Neutral Citation Number: [2012] EWHC 1982 (QB)

Case No: HQ12D01579

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

Robert Crow	**Claimant**
- and -	
Boris Johnson	**Defendant**

- -
- -

Jonathan Crystal (instructed by **Thompsons Solicitors**) for the **Claimant**
David Glen (instructed by **Collyer Bristow LLP**) for the **Defendant**

Hearing dates: 16 July 2012

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Judgment

Mr Justice Tugendhat :

1. The Claimant in this action ("Mr Crow") is the General Secretary of the RMT, the National Union of Rail, Maritime and Transport Workers. In this libel action he sues the Defendant ("Mr Johnson"), who is now the Mayor of London, in respect of leaflets that Mr Johnson published as part of his campaign to secure re-election to that office at the election held on 3 May 2012. As every Londoner knows, Mr Johnson's predecessor in the office of Mayor of London was Mr Ken Livingstone. Mr Livingstone had been Mayor until 2008, when Mr Johnson was first elected. Mr Livingstone was also a candidate for election in May 2012. Mr Livingstone is not making any claim in this action and is not a party to it.

2. Mr Crow was not a candidate for election, but he is referred to as Bob Crow in the leaflets he complains of. Mr Crow is very well known to Londoners, because most of them are dependant upon railways, both mainline and underground, to get to and from work. He has been General Secretary of the RMT since February 2002. As he describes it in his witness statement, his union, and he himself, use every opportunity to drive home their positive agenda for better pay, shorter hours and safer working conditions, and members of the union can rely on them to protect and promote members' interests in the workplace.

3. There is no dispute between the parties that in the course of pursuing these aims, the RMT has called something of the order of twenty strikes on the London Underground since February 2002. It is a matter of common knowledge that strikes cannot be called without the support of members of the union expressed through ballots. But strikes are also controversial. Just as there are some members of the public who support the actions taken by Mr Crow and the RMT, there are other members of the public who oppose and deplore these strikes.

4. The leaflets in question were issued in very large numbers, and in two versions. Mr Crow initially complained of only one of the two versions. Mr Johnson drew attention to the fact that there had been another version. Mr Crow now applies for permission to amend his claim form to sue on both versions.

5. Mr Johnson contends that neither version is capable of bearing any meaning defamatory of Mr Crow, or at least none sufficiently serious to constitute a real and substantial tort. So Mr Johnson applied for an order that the proceedings should be struck out. If he is held to be wrong about that, Mr Johnson would not oppose the amendment, for which Mr Crow seeks permission, to enable Mr Crow to complain about both versions of the leaflet.

6. Copies of the front of both leaflets (the same in each case) and the back of the second are attached to this judgment. There is a difference on the backs of the leaflet only in a few of the quotations from newspapers which are set out. What Mr Crow complains of is that the leaflet includes:

> "Not Again: Ken wants to come back with his … Council Tax rises, Broken promises, cronies, scandals, waste Bob Crow. NotKenAgain.com"

7. Mr Crystal does not submit that there is any difference between the backs of the two versions of the leaflet which is material to any decision that the court has to make at this stage of the proceedings. Both leaflets include cuttings from the Evening Standard dated 11 December 207 and 4 August 2008. The first reads "Ken and lost £500,000: the inquiry begins" and the second reads "The £1m payoff for Ken cronies". In the first leaflet three other cuttings are from the Evening Standard. The one dated 5 February 2001 reads: "I will be on the picket line next time vows Ken". The one dated 16 September 2004 reads: "Ken's U-turn on fares 'will drive people back to cars'". The one dated 4 October 2005 reads: "Ken's huge fares rise". In the second leaflet there is a cutting from The Independent dated 10 January 2001 which reads: "Livingstone promises to join Tube workers' picket".

8. The meanings which Mr Crow attributes to the words he complains of in the original Particulars of Claim are:

> "1.The Claimant's policies, leadership of the RMT and association with Mr Livingstone: (a) seriously damages his electoral prospects and (b) has caused and will cause grave harm to the interests of Londoners.

> 2. The Claimant was part of and supported a culture of political immorality involving broken promises, cronyism, scandals and waste".

9. In the draft amended Particulars of Claim Mr Crow attributes to the words he complains of an additional third meaning:

> "3. The claimant was part of a corrupt, scandalous, unaccountable and wasteful group of cronies".

