Neutral Citation Number: [2006] EWHC 1025 (QB)

Case No: HQ04X03130

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2006

Before :

THE HON. MR JUSTICE EADY

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Between :

1. Christopher Roberts	**Claimants**
2. Barry Roberts	
- and -	
1. Gerry Gable	**Defendants**
2. Steve Silver	
3. Searchlight Magazine Ltd	

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- -

Adrian Davies (instructed by **Osmond & Osmond**) for the Claimants
Gavin Millar QC and Guy Vassall-Adams (instructed by **Kosky Seal**) for the Defendants

Hearing dates: 26th and 27th April 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. On 26 and 27 April 2006 I heard a preliminary issue in these libel proceedings, in accordance with an order made by consent on 9 January of this year by Master Foster. The purpose was to determine the merits of the defence of qualified privilege in accordance with the principles set out by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

2. The Claimants are Messrs Christopher and Barry Roberts who are brothers and both active members of the British National Party ("BNP"). Both stood in the interest of the BNP as candidates in the 2005 general election. Mr Barry Roberts had also been a candidate in the 2001 general election and Mr Christopher Roberts in the European Parliament elections in June 2004.

3. Complaint is made of an article in the issue of the magazine *Searchlight* for October 2003. This is a monthly magazine published by the Third Defendants, Searchlight Magazine Ltd, and edited by the Second Defendant, Mr Silver. The article was written by Mr Gerry Gable, the First Defendant, who was described by his counsel Mr Millar QC as "an established investigative journalist and … a leading expert on the far right in Britain and Europe", although in rather less flattering terms by Mr Davies on behalf of the Claimants. He was for many years the editor of the magazine and writes a column regularly under the general heading "News from the Sewers". The article was headed "BNP London row rumbles on" and appears to be part of a series of articles intermittently covering what was described as a "feud" between different factions of the BNP in the London area. So far as material for present purposes, the article contained the following allegations:

> "In May this column reported a BNP rally in London at which John Tyndall, the party's founder, was the main speaker and several of his supporters were present. It now seems this was an attempt to bring them together with their rivals, the supporters of Nick Griffin, the party's present leader.
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> Since then Tyndall has been expelled from the party and has announced that he is resorting to the courts to challenge the decision.
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> We described the London rally as the Night of the Short Knives. Soon afterwards the BNP's March bulletin accused two members of stealing the collection from the meeting. The story that was put around was that Dave Hill and Robert Jeffries, who is better known in the party as Bob James, stole the money from the house of Chris Roberts, the London and Essex organiser. It appears that the police investigated but decided not to act.
>
> Perhaps the police are now more interested in Roberts and his brother Barry. Hill and Jeffries recently issued a long open letter attacking Griffin and his supporters, including Chris Roberts. It explains that it was Roberts who stole the money from the rally and that although it went against the grain, Hill

> and Jeffries reluctantly threatened to report him to the police. After Roberts angrily returned the money, the letter alleges, he and his brother Barry threatened to 'kneecap, torture and kill' Hill, Jeffries and their respective families.
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> The letter complains that the Griffin leadership described Roberts as a self-made millionaire who was leaving the City to devote his time and fortune to the BNP, but he turned out to be a disappointment. 'It was now quite obvious that a little village somewhere, was missing its idiot!'"

4. The Claimants attribute the following natural and ordinary meanings to the words complained of:

> "that the First Claimant (i) stole money collected at a BNP rally, and (ii) did not return it until threatened with being reported to the police, and (iii) that both Claimants threatened to kneecap, torture and kill Dave Hill and Robert Jeffries *alias* Bob James, and the families of Dave Hill and Robert Jeffries *alias* Bob James and (iv) that both Claimants might be subject to police investigation".

5. The Defendants have raised a plea of justification, which is not in issue for present purposes. I am concerned solely with the alternative plea of qualified privilege. In so far as there were contentious issues of fact specific to the defence of privilege, I heard evidence from the main protagonists; that is to say, Mr Gerry Gable, on the one side, and from each of the Claimants on the other.

6. It is possible to summarise the Defendants' case, I hope without over-simplifying it, in terms of the doctrine of *reportage* as explained by the Court of Appeal in *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2002] EMLR 215. On the face of the article, and especially having regard to the so called "repetition rule", it would appear that the Claimants are being accused of having threatened to "kneecap, torture and kill" various people, and in the case of Mr Christopher Roberts also theft. It is the Defendants' case that they were merely reporting the allegations without adopting or endorsing them. It is sought to distinguish the circumstances of this case from those described in *Galloway v Telegraph Group Ltd* [2006] EWCA 17, where it had been held that the offending articles went beyond mere *reportage* by adopting, and indeed embellishing, the relevant allegations. These were contained in documents referring to Mr Galloway, which had been discovered in the Iraqi foreign ministry in Baghdad shortly after the invasion by coalition forces in March 2003.

