



Neutral Citation Number: [2022] EWHC 837 (QB)

Case No: QB-2020-002381

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

Between :

Dr ARUJUNA SIVANANTHAN

Claimant

- and -

Mr THURAIRAJAH VASIKARAN

Defendant

Mr Jonathan Price (instructed by **Preiskel & Co LLP**) for the **Claimant**
Mr Nicholas O'Brien (instructed by **Nag Law Solicitors**) for the **Defendant**

Hearing date: 21st March 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 3pm 6th April 2022.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice :

Introduction

1. Both parties are members (the claimant, Mr Sivananthan, was chair) of the British Tamil Conservatives (BTC), a political organisation affiliated to the Conservative Party. The defendant, Mr Vasikaran, also belongs to the British Tamils Forum (BTF), a non-partisan organisation ‘which represents and gives voice to a large Tamil community in the United Kingdom in political and socio-economic spheres’. Both parties describe their intense awareness of the troubled history of the Tamil people, and their deep commitment to the interests of the Tamil community in the UK. But there is a history of animosity between them, well-known in the political and community environments they share, and illustrated in incidents and grievances arising in that context over the years.
2. Mr Sivananthan has now brought a libel action against Mr Vasikaran, because of two or three posts he made in 2019 to a WhatsApp group they both belonged to. The group was set up ahead of the May 2018 local elections to help promote Conservative and UK Tamil interest in those elections. It seems to have comprised around 20-30 members, wholly or mainly BTC activists, all well-known to each other. The WhatsApp group continued to discuss political matters for a while after the elections. It closed in October 2019.
3. Mr Sivananthan’s claim was listed for a three-day trial from 21st to 23rd March 2022, at which a certain amount of witness evidence was to be given. This listing followed lengthy litigation history, and what might be described as intensive efforts at case management. The most recent of these was an order of Master Dagnall in October 2021, directing process towards an agreed list of issues to be determined at trial. That objective was only partially achieved. The parties’ pleadings and skeleton arguments showed in particular how far their positions remained uncertainly contingent on preliminary issues which had not themselves been brought fully into focus.
4. In these circumstances, I received the parties’ submissions on the merits of adjourning the hearing after submissions on (a) the single natural and ordinary meaning of the posts complained of; (b) whether the posts amounted to statements of fact or of opinion; and (c) whether the posts were defamatory of Mr Sivananthan at common law – to enable me to give a ruling on those preliminary issues. I concluded it would assist the efficient and fair disposal of the case, narrow and focus the remaining issues to be determined on the evidence, reduce overall costs and the burden on witnesses, and be in the interests of justice as a whole to do so.

Legal principles and approach

5. I had adopted the standard approach to determination of meaning. I first read the posts complained of, without knowing what either party wanted to say they meant. I formed and noted some provisional views. I then read the pleadings and the skeleton arguments. I heard oral submissions and reserved judgment.

