



Neutral Citation Number: [2014] EWCA Civ 600

Case No: A2/2013/1768

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**QUEEN'S BENCH DIVISION**  
**THE HONOURABLE MR JUSTICE TUGENDHAT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14<sup>th</sup> May 2014

**Before:**

**THE RIGHT HONOURABLE LORD JUSTICE LONGMORE**  
**THE RIGHT HONOURABLE LADY JUSTICE BLACK**  
and  
**THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL**

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**Between:**

**JACQUELINE THOMPSON**  
- and -  
**MARK JAMES**

**Appellant**

**Respondent**

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**Ms Christina Michalos** (instructed by **Simons Muirhead & Burton**) for the **Appellant**  
**Mr Adam Speker** (instructed by **Mr Mark James via direct access**) for the **Respondent**

Hearing dates: 30<sup>th</sup> April 2014  
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**Approved Judgment**

## Lord Justice Longmore:

### Introduction

1. Mr Mark James is the Chief Executive of Carmarthenshire County Council. Mrs Jacqueline Thompson is a private citizen who is aggrieved by certain planning decisions made by the Council in relation to applications made by her and her husband Mr Kerry Thompson and her brother-in-law Mr Eddie Thompson between March 2004 and October 2007. She and her husband have a small holding in Llanwrda where she is a community councillor, vice chair of the community council and chair of the Community Association. She stood unsuccessfully for election to the County Council in 2012.
2. In 2006 she (sometimes with her husband) wrote a number of letters accusing both the Head of Planning for the Council (Mr Bowen) and Mr James of corruption, although Mr James had no involvement in the planning decisions complained of by Mrs Thompson. Mr Bowen sued Mr and Mrs Thompson for libel. The Thompsons did not seek to prove the allegations of corruption and their defence of honest comment was struck out. The action was in due course settled by a public retraction and apology in October 2007, as well as by an agreement to pay £7500 towards Mr Bowen's costs.
3. Notwithstanding this defeat, Mrs Thompson started a blog in March 2009 under the title "Carmarthenshire Planning Problems and more". Her postings were highly critical of the Council. She made repeated false statements of fact for which the judge held that there was no foundation and made various allegations of corruption, lying, perjury and misappropriation of public money.
4. Mrs Thompson also started to film proceedings of the Council and posted the resultant clips on YouTube. On the 3<sup>rd</sup> occasion of doing this on 13<sup>th</sup> April 2011 a Council Officer, a Mr Davies, was sent up to the public gallery to ask her to stop. She did stop, left the public gallery and then made an allegation that, while they were in the public gallery, Mr Davies had assaulted her and attempted to steal her mobile phone. The judge found that this allegation was false and known by Mrs Thompson to be false. He also held that it was an attempt to pervert the course of justice.
5. On 21<sup>st</sup> July 2011 a Mr Milan who maintained a blog under the name "Madaxeman" published an open letter critical of Mr James and the Council and urged Mr James to reply to this letter as did Mrs Thompson. Mr James did reply saying (among other things):-

"Mrs Thompson and her family ... have been running a campaign of harassment, intimidation and defamation of Council staff and members for some considerable time ... [and, in respect of the incident on 13<sup>th</sup> April 2011]... the Council would have made a formal complaint of a deliberate attempt to pervert the course of justice to the Police by making false statements, but the [Council] officer concerned ... did not want to make a fuss."

6. On 14<sup>th</sup> November 2011, Mrs Thompson sued Mr James and the Council for libel in Mr James' reply letter. This action failed because Mr James had written what was true. Mrs Thompson has been refused permission to appeal and I need say no more about it.
7. Mr James, however, counterclaimed for libel and alleged that five of Mrs Thompson's postings in 2011 had defamed him by accusing him of corruption, misuse of Council funds and lying. That counterclaim was successful in respect of postings made dated 28<sup>th</sup> February, 22<sup>nd</sup> March and 6<sup>th</sup> April. Mrs Thompson has been granted permission to appeal in relation to the second of these postings only and that is the subject-matter of this appeal. It is, however, necessary to be aware of the contents of each of the postings in respect of which the counterclaim was successful.

