IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 00454

BETWEEN	**CHALLENGER TRANSPORT COMPANY LIMITED**	**CLAIMANT**
AND	**THE GLEANER COMPANY LIMITED**	**1ST DEFENDANT**
AND	**GARFIELD GRANDISON**	**2ND DEFENDANT**

Mr. John Graham and Miss Khara East for Claimant

Mr. Courtney Bailey for Defendants

Heard on March 18, 2008, January 6, 2009, February 22, 2010, July 16, 2010, August 27, 2010 and September 3, 2010

Straw J

1. The claimant Company is suing the defendants for defamatory words published by them on the 19th May 2003. The claimant is a dealer in and repairer of new and used motor vehicles. The published article concerned an ongoing dispute between the claimant and one of its customers. The claimant is also contending that the publication of the article has caused it loss in its business.

2. Paragraph 1b of the Particulars of Claim reads as follows:

   'The claimant had immediately, after the publication of the articles seen a down turn in its business which the claimant attributes to the defamatory words complained of in that there are no other circumstances affecting the claimant's business at the time which has any connection with the down turn in business'

   The defendants have denied that the words are defamatory and state they were not published maliciously and are also claiming absolute privilege.

3. By way of Notice of Application filed on March 10, 2008, the claimant has requested a trial by a judge sitting with a panel of jurors.

   Section 45 (1) of the Judicature (Supreme Court) Act allows for such an application in certain civil actions including slander and libel. This section empowers the court to order the trial with a jury with the following provision attached.

   "... unless the court or judge is of the 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 case 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".

4. In **Gold Smith v Pressdram Limited, 1988 1 WLR page 64,** Lawton LJ in the English Court of Appeal discusses similar provisions contained in section 6 (1) of the Administration of Justice (Miscellaneous Provisions) Act which was slightly amended by section 7 of the Law Reform (Miscellaneous Provisions) Act of 1970. He stated as follows (at page 67).

   'My understanding of the provision is this, that, in the ordinary way a libel action would be tried with a jury, but if the action required any prolonged examination of documents or accounts which could not conveniently be made with a jury then there need not necessarily be a trial with a jury; These should normally be tried by a judge alone, but there was at the end,...further provision that even if the action did require prolonged examination of documents, nevertheless the court could order a trial with a jury."

5. A residual discretion is therefore left to be exercised by the court or judge even if there is a finding that there will be prolonged examination of documents and inconvenience.

However, as pointed out by counsel for the defendants, there are particular circumstances to be considered by the court before exercising this residual discretion to order trial with a jury, for example, in **Rothermere v Times Newspapers Ltd.** (1973 1 ALL ER, 1013 (a majority decision) The English Court of Appeal, held that although he trial of the action might well require "prolonged examination" of documents within the meaning of Section 6 (1) of the Act of 1933, the judge in the exercise of his discretion under the section had failed to give sufficient weight to the national importance of the issues and trial by jury should be ordered.

6. In the instance case, the defendants have objected to the application for trial by jury. They have put the claimants to strict proof of their economic loss. Their affidavits of Shena Stubbs and Rudolph Speid speak to the issue of the necessity to examine numerous documents in relation to the financial affairs of the claimant company between 2000-2006. (Three years before the publication and three years subsequent)

7. They have requested specific disclosure by the claimant of the following documents:

a) All Financial and other records of the claimant in relation to its vehicle sales for the period 2000-2006 including:

(i) Claimant's Sales Ledgers

(ii) Claimant's Sales Day Book

(iii) Claimant's Sales Ledger Control Accounts

(iv) Claimant's Profit and Loss Statements

(v) Claimant's Bank Account Records showing all the transactions to its bank account during the relevant period

(vi) All invoices in relation to sales of motor vehicles made by the claimant.

b). A listing of the different types of vehicles sold by the claimant.

c). The claimant's audited financial statements.

8. The affidavit of Mr. Speid speaks to the reason all these documents will have to be examined and analyzed. He also speaks to the issue of whether the proper accounting standard was used in the preparation of the claimant's audited financial statements and the fact that the further credibility of these statements could be brought into question depending on the independence of its' auditors. Lastly, he stated that if the audited financial statements were not prepared according to IFRS (International Financial Reporting Standards), the defendants would be challenging the veracity of these audited financial statements.

9. It is on this basis that Mr. Bailey, Counsel for the defendants, has submitted that the court ought not to order trial with a jury. Miss Stubb's affidavit of October 29, 2008 states that it will be necessary to conduct a detailed and prolonged examination of these audited financial statements at the trial. She has also stated that she has reasons to believe that the claimant intends to produce and rely on voluminous financial statements in support of its claim.

10. On the other hand, Counsel for the Claimant, Mr. John Graham, has submitted that the defendants have overstated the level of details required and that it is the experts and accountants who will have to do the detailed and prolonged examination of the accounting records.

11. At the request of the court, both parties filed their respective experts' reports in order to assist with the determination of the issues. The report of Mr. Archibald Campbell (on

behalf of the claimants) was filed on the 25th August 2010. The report of Mr. Audley Gordon (defendants) was filed the 27th August 2010.