6. I directed myself to the guidance on ‘meaning’ distilled from the authorities and set out in *Koutsogiannis v Random House Group* [2020] 4 WLR 25, at paragraphs 11 and 12. My task is to “*determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear*”. The governing principle is reasonableness. The intention of the publisher – here, Mr Vasikaran – is irrelevant in law: the test focuses on how words are read, not how they come to be written. It is objective, not subjective.
7. I keep in mind, as guided, the perspective of an ordinary, reasonable reader of WhatsApp posts like those in the present case, reading each post once through in the context in which it appears, and forming an impression of what they convey on their face. The reasonable reader is neither naïve nor suspicious; is able to read between the lines and pick up an implication; and is allowed a certain amount of loose thinking without being avid for scandal.
8. I am guided away from over-elaborate analysis of text. That is not, in particular, how social media posts are read (*Vardy v Rooney* [2020] EWC 3156 (QB) at paragraph 18; *Stocker v Stocker* [2019] 2 WLR 1033 at paragraphs 41 to 47). I need to avoid both literalism, and any strained or forced interpretation. I can and must determine the single meaning I myself consider correct, and am not bound by the meanings advanced by the parties, so long as I do not alight on something more injurious than the claimant’s pleaded meaning.
9. Natural and ordinary meaning – as opposed to innuendo meaning, which is not pleaded in the present case – does not rely on the reader having any special knowledge. No evidence beyond the posts complained of is admissible as to what they mean. At the same time, context is important. The dividing line between intrinsic context (to be taken into account in determining natural and ordinary meaning) and extrinsic context (relevant only to innuendo meaning) is fact-sensitive, particularly in the context of rapid conversational social media. The authorities do however provide some useful guidance, and I have directed myself to the helpful survey of the caselaw set out at paragraphs 13 to 18 in *Riley v Murray* [2020] EWHC 977 (QB). Nicklin J explains there that he derives from the decisions on ‘context’ that a determination of natural and ordinary meaning can take into account matters of common knowledge, matters incorporated into a publication by express reference, and ‘matters of directly available context’; but ‘*the fundamental principle is that it is impermissible to seek to rely on material as ‘context’ which could not reasonably be expected to be known (or read) by all the publishees*’.
10. I have also seen how these general principles may be applied in the particular context of a WhatsApp group conversation in *Abdulrazaq v Hassan* [2019] EWHC 2930 (QB). But each case turns on its own facts. The guidance of the authorities is just that – guidance – intended to simplify not complicate the exercise.
11. I have further directed myself to *Koutsogiannis* at paragraphs 16 and 17 for guidance on considering whether the words complained of contain allegations of fact or opinion. On this, again, the question is how the words would strike the ordinary, reasonable reader. Subject matter and context can be especially important here. “*Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.*” but sometimes care is needed: there is

a difference between comment which is pure opinion and comment which is an imputation of underlying fact.

12. I am reminded by the authorities that the test for the difference between fact and opinion is an objective one. That comes back to how the words would strike the ordinary reasonable reader. I have to look at the substance, not the intention of the writer or any label the writer may have attached.
13. The test at common law for whether a (natural and ordinary) meaning is defamatory is well-established: whether it substantially affects in an adverse manner the attitude of other people towards a claimant, or has a tendency to do so. Some recent authorities put it in terms of identifying that a claimant has breached the common, shared values of our society. This is not about actual impact at this stage, it is about the meaning of the words themselves and their inherent tendency to damage someone's reputation. 'Substantially' imports a threshold of gravity or seriousness.
14. While there are three preliminary issues I am required to determine, the authorities also counsel against the dangers of trying to solve them in too linear or compartmentalised a fashion. I have to bear in mind whether this is a case in which the questions of 'meaning' and 'fact/opinion' might throw light on each other, such that it would be wrong to tackle them in an order which proves to be a trap of false logic. I note the risk and seek to avoid it.

The publications complained of

15. On 14th July 2019, in response to a post by 'Ragu' under a picture of two birds, Mr Vasikaran posted the following to the WhatsApp group:

You should have labelled these two birds Aru & Gajan as only these two individuals are reverse lobbying the Tamil Community's hard work.

Boris was MISLEAD by the BTC leadership to 'Deepening ties with Sri Lanka' and we know when Aru & Gajan registered the APPGT on their name.

Please wake up Ragu anna.

An hour later he added this:

Ragu anna, the 3rd evidence, please CAREFULLY read Boris's letter to Aru. You can see how Boris was misled or misinformed. Do you agree with the contents?

I am really disappointed in Aru & Gajan for misleading the future PM of this country as the Tamil Community's hard work and resources are being wasted by these two individuals.

16. On 14th October 2019, Mr Vasikaran posted this to the WhatsApp group:

...and claiming credit for others achievements, BACKSTABBING other organisations including APPGT,

isolating contributors and breaching the BTC Constitution for their own personal interests. Its really sad.

The dispute

17. Mr Sivananthan fears that the natural and ordinary meaning of the July posts – what they say about him – is that he had

purposefully and seriously misled Boris Johnson, and wasted funds raised and undermined hard work put in by the Tamil community.

