

Neutral Citation Number: [2003] EWHC 1428 (OB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
The Strand
London WCA 2LL

Friday, 13th June 2003

Before:

MR JUSTICE EADY

ALEXANDER VASSILIEV

CLAIMANT

-v-

FRANK CASS & CO LIMITED

DEFENDANT

THE CLAIMANT appeared in person.

MR MONSON (instructed by Hartwig) appeared on behalf of the DEFENDANT.

JUDGMENT
(As Approved by the Court)

JUDGMENT

1. MR JUSTICE EADY: There now follow my rulings on the issues of qualified privilege. The claimant, Mr Alexander Vassiliev, is a journalist and writer, who was formerly an officer of the KGB. He is the co author of a book called "The Haunted Wood", which was published in the United States of America in 1999. The book is about Soviet espionage in America during the Stalin era, and one of the main themes of the book was that the authors had been given substantial and exclusive access to hitherto "top secret" operation files of the KGB and its predecessor agencies, which are held in the archives of the Russian Foreign Intelligence Service in Moscow.
2. The defendants are the publishers of Intelligence and National Security, a specialist journal with about 146 subscribers in the United Kingdom. Readers of the journal have a specialist interest (perhaps professional, perhaps academic) in historical and contemporary intelligence issues. In the issue of the journal for Autumn 2000, the defendants published an article by John Lowenthal, which was peer reviewed and centred upon the subject of Alger Hiss, who was, as is well known, at one time a high ranking official in the United States State Department, and who was accused in the late 1940s of spying for the Soviet Union some years earlier. Mr Hiss denied the allegation in front of a grand jury in December 1948, but was convicted of perjury in 1950.
3. As was observed by Mr Lowenthal in the introduction to his article, an international public debate has raged for many years over whether Mr Hiss was a victim of a miscarriage of justice. Mr Lowenthal readily accepts that he was a long term friend and supporter of Mr Hiss, who went to his grave in 1996 protesting his innocence. Mr Lowenthal set out in the article to question the reliability of new evidence put forward by some commentators as appearing to confirm the validity of Ms Hiss' conviction. In particular, he set out to show that KGB documents had been misconstrued as supporting the identification of Mr Hiss as a Soviet espionage agent.
4. Mr Vassiliev complains of selected passages from a section in the article in which Mr Lowenthal disputes the claim made by Mr Vassiliev and his co author in The Haunted Wood that documents from the files of the KGB archives confirm the earlier tentative identification, made by Venona analysts, that Mr Hiss was indeed a Soviet agent, who bore the covername "Ales" and who was referred to in a Soviet cable sent from the United States and decrypted by Venona. The cable dates from 1945 and is known as "Venona Decrypt Number 1822".
5. The matter has now been tried and a few minutes ago the jury gave their answers to questions which had been posed to them on issues of meaning and fair comment. Their conclusions were to the effect that the words were defamatory of Mr Vassiliev, but that they were an expression of opinion and were such that an honest person could express such views in the light of the material which Mr Lowenthal knew at the time the article was published. Since malice is not alleged in the case against the defendant, the consequence of that ruling is, of course, that the defendant is entitled to judgment against Mr Vassiliev on the issue of fair comment.
6. I now have to rule on an issue of qualified privilege. There were essentially three prongs to the defendant's case on privilege. First of all, common interest; secondly, reply to attack; and, thirdly, what was described as "Reynolds type privilege". The submission of Mr Monson was that the defendant was entitled to succeed on the first two themes and that there was, accordingly, no need to demonstrate that the relevant persons acted in such a way as to qualify for the epithet "responsible" in the context of their Lordships' speeches in Reynolds.
7. Alternatively, he submitted that the first two themes would be relevant to a determination of the question of whether or not the defendant had a duty in a Reynolds sense, that is to say, a social or moral duty to publish the words complained of to the world at large.

8. The common interest argument was based upon the fact that Intelligence and National Security is, as I have indicated, a specialist publication with a specialist readership who subscribe to it. The journal cannot be purchased through retail outlets. Although it may be accessible to the general public via one or two libraries, it is not in practice going to be read by members of the general public, submits the defendant, given the nature of its material, which was described by Mr Monson as "arcane, scholarly and complex". Indeed, the claimant himself pleaded in his Particulars of Claim that the journal had an exclusive readership.
9. Quite apart from the journal itself, the words complained of were published on two websites: the British Universities Film and Video Council and the New York University websites. Those are both, as I understand it, according to the evidence, effectively university websites, and the New York University website is rather a specialist one, devoted, in fact, to matters of general interest in the context of intelligence and, in particular, the story of Mr Alger Hiss.
10. The question which arises, therefore, technically, is whether or not those who read or downloaded the material from either of those sites in England and Wales would be likely to fall within the same small circle of professional and academic specialist interest as the readers of the magazine. There is no evidence about that, but, in the nature of things, submits Mr Monson, the words are unlikely to have been read by any casual surfer in reality. There is no evidence, as I say, but it is likely in practice to have been read only by those with an interest in this broad subject of intelligence generally, or the Alger Hiss story in particular.
11. So far as the other theme is concerned, that is to say, reply to attack, the principles are well known. In paragraphs 14.49 and 14.50 of *Gatley on Libel and Slander* (9th Ed) the matter is summarised in this way:

"A person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made. The law justifies a man in repelling a libelous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false. Mere retaliation, which cannot be described as an answer or explanation, is not protected, but the defendant is not required to be diffident in protecting himself and is allowed a considerable degree of latitude in this respect. Qualified privilege is not available if the defendant is responding to an attack which he knows to be justified."

