



Michaelmas Term

[2015] UKPC 41

Privy Council Appeal No 0064 of 2014

JUDGMENT

Pinard-Byrne (Appellant) vLennox Linton (Respondent) (Dominica)

**From the Court of Appeal of the Eastern Caribbean Supreme Court (Commonwealth of
Dominica)**

before

Lord Clarke

Lord Wilson

Lord Sumption

Lord Carnwath

Lord Toulson

JUDGMENT GIVEN ON

12 October 2015

Heard on 22 April 2015

Appellant

Adam Speker

(Instructed by Simons Muirhead & Burton)

Respondent

In person

Amicus

William Bennett

LORD CLARKE:

Introduction

1.

This appeal is about Reynolds privilege. The appeal arises out of a defamation action in which the claimant, Kieron Pinard-Byrne (“KPB”), alleged that he was defamed by Lennox Linton (“LL”), in a radio broadcast on 26 February 2002 and in an article posted on a website in May 2002. The action was originally brought against LL as first defendant, against Island Communications Corporation Ltd, which operated the radio station, as second defendant and against Raglan Riviere, which operated the website, as third defendant. The action succeeded against all three defendants before Cottle J (“the judge”). The defendants all appealed to the Court of Appeal. The appeals succeeded on one point

before Pereira, Baptiste and Michel JJA. The ground of their success was that the speaking, writing and publishing of the words complained of attracted qualified privilege, sometimes known as Reynolds privilege. KPB appeals to the Board. He only appeals against LL. There is only one issue in the appeal, namely whether the Court of Appeal was wrong to overturn the judge's rejection of the Reynolds privilege defence.

The background facts

2.

KPB is a chartered accountant by profession. Between 1985 and 1997 he was a partner in Coopers & Lybrand. In July 1991 a company called International Development & Management Ltd ("IDM") was incorporated in the Cayman Islands to continue with development plans for an International Conference Centre Resort Hotel ("the Caribbean Shangri-La Project" or "the Project") commenced by Grace Tung, who was Dominica's Honorary Consul General to the Republic of China and Consul General to Hong Kong. In September 1991 Oriental Hotel (Dominica) Ltd ("OHDL") was incorporated in Dominica to be the investment holding company for the Caribbean Shangri-La Project pursuant to an agreement between the Government of Dominica and Grace Tung. The Project also included plans to build an international airport and to set up an economic citizenship programme. Between 1991 and 1997 Coopers & Lybrand were OHDL's auditors.

3.

From May 1992 the United Workers Party ("UWP"), which was then in opposition, commenced a public campaign against the economic citizenship programme. On 2 July 1993 the Government of Dominica signed a new agreement with Grace Tung in respect of the Layou River Project, as the Project was now called. The contract was further amended in 1995 and 1996 under the new UWP Government, which won the General Election in 1995. On 30 May 1995 KPB was appointed the Owners Representative for the Layou River Project until 16 November 2002. At about the same time KPB became the liquidator of Fort Young Hotel, whose operating assets were sold to Grace Tung. As a result of contract problems, construction fraud and natural disaster the Project was never completed and the shareholders in OHDL lost the funds they had invested.

4.

On 10 November 1995 allegations were made by the new Prime Minister, Edison James of UWP, that funds that went towards the Project had been misappropriated by the Promoter. These allegations were denied. On 25 March 1996 Grace Tung resigned. On 15 July 1996 the contract with the Project's main contractor was terminated. Then in November 1997 the Layou River natural disaster occurred, which involved mountain collapse and massive flooding, which irreparably affected the Project.

5.

In 1998 KPB ceased to be a partner with Coopers & Lybrand and became managing partner of KPB Chartered Accountants and a director of KPB Professional Services, which became OHDL's auditors and acted as OHDL's company secretary respectively. On 1 February 2000 a further General Election took place and both UWP and Edison James left the Government. Between 2001 and 2003 KPB became the subject of a number of broadcasts on Kairi FM and a number of articles on the worldwide web published or caused to be published by LL, who is an investigative journalist and was a supporter of the UWP.

