



Neutral Citation Number: [2023] EWHC 2555 (KB)

Case No: KB-2023-003797

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2023

Before:

MR JUSTICE JAY

Between:

ANDREW COOPER

Claimant

- and -

**(1) DAVID EVANS (sued in his capacity as
promoter of material on behalf of the Labour
Marty and/or West Midlands Labour Party)**

**(2) HARRY TAYLOR (sued in his capacity as
promoter of material on behalf of the Labour
Marty and/or West Midlands Labour Party)**

Defendants

Greg Callus and Ben Hamer (instructed by Astraea Linskills) for the Claimant
Gavin Millar KC and Tom Gillie (instructed by Keystone Law) for the Defendants

Hearing date: 12th October 2023

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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MR JUSTICE JAY

MR JUSTICE JAY:

1. A by-election will be held in the constituency of Tamworth on 19th October 2023 following the resignation of the sitting Conservative MP in September. The Conservative party candidate for the by-election is Mr Andrew Cooper (“the claimant”). The defendants are sued in their representative capacity as promoters of material on behalf of the Labour Party and/or the West Midlands Labour Party.
2. Mr Eddie Hughes MP had been selected by the Conservative party as its candidate for the Tamworth constituency in the next general election to be held in or before January 2025. Mr Hughes is the sitting MP for Walsall North but this constituency has been abolished following recent boundary changes. Mr Gavin Milar KC for the defendants submitted that in constitutional terms he remains the Conservative party candidate. I need not resolve that issue.
3. The evidence before me is that the claimant was selected as the Conservative party candidate in the Tamworth by-election on 12th September this year and that Mr Hughes stated publicly two days later that if the claimant won the by-election he would not seek to stand as the Conservative party’s candidate for the Tamworth constituency at the general election.
4. On 24 September an advert funded by the West Midlands Labour Party was placed on Facebook and Instagram. Metadata show that this and an identical advert were “active” between 24th September and 30th September and 24th September and 1st October respectively. One or both of these adverts were reactivated on 1st October and then paused on 8th October. There have been no further publications.
5. This is how the advert appeared on social media:



West Midlands Labour 



Sponsored · Paid for by The Labour Party ·



Eddie Hughes is the Conservative candidate for a General Election.

The Conservative candidate for this by-election doesn't need a long-term plan for Tamworth - because he doesn't need to stick around.

MPs who stand down get a £29,000 taxpayer funded pay off.



6. The claimant now applies for an interim injunction under section 106(3) of the Representation of the People Act 1983 restraining any republication of the advert or anything of a similar character.
7. Mr Greg Callus for the claimant submitted that the seven ingredients for injunctive relief under this subsection are as follows:
 - (a) the defendants make or publish a statement;
 - (b) the statement relates to a candidate;
 - (c) it must be a statement of fact;
 - (d) the statement must be *prima facie* false;
 - (e) the statement is made in relation to the claimant's personal character or conduct;
 - (f) the statement is made for the purpose of affecting the election of Mr Cooper; and
 - (g) the statement is made before or during the election.
8. In my judgment, the live issues in this case are (c) and (e). The claimant has demonstrated to my satisfaction that the statement is *prima facie* false. He has done so by using affidavit evidence from himself and Mr Hughes to the effect that no deal of any sort, "dodgy" or otherwise, was made between the two of them.
9. In the context of the issues that are live, the first question to be resolved is the meaning of the advert and whether it contains a statement of fact or opinion. Here the relevant principles are those set out by Nicklin J in *Kousogiannis v Random House* [2019] EWHC 48 (QB) is approved by the Court of Appeal in *Corbyn v Millett* [2021] EWCA Civ 567. The principles governing the issue of meaning are too familiar to require exposition. As for the issue of opinion, paragraph 16 of *Kousogiannis* sets forth the five points which should guide the court:
 - (i) The statement must be recognisable as comment, as distinct from an imputation of fact.
 - (ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
 - (iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
 - (iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, i.e. the statement is a bare comment.

(v) Whether an allegation that someone has acted "dishonestly" or "criminally" is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact."

