

Bevan Brittan 

## Report to Rutland County Council Rutland Anti-Corruption Party

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### Introduction

- 1 The purpose of this report is to advise Rutland County Council ("the Council") in connection with the statements made by Councillors Richardson, Gale and Wainwright who have formed, and are members of, a group called The Rutland Anti-Corruption Party ("ACP")<sup>1</sup>.
- 2 More specifically, the Council has asked us to advise on what legal and other steps can be taken in response to ACP's allegations and communications.
- 3 We have reviewed the note dated 17 October 2012 prepared by Kim Sawyer which attaches a report prepared by the Council's Chief Executive Officer (Helen Briggs) together with three lever arch files of supporting documents. We have not, at this stage, carried out a detailed review of the documents contained in the three lever arch files.
- 4 We have previously advised the Council in connection with statements made by Martin Brookes on his weblog<sup>2</sup>. We note that some of the allegations now made by ACP have been republished on Mr Brookes' weblog. Our understanding is that the Council does not currently intend to take action against Mr Brookes in connection with the statements made by ACP which Mr Brookes has republished on his weblog.

### Defamation

- 5 The Council's primary cause of action lies in defamation. Defamation relates to the protection of the personal brand (a person's reputation) and the corporate brand (the organisation's reputation and goodwill). It occurs when there is a publication<sup>3</sup> to a third party of words or matters containing an untrue imputation against the reputation of individuals or organisations which serve to undermine that reputation in the eyes of "right-thinking members of society". Libel is the publication of defamatory allegations in permanent (usually written) form.
- 6 The meaning of the words used is a matter of fact for the judge (or the jury in a jury trial) to decide. A defamatory meaning is either the "natural and ordinary meaning" of the words in question or the meaning derived from additional facts known to the third parties to whom the words were published. In determining the natural and ordinary meaning of the words used, the court will consider the statements made in the context of the whole publication.
- 7 In our view, a number of officers are defamed by statements made by ACP. Those officers are therefore entitled to issue a libel claim against ACP seeking damages for the harm caused to their reputation and an injunction preventing further publication of the defamatory statements.
- 8 Examples of the statements that defame individual officers include:

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<sup>1</sup> Our understanding is that ACP is an unincorporated association. Reference in this report to "ACP" is therefore used to collectively describe the three individual councillors.

<sup>2</sup> 24 May 2010.

<sup>3</sup> Publication in this context does not mean commercial publication. In defamation law, it has a wider meaning; a statement is "published" if the words are sent, communicated or drawn to the attention of a third party.

- 8.1 Email from Councillor Wainwright to Geoffrey Pook dated 1 March 2012 stating that "[Ms Briggs] has demonstrated that she is both willing and able to censure email traffic... goodness know what else she does to our supposedly secure communications."
- 8.2 Email from Councillor Gale to all members (copying in the local police) dated 18 July 2012 suggesting that Ms Briggs' attitude is a cause for concern, that she has withheld information from ACP, that she "is not acting in an unbiased and apolitical manner", and that she is evasive.
- 9 ACP may seek to deploy one or more of the following defences to any such claim:
- 9.1 Justification – the "sting" of the libel is substantially true;
- 9.2 Honest comment – the statement is on a matter of public interest, is recognisable as comment (i.e. something that can reasonably be inferred to be a deduction, conclusion, criticism, remark or opinion), is based on facts that are substantially true, and is not made in malice;
- 9.3 Qualified privilege – the maker of the statement has a legal, social or moral duty to make the statement and the recipient has a corresponding legal, social or moral interest in receiving it. The defence is defeated if the statement is made out of malice.
- 10 A number of members are also defamed by statements made by ACP. Whilst they are also entitled to make out a defamation claim, ACP is likely to deploy the defence of qualified privilege. The courts are more sympathetic towards defendants who have criticised those holding a public office (provided the statements are honestly made) as the courts have recognised that those holding a public office must accept a degree of criticism in relation to matters of public interest.
- 11 Some 20 years ago the Court of Appeal held that a local authority is not entitled to issue a defamation claim in its own name in connection with statements that damage the reputation of the authority as a whole (rather than the reputation of its individual officers or members)<sup>4</sup> and this has been the accepted law. However, in our view, this principle has been overturned by the general power of competence granted to local authorities by section 1 of the Localism Act 2011 ("the 2011 Act"). This provision was brought into force on 18 February 2012 and gives a local authority the power to do anything which an individual generally may do. An individual has the power to issue a defamation claim in its own name, and the 2011 Act contains no restriction which would prevent an authority from doing so. Given the extent to which a local authority is now dependent on its public reputation for its ability to secure external funding, to attract competitive tenders for the provision of services, or to recruit outstanding officers, it seems quite appropriate that the 2011 Act should now have brought the law up to date with the commercial reality.
- 12 It is arguable that the following statements, among others, defame the Council and are therefore actionable:
- 12.1 Email from Councillor Richardson to all members (copied to Ms Briggs) dated 15 January 2012 stating "...the fraudulent submission made by Rutland Council for granting funding for the "Little Build" and "corrupt actions".

