Neutral Citation Number: [2007] EWCA Civ 721

Case No: A2/2006/1235

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE EADY
HQ04X03130

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2007

Before :

THE RT HON. LORD JUSTICE WARD
THE RT HON. LORD JUSTICE SEDLEY and
THE RT HON. LORD JUSTICE MOORE-BICK

- -

Between :

	1. Christopher Roberts **2. Barry Roberts**	Appellants
	- and -	
	1. Gerry Gable **2. Steve Silver** **3. Searchlight Magazine Ltd**	Respondents

- -
- -

Mr H. Tomlinson QC and Mr A. Davies (instructed by Osmond & Osmond) for the appellant.
Mr G. Millar QC and Mr G. Vassall-Adams (instructed by Kosky Seal) for the respondent

Hearing date: 22nd February 2007

- -

Judgment

Lord Justice Ward:

A Short Introduction

1. The claimants, Christopher and Barry Roberts, claim that the defendants, Gerry Gable, Steve Silver and the Searchlight Magazine Ltd libelled them in an article in the October 2003 edition of a monthly magazine called *Searchlight*, the natural and ordinary meaning of which is said to be that:

> "(i) the first claimant stole money collected at a British National Party ("BNP") rally, (ii) he did not return it until threatened with being reported to the police, (iii) both claimants threatened to kneecap, torture and kill Dave Hill and Robert Jeffries *alias* Bob James, and the families of Dave Hill and Robert Jeffries *alias* Bob James and (iv) both claimants might be subject to police investigation."

2. The defendants advanced two defences to this claim, justification and qualified privilege. The Master directed that the question of whether the words complained of were published on an occasion of qualified privilege in accordance with the principles set out by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 1 A.C. 127 should be tried as a preliminary issue.

3. On the trial of that issue Eady J. "had no hesitation in upholding the privilege defence" and so on 12th May 2006 he ordered that the claim be dismissed. The claimants now appeal with permission of this Court. The appeal gives rise to important issues about the operation of the so-called *Reynolds'* and *reportage* defences.

The facts

4. The third defendant is the publisher of the magazine *Searchlight* and the second defendant is its editor. The third defendant is the author of the article concerned. He explains in his witness statement that:

> "*Searchlight* is a monthly magazine that reports on the activities of far-right organizations and political parties in Britain and abroad. … We have built up a circulation of 5,000. … Our readership is predominantly comprised of people who are particularly concerned about the racist far-right and neo-Nazi and fascist groups. We count a significant number of MPs, academics, journalists, elements of the criminal justice system and organisations concerned with race relations among our readership along with concerned members of the public."

Its political stance is openly critical of the BNP and this case is concerned with the way some of the activities of the Party and its members and former members were reported in the journal in 2003.

5. Mr Gable describes himself as one who is

> "… recognised as a leading expert on the far right in Britain and in Europe. I have appeared on numerous television programmes, lectured in Western Europe, the USA, Canada and the Middle East, written two reports for the European Parliament on racism, fascism and xenophobia and given evidence before the House of Commons Committee on Home Affairs on a number of occasions …"

6. The claimants, who are brothers, are men of good character. Both are active members of the BNP. At the material time Christopher was their London organiser. He was a potential candidate for the party in the campaign for the London mayoral election due to take place in 2004. He was the BNP candidate in the European elections in June 2004 and stood at the 2005 general election. There are descriptions in the papers of his successful career as an insurance broker in the City of London. Barry Roberts is a central heating engineer. He had been a BNP candidate at the 2001 general election. He stood again in 2005.

7. They are ill-disposed towards, even contemptuous of, the defendants and are less than flattering about their professional standards and probity. Each side is prepared to trade insults with the other and it is obvious that there is no love lost between them.

8. Mr Gable explains that the background to his article which has caused such offence was:

> "that there has been a long-standing power struggle over the policies and the direction of the BNP between Nick Griffin its current leader, and the late John Tyndall, the founder of the party. John Tyndall founded the BNP in 1982, along with ex-members of the National Front and under his leadership the party aspires to openly neo-Nazi policies such as banning marriages between whites and non-whites and the forcible sterilisation of immigrants. Its policies were watered down after Tyndall served a term of imprisonment in the mid-eighties for offences under the Race Relations Provisions of the Public Order Act. Nick Griffin, who has a similar conviction, became party leader in 1999 and has sought to re-brand the party to give it a more respectable and credible image. …
>
> Mr Tyndall did not fade from the scene and used his position as owner and editor of *Spearhead*, a far-right magazine, to attack Nick Griffin and his policies. … Activists were split, with some their owing allegiance to Mr Griffin and others still supporting Mr Tyndall."

9. As evidence of that power struggle our attention was drawn to an article by Mr Griffin called "At the crossroads" published in *Identity* in July 2003 in which he writes that:

> "Over the last few years, it has been the general policy of the British National Party leadership not to respond in our main publications to the continual negativity, distortions and

> downright lies emerging from the small but disruptive clique surrounding the former BNP leader John Tyndall.
>
> [Mr Tyndall] has spent the last four years trying to cause trouble for the present leadership and to create support for his long-awaited comeback bid."

10. In a long article in the October 2003 edition of *Spearhead* Mr Tyndall "pinpoints what is dividing the BNP". The headline of the article expressing his view is "Policies are not the problem: the problem is Mr Griffin." His article ends:

> "But first things first. Before anything permanently can be done, we have to get rid of the wrecker-in-chief."

11. The events with which we are concerned arise from a "**GRAND RALLY** … **to promote the BNP campaign for the London mayoral and GLA elections in 2004."** It was advertised in *Spearhead* to take place on Sunday March 9th but the readers were told that for security reasons the location of the rally would not be divulged in the magazine but that information about it could be obtained by telephone. Chris Roberts and John Tyndall were billed as speakers.

12. There are conflicting reports of what happened at that meeting. The *British Nationalist*, the members' bulletin for March 2003, supporting Mr Griffin, reported as follows:

> "**London 'rally' shambles**
>
> Last month a meeting to reinvigorate the party in London's East End turned into a shambles. The meeting was hijacked by disruptive elements, many of whom not members of our party – and the event served not to breathe new life into the East End and support the party's GLA campaign next year, but to attack the party, its leadership and add personal grievances of all kinds.
>
> The keynote address was given by the party's previous, old leader, Mr John Tyndall, who launched a strong attack upon the party. This is merely the latest in a continual barrage of attacks that began last summer, the object of which is to cause as much disruption as possible.
>
> …
>
> **Proscription**
>
> David Hill of Stepney, east London is henceforth a proscribed person. A non-member, Dave Hill with Robert Jeffries aka 'Bob James' (himself a proscribed person) and one other forcibly entered the home of London & the Essex regional organiser Chris Roberts on 9/3/03 and, with threats, stole £1,024 collection taken at the day's east London meeting, Hill and Jeffries were prominent in turning the East End rally into a

> farcical bear garden. The matter is now in the hands of the police."

13. On the other hand, April's *Spearhead* reported "**London rally best for years**" stating:

> "East London saw one of its best BNP meetings for many years on 9th March when an audience of 120 gathered above a pub in Newham to hear speeches aimed at generating support for the party's campaign to contest the London mayoral election and the elections to the Greater London Authority in 2004.
>
> …
>
> The meeting ended in tremendous enthusiasm and a collection raised a really splendid £1,024.00."

