15

IN THE ELECTION COURT

Court Ref: P558/15

NOTE OF ARGUMENT FOR THE FIRST RESPONDENT

In the cause

(FIRST) TIMOTHY DENIS MORRISON, 5 Springfield Crescent, Stromness, Orkney, KW16 3AS; **(SECOND) EUPHEMIA (ALSO KNOWN AS PHEMIE) MATHESON,** residing at 88-90 Dundas Street, Stromness, Orkney, KW16 3DA; **(THIRD) FIONA MORAG GRAHAME,** Roselea Cottage, Lyking Road, Sandwick, Orkney, KW16 3HY; and **(FOURTH) CAROLYN ANN WELLING,** 41 Graham Place, Stromness, Orkney, KW16 3BY

Petitioners

against

ALISTAIR CARMICHAEL MP, 14 Palace Road, Kirkwall, Orkney, KW15 1 PA, as the member whose election or return is complained of,

First Respondent

and

ALISTAIR BUCHAN, Orkney Islands Council, School Place, Kirkwall, Orkney, KW15 1NY, as the returning officer,

Second Respondent

in respect of

The election for the Orkney and Shetland County United Kingdom Parliamentary Constituency held on 7 May 2015 (the "**Constituency**")

Introduction

1. The First Respondent moves the Election Court to dismiss the Petition as irrelevant. The background is largely undisputed, although certain matters (such as motive) would require probation were the Petition otherwise relevant. The First Respondent submits the Petitioners' statement of facts is irrelevant in law; that the Petitioners' case on the first part of s 106 must necessarily fail even taking all averments *pro veritate* ; and that accordingly the Petition should be dismissed.

2. There are three issues before the court:

   (1) Is section 106 of the 1983 Act engaged by "self-talking", as opposed to attacking another?

(2) If question one is answered in the affirmative, do the words complained of in the petition amount to "false statements of fact … in relation to the personal character or conduct" of Mr Carmichael, within the meaning of section 106?
(3) If questions one and two are answered in the affirmative, do the averments in the petition disclose a relevant offer to prove that the words complained of were uttered "for the purpose of affecting the return of any candidate at the election"?

Section 106 and its background and context

3. The genesis of the statutory provisions underlying the election petition is found in the Parliamentary Elections Act 1868 (31 & 32 Vict, c 125),[1] and the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict, c 51),[2] as amended by the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict, c 40). Section 1 of the 1895 Act provided:

> Certain false statements concerning a candidate to be an illegal practice
> Any person who, or the directors of any body or association corporate which, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice within the meaning of the provisions of the Corrupt and Illegal Practices Prevention Act, 1883, and shall be subject to all the penalties for and consequences of committing an illegal practice in the said Act mentioned, and the said Act shall be taken to be amended as if the illegal practice defined by this Act had been contained therein.

4. Those provisions were consolidated in s 91 of the Representation of the People Act 1949:

> Any person who, or any director of any body or association corporate which, before or during an election, shall, for the purpose of affecting the return of any candidate at the election, make or publish any false statement of fact in relation to the personal character or conduct of the candidate shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true.

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[1] Section 58 contains the amendments for reading the Act in its application to Scotland. Section 58(6) and (7) provided that the judges of the Court of Session to be appointed to the Rota for hearing election petitions would be selected by a vote of the judges of the Court of Session, the President having a casting vote.

[2] Section 68 contains the amendments for reading the Act in its application to Scotland. The procedure of Parliamentary election petitions was applied to Scottish local government elections by the Elections (Scotland) (Corrupt and Illegal Practices) Act 1890 (53 & 54 Vict, c 55).

5. That provision is now found in the Representation of the People Act 1983. Section 106 of the 1983 Act, the basis for the present petition, is in these terms:

> **106.— False statements as to candidates.**
> (1) A person who, or any director of any body or association corporate which—
> (a) before or during an election,
> (b) for the purpose of affecting the return of any candidate at the election,
> makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true.

6. The long statutory history is important because the similarity of the terms chosen by Parliament over the decades engages the presumption, set out in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* 1933 SC (HL) 21 at 27-28 *per* Viscount Buckmaster, that Parliament has adopted the meaning given to the statute by the courts. Reference may thus be made to authorities under the 1895 Act.

