Neutral Citation Number: [2005] EWHC 2438 (QB)

Case No: HQ03X03023

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2005

Before:

THE HON. MR JUSTICE EADY

- -

Between:

Mary Culnane	**Claimant**
- and -	
1. Mark Morris	**Defendants**
2.Vijay Naidu	

- -
- -

Ms Claire Miskin (instructed by **Osmond & Osmond**) for the Claimant
Ms Sara Mansoori (instructed by **Wragge & Co**) for the Defendant

Hearing date: 1st November 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

Mr Justice Eady :

1. On 1st November 2005 a pre-trial review took place in these proceedings, which are due for trial before a jury on Monday 7th November. Various matters were dealt with, including the hearing of a preliminary issue, encouraged by Gray J at an earlier hearing, whereby I was invited to rule upon the impact of s.10 of the Defamation Act 1952 upon the plea of qualified privilege (recently added by way of amendment).

2. The point is a rather unusual one, although the provision was bound to require consideration sooner or later in the light of the Human Rights Act 1998, as Lord Nicholls rather anticipated in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 197:

> "Parliament seems to have taken the view that the defence of comment on a matter of public interest provided sufficient protection for election addresses. Whether this statutory provision can withstand scrutiny under the Human Rights Act 1998 is not a matter to be pursued on this appeal".

3. The case arises in this way. Ms Mary Culnane stood for election in November 2002, in the interests of the British National Party ("BNP"), at a bye-election in the Downham ward in the London Borough of Lewisham. She sues in these proceedings for defamation in respect of words contained in an article published in the local Liberal Democrat leaflet, "Downham Focus", three years ago on 2nd November 2002. It was apparently written by another member of the party, a Ms Cathy Priddey, but it was approved by Mr Vijay Naidu, the Second Defendant, in his capacity as election agent. Mr Mark Morris, the First Defendant, was standing as the Liberal Democrat candidate.

4. The article was headed "Don't be fooled by the BNP" and contained the following words:

> "The BNP are keen to persuade local residents that they are a respectable political party who will stand up for your interests. Don't be taken in!
>
> Since BNP became active in Downham, local people tell us they have felt more intimidated and less safe, particularly at night. There's been an increase in racist graffiti and residents have reported a number of racially motivated attacks on people and their homes. One local resident reported being followed by a gang of youths chanting racial abuse and 'BNP' and having objects thrown at him whilst trying to do his shopping.
>
> They are a blight on our area – and think how much worse it would be if they got elected! Downham would be seen by outsiders as a no-go area and house prices would fall as people would no longer be interested in moving in to our community.
>
> Time and time again, respected bodies, such as the BBC, have discovered members of the BNP with links to football

> hooliganism and other violent activities. And this is a party that claims to want a crackdown on crime!
>
> Facts about the BNP leadership.
>
> FACT: 5 Out of the 15 members of the BNP Advisory Council have criminal convictions.
>
> FACT: 10 out of the 27 BNP regional party organisers have criminal convictions.
>
> There offences include:
>
> ▪A petrol bomb attack ▪Possessing Weapons ▪Possession of drugs ▪Violent attacks ▪Public disorder ▪Criminal damage ▪Offences under the Explosives Act ▪Attacking a teacher.
>
> When you go to vote on November 7th, ask yourself – is this the kind of person you want as your elected councillor?"

5. Almost a year elapsed before a letter of complaint was sent by the Claimant on 2nd September 2003, the claim form following shortly afterwards on 30th September. There will no doubt be arguments as to whether the words refer to the Claimant, and as to their meaning, but she contends that the words would convey the meaning that she has convictions:

> "… for some or all the following criminal offences, alternatively that [she] is the kind of person who would commit some or all of the following criminal offences:
>
> - A petrol bomb attack
> - Possessing weapons
> - Possession of drugs
> - Violent attack
> - Public disorder
> - Criminal damage
> - Offences under the Explosives Act
> - Attacking a teacher".

6. Quite recently, in September of this year, there was a change of legal representation for the Defendants. It was this no doubt which led to the applications before Gray J on 13th October for permission to amend the defence. They wished to expand and clarify the pleas of justification and fair comment, already relied upon, and to add a new defence of privilege, which was framed upon two alternative bases. In the light of certain pleaded facts, the Defendants wish to contend that they were each under a

social, moral or legal duty to communicate to those to whom the words were published the true nature of the BNP and that the recipients had a corresponding interest in receiving the words complained of. It is said that the privileged occasion arose as a result of the duty and interest in correcting hypocritical and/or potentially misleading political statements by the BNP (and the Claimant on the BNP's behalf). It is expressly pleaded that this was quite independent of the fact that there was an election at the time of publication.

