HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 44

on appeal from [2005] EWCA Civ 74

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Jameel and others (Respondents)
v.
Wall Street Journal Europe Sprl (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond

Counsel

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Hearing dates:
26 – 28 June 2006

ON
WEDNESDAY 11 OCTOBER 2006

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LORD BINGHAM OF CORNHILL

My Lords,

1. This appeal raises two questions on the law of libel. The first concerns the entitlement of a trading corporation such as the second respondent to sue and recover damages without pleading or proving special damage. The second concerns the scope and application of what has come to be called *Reynolds* privilege, an important form of qualified privilege.

2. The appellant is the publisher of *The Wall Street Journal Europe*, a respected, influential and unsensational newspaper ("the newspaper") carrying serious news about international business, finance and politics. It is edited, published and printed in Brussels for distribution throughout Europe and the Middle East. It shares some editorial and journalistic personnel and facilities with its elder sister in New York, *The Wall Street Journal*, which has a large circulation in the United States.

3. The respondents, claimants in the proceedings, are Saudi Arabian. The first respondent is a prominent businessman and president of the Abdul Latif Jameel Group, an international trading conglomerate based in the Kingdom of Saudi Arabia comprising numerous companies and with interests in cars, shipping, property and distribution of electronic goods. The second respondent is a company incorporated in Saudi Arabia and is part of the Group. The first respondent is the general manager and president of the company, which does not itself own property or conduct any trade or business here, but which has a commercial reputation in England and Wales.

4. On 6 February 2002 the newspaper published the article which gave rise to these proceedings. It was headed "Saudi Officials Monitor Certain Bank Accounts" with a smaller sub-heading "Focus Is on Those With Potential Terrorist Ties". It bore the by-line of James M Dorsey, an Arabic-speaking reporter with specialist knowledge of Saudi Arabia, and acknowledged the contribution of Glenn Simpson, a staff writer in Washington. The gist of the article, succinctly stated in the first paragraph, was that the Saudi Arabian Monetary Authority, the Kingdom's central bank, was, at the request of US law enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. This information was attributed to "U.S. officials and Saudis familiar with the issue". In the second paragraph a number of companies and individuals were named, among them "the Abdullatif Jamil Group of companies" who, it was stated later in the article, "couldn't be reached for comment".

5. The jury in due course found that the article referred to was defamatory of both respondents. They may have understood the article to mean that there were reasonable grounds to suspect the involvement of the respondents, or alternatively that there were reasonable grounds to investigate the involvement of the respondents, in the witting or unwitting funnelling of funds to terrorist organisations. For present purposes it is immaterial which defamatory meaning the jury gave the passage complained of, neither of which the newspaper sought to justify.

6. The article was published some five months after the catastrophic events which took place in New York and Washington on 11 September 2001. During the intervening months the US authorities had taken determined steps, with strong international support, to cut off the flow of funds to terrorist organisations, including Al-Qaida. These steps were of particular importance in relation to Saudi Arabia, since a large majority of the suspected hijackers were of Saudi origin, and it was believed that much of their financial support came from Saudi sources. Yet the position of the Saudi authorities was one of some sensitivity. The Kingdom was an ally of the United States and condemned terrorism. But among its devoutly Muslim population there were those who resented the Kingdom's association with the United States and espoused the cause of Islamic *jihad*. Thus there were questions about whether, and to what extent, the Kingdom was co-operating with the US authorities in cutting off funds to terrorist organisations. This was, without doubt, a matter of high international importance, a very appropriate matter for report by a serious newspaper. But it was a

difficult matter to investigate and report since information was not freely available in the Kingdom and the Saudi authorities, even if co-operating closely with those of the United States, might be embarrassed if that fact were to become generally known.

7. The trial of the action before Eady J and a jury lasted some three working weeks and culminated in verdicts for the respondents and awards of £30,000 and £10,000 respectively. Much evidence was called on both sides, of which the House has been referred to short excerpts only. The judge rejected the newspaper's argument on the damage issue ([2003] EWHC 2945 (QB), [2004] 2 All ER 92) and the Court of Appeal agreed with him ([2005] EWCA Civ 74, [2005] QB 904). The judge also rejected the newspaper's claim to *Reynolds* privilege ([2004] EWHC 37 (QB)). On this question also the Court of Appeal upheld his decision, but on a more limited ground. This calls for more detailed consideration.

8. The judge put a series of questions to the jury which, so far as relevant to *Reynolds* privilege, were directed to two matters: the sources on which Mr Dorsey, as reporter, relied; and his attempt to obtain the respondents' response to his inclusion of their names in his proposed article. Mr Dorsey testified that he had relied on information given by a prominent Saudi businessman (source A), confirmed by a banker (source B), a US diplomat (source C), a US embassy official (source D) and a senior Saudi official (source E). In answer to the judge's questions the jury found that the newspaper had proved that Mr Dorsey had received the information he claimed to have received from source A, but had not proved that Mr Dorsey had received the confirmation he claimed from sources B-E inclusive. The judge attached significance to these negative findings, since Mr Dorsey said in evidence that he would not have written the article in reliance on source A alone. In the Court of Appeal, the judge's reliance on these negative findings was criticised by the newspaper. At the outset of his direction to the jury the judge had pointed out that there was no plea of justification and that therefore, if the jury found the article defamatory of the respondents, they should assume it to be untrue. This direction, it was said, may well have infected the jury's approach to the questions concerning sources B-E. The Court of Appeal refused the newspaper leave to raise a new ground of misdirection, and thought (para 66) that the jury had "almost certainly" based their answers on the impression made by witnesses in court. But the Court of Appeal preferred to base its decision on the other ground relied on by the judge to deny privilege.

9. Mr Dorsey described attempts to obtain a response from the Group about his proposed article. He said he had telephoned the Group office at about 9.0 a.m. and left a recorded message. The jury found that the newspaper had not proved on the balance of probabilities that that was so. There was, it was agreed, a telephone conversation between Mr Dorsey and Mr Munajjed, an employee of the Group, on the evening of 5 February, the day before publication. During that conversation, according to Mr Munajjed, he had asked Mr Dorsey to wait until the following day for a comment by the Group. He had, he said, no authority to make a statement and the first respondent was in Japan, where the time was 3.0 a.m. Mr Dorsey denied that Mr Munajjed had asked him to wait. But the jury found that Mr Munajjed had made that request. It was on this ground, as I understand, that the Court of Appeal upheld the judge's denial of *Reynolds* privilege:

> "82. We turn to the judge's observation that the Jameels were not given sufficient time to comment on the proposed publication. It was to this matter that the jury's questions 6 and 7 were addressed. Mr Dorsey had given evidence that he had telephoned the Jameels' offices on the morning before the publication and left a recorded message. The jury found that this did not take place. What the jury did find had taken place was that Mr Dorsey had spoken to the Jameels' representative, Mr Munajjed, on the evening before publication, that the latter had asked for the publication to be postponed so that he could contact Mr Jameel, who was in Japan on business, and that Mr Dorsey had declined this request. The judge found that there was no compelling reason why Mr Jameel could not have been afforded 24 hours to comment on the article. We can see no basis for challenging this conclusion, nor did Mr Robertson suggest that there was one."

10. I turn to the two issues raised in the appeal.

I *DAMAGE*

11. The issue under this head is whether a trading company which itself conducts no business but which has a trading reputation within England and Wales should be entitled to recover general damages for libel without pleading and proving that the publication complained of

has caused it special damage. To resolve this question it is helpful to distinguish three sub-issues:

> (1) whether such an entitlement exists under the current law of England and Wales;
> (2) whether, if so, article 10 of the European Convention on Human Rights requires revision of the current domestic law; and
> (3) whether, if not, the current domestic law should in any event be revised.

(1) *The current domestic law*

12. The tort of libel has long been recognised as actionable per se. Thus where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful justification, he need not plead or prove special damage in order to succeed. Proof of injury to his reputation is enough.

13. It was argued in *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133 that this rule did not apply to trading companies. The newspaper in that case had published an article strongly critical of the way in which the plaintiff, a colliery owner, housed its workers, and the company had not pleaded or proved any actual damage. It was argued for the publisher that a corporation could have no personal character, and that the article had not related to the business of the company (pp 134, 137). The Court of Appeal unanimously rejected this argument. Lord Esher MR held the law of libel to be one and the same for all plaintiffs (p 138). While he referred to obvious differences between individuals and companies (pp 138-139), his conclusion (p 139) was clear:

> "Then, if the case be one of libel - whether on a person, a firm, or a company - the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case."

There need be no evidence of particular damage (p 140). Lopes LJ agreed (p 141): a company may maintain an action for a libel reflecting on the management of its business without alleging or proving special damage. Kay LJ also agreed (p 148): a trading corporation may sue for a libel calculated to injure them in respect of their business, and may do so without any proof of damage general or special, although, where there is no such evidence, the damages given will probably be small.

14. In *Lewis v Daily Telegraph Ltd* [1964] AC 234, 262, Lord Reid pointed out that a company cannot be injured in its feelings but only in its pocket. There was, however, no challenge in that case to the principle laid down in *South Hetton*, which was not cited in either party's printed case, or in argument, or in any judgment.

15. Mr Robertson QC, for the newspaper, pointed out, quite correctly, that the Faulks Committee on Defamation, in its *Report* (Cmnd 5909, March 1975), para 336, recommended amendment of the *South Hetton* rule. The amendment recommended was, however, only to limit libel actions by trading corporations to cases where the trading corporation could establish either that it had suffered special damage or that the defamation was likely to cause it financial damage. This recommendation was made after considering trenchant criticisms of the existing rule made by Mr J A Weir ("Local Authority v Critical Ratepayer – a Suit in Defamation" (1972A) CLJ 238). It is not a recommendation to which Parliament has chosen to give effect.

16. In *Derbyshire County Council v Times Newspapers Ltd* the issue concerned the entitlement of a local authority, not a trading corporation, to sue in libel. But at first instance *South Hetton* was cited, and contributed to Morland J's conclusion that a local authority could sue: [1992] QB 770, 781, 783-788. On appeal, counsel for the newspaper distinguished *South Hetton* on the ground of the colliery company's trading character and counsel for the local authority relied on it: *ibid*, pp 792, 797. No member of the Court of Appeal questioned the decision. Balcombe LJ accepted *South Hetton* as binding for what it decided, but also (despite Mr Weir's criticism) expressed his agreement with it: p809. In the House, counsel for the local authority cited the decision ([1993] AC 534, 536-537). Counsel for the newspaper did not criticise it, but distinguished it as applicable to a company with a business reputation which a local authority did not have (p 538). In his leading opinion, with which the other members of the House agreed, Lord Keith of Kinkel (who had been a member of the Faulks committee) cited *South Hetton* at some length, and also *National Union of General*

and Municipal Workers v Gillian [1946] KB 81, in which a non-trading corporation (a trade union) had been assimilated to a trading corporation. He then continued (p 547):

> "The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it. The *South Hetton Coal Co* case [1894] 1 QB 133 would appear to be an instance of the latter kind, and not, as suggested by Browne J, an authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business. The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects. Similar considerations can no doubt be advanced in connection with the position of a local authority. Defamatory statements might make it more difficult to borrow or to attract suitable staff and thus affect adversely the efficient carrying out of its functions."

