Part 6: Grounds of appeal

Paragraph references in square brackets are to the Court of Appeal's judgment. Paragraph references in round brackets with the prefix "J" are to the judgment of the trial judge, Mr. Justice Tugendhat.

Appeal on hard copy and website publications up to 5 September 2007

1. The decision of the Court of Appeal is wrong and ought to be set aside because (a) it is in conflict with binding authority and contrary to established principle (see 2-9, 15 and 18 below); and (b) it proceeds on the basis of unsustainable findings of fact that it was not open to the Court of Appeal to make (see 10-14, 16-17 and 19 below).

2. The principal authorities with which the decision of the Court of Appeal is in conflict are: the decisions of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 ('*Reynolds*'), *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 ('*Jameel*') and *In Re British Broadcasting Corporation* [2009] UKHL 34, [2010] 1 AC 145 ('*BBC*') the decision of the Supreme Court in *Guardian News & Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325 ('*Guardian Media*'); and the decisions of the Court of Appeal in *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] EMLR 11 ('*Galloway*') and *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103 ('*Browne*'). Those authorities are binding on the Court of Appeal.

3. *Jameel* confirms that the *Reynolds* defence, which affords protection for defamatory statements in reports on matters of public interest that are the product of responsible journalism, must be applied in "a practical and flexible manner" and that the courts must be astute to give effect to the "liberalising intention" of *Reynolds*. In the present case, the Court of Appeal ignored those requirements, choosing instead to apply criteria to the content of the article complained of and to the steps taken to verify that content which were inappropriately restrictive, excessively demanding and wholly at variance with the approach dictated by *Jameel*.

4. In the result, the Court of Appeal's decision represents a retrograde and impermissible departure from the principles that now govern cases such as the present. Far from giving effect to the liberalising intention of the

Reynolds decision, it subverts it and risks stifling investigative journalism on matters of public interest.

5. One important consequence of the erroneous approach adopted by the Court of Appeal is that the media may now be deterred or prevented from publishing any accompanying detail when reporting information about possible wrongdoing. This is wholly inconsistent with *Jameel, BBC, Guardian Media* and *Galloway* and contrary to the public interest.

6. Where, as here, the subject-matter of an article satisfies the public interest requirement of *Reynolds/Jameel,* then the inclusion in the article of details that engage the public's interest in that subject-matter contributes to the public interest. As a matter of logic, this principle must embrace not only the publication of the name of the person concerned (which was conceded), but also details of the information about him that enable the public properly to understand the nature and importance of the story (so long as those details are not adopted, embellished or asserted to be true, as they were not here). In this connection, it is to be noted that in *BBC,* the information about D that the BBC was proposing, with the sanction of the House of Lords, to broadcast was significantly more damaging to his reputation than anything said about Mr Flood in the article in this case. Similar observations may be made about the information about M whose publication was sanctioned by the Supreme Court in *Guardian Media.*

7. The Court of Appeal's hostility to "interest and colour" in news reports (at [119]) is in irreconcilable conflict with the principle in *Guardian Media* (at [63]) that it is not in the public interest to limit reports on matters of public importance and concern to "some austere, abstract form, devoid of much of its human interest". In fact, as the Court of Appeal recognised (at [68]), it is unlikely that The Times (or any other media organisation) would have published an article of that kind or, if it had, that any of its readers would have paid it much attention. Moreover, if reports on matters of public interest are to be confined in the way that the Court of Appeal's judgments suggest, there is a real danger that journalistic investigation of possible wrongdoing, particularly by those in authority, will not be undertaken because of the obvious likelihood that it its products will not be published (*Jameel* at [51]).

