Neutral Citation Number: [2005] EWHC 2328 (QB)

Case No: HQ05X00542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2007

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

Prince Radu of Hohenzollern	**Claimant**
- and -	
1. Marco Houston	**Defendants**
2. Sena Julia Publicatus Ltd	

- -
- -

Patrick Moloney QC (instructed by **Carter-Ruck**) for the **Claimant**
Stephen Cogley (instructed by **Blake Lapthorn Tarlo Lyons**) for the **Defendants**

Hearing date: 3 October 2007

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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.

THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. A preliminary issue is due to be tried on 22 October 2007, by order of Master Turner dated 16 March, and I am now asked to resolve the question of mode of trial. Mr Moloney QC, for the Claimant, submits that by one route or another I should rule that the matter be resolved by judge alone.

2. By way of background, I should record that an order was made on 27 February of this year that there should be trial by judge and jury, although it is pointed out by Mr Moloney that this was prior not only to the ordering of a preliminary issue but also to the disclosure of documents. Later, an order was made by consent expressly referring to mode of trial. The relevant terms of that order, dated 19 April 2007, are as follows:

> "…
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> 5. PTR to be arranged as soon as possible after 15 June at which time the question of whether the Trial of the Preliminary Issue be before a Judge alone or Judge and Jury shall be considered;
>
> 6. That the Claimant do apply by 30 March 2007 to the Clerk of the Lists for an appointment to fix the trial period within the trial window. The trial window shall be between 16 July 2007 and 30 November 2007. Trial by Judge and Jury (with both parties reserving the right to seek trial by Judge alone if so advised) with a time estimate of five days; London;"

I do not consider that I need feel inhibited in making a case management decision about the requirements of the case as they now stand, merely because an order was formally made at an earlier stage for trial by judge and jury. I must address the overriding objective and other relevant factors in the light of the current position.

3. The article was published in *Royalty Monthly*, volume 19 no. 5, and was entitled "Scandal in Romania as Princess Margarita's husband is branded an impostor". The sole issue to be determined by way of preliminary issue is that of qualified privilege. This defence is pleaded variously and includes what is generally referred to as *Reynolds* public interest privilege, as well as "conventional" privilege (i.e. relating to an alleged common and corresponding interest between the defendants and the readers of the magazine in which the offending words appeared). Another variant on the theme is the Defendants' reliance upon "*reportage*" privilege, as recently explained by the Court of Appeal in *Roberts v Gable* [2007] EWCA Civ 721. This relates particularly to the Defendants' coverage of a press conference, of which the article is said to be a report, and which took place in Bucharest on 5 August 2004.

4. It is unnecessary to canvass the issues in detail for present purposes. It will suffice to say that the defamatory allegations fall into two categories. First, it is pleaded that the words convey the imputation that "the Claimant is a con man, a forger, an impostor … who has falsely passed himself off as a royal prince in order to con people out of money and to inveigle himself into high official positions which would otherwise have been denied to him". Secondly, they are said also to bear the meaning that the

Claimant is "a former secret policeman for the wicked Ceaucescu dictatorship". It is intended to justify similar but more narrowly drawn meanings and also to rely on fair comment.

5. The present application is made against the background of concerns expressed by various judges in recent years as to the problems of trying to resolve *Reynolds* privilege by way of jury trial and, in particular, the words of Lord Phillips MR in *Jameel v Wall Street Journal Europe (No. 2)* [2005] QB 904 at [70]:

> "… The division between the role of the judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such a case".

6. It is necessary to have in mind the statutory background of s.69 of the Supreme Court Act 1981, against which any discretion must be exercised or case management decisions made:

> "69. (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
>
> (c) any question or issue of a kind prescribed for the purposes of this paragraph,
>
> the action shall be tried with a jury, unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot be conveniently made with a jury.
>
> (2) An application under subsection (1) must be made not 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.
>
> …"

7. It seems that the first consideration by an appellate court of the wording of s.69(4) occurred in *Armstrong v Times Newspapers Ltd* [2006] 1 WLR 2462. In reliance upon that decision, Mr Moloney submits that I need to address the case management issues involved, untrammelled by any predisposition towards or against jury trial, and without any need to consider the hurdle of "prolonged examination of documents or accounts", which would be relevant to an issue arising under s.69(1): see, in particular, the Court of Appeal judgment at [30] and that at first instance at [2006] EMLR 166 at [32].

8. The phrase "rules of court" at the time of enactment would naturally be taken as referring to the former Rules of the Supreme Court, and to RSC Ord 33 in particular, which contained express provisions about jury trial. Now, on the other hand, the phrase would be apt to cover the general rules governing case management contained in the CPR including rules 26.11, 35.15 and 3.1(2)m: see e.g. the Court of Appeal judgment at [14] and [19].