Lord Keith then went on to give his reasons for concluding that a local authority was to be distinguished from other types of corporation, whether trading or non-trading.

17. In *Derbyshire* the correctness of *South Hetton* was not challenged, but acceptance of its correctness was an important step in Lord Keith's reasoning and I find no ambiguity in the proposition he propounded: the authorities clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. In *Shevill v Presse Alliance SA* [1996] AC 959, decided some three years later by a differently constituted committee of the House, one of the plaintiffs was a trading corporation and the presumption of damage in libel cases was treated as part of our national substantive law. I conclude that under the

current law of England and Wales a trading company with a trading reputation in this country may recover general damages without pleading or proving special damage if the publication complained of has a tendency to damage it in the way of its business.

(2) *Article 10*

18. Article 10 of the European Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The central importance of this article in the Convention regime is clear beyond question, and is reflected in section 12 of the Human Rights Act 1998. Freedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the Convention seeks to promote. The newspaper in this case relies on article 10 to contend that a domestic rule entitling a trading corporation to sue in libel when it can prove no financial loss is an unreasonable restraint on the right to publish protected by article 10.

19. This is not an unattractive argument, and it would be persuasive if, in such a case, excessive, punitive or exemplary damages were awarded. But the damages awarded to the second claimant in this case were not excessive, and the argument encounters three problems of principle. First, as the text of article 10 itself makes plain, the right

guaranteed by the article is not unqualified. The right may be circumscribed by restrictions prescribed by law and necessary and proportionate if directed to certain ends, one of which is the protection of the reputation or rights of others. Thus a national libel law may, consistently with article 10, restrain the publication of defamatory material.

20. Secondly, the national rule here in question, pertaining to the recovery of damages by a trading corporation which proves no financial loss, has been the subject of challenge before the European Commission and Court in the context of libel proceedings brought by two corporate plaintiffs against two individual defendants. In *S and M v United Kingdom* (1993) 18 EHRR CD 172, 173, the challenge to the rule was somewhat oblique and the Commission made the points summarised in para 19 above. In *Steel and Morris v United Kingdom* (2005) 41 EHRR 403 the challenge was direct: see para 31 (a) and (b), p 419. The Court accepted that the domestic rule was as stated in *Derbyshire* (para 40) but held (para 94) that

> "The state therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation."

The Court cited and echoed observations in an earlier decision, *Märkt Intern and Beerman v Germany* (1989) 12 EHRR 161, paras 33-38. Thus the Court did not hold the current rule to be necessarily inconsistent with article 10: it was a matter for the judgment of the national authorities.

21. Thirdly, the weight placed by the newspaper on the chilling effect of the existing rule is in my opinion exaggerated. Among the arguments it advances is that the rule is unnecessary since, it is said, defamation of a company involves defamation of directors and individuals who are free to sue as personal plaintiffs. I very much doubt if this is always so, although in some cases it will be. But, to the extent that it is so, I question whether the possibility of a claim by the company will add significantly to the chilling effect of a claim by the individuals.

22. I would accordingly answer this question in the negative.

(3) *Revision of the current law*

23. Since the European Court accords a generous margin of appreciation to the judgment of national authorities, and these include courts, it is appropriate for the House to review the merits of the *South Hetton* rule as re-stated in *Derbyshire*. The newspaper argues that, in accordance with the trend towards enhanced recognition of freedom of expression, the rule should be abrogated. Parliament could of course have legislated to abrogate or modify the rule, but it has not done so. It is accordingly necessary to revert to basic principles.

24. The tort of defamation exists to afford redress for unjustified injury to reputation. By a successful action the injured reputation is vindicated. The ordinary means of vindication is by the verdict of a judge or jury and an award of damages. Most plaintiffs are individuals, who are not required to prove that they have suffered financial loss or even that any particular person has thought the worse of them as a result of the publication complained of. I do not understand this rule to be criticised. Thus the question arises whether a corporation with a commercial reputation within the jurisdiction should be subject to a different rule.

25. There are of course many defamatory things which can be said about individuals (for example, about their sexual proclivities) which could not be said about corporations. But it is not at all hard to think of statements seriously injurious to the general commercial reputation of trading and charitable corporations: that an arms company has routinely bribed officials of foreign governments to secure contracts; that an oil company has wilfully and unnecessarily damaged the environment; that an international humanitarian agency has wrongfully succumbed to government pressure; that a retailer has knowingly exploited child labour; and so on. The leading figures in such corporations may be understood to be personally implicated, but not, in my opinion, necessarily so. Should the corporation be entitled to sue in its own right only if it can prove financial loss? I do not think so, for two main reasons.

26. First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their

corporate images. I find nothing repugnant in the notion that this is a value which the law should protect. Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury. Secondly, I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue.

27. I do not on balance consider that the existing rule should be changed, provided always that where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds.

II *REYNOLDS PRIVILEGE*

28. The decision of the House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues. Both these aspects are, I think, important in understanding the decision.

29. Underlying the development of qualified privilege was the requirement of a reciprocal duty and interest between the publisher and the recipient of the statement in question: see, for example, *Harrison v Bush* (1855) 5 E & B 344, 348; *Pullman v Hill & Co Ltd* [1891] 1 QB 524, 528; *Adam v Ward* [1917] AC 309, 334; *Watt v Longsdon* [1930] 1 KB 130, 147, all cases cited in *Duncan & Neill on Defamation*, 2nd ed (1983), pp 93-94, paras 14.04–14.05. Some of these cases concerned very limited publication, but *Adam v Ward* did not, and nor did *Cox v Feeny* (1863) 4 F & F 13; *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400; *Perera v Peiris* [1949] AC 1 and *Webb v Times Publishing Co Ltd* [1960] 2 QB 535. Thus where a publication related to a matter of public interest, it was accepted that the reciprocal duty and interest could be found even where publication was by a newspaper to a section of the public or the public at large. In *Reynolds* the Court of Appeal restated these tests ([2001] 2 AC

127, 167, 177), although it suggested a third supplemental test which the House held to be mistaken.

30. I do not understand the House to have rejected the duty/interest approach: see Lord Nicholls of Birkenhead, pp 194-195, 197, 204; Lord Steyn, p 213; Lord Cooke of Thorndon, pp 217, 224, 227; Lord Hope of Craighead, pp 229, 235; Lord Hobhouse of Woodborough, pp 237, 239. But Lord Nicholls (p 197) considered that matters relating to the nature and source of the information were matters to be taken into account in determining whether the duty-interest test was satisfied or, as he preferred to say "in a simpler and more direct way, whether the public was entitled to know the particular information."

31. The necessary pre-condition of reliance on qualified privilege in this context is that the matter published should be one of public interest. In the present case the subject matter of the article complained of was of undoubted public interest. But that is not always, perhaps not usually, so. It has been repeatedly and rightly said that what engages the interest of the public may not be material which engages the public interest.

32. Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed (at p 202) a test of responsible journalism, a test repeated in *Bonnick v Morris* [2003] 1 AC 300, 309. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency (p 238), "No public interest is served by publishing or communicating misinformation". But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

33. Lord Nicholls (at p 205) listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognised (at pp 202-203), inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean

that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.

34. Some misunderstanding may perhaps have been engendered by Lord Nicholls' references (at pp 195, 197) to "the particular information". It is of course true that the defence of qualified privilege must be considered with reference to the particular publication complained of as defamatory, and where a whole article or story is complained of no difficulty arises. But difficulty can arise where the complaint relates to one particular ingredient of a composite story, since it is then open to a plaintiff to contend, as in the present case, that the article could have been published without inclusion of the particular ingredient complained of. This may, in some instances, be a valid point. But consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue.

35. These principles must be applied to the present case. As recorded in para 8 above, the Court of Appeal upheld the judge's denial of *Reynolds* privilege on a single ground, discounting the jury's negative findings concerning Mr Dorsey's sources: that the newspaper had failed to delay publication of the respondents' names without waiting long enough for the respondents to comment. This seems to me, with respect, to be a very narrow ground on which to deny the privilege, and the ruling subverts the liberalising intention of the *Reynolds* decision. The subject matter was of great public interest, in the strictest sense. The article was written by an experienced specialist reporter and approved by senior staff on the newspaper and *The Wall Street Journal* who themselves sought to verify its contents. The article was unsensational in tone and (apparently) factual in content. The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. It is very unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored it was unlikely that they would know. It might be thought that this was the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect. I would accordingly allow the appeal and set aside the Court of Appeal judgment.

36. I am in much more doubt than my noble and learned friends what the consequence of that decision should be. The House has not, like the judge and the jury, heard the witnesses and seen the case develop day after day. It has read no more than a small sample of the evidence. It seems to me a large step for the House, thus disadvantaged, to hold that the publication was privileged, and I am not sure that counsel for the newspaper sought such a ruling. But I find myself in a minority, and it serves no useful purpose to do more than express my doubt.

LORD HOFFMANN

My Lords,

The issue

37. On 6 February 2002 the Wall Street Journal published an article claiming that Saudi Arabian Monetary Authority ("SAMA"), at the request of the US Treasury, was monitoring the accounts of certain named Saudi companies to trace whether any payments were finding their way to terrorist organisations. The jury found the article to be defamatory of the claimants, who are respectively the principal director and holding company of a group named in the article. The principal question is whether the newspaper was entitled to the defence of publication in the public interest established by the decision of this House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. The judge (Eady J) and the Court of Appeal (Lord Phillips of Worth Matravers MR, Sedley and Jonathan Parker LJJ) rejected it. But in my opinion they gave it too narrow a scope. It should have been upheld and the action dismissed.

38. Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell v MGN Ltd* [2004] 2 AC 457 and in favour of greater freedom for the press to publish stories of genuine public interest in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. But this case

suggests that *Reynolds* has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles.

The article

39. The background to the article was the defining event of this century, the destruction of the World Trade Center and the other atrocities of 11 September 2001. It was quickly established that 15 out of the 19 hijackers had come from Saudi Arabia and it was strongly suspected that sources in the same country had financed them. Efforts to trace terrorist funds were high on the US and international agenda. On 28 September 2001 the Security Council passed Resolution 1373 requiring all states to prevent and suppress the financing of terrorist acts. The United States made strong diplomatic efforts to secure the co-operation of SAMA. In the months that followed, there was much speculation and controversy about the extent to which the Saudi government was really helping. Some US newspapers and prominent politicians such as Senators McCain and Lieberman accused the Saudis of doing very little, appeasing domestic supporters of the terrorists in the controlled domestic media while publicly denouncing them in statements for overseas consumption. "Time to give Saudis an ultimatum" said the Boston *Globe* headline on 13 January 2002. But the official US government line was that they were co-operating fully with the US Treasury. The subject was one of very considerable public interest, not least to the financial community served by the Wall Street Journal.

