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# Banks v Cadwalladr

& the public interest  
defence



WHITE PAPER CONFERENCE

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## What was *Banks v Cadwalladr* about?

- C is a businessman, who was leader of the campaign for the UK to leave the EU.
- D is a freelance journalist and writer.
- On 15 April 2019, D gave a TED talk – at the TED2019 Conference in Canada – it was recorded and then published on the TED.com website. It was about FaceBook’s role in Brexit and the threat to democracy.

# The defamatory publications

- A sentence in the TED Talk:-  
*"And I am not even going to get into the lies that Arron Banks has told about his covert relationship with the Russian Government".*
- A Tweet sent after D received C's letter of complaint:  
*"Oh Arron. This is too tragic. Nigel Farage's secret funder Arron Banks has sent me a pre-action letter this morning: he's suing me over this TED talk. If you haven't watched it please do. I say he lied about his contact with the Russian govt. Because he did."*  
There was a link to the talk.

See the CA at [12].

# The issues at trial

- D admitted publication.
- Meaning had been determined at a preliminary hearing.
- The issues at trial on liability were:
  - **serious harm** under s1 of the Defamation Act 2013;  
and
  - **public interest** defence under s4 of the Defamation Act 2013.
- Remedies.

# Two key points from the Court of Appeal

- Point 1 – **public interest**
  - In a continuing publication case, D has to prove the public interest defence at all stages – including after a change of circumstances. This was common ground at trial, so not a ground of appeal.
- Point 2 – **serious harm**
  - In a continuing publication case, C has to show serious harm is caused/likely to be caused by publication at all stages – including publication taking place after a change of circumstances.

## Point 1 (of 2)

- A public interest defence under section 4 is not (necessarily) forever – it can fall away, on a change of circumstances.
- At trial, it was “*common ground*” that, where a publication was continuing, “*a public interest defence once established can expire if the circumstances change in such a way that it is no longer reasonable for [D] to believe that publication is in the public interest*”.
- The Judge had proceeded on the basis that D “*had to make out all the elements of the public interest defence with respect to the whole of the continuing publication, and that in making its assessment the court should ‘focus on whether there had been a significant change of circumstances’.*”

See CA at [17].

## (point 1)

- *"...The common law approach to the concept of 'publication' accounts for the principle that a public interest defence, once established, does not necessarily endure for ever. [D] has to show that at the time of each and every publication, he or she continued to believe that it was in the public interest to publish the statement and that this belief remained reasonable when the particular publications were made. The approach is a granular one. The public interest defence is not available in respect of publications made after [D] ceases to hold the belief in question or such a belief ceases to be reasonable..."*.

See CA at [47].

## Point 2 (of 2)

- Where D has a public interest defence at the outset (phase 1 of publication), but continues to publish after that defence falls away (phase 2):
  - The fact that the publication in phase 1 caused serious harm to C's reputation is not enough to justify a judgment for C in respect of phase 2.
  - C has to show that publication in phase 2 had caused, or was likely to cause, serious harm to their reputation.
- This is because – as section 1(1) provides – *“a statement is only to be regarded as defamatory if and to the extent that its publication causes serious harm to reputation or is likely to do so; publication that does not cause serious harm and is not likely to do so is not actionable.”*

See CA [4-5], [46-47].

# So who won? CA upheld part of C's appeal

**The Judge** found that:

- serious harm was caused by the (initial) publication (phase 1) of the TED Talk and Tweet. But C lost, because that phase 1 publication was protected by the public interest defence;
- the public interest defence fell away after 29 April 2020 (start of phase 2); but
- there was no serious harm in relation to publication in phase 2 – for the TED Talk or the Tweet – so C still lost.

**The CA:**

- upheld the Judge's approach to serious harm (point 2 above); BUT
- while they agreed about the publication of the Tweet in phase 2 (no serious harm), they found serious harm from publication of the TED Talk in phase 2 – which was not protected by the public interest defence (it had fallen away) – so C won.