The words complained of

6.

The words complained of were expressed on two occasions. Chronologically, the first was on the radio. On 26 February 2002 KPB was a guest on a radio programme hosted by Mathias Peltier on the topic "The Layou River Economic Citizenship Programme". In the course of the programme, which was broadcast live, LL called the programme and made a number of statements which KPB said were defamatory of him. The words complained of on the second occasion were in an article published on a website in May 2002, which remained live until September 2003. The judge considered the words complained of in the article first and the Board will do the same.

7.

The text of the article, which was entitled "Professional Conduct Procedure - The KPB Version", included the following:

"Self-styled Owners Representative Keiron Pinard-Byrne must know that the record of squandermania and crass deception presented in the Layou 5 star hotel accounts as at December 31, 1999 speaks for itself. It was audited by KPB Chartered Accountants of which Mr Keiron Pinard-Byrne is chairman and CEO. It formed part of the Directors Report to the shareholders which Mr Pinard-Byrne signed as Secretary to the Board. As Owner's Representative, Mr Byrne confirms in the audited statements that he received over 300 thousand dollars for his services to the shareholders of Oriental Hotel (Dominica) Ltd. His actual share of the audit payment and 'administrative expenses' of Oriental Hotel have not been disclosed. The hundreds of thousands of dollars he must have cashed in from Dominican passport money siphoned through International Development & Management (IDM) have not been disclosed either.

This paragon of great Irish virtue has said publicly that he became involved with the Layou River Economic Citizenship Programme as Owner's Representative of the shareholders of Oriental Hotel in 1995. At that time he claims, he was merely acting on behalf of Coopers and Lybrand. He also disclosed that the last shareholders meeting of Oriental Hotel was held in 1994. How then was Mr Byrne appointed owner's representative? And who made the appointment? Keep in mind that shareholders of Oriental Hotel resident in Dominica have publicly expressed their dissatisfaction with the conduct of this gentleman and have rejected suggestions that he represents them.

Notwithstanding Mr Byrne's assurances that he only became involved in 1995, Government records indicate that as far back as 1993 he was having audiences with shareholders in his Roseau office and traveling to Hong Kong to clarify issues of concern.

What he would love to hide from the public is the fact that he was up to his ears in service to the Grace Tung group of companies at the very same time that he was liquidator of the Fort Young Hotel whose operating assets were sold to the Chinese immigrant in a web of intrigue."

8.

As to the radio programme, although there is no transcript of the programme, it is not in dispute that the statements complained of made by LL included the following (as set out in the judge's judgment):

"So no one will challenge him [ie KPB] face to face even as he plays the race card to perfection he talks in a phobia to perfection, he mercilessly insults the intelligence of Dominicans from whose passports he has become a major beneficiary. Tonight he is doing it again ...

When you go back to the record of deception in the 1999 Report and Accounts where they tell you all sorts of stories about the reengineered citizenship Programme of the Government that caused problems for Dominicans in Canada and so on, all these statements are not borne out by the facts.

What Mr Byrne and Company must do is present to the people of Dominica incontrovertible evidence of a revenue stream and you asked the question to IDM that is independent of economic citizenship investment. That is important because I will put it to the promoters that the company IDM was set up specifically to find some clever way of purchasing the Layou River Hotel property in the name of a company owned and operated by Grace Tung. That is what I am putting to them.

In other words they got a cheque and it was time to distribute the money to the shareholders who had invested in that company. But interestingly, when the statement of account was presented by Coopers and Lybrand it did not carry 1st of February as the Chairman of Fort Young claimed as the date of the sale. It carried the 4th of February. Again the significance of the 4th of February date is that, that is the date on which International Development and Management was incorporated in Dominica. Therefore the 1st of February did not exist and they could not have bought anything on the 1st of February."

The proceedings

9.

