Case No: HQ04X01682

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2005

Before :

THE HONOURABLE MR JUSTICE GRAY

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Between :

MICHAEL CHARMAN	**Claimant**
- and -	
ORION PUBLISHING GROUP & OTHERS	**Defendant**

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MR TOMLINSON QC AND MS MOORMAN for the CLAIMANT
MS PAGE QC, MR NICKLIN AND MR SPEKER for the DEFENDANTS

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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 HONOURABLE MR JUSTICE GRAY

MR JUSTICE GRAY :

1. This is the case management conference in an action for libel brought by a former Police Officer, Michael Charman against the author, Graeme McLagan, and the publishers, Orion Publishing Group Ltd, of a book entitled "Bent Cops".

2. A number of issues arise for decision, of these the most important are:
   (1) whether the trial should be with a jury or by a judge alone; and
   (2) if the latter, whether the issue of the meaning of the words complained of should be decided as a preliminary issue.

3. Apart from the dispute as to meaning, the defendants rely on the substantive defences of *Reynolds* qualified privilege, statutory qualified privilege, whether a fair and accurate report and justification of the lower meaning for which the defendants contend. It is unnecessary, for present purposes, to say any more of the background to the action than that the claimant is a former detective constable in the Metropolitan Police. Whilst he was a member of the Flying Squad he handled an informant named Brennan who alleged that he had made corrupt payments totalling £50,000 to the claimant and another officer in return for which he received their protection whilst he, Brennan, was committing a substantial fraud.

4. Brennan was in due course convicted of theft. Thereafter an internal investigation was conducted into the claimant. During the course of that investigation, the claimant saw a document which he was not authorised to see. That led to criminal proceedings being bought against him under the Official Secrets Act, but those proceedings were dismissed. However, a disciplinary charge was brought against the claimant and that charge was subsequently upheld. The disciplinary charge related, as I understand it, to the document which the claimant saw without authority. But I am told that in the course of those disciplinary proceedings reference was made to the allegations of corruption which had been made against the claimant by Brennan. The disciplinary charge having being upheld, the claimant was required to resign: his retirement took effect on 6th May 2004.

5. I deal first with the mode of trial, starting with the principles applicable to applications of the present kind. Section 69 (1) of the Supreme Court Act 1981 provides so far as material as follows:

> "Where on the application of any party to an action to be tried in the Queens Bench Division the court is satisfied that there is in issue a claim in respect of libel, the action shall be tried with a jury unless the court is of the opinion that the trial will require any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with a jury".

6. There are a number of authorities on that sub-section. Of those, the most helpful is *Aitken v Preston and others* [1997] EMLR 415, where Lord Bingham, distilled the following principles from earlier authorities:

   (1) " The basic criterion viz that trial requires a prolonged examination of documents must be strictly satisfied and it is not enough merely to show that

the trial will be long and complicated, (*Rothermere v Times Newspapers* [1973] 1 WLR 448*)."*

However, the word "examination" has a wide connotation. It is not limited to the actual 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* [1988] 1 WLR 64*).*

(2) "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 a trial by Judge alone; (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. (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, and (d) any special difficulties or complexities in the documents themselves, (*Beta Construction v Channel 4 Television* [1991] WLR 1042 applied in the recent case of *Taylor v Anderton* [1995] 1 WLR 447).

7. The ultimate exercise of discretion will in each case depend substantially on the circumstances of each individual case and it would be idle to attempt to enumerate all the factors which might arise.

8. There are however four factors which have been identified in the earlier cases which have some general application and are presently relevant which, as the Judge recognised:

(1) The emphasis now is against trial by juries and this should be taken into account by the Court when exercising its discretion, *(Goldsmith v Pressdram)*. This conclusion is based on Section 69(3) which was a new section appearing for the first time in the 1981 Act to replace Section 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision enforced the date when *Rothermere v Times Newspapers* was decided.

(2) An important consideration in favour of the jury arises where, as here, the case involves prominent figures in public life and questions of great national interest, *Rothermere v Times*.

(3) 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, (*Goldsmith v Pressdram)*.

(4) The advantage over a reasonable judgment is a factor properly to be taken into account, *(Beta Construction v Channel 4 Television*).

As appears from the passage which I have quoted in full, there is another relevant sub section to section 69 of the 1981 Act, namely sub-section 3 which confers on the court a discretion to direct that the trial be heard with a jury even if the statutory criteria for dispensing with a jury is satisfied.