Nature of Election Petitions

7. The last Parliamentary election petition to be heard Scotland was *Grieve v Rt Hon Sir Alexander Douglas-Home* 1965 SC 315. But the leading authority on election petitions in a contemporary context is now the decision of the Divisional Court in *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169, [2012] QB 1,[3] where the opinion of Thomas LJ (as he then was) has been described, in the recent election petition concerning the return of the mayor for the London Borough of Tower Hamlets, *Erlam v Rahman* [2015] EWHC 1215, by Election Commissioner Mr Richard Marey QC, as "magisterial".[4] Considerable reliance will be placed on the legal principles contained in the *Woolas* decision.

8. It is submitted that strict compliance with both procedural and pleading rules is required. The Court of Appeal has struck out an election petition for failure to comply with the provisions on time limits and security for costs: *Ahmed v Kennedy* [2003] 1 WLR 1820 (CA). And this approach has been followed most recently, in *Ireland v*

[3] In part affirming and in part reversing the decision of the Election Court in *Watkins v Woolas* [2010] EWHC 2702.
[4] [2015] EWHC 1215 at para 113.

Dorries, 30 July 2015, where it is understood that the Divisional Court (Barker and Popplewell JJ, unreported) struck out an election petition, arising out of the return of Nadine Dorries MP on 7 May 2015, for failure to effect service of the petition in accordance with the rules.

9. The First Respondent will thus adopt the conventional Scottish approach to testing the relevancy of the Petitioners' averments in the Petition. Having taken the averments *pro veritate*, the First Respondent submits that the Petition does not disclose a relevant case in law and, as a result, since the Petitioners would necessarily fail at proof, the Petition should be dismissed.

Constituent Elements of s 106

10. A number of preliminary observations may be made about s 106. First, and foremost, it creates a criminal offence: the burden of proof is thus beyond reasonable doubt (*R v Rowe (Ex parte Mainwaring)* [1992] 1 WLR 1059 at 1068 *per* Farquharson J approved in *Jugnauth v Ringadoo* [2008] UKPC 50, paras 10 and 11, *per* Lord Rodger of Earlsferry). Second, given the imposition of criminality, a restrictive approach to the construction and application of s 106 is, it is submitted, appropriate.[5] Thirdly, s 106 is, construed as ordinary English, primarily aimed at false statements made by others which relate to the personal character or conduct of a candidate. It does not expressly cover self-talking, something the section could easily have done. Fourthly, s 106 does not prohibit the making or publishing of false statements of fact *per se*: only false statements of fact *relating to personal character or conduct* are prohibited (a "prohibited false statement"). Fifthly, in addition, such a prohibited false statement of fact must have been made *for the purpose of* affecting the return of any candidate at the election. With these preliminary observations in mind, we approach the three issues set out above.

(1) Is section 106 of the 1983 Act engaged by "self-talking", as opposed to attacking another?

11. Section 106(1) requires "a false statement of fact *in relation to* the candidate's personal character or conduct". Politicians are not averse to talking about themselves. Had Parliament intended to criminalise "self-talking" under s 106, it might have been

[5] *Grieve v Douglas-Home* 1965 SC 319 at 335 *per* Lord Kilbrandon quoted at paragraph 11 below.

expected to say so expressly. In *Grieve v Douglas-Home* 1965 SC 319 at 335, Lord Kilbrandon observed:

> We are being asked to construe the intention of Parliament from the terms of section 63, the words of that section not expressly prohibiting the practice complained of but, as it has been submitted, prohibiting it by necessary implication. In these circumstances it seems to me to be a sensible canon of construction that, if a practice is known to Parliament when Parliament is legislating on a question which involves a consideration of the legality of the practice, then, unless the resultant statute uses words clearly prohibiting the practice, it ought to be presumed that Parliament does not intend the prohibition of the practice. This is a rule of common sense rather than of substantive law.

12. The authorities to date have supposed that any false statement being made in relation to a candidate would be made by a person who was not him or herself a candidate. Two examples suffice. The first is the *Attercliffe Division of the City of Sheffield* (1906) 5 O'M & H 218 at 221, where Grantham J said:

> It is a great pity that elections at the present time so many false statements are made, and that votes are obtained in that way. But we cannot be beyond the language of the Act, which is limited to false statements made with reference to the personal character or conduct of the candidate, leaving him therefore to be still exposed to unfriendly attacks with regard to his political views. But if *his opponent* goes beyond that and makes false statements of fact with regard to the *private conduct of his rival*, then the Legislature has said that it is an illegal practice, which will vitiate the election.

13. Similarly in the *North Division of the County of Louth* (1911) 6 O'M & H 103 at 166, Madden J said:

> A public man in his candidature, as in Parliament, is *liable to misrepresentations as to his public character or conduct*, and it can be readily understood why the Legislature has not thought fit to protect either the constituency or the candidate against misrepresentations of this kind. It has drawn the line of defence at a false statement of fact in relation to personal character or conduct.