### **The first posting**

8. On 28<sup>th</sup> February 2011 Mrs Thompson posted the following:-

“News on how other front line services will fair (sic) in this afternoon's debate will soon emerge. I wonder if the Chief Executive will resign and save us all a few quid? Doubtful – he still has many “visions” to fulfil. Will he do everything in his power to protect the “officers club” slush fund? You bet he will. (See the column on right in red and here).”
9. On the right of (or below) the text was the column (or Side Bar, as it has been called) to which the text referred:-

“Mark James and the Council Slush Fund. Carmarthenshire County Council Chief Executive, Head of Law and Head of Resources now have delegated powers to commence and fund (with taxpayers' money) libel proceedings against the public and the press on behalf of themselves and other officers. The Council, as a governing body, has now enabled itself to bring and fund illegal actions under the cloak of a private claimant. This is the only Council in the UK to have granted themselves these powers. This is unlawful, open to abuse, a threat to free speech and a grave misuse of taxpayers' money. See many posts on this blog.”
10. Mrs Thompson asserts that by reason of this “explanation”, the term “slush fund” has a special meaning namely that, by virtue of a change to the Council's constitution on 15<sup>th</sup> May 2008 known as “the Libel Costs Amendment”, the Council had given authority to its officers to begin defamation proceedings at the Council's expense provided that the proceedings were supported by Counsel's advice. The fact that the Council agreed to pay for such proceedings meant that a fund existed for such purpose which could legitimately be called a “slush fund”.
11. The judge held that the posting meant that Mr James would do everything in his power to preserve the power of the Council to grant indemnities to its officers and members for libel actions and that this is a corrupt and unlawful use of public funds.

12. The defence run by Mrs Thompson was a defence of honest comment. The judge accepted that the blog was comment on what Mr James would do in the future (rather than an allegation with regard to what he had done in the past) but rejected this defence on the basis (1) that she had not proved any fact supporting the comment that Mr James would act corruptly and (2) that, in any event, she had no belief that Mr James would so act. This counterclaim of Mr James therefore succeeded.

### **The second posting**

13. On 22<sup>nd</sup> March 2011 Mrs Thompson posted the following:-

“I also hear a rumour that Carmarthenshire Council staff are going to be asked to take a 10% pay cut. It wouldn't surprise me. Isn't it lucky that Mark James and his cronies had the foresight to finance various deals (this for example), just *before* all this budget nonsense came along and, of course, the Council has to keep its slush fund nicely topped up ...”

“This” provided a link to another post about the forgoing of interest on a loan made by the Council. The posting had the same Side Bar as before. The judge held that this posting was fact not comment and held further that the meaning of the posting was that Mr James was unlawfully and corruptly using public money for the benefit of himself and his cronies. It was not suggested that this was a true fact so the counterclaim succeeded. If the judge was wrong and it was comment not fact, the defence of honest comment would anyway have failed for the same reason as the first posting.

14. It is in relation to this second posting, and specifically the meaning attributed to it by the judge, that Mrs Thompson has been given permission to appeal. She submits that the meaning accepted by the judge that the posting accused Mr James of unlawfully and corruptly using public money for himself or his cronies is unsustainable or is, at any rate, not the true meaning of the posting in its context.

### **The third posting**

15. On 6<sup>th</sup> April 2011 Mrs Thompson posted this blog:-

“... typically the Council is back peddling and trying to avoid the clear conclusion that they have completely ignored public opinion and there (sic) own consultation although why we should be surprised at that I don't know. Its all a bit worrying, lets hope that the Chief Executive Mark James takes his role of returning officer (for which he is paid a fat fee) a little more seriously during important elections – and gives an accurate result, not just the one that the Council prefers!

Perhaps we should be grateful the Council didn't go for “the Mark James” or ... although on the subject of Council pantomime, ... I am sure Mr James would make a splendid Abanazer ... or would that be Pinocchio.”

The judge held that, although this comment might be mere mockery if it stood alone, it had to be understood as part of a series of allegations questioning Mr James' integrity and honesty. It was therefore defamatory but was a comment about future conduct. Nevertheless there was no factual basis for it nor did Mrs Thompson honestly believe that Mr James would act dishonestly as the Returning Officer in not declaring the person with most votes was the person elected, so this counterclaim also succeeded.