8. Once the public interest requirement has been met, then the precise manner in which surrounding details are published is a matter of editorial judgment (*Jameel, BBC, Guardian Media*)

9. The Court of Appeal's attempt (at [60] and [117]) to distinguish the present case from *Jameel* proceeded on a false premise, namely that the article in *Jameel* did not disclose the grounds for monitoring the claimants' bank accounts or suggest that there were any. That article explicitly gave potential terrorist connections, and, specifically, the possible funnelling of funds to terrorist organisations, as the reason for monitoring the bank accounts of those who had been placed on the 'suspect lists'. (Moore-Bick LJ appeared to think that the article in *Jameel* was not, or was barely, defamatory (at [105]), which is simply wrong: the jury had found that it was defamatory and that finding was not challenged on appeal).

10. The Court of Appeal ignored, overlooked or misunderstood the trial judge's findings of fact and proceeded on a factual basis which was not open to it, whether by reference to the judgment of Tugendhat J, the evidence given at trial or the parties' stated positions.

11. The Court of Appeal asserted *as a fact* that the Allegations "were largely unchecked and unsupported" ([69]) and that the journalists had not "done much to satisfy themselves that the Allegations were true" ([73]) (the Master of the Rolls), a 'finding' repeated at [103], [108] (Moore-Bick LJ), [116] and [118] (Moses LJ). These assertions of fact lie at the heart of the Court's decision to allow the cross-appeal. As appears below, they are, in their entirety, wrong.

12. The reason for this, as that stated above, is that the Court of Appeal either ignored, overlooked or misunderstood the findings of fact made by Tugendhat J. Those findings, which were not challenged on appeal, demonstrate that the journalists had indeed taken reasonable steps to check the accuracy of the Allegations. Tugendhat J, who had heard three days of evidence consisting largely of cross-examination of the journalists, set out in great detail the extent of the journalists' enquiries and their results (J35, J42-J76, esp. J57, J60, J61, J62, J67, J68, J69, J76, and also J162-J164, J199 and J204). Properly read, those passages in Tugendhat J's judgment show that the journalists went to very considerable lengths, over a long period of time and with a considerable degree of success, to

verify the factual accuracy and credibility of the Allegations. In short, as Tugendhat J found (at J199), they had acted responsibly.

13. Moreover, the Court of Appeal found that the allegations were from "an unknown source" ([73] and [116]). That finding, if it had been correct, must obviously have had a significant bearing on an assessment of the journalists' responsibility. But it was wholly incorrect. As the findings of Tugendhat J show, the journalists knew very well who the source of the information was: see J35, J51, J52, J56 and J57.

14. It follows that, in emphatic contradiction of Moore-Bick LJ (at [98]), the article was a paradigm of the kind of investigative journalism that the *Reynolds* defence exists to protect; for it reported facts that the journalists had indeed uncovered themselves and taken pains to verify and corroborate by a variety of means. See *Jameel* at [150].

15. The level of verification that the journalists in fact achieved exceeded that which, as a matter of law, was required of them: see *Jameel*. However, the Court of Appeal adopted the wrong approach to the requirement of 'verification' in *Reynolds* and, in doing so, set the hurdle so high that, at least in the case of information unearthed and reported by journalists (as opposed to reports of publicly made allegations and counter-allegations, ie, mere reportage), a publisher will have to justify (prove the truth of) the underlying allegations (at [73], [102], [103], [105], [108] and [118]). Again, this is wrong in principle and in direct and acute conflict with *Jameel* (*passim*, but at [62] in particular).

16. At [68] the Master of the Rolls, with whom the other Lords Justices agreed, attributed to the article a meaning which was more serious even than that contended for by the Claimant, namely that the Claimant was *guilty* of a serious criminal offence. The consequence is that the Court of Appeal's judgment must have proceeded on the basis that the article made so serious an accusation against the Claimant that the standard of verification required of the journalists was exceptionally high. This was plainly a significant error. The article did not attribute guilt to the Claimant. The Court of Appeal should have adhered to the approach by the trial judge (J10).

17. The consequence of that error (together with those noted at 10-15 above) was that the Court of Appeal's reversal of the conclusions which the trial

judge reached after carrying out the required balancing exercise with exemplary care was made on a false basis.