He fears that the natural and ordinary meaning of the October post is that he had

- a. falsely claimed credit for the achievements of others;
- b. behaved towards Tamil community groups as if he was supportive of them whilst at the same time doing them down in secret; and
- c. acted in his own personal interests in his capacity as chair of BTC which he was bound to serve by reason of his position, and in breach of the BTC Constitution which he was bound to uphold.

He says these are all allegations of fact, and clearly defamatory of him on the common law test.

18. Mr Vasikaran has not pleaded rival equivalent ‘meanings’ for these posts. He does not agree with Mr Sivananthan’s pleaded meanings – he considers them unjustified commentary on the plain meaning of the words used – but it was put to me on his behalf that little turns on any difference between the parties as to meaning, and that, as it must be acknowledged that natural and ordinary meaning is in the end a matter of impression, I am able to form my own view straightforwardly and without further elaboration. He considers the July postings to be more in the nature of opinion than allegations of fact. He maintains that, bearing in mind the membership of the WhatsApp group and the context of a well-known and long-standing disputatious relationship between the parties, the postings cannot fairly be regarded as defamatory of Mr Sivananthan: no-one would be likely to think the worse of him as a result of reading them.
19. Of course, it is the meaning I determine that Mr Vasikaran may be called upon to defend. Whether an allegation is a matter of fact or opinion determines to an important extent the defences which may be open to him. Defamatory tendency is a potential quality of the allegations in the meaning I find, not a matter of actual impact.

Consideration

20. Construing the natural and ordinary meaning of a WhatsApp group post requires forming a quick and simple impression, since that is how conversational social media content is consumed, but also standing in the shoes of an ordinary and reasonable reader

with access to this material. There is some tension there, where posts to a political, community-interest WhatsApp group are concerned, since all the members share a minimum degree of context not available to a non-member. I bore that in mind when first looking at these posts.

21. Doing so, I was able to form a quick and general impression of their accusatory nature. In the July posts I noted accusations of ‘reverse lobbying’, misleading or misinforming and wasting community resources and hard work. And the October post struck me as in effect a list of accusations of unprincipled behaviour. I was able swiftly to infer a certain amount of the political context. I noticed the key role of the letter mentioned in the second July post, and understood it to be a clear link between the two July posts. But I was also conscious of the limitations of reading these posts in isolation. In particular, it was not immediately clear to me to what the ellipsis at the beginning of the October post referred, nor, indeed, who it was who was being accused there. It was not obvious at first blush whether or how this later post related to the earlier posts. There seemed to be missing context.
22. So I had expected, when I turned to look at what the parties had to say about the meaning of these posts, to find suggestions for ‘context’: other material confirmed by the authorities as capable of being relevant to natural and ordinary meaning. In particular, I had expected to find the surrounding group chat. A conversational medium generally requires at least some sense of the conversation, to yield meaning to any part of it: as Saini J observed in *Abdulrazaq v Hassan*, ‘*where the statement is part of a debate, the whole of the debate is likely to be relevant context*’.
23. The parties have provided a great deal of context as to the disputatious relationship between them, and the wider political and cultural backdrop against which it has played out; but limited textual context for understanding these posts. Context relevant to meaning is not explicitly pleaded as such by either party. That is problematic: Mr Sivananthan sought to take a pleading point against Mr Vasikaran on this issue, but at the same time it is not properly open to a libel claimant to decontextualise social media posts and strip them of the conversational setting of which they are a part. I have in these circumstances tried to take a balanced and common-sense approach, guided by the authorities and informed by the parties’ submissions and what I understand to be uncontroversial facts in the case.
24. Clearly ‘Aru’ in the July posts refers, and would be understood by all readers to refer, to Mr Sivananthan (and ‘Gajan’ apparently to a colleague of his). ‘Boris’ plainly refers to the then future Prime Minister who, at the time, was campaigning to be elected leader of the Conservative Party following the resignation of Mrs Theresa May in May 2019. ‘APPGT’ is an abbreviation for the All-Party Parliamentary Group on Tamils. These are matters of common knowledge. (In this context, noting ‘registered’, APPGT may refer to a company called ‘APPGT Secretariat Ltd’ which Mr Sivananthan had set up at the beginning of 2019 to offer secretariat services to the APPGT, an offer in the event declined. Little may turn on it, but I am prepared to accept for present purposes that this was also universal knowledge in the WhatsApp group.)
25. The July posts make express reference to ‘Boris’s letter to Aru’. This is a document which had been posted to the group by Mr Sivananthan on 12th July, shortly before the first post complained of. The parties do not dispute that it is reasonable to expect it to