9. Miss Page on behalf of the defendants rightly reminded me that the court will not dispense with a jury unless the parties agree, or the requirements of section 69 are strictly proved; she further reminds me that the right to trial by jury on all issues of fact arising in a libel action is a substantive and statutory right which has been described as "an important constitutional right", (see *Safeway Stores Plc v Tate* [2001] 2 WLR 1377 at 1386f).

10. In addition, Miss Page rightly asserts that it is incumbent on the party contending that the trial will require prolonged examination of documents to identify the documents which will require prolonged examination and it is not open to a party to by pass section 69(1) of the 1981 Act by relying on the Civil Procedure Rules.

11. The latter point is pertinent because Mr Hugh Tomlinson, Queen's Counsel for the claimant places reliance in his skeleton argument on the well known principles of case management to be found in Part 1 of the CPR and elsewhere. It is also averred in that skeleton argument, on the basis of a witness statement made by Mr Charalambous of the claimant's solicitors, that the number of files of documents that are arising out of the issues raised by the Defence will amount to twenty lever arch files; that the trial will be lengthy and costly and "document heavy". All that may very well be true but those are not in themselves reasons for concluding that the statutory criteria in section 69(1) is made out, the CPR and indeed the length and costs of trial may be factors which bear on the exercise of the discretion conferred by section 69(3).

12. As will already appear, the ground on which the claimant in this case contends that the action should be tried by judge alone is that it will require a "prolonged examination of documents which cannot conveniently be made with jury". It is agreed that the three questions which arise are:-

    (1) whether there will be a prolonged examination of documents;
    (2) if so, whether it can conveniently be made with a jury; and
    (3) if not, whether the court should none the less exercise its discretion under section 69(3) to order trial with jury.

    I will take those issues separately.

13. As I have already indicated, the following issues arise on liability: the meaning of the words complained of, as contained in both the hardback copy of the book and in the paperback version which I am told is to an extent in different terms from the hardback. The next issue which arises is whether publication is protected by *Reynolds* privilege. There is also the defence raised that the publication of some at least of the words complained of is protected by statutory qualified privilege in that it is a fair and accurate report of criminal and/or parliamentary proceedings.

14. In addition, it is alleged that the defendants are entitled to the protection of the ancillary common law privilege. Finally, there is the defence of justification to which I

have already referred. If the claimants proceed on liability then the issue of aggravated damages will arise for decision.

15. Now before coming to the questions relevant to the issue of mode of trial, there are two preliminary points to be addressed. The first is perhaps an unusual feature of the claimant's present application. No doubt in part anticipating that there would be criticism from the defendants that the present application represents a change of attack on the part of the claimant.

16. Mr Tomlinson candidly says in his skeleton argument that he and the claimant's other legal advisors have given careful consideration as to whether any of the issues are suitable for summary determination, although they were originally attracted to this course.

17. Having reflected further an alternative approach is suggested to the Court. That alternative approach has the following elements: firstly, to seek an order for trial by judge alone; secondly to seek a determination by judge as to the meaning of the words complained of; and thirdly a sequential trial of the remaining issues.

18. I think its fair to say that Mr Tomlinson is not (certainly for the time being) pressing the third element, however he does accept that a reason (and perhaps a major reason) for applying for trial by Judge alone is to enable the claimant, if successful in that issue, to argue for the preliminary determination for the issue of meaning. For my part I see nothing objectionable about this tactic providing of course that the claimant is able to make out his entitlement to trial by Judge alone.

19. The other preliminary matter is this: one of the arguments and perhaps the main thrust of Miss Page's argument on behalf of the defendants is that the present application is premature. She argues that the court does not usually rule on section 69 applications until the issues in the action have become clear. It is not possible until that time to determine what issues any potential jury will actually be required to determine and which documents will be needed to consider those issues in order to resolve them.

20. Equally, submits Miss Page, it is only after the disclosure and witness statements have been completed that the court will be in a real position to ascertain the extent of the factual issues in dispute between the parties. Some of the issues may legitimately be narrowed by further proper case management so as to exclude peripheral issues.

21. If I may say so, I see the force of all of that. However, it appears to me that the approach which I should take is the following: to the extent that it is unclear at the present stage what documents will be deployed and how they will be deployed, then that is a handicap, as it were, which the claimant has to live with the claimant having brought the application as early as it has. But I take the view that I must consider on the material that is available today whether the statutory criteria in section 69(1) is made out. If I were to form an affirmative view on that question. It does not appear to me that the timing of the application can be a good reason for refusing the claimant's application.