18. The Court of Appeal erred in law in its approach to the appeal by refusing to follow *Galloway* (at [45-49] and [107]). The appeal was from a decision in which the trial judge had determined where the balance lay between competing Convention rights. *Galloway* has been authoritatively approved and adopted for such cases: *Browne* (at [45]). This part of the decision therefore has important ramifications for appeals in all cases where conflicting Convention rights are in issue.

19. In any event, the Court of Appeal was wrong to find that the trial judge had abdicated his responsibility for assessing the public interest in favour of editorial discretion. On the contrary, having found that not only the broad subject matter of the article (corruption of police) and its particular context (by wealthy foreigners in the jurisdiction) satisfied the public interest requirement and that naming the Claimant had a legitimate aim (and was therefore in the public interest), the judge was right to hold that the extent to which, and the manner in which, the details of that information were presented fell within the permissible range of editorial judgement. This may be illustrated by reference to the detail in the article (none of which has been challenged as being factually inaccurate) which puts the allegations in their proper context and so enables the reader to understand the true significance of the story.

20. In summary, the Court of Appeal made seven fundamental errors:

    a. It failed to follow *Jameel*.

    b. It wrongly held that this case was distinguishable from *Jameel*.

    c. It wrongly held that that the inclusion in the article of details of the information being investigated by the police was fatal to the *Reynolds* defence.

    d. It misapplied the *Reynolds* requirement of verification, setting a standard that was too high and wrong in law.

    e. It failed to pay any or any sufficient regard to the trial judge's findings of fact and so failed to appreciate that the journalists had

in fact achieved a higher standard of verification than was required by law.

f. It proceeded on the basis of a meaning of the article that was more serious both than that contended for by Mr Flood and than that which the article was capable of bearing.

g. It refused to accept that it was bound by its own decisions in *Galloway* (and *Browne*) not to interfere with the judge's assessment of where the balance between the parties' competing Convention rights lay.

Appeal on website publications after 5 September 2007

21. This appeal arises only if TNL is successful in its appeal on the *Reynolds* defence (above). It raises an important question as to the circumstances in which a report which continues to be published on a newspaper's website may lose the protection of that defence.

22. In considering the position after 5 September 2007 (when the police informed TNL of the outcome of their investigation), the nature and extent of any duty to amend or update the report requires and depends upon a careful examination of all the relevant circumstances, as they were known to TNL. The trial judge and Court of Appeal failed to have sufficient regard to the significance of the ongoing litigation between the parties or the position adopted by Mr Flood.

23. In September 2007, TNL proposed publishing a report which accurately reflected what it had been told by the police. Mr Flood rejected that wording, making clear that he would regard its publication as adding "insult to injury" and that he would rely on it as aggravating the damages. Mr Flood insisted upon publication of a full apology and retraction (even at that stage, pre-trial).

24. There were outstanding issues on liability (the meaning of the words and a defence of justification) and, if TNL were to lose at trial, damages. At that stage (pending trial), it would be unreasonable and disproportionate (as well as a breach of its rights to a fair trial under Article 6) to require TNL to retract and apologise publicly for its original report.

25. Mr Flood's position and TNL's legitimate interests in ongoing litigation were important factors which should have received "an intense focus" as part of the balancing exercise of the competing Convention rights: *Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593 (at [17]). Further, on a proper analysis of the circumstances (in particular, the correspondence between the parties in September/October 2007), contrary to the findings of the judge (J244) and the Court of Appeal ([82-83]), Mr Flood's attitude was both unequivocal and unreasonable. This was therefore a factor that the lower courts should have held weighed in favour of the conclusion that Mr Flood had "lost any right to contend that [TNL]'s failure to amend or withdraw the article was actionable" (the Master of the Rolls at [82]).

26. In the circumstances, TNL was entitled to decide not to update or amend the article before trial.

27. The nature and extent of the duty to update or amend (perhaps, in an appropriate case, to withdraw) an article from website publication when there is ongoing litigation is of general (and practical) importance.