<sup>4</sup> *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534.

- 12.2 Statements made by Councillor Richardson to VAR that the Council was manipulating land deals to fill a hole in their accounts. VAR has said that the intensity of these statements disturbed them.
- 12.3 Email from Councillor Richardson to all councillors and various officers dated 19 July 2012 stating that the decision regarding the football facilities was rushed through by the Council without scrutiny.
- 12.4 Email from Councillor Richardson to Councillor Pocock dated 23 September 2012 stating that the Council had prepared its accounts whilst "flouting all the required rules and regulations" and that the Council has failed to uphold best practice and has breached employment laws in connection with the death of a senior officer.
- 12.5 ACP's manifesto stating the "widespread concern and suggestion by the public of corruption in Rutland Council".
- 12.6 Email from Councillor Wainwright to Neil Bellamy (Audit Commission) dated 17 September 2012 stating that the Council is "trying to manipulate the awarding of contracts". The email attached an anonymous email from a member of the public which attempted to implicate an officer of the Council.
- 12.7 The name of ACP itself, the clear imputation of which is that the Council is corrupt.
- 13 ACP would be entitled to deploy the same defences as are listed above in response to a claim issued by the Council.
- 14 If the Council were to take defamation action against the ACP members, it could demand the withdrawal of the defamatory allegations (and that might include requiring the ACP to change its name to remove the implication of corruption within the Council), as well as seeking damages and an undertaking not to repeat the defamatory statements. The respondent ACP members would have the opportunity to offer to settle the action by agreeing to the Council's demands.
- 15 The Council should bear in mind that if it was to issue a defamation claim in its own name, it would (as far as we are aware) be the first local authority to do so since the general power of competence came into force. The Council's power to issue a defamation claim in its own name is therefore untested and the case would be almost certainly attract media interest beyond a local level.
- 16 It is important to note that the limitation period in defamation claims is one year so individual officers or the Council are unable to take action in relation to statements published before November 2011 unless those statements have since been re-published (which includes re-sending the communications or making the statements available online in which case a new publication occurs each time a viewer accesses the webpage). We note, for example, that allegations of "planning corruption" were made by ACP in mid-2011; these statements would not be actionable in defamation unless they have been re-published since November 2011.

#### **Protection from harassment**

- 17 Under the Protection from Harassment Act 1997 ("the 1997 Act") it is a criminal offence<sup>5</sup> to pursue a course of conduct which amounts to harassment of an individual or group of

<sup>5</sup> A person found guilty is liable for a prison term not exceeding six months and/or a fine not exceeding £5,000.

individuals. Under the 1997 Act, harassment includes causing alarm or distress and a "course of conduct" must involve conduct on at least two occasions. In our view, it is unlikely that the police would prosecute ACP for the action they have taken (the police tend only to pursue the most serious cases which involve threats to a person's safety) but we would still recommend that an officer of the Council contacts the police about ACP's actions and reports their actions as an offence under the 1997 Act as this may result in the police visiting ACP and requesting that they moderate their behaviour.

- 18 The 1997 Act also provides for civil remedies including damages for the anxiety caused and any financial loss suffered by the harassment and an injunction restraining the defendant from continuing to pursue any conduct which amounts to harassment.
- 19 Elected councillors have a democratic function to perform and have extensive rights to the information which they need in order to perform that function, and the actions of the three ACP members must be judged against that background. But those rights are not unlimited. The common law "need-to-know", for example, rests on the assumption that different councillors fulfil different roles, as members of different committees or as executive members, and must have rights of access to information in respect those functions of the authority for which they have responsibility, but must trust those with responsibility for other functions to discharge their responsibilities properly. It also requires a councillor to state the reasons for any demand for information. Further, whilst a councillor is entitled to use assertive language to an officer where it is necessary to secure a legitimate outcome, that is not a license for aggressive and abusive language in correspondence with an officer.
- 20 In our view, the nature and extent of the emails which have been sent to Ms Briggs in particular, and the absence of a substantive justification for such correspondence, are very likely to amount to harassment under the 1997 Act. Ms Briggs, and any other individuals who have suffered harassment, would therefore be entitled to issue a claim in the civil courts seeking damages and an injunction against ACP.
- 21 Please note that harassment must relate to individuals, and accordingly we do not believe that an action would lie in respect of harassment of the Council itself.

