Neutral Citation Number: [2010] EWCA Civ 804

Case No:A2/2009/2415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr. Justice Tugendhat
[2009] EWHC 2375 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2010

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE MOSES

- -

Between :

FLOOD	**Claimant/ Appellant**
- and -	
TIMES NEWSPAPERS LTD	**Defendant/ Respondent**

- -
- -

James Price Q.C. and William Bennett (instructed by **Edwin Coe LLP**) for the **appellant**
Richard Rampton Q.C. and Miss Kate Wilson (instructed by **Times Newspapers Limited** for the **respondent**

Hearing dates : 25th and 26th May 2010

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Approved Judgment

Lord Neuberger MR:

1. This judgment is concerned with an appeal by the defendant, Times Newspapers Limited ("TNL"), and a cross-appeal by the claimant, DS Gary Flood, against the judgment of Tugendhat J in a preliminary ruling in a libel claim. The hearing very sensibly proceeded on the basis that the cross-appeal raised the principal issue, in terms of importance (both to the parties and more generally) and court time, so that it was DS Flood who was the *de facto* appellant and TNL the *de facto* cross-appellant.

The publication of the article

2. DS Flood is a Detective Sergeant with the Extradition Unit of the Metropolitan Police Service ("MPS"). TNL is the publisher of, amongst other titles, The Times and The Sunday Times newspapers. On 2 June 2006, it published an article ("the Article") in The Times under the title:

> "Detective accused of taking bribes from Russian exiles. Police investigating the alleged sale to a security company of intelligence on the Kremlin's attempts to extradite opponents of President Putin, Michael Gillard reports".

TNL also published the Article on its website, and has continued to publish it there.

3. The text of the Article, so far as material, read as follows (adopting the paragraph numbers added by the Judge):

> "[1] Allegations that a British security company with wealthy Russian clients paid a police officer in the extradition unit for sensitive information are being investigated by Scotland Yard.
>
> [2] The officer, who has been moved temporarily from his post, is alleged to have provided Home Office and police intelligence concerning moves by Moscow to extradite a number of Russia's wealthiest and most wanted men living in Britain.
>
> [3] Anti-corruption detectives are examining documents detailing the client accounts of ISC Global (UK), a London based security firm at the centre of the investigation. The financial dossier, seen by The Times, shows that ISC was paid more than £6 million from off-shore companies linked to the most vocal opponents of President Putin of Russia.
>
> [4] Between 2001 and 2005, ISC provided a variety of specialist security services including "monitoring" the Kremlin's attempts to extradite key clients to Moscow, where they face fraud and tax evasion charges.
>
> [5] A former ISC insider passed the dossier to the intelligence arm of the anti-corruption squad in February. The informant directed handlers to a series of ISC payments, totalling £20,000, made to a recipient codenamed Noah. Detectives from Scotland Yard professional standards directorate

were told that Noah could be a reference to an officer in the extradition unit who was friendly with one of ISC's bosses.

[6] The officer under investigation has been identified as Detective Sergeant Gary Flood. His home and office were raided last month.

[7] A spokesman for the Metropolitan Police said yesterday:

> 'We are conducting an investigation into allegations that a serving officer made unauthorised disclosures of information to another individual in exchange for money.'

[8] Anti-corruption detectives are examining the relationship between Sergeant Flood and a former Scotland Yard detective, one of the original partners in ISC. The men admit to being close friends for more than 25 years but deny any impropriety and are willing to co-operate with the inquiry.

[9] Sergeant Flood has not been suspended. His lawyer said: 'All allegations of impropriety in whatsoever form are categorically and unequivocally denied.'

[10] ISC Global was set up in October 2000 by Stephen Curtis, a lawyer. He was already acting for a group of billionaire Russians led by Mikhail Khodorkovsky and Leonid Nevzlin, who controlled Yukos Russia's privatised energy giant…

[15] The dossier also reveals … Boris Berezovsky was a client of ISC.

[16] … Two companies linked to Mr Berezovsky – Bowyer Consultants Ltd … and Tower Management Ltd … - appear to have made payments totalling £600,000 to ISC.

[19] ISC stopped trading last year after Curtis, the chairman, died in a helicopter crash. Subsequently, two former Scotland Yard officers, Keith Hunter and Nigel Brown, whom Curtis recruited to set up ISC, fell out and Mr Hunter bought the company and renamed it RISC.

[20] A spokesman for Mr Hunter said: 'Neither my client nor his associated companies have ever made illegal payments to a Scotland Yard officer.'

[21] Mr Brown, who lives in Israel said: 'Scotland Yard recently contacted me as a result of receiving certain information. I have been asked not to discuss this matter.'"

The instant proceedings

4. In his claim form, issued on 31 May 2007, in respect of both the print and the website publications, DS Flood complained that, as the Judge put it, "the Article meant that there were strong grounds to believe, or alternatively that there were reasonable grounds to suspect, that he had abused his position as a police officer with the MPS extradition unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges, that he had thereby committed an appalling breach of duty and betrayal of trust and had thereby committed a very serious criminal offence". In making that complaint, DS Flood was relying on the repetition rule, namely the principle that a defendant who reports a defamatory statement made by a third person about a claimant is as liable to the claimant as if he had made the statement himself.

5. TNL's Defence pleaded defences of justification and qualified privilege in relation to both the print publications and the website publications of the Article. The meaning which TNL seeks to justify is that:

> "[DS Flood] was the subject of an internal police investigation and that there were grounds which objectively justified a police investigation into whether the Claimant received payments in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs."

6. The defence of qualified privilege, generally known as *Reynolds* privilege, or a *Reynolds* defence, drew no distinction between the print publication on 2 June 2006 and the subsequent website publications. In summary, TNL pleaded that

> "in the circumstances the publication of the Article was in the public interest and its journalists acted responsibly in composing and publishing it."

7. In his Reply, DS Flood pleaded to the public interest defence in terms which applied to both the print and the website publications, but he also alleged, in relation to the website publication, that the circumstances changed as time passed, further information came to TNL, and that there was no continuing public interest in the website publication.

8. On 2 June 2009 Eady J ordered that the validity of the defence of qualified privilege be tried by judge alone as a preliminary issue. That is the issue that came before Tugendhat J, and, as he explained, if the defence of qualified privilege failed, then the defence of justification would fall to be tried, and there was no order for that to be tried by judge alone. Accordingly, as he pointed out, it was undesirable for him to express a view as to the meaning of the Article. As he also explained at [2009] EWHC 2375 (QB), paragraph 10:

> "The parties both submit that it is unnecessary for me to make any decision on meaning. TNL admits that the article is defamatory. The meanings pleaded by the parties respectively are not so far apart that a decision on meaning is required for the purposes of considering the defence of qualified privilege. Accordingly I heard no submissions on what meaning the article would be understood to bear by the reasonable reader. Both parties have

made brief submissions on the meaning which they submit that a responsible journalist should have considered, [but n]othing turns on this at this stage, and I see no need to say any more about it. "

The judgment below

The relevant facts

9. The facts, as agreed or found by the Judge, are fully set out in the judgment below at [2009] EWHC 2375 (QB), paragraphs 15 to 121. They can be summarised as follows.

10. The article was the result of a lengthy investigation by journalists, Michael Gillard (mentioned as the reporter), his father, Michael Gillard senior, and Jonathan Calvert, the editor of "Insight" (i.e. investigations) at The Sunday Times, under whose auspices the investigation had been carried out. Following its decision not to publish, Mr Gillard took the story to The Times, with more success.

11. Mr Gillard was first told in December 2005 of alleged bribes for information from the Extradition Unit by one of his sources ("A"), who identified the police officer in question as DS Flood or his brother (a police officer not in the Extradition Unit). Over the next three months Mr Gillard had meetings with A and two other sources, one of whom, "B", was working with A together with the ISC insider referred to in the article. In January 2006, B contacted the MPS at A's request, and, the following month, the ISC insider met the MPS, and provided them with information and documents on a CD-ROM. The ISC insider told Mr Gillard senior about his meeting with the MPS in conversations in March and April 2006, during which he also provided Mr Gillard senior with a copy of the CD-ROM.

12. A botched attempt by Mr Gillard and Mr Calvert to "door step" DS Flood on 26 April was reported to Mr Hunter, who in turn told DS Flood, who put matters in the hands of his superiors the following day. They informed the MPS press office ("the press office"), who then made contact with Mr Gillard and Mr Calvert. On 28 April, Mr Calvert told the press office that the ISC insider had identified the source of the information as DS Flood; this was not quite accurate: the recipient of substantial payments in the records included on the CD-ROM was described as "Noah", and the ISC insider had speculated that this was a codename for DS Flood. Also on 28 April, the MPS's Directorate of Professional Standards ("DPS"), initiated a police investigation by its Investigation Command, with DCI Crump as the Senior Investigating Officer. The DPS investigations included executing search warrants in respect of DS Flood's home and office.

13. On 28 April, the press office issued the statement quoted in paragraph [7] of the Article, and a few days later, DS Flood was moved from the Extradition Unit owing to the ongoing investigation. Meanwhile the DPS officers investigating the matter, including DCI Crump, had meetings with Mr Gillard and Mr Calvert, at which it was suggested by DCI Crump that, once the matter had been brought to the attention of the press office, the MPS's "hand [had been] forced". Although DCI Crump asked the two journalists for any relevant documents they had, they gave them none and "said that The Sunday Times had none", a statement later formally confirmed to the MPS by TNL (strictly true, as it was freelance journalists who had them, but arguably somewhat disingenuous).

