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Case No: HQ04X01798

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2005

Before :

THE HON. MR JUSTICE EADY

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Between :

Lance Armstrong	**Claimant**
- and -	
Times Newspapers Ltd	**Defendants**
David Walsh	
Alan English	

- -
- -

Richard Spearman QC and Matthew Nicklin (instructed by **Schillings**) for the Claimant
Andrew Caldecott QC and Heather Rogers (instructed by **Addleshaw Goddard**) for the Defendant**s**

Hearing date: 1st December 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady:

1. On 1st December 2005 I was asked by the parties to resolve the issue of whether the preliminary hearing, as to the meaning of the words complained of in this libel action, should take place before a judge sitting alone or with a jury. This was against the background of recent agreement between the parties that the action as a whole should be tried by judge alone. That conclusion is in my view entirely appropriate since, as the parties recognise, it will require prolonged examination of documents and also a scientific investigation which cannot conveniently be made with a jury. In the light of the terms of s.69 of the Supreme Court Act 1981, it follows that the action *shall* be tried without a jury unless the court in its discretion orders it to be tried with a jury.

2. There have been various changes of stance over the history of the litigation as to whether or not the issues, or some of the issues, should be tried by a jury, but the current position is that the Claimant contends that meaning should be ruled upon by a judge alone, whereas the Defendants submit that this issue (alone) should be resolved by a jury. It emerged, however, that the Claimant contends, not merely that the court should exercise its discretion in favour of trial by judge alone, but that there is on a proper construction of the statutory provisions no jurisdiction to order otherwise. This was a novel proposition, so far as I was concerned, and it requires therefore careful consideration of the arguments deployed. I am very grateful to counsel for the clarity of their submissions.

3. The starting point is to set out the terms of the section:

> (1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue –
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> a) a charge of fraud against that party; or
>
> b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
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> c) any question or issue of a kind prescribed for the purposes of this paragraph,
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> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.
>
> (2) An application under sub-section (1) must be made no later than such time before the trial as may be prescribed.
>
> (3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.
>
> (4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection

> (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection.

4. It is logical to start with the arguments deployed by Mr Spearman QC on the question of jurisdiction. He submits that there is no residual jurisdiction for the court to hive off certain specific issues for determination by a jury, since the court's powers are effectively defined and confined by the terms of s.69. It is well known that Parliament has gradually confined the role of jury trial in civil litigation in successive statutes until the present formula was reached. Although one sometimes sees references to a "right" to jury trial or to the jury being the "constitutional tribunal" for resolving certain issues, this terminology can obscure the true position.

5. There is no doubt that the present case "does not by virtue of subsection (1) fall to be tried with a jury". In those circumstances, it has not been suggested by Mr Caldecott QC, on the Defendants' behalf, that there is in any sense a "right" for his clients to avail themselves of jury trial in respect of meaning or any other issue.

6. The parties have focussed in the hearing before me upon the terms of subsection (4) and have given it closer attention, so far as I am aware, than has been brought to bear in any earlier case. It falls naturally into two halves, and it is the relationship between them which has attracted particular consideration.

7. Mr Caldecott submits that the first part of the subsection is not to be qualified by the second and, accordingly, it is right to conclude that there is a general power in the court to order "different questions of fact arising in any action [to] be tried by different modes of trial". It is, moreover, to be noted that the matter received careful consideration by the Court of Appeal in *Phillips v The Commissioner of Police of the Metropolis* [2003] EWCA Civ 382 (although it is fair to say that no such arguments were addressed on that occasion as have been raised before me). It was observed by Scott Baker LJ at [17]:

> "Section 69 (4) … makes it quite plain that different issues of fact may be tried by different modes of trial. The subsection says that the power may be exercised 'in accordance with rules of court'. CPR 3.1 spells out the court's general powers of management. These include [in] 3.1(1)(i) [*I interpose that this was clearly a slip and that what was intended was 3.1(2)(i*)] power to direct a separate trial of any issue and 3.1(1)(m) [*again what was intended was 3.1(2)(m)*] power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective – which is of course to deal with cases justly. Accordingly we have no difficulty in concluding that in applying the exception in section 69(1) the court is able in appropriate circumstances to fillet out part of a case to be tried by judge alone leaving the remainder to be tried with a jury. The split does not necessarily have to be between liability and quantum. That this is so is apparent from the reference in section 69(4) to 'different questions of fact arising in any action'. We do however emphasise the qualification that such an order should only be made in appropriate circumstances. There will no doubt be

> many cases where once it is clear that some issues cannot conveniently be tried with a jury the whole case will more appropriately be tried by a judge alone. An obvious example is where questions of credibility are relevant across the board".

