[2020] JMSC 72

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 05115

BETWEEN	**Vivian Bennett**	**CLAIMANT**
AND	**The Gleaner Company Limited**	**1ST DEFENDANT**
AND	**The Star Newspaper**	**2ND DEFENDANT**
AND	**Garfield Grandison**	**3RD DEFENDANT**

IN CHAMBERS

Raymond Samuels instructed by Samuels & Samuels for the Applicant/Claimant.

Trudy-Ann Dixon Frith and Danielle Reid, instructed by DunnCox for the Defendants/Respondents

HEARD: 12th December, 2019 and 1st May, 2020

Defamation Claim - Libel - Application to be tried by Jury - Whether the application is made out of time - Whether the Claimant has a right to trial by jury - Whether the matter falls within the exercise of the judge's discretion (Defamation Act (1963), S.9; Judicature Supreme Court Act S.45; Rules 26.1; 27.9; 69.4.

THOMAS, J.

Introduction

[1] This is an application by the Claimant for trial by Jury which is being opposed by the Defendants. The Application is brought on the following grounds:

(i) the Claim is one for libel;

(ii) the trial does not require any prolonged examination of documents or account or any scientific or local investigation;

(iii) the matter can be conveniently tried by a jury.

[2] The basis on which the Defendants are objecting to the application are:

(i) The court has no jurisdiction to hear the application as it was filed out of time; and

(ii) The matter is not one that is suitable for jury trial.

History

[3] The substantive claim in this matter is brought by the Claimant, Vivian Bennett, in damages for libel against the Defendants. The Claimant alleges that the 1st Defendant is the publisher and proprietor of the 2nd Defendant. The 3rd Defendant is the Editor in Chief of the 1st and 2nd Defendant.

[4] Further allegations of the Claimant are that:

> On the 1st of December 2005, the 2nd Defendant on the front page of its edition in bold headlines falsely and maliciously published the following words "***Goat Rape, St. Mary man charged with beastiality***". This was in addition to a cartoon depicting a naked caricature behind a goat with hearts around his head. The said words appeared in bold again on page three of the said edition with the following content:
>
> > *"Residents of Cook Street, Port Maria responded with shock and disgust when they learned that a man from their community was accused of having sex with a goat. The accused Vivian "Blacka" Bennett, 52, popular fruit vendor, has since been remanded at the Richmond lock-up on charges of Beastiality, stemming from the incident.*

> *The police report that about 1:30 am on November 28, 2005, a farmer was in his field near Cook Street, when he heard one of his goats (a doe) crying excessively. Upon investigation the farmer saw Bennett in a crouching position behind the struggling goat, engaging in a throbbing movement while* holding down the animal"

[5] The Claimant also complains that the words were repeated several times in different sections of the same issue of the said edition. He avers that the words, which were false and defamatory, were published carelessly and recklessly, without caring whether they were true. He further avers that the words and the caricature taken together meant and were understood to mean that the Claimant had engaged in sexual intercourse with a goat which is an offence punishable with imprisonment.

[6] The Defendants admit that the headline was published on the front page of The Star. They deny that the caricature was naked. They further admit that the words as alleged by the Claimant were in fact published on page 3. They however denied that they were repeated several times in different sections of the newspaper. Further, the substance of the defence is that the publication was not false and malicious but was the end result of research, and that the Claimant was arrested and charged for the act. They acted on the Police report and did not treat the report as a fact. They do not admit that the words or drawings and innuendos when taken in their natural and ordinary meaning are defamatory. They aver that they merely reported the allegations and did not adopt them. They also rely on Section 9 of the ***Defamation Act*** (1963), and have accordingly pleaded the Defence of qualified privilege in that:

> "The Claimant was in fact arrested and charged by the St. Mary Police for the offence of bestiality. They [the Defendants] interviewed the arresting officer. The crime for which the Claimant was charged was of public concern

and in the interest of the residents of Cook Street, Port Maria, St. Mary and to Jamaicans generally."

