully go behind the cabinet decision, the Appellant was in no way responsible or linked in any way to the purported cabinet "creeper" upon which the court plays [sic] so much weight.

vii. In close to 20 years, and three different governments – including the cabinet of the Respondent from June 2014, the 2003 cabinet decision has never been reversed." [Emphasis as in original]

**Issues**

[11] Without doing any disservice to Mr. Bird's case, the grounds of appeal may conveniently and adequately be condensed under four headings and issues as follows:

Whether the learned judge erred in law and reversed the 7th October 2020 declaration of Drysdale M that it was recorded in the Official Minutes of Cabinet that the appellant was the subject of a Cabinet Decision for the sale of one acre of Crown lands to him at a concessionary rate.

Whether the learned judge failed to appreciate certain principles of law and conventions and erred in law by breaching the constitutional separation of powers doctrine by going behind the Official Minutes of Cabinet duly signed by the Cabinet Secretary.

Whether the learned judge in determining this case approached it from the perspective of a judicial review of a Cabinet Decision and not a defamation claim.

Whether the learned judge erred in fact or in law in arriving at her determination in relation to the defence of a) justification or b) fair comment.

**Factual Matrix**

[12] The first publication to which Mr. Bird takes exception was published on Mr. Browne's Facebook page on 5th November 2019 and was accompanied by the photograph of an undated Cabinet Decision (the "Cabinet Decision"). The full text of the post including the contents of the Cabinet Decision are as follows:

> "Killer: When you live in a glass house don't throw stones …"
>
> [Cabinet Decision]
>
> "Sale of Crown Land Vere C. Bird III
>
> 21. Cabinet agreed to the sale of one (1) acre of Crown land to Mr. Vere C. Bird III at concessionary rate of $25,000.00 per acre. Cabinet further agreed that the Ministry of Agriculture should determine the site, effect the demarcation of the land and verify its registration particulars."

[13] The following day, 6th November 2019, Mr. Browne under his Facebook username 'Gaston Browne (a.k.a. Wurl Boss, Top Dog)' posted:

> "Alex Nicholas – Sept 2003, when his late father, Vere Bird Jr was Minister responsible for Crown Lands. Killer, was not a parliamentarian yet, he and his father concocted a deal to sell him land at a Parliamentary rate."
>
> "Our Parliamentary rate is $4.00 per square foot and developmental rate at $3.00 per square foot."

[14] On 8th November 2019, Mr. Browne made the third post:

> "Here goes the Bird Poop again, trying to intimidate people for factual, and responsible free speech.
> You claimed that you didn't get the land, but you cannot refute the decision, to sell you the land at the concessional rate for which you were not eligible.

> Thanks to the vigilance of our public servants the crooked land deal was not effected.
>
> I was even told by my colleagues who served in the Cabinet, that the decision was a Cabinet Creeper.
>
> Crooked Vere, kindly explain to the people, what made you eligible for land at a Parliamentary rate."

[15] In his amended statement of claim Mr. Bird pleaded that by the 6th November and 8th posts, Mr. Browne "falsely and maliciously published or caused to be published of and/or broadcast (sic) certain statements concerning how [he] obtained a cabinet decision agreeing to sell [him] one acre of Crown Land". He asserted that Mr. Browne knew and/or intended that the words complained about would be repeated and republished and/or that such republication internationally and in the State of Antigua and Barbuda was the natural and probable and/or foreseeable consequence of the publications and that such republications would cause maximum harm and damage to his reputation as a senior Barrister at Law and politician. He contended that Mr. Browne ought to have known that the objectionable words would and did spread widespread negative accusations and comments against him by members of the Antiguan and Barbudan public and in the diaspora that had access to the worldwide web and social media.

[16] Mr. Bird pleaded further that Mr. Browne should have known that the words would and did provoke widespread negative accusations and comments against him by the social media audience in the State and internationally; were calculated to disparage him and cause damage to his legal profession and political career and impute that he was guilty of having committed criminal offences of theft, corruption and fraud.

[17] He averred that in their natural and ordinary meaning the words published in the three posts meant or were understood to mean that he was a crook, a thief, a corrupt politician; that he derived a benefit from a crooked cabinet deal; he and his father fraudulently concocted a deal to sell him land at a concessionary Parliamentary rate;

he is guilty of fraudulent practices against the Cabinet of Antigua and Barbuda by having a bogus cabinet decision (a.k.a. Cabinet Creeper) placed in the officially approved Cabinet minutes; and he has defrauded the State of its Crown lands by getting an acre of land at a concessionary rate of $25,000.00.

[18] In his further additional pleadings, Mr. Bird claimed that Mr. Browne was actuated by political agenda and malice. He particularized elements of aggravated and exemplary damages to which he averred he was entitled.

[19] Mr. Browne refuted the claim in its entirety in his Amended Defence. While he admitted publishing the three posts, he contended that they were neither false nor maliciously published, or intended to bring harm to Mr. Bird's reputation, character or integrity. He asserted that the contents of the three posts were true in substance and fact.

[20] Mr. Browne explained that he and Mr. Bird's father, Mr. Vere Bird Jr, were members of Cabinet at the time of the Cabinet Decision. He asserted that the appellant's father was then Minister of Agriculture, Lands and Fisheries while he, Mr. Browne, was the Minister of Planning, Trade, Industry, Commerce and Public Service Affairs. He recounted that the appellant's father approached him privately and requested his support to obtain a Cabinet decision to enable his son, the appellant to receive land at a Parliamentary rate and that he refused. He asserted that the appellant subsequently approached him with the same request and he once again refused his support for such an action. He claimed that although he attended most of the Cabinet meetings during his tenure as Minister he has no recollection of Cabinet ever making the decision captured in the Cabinet Decision.

[21] Mr. Browne noted that Mr. Bird has admitted publicly that he was aware of the Cabinet Decision but states that one Mr. Rupert Sterling was the one who tried to assist him in this way. The respondent asserted that Mr. Sterling was never a member of Cabinet and it is clear that the appellant's father was the driving force

behind the Cabinet Decision, he being the Minister of Agriculture and a member of Cabinet and therefore well-placed to facilitate the arrangements. He surmised that the appellant was aware that his father was attempting to obtain the Cabinet Decision as evidenced by the fact that the appellant himself approached him (Mr. Browne) to assist with getting the Crown land at a Parliamentary rate to which he was not entitled, and therefore the posts were true in fact and substance.

[22] In addition, Mr. Browne denied that the words in the posts bore or were capable of bearing the meanings alleged by Mr. Bird or any defamatory meaning and even if they could they constituted fair comment on a matter of public interest in respect of Mr. Bird's conduct as a politician, leader of a political party, parliamentary candidate and one who regularly accuses the government and ruling party of systemic corruption in the most crude and pejorative terms on social media and on radio programs. It was pleaded further that the words 'should seek psychiatric treatment' is based on the appellant's 'unhinged behavior' and 'the expressed opinion of the general public, that the bizarre and abusive statements by [the appellant] indicates certain mental issues'.

[23] Mr. Browne pleaded further that Mr. Bird is of bad character and is held in low esteem by the legal fraternity, general public and the body politic. Further, that he offered himself twice as a candidate in two general elections and was soundly rejected at the polls, losing his deposit both times.

[24] Both Mr. Bird and Mr. Browne filed witness statements[3] which repeated in material particulars the assertions contained in their respective pleadings. They were the only witnesses at trial. They were cross-examined and expanded on their written testimony.

[25] Prior to the trial, Mr. Browne applied to the learned master for the determination of the preliminary point as to whether the Official Minutes of Cabinet recorded the

[3] Filed respectively on 27th May 2021 and 18th June 2021.

Cabinet Decision. By Order dated 7th October 2020, the learned master made a declaration that it did and made consequential orders.

[26] Subsequently, Mr. Bird filed an application[4] for a ruling as to whether the words used in the posts were capable of bearing the meanings attributed to them by him in his Amended Statement of Claim. By decision dated 30th March 2021, the learned master ruled that the words were capable of bearing the meanings ascribed to them by Mr. Bird in his Amended Statement of Claim (as summarized at paragraph 17 above). In arriving at this decision, the learned master applied the test in **Berkoff v Burchill**[5] and **Rufus v Elliott**[6] that the threshold to hold that words are not capable of bearing a defamatory meaning is high; that the test is objective and not subjective; and it matters not what the defendant's intentions were when he published the words, or how he viewed the words. She found that the ordinary and right-thinking member of the community would likely take the words to mean as the appellant has described them.

**Lower Court's Decision**

[27] The learned trial judge identified four issues that had to be determined:

> "(1) Whether the words are defamatory in the circumstances in which they were uttered.
>
> (2) Whether the words were defamatory of the appellant.
>
> (3) Whether the respondent could avail himself of the defences of fair comment and truth.
>
> (4) Whether the appellant is entitled to damages including aggravated and exemplary damages."

[28] In relation to issue 1, the learned trial judge concluded "Post #1 clearly imputes to the [appellant] that not having been entitled to rates for land sale attributable to a parliamentarian, that he clandestinely and by means of corrupt practices was able

[4] On 10th February 2021.
[5] [1996] 4 All ER 1008.
[6] [2015] EWCA Civ 121.

to attain a parcel of land. In Post #2, it is again imputed to the [appellant] that he was able to manipulate the Cabinet confirmation process and obtain by corrupt means land to which he was not entitled". Consequently, applying the test in **Beulah Mills v Michael Perkins and Nevis Broadcasting Limited**,[7] she found that Mr. Browne's utterances would likely be understood by the reasonable and right-thinking members of society as libelous in all the circumstances.[8]

[29] As to whether the words were defamatory of Mr. Bird, the learned trial judge held that while no evidence was led as to who was referred to as 'Killer' in Post #1, when considered in light of the Cabinet Decision which was included in the post after the name 'Killer' and that the Cabinet Decision mentioned Vere C. Bird III, it followed that the post referred to the appellant. Likewise, Post #2 makes clear that the intended target was the appellant because his name was used in that post.

