Case No: A2/2007/2845

Neutral Citation Number: [2008] EWCA Civ 921
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE EADY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 15th July 2008

Before:

LORD JUSTICE MAY
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between:

PRINCE RADU OF HOHENZOLLERN	**Respondent /Claimant**
- and -	
HOUSTON & ANR	**Appellants/ Defendants**

- -

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Mr S Cogley (instructed by Blake Lapthorn Tarlo Lyons) appeared on behalf of the **Appellant.**
Miss V Sharp QC (instructed by Carter-Ruck) appeared on behalf of the **Respondent.**

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Judgment

Lord Justice May:

1. The issue in this appeal is whether Eady J was correct to decide, as he did on 23 November 2007, that the publication complained of in the proceedings is not privileged and was not published on an occasion of privilege. Eady J's judgment may be found at [2007] EWHC 2735 QB and it may be referred to for greater detail than this judgment will need to contain.

2. Smith LJ had initially refused permission to appeal on both grounds of appeal then advanced. There was a first ground of appeal against the judge's ruling as to meaning which was not subsequently pursued. I was persuaded by Mr Cogley's oral submissions on 4 March 2008 that permission should be given on the second ground of appeal as to privilege. The privilege claimed is that of responsible journalism, often referred to as "Reynolds privilege". This derives from the very well-known House of Lords decision in Reynolds v Times Newspapers Ltd [2001] 2 AC 127. This decision declined to develop a new subject matter category of qualified privilege by which the publication of all political information would attract qualified privilege. Qualified privilege is available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had an interest in receiving it, taking account of all the circumstances of the publication, including the nature, status and source of the material.

3. The leading opinion is that of Lord Nicholls of Birkenhead, with whom Lord Cooke of Thorndon and Lord Hobhouse of Woodborough agreed. Lord Steyn and Lord Hope of Craighead dissented in the result. Lord Nicholls emphasised that in determining whether a journalistic publication is privileged or made on an occasion of privilege the court has to have regard to all the circumstances. At page 205 he gave his well-known catalogue of matters to be taken into account, emphasising that the list was not exhaustive and that the weight to be given to these and other factors will vary from case to case. Lord Nicholls' list is as follows (the comments he introduced the list by are illustrative only):

> "1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
> 4. The steps taken to verify the information.

> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> 6. The urgency of the matter. News is often a perishable commodity.
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> 8. Whether the article contained the gist of the plaintiff's side of the story.
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> 10. The circumstances of the publication, including the timing."

4. As to the eighth of these, whether the article contains the gist of the plaintiff's side of the story, Lord Nicholls had at page 203 rejected the submission that in the context of political speech a report which failed to report the other side should always fail the common law test. Failure to report the plaintiff's explanation is a factor to be taken into account. Depending on the circumstances it may be a weighty factor but it should not be elevated into a rigid rule of law. The decision whether, having regard to admitted or proved facts, a publication is subject to qualified privilege is a matter for the judge -- see Lord Nicholls at page 205D. In Jameel v Wall Street Journal [2007] 1 AC 359, the House of Lords re-emphasised that where the court considered that the public interest criterion was met, as Eady J did in the present case, the publisher was required to satisfy the test of responsible journalism by showing that reasonable steps had been taken to verify the publication and that it is a question of fact in each case depending on the nature and source of the information whether the publisher had behaved fairly and reasonably in obtaining and publishing the material. Lord Nicholls' ten points were factors to be taken into account not hurdles necessarily to be surmounted. The standards of responsible journalism are to be applied in a flexible and practical manner, with due weight being given to editorial discretion as to what should be included and how a story should be presented.