The Evidence

[7] The sum total of the Claimant's affidavit evidence in support of this application is as follows:

> He is a farmer and a vendor. He has worked long and hard to establish himself in and about various townships to include Port Maria, Port Antonio and Ocho Rios. The publication has affected him personally and his livelihood as a vendor and a farmer. He is now unable to function as a vendor and farmer as no one wants to buy anything from him anymore and they constantly curse him about what they read in the Star Newspaper.

[8] He asserts that Libel is in issue in the claim. As such, the court will have to deal with the meaning of the caricature and the article and how they "have been put towards the public". Further he states that in determining the representations conveyed to the public, the court will have to identify the effect of the publication including what it represents to the ordinary reasonable member of the public. He contends that members of the public are better placed to decide whether the publications "are legitimate" and what they understand the representations to mean.

[9] He further states that a jury would represent the very audience to whom the publication was made. In the circumstances, a direction that the case be heard by a Judge and jury would be best.

The Issues

[10] The issues which arise in this application are:

(i) Whether the Application was filed out of time;

(ii) Whether the Claim is of such a nature that it should be tried by a Jury.

The Law

[11] Section 45 of **The Judicature Supreme Court Act** (the Act) makes provision for the Court to make an order for trial by Jury in certain instances. The Section reads:

> *"(1) Subject as hereinafter provided, if, in relation to a civil cause or matter to be tried in the Supreme Court, an application is made by a party thereto before the mode of trial is first determined, for the cause or matter to be tried with a jury, and the Court or a Judge is satisfied that-*
>
> *(a) an allegation of fraud against that party; or*
>
> *(b) a claim in respect of slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise of marriage is in issue, the cause or matter shall be ordered to be tried with a jury, unless the Court or Judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury, but, save as aforesaid, any civil cause or matter to be tried in the Supreme Court, may, in the discretion of the Court or a Judge, be ordered to be tried either with or without a jury*
>
> *(2) The provisions of subsection (1) shall be without prejudice to the power of the Court or a Judge to order that different questions of fact arising in any civil cause or matter be tried by different modes of trial, and where any such order is made*

> *the provisions of subsection (1) requiring trial with a jury in certain cases shall have effect only as respects questions relating to any such allegation or claim as is mentioned in that subsection".*

Submissions

On behalf of the Applicant

[12] Mr. Samuels submits that where Parliament gives a prima facie right to trial by a jury, the public interest is best served by the trial of these issues by a jury. (He relies on the case of ***Rothomere and Others v Times Newspaper Limited and Others*** [1973]1 All ER 1013).

[13] He further submits that:

> The instant case falls within the ambit of the Act and that the Claimant is entitled to have his claim tried by a jury as his reputation has been tarnished. The test to be applied in determining the meaning of words in a libel action is what the words would convey to the ordinary man. A jury is better placed than judicial officers to assess how ordinary reasonable people understand mass media publication. It is a matter for the jury to give effect to a standard which they consider to accord with the attitude of society generally.

[14] He takes the point that the court must identify the effect of the publication including what representation it made on the ordinary or reasonable members of the public. He takes the position that the issues involve giving effect to moral and social values of the community, and as such the jury will be better able to make such assessment in a way that is likely to arrive at a reflection of the society generally than a judge. He points out that a jury looks at a case more broadly giving weight to the factors which impress the lay mind more strongly than the legal. (He relies on cases of ***R. v Nation Wide News Pty Ltd*** [2009] FCA 1308).

[15] He also submits that the case does not fall in the exception as the case will not involve the prolonged examination of documents and the medical evidence is straightforward.