14. If a candidate at an election is liable to misrepresentations *by others* as to his "*public* character or conduct" (the meaning of which is addressed at paragraphs 20-28 below) then, by parity of reasoning, misrepresentations by a candidate himself "in relation to" *his own* public "character or conduct" also must not breach the statute. Although s 106 may be said to be wider than the law of defamation, there is nonetheless a parallel. And it is a truism of the law of defamation that no one may defame him or herself.

15. Politicians are frequently accused (fairly or unfairly) of going back on promises made during an election campaign. Such promises, and any subsequent breaches, clearly amount to public conduct. If breach of a promise as to future conduct, when breached, would constitute public conduct, then falsity as to the past, in so far as it relates to political or public conduct, is also not covered by s 106.

16. Reference will be made below to the need for the court to characterize a statement as relating *either* to "private character or conduct" *or* to "public character or conduct". That fundamental question also has ramifications for the question of whether the s 106 offence can apply to self-talking. For a false statement that has been characterized as relating to the candidate's *public* character or conduct, cannot – merely by dint of the statement's falsity and the fact of it having been made – become a statement relating to private conduct.

(2) If question one is answered in the affirmative, do the words complained of in the petition amount to "false statements of fact ... in relation to the personal character or conduct" of Mr Carmichael, within the meaning of section 106?

17. There are two parts to this question. The first is the meaning of the words "in relation to". The second is the question of whether the statement, admittedly made by the First Respondent, is one which was a statement of fact in relation to the First Respondent's personal character or conduct. We deal with each part in turn.

"In relation to"

18. The equivalent phrase "relates to" has assumed considerable constitutional importance under the devolution arrangements. In *Martin v Most* 2010 SC (UKSC) 40, para 49, Lord Hope of Craighead, commenting on the structure of s 29 of the Scotland Act 1998, said:

> Its structure appears reasonably straightforward. Section 29(2)(b) prohibits legislation by the Scottish Parliament which 'relates to' reserved matters. That is an expression which is familiar in this sort of context, indicating *more than a loose or consequential connection*, and the language of sec 29(3), referring to a provision's purpose and effect, reinforces that.

19. The Supreme Court in *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53; [2013] 1 AC 792 and *Attorney General v Counsel General for*

Wales [2014] UKSC 43; [2014] 1 WLR 2622 has followed that construction of the words "relates to". The First Respondent submits that it is not enough for the Petitioner to offer to prove that there is some consequential connection to personal character or conduct, merely because the statement was untrue. The *content* of the statement itself must "relate to" personal character or conduct.

Personal character or conduct

20. The First Respondent's statement, the content of which is admitted in ANS 5 of the Petition, was:

> *Reporter for Channel 4 News: Surely it's a fair question to ask what you were, what you were aware of?*
>
> I will cooperate fully with Sir Jeremy Heywood's inquiry, but it has to be Sir Jeremy Heywood's inquiry and that's why I will answer the questions to him. **I've** told you, the first I became aware of this, and this is already in the on public record, was when I received a phone call on Friday afternoon from a journalist making me aware of it".
>
> *Reporter: Do you accept the buck stops with you when it comes to the Scotland Office?*
>
> Well eh of course as Secretary of State for Scotland I am responsible for the Scotland Office but you know you seem to be making eh some fairly ehh substantial presumptions about eh the role of the Scotland Office in this. That's why we are having a proper inquiry conducted by the Cabinet Office.

21. The context in which the First Respondent made the statement is important. The reporter's question was directed to the First Respondent in his capacity as Secretary of State for Scotland. The answer related to a leak at the Scotland Office. The leak was the subject of an inquiry by the Cabinet Secretary. These three factors are strongly indicative of a statement relating to the First Respondent's political or public conduct as a Cabinet Minister.

22. The "starting point" for the construction of s 106, according to Thomas LJ in *Woolas* ([2012] QB 1, para 110), is that Parliament has drawn a distinction between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct. As a result, the crucial aspect of s 106 is that the court *must* decide whether a statement relates *either* to "personal

character and conduct" *or* to a candidate's political or public conduct. As the Divisional Court in *Woolas* [2012] QB 1, para 111 held, the court is required to decide whether the false statement relates *either* to personal character or conduct *or* to public conduct: "It cannot be both".

23. Because the false statement complained of *must* relate to "personal character or conduct", it is important to reiterate that false statements relating to a candidate's **public** conduct are **not prohibited** by s 106. That proposition applies to statements made by third parties as well as to statements by the First Respondent himself.

