Neutral Citation Number: [2006] EWCA Civ 519

Case No: A2/2005/2892

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE EADY
HQ04X01798 [2005] EWHC 2816 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2006

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MAY
and
LORD JUSTICE DYSON

- -

Between :

(1) TIMES NEWSPAPERS LIMITED **(2) DAVID WALSH** **(3) ALAN ENGLISH**	**Appellants**
- and -	
LANCE ARMSTRONG	**Respondent**

- -
- -

Andrew Caldecott QC and Heather Rogers (instructed by **Addleshaw Goddard**) for the **Appellants**
Richard Spearman QC and Matthew Nicklin (instructed by **Messrs Schillings**) for the **Respondent**

Hearing dates : 26th April 2006

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Approved Judgment

Lord Justice May:

Introduction

1. This is the judgment of the Court.

2. In this libel action, there are issues of the meaning of the publication complained of; subject to a decision as to meaning, of justification; and of *Reynolds* qualified privilege. The parties agree that the issues of justification and privilege are complicated so that they cannot conveniently be decided by a jury. The parties accordingly agree that the action should be tried in the Queen's Bench Division by a judge alone without a jury. Eady J in substance so ordered on 7th December 2005.

3. The parties also agreed that the question of meaning should be decided as a preliminary issue. This might well enable the parties to reach a compromise or reduce the scope and expense of further proceedings. The defendants want the preliminary issue to be decided by a jury. The claimant wants it to be decided by a judge alone, and preferably by the same judge who will hear the action, if it needs to be heard. On 7th December 2005, Eady J decided and ordered that the preliminary issue as to meaning should be tried by a judge alone other than himself. The defendants appeal against this part of the judge's decision and order with permission of Hooper LJ. A principal concern of the appeal is the meaning and proper application of section 69(4) of the Supreme Court Act 1981.

The publication and the action

4. The claimant, Lance Armstrong, is an internationally renowned cyclist who had won the Tour de France in seven successive years from 1999 to 2005. The first defendant publishes the Sunday Times newspaper. The second defendant was the chief sports writer of the Sunday Times and co-author of a book "L.A. Confidential – The Secrets of Lance Armstrong" published in France in June 2004. The third defendant was the deputy sports editor of the Sunday Times.

5. On 13th June 2004, the Sunday Times published a full page article of 34 paragraphs headed "L.A. Confidential". The article was attributed to the third defendant and referred to the second defendant's book, which was then about to be published. The claimant issued proceedings on 15th June 2004 claiming that the article was defamatory of him. Having reproduced the entire article in his Particulars of Claim, he claimed that in their natural and ordinary meaning its words meant and were understood to mean that, contrary to his denials, he had taken drugs in order to enhance his performance in cycling competition and by so doing and denying that he had done so was a fraud, a cheat and a liar.

6. By their proposed re-amended defence, the defendants denied that the article bore the meaning alleged by the claimant. They said that the ordinary, reasonable reader could not or would not have understood the publication to allege that the claimant had taken performance-enhancing drugs. In the alternative, the defendants say that, in so far as the words complained of had a lesser *Lucas-Box* meaning that there were reasonable or strong grounds to suspect that the claimant has taken performance-enhancing substances in order to compete in professional cycling, they were true in substance and in fact.

7. On 17th December 2004, Eady J had ordered that the words complained of were incapable of bearing a less serious meaning than that now contended for by the defendants. The range of forensically possible meaning therefore lies between the meanings contended for by the claimant and the defendants respectively. Authority artificially requires the tribunal which decides this issue to determine a single meaning within this range – see Diplock LJ in *Slim v Daily Telegraph* [1968] 2 QB 157 at 171-174. Where a libel action is tried by a judge and jury, the decision as to the range of possible defamatory meanings which the words are capable of bearing is reserved to the judge and is "called a question of law". The decision as to the particular defamatory meaning within the range which the words do bear is reserved to the jury and is "called a question of fact" – see Diplock LJ at page 174D. The parties to the present appeal agree that the decision as to the particular defamatory meaning is a question of fact.

Section 69 of the Supreme Court Act 1981

8. Most civil actions are not now tried by juries. Section 69 of the Supreme Court Act 1981 regulates what are now in practice residual classes of civil cases in which there may be, in whole or in part, trial by a jury. Section 69 of the 1981 Act provides:

> "(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 an 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,
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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 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."

It is unnecessary for the purposes of this appeal to embark on a debate whether the possibility of a libel claim being tried by a jury is a statutory hangover or, as some

might say with reference for instance to the decision of this court in *Safeway Stores v Tate* [2001] 2 WLR 1377, a constitutional right.

9. There is, so far as we are aware, no reported authority which has considered section 69(4). As this appeal has shown, the first part of the sub-section up to the semi-colon seems to be reasonably clear; the meaning of the second part after the semi-colon is less clear.