On behalf of the Defendants

[16] The submission and supplemental submissions on behalf of the Defendants are summarized as follows:

The statute requires that any application for trial by Jury must be made before the mode of trial is determined. The mode of trial would be first determined at the Case Management Conference (CMC). The CMC was held on the 27th of January 2017. The application ought to have been made before then and not on the 26th of April 2019. The application is made out of the time prescribed by the statute (She relies on Section 45 of the Act, and Rule 27.9 (3) of the ***Supreme Court of Jamaica Civil Procedure Rules*** (The Rules). The court is precluded from extending the statutory time limit unless the statute itself makes provision for the same. She also points out that the Rule's power to extend time to do certain acts cannot be invoked to extend a statutory time limit. (She relies on the authority of ***Muceili v. Government of Albania*** [2009] UKHL 2)

[17] She also submits that:

There is no dispute on the primary facts or the content of the publication. There is no fact in issue. The principal issue in this case is whether the publication in the Star was an occasioned covered by qualified privilege. The report was about the arrest, court proceedings and reactions of members of the public. The sole primary issue in relation to the publication is a legal one. Namely whether the report was published on an occasion which attracts qualified privilege. This is a technical issue of law which is better suited to be dealt with by a Judge alone rather than a Judge and Jury. (She relies on the cases of ***Reynolds v Times Newspaper Ltd & Ors.*** [2001] 2 AC 127).

[18] She further submits that even where there are disputes as to the primary facts, the Judiciary has frowned upon the use of a jury in a case where qualified privilege in in issue. It is her position that this court has the discretion to make the order that this claim be tried by a Judge alone. (She relies on the cases of ***Jameel (Mohammed) v Wall Street Journal SRL*** [2007] 1AC 359, ***Pince Radu of Hohenzollern v Houston*** [2007] All ER(d) 162 and ***Armstrong v Times News Paper Limited*** [2006] 1WLR 2462).

[19] She also submits that the Claim for loss of earning is significant. She points out that:

> The Claim was also brought against the farmer who alleged to have witnessed the incident and the arresting officer. Default Judgment was entered against the arresting officer. Damages were assessed including loss of earnings. The claim for loss of earnings is the same number of days as is in this case. The monthly sum claimed is twice against the Gleaner, though the cases were filed within days of each other

[20] She takes the position that, the issue of whether the Claimant can properly continue to claim damages for loss of income against the Gleaner, which if successful would be three times the amount he said he earned, should be determined by a Judge.

[21] She also posits that in light of the overriding objective of the Rules to enable the court to deal with cases justly, a trial by a Judge alone will enable the matter to be disposed of expeditiously, fairly, save time and expenses.

Whether the Application was made out of time

[22] It is clear that within the provisions of the Act, in order to succeed on this application, one of conditions that should be satisfied is that the application should be made before the mode of trial is first determined. Counsel for the Defendants relied on ***Rule 27.9 (3)*** to support her position that the application was made out

of time. ***Rule 27*** in general deals with the procedure for managing the cases. ***Rule 27.9*** outlines the "*orders to be made at case management conference*"***. Rule 27.9(3)*** reads:

> *"The court must direct whether the trial is to be before -*
>
> *(a) judge alone;*
>
> *(b) judge with a common jury; or*
>
> *(c) judge with a special jury.*"

[23] Before proceeding any further into the discussion of this issue, I must state the following:

(i) With regards to the case management powers given to the court, Rule ***26.1(1)*** states that "*the list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction* ***or by any enactment***".

(ii) It is trite law that a rule cannot abrogate any power or right given by a statute. Essentially the purpose of the rule should be to give effect to the power or the right created by the statute.

(iii) Where there is any apparent contradiction between a rule and the provisions of the statute, the provisions of the statute supersede.

[24] Additionally, I find Counsel's submissions on this issue to be untenable. She seems to accept the position that the court cannot rely on the rules to alter (extend) a time limit within the Act. Nonetheless, she is relying on the same rules to suggest that a restriction be imposed on the time provided by the Act for the filing of the Application. However, the fact of the matter is this, the Act clearly states that the application should be made before the mode of trial is determined.

[25] The rules do provide that the judge should make orders for the mode of trial at the CMC. However, where the mode of trial is not ordered at the CMC as counsel herself recognized, time for doing things within the Rules can be extended by provisions within the same rules (***See Rule 26(1) (c)***. Nevertheless, the time line within the rules is subject to the time line within the statute. Therefore, within the scheme of the Act, the application can be made any time before the mode of trial is determined, regardless of whether or not the mode of trial is determined at the CMC.