24. A false statement made in relation to a candidate's political conduct is not covered by s 106: *Fairbarin v the Scottish National Party* 1979 SC 393. In *Fairbairn,* Sir Nicholas Fairbairn stood as a parliamentary candidate in Kinross and West Perthshire. He sought an interim interdict against the Scottish National Party, the SNP candidate in that constituency, and the SNP candidate's election agent. Sir Nicholas sought to interdict the publication, circulation or distribution of a pamphlet, the contents of which were in these terms:

> Not everyone can aspire to the complete neutrality which Mailstrom maintains about the coming General Election. The staff of the House of Commons Post Office, for example, are believed to take a particular view about the result in West Perth and Kinross. This may have something to do with the fact that they have taken to complaining that the uncollected mail for the colourful Nicholas Fairbairn, M.P., is threatening to take over their entire space.

25. One of the bases for the petition was s 91 of the Representation of the People Act 1949 (quoted in paragraph 4 above), which is in materially similar terms to s 106 of the 1983 Act. The other basis was defamation. The Petition called before the vacation judge, Lord Ross for interim interdict. In the event, Lord Ross granted the interim interdict given the prima facie defamatory nature of the pamphlet. But Lord Ross held that there was no entitlement to interim interdict under s 91, because these statements, even if false, were made about the Petitioner's public rather than his private conduct. Lord Ross held (at 396):

> The statute makes it plain that the false statement complained of must be in relation to "the personal character or conduct" of the candidate. In my opinion,

> a distinction falls to be drawn between a false statement in relation to the personal character or conduct of the candidate on the one hand and a false statement in relation to the public or official character of the candidate on the other hand. I accept, as Mr Davidson [counsel] suggested, that every false statement in relation to the public character of a candidate may in one sense reflect upon the candidate's personal character, but before there can be an illegal practice in terms of the statute, the false statement of fact must be directly related to the personal character or conduct of the candidate

26. Lord Ross's approach was approved by the Divisional Court in *Woolas* [2012] QB 1, paras 88 and 109.

27. The need to characterise the First Respondent's conduct as being either public or private has important implications for considering whether s 106 can cover self-talking. Section 106, it will be recalled, does not criminalise false statements. It criminalises only false statements "relating to personal character or conduct". The Petitioners in the present case accept that there was no false statement made by the First Respondent in relation to *another* candidate. The petitioners' true complaint, viewed realistically, is what the Respondent did (via authorising the leak) in relation to the First Minister. As the First Minister was not a candidate in the election, however, there can be no complaint in that regard, and the Petitioners have accordingly had to look elsewhere for their complaint. But s 106 is no Procrustean bed into which any complaint about the conduct of a candidate may be forced. The section clearly and deliberately imposes certain prohibitions – namely the disparaging of the private lives of others – which are not engaged by the statements of fact in this case.

28. The Petitioners argue that a statement by the First Respondent, about his conduct as Secretary of State for Scotland, can become a statement relating to personal character or conduct merely by reason of the fact that it is false. But that proposed construction is wholly inconsistent with what has been held by the Courts to be the avowed intention of Parliament, namely that s 106 is to cover *only* statements relating to *personal character or conduct*. Misrepresentations or other false statements relating to public conduct are simply not covered by s 106.

(3) If questions one and two are answered in the affirmative, do the averments in the petition disclose a relevant offer to prove that the words

complained of were uttered "for the purpose of affecting the return of any candidate at the election"?

29. STAT 9 of the Petition is in these terms:

> Notwithstanding that the First Respondent now seeks to suggest he did not have sight of the terms of the Memorandum before its release, *it may reasonably be inferred* from the transcript of the interview and the finding of the Cabinet Office inquiry that the First Respondent did not tell the truth when he was interviewed by Channel 4 News on 5 April 2015. That interview was broadcast to an immediate audience of around 650,000 people, including voters in the First Respondent's constituency, such as the Petitioners. Against a background of polling which indicated the SNP would gain a majority of votes in each of the 59 constituencies in Scotland, with the result that no Liberal Democrat or any other political party would obtain a seat at Westminster, *it is believed and averred that the statement by the First Respondent referred to was for the purpose of affecting the return of the candidates at the election, whether that election is taken to be in the Constituency or the general election as a whole.*

30. The First Respondent is a former Minister of the Crown. Prior to the general election in 2015 had been a Member of Parliament for 14 years. The allegation in the Petition is that the First Respondent has committed a serious criminal offence. The penalties for the offence are extremely serious.