8. There is thus no doubt that the case at least provides support for Mr Caldecott's argument that I have jurisdiction to "fillet out" the issue of meaning to be tried with a jury.

9. Mr Spearman was prepared to recognise, when I put them to him in argument, that his submissions would have at least two consequences which would appear, at least at first sight, to be rather surprising. First, a comparable order to that which Mr Caldecott now seeks was made by Morland J in *Gregson v Channel 4 Television Corporation*. According to Mr Spearman's submission the learned judge had no power to do so. Yet no doubt was cast on the jurisdiction when the matter reached the Court of Appeal: [2002] EWCA Civ 941. Again, therefore, although the arguments were not directly addressed on that occasion either, Mr Caldecott can point to an appellate authority which is, at least, consistent with the order he seeks.

10. Secondly, Mr Spearman acknowledged that in the present case, even if his client had been disposed to agree with Mr Caldecott's proposal to hive off meaning for disposal by a jury, his argument would entail that the court *could* not permit such a step to be taken. That, again, seems a little surprising against the background of all the well known dicta over the years to the effect that the determination of meaning in a libel action is a classic jury issue: see e.g. the observations of Otton LJ in *Safeway Stores plc v Tate* [2001] QB 1120, at 1130-1131. Mr Spearman points out, on the other hand, that those statements would naturally have been made in the context of proceedings which were to be tried by jury and which, *ex hypothesi*, do not fall within the exclusions contemplated in s.69(1) of the Supreme Court Act. Clearly it is important, where there *is* to be a jury trial in any event, that a judge should be careful not to trespass upon the jury's natural role – which certainly would include the determination of the natural and ordinary meaning of the words complained of. But that, he submits, is not this case.

11. I must now focus on the thrust of Mr Spearman's submissions on the interpretation of s.69(4). He argues, first, that once an action fulfils the exclusionary criteria identified in s.69(1) then *the action* shall be tried without a jury (unless the court in its discretion orders it to be tried with a jury). Mr Spearman submits in the light of this wording that it is mandatory for the action as a whole to be tried without a jury. There is provision for the court, in its discretion, to order *it* (i.e. the action) to be tried with a jury, but that is hardly ever exercised once the exclusionary criteria are fulfilled. The only example of which I am aware in recent years was the case of *McPhilemy v Times Newspapers Ltd*, where in July 1999 I ordered jury trial in the light of the particular circumstances of the case and the very grave allegations being made. (The litigation reached the Court of Appeal more than once and the nature of the case can be gleaned from those reported decisions: see e.g. [2000] 1 WLR 1732 and [1999] 3 All ER 775.) Mr Spearman emphasises that the statutory provision does not expressly contemplate any individual issues being hived off separately, within the court's discretion, for trial by jury.

12. Also I must have regard to the words in s.69(4) to the effect that the court's power to order different questions of fact to be tried by different modes of trial is expressly qualified by the phrase "in accordance with rules of court". Obviously, at the time when the section was drafted for inclusion within the Supreme Court Act 1981, the draftsman would have had in mind the Rules of the Supreme Court which were then operative and which remained in effect until 26th April 1999. Those did contain provision in RSC Ord. 33 for trial by jury (subject to the statutory provisions themselves). No corresponding express provisions are to be found in the CPR. Mr Caldecott, therefore, took his cue from the Court of Appeal in the *Phillips* case and cited specifically CPR 3.1(2)(i) and (m). I regard sub-rule (i) as irrelevant to the present circumstances, since it is concerned simply with the power to direct a separate trial of any issue. It is neutral, in my judgment, as to *mode* of trial. It is true that sub-rule (m) is expressed in very general terms:

> "… take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

It is necessary to be wary, however, of any tension between case management powers under the CPR and statutory issues of jurisdiction. If it is indeed the case that there is no jurisdiction by virtue of the statutory provision, as Mr Spearman contends, it would appear that such a gap cannot readily be filled by case management powers.

13. Mr Caldecott points to the importance of sub-rule (m) and its scope for creative developments of practice and, in particular, to the fact that it formed the basis of the Court of Appeal's recognition of the costs capping jurisdiction in *King v Telegraph Group Ltd* [2005] 1 WLR 2282. Here, on the other hand, it is necessary to read it carefully alongside the provisions of s.69 since Parliament clearly regarded it as important to regulate the (now limited) scope for jury trial in civil litigation and, what is more, it has been recognised more than once since the implementation of the 1981 Act that that the emphasis is now against trial by jury – once the exclusionary criteria are, as here, fulfilled: see e.g. *Aitken v Preston* [1997] EMLR 415.

