Neutral Citation Number: [2006] EWHC 783 (QB)

Case No: HQ04X03333

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/04/2006

Before:

THE HON. MR JUSTICE EADY

- -

Between:

Kieren Fallon	**Claimant**
- and -	
MGN Ltd	**Defendant**

- -
- -

Andrew Monson (instructed by **Ralph Davis**) for the **Claimant**
Richard Hartley QC and **Catrin Evans** (instructed by **Davenport Lyons**) for the **Defendant**

Hearing date: 24 March 2006

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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

The Hon. Mr Justice Eady:

1. This case requires consideration of the disciplines imposed in the context of pleading a *Lucas-Box* meaning which is pitched at Level 2 or Level 3 on the scale identified in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 at [45] and *Musa King v Telegraph Ltd* [2005] 1 WLR 2282 at [21]-[22]. It may be a somewhat artificial scale in the sense that defamatory words are capable of bearing an infinite variety of meanings and implications and, correspondingly, a range of levels of gravity which do not necessarily lend themselves to classification in one or other of these three categories. "It is not perhaps an entirely satisfactory distinction": *per* Simon Brown LJ in *Jameel v Wall Street Journal Sprl* [2004] EMLR 6 at [19]; see also *Armstrong v Times Newspapers Ltd* [2006] EMLR 9 at [23]-[25]. Nevertheless, the categorisation is currently found useful primarily because it represents a convenient way of identifying what should be pleaded if it is sought to advance a defence of justification to some defamatory allegation falling short of a direct attribution of guilt. Moreover, it appears to have had the *imprimatur* of Lord Devlin in *Lewis v Daily Telegraph Ltd* [1964] AC 234, 282, 285.

2. The claim is brought by a well known jockey, Mr Kieren Fallon, against the publishers of *Racing Post* in respect of an article published on 7 September 2004. The words complained of were spread over three pages. On the first page there was the headline "Rodgers' betting history revealed" and the story was continued inside, on pages 4 and 5, with the further headline "Fallon, Williams, Lynch and Burke all featured in Rodgers' ledger".

3. As always, context is important and most readers of this specialist publication will have been only too well aware that a number of people, including Mr Fallon, had been arrested a week earlier, on 1 September, by police officers investigating a supposed conspiracy. Indeed, such readers were reminded on page 4 that all the named jockeys had been arrested together with a trainer (Mr Burke), Mr Rodgers (described as the "ex-boss and founder of the Platinum Racing Club"), and eleven other people.

4. Against that background, it was hardly wise to publish material which could well form part of a prosecution case. Moreover, it is not surprising that the Attorney-General should have expressed his concern at the possible prejudice to the course of justice.

5. It is necessary to set out the words complained of in full:

> "**Rodgers' betting history revealed**
>
> **Platinum Racing boss had 96 per cent strike-rate backing horses to lose**
>
> The extent to which Miles Rodgers played and won on the betting exchanges up to the time of his disqualification is revealed today for the first time by the *Racing Post*.
>
> The ex-boss and founder of the Platinum Racing Club not only bet against members of his own string – horses such as Uhoomagoo, Nimello, Million Percent and Legal Set – but also

laid three other horses whose running caused public controversy, namely Ballinger Ridge, Ice Saint and Hillside Girl.

Details of just one of the several accounts that he is believed to have used reveal Rodgers' extraordinary strike-rate during the period from late May last year to March this year.

In the ledger of 59 bets compiled by the *Racing Post*, Rodgers made 51 bets where he backed a horse to lose – and was right 49 times.

The majority of those "lay" bets were struck on horses ridden by one of the same three jockeys: Fergal Lynch, who rode 15 of the 51 runners laid, Darren Williams, who rode 10, and Kieren Fallon, who rode seven.

On 11 of the 51 times that Rodgers backed horses to

Continued Page 4

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Fallon, Williams, Lynch and Burke all featured in Rodgers' ledger

One or more connected to 33 of 49 winning lays

From front page

lose, Karl Burke was the trainer. Rodgers, Lynch, Williams, Fallon and Burke were among 16 people arrested last week by officers of the City of London police as part of an investigation into conspiracy to defraud.

They have been bailed until November. All deny the allegations.

Rodgers was warned off for two years by the Jockey Club in March after he was found to have laid Platinum Racing Club-owned horses before they lost.