[26] Counsel seemed to be basing her arguments on the 1981 UK Act. That is ***The Supreme Court Act*** 1981. However, a careful comparison of the 1981 UK Act with the Jamaican Legislation reveals that, there is a clear distinction between the provisions dealing with this issue. Section 69(2) of ***The Supreme Court Act 1981*** (UK) states:

> *"An application under subsection (1) must be made* ***not later than such time before the trial as may be prescribed****."*

[27] It is clear that while not specifically setting the time limit for the application to be filed, this provision allows for a time limit to *"be prescribed*". Nowhere else in that legislation was the time prescribed. Therefore, implicit in the UK provision is that, despite the fact that the time is not specifically stated in the Act, the application should be made in the time prescribed by a competent authority. It is within that context that the Court in the ***Armstrong*** case (supra) referred to the CPR rules to identify the time prescribed. In that case the court stated at paragraph 14 that:

> "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)"

[28] However, an examination of the Jamaican statute reveals that the statute itself specifies the time limit for the application. That is, an application is made by a party thereto, ***"before the mode of trial is first determined".***

[29] Additionally**,** having examined the trajectory of the claim to date I note that at the CMC on the 27th of January 2017, CMC orders were in fact made. The trial date was then set for the 15th to 17th of April 2019 in open court. However, in those orders it is clear that no decision had been taken with regards to the mode of trial. In fact, Order No.9 of those orders states that the determination of the mode of trial is deferred to the pre-trial review which was set for the 7th of January 2019. On the 7th of January 2019 no decision was taken as to the mode of trial. The pre-trial review was further adjourned to the 31st of January 2019. On the 31st of January 2019 still no decision was taken as to the mode of trial. The pre-trial review was further adjourned to the 20th of March 2019.

[30] When the matter came up for the pre-trial review on the 20th of March 2019, an oral application was made by the Claimant for trial by Jury. The Defendants indicated that they were opposing the application. At that date, orders were made vacating the trial dates, new trial dates were set and orders were also made for the written application to be filed. This is the application that is now being considered.

[31] Therefore, having traced the history of the matter it is clear that to date, there was no order settling the mode of trial. In any event, it is clear that at the CMC, the Judge recognized the duty to determine the mode of trial and in that regard, made orders for the time for the determination of that issue to be deferred. In light of the provisions of the Act it is my view that the only requirement that the Applicant needs to satisfy on this particular issue is that the application was made prior the mode of trial being determined. This is regardless of the fact that the mode of trial was not first determined at the CMC.

[32] In light of the foregoing, I find that the Claimant, in filing this application before the mode of trial was first determined, has complied with the timeline provided for in the statute, thereby giving this court the jurisdiction to hear this application.

Whether the Claim should to be tried by Judge alone or Judge and Jury

[33] It is obvious that the Act makes provisions, on the application of a party to the proceedings in matters such as this, that is in respect of slander or libel, that the mode of trial "shall" be by jury. The Act also provides a category of exceptions in relation to the aforementioned provision, namely, where the judge finds that it will involve prolonged examination of documents or scientific or local investigation which cannot conveniently be made by the jury.

[34] Counsel for the Defendants has pointed to a component of the overriding objective of the Rules, that is, "to enable the court to dispose of cases expeditiously, fairly, to save time, and expenses", as one of the reasons why the matter should be tried by a jury. However, as I have indicated earlier the Rules cannot override the provisions of the Act. To the contrary, they are subject to the provisions of the Act. Therefore, despite the fact that a trial by a judge alone may in fact be more expeditious, the Act provides that a claim of this nature must be tried by a jury unless the case can be brought within the exception.

[35] Therefore, unless the case falls within the exception under ***Section 45*** of the Act, the Claimant is entitled to have the claim tried by a jury. However, this does not inhibit the discretion given to the court within ***subsection 2 of Section 45***, to order that a question of fact on the claim be determined by a judge or jury. Additionally, where the case falls within the exception, it is treated like any other civil case within ***Section 45****,* where the court has the discretion to order the case to be tried either with or without a jury.