40. The article was written by Mr James Dorsey, the paper's special correspondent in Riyadh and checked by Mr Glenn R Simpson, a journalist based in Washington who was concentrating almost exclusively on terrorist funding and had daily contact with sources at the US Treasury. It was published in the New York edition but the claimants have brought their proceedings in this country against the publishers of the European edition, the Wall Street Journal Europe, in which it also appeared. The defendants are based in Brussels but some 18,000 copies of the paper are sold daily in the United Kingdom. The article was not the lead story but appeared on the front page:

SAUDI OFFICIALS MONITOR CERTAIN BANK ACCOUNTS

Focus Is on Those With Potential Terrorist Ties

RIYADH, Saudi Arabia – The Saudi Arabian Monetary Authority, the kingdom's central bank, is monitoring at the request of US law-enforcement agencies the bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used wittingly or unwittingly for the funnelling of funds to terrorist organizations, according to US officials and Saudis familiar with the issue.

The accounts – belonging to Al Rajhi Banking & Investment Corp, headed by Saleh Abdulaziz al Rajhi; Al Rajhi Commercial Foreign Exchange, which isn't connected to Al Rajhi Banking; Islamic banking conglomerate Dallah Al Baraka Group, with $7 billion (8.05 billion euros) in assets and whose chairman is Sheik Saleh Kamel; the Bin Mahfouz family, separate members of which own National Commercial Bank, Saudi Arabia's largest bank, and the Saudi Economic Development Co; and the Abdullatif Jamil Group of companies – are among 150 accounts being monitored by SAMA, said the Saudis and the US officials based in Riyadh. The US officials said the US presented the names of the accounts to Saudi Arabia since the Sept 11 terrorist attacks in America. They said four Saudi charities and eight businesses were also among 140 world-wide names given to Saudi Arabia last month.

The US officials said the US had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action. Many of the Saudi accounts on the US list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and the United Arab Emirates. 'This arrangement sends out a warning to people,' a US official said.

SAMA couldn't be reached for comment. In a recent report to the United Nations about combating terrorism, however, the Saudi government said: 'The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in suspect lists have any real connection with terrorism.'"

41. The article went on to say that some of the named companies had denied that they were being monitored but that "the Abdullatif Jamil Group of companies couldn't be reached for comment". Abdul Latif Jameel Company Ltd, the second claimant, is a very substantial Saudi Arabian trading company with interests in a number of businesses, including the distribution of Toyota vehicles. It is part of an international group owned by the Jameel family which includes Hartwell plc, a company which distributes vehicles in the United Kingdom. Mr Mohammed Abdul Latif Jameel, the first claimant, is general manager and president of the second claimant and the principal figure in the group.

42. The jury found that the article was defamatory of both claimants. The newspaper did not attempt to justify any defamatory meaning and there is no appeal against the finding that it was defamatory. The absence of a plea of justification is not surprising. In the nature of things, the existence of covert surveillance by the highly secretive Saudi authorities would be impossible to prove by evidence in open court. That does not necessarily mean that it did not happen. Nor, on the other hand, does it follow that even if it did happen, the Jameel group had any connection with terrorism. The US intelligence agencies sometimes get things badly wrong.

The Reynolds defence

43. The newspaper's principal defence was based on *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. It is called in the trade "*Reynolds* privilege" but the use of the term privilege, although historically accurate, may be misleading. A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can be defeated only by showing that the privilege was abused. As Lord Diplock said in a well-known passage in *Horrocks v Lowe* [1975] AC 135, 149:

> "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on

> matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused."

44. Misuse of the privileged occasion is technically known as "malice" and the burden is upon the claimant to prove it. In *Reynolds*, counsel for the newspaper invited the House to declare a similar privilege for the publication of political information. But the House refused to do so. Lord Nicholls of Birkenhead said that to allow publication of any defamatory statements of a political character, subject only to proof of malice, would provide inadequate protection for the reputation of defamed individuals.

45. Instead, Lord Nicholls said (at p 202) that—

> "the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin."

46. Although Lord Nicholls uses the word "privilege", it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. The burden is upon the defendant to prove that those conditions are satisfied. I therefore agree with the opinion of the Court of Appeal in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783, 806 that "*Reynolds* privilege" is "a different jurisprudential creature from the traditional form of privilege from which it sprang." It might more appropriately be called the *Reynolds* public interest defence rather than privilege.

47. In *Reynolds* itself, the publication failed by a very considerable margin to satisfy the conditions for the new defence. The House was therefore able to deal with those conditions only in very general terms. Lord Nicholls offered guidance in the form of a non-exhaustive, illustrative list of matters which, depending on the circumstances, might be relevant. "Over time", he said (at p 205), "a valuable corpus of case law will be built up." This case, in my opinion, illustrates the circumstances in which the defence should be available.

Applying Reynolds

(a) The public interest of the material

48. The first question is whether the subject matter of the article was a matter of public interest. In answering this question, I think that one should consider the article as a whole and not isolate the defamatory statement. It is true that Lord Nicholls said, in the passage which I have quoted above, that the question is whether the publication of "particular material" was privileged because of its value to the public. But the term "particular material" was in my opinion being used by contrast with the generic privilege advocated by the newspaper. It was saying that one must consider the contents of each publication and not decide the matter simply by reference to whether it fell within a general category like political information. But that did not mean that it was necessary to find a separate public interest justification for each item of information within the publication. Whether it was justifiable to include the defamatory statement is a separate question, to which I shall return in a moment.

49. The question of whether the material concerned a matter of public interest is decided by the judge. As has often been said, the public tends to be interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn. It is for the judge to apply the test of public interest. But this publication easily passes that test. The thrust of the article as a whole was to inform the public that the Saudis were co-operating with the US Treasury in monitoring accounts. It was a serious contribution in measured tone to a subject of very considerable importance.

50. In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The *Reynolds* defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist. The *Reynolds* defence is very different from the privilege discussed by the Court of Appeal in *Blackshaw v Lord* [1984] QB 1, where it was contemplated that in exceptional circumstances there could be a privileged occasion in the classic sense, arising out of a duty to communicate information to the public generally and a corresponding interest in receiving it. The Court of Appeal there contemplated a traditional privilege, liable to be defeated only by proof of malice. But the *Reynolds* defence does not employ this two-stage process. It is not as narrow as traditional privilege nor is there a burden upon the claimant to show malice to defeat it. So far as Lord Cooke of Thorndon said in *Reynolds* (at p 224) and in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 301 that the principle in *Reynolds* was essentially the same, I respectfully think that he did not fully analyse the differences: see the comment in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783, 806.

(b) Inclusion of the defamatory statement

51. If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision

should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting.

52. In the present case, the inclusion of the names of large and respectable Saudi businesses was an important part of the story. It showed that co-operation with the US Treasury's requests was not confined to a few companies on the fringe of Saudi society but extended to companies which were by any test within the heartland of the Saudi business world. To convey this message, inclusion of the names was necessary. Generalisations such as "prominent Saudi companies", which can mean anything or nothing, would not have served the same purpose.

(c) Responsible journalism

53. If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair. As Lord Nicholls said in *Bonnick v Morris* [2003] 1 AC 300, 309:

> "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege."

54. Lord Nicholls was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for convenience continue to describe this as "responsible journalism".

55. In this case, Eady J said that the concept of "responsible journalism" was too vague. It was, he said, "subjective". I am not certain what this means, except that it is obviously a term of disapproval. (In the jargon of the old Soviet Union, "objective" meant correct and in accordance with the Party line, while "subjective" meant deviationist and wrong.) But the standard of responsible journalism is as objective and no more vague than standards such as "reasonable care" which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, as Lord Nicholls said, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.

56. In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how Eady J treated them. The defence, he said, can be sustained only after "the closest and most rigorous scrutiny" by the application of what he called "Lord Nicholls' ten tests". But that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick* (at p 309) the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities.

57. Instead, Eady J rigidly applied the old law. Building upon some obiter remarks of Lord Cooke of Thorndon in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 301 to which he referred seven times in the course of his judgment (the case was actually about statutory privilege), the judge insisted that *Reynolds* had changed nothing. It was not in his opinion sufficient that the article concerned a matter of public interest and was the product of responsible journalism. It was still necessary to show, in the words of Parke B in *Toogood v Spyring* (1834) 1 CM & R 181, 193, that the newspaper was under a social or moral duty to communicate to the public at large not merely the general message of the article (the Saudis were co-operating with the US Treasury) but the particular defamatory statement that accounts associated with the claimants were being monitored. A "useful cross-check", he suggested, was "whether the journalists concerned might be the subject of legitimate criticism if they withheld the *ex hypothesi* false

allegations." In my opinion this approach, equating a responsible journalist reporting on matters of public interest with an employer who has a moral duty to include in his reference the fact that his former employee was regularly drunk on duty, is quite unrealistic. Its use by Eady J on two previous occasions had already been criticised by the Court of Appeal in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783, 811 at para 49. In my opinion it is unnecessary and positively misleading to go back to the old law on classic privilege. It is the principle stated in *Reynolds* and encapsulated by Lord Nicholls in *Bonnick* which should be applied. On this question I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond and wholeheartedly concur in her remarks.

58. I therefore pass to the question of whether the newspaper satisfied the conditions of responsible journalism. This may be divided into three topics: the steps taken to verify the story, the opportunity given to the Jameel group to comment and the propriety of publication in the light of US diplomatic policy at the time.

Verification of the story

(a) In Saudi Arabia

59. Mr James Dorsey, the correspondent in Riyadh, said that his story was derived from 5 sources whom, in accordance with journalistic practice, he did not identify by name. The first was "a prominent Saudi businessman", referred to as A, whose information was second-hand, and the others were "a banker", "a US diplomat", "a US embassy official" and "a senior Saudi official", all of whom were in a position to know and were referred to as B to E respectively. In *Reynolds*, Lord Nicholls said (at p 205) that any disputes of primary fact about matters relevant to the defence should be left to the jury. The judge therefore asked the jury whether the defendant had proved, on a balance of probabilities, that Mr Dorsey had been informed by source A that the Abdul Latif Jameel group was on an unpublished list of names whose accounts were being monitored by SAMA at the request of the United States and whether this had been confirmed by sources B to E.

60. That was a perfectly proper question to leave to the jury, but what in my opinion vitiated the answers was the assumption which the judge instructed the jury to make in considering it. He said:

> "If…you come to the view, after due consideration, that the article does in some way link one or other or both of them to the funding of terrorism, then we accept, as an absolute fundamental assumption in this case, that such allegation is untrue….You and I therefore proceed on the basis that neither claimant was being monitored nor suspected nor on any list of suspects provided to the Saudis by the United States Government or anyone else…To put it simply, what Mr Price argues is that if in fact it was not true that they were on the list and it is not true they were being monitored, how can his sources have given him that information? What matters at this stage is that I am stating, as the law requires me to state, that they are fully entitled to the presumption that they are not guilty of funding terror or on any list or suspected of doing so."

61. In other words, the jury were told that in deciding whether sources B to E had given the information, they were to assume that they would have known that it was false. In the circumstances, it is not surprising that they were unconvinced that sources B to E had confirmed the story. It is true that they accepted that source A had provided Mr Dorsey with his lead, but that may have been because source A did not have first-hand knowledge and could not therefore be treated as having known that the information was false.

62. Telling the jury to make that assumption was, as the Court of Appeal decided (at para 59), a misdirection. The fact that the defamatory statement is not established at the trial to have been true is not relevant to the *Reynolds* defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ("reportage") in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial.

