RACKHAM v SANDY AND OTHERS

Mr Justice Gray:

1. This is an application by the three Defendants in the action, Messrs Sandy, Etheridge and Hardman, for this libel action to be tried by judge alone on the ground that prolonged examination of documents will be required. The application is opposed by the Claimant, Mr Rackham, who wants a jury trial.

2. The facts, so far as they need to be stated for the purpose of disposing of the application, are these: Mr Rackham is the founder and former managing director and Executive Chairman of a waste disposal company named Waste Recycling Group ("WRG"). He sues on a letter dated 20 September 2002, which was published by the three Defendants (who were at the time respectively the Chief Executive, Financial Director and Legal Director of WRG. The letter was sent to the Chairman and three non-executive directors of WRG. The letter complained of makes a number of allegations against the Claimant, including that he failed to disclose to the Board of WRG a disclosable shareholding in one of WRG's financial advisors whose appointment he had actively promoted to the Chief Executive of WRG; that he failed to disclose a beneficial interest in one of WRG's landfill sites which he improperly diverted for his own personal gain; that he convened an illegal price-fixing meeting of competitors and that he wrongfully instructed a competitor to discredit WRG's proposed technology. It is admitted on behalf of the Defendants that the letter was defamatory of the Claimant. For his part, the Claimant accepts that the letter was written on a privileged occasion. The crucial issue at trial will be whether the Defendants were actuated by malice in publishing the letter. The nature of the case advanced on behalf of the Claimant on the issue of malice is that they published the words knowing they were false or recklessly and/or with the dominant improper motive of injuring the Claimant and forcing him to resign from the Board of WRG and/or in an improper attempt to save their own jobs. The Claimant is therefore advancing a double-barrelled case on malice: that the Defendants' motives for publishing the letter were improper and that they knew that the allegations contained in it were false.

3. Before addressing the question whether the Defendants have made out an entitlement to trial by judge alone, I should make two preliminary points. The first is that the trial of the action is at present fixed to commence on 14 March 2005. There is a real concern, at least on the Defendants' side, that, if the case is to be heard with a jury, it may be impossible to finish the case before the end of term (23 March 2005). In that event the trial would have to be postponed until October, something which the Defendants are anxious to avoid. I make clear that logistical considerations of this kind are irrelevant to the issue which I have to decide.

4. The second, related point concerns the timing of the present application. It comes very late and Ms Adrienne Page QC on behalf of the Defendants candidly accepts that the application has been triggered, at least in part, by the Defendants' concern that the trial should not be postponed. But I do not think it would be right for me to draw any adverse inference about the merits of the application from the fact that it is made so

close to trial. I did not understand Mr Richard Rampton QC, for the Claimant, to contend otherwise.

5. I start with the applicable law. Section 69 of the Supreme Court Act, 1981 so far as relevant provides:

i) "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 …

b) a claim in respect of libel …

the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents … which cannot conveniently be made with a jury …

iii) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (i) 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".

The questions which I have to decide are therefore:

i) will there be a prolonged examination of documents?

ii) if so, can that examination conveniently be made with a jury?

iii) if not, should the court nonetheless exercise its discretion to order trial with a jury?

6. There are quite a number of authorities dealing with the circumstances under which the right to jury trial in a libel action may be dispensed with pursuant to section 69. They are conveniently collected and summarised in the judgment of Lord Bingham CJ in *Aitken v Preston* [1997] EMLR 415.

7. Of the question whether the trial requires a prolonged examination of documents, Lord Bingham said at page 421:

> "[This] basic criterion … must be strictly satisfied and it is not enough merely to show that the trial will be long and complicated (*Rothermere v Times Newspapers Limited* [1973] 1 WLR 448). However, the word 'examination' has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (*Goldsmith v Pressdram Limited* [1988] 1 WLR 64)".

"Prolonged examination" has been construed to mean "careful reading": per Slade LJ in *Goldsmith v Pressdram* (op. cit.).

8. As to the question of convenience, Lord Bingham said:

> " 'Conveniently' means without substantial difficulty in comparison with carrying out the same process with a judge alone. This may involve consideration of several factors, for example:
>
> (a) the additional length of a jury trial as compared with the trial by judge alone;
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> (b) the additional cost of a jury trial, taking into account not only the length of the trial but also the cost of, for example, additional copies of documents;
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> (c) any practical difficulties which a trial by jury would entail, such as the handling of particularly bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required;
>
> (d) any special difficulties or complexities in the documents themselves."

Mr Rampton submitted, and I accept, that there must be shown to be a causal nexus between the prolonged examination of documents and the inconvenience.