# Why?

- Nature of the allegation: serious and inherently likely to cause serious reputational harm.
- Extent of publication: extensive publication within the jurisdiction in phase 2.
- J had rejected D's claim that C had a "*general bad reputation*". And the CA rejected J's reasoning about publication being in an "*echo chamber*" and to people whose opinion was of "*no consequence*" to C. So:
  - "*There was nothing else to act as a counterweight to the natural inference that publication in phase two had caused serious harm to the reputation of [C]. The precise measure of the harm remains to be assessed, but it is not possible to conclude that it was not 'serious'.*"

See CA [9], [67]

## What next?

- The consequential matters include the “*appropriate procedure*” for assessing damages and for resolving what other remedies should be granted. Such as:
  - an injunction – to prohibit D from publishing/causing further publication; and
  - prohibitory orders against third parties under s13 of the 2013 Act.
- C did not seek to prevent publication of the entire TED Talk, only the single sentence about which he had complained.
- *“Although [D] has admitted responsibility for the publication of the words complained of up to trial, it is common ground that she is not able to control what the TED organisation does. There is an issue about the extent to which she should seek to persuade it to edit the TED Talk or cease publication of the talk in its current form.”*

See CA [72].

# What is a D able – or expected - to do?

- The TED Talk is still there – but not in its original form:-
  - [www.ted.com/talks/carole\\_cadwalladr\\_facebook\\_s\\_role\\_in\\_brexit\\_and\\_the\\_threat\\_to\\_democracy](http://www.ted.com/talks/carole_cadwalladr_facebook_s_role_in_brexit_and_the_threat_to_democracy)
- *"This video has been edited as a result of judgment in the Court of Appeal in England and Wales in a libel action by Arron Banks, the funder of the Leave.EU Brexit campaign, against Carole Cadwalladr. A judge found that the talk was lawful at the time of delivery, however due to a subsequent change in circumstances part of the talk was found to be unlawful in England and Wales and has therefore been removed. The judgment can be found [here](#)."*

# Back to section 4

lessons from *Banks v Cadwalladr* (and other recent cases)

# How the defence worked in *Banks*

It's time-consuming – expensive – and stressful.

- 5 days of trial - C gave evidence for a day (split over 2 days); D for 2.5 days (split over 3 days). A 46-page witness statement.
- Jmt has 416 paragraphs, 313 on the s4 defence.
- The TED Talk page (above) has a link (still) to D's funding appeal, which says she raised £594,961 (of a £600,000 target):-
  - [www.gofundme.com/f/democracy-the-fight-back](http://www.gofundme.com/f/democracy-the-fight-back)
- For the emotional toll, hear D's interview on *The Media Show* (15 June 2022):
  - [www.bbc.co.uk/sounds/play/m00187xj](http://www.bbc.co.uk/sounds/play/m00187xj)
  - See also the "*Clarification*" on that page, giving C's response to D's criticism of the cross-examination and of C's decision to sue D, rather than TED Talks or *The Observer*.

# The three key elements of the s4 defence

- (1) Was the statement complained of a statement (or did it form part of a statement) on a matter of public interest?
- (2) If so, did the defendant believe that publishing the statement complained of was in the public interest?
- (3) If so, was that belief reasonable?

*Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 (Supreme Court)

*Lachaux v Independent Print Limited* [2021] EWHC 1797 (QB), [2022] EMLR 2 (Nicklin J)

*Riley v Murray* CA at [64]