14. On 2 June 2006, The Times published the Article as a newspaper report and on its website. On 2 December 2006 the DPS made their report ("the DPS Report"), in which the DPS concluded that they had been: "unable to find any evidence to show that [DS Flood] … has divulged any confidential information for monies or otherwise. Consequently there are no recommendations made as to criminal or discipline proceedings in relation to that matter."

15. Although the DPS Report was presented in December 2006, its outcome was not communicated to the parties until 5 September 2007. Thereafter, there was an exchange of letters and emails between the solicitors acting for DS Flood and for TNL as to what, if anything, should be done in relation to the Article on TNL's website. In the event, it remained on the website unaltered. Meanwhile DS Flood had returned to the Extradition Unit in January 2007.

16. After a four day hearing in July 2009, the Judge, in a full and careful judgment, decided that (1) the print and website publications of the Article were both protected by *Reynolds* privilege at the time that they were published, June 2006, but (2) the continued publication of the Article on the website after 5 September 2007, when TNL learnt of the Report's conclusions, was not so protected. DS Flood appeals against the first decision, and TNL against the second.

The law as considered by the Judge

17. The Judge's decision on the first, and main, issue involved the so-called *Reynolds* defence, or *Reynolds* privilege, which, if it can be relied on, provides a complete answer to a claim for libel. This form of privilege was developed and explained in two important decisions of the House of Lords, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, which the Judge considered at paragraphs 122 to 153 of his judgment.

18. At [2009] EWHC 2375 (QB), paragraph 123, the Judge effectively adopted the submission of Mr Rampton QC, for TNL below that the effect of Lord Hoffmann's explanation of *Reynolds* privilege in *Jameel* [2007] 1 AC 127, was that it required:

> "that the article as a whole should be on a matter of public interest (at [48]), that the inclusion of the defamatory statement should be part of the story and should make a real contribution to it (at [51]), and that the steps taken to gather and publish the information should have been responsible and fair (at [53]). In regard to this last requirement, the following summary in *Bonnick* [*v Morris* [2003] 1 AC 300] was expressly approved by Lords Hoffman and Scott in *Jameel* (at [57] and [136]):
>
> > 'Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interest of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.'"

19. In *Reynolds* [2001] 2 AC 127, 204-205, Lord Nicholls of Birkenhead set out certain matters which he considered could usefully be taken into account when considering whether the privilege should be invoked. In a passage quoted in full by the Judge below, he said this:

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.
>
> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 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 plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff 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.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.
>
> In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."

20. As the Judge said at [2009] EWHC 2375 (QB), paragraph 150, *Jameel* [2007] 1 AC 359 is "the most recent and authoritative statement of the law in relation to *Reynolds* public interest privilege", and its importance is reinforced by the fact that it refined and confirmed the existence and scope of *Reynolds* privilege after the Human Rights Act 1998 had come into force. The opinions in *Jameel* [2007] 1 AC 359 therefore took into account Articles 8 and 10 of the Convention, which are, of course, of critical importance in this area (given that reputation has been authoritatively held to be within the ambit of article 8 – see *Cumpana v Romania* (2005) 41 EHRR 14 (GC), paragraph 91, and *Pfeifer v Austria* (2009) EHRR 8, paragraphs 33 and 35).

21. In that connection, although the point was not mentioned in *Jameel* [2007] 1 AC 359, I agree with the Judge (at [2009] EWHC 2375 (QB), paragraph 146) that the last sentence in the passage quoted above *in extenso* from Lord Nicholls's opinion cannot stand following the 1998 Act: it is clear from *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 and *Attorney-General's Reference No. 3 of 1999; ex p BBC* [2009] UKHL 34 that Articles 8 and 10 have equal weight.

22. *Jameel* [2007] 1 AC 359 was fairly heavily referred to in argument before us, as both parties were keen to identify differences or similarities between that case and the instant case. Given that the law relating to *Reynolds* privilege is at a relatively early stage of development, and in the light of Lord Nicholls's reference to "a valuable corpus of case law [being] built up" over time, this is understandable. However, there is a risk of unnecessarily protracted hearings and losing sight of the wood for the trees if there is too minute a comparison of the various factors in previous decided cases and those in the case at issue. Each case turns on its own facts, and the court has to apply the normal sharp focus on the competing factors, which is required where there are tensions between Convention rights. Too much concentration on the facts of other cases can distract from the exercise.

The reasoning of the Judge

23. At [2009] EWHC 2375 (QB), paragraphs 155-175, the Judge set out the parties' respective arguments on the various points identified by Lord Nicholls in the extensive passage quoted above. After dealing with some points of principle (some of which have to be considered on this appeal), he turned to "the balancing exercise" at paragraph 199, first considering the factors in favour of "freedom of expression" and then those favouring "the claimant's reputation". At paragraph 215, he said that "the real issue in the present case ... comes down to whether the journalism was responsible in the sense of whether the publication of the article, as and when it was published, was fair to [DS Flood], that is to say, whether it was a proportionate interference with his right to reputation given the legitimate aim in pursuit of which the publication was made." He then resolved that issue in TNL's favour for these reasons:

> "216. ... [T]he publication on 2 June 2006 was a proportionate interference with [DS Flood's]'s right to his reputation, given the legitimate aim in pursuit of which the publication was made. I uphold the defence of qualified privilege ... . The story was about a police investigation into an allegation that an officer in the extradition unit had been corrupted by a

> former police officer now working on behalf of very wealthy and controversial Russians living in England. That was a story of high public interest. The purpose of publishing the story was to ensure that that investigation was carried out promptly. That too was a matter of public interest.
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> 217. This is not to say that the judgment of TNL was a good judgment in the circumstances, but only that it was within the range of permissible editorial judgments which the court is required to respect. It is not the function of the court to express views on whether it was a good judgment or not, and I do not do so.
>
> 218. The naming of [DS Flood] was within the range of judgments open to TNL in this case, partly because it gave the story the interest referred to by Lord Steyn in *Re S* at para 34 cited above, but more importantly because not naming [him] would not have saved his reputation entirely. Rather it would have spread the damage to reputation to all the officers in the extradition unit."

24. The Judge finally turned to the question whether the continued presence of the Article on the website could also attract privilege and concluded that it could not.

Can *Reynolds* privilege apply even in principle in this case?

Publication of the press statement and of the identity of DS Flood

25. Mr Price QC, on behalf of DS Flood, accepts that his client could have had no objection to publication of the MPS press office statement ("the press statement"), which is set out in paragraph [7] of the Article, and he is prepared to accept that he can have no objection to the Article having named him as the police officer under investigation. What he says the Judge should not have held to have been capable of being covered by privilege were the paragraphs of the Article (paragraph [5], and also paragraphs [8], [15] and [16]) which contained the allegations made by the police informant concerning DS Flood, the ISC, and the ISC's Russian clients, including Mr Berezovsky – and the documentary evidence said to support those allegations ("the Allegations").

26. Mr Price's acceptance of TNL's entitlement (a) to publish the press statement and (b) to identify DS Flood as the person being investigated, is based, respectively, on (a) section 15 of the Defamation Act 1996, and (b) recent judicial statements of the highest authority.

27. So far as publication of the press statement is concerned, section 15(1) provides that "[t]he publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice ...". Paragraph 9 of that schedule includes reference to "[a] fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of ... any authority performing governmental functions", and such functions expressly include "police functions". Paragraph 9 is in part II of Schedule 1 to the 1996 Act, and so the privilege otherwise accorded by section 15(1) cannot be claimed if section

15(2) is unsatisfied – i.e. " if the person claiming the privilege was requested ... to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction" and failed to do so.

28. As to the identification of DS Flood as the police officer being investigated, Mr Price accepts that statements in a trio of House of Lords or Supreme Court authorities appear to justify this, essentially on the basis that "stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature". Those statements are in *In re S* [2005] 1 AC 593, paragraph 30, per Lord Steyn, *In re British Broadcasting Corporation* [2009] UKHL 34, paragraphs 25-26 and 65-66, per Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood, and *In re Guardian News and Media Ltd* [2010] UKSC 1 [2010] 2 WLR 325, paragraphs 63-65 per Lord Rodger (from which the passage just quoted is taken).

29. In other words, Mr Price is prepared to accept that the statutory privilege which is accorded to publication of a report which falls within the ambit of section 15 of the 1996 Act can be treated as extending to naming an individual who is referred to, but not specifically identified, in the report. Accordingly, where, as here, the Article was about a police investigation of alleged wrongdoing on the part of an unidentified police officer, the statutory privilege effectively extends to identifying or naming the police officer. Technically, it is probably wrong to refer to the statutory privilege going any further than the statute provides, but it is, I think, a fair description of the effect of Mr Price's concession.

Can Reynolds privilege attach in principle to the report of the Allegations?