[30] The learned trial judge considered first the defence of truth. She noted that the **Defamation Act**[9] of Antigua and Barbuda codifies the defence of truth at section 20. She noted that the defence was considered in **Abraham Mansoor et al v Grenville Radio Limited et al**,[10] **Gatley on Libel and Slander**,[11] and **Edwards v Bell**.[12] Thereafter, she examined Post #1 in two separate parts, the first part being limited to the words 'Sept 2003 when his late father Vere Bird Jr was Minister responsible for Crown Lands'.

[31] The learned judge found that those words were made in response to a question posed by a third person as to the timing of the Cabinet Decision. She noted that in cross-examination the appellant accepted that his father was Minister of Lands in 2003 and that a Cabinet Decision was made that year granting him permission to

[7] NEVHCV2009/0098 (delivered 23rd July 2014, unreported).
[8] See paras. 16 and 17 of the High Court judgment.
[9] Act. No. 7 of 2015 of the Laws of Antigua and Barbuda.
[10] ANUHCV2004/0408 (delivered 12th October 2007, unreported).
[11] 12th Ed. Para. 11.7.
[12] (1824) 1 Bing 403 at para. 409, per Burrough J.

buy Crown Lands at a concessionary rate. The learned trial judge concluded that part 1 of the post was truthful.

[32] The second part of the post contained the words 'Killer was not a parliamentarian yet, he and his father concocted a deal to sell him land at a parliamentary rate'. As to these words, the learned judge noted that Mr. Bird acknowledged that he was the one being referred to as 'Killer' and that he was never a parliamentarian. In addition, he accepted that a family friend by the name of Rupert Sterling who was not a member of Cabinet, told him that he could get him a piece of land to purchase from the government and six months later advised him to collect the Cabinet Decision which granted him such permission and concession. The judge considered Mr. Bird's testimony that he had not applied to buy Crown land and he was not in a position to deny that his father had approached Mr. Browne seeking his support for the Cabinet Decision. She found that taken in the round the evidence and inferences to be drawn from it supported a finding that the defence of truth was made out in relation to Post #1.

[33] The learned judge examined Post #2 in five parts. She dealt with aspects under the defence of truth and others under fair comment. She found that the words: 'You claimed that you didn't get the land, but you cannot refute the decision to sell you the land at the concessional rate for which you were not eligible'; 'Thanks to the vigilance of our public servants the crooked land deal was not effected'; and 'I was even told by my colleagues who served in the Cabinet that the decision was a Cabinet creeper' all captured factual statements of the circumstances under which the Cabinet Decision came about and entitled Mr. Browne to rely on the defence of truth.

[34] The learned judge left two statements for consideration under the defence of fair comment. They are: 'Here goes the Bird Poop again, trying to intimidate people for factual and responsible free speech' and 'Crooked Vere, kindly explain to the people what made you eligible for land at a parliamentary rate'.

[35] After setting out the relevant provisions of the **Defamation Act**, material portions of **Gatley on Libel and Slander** and case law on the defence of fair comment, the learned trial judge assessed the two remaining statements in Post #2 and ruled that Mr. Browne had made out his defence of fair comment in respect of those assertions. She held further that Mr. Browne was not actuated by malice that would defeat the defence of fair comment.

**Issue 1 – Reversal of 7th October 2020 Order point**
**Appellant's submissions**

[36] The nub of Mr. Bird's first ground of appeal is that the learned trial judge reversed the decision made by Drysdale M that the Official Minutes of Cabinet recorded that he was the beneficiary of the Cabinet Decision granting him permission to purchase one acre of Crown land at the concessionary rate. On his behalf, learned King's Counsel Mr. Ruggles Ferguson submitted that by finding that the Cabinet Decision was a Cabinet Creeper and not a real decision of Cabinet, the learned trial judge thereby made a contrary declaration to Drysdale M and thereby erred in law by reversing her decision, when she was not sitting as an appellate court and had no jurisdiction to overturn that finding. It was submitted that it was not for the court to inquire into how the decision came about or whether the proper procedure had been followed. Further, to the extent that the litigation required the court to find that the Cabinet conclusion was proper it should have declined jurisdiction.

**Respondent's submissions**

[37] Mr. Browne argued through his lawyer Mr. Jarid Hewlett that the issue as to the legitimacy of the Cabinet Decision was a live one before the learned trial judge who was invited to make a finding of fact in relation to it. In this regard, while the parties took no issue with the existence of the Cabinet Decision, the appellant maintained that it was a legitimate decision while the respondent contended that it was not. Accordingly, the judge's decision on this issue constitutes a finding of fact and cannot be disturbed at the appellate level unless the learned judge erred and as a result made a palpably wrong decision.

**Discussion**

[38] It is now well-established that an appellate court will not lightly disturb the findings of fact or of law by a lower court. In relation to appeals against findings of fact the appellate court's function is limited to assessing whether the judicial officer correctly advised herself as to the applicable legal principles and applied them appropriately in arriving at the findings of fact. If the appellate court is satisfied that the learned judge was entitled on the evidence to make the findings that she made, they will not be disturbed. This Court has stated in **St. Kitts Marriott Resort v Deborah Stevens**,[13] that the appellate court "… ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to an appellate court". Similarly, it is trite law that an appellate court would interfere with a finding of law by a lower court only if the wrong principles of law were considered and applied or if the learned judge failed to consider some relevant legal principle which leads the court to make a decision that is wrong. I bear those principles firmly in mind in addressing the grounds of appeal.

[39] At the heart of this dispute is what findings the learned judge made on this point and whether it had the effect of reversing the earlier order of the master. Both parties agree that the impugned ruling is set out at paragraph 57 of the judgment. It states:

> "This court on a balance of probability finds that the evidence of the [Respondent] as to not having participated in the process to approve this sale or seeing it in any minutes which he reviewed stands uncontroverted. The truth is that this Cabinet Decision cannot be grounded in any sanctioned procedure. The [Appellant] simply states that its mere existence is sufficient evidence of its validity. Indeed, perhaps that may have availed him in circumstances where there was no evidence by someone who would have been legitimately part of the process. But there is, and the [Respondent's] contentions cannot be discounted without more especially when the [Appellant] makes it clear that he did not seek to get land at a concessionary rate, that Mr. Sterling obtained the land without his consent and that it was not his father who was the Minister who orchestrated the permission."

[13] SKBMCVAP2016/0001 (delivered 30th October 2020, unreported); see also Watt (or Thomas) v Thomas [1947] 1 All ER 582 and Yates Associates Construction Company Ltd. v. Blue Sand investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

[40] She continued at paragraph [58]:

> "In this court's mind it was therefore entirely appropriate for the [Respondent] to question the origins of this Cabinet Decision knowing full well that there was no supporting information as to its appearance and when the evidence of the approach to the [Respondent] by the father of the [Appellant] remains untested there is only one conclusion that the Cabinet Decision was a creeper and that the [Respondent] is entitled to rely on the defence of truth."

[41] To the extent relevant, the 7th October 2020 Order of Drysdale M states:

> "AND THE COURT being of the opinion that having regard to the pleadings and the prayer seeking relief for the defamatory statements made on the 5th November 2019 which includes but is not limited to the quotation of a cabinet conclusion that it is unclear whether the existence of the cabinet conclusion was being dispute (sic) and as such the application made by the Defendant is not unnecessary in the circumstances.
>
> AND CONSIDERING that the Claimant does not deny the existence of the Cabinet Conclusion.
>
> AND CONSIDERING that the court believes that the issue of whether the Claimant was a member of parliament and entitled to such a rate is not an issue that can be entertained at this juncture. That further the cabinet conclusion referencing a concessionary rate and no indication being (sic) that such a rate is exclusively granted to only parliamentarians. And further this court is not seized with the ability to determine the lawfulness of such a decision at this juncture.
>
> IT IS HEREBY ORDERED
>
> 1. That the Defendant is granted a declaration that it is recorded in the Official Minutes of Cabinet that the Claimant was the subject of a Cabinet decision for the sale of one acre of Crown Lands to him at a concessionary rate."

[42] It is readily apparent from the October 2020 Order that the learned master:

(1) Declined to make any findings as to the legality or legitimacy of the Cabinet Decision; and

(2) Limited her declaration to the factual finding that the Official Minutes of Cabinet recorded that the appellant Mr. Bird was the subject of a decision by Cabinet permitting him to purchase Crown lands at a concessionary rate.

[43] By contrast, the learned trial judge found that:

(1) Mr. Browne supplied uncontroverted evidence at trial that he: a) did not participate in the process to approve the Cabinet Decision; and b) did not see it in any minutes of Cabinet that he reviewed.

(2) The Cabinet Decision did not emanate from any sanctioned procedure.

(3) The appellant relies on its existence to substantiate its validity.

(4) There is evidence from the respondent which supports a finding that the Cabinet Decision is not legitimate or valid.

(5) The appellant's testimony as to Mr. Sterling's involvement and his father's non-participation cannot be ignored.

(6) The respondent's evidence that he was approached by the appellant's father is not tested.

(7) The respondent's suspicions about its legitimacy were reasonable in the circumstances.

(8) In those circumstances, the only conclusion is that the Cabinet Decision was a creeper.

[44] From the foregoing, it is pellucid that the findings of the two judicial officers are not at variance. Drysdale M deliberately and prudently refrained from entertaining any contention that the Cabinet Decision was not valid or legitimate. Therefore, the finding by the learned trial judge that it was a creeper did not implicitly or expressly go contrary to any finding made by Drysdale M. Likewise, the learned trial judge acknowledged at paragraph 26 of her judgment that Drysdale M had already made a determination that the substance of the Cabinet Decision was recorded in the Official Minutes of Cabinet.