7. Alternatively, it is pleaded that, if any potential privilege is found only to arise as a result of the publication having taken place "at a time of an election" (which is denied), the provisions of s.10 of the 1952 Act should be construed in a manner which permits the availability of the defence of privilege in this case in order to comply with the Human Rights Act and certain articles of the European Convention on Human Rights, and specifically Articles 6 and 10.

8. In the amended reply, served on 21st October 2005, the point is taken on the Claimant's behalf that no privilege attached to the occasion of publication, for a variety of reasons, and that in any event "the Claimant is entitled to rely on section 10 of the Defamation Act 1952 according to its true meaning and intendment". It is the Claimant's case that this statutory provision simply precludes reliance on privilege in the circumstances I have described. I therefore turn to the words of the enactment themselves:

> "*Limitation on privilege at elections*
>
> 10. A defamatory statement published by or on behalf of a candidate in any election to a local government authority or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election".

9. For what it is worth, the introductory rubric would appear to suggest that it was Parliament's intention that privilege at elections should be "limited" rather than precluded altogether. More importantly, however, it is to be noted that the section does *not* provide that: "A defamatory statement published by or on behalf of a candidate in any election to a local government authority or to Parliament *shall be deemed not to be published on a privileged occasion …".*

10. If I were to be determining the matter from first principles, and without reference to earlier appellate authority, I should construe the provision as making it clear that it would never be sufficient to establish privilege *ipso facto* that a defamatory statement was "material to a question in issue in the election". In other words, a candidate could not acquire a special privilege for the publication of defamatory statements, not open to other citizens, merely because he or she happened to be addressing such a material issue. It would not seem to me to be plausible that the legislature intended actually to cut down the rights of a candidate during an election period – by comparison, for example, with the rights that he or she would enjoy outside an election period or with the rights enjoyed by other citizens during the election period.

11. No doubt, in accordance with ordinary principles of defamation law, circumstances could arise in the course of communications with electors, or potential electors, that would give rise to a *prima facie* defence of qualified privilege. This would depend on whether the usual ingredients, such as a social or moral duty, or a common and corresponding interest, could be demonstrated to be present on the particular occasion. It seems counter-intuitive that the legislature intended that a citizen should have to face an additional hurdle purely by virtue of being a candidate at an election. As I commented in *Donnelly v Young*, 5th November 2001 (unreported):

> "Freedom of speech is, if anything, more important than ever in a democratic society at times when candidates are submitting themselves for election to their fellow citizens. Free and frank discussion is vital. The section cannot be construed, in my judgment, as imposing a more 'chilling' environment for the free communication of ideas and information at such times than generally applies. That would be absurd".

12. In the particular circumstances of *Donnelly v Young* the Defendants wished to rely upon the form of privilege generally categorised as "a reply to an attack". That was rather a special case and it has no application here. I took the view on that occasion that s.10 of the 1952 Act was not capable of cutting down any rights of that kind which would otherwise apply.

13. The observations I made in the *Donnelly* case about freedom of speech do no more than reflect more eloquent reminders contained in judgments of the European Court of Human Rights. Ms Mansoori, appearing on the Defendants' behalf, has rehearsed some of these well known and important pronouncements. It is right that I should have them in mind when attempting to construe these rather controversial words of the legislature. Perhaps I may be forgiven, therefore, for setting them out.

14. In *Castells v Spain* (1992) 14 EHRR 445 at [43] it was said:

> "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society".

In *Da Silva v Portugal* (2002) 34 EHRR 56 at [32]-[33] the court was concerned with an editorial expressing a reaction to the news that a particular candidate had been invited to stand in the Lisbon City Council elections as the Popular Party candidate and observed in that context:

> "In the editorial the applicant had reacted to that news by expressing his views on [the candidate's] political beliefs and ideology, and referring more generally to the political strategy of the Popular Party in choosing him as a candidate. That sort of situation clearly involved a political debate on matters of general interest, an area in which, the court reiterates,

> restrictions on the freedom of expression should be interpreted narrowly".

15. Coming closer to home, I was reminded also of the following words from *Bowman v United Kingdom* (1998) 26 EHRR 1 at [42]:

> "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. … The two rights are inter-related and operate to reinforce each other: for example, as the court has observed in the past, freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of opinion of the people in the choice of legislature'. … For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely".

16. Returning to the speech of Lord Nicholls in *Reynolds v Times Newspapers Ltd*, from which I made a brief citation earlier, one finds very similar sentiments (at p.200) which, no doubt, provided the context for his Lordship's query as to whether s.10 of the 1952 Act could be said to be compliant with the disciplines of Article 10 of the Convention:

> "At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of Parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions".