[36] In support of the Claimant's application Mr. Samuels relies on the authorities of ***Rothomere and Others v Times Newspaper Limited and Others*** (supra). In that case the court discussed Parliament's reason for preserving the right to trial by jury

in matters of this nature. That reason, it said, must be this: “the trial is likely to end with the honour, integrity and reputation of either the plaintiff or the defendant being tarnished or even destroyed” (See paragraph 120 of the judgment)

[37] In the case of ***R v. Nation Wide News Pty Ltd*** (supra) at page 1308 paragraph19, the Court stated that:

> *“One of the great virtues of having a jury try the substantial factual issues in a defamation action is that they represent the very audience to which the defamatory publication was addressed. In assessing whether or not a publication, first, is defamatory in the sense complained of and, secondly, has been defended under defences such as truth, honest opinion or fair report, a jury of ordinary reasonable people is able to evaluate the competing factual issues bringing to bear the moral and social standards that they share with the community at large. And, they are better placed than judicial officers to assess how ordinary reasonable people understand mass media publications”.*

[38] At paragraph 46 the court further stated that:

> *“In such cases the ordinary reasonable person may be expected to draw upon such community standards as may be relevant, in order to answer the question whether* ***there has been injury to that reputation.”***

[39] Therefore, to my mind the legal principle to be extrapolated from these cases is that where the issues to be determined are factual such as whether the words, pictures or innuendos were in fact defamatory, then the issue should be tried by a jury. Counsel for the Defendants has submitted that the only issue that lies to be determined is qualified privilege which is a legal determination.

[40] However, when I examine the statement of case of the Defendants, whereas there is no significant departure from the case of the Claimant in terms of the contents of the publication, they deny that the caricature was naked. They do not admit that the words, drawings and innuendos when taken in their natural and ordinary meaning are defamatory. That is, they deny the allegations of the Claimant that the words and innuendos are understood to mean that "*the Claimant was engaged in sexual intercourse with a goa*t". They further deny that the words were repeated several times. They also deny that the words are false and defamatory.

[41] The issue of defamatory meaning of words (publication) involves two stages of inquiries. These are:

(i) Firstly, what meaning the words (depictions) are capable of bearing; and

(ii) secondly whether that meaning is defamatory or not.

The first question is one of law to be considered by the judge. If the judge finds that the statement is not capable of being defamatory that would settle the issue. If the judge finds that the meaning of the words is capable of being defamatory, then the question of whether the statement was in fact defamatory is one of fact for the jury. (See ***Broome v Agar*** (1928) 44 TLR 339; ***Keays v Murdoch Magazines*** [1991] 1 WLR 1184)

[42] However as stated in the case of ***Reynolds*** (supra), if this defence of qualified privilege is available to the Defendants, they have a complete defence to the action (see paragraph 5 of that judgment).

[43] In that case, the events giving rise to the proceedings took place during a political crisis in Dublin in November 1994. The crisis culminated in the resignation of Mr. Reynolds as Taoiseach (Prime Minister) of Ireland and leader of the Fianna Fáil party. The reasons for Mr. Reynolds' resignation were of public significance and interest in the United Kingdom because of his personal identification with the Northern Ireland peace process. Mr. Reynolds was one of the chief architects of

that process. He announced his resignation in the Dáil (the House of Representatives) of the Irish Parliament on Thursday, 17th of November 1994. On the following Sunday, the 20th of November, the 'Sunday Times' published in its British mainland edition an article entitled *'Goodbye gombeen man*.' The article was the lead item in its world news section and occupied most of one page. The article was sub-headed *'Why a fib too far proved fatal for the political career of Ireland's peacemaker and Mr. Fixit'*. Mr. Reynolds in relation to this article in the British mainland edition, brought libel proceedings claiming that the meaning that the article conveyed was that he dishonestly mislead his cabinet colleagues by suppressing and withholding vital information and had lied to them about when the information had come into his possession. The action was tried by a judge and a jury. The issues considered at the trial were: the meaning of the article, qualified privilege at common law, justification, malice and damages.

