SEVEN POINTS ABOUT SERAFIN

Heather Rogers QC (HR) and Jonathan Price (JP), from the Doughty Street Chambers Media Team, tell you what you need to know about the latest decision from the Supreme Court on defamation

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Serafin v Malkiewicz and others
[2020] UKSC 23
(3 June 2020)

HR: Jonathan – what's the story about the Supreme Court decision in *Serafin v Malkiewicz* from 3 June 2020?

JP: It's the first opportunity the Supreme Court has had to consider the defence of "publication on matter of public interest" – under section 4 of the Defamation Act 2013. That's a crucial defence – and there are SEVEN key points to note.

HR: Great – let's go through them. But shall we start with a bit of background? It's hard to believe that before 1999 - when the House of Lords decided the case of *Reynolds v Times Newspapers*[1] - there was no defence of public interest to a defamation claim. A media publisher had either to show that what they published was true or that it was fair comment. Eventually, the courts recognised that there had to be a defence for publication on matters of public interest, even if what was published was defamatory and untrue. There had to be some 'tolerance for error' as Lord Hobhouse put it[2]. Using old principles of "qualified privilege", the court created a new defence – with a test of "responsible journalism" – said to be the price the publisher had to pay for having the defence. The court looked at all the circumstances of the case, including a list of ten factors set out by Lord Nicholls[3]. The defence had a slightly chequered history – but was given new life by later top court decisions – the Privy Council in *Bonnick v Morris*[4] – and the House of Lords in *Jameel v Wall Street Journal*

1 [1999] UKHL 45, [2001] 2 AC 127.
2 *Reynolds* (fn1) at p238C-E.
3 *Reynolds* (fn1) at p205A-F.
4 *Bonnick* - [2002] UKPC 31, [2003] 1 AC 300.

Europe[5] – and then the Supreme Court in *Flood v Times Newspapers*[6]. So much for ancient history – what is section 4 about?

JP: The Government consulted about reform of the law of defamation in March 2011, in the face of mounting concern that the law was "failing to strike the right balance and was having a chilling effect on freedom of speech". The end result was the Defamation Act 2013[7]. Apart from introducing the new "serious harm" requirement in section 1 (which was considered last year by the Supreme Court in *Lachaux*[8]), it puts three of the big common law defences onto a statutory footing: section 2 is the "truth" defence; section 3 is that of "honest opinion"; and section 4 replaced the *Reynolds* defence with a new public interest defence[9]. For a defendant to succeed in that defence, they have to show three basic elements[10]:

(1) That the statement was on, or formed part of a statement on, a matter of public interest;

(2) That the publisher believed that publication was in the public interest; and

(3) That belief must be reasonable.

The court is required to have regard to all the circumstances of the case[11]. It must also have regard, as appropriate, to "editorial judgement"[12].

HR: That all sounds clear and workable. We know that there has not been much case law so far under section 4 (which has been in force for 6½ years now). That may indicate that it's deterring claimants from suing over public interest stories – or maybe enabling parties to settle cases (without going to court). It's been run unsuccessfully at trial in four cases[13]; and

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5 *Jameel* - [2006] UKHL 44, [2007] 1 AC 359.

6 *Flood* - [2012] UKSC 11, [2012] 2 AC 273.

7 Available at www.legislation.gov.uk/ukpga/2013/26/contents/enacted; also set out in Appendix 1 of *Duncan & Neill on Defamation* (4th edition).

8 *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2019] 3 WLR 18.

9 Section 4(6) states that the "common law defence known as the Reynolds defence is abolished".

10 Section 4(1)(a); and see *Duncan & Neill* (fn7) at [14.27]; *Economou v de Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7 at [87]; *Turley v Unite the Union* [2019] EWHC 3547 (QB) (Nicklin J) at [38(ii)]

11 Section 4(2).

12 Section 4(4).

13 *Turley* (fn 10) (D1 had not formed the relevant belief [148-149]; D2 failed to show that his belief was reasonable [153-156]); *Burgon v News Group* [2019] EWHC 195 (QB) (Dingemans J) (Ds omitted to include C's comment, which changed the 'essential thrust' of the story [95-102]); *Doyle v Smith* [2018] EWHC 2935 (QB), [2019] EMLR 15 (D had not shown such belief [75-76]; further, D knew that what he published was untrue, as he had invented and published a false confession by C [79], [84]); *Hourani v Thomson* [2017] EWHC 432 (QB) (Warby J) (two Ds relied on s4, but had not formed the required belief [164], [169], [172]; on the harassment claim, Ds

successfully – *Serafin* apart – only in the unusual case of *Economou v de Freitas*[14]. That case went to the Court of Appeal. We'll come back to some of the principles stated in *Economou* by the trial judge (Mr Justice Warby) and in the Court of Appeal (led by Lady Justice Victoria Sharp) in a minute. But what happened in *Serafin*?