9. As to the issue of discretion, Lord Bingham observed that it would in each case depend substantially on the circumstances of the individual case. He did, however, enumerate some of the factors which might arise, including:

> "(i) the emphasis now is against trial by juries and this should be taken into account by the court when exercising its discretion…;
>
> (ii) an important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest…;
>
> (iii) the fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury… and
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> (iv) the advantage of a reasoned judgment is a factor properly to be taken into account…".

10. Although this is the Defendants' application for trial by judge alone, Mr Rampton at the outset helpfully indicated the manner in which he proposes to present his client's case on malice to (as he hopes) the jury. In summary what Mr Rampton said was that a large part of the Claimant's case for saying that the Defendants knew that their allegations against the Claimant contained in the letter complained of were untrue can be demonstrated with little, if any, need to resort to the documents in the case. For instance in relation to the allegation that the Claimant improperly diverted from WRG

a site (Fornham Park) which he bought for his own personal gain, the underlying facts are not in dispute: it is accepted that Fornham Park was acquired by the Claimant's family trust and that its acquisition was not disclosed to the Board. The Defendants' case is that they were informed of this allegation by a main board director of WRG, subsequently identified as either Mr Knott or Mr Walsh. This claim can easily be shown to be false, says Mr Rampton, because Mr Knott was never a main board director of WRG and Mr Walsh will be called to give evidence denying that he told the Defendants about the acquisition. No documents, it is said, will be required. Mr Rampton makes similar submissions in regard to the other allegations against the Claimant contained in the letter complained of.

11. As to the second prong of the Claimant's case on malice, namely that the Defendants were actuated by the improper motive either of securing the removal of the Claimant from the Board of WRG or saving their own jobs, Mr Rampton accepts that it will be necessary to refer to a series of documents to make good the claim that the Defendants were aware of a risk that they would be dismissed. But, he says, the documents in question are straightforward. The main issue will be the credibility of the witnesses in question, including in particular the Defendants, rather than the interpretation of documents.

12. I have no doubt that Mr Rampton will indeed advance his case in the manner in which he has indicated, at least if the trial involves a jury. But I think Miss Page is right to point out that I must take account also of the manner in which each of the Defendants will seek to answer the charge against him. Not only are there a number of documents which will have to be considered in connection with the allegation that the Defendants knew that their jobs were on the line, it will also be necessary to examine a greater number of documents relating to the question whether the Defendants honestly believed the allegations against the Claimant to be true. It is accepted that the answer to that question will in part depend upon oral evidence but, submits Miss Page, her clients are entitled to rely on documents evidencing their state of knowledge at the material times.

13. Such being in general terms the stances adopted by the respective parties, I turn now to the individual questions which arise starting with the question whether the trial will involve "the prolonged examination of documents". It appears to me that this is an essentially factual question and that the parties seeking to dispense with the jury should indicate which documents it contends will require prolonged examination as well of course as indicating the generality of the documentary evidence which will be required. Accordingly I invited Miss Page to identify those documents on which she particularly relies. In response Miss Page indicated the following documents which I will list using the pagination in the Claimant's proposed trial bundle:

    i) the letter complained of (page 212), which is detailed and runs to three type-written pages;

    ii) memoranda recording advice given to the Defendants by the solicitors' firm Gouldens (pages 130 and 206). The latter runs to five pages;

    iii) various drafts of the letter complained of which include passages evidently added by or on the recommendation of Gouldens (pages 184-6, 190, 193 and 206);

iv) the report of the Investigatory Sub-Committee to the WRG Board which deals with some of the allegations contained in the letter complained of and is 17 pages long. Miss Page wishes to rely on the contents of that report as indicating that the allegations against the Claimant were not trumped-up or bogus;

v) the notes of the interviews of both the Claimant and the first Defendant by the members of that sub-committee preparatory to its report (pages 331 and 305) together with the manuscript notes taken in the course of those interviews (pages 299 and 327);

vi) a memorandum prepared by the Claimant and dated 6 December 2001 (page 18) which is relied on by the Claimant as an early warning to the first Defendant of dissatisfaction with his performance;

vii) a note of a meeting with Mr Wheatley (page 128) about meetings in November 2001 when it is alleged that the Claimant participated in discussions which infringed the provisions of the Competition Act.

14. Miss Page also draws attention to the fact that the trial bundle proposed by the Claimant already contains 369 pages. She says there are many documents which the Defendants will wish to have added to the trial bundle. In addition it will be necessary to consider the provision of the Companies Act as to disclosure of interest as well as WRG's Articles of Association.