30. What Mr Price does not accept, however, is that the statutory privilege can extend to publishing the *ex parte* allegations which gave rise to the investigation in question. Unsurprisingly, that is not in contention: neither the Judge's decision nor Mr Rampton QC's argument for TNL is based on section 15 of the 1996 Act. However, Mr Price goes further and contends that *Reynolds* privilege cannot, as a matter of law, extend to publication of allegations of wrongdoing made to the police or other authorities. As I understand it, that argument rests on two separate bases. The first is the contention that it would be inconsistent with section 15 of the 1996 Act if such privilege attached to allegations whether or not made to the police. The second basis is that there is authority for the proposition that publication of such allegations is not privileged and, far from *Reynolds* [2001] 2 AC 127 or *Jameel* [2007] 1 AC 359 calling that authority into question, there are dicta in the former case which tend to support it.

31. In my view, while the argument has some attraction, there is no inconsistency between the privilege afforded by section 15 of the 1996 Act and the notion that *Reynolds* privilege can be claimed in relation to the reporting of allegations made to the police. Subject to complying with section 15(2) and being unmalicious, publication by a defendant of a statement made by the police will be privileged irrespective of whether publication of the statement is in the public interest, and without the defendant being under any duty to check the accuracy of the statement. On the other hand, if it is potentially covered by *Reynolds* privilege, publication of an allegation made to the police will only attract privilege if it is in an article which, taken as a whole, is on a matter of public interest, if its inclusion in the article is

justifiable, and if the steps taken to gather and publish the information were responsible and fair.

32. While these seem to be two conceptually rather different sets of criteria, I accept Mr Price's point that, if one considers the matter more closely, there is, in practice, more overlap between the section 15(1) criteria and the *Reynolds* privilege criteria than may at first appear. Thus, reporting a police statement unmaliciously might well normally be expected to satisfy all the *Reynolds* privilege criteria. However, that rather misses the point; in some cases, absent section 15, it is quite conceivable that the court might take the view that publicising such a statement would not be in the public interest, or even that a competent journalist would have checked the original source of the contents of the statement before publishing it. One can analyse the legislative balancing exercise as involving section 15(2) being a *quid pro quo* for removing the risk of such a possibility in a case where the publication is of a police statement, and there is nothing inconsistent with that analysis in the notion that *Reynolds* privilege can apply to publication of the information which led to the statement.

33. The second argument raised by Mr Price is that there is a line of authority which supports the proposition that privilege should not be accorded to the publication of *ex parte* accusations, or of interim stages of official inquiries, and that nothing in the more recent learning of the House of Lords impinges on the validity of this principle.

34. The line of authority originates in *Purcell v Sowler* (1877) 2 CPD 215, which concerned a report in a newspaper of proceedings at a meeting of the board of guardians for a local poor-law union, in fact held in public, though the Court of Appeal considered that it should have been held in private. At the meeting, *ex parte* charges of neglect against the plaintiff, the medical officer of a union workhouse, were made in the form of a report. Cockburn CJ said at (1877) 2 CPD 215, 218 that "it is impossible to doubt that the administration of the poor-law is a matter of national concern", but that was not the "true question", which was "whether ... the occasion on which the words were uttered was privileged so as to protect the bona fide publication of the report." On the following page, he distinguished between reports of public meetings of public bodies, such as "municipal councils ... or ... magistrates in quarter sessions", where "publicity may be essential to good administration", and a meeting of a board of poor-law guardians, which is "not necessarily public", and is "a body of very limited jurisdiction, and as to which it cannot be asserted that publicity is essentially necessary or usual."

35. Mellish LJ said at (1877) 2 CPD 215, 221:

> "Although [the board of guardians] admit the public on an occasion when ex parte charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had the opportunity of meeting them … Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges."

Baggallay and Bramwell JJA agreed, the latter saying at (1877) 2 CPD 215, 223 that "Serious and grievous harm has resulted to the plaintiff, whose character has been assailed, and for no public good."

36. Mr Price relies on the fact that *Purcell* (1877) 2 CPD 215 was cited with apparent approval by Lord Nicholls in a passage in his speech on "Privilege and publication to the world at large" in *Reynolds* [2001] 2 AC 127, 195-197. It is important to see what Lord Nicholls said in relation to *Purcell* (1877) 2 CPD 215 in its context, and so it is appropriate to set out a relatively long passage in his opinion:

> "Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In *Cox v. Feeney* (1863) 4 F. & F. 13, 19, Cockburn C.J. approved an earlier statement by Lord Tenterden C.J. that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.
>
> This issue has arisen several times in the context of newspapers discharging their important function of reporting matters of public importance. Two instances will suffice, together with one instance of the publication in book form of information originating with the publisher. *Purcell v. Sowler* (1877) 2 C.P.D. 215 concerned a newspaper report of a public meeting of poor-law guardians. During the meeting the medical officer of the workhouse at Knutsford was said to have neglected to attend pauper patients when sent for. In deciding that publication of this allegation was not privileged, the Court of Appeal looked beyond the subject-matter. The court held that the administration of the poor-law was a matter of national concern, but there was no duty to report charges made in the absence of the medical officer and without his having had any opportunity to meet them. The meeting was a privileged occasion so far as the speaker was concerned, but publication in the press was not. In *Allbutt v. General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400, 410, the defendants published a book containing minutes of a meeting of the council recording that the plaintiff's name had been removed from the medical register for infamous professional conduct. This was after an inquiry at which the plaintiff had been represented by counsel. The Court of Appeal held that the publication was privileged. Giving the judgment of the court, Lopes L.J. expressly had regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the council and the duty of the council towards the public. *Perera v. Peiris*

> [1949] A.C. 1, 21, was an appeal to the Privy Council from the Supreme Court of Ceylon. The 'Ceylon Daily News' had published extracts from a report of the Bribery Commission which was critical of Dr. Perera's lack of frankness in his evidence. The Judicial Committee upheld a claim to qualified privilege. In the light of the origin and contents of the report and its relevance to the affairs of Ceylon, the due administration of the affairs of Ceylon required that the report should receive the widest publicity."

37. In my judgment, there is no reason to exclude allegations made to the police from the ambit of potential *Reynolds* privilege. As a matter of principle, I find it very hard to see why the fact that an allegation is made to the police rather than (or in addition to) another third party, or indeed direct to the journalist himself, should preclude publication of the allegation from being able to attract *Reynolds* privilege. After all, the material publicised in both *Reynolds* [2001] 2 AC 127 and *Jameel* [2007] 1 AC 359 were of allegations which could be said to have amounted to imputations of actual or suspected criminal activity on the part of the claimant, and it is hard to see why the fact that the allegations were made to the police should make all the difference. Nor do the cases relied on by Mr Price seem to me to support such a proposition.

38. *Purcell* (1877) 2 CPD 215 itself is clearly a decision on its facts. The observations of Cockburn CJ strongly suggest that there is no hard and fast rule as to when an allegation of misconduct at a public meeting can be more widely publicised under the cloak of privilege, and the "very limited" jurisdiction of the body concerned clearly weighed with him. Mellish LJ relied on the fact that the plaintiff had not had an opportunity to consider, let alone to meet, the allegations, which chimes well with Lord Nicholls's points 7 and 8 in *Reynolds* [2001] 2 AC 127, 205. Bramwell JA self-evidently could have decided the case differently if the publication in question had been "for [the] public good", which again brings into play the sort of factors identified by Lord Nicholls.

39. As I read it, in the passage I have just quoted extensively, Lord Nicholls made it clear that publication of allegations of wrongdoing may or may not attract privilege depending on all the circumstances of the particular case: see the last two sentences of the first of the two paragraphs, and the contrast between *Purcell* (1877) 2 CPD 215 and the other two cases summarised in the second of those paragraphs.

40. Furthermore, particularly as the issue involves so much of a value judgment, in an area which raises fundamental issues of freedom of speech and respect for private life, I believe that it can be rather dangerous to rely on cases decided more than a century ago, especially now that Convention rights have become of paramount significance. Not only does the introduction of Convention rights into our law potentially justify a different approach, but, as the Judge put it at [2009] EWHC 2375 (QB), paragraph 122, "[i]n *Reynolds* [2001] 2 AC 127 the House of Lords reconsidered the weight which the law accords to protection of reputation and freedom of the press, and redressed the balance in favour of greater freedom to publish matters of genuine public interest".

41. In other words, quite apart from any change in perceptions and standards which could properly be taken into account since 1877, there have been two important relevant changes in the past decade – the coming into force of the 1998 Act and *Reynolds*

[2001] 2 AC 127. The 1998 Act has caused the courts to focus particularly acutely on the competing Convention rights involved in a case where public interest privilege is raised to justify what otherwise might be a defamatory and inaccurate statement. And, as Lord Bingham of Cornhill put it in *Jameel* [2007] 1 AC 359, paragraph 28, *Reynolds* [2001] 2 AC 127 "carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues."

42. Mr Price also relies on *de Buse v McCarthy* [1942] KB 156, where the Court of Appeal held that no privilege could attach to publication of an agenda of a town council committee, which suggested that the plaintiffs had been stealing petrol from the council's depot. The court considered that there was no public interest in such allegations being publicised generally (by copies of the agenda being posted in public libraries and other public places). However, in the leading judgment, Lord Greene MR, at [1942] KB 156, 166-167, accepted that there could be reasons justifying publication of *ex parte* allegations, for instance publication by an employer of allegations against an employee which resulted in the latter's dismissal "to bring home to its employees the type of action which was regarded ... as a proper subject for ... dismissal". As the Judge said at [2009] EWHC 2375 (QB), paragraph 189, *de Buse* [1942] KB 156 was a case involving a council, not the media, publicising the information, and it would "now fall to be considered not under *Reynolds* public interest privilege, but under the Human Rights Act 1998 ... s.6(1) and Article 8 directly, or, if applicable, under the Data Protection Act 1998 : see *Clift v Slough BC* [2009] EWHC 1550 (QB)". In summary terms, *de Buse* [1942] KB 156 turned, inevitably, on its facts; it predated the coming into force of the 1998 Act and the development of *Reynolds* privilege; and, even then, the court accepted, albeit on the basis of specific facts, that privilege could attach to publication of allegations of criminal activity.

