IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No CA-2025-003218**

ON APPEAL FROM THE HIGH COURT OF JUSTICE **Claim No KB-2025-002764**

KING'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

B E T W E E N :

GUARDIAN NEWS & MEDIA LIMITED

Appellant / Defendant

- and -

ANDY NGO

Respondent / Claimant

APPELLANT'S REPLACEMENT APPEAL SKELETON ARGUMENT
20 October 2026
(originally lodged 14 July 2026)

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*In this skeleton argument, references to paragraphs in the judgment under appeal ("**the Judgment**") appear as "J/§[paragraph number]" and references to the appeal bundle appear in the format [Tab/Page] where "**CB**" refers to the Core Bundle and "**SB**" refers to the Supplementary Bundle*

A. Introduction

1. This is an appeal in relation to the Order of 28.11.25 of Guy Vassall-Adams KC [**CB/6/90**], sitting as a Deputy High Court Judge ("**the Order**"; "**the Judge**"), on a trial of preliminary issues in libel proceedings.

2. The claim concerns a music review published on *theguardian.com* website (from 28.03.25) [**SB/1/2**] and in the print version of *The Observer* newspaper (on 30.03.25) [**SB/2/4**] ("**the Article**"). The statement complained of is as follows ("**the Statement**"):

> "*In the wake of the 2021 exit of banjo player (and son and co-founder of GB News) Winston Marshall, Mumford & Sons have reverted to a trio for their fifth album. Marshall's departure followed an outcry after he praised "alt-right" agitator Andy Ngo. Yet listening to Rushmere, one wonders whether the world might be a better*

place had every member of the band felt obliged to quit three years earlier, when news broke that they had hosted Jordan Peterson[1] *at their studio*."

3. By §§1-4 of the Order, the Judge determined that (a) the natural and ordinary meaning of the Statement is that the Claimant ("**C**") actively promotes far right beliefs; (b) the innuendo meaning of the Statement is that C actively promotes far right, racist and white supremacist beliefs; (c) the Statement is a statement of fact (and not an expression of opinion); and (d) the Statement is defamatory at common law.

4. The Appellant ("**GNM**") sought permission to appeal ("**PTA**") in respect of each of those matters. By his Order of 06.03.26 [**SB/10/108**] Warby LJ refused PTA in respect of the Judge's determination of natural and ordinary, and innuendo, meaning (Grounds of Appeal 1 and 2) but granted PTA in relation to the Judge's decisions on fact / opinion and whether the Statement is defamatory at common law (Grounds of Appeal 3, 4 and 5). Only Grounds of Appeal 3, 4 and 5 are referred to further below.

5. On this appeal, GNM contends that the Judge's decision was wrong in several respects and/or was unjust because of a serious procedural irregularity. The Judgment [**CB/7/92**] contains a number of serious errors of law and fact in its analysis of, and findings on, each of the issues identified above. This appeal raises important issues as to the correct approach to the availability of the vital defence of honest opinion in a music review which comments on the political views and activities of a highly political journalist and author; the applicability – if any – of the concept of "*bare opinion*"; the proper application of s 3(3) Defamation Act 2013 ("**DA 2013**"); and the scope for statements about political activities and beliefs / characterisations to be defamatory at common law. GNM contends that unless reversed the Judge's decision constitutes a very serious restriction on political speech and the defence of honest opinion (which is a bulwark of free speech) and an unjustified interference with the Article 10 rights of GNM and its readers.

6. GNM's reasons are set out in detail below, but the errors in the Judge's approach can be illustrated by the following outline points:

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[1] In the online version of the Article, the underlined words contain a link to a further article headlined "*Mumford and Sons Unable to Banjo Their Way Out of Jordan Peterson Questions*" (https://www.vice.com/en/article/mumford-and-sons-unable-to-banjo-their-way-out-of-jordan-peterson-questions/).

a. The Judge's reasoning on fact / opinion failed to take into account properly or at all numerous critical features of the content and context of the Statement. Among these are that (i) the Statement appeared in a light-hearted and jocular music review which referred to C only once and in passing, (ii) the key term ("*alt-right*") appeared in quotation marks, denoting a matter of received opinion rather than definitive fact; and (iii) that term is by its nature imprecise and evaluative. These central elements – none of them referred to in the Judge's reasoning – made plain to the reasonable reader that the Statement conveyed an opinion or comment rather than a factual statement.

b. The consequence of the Judge's finding that the Statement is factual is that, in order to defend the claim as true (and subject to the issue of serious harm to reputation), GNM would be required to prove as a matter of fact that the beliefs which C actively promotes are "*far right*". But the question of whether beliefs are "*far right*" is obviously and inherently subjective. That such a term is a value judgment can be illustrated by asking at what point beliefs in relation to various topical issues, such as migration, multiculturalism, nationalism, law and order and trans rights / gender, become "*far right*". The answer is obviously a question of opinion and highly evaluative. However, on a defence of truth, the Judge's finding would put the trial Court in the invidious and inappropriate position of having to determine which beliefs are / are not "*far right*" as a matter of fact, notwithstanding that there is no suitable judicial yardstick by which such issues can be factually determined. Such a course would result in the same outcome deprecated by Lord Judge CJ in *British Chiropractic Association v Singh* [2011] 1 WLR 133 as follows: "*to allow the party which has been denounced on the basis of [an opinion] to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth*": §23. It is precisely to avoid that Orwellian situation that the law provides for an honest opinion defence.