15. Dealing with the individual documents identified by the Defendants as requiring prolonged examination, Mr Rampton points out that the words complained of always have to be read with care in libel actions. Of the drafts he says they do not matter since the factual information in the letter complained of must have derived from the Defendants and in any event the Defendants are saddled with the contents of their own letter. Mr Rampton argues that the report of the sub-committee has no relevance, given that there is no plea of justification and both Claimant and Defendants accepted the report. He does, however, accept the entitlement of Miss Page to rely on the report in support of the Defendants' case that the allegations in the letter complained of were not bogus ones. The notes of the Claimant's interview by the sub-committee are said by Mr Rampton to have no relevance. It is accepted that what the first Defendant said in interview is relevant, not least for his inability to particularise the further allegations against the Claimant to which the letter complained of makes reference. As to the other documents identified by Miss Page, Mr Rampton's case is that their meaning is clear and that a jury could easily cope with them. He emphasises that the need for prolonged examination of documents will only be established if they require a more intensive scrutiny than simply being read through.

16. I accept that this case will involve prolonged examination of documents. The starting point is that the Claimant's proposed trial bundle contains 369 pages, most of which are quite detailed. I have no doubt that Miss Page is right when she says that there will be a not inconsiderable number of documents which her clients will properly be able to require to be included in the bundle. I recognise of course that there have historically been many libel actions which have been tried by juries where the number of documents has been far greater than in the present case. But I have to consider whether the documents in this case will require prolonged examination. In my

judgment a significant number of them will do so. Whilst I accept that the words of the letter or article or broadcast which is the subject of complaint in a libel action always has to be considered with care, that is particularly so in the present case. I say that firstly because of the length and detailed nature of the letter of which the Claimant complains and, secondly, because it will be relevant and necessary to consider in some detail the various drafts of the letter complained of so as to determine the origin of certain of the passages in the letter. I appreciate that the Claimant will contend that the Defendants are answerable for the whole of the letter which was sent out on their instructions but that does not to my mind prevent the Defendants from explaining the contents of the letter complained of by reference to their meetings with their solicitors and the drafting suggestions made by them. For similar reasons I take the view that a careful reading of Gouldens' advice (page 206) will be relevant and necessary. That advice deals in detail with the Fornham Park allegation; the concept of fiduciary duties owed by directors; the construction of WRG's Articles of Association and the related provision of the Companies Act 1985 as well as with the information required to be included in a company's audited accounts. Nor do I think that the Defendants can be shut out from inviting the court to consider with care the Sub-Committee report together with the two interviews which preceded it. That exercise will involve examining the extent to which, if at all, the sub-committee concluded that there was substance in the allegations made by the Defendants in the letter complained of.

17. I turn to the question of convenience. In this connection Mr Rampton relies on what I said in paragraph 19 of my judgment in *MacIntyre v Chief Constable of Kent* (24.01.02, unreported). Everybody knows that cases take longer if they are heard with a jury: witness statements will not be pre-read; evidence in chief has to be given orally; speeches to juries are longer, if only because a Judge sitting alone can tell counsel when he has understood a point and court time is spent summing-up the case to the jury. Such considerations as these do not justify dispensing with a jury. I have to ask myself whether the prolonged examination of documents which I have held will be necessary will be possible without substantial difficulty in comparison with carrying out the same process with a judge alone. This appears to me to be a question of degree, depending in part on the number of documents and in part on the degree of scrutiny which will be necessary. My conclusion is that the exercise will be substantially more difficult with a jury than it would be with a judge alone. A significant amount of extra court time (and therefore expense) will be taken up because of the need to proceed at the pace of the slowest juror. As it happens in this case it may be necessary to examine some documents alongside one another, for example the various drafts of the letter complained of and the letter as sent, the references to unparticularised allegations against the Claimant contained in the letter complained of as against what the first Defendant said in the course of his interview by the sub-committee. It is at least possible (I put it no higher than that) that it may be germane to consider provisions of the Companies Act and WRG's Articles of Association. I accept that issues of construction are for the Judge even in a jury trial, but it may prove necessary to investigate whether the Defendants' understanding of the legal position is tenable. For all these reasons I conclude that the prolonged examination of documents which will be required is such that it cannot conveniently be carried out with a jury.

18. There remains the question whether, notwithstanding that the Defendants can bring themselves within one of the gateways to trial by judge alone contained in section 69, I should nonetheless exercise my discretion in favour of a jury trial. As to this question, Mr Rampton can say that the letter complained of made serious allegations of impropriety and dishonesty on the part of the Claimant. But there is no plea of justification, so it cannot be said that the Claimant's honour and integrity are under attack. There is an attack on the integrity of the Defendants because of the plea of malice but that is not a factor which the Claimant can pray in aid. In any case it is not an overriding factor in favour of trial by jury. Moreover, there are in this case factors which favour a trial by judge alone. Firstly, the emphasis is nowadays against trial by juries. Secondly, trial by judge alone carries with it the advantage of a reasoned judgment. The Claimant in this case cannot say that it involves prominent figures in public life or questions of great national interest. Important though I accept the issues are to the parties, the case is at root a boardroom dispute. I therefore decline to exercise my discretion in favour of a jury trial.

24 February 2005