63. Although the Court of Appeal accepted that this was a misdirection, they refused leave to appeal on the point, partly because counsel for the newspaper had not raised the matter at the trial and partly because they thought it would have made no difference to the

outcome. But they agreed (at para 72) that they should not rule out the *Reynolds* defence on the basis of the jury's answers to the questions about Mr Dorsey's sources and that "if this appeal is to be dismissed, it should be on the basis of the findings in favour of the Jameels in respect of the other issues before us." I agree and one can therefore leave the answers to the questions about sources B to E on one side.

(b) In Washington

64. In New York, the news editor Ms Blackshire had Mr Simpson in Washington check it with the US Treasury, which was alleged to have provided SAMA with the list of accounts including those of the companies named in the story. The Washington staff reporter Mr Simpson gave evidence that he had given his contact at the Treasury the names provided by Mr Dorsey and that the Treasury had confirmed to him that they were on the list.

65. This was evidence of such importance that I must explain at some length why it seems to have received such little attention both at the trial and in the Court of Appeal. For this purpose, it is necessary to quote a number of passages from the transcript of Mr Simpson's evidence. He was asked to check the story on the morning of 5 February and recorded the outcome of his first conversation with his Treasury contact in an e-mail at 10:13 am, Washington time:

> Treasury sounds like it will issue a partial denial. Off the record so far, they confirm they've asked the Saudis to monitor some accounts, and that one of the names we have is someone who's of interest to them. But the other players, they insist, they've never heard of. They add that other US agencies have a lot of dealings with the Saudis on this issue, including FBI, so some of the folks we name could be of interest to other agencies. I asked them to look into it a little more and give us an on the record denial if that's what they want to do and they're going to get back to me. My sense is that James's story is mostly on the money but if they come back with a strong denial we may need to rethink/rejigger.

66. In evidence, Mr Simpson added (Proceedings Day 8, p 1064):

> A. On the record, off the record, however they want to do it, we needed to get some kind of answer from them. I made that clear to my contact…I said 'You know, look, if you do not think these names were turned over, I would like to get that on the record, that kind of denial, so that we can take appropriate action…there is nothing casual about this process. It is very deliberate and the Wall Street Journal has pretty thorough procedures for story verification, especially with official outlets like the US Government.

67. Mr Simpson went on to say that he had known his source at the Treasury for some years and at this time was often speaking to her several times a day. Her information had been consistently reliable and she had access to the "senior intelligence official who is involved in developing lists of names which are of interest to the US government in financing terrorism." (See p 1070).

68. Critically for the purposes of this case, he said that he and his contact communicated with each other in a code ("ritual" was what he called it) which was well understood in dealings between journalists and government departments:

> A. Washington has developed elaborate rituals for relationships between journalists and government officials to circumvent laws on secrecy, to avoid embarrassment…The official does not act or does not say 'This story is right', does not say 'This story is true.' He just does not object, he says, and that is done so that, if later on, if the information comes out and there is a big fuss, the government official can say 'I did not actually tell them anything.'
>
> Q. This is a well known formula between government officials and reporters in Washington?
>
> A. It is a sign of confirmation – a term for it.

69. Later in the day, Mr Simpson's source came back to him with further news:

> A. This person replied that they had indeed looked into this and that the Treasury had elected not to make a public

comment or dispute in any way. Essentially, that is a confirmation.

70. Mr Simpson immediately telephoned the news editor:

> A. When I heard from the Treasury person again, I picked up the phone and called her back and said they have decided they are just not going to object to any of this – and there we go…They have no problem with the story. I will just reiterate that this is a very deliberate process. It is the Wall Street Journal. It is the United States Treasury and it is terrorism, and we are all gravely serious about what we do.

71. He went on to explain that although his source provided information off the record and on terms of confidentiality, that did not mean that she was acting without authority. That was how the Treasury chose to distribute certain information:

> A. You would not really characterise this as a leak. This was a fully authorised procedure for distributing information. It was clearly vetted through the Treasury management…This person was not the type to engage in freelance activities, and they would not really even be able to freelance an answer like this because they had to contact other people in the security apparatus to check my question. The only answer they could give me would be one which they were authorised to give me.

72. It was put to Mr Simpson in cross-examination that he had misunderstood what his Treasury source had said. It was not confirmation but simply a decision to make no comment – perhaps because the US government had agreed not to disclose the identities of the accounts which they had asked to be monitored. But Mr Simpson stood his ground:

> Q. I just want to get it absolutely clear. What your evidence is, is that 'We are not going to make a public

comment' must be taken as meaning 'We do not dispute the story at all.'

A. My position is that, in this context, that is the meaning of that.

Q. Why?

A. Because, as I explained, I had frequent dealings with this person. We had a close working relationship and this is the method by which information is conveyed in Washington where there are frequent government inquiries into where reporters get their information.

73. Later, counsel for the claimants put the point again:

Q. Are you able to tell the jury now, as you sit there, that you are confident that the four names that were initially denied were in fact later confirmed? Is that your evidence to the jury?

A. Yes … It is my testimony. I am confident that those names are confirmed.

74. In the discussion about the questions to be left to the jury, Mr Robertson QC (for the defendants) suggested that they should be asked whether Mr Simpson's Treasury source had confirmed the story: see para 75 of the judgment of the Court of Appeal. Mr Price QC for the claimants objected on the ground that there was no issue of primary fact about what the Treasury source had said: "the issue was as to the implications to be drawn from this". As a result, the jury was not asked any question about Mr Simpson.

75. Eady J dealt with his evidence quite shortly (at para 15):

It is true that Mr Dorsey and Mr Glenn Simpson, based in Washington, also gave evidence of some degree of confirmation of the story (or at least of answers or declination to comment, which they interpreted as confirmation). That evidence was, however, fundamentally disputed in cross-examination and the parties did not suggest formulating any question for the jury's decision on any of these points.

76. It is true that in cross-examination Mr Price suggested more than once that the words used by the Treasury contact could not have meant what Mr Simpson said that they were intended and understood to mean. But Mr Simpson was not shaken on this point. He insisted (at p 1099) that there was nothing ambiguous about the communication which he had received. No evidence was called to contradict his statement that there was a well recognized Washington code by which "we are not going to make a public comment" meant "we have checked your story and as far as we are concerned it is correct". Nor was it suggested that he was being dishonest in testifying to the existence of this code. All that was put to him was that this was not, in normal usage, what the words meant. That of course is true.

77. The Court of Appeal said that Eady J's concluding words indicated that he must have forgotten Mr Robertson's proposed question. But, they said (at para 77):

> Mr Simpson's evidence was not that his Treasury source confirmed the story that the Jameel Group was on the list, but that his failure expressly to deny this was tantamount to confirmation. Having been referred to the evidence we consider that the judge was entitled to attach no more weight to it than he did.

78. That is a misunderstanding of Mr Simpson's evidence. He said loud and clear that his Treasury source confirmed the story. But the source did so in words which, in normal usage, would not be regarded as words of confirmation. If there was the ritual or code to which Mr Simpson testified, it was nevertheless confirmation. The meaning of a communication depends not only upon the dictionary meaning of words but upon the common assumptions between the parties about what words will be used to mean. If it is clearly understood between two parties to a conversation that the word black will be used to mean white, then when one of them says black, he intends to use and knows that he will be understood to have used the word to mean white. There was therefore an issue of primary fact in relation to Mr Simpson's evidence, namely whether there was a convention among journalists and their Washington government sources by which "We are not going to make a public comment" would be intended and understood to mean "We confirm our understanding that your story is correct." If it was to be challenged, the claimants could have called evidence on the point and in any event the question should have been left to the jury. As it was,

Mr Simpson's evidence of the convention stood unshaken and uncontradicted.

Opportunity to comment

79. One of the matters which Lord Nicholls in *Reynolds* said should be taken into account was the opportunity, if any, which the claimant had been given to comment on the allegations before they were published. Items on the list (at p 205) were:

> "7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story.

80. But Lord Nicholls (at p 203) rejected the suggestion that failure to obtain and report a comment should always be fatal to the defence:

> Failure to report the plaintiff's explanation is a factor to be taken into account. Depending upon the circumstances, it may be a weighty factor. But it should not be elevated into a rigid rule of law.

81. In this case, Mr Dorsey telephoned to ask for a comment at 5 pm (Saudi time) on 5 February, the day before publication. (He said in evidence that he had left a recorded message that morning, but the jury did not accept this.) He spoke to Mr Jameel's secretary, who referred the call to a Mr Munajjed in Jeddah, who described himself as Mr Jameel's adviser. Mr Munajjed called back four hours later. Mr Munajjed said that he did not think it possible that the group's accounts would be monitored. They were a big and respectable organisation. Mr Dorsey asked whether he could quote this and Mr Munajjed said no, the only person who could speak on the record for the group was Mr Jameel. He was asleep in Tokyo and Mr Munajjed was not inclined to wake him. He asked whether publication could be postponed for 24 hours. Mr Dorsey said no, the article would be published with a statement that the Jameel group was not available for comment.

82. The judge and the Court of Appeal regarded this refusal to delay publication as fatal to the defence. The judge in particular drew attention to the fact that Mr Jameel subsequently obtained a denial from SAMA that they were monitoring his account and, if he had been given 24 hours, would very likely have been able to produce the denial to the Wall Street Journal before publication. In that case, said Eady J —

> "the importance of this front-page story would have been considerably blunted – even to the extent, perhaps, that no such story could be published."

83. I am bound to say that I regard this as unrealistic. There was no way in which SAMA would admit to monitoring the accounts of well known Saudi businesses at the request of the US Treasury. A denial was exactly what one would expect. (Mr Dorsey had approached SAMA directly for a comment but was unable to obtain one.) But I do not imagine that SAMA's denial would have inhibited the Wall Street Journal from publishing a story which had been confirmed by the Treasury in Washington. While it is true – and Mr Dorsey admitted – that the story would have been no better or worse 24 hours later, this is only significant if the delay would have made a difference. In my opinion it would not.

84. Lord Nicholls said that the importance of approaching the claimant was that "he may have information others do not possess or have not disclosed". But that was not the case here. In the nature of things, Mr Jameel would have no knowledge of whether there was covert surveillance of his bank account. He could only say, as Mr Munajjed and the other named businesses approached by Mr Dorsey had said, that he knew of no reason why anyone should want to monitor his accounts. This Mr Dorsey would have reported if he had been allowed to do so.

85. It might have been better if the newspaper had delayed publication to give Mr Jameel an opportunity to comment in person. But I do not think that their failure to do so is enough to deprive them of the defence that they were reporting on a matter of public interest.

Diplomatic relations

86. The article, it will be recalled, said that "the US had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action". The judge rejected the newspaper's defence on the additional ground that it could not be in the public interest for the Wall Street Journal to publish information which the US government had agreed not to publish. In principle, I would be very reluctant to accept the proposition that it cannot be in the public interest for a newspaper to publish information which one's government had agreed not to publish. But in any case, the position of the Wall Street Journal was that they had no wish to publish anything which might be damaging to the diplomatic interests of the United States or its attempts to secure Saudi co-operation in tracing terrorist funds. If the Treasury had indicated that the information should not be published, they probably would not have done so. But the Treasury cleared the article and that was good enough for them.

87. The Court of Appeal rejected this argument on the ground that the judge had not been convinced that the Treasury was content that the information should be released. There seems to me, however, no ground on which the judge could reject Mr Simpson's evidence on this point. If he was to be disbelieved, that should have been left to the jury.

