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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MARTIN STOKES

Plaintiff/Respondent;

-and-

SUNDAY NEWSPAPERS LTD T/A THE SUNDAY WORLD

Defendant/Appellant.

Before: Gillen LJ, Weir LJ and Treacy J

GILLEN LJ (giving the judgment of the Court)

Introduction

[1] This appeal concerns the decision by Stephens J of 6 January 2016, to amend an Order he had previously made on 24 June 2015 that this action be tried by a judge without a jury. The learned trial judge now ordered that this action in part, namely the Reynolds defence aspect, be tried without a jury, it being unsuitable for trial by judge and jury for special reasons namely:-

> "The complicated factual questions which will require to be addressed by the jury in determining the Reynolds defence, the confused division of functions of the judge and the jury in relation to the Reynolds defence and the difficulties presented to the jury in considering the different meanings between the Reynolds defence and other issues in this action."

[2] On this occasion, the judge further determined that in the exercise of the discretion conferred by Section 62(2) of the Judicature (NI) Act 1978 ("the 1978 Act"), the issues of identification, meanings, justification and damages should be tried by judge and jury.

[3] Sunday Newspaper Limited t/a The Sunday World (hereinafter variously termed "The Sunday World", "the defendant" or "the appellant "), appealed against the determination that the Reynolds defence should be tried by judge alone and the plaintiff/respondent Martin Stokes appealed against the determination that the issues of identification, meanings, justification and damages should be tried by judge and jury. Mr Lavery QC appeared with Mr McCann for the plaintiff/respondent and Mr Humphrey QC appeared for the defendant/appellant with Mr Fahy.

Background

[4] In this matter the plaintiff Martin Stokes claims damages against the defendant in relation to an article published in the Sunday World on 2 December 2012. The plaintiff alleges that the article contains defamatory meanings that the plaintiff wished to kill or wishes to have killed his cousin or that he will act or conspire with others to have him killed. He also alleges that the article contains a defamatory meaning that the plaintiff threatened to kill Julia Mongan to prevent her from giving evidence at his criminal trial for the murder of her husband or that he conspired with others to kill Julia Mongan to prevent her from giving evidence.

[5] The defendant denies that the article identifies the plaintiff was the person who allegedly threatened or conspired with others to kill Julia Mongan and denies that the article identifies the plaintiff as a person who wished to kill or wished to have John Stokes killed or who would act or conspire with others to have John Stokes killed. The defendant says that the words published are true in substance and in fact to the extent set out in its defence or alternatively that the words were published on an occasion of Reynolds privilege (see Reynolds v Times Newspapers [2001] 2 AC 127) in that they concern matters of public interest and were written by a responsible journalist.

[6] The plaintiff set down the action for hearing without a jury. The defendant then exercised its rights under Order 33 Rule 4(2) of the Rules of the Court of Judicature (NI) 1980 to request trial by jury. The plaintiff then applied under Order 33 Rule 4(4) for an Order that the action be tried without a jury.

[7] When this issue first came before Stephens J ("the original hearing ") he gave judgment on 24 June 2015 to the effect that the action should be tried without a jury for the special reasons set out in his judgment.

[8] The defendant appealed against that Order. Section 62(2)(d) of the 1978 Judicature (NI) Act 1978 ("the 1978 Act") requires that any special reason by virtue of which the action or any issue of fact in the action is unsuitable to be tried with a jury should be mentioned in the order. The Order of the Court which followed the judgment did not outline the special reasons.

[9] During the course of that original hearing, the defendant had not advanced the proposition that, if it was established that any particular issue of fact in the action

e.g. the Reynolds defence should be tried without a jury, the remaining issues should be tried with a jury. On the hearing of the appeal before this court it became apparent that the defendant wished to advance that alternative proposition. Furthermore during the original hearing there had been no submission on behalf of the plaintiff that, if there were issues of fact which were unsuitable to be tried with a jury, then in relation to the remaining issues of fact in the action it followed a fortiori that this was another special reason for them to be tried without a jury because having different modes of trial for different issues would, on the balance of probabilities, result in confusion and an unmanageable trial process. Alternatively it was submitted that for the reason that different modes of trial were undesirable, the court should exercise its discretion to order that the entire action should be tried without a jury.