17. In the light of such ringing pronouncements, I would have no hesitation, as I have said, in construing the wording of the statutory provision narrowly. I would permit the defence of privilege, as pleaded, to go forward to be determined at trial in the light of the jury's decision on the disputes, such as they are, relating to the primary facts relied upon as giving rise to the privilege. Matters are not, however, quite that straightforward, since to a limited extent the wording of s.10 has been the subject of consideration by an appellate court, which is clearly binding upon me according to familiar principles of *stare decisis*.

18. It would seem to be clear from the decision of the Court of Appeal in *Plummer v Charman* [1962] 1 WLR 1469 that the members of that court considered that its effect was to impose significant restrictions upon a candidate's scope for pleading privilege in respect of words published during an election period. Lord Denning MR commented at pp.1471-1472 that "… in the ordinary way the only defences open to a person who makes an election address and puts it out to the electors is either that the words were true or that they were fair comment on a matter of public interest". In other words, that decision would provide considerable support for the Claimant's submission in this case that the statute actually precludes the Defendants from relying on privilege at all. It is noteworthy that the two other members of the Court of Appeal

who expressed agreement with Lord Denning in the *Plummer* case were Upjohn and Diplock L JJ.

19. I should perhaps briefly summarise the factual context of their Lordships' decision. Sir Leslie Plummer was a member of Parliament who claimed damages against three candidates at a local government election, and against their election agents, for defamatory words contained in an election address published within his constituency. As it happened, the election address was that published on behalf of the BNP at the London County Council elections for the division of Deptford held in April 1961. Sir Leslie had been described as "Your pro-black MP" and it further contained the remarkable words:

> "There you have it: your Labour MP comes down solidly on the side of coloured spivs and their vice-dens as opposed to the white people of Deptford".

It was against that background that Upjohn LJ, agreeing with the Master of the Rolls, clearly stated:

> "Prima facie the plea which is now sought to be raised is plainly barred by section 10 of the Defamation Act, 1952. … The alleged libellous statement is published on behalf of three candidates in an election to a local authority, and it would appear to be material to a question in issue in this election. …
>
> [Counsel], however, has argued that you may have a case – I would think a somewhat theoretical one – where the statement, although contained in an election address, may be the subject of some qualified privilege because, quite independently of it being the occasion of an election or being contained in an election address, the person who has made it was under a public or private duty, legal or moral, in matters where his interests were concerned, to communicate it to the persons who were in fact the electors who had an interest to receive it. It is, I suppose, possible that such a case may one day be made, and, if so, the court will then have to determine whether that alternative case of privilege can still be made, notwithstanding section 10."

I imagine that it was the "theoretical" possibility canvassed by Upjohn LJ which led Ms Mansoori to plead the alternative ground of privilege (which I have identified above).

20. Equally unequivocal were the words of Diplock LJ:

> "As my Lords have pointed out, and I agree, that particular ground of privilege, although it would have been available before the passing of section 10 of the Defamation Act, 1952, was removed by that section".

21. For a judge invited to construe s.10 of the 1952 Act, those are formidable authoritative statements, which might be thought to conclude the matter once and for all, or at least until Parliament in its wisdom decides to amend the law. It is obvious, on the other hand, that these statements were made not only prior to the advent of the Human Rights Act 1998, with its requirement that judges should construe legislation consistently with Convention rights, but also prior to the decision of the House of Lords in *Pepper v Hart* [1993] 1 AC 593 which, as is well known, now affords to judges an opportunity (where there is ambiguity) of considering Parliamentary debates and ministerial statements in order to understand the purpose and rationale of any particular enactment. There is here in my view sufficient scope for differing interpretation of s.10 as to justify Ms Mansoori's investigation of the legislative background.

22. It is quite clear that the members of the Court of Appeal in *Plummer v Charman* were of the opinion that the purpose of the legislature had been, putting it perhaps somewhat crudely, to reverse the effect of the decision of the Court of Appeal in *Braddock v Bevins* [1948] 1 KB 580. Most of the provisions of the 1952 Act derived from recommendations made by Lord Porter's Committee which had reported on the law of defamation in 1949. By contrast, however, s.10 was introduced independently (rather as, so many years later, the right of a member of Parliament to waive the provisions of the Bill of Rights 1689 was introduced in s.13 of the Defamation Act 1996 quite independently of the recommendations of Sir Brian Neill's Committee in 1991). It would seem that the opportunity was taken simply because a Defamation Bill was before the House. It is of some marginal historical interest to note that s.10 was introduced at the Standing Committee stage of the Bill in the House of Commons by Mr Sidney Silverman MP (who happened to have been, in his capacity as a solicitor, on the losing side of the issue in *Braddock v Bevin).*

23. It is of greater interest to follow through how Mr Silverman's original proposal was modified in the course of Parliamentary progress, apparently to a large extent under the influence of the then Attorney-General (Sir Lionel Heald). Mr Silverman's original formula was in these terms:

> "No privilege shall attach to any defamatory statement by or on behalf of a candidate in any election to a local government authority or to Parliament nor shall the plaintiff in an action founded upon such a statement be required to allege or prove that the defendant was actuated by malice".