c. Strikingly, the Judgment also lacks any mention of GNM's right to freedom of expression, whether at common law or under Article 10. This is an important omission because that right is strongly engaged on three bases in this case. This is because: (i) the Statement is political speech in respect of which there is little scope for restrictions under Article 10; (ii) a requirement to prove the truth of a value judgment infringes freedom of opinion, itself protected by Article 10; and (iii) C

has entered the arena of public debate by reporting and writing prolifically on political matters, and Article 10 requires those who have entered such a debate to show "*a higher degree of tolerance to criticism when opponents consider their aims and means employed in that debate*".[2] These principles were highly relevant to the issues before the Court but nowhere recognised by the Judge.

d. Further, in relying on the concept of "*bare opinion*", the Judge wrongly applied that concept so as, artificially, to treat a statement of opinion as a statement of fact (contrary to the relevant authorities). Moreover, in doing so the Judge made impermissible factual findings that (for example) C is not "*a well-known public figure*" and "*most people would never have heard of [C]*" which were entirely unsupported by evidence and were in fact contradicted even by the limited material which was before the Court, namely the Article and the Particulars of Claim which stated that C is a high-profile and well-known public figure. This also involved a serious procedural irregularity.

e. In addition, the Judge was wrong to conclude that the Statement's attribution to C of certain "*far right*" political views or activities tended to lower the claimant in the estimation of right-thinking people generally and tended to have a substantially adverse effect on the way that people would treat C. This is particularly the case given that the "*demands of pluralism in a democratic society make it important to allow room for differing views to be expressed, without fear of paying damages for defamation*" with the result that "*a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society*" (*Monroe v Hopkins* [2016] 4 WLR 68, §50).

f. The consequences of the Judge's errors are significant. If not corrected by the Court of Appeal, they would give rise to the real risk of a significant chilling effect in the expression of views relating to the political activities of public figures and/or their political viewpoints. Such expression will be stifled if media organisations (and others) fear that the reporting of views and opinions on such matters will have to be defended as a matter of fact rather than opinion.

[2] *Jerusalem v Austria* (2003) 37 EHRR 25, §46.

B. Summary of relevant background

B.1. The Claimant

7. As set out in the Particulars of Claim [**CB/12/118**], C is a journalist and author whose work covers issues of political controversy, including the "*Antifa*" movement (which is the subject of his book *Unmasked: Inside Antifa's Radical Plan to Destroy Democracy*). C claims to have been the subject of widespread public attention and hostility, in both the US and Ireland, as a result of his work. C's case, at §1.2 of his Particulars of Claim, is that his activities have "*engendered a great deal of hatred towards him*".

B.2. The Judgment

8. At this stage, GNM provides an outline summary of the Judgment, which is addressed in more detail in **Section D** below.

9. Having summarised the relevant background, the core principles and the parties' submissions, the Judge set out his reasoning at J/§44 onwards.

10. At J/§49 [**CB/7/102**] he concluded that "*the natural and ordinary meaning of the words complained of is that the Claimant actively promotes far right beliefs*": J/§49. For the purpose of innuendo meaning, the Judge had to assume as a fact that "*alt-right is a descriptive term for an amalgam of racists and white supremacists*" and that at least one reader of the Article knew this, as pleaded at §6.1 of the Particulars of Claim [**CB/12/120**]. On that assumption the Judge found that "*the innuendo meaning of the Article is that the Claimant actively promotes far right, racist and white supremacist beliefs*": J/§50 [**CB/7/102**].

11. Both the natural and ordinary meaning, and the innuendo meaning, were held to be defamatory at common law: J/§51.

12. The Judge concluded that the allegation that C was an "*alt-right agitator*" was an assertion of fact, and was not recognisable as opinion: J/§52. If, alternatively, the Statement was recognisable as opinion, the Judge described this as a "*classic case of bare opinion*" such that the Statement "*should be treated as an allegation of fact*": J/§54.

13. The Judge went on to consider whether the condition under s 3(3) DA 2013 – that the statement complained of indicated, whether in general or specific terms, the basis of the

opinion – was satisfied, in the event that he was wrong to conclude that the Statement was factual. He held that the Statement "*contains no express indication, either of a general or specific nature, as to the basis of the opinion*": J/§58 [**CB/7/103**]. The Judge also rejected the submission that there was "*an implied indication as to the factual basis of the opinion*" by reference to the principles in *Kemsley v Foot* [1952] AC 345. The Judge therefore concluded that the Statement "*does not impliedly identify its subject matter as a class of material that is in the public domain*": J/§60.

C. Relevant legal principles

C.1. Test for appellate intervention on decisions on meaning and fact / opinion

14. An appellate court is entitled to interfere with a first instance ruling on meaning if it is vitiated by an error of law: *Stocker v Stocker* [2020] AC 593, §60. At §59 of *Stocker v Stocker* Lord Kerr described the approach of the appeal court where no error of law is identified as follows:

> "*As to whether the appellate task needs to be described as one requiring caution, as Simon LJ suggested* [in *Bukovsky v CPS* [2018] 4 WLR 13]*, I am doubtful. I would prefer to say that it calls for disciplined restraint. Certainly, the trial judge's conclusion should not be lightly set aside but if an appellate court considers that the meaning that he has given to the statement was outside the range of reasonably available alternatives, it should not be deterred from so saying by the use of epithets such as "plainly" or "quite" satisfied.*"

15. This reflects the observation of Salmon LJ in *Slim v Daily Telegraph* [1968] 2 QB 157 that if the appellate tribunal is satisfied that the judge's finding as to meaning is wrong it is its duty to reverse him: p 187A.

16. The same principles apply to appellate review of a decision on whether words complained of are fact or opinion: *Blake v Fox* [2024] EMLR 2, §50.