Analysis of the Issues

12. The issues for the court to determine are as follows:

    (a) Will trial of the action involve a prolonged examination of documents

    (b) If yes, can it be conveniently tried with a jury?

    (c) If no, is there any good and sufficient reason for the court to exercise its discretion to order trial by jury.

(a) **Will there be prolonged examination of documents**

As previously indicated, counsel for the defendants have submitted this will necessarily be the position.

Counsel for the claimant has asked the court to consider that both sides will be filing expert reports (as at time of submissions) and that these experts would have gone through the relevant documents and stated their findings. He further submitted that it would not therefore be necessary to expose the jury to all the documentation. This view is to, a great extent, urgent and compelling. In **Rothermere v Times** (supra) Lord Denning expressed this view in the following words: (page 1016)

"I think this assertion of "prolonged examination of documents may well turn out to be bogey, which, in capable hands, can be cut down to size. I have tried cases with masses of documents on many occasions. It is remarkable how often they can be reduced to manageable proportions. One very useful thing is to get accountants and experts to go through the documents and to state the general result of them, without going into details.

Another useful thing is for counsel to make a wise selection of the available material, using some instances as typical of others".

Both experts' reports speak to limitations involved in the assessment. Certain results were categorized under the years 2000 or 2001 to 2006 in relation to profit and losses.

It is to be noted that the claimant for the expert, Mr. Archibald Campbell states that he has been instructed to review the audited financial statements of Challenger Transport Limited for the years 2000 – 2005 and prepare a report which addresses the following:

(1) The amount of profit and or loss for each year;

(2) Whether there has been a loss suffered by the company for the years 2003 – 2005 and if so, what is the extent of the loss for each of the years;

(3) Whether the losses are due primarily or substantially to a decline in states for the period.

His report also reveals that he is unable to confirm whether proper accounting practices were used in arriving at the stated profit or loss for each year. He lists several reasons why.

He speaks to the need to do additional audit work on the company.

His analysis of loss and profit is done against the figures shown in the audited statements.

The report of the defendant's expert, Mr. Audley Gordon is much more in depth as it examines not only the audited financial statements but vehicle sales listing, invoices to support summaries and other documentation.

In particular, he noted that the firm was requested to analyse the financial statements along with other financial documents and records to assess

(a) Whether the claimant has in fact suffered loss in its profits in the period 2003 to 2006 when compared to the period 2000 – 2002 and if so, what is the amount of any such loss.

(b) What is the cause of any such loss in profits?

(c) Whether any such loss in profit is attributable to a decline in sales of motor vehicles generally and Chevrolet Avalanche Pick Ups in particular.

(d) Whether the Claimant has suffered a decline in motor vehicle sales in general and Chevrolet Avalanche Pick Ups in particular over the period 2003 – 2006 when compared with the period 2000 – 2002.

(e) How many of each different kind of motor vehicle were purchased by the claimant for resale each year for the period 2000 – 2006.

The court has taken the time to mention the differences in the scope of both expert reports as there was a 4th affidavit (for defendant) filed by Shena Stubbs on the 1st September 2010, subsequent to both reports being filed.

She speaks to the fact that in excess of 4000 pages of financial documentation have been provided by the claimant in compliance with the order for specific disclosure.

She further speaks to the fact that any challenges to the findings or conclusions of Mr. Gordon would necessitate an examination of the relevant documentation. She also states that in order to determine which of the two expert reports is more accurate there will of necessity be cross examination of significant portions of over 4000 pages of documents.

While the court has taken into consideration the views of counsel for the defendants, I am not of the view that it will be necessary to produce significant portions of these documents to the jury.

What is clear is that both experts may have to file additional reports, particularly, the expert for the claimant as his report is limited in scope in comparison to the expert report of Mr. Gordon.

It is also clear that the figures on the actual documents will not change. What may be in issue is the method used to analyze the profits and loss for each year and the reasons for it.

While there may be the necessity for examination of documents, this court is not of the view that it need be a prolonged examination. The issue of the loss or profit between the years 2000 to 2006 will certainly add length and complication to the trial process but as Lord Denning expressed in **Rothermere** (supra) "length and complication are no bar to a jury...It is not the length and complication but 'the prolonged examination of documents' which take away the right to a jury". (per page 1016)

14. The issue of whether or not the financial statements comply with proper accounting standards and are actually accurate and authentic can easily be resolved by evidence of the standards applicable and ought not to add greatly to the issue of prolonged examination. The reports do not reveal much divergence of views on this subject.

15. Counsel for the defendants has submitted that the fact that expert reports will be commissioned will not remove the likely necessity that copious documents will need to be carefully read and that there will likely be disagreement between the experts. He further submitted that any disagreement would become the subject of cross examination and as such would include any documents that become relevant during the course of cross-examination.