On 23 April 2004 KPB filed an amended claim against the defendants, seeking damages, an injunction and costs. In early 2006 Lewis S Hunte J heard argument by way of preliminary issue on the question whether the words complained of were capable of bearing the defamatory meanings ascribed to them in the statement of claim. On 10 April 2006 he made a determination that they were so capable. The trial before the judge commenced on 27 September 2010. He handed down his judgment on 22 March 2011.

The findings of the judge

10.

In paras 4 and 5 of his judgment the judge described the background in much the same way as the Board has done. He said this.

"4. A little background assists in understanding the matrix out of which this matter arises. In 1993, the then Government of the Commonwealth of Dominica entered into an agreement with one Grace Tung to develop and build a hotel on the bank of the Layou river, an area of great natural beauty. Ms Tung undertook to procure investors from Pacific Rim countries to purchase shares in the undertaking. In return for their investment these persons would be accorded citizenship in the Commonwealth of Dominica and passports of Dominica. A company was incorporated to realise the project. This company was ... (OHDL)

5. For reasons which remain disputed, the project failed entirely and many shareholders lost their investment. The claimant was a partner in the accounting firm KPB Chartered Accountants who were the Auditors of OHDL. He also signed the 1999 report and accounts of OHDL as Secretary to the company. It is disputed whether he was secretary in his personal capacity or whether his firm supplied services as corporate secretary."

11.

The judge accepted the submissions made on behalf of KPB that, giving the words their ordinary and natural meaning, they were defamatory. In para 19 he rejected the submissions made on behalf of the defendants that the meanings contended for by KPB were the product of strained, forced or utterly unreasonable interpretation. He noted that the article published on the website says that KPB, as auditor of the accounts of OHDL, permitted the publication of accounts calculated to conceal from the

public the squandermania of OHDL and also the fact that he benefitted personally to the tune of hundreds of thousands of dollars of Dominican passport money siphoned through IDM. He added at para 20 that it was an accusation of professional dishonesty and could only be regarded as meaning that the claimant dishonestly acquired property that belonged to the people of Dominica and failed to disclose that fact in the accounts either as auditor of the accounts or as owner's representative. The article went on to add that the claimant was also dishonest in concealing that he was "up to his ears in service to the Grace Tung Group of companies at the very same time he was liquidator of the Fort Young Hotel whose operating assets were sold to the Chinese immigrant in a web of intrigue".

12.

The judge said at para 21 that the only meaning he could reasonably ascribe to the article was that KPB was involved in professionally discreditable behaviour to the detriment of the shareholders of Fort Young Hotel Ltd and that he wished to hide this from the public. It was telling, the judge added, that no shareholder of Fort Young Hotel Ltd had come forward to say that he or she was at all disadvantaged by the way in which KPB performed his duties as liquidator.

13.

As to the radio broadcast, the judge said (in the opinion of the Board correctly) that it had to be considered in the context in which it was made. Against the backdrop of the continuous publicity occasioned by LL's publication of the results of his investigative journalism into the entire Layou River Hotel affair and the economic citizenship program, to accuse the claimant of having become a major beneficiary of the passports of Dominicans must be taken to mean that the claimant has benefitted personally from the sale of Dominican passports.

14.

Finally under the heading of natural and ordinary meaning, in para 22, the judge noted that LL went on to add that KPB was involved in the dissemination to the public of the 1999 accounts of OHDL and that those accounts are a record of deception proffering "all sorts of stories" which "are not borne out by the facts". He concluded that that again was clear defamation of KPB in the conduct of his profession. By way of summary he held in para 23 that the words in their natural and ordinary meanings were defamatory of the claimant because they would have the effect of lowering him in the esteem of the public and they ascribed to him both criminal and professionally discreditable conduct.

15.