[45] Contrary to the appellant's contentions before this Court, the learned trial judge made no finding that the Official Minutes did not record the substance of the Cabinet Decision. Instead, the learned trial judge restricted herself to holding that the Cabinet Decision was not grounded in the normal procedures for obtaining a decision of Cabinet but was arrived at instead in an irregular manner and was therefore a creeper. This finding is not inconsistent with the October 2020 Drysdale M Order.

[46] Furthermore, Mr. Browne testified that "[a]lthough uncommon, it is not unheard of for certain 'decisions' being placed into the Official Cabinet Minutes by the Secretary, without having actually been made in Cabinet. Such "decisions" are referred to as 'Cabinet creepers', and it is my firm belief that this decision was one such creeper, as I do not recall any such decision being made in Cabinet". The learned judge accepted this evidence and acted on it in arriving at her decision. It follows that in view of this context, the October 2020 declaration is not excluded from mutual co-existence with the learned trial judge's determination that the Cabinet Decision was not legitimate. The appellant's contention that the learned trial judge reversed Drysdale M's October 2020 Order and thereby wrongly assumed the role of an appellate court is therefore not made out.

[47] It is important to note further that the respondent's testimony elicited during cross-examination is that he served in the Cabinet at the time when the Cabinet Decision was made and he cannot agree that it is a legitimate or valid decision. That answer was given in response to the question: "… Now, this Cabinet decision on the face of it is a legitimate decision, isn't it? Apart from your peculiar knowledge … would you say that this Cabinet decision on the face of it is … a valid Cabinet decision?" It is clear from this exchange that the legitimacy of the Cabinet Decision was a live issue at trial with which the appellant engaged frontally and fulsomely and was addressed by the learned trial judge in her judgment.

[48] The appellant contended that the learned judge relied on inadmissible hearsay evidence from the respondent to ground her decision that the Cabinet Decision was not legitimate. It is a matter of record that Mr. Browne's witness statement was admitted as his evidence in chief without objection by Mr. Bird.[14] The appellant is therefore taken to have accepted any hearsay material recorded in the witness statement, having not made any challenge to it before or during the course of the trial. Further, the appellant in response to a question posed to him during cross-examination stated that the Cabinet Decision is not crooked but rather a legitimate Cabinet decision.[15] On this point, the respondent applied for and without objection by the appellant obtained leave to amplify his witness statement to comment on that evidence.[16]

[49] Mr. Browne's full comment on Mr. Bird's characterization of the Cabinet Decision as legitimate is as follows:

> "… the decision could not have been illegitimate (sic) decision and let me explain why. It's a process in which each matter goes to the Cabinet. That process, certainly in the case of the sale of land involves a formal application from the applicant. That application followed by the creation of what is called a circulation note. The circulation note, emanates from the Ministry of Lands, and then it is sent to the Cabinet Secretary to be included in the Cabinet's agenda and to be presented by the minister responsible for the subject area. In this case, the Minister of Lands. Third party who is not a member of the Cabinet obtained a legitimate Cabinet decision. During the process of the Cabinet meeting, the circulation note is presented by the minister responsible for the subject area. Then consensus decision is made to determine if to approve or reject the application.
>
> If approved information is then sent to the Ministry of Lands, and then it follows a process, the Ministry of Legal Affairs to the Governor General's Office culminating the sale. The fact that the claimant said that he did not make an application confirmed that the process was not followed, that alone was evidence that the process was circumvented and certainly was flawed. I wish to emphasize that no third-party, no member of the public could obtain a Cabinet decision to purchase or for the acquisition of land without being a member of the Cabinet."[17]

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[14] Record of Appeal pg. 79 lines 16-25 and pg. 80, lines 1 -7.

[15] Record of Appeal pg. 55, lines 16-25 and pg.56, lines 1-3.

[16] Record of Appeal, pg. 80, lines 9-25; and pg. 81 lines 1-5.

[17] Record of Appeal pg. 81 lines 7-17, and lines 19 – 25; and pg. 82, line 1.

[50] The foregoing extracts from the Record of Appeal demonstrate that the appellant took no exception to the admissibility of such evidence by the respondent on the basis that it was hearsay or otherwise. He had the option to challenge the contents of Mr. Browne's witness statement and/or his oral testimony on these matters at trial. He elected not to do so. This Court may not properly entertain his belated complaint that hearsay evidence was admitted and relied on by the learned trial judge when he opted not to object to that evidence in the court below. It was open to the learned trial judge on the evidence to make the findings of fact that she did; she committed no error of law or fact in arriving at her conclusion and there is accordingly no basis for interfering with it. For the foregoing reasons, I would dismiss ground 1 of the appellant's appeal.

**Issue 2 – Separation of Powers point**
**Appellant's submissions**

[51] I turn next to consider the separation of powers point in Mr. Bird's grounds of appeal 3, 4 and 11. Essentially, in relation to those grounds of appeal he contended that at the heart of the trial judge's determination is her finding that the Cabinet Decision was a creeper and this finding informed her conclusions that Mr. Browne could avail himself of the defences of truth and fair comment. It was submitted that it is not for the court to inquire into or determine how the Cabinet Decision made 16 years prior, came about, or whether the proper procedure was followed.

[52] It was submitted further that the learned judge violated the separation of powers doctrine by going behind the Official Cabinet Minutes that were duly signed by the Cabinet Secretary and by finding that the Cabinet Decision was a creeper and that Cabinet did not authorize the sale of Crown lands to him at the parliamentary rate. Mr. Bird argued that such breach of the separation of powers doctrine demonstrated a lack of appreciation by the trial judge of established constitutional conventions and principles of law as to: a) the co-equal status of the judicial and executive arms of the State; b) the judiciary's impotence to set

aside policy making decisions of Cabinet; c) Cabinet's exclusive responsibility for the sale of Crown lands; d) Cabinet's exclusive role in setting the price for Crown lands except where it delegates that power to another functionary; e) Cabinet's unfettered jurisdiction to sell Crown lands to citizens at any price or without consideration, without being restricted by its policy regarding sale of land to Parliamentarians; f) Cabinet's unerring adherence to operating on the basis of collective responsibility; g) the reality that Mr. Browne is bound by Cabinet decisions and is estopped from seeking to impugn the Cabinet Decision in court 20 years later by deploying what Mr. Bird described as 'inadmissible hearsay evidence'; h) the fact that Mr. Browne, as a Member of Cabinet, is bound by an oath of secrecy and confidentiality that Mr. Bird asserts was violated by his evidence in Court; and i) the Court's duty to accept the duly signed minutes of Cabinet as reflecting the proceedings and decisions of Cabinet. Mr. Bird reasoned that the learned judge erred in law when she relied on inadmissible hearsay testimony from Mr. Browne, given in breach of his oaths of secrecy and confidentiality and the collective responsibility principle of Cabinet by holding that the Cabinet Decision had not been made in conformity with proper procedure.

[53] Learned King's Counsel, Mr. Ferguson submitted that decisions of the Executive are presumed to be regular until and unless set aside by the court in the exercise of its supervisory jurisdiction pursuant to the **Civil Procedure Rules** ("CPR") Part 56. Accordingly, the Cabinet Decision is presumed to be regular and valid. Citing **Council of Civil Service Unions v Minister for the Civil Service**,[18] he submitted that if Mr. Browne wanted to defend the claim by a defence of concoction and invalidity he ought to have filed a claim for an administrative order under Part 56 of the CPR on the ground of illegality, procedural impropriety and irrationality. In the absence of such a suit the learned judge as a matter of law was constrained to treat the Cabinet Decision as regular and valid. In any event the decision-making procedure adopted by Cabinet is purely a matter for Cabinet and beyond the court's supervisory jurisdiction. Further, the learned judge erred

[18] [1984] 3 ALL ER 935.

by not having regard to the presumption of regularity of cabinet decisions and by taking into account and placing weight on the appellant's lack of knowledge of the specific procedure to have a matter laid in Cabinet and how a Cabinet decision can be obtained and she thereby erred in principle and made a wrong decision.

**Respondent's submissions**

[54] On this issue, Mr. Browne argued that at no point prior to the judgment did Mr. Bird raise any objection as to the trial judge's ability to determine as a matter of fact the legitimacy of the Cabinet Decision. He contended that instead he made submissions on the issue of its legitimacy in the lower court and must therefore be taken to have accepted that the court had jurisdiction to make such a finding.

[55] Mr. Browne contended further that although the finding in respect of legitimacy of the Cabinet Decision is a factual finding, Mr. Bird has erroneously characterized it as a finding of law and compounded this error by not identifying any error made by the judge. Similarly, the learned judge's finding that the Cabinet Decision cannot be grounded in any sanctioned procedure is also one of fact and was properly made on the evidence led at trial including testimony by Mr. Bird. In this regard, his evidence that Mr. Sterling who was not a Member of Cabinet approached him and offered him assistance after which the Cabinet Decision materialized, no further action having been taken by Mr. Bird, was factored into the judge's deliberations and supported her findings.

[56] As to Mr. Bird's submissions regarding collective responsibility and the oaths of secrecy and confidentiality, Mr. Browne argued that they are misguided and irrelevant. It was submitted that the judge's ruling did not alter the validity of the Cabinet Decision in any way. Furthermore, within the context of a defamation suit in which the defence of truth was pleaded, the impugned factual finding cannot be inflated into some breach of the doctrine of separation of powers. It was submitted that the learned judge was invited to and concluded on the

evidence that Mr. Bird had not discharged the onus on him to prove on a balance of probabilities that the Cabinet Decision was properly made and therefore the contents of the posts were untrue and defamatory. He failed to establish his claim to the requisite standard. Therefore, his insistence that he only had to produce the Cabinet Decision, rely on its existence and the fact that it was recorded in the Official Minutes to establish his claim, without successfully refuting the respondent's evidence about the genesis of the Cabinet Decision, defies logic and is preposterous.