5. In the present case a reportage defence failed on the basis that the thrust of the publication as a whole was not limited to recording the fact of statements made without adopting them as true. See, for this form of defence, Charman v Orion Publishing Group Limited [2008] 1 All ER 750. Charman is also notable for the further consideration it gives to the qualified privilege defence of responsible journalism developing from Reynolds. Reynolds should be seen as an attempt to redress the balance between Articles 8 and 10 of the European Convention of Human Rights in favour of greater freedom of the press to publish stories of genuine public interest. Lord Nicholls in Reynolds had addressed this subject matter on pages 200 to 201 in a passage quoted at some length by Eady J in paragraph 44 of his judgment in the present case. Charman re-emphasises that the question whether a publication is on a matter

of public interest and whether the standards of responsible journalism have been met must be considered in the context of the publication as a whole. Taking steps to verify information is given added emphasis. A test of responsible journalism is whether the steps taken to gather and publish information were responsible and fair. The ten factors in Reynolds were pointers which might be more or less indicative, depending on the circumstances of the particular case, not a series of hurdles to be negotiated by the publisher before he could successfully rely on qualified privilege, nor tests which the publication had to pass. The test was not intended to present an onerous obstacle to the media in discharging their functions. The consistent trend of Strasburg jurisprudence was supportive of the right of free expression.

6. Eady J referred to Charman and also to Roberts v Gable [2008] 2 WLR 129, in which a defence of reportage succeeded as a species of responsible journalism although the publisher had not taken steps to verify the accuracy of what was reported. What is of significance for the present appeal is that a judicial decision whether a publication is subject to qualified privilege or made on an occasion of privilege is one of evaluative fact, taking account of all relevant circumstances.

7. There appears to be some disharmony between various elements of the Romanian royal family. Two poles of this are represented by ex-King Michael on the one hand and Prince Paul on the other. This is no doubt a subject matter of general public interest, at least to some. The claimant, a professional actor trained as such in Bucharest, married Princess Margarita of Romania in 1996. He now performs an official ministerial role for the Romanian government, advancing the country's interests with NATO and the European Union. Princess Margarita is the daughter of the former king of Romania. Since 1999 the claimant has been using the title Prince Radu of Hohenzollern-Veringen. His pleaded case is that this came about because he was publicly given the title at the suggestion of ex-King Michael by the head of the Hohenzollern-Sigmaringen family, Friedrick Wilhelm Fürst von Hohenzollern, whom I shall call "the Fürst". The grant of the title is said to have been embodied in a document or instrument signed by the Fürst, which has been described in these proceedings as the "Urkunde", being the German word for deed or instrument. Prince Paul however contends that this document is not genuine, having been told by the Fürst that he did not sign it. The article in question in these proceedings also casts doubt on the authenticity of the document by reason of the style of the crest and its position at the foot of the page.

8. There was a press conference in Bucharest on 5 August 2004 given by a delegation from the House of Hohenzollern, at which the claimant's royal title was said to be bogus. The publication complained of in these proceedings appeared in September 2004 in a magazine called *Royalty Monthly* under the heading "Scandal in Romania as Princess Margarita's husband is branded an impostor". The press conference was arranged by Prince Paul's head of protocol, Ana-Maria Pascaru. Also present were two Americans: a retired ambassador, Richard Carlson, and Brad Johnson, a US attorney. The first defendant is the editor of the magazine and the second defendant its publisher.

The article is reproduced in full in paragraph 5 of Eady J's second judgment of 23 November 2007. It is not necessary to reproduce it in full again.

9. In addition to challenging the claimant's right to use the title, the article accused him of having been a member of the former Romanian secret police. In a ruling of 23 October 2007 Eady J had given a judgment on the defamatory meanings of the article as follows:

> "The article complained of bears the following meanings defamatory of the Claimant:
>
> A That here is a very strong case against the Claimant, which he has so far failed convincingly to refute, to the following effect:
>
> i. That the claimant was not granted a title or rank by the Fürst, and that his claims to the contrary are false and dishonest;
> ii. that he is...relying upon a document, namely the Urkunde, in support of his claims, although it is not genuine, and indeed contains a forged signature purporting to be that of the Fürst;
> iii. that he has used a rank to which he is not entitled in order to deceive people into according him access to social circles and to particular official roles to which he would otherwise not be admitted, and also for monetary gain;
> iv. that he has created a security risk because what he has done has exposed him to blackmail;
> v. that having been told (by some unspecified person) that the Fürst had no power to grant a title by German law, the claimant shifted his stance and falsely claimed to have been adopted by the Hohenzollerns.
>
> B. That the Claimant is guilty of having been an officer in the Securitate secret police under the regime of the Communist dictator Ceaucescu."