31. Averments in a petition are statements which a Petitioner offers to prove. The principal element under this head which the Petitioner must prove – beyond reasonable doubt – is that the First Respondent made a false statement "for the purpose of affecting the return of any candidate at the election". The Petitioners must therefore offer to prove – beyond reasonable doubt – both the falsity of the statement and the purpose with which the false statement was made. Taking the Petitioners' case at its highest, it falls short of a relevant offer to prove the necessary motive.

32. In *Brown v Redpath Brown & Co Ltd* 1963 SLT 219 at 222, Lord Justice Clerk Thomson said:

> The use of the formula ''believed and averred'' is frequent and convenient in our pleading, but its appropriate function is to aver an inference which the user seeks to draw from certain facts; and they are generally facts which are not and cannot be fully known to him. ... Where a definite averment of facts which a party must establish is necessary, the formula is quite inappropriate.

> Here it is an expression of hope rather than of fact; and I can read it only as an attempt to salve the conscience of the pleader.

33. That statement of principle has been approved recently by the Inner House: *Burnett v Menzies Dougal WS* 2006 SC 93 at 99 *per* Lord Macfadyen. Proof beyond reasonable doubt of the First Respondent's purpose of affecting the return of candidates at the election is a cardinal element of the s 106 offence. The Petitioners *must* offer to prove it. It is not enough for the Petitioners to rest their case on the formula "believed and averred" when there are no primary facts pointing towards the necessary purpose.

34. That is particularly so given that the Petitioners' case is pled in the alternative: "it is *believed and averred* that the statement by the First Respondent referred to was for the purpose of affecting the return of the candidates at the election, *whether the election is taken to be to the Constituency* ***or*** *the general election as a whole*". The weaker of these alternatives (see MacPhail, *Sheriff Court Practice* (3rd edn 2006) para 9.36) is that it was to affect the general election as a whole. And it is on that alternative that the averments must therefore be judged, for "When there are alternatives, one of which is relevant, and one of which is not relevant, the action before the Court comes to be an action on no allegation at all, because the relevant alternative cannot be adopted when the party himself does not stand upon it" (*Finnie v Logie* (1859) 21 D 825 at 830 *per* Lord Curriehill, followed in *Murray v Wylie* 1916 SC 356 at 361 *per* Lord President Strathclyde). Lest it be suggested that this approach is overly technical, it will be recalled that (a) the averments in the petition are that the First Respondent has committed a serious criminal offence and (b) the consistent approach of both the Divisional Court and the Court of Appeal in England is to construe the procedural requirements of the 1983 Act strictly.[6]

35. In the present case, however, the averments in relation to the "general election as a whole" are irrelevant. Section 106 refers to "an election". The relevant election is a parliamentary election. And a "parliamentary election" is one relating to the constituency: see section 1 and sections 120-123 of the 1983 Act and the Interpretation Act 1978, schedule 1, where the term, "Parliamentary Election" means "the election of a Member to serve in Parliament for a constituency". The averment

[6] See the authorities referred to at paragraph 8 above.

that "it is believed and averred that the statement by the First Respondent referred to was for the purpose of affecting the return of candidates at the election, whether that election is taken to be to the Constituency *or the general election as a whole*" thus contains an irrelevant weaker alternative.

36. The alternative averment about the general election as a whole is, in any event, lacking in specification: for the purpose of affecting the return of which candidates in which constituencies? In the absence of any specification as to the particular constituencies, the averment must be taken as face value to mean all Parliamentary constituencies. But it is within judicial knowledge that the SNP did not field candidates in constituencies in Northern Ireland, Wales or England. A statement by the First Respondent, even if false, about the leader of the SNP could not have been relevant to the return of any candidate in a constituency in Northern Ireland, Wales or England. The Petitioners' averments concerning the First Respondent's purpose are thus also irrelevant for lack specification.

37. The petitioners are not entitled to proof on the basis of averments which amount to no more than "an expression of hope", to use Lord Justice Clerk Thomson's phrase (quoted in paragraph 32 above).

Conclusions

38. For the reasons set out above, the First Respondent moves the court to find the averments in the Petition to be irrelevant in law; to refuse the prayer of the Petition; to find that the First Respondent was thus duly elected to represent the Constituency as its Member of Parliament; and to provide to the Speaker of the House of Commons a certified copy of that interlocutor in terms of s 144 of the Representation of the People Act 1983.

Roddy Dunlop QC

R G Anderson, Advocate

19 August 2015