10. A number of points should be noted about section 69.

11. First, no question or issue has been prescribed for the purpose of sub-section (1)(c); so sub-section (1) is confined to an action to be tried in the Queen's Bench Division where there is in issue a charge of fraud or a claim in respect of libel, slander, malicious prosecution or false imprisonment.

12. Second, if such a charge or claim is in issue, the *action* has to be tried with a jury, unless this is inconvenient for reasons of complication within the terms of the exception. We should add that, since the court's decision as to the mode of trial is here on the application of a party, the parties can agree that an action within sub-section (1) which does not come within the exception may nevertheless be tried by judge alone. The parties cannot agree the converse, that is that an action not within sub-section (1) shall nevertheless be tried with a jury. That is a matter for the court's discretion under sub-section (3).

13. Third, sub-section (1) may apply to require trial with a jury, even though the action has other issues than those in sub-section (1)(a) and (b). This might be, for instance, if a claim for libel and a claim for breach of contract arose out of the same facts; or if there was a claim for both false imprisonment and personal injury sustained in the course of a wrongful arrest.

14. Fourth, CPR rule 26.11 provides that an application for a claim to be tried with a jury must be made within 28 days of service of the defence. This serves for section 69(2), but there is no other rule of court specifically relevant to section 69, notwithstanding the expectation from the terms of sub-section (4). The CPR do not otherwise reproduce the provisions of Order 33 rules 4 and 5 of the former Rules of the Supreme Court. But Order 33 rule 5 was largely circular in directing attention back to section 69 of the 1981 Act, as in earlier versions it had directed attention back to section 6 of the Administration of Justice (Miscellaneous Provisions) Act 1933, the statutory predecessor of section 69 of the 1981 Act. Archaeologists could also go back to Order XXXVI of the Rules of the Supreme Court as they were in 1933, but without, we think, much illumination on the present problem. Archaeology shows generally that statute, rule and practice have gradually moved away from trial of civil actions with a jury from the Common Law Procedure Act 1854, and via sections 68 and 69 of the Supreme Court of Judicature Act 1873 with paragraph 32 of its Schedule; and section 6 of the 1933 Act. A full account of this statutory history may be found in the judgment of Neill LJ in *Beta Construction v Channel Four Television* [1990] 1 WLR 1042 at 1052ff. Interesting though the inquiry is, we do not think that the present difficulty with section 69(4) of the 1981 Act is resolved or helped by archaeological comparison.

15. Fifth, an action which does not come within section 69(1) has to be tried without a jury, unless the court in its discretion orders it to be tried with a jury. The discretion is now very rarely exercised, reflecting contemporary practice. Contemporary practice has an eye, among other things, to proportionality; the greater predictability of the decision of a professional judge; and the fact that a judge gives reasons.

16. Sixth, both sub-section (1) and (3) of section 69 concern the trial of an *action*. Mr Caldecott QC, for the appellants, accepts that the discretion in sub-section (3) cannot be used to order an issue, as distinct from the action, to be tried with a jury. If an action is to be tried with a jury, and unless they are directed to give a special verdict, their verdict is composite and unexplained. They are directed as to the law and it is assumed that they will apply it as directed. They make decisions of fact, with the help of a summing up from the judge, but they do not explain their findings of fact. In a routine libel action, for instance, the jury's verdict will be for the claimant or the defendant, and, if it is for the claimant, may comprise an unexplained award of damages. The nature of a decision on a question of fact – see sub-section (4) – is different.

17. Seventh, the power of the court in section 69(4) is not affected by anything in the three preceding sub-sections. This, we think, means that the discretion which the power embraces is an open discretion which does not start with a leaning towards any particular mode of trial – as, for instance, a leaning towards trial with a jury in actions within section 69(1)(a) or (b).

18. Eighth, the power in section 69(4) is to order that "different questions of fact arising in any action be tried by different modes of trial". It does not concern *issues*, other than issues which are exclusively questions of fact. It does not therefore concern issues which are mixed questions of law and fact. Otherwise, the meaning and application of the first part of sub-section (4) is reasonably plain. The wording of the sub-section anticipates that, if the power is used, there will be at least two different modes of trial within the proceedings; and that the selected questions of fact will have a different mode of trial from other questions of fact or indeed from the action. The discretion is available in *any* action, not just those within section 69(1). There are other modes of trial than trial by judge alone or with a jury, including trial by judge sitting with one or more assessors – see CPR rule 35.15.