10. The task of the court at this stage is to decide whether the words complained of are capable of bearing the meanings defamatory of Mr Crow which Mr Crow attributes to them, or any other meaning defamatory of Mr Crow: CPR Practice Direction 53 para 4.1. If I find that the words complained of are capable of bearing any meaning defamatory of Mr Crow, then the decision as to what the words actually mean, will be taken at a later stage, probably at a trial. If I find that the leaflets are not capable of bearing any meaning defamatory of Mr Crow, then the existing claim form, and the proposed amendment, will each disclose no reasonable grounds for bringing the claim, and it will be my duty to strike it out under CPR r.3.4(2)(a).

11. The law that I must apply at this stage is not controversial. It is the same on each of the two questions raised in relation to the words complained of in this case: are the words capable of being defamatory at all? And are the capable of being understood as referring to Mr Crow?

12. The law can conveniently be taken from the judgment of Thomas LJ in *Modi v Clarke* [2011] EWCA Civ 937 paras 10 to 12:

> "10. There was no dispute as to the applicable law. Although there are a number of well-known definitions of the legal meaning of the word "defamatory", the case proceeded before the judge on the basis of the definition used by Sir Thomas Bingham, MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 where he said:
>
> > "A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally."
>
> 11. In deciding what meaning the words complained of were capable of bearing, it was again common ground that the court must have in mind the guidance given in *Skuse v Granada Television*, summarised most recently by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paragraph 14:
>
> > "The legal principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not

> naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) [….] (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" …. (8) It follows that "it is not enough to say that by some person or another the words *might* be understood in a defamatory sense."

> 12. It was also accepted that there is a distinction between "people generally" and a section of people. The distinction is set out in a number of authorities but the one relied on before the judge was that of Greer LJ in *Tolley v Fry* [1930] 1 KB 467 at 479 where he said:

> > "Words are not defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that would disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation." ”

13. It is also common ground that the fact that Mr Crow holds the position of General Secretary of the RMT together with the fact that the words complained of were published in an election leaflet, mean that a particularly wide latitude for freedom of expression has to be allowed.

14. The law of Scotland is the same in this respect as the common law of England. It was recently stated in the judgment of Lady Paton in *Curran v Scottish Daily Record and Sunday Mail Limited* [2011] CSIH 86; [2012] S.L.T 359 at paras [45] and [53] in which she gave reasons for deciding that the words complained of in that action did not have a defamatory meaning. She said:

> “[45] There is a clear line of authority in Scottish law to the effect that a wide latitude is allowed to comment and criticism in the political and public sphere. In the late 19th century, Lord Shand observed at page 1113 of *Godfrey* v *W & D C Thomson* (1890) 17 R 1108:

> "... I think that in these times persons must be allowed to speak pretty freely of public political conduct and principles ..."

In the same case, Lord McLaren stated at page 1114:

> "In considering cases such as the present - actions of damages against newspapers of public speakers for defamation - it is to be remembered that it is the privilege of every citizen to express his opinions freely regarding the public acts and utterances of his fellow-citizens. It is sometimes said that everyone who occupies a public position invites such criticism, and it will not, I think, make the criticism actionable that it is uncourteous, or even offensive or vituperative, provided it amounts to nothing more than an expression of opinion on a matter of public concern ..."

> [53] … criticism of public conduct in the context of a political struggle, even if strongly worded ("scab") and even if not always entirely accurate …, in our view falls well within the latitude permitted by the law where comments are made about persons acting in their public capacity. In particular, we are not persuaded that the article would lower the pursuer in the esteem of right-thinking members of the public. …
>
> In our view, the readers of the article would appreciate that they were witnessing a political skirmish, with warring factions within the SSP and diametrically opposed views about how the party and its members should conduct themselves, .."

15. The common law is consistent with the Strasbourg Court's jurisprudence on freedom of expression under Art 10 of the Convention. Mr Glen also cites *Bowman v United Kingdom* (1998) 26 EHRR 1 at para [42]:

> "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system ... The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature" ... For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely."

16. In this context there is no suggestion that Mr Crow's rights under Art 8 of the Convention (right to respect for private life) are engaged.