C.2. Honest opinion

Introduction

17. Section 3 DA 2013 provides for a defence to a defamation claim where the statement complained of is a statement of opinion and the two further conditions in s 3(3)-(4) DA 2013 are satisfied.

18. The defence of honest opinion (like its predecessor, fair comment) is "*one of the fundamental rights of free speech and writing*" which is not to be "*whittled down by legal refinements*": *Joseph v Spiller*, §107; and see Sharp LJ in *Butt v SSHD* [2019] EMLR 23, at §§25-39. Accordingly, "*the common law has always been fiercely protective of comment and opinion*": *Yeo v TNL* [2015] 1 WLR 971, §15.

19. This is consonant with the approach taken in the Strasbourg jurisprudence on Article 10 which distinguishes between statements of fact and value judgements. Whereas the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof. A requirement to prove the truth of a value judgement is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10: *Mortensen v Demark* (App no. 16756/24), judgment of 21.10.25, §36.

20. Further there is little scope under Article 10 for restrictions on freedom of expression in relation to political speech and matters of public interest. A high level of protection of freedom of expression will be accorded in such cases, which will not be obviated by "*[a] degree of hostility or the potential seriousness of certain remarks*": *Mortensen*, §44.

The characterisation of a statement as fact or opinion

General principles

21. In deciding whether a statement contains allegations of fact or opinion, the Court considers the words used, not the meaning of those words as identified by the Court: *Millett v Corbyn* [2021] EMLR 19. §17. That question may be considered after the meaning has been decided, or at the same time, or in the reverse order, which is common practice: *Blake v Fox* [2024] EMLR 2, §23.

22. The Court's assessment of fact / opinion is guided by the following overarching principles (*Koutsogiannis* at §16, approved in *Millett* at §12):

> "*(i) [In order to qualify as opinion] [t]he statement must be recognisable as comment, as distinct from an imputation of fact.*
>
> *(ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.*[3]

[3] See also see *Clarke v Norton* [1910] VLR 494, 499; *Branson v Bower* [2001] EMLR 32, §12; *Burstein v ANL* [2007] 4 All ER 319, §24; *Butt*, §§34-45.

(iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion."

23. The significance of the "*subject matter and context of the words*" to the determination of the fact / opinion question has frequently been emphasised in the authorities.

24. In *Yeo* Warby J explained how the Court should assess the subject matter and context of the words so as to ascertain whether they convey fact or opinion (at §97):

> "*It seems to me that in seeking to place itself in the position of the ordinary reasonable reader the court should take as its starting point the general features of the article and the impact these are likely to have on how the words used strike the mind of the ordinary reader. It should bear in mind the positioning within the paper of the article under examination (for instance whether it is in the news section or in an "op ed" piece or magazine); the general nature of the subject matter dealt with in that article (news, political, social, financial or other); who has written the material, if this is apparent (is it for example the paper's political correspondent or an established commentator?); and the form of expression the reader would be likely to expect from an article on this subject matter, positioned as it is, and by this or these author(s). It is against that background that the court should consider the particular statements in the article and assess, as far as possible at the same time, what if any defamatory meaning it conveys and the extent to which this is factual or comment. In performing this last task the court should be alert to the importance of giving free rein to comment and wary of interpreting a statement as factual in nature, especially where as here it is made in the context of political issues. In drawing the distinction the court should consider what the words in their context indicate to the reader about the kind of statement the author intends to make.*"

25. Consistent with that approach:

    a. The reasonable reader will expect words contained in a review by a critic to contain subjective commentary by the critic: *Burstein v ANL* [2007] 4 All ER 319, §23.

    b. Some terms are inherently capable of a range of meanings and/or have an intrinsic evaluative quality, with the result that they will tend to indicate a statement of opinion. Examples include the words "*fascist*", "*antisemitic*" and "*racist*": *Greenstein*, §31(iii); *Swan v ANL* [2020] EWHC 1312 (QB), §57(1); *Blake v Fox* (Nicklin J), §§32-33, upheld on appeal: §§53-54. A similar approach is reflected in the Strasbourg jurisprudence in which references to "*sects*" of "*a totalitarian character*" which show "*fascist tendencies*" were held to be value judgments, not factual statements (*Jerusalem v Austria* (2003) 37 EHRR 25, §44); as was an allegation that an individual was a "*Nazi*" (*Mortensen*, §§40-41).

26. The fact that a claimant has sought publicity or submitted words for public consumption may support the conclusion that subsequent statements about the claimant are opinion or fact because by doing so the claimant naturally invites comment: see *Duncan & Neill on Defamation (5th ed.)*, §13.12; *Burstein v ANL* [2007] 4 All ER 319, §20. The same point was emphasised by Eady J in *Keays v Guardian Newspapers Ltd* [2003] EWHC 1565 (QB). That case concerned an article relating to the claimant who had had an affair and a child with the then Conservative politician, Cecil Parkinson. Eady J held that the claimant's own statements in the public domain about her relationship with Mr Parkinson and their child were "*part of the context against which the judgment [of whether the words complained of were fact or comment] has to be made*". He went on:

> "*48. One factor which appears to weigh in favour of construing [the journalist's] observations as comment, or as being analogous to value judgments, is that she is on the face of the article responding to a corpus of published work emanating from Miss Keays. The very fact that Miss Keays launched a barrage of material about herself and her daughter for public consumption naturally invites comment upon the subject−matter and upon the appropriateness of what she has done…*
>
> "*50. Anyone who chooses to enter the public arena invites comment and often this will include scrutiny of and comment about motives. Such persons cannot expect as of right to be taken at face value. It is sufficient protection in such circumstances for personal reputation that any adverse comments should be made in good faith, and that the words should be subjected, at the appropriate stage, to the objective test of whether the inferences or deductions could be drawn by an honest person with knowledge of the facts...*"

27. Allegations about a claimant which, by their very nature, cannot be verified by another person but only established by inference (for example, statements about a claimant's state of mind or motives) are likely to be classed as opinion: see *Duncan & Neill*, §13.13, citing *Keays* at §49 and *Branson v Bower* [2001] EMLR 32 at §13 and §16.