[57] Mr. Browne accepted that the mere existence of a record of the Cabinet Decision in the Official Minutes carries the presumption that the Cabinet Decision is valid and regular. He submitted however, that it is a rebuttable presumption as conceded by Mr. Bird[19] and noted by the learned judge. The judge was entitled to find and accept that it had been rebutted by the respondent's testimony about how the Cabinet Decision came to be, and she found as a matter of fact that it was not legitimate. In the circumstances, the judge made no error of fact and Mr. Bird's argument that she was not entitled to find that the presumption of validity was successfully rebutted, must fail.

[58] It was submitted further that Mr. Bird's contention that Mr. Browne should have applied under CPR Part 56 for a declaration as to the validity of the Cabinet Decision is unfathomable in view of the length of time that had transpired since the Cabinet Decision came into being (2003 to 2019 – 16 years) which would have rendered such an attempt impossible to achieve. Mr. Browne contended that the argument that the learned judge placed the burden of proof on Mr. Bird is disingenuous and misrepresents the judge's comment. It was submitted that the learned judge took note of the uncontroverted evidence led by Mr. Browne, found that it rebutted the presumption of validity of the Cabinet Decision and concluded that Mr. Bird had failed to prove that it was legitimately arrived at and he therefore lost the benefit of the presumption of validity. Mr. Browne reasoned

[19] At paragraph 11 of his skeleton arguments.

that this finding was available to the learned judge on the evidence and her findings afford no basis for appellate interference.

**Discussion**

[59] The separation of powers point raises four questions: firstly, whether the findings that the Cabinet Decision had not been made within the parameters of proper procedure and was not legitimate ('the legitimacy and procedure questions') were matters of fact or law. Secondly, whether determination of those issues was germane to the appellant's or the respondent's case; thirdly, whether the principles of collective responsibility applicable to ministerial colleagues, the secrecy and confidentiality of the business of Cabinet were relevant considerations in determining the issues joined between the parties on the appellant's suit for defamation and/or the respondent's defence of truth. Fourthly, whether the learned judge's consideration and determination of the legitimacy and procedure questions breached the separation of powers doctrine as alleged by the appellant. I shall address the first two together and the other two jointly.

**Legitimacy and Procedure - Findings of fact or law**

[60] In the Notice of Appeal, Mr. Bird sets out the following as findings of law against which he appeals:

> "8. This Court on a balance of probability finds that the evidence of the Defendant (Respondent) as to not having participated in the process to approve the sale or seeing it in any minutes which he reviewed stands uncontroverted. The truth is that this Cabinet Decision cannot be grounded in any sanctioned procedure. The Claimant (Appellant) simply states that its mere existence is sufficient evidence of its validity. Indeed, perhaps that may have availed him in circumstances where there was no evidence by someone who have been legitimately part of the process- **See para 57**.
>
> 9. In this Court's mind it was therefore entirely appropriate for the Defendant (Appellant) to question that origins of this Cabinet's Decision knowing full well that there was no supporting information as to its appearance and when the evidence of the approach to the Defendant by the father of the Appellant remains untested there is only one conclusion that the Cabinet Decision was a creeper and that the

Defendant is entitled to rely on the defence of truth - **See para 58.**"[20] (Underlining supplied)

[61] In the next section of the Notice of Appeal under the rubric "Details of finding of fact appeal (sic) against' he reprises aspects of those paragraphs by signaling that his appeal challenges the following findings of fact:

> "20. The truth is that this Cabinet decision cannot be grounded in any sanctioned procedure. The Claimant simply states that its mere existence is sufficient evidence of its validity. Indeed, perhaps that may have availed him in circumstances where there (sic) no evidence by someone who would have been legitimately part of the process- **See para 57**.
>
> 21. It was therefore entirely appropriate for the Defendant to question the origins of Cabinet's Decision knowing full well that there was no supporting information as to its appearance and when the evidence of the approach to the Defendant by the father of the Claimant remains untested, there is only one conclusion that Cabinet Decision was a creeper and the Defendant is entitled to rely on the defence of truth- **See para 58**." (Underlining supplied)

[62] In his submissions, the appellant contended that the impugned findings were factual in nature. However, his Notice of Appeal categorized them as both findings of fact and law. Both paragraphs [57] and [58] summarize the learned judge's findings in respect of the respondent's defence of truth on the legitimacy and procedure questions. It is settled law that the defence of truth is established through proof of the facts or imputations asserted in the impugned publication. The judicial officer charged with determining whether the defence is made out, is obliged to evaluate the publication and decide whether the defendant has proved the truth of the statements in it which are defended as facts or the truth.

[63] The defence of truth is codified in section 20 of the **Defamation Act**. Section 20(3)(a) and (b) provide:

> "**20. Defence of truth**
>
> (1) …

[20] Paragraphs 8 and 9 under the Rubric 'Details of Findings of Law appealed against'.

(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

(3) In proceedings for defamation, a defence of truth shall succeed if-

(a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or

(b) where the proceedings are based on all or any of the matter contained in a publication taken as a whole was in substance true, or was in substance not materially different from the truth, if the words not proven to be true do not materially injure claimant's reputation having regard to truth of remaining imputations." (Underlining supplied)

[64] The appellant pleaded that in their natural and ordinary meaning the words published on 6th and 8th November 2019 by the respondent in his posts meant or were understood to mean that the appellant is a crook, thief and corrupt politician; that he derived a benefit from a crooked cabinet deal; the appellant and his father fraudulently concocted a deal to sell him land at a concessionary Parliamentary rate; the appellant was guilty of fraudulent practices against the Cabinet of Antigua and Barbuda by having a bogus Cabinet Decision (a.k.a. Cabinet Creeper) placed in the officially approved Cabinet minutes; and the appellant has defrauded the State of Antigua and Barbuda of its Crown lands by getting an acre of land at a concessionary rate of $25,000.00.[21]

[65] In his pleadings, the respondent admitted making the posts and maintained that they were true in substance and fact.[22] He pleaded that he does not recall Cabinet ever making such a decision and when it was later brought to his attention that such decision was recorded in the Official Cabinet Minutes he concluded that the appellant's father was the 'driving force behind obtaining the Cabinet decision recorded in the Minutes' he being a member of Cabinet and the Minister of Lands.

[21] Para. 10 of the Amended Statement of Claim.
[22] See paragraphs 4, 5, 6, 7, 8 and 9 of the Amended Defence filed on 30th October 2020.

He added that the appellant had approached him to support such an initiative in Cabinet, therefore, he (the appellant) was well aware that his father was attempting to and succeeded in obtaining the Cabinet Decision granting him permission to buy Crown land at a rate to which he was not entitled.

[66] These competing contentions were addressed in the parties' respective witness statements and oral testimony. The appellant averred that when he returned to Antigua and Barbuda in August 2002 having lived abroad since October 1983, he received a visit at his rented accommodation from a family friend Rupert Sterling who was employed in the Ministry of Agriculture. Mr. Sterling on learning that he did not own land in Antigua offered to get him land to purchase and telephoned him six months later inviting him to the Prime Minister's Office where he handed him a copy of the Cabinet Decision.

[67] In his oral testimony, the appellant denied approaching the respondent to seek his support of the Cabinet Decision.[23] During cross-examination, he asserted that the Cabinet Decision was not crooked but instead was legitimate.[24] His witness statement mirrored his pleadings in material respects including in relation to the meanings imputed to the words in the impugned posts.

[68] For his part, a common thread ran through the respondent's witness statement and oral testimony to the effect that the statements in his posts were true in substance and in fact. He thereby invoked the defence of truth under section 20 of the **Defamation Act**.

[69] In his witness statement[25] the respondent averred that the appellant's father and subsequently the appellant approached him privately requesting his support to obtain a decision from Cabinet offering the appellant the opportunity to purchase

[23] Record of Appeal, pg. 36 lines 7 – 25 and pg. 37 lines 1 – 7.
[24] Record of Appeal pg. 55, lines 16 – 25 and pg. 56, lines 1 – 3.
[25] Filed on 18th June 2021.

Crown land at the concessionary rate applicable to Members of Parliament, being $25,000.00 per acre. He claims that he rebuffed them both.

[70] He asserted further:

> "[7] … Not only was the decision made regarding the sale at a concessionary rate to the Claimant, … Although uncommon, it was not unheard of for certain "decisions" being placed into the Official Cabinet Minutes by the Secretary, without having actually been made in Cabinet. Such "decisions" are referred to as Cabinet creepers", and it is my firm belief that this decision was one such creeper, as I do not recall any such decision being made in Cabinet. …
>
> [9] If it is true that the Claimant indeed was the recipient of a Cabinet decision for him to be sold land at a Parliamentary rate as reflected in the Official Cabinet Minutes; the Claimant, not being a Parliamentarian; it would stand to reason that such a decision was made improperly and unlawfully."[26]

[71] Mr. Browne explained under cross-examination that the terms and conditions for the sale of government lands, including the sale price, is solely a matter for the Cabinet subject to compliance with policy guidelines set by Cabinet. He added that authentic decisions are characterized by observance of those guidelines.[27] Based on this evidence, it seems clear that the guidelines are not law and only protocols grounded in policy directives.

[72] In light of the foregoing, it is pellucid that from the inception of his suit, the appellant raised the issue of legitimacy of the Cabinet Decision as a critical plank of his defamation case and likewise, from the outset the respondent relied on assertions of improper procedure and illegitimacy to undergird his defence of truth. It therefore cannot be gainsaid that it was incumbent on the learned judge to assess the evidence and decide as a matter of fact whether the procedure by which the Cabinet Decision was made was irregular and invalidated the Cabinet Decision. In view of the pleadings and the opposing narratives before the learned judge, she could not

[26] Paragraphs 7 and 9 of the respondent's witness statement.

