

Flood v Times Newspapers Ltd  
[2012] UKSC 11

## Summary

The claimant worked in the Metropolitan Police Service Extradition Unit. He was named by the defendant's newspaper as being under investigation for corruptly accepting bribes in return for information about the Russian government's attempts to extradite various Russian nationals who had taken up residence in London. The claimant sued for defamation. The defendant did not attempt to justify the allegations in the newspaper article but instead argued that they were subject to *Reynolds* privilege, which protects responsible journalism on matters of public interest.

At first instance, Tugendhat J held that the article was protected by *Reynolds* privilege: allegations that a police officer had been accepting bribes were clearly a matter of public interest and the story had been handled responsibly. The Court of Appeal disagreed on the last point, holding that the author of the article had not done enough to verify the allegations that the claimant had accepted bribes. The UK Supreme Court unanimously reversed the Court of Appeal's decision, and reinstated Tugendhat J's decision that the article was protected by *Reynolds* privilege. All five Supreme Court Justices who heard the case gave a judgment.

### **Lord Phillips...**

(1) ...agreed (at [42]) with Lady Hale in *Jameel (Mohammed) v Wall Street Journal Europe* (2007) that for *Reynolds* privilege to be pleaded, it had to be shown that 'there must be some real public interest in having this information in the public domain.' He doubted 'if this formulation could be bettered.'

(2) ...thought (at [51]) that in determining whether the defence of *Reynolds* privilege was available to a journalist, no attempt should be made to determine what *the* meaning of the words published by the journalist were. Instead, in determining whether the journalist had acted responsibly in publishing the story as he or she did, account should be taken of the full range of meanings that it was possible to put on the story.

(3) ...held (at [68]) that in relation to stories alleging that a public officer is under investigation for accepting bribes, the 'overriding test [for determining whether the story is protected by *Reynolds* privilege] is one of responsible journalism.' In other words, so long as the journalist acted responsibly in reporting the story, the requirement that the story be on a matter of public interest would be automatically satisfied. But in deciding whether to publish a story claiming that X was under investigation for acting corruptly, a responsible journalist would have to weigh the public interest in being informed of that investigation against the potential prejudice that X might suffer as a result of everyone being told that he was under investigation before he had had a chance to clear his name.

(4) ...held (at [69]) that the journalist (MG) who wrote the story that had given rise to the claim in *Flood* had acted responsibly in deciding to go ahead with the story – despite the potential prejudice to Flood that publishing the story would involve – because he legitimately feared that if the facts of the investigation were not made a matter of public knowledge, the police might be inclined to sweep the allegations of corruption against Flood under the carpet.

(5) ...held (at [74]) that MG had acted responsibly in naming Flood as being the officer who was being investigated because those who knew Flood either already knew that he was under investigation or would be able to identify him as being the subject of the story, and that

there was a danger that if he was not named, people who did not know Flood would begin to suspect innocent members of the Extradition Unit as being the targets of the investigation.

(6) ...held (at [76]) that a responsible journalist will not need to verify the truth of allegations made against a particular individual in a case of reportage, where the journalist is merely reporting the existence of a dispute between two people, and where the public interest attached to the story is the fact of the dispute, and not the truth of the allegations made by the disputants. But the story in *Flood* was not a case of reportage: the public interest in learning of the allegations made against Flood lay not in the fact that the allegations had been made, but in the truth of those allegations.

(7) ...drawing on the decision in *Chase v News Group Newspapers Ltd* (2002), drew (at [8]) a distinction between different types of meaning that people can put on a newspaper story that reports that someone is under investigation. In a *Chase* level 1 case, the newspaper story leads people to believe the claimant is guilty. In a *Chase* level 2 case, the story leads people to believe that there are reasonable grounds to suspect claimant is guilty. In a *Chase* level 3 case, the story leads people to believe that there are grounds for investigating whether claimant was guilty.