JP: In *Serafin*, the trial judge found in favour of the section 4 defence at trial. This was a libel claim over publication in a Polish language magazine, published here, in this jurisdiction. The Court of Appeal overturned the judge's findings[15] and, on the way to doing so, made a number of statements of principle about the section 4 defence that were – well, without putting it too high, they would have pretty much killed it off altogether – or at least made it much more difficult to run in practice.

HR: The Supreme Court held that the Court of Appeal was right in deciding that, on the facts of the case, the conduct of the trial by the judge had been unfair. There were some devastating criticisms of his conduct – essentially bullying the unrepresented claimant – which may be interesting to those who remember the trial judge, Mr Justice Jay, from his former role as counsel to the Leveson Inquiry[16]. As the trial had been unfair, they had no option but to remit the case to be reheard before another judge[17]. That was the "decision" of the Supreme Court, but it also dealt with what it called the "second dimension" to the appeal: the Court of Appeal had included an analysis of the defence of public interest – and made "abstract statements of principle" about it – which were criticised by the defendants and by the Media Lawyers Association –

JP: We should declare our interest: that we represented the MLA as intervener on the appeal[18].

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failed to show that their conduct was reasonable in the circumstances [213-214], [235], for reasons that included that D5's thinking was 'beyond sloppy' [222]).

14 *Economou* – [2016] EWHC 1853 (QB) (Warby J: trial); [2018] EWCA Civ 2591, [2019] EMLR 7 (appeal).

15 *Serafin* – [2017] EWHC 2292 (QB) (Jay J: trial); [2019] EWCA Civ 852 (appeal).

16 The link was not lost on MailOnline: www.dailymail.co.uk/news/article-8386277/High-court-judge-censured-ill-tempered-times-offensive-language-libel-case.html

17 *Serafin* – Supreme Court at [37-51] and see the extracts from the trial transcripts in the Schedule; for those in a hurry, the devastating conclusion is at [48].

18 The Supreme Court granted permission to intervene in writing only. We appeared with Romana Canneti, instructed by Pia Sarma, Editorial Legal Director, Times Newspapers Limited, for MLA.

HR: - and even the claimant conceded that what the CA had said about section 4 was "in various places at least unfortunate". So the Supreme Court addressed those criticisms - even though this is not part of their "decision" – and it dealt with them (insofar as they were valid) – since, otherwise, what the CA had said would remain binding on the new judge at the retrial and more generally. This was an attempt to be "helpful"[19].

JP: And it will be. One useful part of the Judgement is that it reviews the Parliamentary history of section 4.[20] Interestingly enough, when it was first introduced in the draft Defamation Bill (which was put out for consultation), it was really a statutory *Reynolds* defence. The first element was the same - the defendant had to show that the statement complained of was, or formed part of, a statement on a matter of public interest – but they then had to show that they "acted responsibly in publishing"; and, in addition, the clause listed 8 factors – later increased to 9 - to which the court should have regard (and these were based on the factors identified by Lord Nicholls in *Reynolds*). That was the shape of the defence when the Bill started its Parliamentary journey on 10 May 2012.

HR: But on 19 December 2012, Lord McNally introduced amendments which transformed the public interest defence – that defence was, as he said, at "the heart of the Bill"[21].

- The first element stayed the same: the publication had to be "on" a matter of public interest.
- But the second element became that the defendant had to show that they "reasonably believed that publishing the statement complained of was in the public interest".
- And the list of factors disappeared: the court was to have regard to "all the circumstances of the case".

19 *Serafin* – Supreme Court at [1], [51-78]; for those in a hurry, the key points are summarised in this note.

20 *Serafin* – Supreme Court at [57-59], [61-66]; the court also reviewed the common law defence, including the cases mentioned above, at [53-56] and [60].

21 *Serafin* – Supreme Court at [61-65].

JP: The key differences, then, were that the defendant did not have to show that they behaved "responsibly": the new formulation required proof of a subjective element (that the defendant believed publication was in the public interest) and an objective element (that this belief was reasonable). This focused on what the defendant believed at the time they published (as Lord McNally explained). And the removal of the list of factors was, he said, to give "greater flexibility than a statutory list might provide." Parliament intended to "send a signal to the courts and practitioners to make clear the wish of Parliament that the new defence should be applied in as flexible a way as possible in light of the circumstances"[22].