[27] Pages 84 – 86 of the Record of Appeal.

avoid entertaining those questions in determining a) the appellant's claim and b) whether Mr. Browne could avail himself of the defence of truth by challenging the legitimacy of the Cabinet Decision and the procedure employed to secure it. Additionally, she was duty bound to decide whether the Cabinet Decision was rendered illegitimate due to an error or irregularity in the procedure so as to afford a defence of truth to the respondent. This latter issue involved a question of mixed law and fact in that the findings of fact on the evidence would inform the conclusion of whether the defence of truth was made out to the legal standard.

**Separation of Powers and Collective Responsibility – Relevance**

[73] In answering whether evidence about the internal workings of Cabinet is inadmissible because it violates the separation of powers doctrine and collective responsibility of Cabinet colleagues, the sole consideration is whether such evidence is relevant. It is trite and settled law that the principal test for admissibility of evidence in court is relevance based on its probative value. The more probative the evidence, the more relevant and likely it is to be admissible. The learned authors of **Halsbury's Laws of England** explain:

> "What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. Exclusionary rules may, however, provide that certain kinds of evidence are inadmissible notwithstanding that they may be logically relevant. Admissible evidence is thus that which is relevant and not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another."[28]

[74] The central factual contention between the parties had to do with whether the contents of the posts were defamatory of the appellant who contended that they were, while the respondent insisted that they were not. The appellant was insistent that the Cabinet Decision was legitimate and emanated from adherence by Cabinet members to the regular procedure of Cabinet. He relied on the existence of the Cabinet Decision to establish this assertion. For his part, the respondent was

[28] Lexis Nexis version, Vol. 12 (2020) para. 686.

adamant that the procedure neither complied with established protocols for directing and processing an application for approval of concessionary rates on the sale of Crown Lands nor with the policy guidelines governing the bestowal of such benefits and these failures invalidated the Cabinet Decision and rendered it illegitimate.

[75] As concluded by the learned trial judge, a review of the evidence reveals that the appellant's case was hinged entirely and purely on the presentation of the Cabinet Decision to prove its legitimacy while the respondent relied on oral testimony about the Cabinet's protocols and procedures, knowledge about which he was seized having been a member of Cabinet at the material times. To exclude the respondent's account on the ground of separation of powers, breach of oaths of secrecy and confidentiality and violation of the principle of collective responsibility would engage the exercise of judicial discretion with respect to the central question of admissibility of the evidence. Such exercise always necessitates giving effect to the overriding objective of the CPR to do justice as between the parties.

[76] It is a cardinal principle of law and feature of the administration of the justice system that the court retains exclusive jurisdiction to control the evidence to be given at a trial. This is achieved by issuing appropriate directions at a case management or pre-trial review conference or on application by a party before or during the trial.[29] The Court is also empowered by CPR rule 26.2 to make orders of its own volition. However, before doing so it must give any party likely to be affected a reasonable opportunity to make representations.

[77] As is usual, the matter was case managed. By her order, Drysdale M set the matter down for case management on 19th January 2021. Subsequently, Thomas M in her 30th March 2021 order granted liberty to the parties to make any application by 21st May 2021 and fixed a further case management conference for 23rd June 2021. Although entitled to do so, the appellant at no time before or during the trial made any application to strike out any part of the respondent's pleadings or witness

[29] CPR 29.1.

statement on the ground of inadmissibility due to objectionable hearsay; breach of the separation of powers doctrine; breach by the respondent of his oaths of secrecy or confidentiality; or violation of Cabinet collective responsibility. Further, he made no such submissions before the learned trial judge.

[78] In the circumstances, the learned trial judge was entitled to presume that the appellant had no objections to any of the material laid out in the respondent's Amended Defence or his witness statement or his oral testimony. She had no duty to descend into the arena to identify and strike out from the evidence, hearsay material or information which might have been adduced in breach of any oath of secrecy or confidentiality, breach of separation of powers or Cabinet collective responsibility or to ignore such evidence in arriving at her decision in the absence of an application.

[79] Moreover, taking such a course in this case would have been presumptuous, needing to be premised on knowledge that the respondent was not armed with exemptions from the very Cabinet absolving him of the need to observe the referenced conventions and oaths. There was nothing in the record to justify embarking on such a course. More fundamentally, it is well-established and almost trite law that an appellant is not at liberty to raise a legal argument on appeal that was not made in the court below. Since Mr. Bird took no exception to those matters and did not object to any hearsay evidence in the court below, he may not advance those arguments successfully as a basis for his appeal. Moreover, adopting such a stance would have denied the respondent the opportunity to present his case, would run counter to the overriding objective and be unjust and unfair. For those reasons, the appellant's contention that the learned judge erred by ignoring the separation of powers doctrine, the principle of collective responsibility of Cabinet and alleged breach by the respondent of his oath of secrecy and confidentiality does not assist him.

[80] For completeness, it is worth noting that for purposes of determining a defamation suit and whether the defence of truth was made out, it was not necessary for the learned judge to engage with and determine issues concerning the co-equal status of the judicial and executive arms of government; whether a court can set aside policy making decisions of Cabinet (and she did not set aside the Cabinet Decision); the collective responsibility of members of Cabinet; whether Mr. Browne is bound by Cabinet decisions and is estopped from impugning the Cabinet Decision; or whether the respondent by giving evidence breached his oaths of secrecy and confidentiality. Additionally, she was not bound to accept that the Cabinet Minutes reflected the proceedings and decisions of Cabinet where there was contradictory evidence which she was bound to consider and entitled to accept and act on, if she determined that it was credible and that it rebutted the presumptions of regularity and validity, as she evidently did.

[81] The learned judge clearly took into account the evidence that the Cabinet is vested with exclusive responsibility for the sale of Crown lands and for fixing any price in relation to such sale. This is a reasonable and compelling inference to draw from her reasoning and conclusions. She may not have stated this expressly but there was no need for her to do so. Moreover, there is nothing in the judgment that suggests that she did not factor this into her deliberations. I am not persuaded that she did not.

**Issue 3 – Truth and Fair Comment**
**Appellant's submissions**

[82] At the centre of Mr. Bird's appeal was a three-pronged criticism of the learned trial judge's factual and legal findings regarding the defences of truth and fair comment mounted by Mr. Browne. Mr. Bird submitted that: a) not only was the weight of the evidence against the decision; but also b) the learned judge erred in law by attaching the meanings that she did to the words used in the posts; by failing to take into account relevant considerations; and c) by holding that it was not established that Mr. Browne was actuated by malice. In advancing these submissions Mr. Bird

repeated arguments that have already been addressed in this judgment. It is therefore not necessary to set them out at length again.

[83] Mr. Bird contended that no evidence was adduced of him being involved in anything nefarious or illegal such as a suggestion that he attempted to bribe Mr. Browne for assistance in securing the Cabinet Decision. Further, he was not a member of Cabinet, was not in a position to influence the Cabinet in making the decision to offer him land for sale at a special concessionary rate, and there was no evidence that he was responsible for it or linked to it. He reasoned that the Cabinet Decision is still in place from 2003, not having been reversed by successive governments and it was relevant that he never purchased or took other action on it.

[84] It was submitted that in the face of that reality and the evidence supporting such findings, the learned judge ascribed too much weight to inadmissible, self-serving hearsay evidence from Mr. Browne that other Cabinet colleagues told him that there was no discussion of the decision at Cabinet; allowing him to successfully attack the Cabinet Decision leading to a finding by the learned judge that it was a creeper decision and not legitimate. It was submitted further that the learned judge erred by shifting the burden to him to prove that the decision was valid and the judge had no other evidentiary basis on which to find that the Cabinet Decision was a creeper. It follows that her conclusion that it was, is against the weight of the evidence.

**Defence of Truth**

[85] In relation to the defence of truth, Mr. Bird contended that the learned judge erred in law by holding that it was available to the respondent. In particular, he highlighted the findings that Post #1 clearly imputes to him that having not been entitled to rates for land sale attributable to a parliamentarian, he clandestinely and by means of corrupt practices was able to obtain a parcel of land; of the imputation in Post #2 that he was able to manipulate the Cabinet confirmation process and obtain by corrupt means land to which he was not entitled; and that Mr. Browne's utterances

would be likely to be understood by the reasonable and right-thinking member of society as libelous in the circumstances.

[86] Mr. Bird argued that the learned judge failed to have regard to the 30th March 2021 ruling by Thomas M that the words complained of were capable of bearing the meanings ascribed to them in the statement of claim (i.e. that he is a thief, a crook and corrupt politician). He maintained that the evidence does not support the conclusion that he was a corrupt politician, crook or thief, or that he derived a benefit from a crooked cabinet deal, or defrauded the State of Crown lands at the Parliamentary rate of $25,000.00 per acre to which he was not entitled.

[87] It was submitted further that the learned judge erred in law by holding that the defence of truth is available to Mr. Browne in respect of the words:

(1) 'Yet, he and his father **concocted a deal** to sell him land at the parliamentary rate'.

(2) 'You claim that you didn't get the land, but you cannot refute the decision to sell you the land at the concessionary rate for which **you were not eligible**'.

(3) 'Thanks to the vigilance of our public servants the **crooked land deal** was not effected'.

(4) '**I was even told by my colleague who served in the Cabinet that the decision was a Cabinet creeper**'. [Emphasis added]

[88] It was argued that to the contrary the uncontroverted evidence is that Mr. Bird did not purchase the Crown lands although the Cabinet Decision approved the sale to him. Moreover, nothing prevented Cabinet from approving the sale to him at any price, even below the parliamentary rate. On this score, it was submitted that the learned judge should have accepted that Cabinet granted him the concessionary rate, and should not have shifted the onus to him to prove that he was entitled to that rate.