14. *Searchlight* itself reported the meeting in its April 2003 edition. Mr Nick Lowles wrote:

> "The fractious infighting in the British National Party shows little sign of abating as its north-west regional organiser resigns and its former leader, John Tyndall, rallies forces against the current leadership in London.
>
> …
>
> Over 100 London activists attended the meeting arranged by the BNP east London organiser …
>
> Despite the best efforts of Chris Roberts to keep to the set agenda, Tyndall and others openly attacked the leadership, Tyndall's exceptionally robust and bitter speech never mentioned anyone by name, referring only to "our chairman" and "our leadership". His words were punctuated by bursts of applause, especially when he directly criticised the party leadership."

15. Mr Gable wrote about this meeting for the first time in the May 2003 edition of *Searchlight*. His column is charmingly headed *"News from the Sewers*". In this article he was writing about the "***Night of the Short Knives"***. He reported:

> "Shortly after the rally the BNP March members' bulletin came out with the claim that Hill and James had turned up at Roberts's house and stolen the money collected at the meeting. Even more grassing took place at this juncture as a result of which the BNP leadership revealed James's true identity as Robert Jeffries. The party claims that the police have been informed about the alleged theft.
>
> The story doing the rounds is that Hill and Jeffries initially went to collect the £200 booking fee for the meeting room which Roberts had forgotten to pay in his rapid exit from the

> pub, but seeing all the money it appears temptation got the better of them and they took the lot.
>
> The party has proscribed Hill and claims that James is not a member, but then goes on about an existing proscription notice against him for subversion and attempted sabotage which remains in force.
>
> These are certainly not happy times for the BNP in London."

16. In June 2003 *Spearhead* published a letter from Tony Lecomber, a party organiser, which ended:

> "Lastly, I am not overly bothered by the condemnation of the thieves and robbers who were shouting the odds at the March London meeting. When people who criticise me go on the same day to break into the home of our London and Essex organiser and rob him of the Party's collection money then I know that I am on the right side."

17. Also in June a piece was published by "Dave & Bob", who are Dave Hill and Bob James *aka* Jeffries. They wrote about "Unrest in London" in these terms:

> "Now much has been said concerning the events **AFTER** the meeting [on 9th March], almost always by people who do not know what happened and therefore should have better sense than to slander others, namely us! **The truth is simple:** as the meeting closed and we were occupied shaking hand after hand of those leaving the hall Chris Roberts was observed by reliable witnesses taking the collection money, beckoning to his brother (who appeared confused) to follow him and then disappearing down the fire exit at the rear of the stage like excrement down a toilet. Now some people may call that theft!
>
> It was some ten minutes later, after John Tyndall and Richard Edmunds had also left that this happening was brought to our attention. Chris Roberts was immediately contacted via phone and asked to return with the collection so that the meeting's disbursements could be made and the funds passed to the north-west London organiser (who was waiting patiently) as agreed.
>
> Also on legal advice we came to the conclusion that if we can be reported to the police for something we didn't do, we would not be disgracing ourselves by reporting both Chris Roberts and Barry Roberts to the police for crimes they did commit. The matter is ongoing and therefore we cannot comment further at this time."

18. Dave Hill and Bob James also wrote to *Spearhead* in August in reply to Mr Lecomber's earlier letter describing them as "thieves and robbers". They responded saying:

> "It is not true that we broke into the home in question. If anyone is in doubt about this, they should feel free to contact Limehouse CID (East London) and/or the Essex Constabulary. Money was taken and kept which was owing to us for expenses incurred in organising a party meeting; all other money was shortly afterwards handed back to the party.
>
> The genuine version of these events can be found in a five page bulletin from us via the usual channels. All we ask from Mr Lecomber is that if he wishes to libel us he should have the legal bottle to use our names."

The editor added this note:

> "By printing this letter it should not be assumed that *Spearhead* takes sides in this dispute. We are only going in the interests of fairness, just as for the same reason we printed the Lecomber defence to which it refers."

19. August 2003 also saw the expulsion of Mr Tyndall from the BNP and the launching of his campaign to challenge that expulsion.

20. In September *Spearhead* published a letter from Laura Roberts, Chris Roberts' daughter setting out her account of how Dave Hill and Bob James retrieved the money and the editor noted that:

> "Now that all parties have had their say, correspondence on this subject is now closed."

21. The "five-page bulletin" referred to in the letter from Dave Hill and Bob James was sent anonymously to *Searchlight* in August or September 2003. It begins by observing that "dissatisfaction and unrest is rife in many regions for various reasons under our current leadership." It contains an attack on Mr Tony Lecomber and speaks of "an unholy alliance" between Lecomber and Griffin. It spoke of Chris Roberts in these terms:

> "Roberts came in with a swathe of criticisms about Lecomber and with a highly mooted CV outside nationalism. He was allegedly a millionaire, who retired early from the City with his fortune, a whiz kid who hated Lecomber, who had Nick Griffin's confidence and his ear. Just what was needed! Naturally, this endeared him immediately to organisers and activists in the south who loathe Lecomber almost to a man. Sadly, these glowing credentials quickly faded, evaporated and died.
>
> …
>
> Roberts soon began to look like a Griffin/Lecomber plant!

> Interestingly, his home turned out not to be on Millionaire's Row as we'd expected, but on Skid Row, among the working classes who slip and slide through life just like the rest of us.
>
> It was now quite obvious that a little village somewhere, was missing its little idiot!
>
> …
>
> It was quickly recognised by many old hands across London and the south, that this whiz-kid, this organisational genius and political saviour, was a fraud."

22. Then followed a piece which lies at the heart of this appeal. The bulletin continued:

> "Much has been said concerning events *after* the meeting, chiefly by people who do not know what really happened, but are foolishly ready to slander others who were actually robbed.
>
> The truth is simple, as it usually is. As the meeting closed, we were busy shaking hand after hand of those leaving the hall. Chris Roberts was observed by a reliable witness, taking the collection money and beckoning to his brother, who appeared confused, to follow him. He then disappeared down the fire escape at the rear of the stage like a turd down the toilet. Now some people call THAT theft!
>
> It was some ten minutes later, after John Tyndall and Richard Edmunds had also left, (respectively by the front door) that this strange behaviour of the Robbers – er, sorry, I mean the Roberts' brothers was brought to our attention.
>
> Chris Roberts was immediately contacted by phone and asked to return the collection money for obvious reasons, not least that the evening's disbursements could be executed, and the residue be passed to the pre-arranged fund holder as was understood by Roberts himself from the outset.
>
> Chris Roberts's response on the phone was that he was retaining the collection. He refused to recognise the booking fees etc were to be paid from the funds raised, said that we had to cover these costs ourselves, and that the entire meeting had been a "shambles" which he wished he had nothing to do with (and so say all of us).
>
> …
>
> Again we asked for the return of the funds. He became angry and aggressive, ranting that the money was his to do with, as he saw fit, before turning his phone off.