14. It is thus by no means obvious to me what the "rules of court" are to which subsection (4) must now be taken to refer.

15. Nevertheless, Mr Spearman went on to attach importance to the wording of the subsection taken as a whole. He points out that where any such order is made (i.e. that different questions of fact should be tried by different modes of trial) " … subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection". What Parliament therefore must have had in contemplation (he argues) is a situation where different claims are to be tried separately (e.g. breach of contract or negligence in a case where defamation is also relied upon). The statutory words make clear that in such a case the court will only be concerned to apply the exclusionary criteria of s.69(1) to the defamation (or other relevant) aspect of the claim. Here, in the present proceedings, we are past that stage. It is accepted on all sides that the criteria are fulfilled. It follows, submits Mr Spearman, that subsection (4) has no bearing on the present circumstances.

16. I find Mr Spearman's arguments very persuasive, albeit surprising, but in the end it seems to me that I must determine the jurisdiction question by reference to Court of Appeal authority, in so far as it gives guidance. It is true that Mr Spearman's

arguments were not considered by the Court of Appeal either in *Phillips* or *Gregson*, but it would be wise nevertheless for a judge of first instance to proceed on the basis that the jurisdiction does exist (as Scott Baker LJ contemplated). The primary question therefore will be whether "the whole case will more appropriately be tried by a judge alone".

17. When it comes to the court's discretion, the exercise is altogether more straightforward. As I have already indicated, the modern approach in a case of this kind is to lean in favour of trial by judge alone once the s.69(1) criteria have been shown to apply. It may be said, however, that this is because the case cannot conveniently be tried with a jury, for one reason or another, but here the particular issue which Mr Caldecott wishes to have tried by jury is in itself relatively simple. I accept that the resolution of meaning could, if hived off, be dealt with by a jury without inconvenience. Nor would it involve the prolonged examination of documents. Whoever decides meaning in this case, it will only be necessary to look at the article complained of and to apply the guidance given in a number of relatively recent Court of Appeal authorities from *Gillick v BBC* [1996] EMLR 267 onwards: see e.g. *Gatley on Libel and Slander* (10th edn.) at para. 30.5. Generally, however, the right approach in assessing the appropriate mode of trial is to address the action as a whole. Once one has done so, and it has been established that it cannot be conveniently tried with a jury, then the emphasis is against that mode of trial.

18. There are undoubtedly a number of potential disadvantages in having the issue of meaning tried by jury, to which I shall turn in a moment. The critical question, therefore, seems to me to be whether or not there is a sufficiently clear countervailing advantage to the parties to justify tolerating those problems.

19. Obviously jury trial of any issue is going to be more expensive and, to some extent, time-consuming than trial by judge alone. That is a factor which should not be exaggerated in the present situation, because I think it is reasonable to assume that the issue of meaning could be satisfactorily disposed of within a single day whatever the mode of trial. There would, no doubt, be extra copying charges but in the context of this case overall that is a factor of very little weight.

20. I turn therefore to the problems of greater substance. Mr Spearman drew my attention to certain observations which were made in *Jameel v The Wall Street Journal Europe SPRL. (No. 2)* [2004] EMLR 11 at [5]-[7]:

> "It is clearly desirable that, so far as possible, a jurors' 'examination paper' should be framed in such a way as to enable them to give Yes or No answers. Otherwise, the questions may give rise to problems of drafting in committee or of catering for differences of emphasis as between jurors.
>
> Such problems are also likely to arise in the context of meaning. It has long been recognised (as it is often said, since Fox's Libel Act of 1792) that it is for the jury to determine the meaning or meanings of words complained of. Of course, in reality, fair-minded readers of a newspaper article may differ, on any day of the week, as to the true implications or shades of