19. Ninth, as we have said, the Civil Procedure Rules retain no rules specifically designed to regulate the power in section 69(4). This is not, we think, a jurisdictional impediment to its operation. Neither party to this appeal suggested that it was. Rules 26.11 and 35.15 concern related matters. The overriding objective in rule 1.1 and rule 3.1(2)(m) are there for general case management purposes. On this topic, paragraph 17 of the judgment of this court, given by Scott Baker LJ, in *Phillips v Commissioner of Police of the Metropolis* [2003] EWCA Civ 382 is instructive in emphasising that the discretion under section 69(4) should be exercised with caution. We respectfully consider that the assumption in this paragraph of the court's judgment, unnecessary to the eventual decision, that the court can, other than by agreement, use section 69(4) to fillet out "issues", as opposed to "questions of fact", is not to be found in the wording of the sub-section. The relevance of this for present purposes is that, if questions of fact are to be determined by a jury, the jury will have to give a special verdict.

20. Tenth, in our judgment, the first part of section 69(4), taken alone, gives the court a discretion in a libel action such as this, where the action is to be tried by judge alone because it comes within the exception to section 69(1), to order that the issue of meaning, being a question of fact, is to be tried with a jury. The first question in this appeal is whether that conclusion is affected or moderated by the second part of section 69(4).

21. Mr Spearman QC, for the respondent, submitted before this court, as he had before the judge, that, because of the second part of section 69(4), there was no jurisdiction in this case to order the issue of meaning to be tried with a jury, where the action was to be tried by a judge alone. We understood his submission to be as follows. The decision under 69(1) and (3) will provide for the action to be tried either with a jury or by judge alone. Section 69(4) gives the court power to modify what would otherwise be the consequence of applying those sub-sections. If the action comprises mixed issues, the court can order those issues which are unsuitable for the mode of trial for the action to be taken out of that regime and to be tried separately by a different mode of trial. But, by the second part of sub-section (4), sub-section (1) still applies to the issues which come within sub-section (1). It follows that the court's decision under sub-section (1) cannot be altered under sub-section (4) for those issues which come within sub-section (1). Since, in the present proceedings, which are entirely within sub-section (1), the court has ordered that the action should be tried by judge alone, there is no power to order the question of meaning to be tried with a jury. In short, the submission is that sub-section (4) cannot operate in a claim for libel.

22. Eady J found Mr Spearman's submission as to the meaning of section 69(4) persuasive, if surprising. But in the end, he considered that he must determine the jurisdiction question by reference to authority of this court. He referred to *Phillips* and *Gregson v Channel Four Television* [2002] EWCA Civ 941. In our judgment, Mr Spearman's submissions here are both surprising and unpersuasive. We have already pointed out that sub-section (4) refers to questions of fact, not issues – nor, as Mr Spearman initially suggested, to causes of action. It applies to "any action", which must include an action in which there is a claim for libel. The opening words of sub-section (4) say that the power of the court in sub-section (4) is *not* affected by anything in the preceding sub-sections; yet, by Mr Spearman's construction, that is precisely what may happen. The second part of sub-section (4) opens with the words "Where any such order is made". This refers to the order for which the first part of the sub-section provides, which may be made in "any action". Whatever the import of the second part of the sub-section, it cannot extend to meaning that the order has not been made, or cannot be made in some circumstances. The same is implied by the use of the word "only" in the second part of the sub-section. For these reasons, we are clear that the first part of sub-section (4) gives the court an open discretion within its terms, which is not moderated by the second part of the sub-section. Syntactically, the second part of the sub-section is not entirely straight forward. But we think that its general import is that, when an order under sub-section (4) is made, sub-section (1) remains to be applied to the remainder of the action. In the light of our view as to the unrestricted meaning of the first part of sub-section (4), a more definite conclusion as to the second part is unnecessary.

The judge's decision

23. The judge accepted that the issue of meaning, which the defendants want to be tried with a jury is relatively simple. It could be hived off to be dealt with by a jury without inconvenience. Whoever decides meaning, it would 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. He said that generally, however, the right approach in assessing the appropriate mode of trial was to address the action as a whole. Once it has been established that the action cannot conveniently be tried with a jury, then the emphasis is against that mode of trial. There were undoubtedly a number of potential disadvantages in having the issue of meaning tried by jury. The critical question therefore was whether there were sufficiently clear countervailing advantages.

24. Whatever the mode of trial, the issue of meaning would be disposed of within a day. A jury trial of the issue would be somewhat more expensive, but not much. That was a factor of very little weight. There were, however, problems of greater substance. The judge explained them with reference to *Jameel v Wall Street Journal Europe SPRL (No. 2)* [2004] EMLR 11 at paragraphs 5-7 and *Galloway v Telegraph Group Limited* [2005] EMLR 7 at paragraphs 30 and 32-33. The law requires the determination of a single definitive meaning. The jury would have to determine this from a range of possible meanings. The views of individual jurors may vary as to the shades of meaning which a fair minded reader would attribute to the article. There are limits to the number of possibilities which can be presented to the jury ideally seeking a "yes" or "no" answer. There may be scope for stalemate. These difficulties are more acute with a lengthy, complicated and multi-layered newspaper article. The jury would have to be directed not only as to the single meaning rule, but also as to the repetition rule.