> There were two options: go against the grain and inform the police of the theft, or save the party from bad publicity and go to Chris Roberts' home and request him face to face to return what was not his. On the advice of some respected and credible members of longstanding, notable John Morse (who had chaired the meeting) and others, the latter course of action was decided upon.
>
> **THINGS GO FROM BAD TO WORSE**
>
> After a long and bizarre journey to Chris Roberts' home, which included getting cabs due to an exploding car (nothing to do with the wannabe Bomber Lecomber) we demanded the return of the money which he had no right to retain. After a short but negative exchange of words whereby Roberts made it plain he had no intention of complying with our request, we reluctantly threatened to report it as a matter of theft to the police there and then.
>
> At this, he voluntarily but angrily went to his car and retrieved the stolen funds and handed it over.
>
> …
>
> Just minutes after we left Chris Roberts' home his brother contacted us by mobile phone. He issued death threats to us, and to all who stood with us. Why? Simply because we had rightfully called his brother to account for stealing from us and from the people who had donated that money for a specific cause.
>
> **WHO IS ROB PURCELL?**
>
> Not long afterwards, a party bulletin scribed by one Rob Purcell, whoever he is, appeared with the laughable claim, and honestly, it did make us laugh, that we had committed what amounted to aggravated burglary, and that the party had left the matter in the hands of the police! So the whole episode takes a surreal turn.
>
> Chris Roberts takes money that does not belong to him, informs the police of a non-existent crime supposedly committed by his own victims, then over the following minutes, days, and now months, joins his brother in threats to "kneecap, torture and kill" our respective families and ourselves. These things are all recorded in official files, and can always be used to evidence the truth should it ever be necessary in future."

23. Mr Gable used all of the above material as sources for his article. He says he carried out his own research about the allegations that Hill and Jeffries had made. In his witness statement he says that he made contact with a number of individuals who

provided him with information about the rally and its aftermath, including the alleged theft and threats but he would not reveal their identity in order to protect his confidential sources of information. He did not contact either of the claimants because, as he explained in his oral evidence, "I didn't think they would have spoken to me. … I think I would have been told where to go very rapidly." He says that he believed the allegations were true but adds this in his witness statement:

> "The purpose of the article complained of was not to suggest that the allegations of either side were true, but to expose the very fact of the divisions within a political party trying to present a united and respectable front in advance of coming elections.

It was in those circumstances that he wrote the piece which is now the subject of this libel claim.

The libellous article

24. The "*News from the Sewers*" published in the October edition of *Searchlight* has the headline "**BNP London Row Rumbles on**". It reads as follows:

> "The two rival camps in the British National Party seem to have set their feud aside during the campaign that won the party a council seat in Gray's, Essex, last month. Even people who should not be in the party at all, such as the old hard line Nazi and *Searchlight* informant, Keith Thompson, were out plodding the streets for the BNP.
>
> In May this column reported a BNP rally in London at which John Tyndall, the party's founder, was the main speaker and several of his supporters were present. It now seems that this was an attempt to bring them together with their rivals, the supporters of Nick Griffin, the party's present leader.
>
> Since then Tyndall has been expelled from the party and has announced that he is resorting to the courts to challenge the decision.
>
> We described the London rally as the Night of the Short Knives. Soon afterwards the BNP's March bulletin accused two members of stealing the collection from the meeting. The story that was put around was that Dave Hill and Robert Jeffries, who is better known in the party as Bob James, stole the money from the house of Chris Roberts, the London and Essex organiser. It appears that the police investigated but decided not to act.
>
> Perhaps the police are now more interested in Roberts and his brother Barry. Hill and Jeffries recently issued a long letter attacking Griffin and his supporters, including Chris Roberts. It explains that it was Roberts who stole the money from the

> rally and that although it went against the grain, Hill and Jeffries reluctantly threatened to report him to the police. After Roberts angrily returned the money, the letter alleges, he and his brother Barry threatened to "kneecap, torture and kill" Hill, Jeffries, and their respective families.
>
> The letter complains that the Griffin leadership described Roberts as a self-made millionaire who was leaving the city to devote his time and fortune to the BNP, but he turned out to be a disappointment. 'It was now quite obvious that a little village somewhere, was missing its idiot!'"

25. Chris and Barry Roberts issued their claim for damages for libel on 30th September 2004. The defendants' case is that the activities of prominent members of a political party are always a matter of public interest and that they were merely reporting the allegations without adopting or endorsing them thus giving them a good defence under the recently emerging *reportage* doctrine referred to in *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2002] EMLR 215.

The judgment under appeal

26. The case is now reported at [2006] E.M.L.R. 23. Eady J made these findings:

> "16. It will thus be apparent that reporting both sides, in a disinterested way, is an important element in the doctrine of *reportage*. That is not to say, of course, that a journalist or publisher will be deprived of the opportunity of such a defence merely by reason of having a particular personal or corporate political stance. What is important in this context is not so much the political stance of the defendant, but rather the way in which the particular dispute or controversy is being reported. There is no doubt, for example, that Mr Gable is far from neutral so far as the BNP is concerned, but that does not mean that he is incapable of objective and disinterested reporting of what goes on within the party, although naturally it may require that any such defence be scrutinised with particular care. …
>
> 20. … At the time [of the meeting on 9 March 2003] it was apparently on the cards that Mr Christopher Roberts would be put forward as the BNP candidate for the office of Mayor. That fact alone would mean that his activities, policies and motivations were of legitimate public interest.
>
> …
>
> 24. … It is clear to me that readers of the words complained of would be well aware of Mr Gable's antipathy to the BNP and that he was merely reporting the conflicting positions rather than taking sides with either. They could hardly conclude that he had been present as an eye-witness and would, therefore, realise that he was not in a position to espouse one version or

> the other. What would be of interest to the reader would be the fact that the allegations and cross-allegations of criminal offences were being made by BNP factions against each other, and "not necessarily [their] truth or falsity" (to echo the words of Latham LJ in *Al-Fagih*). It seems to me that these were allegations they were entitled to know about, in the context of a party presenting itself before the electorate of London, and especially so since the allegations *against* Messrs Hill and Jeffries had already been reported."

27. He then dealt with the claimants' submission that the defendants would fail each and every one of Lord Nicholls "ten non-exhaustive tests" set out in *Reynolds* observing:

> "25. … I note in passing that they do not necessarily fit the *reportage* template (which was only articulated subsequently) as well as those situations where defamatory allegations appear to readers to have been adopted. Nevertheless, it is still no doubt right to have them in mind."

28. His judgment on those "tests" was:

> "26. The allegations are undoubtedly serious. It is perhaps fair to say that many readers would be likely to understand the allegations and cross-allegations to reflect the underlying personal and political dispute and to relate to a disagreement as to who should take charge of the collection – rather than to an allegation of taking money for personal enrichment. Nevertheless, the allegation passes Lord Nicholls' first test.
>
> 27. The legitimate interest in the subject-matter does not seem to me to be confined to party members or activists. For the reasons I have given, it extends in my view more widely and would embrace the general public and, in particular, the electorate.
>
> 28. No steps were taken to verify the information (as was also true in *Al-Fagih*). That would not be fatal, however, in a *reportage* case, where the fact of the allegations being made is what is important. Indeed, as Simon Brown LJ had commented, verification could be regarded as inconsistent with objective reporting.
>
> 29. So too, the "source" is of less significance in a *reportage* case, since it is not the reliability of either side which matters so much as the nature of the quarrel.
>
> 30. The allegations have certainly not been the subject of any investigation which would "command respect". The "status" speaks for itself, in the sense that the readers know who is making the accusations on either side. Readers of *Searchlight* are unlikely to accord much "status" to allegations being made

in such circumstances and may indeed be sceptical about both. (A significant proportion is likely to say "A plague on both your houses!")