43. Having said that, cases such as *Purcell* (1877) 2 CPD 215 and *de Buse* [1942] KB 156 are salutary reminders that publicising allegations of serious wrongdoing made by third parties, whether relayed to the police or not, can cause serious distress and reputational harm to the victim, and that, if they turn out to be untrue, there should be a good reason before the victim is left without redress. As Lord Nicholls said in *Reynolds* [2001] 2 AC 127, 201, in a passage quoted by the Judge:

> "Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."

44. That brings me to the final argument raised on behalf of DS Flood, namely, given that *Reynolds* privilege is, in principle, capable of attaching to the article, the Judge was wrong to hold that the requirements of the privilege were satisfied, or, to put it another way, that the balance came down in favour of publication of the article being

privileged insofar as it included information contained in the Allegations made against DS Flood.

Is the publication of the Allegations protected by *Reynolds* privilege?

The proper approach on an appeal

45. Given that the Judge concluded, after a full and careful analysis of the evidence and arguments, that the article, including the Allegations, when first published, attracted *Reynolds* privilege, the first question to be considered is the nature of our role as an appeal court. Mr Rampton for TNL relies on what was said in this context by Sir Anthony Clarke MR giving the judgment of the Court of Appeal in *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] EMLR 11, paragraph 68, where he said:

> "The right to publish must however be balanced against the rights of the individual. That balance is a matter for the judge. It is not a matter 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."

46. I have some difficulty with that approach, which seems to me, with great respect, to treat what is a value judgment or balancing exercise as if it were a discretion. While an appellate court should be very slow in interfering with a judge's findings of fact or exercise of discretion, it seems to me that the inquiry involved in deciding whether or not *Reynolds* privilege can be claimed is ultimately a matter of judgment. Even though one can qualify it as being a "value" judgment or describe it as a balancing exercise, it raises a question of law, to which, as a matter of principle, and however difficult it may be to resolve, there is only one right answer.

47. On the other hand, I must admit to being unhappy at the notion that every time a judge decides whether *Reynolds* privilege can be invoked, the dissatisfied party can, in effect, have a fresh rehearing on the issue (albeit in all probability on the basis of the judge's findings of primary fact) in the Court of Appeal. Of course, permission to appeal would be required, but in many cases it may be hard to say that there is no real prospect of success in the Court of Appeal if the issue is effectively the subject of a rehearing on appeal. Important though it may often be, it seems to me undesirable in terms of certainty, despatch and cost, as well as sensible use of court time, that such an issue should effectively be reconsidered, rather than the judge's decisions on the issue being reviewed, on an appeal.

48. I note that, at the end of his opinion in *Jameel* [2007] 1 AC 359, paragraph 36, Lord Bingham referred to the fact that the House of Lords had not, "like the judge and the jury, heard the witnesses and seen the case develop day after day", and the fact that the House had "read no more than a small sample of the evidence". Accordingly, he described it as "a large step" for the House to decide for itself whether *Reynolds* privilege could be invoked in that case. It could be said to be an even larger step for an appellate court, which has not (and should not have) been taken through all the evidence, and which has not seen the witnesses and the development of the case over four days, to disagree with the trial judge's assessment, unless he has misunderstood

the evidence, taken into account a factor he ought not to have taken into account, failed to take into account a factor he ought to have taken into account, or reached a conclusion no reasonable judge could have reached.

49. In my view, a decision in a case such as this does not involve the exercise of a discretion and cannot therefore be approached as the court suggested in *Galloway* [2006] EMLR 11, paragraph 68. Where a first instance court carries out a balancing exercise, the appeal process requires the appellate court to decide whether the judge was right or wrong, but it should bear in mind the advantage that the trial judge had in the ways described in *Jameel* [2007] 1 AC 359, paragraph 36. Where the determination is a matter of balance and proportionality, it is, generally speaking, difficult for an appellant to establish that the judge has gone wrong.

Preliminary points

50. As I have already explained, the Judge carefully considered the various factors identified by Lord Nicholls in *Reynolds* [2001] 2 AC 127, 205, and conscientiously carried out the requisite balancing exercise. In the end, it does not appear to me that Mr Price's attack on the Judge's reasoning involves attacking much of the detailed aspects of his analysis of the facts or even the force of the competing issues as he assessed them. In effect, Mr Price's argument is really that, for a number of reasons of principle, the Judge was wrong to consider that *Reynolds* privilege should attach to the article insofar as it included the Allegations. Before turning to what I regard as the central reason, it is convenient to dispose of four of those reasons.

51. First, it is said that TNL cannot rely on responsible journalism in this case, as publication of the article, and indeed other actions by Mr Gillard, Mr Gillard senior and Mr Calvert ("the journalists"), impeded the police investigation. I am not convinced that such matters would, at least normally, be relevant to the issue of whether *Reynolds* privilege can be claimed. However, it is unnecessary to decide that point: at [2009] EWHC 2375 (QB), paragraph 185, the Judge said that there was "no evidence that the journalists did in fact interfere with the course of justice, or the police investigation." There are no grounds for doubting that conclusion.

52. Secondly, Mr Price contends that, as the journalists who wrote the article with the Allegations for which *Reynolds* privilege is now claimed, were responsible for those very Allegations being made to the police and causing them to initiate an investigation, it should not be open to the publisher of the article to rely on the existence of the investigation as a reason for invoking privilege. I do not see anything in that point. It is the police who decide whether an allegation deserves investigation, and if privilege is dependent on an investigation being under way, it cannot depend on whether the journalist responsible for the publication is, in some way, involved with, or responsible for, the investigation. Apart from being illogical, it would mean that any journalist with a good story would be reluctant to contact the police, even if he ought to do so, as it could disadvantage him as against his colleagues when reporting the story. As the Judge implied at [2009] EWHC 2375 (QB), paragraph 191, it might have been different if "TNL were simply reporting that they had made allegations to the police", but that was not the case here: there was a police investigation.

53. Thirdly, Mr Price relies on TNL's failure to withdraw or amend the website publication of the article after September 2007 to support his contention that *Reynolds* privilege should not be available for its original publication. That seems to me to be a false point: in relation to the original publication of the article, the claim for *Reynolds* privilege must be judged as at the date of publication.

54. Fourthly, there was some argument concerning the motives of the journalists in writing the article and seeing that it was published. I am doubtful whether that is of much relevance. Whether the publication of certain information is in the public interest does not depend on the subjective motives of the journalist or publisher. It is conceivable that the subjective motives of the journalist could influence the court in deciding what reasonable enquiries a responsible journalist would make in the particular circumstances, but it would, I think, take a pretty unusual case. I do not consider that this is such a case.

Reynolds privilege and the allegations included in the article

55. Mr Rampton's case is that the Judge rightly held that the three requirements of *Reynolds* privilege, which can be gleaned from the opinions in *Jameel* [2007] 1 AC 359 (as summarised in paragraph 18 above), were satisfied: (a) the article as a whole was on a matter of public interest, (b) the inclusion of the Allegations was part of the story and made a real contribution to it, and (c) the steps taken to gather and publish the information were responsible and fair. As to (a), the article concerned police corruption, which the Judge described at [2009] EWHC 2375 (QB), paragraph 131, as "a matter of interest to the community". As to (b), the Judge held at [2009] EWHC 2375 (QB), paragraph 202, that "it was within the range of editorial judgments open to TNL to publish [the article] in the form they did." As to (c), the Judge said at [2009] EWHC 2375 (QB), paragraph 199 that he accepted the submissions made on behalf of TNL in relation to "the steps taken to verify the information".

56. Mr Price accepts the Judge's conclusion on point (a), as far as it goes. However, on point (b), he says that what the Judge ought to have asked himself was whether the inclusion in the article of the Allegations made by the ISC insider was in the public interest, or, to use the words of Baroness Hale of Richmond in *Jameel* [2007] 1 AC 359, paragraph 147, whether there was "a real public interest in communicating and receiving" the summary of the Allegations made against DS Flood by the ISC insider as interpreted and relayed by the journalists in the article.

57. As to (c), Mr Price says that the journalists made no proper checks on the truth of the Allegations, and in particular that DS Flood had accepted money for passing sensitive information held by the MPS Extradition Unit to ISC. In effect, says Mr Price, TNL succeeded in invoking *Reynolds* privilege in relation to the publishing of the Allegations simply as a result of the journalists getting the ISC insider to tell them what he had told the police. While allegations of police corruption are of public interest, the mere fact that particular allegations are being investigated by the police themselves should not enable the media to publish details of the allegations, without fear of being liable for defamation, unless (a) the publication of the allegations is in the public interest, and (b) the journalist responsible took reasonable steps to check on their accuracy.