# (1) On a matter of public interest

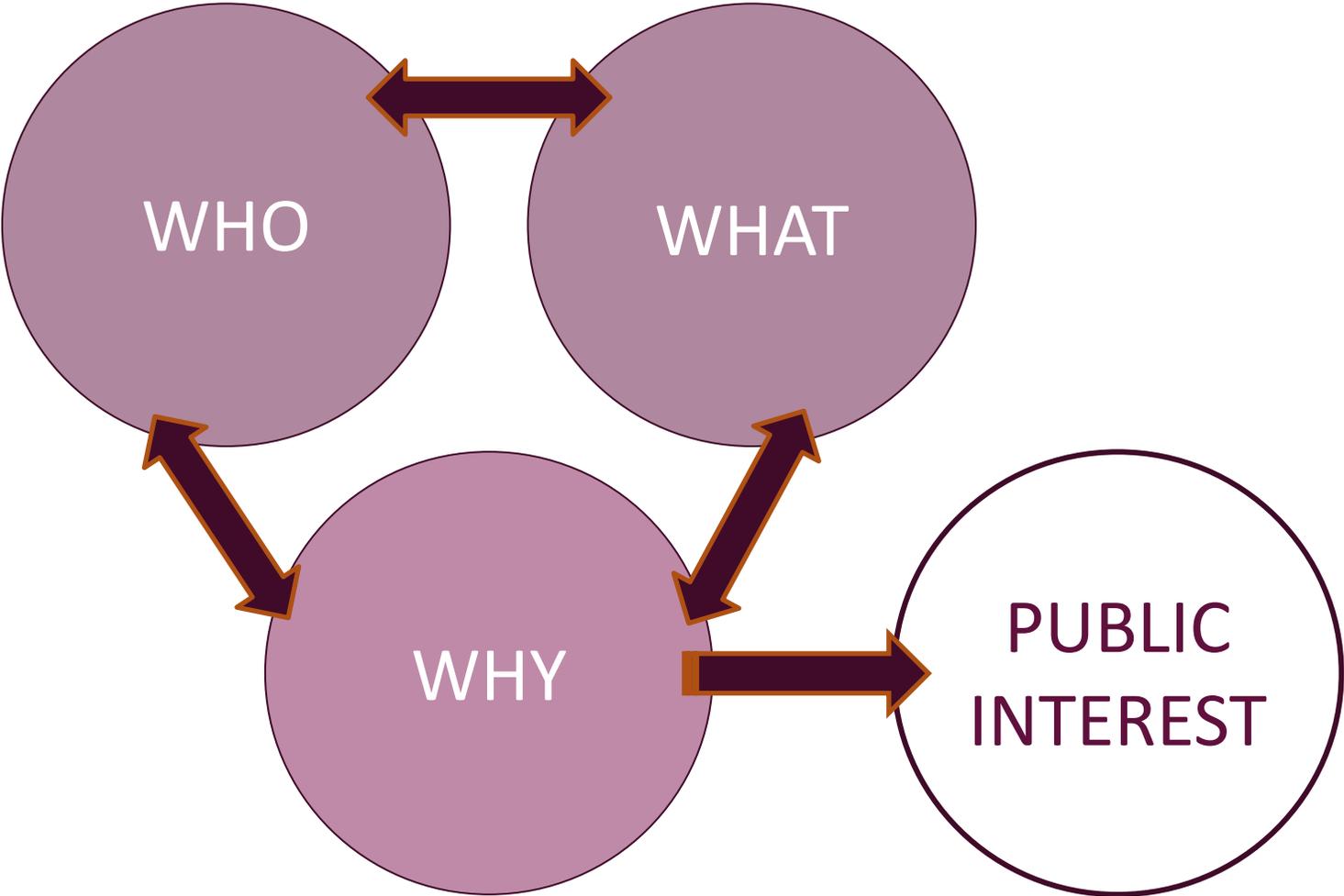
- The “*public interest*” in section 4 is a broad concept.
- Not disputed in *Banks*: J at [136], see [136-140]; nor in *Riley v Sivier*: J at [140-141]
- *Riley v Murray* CA at [71] (a Twitter case):
  - Wrong to take a “*narrow view*” of what could count as a matter of public interest.
  - Does not extend to matters which are purely personal and private (“*such that there is no public interest in their disclosure*”).
  - A broad criterion – extending to “*matters relating to the public life of the community and those who take part in it*”.
  - This was not a private chat with friends, or a private joke; C – a “*well-known celebrity and prominent political activist*” - used a public platform, to address a readership exceeding that of most national newspapers – with a provocative tweet, on a topic of political significance; C was “*choosing to play a role in public life*” [74].

## (2) Belief that publication is in public interest

- The publisher must form that belief at the time of publication.
  - Without a (subjective) belief that publication is in the public interest – the defence does not get off the ground.
  - (For some examples: see Duncan & Neill 5<sup>th</sup> – *Defamation and Other Media and Communications Claims* – 5<sup>th</sup> edition at 14.28, n3).
- In a continuing publication case, the publisher must keep on believing that (continued) publication is in the public interest.
  - Must take account of changing circumstances. What matters: what C says (in a letter of complaint); new evidence; the outcome of an investigation (ongoing at the time of initial publication); a successful appeal against a decision; a ruling on meaning. Very fact specific (or “granular”).
  - Is publication still in the public interest? Should there be a “qualification” to what was published?