have been known or read by *all* the publishees. The reference to ‘deepening ties with Sri Lanka’ in the first post quotes from it.

26. I have therefore read this letter as necessary and appropriate context for the natural and ordinary meaning of these posts. They do not yield their meaning without it. I bear particularly in mind that, in the heightened political context of the time, its politically active and sophisticated addressees would have received it with interest and read it carefully.
27. It was a letter (undated but apparently sent not long before it was posted to the group) with a ‘Back Boris’ letterhead, addressed to ‘Aru and members of the British Tamil Conservatives’ and signed by Mr Johnson. It followed up a reception on 3rd July, one of a series of receptions for sympathetic interest groups, held as part of his leadership campaign, at which it appears Mr Johnson and Mr Sivananthan met briefly. In content, it is essentially a campaign document, rallying support for the Party in general and Mr Johnson’s vision and candidacy in particular. As well as generic political messaging, it includes some inflexions towards the particular interests of its addressees (it seems that similar letters with different inflexions followed the other reception events). The following is the most relevant example:

Many Conservative voters have deserted us because we have not delivered Brexit, and so we must leave the EU on 31 October, with or without a deal. Delivering Brexit will mean that we can move beyond Brexit, unite our country and get on with striving for a brighter future for Britain. After we have left the European Union we can take back control of our trade policy for the first time in decades, including deepening ties with countries such as Sri Lanka. We will stand up for businesses, recognising that support for individual enterprise is the backbone of this country’s economic success, and we will finally be free to strike our own trade deals with other countries around the world.

28. I have had regard to some further context. Although I was not shown the group chat more extensively, I was invited by Mr Vasikaran to have regard to a small number of posts other members made to the group, reacting to the letter. I considered them close enough in time to the July posts complained of to be reasonably regarded as part of the same conversation - immediate context for the July posts, available to all the readership of those posts.
29. They included this, on 12th July (the day the letter was posted):

Aru, it would have been better if you could have asked Boris to hold Sri Lanka to account for the Warcrimes, Crimes Against Humanity & Genocide of Tamils instead of DEEPENING ties with Sri Lanka.

You have wasted and reversed the Tamil Community’s hard work and lobbying the Conservative Party for over a decade. We are really disappointed in you, Aru.

How could you do this to our Tamil community?

And this, on 14th July, the same day as the posts complained of:

Seriously Ragu anna

Do you agree that Boris has been misled and misinformed?

Can you knock on the Tamils doors with that letter?

Don't you realise that the letter will turn many people away from Conservatives to vote labour?

The chairman and secretary of BTC must take full responsibility for misleading the future PM of UK.

30. Although the particular mention of Sri Lanka in Mr Johnson's letter was no doubt intended to add colour and community appeal to what was otherwise a generic political message, Mr Vasikaran's posts and the other proximate comments show clearly it had proved divisive in the Tamil community. Many Tamils hold the Sri Lanka political regime, past and present, responsible for oppression and atrocity committed against the Tamil people. A foreign policy of deepening trade ties with that regime is the opposite of what many British Tamils were seeking to achieve; on the contrary, there had been a concerted effort to encourage the imposition of trade sanctions. Mr Vasikaran and others plainly took particular exception to this reference. It would appear from all the July posts, however, that they were reluctant to blame Mr Johnson for writing it, and inferred instead that he had been misled into doing so. A reasonable reader would clearly understand that Mr Vasikaran's posts put the blame squarely on Mr Sivananthan and 'Gajan' for misleading Mr Johnson and causing him to write what he did, thus undermining British Tamil efforts to see the Sri Lankan regime challenged and held to account for its actions.
31. Turning to the October post, the parties appear to agree it does refer to Mr Sivananthan, and would have been universally understood in the WhatsApp group as referring to him. That is because of the following context.
32. Mr Johnson's letter (to 'Aru and members of the British Tamil Conservatives') had opened with thanks for past campaigning and lobbying efforts. It then said this:

A great example of how you have worked with parliamentarians is when you took a number of MPs last year to the UN Human Rights Council in Geneva. This resulted in a House of Commons debate, so I know first-hand just how effective the BTC are in campaigning.
33. One of the posts to the WhatsApp group at the time of the letter, on 12th July, took exception to this attribution of praise to the BTC, and blamed Mr Sivananthan for it:

Aru, BTF taken MPs to UNHRC, not you. Please stop claiming credit for someone else's hard work!
34. This appears to be relevant context for the meaning of the reference in the October post to 'claiming credit for others' achievements', and I accept that Mr Johnson's letter would still have been a reference point for the whole of the group at that date; it was

- evidently a memorable letter in the group (even if only because it had touched more than one raw nerve). In the October post, a reasonable reader in this context would understand that Mr Vasikaran, a BTF member, was further referencing Mr Johnson's letter and blaming Mr Sivananthan for taking the credit, including on behalf of BTC, when it was the BTF, not the BTC, which had taken the MPs to Geneva.
35. No other context relevant to the natural and ordinary meaning of the words complained of is proposed or suggests itself.
 36. I remind myself that my task is not to agree or side with one party or another about meaning but, having formed some initial quick views about these few posts, to consider what the parties say about them, look at such context as appears to me to be proper, reasonable and relevant, and test my initial views, before doing what I am required to do by law: find a single natural and ordinary meaning. I must look at the posts as they would have been read, in such of their immediate conversational context as I have. I remind myself that social media comment is fast-moving, consumed quickly and reacted to impressionistically and briefly, but that the letter which features in this particular conversation needs to be properly understood for the light it sheds on it.
 37. Reading the July posts in the WhatsApp group's shared context of Mr Johnson's letter and a small number of others' immediate reaction to it, it seems to me to be blaming Mr Sivananthan for the passage referring to deepening ties with Sri Lanka. That passage, and the policy it suggested, are said to be the opposite of what the Tamil community was trying to achieve, and undermined the efforts and resources the community had put in to securing a foreign policy position of holding Sri Lanka to account for its treatment of Tamils. Mr Sivananthan is blamed for this – he and his colleague have caused Mr Johnson to be misinformed or misled.
 38. I do not agree with Mr Sivananthan that there is a quality of 'purposefully and seriously' to the allegation of misleading over and above the claim that he is responsible. But the allegation of responsibility does strike me as an allegation of fact – that the letter is as it is because of something Mr Sivananthan has done or said. The effect of the letter is alleged to be the undermining of the Tamil community's efforts and resources. That too must therefore be laid at Mr Sivananthan's door. But that conclusion strikes me as more in the nature of '*something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc*' (Koutsogiannis at paragraph 16(ii)) – that is, an expression of opinion.
 39. The October post seems to continue the theme of blaming Mr Sivananthan for Mr Johnson's letter thanking the BTC rather than the BTF for the Geneva trip, and thus undermining the efforts of others in the Tamil community. I do not read it as necessarily suggesting Mr Sivananthan positively misled Mr Johnson on this score also (although that perhaps hangs in the air). But it at least suggests that Mr Sivananthan was happy to allow the misattribution of praise to persist and that his failure to set the record straight was reprehensible.
 40. It is not clear to me *without context* that the remaining allegations of backstabbing other organisations and 'isolating contributors' can be readily understood as going any further than amplifying the allegations of undermining other Tamils: they are simply too allusive and unparticularised. As for 'breaching the BTC Constitution for their own personal interests', again, without context, that suggests some unspecified (factual) act

inconsistent with that constitution and Mr Sivananthan's membership or leadership of the BTC, and ascribes a motive for that (as a matter of opinion).