22. I note in passing that in the case of *McIntyre v Chief Constable of Kent* a judgment of mine on 24th January 2001, which was unreported, the application in relation to mode

of trial was made at more or less the same stage as the present application was made in this case. It does not appear from the judgment that any particular point on prematurity was taken in that case. It is fair to add that the application for trial by judge alone was in that case refused.

23. I return to the first question which I have to decide, which is whether the trial will involve the prolonged examination of documents. In addressing that question I have well in mind the legal principles which I will endeavour to summarise.

24. It seems to me that in applications of the present kind it is invariably going to be very helpful for the court to be provided with a list of the documents which are said to be going to require prolonged examination. That is something which Mr Tomlinson has helpfully done, and I propose to deal with the various documents on which he relies. The first is the book itself, or to be more accurate the books, because as I have said there are both hardback and paperback versions of the book. As a matter of fact, it is right to record that the words complained of run to twenty-five closely typed pages, those being the sections of the book which are relied on.

25. In addition, the claimant indicates that he wishes to rely as context on the remainder of the book. Sometimes that reliance is somewhat meaningless, but in the present case Mr Tomlinson says that his case, or part of his case is that the book is a rogues gallery book, that is not intended to be in any sense critical of the author, but Mr Tomlinson will want at trial to rely on the surrounding passages to support his submission that the claimant is but one of a number of "bent coppers" who are being written about.

26. It is not only the claimant who wishes to rely on other passages than those complained of. The defendant has also indicated by means of a schedule the other passages on which it or they, rather, wish to rely at trial. I would not wish to be taken to be saying that any libel action involving a complaint about a book or indeed any libel action involving a complaint about a lengthy publication will be unsuitable for trial with a jury, plainly that is not the position.

27. The question which I have to decide is whether there will need to be prolonged examination of this book. It seems to me that there will inevitably have to be prolonged examination of the book: one anticipates that it would be necessary at an early stage of the trial for the jury to be invited to go and read the entire book and perhaps to compare the hardback with such differences as exist between it and the paperback version.

28. That examination or that reading is bound to be prolonged. I have taken Miss Page's point that the jury is directed invariably in the libel action that the publication complained of has to be read as the ordinary reader would have read it on the bus or the underground or at home with the television on. |But one knows as matter of experience that it is inevitable and necessary that there be continued reference in the course of any libel action to the words complained of and that will be true, it seems to me particularly in the present case. There is one further point to be made in relation to the reliance placed on the book.

29. There is a nice point to be decided by whichever tribunal deals with this case between the meaning of "guilt" for which the claimant contends and the meaning of "reasonable

grounds to suspect", for which the defendant contends. That is not always a feature of a complaint in a libel action. In addition, and secondly, the claimant relies on what he says is the prolonged examination which will be necessary of what are described as either the Brennan allegations or the Gaspar allegations. These consist as I understand it, of allegations made by Brennan about, amongst other things, the alleged corruption of the claimant and other officers. I am told that those allegations were taped over a two- day period and that the transcript of them is around one hundred and ninety seven pages.

30. It is right to say that in the Defence the defendants have indicated an intention to rely on the entire contents of those tapes. Miss Page makes the point that there was no dispute as to what the allegations were; they are listed in the defence, and they are admitted in the reply. That submission is right so far as it goes but it appears to me that at the heart of this case, in relation to justification and to an extent in relation to Brennan's privilege also, there is an issue as to the credibility of those allegations.

31. It seems to me to be likely that there will be cross examination of the author Mr McLagan as to the credibility of those allegations that will involve as it appears to me, looking in detail at what the allegations were, perhaps also how they were made. No doubt it is for that reason that in the defendant's skeleton argument it is said that the defendants will want the jury to listen to the tapes, I take the view that the transcript will also require prolonged examination at the trial.

32. Thirdly, Mr Tomlinson relies upon some newspaper articles and I believe a short broadcast news item in which it is alleged on behalf of the defendants that the claimant in effect went public as to the Brennan corruption allegations, that is to say he put the issue in the public domain. To quote one example, reliance is placed in connection with *Reynolds* privilege on the coverage devoted to police corruption in *The Guardian*: reliance is placed on the whole of pages 8 and 9 of a particular issue of *The Guardian*, it is pleaded that the article appeared in corroboration with, and/or on information and documents provided to the newspaper by the claimant and his brother officer and Brennan.

33. It seems to me inevitable that if that contention is to be advanced at trial that it will be necessary to look in detail at the Guardian article to see what inferences may properly be drawn as to the provenance of the contents, so here too, I take the view that there is going to be a need for prolonged examination of documents.