58. Mr Price reinforces the argument by drawing attention to the risk of trial by the media, particularly if malicious, or money-seeking, informants are involved. Anonymous allegations to the police followed by the maker of the allegations going to the press is not an unlikely state of affairs: indeed, there are good reasons for thinking that that could have been what the ISC insider did here. If such allegations can be published without the publisher or journalist having to take reasonable steps to verify their accuracy, then there would be a danger, perhaps particularly in relation to police officers, of malicious allegations being easily published with relative immunity.

59. In my opinion, Mr Price's submission is well-founded. Both limbs of *Reynolds* privilege are based on the public interest: journalists should be relatively free to report matters which it is in the public interest to place in the public domain, and journalists should take reasonable care to verify the accuracy of stories which may damage reputations. It is hard to see why those principles should not apply to publication of *ex parte* allegations made against an individual, simply because those allegations are being, and are publicly known to be, investigated by the police. The fact that the allegations are being investigated by the police may, depending on all the circumstances, influence the question of what investigations a responsible journalist might make, but I see no reason why it should go any further than that.

60. It is said that the decision and reasoning in *Jameel* [2007] 1 AC 359 is inconsistent with Mr Price's submission. I do not agree. In that case, the newspaper report (quoted in full at [2007] 2 AC 359, paragraph 40) stated that the Saudi Arabian Monetary Authority ("SAMA") was monitoring around 150 bank accounts of some prominent businessmen to "prevent them being used wittingly or unwittingly" for funnelling terrorist funds, and it identified some of the companies and individuals involved. There was no question of the report in that case containing any of the allegations or information on which the SAMA had proceeded. Accordingly, the report was rather similar to an article reporting the police statement in the present case and identifying DS Flood.

61. In *Jameel* [2007] 1 AC 359, there was an obvious public interest in the fact that the SAMA was monitoring certain accounts and why it was doing so, and the report informed the public about this and, reasonably, included names of those who were, after reasonable and professional inquiries, believed to be holders of accounts which were being monitored for funnelling. But what the report did not do was to suggest that there was, let alone to publish, any evidence which tended to support the notion that the claimants' account was being used for this purpose, let alone that any such use was "wittingly".

62. As Lord Hoffmann observed in that case at [2007] 1 AC 359, 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". However, as he immediately went on to say, "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." The reportage defence needs to be treated restrictively, as Sedley LJ said in *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502, paragraph 74, and it only appears to have succeed in this jurisdiction in two cases, both involving a political controversy – *Al-Fagih v HH Saudi Research &*

Marketing (UK) Ltd [2001] EWCA Civ 1634, [2002] EMLR 13 and *Gable* [2008] QB 502 itself.

63. The fact that an unidentified insider has given specific information which, if true, may incriminate a claimant, will very rarely be justifiable reportage. Of course, it will add something to the substance and newsworthiness of the story that the police are investigating the claimant, but it seems to me that it would be tipping the scales too far in favour of the media to hold that not only the name of the claimant, but the details of the allegations against him, can normally be published as part of a story free of any right in the claimant to sue for defamation just because the general subject matter of the story is in the public interest. The fair balancing of Article 8 and Article 10 would normally require that such allegations should only be freely publishable if to do so is in the public interest and the journalist has taken reasonable steps to check their accuracy. If they are true, a claim for defamation will fail; if they are untrue, but their publication was in the public interest, and a reasonable check was carried out, there is good reason why a claim for defamation should fail, even though it is hard on the claimant; if they are untrue and their publication cannot be said to be in the public interest or no reasonable check was carried out, it seems quite unjust that the claimant should have no remedy in law.

64. The Judge seems to have considered that the question of whether to include the Allegations in the article in this case was a matter of editorial judgment with which the court should not interfere, following the guidance given in the last paragraph of the passage in the opinion of Lord Nicholls quoted in paragraph 19 above – see at [2009] EWHC 2375 (QB), paragraph 205. I accept, of course, that the court should be careful that it does not step into the area of editorial judgment.

65. However, it seems to me that, when the media publish a police statement that a person is being investigated for a crime and identify the person concerned, the question whether reporting, in addition, the allegations upon which the investigation is based should be accorded *Reynolds* privilege is properly to be judged by seeing whether the established requirements of that privilege are met in relation to the reported allegations. Otherwise, one would be effectively extending the privilege by section 15 of the 1996 Act accorded to the report of the police statement, by refracting it through the prism of editorial control, so that the report of the allegations which gave rise to the investigation are also privileged, albeit on a slightly different basis. It seems illogical in principle and unfair on the person concerned that publication of the allegations can attract *Reynolds* privilege without the requirements of that privilege being satisfied in relation to those allegations, simply because section 15 permits the publication of a police statement that an investigation (which happens to be based on those allegations) to be published.

66. Accordingly, unless the publication of the Allegations can be said to have been responsible journalism, i.e. to have been in the public interest with the journalists having taken reasonable steps to verify the truth of the Allegations, it would appear to follow that the publication of those Allegations, as part of the article, cannot attract *Reynolds* privilege. I turn, then, to consider that issue.

Responsible journalism: public interest and steps to verify

67. This is a case where it seems to me to be quite helpful to go through the factors identified by Lord Nicholls in *Reynolds* [2001] 1 AC 127, 205, while acknowledging that they were said to be neither necessary nor sufficient.

68. The Allegations were serious: accusing a fairly senior police officer of what was not inaccurately described in DS Flood's pleaded case as "an appalling breach of duty and betrayal of trust and ... a very serious criminal offence" is self-evidently a very grave charge. Being identified as the officer the subject of the investigation described in paragraph [7] of the article in the Times may, on its own, have been pretty damaging to DS Flood (although I have doubts as to whether the Times would have published on that limited basis). However, by going further and publishing the allegations being made against him, with the details given in paragraph [5], coupled with the references to Mr Berezovsky and others in paragraphs [10], [15], [16] and [19], the journalists must have realised would be very likely to result in the article constituting a story with a far greater impact, and far greater effect on DS Flood's reputation. As Lord Nicholls said "the more serious the charge, the more the public is misinformed and the individual harmed" – [2001] 1 AC 127, 205.

69. The nature of the information contained in the Allegations is of considerable public concern in that it involves police corruption, but the weight to be given to that point is very severely reduced by the fact that the information is contained in the Allegations, which, as the journalists knew, were largely unchecked and unsupported. That factor is particularly important once one appreciates that the main content of the article was the Allegations, coupled with the identification of DS Flood, and the link with named Russian émigrés.

70. I turn to the source of the Allegations and what Lord Nicholls called "the status of the information". The contrast with Lord Nicholls's "allegation [which has] already been the subject of an investigation which commands respect" could scarcely be more marked.

71. The Judge touched on the quality of the evidence to support the Allegations at [2009] EWHC 2375 (QB), paragraph 203, where he said this:

> "[W]hile the basis for the allegation was weak, in that there was no evidence that the Claimant was Noah, or that any confidential information had been received by ISC, nevertheless, as early as 9 May, and up to the time of publication on 2 June, the police had confirmed that they had had sufficient evidence to obtain a search warrant and to carry out an investigation."

72. The Judge also made some relevant remarks at paragraph 210, where he said:

> "While the information was sufficient to enable MPS to obtain a search warrant, it was not a strong case, on the basis of what was known to the journalists. There was no evidence known to the journalists that [DS Flood] had received payments from ISC, and none that he had disclosed confidential information. The ISC Insider had specifically said, as reported in the article at para [5], that 'Noah could be a reference to an officer in the extradition unit', not that Noah was in fact a reference to him. So far as known to the journalists, the allegations were based on the facts that [DS

> Flood] served in a Unit which might have had information of use to ISC's clients, and that he enjoyed a close friendship with Mr Hunter, and that in his own personal circumstances he might have been thought to be a potential target for corruption if Mr Hunter was that way inclined. There was no evidence that Mr Hunter was so inclined, but his clients were individuals about whom much adverse information has been published."

73. When one turns to the "steps taken to verify the information", the journalists do not seem to have done much to satisfy themselves that the Allegations were true. When they were published in the article, they were, as the passages just quoted from the judgment show, and as the journalists must have appreciated, no more than unsubstantiated unchecked accusations, from an unknown source, coupled with speculation. The only written evidence available to the journalists did not identify any police officer, let alone DS Flood, as the recipient of money from ISC at all, let alone for providing confidential information.

74. As to urgency, there was no reason for rushing to publish, so far as I can see. DS Flood was given an opportunity to answer the Allegations, but, as Mr Price points out, he was rather hampered in what he could say, in the light of the fact that he was being investigated. The tone and timing of the article (subject to the point I have made about lack of urgency) do not, in my judgment, take matters much further either way.

75. I have not so far mentioned the factor which played such a large part in *Jameel* [2007] 2 AC 359, and which encompasses most of the points I have been considering, namely the public interest in the Allegations being placed in the public domain. The mere fact that an ISC insider had made the Allegations against a member of the MPS is plainly not enough to justify publication of the Allegations: otherwise, as Moore-Bick LJ points out, there would have been a reportage defence. Further, the public interest must take into account factors already mentioned, namely the harm publication of the Allegations would have on DS Flood and his family: for the reasons described by Lord Nicholls in the passage cited in paragraph 43 above, the ease with which accusations of impropriety can be made against members of the police is a factor to be borne in mind.