[89] In addition, it was contended that by doing so the learned judge improperly took into account that he had not adduced evidence to show that he had notified Cabinet of his decision not to accept the option to purchase the said lands. Mr. Bird submitted that the learned judge should have concluded instead that the onus was on Cabinet to reverse the Cabinet Decision if it considered that it was improper.

[90] As to the reference to the vigilance of public servants and being told by a colleague that the Cabinet Decision was a creeper, it was submitted that the learned judge once again relied on self-serving, inadmissible, hearsay statements by Mr. Browne that were entirely speculative, opinionated and not supported by evidence. Further, Mr. Bird's lack of knowledge of the procedure to have a matter laid before Cabinet and about how such decisions are obtained were considered by the learned judge without the parallel appreciation that such matters are generally not known by laymen and are within the peculiar knowledge of Ministers and their supporting technocrats. By ignoring these realities, the learned judge erred and compounded this error by placing the onus on Mr. Bird to prove the authenticity of the Cabinet Decision.

[91] Mr. Bird submitted that the learned judge erred by attaching significance to Mr. Browne's evidence that he was approached by the appellant's father when there was nothing wrong with a Cabinet colleague approaching another for support of an upcoming Cabinet proposal, and further the evidence did not suggest that either the father or the son invited Mr. Browne to commit fraud or engineer a Cabinet creeper.

**Fair Comment**

[92] On the issue of fair comment, Mr. Bird acknowledged that the test for the defence of fair comment as laid down in **Silkin v Beaverbrook Newspapers Ltd**[30] is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it. He contended however that the learned judge erred in law by not applying the proper test in that she held that once satisfied that Mr. Browne's

[30] [1958] 1 WLR 743.

comment and opinion was supported by proof that the appellant was the beneficiary of the Cabinet Decision allowing him to buy Crown land at a rate traditionally reserved for parliamentarians he could rely on the defence of fair comment. It was submitted that it was not sufficient for the learned judge to isolate the fact of the Cabinet Decision and conclude that once the comment was related to the fact of that decision it is fair no matter how exaggerated, prejudice or obstinate it is rendered. Mr. Bird argued that instead, she should have assessed the facts in the context that he played no role in securing the Cabinet Decision, that he had not taken it up and had evinced no intention to do so; and it had not been rescinded by Cabinet, including the one headed up by Mr. Browne as Prime Minister for the past nine years.

[93] It was submitted further that the learned judge erred in law by finding that the defence of fair comment was available in respect of the words: 'Crooked Vere, kindly explain to the people what made you eligible for land at a parliamentary rate'. Further, that by referring to him as 'crooked', Mr. Browne was expressing an opinion as to the nature of his conduct and could in the circumstances be understood as an inference from supporting facts. He argued that she erred by holding that the use of the word 'crooked' in reference to him, while being 'pungent and offensive', it was Mr. Browne's opinion of his (Mr. Bird's) actions.

[94] Mr. Bird submitted further that in any event, Mr. Browne did not properly set out the relevant facts in his pleadings on which his fair comment defence relied. He argued that the learned judge erred in law by not taking this failure into account and consequently made a determination which is wrong.

**Malice**

[95] Learned King's Counsel Mr. Ferguson argued that in all the circumstances of the case, the defence of fair comment was defeated by malice and the learned judge erred in law by failing to so find. He argued that she erred further by finding that the expression 'Crooked Vere' was not utterly disproportionate to the facts; that all that

Mr. Browne said was based on a truthful interpretation of what had transpired; and finding he had not proven that Mr. Browne was actuated by malice so as to defeat the plea of fair comment.

[96] It was submitted further that Mr. Bird and Mr. Browne are political rivals and by virtue of his position as Prime Minister, the respondent knew or ought to have known that he had nothing to do with procuring the Cabinet Decision, yet he sought to pin him with such involvement and in the process described him as crooked out of political spite or for the ulterior motive of gaining a political advantage.

**Respondent's submissions**

[97] On Mr. Browne's behalf, learned counsel Mr. Hewlett argued that the learned judge properly found as a matter of fact that the only reason why the Cabinet Decision was not executed and Mr. Bird put into possession of the Crown lands was because there was a change of government and public servants in government employ would not have effected the illegitimate decision. Against this factual finding, it followed that it was open to her to conclude that the substance of Mr. Browne's comments was factual and afforded him the defence of fair comment.

[98] It was submitted further that the evidence showed that Mr. Browne won his seat in every election since the 1990s while Mr. Bird was unsuccessful in securing his seat on either occasion on which he offered himself as a political candidate. Accordingly, it was open to the learned trial judge to find that they were not political rivals in that Mr. Bird was not a threat to Mr. Browne and it could not be said that he was seeking political mileage through the posts nor was it demonstrated that he had ever shown bad intent towards Mr. Bird. It was submitted that based on the evidence the learned judge was entitled to accept Mr. Browne's testimony and find as she did that the defence of fair comment had been made out and that Mr. Browne was not actuated by malice.

**Discussion**
**Defence of Truth**

[99] Although Mr. Bird appealed against the learned judge's finding that the defence of truth is made out, on those grounds his submissions were very limited and he appeared to have resiled somewhat from that posture. Notwithstanding, for completeness, it is necessary to examine the learned judge's evaluation of the defence against the background of the case.

[100] To succeed in a claim of defamation a claimant is required to prove that the defendant has published material about him to another person or other persons which tends to lower him in the estimation of right-thinking members of the society. In determining whether the defence of truth is available, the trial judge must evaluate all the evidence. In construing the meaning of the words, the court will give them their natural and ordinary meaning. Such meaning may include any implication or inference which a reasonable reader may draw from the words used. For such purposes, the reasonable reader is an individual who is guided by general knowledge, has no special knowledge about the subject matter and is not fettered by strict legal rules of interpretation.[31]

[101] To defeat an action for defamation, a defendant who raises a defence of truth must prove either that every impugned libelous statement made by him is truthful or substantially true. This is the effect of section 20 of the **Defamation Act** of Antigua and Barbuda. In practical terms, such a defendant must demonstrate that the imputations of the impugned words were true or not substantially different from the truth. The defence will also succeed if the defendant can show that when taken as a whole, the publication was materially true if, when the truth of the remaining imputations is considered, the words not proven to be true do not damage the claimant's reputation substantially.

[31] Lewis v Daily Telegraph Ltd [1964] A.C. 234. See also Jones v Skelton [1963] 1 WLR 1362.

[102] It is entirely within the province of the trial judge to assess the ordinary and natural meaning of a publication. In doing so, he must 'read the article as a whole, and eschew over-elaborate analysis, and, also, too literal an approach.'[32] An appellate court would only disturb such a finding if satisfied that the trial judge erred. In instances where the words used may bear multiple good interpretations, it would be unreasonable for the judge to latch onto the only adverse or negative one to ascribe a defamatory meaning to them. It is not presumed that the ordinary reader is avid for scandal. Such a reader is one who would not select one defamatory meaning over meanings that are not defamatory if such other meanings may also be imputed to the words used.

[103] The learned trial judge in this case noted at the outset[33] that the learned master had determined on 30th March 2021 that the words complained of were capable of bearing the meanings set out in the statement of claim at paragraph 10 and there was therefore no need to make that finding. She set out those meanings in footnote 5. Citing **Dr. Frank Skuse v Granada Television Limited**,[34] the learned judge noted that it was the court's responsibility to assess those words in their context to 'characterize and summarize the thrust of the [information] as a whole' in making the determination of whether they are defamatory or in fact defamed Mr. Bird.

[104] In considering the test as to what is defamatory, the learned judge correctly noted that such a publication is one that contains "either expressly or by implication statements of fact which tend to lower the Claimant in the estimation of right-thinking members of society generally or it exposes [him] to contempt, public hatred, and ridicule … [or that] imputes dishonesty to a person in the context of his trade, business, or profession. … the test is that, of how the **ordinary, reasonable man who is fair minded** to whom the words are published is likely to understand

[32] Bonnick v Morris and others [2002] UKPC 31, at para. 9.
[33] At para. [11] of the High Court judgment.
[34] [1993] EWCA Civ 34.

them."[35][Emphasis as in original]. **Beulah Mills v Michael Perkins et al**[36] was referenced as articulating this test.

[105] In her 30th March 2021 ruling, the learned master held that in their natural and ordinary meanings, the words published and broadcasted by Mr. Browne in his 6th and 8th November 2019 posts, meant or were understood to mean (as pleaded by Mr. Bird at paragraph 10) that:

> "(a) The Claimant is a crook.
>
> (b) The Claimant is a thief.
> (c) The Claimant is a corrupt politician.
>
> (d) That the Claimant derived a benefit from a crooked cabinet deal
>
> .
>
> (e) The Claimant and his father fraudulently concocted a deal to sell him land at a concessionary Parliamentary rate.
>
> (f) The Claimant was guilty of fraudulent practices against the Cabinet of Antigua and Barbuda by having a bogus cabinet decision (a.k.a. Cabinet Creeper) palced (sic) in the officially approved Cabinet minutes.
>
> (f) (sic) The Claimant had defrauded the State of Antigua and Barbuda of its Crown Lands by getting an acre of land at a concessionary rate of $25,000.00."

[106] The learned master held further that the ordinary and right-thinking member of the community would likely take the words to mean as Mr. Bird described them – he was a crook, a thief and he had committed fraud. She also agreed that the words spoken on 6th November 2019 could be taken by right thinking members of society that the appellant had committed criminal offences relating to corruption and fraud. Further, "[w]ith specific regards to the allegation of corruption and fraud, conspiracy and aiding and abetting to commit criminal offences. Insofar as the words allege that the claimant aided and abetted his father in the crooked land deal, and this would have been a criminal offence by his father, the words are capable of bearing the meaning that the claimant [the appellant] too, committed criminal offences".