Four of the 51 "lay" bets were on horses owned by the Platinum Racing Club. Of those, one was ridden by Lynch, one by Williams and none by Fallon. The champion jockey has ridden only twice for Platinum since 2003 and was not the subject of a bet by Rodgers on either occasion, according to the list.

Rodgers had control of a Betfair account that turned over £4 million last year and it is his activities that are believed to form

> a key part of the investigation that the police have stated is "of national significance".
>
> Since last week's dawn raids it has been claimed that the police had put suspects under surveillance and even bugged telephones before making their swoop on 19 addresses. City of London police are declining to comment on such speculation.
>
> A spokesman said yesterday: 'The investigation is ongoing. Some people involved may have chosen to talk about that, but we are not.
>
> 'Our officers have not ruled out further arrests, but at the moment they are reviewing what they've got. I wouldn't expect a flurry of information any time soon.
>
> 'The arrests were made across the country. Racing takes place across the country. It is national sport, so this is of national significance'.
>
> [Caption]
>
> '*Rogers laid Ballinger Ridge (far side) at Lingfield in March when Kieren Fallon was caught close home by Rye (near)*'
>
> [Caption]
>
> '*Miles Rodgers*
>
> *Phenomenal strike-rate*'"

6. There was also displayed a table headed "Ten months in the life of a Miles Rodgers account" which listed bets alleged to have been placed by Mr Rodgers between May 2003 and March 2004. This identified the respective dates and horses, and also whether Mr Rodgers had backed the horse in question or placed a "lay" bet (i.e. that the horse in question would lose). It was specified whether he made a profit or a loss (in the vast majority of cases a profit) and it also identified in each case the jockey riding the particular horse. Fourteen were ridden by Mr Lynch, twelve by Mr Williams and eight by Mr Fallon.

7. The Claimant's meanings are pleaded as follows:

> "4. In their natural and ordinary meaning, and/or by way of innuendo, the said words meant and were understood to mean that Miles Rodgers' extraordinary success rate in backing the Claimant's horses to lose must be, or is likely to be, attributable to the fact that the Claimant has conspired with Mr Rodgers to lose, and that the Claimant was thereby guilty of race-fixing and criminal conspiracy to defraud.
>
> (1) In the issues of the *Racing Post* dated 2nd and 3rd September 2004 the Defendant published prominently a series of

reports about the arrests of the Claimant and Mr Rodgers which took place on 1st September 2004. The Defendant reported that the purpose of the arrest by the police was to question them about race-fixing and conspiracy to defraud.

(2) The main report on 2nd September 2004 was headed 'Race-fixing arrests: KIEREN FALLON ARRESTED' and it bore the sub-headline: 'Champion among 16 detained in race-fixing investigation after dawn raids involving 130 police.' The report went on to state that the Claimant 'was one of 16 detained for alleged conspiracy to defraud'. The report stated that a near year long inquiry into possible race-fixing and passing information for gain had reached a sensational climax. It said that it was understood that the investigation involved more than 80 races. Racing pundit John McCririck was quoted as illustrating the size of the story by telling Sky Television News: 'It's as though we had Michael Schumacher accused of fixing formula One or David Beckham missing penalties deliberately.' The report continued: 'It is thought that the arrests revolve around Rodgers, who controlled a Betfair account last year [that] had a turnover of £4 million'.

(3) As noted in the issue of the *Racing Post* dated 3rd September 2004 in an article by David Morgan entitled 'Only Jordan is big enough to keep Fallon off the front page', there was massive coverage throughout the national print media on 2nd September 2004 of the race-fixing allegations against the Claimant. Such coverage included a front page article in *The Daily Mirror*, also published by the Defendant, in which the Claimant's head appeared above the headline: 'Internet sparked "race-fix" swoops', and an article on pages 8 and 9 of he same newspaper, which bore the headline 'Betting shopped' above another photograph of the Claimant.

(4) In the premises, the vast majority of the readers of the *Racing Post* will have known that the alleged justification for the arrest of the Claimant by the police was that he was suspected of fixing races for betting coups. Such readers will thereby have understood the words complained of to bear the meaning set out above."

It has not been suggested that the words are incapable of bearing the Claimant's meanings.

8. The *Lucas-Box* meanings are pleaded in the defence at para. 6:

"1. there are reasonable grounds to suspect that the Claimant had conspired with Miles Rodgers to lose races and was

> thereby guilty of race-fixing and criminal conspiracy to defraud;
>
> 2. alternatively, there are sufficient grounds to investigate whether the Claimant had conspired with Mr Rodgers to lose races and was thereby guilty of race-fixing and criminal conspiracy to defraud".