9. Although he argues that there is no need on the present application to consider the criteria set out in s.69(1), Mr Moloney is prepared to submit, in the alternative, that "the trial" (whether one takes the litigation as a whole or the preliminary issue alone) would indeed require prolonged examination of documents which cannot conveniently be made with a jury. Mr Cogley, appearing for the Defendants, submits that I cannot possibly come to a conclusion on that broad submission at the moment. It would be premature, since neither disclosure of documents nor exchange of witness statements has yet taken place in relation to the outstanding issues (in particular, justification and fair comment). Normally, one would address an application based on s.69(1) only at the stage when the court is in a position to assess the scope and nature of the documentation involved.

10. Although I could come to a judgment about the supposed need for prolonged examination of documents on the privilege issues, taken in isolation, there is no need for me to do so because s.69(4), as construed by the Court of Appeal, does not require that any such preliminary hurdle be overcome in considering whether the "questions of fact" relating to privilege should be tried by judge or jury. Those could be hived off for separate determination whatever the mode of trial on other matters. Nevertheless, when I come to assess the convenient or most proportionate way of dealing with the preliminary issue, it will plainly be at least a relevant factor to consider the scope of documentation.

11. It has been agreed between the parties that, whatever the mode of trial, it would be appropriate for the Defendants to go first in the trial of the preliminary issue. The burden is upon them to demonstrate the scope of protection (if any) afforded by the defence of qualified privilege; and, in particular, for the purposes of *Reynolds* privilege, to persuade the court that their journalistic conduct underlying the publication of the article was "responsible" in the senses contemplated by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and/or *Jameel v Wall Street Journal Europe (No.2)* [2007] 1 AC 359.

12. The role of a jury in this exercise would have to be confined to returning special verdicts on essential issues of primary fact. Whether a jury could serve a useful function must depend on what those issues are. No clear list of factual questions has been identified as fit or necessary for jury determination on the qualified privilege

issue, although Mr Cogley put forward a number of general possibilities. He suggested, however, that it would only be possible for the definitive list to emerge in the course of the hearing according to how the evidence went. I do not find this very satisfactory. As I commented in *Galloway v Telegraph Group* [2005] EMLR 115 at [20]:

> "I am always reluctant to launch into any form of jury trial without the jurors having signposts to enable them to know why they are listening to the evidence, and to be able to relate it to the issues they will have to resolve. … The judge and the parties owe it to those who serve as jurors not to launch them in a state of confusion upon uncharted waters".

13. It is elementary that questions of evaluation (in particular, as to whether the journalists have been "responsible"), and the ultimate decision of whether privilege attaches to the relevant publication(s), are for the judge to resolve. Against that background, one has to be clear what it is that the jury is being asked to do in laying the ground. Since, in Lord Phillips' words, the division between their roles "is not an easy one", it is best to be clear from the start, in the particular circumstances of the case, what role is being allotted to the jurors. It is not appropriate to take the line that some issues of fact *may* emerge for them to resolve. This was a point which troubled Gray J in *Charman v Orion Publishing Group Ltd* [2007] 1 All ER 622 at [4]:

> "This case is a good example of the advantages of trying the issues of privilege (and in particular the issue of responsible journalism) without a jury. Trial by judge alone dispenses with the sometime problematic question of distinguishing between issues of law (which are for the judge to decide) and issues of fact (which would be a matter for the jury, if there were one). Another problem which arises in cases where responsible journalism is relied on by the defence is that there may in the particular circumstances of the case be very few contentious issues of fact for the jury to resolve and that such factual questions as do arise may appear to the jury to be trivial and unimportant. Eady J adverted to this problem in *Galloway v Telegraph Group Limited* [2005] EMLR 7 at 19-20. Try as the judge may to explain to the jury why their role in the trial is so limited, it is entirely understandable if jurors are puzzled, if not affronted, at the role they have been called upon to play. One case in point is *Loutchansky v Times Newspapers Limited* [2002] QB 321. "

There are other pitfalls which need to be borne in mind.

14. There is a possibility of conflict where issues in any case are to be resolved by different tribunals. For example, here, if a jury were to come to a certain conclusion on meaning for the purposes of resolving privilege and, later, another jury had to address justification, fair comment and damages, their views may not be easy to reconcile. Mr Cogley suggests that meaning does not matter, since his case is that the publication was privileged *whatever the words meant*. That seems to me a novel approach. Almost always, where it is in issue, the first task in a libel action will be to

decide the meaning of the words complained of: cf *Lowe v Associated Newspapers Ltd* [2007] QB 580 at [15]. After all, the meaning needs to be identified in order to decide whether the words are defamatory at all. Also, whether there is a duty to publish (and/or the public has an interest in hearing the allegations) would require the meaning to be pinned down. These points cannot be resolved in a vacuum.