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[35] Para. 15 of the High Court judgment.
[36] NEVHCV2009/0098 (delivered 23rd July 2014, unreported).

[107] The learned master continued:

> "[7] The words published on the 6th November 2019 that "he and his father concocted a deal to sell him land at a Parliamentary rate" could have been taken by the ordinary man to mean that in fact the claimant had been sold the land in question. While lawyers and judges with legal training would know as a matter of law that the statement did not mean that the claimant had received the land and that something more had to have been said to impute an actual sale, I am of the view that the ordinary man would not appreciate that more needed to be said. It is likely that ordinary people hearing those words would take the words to mean that the claimant actually benefitted from the 'deal'.
>
> [8] …. I am of the view that the publication of the 8th of November 2019 does not change the meaning of the words published on 6th November 2019. Any communication on the 8th November 2019 merely in my view removes the sting of the 6th November publication …
>
> [9] In relation to the meaning the "the Claimant was guilty of fraudulent practices against the Cabinet of Antigua and Barbuda by having a bogus cabinet decision (a.k.a. Cabinet Creeper) placed in the officially approved Cabinet minutes", paragraph 10(f-1) I cannot say that the words carry that meaning. It seems to be that the words "Cabinet Creeper" do not have a clear meaning or would mean nothing at all to the ordinary man. It was for the claimant to plead any innuendo meaning attributed to the words. For the ordinary man to appreciate the meanings ascribed, he would have to know the background and circumstances behind the use of the words "Cabinet Creeper". I accordingly find that that meaning ascribed is not the natural and ordinary meaning of the impugned words and as such the claimant cannot rely on that pleaded meaning at trial, him (sic) having failed to particularise the facts and matters in his pleadings to show a meaning other than the natural and ordinary meaning of those words. Those words are accordingly struck out.
>
> <u>IT IS HEREBY ORDERED THAT:</u>
>
> 1. ....
> 2. The meaning ascribed to the words at paragraph 10(f-1) is struck out."[37]

[108] Citing **Gatley on Libel and Slander** the learned judge noted that when considering the defence of truth it is important to 'isolate the essential core of the libel and not

[37] Paragraphs [7], [8] and [9] of the 30th March 2021 Order.

to be distracted by inaccuracies around the edge – however substantial.' She noted further that the context of the entire publication as a whole is to be considered and words should not be taken out of context. She added, 'the claimant is not entitled to take a blue pencil to the article, so as to change its meaning and then prevent the defendant from seeking to prove the truth [of] the words in the unexpurgated form.'

[109] The articulation of the applicable legal principles by the learned judge as it relates to what is required to establish the defence of truth, is unassailable. To the extent that Mr. Bird takes issue with the judge's identification and reproduction of the relevant law, such submissions are not borne out.

[110] I turn next to how the learned judge applied the legal principles to the content of the posts and the evidence in its totality. After she outlined the law she proceeded to consider Post #1 in which it was stated: "Sept 2003 when his late father Vere Bird Jnr was Minister responsible for Crown Lands. Killer was not a parliamentarian, yet, he and his father concocted a deal to sell him land at a parliamentary rate" ("the statement"). She found on a balance of probabilities that the appellant's father was a member of Cabinet and was the respondent's colleague at the time of the Cabinet Decision; that Rupert Sterling was not a member of Cabinet and that the Cabinet Decision allowed the appellant to buy land at a concessionary rate to which he was not entitled.

[111] The learned judge accepted that the sting in the statement would have been attached to the word concocted and that Mr. Bird admitted in evidence that that was the reason he was upset. She found that Mr. Browne had proven the literal truth of the basis of the statement and further that it could be reasonably inferred that the appellant and his father who was a member of Cabinet had been able to create a scenario in which he received lands at a concessionary rate to which he was not entitled, especially in view of the fact, that Mr. Sterling was not a member of Cabinet and had no ability without assistance from a Cabinet member to arrange such a benefit to the appellant. She ruled that the word 'concocted' in the context used

cannot be considered as materially injuring Mr. Bird's reputation because the facts giving rise to the use of that word are true and could lead a reasonable person to use that term.

[112] In my opinion, the statement under consideration was expressed in clear unambiguous language which gave rise in the natural and ordinary expressions to the meanings ascribed to them by the learned judge. In arriving at that conclusion, she clearly applied the natural and ordinary meanings of the words including in relation to the sting.

[113] In relation to part 2 of Post #2 ('You claimed that you didn't get the land, but you cannot refute the decision to sell you the land at the concessional rate for which you were not eligible'), the learned judge noted that this statement expands on the earlier accusation that the Cabinet Decision conferred a benefit on the appellant to which he was not entitled and she found that it was true. As to part 3 of Post #2 ('Thanks to the vigilance of our public servants the crooked land deal was not effected') she noted the appellant's testimony that the reason the offer to buy land at the concessionary rate was not taken up by him, was because he was uncomfortable since he 'did not want to be associated with other members of Cabinet who bought land at peppercorn rates and then sold them for millions of dollars'.

[114] The learned judge had the option of accepting this testimony or finding that the respondent's explanation in the post was more probable, reasonable and acceptable. She chose the latter, reasoning that Mr. Bird had not produced any evidence to show that he had communicated his decision to Cabinet that he did not intend to take up the offer. She held further that the adjective 'crooked' was a reasonable inference to be drawn in all the circumstances, the Cabinet Decision having been effected outside the parameters of normal procedure. She found that the statements did not materially depart from the truth of the situation and therefore the respondent could avail himself of the defence of truth in relation to them.

[115] Having accepted the ruling by the learned master (at paragraph 11 of the judgment) that the words were capable of being construed to mean that the appellant is a crook, a corrupt politician and that he derived a benefit from a crooked cabinet deal, the learned judge did not repeat or incorporate this determination at this later stage. It is implicitly captured by reference to this post where the term 'crooked' appears.

[116] Here again, the language of the impugned post is clear and unambiguous. The words permit a natural and ordinary construction of the kind adopted by the learned trial judge. Within the factual context the learned judge was entitled to infer that the term 'crooked' was appropriate and reasonable. In my estimation, she did not err in applying the legal principles in arriving at the meaning of the statements or finding that the defence of truth is available and I would not disturb her findings.

[117] In relation to Part 3 of Post #2 ('I was told by my colleagues who served in the Cabinet that the decision was a Cabinet creeper') as outlined earlier in this judgment, the learned judge accepted Mr. Browne's uncontroverted evidence and found that the Cabinet Decision could not be grounded in any sanctioned procedure. It is noteworthy that while the learned master declined to rule on the meaning of the expression 'Cabinet creeper' the learned judge accepted the explanation proffered by the respondent as to the meaning of and rationale underpinning the term. She remarked that the respondent thoroughly explained the concept in his examination in chief as being a non-genuine decision of the Cabinet.[38] She accepted that explanation of what constitutes a Cabinet creeper and was entitled to do so on the evidence available to her.

[118] In any event, the appellant has not appealed against the meaning ascribed to the term 'cabinet creeper'. The learned judge's ruling as to the meaning therefore stands as does her finding of the meaning of the related impugned statement and that the respondent is entitled to rely on the defence of truth in relation to it. It is worth noting that the law does not require that the impugned statement attracts all of the negative

[38] Para 54 of the High Court judgment.

meanings that may be ascribed to them, merely that the imputations are factually true or substantially true. In other words, if a particular natural and ordinary defamatory meaning is shown to be true or substantially true the defence is made out even if another possible defamatory meaning is not borne out by the facts, if when the truth of the other imputations is considered, the unproven words do not damage the claimant's reputation substantially.

[119] It is accepted that the learned judge did not engage with or address frontally whether the defence of truth is available in respect of the imputations that the appellant is 'a thief, corrupt politician or that he and his father 'fraudulently' concocted a deal or that he 'defrauded the State of Antigua and Barbuda of its Crown lands by getting an acre of land at a concessionary rate of $25,000.00'. Further, she did not consider if the defence of truth was available in respect of those meanings and if not, whether they had the effect of damaging the appellant's reputation substantially. It therefore stands to this court to do that assessment.

[120] While the learned judge did not address the meaning of 'fraud' or 'fraudulently' in making her determination, she accepted that the learned master had already captured the full scope of imputations arising from the posts. Suffice it to say that 'fraud' from the viewpoint of a reasonable right-thinking lay person carries the meaning of dishonest or absence of integrity. Such imputations, in my view, arise from the facts found to have been proved by the learned judge, i.e. that the appellant's involvement in securing the Cabinet Decision was dishonest. Such an imputation would add nothing to the findings made by the learned judge and in my estimation not significantly lower the appellant's reputation in the mind of right-thinking members of society below the level occasioned by the other imputations attributed to the impugned statements and would similarly be defensible by truth.

[121] With respect to the imputations of 'thief' and 'corrupt politician', I hesitate to find that they have been made out. The fact that Mr. Bird has not taken up the offer in the Cabinet Decision goes towards negativing the imputation that he received

something much less stole anything and is therefore a thief. Likewise, it is important to consider the learned judge's findings at paragraph [16] of the judgment that 'Post #1 clearly imputes to the Claimant [appellant] that not having been entitled to rates for land sale attributable to a parliamentarian, that he clandestinely and by means of corrupt practices was able to attain a parcel of land. Post #2, it is again imputed to the Claimant that he was able to manipulate the Cabinet confirmation process and obtain by corrupt means land to which he was not entitled'.