76. Once one examines Lord Nicholls's factors in relation to this case, and indeed once on asks whether publication of the Allegations constituted responsible journalism, it seems to me that it is clear that the publication of the article, insofar as it included the Allegations, does not attract *Reynolds* privilege. That makes it unnecessary to consider TNL's appeal, but, as it was fully argued and it raises a point which may occur again, I shall deal with it.

Did publication on the website attract privilege after September 2007?

77. The Judge concluded that, even though the original publication, on 2 June 2006, of the article on the Times website, like the publication of the article in the Times newspaper, attracted *Reynolds* privilege, it ceased to do so after early September 2007, once TNL had been told the result of the DPS investigation and the conclusion reached in the Report. As the Judge put it, at [2009] EWHC 2375 (QB), paragraph 249, "The failure to remove the article from the website, or to attach ... a suitable qualification, cannot possibly be described as responsible journalism. It is not in the

public interest that there should continue to be recorded on the internet the questions as to [DS Flood's] honesty which were raised in 2006, and it is not fair to him. It is not in the public interest ... ".

78. On the face of it, at least, that conclusion appears to be not merely one which the Judge was entitled to reach: it was plainly right, and indeed appears to be consistent with the decisions of this court in *Loutchansky* [2002] QB 783 and (on effectively the same facts) of the European Court of Human Rights in *Times Newspapers Ltd v UK (Nos 1 & 2)* (application nos 3002/03 and 23676/03), 10 March 2009. If the original publication of the allegations made against DS Flood in the article on the website had been, as the Judge thought, responsible journalism, once the Report's conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification. Despite this, nothing was done.

79. The only argument to challenge the Judge's conclusion that the website publication of the article no longer attracted *Reynolds* privilege after early September 2007, which TNL sought to raise below or in this court is based on correspondence which passed between the solicitors to the parties after 5 September. As Mr Rampton very fairly accepts, the precise way in which TNL puts its case on that correspondence has changed, or developed, since the hearing before Tugendhat J.

80. The essence of his case is that (a) TNL's solicitors made reasonable proposals to DS Flood's solicitors, which were rejected, (b) that DS Flood's solicitors demanded that TNL posted on the website a statement which was far more than DS Flood was entitled to, and (c) that the correspondence ended with TNL's solicitors saying that they would assume that DS Flood would not want any change to the website unless they heard otherwise, a statement to which there was no specific reaction or reply from DS Flood's solicitors. The third point was not really developed before the Judge.

81. Subject to one point, I would adopt what the Judge said at [2009] EWHC 2375 (QB), paragraph 244, namely:

> "Each party was entitled to reject the form of words tendered by the other in correspondence. The parties to a dispute are not obliged to settle it, and may choose to litigate. But the risk in relation to the *Reynolds* public interest defence lay on TNL, and not on the Claimant. It is for a defendant to make good his defence. It may well be good practice to seek to agree a form of follow-up publication in a case such as this. But if there is no agreement, then the publisher must take his own course, and then defend it if he can at trial. He cannot offer the claimant a form of words which the claimant refuses to accept, and then rely on that refusal to relieve him of the obligation of acting responsibly and fairly, at least when the claimant's refusal is reasonable, as it was here."

The only qualification I would make to that analysis relates to the last sentence. The fact that the claimant's refusal is unreasonable will, save perhaps in the most unusual circumstances, not be enough to justify the defendant doing nothing if responsible journalism would otherwise require him to retract or modify a website publication if further relevant information comes to light. The essential point is that it is for a defendant to decide on the appropriate course to take. As well as being contrary to principle, it seems to me to be literally adding insult to injury to enable a defendant to

require a claimant, after new evidence has come to light, to agree a form of words to amend a publication, which is defamatory of him but against which he cannot protect himself in law, so as to ensure he still cannot protect himself against it in law.

82. Of course, in an appropriate case, a claimant may be held to be unreasonable in his attitude to a defendant's proposal, and this could be reflected in any order for costs a court may make, or even, conceivably, in the measure of damages it awards. If a claimant says in clear terms that he does not want the publication to be amended or withdrawn, or even that he does not care whether it is amended or withdrawn, then, at least as at present advised, I consider that he could be held to have lost any right to contend that the defendant's failure to amend or withdraw the article was actionable: it could be a simple case of waiver or estoppel, or even, if there was consideration, of contract. However, it is fanciful to suggest that DS Flood's solicitors were adopting such an attitude in the correspondence in this case.

83. I am unimpressed with the argument that DS Flood cannot complain of the continued publication of the article because his solicitors did not reply to a statement in an email from TNL's solicitor effectively indicating that he would assume that DS Flood was content that nothing be done to the website article if he received no reply. First, I doubt that that interpretation is one which TNL's solicitor's letter properly bears; secondly, even if it does, it is not open to a defendant's solicitor, in circumstances such as these, to require the claimant to elect between continuing discussions as to the form of words which should be added to the publication and accepting that nothing will be done; thirdly, although they did not expressly answer, it was clear from DS Flood's solicitors' reply that he would not be happy if nothing was done: his consistent position was that what TNL was offering did not go far enough.

Conclusion

84. For these reasons, and for the reasons more concisely expressed by Moore-Bick LJ and Moses LJ, I would dismiss TNL's appeal and allow DS Flood's cross-appeal.

85. Following the hearing, our attention was drawn by Mr Price to the decision of the European Court of Human Rights in *A v Norway* (Application no 28070/06). The decision may well provide some support for the conclusion I have reached, and it may even cast doubt on the concession made on behalf of DS Flood that TNL was entitled to identify him in the Article. However, as Mr Rampton points out the facts were slightly different, and the decision predates the Supreme Court's decision in *Guardian* [2010] 2 WLR 325. As it has not been suggested by Mr Rampton that the decision in *A v Norway* assists TNL's case, it seems to me that it is unnecessary to say any more about it.

Lord Justice Moore-Bick :

86. This appeal raises once again the difficult task of balancing freedom of expression against the right to reputation. The circumstances which have given rise to the proceedings have been fully described by the Master of the Rolls. I gratefully adopt his account and agree that the appeal should be allowed for the reasons he gives. However, in view of the importance of the case I propose to explain in my own words my reasons for allowing the appeal.

87. The case concerns the publication in *The Times* of an article rehearsing various allegations made by third parties against the appellant, an officer in the Metropolitan Police Force. The article not only set out the allegations but named the appellant as the person against whom they had been made. The precise meaning to be attributed to the article is in dispute, but for the purposes of this appeal it can be presumed to have been defamatory and untrue. The question is whether the newspaper is entitled to claim privilege in respect of the publication on the grounds that it represented responsible journalism of the kind considered in *Reynolds v Times Newspapers Ltd* [2001] A.C. 127 and *Jameel v Wall Street Journal Europe S.p.r.L* [2006] UKHL 44, [2007] 1 A.C. 359.

88. Since the article reported allegations made by others the starting point, in my view, is the repetition rule, that is, the principle that a person who reports a defamatory statement made by a third party about another renders himself liable as if he had made the statement himself: see *Gatley on Libel and Slander*, 11th ed., paragraph 11.4. A limited incursion into that rule has been made by the recognition that in some circumstances the mere fact that a person has made allegations of a defamatory nature about another is a matter of sufficient public interest to justify a report of what was said: see *Roberts v Gable* [2007] EWCA Civ 721, [2008] Q.B. 502. However, such cases are relatively rare and no attempt is made to rely on the reportage defence in this case.

89. The judge held in paragraph 126 of his judgment that whether the subject matter of the article was a matter of public interest depended upon the effect of the article as a whole, and not upon the effect of the particular defamatory statement which is complained of, which, unless it had no contribution to make to the overall effect of the article, should not be isolated for separate consideration. He derived those propositions from paragraphs 48 and 51 of Lord Hoffmann's speech in *Jameel*. Since police corruption is a matter of interest to the community, he held that the requirement of public interest was satisfied and turned to the issue of responsible journalism, which he considered by reference to the factors identified by Lord Nicholls in *Reynolds*. Having done so, he held that the test of responsible journalism was satisfied in this case.

90. Mr. Price submitted that there is no public interest in reporting the details of allegations that have yet to be investigated and to which no response is called for by the person against whom they are made in accordance with the ordinary principles that govern the pursuit of criminal or disciplinary charges. On the contrary, he submitted that the public interest requires that such allegations should in general not be made public. Many unfounded allegations are made maliciously or by misguided persons wholly without foundation and, if made public, may cause considerable embarrassment or more serious harm. Even if the allegations are true, premature publication may place the person concerned under serious pressure to respond in detail at a time when he is not prepared to do so or contrary to the safeguards for accused persons provided by the criminal law. He relied on the decisions in *Purcell v Sowler* (1877) 2 C.P.D. 215 and *De Buse v McCarthy* [1942] 1 K.B. 156 in support of the general proposition that there is no public interest in reporting allegations of that kind.

91. Mr. Rampton submitted, however, that the legal landscape has been altered by the decisions in *Reynolds* and *Jameel*, whose effect was to protect the publication by

responsible journalists of information, including reports and statements made by third parties, which it is in the public interest to know. He submitted that in *Jameel* itself their Lordships had held to be privileged the publication in good faith of allegations made by a third parties, in that case the United States authorities, of steps said to have been taken by the Saudi central bank to monitor the bank accounts of those, including the claimants, who might, wittingly or unwittingly, be involved in terrorism. The decision, he submitted, is authority for the proposition that responsible reports of statements made by third parties will be protected if the subject matter is such that publication is in the public interest. Corruption in the police is a matter of public interest and accordingly a responsible report of statements made by others relating to such matters is privileged. The approach taken in *Purcell v Sowler* and *De Buse v McCarthy* has given way to the broader test of responsible journalism which seeks to hold a proper balance between freedom of expression and the protection of reputation.