31. There was no "urgency" about the matter. The ongoing dispute was being reported at a leisurely pace as it developed.

32. No comment was sought from either Claimant. Mr Gable did not imagine that either would wish to speak to him. Although both said they would have wished to have the opportunity of denying personal wrong-doing, they accepted that they would never have discussed political matters with anyone from *Searchlight*. The suggestion that they would have been willing to talk to him came as something of a surprise to Mr Gable, but the essential question is whether it was reasonable in all the circumstances for him not to make an approach. Given the long history of Mr Gable's interaction with the BNP, it seems to me that it plainly was. In any case, the important point (yet again) is the fact of cross-allegations rather than the extent of their accuracy.

33. It was disputed whether the Claimants' side was put. But readers would understand that each of the factions was denying impropriety but accusing the other.

34. As to the "tone" of the article, it is significant that Mr Gable was not adopting but reporting. I do not accept Mr Davies' submission that the use of "Perhaps" (in "Perhaps the police are now more interested in Roberts and his brother Barry") or "explains" (in "It explains that it was Roberts who stole the money …") demonstrates otherwise.

35. It will by now be apparent why I commented that Lord Nicholls' tests did not comfortably fit into a *reportage* case … Notwithstanding their cogency, it seems to me that in a *reportage* context this is a stronger case than *Al-Fagih* because of the significance to the British public and to the London electorate in particular. …

36. There is a duty ("social or moral") upon political commentators generally, including Mr Gable, to cover the goings-on in political parties, including disputes, fully and impartially. There is a corresponding legitimate interest in the public, and especially those who have a vote, to have such information available. More specifically, *Searchlight* having covered the allegations against Messrs Hill and Jeffries in its May 2003 issue, it would also be incumbent on it to cover their denials. As I have already noted, this set of circumstances is analogous to that considered by the Court of Appeal in *Al-Fagih* and its reasoning is correspondingly applicable – although this case is closer to home, in the sense that it was an

> English language journal discussing political factions within this jurisdiction.
>
> 37. In all the circumstances, I have no hesitation in upholding the privilege defence."

A summary of the submissions

29. Mr Tomlinson QC submits on the appellants' behalf that the appeal raises an important point of principle perhaps best encapsulated in these paragraphs taken from his speaking note:

> "[Eady J.'s decision] does, however, appear to have this consequence:
>
> > the media can (and indeed have a duty to) report any accusations made by members (or supporters) of political parties against one another provided only that there is
> >
> > > (a) no "adoption" and
> > >
> > > (b) those views are expressed in the course of a "dispute".
> > >
> > > In other words, provided there is a dispute, words in the form "A says that B has committed the following wrongdoing" are likely to be protected by qualified privilege.
> >
> > 14. This is a very considerable extension of *Reynolds*' principles and a fundamental shift in English defamation law. That law involves the balancing of the rights of reputation on the one hand and freedom of expression on the other – in modern parlance, the balance of the Article 8 right to reputation and the Article 10 right to freedom of expression. That balance has been carefully struck – the so-called "reportage" doctrine threatens to disrupt that balance to the detriment of the Article 8 rights of the claimants. This at the very time when, in other areas such as "privacy", the courts have recognised Article 10 rights are not "trump cards" but must be carefully balanced against Art. 8 rights. …
> >
> > 34. It is submitted that the "reportage" defence only applies when four conditions are satisfied;
> >
> > > (1) there is a continuing and active public dispute on a matter of public interest
> > >
> > > (2) where the urgency of the matter makes verification in the ordinary way difficult or undesirable

> (3) the reported allegations are attributed and not adopted
>
> (4) the reported allegations do not involve misconduct which has wider ramifications – that is misconduct which potentially exposed those responsible to third party sanctions."

30. In essence he submits:

> (1) the Article adopted the allegations and so lost the benefit of the *reportage* defence;
>
> (2) responsible journalism demanded verification and there was none. If there was no requirement to verify the allegations in a case like this, then there was an unacceptably wide "free fire zone" where the Art. 8 protection of reputation is given insufficient weight in the balance to be struck with Art. 10.

31. Mr Millar Q.C. emphasised the fundamental importance of freedom of expression and the need to establish a pressing social need to justify any exception to it. Hence a balance has to be struck, and it is for the trial judge to strike it and for the Court of Appeal to be slow to dislodge it. He submits that *reportage* is not a separate doctrine but an example of fair and responsible reporting within the scope of *Reynolds*, that the essence of *reportage* is the journalist's making it clear that that he is not asserting that the material is true. He submits that Eady J. was correct in deciding the case as he did.

Discussion

The Reynolds' defence

32. The libel law landscape has been liberalised by *Reynolds.* Although it is tempting for the purpose of this judgment to follow Simon Brown L.J.'s approach in *Al-Fagih* and say that one can "take as read the bulk of what was said in each of the five speeches in *Reynolds*", I do need to set the scene in a little more detail in order to do justice to the powerful arguments addressed to us in a field in which a "corpus of case law" is still being built up, in the development of which we are invited to participate. *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UK HL 44, [2006] 3 WLR 642, [2007] A.C. 359, is the most recent valuable elucidation of the proper approach. Without citing great swathes of the opinions expressed in those cases and at the risk of oversimplification, the relevant principles which inform the case before us can perhaps be stated as follows.

> (1) The chilling effect which the common law's rigorous protection of reputation has had on the media must now to be acknowledged and, according proper weight to ECHR jurisprudence, reputation must now give some way to what may be regarded as the higher priority of what Lord Steyn at p.207 G describes as the fundamental "constitutional right", that of freedom of expression.
>
> (2) Though the categories of privilege are not exhaustive and the list is not closed, a generic qualified privilege of political speech was to be rejected. The duty/interest

test remains the essential element in the structure of qualified privilege even though Lord Hoffmann prefers in *Jameel* paragraph 46 to call it the *"Reynolds* public interest defence" and Baroness Hale in paragraph 146 prefers "a defence of publication in the public interest".

(3) That duty/interest test can be satisfied if the public is entitled to know the particular information being published subject to two essential pre-requisites.

(4) The first is that the article as a whole must be in the public interest. What engages the interest of the public, as in the example given by Baroness Hale, "the most vapid tittle tattle about the activities of footballers' wives and girlfriends", may not be material which truly engages the public interest.

(5) Responsible journalism is the second pre-requisite. Whether the article is of value of the public depends upon its quality as well as its subject matter and the value of the article to the public must be tested against a standard of responsible journalism. Responsible journalism is the point at which a fair balance can be held between freedom of expression on matters of public concern and the reputation of the individual harmed by that disclosure, the vital balance between art. 10 and art. 8 of the ECHR.

(6) The court, not the editor, must decide whether the particular material is privileged because of its value to the public but due weight must be given to editorial judgement.

(7) Interference with freedom of speech is to be confined to what is necessary in the circumstances of each and every case and, depending on those circumstances, the matters usually to be taken into account will include the following ten factors put forward by Lord Nicholls at p.205. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and individual is harmed if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication including the timing.

(8) This list is not exhaustive. The weight to be given these and any other relevant factors will vary from case to case. The list certainly does not set up a series of hurdles to be negotiated by a publisher before he can successfully rely on qualified privilege.

(9) Any lingering doubt should be resolved in favour of publication.

Reportage

33. The pleaded defence is that the article did not allege that either of the claimants was guilty of criminal conduct. It described the allegations being made by both groups of supporters against each other to illustrate the enmity between rival groups struggling for political leadership of the British National Party. It is a defence of what is now becoming known as *reportage*. This appeal has given this Court the opportunity to explore the nature and extent of that defence and its place in the libel law landscape.