25. We note that some of these difficulties could arise whenever a jury decides a libel action. They are not confined to a case in which the jury may be asked to decide meaning only. They are as much reasons for not having jury trials for libel actions at all, as reasons for not having a jury try the issue of meaning.

26. The judge was persuaded that he should not be beguiled into offering the jury a choice between two or three shades of a meaning only. The principles in *Slim v Daily Telegraph* must not be encroached on. It would be open to the 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 was that there were "cogent grounds" to suspect. It would not be right for the judge to attempt to delimit the options available to the jury. It was not possible artificially to eliminate or minimise the problems inherent in drafting in committee.

27. The judge noted Mr Caldecott's argument that a jury would have refreshingly open minds unclouded by the baggage of lawyers' preconceptions. He thought this to be exaggerated when the jury would have listened to counsels' submissions and the judge's summing up. He did not see that a jury's spirit of compromise was more desirable than the conclusion of a reasonable individual judge. He considered that a reasoned judgment of a judge and the possibility of an appeal from it was an advantage. He had never found very convincing the suggestion that judges are out of touch and over analytical. They would need conscientiously to apply the principles in

Gillick which include the injunction not to analyse an article as a lawyer or accountant would analyse documents or accounts. The judge referred to Lord Devlin's observations in *Lewis v Daily Telegraph* [1964] AC 234 at 277 to the effect that laymen tend to read in an implication more freely than a lawyer. The judge thought this might be seen as patronising and rather contrary to the modern approach, but that a readiness to take a nudge and a wink would tend not to be to a defendant's general advantage.

28. The judge expressed his conclusion in paragraph 32 of his judgment as follows:

> "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 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".

He therefore ruled that the preliminary issue of meaning should, like the other issues in the case, be determined by judge alone.

The appeal

29. The defendants have an uphill task in seeking to dislodge the judge's discretionary decision. He made no error of principle. Mr Caldecott suggests that he did, pointing to paragraph 17 of the judgment among others. The judge there said that the modern approach was to lean in favour of trial by judge along once the criteria in section 69(1) of the 1981 Act had been shown to apply. This, it is suggested, was wrong. There should have been no starting point against a jury trial of the issue. Mr Caldecott points to other passages in which he says that the judge showed an inbuilt feeling against jury trial. He submits that the emphasis should have been in favour of trial with a jury and that this particularly applies to the issue of meaning, a classic jury question. Juries are, he submits, better equipped, in the light of *Gillick*, to determine the issue of meaning than are over analytical lawyer judges. There were no disadvantages in a short jury trial of the preliminary issue of meaning. The judge showed little recognition of the historically recognised advantages of having a jury decide meaning. The underlying point is that there is an important discrete issue which is convenient for jury trial and for which a jury is the intrinsically preferable tribunal. A jury is inherently more likely, through discussion and compromise, to reach a closer approximation to what the hypothetical reasonable reader would take the words to mean than a single lawyer.

30. As we have said, we are not persuaded that the judge made an error of principle. We think that he was entitled to take account of the general advantage of having all issues tried by the same tribunal. That said, when he came to make his decision in paragraph 32, which we have quoted, he said that he should assess the relative advantages and disadvantages dispassionately, which in the context meant without predisposition one way or the other. He said that he should not start with any predisposition in favour of jury trial. This was, in our judgment, correct in the light of the opening words of section 69(4) of the 1981 Act. He did not in this critical deciding paragraph start with a predisposition in favour of trial by judge alone. He took account in the course of his judgment of all Mr Caldecott's points in favour of the "classic jury issue" of meaning being decided by a jury. His reasons in support of his conclusion were sufficient to justify it. There may be significant difficulties in having meaning determined by one tribunal and the rest of the action by another. There are certainly reported cases in which a jury has been asked to decide the issue of meaning as a preliminary issue – see *Marks and Spencer v Granada Television* Popplewell J, 23rd February 1998 and *Gregson v Channel Four Television* 4th July 2002, CA [2002] EWCA Civ. 941. These were cases in which for convenience the issue of meaning was taken separately. There was no decision relevant to the issue which arises in this appeal, although in *Gregson* the trial judge subsequently decided that later issues should be tried by judge alone. In the present case the judge's concern about the problem arising from varying shades of meaning and the possible difficulty for a judge applying the jury's unexplained decision as to meaning were legitimate. It was legitimate also to take into account that the rest of the action was to be tried by judge alone.

31. For these reasons, we are not persuaded that Eady J's discretionary decision was wrong, and we dismiss the appeal.