### **Malicious Communications Act 1988 and Communications Act 2003**

- 22 Under the Malicious Communications Act 1988 ("the 1988 Act") it is a criminal offence<sup>6</sup> to send to another person a letter or electronic communication (including an email) which conveys a threat or information which is false (and known or believed by the sender to be false) if the purpose (or one of the purposes) in sending it is to cause distress or anxiety to the recipient.
- 23 A similar offence exists under the Communications Act 2003 ("the 2003 Act"). Under the 2003 Act it is a criminal offence<sup>7</sup> to send by means of a public electronic communications network a message that he knows to be false if the purpose in sending it is to cause annoyance, inconvenience or needless anxiety to another.
- 24 There are no civil remedies for the above offences so the individuals who have received communications from ACP will need to report the offences to the police.

<sup>6</sup> A person found guilty is liable for a prison term not exceeding six months and/or a fine not exceeding £5,000.

<sup>7</sup> A person found guilty is liable for a prison term not exceeding six months and/or a fine not exceeding £5,000.

- 25 In our view it is possible that some of the communications sent by ACP may amount to an offence under the 1988 Act and/or the 2003 Act provided that the requisite knowledge in the falsity of the information is proven. It should be borne in mind that the standard of proof in criminal cases is "beyond reasonable doubt". The standard of proof in civil claims is lower; "on the balance of probabilities".

#### **Taking action against ACP as a group**

- 26 ACP comprises the three councillors, Richardson, Gale and Wainwright, who have notified the Council that they wish to be recognised as a political group for the purpose of the Local Government and Housing Act 1989 under the title of the Rutland Anti-Corruption Party. They have therefore acknowledged that they are undertaking a common enterprise, and their subsequent correspondence and conduct, such as their mutual copying of correspondence and their mutual support in their various campaigns, reinforce this impression.
- 27 As a result, whilst a defamation or harassment action must be taken against one or more individuals (and ACP is not a separate legal entity), it is possible to treat them as an unincorporated association, with a common purpose, and therefore to treat the actions of each member of the group as the actions of each member of the group. This is important in seeking to determine whether their collective actions in respect of any individual officer or the authority are reasonable, and whether or not they are genuinely motivated by the public interest.

#### **Council Powers to support actions by or on behalf of officers and members**

- 28 It is apparent from the documents provided that the actions of ACP have damaged the ability of the Council to discharge a number of its functions, including its ability to recruit outstanding officers and to secure external funding for the provision of educational and recreational facilities, and has seriously distracted from the ability of senior officers to discharge their own functions effectively.
- 29 The Council has a power to prosecute and appear in legal proceedings, and may institute civil proceedings in its own name "for the promotion or protection of the interests of the inhabitants of their area"<sup>8</sup>. Accordingly, it could seek an injunction in its own name to protect its employees, or its councillors, against harassment.
- 30 The Council also has very broad powers to support officers in, and indemnify officers for the costs of, taking legal action. The Council has a power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions<sup>9</sup>. Further, it has been held that the power to employ officers "on such reasonable terms and conditions as the authority think fit", can include the provision of an indemnity for the officer against the costs of taking legal action, even taking defamation action, in respect of any matter arising from the officer's employment<sup>10</sup>. These powers were supplemented by regulations made under Section 101 of the Local Government Act 2000<sup>11</sup>. These regulations give the Council the power to grant an indemnity to an officer to take legal proceedings, other than defamation proceedings, in respect of matters arising from the officer's employment. The regulations specifically exclude the power to fund the taking of defamation action by an officer but it is considered that this does not restrict a council's power to do so as this had already been established in the Bedford case referred to above. So the Council could

<sup>8</sup> Section 222, Local Government Act 1972

<sup>9</sup> Section 111, Local Government Act 1972

<sup>10</sup> *R v Bedford Borough Council ex parte Conninos* [2003] EWHC 121 (Admin).

<sup>11</sup> The Local Authorities (Indemnities for Members and Officers) Order 2004. SI 2004 No. 3082

underwrite the costs of an officer in seeking an injunction or in taking defamation action against individuals by relying on a combination of the power under the Local Government Act 1972 (confirmed by the courts in the Bedford case) and on the powers in the regulations in relation to other legal action. We would, however, counsel caution if the Council is minded to offer an indemnity given the financial cost and negative publicity associated with a defamation claim. The Council would need to satisfy itself that it was in the Council's interest to indemnify the officer or officers concerned. We have considerable experience of drafting the terms for such indemnities to both members and officers, and would be happy to assist if the need arose.