To my mind that wording is clearly more restrictive, on its face, of a candidate's rights in defamation proceedings than the terms later enacted. It would indeed have precluded, without question, a defence of qualified privilege. There is no doubt that Mr Silverman was of the opinion that in circumstances of Parliamentary or local government elections the defence of fair comment was quite enough. No wider protection was necessary. He expressed his thoughts in the course of debate on 18th March 1952:

> "Provided one clothed those participating in such an election with the protection of the law of fair comment, which is not affected by this new clause, one would have thought that those interests – interests of the public, the electorate, the candidate,

> the supporters and the interests of Parliamentary representative democracy – were being fully and wholly served. That is not the present law. Until quite recently it was thought to be the present law. A recent decision of the Court of Appeal in a case in which I was professionally concerned decided otherwise. … It is not for me to say whether the Court of Appeal decided wrongly, because they are the judges of the law and not I; but I submit the court decided wrongly so far as public interest was concerned".

24. *Hansard* (at Col. 1079) records that a week later, on 25th March 1952, a significant amendment was introduced because of concerns that an election candidate would be placed at a disadvantageous position in public debate as compared with any other citizen. The modified wording proposed was as follows:

> "No privilege shall attach to any defamatory statement by reason only of the fact that it was published by or on behalf of a candidate in any election to a local government authority or to Parliament".

It is significant that Mr Silverman, in supporting the new wording, offered (at Col. 1080) the following explanation:

> "… the Solicitor-General pointed out that as the Clause was drafted it might take away from a man the protection he otherwise would have had. In other words, there might be something he had said, written or published which was perfectly defensible and the Clause, as I have somewhat carelessly drafted it, might have left an election candidate in a worse position than if he had not been a candidate. It would have meant he had no privilege.
>
> The intention was not to take away from an election candidate any privilege possessed by everybody else. On the contrary he has certain protection and he ought to retain it. The intention was that a statement defamatory and not privileged when made by somebody else should not become privileged merely because it was made at an election. I think the new Clause completely meets the objections raised to the previous Clause."

25. At the report stage of the Bill the Attorney-General proposed an amendment which included the wording eventually accepted; that is to say with the words "… shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election". The reasoning behind this proposal is of importance for present purposes (or so it seems to me). The Attorney explained on 27th June 1952 that he was trying to achieve a position whereby "no candidate at an election should have any special privilege by virtue alone of his being a candidate and that he should not be able to secure that privilege by a side-wind, as it were, by saying, 'Well, as a matter of fact, I am elector. Therefore when I was speaking on that

platform as a candidate at that election I was speaking as one elector to another, and not as a candidate'".

26. There is thus a clear correspondence between what the Attorney-General was attempting to achieve and the interpretation I would have given to the words of s.10, as it now stands – were the matter entirely free from authority. There does not appear to have been, by that stage, any intention to deprive a candidate or agent of a privilege which would be available to other citizens, but rather only to ensure that such persons were not accorded a special privilege of their own. I believe that these developments between March and June 1952 are illuminating. If I may say so, with all due deference, it would appear that the distinguished members of the Court of Appeal in *Plummer v Charman* were construing the intention of the legislature as being consistent with, and identical to, the intention of Mr Sidney Silverman when he introduced the original wording. It was at that stage his objective, or so it appears, that the effect of the judicial decision in *Braddock v Bevins* should be comprehensively reversed. That may, however, be a somewhat simplistic interpretation of the words ultimately enacted – especially having regard to the concerns expressed by, among others, the Attorney-General of the day.