Disposal

88. In my opinion there was no basis for rejecting the newspaper's *Reynolds* defence. For the reasons I have given, no weight can be attached to the jury's rejection of the confirmation by sources in Saudi Arabia and they were asked no question about the confirmation in Washington. The failure to delay publication and the effect on diplomatic relations are insufficient reasons. The question is then whether the case should be remitted for a new trial or whether the appeal should be allowed and the action dismissed.

89. A new trial would in effect be to allow the jury to answer the question to which Mr Price objected, namely, whether Mr Simpson was telling the truth when he said that he had received confirmation in Washington. If this question had been answered in the newspaper's favour, it would have been bound to succeed. Indeed, such an answer, and a correction of the misdirection on the presumption of innocence,

would be likely also to have affected the jury's answers to the questions on confirmation in Saudi Arabia. But Mr Simpson's evidence was, as I have said, essentially uncontradicted. I think that it is now too late for the claimants to change their minds and have the question of his veracity put to the jury. I would therefore allow the appeal and dismiss the action.

Proof of damage

90. That leaves one point which was argued but in the event does not arise. Mr Robertson submitted that a commercial company like the second claimant should not be able to sue for libel unless it can prove special damage. That would involve overruling the contrary decision of the Court of Appeal in *South Hetton Coal Company Ltd v North Eastern News Association Ltd* [1894] 1 QB 133 and the statement of the law by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 547. For my part, I would accept Mr Robertson's submission but as I understand that a majority of your Lordships would reject it and I agree on this point with the opinion of my noble and learned friend Baroness Hale of Richmond, I shall not detain your Lordships long with my own reasons.

91. In the case of an individual, his reputation is a part of his personality, the "immortal part" of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss. But a commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation.

LORD HOPE OF CRAIGHEAD

My Lords,

92. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for all the reasons that he gives I too would allow the appeal and set

aside the order of the trial judge. I wish to add only a few observations of my own.

Damage

93. This issue has been referred to as "the presumption of damage" issue. But to describe the award of damages for libel as based on a presumption is not wholly accurate. The question in every case of libel is whether the statement complained of would tend to bring the claimant into contempt, hatred or ridicule, or to injure his character: *South Hetton Coal Company Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, 138, per Lord Esher MR. This is a question of fact. It is the injury to the claimant's feelings or to his reputation that makes the false statement libellous. The award flows from the fact that, in the case of an individual, an injury to feelings or to reputation will always sound in damages. In the same case, at p 145, Kay LJ said one of the differences between libel and slander is that in an action for libel, generally speaking, damage is presumed and that special damage need not be proved or alleged. But it is the fact that the statement was calculated to injure the claimant in his character or reputation that makes the action maintainable. Proof that he has a reputation that is capable of being injured in this way is an essential element. In the case of an individual it can be presumed that he has a reputation of that kind. In all other cases this is something that must be proved.

94. Mr Robertson QC for the respondents invited the House to depart from the decision in *South Hetton* that proof of special damage is not needed in the case of a trading company. It was on the decision in that case that in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 547B-C Lord Keith of Kinkel based his observation that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. In *South Hetton* the libel complained of fell within this description as it was an attack on the business reputation of the company. But Mr Robertson's submission was that a trading company must always prove special damage. If that submission is sound, it must follow that an action for libel will never lie at the instance of a trading company unless it is in a position to assert and prove that as a result of the statement complained of it has sustained special damage. It will no longer be enough for the company to prove that, in the words of Kay LJ in *South Hetton* at p 145, it has a trading character which may be ruined or destroyed by a libel.

95. It is obvious, of course, that a trading company has no feelings which are capable of being injured. Trade is its business, and it is injury to its reputation in regard to its trade that is of the essence in its case. Lord Reid's comment in *Lewis v Daily Telegraph* [1964] AC 234, 262 that it can only be injured in its pocket captures the way in which the principle of the law of libel applies in its case. This does not mean, however, that it can only be injured in a way that gives rise to loss which, because it can be calculated, has the character of special damage. What it means is that it must show that it is liable to be damaged in a way that affects its business as a trading company.

96. The principle works in the same way in the case of a non-profit organisation such as a charity. In its case it is not only its pocket, due to a loss of income, that is liable to be injured. Injury to its reputation in the eyes of those with whom it must deal to achieve its charitable objects may be just as damaging to the purpose for which it exists. The principle works in the same way too in the case of other bodies, such as trade unions or other organisations which exist not to trade but to deal with others in the interests of their members or those they represent. Proof that the body has a reputation that has a tendency to be damaged is an essential element in the claim that the false statement was libellous. As the law stands nothing more need be proved to entitle it to damages.

97. It is not impossible to imagine cases where a trading company could show that it had sustained financial loss of a kind that would entitle it to an award of special damages. But in *South Hetton* at pp 145-146 Kay LJ said that if such a proof were necessary in order to lay a foundation for the action it would in many cases put the plaintiff in a position of much difficulty. The Report of the Faulks Committee on Defamation 1975 (Cmnd 5909), p 90, para 336 also recognised that it was very difficult for a plaintiff, whether corporate or personal, to prove actual financial damage specifically flowing from a defamation. It recommended, at para 342, that a trading corporation should have to establish that it had suffered special damage or that the words used were likely to cause it pecuniary damage. This recommendation was not adopted by Parliament. Nevertheless Mr Robertson now invites your Lordships to go further and hold that proof of special damage is an essential requirement in every case where a trading company seeks to establish a cause of action for libel.

98. I do not think that such a change in the law is either necessary or desirable. The argument that the change is necessary because the law is incompatible with article 10 of the European Convention on Human

Rights is not sustainable. This is demonstrated by the way the European Court dealt with the question in *Steel and Morris v United Kingdom* (2005) 41 EHRR 403. In that case, after a very long trial during the bulk of which they had represented themselves, the applicants were found liable in damages to McDonalds, a very large multi-national company. The Court said at p 435, para 97, that the award was disproportionate to the legitimate aim served by it. But it took a different view on the question whether the interference with the applicants' rights to freedom of expression which the English law of defamation prescribes in its pursuit of the legitimate aim of protecting the reputation or rights of others was necessary in a democratic society.

99. Having noted that large public companies knowingly lay themselves open to close scrutiny and that the limits of acceptable criticism are wider in their case, the Court said at p 435, para 94:

> "However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The state therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation."

The European Court, then, leaves it to domestic law to determine how the balance is to be struck between these two competing objectives. In *Castells v Spain* (1992) 14 EHRR 445, 476, para 43 it reminded us that the pre-eminent role of the press in a state governed by the rule of law must never be forgotten. But the change in the law for which Mr Robertson contends would apply to every case where a trading company wishes to bring an action for libel. He did not suggest that there should be one law for the press and another law for everyone else in this respect.

100. As for the question whether the change in the law which Mr Robertson has urged on us would be desirable, I would make the following points. First, as Lord Esher MR recognised in *South Hetton* at p 138, the law of libel is one and the same to all plaintiffs. As he put it, it is the same by whomsoever the action is brought – whether by a person, a firm or a company. To the examples on his list I would add

the other bodies that Lord Keith referred to in *Derbyshire* at p 547D-E, such as trade unions and charities. It would not be satisfactory to single out trading companies for special treatment.

101. Mr Robertson did not attempt to argue that the other bodies referred to by Lord Keith such as trade unions or charities, or any other business organisations apart from companies, should be treated in the same way. This feature of his argument shows that it is not soundly based in principle. In the case of those other bodies damages are at large, as Lord Esher put it at p 139. This is because false statements which reflect on the way they conduct themselves affect the reputation on which they rely to perform their objects. In that respect they are no different from trading companies. In their case too reputation is something that in itself has a value which the current state of the law enables them to protect. What the law does not require them to do is to place a financial value on that reputation or to show, with the precision that this would require, that damage to it is likely to result in financial or pecuniary damage. There is no good reason why trading companies should be treated differently from the rest.

102. Secondly, there is the difficulty that trading companies would be likely to encounter in proving that a defamatory statement has resulted, or will result, in special damages. This point goes to the root of the matter. As the European Court recognised in *Steel and Morris v United Kingdom* (2005) 41 EHRR 403, 435 para 94, one of the main functions which the right of action for libel seeks to serve is to enable the claimant to challenge the truth, and limit the damage, of allegations which risk harming its reputation. It is to enable it to nail the lie, as it was put in argument. A requirement that special damage had to be proved in every case would deprive the trading company of that opportunity. It would have to wait until it was in a position to show that some damage had actually been done to its business which was capable of being proved. In its case proof of a risk of harm to its reputation – of a tendency to damage it in the way if its business, as Lord Keith put it in *Derbyshire* at p 547B-C – would not be enough. The effect would be to undermine the right of action and to leave trading companies whose reputation was put at risk without a means of averting the damage that might result from the libel. This could be incalculable.

103. At various points in his argument Mr Robertson referred to companies, or corporations, more generally – suggesting, as I understood him, that the change in the law should be extended to non-trading as well as to trading companies. But a non-trading company

would be likely to find it even more difficult to claim and prove special damage. If the fact that it had a reputation which had a tendency to be damaged was not a sufficient basis for a right of action for libel, it would be likely to be left without a remedy.

104. For these reasons I consider that the proposition that an action of libel will lie at the suit of a trading company without proof of special damage as stated in *South Hetton Coal Company Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133 remains sound law and that it ought not to be departed from.

Reynolds privilege

105. I should like to emphasise at the outset that the only question on which there was a difference of view in the House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 on any matter of substance was whether the issues of justification and qualified privilege should be reconsidered at a new trial: see Lord Steyn at pp 216D-217A and my own speech at p 237F-G. It has sometimes been suggested that *Reynolds* was a majority decision. But the primary question raised by the case was whether there should be a new category of privileged subject matter – a generic qualified privilege of political speech, as Lord Steyn called it at p 209C-D. On that question the House was unanimous. Everyone accepted that the duty-interest test was an essential element in the structure of the law of qualified privilege. There was no dissent from the analysis by Lord Nicholls of Birkenhead of the way in which the common law test should be adapted so as to strike a balance between the role of the media and the restrictions that are necessary in a democratic society for the protection of the reputation of the individual. Nor was there any dissent from his observation at p 202E-F that the common law does not seek to set a higher standard than that of responsible journalism.

106. Mr Robertson submitted that the standard of responsible journalism provided an insufficiently precise test. It was rejected by the trial judge, Eady J, who said at para 17 that the primary question was whether the particular circumstances gave rise to a duty to publish. The Court of Appeal agreed with him that the phrase "responsible journalism" was insufficiently precise to constitute the sole test for *Reynolds* privilege: [2005] QB 904, para 87. Mr Robertson said that a new test should be substituted. This was whether what had been published was the product of high quality journalism of demonstrable

value to the public. If met, it would be defeated only by proof either of malice or of negligence. In effect he was suggesting that journalists should be subjected to a higher, and certainly more elaborate, standard than that which Lord Nicholls has identified.

107. Any test which seeks to set a general standard which must be achieved by all journalists is bound to involve a degree of uncertainty, as Lord Nicholls recognised in *Reynolds* at p 202D-E. But, like him, I think that the extent of this uncertainty ought not to be exaggerated. "Responsible journalism" is a standard which everyone in the media and elsewhere can recognise. The duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context.