(8) ...held (at [79]) that in a *Chase* level 1 case, a journalist would not be able to argue that he acted responsibly in publishing the story unless he had satisfied himself, on reasonable grounds, that the claimant was in fact guilty. But *Flood* was not a *Chase* level 1 case – a reasonable person reading the story in *Flood* would not be entitled to conclude from it that Flood *was* guilty of accepting bribes.

(9) ...held (at [80]) that where ‘a journalist alleges that there are grounds for suspecting that a person has been guilty of misconduct, the responsible journalist should satisfy himself that such grounds exist, but this does not necessarily require that he should know what those grounds are. Their existence can be based on information from reliable sources, or inferred from the fact of a police investigation in circumstances where such inference is reasonable.’

(10) ...held (at [81]) that the story in *Flood* went further than simply alleging that there were grounds for suspecting that Flood was guilty of misconduct, but could be construed as alleging that there were strong grounds for believing that Flood had abused his position. Given this, ‘responsible journalism required that [MG] should be reasonably satisfied that the [facts alleged in the article as supporting the allegations against Flood] were true and that there was a serious possibility that...Flood had been guilty of the corruption of which he was suspected.’

(11) ...held (at [98]-[99]) that the evidence indicated that MG reasonably thought that the ‘supporting facts’ instanced in his article as supporting the allegations against Flood were true, and that MG thought that there was a serious possibility that Flood was guilty of corruption. Given this, ‘the requirements of responsible journalism were satisfied’ and MG’s story about Flood was protected by qualified privilege.

(12) ...held (at [106]) that given that the Supreme Court had not had the benefit of argument on the matter, it would be inappropriate to address the issue of when an appellate court like the Court of Appeal should feel itself entitled to set aside a decision of a first instance judge that a story was protected by qualified privilege, and when the appellate court should defer to the judgment of the first instance judge who will have had the benefit of hearing at first hand the evidence of journalists as to how they approached the story that is the subject of complaint.

### **Lord Brown...**

(13) ...agreed (at [111]) with Lord Phillips’ point at (2), above.

(14) ...held (at [113]) that ‘In deciding whether *Reynolds* privilege attaches... the judge, on true analysis, is deciding but a single question: could whoever published the

defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?’

(15) ...confessed (at [115]) that he had doubted whether *Reynolds* privilege could ever attach to a story reporting that someone was under investigation by the police before the police had had a chance to conduct that investigation, let alone charge the suspect.

(16) ...but held (at [118]-[119]) that in the end he thought that there was no principle of law that would rule out *Reynolds* privilege being pleaded in a case like this, where ‘the denunciation is of a public officer, relates to a matter of obvious public importance and interest, and may justifiably appear to the journalists to be supported by a strong circumstantial case’. In such a case, he thought, ‘it seems to me properly open to the trial judge to find the defence made out.’

### ***Lord Mance...***

(17) ...agreed (at [126]) with Lord Phillips (see point (1), above) that Lady Hale’s formulation as to when *Reynolds* privilege would be available was ‘helpful’.

(18) ...held (at [137]) that the courts should ‘give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect.’

(19) ...agreed (at [158]) with Lord Phillips that the defence of *Reynolds* privilege ‘involves a spectrum. At one end is pure reportage, where the mere fact of a statement is itself of, and is reported as being of, public interest. Higher up is a case like the present, where a greater or lesser degree of suspicion is reported and the press cannot disclaim all responsibility for checking their sources as far as practicable, but, provided the report is of real and unmistakably public interest and is fairly presented, need not be in a position to produce primary evidence of the information given by such sources.’

(20) ...thought (at [179]-[181]) that all the evidence indicated that MG had handled the story responsibly. He had been motivated by a concern to ensure that the investigation into Flood was properly carried out. He had investigated the ‘sources and nature of the allegations exhaustively’. The article ‘was balanced in tone and content’. Everyone involved in the story had been given an opportunity to comment on it.

(21) ...agreed (at [182]) with Lord Phillips’ point at (12), above.

### ***Lord Clarke...***

(22) ...agreed (at [184]) with the judgments of Lords Mance and Dyson.