10. The judge's careful decision may be summarised as follows. First, there were serious defamatory allegations made in the article. Second, whilst the first defendant took some steps prior to publication, he only approached Prince Paul, Richard Carlson, Ana-Maria Pascaru, Laszlo Forrai and Harold Brookes-Baker (he also appears to have approached two experts on royal heraldry). These individuals, according to the judge, presented only one side of the story. Prince Paul was described as someone with an axe to grind as he is embroiled in a dispute with ex-King Michael and his direct descendants as to succession of the Romanian royal family. He also attacked the claimant's entitlement to the title by way of the press release contained in the article. Richard Carlson made the allegation at the press conference that

the claimant was an impostor. Ana-Maria Pascaru was the head of protocol to Prince Paul and his public relations consultant. Laszlo Forrai was responsible for the facilities at the press conference. Harold Brookes-Baker had close involvement with Prince Paul and had written a book called *Historical Facts on the Succession Rights of the Romanian Royal Family*, which put forward all the evidence in support of Prince Paul's claim in the dynastic dispute. He also published a letter in The Times in September 1996 stating that Princess Margarita, on her marriage, should be referred to as Mrs Duda.

11. The first defendant was aware of the long and bitter dynastic dispute between the two branches of the Romanian royal family: Prince Paul on the one side and King Michael along with Princess Margarita and the claimant on the other. It was an obvious step for the first defendant to ask for a better copy of the Urkunde so as to compare it with the one distributed at the press conference and denounced it as a forgery. This would have enabled him to express an opinion, as opposed to asserting a fact, as to the crest and the correct identification of the heraldry. What is striking, said the judge, is that those approached all represented one side of the story only. The first defendant failed to contact anyone on the claimant's side. A responsible journalist wishing to present a fair picture in view of the gravity of the allegations would surely have approached the claimant at least, who was never asked for comment prior to publication; Simina Mezincescu, the chief of protocol at the House of King Michael; or Adrian Vasiliu, the Romanian royal family's attorney and official spokesman. The first defendant chose not to seek out the claimant's side; rather he would wait for Ana-Maria Pascaru to inform him of any response from the claimant. The first defendant knew that Mr Nastasi, the then prime minister of Romania had, shortly after the press conference, by way of statement expressed his confidence in the claimant and the appropriateness of his occupying public positions, yet the first defendant chose to make no mention of this in the article. The first defendant left the Securitate allegations unanswered in the article despite being aware of the public statement made by the claimant that the allegation was unfounded. The clear impression of the article was that the allegation had gone unanswered.

12. The judge approached each of the ten pointers in Reynolds as non-exhaustive matters which had to be borne in mind. He made the following observations in relation to some of them: regarding the source (which is the Reynolds third pointer) of the information leading to the grant of the title and the Securitate allegations, those who were approached -- Richard Carlson and Brad Johnson -- had no direct knowledge of either. As to the dynastic dispute, the Hohenzollerns or Prince Paul could not be said to be dispassionate observers. Secondly, the steps taken or not taken to verify the information (the fourth of the Reynolds pointers) was one of the most important factors in this case. Thirdly, the article did not contain the claimant's side of the story on the forgery, or the alleged forgery, of the Urkunde or the Securitate allegation, which was another factor which was especially germane in the present case. The judge saw no reason to suppose that the claimant would not have responded if he had been approached. He was the best possible source of information about any involvement with the secret police. There was no question of the claimant having to establish that if he had been approached it

would have made a difference to the tone or content of the article. The judge referred here to the judgment of this court in Galloway v The Telegraph Group [2006] EMLR 221 at paragraph 75.