12. The learned editors go on in paragraph 14.50 to deal with the general subject of responses to attacks on other persons:

"The privilege here discussed is not confined to attacks on the defendant, but extends to action taken by him to defend his family. In *Bowen-Rowlands v Argus Press*, Times, February 10th and March 26th 1926, the defendants, in a newspaper review of a book written by the plaintiff, quoted from the book a story told by the plaintiff about A, a well known public man then deceased, which story, if not actually defamatory of A, was clearly calculated to injure his daughter's feelings. A's daughter wrote a letter to the defendants in which she said that the story was 'pure invention from beginning to end; it is absolutely false, both as to matter and manner'. The defendants published this

letter, without comment, in their newspaper. The plaintiff brought an action for libel alleging that the publication of this letter imputed that he had invented the story and told a deliberate lie, and was a slur upon his character as an author. It was held by the Court of Appeal that the letter, even if defamatory of the plaintiff, was published on a privileged occasion, for A's daughter was entitled to contradict the story, and the defendants were entitled to publish such contradiction in their columns."

In paragraph 14.53 the learned editors go on to discuss the matter of an agent protecting a Principal's interest in a similar way.

13. It is submitted by Mr Monson that it is important to bear in mind the relationship of friendship which existed between Mr Lowenthal and Mr Hiss during his lifetime and that Mr Hiss went to his grave, as I have said, protesting his innocence. Furthermore, Mr Lowenthal, as an historian, has had a long standing interest in any event in the subject matter of the Hiss saga. The message of *The Haunted Wood*, among other things, is that Mr Hiss did indeed betray his country by spying for a foreign power and that he was rightly convicted of perjury. The book does not discuss, submits Mr Monson, or even refer to, any evidence or arguments which would have the effect of contradicting that thesis that Mr Hiss spied for the GRU (the Soviet military intelligence) under the covername of Ales.
14. The promotional publicity for the book was rather to the effect that, as Mr Monson put it, a gauntlet was being thrown down to any would be defender of Mr Hiss. The paperback edition, published about a year later (in 2000, I believe), displayed a review in the *Washington Post*, which said that the book left no doubt about Mr Hiss' treason. It is fair to say that the claimant, Mr Vassiliev, regards Mr Hiss as being, if anything, a hero rather than a villain in relation to his conduct in the 1930s and 1940s, as he believes it to be.
15. Mr John Lowenthal, therefore, effectively took up the gauntlet thrown down by the claimant and his co author. He declared himself, quite openly, as a friend of Mr Alger Hiss, as was no doubt well known in any event in those circles where people were interested in the subject matter. He said that he was going to try and answer the charges which had been laid against Mr Hiss, and it is submitted by Mr Monson that his reply in the article could fairly be described as relevant to the accusations made and as being proportionate. Of course, it is fair to say that *The Haunted Wood* was published on a wider basis than the journal itself or the website.
16. It is clear that a reply can be made to an attack by a person who is either a family member or an agent of the person attacked, and the protection is not confined to the victim himself, as I have just illustrated from those passages I read from *Gatley on Libel and Slander*. Furthermore, it is clear from the relatively recent case of *Regan v Taylor* in the Court of Appeal on 9th March 2000 that an agent can respond to an attack upon his principal without any express instructions for that purpose. That case concerned a solicitor speaking on behalf of a client. What is described as a "novelty" in this case is the fact that Mr Hiss was dead at the time of the criticism, although, of course, as I have just illustrated, the circumstances are in some respects not dissimilar from those in *Bowen-Rowlands v Argus Press*. In an event, submits Mr Monson, that fact should not prevent the reply in Mr Lowenthal's article from being held to have been published on an occasion of privilege, because the reputation of dead people can be of as much concern as the reputation of the living. It has never been the rule that to justify a proportionate response under the cloak of qualified privilege the person attacked has himself to be able to establish a cause of action in libel. Since Mr Hiss is dead, there would be no cause of action, but that is not necessary in itself to justify privilege arising.
17. In relation to reply to an attack, Mr Vassiliev made a number of submissions. He submitted, first of all,

that if Mr Lowenthal distorted what Mr Labusov said in the article (being one of his sources) there should be no privilege. But it is important to note that malice is not pleaded here and, what is more, the distortion upon which he relies is, in my judgment, no more than abbreviation.

18. Secondly, he submitted that this was not an "attack" in the sense in which it is relevant for the purposes of qualified privilege. He regards Mr Hiss as being a hero in serving the interests of his own country, that is to say, the former Soviet Union.
19. Thirdly, he pointed out that Mr Hiss had not sued anyone for libel himself for having been accused of being a Soviet agent, since he failed to vindicate himself in his claim against Whittaker Chambers more than half a century ago. I do not believe that that makes any difference, because a person is entitled to respond to an attack, whether or not he has sued for libel over a similar allegation on past occasions.
20. In my judgment, this is a clear case of privilege under both the first and second categories, i.e. under the common interest privilege relating to the specialist subject matter and also under the category of reply to an attack.
21. The parties also made submissions to me on Reynolds privilege. I do not need to resolve that issue, but I have considerable doubt as to whether it would have been possible to establish the social or moral duty to publish these allegations to the world at large. That is what Reynolds is all about. As I say, I do not regard it as being necessary to rule upon that matter.