[10] Given that the Order of Stephens J in the original hearing did not mention the special reasons and that these other issues had not been argued, this court referred the matter back to Stephens J for further consideration of these matters.

[11] At the further hearing, having heard argument, the learned trial judge then made the Order mentioned in paragraph [1] above ("the subsequent Order") and dealt with the remaining issues in his judgment.

The statutory and regulatory provisions

[12] Section 62 of the 1978 Act provides as follows:

> "(1) Subject to subsection (2), an action or an issue of fact in an action in the High Court in which a claim is made in respect of—
>
> (a) libel;
>
> (b) slander;
>
> (c) malicious prosecution;
>
> (d) false imprisonment;
>
> shall, if any party to the action so requests, be tried with a jury.
>
> (2) The court may, on the application of any party to an action referred to in subsection (1), order that the action or any issue of fact in the action shall be tried without a jury if it is of the opinion that such trial—

(a) will substantially involve matters of account;

(b) will require any protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury;

(c) will be unduly prolonged; or

(d) is for any special reason (to be mentioned in the order) unsuitable to be tried with a jury.

(3) Subject to subsection (4), any other action or any issue of fact therein shall be tried without a jury."

[13] Section 62(5) of the 1978 Act provides that:

> "(5) Subject to subsections (1) and (3), the High Court may in accordance with rules of Court order that different questions of fact arising in any action be tried at different times or by different modes of trial."

[14] Order 33 Rule 4(6) of the Rules of the Court of Judicature (Northern Ireland) 1980("the 1980 Rules") provides that:

> "The Court may, upon application made under paragraph (4) or (5) and subject to section 62 of the Act, fix the mode of trial of any action or of any issue of fact therein and, only where it considers that the interest of justice so require, order that different questions of fact arising in the action be tried at different times or by different modes of trial."

[15] Order 43 Rule 4(1) of the 1980 Rules provides that the party setting down the action for trial must specify the mode of trial which he requests. If the party setting the action down requests a trial without a jury then any other party may within seven days after receiving the notice of setting down lodge a request that the action be tried with a jury.

[16] We pause at this stage to cite the relevant comparable legislation in England and Wales. Essentially Section 11 of the Defamation Act 2013 has removed the right to jury trial in libel and slander actions. Prior to that amendment, Section 69(1) of the Senior Courts Act 1981, where relevant, provided as follows:

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue —
>
> ….
>
> (b) a claim in respect of libel …
>
> 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.
>
> ……
>
> (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."

The special reasons

[17] In his judgment of 24 June 2015 Stephens J dealt with the mode of trial between paragraphs [37]-[53]. In essence the special reasons which he set out at paragraph [51] et seq for ordering the matter to be tried without a jury can be summarised as follows. The inter-play between meaning and the Reynolds defence is potentially complicated. The test in relation to meanings in the Reynolds defence may be different from the single meaning to be applied in relation to the rest of the action. In short, a jury deciding the meanings in relation to the defence of justification would have to find the single meaning of the article but in deciding meanings for the Reynolds defence it would have to consider whether the words were susceptible of another meaning and whether that meaning was one which a responsible journalist could be expected to perceive.

[18] At paragraph [52] Stephens J explained that decision in some more detail when he said:

> "In arriving at that conclusion I take into account that the further amended defence has to be subject to yet further amendments. However a consideration of the existing further amended defence establishes that there will be an extensive number of factual questions for the jury in relation to the Reynolds defence. Instances of this are factual questions as to the

> experience of the journalist, the research that she carried out, the meetings that there held, the number of days that she was in court during the retrial, whether she was in court when Julia Mongan gave evidence and if so what she made and what she ought reasonably to have made of the credibility of Julia Mongan's evidence. Whether the journalists relied on other experienced journalists when she was not in court, and if so what information was provided to her and whom, or whether there is a custom and practice amongst journalists to give greater weight to a source if she has given evidence under oath but not necessarily about all the matters contained in the article, whether there was a risk to the source if comment was sought from the plaintiff, and whether there was a risk that if comment was sought from the plaintiff that Julia Mongan would lose trust in the defendant with the result that a source of information for the public would be lost, the nature and extent of the editorial process and whether it was sufficient in view of the interests in play and the attitude of the journalist and her editor to members of the travelling community in general and to the plaintiff in particular and if in adverse attitude then the degree, effect and whether factually justified. I consider that as the evidence develops at trial a significant number of further factual issues will arise and that this case will present as a list of factual exam questions for the jury.
>
> I consider that the case should be tried without a jury given the complicated factual questions that will have to be addressed by the jury combined with the difficulties presented by the juries consideration of meanings. Accordingly I order that the action should be tried alone for the special reason of the interaction of the *Reynolds* defence with the other issues in this action."