### **The funding by the Council of libel proceedings**

16. Before setting out the submissions of the parties it is necessary to say a little about the background to the Council's funding of libel claim by their officers to which I have already referred. In Derbyshire County Council v Times Newspapers Ltd [1993] AC 534 the House of Lords held that a local authority has no right to maintain an action for defamation. The main reason for this is that libel proceedings tend to deter free speech which is essential for a healthy and vibrant democracy in local affairs. That does not, of course, prevent an individual officer of a local authority from suing for defamation if he or she is personally defamed in the course of his local authority duties (see page 550D). The question therefore arises whether local authority funds can be used to indemnify council officers in respect of the costs of defamation actions. As far as Wales is concerned the Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006 (SI 2006/249) ("the 2006 Order") prohibits local councils from funding defamation claims brought by local authority members or officers but permits funding for such members' or officers' defences against defamation allegations.
17. In spite of this provision the Council altered its own constitution to allow its Head of Paid Services (namely its Chief Executive) to authorise the initiation (and funding) of proceedings for defamation by Council Officers (excluding himself) provided that such initiation was supported by Counsel's advice and similarly to allow the Head of Administration and Law and the Director of Resources to authorise the initiation and funding of proceedings by the Head of Paid Services if supported by Counsel's advice. This has been called the "Libel Costs Amendment". The lawfulness of this constitutional amendment was the subject of much consideration by Mrs Thompson in her blogs but the funding of Mr James's counterclaim was in fact authorised by a committee of elected councillors (rather than the officers named in the Amendment) on the basis, as the court has been informed, that the 2006 Order did not remove a Council's power, to indemnify one of their officers bringing libel proceedings, under s.111 of the Local Government Act 1972. I, of course, make no observation on the lawfulness of that proposition.

### **Submissions**

18. Ms Michalos for Mrs Thompson maintains
  - i) the words "slush fund" are not inherently defamatory and the meaning depends upon the context, since the term can mean money used for other than its intended purposes or simply an excess reserve fund, just as much as money used for corrupt purposes;

- ii) in any event “slush fund” had a particular meaning as set out in the blog and the Side Bar namely:-  

“money intended to be used for the (allegedly) unlawful purpose of funding libel proceedings instituted by Council Officers.”
- iii) even if these submissions are incorrect and the correct meaning is that there was public money being unlawfully and corruptly used for the benefit of Mr James and other Council Officers, the allegation of corruption was against the Council and was not an allegation that Mr James was personally acting unlawfully and corruptly. The fact that Mr James was the beneficiary of the Council’s decision to fund his counterclaim for libel does not mean that Mr James was himself acting unlawfully or corruptly;
- iv) if there was any difficulty in ascertaining the meaning of the second posting, such difficulty should be resolved in Mrs Thompson’s favour by reason of Article 10 of the European Convention on Human Rights.

19. Mr Speker for Mr James submits:-

- i) the term “slush fund” in its ordinary meaning means money either obtained corruptly or used for corrupt purposes;
- ii) the Side Bar did not change that meaning nor did its existence indicate that the term “slush fund” was being used in any special sense;
- iii) the allegation was that Mr James had been instrumental in procuring the Libel Costs Amendment and the concomitant slush fund not that he was an innocent beneficiary.

**The meaning of the Second Posting**

- 20. Counsel agreed that the meaning of the posting had to be considered in its context and that context included the Side Bar. As I have said Tugendhat J accepted (para 364) that the meaning was that Mr James was unlawfully and corruptly using public money for the benefit of himself and his cronies. This is a decision of an experienced trial judge on what is, for the purpose of defamation proceedings, a question of fact, see Lewis v Daily Telegraph [1964] AC 234, 258. This court does not lightly interfere with a trial judge’s decision on meaning and will not do so unless it is “quite satisfied” that he was wrong, see Skuse v Granada Television Ltd [1996] EMLR 278, 285 and Cruddas v Calvert [2014] EMLR 140 paras 18-22.
- 21. I am not so satisfied. The natural meaning of “slush fund” is that money is either being used for improper purposes or, at the very least, for purposes which the provider of the funds is not prepared publicly to acknowledge because he fears that legitimate criticism of use of such funds can be made. In the context of local authority expenditure, the ordinary reader would regard the use of the term “slush fund” as an imputation that the provider of the funds is acting corruptly. The purpose of using the word “slush” as part of the term “slush fund” is to imply that the money is dirty money.