Inferential expressions of opinion

28. Inferences of fact may qualify as expressions of opinion: see *Duncan & Neill*, §13.9 and §21 of the Explanatory Notes to the DA 2013 (which states: "*[a]s an inference of fact is a form of opinion, this would be encompassed by the defence*"). In *Butt* at §37, Sharp LJ observed: "*[t]he matter is perhaps expressed too broadly in paragraph 21 of the Explanatory Notes, since this is often, but not invariably the case. Be that as it may, that comment can include inferences of fact is a general principle of very long standing*".

29. In *O'Brien v Marquis of Salisbury* (1890) 54 JPN 209 Field J observed: "*[c]omment may sometimes consist in a statement of fact, and may be held to be a comment if the fact so*

stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred." The first part of this passage was approved in *Butt*, §§37-38.

30. Although a "*naked*" statement of fact (that is one made without reference, express or implied, to any other fact(s) on which it purports to be based) may leave "*little, if any, room for the inference that it was understood otherwise than as a bare statement of fact… if although stated as a fact, [the statement] is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment*": *O'Brien* at p 216; and *Duncan & Neil* at §§13.10-13.11. It is not necessary for there to be an express statement to the effect that it is the author's inference from other facts, provided that it is clear to the reader that it is an inference: *Duncan & Neill*, §13.11. Further, it is not necessary for the facts from which the inference is drawn to be set out in specific terms: *Duncan & Neill*, §§13.17-13.18.

31. This principle – as properly understood – comes into play when it is suggested by a defendant that what might otherwise be a statement of fact would be understood to be a comment (because it is an inference from other facts), <u>not</u> that a statement which would otherwise be understood to be a comment should be interpreted as a statement of fact because it is a "*bare comment*". The phrase "*bare comment*" is a misnomer and mischaracterises the relevant principle. This is clear from the judgment of Field J in *O'Brien* in which the judge referred to "*a statement in words of a fact stands by itself <u>naked</u> …*", and "*understood otherwise than as a <u>bare</u> statement of fact*" (emphasis added). This is an important matter of law which, it is submitted, justifies further consideration by the Court of Appeal as the Judge erred by relying on and adopting a mistaken approach to the (misleading) concept of "*bare comment*", as set out at §§55-56 below.

"Bare comment"

32. The principle deriving from the line of authorities relating to so-called "*bare comment*" was summarised in *Koutsogiannis* as follows: "*[s]ome statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, i e the statement is a bare comment*" (§16(iv)).

33. However in *Millett* Warby LJ recalled at §24 that:

> "*…the ultimate determinant of the fact / opinion question is how the statement would strike the ordinary reasonable reader … – that is, whether the statement is discernibly comment (to such a reader) … In that regard, the subject matter, the nature of the allegation and the context of the relevant words may well be important*".

34. He continued that:

> "*The cases on "bare comment" do not lay down a rigid rule of law that requires a court to depart from this key principle, and artificially treat a statement of opinion as if it was a statement of fact. On the contrary. The authorities show that "bare comment" is a pointer, or guideline, or rule of thumb that reflects the key principle. The question is, would the words used strike the ordinary viewer as a statement of fact or opinion? The answer does not turn on whether any given word is an adjective, noun, or verb, or some other part of speech. This is a matter of substance, not a formal, analytical matter of grammar or linguistics. In practice, when someone uses a descriptive word without giving any detail of what he is describing, that will tend to come across as an allegation of fact.*"

35. Further, and consistent with the principle identified in *Millett*, even where a statement is described as a "*bare comment*", the Court does not necessarily treat the statement as a factual allegation. For example, in *Greenstein* Nicklin J held that the allegation that the claimant was a "*notorious antisemite*" was an expression of opinion, notwithstanding that it was a "*bare comment*" (see §41). Similarly in *Blake* Nicklin J held that an allegation of racism was a statement of opinion even though the publication complained of did not provide any basis for the opinion expressed: §56 and §59 (this decision was upheld on appeal: §55).

Section 3(3) DA 2013

36. By s 3(3) DA 2013, the second condition for the honest opinion defence is that "*the statement complained of indicated, whether in general or specific terms, the basis of the opinion*". As stated at §22 of the Explanatory Notes to the Defamation Act 2013, s 3(3) is intended broadly to reflect the common law principle as stated in *Joseph v Spiller* that "*the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based*" (at §105).

37. This condition does not require that the reader should be in a position to evaluate the comment for themselves: see *Joseph v Spiller* at §98. Instead, the comment must "*identify at least in general terms what it is that has led the commentator to make the comment,*

so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did": §104.

38. This approach applies not only "*where adverse comment is made generally or generically on matters that are in the public domain*" but even to a case "*where the subject matter of the comment is not within the public domain, but is known only to the commentator or to a small circle of which he is one*": *ibid*, §99. Lord Phillips illustrated that principle with the following example:

> "*Today the Internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out. If Lord Nicholls's fourth proposition*[4] *is to apply the defence of fair comment will be robbed of much of its efficacy*".