108. When he was examining the nature of privilege as shown by the cases in *Reynolds* Lord Nicholls said at p 195E-F that whether the public interest requires that publication to the world at large should be privileged depends on an evaluation of the particular information in the circumstances of its publication. He then said that through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. I do not believe that he was intending by those remarks to indicate that the public's right to know each piece of information in any given article should be assessed, piece by piece, without regard to the whole context. On the contrary, each piece of information will take its colour and its informative value from the context in which it is placed. A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor.

109. I would reject Mr Robertson's argument that a higher test is needed to distinguish between those stories that are in need of protection

and those that are not. The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate. Mr Robertson's test which introduces the criterion of "high quality journalism", especially if it is applied to each particular piece of information that is published, would contravene that principle. But he does not need to have the benefit of a higher standard to succeed in this appeal.

Conclusion

110. Like Lord Bingham, I have been troubled by the fact that the information about Mr Dorsey's sources is incomplete. His evidence as noted by Eady J, para 11, was that it would not have been possible, responsibly, to publish the story on the basis of A's information alone. This led to the judge's comment in para 13 that in the light of the jury's verdict, as A was only a lead and not a primary source, the four corners of the respondents' case on sources had been knocked away. The jury's verdict on the other sources is tainted by a misdirection, so that conclusion cannot stand. But we cannot assume that the other sources were proved. Nor are we in a position to examine all the other evidence.

111. On the other hand, the question whether publication of the respondents' names was privileged has to be judged in the context of the article read as a whole. Taken overall it has all the hallmarks of responsible journalism. Its subject matter was of considerable interest to the public in general, and to readers of the Wall Street Journal Europe in particular. It did not seek to sensationalise or to exaggerate. The truth and accuracy of the references to the other Saudi institutions and individuals have not been challenged. Nor have Mr Dorsey's experience and qualifications as a specialist reporter or of the senior staff who approved his article been called into question. It was said that the publication of these names was needed to show how seriously the issue was being taken by the Saudi authorities as they were monitoring the leading, most prominent businessmen in the country. The editorial judgment that the respondents' names should be included, with the comment that the Group could not be reached for comment, is not conclusive. But much weight must be given to it, in light of the thrust of the whole article of which that particular information forms part.

112. On balance I am persuaded that no advantage would be gained by sending the case back for further consideration of the evidence. There is a sufficient basis in the information which we have and which my noble and learned friend Lord Hoffmann has so carefully analysed for a finding that the appellants are entitled to claim that publication of the respondents' names was protected by qualified privilege.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

113. The facts which have given rise to these defamation proceedings have been fully set out by my noble and learned friends Lord Bingham of Cornhill (paras 2, 3, 4 and 6 of his opinion) and Lord Hoffmann (paras 39 to 42 of his opinion). To avoid tedious and unnecessary repetition I propose to refer only to the essential background necessary to explain the conclusions I have come to on the issues before the House.

114. On 11 September 2001 there occurred the horror of the destruction of the Twin Towers in New York, the attack on the Pentagon and the frustration (brought about by the bravery of some of the passengers on the fourth hijacked airliner) of the planned attack on the White House. The loss of lives was huge. The shock to and sense of outrage felt by the citizens of the United States, shared vicariously by most of the citizens of most of the countries of the world, was immeasurable. The international repercussions of that shock and outrage were immediate, and are continuing and of a duration that none of us can foretell. Investigations soon revealed that most of the hijackers who had seized control of the four airliners came from or had a connection with Saudi Arabia. There was natural speculation about the sources of the finance that must have been available to those who had planned the 11 September atrocities. Resolution 1373 passed by the Security Council required all states to prevent and suppress the financing of terrorist acts and the co-operation of the Saudi Arabian government and its central bank, SAMA, was sought by the US authorities.

115. I have mentioned these background matters (referred to also, and more fully, in para 39 of Lord Hoffmann's opinion) for the purpose of underlining the high degree of public interest, not only in the United States but also in this country and many other countries, in information indicating whether or to what extent the authorities in Saudi Arabia were taking steps to comply with Resolution 1373. Saudi Arabia is not a democracy and, so far as I am aware, does not aspire to become one. It is ruled by the sons and grandsons of Abdul Aziz ibn Saud. An institution such as the central bank, SAMA, cannot be taken to be independent of government control. And it would be foolish to suppose that either the Saudi government or SAMA would feel any obligation to be forthcoming with information to investigative journalists wishing to discover what steps were being taken to monitor bank accounts of Saudi individuals and companies with a view to identifying transfers of funds that might be going to terrorist organisations. It has to be borne in mind, also, that the dominant religion in Saudi Arabia is Wahabiism, a fundamentalist version of Islam, and that the Saudi Arabian rulers preside over a population that is not uniformly sympathetic to the United States and western culture. To the extent that Saudi Arabia may have been co-operating with the United States in trying to identify the sources of funding for terrorism by authorising, at the request of the US, the monitoring of bank accounts of particular individuals or companies, it is not necessarily to be expected that the Saudi authorities would publicly acknowledge that this was happening.

116. This is the background to the publication by the Wall Street Journal Europe of the article by Mr James Dorsey, its special correspondent in Riyadh, which has led to this litigation. The article is set out and the circumstances of its publication are described in paras 40 and 41 of Lord Hoffmann's opinion.

117. The trial before Eady J and a jury of the libel action brought by Mr Mohammed Abdul Latif Jameel and the company he controls, Abdul Latif Jameel Co. Ltd, led to a verdict in their favour and awards of £30,000 to Mr Jameel and £10,000 to the company. The defence of qualified privilege failed. The Wall Street Journal Europe's appeal to the Court of Appeal also failed but a further appeal has been brought before your Lordships.

118. Mr Robertson QC, for the appellant, has taken two points. First, he contends that the rule, well established in the law of defamation, that where a libel has been published damage is presumed to have been caused to the object of the libel, ought to be held to have no application

to complaints of libel by corporations. In order for a corporation to succeed in a libel claim it ought, Mr Robertson submits, to be necessary for the corporation to plead and prove that some actual damage has been caused to it by the libel. This is a free-standing point of law to which the particular circumstances of and background to the publication of Mr Dorsey's article have no relevance whatever. Mr Robertson's second point is the qualified privilege point. If an investigative journalist, or anyone else for that matter, uncovers, or fortuitously comes across, a story of genuine public interest and importance, in what circumstances can the publisher of the story claim the protection of qualified privilege? The question assumes that the story contains a defamatory statement or innuendo and that the publisher cannot, or does not, prove that the sting of the libel is true.

The presumption of damage

119. Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel "the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights" (Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524 at 528). It is accepted that the rule applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel they should be required to show that the libel has caused them actual damage.

120. These arguments, in my opinion, miss the point. The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but an asset of positive value to it. Why else do trading companies pay very substantial sums of money in advertising their names in TV commercials which usually say next to nothing of value about the services or products on offer from the company in question but endeavour to present an image of the company that is attractive and likely to cement the name of the corporation in the public memory? Why do commercial companies sponsor sporting competitions, so that one has the XLtd Grand National or the YLtd Open Golf Championship or the ZLtd Premiership? It is surely because reputation matters to trading companies and because these sponsorship activities, associating the name of the company with popular sporting events, are believed to enhance the sponsor's reputation to its commercial advantage. The

organisers of a variety of activities some sporting, some cultural, some charitable, are constantly on the look-out for sponsorship of the activity in question by some commercial company. The choice of sponsor and the reputation of the sponsor matter to these organisers. Who would these days choose a cigarette manufacturing company to sponsor an athletic event or a concert in aid of charity? If reputation suffers, sponsorship invitations may be reduced, advertising opportunities may become difficult, customers may take their custom elsewhere. If trade suffers, profits suffer.

121. It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

122. There is no doubt that, as the case law now stands, a libel is actionable *per se* at the suit of a corporation as it is at the suit of an individual, without the need to prove that any actual damage has been caused. In the *South Hetton Coal Co Ltd* case [1894] 1 QB 133 the plaintiff, a colliery company, complained of a libel that had attacked the company in respect of its management of company houses in which some of its colliery workers lived. The Court of Appeal held that the libel was actionable *per se* and, at p 140, that "… the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage."

123. *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 was a case in which a society registered under the Industrial and Provident Societies Act 1893 complained of an article in the Daily Herald commenting on the way in which the society had kept its accounts and insinuating that the figures had been deliberately falsified and that the society had carried on business "by dishonest methods" (p 450). Slessor LJ commented that "A more terrible indictment of a society of this kind it is difficult to imagine" (pp 450 - 451). The jury found these

insinuations to be false. But the society had neither alleged nor proved any special damage and the jury, inadequately directed by the trial judge, had awarded damages of one farthing. The society successfully appealed and the case was remitted for a retrial limited to the issue of quantum of damages. Slessor LJ said, at 455 that

> "I cannot help feeling that …… the jury must have come to the conclusion that in so far as they were not satisfied that the company had lost any business, they must treat the damages as quite nominal or trivial. If they did go into their deliberations with that view they were entirely in error. A libel by the invasion of a legal right gives a right to damages. It is the duty of a jury to assess those damages, which may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation."

Goddard LJ said, at 461, that

> "There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff may, if he can, by way of aggravating damages, prove that he has suffered actual damage. But in every case he is perfectly entitled to say that there has been a serious libel upon him; that the law assumes that he must have suffered damage; and that he is entitled to substantial damages."

All of this was said of a corporate industrial and provident society whose reputation had been besmirched by the libel. And it is to be borne in mind that the primary purpose of an award of damages in a libel action, where no actual damage caused by the libel has been pleaded or proved, is not compensation but vindication of reputation.

124. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 established the important principle that institutions of central or local government have no right at common law to maintain actions for damages for defamation. But no doubt was cast on the right of corporations to do so. The leading speech was given by Lord Keith of Kinkel who (at 544 - 545) cited the *South Hetton Coal Co* case with approval.

125. My Lords I can see no good reason why your Lordships should now disqualify corporations from bringing libel actions unless able to allege and prove actual damage caused by the libel. Every corporation is incorporated for some purpose. In the constitution of every corporation its principal objects will be set out. A trading company's principal object will be to carry on trade. A charitable corporation's principal object will be the promotion or pursuit of some charitable object. Some companies are incorporated as holding companies, holding subsidiary companies or other assets for the benefit of the group of which they form part. Whether publications containing disparaging or derogatory remarks about a company can be complained of by the company as being defamatory will depend upon the nature of the remarks and the nature of the corporation's objects and reputation. It might be quite difficult to defame a holding company. But a holding company's reputation might be indistinguishable from that of the corporate group to which it belonged. If, however, the conclusion can be reached that the remarks in question were indeed defamatory, damaging to the reputation of the company and apt to damage its ability to pursue its trading or charitable or other objects, I can see no reason of principle why the long-standing rule of law enabling the company to pursue a remedy in a defamation action without the need to allege or prove actual damage should be changed.