22. The presence of the Side Bar makes no difference to this conclusion. It provides a particular context namely the Libel Costs Amendment, but it is still headed “Mark James and the Council Slush Fund”. The word “corrupt” does not appear in the Side Bar but, as I have said, it is already implicit in the word “slush” in the term “slush fund”.
23. It is, of course, true that no fund existed, in the sense of money deposited in a bank and ring-fenced for the purpose of enabling Council members and staff to sue for libel, but (if that is an inaccuracy) it was (as the judge said in para 386) an immaterial inaccuracy. The gist of the allegation is that funds will be made available for that purpose as and when required and that those funds constitute a slush fund. It is still dirty money.
24. Ms Michalos referred us to the formulation of the legal test of “meaning” in defamation law in Jeynes v News Magazine Ltd [2008] EWCA Civ 130 at paras 14 and 15 (which was itself based on Skuse v Granada) in the following terms:-

“(1) The governing principle is reasonableness.

(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) Over-elaborate analysis is best avoided.

(4) The intention of the publisher is irrelevant.

(5) The article must be read as a whole, and any “bane and antidote” taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, “can only emerge as the produce of some strained or forced, or utterly unreasonable interpretation” ...

(8) It follows that “it is not enough to say that by some person or another the words might be understood in a defamatory sense.”

She then submitted that, in contravention of sub paragraph (2), the judge has selected one bad meaning where other non-defamatory meanings were available. For the reasons I have given, I do not consider that the judge did that. He gave the postings (including posting 2) their natural and ordinary meaning. It may not be impossible, but it must be seldom, that the term “slush fund” can be used in a sense that is not defamatory of the provider or arranger of such fund.

25. Ms Michalos then submitted that any defamation was defamation of the Council not of Mr James personally. Again, I cannot accept that. The first posting complained of referred to Mr James doing everything in his power to protect the “officers club” slush fund. The Side Bar was headed “Mr James and the Council Slush Fund”. The second posting refers to the foresight of “Mark James and his cronies” in financing deals before the budget cuts became operative. Mrs Thompson is not asserting that Mr James is an innocent recipient of the benefit of the so-called “slush fund”. She is saying that he was either instrumental in setting up the fund, or at the very least, that he knew it was being set up so that he could benefit from it.

### **Article 10 of the Human Rights Convention**

26. Article 10 provides that everyone has the right to freedom of expression but that the exercise of that freedom may be “subject to such conditions [or] restrictions ... as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...”. The common law of libel is one such condition or restriction and that, of course, includes the legal test for “meaning” as set out in Jeynes.
27. Ms Michalos submitted that the test set out in the eight principles in Jeynes needed amplification in cases where local authority officers (or indeed servants of central government) bring defamation proceedings because of the importance given by the Convention to the need for healthy debate in a democratic society. She proposed a ninth principle in the following terms;-

“Where the choice of meaning is evenly balanced and in cases where the publication is critical of local or central government, the court should regard Article 10 of the Human Rights Convention as a final grain of sand tipping the balance in favour of the non-defamatory meaning.”

28. For my part, I cannot accept this. It says no more than the second principle of Jeynes that a court should not select one bad meaning where other non defamatory meanings are available and it offends the third principle that over-elaborate analysis is best avoided. Article 10 has already been taken into account in the formulation of the principles in Jeynes and need not be taken into account in some separate or different way when government officials are defamed. Of course the court should not be too astute to assume defamation of a government officer when it is the government itself that is being criticised but that is a different matter and for the purposes of this case is dealt with separately in paragraph 25 above.

### **Conclusion**

29. I would therefore dismiss this appeal.

### **Lady Justice Black:**

30. I agree.

### **Lord Justice Underhill:**

31. I also agree.