- 31 The power to support members in taking legal action is limited to the statutory powers under Section 101 of the Local Government Act 2000 (as a councillor has no contract of employment with the Council). That can include providing an indemnity against the legal costs of taking such action. However, the Council is not entitled to provide financial assistance to a member who elects to issue a defamation claim<sup>12</sup>.
- 32 The *Derbyshire* case and the High Court decision in *McLaughlin and others -v- London Borough of Lambeth and Khan*<sup>13</sup> are still good authority for the proposition that the Council cannot issue a defamation claim in its own name where it is more appropriate that the action be taken by an individual officer (because the words complained of refer to, and are defamatory, of the individual rather than the local authority as a whole).

## Practical solutions

- 33 Quite apart from any legal action, the Council has a general "power of self-regulation" – that is a power to take administrative steps to ensure that it can continue to discharge its functions effectively<sup>14</sup>. In the *Broadland* case the Chief Executive as manager of the council's staff and premises decided that Councillor Lashley's conduct amounted to harassment of officers and took the administrative decision to prohibit her from entering the council's offices, as opposed to the member meeting rooms, and to put her on Single Point of Contact ("SPOC") instructing her to direct all her telephone enquiries to a nominated officer's number, which officer would then deal with all her requests. The intention was to prevent her from harassing junior officers, to enable the council to monitor her interactions with the council, and to ensure that she did not make unreasonable demands on officer time. Such administrative actions must not prevent the councillor from discharging his proper functions as a councillor. The Chief Executive in that case offered her the opportunity of an appeal to the council's Standards Committee.
- 34 It is clear from the correspondence that the three ACP councillors make requests, largely by email, to many individual officers of the Council, that they are very persistent in such correspondence, demanding almost instant responses, and that they use aggressive rather than just assertive language, and that this causes considerable and unreasonable stress for whichever officer is the current focus of their attention. There is often a valid purpose underlying their correspondence, but the manner of their correspondence is unreasonable and collectively, and sometimes individually, amounts to harassment. We are therefore of the opinion that the Council, by decision of the Chief Executive as senior manager of staff and buildings, or by resolution of Council, would be justified in applying such restrictions to all three members of ACP.
- 35 One aspect of the conduct of the three ACP members is their refusal to make use of the Council's GCSX secure email system. The Council is a unitary authority which processes a

<sup>12</sup> Article 6(3), The Local Authorities (Indemnities for Members and Officers) Order 2004. SI 2004 No. 3082.

<sup>13</sup> [2010] EWHC 2726 (QB)

<sup>14</sup> *R v Broadland DC ex parte Lashley* (2000) 2. L.G.R.

large quantity of personal and commercially sensitive information, and it has decided that it is appropriate to establish and use a secure email system for intra-authority communications, including communications between officers and members, and has made computers, home printers and email addresses available to all councillors to enable them to access this system within the Council's offices and remotely, for example from home. The Council now sends all meeting summonses, agendas and reports to members through this system, backing this up with hard copies on request for members of the actual decision-making body and for the press and public in respect of non-confidential matters. The three ACP members have consistently refused to use the GCSX system and insist on corresponding with Council officers and members from their private email addresses. The Council's GCSX system has been demonstrated to be secure, whereas one of the ACP member's private email address has been hacked by persons unknown. Perversely, the three ACP members have used the hacking of a private email address as a justification for alleging that the GCSX system is insecure, and are refusing to use it. They have made a number of allegations of internal insecurity and interception of emails within the GCSX system. These allegations have frequently been very generalised in nature and the ACP members have failed to provide supporting evidence, despite stating that they have provided such detailed evidence to the Police. When they have been more specific, the Council has always been able to justify how particular officers or members have had access to particular correspondence. Despite the security of GCSX having been demonstrated, and occasionally acknowledged by ACP members, they continue to assert that its alleged insecurity is justification for their not using it. This issue has been taken to full Council which has approved a policy of use of GCSX for all intra-authority communications with members.