126. And, in particular, I can see nothing in article 10 of the European Convention on Human Rights that requires a different conclusion. The right to freedom of expression was never intended, in my opinion, to allow defamatory statements, whether of individuals or companies, to be published with impunity. If a defamer can neither justify the statement nor claim the protection afforded by the law to fair comment on matters of public interest or to statements that qualify for privilege, he must, in my opinion, be prepared to answer for the libel. On this issue I am in full agreement with the opinions that have been expressed by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead.

Qualified Privilege

127. I have found it instructive to remind myself of the reason why qualified privilege emerged from the case law of the 19th Century as a defence in defamation actions. The reason was given by Parke B in *Toogood v Spyring* 1 CM & R 181,149 ER1045. Parke B was explaining why there were "cases where the occasion of the publication affords a defence in the absence of express malice." He said this (at 193):

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Parke B's references to "malice" were explained by Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 at 345:

> "A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language"

and, at 347, citing Erle CJ in *Whiteley v Adams* (1863) 15 CB (NS) 392, 414:

> "I take it to be clear that the foundation of an action for defamation is malice. But defamation pure and simple affords presumptive evidence of malice. The presumption may be rebutted by showing that the circumstances under which the libel was written or the words uttered were such as to render it justifiable"

128. It would be convenient to be able to extract from these dicta the principle that any circumstances attending the publication that render the publication "justifiable" would rebut the "presumptive evidence of malice" and attract the protection of qualified privilege. But to do so would be to overlook subsequent authority that appears to place fairly

rigid limits on the occasions that can attract qualified privilege. In *Adam v Ward* [1917] AC 309 Lord Atkinson said, at 334, that

> "A privileged occasion is …. an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

129. My Lords, however accurate Lord Atkinson's statement of law may be where the defamatory communication has been made to a relatively limited number of people, it does not, as it seems to me, cater for the role of the press, at the end of the 20th Century and the beginning of the 21st, in reporting on matters of public importance. Newspapers address their contents to the public at large. Some, like the Wall Street Journal Europe, have an international readership, but the relationship between a newspaper and the members of the public who choose to read it is essentially the same, whether the readership be international or local. The publication is to the public at large. To insist on a reciprocity of duty and interest between the publisher of a newspaper and the reader of the newspaper, who may be in New York, London, Rome, or anywhere, either makes the requirement of reciprocity meaningless or deprives any defamatory statement in the paper, no matter how important as a matter of public interest the content of the statement may be, of the possibility of the protection of qualified privilege. It was this undesirable rigidity of the law of qualified privilege that, to my mind, the seminal judgment of Lord Nicholls of Birkenhead in the *Reynolds* case [2001] 2 AC 127 was designed to meet.

130. Lord Nicholls did not turn his back on the reciprocal duty/interest test for qualified privilege. Instead he moulded the test so as to cater for the publication of information that the public as a whole, as opposed to a specific individual or individuals, was entitled to know. He said, at 197, that the court should take into account the nature, status and source of the material published and the circumstances of the publication and continued:

> "These factors are to be taken into account in determining whether the duty-interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know the particular information.

> The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them. A claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement."

131. At 204, under the heading "Conclusion", Lord Nicholls rejected the notion that a new category of qualified privilege needed to be developed. He emphasised that

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern."

He then (at 205) gave some illustrative examples of matters that should be taken into account by the court when judging whether a particular publication attracted qualified privilege, but warned that:

> "This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case"

and that

> "The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know …. Any lingering doubts should be resolved in favour of publication."

132. Lord Steyn, in his speech, in *Reynolds* said, at 214, that a publication should be entitled to the protection of qualified privilege if

> "… it can fairly be said to be in the public interest that the information about political matters should be published"

and, at 215, that he

> "… would uphold qualified privilege of political speech, based on a weighing of the particular circumstances of the case."

And Lord Cooke of Thorndon, in an important passage at 225, said that

> "Hitherto the only publications to the world at large to which English courts have been willing to extend qualified privilege at common law have been fair and accurate reports of certain proceedings or findings of legitimate interest to the general public. In *Blackshaw v Lord* [1984] QB1, *Templeton v Jones* [1984] 1 NZLR 448, and now the present case, the law is being developed to meet the reasonable demands of freedom of speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances …"

Lord Hobhouse of Woodborough expressed his full agreement with what Lord Nicholls had said.

133. In effect, in my opinion, the House was, in the context of journalistic reporting, re-investing qualified privilege with the flexibility that Baron Parke in *Toogood v Spyring* and Lindley LJ in *Stuart v Bell* would appear to have accorded it: As Erle CJ said in *Whiteley v Adams*

> "That presumption [of malice] may be rebutted by showing the circumstances under which the libel was written …. were such as to render it justifiable".

This view of the effect of *Reynolds* accords with remarks by Lord Cooke of Thorndon in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 301:

> "… until *Reynolds* it would seem that the legal profession in England may not have been fully alive to the possibility

> of a particular rather than a generic qualified privilege for newspaper reports where *the circumstances warranted a finding of sufficient general public interest*" (Emphasis added).

and

> "It seems to me that the *Reynolds* case was less a breakthrough than a reminder of the width of the basic common law principles as to privilege".

134. A somewhat different, though no less welcoming, view of *Reynolds*, was expressed by the Court of Appeal in *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783. The judgment of the court said, in para 33 that

> "Whereas previously it could truly be said of qualified privilege that it attaches to the occasion of the publication rather than the publication, *Reynolds* privilege attaches, if at all, to the publication itself: it is impossible to conceive of circumstances in which the occasion of publication could be privileged but the article itself not so. Similarly, once *Reynolds* privilege attaches, little scope remains for any subsequent finding of malice."

And, in paras 35 and 36, that

> "35. Once *Reynolds* privilege is recognised, as it should be, as a different jurisprudential creature from the traditional form of privilege from which it sprang, the particular nature of the 'interest' and 'duty' which underlie it can more easily be understood.
>
> 36. The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed …. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish

> unless he is acting responsibly any more than the public has an interest in reading what may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise."

135. My Lords I am in respectful and complete agreement with the explanation of *Reynolds* privilege given by the Court of Appeal in paragraph 36 cited above. But I would not myself accept the conclusion that *Reynolds* privilege is "a different jurisprudential creature" from traditional qualified privilege. The "interest" and "duty" referred to in para 36 and the criteria for establishing their existence do no more, in my opinion, than give expression in a particular journalistic context to the principle expressed by Erle CJ that qualified privilege arises where "the circumstances under which the libel was written … were such as to render it justifiable."

136. The advice of the Privy Council, written by Lord Nicholls, in *Bonnick v Morris* [2003] 1 AC 300, represented, again in a journalistic context, a further move away from rigidity. There were two issues before the Board. One was as to the meaning to be attributed to the statement complained of. A defamatory meaning was one possibility but was not the only meaning that might be conveyed to a reasonable reader. The Board took the view the natural and ordinary meaning of the words used in the statement carried with them a defamatory implication. The other issue was whether a defence of qualified privilege was available. Lord Nicholls explained, in para 22, the dilemma produced by the ambiguity of the words used in the statement in question.

> "It is one matter to apply this [single meaning] principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct."

He continued, in paras 23 and 24:

> "23. Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals…. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.
>
> 24. To be meaningful this standard of conduct must be applied in a practical and flexible manner … A journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views … If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances."

In the event the Board held that the "article was a piece of responsible journalism to which the defence of qualified privilege is available"(para 28). In my opinion, this appeal presents an opportunity which your Lordships should take to confirm that the approach taken in *Bonnick v Morris* was an approach which accords with the principles expressed by the House in *Reynolds*.

137. My Lords, in my opinion the judgments in the courts below which have led to this appeal have not correctly applied the principles for which the *Reynolds* case stands as authority. In para 23 of his judgment Eady J said that it was not possible to construe what Lord Nicholls had said in *Reynolds* at 202 "as supplanting the common law touchstone of 'social or moral duty' by a different test such as 'responsible journalism' or the exercise of 'due professional skill and care'." However the touchstone of a reciprocal interest and duty between the receiver and the giver of the defamatory statement was a judicial construct of the 20th Century designed to produce certainty as to the circumstances in which a defamatory statement made by A to B could be accorded the protection of qualified privilege. It is a touchstone that makes little sense in relation to statements, typically those contained in the pages of newspapers, made to the world at large. *Reynolds* was not supplanting the duty/interest touchstone for situations to which that touchstone was intended to apply and could sensibly be

applied. It was supplementing that touchstone in order to provide the protection of qualified privilege, where the circumstances warranted that protection, to statements published to the world at large. The expression "responsible journalism" has been usefully coined as a succinct summary – but only a summary – of the circumstances in which a defamatory article in a newspaper can claim that protection.

138. Journalists, and the editors and publishers of the newspapers in which journalists' articles appear, may or may not regard themselves as under a "social and moral duty" to publish the information contained in their articles. If the impulsion to publish is to be expressed in "duty" terms, it would be nearer the mark to describe the duty as a "professional duty". Newspapers exist to supply information to the public. The information may be interesting but trivial; it may be lacking in much interest but nonetheless important. Newspapers may decide to publish information that would be interesting to the public but that is essentially unimportant or, as it might be put, of very little public interest. It would be a misuse of the word "duty" to describe a newspaper as having a "duty" to publish information of that character. But there is other information the public interest of which is real and unmistakable. In relation to information of that character it makes sense to speak of newspapers having a "duty" to publish. They, and their reporters, should, of course, take such steps as are practicable to verify the truth of what is reported. Fairness to those whose names appear in newspapers may require, if it is practicable, an opportunity to comment being given to them and/or an opportunity to have a response published by the newspaper. These are all circumstances the weight of which in assessing whether a report should be protected by qualified privilege will vary from case to case. Lord Nicholls made all of this clear in *Reynolds*.

139. Eady J, having (in para 36), posed for himself the question whether Mr Dorsey or the Wall Street Journal Europe had a "social or moral duty" to write and publish the article and, in it, to name the Jameel group, said, in para 41, that "more is required for privilege than that the subject of the defamatory allegations should be of public interest". But that must depend on the nature of the public interest, the degree of its importance. The 11 September 2001 background to the story and the importance, as a matter of public interest, of whether the Saudi authorities were, at the request of the United States authorities, monitoring the bank accounts of Saudi companies or individuals, entitled Mr Dorsey's report to be ranked as of very high public interest indeed. Mr Dorsey had, as the jury accepted, been given the names of some of those whose accounts were said to be being monitored. Mr

Dorsey's ability to give the names added verisimilitude to his report. He endeavoured to check, both by inquiries in Saudi Arabia and by inquiries in Washington DC, the accuracy of the information he had been given. He received that confirmation in Washington, and I agree entirely with Lord Hoffmann's criticism (para 65 to para 78 of his opinion) of the judge's and the Court of Appeal's treatment of Mr Dorsey's and Mr Simpson's evidence about that confirmation. Mr Dorsey said that he had received that confirmation also from four different sources in Saudi Arabia. But, the judge having directed the jury that they must assume that the story that the Jameel group was on the list of those whose accounts were being monitored was false, the jury not surprisingly said that they did not accept that Mr Dorsey had had that story confirmed.