Under the heading of fair comment, at paras 25 and 26, the judge made these observations. KPB was said not to have disclosed to the citizens of Dominica "the hundreds of thousands of dollars he must have cashed in from Dominican passport money siphoned through IDM". The judge concluded that that was a factual imputation of being involved in criminal behaviour. The claimant was further said to "mercilessly insult the intelligence of Dominicans from whose passports he has become a major beneficiary" and to have been "up to his ears in the service to the Grace Tung Group of companies at the very same time he was liquidator of Fort Young Hotel, whose operating assets were sold to the Chinese immigrant in a web of intrigue". The judge correctly held that those were statements of fact and added that the defendants (including LL) had not been able to demonstrate that the statements were true. No evidence of money siphoned through IDM had been presented and there was no evidence before the court that KPB had personally benefited from the illicit diversion of the proceeds of sale of Dominican passports. The judge added at para 27 (albeit again in the context of fair comment) that, in addition, the defendants had not been able to show that the audit done by the claimant was less than professionally done or that it failed to reach generally accepted audit

standards. The defendants did not call any experts in accounting or audit to give evidence to that effect.

16.

The judge ordered that LL and the second defendant each pay KPB damages in the sum of \$50,000 and that the third defendant pay damages in the sum of \$10,000. He awarded costs of \$14,000 each against LL and the second defendant and \$3,333.33 against the third defendant.

17.

LL appealed to the Court of Appeal but in a judgment handed down on 25 March 2013 the Court of Appeal held that there was ample evidence upon which the judge could properly conclude that the words were defamatory and that there was no basis upon which the court could find that they were justified. LL does not seek to appeal against this part of the decision of the Court of Appeal upholding the judge. The same is true of the decision of the Court of Appeal upholding the judge's rejection of the defence of fair comment advanced on behalf of LL. The defence was rejected principally on the basis that, although the words complained of related to a matter of public interest, they were not comment but statements of fact.

18.

As stated at the outset, the sole issue in this appeal is KPB's appeal against the decision of the Court of Appeal allowing LL's appeal against the decision of the judge rejecting LL's defence of that type of qualified privilege known as Reynolds privilege, to which the Board now turns.

Reynolds privilege – the principles

19.

Reynolds privilege is a form of qualified privilege which takes its name from the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. See also, for example, *Bonnick v Morris* [2003] 1 AC 300, *Panday v Gordon* [2006] 1 AC 427, *Jameel (Mohammed) v Wall Street Journal Europe SpA* [2007] 1 AC 359 and *Flood v Times Newspapers Ltd* [2012] 2 AC 273. It is perhaps more accurate to describe the defence as a public interest defence, which is designed to strike an appropriate balance between the right to freedom of expression and the right of an individual to protect his reputation.

20.

In *Flood* Lord Brown said at para 113:

"In deciding whether Reynolds privilege attaches (whether the Reynolds public interest defence lies) the judge, on true analysis, is deciding but a single question: could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest? In deciding this single question, of course, a host of different considerations are in play."

See also per Lord Mance at para 145.

21.

In para 28 of his judgment the judge noted that in *Reynolds* Lord Nicholls listed ten matters to be taken into account in order to determine whether a plea of qualified privilege is available or can be relied upon by defendants. He continued:

“As put by counsel for the claimant in his written closing submissions

‘If the defendants’ defences of qualified privilege are to have any chance of surviving, they must satisfy the court, that there exists on the pleadings, documentary evidence, and witness statements, a sufficient plea and/or evidence that they acted RESPONSIBLY and had a DUTY to publish and broadcast the allegations made against the claimant to the public, and that their plea or defence of qualified privilege meets and passes the litmus test set out in *Reynolds v Times Newspaper Ltd*. In *Reynolds ... Lord Nicholls of Birkenhead*, at pp 22-23, set out ten matters, which must be taken into account in order to determine whether a plea of qualified privilege is available or can be relied on by a defendant. The ten matters are:

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 claimant or some other person with knowledge of the facts.

8)

Whether the publication contained the gist of the claimant's side of the story.

9)

The tone of the publication.

10)

The circulation of the publication, including the timing.”

22.