9. In this context, Mr Monson for the Claimant argues that it is simply not realistic to contend, as the Defendant does, that the words are capable of bearing only a Level 3 meaning; that is to say, "grounds to investigate". Some investigation had obviously preceded the arrests: they are said to have taken place "as part of an investigation into conspiracy to defraud". Also, there had been a "near year long inquiry". Mr Monson thus submits that a jury would be perverse to conclude that the words conveyed *only* the defamatory meaning that there was something worth investigating. He places considerable reliance on the fact that this coverage in the *Racing Post* was building upon the known fact of the arrests and purporting to show how strong the evidence was. Indeed, the *Racing Post* presumably carried out some investigation of its own before publishing the article. In other words, the authors were presenting the conclusions of an investigation – not merely calling for one to take place.

10. Mr Hartley QC for the Defendant takes the point that no application has been made under CPR Part 53 for the court to delimit the possible meanings, and Mr Monson agreed in retrospect that it might have made his intentions clearer if he had done so. The question is whether or not, on this ground alone, I should preclude Mr Monson from making his submission. The application attacking the plea of justification was dated 20 March 2006 – some four days before the hearing took place. It was confined to CPR Part 3.4(2). It combined an attack on the pleading itself with criticisms also of the witness statements, which were said to contain some irrelevant material. (It was decided that I should first determine the legitimate scope of the pleading and leave points on the witness statements until later. Counsel may be able to agree any deletions or amendments in the usual way.)

11. The relevant part of the application notice claimed that the statement of case "discloses no reasonable grounds for defending the claim by reference to the allegations set out below". Those allegations include both sub-paragraphs of the *Lucas-Box* meaning (i.e. the application embraces "sufficient grounds to investigate"). Alternatively, it is said that the continued inclusion of the allegations is an abuse of process. I have seen applications to strike out meanings expressed with greater clarity, but I cannot accept that the Defendant's advisers could in these circumstances be properly regarded as taken by surprise. Mr Monson's submissions on the Level 3 meaning seem to me plainly correct. Given that two investigations had already taken place (i.e. by the police and *Racing Post*), it would indeed be perverse to conclude that the article meant no more than that it was time an investigation took place.

12. It is to be noted that the application notice reserved the right to extend the scope of the application when the Defendant's expert evidence became available. The Defendant had resisted an order for serving the expert evidence so early, but the Master ordered that it should do so. When it arrived, late in the day, it became part of Mr Monson's case that even the Level 2 meanings ("reasonable grounds to suspect") should be struck out also. This was for a different reason.

13. The Level 2 meanings are both attacked on the basis that there are no particulars capable of "supporting reasonable grounds to suspect" Mr Fallon of conspiring with Miles Rodgers to fix either the Ballinger Ridge race on 2 March 2004 or any other race. Alternatively, it is said that some of the particulars at least are incapable of supporting such a meaning.

14. The significance of the Defendant's expert race-riding evidence is that it was supposed *inter alia* to support para. 6.3 of the particulars of justification, which concludes with the words "… the Claimant looked round twice in the straight, eased his mount and *appeared to wait* for Rye to close the gap, which she did" (emphasis added). The evidence of the expert in question (Mr John McCririck) was directed in part to what the Claimant *appeared* to be doing in the straight. If indeed he did give the appearance of waiting to a reasonable onlooker, with the relevant knowledge and experience of racing, that would plainly be capable of supporting reasonable grounds to believe that he was implicated in race-fixing. It would not necessarily be conclusive, of course, but it would be a potentially important building brick in constructing such a case.

15. As it turned out, however, Mr McCririck did not say that. He was of the view simply that the Claimant made a mistake. Thus, submits Mr Monson, "his evidence delivers a fatal blow to the Defendant's case". It was to have been central to that case that Mr Fallon brought suspicion upon himself by the way he rode the race. As a race-riding expert, that is what Mr McCririck was supposed to support, but instead he agrees with the Claimant's expert (Mr Willie Carson) that it appeared to be an error of judgment.

16. Mr McCririck came later, apparently, to suspect that there might be a different explanation when he heard tell of certain betting patterns, but that is not a matter for a race-riding expert. That is a matter for assessing the statistics and forming a judgment on probabilities. The whole object of the exercise is to justify a defamatory meaning against Mr Fallon. The pleaded particulars and evidence must relate, at least to a minimum extent, to the Claimant. That is as true of Level 2 meanings as it is of direct allegations of guilt.