34. *Reportage* is a fancy word. The Concise Oxford Dictionary defines it as "the describing of events, esp. the reporting of news etc. for the press and for broadcasting." It seems we have Mr Andrew Caldecott Q.C. to thank – or to blame – for its introduction into our jurisdiction. The doctrine first saw the light of day in *Al Fagih*. Simon Brown L.J. said in paragraph 6 that it was "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper." That may indeed conveniently describe what it is but there is more to it than that and it is necessary to see how this new doctrine fits into the firmament.

Al Fagih

35. Since Mr Tomlinson seeks to distinguish his case from *Al Fagih*, it is necessary to examine it closely. The claimant (AF) and a Dr Al Mas'aari (AM) were prominent members of a dissident political organisation (the Committee) opposed to the existing Saudi Arabian government. The defendant newspaper supported the government and was sponsored by the Saudi royal family. The Committee was riven by a dispute between AF, the manager of its London office, and AM its spokesman. This dispute escalated to the point that both men were issuing press releases reporting their side of the problem and these were avidly reported by the defendant on a day to day basis as the saga unfolded. On 5th March 1996 AM issued his press release announcing the expulsion of AF and setting out a number of allegations against him one of which was of his spreading malicious rumours to defame the honour of his fellow members of the Committee and the women of certain provinces in Saudi Arabia. This was reported the following day, 6th March, by the defendant though the scandal-mongering allegation was slightly toned down. AF's riposte the same day was to issue his press release announcing AM's removal as the Committee's official spokesman. The defendant's journalist spoke to AM for his reaction. In the course of this conversation AM gave as an example of the rumours that were being spread by AF that AF had accused his mother of bringing women to him at home. AM said he would be able to produce tape recordings to confirm what was being said. That was reported in the defendant newspaper on 7th March. AF read it with shock and disbelief because in Muslim society an allegation that a person had made imputations of a sexual nature such as he was alleged to have made was regarded with greater censure than the person of whom the imputations were made. Later that day the journalist telephoned AF to seek his comments on the article, the truth of which AM denied. On 8th March the newspaper published another long article about the split within the Committee and included AF's response to the article.

36. The trial judge, Janet Smith J. rejected the defence of qualified privilege but one of the arguments before her was abandoned by Mr Caldecott, part of the defendant's new team to represent it on the appeal. It is important to note that Mr Caldecott accepted that he had to bring the defence of qualified privilege within the ambit of *Reynolds* as those principles had to apply in every case, irrespective of whether or not it was within the field of political discussion, whether the defamatory allegation was adopted

or unadopted, attributed or unattributed. His submission was that qualified privilege was established because these reports were made within the context of a political dispute, were attributed to a political rival and were not adopted by the newspaper.

37. Simon Brown L.J. reached these conclusions:

> "45. At the end of the day it is necessary to stand back from much of the detail and ask oneself the root question whether in all the circumstances of the case the duty-interest test (or the right to know test) was satisfied. …
>
> 49. This publication occurred in the course of what was undoubtedly a political dispute. The judge herself rightly "accept[ed] that the news of the split within the Committee was a matter of real interest and concern to the readership. It was important news". She was prepared to accept too "the defendant's claim that it did not adopt the allegation or in any way imply that it was true". To my mind she should not in these circumstances have concluded that, without an attempt to verify the allegation, the publication could not be regarded as being in the public interest. That was the critical finding and I find her reasoning in this regard unconvincing. In the first place it must be recognised that both parties to the dispute had issued press releases and were ready to make allegations against the other. … Secondly, … If, as the judge accepted (and seems to me plain), "the mere fact that such allegations are being made is of public interest and importance", notwithstanding that the reader could not determine whether they were true or false, then I have difficulty with the view that the public interest in being informed of the particular allegation complained of was only "very limited". These, it seems to me, are nice distinctions for which there is really no place in the reporting of an on-going dispute on a day-to-day basis. … What is clear from these mutual allegations, however, is that one or other if not both of these leading Committee members were being shown to be disreputable and that basic fact seems to me something which the appellant's readership were entitled to be kept informed about. In my judgment there was no need for the newspaper, at any rate at this early stage of mutual accusation, to commit itself to preferring and adopting the contentions of one side over the other.
>
> 50. In short, the case for finding qualified privilege here seems to be not merely to have been very much stronger than in *Reynolds* … but strong enough not to have been held forfeit by the appellant's failure to turn an objective report into a verified and adopted allegation. To my mind AK was entitled in this case to publish without attempting verification. Indeed in the present context verification could even be thought inconsistent with the objective reporting of the dispute. …

> 51. I am not, of course, saying that verification (or at least an attempt at verification) of a third party's allegations will not ordinarily be appropriate and perhaps even essential. In rejecting the general claim for qualified privilege for political discussion Lord Nicholls said in *Reynolds* at 203B:
>
> > "One difficulty with this suggestion is that it would seem to leave a newspaper open to publish a serious allegation which it had been wholly unable to verify. Depending on the circumstances, that might be most unsatisfactory."
>
> 52. I am saying, however, that there will be circumstances where, as here, that may not be "most unsatisfactory" – where, in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other."

38. Mantell L.J. considered he could not interfere with the judge's decision and he would have upheld her.

39. Latham L.J. concluded that:

> "65. … What emerges clearly from that summary [of the facts] is that the paper was reporting a split in a political group which was clearly of significant interest to its readers. It seems to me that in this context, what is said by the one side in relation to the other is itself of considerable interest. This is so whether what is said is of high political importance, or merely scurrilous gossip or personal accusations. The fact that allegations of the latter sort are made rather than the former enables the interested reader to obtain some insight into the nature of the dispute. *It is the fact that the allegation of a particular nature has been made which is in this context important, and not necessarily its truth or falsity* (emphasis added).
>
> …
>
> 67. … It seems to me that in the context of allegation and counter-allegation as was undoubtedly the case here, the interested reader was entitled to know what type of allegations were being made from time to time by one side against the other, for the reason which I have already given. Provided that the paper did not, and there is no suggestion of it having done so, in any way suggest that it was adopting the allegation, the fact that the allegation was made was a matter of proper interest to the reader and the paper had an appropriate duty to publish it. …

> 68. It is in this context that the need for verification has to be considered. Whether or not there has been verification is only one of the criteria to which consideration has to be given. Whether verification is necessary in any given case in order to obtain the protection of qualified privilege would clearly depend upon the facts. That is a trite statement. But if, as here, the publication is of an allegation made in the context of allegation, counter-allegation and refutation, where attribution is clear, and where the paper has said nothing to suggest that it in any way adopts an allegation, verification is only likely to be of significance where the allegation is, for example, of criminality the ramifications of which may go well beyond the ambit of the dispute which is the subject matter of the publication."

40. Although one can distil from the judgments the essential strands of the reasoning, namely that the *Reynolds'* rules apply but that where there has been full attribution but not adoption of a political dispute (a 'spat' as it has since been described), verification is not essential, nonetheless I see the force of the submissions that the ambit of the reportage defence is still not clearly defined or confined by *Al Fagih*.