39. The limited nature of the common law requirement is also demonstrated by the earlier decision of the House of Lords in *Kemsley v Foot*. That case concerned a newspaper article which referred to the plaintiff, Lord Kemsley (a newspaper proprietor), in the headline (which read "*Lower than Kemsley*"), but which then made no further reference to him. The body of the article instead attacked the conduct of the *Evening Standard*, which was then controlled by Lord Beaverbrook. Upholding the decision of the Court of Appeal[5], the House of Lords rejected the plaintiff's argument that the defendants could not rely on the defence of fair comment because the facts on which they alleged the comment to be based were not arguably referred to in the article complained of.

40. Lord Porter noted that, in the article sued upon, Lord Kemsley was attacked as "*a newspaper proprietor who prostitutes his position by conducting his newspapers or*

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[4] This is a reference to the judgment of the Court of Final Appeal of Hong Kong in *Tse Wai Chun v Cheng* [2001] EMLR 777 in which Lord Nicholls identified the following condition as one of the five requirements of the defence of fair comment: "…*the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded*." That requirement was rejected in *Joseph v Spiller*.

[5] [1951] 2 KB 34. See particularly the reasoning of Birkett LJ at pp 46-47 and p 51.

permitting them to be conducted in an undesirable way" (p 355). He continued as follows:

> "*If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment. Not all the public will see or read or hear it but the work is public in the same sense as a case in the Law Courts is said to be heard in public. In many cases it is not possible for everyone who is interested, to attend a trial, but in so far as there is room for them in the court all are entitled to do so, and the subject-matter upon which comment can be made is indicated to the world at large.*
>
> *The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded."*

41. Against that background, the question was "*whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action*": p 356. For those purposes "*the facts necessary to justify comment might be implied from the terms of the impugned article*" and it was therefore not necessary for the defendant to "*point to definite assertions of fact in the alleged libel upon which the comment is made*". Instead, it was sufficient if there was "*subject-matter indicated with sufficient clarity to justify comment being made*". In *Kemsley v Foot*, that test was met as "*there is subject-matter and it is at least arguable that the words directly complained of imply as fact that Lord Kemsley is in control of a number of known newspapers and that the conduct of those newspapers is in question*": p 357.

42. In his concurring judgment, Lord Oaksey held that it was not "*a matter of importance that the reader should be able to see exactly the grounds of the comment*"; rather, it was "*sufficient if the subject which ex hypothesi is of public importance is sufficiently and not incorrectly or untruthfully stated*": p 361. He continued:

> "*In the present case the word which indicates the subject is "Kemsley" and it must be read in its context, and in that context it must, I think, mean the newspapers controlled by Lord Kemsley - that is the subject-matter of the comment. The comment is that those newspapers are nearly as low as Lord Beaverbrook's newspapers, about which many defamatory statements are made in the alleged libel*."

43. In *Joseph v Spiller* Lord Walker provided the following commentary on *Kemsley v Foot*, emphasising the continued need for flexibility in the application of the requirement that a comment should indicate its basis:

> *"Kemsley v Foot [1952] AC 345 was an important milestone. ... In the half-century or more since Kemsley v Foot society and its concerns have continued to change. The creation of a common base of information shared by those who watch television and use the Internet has had an effect which can hardly be overstated. Millions now talk, and thousands comment in electronically transmitted words, about recent events of which they have learned from television or the Internet. Many of the events and the comments on them are no doubt trivial and ephemeral, but from time to time (as the present appeal shows) libel law has to engage with them. The test for identifying the factual basis of honest comment must be flexible enough to allow for this type of case, in which a passing reference to the previous night's celebrity show would be regarded by most of the public, and may sometimes have to be regarded by the law, as a sufficient factual basis*".

44. Although this passage refers to "*the factual basis of honest comment*", it is relevant to note that the basis for an opinion, within the meaning of s 3(3) DA 2013, is not required to be factual in nature. It might be factual, or it might be "*something broader and less tangible, such as the style of an operatic production, or the characterisation in a novel, or the policy of a political party*": *Burki v Seventy Thirty Ltd* [2018] EWHC 2151 (QB), §229.

C.3. Whether a statement is defamatory at common law

45. At common law a meaning is defamatory if it satisfies both the "*consensus requirement*" (i.e. it tends to lower the claimant in the estimation of right-thinking people generally by imputing behaviour or views that are contrary to common, shared views of our society) and the "*threshold of seriousness*" (i.e. it tends to have a substantially adverse effect on the way that people would treat the claimant): *Millett*, §9. In *Monroe v Hopkins* [2017] 4 WLR 68 Warby J explained the consensus requirement at §§50-51:

> "*...a statement about a person's views is only defamatory if it attributes views that would lower a person in the estimation of "right-thinking people generally". This old phrase is of course about people who think correctly, and it refers to common standards. It also covers left-thinking people, and those in the middle. In a diverse society, there are many with views of which some people approve and some disapprove. The demands of pluralism in a democratic society make it important to allow room for differing views to be expressed, without fear of paying damages for defamation. Hence, a statement is not defamatory if it would only tend to have an adverse effect on the attitudes to the claimant of a certain section of society…*
>
> *51. The judge's task is not to impose his or her own views. It can be put this way: to determine whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society. This again is*

> *a matter for judgment, not a matter for opinion polls or other evidence. It can be difficult. But one test is whether the conduct or view in question is illegal or, by the standards of society as a whole, immoral.*"