HR: As the Supreme Court noted, Parliament also wanted to ensure that the new defence reflected the broad principles stated by the Supreme Court in the *Flood* case. It's interesting that they quote[23] the essential test for the Reynolds defence as the single question posed by Lord Brown in *Flood* at [113]:

> "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?"

Now that single question resonates a bit with where we are now. Which, of course, brings us to….

JP: *Serafin* – and the key points of learning, of which we have identified seven.

POINT ONE: This defence is different from the *Reynolds* defence. That might sound like a statement of the obvious – but it needed saying after the Court of Appeal in *Serafin* went so badly wrong.

The rationale for the two defences (*Reynolds*/section 4) is not materially different – and the principles underlying them are the same. BUT – and crucially - the elements of the defences ARE different. Or, to put that into Supreme-Court-speak – it is "wrong" to consider that the elements of the defences can be "equiparated". And the concept of qualified privilege – which

22 *Serafin* – Supreme Court at [63], [65].
23 *Serafin* – Supreme Court at [60].

had been relied on by the House of Lords when inventing Reynolds – was "laden with baggage" which "on any view" does not burden the section 4 defence[24].

We may do well to learn from history – but we are not bound to repeat it. In looking at section 4, don't look back at *Reynolds* - look at the section.

HR: **POINT TWO**

This is a small – and related – point. The Explanatory Notes to the draft Defamation Bill had said at the outset that the statutory public interest defence abolished the old common law *Reynolds* defence (which is true) – but then added that it was intended "essentially to codify" the common law. The Supreme Court in *Serafin* said that it was "unfortunate" that the Explanatory Notes had not been changed (as the shape of the defence changed). As they said[25]:

> "'Codify' is a strong word. One could scarcely say that the terms of the section ultimately enacted went so far as to 'codify' the law even as set out in the *Jameel* and *Flood* cases, let alone as set out in the *Reynolds* case."

Section 4 is not codifying the old defence; it's creating a new one.

JP: **POINT THREE**

The first element of the section 4 defence is whether the statement is "on" a matter of public interest. This is not the same as considering whether the publication was "in" the public interest.

You might have thought this was obvious from the words of the section – from 4(1)(a) - but the CA in Serafin got into a mess in introducing a balancing test at this stage, considering a claimant's Article 8 rights[26]. That was a mistake – it's much simpler than that. Whether the statement is on a matter of public interest is a straightforward objective question.

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24 *Serafin* – Supreme Court at [68], [72], [73].
25 *Serafin* – Supreme Court at [66].
26 *Serafin* – Supreme Court at [75].

HR: **POINT FOUR**

There's a clear message: DON'T MENTION A CHECKLIST. You look at all the circumstances of the case – as mandated by the section (in 4(2)). But, as the Supreme Court said, reference to a "checklist" is not appropriate. Parliament did not intend that the Nicholls factors should be set out and applied to the facts of the case. That's not the way to do it. And reference to acting "responsibly" is now best avoided. In terms of what you do under s4(1)(b) – you LOOK AT ALL THE CIRCUMSTANCES OF THE CASE.

When you are thinking about what those circumstances are – and providing you avoid the word "checklist" – you can still look at the Nicholls factors. The Supreme Court said that – subject to what it said was a small "quibble" – what Sharp LJ said in *Economou* at [110] was valid[27]. Just to remind you of what she said – and missing out the double negatives:

- The matters identified by Lord Nicholls may be relevant to the outcome of a public interest defence –
- AND, on the facts, the failure to comply with one or some of those factors may tell decisively against a defendant -
- BUT – as under *Reynolds* – the weight to be given to those factors, and any other relevant factors, would vary from case to case.

So basically, as the Supreme Court said: the Nicholls factors might not be a "checklist" – but that is "*not to deny that one or more of them may well be relevant to whether the defendant's belief was reasonable within the meaning of subsection (1)(b).*"

JP: Which brings us to **POINT FIVE** and an important factor, which is EDITORIAL JUDGEMENT. This is mentioned expressly in the statute – section 4(4). As Parliament intended – and as referred to in *Flood* – this is a reference to editorial judgement both as to what steps need to be taken before publication (including about verification[28]) – and what should be included in the publication. You can look back to what Lords Mance and Dyson said in *Flood* about this[29].

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27 *Serafin* – Supreme Court at [69], [77]. The quoted words at the end of this paragraph come from [69].