15. Even though the judge has to decide the critical questions on privilege, and to consider a good deal of documentary (and oral) evidence to enable him to do so, the jury would have to be present while the evidence is given, and probably to follow it, despite the fact that the bulk of it will have no bearing on any primary question of fact which they could conceivably be asked to resolve. Without a jury, I could pre-read the documentation and dispense with taking evidence in chief in the usual way. To have the jury sitting by, just in case there arises an issue of primary fact which they could resolve, seems to me to be wasteful of everyone's time and unnecessarily costly: cf *Galloway* (cited above) at [27]. I can well understand that jurors may well have an important role in cases where there is, for example, a direct conflict of evidence between witnesses on a significant issue which has to be determined, and especially where the credibility or good faith of a party depends on the outcome. But on the preliminary issue in this case the task is essentially one for the judge.

16. It is difficult to understand what advantage the Defendants will obtain from having a jury trial such as to outweigh the significant disadvantages. Although the *Armstrong* case was different on its facts, it is similar in the sense that here, too, I am being asked to take the unusual step of ordering two different modes of trial. If the Defendants fail on the defence of privilege, another tribunal would have to decide the remaining issues. It might be a judge or a different jury, but there would still be the potential for conflict as to (say) the meaning of the words or the views taken of witnesses. Also, some evidence would have to be taken again if a second jury were involved. As in *Armstrong*, I do not see how taking this course would be "furthering the overriding objective".

17. It is right that I should also address specifically Mr Moloney's submissions on the scale of the documentation. He drew to my attention the fact that most of the documents contained in the three exhibits bundles are referred to in Mr Houston's own witness statement (dealing with the preliminary issue). It is to be assumed, therefore, that if there is a jury trial it will be necessary to go through them in chief. Mr Houston himself describes the exhibits as "voluminous" (although obviously it is for the court ultimately to decide what is to be admitted in evidence as being relevant, admissible and proportionate). Mr Moloney said that it would not be easy to envisage any significant period in his cross-examination when it would not be necessary to have at least two bundles open for comparison purposes.

18. In particular, there are many back numbers of *Royalty Monthly*, which are relied upon for their several purposes by each side. The Defendants say that they illustrate, in general terms, their "responsible" approach and, specifically, towards the Romanian dynastic dispute. On the other hand, the Claimant wishes to refer to them in order to demonstrate how unfair the article complained of actually was in the light of the matters of which Mr Houston was aware.

19. Next, it is said that close scrutiny will be required of the Urkunde and the associated documents. This is an official document said to authorise the Claimant's use of the

title. That may be so, but the material would not in itself take up significantly more time with a jury than with judge alone. Likewise, although there are several versions of it, it can hardly be said that a press release issued by Mr Paul Lambrino, on the day of the press conference, would be unmanageable in a jury trial.

20. There are also various notes or transcripts of the press conference itself, which will need carefully to be considered in order to decide what actually transpired and, in the light of that, how fair and/or accurate was the Defendants' *reportage*. Again, that is not something which of itself would present insuperable hurdles in a jury trial, especially since their function would be confined to deciding merely what was said, although there would obviously be scope for confusion in arriving at a single definitive version when twelve people have to be consulted.

21. There is also other media coverage from Romania of the press conference, the relevance of which is that the Claimant wishes to point to some matters which the Defendants should have included, and the omission of which is said to undermine the fairness and accuracy of the Defendants' article and to demonstrate that their journalism failed the *Reynolds* criteria.

22. Taken as a whole, this material does seem to me to me to indicate that a jury trial would be considerably longer than trial by judge alone. What is more, it would for the most part be irrelevant to the determination of any significant primary issue of fact. Much of the jurors' time would be wasted in getting to grips with these matters, and the essential issues between the parties could be resolved more quickly and efficiently by a judge sitting alone. Were it necessary to do so, I would have been prepared to hold in the light of the guidance contained in *Aitken v Preston* [1997] EMLR 415 that there would be a prolonged examination of documents, which could not be "conveniently" carried out with a jury (by comparison with carrying out the same process before a judge alone). It is not, however, necessary for me to apply these criteria in the present case for the reasons explained above. Nevertheless, this element of delay and expense remains a significant factor when weighing the case management considerations which arise on the present application.

23. I therefore exercise my discretion in favour of the preliminary issue being tried by judge alone.