(23) ...agreed (at [184]) with Lord Brown’s formulation of when the defence of *Reynolds* privilege would be available at (14), above.

(24) ...agreed (at [186]) with Lord Phillips’ point at (12), above.

### ***Lord Dyson...***

(25) ...agreed (at [190]) with the judgment of Lord Mance.

(26) ...agreed (at [190]) with the judgment of Lord Phillips on what steps need to be taken by a responsible journalist to verify a story alleging that someone is being investigated for an offence (see points (8) – (10), above).

(27) ...thought (at [195]) that in deciding whether it was responsible to publish a story alleging that someone is under investigation for committing an offence, a distinction needs to be drawn between allegations made against ordinary individuals and allegations made against

persons who perform public functions. The ‘danger of trial by press without proper safeguards will often weigh heavily against the publication of the details of an accusation against an ordinary individual.’ But the same is not true of allegations of corruption that have been made against a public officer: ‘It is generally likely to be in the public interest to publish the details of allegations of police corruption, whatever the nature of the alleged corruption, provided that the test of responsible journalism is met.’

(28) ...held (at [199]) that in determining whether it was in the public interest to name Flood as the officer who was being investigated for corruptly accepting bribes, ‘weight should be given to a newspaper’s editorial judgment as to what details are necessary to convey the essential message. These include whether an individual should be named... the court should be slow to interfere with an exercise of editorial judgment and would hold on that ground... that the naming of the individual was justified in this case.’

(29) ...agreed (at [203]) with Lord Phillips’ point at (12), above.

## Comments

The 4th edition of McBride & Bagshaw is fiercely critical of the Court of Appeal’s decision in the *Flood* case, condemning it as completely contrary to the spirit of the House of Lords’ decision in *Jameel* (2007), which was intended to send a message to the lower courts to stop second-guessing respectable newspapers’ judgments about what amounted to responsible journalism. The news that the UK Supreme Court had reversed the decision in *Flood* provoked the hope that its decision would amount to a second *Jameel* and finally ensure that the defence of *Reynolds* privilege would be allowed to provide editors with some reassurance ahead of publication that they *could not be sued* provided that they aspired to standards higher than those of the now defunct *News of the World* in handling the story.

However, the Supreme Court’s decision in *Flood* comes as a crashing disappointment. While there are a few *Jameel*-like references in *Flood* to the need to give weight to the judgment of editors and journalists as to what amounts to responsible journalism (see points (18) and (28), above), they are few and far between and likely to be lost amid the torrent of words produced by the Supreme Court in trying to dispose of this case (73 pages! 203 paragraphs!). Lord Phillips’ cheese-paring distinctions between alleging that there are *grounds* to believe that someone has committed an offence, and alleging that there are *serious grounds* to believe that someone has committed an offence are likely to provide little reassurance to journalists who want to know how much they need to do to verify allegations of wrongdoing in order to reach the safe haven of ‘responsible journalism’. The very detailed consideration of the conduct of the journalists who prepared the story in *Flood* in both Lord Phillips’ and Lord Mance’s judgments will do nothing to discourage lower courts from endlessly picking over the details of a journalist’s investigation in order to see whether the journalist’s conduct comes up to *their* standards of ‘responsible journalism’.

It was completely inappropriate in a case of this type for the Supreme Court to deliver five different judgments, all saying different things about when *Reynolds* privilege could be pleaded. *Reynolds* privilege cannot work to free newspapers from the ‘chilling effect’ of being threatened with actions for defamation unless it is *clear and certain* as to when it will apply. The Supreme Court has passed up its opportunity to provide us with such clarity and certainty in this vital area of the law, instead contenting itself with expressing the pious hope that in time ‘a valuable corpus of case law will be built up’ as to when *Reynolds* privilege will be available (Lord Phillips at [26], Lord Dyson at [187]). Who knows when they will get another chance? And who knows how many stories on vital matters of public interest will be suppressed by the newspapers in the meantime, because decisions such as those in *Flood*

mean that they cannot be sure that the courts will agree with them as to what 'responsible journalism' involves?

*Nick McBride*