46. Accordingly, "*the standards to be applied in assessing whether the offending statement is damaging to reputation in a way that is legally actionable must be collective standards of society generally, that are shared and agreed upon by society at large, and not just by a part of society*": *Sube v NGN* [2018] EWHC 1234 (QB), §30. As a result:

> "*It is… necessary to consider carefully the kind of behaviour which the statement imputes to the claimant, and to ask whether such conduct would involve a serious breach of a settled and important societal norm; or, putting it more precisely, whether the attribution of such conduct would tend to harm the claimant's reputation in the eyes of reasonable members of society generally in a way or to an extent that is serious. In a plural society there may be much that some reasonable people condemn but other reasonable people approve, or tolerate without strong disapproval.*" (*Sube*, §31)

47. In accordance with this principle of pluralism it is not arguably defamatory at common law to allege, for example, that a person is a supporter of Donald Trump (or his policies): *BrewDog Plc v Frank Public Relations Ltd* [2020] EWHC 1276 (QB), §33. As stated in *Duncan & Neil* at §4.03, "*Social standards and attitudes do, of course, change over time. At times in the past, it would, for example, have been seriously defamatory to describe someone as a Communist or a Papist, but in the present day allegations impugning a person's political or religious allegiance would be judged by quite different standards*".

48. The fact that an imputation is presented to the reader as opinion may well mitigate any defamatory impact: *Blake v Fox* [2026] E.M.L.R. 3, §70.

D. Submissions in support of the Grounds of Appeal for which permission has been granted

D.1. Ground 3: The Judge erred (in law and fact) and was wrong in holding that the Statement was a statement of fact

49. The Judge held that the Statement was a statement of fact. In so doing, he erred (in law and fact) and was wrong. The Statement was clearly a statement of opinion.

50. The Judge's primary finding was that the description of C as an "*alt-right agitator*" would "*strike the ordinary reasonable reader as an assertion of fact*": J/§52 [**CB/7/102**]. The only reason given for that finding was that "*[t]he focus of the allegation is not that [C] holds certain beliefs, but that he agitates for them*". The Judge went on at J/§53 to say

that he "*readily accept[ed] that calling someone 'alt-right' or an 'alt-right agitator' could, in a different context be a statement of opinion*". He identified examples such as "*the alt-right agitator Mr X who was involved in Y famous (alt-right) event*", or "*the alt-right Mr X who expresses his scandalous views on the website Y*" as allegations which the reasonable reader "*might well*" have viewed as expressions of opinion.

51. In case he was wrong to conclude that the statement was not "*recognisable as opinion*", the Judge held that this was a "*case of bare opinion*". This was because "*[t]he reader is simply presented with the assertion that the Claimant is an 'alt-right agitator' without any further facts to support it*".

52. The Judge's reasoning on the fact / opinion question failed to consider the following factors of critical relevance to the issue:

    a. The Judge gave no weight to the fact that the Article was a music review which was humorous in tone and therefore to be regarded by the reader as inherently likely to contain the author's opinionated and light-hearted observations and comments rather than any factual account relating to C (who was moreover only peripherally referred to in the Article): see *Yeo*, §97; *Burstein*, §23.

    b. Nor was any account taken of the inherently evaluative quality of the key word "*alt-right*". That term is capable of a variety of definitions and embraces a wide range of different individual beliefs, even more so than the words "*fascist*", "*antisemitic*" and "*racist*" (held to have an intrinsically evaluative quality in *Greenstein*, *Swan* and *Blake* respectively). Whether a person is or is not "*alt-right*" is not verifiable as a matter of fact: such a characterisation inevitably involves the application of a subjective judgment, not least because the term is capable of wide variety of meanings which are not agreed on. To call someone an "*'alt-right' agitator*" is therefore a paradigm example of a "*deduction, inference, conclusion, criticism, remark, observation etc.*" qualifying as opinion.

    c. This is underscored by the use of quotation marks around the word "*alt-right*" which further highlights to the reader that the description is not a definitive factual statement but a matter of received opinion about a subjective characterisation of C.

    d. Similarly, the description of C was, in the language of the Article 10 jurisprudence, a value judgment, the truth of which is not susceptible of proof. In that sense it was

equivalent to terms such as "*sects*" of "*a totalitarian character*" which show "*fascist tendencies*" (held to be a value judgment in *Jerusalem*) and "*Nazi*" (held to be a value judgment in *Mortensen*). As such a requirement to prove the truth of the allegation, as opposed to the ability to rely on an honest opinion defence, would infringe Article 10.

e. Moreover the purpose of the reference to C in the first sentence of the Statement is to set up a joke about Mumford & Sons which appears in the second sentence. That joke involves an implicit comparison between C and Jordan Peterson, who, as the hypothetical *Observer* reader would know, is a well-known right-wing academic whose views are influential among large numbers of conservative commentators and activists. The general association made between C and Mr Peterson heightens the broad, evaluative approach taken to the description of C and the humorous context in which C's name is mentioned reinforces the non-factual impression conveyed by the Statement.

f. Notwithstanding the jocular nature of the Statement, it is concerned with political issues. It therefore engages the principle identified by Warby J at §97 of *Yeo*, by which, in determining fact / opinion "*the court should be alert to the importance of giving free rein to comment and wary of interpreting a statement as factual in nature, especially where… it is made in the context of political issues*". This is bolstered by the limited scope under Article 10 for restrictions on freedom of expression in respect of political speech (which will not be obviated by "*[a] degree of hostility or the potential seriousness of certain remarks*"): *Mortensen*. By disregarding these Article 10 issues the Court failed to apply the requisite caution before finding that the description of C's political views was a factual statement.