92. *Purcell v Sowler* concerned a report in a local paper of proceedings at a meeting of the board of guardians of the Altrincham poor-law union at which allegations of neglect of duty had been made against the medical officer. At trial it was admitted that the allegations were ill-founded, but that the report of the proceedings was accurate and had been made in good faith. The defendants asserted qualified privilege, that is, privilege attaching to reports of public proceedings made in good faith. All the members of the court accepted that the administration of the poor-law was a matter of legitimate public concern, but they recognised that publicity was not essential and that the guardians were entitled to conduct their proceedings in private. Privilege did not therefore attach to a report of their proceedings.

93. In *De Buse v McCarthy* [1942] 1 K.B. 156 the town clerk sent out a notice convening a meeting of the council to consider the report of a committee on the loss of petrol from one of the council's depots. Copies of the notice, which included a full copy of the report, were sent to public libraries where they were available to members of the public. Four employees of the council complained that the report contained statements which were defamatory of them and brought proceedings for libel. The defendants argued that the council and the ratepayers had a common interest in the subject matter of the words complained of and that the occasion of publication was therefore privileged. The argument was rejected on the grounds that there was no common interest between the ratepayers and the council to communicate what at that stage were allegations that had not been fully investigated.

94. These cases go some way towards supporting Mr. Price's submission that, at least prior to the decisions in *Reynolds* and *Jameel*, the public interest was not normally thought to be served by reporting allegations of misconduct that remain to be investigated and substantiated. On that basis he submitted that there was no public interest in reporting allegations made by an "ISC insider" against a member of the Metropolitan Police, much less in identifying the officer concerned.

95. The judge rejected Mr. Price's submission, which he considered to be inconsistent with the decision in *Jameel* under which the law provides protection for the responsible reporting of statements made by others on a matter of public interest. He also considered that the means available to prevent newspapers from interfering with the proper administration of justice were such that it was not possible to justify on those grounds preventing them from questioning those who were under investigation or from reporting of allegations. If the judge is right, there is very little distinction to

be drawn between the defence of reportage and the defence of responsible journalism in relation to the reporting of statements made by third parties.

96. In his celebrated speech in *Reynolds* Lord Nicholls emphasised that the principle underlying the defence of qualified privilege is the recognition of the need in the public interest for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. When that is translated into reporting to the public at large the question becomes whether the public has a right to know the particular information and in answering that question the court has regard to all the circumstances. It is concerned to assess whether the information is of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice. Lord Nicholls referred to a number of cases in which the principle had been considered in the context of reporting in newspapers. One of the cases to which he referred was *Purcell v Sowler*, which he clearly regarded as providing an example of that general principle, rather than as establishing any principle relating specifically to uninvestigated allegations. At page 202C he pointed out that the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public and that its value to the public depends upon its quality as well as its subject matter. The common law does not seek to set a higher standard than that of responsible journalism. At page 205 Lord Nicholls identified ten matters which he intended to be no more than illustrative of the kind of things that the court should take into account when deciding whether the occasion of publication was subject to qualified privilege. Ultimately, in his view, the test of public interest is a compendious.

97. In *Jameel* their Lordships applied the principles developed in *Reynolds*. The newspaper reported that at the request of the United States' authorities the central bank of Saudi Arabia was monitoring certain bank accounts to prevent their use for channelling funds to terrorist organisations. It listed, as account holders, the names of a number of individuals and companies, including that of the claimants' trading group. Lord Hoffmann suggested a structured approach to the application of the principles derived from *Reynolds*. The first step is to decide whether the subject matter of the report is a matter of public interest; the second to decide whether the inclusion of the defamatory statement was justifiable; the third to decide whether the steps taken to gather and publish the information were responsible and fair. In that way one arrives at a decision on the overall question whether publication was in the public interest.

98. The article in the present case did not take the form of a classic piece of investigative journalism, in which the newspaper reports facts uncovered by the journalist, but reported the fact that the police were investigating allegations by a former ISC insider that a member of the Metropolitan Police Extradition unit had provided information in exchange for payments. It went on to name the claimant as the person under investigation. The sting of the article is said to be that there were reasonable grounds for suspecting that DS Flood had been corruptly passing information to ISC. For present purposes it does not matter whether the allegation was true or false since, as Lord Hoffmann pointed out in *Jameel* (paragraph 62), that is not relevant to the *Reynolds* defence. It is a neutral circumstance, because the elements of that defence are the public interest of the material and the conduct of the journalists at the time.

99. The article went much farther than merely reporting the fact that the police were investigating an allegation of corruption, because it set out the details of what had been alleged and referred to the fact that the allegations were said to be supported by a dossier. Part of the contents of the dossier were then described, including references it was said to contain to a series of payments made by ISC totalling £20,000 to a recipient codenamed Noah, which 'could be a reference to an officer in the extradition unit who was friendly with one of ISC's bosses'. The article then went on to name DS Flood as the officer under investigation. Mr. Price submitted that even if DS Flood had not been named, the codename Noah was an obvious allusion to him.

100. Since the subject matter of the article was police corruption, there can be no doubt that it was a matter of public interest. I can therefore pass at once to the second question, namely, whether the inclusion of the defamatory material was justifiable. The details of the allegations and the naming of DS Flood were potentially very damaging to him and it was therefore necessary for them to make a real contribution to the public interest element of the article. It has been recognised that a considerable degree of deference should be paid to editorial judgment when deciding whether the inclusion of the defamatory material was justified and undoubtedly setting out the allegations and naming DS Flood added force and credibility to the story. The paragraphs about various Russian oligarchs, their business affairs and their relationship with the Kremlin, were no doubt included essentially for colour and presentational purposes. However, this was not a case in which the article simply purported to report information which it was in the public interest to know, the presentation of that information being rendered more vivid and arresting by the inclusion of some defamatory material. In this case the allegations *were* the whole story. So if the inclusion of the defamatory material was justifiable, so was the story, and vice versa.

101. In my view, therefore, it is not possible to decide whether the publication was in the public interest without some consideration of the question of responsible journalism. Lord Nicholls identified ten matters which will often fall to be considered in this context, but which were not meant to be exhaustive. They were primarily directed to the publication of information put before the public as reliable and for that reason some emphasis was placed on the steps taken to obtain the information and to verify its accuracy. Similar requirements apply to the true reportage defence: a responsible journalist will take proper steps to ensure the accuracy of the statement being reported, the identity of the person by whom it was made, the occasion on which it was made and the circumstances in which it came to be made, including any relevant statement from the person about whom the allegation was made to which it is a response, or which was made in response to it.

102. There was no public interest in knowing the mere fact that an ISC insider had made allegations against a member of the Metropolitan Police (hence the absence of any attempt to rely on the reportage defence), but there was a public interest in knowing the facts insofar as the allegations were true and by virtue of the repetition rule the newspaper is to be treated as having itself made the statements contained in the allegations which it reported. It is therefore necessary to ask, in particular, what was the source of the journalist's information, what steps were taken to verify it, what was the status of the information, how urgent the matter was, whether the article reported DS Flood's side of the story and its general tone.

103. Mr. Price criticised the standard of journalism in this case on a number of grounds. I agree with the Master of the Rolls that there is no substance in many of them and I do not wish to add to what he has said in paragraphs 51 to 54 of his judgment. However, in some respects his criticisms were well-founded. Although the journalists in this case had taken steps to ensure the accuracy of their reporting, I think Mr. Price was right in saying that they had taken few, if any steps, to verify the truth of the allegations themselves. Moreover, the status of the information was no more than that of an uninvestigated and unsubstantiated allegation. The dossier, which the journalists had seen, did not itself identify DS Flood or any other member of the Metropolitan Police as 'Noah'; nor did it specifically support the allegation that any officer had been the recipient of payments from ISC. The status of the information was, therefore, little greater than any allegation made to the police and currently under investigation. There was no urgent need for publication.

104. In my view responsible journalism requires a recognition of the importance of ensuring that persons against whom serious allegations of crime or professional misconduct are made are not forced to respond to them before an investigation has been properly carried out and charges have been made. It is very easy for allegations of impropriety or criminal conduct to be made, to the police, professional bodies and others who may have a duty to investigate their truth, out of malice, an excess of zeal or simple misunderstanding. If the details of such allegations are made public, they are capable of causing a great deal of harm to the individual concerned, since many people are inclined to assume that there is "no smoke without fire". Moreover, there is a serious risk that once the allegations have been published the person against whom they are made will feel obliged to respond to them publicly, thereby depriving himself of the safeguard of the ordinary process and risking a measure of trial by press. I am not dealing here with the publication of the simple fact that a complaint has been made against a person, without any details being given, or with the publication of the fact that a person has been charged with a criminal offence. Such information is likely to be a matter of public interest. It is routinely made public in statements issued by the police and when that occurs a report of the statement is protected under section 15 of the Defamation Act. However, it is unnecessary and inappropriate for such reports to set out the details of the allegations made against the person charged; the description of the charge itself is sufficient to inform the public of what it has an interest in knowing. The alternative is trial by press without proper safeguards, which is clearly not in the public interest.