Other cases of reportage

41. *Reportage* is next mentioned in *Mark v Associated Newspapers Ltd* [2002] E.M.L.R. 38. There the *Daily Mail* repeated assertions in the *Mail on Sunday* that Miss Mark, the Prime Minister's former nanny, had authorised publication of material from her book which she ought not to have done without the Blairs' consent and, moreover, that she had misrepresented her position when claiming to have been devastated by the publication of extracts from her book in the Mail on Sunday. These were defamatory remarks. The *Daily Mail*, however, also published her denial that she had authorised publication. The two central questions which arose on the appeal were (1) whether the repetition rule was reconcilable with Strasbourg jurisprudence, and (2) even if it is, does the reporting within the same publication of two conflicting statements, the one defamatory, the other its denial, without the publishers disclosing a particular preference for either, have the consequence that the denial is to be regarded as the antidote to remove the bane of the publication in a way which results in its losing its otherwise defamatory meaning. This Court found there was no inconsistency between the repetition rule and decisions of the European Court of Human Rights and that it was only in cases where the antidote so obviously extinguished the bane that no issue could properly be left to the jury that the judge should rule at an interim stage that the article was not capable of being defamatory. In the course of his judgment Simon Brown L.J. said of *Al-Fagih*:

> "35. In short, whilst I am certainly prepared to recognise that the approach adopted in *Al-Fagih* may need to be taken further still - rather than perhaps confined merely to the reporting of statements (attributed and unadopted) by both sides to a political dispute - I reject entirely the argument that the repetition rule as such needs changing. To regard reportage as being incapable of harming a person's reputation would be to

> introduce into the law a fiction which the repetition rule is designed to avoid."

42. The doctrine is next mentioned in *Galloway v Telegraph Group Ltd* [2006] E.M.L.R. 221. The articles concerned asserted that Mr Galloway, a well-known Member of Parliament, was in the pay of Saddam Hussein, secretly receiving sums to the order of £375,000 a year, that he had diverted monies from the Oil for Food Programme thus depriving the Iraqi people whose interests he claimed to represent of food and medicine and that he had probably used the Mariam appeal as a front for personal enrichment. The *Daily Telegraph* did not seek to justify these defamatory statements as true but, relying upon the fact that they were based on documents found by their reporter in Baghdad claimed that the publication was protected by privilege, inter alia, as *reportage*. The Court of Appeal held:

> "48. It is not in dispute that the Baghdad documents were of great interest to the public and The Daily Telegraph was naturally very keen to publish them. If the documents had been published without comment or further allegations of fact Mr Galloway could have no complaint since, in so far as they contained statements or allegations of fact it was in the public interest for The *Daily Telegraph* to publish them, at any rate after giving Mr Galloway a fair opportunity to respond to them. Such publication would be *reportage*. The balance would come down in favour of freedom of expression, which, subject to Art. 10.2, is protected by Art. 10.1 of the Convention, and the statements would be protected by privilege. …
>
> 59. It appears to us that the newspaper was not merely reporting what the Baghdad documents said but that … it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation. … the thrust of the coverage was that *The Daily Telegraph* was saying that Mr Galloway took money to line his own pockets. In all the circumstances we answer the question whether the newspaper adopted and embellished the statements in the Baghdad documents in the affirmative. …
>
> 68. … The right to publish must however be balanced against the rights of the individual. The balance is a matter for the judge. It is not for an appellate court. This court will not interfere with the judge's conclusion after weighing all the circumstances in the balance unless he has erred in principle or reached a conclusion which is plainly wrong."

43. Finally, we find some endorsement of the doctrine in *Jameel*. Lord Hoffmann said in paragraph 62:

> "In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the

> statement was true but there are cases ("reportage") in which the *public interest lies simply in the fact that the statement was made*, when it may be clear that the publisher does not subscribe to any belief in its truth (emphasis added)."

Baroness Hale commented in paragraph 149:

> "Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. … The requirements in "reportage" cases, where the publisher is simply reporting what others have said, may be rather different, but if the publisher does not himself believe the information to be true, he would be well-advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on."

Help from abroad?

44. At our request counsel did an electronic search of Commonwealth jurisdictions but nothing of assistance was found. The doctrine is known in the United States of America. The leading case appears to be *Edwards v National Audubon Society* 556 F. 2d 113 decided in May 1977. The National Audubon Society was an environmentalist group vigorously opposed to the insecticide DDT because, in their view, use of the chemical endangered bird life. Proponents of the pesticide denied the charge and forcefully urged that without DDT, millions of human beings would die of insect-carried diseases and starvation caused by the destruction of crops by insect pests. The Society published an annual Christmas bird count which showed a steady increase in bird sightings despite the growing employment of pesticides in the past 30 years. These statistics were seized upon by the scientists as proof of the fallacy of the Society's claims. In riposte the Society prefaced the next year's bird count with an article explaining that the count was the result not of more birds, but of more "birders" (bird watchers). The article added:

> "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie …"

A journalist on the New York Times realised that the Society's charges were a newsworthy development in the already acrimonious debate and he accordingly telephoned the author of the article to obtain the names of those the Society considered to be "paid liars". The plaintiffs were named. The reporter sought their comment. The New York Times published an account of the article, of the names given at interview and of the response of the accused men.

45. The United States Court of Appeals for the Second Circuit said this:

> "At stake in this case is a fundamental principle. Succinctly stated, when a responsible prominent organisation like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and

> disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. … What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy comments merely because it has serious doubts regarding their truth. Nor must the press take the cudgels against dubious charges in order to publish them without fear of liability for defamation. … The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.
>
> The contours of the press's right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made. … It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusation.
>
> It is clear here, that [the journalist] reported Audubon's charges fairly and accurately. He did not in any away espouse the Society's accusations: indeed, [he] published the maligned scientists' outraged reactions in the same article that contained the Society's attack. The *Times* article, in short, was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps. Accordingly, we hold that it was privileged under the First Amendment."

46. In a leading American text book, *Sack On Defamation*, vol. 1, 3rd ed., the author identifies four features of the case: (1) that the defendant was a responsible prominent organisation, (2) the plaintiff was a public figure, (3) the Times report was accurate and disinterested and (4) the accusations were themselves newsworthy simply because they were made in the context of a controversy then ranging about a sensitive issue.

An analysis of cases since *Audubon* seem to show that those criteria had been met in relatively few cases and neutral reportage had, therefore, rarely been applied by the courts to immunise publication.

47. The American experience must be treated with some caution. It is quite possible that the First Amendment carries more weight in the New York Court of Appeal than Article 10 does here in striking the balance between freedom of expression and the right to protect reputation. The introductory words of Chief Judge Kauffman are suggestive of that:

> "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet. It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgements on issues that affect their ability to intelligently govern themselves. … the federal courts have steadfastly sought to afford broad protection to expression by the media, without unduly sacrificing the individual's right to be free of unjust damage to his reputation."

Human rights jurisprudence

48. Lord Nicholls was firmly of the view that the test of responsible journalism struck the right balance between the Art. 10 right to freedom of expression and the Art. 8 right to the protection of reputation saying at p.203H:

> "The common law approach accords with the present state of human rights jurisprudence."

He repeated in *Bonnick v Morris* [2003] 1 AC 300 paragraph23:

> "Responsible journalism is the point at which a fair balance s held between freedom of expression on matters of public concern and the reputation of individuals."

49. In paragraph 80 of *Galloway,* the Master of the Rolls quoting how Strasbourg stresses the importance of the national court striking a fair balance between the protection of freedom of expression enshrined in Art. 10 and the protection of freedom of a person's reputation enshrined in Art 8 as an aspect of private life, said:

> "It seems to us that is exactly the balance which Lord Nicholls was articulating in *Reynolds:* … Moreover, it also seems to us that Lord Nicholls was himself according particular importance to freedom of expression and thus freedom of the press in just the same way as the European Court has done. We see no difference in principle between the approach of the House of Lords in R*eynolds* and that of the European Court."