34. Fourthly, Mr Tomlinson relies on the complaints made by the claimant about the action being taken against him and interviews given by him in relation to the Police raid. I don't think very much time is going to need to be spent on those at the trial. There were only six letters of complaint written, they say whatever they say, there were three interviews of the claimant but he declined to comment in the course of them.

35. Fifthly, further reliance is placed on the evidence that was given at the criminal trial of Brennan, There is a transcript of the trial which runs to three or four lever arch files.

36. Miss Page is plainly right when she says that only a relatively small portion of that transcript is going to be relevant, to the material issue which is whether it is right to

say, as the defendants do say, that the prosecution in the Brennan trial effectively adopted as part of its case the allegations of corruption which had been made by Mr Brennan. There is also an issue whether the report of the trial in the book complained of was fair and accurate.

37. I accept that the issue of accuracy, which appears to be a relatively minor one, is not something which would require prolonged examination of the transcript. However, there is an issue as to the fairness and indeed the responsibility with which the defendants dealt with the trial process. It appears to me that this is another document of which there will need to be prolonged examination. For example, the author, Mr McLagan, who will inevitably have to give evidence since Reynolds privilege is to be relied on, is bound to be cross examined as to the fairness of the book's account at the trial.

38. That will involve looking firstly at what the book says, and secondly what happened at the trial and comparing the two. That is bound to be a lengthy process and I take the view, contrary to Miss Page's submission, that that is something which is apparent at this stage.

39. Finally, Mr Tomlinson relies on some logs and reports and accounts which are said by the defendants to be false and which came into existence in connection with Operation Nightshade. The falsity consists, so the defendants allege, in the claimant and his brother officer making false claims as to meetings which have taken place and events which have occurred in the course of 1993 and also reliance is placed by the defendants on financial analysis of the bank accounts of the claimant and his fellow officer. I am not impressed with the submission that they will require prolonged examination. It seems to me that this part of the case is relatively straightforward.

40. I would only add this: that being the totality of the documents specified relied on by Mr Tomlinson, if one goes through as I did in the course of pre-reading the defence, it does appear to me that there are a number of further documents expressly pleaded in the defence which will require examination which if not prolonged in the true sense, will never- the- less be of some significant length. I do not propose to burden this ruling with going through them: it is quite apparent if one reads the Defence what they are. Standing back is the statutory criteria in section 69(1) as to the prolonged examination of documents satisfied, which in my judgement for the reasons which I have given, it is.

41. I turn to the second question, namely, whether the requirement of convenience with a jury is satisfied. I think for what it is worth, it is true to say that in the ordinary run of applications relating to mode of trial, where it is found that prolonged examination of documents will be required, it is usually the case that that will not be possible conveniently with a jury, although as Miss Page rightly points out there is at least one instance where that was not true, namely the case of McIntyre to which I have already referred. But I remind myself as to the observations of Lord Bingham in *Aitken* as to the meaning of the word conveniently. It includes consideration of the additional length of the trial and the additional cost to the trial with a jury, where a prolonged examination of documents is necessary.

42. Just to take one short and simple example: if the jury has to be sent away to read the book, that would take at least a day, in my view, because of the speed of the jury is the speed of the slowest. A day of any trial in these courts costs a great deal of money. I have been provided with a figure by Mr Tomlinson of what the estimated cost of the trial is going to be: it is in excess of £1.76 million. It seems to me that if one were not to have a jury there would be a very significant saving of costs not least because the Judge would be able to do what a jury cannot plainly do, mainly to pre-read the material, that in itself saves the parties the costs of a considerable number of court days.

43. This is a case where there would be inconvenience as it appears to me, in the jury having to cope with what is inevitably going to be a significant number of files. Of course that problem can be overcome by the ushers being helpful, as ushers invariably are, in swapping the files around as required by the course of examination and cross-examination. But one knows how inconvenient, to use the material term, that can in practice prove to be, especially where as would happen here, it is going to be necessary to have two bundles alongside each other within the confines of the jury box. This is one of those cases where it appears to me that were prolonged examination of documents is required it necessarily follows that that is not something that can be conveniently done with a jury so that requirement is in my view also satisfied in this case.

44. I turn finally to discretion. This does not appear to me to be a case where with due respect prominent figures in public life are involved, or indeed questions of great national interest raised, the extent to which there is an issue as to the credibility of any of the parties is limited by the nature of the plea of justification. The *Reynolds* privilege does not appear to me to involve any allegations against the credibility of the author or the defendants. I am satisfied that this is a case where, notwithstanding the prematurity as Miss Page would describe the application, it is one that should be granted.