17. The disciplines set out in the Court of Appeal's judgment in *Musa King v Telegraph Group Ltd* at [22] are important because it is necessary to achieve a proper balance between freedom of speech and the protection of individual integrity in accordance with Articles 10 and 8 of the European Convention on Human Rights and Fundamental Freedoms. It is desirable as a matter of public policy to avoid a situation where journalists, unable to plead justification at the highest level, approach the defence as though it will suffice simply to throw mud at the claimant in the hope that some of it will stick.

18. Three of the principles identified in *Musa King v Telegraph Ltd* are of particular significance in this case. First, the "conduct rule" requires that a plea should be directed generally towards the claimant's conduct. He or she must have done something by way of contributing to the reasonable grounds for suspicion for such a defence to be pleaded. That is true of Level 2 meanings and, according to Gray J in *Jameel v Times Newspapers Ltd* [2003] EWHC 2609 (QB), there are good reasons why it should also apply to Level 3 meanings. This aspect of his judgment was not challenged on appeal. It is true that it was recognised by Brooke LJ in *Musa King* that sometimes "strong circumstantial evidence" could be pleaded even if it arose

apparently through no fault of the claimant. So far, however, that remains theoretical and has not been exemplified in any particular case. Courts, therefore, need to be wary of pleaded particulars which appear to be designed to circumvent the primary conduct rule.

19. Secondly, it has been said on more than one occasion that particulars should not be pleaded in such a way as to transfer the burden of proof to the claimant of making a positive case to disprove the allegations against him: see e.g. *Musa King* at [22] and *McPhilemy v Times Newspapers Ltd* [1999] EMLR 751, 774.

20. Thirdly, it is necessary to plead primary facts which are capable of giving rise to a reasonable suspicion against the claimant – *objectively judged*. Thus it will not do to recite the suspicions of some third party, or even a public announcement by the law enforcement authorities that someone has been arrested or is under suspicion. That is an aspect of the repetition rule. In any event, it will not suffice simply to show that someone harbours suspicions about the claimant. The test is whether or not there are solid grounds for suspicion that are reasonable.

21. Against this background, I must consider whether in the light of the evidence of the race-riding experts Mr McCririck and Mr Carson there is anything left by which to link in Mr Fallon's own behaviour to the grounds for suspicion against him. The Defendant appears to place weight on Mr Rodgers' betting activities, which do not of themselves implicate Mr Fallon, or indeed any of the other named persons, in a corrupt conspiracy to fix races. The only allegations relating to a race in which Mr Fallon took part are those concerning the 3.30 at Lingfield on 2 March 2004. Nothing is pleaded at all about suspicious behaviour on his part which even "appeared" to involve throwing any other race.

22. The only pleaded connection between Mr Fallon and Mr Rodgers relates to a brief car journey in May 2004, when it seems that Mr Rodgers gave him a lift to Leicester airport from a race meeting *together with two other named jockeys*. It is Mr Fallon's case that he had never knowingly met or spoken to Mr Rodgers on any other occasion. Nor indeed did he say anything of substance during the car journey itself. The Defendant has pleaded nothing to gainsay that. Yet Mr Hartley simply submitted that this was incredible, especially having regard to the fact that Mr Fallon had ridden seven horses in the previous nine months all but one of which Mr Rodgers had successfully backed or layed. The implication was presumably that in cross-examination Mr Fallon might break down and admit having met Mr Rodgers, or communicated with him, on other occasions also. This illustrates why it is so important to remember that such defences should not be pleaded in such a way as to reverse the burden of proof.

23. The Defendant wishes to allege "reasonable grounds to suspect" that Mr Fallon and Mr Rodgers were involved in a corrupt race fixing conspiracy. That remains a serious allegation – even pitched at Level 2. Sharing a car journey with Mr Rodgers and other jockeys, about ten weeks after the Ballinger Ridge race, does not get off the ground, whether judged by the conduct rule itself or by the test of "strong circumstantial evidence". Nudges and winks will not suffice.

24. The Defendant is left therefore, effectively, with nothing but the statistics relating to Mr Rodgers' successful betting record as summarised in the table.