10. Mr Milar submitted that the advert does not contain any statements that relate to the Claimant. The statements at issue relate to the Conservative party which after all is instrumental in choosing parliamentary candidates. Given, so the argument runs, that the statements relate to the Conservatives and not to the claimant, it is said that they should be treated as statements of opinion and not of fact. The "dodgy deal" mentioned in yellow in large letters on the photograph is an arrangement made by those within the Conservative party which serves to conceal the true facts from the public, namely that the claimant will not on any view be the MP for Tamworth after the next dissolution of Parliament.
11. My reading of the advert applying the well-known principles collected in *Kousogiannis*, paragraph 12 is that the claimant has struck an arrangement with Mr Hughes along the lines that if elected at the upcoming by-election he would stand down before the next general election. It is for this reason that the claimant is not in it for the long term. It is right to point out that this interpretation could not be arrived at without reference to the photograph and the accompanying wording. However, seeing the two men together with speech bubbles should draw any reasonable reader to conclude that the "dodgy deal" has been made between them as members of the Conservative party. The "just keep the seat warm you don't need a plan" is Mr Hughes notionally addressing the claimant. By the same token, the "and I still get the £29,000 payoff from the taxpayer?" is the claimant notionally speaking to Mr Hughes.
12. The advert does not suggest that Mr Hughes is paying the claimant anything for being so obliging. Indeed, it is made quite clear, twice, that the claimant will receive his pay-off from the taxpayer. That would be his entitlement as a departing MP were he to be elected next week and were he to stand down when Parliament is dissolved. Indeed, it would be his entitlement were he to stand down or lose an election at any stage in the future.
13. The "dodginess" of the deal inheres in the simple and straightforward fact that the two men have come to a private understanding along the lines that the claimant will make way for the senior man, currently of course the sitting MP for Walsall North, at the appropriate time; and that the claimant in particular has not made this clear to the electorate of Tamworth. These features, taken together, enable the deal to be characterised as underhand, dubious and lacking in frankness.
14. I am also firmly of the view that this is a statement of fact. The allegation that a deal has been struck is not opinion; it is one of fact. The position could not be clearer in my judgment.
15. The real question in this case is, therefore, whether the statement relates to the personal character or conduct of the claimant.
16. Section 106(1) of the 1983 Act provides:

“106 False statements as to candidates.

(1) A person who, or any director of any body or association corporate which—

(a) before or during an election,

(b) for the purpose of affecting the return of any candidate at the election,

makes or publishes any false statement of fact in relation to the candidate’s personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.”

17. Section 106(3) provides:

“(3) A person making or publishing any false statement of fact as mentioned above may be restrained by interim or perpetual injunction by the High Court or the county court from any repetition of that false statement or of a false statement of a similar character in relation to the candidate and, for the purpose of granting an interim injunction, *prima facie* proof of the falsity of the statement shall be sufficient.”

18. *Pace* the approach taken by the Outer House of the Court of Session in *Swinson v The Scottish National Party* [2019] CSOH 98, the court must determine on a definitive basis the binary question of “personal character or conduct” rather than whether there is a *prima facie* case. Section 106(3) makes clear that *prima facie* proof is relevant only to the issue of the falsity of the statement.

19. It is not a worthwhile or valuable exercise to consider the facts and circumstances of previous decided cases in order to determine which side of the notional line a particular case may fall. Instead I will consider and apply the general statements of principle laid down by the Divisional Court (Thomas LJ, Tugendhat and Nicola Davies LJ), in *R (oao Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2012] QB 1.

20. The following paragraphs of the Divisional Court’s judgment are relevant:

“112. Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate.

113. For example, a statement made simply about a candidate's conduct as a businessman might imply he is a hypocrite (as in *Bayley v Edmonds* or *Sunderland*). As his conduct as a businessman relates to his personal conduct, such a statement is within s.106, subject to possible issues of proportionality under Article 10 to be determined in relation to the seriousness of the allegation. However, a statement about a candidate's political position may well imply that he is a hypocrite or untrustworthy because of the political position he is taking. That is not a statement in relation to his personal character or conduct. It is a statement about his political position though it might cast an imputation on his personal character. We do not consider that Parliament intended that such statements fall within s.106, particularly bearing in mind the fact that criminal liability attaches for statements made negligently. It would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on if such were the width of the prohibition. In any event it would also be difficult to reconcile such a broad construction with the balance that Article 10 mandates be achieved.

114. However, a statement about a political position can go beyond being a statement about his political position and become a statement that is a statement about the personal character or conduct of a candidate. A clear illustration is to accuse a candidate of corruption, even if that corruption involves the conduct of a public or political office. What is being said about the candidate is not a statement in respect of the conduct of a public office, but a statement that he is personally dishonest and committing a crime. The statement is not to be characterised as one about his political position, but one in relation to his personal character.