28 Do not forget s4(3) – not relevant in this case: a publisher is not required to verify the truth of an imputation where the statement was, or formed part of, an "accurate and impartial account of a dispute to which the claimant was a party".

29 *Flood* (fn6): Lord Mance [132-137]; Lord Dyson [194], [199]; Lord Clarke agreed with both [184].

This is a clear message to the courts to back off – but comes with an equally clear message that there are limits: editorial discretion is not unlimited; it's not a trump card that always wins; and it's not a free pass. At the end of the day, the court decides whether the belief about publication being in the public interest was reasonable.

HR: So we are nearly there now with **POINT SIX**. This is an important practical point about contacting the subject prior to publication: the Court of Appeal had referred to this as the "core" *Reynolds* factor – and, basically, made it a "requirement" for a successful defence. The Supreme Court stomped on this approach[30].

> "A failure to invite comment from the claimant prior to publication will no doubt always at least be the subject of consideration under subsection (1)(b) and may contribute to, perhaps even form the basis of, a conclusion that the defendant has not established that element of the defence. But it is, with respect, too strong to describe the prior invitation to comment as a "requirement". It was never a "requirement" of the common law defence: see the Jameel case, cited at para 53 above; and so to describe it would be to put a gloss on subsections (1)(b) and (2) of the section."

So it's not a "requirement" as such – but it is something that will "always" be considered.

And remember this was often a killer factor under the old *Reynolds* defence – and there is little doubt that courts will continue to expect that, unless there is good reason not to, that the subject will be contacted before publication and given a proper opportunity to comment.

JP: **POINT SEVEN AND LAST**

Looking at this defence overall – and coming back to its pivotal role in defamation - striking the balance between protection of reputation and freedom of expression – it's important to note that the Supreme Court considered that the three key requirements of the section[31]

> "are intended, and may generally be assumed, to ensure that operation of the section generates no violation either of the claimant's right under article 8, or of the defendant's right under article 10". The word "reasonably" is "sufficiently elastic to enable the section to be given effect in a way which is compatible with Convention rights".

30 *Serafin* – Supreme Court at [76].
31 *Serafin* – Supreme Court at [74].

So that begs the question: what will be "reasonable"? Well – how long, in all the circumstances, is that piece of string?

The Supreme Court looked back at what Mr Justice Warby said in *Economou* at [241] – approved in the CA at [101]:

> "I would consider a belief to be reasonable for the purposes of section 4 only if it is one arrived at **after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case."**

The Supreme Court – having quoted those words - said about this that, while it was

> "almost impossible to expand in the abstract on the meaning of the word "reasonable" but, so far as it goes, the judge's statement is no doubt helpful"[32].

HR: It's a bit like the famous 'metwand of proportionality'[33] – you have a straightforward principle – and then it's all about the facts.

JP: Of course.

HR: So in conclusion: we've come up with seven points for people to think about. Overall, there is no doubt that defendants are better off now – with the helpful explanation (and correction) from the Supreme Court in *Serafin* than they would have been with the Court of Appeal judgement.

JP: Absolutely. The Supreme Court has made plain that the section means what it says – it's all about the facts – and then there is everything to play for. When people are publishing – and this defence is for everyone, not just the media - they need to think about what matter (or matters) of public interest are at stake – and what they are going to publish in the public interest.

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32 *Serafin* – Supreme Court at [67].

33 See, notably, Sedley LJ in the breach of confidence case *London Regional Transport v Mayor of London* [2001 EWCA Civ 1491, [2003] EMLR 4; see also *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, [2018] 2 WLR 565.

HR: So the publication has got to be "on" a matter of public interest. And they've not only got to be believe that publication will be in the public interest (having thought about it) – but also be aware that the court needs to accept that their belief was reasonable.

JP: The court will look at "what enquiries and checks" it is "reasonable to expect" of them - in all the circumstances of the case. So they should be thinking about that too – BEFORE they publish.

HR: The court will be looking at what they did – and what they did not do. It's smart to contact the subject before publication – or to have a good reason not to do so. Sum it up in a sentence, Jonathan?

JP: The Supreme Court has gone back to the words of section 4 and brought them back to life – it's made plain that it's a practical and flexible defence – and now it's all about the facts.

HR: So that's alright then. Fancy a cup of tea?

JP: I don't mind if I do.

HR: Those are our seven points about *Serafin*. We hope you have found this recording useful. A transcript of it will be available through the Doughty Street website. And, of course, we welcome feedback. Thanks for listening.

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