50. In *Jameel* Lord Hope embraced the European approach when he said in paragraph 109 in the language which resonates from Strasbourg:

> "The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate."

51. Since then the European Court has given judgment in *Verlagsgruppe News GMBH v Austria* (Application 76918/01) where the applicant newspaper quoted a letter

defamatory of a politician which had earlier been published by another paper in the context, said the Court, "of its reportage about the then pending defamation proceedings against Mr Heller [the author of the letter] which, involving several … politicians on the one hand and a well-known artist criticising them publicly on the other hand, was certainly a subject of public interest." So this is seen by the Court as a case of reportage. The Austrian courts ordered the forfeiture of the publication concerned. The Court found that to be in violation of Art. 10, holding:

> "31. …due to the fact that the publication of Mr Heller's statements contributed to the discussion of a subject of public interest and addressed well-known politicians, particularly strong reasons had to be put forward to explain any punishment of the applicant company for assisting in their dissemination.(see *mutatis mutandis Thoma v Luxembourg).* …
>
> 33. … It is certainly true that the article at issue reflected a rather critical approach to the defamation proceedings. This cannot, however, justify the conclusion that the article identified and adopted the content of the impugned statements of the quoted passage. In this regard the Court further recalls that a general requirement for journalists to distance themselves from the content of a quotation that might provoke or insult others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see *Thoma v Luxembourg.* "

52. Like this court in *Galloway,* I am satisfied that we walk in tune and in step with the Convention and the Strasbourg jurisprudence and no radical departure from our approach is necessary.

Where have we arrived so far?

53. What can be learnt so far from this review of the authorities is that the journalist has a good defence to a claim for libel if what he publishes, even without an attempt to verify its truth, amounts to *reportage*, the best description of which gleaned from these cases is that it is the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other kind of dispute. Mr Tomlinson objects that that this is vague and wide and constitutes an unprincipled extension to freedom of expression. His objections can only be met by placing *reportage* in its proper place in the legal landscape. To do so one must answer these questions:

(1) Why is the reporter of *reportage* free from the responsibility of verifying the information and why does the well-established repetition rule not require the journalist to justify the truth of what he is reporting?

(2) Do the *Reynolds* rules apply to *reportage*?

(3) What then is the proper approach to the *reportage* defence?

Reportage and the repetition rule

54. The repetition rule is well-established and has an important place in libel law. The rule was succinctly described by Lord Reid in *Lewis v Daily Telegraph Ltd* [1964] A.C. 234, 236 as:

> "Repeating someone else's libellous statement is just as bad as making the statement directly."

Indeed it may be much worse:

> "… if the words had not been repeated by the newspaper, the damage done by J. [by slandering the plaintiff] would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large …" *Truth (N.Z.) Ltd v Holloway* [1960] 1 W.L.R. 997, 1003 PC.

55. Thus the rule is that if A makes a defamatory statement about B and C repeats it, C cannot succeed in the defence of justification by showing that A made the statement: C must prove the charge against B is true. This is so even if C believes the statement to be true and even when C names A as his source. Lord Devlin put it succinctly in *Lewis v Daily Telegraph* at p. 284:

> "For the purposes of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it."

56. The obvious question which then arises is this: if ordinarily C has to prove the truth of what A said about B, why should that rule not apply simply because C goes on neutrally to report that A and B are in a political dispute and that in the context of that dispute B was also making defamatory or derogatory remarks about A? Why should C be exculpated when reporting what is said in the context of a dispute but not when reporting the allegation in isolation? It was a question posed by Simon Brown L.J. at paragraph 35 of *Al-Fagih* when he asked:

> "At first blush one might wonder why a correctly attributed and unadopted allegation is defamatory at all; to state that the allegation has been made is, after all, true."

57. The answer was given by Mr Caldecott Q.C. in paragraph 36:

> "What, however, Mr Caldecott stresses is that the repetition rule concerns only the scope of the defence of justification in report cases; it does not limit the scope of qualified privilege at common law. Least of all does it require that an unadopted allegation is to be treated in the same way as an allegation asserted to be true."

58. This was made more explicit in *Mark* where Simon Brown L.J. said in paragraph 34:

> "The repetition rule concerns the meaning of words - and, of course, justification, the other side of the same coin. It recognises the reality as I have sought to explain it. It does not have the effect of making defamatory a publication which otherwise would not be. But when, of course, it comes to qualified privilege, the precise terms and circumstances in which the defamation comes to be repeated become all-important. The (non-exhaustive) ten factors identified by Lord Nicholls in *Reynolds* … are then all in play. It is at this point that the journalist can seek to pray in aid "the contribution of the press to discussion of matters of public interest" …"

59. So the answer to the first question is that the repetition rule and *reportage* are not in conflict with each other. The former is concerned with justification, the latter with privilege. A true case of *reportage* may give the journalist a complete defence of qualified privilege. If the journalist does not establish the defence then the repetition rule applies and the journalist has to prove the truth of the defamatory words.

Reportage and Reynolds' qualified privilege

60. Once *reportage* is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in *Al-Fagih* a form of, or a special example of, *Reynolds'* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence *sui generis* because *Reynolds* is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it (see p. 194 G). If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for *reportage* must be dismissed.

The proper approach to the reportage defence

61. Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of *reportage*.

(1) The information must be in the public interest.

(2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse in *Reynolds* at p. 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published (see, also in *Reynolds*, Lord Nicholls' factor four at page 205 B, and Lord Cooke at p. 225, and in *Jameel*, Lord Bingham at paragraph 12 and Baroness Hale at paragraph 149). This is where *reportage* parts company with *Reynolds*. In a true case of *reportage* there is no need to take steps to ensure the accuracy of the published information.

(3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of *reportage*. I draw it from the highlighted passages in the judgment of Latham L.J. and the speech of Lord Hoffmann cited in paragraphs 39 and 43 above. To qualify as *reportage* the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of

the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramanian v Public Prosecutor* [1956] 1 W.L.R. 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from *Reynolds*, the burden being on the defendants. In this way the balance between Art. 10 and Art. 8 can be maintained. All the circumstances of the case and the 10 factors listed by Lord Nicholls adjusted as may be necessary for the special nature of *reportage* must be considered in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls' factor 1) is obviously relevant for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham L.J. meant to convey any more than that in paragraph 68 of his judgment in *Al Fagih* cited in paragraph 39 above. There is, however, no reason in principle why *reportage* must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question: does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said at paragraph 51 in *Jameel*:

> The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article."

All the circumstances of the case are brought into play to find the answer but if it is affirmative, then *reportage* must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.

(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as pre-conditions for *reportage* on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the U.S.A.

(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, the *reportage* can only flourish where the story unfolds day by day as in *Al Fagih.* Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication.

The application of that approach to this case

62. The judge correctly held that the report covered a subject of legitimate public interest and there is no challenge to that finding. It is true that the particular aspects of the article which are seized upon by the appellants relate to their alleged criminality and not to their political views, but "no distinction is to be drawn between political discussion and other matters of public concern", to quote from Lord Nicholls speech at p.204F. Moreover, as Lord Hope put it in paragraph 108 in J*ameel:*

> "A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public."

63. This article is set in the context of the "BNP row [that] rumbles on." It describes what the judge, colloquially but accurately enough, in my view, characterised as the "goings-on" in the party with each side accusing the other of misappropriation of the funds raised at the rally. It concerns the appellants in their political life, not their private life. Judged as a whole it is clearly a matter of public interest.