27. It would not be open to me, as a judge of first instance, to adopt the interpretation which seems to me to be the natural one if matters were still governed by the traditional rules of precedent. Fortunately or unfortunately, depending on one's point of view, matters are not now so straightforward. I am bound by the requirements of the Human Rights Act 1998 to do the best I can to construe legislation in a way that is consistent with the rights guaranteed by the European Convention. So far, I have referred only to Article 10, which is of undoubted importance in this context. On the other hand, I need also to have in mind, as Ms Mansoori submits, the public policy factors underlying Article 6 and Article 14. If the background circumstances give rise to a pleadable defence of qualified privilege, as Gray J has held, then the litigants who seek to rely upon it would appear to have a right to have that defence considered and determined fairly by a court of competent jurisdiction. If they are to be deprived of the opportunity of canvassing this important defence at all, purely because of their status, relative to the local government bye-election, at the time of publication, then they would clearly be put at a disadvantage compared to other citizens who might have wished to make similar points about the BNP. The interpretation of s.10 of the 1952 Act for which the Claimant, through Ms Miskin, now contends would certainly impinge adversely upon the Defendants' rights under Articles 6 and 10. Accordingly, it seems to me that I must ask myself whether those restrictive consequences (which are undoubtedly "prescribed by law", within the meaning of Article 10 (2) of the Convention) are necessary in a democratic society and proportionate to the achieving of a legitimate aim.

28. Doing the best I can, it seems to me that the purpose which Parliament must be taken to have intended was that of ensuring that candidates in local and Parliamentary elections should not abuse their position by defaming people, in circumstances in which they could not establish a defence of either justification or fair comment, by availing themselves of a special privilege. I have considerable difficulty with this. It is not obvious to me why candidates should be placed during an election campaign, of all times, in a worse position that anyone else. Moreover, it is necessary to remember that a plea of qualified privilege is defeasible on proof of malice. That is the means by

which the law has always recognised that occasions of qualified privilege should not be abused. As with any other defendant in a libel action, if a candidate has on an occasion of *prima facie* qualified privilege abused his position by saying something which he knows to be false or, perhaps, has behaved recklessly, then the defence will not be available.

29. To construe the provision as *precluding* a defence of qualified privilege for candidates, *qua* candidates, does not seem to me to be consistent with any legitimate aim – nor, more importantly, is that what Parliament (or even, by the end, Mr Sidney Silverman) set out to achieve.

30. In *Plummer v Charman* the court did not have the opportunity to consider the Parliamentary debates. It might have made a significant difference.

31. Ms Mansoori cited another unreported case on s.10, which she submitted illustrates the *reductio ad absurdum* of the traditional restrictive interpretation. In *Greenaway v Poole* [2003] EWHC 1735 (QB) Jack J was invited to rule on the effect of the provision without counsel even apparently citing *Plummer v Charman*. It concerned the publication of three newsletters said to contain defamatory allegations about a council member and town clerk. Qualified privilege was held to apply to the first – not being published as an "election special". The other two, however, were so described. A distinction was drawn between them nevertheless. In respect of one of them, the defendant was acting in the capacity of councillor (not *qua* candidate) and, moreover, the parishioners had a legitimate interest in hearing his views. Privilege was therefore upheld. As to the other publication, by contrast, this took place in a different parish in which the defendant was standing as a candidate. It was thus held that s.10 prevailed and the defence of privilege was not open to him. This set of facts is almost like an examination question designed to illustrate the consequences of the traditional interpretation of the section or, as Ms Mansoori suggests, its absurdity.

32. I have no difficulty in interpreting s.10 in a way that is compatible with Convention rights, as s.3 of the Human Rights Act requires. I construe it in accordance with what seems to me to be the natural meaning of the words: a candidate cannot claim a special privilege by virtue *only* of publishing words that are "material to a question in issue in the election". On the other hand, a candidate like any other citizen may be able to establish a defence of qualified privilege if the ingredients recognised at common law are present on the facts of the case. The Act does *not* specify that a candidate should be confined to the defences of fair comment and justification. I am not prepared to read such words into the text by implication. It would be a curious step to take given that Mr Silverman concluded, more than half a century ago, that such a stipulation would be going too far: "The intention was not to take away from an election candidate any privilege possessed by everybody else".

33. It is not for me to rule at this stage whether the words complained of are protected by privilege. That will turn in part on the facts as found by the jury at trial. All I am asked to do is to rule on whether the pleaded defence of privilege is "barred by section 10" (in the words of Upjohn LJ). I am quite satisfied that it is not.

34. There is no need for Ms Mansoori, in advancing a plea of privilege at trial, to confine herself to arguing that the occasion of privilege "was quite independent of the fact that this was an occasion of an election". I am not addressing the merits of the defence at

the moment, and would not attempt to do so unless and until the facts are all agreed or the disputed allegations resolved by the jury. But at the moment what I wish to make clear is that, for determination of whether or not there was an occasion of privilege, there is no statutory bar prohibiting reference to the fact of an election or to the relevance of issues within it. Such matters are part of the background circumstances, which it may be proper to take into account, even if they are insufficient in themselves to give rise to privilege automatically.