[44] At paragraph 59 of the Judgment on appeal the court stated that:

> "*Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury.*"

[45] It is significant to note that in that case, the issues of fact were as to:

(i) whether the defamatory allegations were true in relation to the defence of justification;

(ii) whether the writer of the article was acting maliciously in writing and publishing the words complained of were determined by the Jury.

The issue of qualified privileged was determined by the Judge after submissions from counsel.

[46] In fact, several authorities have expounded on the same principle expressed in the aforementioned authority, as it relates to the mode of trial in actions for libel. That is, where qualified privilege is the only defence raised by the Defendant, if the facts are not in dispute, it is a question of law to be determined by the Judge alone. However, where questions of fact are in dispute upon which the determination of the question of qualified privilege depends, the facts should first be determined by the jury. (See ***Adam v Ward*** [1917] AC 309; ***Edward Seaga v Leslie Harper***, Privy Council Appeal N0.90/206 ***Jameel (Mohammed) v Wall Street Journal SRL*** [2007] 1AC 359;

[47] In the case of ***Rudolph Wallace v Vivian Cohen*** [2012] JMCA Civ 60, Phillips JA in handing down the judgment of the Court of Appeal and in restating this principle expounded in ***Adam v Ward,*** noted that the very principle was applied by their Lordships in the in the Privy Council Case of ***Edward Seaga v Leslie Harper (Supra).*** At paragraph 136 she stated***:***

> *"It has been endorsed by the Privy Council in* ***Edward Seaga v Leslie Harper*** *Privy Council Appeal No 90/2006, on appeal from this court, delivered on 30 January 2008.* This is what Lord Findlay said:
>
> *'Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. It is further for the judge to decide whether there is any evidence of express malice fit to be left to the*

*jury - that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant, in publishing the libel, was actuated by spite or some indirect motive**".***

[48] In the instant case, it is my view that there are factual issues to be determined. These are:

(i) whether the words, drawings and innuendos were in fact defamatory. That is, the meaning they convey to the ordinary reasonable member of the public.

(ii) Whether the publication was in fact false. That is, whether it is justified. Additionally, the fact that the defence of qualified privilege has been raised, means that there is also a legal issue to be determined. However, there is also a factual component to this issue. That is whether the Defendants were motivated by malice.

[49] In the ***Armstrong*** case the Claimant, a professional cyclist, brought an action in defamation alleging that the Defendant newspaper had published an article which implied that he had taken performance enhancing drugs. One of the factual issues raised in that case was the defence of justification, which generally would fall to be determined by a jury. However, the parties agreed that the action as a whole should be tried by judge alone because of the necessity for the prolonged examination of documents and a scientific investigation which could not conveniently be made with a jury.

[50] Nevertheless, the Defendants requested a preliminary hearing on the question of meaning with a jury. The Claimant wanted it to be decided by a judge alone, and preferably by the same judge who would hear the action, if it needed to be heard. On the 7th of 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 appealed against that part of the judge's decision. The principal concern on appeal was the meaning and proper application of section 69(4) of ***The Supreme Court Act 1981(UK***).

[51] Section 69 of the Supreme Court Act 1981, (UK) reads:

> "(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-*
>
> *(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 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."*

[52] Concerning the application of the section the court had this to say:

> "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.
>
> 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 subsection (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** (Emphasis mine.) (See paragraphs 11-13)

At paragraph 20 the court stated:

> *".. 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).*

[53] Therefore, on a proper reading of the judgment in ***Armstrong*** it is clear that, in light of the fact the case fell within the exception, the Claimant could not claim a right to trial with a jury. The matter therefore fell to be considered under Section

69(4), the equivalent to the provision within section 45 of the Act (Jamaican) which gives the judge the discretion to determine that the mode of trial should be with a Jury or by a Judge alone. That is, the fact that the case fell within the exception, activated the discretion given to the Court under the equivalent of Section 45.