In para 30, in a passage criticised by the Court of Appeal, the judge said this:

“30. I have no difficulty in coming to the conclusion that the failure by the first defendant to make any inquiries of the claimant and the third defendant’s failure to make any inquiries at all are factors which weigh heavily against them being able to rely on privilege in the sense of the *Reynolds* case.”

The judge accepted at para 32 that the case revolved around matters of considerable public interest and that the issues surrounding the economic citizenship programme and the Layou River Hotel project were matters of public importance but concluded that the defamatory statements injured KPB in the performance of his profession and accused him of criminal conduct. He then expressed his conclusions thus:

“33. The evidence is that the first defendant has no professional expertise to evaluate the claimant’s work and that no reports of criminal conduct were made to the authorities. The conduct of the claimant was not referred to any body with responsibility for oversight of the conduct of chartered accountants in their profession. In those circumstances can it be fairly said that there was a duty on the defendants to publish their assertions of wrongdoing by the claimant? The case of *Vickery v McClean*, Court of Appeal 125/2000, points the way to an answer.

34. The court was of the view that it was demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made ventilated through the news media. That would only encourage trial by media and associated developments that would be inimical to the criminal justice processes. Society has mechanisms for investigation and determination of guilt or innocence and it was not in the public interest that such mechanisms be bypassed or subverted. That is a view which I, too, share and commend to all local media practitioners.

35. From the foregoing I conclude that there was no duty on the defendants to communicate the words complained of and no public interest in receiving them.”

23.

In the context of damages, in para 42 the judge added this of LL:

“42. The defendants, especially the first defendant, remain unapologetic. He continues to insist that his statements were based on facts, revealed by his very ‘thorough’ investigation, although at the trial no evidence was led to establish the truth of those statements. His demeanour in the witness box was more consistent with personal animosity towards the claimant rather than an unbiased search for truth. The overall tone of the offending publications also reeked of rancour rather than even handed reporting.”

The decision of the Court of Appeal

24.

The Court of Appeal took a different view on the issue of privilege. It unanimously reversed his decision. At para 27 it set out the basic principles of qualified privilege in this quotation from *Gatley on Libel and Slander*, 10th ed (2004):

“There are circumstances in which, on grounds of public policy and convenience, less compelling than those which give rise to absolute privilege, a person may yet, without incurring liability for defamation, make statements about another which are defamatory and in fact untrue. In such cases a person is protected if the statement was ‘fairly warranted by the occasion’ (that is to say, fell within the scope of the purpose for which the law grants the privilege) and so long as it is not shown that the statement was made with malice, ie with some indirect or improper motive or knowing it to be untrue, or with reckless indifference as to its truth.”

25.

The Court of Appeal then set out its view of Reynolds privilege thus at para 30:

“30. A reading of the cases from the UK and other Commonwealth countries would indicate that the purpose for which the law grants the privilege, certainly in the case of the media and its coverage of or reporting on matters of public importance, is to permit the media to carry out its primary function of disseminating information to the public on matters of public interest without running the risk that - because of innocent factual misstatements - the owners, operators, employees and/or contributors to the media would become liable in damages and otherwise to any person who felt aggrieved by the information disseminated. At the same time, the common law continued to seek to protect the reputation of persons (including public figures) from unwarranted attack. The balance to be struck between these two competing objectives of the common law is to be found in the concept of responsible journalism, so that the defence of qualified privilege is available to the media if the author and/or publisher of the information in the media conformed to the standard of responsible journalism.”

Finally, in para 32 the Court of Appeal set out Lord Nicholls’ ten factors and noted that Lord Nicholls also added that the list was not exhaustive and that the weight to be given to these and any other relevant factors would vary from case to case.

26.

So far as the Board is aware, those principles are not in dispute. The principal basis upon which the Court of Appeal reached a different conclusion from the judge was that he had not carried out a thorough analysis of the evidence in the case. In particular, it criticised the judge’s conclusion that LL failed to make any inquiries of KPB in circumstances in which it was LL’s evidence that he made a significant number of such inquiries. The Court of Appeal said in para 33 that in para 30 of his judgment (quoted above) the judge had made what may be described as a summary determination without giving reasons for doing so. The Court of Appeal gave particulars for its view in para 34 as follows:

“34. The uncontroverted evidence of [LL in paras 3 and 19 of his witness statement] was that:

(1) ‘Between 1995 and 2002, I conducted thorough investigation on the Layou River Economic Citizenship Programme.’