[www.youtube.com/watch?v=HNtIPdWoHe8](http://www.youtube.com/watch?v=HNtIPdWoHe8) (The Essential JOURNEY- “Don’t Stop Believing”)

# Thinking about publication in the public interest



### (3) Was the belief reasonable?

- This depends on all the circumstances of the case.
- The general approach of the court: *"a belief [is] reasonable for the purposes of s4 only if it is one arrived after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case"*: *Riley v Murray* CA at [84] (from *Economou* – J and CA).
- Two factors considered in *Banks*?
  - *"meaning"* and change of circumstances.
- Selected factors that did not arise in *Banks*
  - How does a D show their reasonable belief (record keeping / audit trail)?
  - Does D have to contact C before publication?

# Belief – s4 – and the question of “*meaning*”

Principles summarised by Steyn J in *Banks* at [121-123]:-

- The focus of s4 is “*the statement complained of*”, not its single meaning: [121-122].
- The defence “*may be founded on a reasonable belief that it is in the public interest to make statement A, even if the words used unintentionally conveyed imputation B. If a journalist genuinely did not appreciate that the words could carry imputation B, unless that ought to have been obvious to her, she could hardly be criticised for not seeking to verify or give an opportunity to comment on imputation B*” [122].
- This approach derives from *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300 at [24]-[25]. See also *Economou* CA at [85], [92-95] & Warby J at [152-159]; *Lachaux* (Nicklin J) at [130].
- A publisher should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views – but a defamatory meaning that is “*obviously one possible meaning*” - or “*glaringly obvious*” – should not be ignored. “*But if that threshold is not reached, the reasonable belief of a journalist who did not perceive the more damaging meaning falls to be assessed by reference to the less damaging meaning.*”

## Or, to put it more simply

Steyn J in *Riley v Sivier* at [132]:

- *“The public interest defence is not assessed by reference to the single meaning, but by reference to the statement complained of and the range of meanings that it bears. If the single meaning is “obviously one possible meaning” (or “glaringly obvious”) it would not have been reasonable for the defendant to have ignored it. But if that threshold is not reached, the reasonable belief of a defendant who did not perceive the more damaging meaning falls to be assessed by reference to the less damaging meaning. This is known as the Bonnick principle...”*
- The two questions - whether D believed that publication was in the public interest – and whether that belief was reasonable – are determined *“by reference to the statement complained of and the range of meanings that it bears”*, including the single meaning and the meaning D intended: [139] (D’s meaning is in 135).

# What was the meaning in *Banks*?

Saini J decided on a single meaning – different from the parties' meanings:

- *“On more than one occasion [C] told untruths about a secret relationship he had with the Russian government in relation to acceptance of foreign funding of electoral campaigns in breach of the law on such funding”.*

C's pleaded meaning was: *C “has repeatedly lied about the nature and/or extent of his relationship with the Russian Government”.* C modified that meaning at and (in writing) after the hearing.

D's meaning was: *“that (a) there are reasonable grounds to suspect that Mr Banks has lied about having a secret relationship with the Russian government and (b) there are grounds to investigate whether that relationship involved acceptance of foreign funding in breach of the law on funding referendum campaigns”*

## What was D's intended meaning in *Banks*?

Steyn J found that D intended to convey these meanings [376]:

- (i) [C] *"lied on more than one occasion about a secret relationship he had with the Russian government"*; and
- (ii) *"there are questions to be asked (i.e. grounds to investigate) whether the source of his donations was foreign funding, accepted in breach of the law on the funding of electoral campaigns."*

J accepted that D *"genuinely did not appreciate"* that her words could carry the single meaning found by Saini J [380].

- Looking at how C had formulated the meaning – the question of acceptance of foreign funding was *"not so obvious that it was unreasonable for [D] to have failed to appreciate it."*
- The question was whether D had *"reasonable grounds to believe that her intended meaning was true"* [383]; and see [108-109].

# Meaning: lessons for Cs and Ds

For Cs:

- If you do not include a meaning (or aspect of a meaning) in your complaint / pleaded meaning, how can you expect a court to find that it was “*obvious*” or “*glaringly obvious*” - so that D was wrong (unreasonable) to ignore it?

For Ds:

- You need to think not only about what you want to say – but also about how what you say will be read by other (reasonable) people.

And – for both – need to think about what impact the court’s determination of the “*single meaning*” has?

# Changing circumstances: what counted in *Banks*?

C said there were five significant changes in circumstances (after initial publication) [400].