[54] However, the distinguishing feature in the case at bar is that there is no suggestion or assertion that it falls within the exception. Therefore, in light of the very authority on which counsel for the Defendants relies, this matter has to be tried with a Jury. Incidentally, this does not affect the settled principle of law that any question of law during the trial should be determined by the Judge.

[55] I also note that there is no similar provision to section 69(1)(c) of the UK Act to the Jamaican Legislation. That section reads:

> "(c) *any question or issue of a kind prescribed for the purposes of this paragraph.*"

[56] It is also clear that it is on the basis of this provision that the court stated that:

> "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."

[57] Therefore, on my review of the authorities, I form the view that the fact that the defence of qualified privilege is pleaded does not preclude an order that the claim to be tried with a jury, where there are issues of fact to be determined. The roles between judge and jury are clearly defined. That is, even in a trial with a jury, the judge should leave only the issues of fact to the jury to be determined and the judge should make the determination on the legal issues. It is in these circumstances that the discretion under Section 45(2) of the Act becomes

applicable, giving the court the jurisdiction to make orders that some issues of facts be determined by the Jury and some by the Judge during the trial.

[58] I also made the observation that if there is a finding that in applying the natural ordinary meaning, the words taken together with the pictures are not capable of being defamatory, then that would be end of the matter. In fact, **Rule 69.4** makes provision for this aspect of the case to be determined as a preliminary issue on an application by either party. The Rule states:

> "(1) At any time after the service of the particulars of claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case.
>
> (2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

[59] However, if it is determined by the Judge that the words are capable of being defamatory then the question of whether they are in fact defamatory becomes a question of fact for the jury. Nevertheless, it is accepted that the question of qualified privilege is a question of law which should be determined by the judge in the absence of the jury.

[60] Notwithstanding**, *Section 9(1) of the Defamation Act*** (**1963**) makes provision for the defence of qualified privilege to be defeated on the proof of malice. The section reads:

> "(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule shall be privileged, unless the publication is proved to be made with malice."

[61] The Defamation Act has not provided a definition for malice. However, case law has provided a suitable definition for "*malice*" in the context of defamation. The courts have stated that:

> "Malice, in a libel context, means that the defendant makes the statement for some dominant improper motive. If it can be shown that defendant did not believe the words to be true, or was reckless as to their falsity, then that is generally conclusive evidence to show that the defendant has acted with a dominant improper motive." (See **Singh v Weayou** [2017] EWHC 2102 (QB; ***David v Hosany*** [2017] EWHC 2787 (QB)

[62] Therefore, even if the Judge finds that the publication qualifies for qualified privilege, whether the defence of qualified privilege succeeds is dependent on a finding of fact that the publication was not motivated by malice. This would be in the province of the jury.

[63] In any event, if it the defence succeeds, that brings the matter to an end. If the defence fails, then it means that the Claimant would succeed in terms of liability. The jury should then be allowed to consider the amount of damages to be awarded.

[64] It is my view on the point that has been raised by counsel for the Defendants in relation to the Claimant having already received an award on a separate Claim for Libel for loss of earnings in relation to the same facts surrounding this Claim, that it is for the Judge to direct the jury as to how this fact should be treated in relation to any damages to be awarded under this head. In essence, it is my view that this does not prevent the Claim from being tried by a Jury.

Conclusion

[65] In light of the foregoing discussion I find that the Claimant has established that he is entitled under Section 45 of the Act to have his claim tried by a Jury.

Orders

Consequent upon my findings I make the following orders:

i. The Claim is to be tried by a Judge and Jury.

ii. Either party can make an application for a determination of whether the words and caricature are capable of being defamatory as a preliminary issue by a Judge in Chamber before the trial.

iii. The application should be made on or before the 19th of November, 2020.

iv. Cost to the Applicant to be agreed or taxed.

v . Leave to Appeal granted.