53. So far as concerns the reason given by the Judge in support of his determination that the Statement was factual, his observation at J/§52 [**CB/7/102**] that "*[t]he focus of the allegation is not that [C] holds certain beliefs, but that he agitates for them*" could not reasonably support that finding. The fact / opinion issue does not turn on the nature of C's relationship with "*alt-right*" beliefs (i.e. whether he "*holds*" them or "*agitates for*" them). Rather it is informed by the characterisation of the beliefs themselves. In other words, the opinion expressed in the Statement is that the beliefs which C "*agitates for*" (or indeed "*holds*") should be characterised as "*alt-right*". The assessment of a person's political beliefs can be a matter of opinion if that person "*agitates for*" them just as much

as if he "*holds*" them. Such an assessment can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation.

54. At J/§53 the Judge observed that a description that a person is "*alt-right*" or an "*alt-right agitator*" might well be an expression of opinion if accompanied by facts which support the statement. The paragraph seems to imply that the Article lacks such facts and therefore is to be regarded as a "*bare comment*" (a finding then made at J/§54).

55. However, the Judge erred in holding that the Statement was a "*classic case of bare opinion*" which "*should be treated as an allegation of fact*" (at §54). That approach reflected a misunderstanding of the applicable principles (see §§29-31 above) and the content of the Statement itself. The Judge was wrong in law to treat a statement of opinion as a statement of fact on the basis that the statement did not include "*any further facts to support it*" (at §54). If the statement is recognisable as opinion (as the Judge postulated at J/§54) then it is wrong in law (and artificial) to treat it (as the Judge did) as an allegation of fact.

56. The Judge's error was compounded when he went on to consider s 3(3) DA 2013. He wrongly stated (at J/§55) that the issue under s 3(3) DA 2013 is "*closely connected to the question of bare opinion*". It is not. They are quite separate and distinct issues. Eliding them risks confusion and error, as happened in this case. The Judge wrongly considered these issues together.

D.2. Ground 4: The Judge erred (in law and fact) and was wrong, and engaged in a serious procedural irregularity, in holding that, in the event that the Statement was a statement of opinion, it did not indicate, whether in general or specific terms, the basis of the opinion

57. The Judge was wrong to conclude, for the purposes of s 3(3) DA 2013, that the Statement did not indicate, whether in general or specific terms, the basis of the opinion. It clearly did.

58. The Judge erred in holding that the Statement contains "*no express indication, either of a general or a specific nature, as to the basis of the opinion*" (J/§58) [**CB/7/103**] and "*does not impliedly identify its subject matter as a class of material that is in the public domain*" (J/§60). The Statement included both an express indication of "*in general terms what it is that has led the commentator to make the comment*" (*Joseph*, §104) and an

implicit indication of the comment's "*subject matter as a class of material that is in the public domain*".

59. As held in *Kemsley v Foot*, in order for the fair comment defence to be engaged, it is necessary for there to be "*a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action*" such that the "*subject-matter [is] indicated with sufficient clarity to justify comment being made*". In that case the sole word indicating the subject was "*Kemsley*".

60. In *Joseph v Spiller,* Lord Phillips described the requirement as being to "*identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did*" or that "*the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based*". Those passages underscore the limited nature of the identification required. Importantly they establish that there is no need for the reader to be able to evaluate the comment from the contents of the publication itself.

61. In this case the Statement does identify the "*subject-matter*" of the comment, which is C, his conduct and activities (in the capacity as "*agitator*"), and his "*alt-right*" views. It also expressly identifies what has led the commentator to make the comment, namely that the praise given to C by Mr Marshall had caused an outcry and Mr Marshall's departure from Mumford & Sons.

62. Indeed, the Statement corresponds to one of the examples identified by the Judge at J/§53 as an allegation which "*might well*" be understood as "*a statement of opinion based on facts set out in the article or a class of material in the public domain*". That example is an allegation that "*the alt-right agitator Mr X who was involved in Y famous (alt-right) event*". The Statement does refer to a famous event in which C was involved: the "*outcry*" which followed the praise given by Mr Marshall to C, which resulted in Mr Marshall's departure from Mumford & Sons and which forms the backdrop to the reviewer's attribution of the "*alt-right*" characterisation to C.

63. In any event C had placed his views in the public domain by setting them out in his journalistic work and in his book *Unmasked*. As such the subject-matter of his views are

"*open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded*" (to adopt the language of Lord Porter in *Kemsley*). Similarly, by his journalism and book-writing C had "*[chosen] to enter the public arena [and] invite[d] comment*" (in the words of Eady J in *Keays*), and the matters on which comment was made were "*in the public domain*" (to cite Lord Phillips in *Joseph*).[6]

64. It would therefore have been sufficient for the basis of the comment in the Article to be implicit, as it was in *Kemsley*, in which the sole reference to the plaintiff in the article in issue was his name in the headline. In fact, the comment in the Article contained far more detail about C, from which it was at the very least implicit that the opinion was based on the politically-focused actions of C (i.e. the things he had said, written and done, or agitated on, on political matters) which had entered the public domain and had given rise to an "*outcry*" when Mr Marshall had praised him. The identification of the basis for the opinion in this case was therefore clearer than in *Kemsley* since in that case no facts at all relating to the plaintiff were described in the publication complained of.

65. The Judge rejected the comparison with *Kemsley* at J/§60 [**CB/7/103**]. This was on the basis that C "*is not a well-known public figure*", "*most people would never have heard of him*", he "*is not notorious in the public mind for things he has said and done*" and "*[i]f as a journalist he is responsible for many publications in which he expresses his views, those are not a matter of general knowledge*". There were two errors in this reasoning.