- 36 ACP members are entitled to correspond with the Council as private individuals, and to submit FOI and EIR information requests to the Council, from their private email addresses. Where they correspond as private individuals, they would only have the rights of access to information which the law accords to members of the public, and the Council may deal with their correspondence in the manner and with the priority which it would attach to such ordinary correspondence (for example, any FOI request received by any officer of the Council would normally be referred on to the Council's Information Officer to respond, and would be subject to the statutory exceptions in terms of the information which must be provided, and need only be responded to within twenty days, which may be rather slower than the response time which the councillor might expect when corresponding as a councillor). The Council may also assume that, when an ACP member emails to the Council from his private email address, he is corresponding in his capacity as a private individual and not as a councillor. As a consequence, requests for information received from a private email address should not be treated in accordance with the enhanced statutory rights of access to information or the common law "need to know" which councillors are entitled to when acting as a councillor.
- 37 Despite being repeatedly advised of the Council's resolution to confirm the use of the GCSX system for all intra-authority communication, the ACP members have chosen to defy that policy, and continue to correspond from their private email addresses on Council business. In our opinion, the Council is entitled to insist on the proper application of its policy. This might take the form of the Council or the Chief Executive instructing and enforcing that all correspondence from a member's private email address is treated as coming from them in their capacity as a member of the public, but that all emails which the authority or its officers sends to any of the members in their capacity as a councillor shall be directed exclusively to that member's GCSX address. In respect of agendas and reports, there is no reason why ACP councillors should be treated differently from other councillors, being sent email versions of all summonses, agendas and reports (other than exempt and confidential reports for meetings of which they are not a member) but may request hard copies for meetings of which they are a member, or on attending a meeting as a member of

the public. Taking such a firm but consistent line in accordance with the policy which has been adopted by full Council would not, in our view, be considered to prevent the ACP members from discharging their functions as councillors effectively and so would not be open to successful legal challenge. But we are of the view that the Council needs to take a firm and consistent line on this, as the ACP members have demonstrated that they will try to evade and erode this policy, and allowing such avoidance will open the door to further harassment of officers.

- 38 If the Council is concerned about any statements made on the 4rutland.com blog, we could contact the registrar of the website (eNom) and request that any defamatory material is removed. Whilst an EU-based registrar would be obliged to comply with any such request, it is very unlikely that eNom would do so as it is a US-based company and it would seek to argue that it is not subject to European law. The Council would be entitled to seek an order from the court requiring eNom to remove any defamatory material but the Council would then need to take steps to get the order recognised and enforced against eNom in the US courts. This is likely to be time consuming and costly.

#### Next steps

- 39 Once the Council has had an opportunity to consider its options, we would be happy to advise the Council in more detail on the merits of each cause of action. Our initial view is that there is particular merit in considering action by the Council for defamation of the Council, as this would go to the root of the issue, and for an injunction against further harassment of officers, as this would be effective but require a relatively low standard of proof.
- 40 If the Council (or its individual officers) did wish to proceed with either a defamation claim or a harassment claim (in the civil courts) we would need to take the following steps:
- 40.1 Detailed review of the documents including a meeting with Ms Sawyer and the relevant officers (we estimate that the cost of taking this step will be between £4,000 and £6,000 exc. VAT).
- 40.2 Drafting formal letters of claim to the three defendants including seeking undertakings from the defendants to desist from making any further defamatory statements and/or harassment (we estimate that the cost of taking this step will be between £3,500 and £5,000 exc. VAT)<sup>15</sup>.
- 41 If those steps do not bring the matter to a satisfactory conclusion, the Council (or its individual officers) will need to consider issuing a claim against the defendants. It is difficult to estimate the cost of taking the claim through to trial as this will depend on the nature of the defences deployed by the defendants, the extent of the disclosure exercise and the number of witnesses. However, as a guide, we would expect the cost of any litigation to be at least £90,000 exc. VAT. The winning party will normally recover around 70% of its costs from the losing party, although if the losing party is unable to satisfy any costs order (because he or she has few or no assets) the costs order will be of little value.
- 42 The remedies available to the claimants are damages for the harm caused to reputation and an injunction to prevent further publication of the defamatory statements or harassment. The court does not have the power to order an apology or correction of the

<sup>15</sup> We would recommend involving counsel in the drafting of the letters of claim as it is important that the assertions made are consistent with those set out in the particulars of claim (if the Council elected to proceed with a formal claim). Counsel's fees are likely to be in the region of around £3,000 exc. VAT.



statements made unless the claim is determined at an early stage following an application for summary disposal<sup>16</sup>.

- 43 We have also set out the practical steps which the Council may take outside of litigation, in terms of setting up communications rules for the three ACP members and enforcing the Council's adopted communications policy. The former would require a positive decision, which could be taken either by the Chief Executive or by full Council. The latter can be effected simply by Chief Executive instruction to all staff and confirmation to the three ACP members. Should you feel that formal reports are required for this purpose, we can assist in drafting these. We have not formally costed these, but each report could be provided for no more than £2,000 exc. VAT.

Bevan Brittan LLP  
16 November 2012

For more information, please contact:

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<sup>16</sup> That application would only succeed if the court determined that the defendants had no reasonable prospect of successfully defending the claim.

