

A2/2005/0308

Neutral Citation Number: [2005] EWCA Civ 435  
IN THE SUPREME COURT OF JUDICATURE  
IN THE 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, WC2

Monday, 18th April 2005

B E F O R E:

**LORD JUSTICE TUCKEY**  
**LORD JUSTICE LATHAM**

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**GEORGE GALLOWAY MP**

**Claimant/Respondent**

-v-

**TELEGRAPH GROUP LIMITED**

**Defendant/Applicant**

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(Computer-Aided Transcript of the Palantype Notes of  
Smith Bernal Wordwave Limited  
190 Fleet Street, London EC4A 2AG  
Tel No: 020 7404 1400 Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

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**MR JAMES PRICE QC** and **MR MATTHEW NICKLIN** (instructed by Messrs Dechert  
LLP, London EC4Y 1LT) appeared on behalf of the Applicant  
The Respondent did not appear and was not represented

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**J U D G M E N T**  
**(As approved by the Court)**

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1. LORD JUSTICE TUCKEY: This is a renewed application by Telegraph Group Ltd for permission to appeal from the judgment of Eady J awarding the claimant, the well-known MP George Galloway, £150,000 for libel for articles appearing in the Daily Telegraph on 22nd and 23rd April 2003. The trial was by judge alone. The Telegraph seek to challenge both the judge's finding of liability and his award of damages.
2. The articles appeared just over a month after the invasion of Iraq and were prompted by the discovery by a Telegraph journalist of a number of documents in the burnt-out offices of the Iraqi Foreign Ministry in Baghdad. The paper published the relevant documents in the original Arabic and accurate English translation in the two issues of the paper about which complaint was made.
3. The documents concerned the Mariam appeal or campaign mounted by Mr Galloway by which he arranged to bring a young Iraqi girl suffering from cancer to England for urgent medical treatment so as to highlight the hardships caused by the sanctions imposed on Iraq and further his well-publicised political campaign to lift this embargo.
4. It is unnecessary to quote the documents, but the two most relevant ones are quoted in full in paragraph 16 of the judge's judgment, [2004] EWHC 2786 (QB). Suffice it to say that the documents, which were deemed to be authentic, stated that the Iraqis had funded the Mariam campaign by providing Mr Galloway with the means to make profits on oil supplied by Iraq under the oil for food programme and on food contracts with the Iraqi Ministry of Trade. It was said that at the end of 1999 he had met with an Iraqi intelligence officer to explain that the campaign needed greater financial support and so had asked for an increased share of the oil and exceptional commercial and contractual facilities. These arrangements were to be carried out by his nominated Iraqi representative and partner so that Mr Galloway could not be directly connected with them. Other documents showed that this proposal had been considered by Tariq Aziz and that in May 2000 Saddam Hussein had rejected the request for increased support, although a four-man committee subsequently recommended continuing the existing co-operation with oil and commercial contracts.
5. The Telegraph's reporting of the discovery of the documents and its consequences occupied the front five pages of both issues of the paper and were the subject of the only leaders on both days. The reporting included Mr Galloway's response to the allegations which were put to him on the telephone on 21st April, when he denied (as he always has) ever having asked for or received any money from Iraq to support the Mariam campaign, ever having bought or sold any oil or, so far as he was aware, ever meeting an Iraqi intelligence officer. The campaign, he said, had been funded by private donations and friendly governments.
6. The reporting also included a blitz or blizzard, as Mr Galloway described it, of other material. The flavour of this other material can be discerned from the headlines under which it appeared: "Galloway was in Saddam's pay"; "Saddam's little helper"; "MP in Saddam's pay defends himself from £250,000 villa in the Algarve".

7. The judge found that in their reporting of this story the Telegraph had not merely adopted the allegations made in the documents, but had embraced them with relish and fervour, and then gone on to embellish them. In a summary of his conclusions, the judge found that they conveyed the following meanings: (a) Mr Galloway had been in the pay of Saddam Hussein, secretly receiving sums of the order of £375,000 a year; (b) he diverted monies from the oil for food programme, thus depriving the Iraqi people, whose interests he had claimed to represent, of foods and medicines; (c) he probably used the Mariam appeal as a front for personal enrichment; and (d) what he had done was tantamount to treason. The allegations had been embellished because the reporting alleged that Mr Galloway had taken the money for himself, whereas the Baghdad documents alleged that it had only been for the Mariam campaign. Furthermore, the allegation of personal gain had not been put to Mr Galloway.
8. In their defence to the claim, the Telegraph did not suggest that any of the allegations made in the documents or their reporting of the matter were true or that they had reasonable grounds for suspecting that they were true. There was no plea of justification. They contended that the entirety of their reporting was protected by Reynolds qualified privilege and/or fair comment.
9. When dealing with qualified privilege, the judge noted that an important element of the paper's argument was that their coverage amounted to *reportage*, described by Simon Brown LJ in Al-Fagih v HH Saudi Research and Marketing (UK) Ltd [2001] EWCA Civ 1634 as:

"... a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper ..."
10. It was accepted on behalf of Mr Galloway that if the Telegraph had done no more than report the discovery and content of the Baghdad documents in a fair and disinterested way, no complaint could have been made because the public had an interest in being told such facts and the Telegraph had a corresponding duty to tell them. In other words, the paper would have had a defence of qualified privilege.
11. After a lengthy review of the English and European cases, the judge said that he could do no better than apply the principles in Reynolds which had been fashioned with Article 10 very much in mind. Following a detailed consideration of those principles, he concluded:

"171. The question is not simply whether the allegations in the Iraqi documents were of public interest, but whether The Daily Telegraph was under a social or moral duty to communicate the totality of what it chose to publish to the world at large on 22nd and 23rd April 2003 and, specifically, the words complained of in these proceedings.