- (i) The announcement by the National Crime Agency (**NCA**) on 24.9.19 of the outcome of its investigation. Matters had been referred to it by the Electoral Commission; NCA concluded that there was no evidence that C (or his companies) had received any third party funding or acted as agent for a third party; and no evidence of any criminal offences,
- (ii) The meaning judgment of Saini J - 12.12.19.
- (iii) A Joint Statement – issued by the Electoral Commission (**EC**) and C – on 29.4.20 – which included that the EC accepted NCA’s conclusions (no evidence of any criminal offence) and that the NCA had received no evidence of third party funding / acting for a third party.
- (iv) D’s notification to C that she was abandoning her truth defence – on 11.11.20.
- (v) An apology – issued by D to C on 25.3.21 - in which D accepted that the single meaning was untrue, *“withdrew it, and confirmed she had no intention of making such an allegation in future.”*

## - outcome of investigation - (i) & (iii)

Steyn J [402-408]:

- The NCA investigation demanded “*appropriate respect*”, but was not “*beyond reasonable questioning, or criticism*”. On the face of it, there appeared to be a difference of view between the NCA and EC.
- But, once the Joint Statement was made, both organisations with responsibility for determining whether there had been a breach of the relevant laws had accepted that there was no evidence of any such breach. D did not suggest the investigation should be reopened and she had no evidence of breach of the law.
- After the Joint Statement: “*it was no longer reasonable to believe that it was in the public interest to assert that there were grounds to investigate whether the source of [C’s] donations was foreign funding, accepted in breach of the law on the funding of electoral campaigns, at least, without any qualification referring to the NCA’s statement and the Joint Statement.*”

The public interest defence fell away on 29.4.20.

## - ***“..without qualification..”***

A brief reminder of history:

- In *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] 1 WLR 153 at [79], the CA upheld the J's striking out of a *Reynolds* defence (responsible journalism) because:
  - D *“had repeatedly republished on the internet defamatory material that was the subject of a defamation action in which they were not seeking to justify the truth of the allegations without publishing any qualification to draw to the reader's attention the fact that the truth of the articles was hotly contested”*;
  - the *“failure to attach any qualifications to the articles published over the period of a year on The Times' website could not possibly be described as responsible journalism.”*
- After a year, D had added that the article was subject to High Court libel litigation (brought by C) and *“should not be reproduced or relied on without reference to [D's] Legal Department”* [9].

- In *Loutchansky*, the CA considered that their conclusion did not inhibit the maintenance of a newspaper archive (online) [74]: *“Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.”*
- TNL’s application to Strasbourg was rejected: [2009] ECHR 451, [2009] EMLR 14. At [47], the ECtHR held that it was not a disproportionate interference with Art 10 to require D *“to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press..”* The fact that TNL had (eventually) added a *“brief notice”* to the archive undermined its argument that any qualification would be *“difficult to formulate”*.

- And see *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 at [77-79], [2011] 1 WLR 153: publication of a report about allegations of police corruption was initially protected by the *Reynolds* defence (once the Supreme Court allowed D's appeal) – but that defence was not available in respect of continued online publication after D was informed that C had been cleared by an internal police investigation. At trial on the continued publication, the failure to amend the article (for over two years) was said to be a “*misjudgment*” – but the J found that it was a “*dogged refusal to take a course which was professional, responsible and fair. It was devoid of any consideration fo the position of [C]*”: [2013] EWHC 4075 (Nicola Davies J) at [78]. C was awarded £60,000 for the actionable publication (over the two year period), including £15,000 by reason of D's conduct and “*to serve as a deterrent to those who embark upon public interest journalism but thereafter refuse to publish material which in whole, or in part, exculpates the subject of the investigation*” [83].
- See also *Lachaux* (Nicklin J) at [156-159]. And see [192-195] – D needs to make the case for a s4 defence in respect of continued publication; and, on changed circumstances (what C said in letter of claim & a Jmt in the Family Court), see [196-206]

## - meaning – (ii), (iv) & (v)

Steyn J [409-412]

- When the TED Talk was published, the single meaning was not “so *obvious*” that it was unreasonable of D to have failed to appreciate it. But – after the meaning judgment - “*it can no longer be said that the single meaning is not one that [D] should have appreciated.*”
  - So: once the court has determined the single meaning: D has to take it into account
- There was an added complication here, in that (after the meaning ruling) D initially maintained a defence of truth “*on the basis of a misunderstanding of the single meaning that had been determined by the court*”. The parties made a joint request for clarification - a hearing took place (23.10.20) – the meaning was clarified – and D notified C she was abandoning the truth defence. Until that point – it had been reasonable for D “*to act on the basis of her legal representatives’ advice as to what had been decided.*” But not thereafter.
  - So: from 11.11.20 – this (clarified meaning) was a change of circumstances.
- Once D “*should have appreciated*” that one of the meanings conveyed by her words was a “*serious allegation that [D] did not believe to be true*” – it was “*no longer reasonable to believe that publication of those words (without amendment or qualification) was in the public interest.*”