7. Here, by contrast, what is said is that Mr Gable, and the other Defendants, were under a duty to publish to the world at large allegations and counter- allegations being made on both sides of the BNP divide and that, irrespective of their truth, the fact of those allegations being made was a matter of legitimate public interest. It is Mr Gable's case that he had no reason to take sides or to come to a definitive conclusion as to whose allegations were right and, moreover, that it would be entirely clear to his readers that he was not in a position to do so. He was viewing the dispute as an outsider. Thus, it is said, whatever may be the distinctions to be drawn between the

differing factual circumstances, there is a direct comparison to be made with the analysis applied by the Court of Appeal in the *Al-Fagih* case.

8. It is important to recognise that there is nothing unique in this respect about the BNP. Nor is it any part of the Defendants' case to suggest otherwise. The Defendants' argument is based, essentially, upon the proposition that the public is entitled to know what is going on within any political party which presents itself regularly, through its candidates, for consideration by the electorate. The same argument would hold good, presumably, for any continuing feud or controversy within the Conservative or Labour party.

9. As was observed in *Branson v Bower* [2002] QB 737 at [25]:

> "In a modern democracy all those who venture into public life, in whatever capacity, must expect to have their motives subjected to scrutiny and discussed. Nor is it realistic today to demand that such a debate should be hobbled by the constraints of conventional good manners – still less of deference. The law of fair comment must allow for healthy scepticism."

10. Similarly, more recently, in *Ukrainian Media Group v Ukraine*, App No 72713/01, 12 October 2005, at [67], it was again emphasised that politicians must accept, in a democratic society, that their activities will be open to "robust criticism and scrutiny".

11. This is clearly an important consideration of public policy which has long been recognised, not only in the Strasbourg jurisprudence but also in the common law – albeit more traditionally, perhaps, in the context of the defence of fair comment. It is to this aspect of public policy that one must turn in seeking to reconcile the demands of the "repetition rule" and the recently emerging *reportage* doctrine. That reconciliation has to be achieved by reference to Article 10(2) of the European Convention on Human Rights and Fundamental Freedoms. There is a general need for any restrictions upon freedom of speech to be prescribed by law, and thus reasonably accessible to the public, and to be no greater than is necessary and proportionate to the demands of any countervailing interest, such as the protection of an individual's integrity or reputation in accordance with the rights protected by Article 8.

12. In *McCartan, Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290-291, Lord Bingham made the following observations:

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussion and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that

> the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction".

There are several other similar pronouncements of high authority both in Strasbourg jurisprudence and domestic authorities.

13. The circumstances in the *Al-Fagih* case itself were rather more remote from the general public in this jurisdiction than those forming the background to the present proceedings. Those allegations, which had been published in an Arabic language journal, concerned rival factions in the very different context of Saudi politics. The paper had reported an ongoing political dispute over a period leading up to the publication of the particular words complained of. There had been damaging allegations made on both sides. The newspaper report in question repeated allegations by one protagonist against the other. It is important to note certain factors in that case which, Mr Millar submits, are present here also:

    i) There was a political dimension;

    ii) There was *reportage* of an ongoing dispute (without adoption, endorsement or embellishment);

    iii) It was made clear to whom the defamatory allegations were being attributed;

14. Against this background Simon Brown LJ (as he then was) identified certain principles at [49]-[52]:

> "What was clear from these mutual allegations … is that one or other if not both of these leading Committee members were being shown to be disreputable and that basic fact seems to me to be something which the appellant's readership were entitled to be kept informed about. In my judgment there was no need for the newspaper, at any rate at this early stage of mutual accusation, to commit itself to preferring and adopting the contentions of one side over the other.
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> … To my mind A K [the defendant's journalist] was entitled in this case to publish without attempting verification. Indeed in the present context verification could even be thought inconsistent with the objective reporting of the dispute. …
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> … there will be circumstances where … in short, both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other."

15. Whilst it is true that their Lordships in *Reynolds* rejected a general category of privilege attaching to political speech, it is nonetheless obvious that the political significance of a publication will often be an important factor in determining the merits of a privilege plea. One can easily envisage circumstances in which this factor would impact upon issues of duty and/or public interest.