[122] I note that while the learned judge held that Mr. Bird was involved with his father in 'creating a scenario where he received land at concessionary rates in circumstances where he was not so entitled' she stopped short of finding that he received the land or that the imputation of corruption was defensible as truth. I likewise refrain from doing so because he never received the Crown lands and it is unclear from the learned judge's findings of fact what that thing is that Mr. Bird is alleged to have done 'to create a scenario'. The question remains 'when the truth of the proven imputations is considered would those unproven words damage Mr. Bird's reputation substantially?' I would answer that question in the negative for the simple reason that when the proven imputations are considered, accusing Mr. Bird of being a corrupt politician and a thief is not much worse than the other imputations that were appropriately found by the learned judge to be protected by the defence of truth.

[123] From the foregoing, it is evident that contrary to Mr. Bird's contentions, the learned judge applied the relevant legal principles to the underlying facts as proved and in each instance correctly, reasonably and justifiably held that while the words have the defamatory effect as ruled by the learned master (and by her in relation to the term 'cabinet creeper'), the defence of truth was available to Mr. Browne. Further, in arriving at this determination, the learned judge not only considered the learned master's ruling as to the natural and ordinary meanings of the impugned statements, she applied them appropriately to the extent that they are applicable. The appellant's contention to the contrary is not made out.

[124] As to Mr. Bird's submissions that the learned judge took into account irrelevant considerations by placing significance on the fact that he had shown that he notified Cabinet that he did not wish to exercise the option to purchase Crown lands at the concessionary rate, I am satisfied that the learned judge was entitled to take that matter into consideration in determining whether the defence of truth was available in respect of the imputations regarding Mr. Bird's involvement in obtaining the decision. As indicated earlier, Mr. Bird's objection to the admission of hearsay evidence at this appellate level cannot assist him since he did not raise it before the lower court. Further, it is not correct to say that the learned judge did not take into account that the Cabinet Decision was never reversed. She may not have mentioned it expressly but this does not equate to lack of consideration. Finally, there was more than sufficient evidence on which the learned judge was entitled to rule as she did on the defence of truth. In the circumstances, I would dismiss Mr. Bird's appeal in relation to criticisms made about the learned judge's findings with respect to that defence.

**Fair Comment and Malice**

[125] A defendant who mounts a defence of fair comment in a defamation suit would succeed if he proves that the facts or allegations of facts on which the comments are based are true and that the comments about those facts are fair. He is also required show that the impugned words are comments on a matter of public interest and not facts – **Reynolds v Times Newspaper Ltd and others**.[39] Mis-statements of fact are not covered by the defence of fair comment. In relation to allegations of fact, a defendant will not be able to avail himself of the defence of fair comment by pleading that he honestly believed them to be true - **Myrna Liburd v Lorna Hunkins**.[40] The comments must be based on facts or be protected by privilege and must be one that on the facts as proved, an honest person could have held that opinion – **Deldridge Flavius v Dr. Ernest St. Hilaire**.[41]

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[39] [2001] 2 AC 127.

[40] SKBHCVAP2014/0023 (delivered 19th July 2019, unreported). See also Vaughn Lewis v Kenny Anthony SLUHCVAP2006/0002 (delivered 14th May 2007, unreported).

[41] SLUHCVAP2015/0003 (delivered 22nd July 2015, unreported).

[126] The legal principles articulated in the referenced cases are now embedded in sections 21 and 22 of the **Defamation Act** which provide:

> "**21**. **Defence of Fair Comment, truth of assertions**
>
> (1) In an action for defamation in respect of words, including or consisting of expression of opinion, a defence of fair comment shall not fail only because the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such of the assertions as are proved to be true are relevant and afford a foundation for the opinion.
>
> (2) Nothing in this section affects the liability of the defendant in an action for the defamation for the acts of his employee.
>
> **22. Publication on a matter of interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that –
>
> (a) The statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) The defendant reasonably believed that publishing the statement complained of was in the public interest."

[127] There is common ground among the parties that the leading authority on the defence of fair comment is **Silkin v Beaverbrook Newspapers Ltd**[42] which was applied by the learned judge. In that case, the Law Lords of the Judicial Committee of the Privy Council provided useful guidance on the applicable test explaining that irrespective of how exaggerated, obstinate or prejudiced an opinion may be, it affords a defence to a defendant of fair comment, provided that the opinion was honestly held by the author or publisher. Lord Diplock opined:

> "On what is the true test …, adapting it to the facts of this case, a statement made by a judge some years ago when he said this; "When you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind… you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people who do know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you," the jury, "to say. If they do believe it, and they are

[42] [1958] 1 WLR 743.

> within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments."

[128] The United Kingdom Supreme Court made similar pronouncements in **Spiller and another v Joseph and others**[43] with specific reference to posts on social media platforms by regular people. Lord Phillips had this to say:

> "…Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out."[44]

[129] He went on to stress that it is important for the comment to identify the subject matter of the post on which the comment is based at the very least in general terms or the general nature of the facts that led to the criticism. It is important to note that it is settled law that matters of public interest that may be open to fair comment include the behaviour of persons who hold or seek to hold public office or positions of public trust.[45] I bear these principles in mind as I examine the learned judge's determination against the appellant's criticisms which have to do not with any misdirection by the learned judge as to the applicable law but rather what have been characterized as errors in applying the law.

[130] With respect to malice, it is now settled and beyond dispute that proof that a defendant was actuated by malice would defeat a defence of fair comment. Express or actual malice refers to ill will or spite directed at the claimant or an indirect or improper motive in the defendant's mind which is the primary or only motive for the impugned publication. It is established by proof that the defendant did not honestly

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[43] [2010] UKSC 53.

[44] Ibid at para 99.

[45] Myrna Liburd v Lorna Hunkins, at para. [58].

hold the opinion expressed in the publication – **Halsbury's Laws of England**.[46] It is for the claimant to prove that the defendant was actuated by malice in making the publication.

[131] In the case at the appeal bar, the learned judge quoted sections 21 and 22 of the **Defamation Act** and relied on **Silkin v Beaverbrook Newspapers Ltd**, **Joseph v Spiller** and **Tse Wai Chun v Cheng**[47] among others for the propositions of law highlighted in the preceding paragraphs as to fair comment. She identified two statements as containing comments: 'Here goes the Bird Poop again, trying to intimidate people for factual and responsible free speech' and 'Crooked Vere, kindly explain to the people what made you eligible for land at a parliamentary rate.' The learned judge concluded that both statements were opinions by Mr. Browne in relation to conduct by Mr. Bird on a matter of public interest about which underlying facts were set out in the previous statements of the posts and held to be truthful. She concluded that having regard to the actions described in those statements an individual could honestly hold the beliefs of disgust and disapproval against Mr. Bird which could properly and justifiably attract the description of 'crooked' and 'Bird Poop' to reflect their disdain.

[132] It was acknowledged by the learned judge that the adjectives used by Mr. Browne to describe Mr. Bird's conduct were 'pungent and offensive' and 'prejudiced and exaggerated' but nonetheless predicated as they were on the truthful fact that Mr. Bird was the beneficiary of the Cabinet Decision, Mr. Browne could avail himself of the defence of fair comment in respect of both comments.

[133] I am satisfied that the learned judge correctly applied the legal principles enunciated in **Silkin v Beaverbook Newspapers** when she found that the posts constituted fair comment on a matter of public interest that were honestly held by Mr. Browne and grounded in the truth of the facts outlined in the posts which she ruled were

[46] Vol. 32 (2023) para. 646.
[47] [2000] HKCFA 86; [2001] EMLR 31.

substantially true. In my opinion, the learned judge did not err in the evaluation exercise by finding that the defence of fair comment was available to Mr. Browne in respect of those posts.

[134] On the issue of malice, the learned judge cannot be faulted in her articulation of the law governing the nature and effect of malice. She held that the words 'Bird Poop' and 'Crooked Vere' were not in themselves violent or utterly disproportionate to the facts. She rejected Mr. Bird's assertion that Mr. Browne was motivated to make the publications because he was seeking political mileage. She reasoned that the parties' respective track records as political candidates belied Mr. Bird's contention that Mr. Browne considered him a political threat or rival or that the latter was actuated by malice. I agree with her conclusions for the reasons she outlined in the judgement. I would not interfere with her determination that Mr. Browne was not actuated by malice when he published the impugned statements and would dismiss the related grounds of appeal.

**Issue 4 – Judicial Review point**

[135] Mr. Bird criticized the learned judge's approach to the trial by arguing that she treated it as a judicial review hearing and not as a defamation claim. He reasoned that the learned judge's failure to accept the Cabinet Decision at face value as being regular and by entertaining contradictory evidence from Mr. Browne as to its legitimacy was an error in law that made her decision wrong.

**Discussion**

[136] This ground of appeal and submission amounts to a re-packaging of the argument that the learned judge erred in law by going behind the Cabinet Decision and inquiring into the procedure by which it came about. It was addressed earlier and discounted as a meritorious submission. In my opinion, the learned judge did not conduct a review of the Cabinet Decision akin to the procedure utilized in a judicial review action. Her approach to the competing evidence and submissions on the point were in conformity with the applicable CPR rules and other procedural rules

applicable to the hearing and disposal of civil claims. She did not depart from well-established practice and procedure. The appellant's assertions to the contrary are not borne out by the record. I would therefore dismiss ground of appeal 3.

**Disposition**

[137] For the reasons outlined above, I would make the following orders:

(1) The appeal against the judgment of Byer J dated 27th April 2023 is dismissed and the orders made in it are affirmed.

(2) The appellant shall pay costs of this appeal to the respondent to be assessed, if not agreed within 21 days of today's date.

[138] Completion of this judgment was protracted. I wish to express sincerest apologies to the respective parties for the delay and for any inconvenience caused to them. The patience exhibited by both sides is very much appreciated.

[139] Finally, I am grateful to the legal practitioners for their written and oral submissions.

I concur.
**Margaret Price Findlay**
Chief Justice (Ag.)

I concur.
**Vicki Ann Ellis**
Justice of Appeal

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

**By the Court**

**Chief Registrar**