    The court does agree that this could arise but it is the opinion of this court that where there is such divergence, it does not necessarily follow that there need be prolonged examination. The figures, whether accurate or inaccurate will be on the extracts. Both experts may

disagree on the accuracy or inaccuracy, authenticity or inauthenticity of the figures and statements. They would necessarily have to explain why. This does not necessarily mean that every bank statement, states invoice etc would have to be shown to the jury.

In **Goldsmith** (supra), the Court of Appeal upheld a decision of JUPP J for trial by judge as the defence involved details of documentation of complex multiple transactions. Lawton LJ took into account the sort of issues that would arise. He stated as follows: (at page 68)

"The defendants, by their particulars of justification, have given much detail about various share transactions which, they say, were carried out in contravention of Section 27 of the Companies Act 1967. We have read these particulars and they are not easy to follow. JUPP J said he had difficulty in following them, and I have too. What the defendants have alleged is that there has been a pattern of hiding Sir James financial affairs over a longish period of years. It seems that the period extends from 1976 to 1980. The subject matter of these particulars of justification, namely, multiple transactions in the shares of interlocking companies will, submitted the defendants, be very difficult for any jury to follow...that trying to get the jury to understand these complicated transactions will require them to look at a large number of documents".

It is against this background having regard to the complexity and the difficulties which a jury would have in following the details of evidence that the court refused to exercise its residual discretion to order trial with a jury.

16. However, even if this is a wrong assessment, the fact that it may involve prolonged examination of documents is not an end to trial with a jury. The court would then have to consider the second issue.

(b) Can the matter be conveniently tried with a jury.

17. The question of convenience was reviewed in **Beta Construction Limited vs Channel Four Television Company Limited** (1990 2AER 1012) and accepted and expanded in **Goldsmith** (supra)

In **Beta** (supra), the plaintiff's case was supported by 81 pages of an expert's report with schedules and the defendants' by 91 pages and appendices.

It was held that the primary consideration in determining whether the prolonged examination of documents or accounts required at the trial could conveniently be made with a jury was whether the trial with a jury would be consistent with the efficient administration of justice.

Stuart Smith LJ spoke to four main areas in which the efficient administration of justice may be rendered less than convenient if the trial takes place with the jury (pages 1048, 1049). These are as follows:

(a) The physical problem of handling, in the confines of the jury box, large bundles of do documents that are so bulky that they cannot be conveniently looked at.

(b) Prolongation of the trial, in particularly where the prolongation is likely to become substantial because of the number and complexity of the documents. Lawton LJ went on to explain that if a judge did not understand a document or follow it, he can say so and the matter is clarified, further that the judge can study the documents out of court which the jury are unable to do.

(c) The question of expense which may be significantly increased because of trial by jury as costs may be increased not only by the added length of the trial but by the costs of copying.

(d) The risk of the jury not sufficiently understanding the issues on the documents or accounts to resolve them correctly.

In relation to the first and second issue, the court has already examined this under 'the prolonged examination' of documents. The claimants expert has filed a ten page report excluding attachments which include resume, accounting framework, and documentation in relation to International Financial Reporting Standards.

The Defendants' expert has filed a nineteen page report accompanied by appendices.

In **Viscount De L'Isle vs Times Newspaper Limited 1987, 3 ALL ER 499,** the court held that the issue as to whether the trial was likely to involve such a lengthy examination of documents and accounts that it was likely that the administration of justice would suffer required weighing up the conflicting considerations in the light of the pleadings and any other material put before the judge.

May LJ stated as follows (page 506g)

"I do not think that the trial of this action will require the long and detailed investigation of the financial position of FNFC over more than ten years which counsel for the plaintiff suggested. On the issues raised by the pleadings, I think it will only be necessary to take a 'broad brush' or general over-view of the company's financial situation before and after the plaintiff resigned as chairman".

When the court examines the submissions in the present case, the major issue in relation to the economic loss is the comparison of profit and loss for 2000 to 2003 as against 2003 to 2006 and the analysis of reasons for the findings. I do not think that boxes of bank statements, sales ledgers etc. will have to be handled by a jury. This essentially also deals with the matter of expenses in relation to copying, although I accept that trial by judge alone will be cheaper than

trial with a jury. In the **Beta** case, the test is "a significant increase". I am not convinced of this in the instant case. It is already a given that the trial may necessarily be longer. This is not, by itself a bar to a jury trial as indicated previously.

Lord Denning makes this point in **Rothermere** (supra) page 1016)

"No doubt the trial will be long and complicated, but length and complication of themselves are no bar to a jury. Many of the important libel cases in recent years were long and complicated, but they were tried with juries. It is not the length and complication but the 'prolonged examination of documents' which take away the right to a jury".

In relation to the fourth issue, I believe a specially selected panel of jurors will be able to understand the issues and even more importantly, a properly directed jury will be well able to correctly determine all relevant issues.

In conclusion, I'm not satisfied that this case can be compared to the issues raised in **Goldsmith** and that it would involve a prolonged examination of documents and complicated accounts. There is therefore no good reason to deprive the claimant to a trial with a jury and I so order.

Notice of Application filed on March 10, 2008 is therefore granted in terms of paragraphs one as amended and two.

Leave to appeal granted.