> meaning contained within it. Nevertheless, by convention, English law operates on the principle that for determining most issues in a libel action there is at least one definitive meaning in the light of which, for example, decisions have to be made on any defence of justification or on the level of compensation which is appropriate: see e.g. the discussion in the Court of Appeal in *Slim v Daily Telegraph* [1968] 2 Q.B. 157, 171-2, and in the Privy Council in *Bonnick v Morris* [2003] 1 A.C. 300, 309 at paragraphs [21] to [22]. … It is difficult to see how it would be possible to avoid asking the jurors to draft in committee, since they cannot generally be given a finite number of multiple option questions. They are not, as Diplock L.J. made clear in *Slim*, bound by either side's contentions on meaning. It is open for them to come up with their own particular meaning or meanings. Also, where there is room for differences between ordinary readers as to the interpretation of a newspaper article, there is no reason to suppose that all twelve jurors are necessarily going to fit into one straitjacket. Any differences between them, which are likely to be relatively minor and limited to matters of shading or emphasis, would not normally have to be revealed. If they are asked to produce a carefully drafted set of meanings, however, which remove any ambiguity which has been left in the article *ex hypothesi* by the professional journalist or editor, there is much more scope for stalemate.
>
> In this case, I resisted the suggestion that the jury should be asked to set out their own (defamatory) meaning, and counsel did not press it with any vigour."

21. Mr Spearman also prayed in aid similar comments (made specifically in the context of *Reynolds* privilege, which applies in the present case) in *Galloway v Telegraph Group Ltd* [2005] EMLR 7 at [30] and [32]–[33]:

> "… Of course, if there were a plea of justification, the jury would need to decide on the meaning or meanings of the words. Likewise no doubt, when they are asked to award compensation to a claimant, they will do so in the light of their interpretation of the words, their tone and gravity and so on. Traditionally, they are not asked to draft in committee *the* meaning or meanings which they, as a body, unanimously think the words convey. That is an exercise fraught with difficulty, especially in the case of lengthy, complicated or multi-layered newspaper articles. I explained my misgivings about such an exercise in *Jameel v The Wall Street Journal SPRL (No. 2)*, cited above. What if the jurors cannot agree precisely on the drafting of *the* natural and ordinary meaning(s)? Suppose they agree with one party or the other on some meanings but not on others: how is one to explore different strands of meaning or, if the jury were left with a choice between two alternative sets of meanings,

> find out how close the words came to the meaning they have *ex hypothesi* rejected?
>
> …
>
> How is a judge to be helped in assessing the duty of the defendants on one hand, and the right of the public to know, on the other hand, by reading the composite natural and ordinary meanings, whether negotiated amongst themselves or agreed upon unanimously, by twelve lay persons *ex hypothesi* 19 months later? For all I know, the meanings finally arrived at on such an exercise may represent a compromise between various different interpretations of the articles which emerged in discussion in the jury room. Moreover, it is the judge who is charged with the responsibility of assessing the gravity and tone of the words for privilege purposes (although, as I have said, it would be the jury's assessment that counts for quantification of damages).
>
> There are two well established doctrines that apply in the law of defamation - at least for certain purposes. I have in mind the 'single meaning' doctrine and the so-called 'repetition rule'. In a multi-layered and complex newspaper article or series of articles, common sense tells us that there may be several shades of meaning and that some readers will simply understand the words in different senses from others. That is obviously as true of readers who happen to be members of a jury as of any other reasonable and fair-minded persons. For justification, however, it is thought in English law necessary to decide upon the basis not of *shades* of meaning but of a defined single meaning, or sometimes several such meanings. The jury have to select what is called the 'single meaning' out of the available and possible shades of meaning. It is well settled that, in doing so, they are not to be confined to the pleaded meanings of the parties, which often owe more to the ingenuity of counsel than to first impression. Jurors are free to decide meaning quite independently: see e.g. *Slim v Daily Telegraph* [1968] 2 QB 157."

22. These pitfalls were also adverted to in *Jameel* by Lord Phillips MR, on appeal, at [2005] 4 All ER 356 [30]-[31]. He added at [70], more generally, that "the division between the role of the judge and that of the jury when *Reynolds* privilege is an issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such a case".

23. Against the background of those difficulties, Mr Spearman submitted that there is no satisfactory solution in the circumstances of this case. It is tempting to conclude that here a similar course could be followed to that adopted by Morland J in *Gregson*. In other words, the jury could be set a number of yes/no questions identifying a few possible meanings (e.g. "guilt", "reasonable grounds to suspect" or "strong grounds to suspect").

24. It is significant that in this case I have already ruled that the lowest level of gravity identified in *Chase v News Group Newspapers Ltd* [2003] EMLR 218 (i.e. "grounds to investigate") would not be within the range of possible meanings for the article complained of. Accordingly, it would not be open to the jury to find such a meaning. There would be less scope, therefore, for intruding upon their traditional discretion to find any meaning (which the words are capable of bearing) irrespective of the parties' pleaded contentions.