# Is doing nothing an option?

- The CA in *Banks* included this as part of their account of the “*claim and the issues*” [19]:
  - “[D] had taken no steps to stop publication of the TED Talk or the Tweet or to attach any qualifying statement to either of them. At trial, she did not accept that any of the changes of circumstance relied on, including the NCA Statement and the Joint Statement, required her to do this or that they made it unreasonable for her to continue believing that publication was in the public interest...”
- D’s alternative case (if there was a point when the s4 defence ceased to apply), was that C would need to prove serious harm for publications after that point [19].
- Remember: this was a case in which D had admitted responsibility for publication of the statements complained of up to trial [72]. To decide to do nothing – after all the changes in circumstances – was high risk. It paid off before the Judge, but not the CA (their approach to serious harm from continued publication is noted above). It was common ground that D was “*not able to control what the TED organisation does*” [73] (emphasis added) – but that does not mean there was nothing D could do. Doing nothing was not an option (or, at least, not one that appealed to the CA).

# What is at the heart of the matter?

**Where there is a wrong, there should be a remedy.**

What if:

- A statement is published – it makes a serious and damaging allegation about someone – and its publication causes (or is likely to cause) serious harm to their reputation.
- The court determines “*meaning*”. Whatever the publisher intended when they published – now they know what (the court thinks) the ordinary reasonable reader would make of it. D does not believe (or intend to say) that the (single) meaning is true.

If the public interest defence protects its continued publication – how could that be right?

To listen to the CA hearing:-

- [www.judiciary.uk/live-hearings/banks-appellant-v-cadwalladr-respondent/](http://www.judiciary.uk/live-hearings/banks-appellant-v-cadwalladr-respondent/)

# How does a D show reasonable belief

- D has to plead the defence and then prove it.
  - For hints on pleading: *Hijazi v Yaxley Lennon* (Nicklin J); *Riley v Sivier* (CA – the 1st time).
- Nicklin J and Warby LJ (as a J) have emphasised the importance of contemporaneous notes showing the thinking / decisions on public interest.
  - In *Lachaux*, Nicklin J at includes that it is “*not unrealistic*” to expect documents to be available to “*record (or at least shed some light on) decisions taken as to what was identified, at the time, as the public interest justification for publication*” [119]; and Ds would be “*well-advised to ensure they are able to demonstrate that they reasonably believed that publication would be in the public interest and how, and with whom, that was established at the time*” [123]. The consequences of failing to have such records can be fatal to a s4 defence [165-168].
  - See also *Sicri v Associated Newspapers Ltd* [2021] 4 WLR 9 (Warby J) at [121-122]

## more from Nicklin J in *Lachaux* (1)

- “[120] Perhaps more importantly, a requirement that journalists and those in professional publishing organisations should be able to demonstrate, not only that they reasonably believed that publication would be in the public interest, but also how and with whom this was established at the time, is not an unworkable, unreasonable, or unachievable objective set by lawyers or the court. It is the standard set at the time by the PCC in the industry Code of Practice; a “benchmark” that was set by the print media’s own regulator at the time as the “cornerstone of the system of self-regulation”. As Lord Nicholls said of the old Reynolds defence: “The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse”: Reynolds (at 202E)

## more from Nicklin J in *Lachaux* (2)

The PCC Code and Ds' own code were relevant (following Warby J in *Sicri* at [111-122]):

*"[154] ..Ultimately, the decision on whether a [D's] belief that publishing the statement complained of was in the public interest was reasonable is an objective question for the Court. However, a relevant code of conduct has a potential bearing in two key respects.*

*i) First, if a [D] has complied with the provisions of a relevant code, it seems to me that s/he is entitled to rely upon that fact as being a factor supporting the objective reasonableness of the belief that publication was in the public interest. Correspondingly, a failure to comply with a relevant code of conduct, depending on the seriousness of the breach, its consequences, and the explanation for it, may also be relevant to the assessment of the reasonableness of the belief. I agree with the MLA's submissions to the Supreme Court that, under s.4(2), the Court must have regard to all the circumstances. Adherence to a regulatory code plainly may be a relevant factor.*