(2) ‘In making my comments both on radio and on the mentioned internet article ... I relied primarily upon official documents evidencing the transactions referred to in the words complained of and at all times spoke in direct response to what I considered to be incomplete and/or misleading information about the programme coupled with distasteful and highly disrespectful utterances against the native population placed on the public record by the claimant’ and ‘I exercised due care in obtaining and verifying the factual information contained in the words complained of and relied on the entirety of the documentation researched prior to speaking the words complained of.’”

27.

The Court of Appeal demonstrated that there was evidence before the court in the oral evidence of LL that he carried out significant investigations into the Project, that in doing so he interviewed KPB at least once and that he considered a host of documents, including his explanations in articles published by KPB in the Chronicle newspaper: see the judgment of the Court of Appeal at paras 35, 36, 38 and 39. In para 37 the Court of Appeal said this:

“37. It was the uncontroverted evidence of [LL], both in his witness statement and under cross examination, that his statements of and concerning [KPB] were responses by him to statements made by [KPB] on radio, on television or in newspaper articles either written by [KPB] or written by others

quoting or reporting statements by [KPB]. It was also his evidence that the words complained of which were broadcast on the second appellant's radio station were spoken by him ([LL]) on a call-in radio programme on which [KPB] was the in-studio guest and on which he ([KPB]) had made statements which he ([LL]) was responding to and which, of course, KPB - as the in-studio guest - would be able to respond to contemporaneously or immediately after the words were spoken."

28.

The conclusions stated by the Court of Appeal in paras 40 to 43 may be summarised in this way. LL had publicly and strongly criticised the Project and those concerned with it, including KPB, who was a public figure and lead spokesman for the Project. The issues raised were matters of public interest, and indeed public importance to the people of Dominica. That the statements which contained the words complained of were based on LL's investigations was put beyond doubt by his evidence in cross-examination. On that evidence it was not open to the judge to make the finding he made in para 30 (quoted in para 22 above) that the failure by LL to make any inquiries of KPB weighs heavily against him being able to rely on the privilege. Moreover, it was against the weight of the evidence and it was not open to him to treat the economic citizenship programme and the Project as being of no consequence because "that is not what the present case concerns". The Court of Appeal held that, on the contrary, it is precisely what the present case concerns because, as it put it, it forms the background against which the words complained of were spoken and written by LL. It further held that the judge should not have relied upon the absence of complaint to the authorities and on LL's failure to report KPB's conduct to the body responsible for the oversight of chartered accountants or, perhaps, the police. It followed that the judge's conclusion that LL was not entitled to rely upon the privilege was not open to him on the evidence.

29.

Finally, the Court of Appeal, through Michel JA, expressed its conclusion in para 44 as follows:

"44. I find that the words complained of - although strong in their criticism of [KPB] and not proven by the appellants to be true - were spoken and/or written by [LL] and published by the second and/or the third appellant following extensive investigations by [LL] and were not proven to have been actuated by malice towards [KPB], but only by strong sentiments held by the appellants, in particular, [LL], on the handling by and involvement of [KPB] and others in the economic citizenship programme and the Layou Hotel project. It appears from the evidence that [LL] did honestly believe in the truth of the conclusions that he reached and the words that he spoke and wrote concerning the whole affair, including the words spoken and written by him about [KPB]."

The Court of Appeal accordingly allowed LL's appeal and those of the other defendants.

Discussion

30.