64. Although he may not have addressed the question as explicitly as I do, the judge found in paragraph 24 that Mr Gable "was merely reporting the conflicting positions rather than taking sides with either" and "what would be of interest to the reader would be the fact that the allegations and cross- allegations of criminal offences were being made by BNP factions against each other, and "not necessarily [their] truth or falsity" (to echo the words of Latham LJ)." He was, therefore, making a finding of what I regard to be essential to establish *reportage*, namely that the effect of the article was to report the fact that these charges had been made, not that they were true.

65. The next question is whether or not they were adopted by the respondents. The judge dealt dismissively with the adoption argument in paragraph 34. He simply said that neither the use of "Perhaps" (in the sentence "Perhaps the police are now more interested in Roberts and his brother Barry") nor "explains" (in "It explains that it was Roberts who stole the money …") demonstrated adoption but he gave no reasons for those conclusions.

66. I have not found the "Perhaps" argument so easy to dismiss. "Perhaps the police are now more interested…" can be read as "Maybe the police should now be more interested" as if Mr Gable, who says he did in fact believe the allegation against the brothers was true, was asserting just that. Upon reflection I am not convinced that is the right way to read the article. "Perhaps" is used sarcastically as a journalistic device to add colour to the article. On this aspect, the learning from Strasbourg is clear. Recently, for example, the Court held in *Radio France v France* (2005) 40 E.H.R.R.706 in full accord with earlier decisions:

> "37. … Nevertheless, journalistic freedom also allows for the possible use of a certain dose of exaggeration, and even provocation. …
>
> 39. It is not for the court to take the place of the press by saying what reporting technique journalists should adopt; besides the essence of the ideas and information expressed, Art.10 protects their mode of expression."

67. *Jameel* is to the same effect, for example as Lord Hoffmann said in paragraph 51:

> "… the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting."

68. I am now satisfied, without lingering doubts which need be resolved in favour of publication, that, taking the article as a whole and making allowance for the sarcastic speculation about possible police interest, the respondents did not adopt the allegation of wrongdoing as their own. This was attributed neutral reporting of a story in the public interest. It was proper reportage as that defence must now be understood (and now that it has a firm place in the libel lexicon, there should no longer be any need to italicise the word). Consequently responsible journalism did not require verification of the truth.

69. Nonetheless all the circumstances of the case, including Lord Nicholls' 10 factors, must be borne in mind before a final endorsement of the responsibility of the publication can be pronounced and the judge did engage in that overview and in my judgment did not err in his appraisal.

70. He correctly recognised that the apparent seriousness of the allegation was diluted by the fact that the thrust of the article related to the disagreement as to who should take charge of the collection, not to whether one or other stole it. The public were entitled to know of the fact that the BNP were then riven by this dispute. The source of the information was attributed and truth was not the effect of publication so the reliability

of the source was of little significance and verification was not essential. In fairness to Mr Gable I should repeat that he did make some enquiries of other sources to satisfy himself that the dispute was real. The lack of "status" does not destroy the integrity of the report. The story was one which unfolded over the weeks and months and was current, or at least not stale at the time of publication. No comment was sought from the appellants for wholly understandable reasons. In any event the claimants' side of the story was to be inferred: each protagonist was denying impropriety and blaming the other. Apart from a note of sarcasm, and, as all readers would suspect, some unfeigned glee at having this embarrassment to their political enemies presented "on a plate", the tone was as neutral and as disinterested as any article in *Searchlight* on the BNP could be. There was nothing untoward in the timing of the publication. In all the circumstances, this was a piece of responsible journalism.

71. I see nothing in paragraph 36 of the judgment which amounts to an error of principle. Reference to "goings-on in political parties, including disputes" does not pitch the case too wide so long as the "goings-on", of whatever kind, are matters which are of enough public concern, as these were, to justify the press bringing them to the attention of their readers. Far from exceeding the permitted bounds of reportage and responsible journalism, this judgment correctly applies the principles as I have expounded and expanded them.

Conclusion

72. For those reasons, I would dismiss this appeal.

Lord Justice Sedley:

73. I too would dismiss this appeal.

74. I would accept Mr Tomlinson's submission that because the reportage defence modifies the repetition rule in the interests of *Reynolds* privilege, it needs to be treated restrictively. But this case seems to me, as it did to Eady J, to sit squarely within the ring-fence. It is fanciful to suggest that the writer, by remarking that the police were perhaps now more interested in the claimants than in Hill and Jeffries, or by reporting that the latter's letter "explains" that it was one of the claimants who stole the money, was adopting the defamatory allegation. No doubt the prose of the article was marginally more readable than a bald recounting of the dispute would have been, but it did no more than record that Hill and Jeffries had turned the accusation of theft back upon the claimants. The article offers no view about which side is telling the truth; and nothing in the law denies the reportage defence to a defendant who is taking a perceptible pleasure in reporting the controversy. When Baroness Hale in *Jameel* says (at paragraph 149) that the tone in which the information is conveyed will be relevant to whether the publisher has behaved responsibly in passing it on, I do not imagine that she means the reportage defence to be a prize for bland journalism. Such a view would be inconsistent with what the European Court of Human Rights held in *Radio France v France* (see paragraph 66 above). I understand her to mean that the defence may be forfeited by a presentation which is such as to undermine the claim to be publishing in the public interest. That is not the case here; and Mr Tomlinson's suggestion that it was irresponsible for Mr Gable to report the dispute without first

soliciting the claimants' side of the story is, if he will forgive me for saying so, not entirely in touch with reality.

75. I respectfully agree with the cautionary note sounded by Ward LJ about the *Audubon* case in the US Second Circuit Court of Appeals, notwithstanding the fine and persuasive prose of Chief Judge Kauffman's opinion. Where rights to reputation and privacy have wilted somewhat in the bright light of First Amendment jurisprudence, the English common law, now reinforced by the European Convention on Human Rights, seeks to hold the two in a sometimes difficult balance, calibrated by the concept of responsible journalism. Although Mr Millar has preferred to argue the issue on its merits, the judgment was in law for Eady J to make and can be impugned before us only for error of law.

76. I would wish, with respect, to enter a caveat about the parts of the judgment of Latham LJ in *Al Fagih* cited in the judgment of Ward LJ at paragraph 39. For my part I would not put scurrilous gossip on a par with matters of political importance for reportage purposes; nor do I consider that, where reportage is potentially involved, the fact that criminality is alleged may make it necessary to attempt verification. In my view, the more personal and scurrilous the content of the reported controversy, the less likely it is that the controversy itself will be a matter of genuine public interest, and the more likely that to report it will be an invasion of personal privacy. But if the subject-matter is such as to make the controversy itself a matter of public interest, even an accusation of criminality has to be accepted as within the ring-fence. Whether responsible journalism calls for verification will be a case- and fact-specific question, as Simon Brown LJ explained in *Al Fagih*; but I tend to think, like Ward LJ, that in a great many cases verification – of the content of the allegations rather than of the fact that they have been made – will be beside the point.

77. For the rest, I respectfully agree with the judgment of Ward LJ. I would add that the claimants' plainest recourse, whether for damages or for an injunction, lay against their detractors but has not been attempted. Instead they have taken the opportunity to try to put one of their party's political opponents out of business. While such a motive does not disqualify a claimant, any more than the defendant's enjoyment of the row enhances his liability, it should put the court on its guard against elevating reporting to adoption in the absence of clear words.

Lord Justice Moore-Bick:

78. I agree that the appeal should be dismissed for the reasons given by Ward LJ.