66. First, it misstated the circumstances in which the *Kemsley* analysis will be engaged. In order for conduct to be "*open for comment*" in the way described in *Kemsley*, it is not necessary for it to be "*a matter of general knowledge*". On the contrary Lord Porter explained that it is sufficient if "*the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity to of ascertaining for themselves the subject-matter upon which the comment is founded*" (emphasis added). In *Joseph* Lord Phillips stated at §98 that "*where adverse*

[6] Similarly, in accordance with the Article 10 case-law, C had laid himself open to scrutiny by journalists and the public at large by voluntarily entering the arena of public debate: *Jerusalem v Austria*, §46.

comment is made generally or generically on matters that are in the public domain I do not consider that it is a prerequisite of the defence of fair comment that the readers should be in a position to evaluate the comment for themselves" (emphasis added). In this case C's views plainly were "*in the public domain*" via his journalism and book (as pleaded in the Particulars of Claim). Lord Walker's observations (at §131) (cited above at §**Error! Reference source not found.**) as to the need for flexibility in the test for identifying the factual basis of honest comment, are equally applicable.

67. Second, the Judge's factual findings summarised at §65 above were not properly open to him and resulted in a serious procedural irregularity. There was no evidence before the Court to support the conclusions that (for instance) C is not "*a well-known public figure*" or that "*most people would never have heard of him*". On the contrary the material that was before the Court contradicted those findings. The Article makes clear that C is well-known as a result of the "*outcry*" caused by the praise given to him by Mr Marshall which resulted in his departure from Mumford & Sons. The Particulars of Claim further allege that C was a high-profile and well-known public figure, pleading that (a) he is a journalist who has specialised in investigating Antifa; (b) he is the author of *Unmasked: Inside Antifa's Radical Plan to Destroy Democracy*; (c) his activities have "*engendered a great deal of hatred towards him*" (emphasis added); and (d) he "*has also been subjected to a substantial number of threats of violence*".

68. Accordingly, the Judge was incorrect to hold that there was "*no true analogy with Kemsley v Foot on the facts of this case*". In fact, the Article contained both express and implicit identification of the basis of the comment such that the principles in *Kemsley* apply with even greater force than in that earlier case.

D.3. Ground 5: The Judge erred (in law and fact) and was wrong in holding that the Statement was defamatory at common law

69. In finding that the Statement was defamatory at common law the Judge erred (in law and fact) and was wrong. The Statement was not defamatory at common law.

70. As set out in *Monroe v Hopkins* (see §45 above), the consensus requirement is an important control mechanism in defamation law. It ensures that this aspect of the law meets the demands of pluralism in a democratic society by confining actionable allegations to those that are contrary to society's common, shared views and barring

claims in respect of statements alleging beliefs or conduct that would harm the reputation of the claimant in the estimation only of sections of society. Coupled with the seriousness requirement, the consensus requirement will be met only if the belief or conduct imputed to the claimant "*would involve a serious breach of a settled and important societal norm*": *Sube* (see §46 above).

71. The natural and ordinary meaning found by the Judge – that C "*actively promotes far right beliefs*" – does not meet that threshold. The promotion of such beliefs may be condemned by certain sections of society but it is not contrary to the common, shared views of our society, nor does it involve a serious breach of a settled and important societal norm. On the contrary English law protects the political right to hold and promote far right beliefs, provided that such activities do not infringe others' rights or give rise to some other form of unlawful conduct. For example, a person's status and work as a local councillor for the far right British National Party is protected by article 11 ECHR: *Redfearn v UK* [2013] 3 Costs LO 402. Similarly Restore Britain[7] and Reform UK[8], both of which have been characterised as far right political parties, are registered political parties which are entitled to campaign, fundraise and field candidates in elections, and each party has democratic representatives in national and local legislatures in England.

72. In those circumstances the simple promotion of, or agitation for, far right beliefs cannot reasonably be characterised as "*contrary to common, shared views of our society*" or an imputation which involves "*a serious breach of a settled and important societal norm*". Such a characterisation would be inconsistent with a pluralistic society in a democracy and impose an undue fetter on the right to freedom of expression. The meaning found by the Judge does not incorporate any sense that such promotion includes the infringement

[7] Restore Britain's policy objectives include the abolition of the asylum system; the detention of all illegal entrants in tents before removal; the banning of all foreign nationals from voting in elections; the removal of all foreign nationals living in Britain who cannot speak English; and the barring of foreign nationals from any entitlement to state benefits: see https://www.restorebritain.org.uk/immigration_border_control [**SB/5/10**].

[8] Reform UK's policies include "*intercepting and detaining all illegal arrivals, and deporting them*"; abolishing indefinite leave to remain and rescinding existing awards; and barring foreign nationals from benefits: https://reformparty.uk/policies#policies-parallax [**SB/6/15**].

of others' rights or gives rise to any form of unlawful conduct. It therefore does not satisfy either the consensus or the seriousness threshold.

73. The position would be *a fortiori* if the Court accepts GNM's contention above that the Statement is an expression of opinion. That conclusion would further downgrade the impact of the Statement which would be understood by the reasonable reader as nothing more than the author's view of C: see §48 above.

74. In failing to apply the relevant legal principles set out above, the Judge erred in holding that the natural and ordinary meaning is defamatory at common law. Moreover, that conclusion was unsustainable in light of those governing principles.

E. Conclusion

75. For the reasons given above the Court is invited to allow the appeal on each of Grounds 3, 4 and 5.

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Matrix

14 July 2026

Lodged as Replacement Skeleton Argument: 20 October 2026