16. It will thus be apparent that reporting both sides, in a disinterested way, is an important element in the doctrine of *reportage*. That is not to say, of course, that a journalist or publisher will be deprived of the opportunity of such a defence merely by reason of having a particular personal or corporate political stance. What is important in this context is not so much the political stance of the defendant, but rather the way in which the particular dispute or controversy is being reported. There is no doubt, for example, that Mr Gable is far from neutral so far as the BNP is concerned, but that does not mean that he is incapable of objective and disinterested reporting of what goes on within the party, although naturally it may require that any such defence be scrutinised with particular care. In the *Al-Fagih* case the newspaper happened to support the Saudi government and was not politically in sympathy with either of the protagonists whose activities were being reported. It was, nevertheless, able to avail itself of the *reportage* defence in the light of what had actually been published.

17. Mr Millar prayed in aid also the reasoning of Latham LJ at [65]-[67]:

> "… the paper was reporting a split in a political group which was clearly of significant interest to its readers. It seems to me that in this context, what is said by the one side in relation to the other is of considerable interest. This is so whether what is said is of high political importance, or merely scurrilous gossip or personal accusations. The fact that allegations of the latter sort are made rather than the former enables the interested reader to obtain some insight into the nature of the dispute. It is the fact that the allegation of a particular nature has been made which is in this context important, and not necessarily its truth or falsity.
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> … Provided that the paper did not … in any way suggest that it was adopting the allegation, the fact that the allegation was made was a matter of proper interest to the reader and the paper had an appropriate duty to publish it …".

18. Here, the subject-matter of the article, and of the ongoing dispute between the factions in the BNP, was much closer to home. The BNP regularly places candidates before the electorate, both in London and elsewhere, and that in itself could be said to render the allegations and cross-allegations (especially of apparent criminality) as of "significant interest", but it is also relevant to have in mind that there was in or about October 2003, when the article was published, what Mr Millar has described as "heightened public interest in the BNP". This was in large measure because Mr Nick Griffin, who had taken over the leadership from Mr John Tyndall in 1999, had been given a high media profile in the course of presenting the party and its policies to the electorate.

19. My attention was drawn, in particular, to an article published in March 2003 in the BNP journal *Identity*, which set out its stall under the title "Knowing who we are and where we have to go". This attracted a certain amount of media attention. Moreover, following success in local elections in Lancashire in 2002, the BNP had begun to put up more candidates in elections. Because of this high profile, people were naturally taking a greater interest in the party and also in policy and doctrinal divisions among its activists. A focus of particular interest was the split between two factions generally identified, respectively, with Mr Griffin and Mr Tyndall. This was the general context of the coverage which *Searchlight* was giving at the time.

20. On 9 March 2003 there had been a meeting in East London at which Mr Tyndall was invited to speak, the purpose of which was advertised as being the promotion of the BNP campaign for the London Mayoral and GLA elections in 2004. At the time it was apparently on the cards that Mr Christopher Roberts would be put forward as the BNP candidate for the office of Mayor. That fact alone would mean that his activities, policies and motivations were of legitimate public interest.

21. The meeting had been reported by *Searchlight* in its April edition. It referred to the fact that it had been organised by Mr Dave Hill, a John Tyndall supporter, who had clashed with Mr Christopher Roberts at the meeting. This was over Mr Hill's proposal to call a vote against the party's group development officer, Mr Tony Lecomber, who was generally known as a close ally of Mr Griffin.

22. Afterwards, the *British Nationalist* for March 2003 published a report alleging that Mr Hill, together with a Mr Bob Jeffries (also known as Bob James) and another person, had forcibly entered the home of Mr Roberts following the meeting on 9 March and had stolen £1,204, which represented the collection taken at the meeting. It further alleged that the matter was then in the hands of the police. This was picked up in *Searchlight* in the May 2003 issue in an article headed "Night of the short knives". As this forms an important part of the background context to the October article, it is necessary to set out an extract:

> "… Shortly after the rally the BNP March members' bulletin came out with the claim that Hill and James had turned up at Roberts's house and stolen the money collected at the meeting …
>
> The story doing the rounds is that Hill and Jeffries initially went to collect the £200 booking fee for the meeting room, which Roberts had forgotten to pay in his rapid exit from the pub, but seeing all the money it appears that temptation got the better of them and they took the lot".

23. In due course, Messrs Hill and Jeffries replied to these allegations, which had in the meantime been repeated by Mr Lecomber in a letter to *Spearhead* in June. They chose to reply in the August edition of the magazine, denying the allegations of forced entry and Mr Lecomber's allegation that they had tried to "rob" Mr Roberts of the party's collection money.