41. My conclusion as to the natural and ordinary meaning of the words complained of is that they mean:

Mr Sivananthan misled or misinformed Mr Johnson, causing Mr Johnson to refer in his letter to 'deepening ties' with Sri Lanka. *That in turn will have the effect of undermining or reversing the hard work, and wasting the resources, others in the Tamil community have put in to promoting a very different foreign policy towards Sri Lanka and/or attracting support for the Conservative Party.*

Mr Sivananthan also, actively or by omission, takes the credit given in the letter to the BTC for taking parliamentarians to the UNHRC in Geneva, when it was the BTF that did so. *This, and other behaviours, also undermines others in the Tamil community.*

Mr Sivananthan has acted in breach of the BTC constitution *in order to advance his own interests.*

42. Allegations amounting to statements of opinion are indicated in italics. The allegations otherwise amount to statements of fact. I am satisfied that none of the meanings I have found is worse than those pleaded by Mr Sivananthan.
43. I turn to whether these allegations, or any of them, are defamatory of Mr Sivananthan at common law – that is, whether they have an inherent tendency substantially (a threshold of gravity) to affect adversely the attitude of readers towards him or to suggest he has breached the common, shared values of our society. I remind myself that this is not at this stage about actual impact on any readers, but about the intrinsic meaning of the words and what they say about Mr Sivananthan.
44. While I have not agreed with Mr Sivananthan that the natural and ordinary meaning of these posts includes any adverbial qualifications in the allegations of misleading or misinforming, I do agree that the accusatory nature of the posts, and the holding of Mr Sivananthan responsible for the aspects of Mr Johnson's letter to which Mr Vasikaran takes exception, impute to him a real degree of wrongdoing in the misleading/misinforming – particularly in doing so to a candidate for Party leader and Prime Minister, at a politically sensitive time, and about a matter going to the heart of community feeling and endeavour. That is a shocking and alienating kind of allegation to make about a BTC leader.
45. I am also satisfied that the various accusations of ultimate responsibility for undermining others in the Tamil community suggest a serious transgression of common shared values. In reaching that conclusion I have particular regard to the seriousness of the subject-matter underlying all of this – the history of Tamil suffering nationally and individually, and the appropriate stance of the UK to Sri Lanka in consequence. I take into account that, although the general context is political, the sting of these posts is personal: this is not regular political debate, however impassioned, it is imputation

of personal misconduct, unethical, self-serving behaviour and disloyalty. I am satisfied that these posts, individually and collectively, are defamatory of Mr Sivananthan at common law.

Conclusions and next steps

46. The natural and ordinary meaning of the publications complained of, and whether they are allegations of fact or opinion, are set out at paragraphs 40 and 41 above. In that meaning, they are defamatory in tendency.
47. The purpose of this preliminary ruling has been to clarify the basis on which the parties can decide how most efficiently to proceed, if so advised, and how best to marshal the written and oral witness evidence they would need, to advance their respective positions. The parties intend to reflect on their positions in response to this ruling, and I shall be inviting written submissions on case management directions before this claim progresses any further to trial.
48. I remind the parties that, should this litigation continue, it will be for Mr Sivananthan to establish that the posts complained of are not only of defamatory tendency at common law, but also pass the threshold set out in section 1 of the Defamation Act 2013 – that they have caused or are likely to cause serious harm to his reputation. That requires looking beyond the intrinsic meaning of the words and considering the facts and evidence about their impact.
49. It would then be for Mr Vasikaran to establish that the factual allegations are substantially true (section 2 of the 2013 Act), the opinions are justifiable in accordance with section 3 of the Act, or that any other available defence is made out.