13. The judge then considered the matter in the round: the right to uphold the defence of privilege notwithstanding that some of Lord Nicholls' questions were answered negatively; whether it was in the public interest to publish the article regardless of the article's truth or falsity; and whether the steps taken to gather and publish the information were responsible and fair. It was a judgment for the court to make; and considering all the matters before him, Eady J decided that the plea based on Reynolds failed. It was particularly significant to his assessment that such serious allegations were put into circulation without giving any opportunity for the claimant's side of the story to be stated on the alleged forgery of the Urkunde; its use for personal gain; the false claim that the Hohenzollerns adopted him; or his alleged service in the secret police. The article did not have a balanced tone.

14. The defendants' written Grounds of Appeal and Mr Cogley's written submissions in support of them may be summarised as follows. First, the judge was wrong as a matter of law and fact in reaching the conclusions he did. He infringed the defendants' Article 10 rights without sufficient, or any, justification and made findings contrary to the evidence. Lord Nicholls' ten factors are not mandatory factors but were, in effect, treated as such. In particular the fact that the defendants did not contact the claimant or his representatives before publication was the result of a reasoned, deliberate and careful editorial decision by the first defendant, to which the judge gave insufficient weight.

15. The claimant did not make any contact with the Romanian press or TV in the aftermath of the press conference and, further, did not make a response to the article, which would have been conveyed to him by the press conference organisers. The first defendant also concluded that, similarly, the claimant's representatives would not have engaged with him either. There was no evidence that had contact been made it would have made any difference. The claimant did not give evidence (a submission which, as Eady J said, tends to reverse the burden of proof). The defendants have to establish that they acted as responsible journalists.

16. Secondly, it was not irresponsible, it is submitted, for the first defendant to contact the individuals he did. Howard Brookes-Baker was until his death one of the world's leading authorities on genealogical matters and was an appropriate source for further expert investigation. It was not irresponsible to use the organisers of the press conference as sources in providing the accredited transcripts, even though they turned out to be inaccurate. Ex-United States Ambassador Richard Carlson was a man of high repute and Prince Paul issued a separate press statement which was reported verbatim. Further, the first defendant consulted two experts in relation to the authenticity of the Urkunde and he had no reason to suspect that they would have an axe to grind or their observations were flawed. It was not irresponsible of the first defendant not to obtain a good copy of the Urkunde. No issue turned prior to

publication on the quality of the copy. The judge's observations that enquiries to the claimant's representative would have yielded a better copy are fanciful under circumstances where there has not been a complaint regarding quality and unsupported by any evidence from which supposition could arise. It was not irresponsible to fail to include in the article references to the then prime minister's endorsement of the claimant as the article was directed to whether the title was genuine and Mr Nastasi did not care whether the claimant was a baron or a prince. He was a very controversial figure and this would fuel debate and change the thrust of the article.

17. The first defendant concluded that including the prime minister's endorsement would necessitate the need to cover further aspects of the claimant's character which were "very nasty". He took an editorial decision to confine the article to the form it ultimately appeared in. The article did not give the clear impression that the Securitate allegation had gone unanswered and was likely to be true. The references were not alleged as facts but allegations, mentioned as matters of context in relation to the security concern. The first defendant refers to a ground of appeal as to why the claimant's camp were not contacted and the most the claimant's representatives had said was that they were unfounded, coupled with threats to anyone who chose to dig deeper. And it is submitted in the circumstances that the judge substituted the journalistic editorial judgment of the first defendant with his own views and gave no weight to the judgment of the first defendant as an editor exercising it at the time. And it is submitted that he approached the question of publication in the public interest by applying a test akin to negligence as opposed to responsible journalism. He did so without any evidence as to the conduct to be expected of a reasonable journalist under the same or similar circumstances.

18. It is further submitted that the judge either impermissibly speculated in favour of the claimant as to what would have happened if contact had been made with the claimant's camp by the defendants but rejected the defendants' submission that the absence of any evidence as to what would have occurred meant the failure to contact was immaterial or, in the circumstances, he elevated the defendant's failure to contact the claimant's camp as an item in the list of items expounded in Reynolds to being a hurdle that the defendants had to clear rather than simply being a factor that had to be taken into account in an appropriate case. And it is submitted that under the circumstances the judge misapplied the law. He should have found that the denial of privilege to a journalist because he should have undertaken further research or contacted other sources, even though it would have made no substantial difference, was not necessary in a democratic society nor a relevant reason to deny privilege.