25. It is necessary nonetheless to be careful not to trespass upon a jury's unlimited discretion, which was clearly recognised by the Court of Appeal in *Slim v Daily Telegraph* [1968] 2 QB 157. Mr Spearman has persuaded me that I should not be beguiled by the apparently straightforward option of giving them only two or three choices. The principle in *Slim v Daily Telegraph* must not be encroached upon. It would, for example, be open to a jury to find that the words meant that the Claimant was "likely", "very likely" or "almost certain" to have taken performance enhancing drugs in the course of his career. Another variant on the theme was that of "cogent grounds" to suspect, which was the meaning found by Gray J in *Charman v Orion Publishing Group* [2005] EWHC 2187 (QB). I am not sure if there is a difference between "reasonable" grounds and "cogent" grounds but, if there is, this tends to underline how subtle the exercise can be. Since that is so, it would not be right for a judge to attempt to de-limit the options available to them. Inevitably, of course, this means that there is more scope for disagreement and stalemate when twelve people gather together in an attempt to identify *the* single defamatory meaning in the article.

26. It is thus not possible artificially to eliminate or minimise the problems inherent in "drafting in committee".

27. Mr Caldecott has argued that the jury would come with refreshingly open minds to the question of meaning without the baggage of lawyers' preconceptions. This advantage can be exaggerated, however, because one has to remember that the jury will only be making their decision after hearing the rival submissions of counsel and then the judge's summing up (reminding them, somewhat paradoxically, that they should put counsel's submissions to one side and approach the article as though they were reading it for the first time).

28. Another argument raised by Mr Caldecott was that, with twelve people gathered together in a spirit of compromise, it is more likely that they will reach "a closer approximation" to the meaning which would be attributed by the hypothetical "reasonable reader". This is a rather sophisticated theory, which I have never heard advanced before. I see no reason why a "compromise" or "approximation" should be thought to be more desirable than the conclusion of a reasonable individual applying the well known criteria for determining *the* single meaning.

29. The point was also taken in the Defendants' solicitor's witness statement that it is a positive advantage that a jury's conclusion would be more difficult to appeal. I find this very puzzling. It is surely ironic that he should press, on the one hand, for the supposed safeguard of multiple minds being applied to the problem (as opposed to a single judge) while, on the other hand, wishing to preclude his clients from the advantage of being able to challenge the ruling on meaning by going to the Court of Appeal. In the light of Article 6 of the European Convention particularly, I do not find it to be an advantage that a litigant should be deprived, first, of a reasoned judgment

and, secondly, of an opportunity to appeal. Save where a judge is constrained by a statutory presumption in favour of jury trial, I should have thought it would be natural to perceive a reasoned judgment, and an opportunity of appealing, as advantageous rather than the other way about.

30. It is sometimes said that judges and lawyers are out of touch and inherently likely to be over-analytical in their approach to newspaper articles. I have never found this very convincing, but it is in any event important to remember that a judge would need conscientiously to apply the principles identified by Neill LJ in *Gillick v BBC* and, in particular, *not* to " … analyse the article as a lawyer or accountant would analyse documents or accounts". If these strictures are borne in mind, as a judge would be required to do, there is no reason to suppose that there is a significant advantage such as to justify all the risks attaching to jury trial.

31. It is true that Lord Devlin observed in *Lewis v Daily Telegraph* [1964] AC 234 at 277:

> "… the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory".

Nevertheless, it is necessary to read these words, 40 years on, with some careful reservation. They might, nowadays, be thought to be somewhat patronising to the hypothetical juror – in a way that is rather contrary to the modern approach. Secondly, even if his Lordship's observations are still valid, I can hardly think that it would be to the Defendants' advantage in this case to have a tribunal of fact which was especially susceptible to "reading in an implication". A readiness to take "a nudge and a wink" would surely work to their disadvantage.

32. When I first read the papers, I was inclined to think that the Defendants should be permitted to have a jury if they now want one because, traditionally, one has always thought of meaning as being a "classic jury issue". Upon greater reflection, however, and with the benefit of full submissions from both counsel, I have decided that this is a case where I should not start with any predisposition in favour of jury trial (the exclusionary criteria having been fulfilled). I should assess the relative advantages and disadvantages dispassionately from a case management point of view, and without being distracted by the emotive "constitutional tribunal" impedimenta. Having carried out the exercise, I have come firmly to the conclusion that there is no significant countervailing advantage in favour of jury trial, for the purposes of resolving the one issue of meaning, so as to justify the unusual step of having two

different modes of trial. I do not, in particular, see how this would be "furthering the overriding objective".

33. Accordingly, I would rule that the preliminary issue of meaning should, like the other issues in the case, be determined by judge alone.