172. As is obvious, those communications went well beyond reporting the content of the documents and calling for an inquiry. Did the public have a right to be given The Daily Telegraph 'blizzard' of interpretation (in Mr Galloway's phrase) as well as the basic facts? To put it another

way, did The Daily Telegraph have a duty to publish the material to the effect that Mr Galloway was an 'MP in Saddam's pay' at all? Did they have a duty to do so without putting that allegation to him? To my mind the answer must clearly be in the negative. Unfortunately, as emerged from a consideration of the transcript, the discussion between [the journalist who put the allegations to Mr Galloway] and Mr Galloway was confined to the Mariam Campaign and whether Iraqi money had been solicited or received for that. That was denied in unequivocal terms, but nothing was said about using it as a front, or siphoning off monies from the oil-for-food programme, for personal enrichment.

173. Thus, I am afraid that making all due allowance for the encouragement towards the wider and more flexible use of common law principles, in *Reynolds*, I am quite unable to uphold the privilege defence."

12. Following refusal of permission to appeal on the papers by Keene LJ, Mr Price QC for the Telegraph has refined his criticisms of the judge's approach and conclusions to one main point. This arises from the tension, which the judge recognised, between the English repetition rule and *reportage*. The English rule is that if a third party makes a defamatory allegation which is reported, the report cannot be justified simply by proving that the allegation was made, the allegation itself must be justified. As Al-Fagih shows, English law will afford qualified privilege to the full, fair and disinterested reporting of allegations provided they are not adopted by those who report them. But Mr Price submits that, at least since Reynolds and Al-Fagih, the European Court of Human Rights has gone further than that, notably in the cases of Thoma v Luxembourg (2003) 36 EHRR 21 and Selisto v Finland (judgment delivered 16th November 2004).
13. In Thoma, a radio journalist repeated a serious allegation made in a newspaper. Although it was found that he had partly adopted the allegation, the Strasbourg court said that he should not have been found liable under what approximated to Luxembourg's version of our repetition rule. The court said at paragraph 64:

"A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas."
14. In Selisto, in the context of a wider debate about drunkenness, a regional daily paper had published allegations made by a relative of a patient who had died during surgery that the surgeon performing it was drunk. The surgeon was not identified, but from the context would have been known to people in the area where he lived. The Strasbourg court held by a majority that the journalist's conviction for intentional defamation "despite better knowledge" was contrary to Article 10. The judge described the Selisto decision as striking, noting (among other things) that the allegations were recognised to be factual in character rather than value judgments and that no defence had been put forward that they were true. What had been crucial to the court's decision was the public interest in the drunkenness issue. The judge distinguished Selisto on the latter

basis and concluded that neither these or the other Strasbourg cases to which he referred meant that he should adopt anything other than the Reynolds approach.

15. Mr Price submits that the two cases show that Simon Brown LJ's definition of *reportage* is not exhaustive. It is not fatal to a defence of qualified privilege that the press have adopted the allegations made by a third party. They are entitled, he submits, to explain, interpret and adopt allegations made, as the Telegraph did with the Baghdad documents in this case.
16. I think it is sufficiently arguable -- that is to say, there is a real as opposed to a fanciful prospect of success -- that a defence based upon *reportage* goes further than this court had to decide in Al-Fagih to justify permission to appeal being given in this case. This will enable the court to consider the point which is of importance and likely to arise in other cases. I say nothing about whether, on the facts of this case, resolution of the issue that I have identified will make any difference to the result, given the extent to which the reporting in this case went beyond the type of reporting considered in Al-Fagih.
17. The Telegraph's defence of fair comment was rejected by the judge on the basis that it had not proved the facts upon which the comment was based and because in any event the so-called comment contained further unproven facts. Mr Price again submits that *reportage* entitled the Telegraph to report the allegations without proving them and then comment on them relying on the defence of fair comment. I am not sure whether the defence of fair comment adds anything, because it must be dependent upon the statements of fact being protected by privilege. But there may be something more to it than that and so I would grant permission to argue fair comment as well.
18. The notice of appeal also contains a number of assorted points relating to the judge's finding about privilege, which are of less importance than the main point and would not justify permission to appeal on their own. Nevertheless, as there is to be an appeal I would not limit the permission to exclude those grounds.
19. As to quantum, the Telegraph submitted that Mr Galloway should be compensated on the basis that the Baghdad documents would have come into the public domain sooner or later and so his reputation would have been damaged in any event. The judge rejected this approach as illogical. The documents did not publish themselves and the mode of their presentation was wholly under the Telegraph's control. Mr Galloway was entitled to be compensated for the manner in which the newspaper chose to put them in the public domain and the spin which they put on them.
20. The Telegraph's argument was one of causation, i.e. even if they had not defamed Mr Galloway, his reputation would have been substantially damaged by the publication of the document. The judge pointed to the difficulties of deciding hypothetical questions about what would have happened if the documents had found their way into the public domain by another route. But difficult assumptions and hypotheses often have to be made in the assessment of damages and so this may not necessarily be an answer to the Telegraph's arguments. I would give them permission to appeal on this point also.

21. Finally, it is argued that £150,000 was excessive in any event. I do not agree. If the judge's approach was right, there is no real prospect of this court interfering with the amount he awarded.
22. LORD JUSTICE LATHAM: I agree.

**ORDER: Application for permission to appeal granted; a stay of execution of both damages and costs ordered until the appeal is finally determined; the costs of today to be costs in the appeal; time estimate for the appeal to be 1½ to 2 days, the appeal to be heard by the Master of the Rolls sitting with two Lords Justices.**

(Order not part of approved judgment)

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