SUBMISSIONS

17. Mr Crystal submits that all readers of the leaflets would have understood that Mr Crow had been the General Secretary of the RMT with whom Transport for London and the Mayor (whether Mr Livingstone or Mr Johnson) had dealt since 2002, and that Mr Crow would continue to be the General Secretary of RMT with whom they would deal, whichever candidate won the election in May 2012. So the reader could not understand that voting for Mr Livingstone would make a difference to the involvement of Mr Crow in the affairs of London. He submits that the leaflets are capable of meaning that Mr Crow is one of those involved in the scandals, waste and other matters referred to in the press cuttings. If the reader asks himself why Mr Crow is named in the leaflet at all, the answer must be that because he is involved in the scandals and waste. He submits that the words complained of are plainly capable of exposing Mr Crow to hatred and contempt, and to cause him to be shunned or avoided.

18. Mr Glen submits that the cuttings referring to cronies, scandals and waste are not capable of being understood as referring to Mr Crow. Such a meaning would be contrived and unreasonable. The references to waste and scandal are only capable of being understood as references to Mr Livingstone. The reader could only understand Mr Crow to be one item on a list that starts with tax rises and ends with waste. The cuttings that are capable of referring to Mr Crow are, he submits, only those that mention the tube or a picket line, but they are not capable of being defamatory or Mr Crow.

19. Mr Glen submits that to say of Mr Crow that his association with Mr Livingstone seriously damages Mr Livingstone's electoral prospects is not capable of being defamatory, because there is no one view that right thinking people should hold as to whether damaging Mr Livingstone's electoral prospects is a good thing or a bad thing. To say of Mr Crow that Mr Livingstone's association with him will cause grave harm to the interests of Londoners is well within the range of political speech that is acceptable at an election, and is not capable of being defamatory.

20. Mr Glen accepts that the leaflets are critical of Mr Crow, but it does not follow that they are defamatory.

DISCUSSION

21. It is plain that whether or not an association with Mr Crow would tend to damage the electoral prospects of Mr Livingstone, or would be understood as meaning that Mr Livingstone would be likely to harm the interests of Londoners, must depend on the political views of the reader of the leaflet. Insofar as the leaflet is issued by Mr Johnson, plainly it is issued with the intention that the reader should understand that such an association carries negative connotations for the electorate. But whether words are defamatory, or merely insulting, or not even that, does not depend upon the intention of the publisher. The test is the understanding of the reasonable reader.

22. In this case the reasonable reader will be a Londoner, and the views of Londoners at that election were divided. There were a number of candidates at this election, as on previous elections. And as everyone knows, whether or not Mr Livingstone ought to be elected as Mayor of London was not a question upon which it could be said there was a right or a wrong answer which all right thinking people should give. So in my judgment the first meaning pleaded by Mr Crow is not capable of being defamatory.

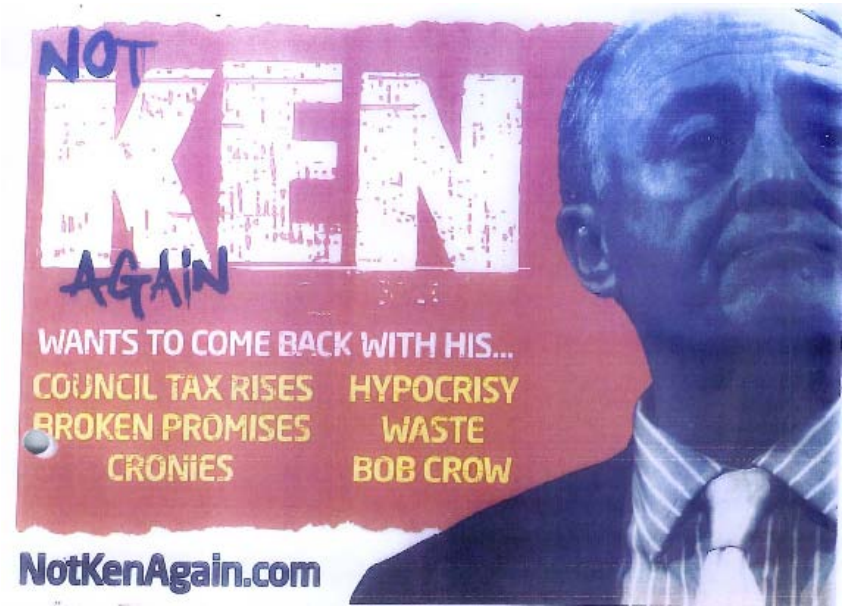
23. The second and third meanings Mr Crow attributes to the leaflets could, I accept, be defamatory in certain contexts: supporting political immorality, scandals and waste. But there are two difficulties. First, what is described in the leaflet by the words "council tax rises, scandals, broken promises waste and cronies" are plainly what Johnson and his supporters attribute to Mr Livingstone, who is not a claimant in these proceedings. An association with Mr Crow is simply one other matter which is attributed to Mr Livingstone. In my judgment no reasonable reader could understand those matters to be attributed to Mr Crow by this leaflet. It is true that the reasonable reader would understand that Mr Crow would remain General Secretary of the RMT whoever was elected Mayor. But what the leaflet is drawing attention to is Mr Livingstone's reported statement that he would be on the picket line himself.