19. In short, the appellants submit that the judge elevated Lord Nicholls' fourth, seventh and eight points to a status they do not deserve in this case, especially when there was no evidence to refute the journalistic judgment of the editor that an approach to the claimant's camp would have made no difference. Jameel is advanced as an example of a case where the claimant's account would have made no difference because he would not have anything material to say. Mr Cogley emphasises these points in his oral submissions and emphasises, in particular, that it was the defendants' intentional editorial

decision not to put the gist of the article to the claimant, having judged that if he had he would not have responded. The failure has, it is submitted, been elevated to breach of a rule of law. The editorial decision, it is said, was based on the fact that in the four to five weeks between the press conference and publication there had been no attempt on behalf of the claimant to respond to extensive media coverage in Romania. Too much emphasis was placed on the failure to contact the claimant's camp and the judge wrongly speculated as to what the outcome might have been if there had been such contact. The journalist was not in this case cavalier, careless or slipshod and the judge should not have decided as he did.

20. As I have said, in this appeal the court is concerned to review the evaluative judgment of a very experienced judge. As the Master of the Rolls, Sir Anthony Clarke, said in Mersey Care NHS Trust v Ackroyd [2008] EMLR 1 decisions of this kind involve a balancing of different factors and, although it can be said to involve a question of law, it is a question of law which is heavily fact-dependent and value-laden and upon which many factors may be relevant on both sides. The Master of the Rolls likened the exercise in that case to the exercise performed by a judge in balancing the various factors identified by Lord Nicholls in Reynolds as being relevant to the issue of Reynolds privilege. The Master of the Rolls had said in Galloway that the right to publish must be balanced against the rights of the individual. The balance is a matter for the judge. It is not a matter for the appellate court. This court will not interfere with a judge's conclusion after weighing all the circumstances in the balance unless he has erred in principle or reached a conclusion which is plainly wrong.

21. I do not consider that Eady J erred in principle in the present case nor that he reached a conclusion which was plainly wrong. As to principle, he took all the main matters carefully into consideration. He addressed Lord Nicholls' ten points in turn but did not regard them or any one or more of them as necessarily or by themselves determinative. He treated them as relevant considerations, not, in my view, as hurdles, each of which a defendant is required to overcome. He was entitled to regard the tone of the article as one-sided and unbalanced. The fact that the appellants had not approached the claimant or anyone on his side of the dynastic divide was relevant and an important, but not all-embracing reason for the judge's decision. It was relevant that the appellants did not report the claimant's public denial that he had been a member of the secret police in Iron Curtain days. If the editorial judgment was that approaching the claimant would have made no difference, the claimant did not have to prove positively that it would have made a difference and this is not a case, such as was Jameel, where all relevant knowledge and information lay elsewhere.

22. The appellants' supposition that enquiries of the claimant or his camp would have been fruitless, based on the fact that there had been no response to the press conference, was capable of being regarded as mere supposition. The question was not whether the claimant would have responded, but whether it was irresponsible not to ask. The judge's proposition was that it was a matter of elementary fairness that a serious charge should be accompanied by the gist

of any explanation already given. This applies directly to the secret police allegation and here and elsewhere, as with the alleged forgery, the claimant was, as Miss Sharp submitted, the obvious person to ask. As to the press conference itself, Miss Mezincescu did attend, brought a copy of the Urkunde and made clear that King Michael and the claimant were contending that the grant was genuine. I am not in addition over-impressed with Mr Cogley's repeated submission that decisions in this case were matters of editorial judgment, as if the magic wand of editorial judgment answers all possible criticism of the balance of the article.

23. In the end, in my view, the judge came to a balanced overall conclusion, looking, as he said he did, at the matter in the round. He also gave due weight to editorial discretion, emphasising that the question was not what he would have done, because he is not a journalist. For these reasons I would dismiss this appeal.

Lord Justice Moore-Bick:

24. I agree and there is nothing that I wish to add.

Lord Justice Lawrence Collins:

25. I also agree.

Order: Appeal dismissed