*ii) Second, under s.4(4), the Court must make such allowance for editorial judgment as it considers appropriate. For similar reasons, whilst remaining an objective assessment, the Court is likely to afford greater allowance to editorial judgment if it is shown to have been exercised in a process in which there has been proven compliance with a relevant regulatory code."*

## Belief not reasonable – *Riley v Murray*

- D criticised C for what C had (according to D) said in a Tweet. But D misrepresented what C had tweeted (she did not quote-tweet or quote it). Nicklin J and CA rejected D’s argument that her conduct should be assessed by reference to what D believed C had said. CA at [83]:
  - *“..That, in my view, is simplistic and wrong. When assessing the reasonableness of a belief that it is the public interest to denounce a person as dangerous and stupid for what they have said in a public statement, it must be relevant that the statement has an obvious alternative and lesser meaning which is not worthy of such denunciation...”*
- See also Nicklin J at [120-131] and CA at [78-80]. At [124], Nicklin j referred to his earlier observation (in *Turley*) that
  - *“..it can never be in the public interest for a journalist to misrepresent in an article the information or evidence that s/he has obtained”: .. [D] is not a journalist, but this fundamental principle applies equally to her or anyone else seeking to avail themselves of a s.4 defence in answer to a defamation claim. A person who misrepresents the material they have is likely to find it difficult to establish that s/he reasonably believed that the resulting inaccurate publication was in the public interest.”*

## bit more from *Riley v Murray (and ..v Sivier)*

- A single factor – D's "*failure to reflect an obvious and important ambiguity*" – led to the failure of the s4 defence in *Riley v Murray*: CA at [88].
- Editorial discretion – s4(4) did not help D.
- D said that she excluded the text of C's tweet from her own because she did not want to drive additional traffic to it; but this was "*not a good enough reason*" for depriving those who read D's tweet of knowing what C had said: CA [86], J at [125-131].
- Editorial discretion did not help D in *Riley v Sivier*: see PTA at [37].

## Belief not reasonable – *Riley v Sivier*

See trial (Steyn J) and PTA (Warby LJ).

- J accepted that D believed that publication was in the public interest, though the opportunity to consider the matter had been brief: [142-148].
- J did not accept that D had done all that he said he had done – including checking hyperlinks in two articles on which he relied – or analysing 243 tweets (as annexed to his amended Defence). D had no record of any research he said he undertook; no contemporaneous record of tweets read prior to publication; and it was *“unlikely”* that his memory was reliable. Plus - as the J noted - after Nicklin J’s ruling on meaning, D had said on his website: *“I have spent the last week looking up the evidence...”* [149-155].
- All upheld by Warby LJ (refusing PTA): D’s ground of appeal (on failure to take account of all the circumstances) amounted to nothing more than disagreement with J’s factual conclusions. To criticise the J (ground 3) for reaching conclusions on the facts was a *“rather startling”* complaint; J was entitled to conclude that C’s tweets afforded no arguable basis for D’s allegations.

# Must D invite C to comment?

- *Serafin* at [76]: “A failure to invite comment from [C] prior to publication will no doubt always at least be the subject of consideration under subsection (1)(b) and may contribute to, perhaps even form the basis of, a conclusion that [D] has not established that element of the defence.”
- It did not matter in:
  - *Banks* (D did not contact C for the TED Talk, but there had been repeated contact for earlier publications);
  - *Riley v Murray* (failure to put allegation to C was not significant – s4 defence would not fail for that reason – though, had D quoted C’s tweet, D would “almost certainly” have succeeded in an honest opinion defence, so would not have needed s4): J at [127];
  - *Onwude v Dyer* (report of disciplinary tribunal, in which C had participated, had included C’s responses to the charges [152]; note D had corrected the article when notified of an appeal judgment).
- It did matter in:
  - *Riley v Sivier*: J at [156-160] (D did not have C’s side of the story – he said he thought C would not comment, but should have given her the opportunity to comment (not rely on his assumption – which seemed to be wrong);
  - *Vardy v Rooney* (s4 a very small part of the case) [288-289];
  - *Lachaux* (putting a potentially damaging story to C was required by D’s own code) [26(iv)], [177], [191].