...

117. We turn first, in the light of the distinction we consider must be drawn to the statement in *Choose* set out at paragraph 70 in relation to Mr Watkins in relation to reneging on his promise to live in the constituency. It was accepted that this was a statement about Mr Watkins' political position; whether a candidate lives or does not live in the constituency is not a matter relating to his personal character or conduct, but to his political position. A statement that the candidate has reneged on his promise to live there does, we accept, cast an imputation on the candidate's trustworthiness, as the Election Court held, but it is in respect of his trustworthiness in relation to a political position. To hold that such a statement fell within the prohibition would have a significant inhibiting effect on ordinary political debate, as candidates, particular those who have been MPs, are sometimes criticised for going back on

promises on a political issue. This is particularly important as s. 106 does not only prohibit untrue statements that are dishonestly made, but untrue statements that are carelessly made.”

21. Mr Callus submitted that the allegation that the claimant entered into an arrangement with Mr Hughes not to stand at the next general election and was motivated by the sum of £29,000 to agree to such a deal self-evidently relates to his personal character and conduct, and not to any political ideas or policy positions for which he stands.
22. I may readily agree with Mr Callus that the advert contained no statements, averments or allegations as to the claimant’s political ideas or policy positions, but in my judgment that is too narrow a formulation. The question is whether the advert contains an allegation about the claimant’s political position which includes his present and future political intentions. The advert was clearly saying that the claimant’s political aspirations in relation to the constituency of Tamworth was short-term only. It is quite true that the advert was also saying that the claimant was untrustworthy and/or had been less than open and frank with the electorate. However, that was “because of the political position he [was] taking” (see paragraph 113 of *Woolas*); or, put another way, this was a statement about the claimant that related to his political position but carried an implication which, if not made in the context of a statement as to a political position, impugned his personal character (see paragraph 112 of *Woolas*). This implication in the context of the present case was insufficient to render the statement or allegation as relating to his personal character.
23. Paragraph 114 of *Woolas* is also highly instructive. In that paragraph the Divisional Court gave what they called a clear illustration of a case that crosses the line from the political to the personal. An accusation of corruption, a criminal offence of course, is a paradigm example. Although the political context remains relevant background, the egregious nature of the conduct brings the personal character of the individual clearly into the frame. The same approach, albeit in an altogether different context, applies to terrorist violence which was the subject matter of the *Woolas* case itself. That conduct is so obviously wrong that it would be an abuse of language and common sense to call it “political”.
24. The advert in the present case did not allege corruption. Taken at its highest it alleged that the claimant was prepared to accept the taxpayer-funded payoff as the price for making way for Mr Hughes. That in my judgment must be seen in its proper context. As the advert itself correctly pointed out, MPs who stand down or are dismissed by the electorate receive this payoff as of right. These circumstances cannot begin to be compared with the acceptance of a bribe or the sort of grossly reprehensible conduct that the Divisional Court surely had in mind in paragraph 114 of *Woolas*.
25. The real sting of the article is that it was alleging that the claimant and Mr Hughes had come to an arrangement of dubious merit that served to conceal the claimant’s short-term aspirations from the electorate of Tamworth. My overall evaluation is that this sting as I am describing it falls on the political rather than the personal side of the dichotomous line identified by the Divisional Court of paragraph 111 of its judgment in *Woolas*.

26. It follows that I must refuse the claimant's application for an injunction under section 106(3).
27. During the course of his submissions, Mr Milar informed me that win or lose he was instructed to say on behalf of the Labour Party and the two representative defendants that this advert will not be republished. Had I been against the defendants on the merits, an issue would have arisen as to whether an assurance by the Labour Party's solicitors to their opponents would have been sufficient in all these circumstances that injunctive relief would be inappropriate as a matter of discretion.
28. That issue has become moot. My preliminary view, in line with the decision of Nicol J in *ERY v Associated Newspapers Ltd* [2016] EWHC 2760 (QB), at paragraph 52, is that such an assurance should ordinarily be regarded as sufficient. It is correct that the Labour Party's solicitors gave no assurance in relation to any future statement of a similar character but that in my opinion is both implied and unnecessary. In the context of an assurance as opposed to injunctive relief, the question is whether there is a real risk of republication of the same material or anything similar.
29. However, in the circumstances that have arisen it is unnecessary for me to express any concluded view about this.
30. For the reasons I have given, this application must be refused.