The Board concludes that the Court of Appeal was wrong to allow LL's appeal. The thrust of KPB's case that the words were defamatory was, not that the Project had been badly managed and that KPB was partly responsible, but that (as stated at paras 11 and 12 above) the judge held in his para 19 that as auditor of the accounts KPB permitted the publication of accounts calculated to conceal from the public the "squandermania of OHDL and also the fact that he benefitted personally to the tune of hundreds of thousands of dollars of Dominican passport money siphoned through International Development & Management". Moreover the judge added at para 20 that in the words complained of LL accused KPB of professional dishonesty and could only be regarded as meaning that he dishonestly acquired property that belonged to the people of Dominica and failed to disclose that fact in the

accounts either as auditor of the accounts or as owner's representative. In para 20 the judge concluded by saying that the article went on to add that KPB was also dishonest in concealing that he was "up to his ears in service to the Grace Tung Group of companies at the very same time he was liquidator of the Fort Young Hotel whose operating assets were sold to the Chinese immigrant in a web of intrigue". Further, in para 21 the judge said that the only meaning he could reasonably ascribe to the article was that KPB was involved in professionally discreditable behaviour to the detriment of the shareholders of Fort Young Hotel Ltd and that he wished to hide this from the public. It was telling, the judge added, that no shareholder of Fort Young Hotel Ltd had come forward to say that he or she was at all disadvantaged by the way in which KPB performed his duties as liquidator. As stated in paras 13 and 14 above, the judge held in para 22 that much the same was true of the words complained of in the radio broadcast. LL said that the 1999 accounts were a record of deception and, by way of summary, the judge held in para 23 that the words in their natural and ordinary meanings were defamatory of KPB because they would have the effect of lowering him in the esteem of the public and they ascribed to him both criminal and professionally discreditable conduct. The Court of Appeal upheld those conclusions, which are not challenged in this appeal.

31.

The question for decision by the judge was whether, in publishing the words complained of, that is the defamatory words, LL was acting responsibly and had a duty to the public to publish them. As Lord Nicholls put it in the first of his ten points, the more serious the charge, the more the public is misinformed and the individual (here KPB) harmed, if the allegations are not true. The focus is upon the allegations which are not true. Thus, where in his second point Lord Nicholls focuses upon the nature of the information and the extent to which the subject matter is a matter of public concern, he is again referring to the allegations which prove not to be true.

32.

As the Board sees it, it is not sufficient for the court to focus on the underlying circumstances. Thus is not sufficient to say, as the Court of Appeal did, that the underlying project was a matter of public interest or a matter of public importance. The judge correctly accepted that it was, as indeed did the Court of Appeal. The Board recognises that evidence that KPB was guilty of wrongdoing would be a matter of public importance. However, in the opinion of the Board, before making allegations to that effect it was the duty of LL to carry out a reasonable investigation to ascertain whether they were true. The problem is that LL did not carry out an investigation to that end. The Board accepts that, as the Court of Appeal concludes, he made some investigations into the Project. There is however no evidence that he investigated whether KPB was guilty of the kind of wrongdoing alleged in the words complained of.

33.

In all the circumstances the Board accepts the submission that the judge was entitled to reach the conclusion he reached in para 42 of his judgment quoted in para 23 above. No evidence was led to establish the truth of the defamatory words complained of. The judge was entitled to reach the conclusion that LL continued to insist that his statements "were based on facts, revealed by his very 'thorough' investigation, although at the trial no evidence was led to establish the truth of those statements". He was also entitled to conclude that, as he put it in para 42,

"[LL's] demeanour in the witness box was more consistent with personal animosity towards the claimant rather than an unbiased search for truth. The overall tone of the offending publications also reeked of rancour rather than even handed reporting."

The judge was in a unique position to reach that conclusion because LL had given evidence before him.

34.

As to Lord Nicholls' third and fourth points, no evidence was put before the court to establish the source of the allegations of wrongdoing or as to the steps taken to verify the allegations. As to his fifth point, there is no suggestion that the allegations of wrongdoing were already the subject of an investigation which commanded respect. As to the sixth point, there is no evidence that it was urgent to make the allegations complained of. As to the seventh and eighth points, no attempt was made to seek comments from KPB as to the truth or otherwise of the wrongdoing alleged or to obtain KPB's side of the story before the allegations were made. In the opinion of the Board it is not sufficient simply to say that KPB had an opportunity to say what he wished in the course of the radio programme. Before LL made the defamatory statements he should have put them specifically to KPB.