25. It is helpful at this stage to recall the words of Lord Nicholls in *Re H (Minors)* [1996] AC 563 at 586:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under aged stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

26. It is inherent in Mr Hartley's argument, as he accepted, that the statistics contained in the table give rise to "reasonable grounds to suspect" against all three of the named jockeys. Applying Lord Nicholls' test, which is more likely to be true: that Mr Rodgers was a skilled judge of form, who turned his knowledge and experience to efficient money-making, or that he was corruptly involved with race-fixing together with three jockeys? Surely the former. Thus, there must be something pleaded which links the jockey in question to the supposed conspiracy, over and above the bare fact of his successful betting history during the months in question. As Mr Monson put it, the Defendant needs to construct a "bridge" between Mr Rodgers and Mr Fallon. It need not be a particularly robust construction at this stage, but it must at least be strong enough to support "reasonable grounds".

27. There are other allegations in the particulars of justification which, upon analysis, add no significant weight. It is said, for example, that the police raided the premises of those arrested and took computer equipment and documents. That in itself proves nothing. There is no suggestion that anything incriminating was found. As I have said, the test is objective. No charges have been brought even after 18 months from the arrests, but what is important is that the reasonableness of the grounds for suspicion must be judged at the date of publication.

28. Another argument raised is that by 7 September 2004 Mr Fallon had not sued News Group Newspapers Ltd in respect of similar allegations published some six months earlier (although he has subsequently done so). Mr Hartley argued that this entitled his client (and presumably everyone else) to proceed on the basis that the allegations were not challenged. Mr Fallon has given certain explanations, such as for example that he was concentrating on disciplinary proceedings in the following months, and that he publicly denied the charges. Moreover, Mr Rodgers' name had not even been mentioned in the News Group coverage. But what matters is the principle, to which I adverted earlier, that one must not reverse the burden of proof. It is not permitted to say to a claimant "I may have libelled you, but there are reasonable grounds to suspect

you of being guilty because you failed to sue Newspaper X or Television Company Y when they published something similar on an earlier occasion".

29. In paragraph 6.2 there is an allegation that the Claimant told people on the day of the Lingfield Park race that Rye would win. That is answered in detail at paragraph 7 of the Reply. It is not for me at this stage to resolve disputed issues of fact, but that basic allegation is accepted. The Claimant then goes on to explain why he genuinely believed Rye would win the race. The important point for present purposes is that it is at best neutral. It does not in itself provide grounds for supposing that he had entered into a dishonest conspiracy. Indeed, it might be argued that it points the other way, in the sense that he would hardly be likely to be telling people the result if he was about to throw the race. In any event, all that matters is that the point is neutral.

30. There was reference in paragraph 6.3 of the particulars to "a public outcry" following the Ballinger Ridge race. As I think Mr Hartley recognised, that is not in itself a legitimate plea. A public outcry, as one sees often in the press, may be prompted by matters other than reason and derived, for example, from prejudice or knee jerk reactions. It adds nothing useful in the present context.

31. At paragraph 6.4, a "suspicion" is attributed to the Jockey Club by virtue of its announcement that an inquiry would take place into betting patterns linked to the 3.30 race at Lingfield on 2 March 2004. The pleader is speculating in this respect but, even if it is is correct to attribute the suspicion, it would not be a valid matter to plead for the reasons I have set out above at [20]. It is to be noted, in any event, that the disciplinary proceedings instituted against Mr Fallon, following the 2 March race, were brought under Rule 156(i) of the Rules of Racing (for failing to obtain the best possible placing). This was consistent with error on his part and is not equivalent to proceeding under Rule 157, which would have been relevant to a deliberate stopping or slowing of the horse.

32. Paragraphs 6.10 and 6.11 refer to the genesis of the City of London Police inquiry. It is said that it began in January 2004 after information was passed by the Jockey Club which had "uncovered evidence that indicated criminal activity". This was not even on its face linked to Mr Fallon and is thus incapable of supporting "reasonable grounds to suspect" *against him*. Likewise, it is irrelevant that "much of the police inquiry surrounds betting patterns" in general terms.

33. Finally, Mr Hartley argued that it was premature to rule on the pleading of justification because, at some stage in the future, perhaps in July of this year or later, the attitude of the Crown Prosecution Service towards the evidence may become apparent. It may be decided (nearly two years after the arrests) to launch prosecutions against one or more of those involved – or again it may not. In such circumstances, it may be that further evidence would come to the Defendant's possession which would enable a more substantial plea of justification to be placed on record. It seems to me that the way to address this hypothetical possibility is not to allow a defective pleading to stand, but rather to address any application to amend, on it own merits, as and when it arises.