24. It was against this background that the Defendants reported the Hill/Jeffries denial of the allegation of criminality, to which they had already given currency in the May

issue. It is clear to me that readers of the words complained of would be well aware of Mr Gable's antipathy to the BNP and that he was merely reporting the conflicting positions rather than taking sides with either. They could hardly conclude that he had been present as an eye-witness and would, therefore, realise that he was not in a position to espouse one version or the other. What would be of interest to the reader would be the fact that the allegations and cross-allegations of criminal offences were being made by BNP factions against each other, and "not necessarily [their] truth or falsity" (to echo the words of Latham LJ). It seems to me that these were allegations they were entitled to know about, in the context of a party presenting itself before the electorate of London, and especially so since the allegations *against* Messrs Hill and Jeffries had already been reported.

25. Mr Davies has argued that the Defendants would fail each and every one of Lord Nicholls' ten non-exhaustive tests (set out in *Reynolds* at p.205). I note in passing that they do not necessarily fit the *reportage* template (which was only articulated subsequently) as well as those situations where defamatory allegations appear to readers to have been adopted. Nevertheless, it is still no doubt right to have them in mind.

26. The allegations are undoubtedly serious. It is perhaps fair to say that many readers would be likely to understand the allegations and cross-allegations to reflect the underlying personal and political dispute and to relate to a disagreement as to who should take charge of the collection – rather than to an allegation of taking money for personal enrichment. Nevertheless, the allegation passes Lord Nicholls' first test.

27. The legitimate interest in the subject-matter does not seem to me to be confined to party members or activists. For the reasons I have given, it extends in my view more widely and would embrace the general public and, in particular, the electorate.

28. No steps were taken to verify the information (as was also true in *Al-Fagih*). That would not be fatal, however, in a *reportage* case, where the fact of the allegations being made is what is important. Indeed, as Simon Brown LJ had commented, verification could be regarded as inconsistent with objective reporting.

29. So too, the "source" is of less significance in a *reportage* case, since it is not the reliability of either side which matters so much as the nature of the quarrel.

30. The allegations have certainly not been the subject of any investigation which would "command respect". The "status" speaks for itself, in the sense that the readers know who is making the accusations on either side. Readers of *Searchlight* are unlikely to accord much "status" to allegations being made in such circumstances and may indeed be sceptical about both. (A significant proportion is likely to say "A plague on both your houses!")

31. There was no "urgency" about the matter. The ongoing dispute was being reported at a leisurely pace as it developed.

32. No comment was sought from either Claimant. Mr Gable did not imagine that either would wish to speak to him. Although both said they would have wished to have the opportunity of denying personal wrong-doing, they accepted that they would never have discussed political matters with anyone from *Searchlight*. The suggestion that

they would have been willing to talk to him came as something of a surprise to Mr Gable, but the essential question is whether it was reasonable in all the circumstances for him not to make an approach. Given the long history of Mr Gable's interaction with the BNP, it seems to me that it plainly was. In any case, the important point (yet again) is the fact of cross-allegations rather than the extent of their accuracy.

33. It was disputed whether the Claimants' side was put. But the readers would understand that each of the factions was denying impropriety but accusing the other.

34. As to the "tone" of the article, it is significant that Mr Gable was not adopting but reporting. I do not accept Mr Davies' submission that the use of "Perhaps" (in "Perhaps the police are now more interested in Roberts and his brother Barry") or "explains" (in "It explains that it was Roberts who stole the money …") demonstrates otherwise.

35. It will by now be apparent why I commented that Lord Nicholls' tests did not comfortably fit into a *reportage* case, but I have recorded Mr Davies' submissions about them. Notwithstanding their cogency, it seems to me that in a *reportage* context this is a stronger case than *Al-Fagih* because of the significance to the British public and to the London electorate in particular. As it happens, in the period following the conclusion of the hearing the BNP has, on 4 May 2006, made significant gains in local elections not only in London but elsewhere. I should make it clear, therefore, that this has nothing to do with my decision. I must judge matters, so far as the defence of privilege is concerned, as at the date of publication in 2003.

36. There is a duty ("social or moral") upon political commentators generally, including Mr Gable, to cover the goings-on in political parties, including disputes, fully and impartially. There is a corresponding legitimate interest in the public, and especially those who have a vote, to have such information available. More specifically, *Searchlight* having covered the allegations against Messrs Hill and Jeffries in its May 2003 issue, it would also be incumbent on it to cover their denials. As I have already noted, this set of circumstances is analogous to that considered by the Court of Appeal in *Al-Fagih* and its reasoning is correspondingly applicable – although this case is closer to home, in the sense that it was an English language journal discussing political factions within this jurisdiction.

37. In all the circumstances, I have no hesitation in upholding the privilege defence.