105. The judge considered and rejected these arguments in paragraphs 176-187 of his judgment. He was of the view that in substance Mr. Price's submissions were inconsistent with the decision in *Jameel* since, if they were sound, they would have succeeded in that case. In my view, however, the decision in *Jameel* does not provide a defence of responsible journalism in this case. The problem is not one of interfering with the administration of justice (which I accept the court has power to control), but with the public interest in publishing as fact allegations made by third parties which, if true, may lead to prosecution or disciplinary proceedings but have yet to be investigated. Both the judge's analysis and Mr. Rampton's submission fail to recognise an important distinction between the nature of the publication in *Jameel* and the publication in the present case. The thrust of the article in *Jameel* was that the Saudi authorities were actively co-operating with the United States authorities in the fight against terrorism. It was impossible for the journalists to verify independently

whether what the United States authorities said was true, but what mattered was that they had said it. It was in the public interest to know that the United States' authorities were expressing themselves to be satisfied that the Saudi authorities were providing co-operation in the fight against terrorism at a time when some were inclined to question that. Moreover, the article itself indicated that the accounts being monitored might be used by terrorists without the knowledge or connivance of the holders and to that extent itself neutralised any potentially defamatory implication. The allegation being made by the United States authorities (if that is how it should be viewed) that the Saudi central bank was monitoring certain accounts is very different from the kind of allegation with which the present case is concerned. I do not think their Lordships intended to hold that even where the reportage defence cannot be made out the publication of detailed allegations by third parties of criminal behaviour or other serious misconduct which have still to be investigated is in the public interest. In my view there is no parallel between the two cases.

106. The judge accepted that part of the public interest in publishing the story lay in prompting the police to pursue an investigation that they would or might otherwise abandon. However, I am unable to accept that. If that had been the purpose of the article it would surely have been written in a way that would have placed greater emphasis on the existence of the allegations and the failure of the police to pursue an investigation. In fact the police were pursuing an investigation, as the statement they issued, itself reported in the article, made clear.

107. In the end the question is one of striking a balance between freedom of speech and the protection of reputation, or, as the judge put it in paragraph 215 of his judgment, of deciding whether the publication of the article was a proportionate interference with the claimant's right to reputation. The judge held that the balance in this case was to be struck in favour of freedom of speech and that the interference with DS Flood's right to reputation was proportionate. Mr. Rampton naturally submitted that this court should not interfere with the judge's assessment and drew our attention to the remarks of Sir Anthony Clarke M.R. in *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] E.M.L.R. 11, to which the Master of the Rolls has referred, suggesting that the decision is essentially one for the judge at first instance rather than an appellate court. In my view, however, that is not correct. There is an intrinsic difference between exercising a discretion and deciding a question of law. In cases where the court is called upon to exercise its discretion views may legitimately differ about the order that should be made. For that reason the judge's decision cannot be overturned otherwise than on well-recognised grounds which, if established, undermine the basis on which the discretion was exercised. When a question of law is to be decided there is only one correct answer, however difficult it may be to find. Thus, if the true meaning of a document is in issue, the fact that the construction preferred by the judge is plausible does not prevent an appellate court from deciding the matter for itself. Nonetheless, where newspapers and broadcasters are involved striking a balance between freedom of speech and the protection of reputation will often depend to a large extent on an assessment of the behaviour of the journalists involved in the publication. Factors of the kind identified by Lord Nicholls require a careful assessment of the evidence and an appellate court should be cautious before overturning the decision of the judge below, particularly since it has not itself had the advantage of seeing the witnesses.

108. Nonetheless, I agree with the Master of the Rolls that the judge reached the wrong conclusion in this case. He did so because he failed to have sufficient regard to the serious nature of the allegations made against DS Flood and the journalists' failure to take any significant steps to verify their accuracy and because he misunderstood the effect of the decision in *Jameel*. I would therefore allow the cross-appeal.

109. As to the appeal itself, there is nothing I wish to add to what has been said by the Master of the Rolls. I agree that it should be dismissed.

Lord Justice Moses :

110. The crucial question in the instant appeal is whether the article of 2 June 2006 went too far. The publication by the police of the statement reproduced at [7] of the article is protected by section 15(1) and paragraph 9 of Schedule 1 to the 1996 Act. It was not argued that the privilege did not extend to publication of DS Flood's name. But TNL seeks to uphold the judge's view that the cloak of qualified privilege covers not only the fact that the police were investigating an allegation of corruption against a fellow officer but the nature of the case on which the allegation is based. Tugendhat J regarded publication of the basis of the case as part of that which he described as 'the story', inclusion of which was a matter of editorial judgement with which the court should not interfere [216]-[218].

111. It seems to me that the distinction between the fact and nature of the investigation should not be so easily elided with the facts which triggered the investigation. The Master of the Rolls calls the facts on which the allegation was founded 'the Allegations' [25] and Lord Justice Moore-Bick describes them as the details of what had been alleged [99]. I prefer to call those facts the material on which the allegation is based since it assists in drawing the distinction on which I believe, in agreement with my lords, resolution of this appeal depends.

112. It seems to me that, whether or not the police had published the statement at [7], it was a matter of public interest that the Times should publish and the public should learn that the police were investigating an allegation of corruption against a fellow officer. It is instructive to emphasise why such publication is a matter of public interest; if the reason why it was of public interest is identified, it becomes easier to identify the limits of that public interest.

113. That the police are pursuing an investigation of corruption against a fellow police officer is a matter of public interest because corruption undermines the necessary public trust in those responsible for upholding the law and protecting the public. Trust depends, at least in part, upon the belief that corruption will be investigated and rooted out wherever it occurs and that the police will investigate and pursue the investigation with due rigour against one of their own.

114. Whilst I accept that the suggested subjective motives of the journalists to ensure that the investigation was vigorously pursued does not assist in identifying whether or not the publication was in the public interest [54], and that the article was not drawn in a way which suggested such a purpose, as Lord Justice Moore-Bick points out, nonetheless it does seem to me that the effect of such an article does demonstrate why publication of the fact of the investigation was in the public interest. It underlined the significance of alleged corruption and provided some assurance to the public. Test it

in this way: keeping quiet about its inception would only fuel the suspicion, however unfounded, should the fact of the investigation ever emerge, that the police were better at keeping from the public gaze the fact of an investigation against their own than against other members of the public. Moreover, publication does provide some impetus to pursuing the investigation to conclusion. I am not, for one moment, suggesting that the investigation would not be properly pursued but public perception of corruption and efforts to repel its insidious consequences is important.

115. Once the reasons for the conclusion that it was of public interest to publish the nature of the allegation and its target are identified, it becomes easier to discern the need to separate publication of the allegation and publication of the facts on which it was founded. As the Master of the Rolls points out, [57]-[65], it does not follow that because it is in the public interest to publish the allegations, it is in the public interest to publish the details of their foundation. In the instant case, of what public interest, in the correct legal sense, was it to know that it was alleged that the payments were to a recipient to whom a code-name was applied with an unfortunate but incorrect biblical connotation with the officer under investigation?(Article[5]) Of what public interest was it that he was a close friend of an employee of ISC? (Article [8]) Of what public interest was it that Berezovsky was a client of ISC?(Article[15]).

116. Such allegations merely added credence to the grounds on which the investigation was pursued; they invited the reader to think that, although they had not been investigated let alone substantiated, there might be "something in them". The greater the detail, the greater the potential for harm. The details added nothing to the public interest on which the claim to qualified privilege was based. On the contrary, they exposed DS Flood to the suggestion that unchecked and unsubstantiated allegations, from an unknown source, might be well-founded. And all that at a time when it was quite wrong to expect him to have to give any detailed answers.

117. The distinction I have drawn between publication of the details on which the allegation was based and the allegation itself is the very distinction which forms the basis of *Jameel*, as the Master of the Rolls and Moore-Bick LJ have demonstrated. The basis on which SAMA had chosen to co-operate with the United States was never disclosed. Nothing that was published suggested justification for the inclusion of the claimant's bank accounts amongst those to be monitored. Monitoring embraced those whose accounts might be used unwittingly.

118. Of course, the details in the Times' article added spice to the story; of course those details might make it more likely that a reader would notice the article. Editors know how to attract the attention and interest of their readers and the courts must defer to their judgement of how best to achieve that result (*In re Guardian News and Media Ltd* [63], *In re S* [34]). But *non sequitur* that it can be left to them to judge whether publication of the impugned details is of public interest. That is for the courts when determining whether the article as a whole was a proportionate interference with DS Flood's right to his reputation. I agree that publication without investigation of the details on which the allegation was based was not in the public interest. The newspaper must be left to justify any imputation, as yet undetermined, without protection of qualified privilege.

119. Lest it be thought that the conclusion of this court impedes attempts to add interest and colour to a story, the newspapers and their readers have only themselves to blame.

That a person is accused is generally of far greater interest than his or her subsequent triumphant acquittal. Once an accusation is dismissed, the blaring headline of accusation on page 1 becomes a tepid reference in the graveyard of page 2. I agree that DS Flood's cross-appeal should be allowed and TNL' appeal be dismissed.