24. Further, in the context of a hotly contested election, these meanings could not in any event be held to be defamatory. In defamation context is crucial. In the context of an election, statements by one candidate about another candidate, or about a person associated with another candidate, are not capable of being understood as anything other than partisan. In the present case it cannot be said that right thinking members of society generally could understand the partisan statements in the leaflets complained of as adversely affecting Mr Crow in their estimation.

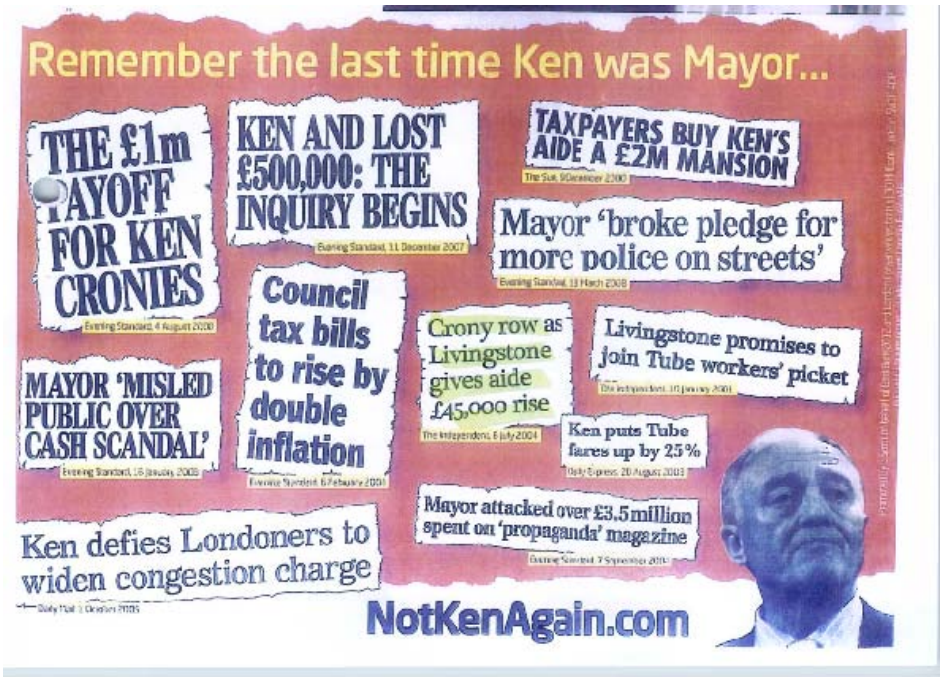
CONCLUSION

25. In my judgment the words in the leaflet that Mr Crow complains of are within the latitude permitted by the law in the context of the election in the course of which they were published. They are not capable of being defamatory of Mr Crow, and so the action must be struck out.

26. The front of both leaflets is:



27. The back of the second leaflet is:


Remember the last time Ken was Mayor...
THE £1m PAYOFF FOR KEN CRONIES
KEN AND LOST £500,000: THE INQUIRY BEGINS
TAXPAYERS BUY KEN'S AIDE A £2M MANSION
Mayor 'broke pledge for more police on streets'
Council tax bills to rise by double inflation
Crony row as Livingstone gives aide £45,000 rise
Livingstone promises to join Tube workers' picket
MAYOR 'MISLED PUBLIC OVER CASH SCANDAL'
Ken puts Tube fares up by 25%
Mayor attacked over £3.5 million spent on 'propaganda' magazine
Ken defies Londoners to widen congestion charge
NotKenAgain.com