35.

In all the circumstances, subject to one point, LL failed to put his allegations fairly to KPB before making them. That one point is this. In paras 33 and 34 (quoted in para 22 above) the judge stressed that LL made no complaints to the relevant authorities, notably the police or the chartered accountants' professional body. The Board accepts that it is relevant to have regard to those facts but would not go as far as the judge in so far as he may have suggested that it will never be possible to establish the privilege in the absence of such complaints: see eg Flood per Lord Dyson at para 195. All will depend upon the circumstances. As Lord Nicholls makes clear, the relevant exercise is to decide whether it was the duty of a responsible journalist to publish the material concerned.

36.

In the instant case, the question was whether LL owed such a duty and whether it was responsible to publish the defamatory statements in all the circumstances of the case. As the Board reads the judge's judgment, the essential reason why he answered that question in the negative was that LL did not carry out any investigation of the truth or otherwise of the allegations of criminal behaviour or professional misconduct which he subsequently made. In particular he did not produce any evidence of it, either at the time or since. He did not himself have any professional expertise in these aspects of the matter and did not call any witnesses other than the former Prime Minister Edw. Heath and Frederick Baron, neither of whom gave evidence relevant to the issue of privilege.

37.

In the opinion of the Board the judge was justified in concluding, as in effect he did, that on the material available, LL could not properly have considered the publication of the defamatory statements to be in the public interest. As Lord Brown said in Flood, in deciding that question a host of different considerations are in play. As the Board sees it, it is largely for that reason that the Court of Appeal should not interfere with the judge's conclusion unless he reaches a conclusion which is wrong in principle or which can otherwise be seen to be wrong. The judge has an advantage over the Court of Appeal in that he has seen the witness (here LL) give evidence and in a case where there are many factors in play, considerable respect must be paid to the balance struck by the trial judge.

38.

In Flood at para 196, Lord Dyson put it thus:

"It seems to me that the Reynolds privilege jurisprudence provides sufficient protection from the unjustified inclusion of the details of allegations of crime or professional misconduct. Thus not only must the story as a whole be in the public interest, but there must also be a public interest in the

publication of the details of the allegations. The need for verification provides real protection for the individual concerned.”

The Board agrees. There must be a public interest in the publication of the details of the allegations of crime or professional misconduct and there must be verification because the need for verification provides real protection for the individual concerned, here KPB.

39.

On the facts the detailed case against KPB was not spelled out and no evidence in support of the allegations was adduced. Moreover, although the evidence shows that KPB played a significant part in the radio programme, KPB was not asked for his response to the specific allegations against him before the defamatory statements were made. The judge was correct to reach the conclusion he did. The one error of principle he made was not critical. He recognised that LL did not act responsibly in making the serious allegations he did. By contrast the Court of Appeal focused on the public interest in the scheme and not on the particular allegations made against LL. In that, it erred in principle. If the correct approach is for the Board to approach the issue of Reynolds privilege for itself, on the footing that both the judge and the Court of Appeal made errors of principle, for the reasons it has given it reaches the same conclusion as the judge.

40.

In all these circumstances the Board concludes that KPB’s appeal should be allowed. In principle KPB must be entitled to his costs, although the Board will consider any written submission the parties may make as to costs. The Board also invites the parties to make written submissions on the form of the order. The submissions should include consideration of the positions of the other parties to the action if they are thought to be relevant. The written submissions should be served within 21 days of the promulgation of this judgment, with any submissions in reply being served within 14 days thereafter.

Postscript

41.

The Board would in particular like to thank William Bennett for his submissions as amicus, in addition to those made by LL and by counsel on behalf of KPB.