140. The direction was a misdirection. It perpetrated much the same sort of error that was exposed by Lord Nicholls in *Bonnick v Morris*. In deciding whether or not the criterion of responsible journalism had been met, the court should apply the standard of conduct expected of the journalist "in a *practical* and flexible manner" (emphasis added). The question the jury should have been asked was whether Mr Dorsey had received the confirmation he claimed to have had that the name of the Jameel Group was on a list of those whose accounts were to be monitored that had been provided to the Saudis by the US authorities. To preface the question by requiring the jury to assume the list to be non-existent deprived the jury's answers of any value.

141. Another matter the judge took into account was that a response to the story had not been obtained from Mr Jameel. He had been unavailable and a comment that Mr Dorsey had obtained from one of Mr Jameel's subordinates could not be used. The judge concluded, and the Court of Appeal confirmed the conclusion, that the criterion of "responsible journalism" required that publication of the article be postponed until Mr Jameel could be contacted. I disagree. Mr Jameel did not know that his group's accounts were being monitored. He was not in a position to deny that they were being monitored. He could say no more than his subordinate had already told Mr Dorsey, namely, that his companies had no connection of any sort with terrorism and there was no reason for their accounts to be monitored. He could have requested, or demanded, publication in the next edition of the Wall Street Journal Europe, of a response on those lines, but he never did so. In the circumstances the newspaper's refusal to postpone publication of the story was not, in my opinion, a circumstance of any real weight in the scale for measuring the presence or absence of "responsible journalism".

142. Finally the judge appears to have regarded it as reprehensible or, at least, inconsistent with "responsible journalism" for the Wall Street Journal Europe to have published a story disclosing the names on a list that the US authorities had undertaken to keep confidential. Coupled with this is the denial by SAMA and the Saudi banks that the list existed (see para 54 of the judgment). In para 58 the judge said that

> "where there was an inter-governmental agreement not to reveal the names of those being investigated in the fight against terror, cogent grounds are required to show why the public interest called for that agreement to be breached."

I would, for my part, answer that point in two ways. First the importance of the story was not the identity of the names on the list but that there *was* such a list, evidencing the highly important and significant co-operation between the US and the Saudi authorities in the fight against terror. The names gave credibility to the story. Second, I know of no government that discloses information to which sensitivity may attach otherwise than with great reluctance. Subject to D notices and the like, it is no part of the duty of the press to co-operate with any government, let alone foreign governments, whether friendly or not, in order to keep from the public information of public interest the disclosure of which cannot be said to be damaging to national interests.

143. This is a case in which, as it seems to me, the information disclosed in Mr Dorsey's article was information of high importance and public interest not only, or even particularly, in this country but worldwide. The public had a right to the disclosure of the information and the newspaper had a professional duty to disclose it. The circumstances attending the writing of the story by Mr Dorsey and its publication by the Wall Street Journal Europe satisfied, in my opinion, the criterion of responsible journalism. If the truth be that Mr Dorsey had failed to obtain confirmation of the story by Saudi sources, other than the Saudi source from whom he had obtained the story in the first place, nonetheless, in my opinion, the confirmation that Mr Simpson had obtained in Washington justified the publication of the story. The criterion of responsible journalism, given the importance of the story, would have been satisfied. I see no reason for the case to be referred back for a re-trial.

144. I would for these reasons uphold the privilege defence, allow the appeal, set aside the damages award and dismiss the action. Having had the advantage of reading the respective opinions of my noble and learned friends on the qualified privilege point I am unable to discern any real differences of principle. If, however, there are any, I want to express my full agreement with the reasons given by my noble and learned friend Lord Hoffmann.

BARONESS HALE OF RICHMOND

My Lords,

145. There are two issues before us and on both of them I agree with the opinions expressed by my noble and learned friend, Lord Hoffmann. There is only a little I wish to add on the issue of "*Reynolds* privilege" but rather more on the issue of damage.

The Reynolds defence

146. It should by now be entirely clear that the *Reynolds* defence is a "different jurisprudential creature" from the law of privilege, although it is a natural development of that law. It springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information. It is not helpful to analyse the particular case in terms of a specific duty and a specific right to know. That can, as experience since *Reynolds* has shown, very easily lead to a narrow and rigid approach which defeats its object. In truth, it is a defence of publication in the public interest.

147. This does not mean a free-for-all to publish without being damned. The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it. It is also different from the test suggested by Mr Robertson QC, on behalf of the Wall Street Journal

Europe, of whether the information is "newsworthy". That is too subjective a test, based on the target audience, inclinations and interests of the particular publication. There must be some real public interest in having this information in the public domain. But this is less than a test that the public "need to know", which would be far too limited.

148. If ever there was a story which met the test, it must be this one. In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped. There was and should have been a lively public debate about this. Given the nationalities of the hi-jackers, this focussed particularly upon the efforts of the Saudi Arabian authorities. Anti-Saudi feeling was running high in some places. Information that the Saudis were actively co-operating, not only with the United Nations, but also with the United States was of great importance to that debate. This was, in effect, a pro-Saudi story, but one which, for internal reasons, the Saudi authorities were bound to deny. Without names, its impact would be much reduced.

149. Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it. We are frequently told that "fact checking" has gone out of fashion with the media. But a publisher who is to avoid the risk of liability if the information cannot later be proved to be true would be well-advised to do it. Part of this is, of course, taking reasonable steps to contact the people named for their comments. The requirements in "reportage" cases, where the publisher is simply reporting what others have said, may be rather different, but if the publisher does not himself believe the information to be true, he would be well-advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.

150. Once again, as my noble and learned friend Lord Hoffmann has demonstrated, the publication of this story passed this test. We have to judge the steps which are known to have been taken against the background of the style and tone of the publication in general and the article in particular. This is not a newspaper with an interest in publishing any sensational information however inaccurate (or even in

some cases invented). It is, as the journalist quoted by my noble and learned friend said, "gravely serious" (indeed some might find it seriously dull). We need more such serious journalism in this country and our defamation law should encourage rather than discourage it.

151. In short, My Lords, if the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding.

Damage

152. The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. Indeed, as Tony Weir points out in *A Casebook on Tort* (10th edition, 2004, at p 519), it is so tender to a person's reputation that it allows him to claim substantial damages without having to show that the statement was false, or that it did him any harm, or that the defendant was at fault in making it. In the case of an individual, all this is so well established that we have ceased to think it odd (if we ever did) and it would certainly take the intervention of Parliament to change it. But the authority for the proposition that a company is in the same position as an individual is the Court of Appeal decision in *South Hetton Coal Company Limited v North-Eastern News Association Limited* [1894] 1 QB 133. This House is therefore free to overrule it, although of course it would only disturb an authority of such long-standing if there were good reason, in modern circumstances, to do so.

153. Among those modern circumstances is the importance now attached in all developed democracies to freedom of expression, especially on matters of political interest. *South Hetton* was decided before there was universal suffrage in this country, so before we were a proper democracy. Since then, we have acceded to several international instruments which guarantee freedom of speech. The most important is article 10 of the European Convention on Human Rights, because we have not only an international but also a domestic obligation to comply with it. Article 10(2) acknowledges that the protection of a person's reputation is a legitimate aim which may justify the restriction of freedom of speech. This includes the reputation of a commercial company. The competing interests in "open debate about business practices" and "protecting the commercial success and viability of companies" mean that the state enjoys "a margin of appreciation as to the means it provides under domestic law to enable a company to

challenge the truth, and limit the damage, of allegations which risk harming its reputation": see *Steel and Morris v United Kingdom* (2005) 41 EHRR 403, para 94 (the "McLibel Case"). Nevertheless, those means must be "necessary in a democratic society": ie they must meet a pressing social need and be proportionate to the legitimate aim pursued. One of the reasons why the European Court of Human Rights found that the award of damages against the defendants in the "McLibel" case was disproportionate was that "in accordance with the principles of English law, they were not required to, and did not, establish that they had in fact suffered any financial loss as a result of the publication": *ibid*, para 96.

154. It seems, therefore, that while the retention of the rule that a company does not have to show that it has in fact been harmed in any way may be within our margin of appreciation, we should scrutinise its impact with some care to see whether it may have a disproportionately chilling effect upon freedom of speech. The earliest critical comment upon the rule in the United Kingdom to which we have been referred came again from Tony Weir, in a case-note on *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169: see "Local Authority v Critical Ratepayer – A Suit in Defamation" [1972A] CLJ 238 (but see also "Libel and the Corporate Plaintiff" (1969) 69 Columbia Law Review 1496):

> "There is still some justification, however, for the rule that the human plaintiff need not prove any harm. If the statement is defamatory, he will feel bad and others will think badly of him; the first need not be proved and the second cannot be. Indeed, this duality of harm can be presumed precisely because it is required: you get damages only if someone has been rude *about* you *to* someone else."

But it was absurd to give substantial damages to a trading company:

> "It was absurd because [the company] had no feelings which might have been hurt and no social relations which might have been impaired. The two kinds of presumptive harm could not be presumed because they could not have occurred. . . . the reasons for which we absolve the human plaintiff from the usual requirement of proving loss cannot and do not apply to the inhuman plaintiff … To prefer the

> interest in maintaining the corporate image to the right of the citizen to say what he reasonably believes to be true is a grim perversion of values."

155. Lest it be thought that these are maverick academic views, it should be noted that amongst the recommendations of the *Report of the [Faulks] Committee on Defamation* (1975, Cmnd 5909, para 342) was the proposal that:

> "(a) No action in defamation should lie at the suit of any trading corporation unless such corporation can establish either – (i) that it has suffered special damage, or (ii) that the words were likely to cause it pecuniary damage.
>
> (b) Actions in defamation by non-trading corporations (including government bodies and local authorities) and trade unions should be subject to similar limitations."

The Faulks Committee were influenced by Mr Weir's views, and also by the well-known words, albeit uttered in a different context, of Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, at p 262:

> "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."

The Committee included the likelihood of future financial damage because of the difficulty of proving "actual financial damage specifically flowing from a defamation": para 336.

156. This recommendation was not enacted, although others were. Nevertheless, this House felt able to go further than the Committee had gone in relation to local authorities, when in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, it overruled the *Bognor Regis UDC* case and held that central and local government authorities could not sue in defamation at all. At p 547, Lord Keith of Kinkel, giving the only reasoned opinion, accepted that the cases cited "clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way

of its business". He gave examples including deterring banks from lending, or the best qualified workers from joining, or a trade union's ability to keep its members, or a charity's ability to raise money. He then went on to distinguish governmental organisations on the grounds of democratic accountability.

157. As none of the authorities cited by Lord Keith was binding upon this House, and the question of non-governmental corporate bodies was not before the House, it is open to us to take the matter further. It would require very little amendment to Lord Keith's formulation for us to reflect the recommendations of the Faulks Committee. Thus for the words "which can be seen as having a tendency to damage it in the way of its business" we could substitute "which can be shown to be likely to cause it financial loss". Indeed, Mr James Price QC, on behalf of the claimants, was keen to stress that Lord Keith's formulation was already something of a barrier to companies which could not show such a tendency. We cannot know whether Lord Keith, had the matter been in issue, would have accepted the invitation to require that corporations produce at least some evidence to support the likelihood that their pockets would indeed be injured in some way.

158. My Lords, in my view such a requirement would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.

159. For these short reasons, I would have allowed the appeal against the award to the Company in any event. But as a majority of your Lordships take a different view, and the appeals against each claimant are in any event to be allowed on the *Reynolds* point, there is no need to say more.