## So: three (basic) steps

**Step 1** – is the publication in the public interest zone?

- This is a relatively straightforward question. No closed definition of “*public interest*” – a broad concept.

**Step 2** – does D believe that publication is in the public interest?

- Who has to form the belief? How can D prove it (audit trail / documents)?
- If continuing to publish – need to check continuing belief.
- Consider factors that C draws to D’s attention – do they change things?

**Step 3** – is that belief that publication is in the public interest reasonable?

- How can that be shown – at the outset and taking into account any new factors.

# And what if it goes wrong at trial?

Sharp P and Warby LJ are in the CA – see Warby LJ on the *Riley v Sivier* PTA at [13] on the “general approach” to a s4 appeals on a J’s failure to have regard to all the circumstances / being wrong:

*“The overarching point is that an appeal is a review and not a re-run of the trial. To win on appeal the appellant has to show that there was some serious flaw in the judgment that calls for a change in the result or a retrial. When it comes to findings of fact, there are five points to make:*

- (1) The court will treat the factual findings of a trial judge with a generous degree of deference. To uphold an appeal on the basis of criticisms of this kind the appeal court will need to be satisfied that there was a critical finding of fact that was either unsupported by the evidence before the judge or a finding that no reasonable judge could have reached.*
- (2) This approach applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.*
- (3) The court will bear in mind that the trial judge has a whole “sea of evidence” instead of “island-hopping” as appellants are prone to do when seeking to challenge findings at first instance.*
- (4) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into her consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that she overlooked it.*
- (5) The same applies with even greater force to matters of argument. A judge is not bound to mention and address every single argument advanced.”*



# THE SECTION AND SOME CASES

## Section 4 – Defamation Act 2013

- (1) It is a defence to an action for defamation for the defendant to show that—
  - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
  - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

# ***Banks v Cadwalladr***

- Meaning: [2019] EWHC 3451 (QB).  
Saini J – 12.12.19
- Trial: [2022] EWHC 1417 (QB), [2022] 1 WLR 5236  
Steyn J – 13.6.22

Appeal: [2023] EWCA Civ 219  
Sharp P, Singh & Warby LJ – 28.2.23

# *Riley v...*

## *...Murray*

- Meaning: [2020] EWHC 977 (QB)  
Nicklin J – 24.4.20
- Trial: [2021] EWHC 3437 (QB), [2022] EMLR 8  
Nicklin J – 20.12.21
- Appeal: [2022] EWCA Civ 1146, [2023] EMLR 3  
Arnold, Dingemans, Warby LJ – 11.8.22

## *....Sivier*

- Appeal (against s/o): [2021] EWCA Civ 713, [2021] 4 WLR 84  
Sharp P, Henderson, Warby LJ – 14.5.21
- Trial: [2022] EWHC 2891 (KB), [2023] EMLR 6  
Steyn J – 16.11.22.
- PTA [2023] EWCA Civ 71  
Warby LJ – 1.2.23

## Some recent (after *Serafin*) trials

- *Onwude v Dyer and others*  
[2020] EWHC 3577 (QB)  
HHJ Parkes (sitting as HCJ) – 23.12.20
- *Lachaux v Independent Print Ltd*  
[2021] EWHC 1797 (QB), [2022] EMLR 2  
Nicklin J – 1.7.21
- *Vardy v Rooney*  
[2022] EWHC 2017 (QB), [2023] EMLR 1  
Steyn J – 29.7.22

## And also (for info)

- (on disclosure) *Soriano v Societe de L'hebdomadaire Le Point (Sebdo)*  
[2022] EWHC 3370 (KB) – 23.12.22 (Hill J)
- (very subsidiary issue at trial) *Goldsmith v Bissett-Powell*  
[2022] EWHC 1591 (QB) - 27.6.22 (Julian Knowles J)
- (on case management / preliminary issues) *Harcombe v Associated Newspapers Ltd*  
[2022] EWHC 543 (QB) – 10.2.22 (Nicklin J)
- (on s/o and pleading) *Hijazi v Yaxley-Lennon*  
[2020] EWHC 3058 (QB) – 16.11.20 (Nicklin J)

# And do not forget

## *Serafin v Malkiewicz*

[2020] UKSC 23, [2020] WLR 2455

## *Economou v De Freitas*

[2018] EWCA Civ 25915, [2019] EMLR 7 – CA

[2016] EWHC 1853 (QB), [2017] EMLR 4 – Warby J



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# Q&A



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