The Reynolds Defence

[19] In order to consider the concept of special reasons in the instant case, the Reynolds defence requires exploration. In Reynolds the claimant was a former Taoiseach of the Irish Republic and sued the Sunday Times in England in respect of an alleged libel in its British mainland edition concerning the circumstances of his resignation as leader of the Fianna Fáil/Labour Coalition in 1994. He alleged that the article meant that he had knowingly misled the Dáil and his Cabinet colleagues

over the handling of a controversial extradition case by the then Attorney General whom he wished to appoint as President of the High Court.

[20] The question of qualified privilege in these circumstances was determined by the court in Reynolds in a much cited speech of Lord Nicholls who set out a non-exhaustive list of circumstances which would be relevant to the defence of qualified privilege in a "media" case as follows:

> "1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> 2. The nature of the information, and the extent to which the subject matter is a matter of public concern.
>
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> 4. The steps taken to verify the information.
>
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
>
> 6. The urgency of the matter. News is often a perishable commodity.
>
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
>
> 8. Whether the article contained the gist of the plaintiff's side of the story.
>
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
>
> 10. The circumstances of the publication, including the timing."

[21] Jameel (Mohammed) v Wall Street Journal Europe SPRL [2006] UKHL 44 reiterated and explained the principle underlying Reynolds. However Lord Nicholls' factors were not be approached "artificially as though they occupied separate compartments" and the House of Lords emphasised that the matter must be approached in a practical and flexible manner with due deference to editorial discretion.

[22] In the great majority of cases the defendant seeking to rely on the Reynolds variety of privilege will be a newspaper or other organ of the news media. Hence "responsible journalism" is a convenient shorthand description of its requirement.

[23] Under the Reynolds principles the question of whether the publication was protected by privilege (the evaluation of the defendant's conduct against the standard of responsible journalism as well as the issue of public interest) is for the judge. It is for the jury to decide, whether the words complained of are allegations of fact or comments and if expressions of opinion, whether such comments are fair comment or not. The jury will apply the objective test whether an honest minded man might honestly hold the views stated as comments on the facts on which these comments were made.

[24] Hence in every case it is first of all the duty of the judge to determine whether the words are capable of being comment or conversely were not capable of being statements of fact and whether there is any material which would entitle the jury to find that the comment was unfair, that is to say the opinions expressed were such that they could not honestly be held on the clearly established or uncontroversial facts.

[25] Lord Nicholls summarised this position in Reynolds when he said:

> "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."

The approach to the Reynolds defence

[26] It would seem to be beyond plausible dispute, through a perusal of the English authorities, that in England and Wales there has been a gathering momentum towards removing juries in general in defamation actions and in particular Reynolds defences from the jury.

[27] Thus for example in Ratiu v Conway [2005] EWCA Civ. 1302 at [185] Auld LJ, giving judgment on an appeal in a libel action brought by a solicitor against his clients who had accused him in a letter to a firm of estate agents of breach of fiduciary duty and breach of confidence, said:

> "Before leaving this case I should express my sympathy to the judge and to the jury on the enormous burdens imposed on both of them in this case, given the unhappy divide of responsibility between them on supposedly self-contained issues of law and fact. In fact the critical issues, particularly as to fiduciary relationship in matters of confidence, and the ingredients of malice as distinct from justification, were in truth more matters of mixed law and fact. It is, in my view, no advertisement for our system of jury trial in civil cases – where it applies – for such complex issues to be tried in this way. A Martian on learning of it would be amazed, as would the ordinary person in the street."

[28] In Jameel's case in the Court of Appeal Lord Phillips MR said:

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

[29] In Cooke v Telegraph Media Group [2011] EWHC 763 (QB), a case involving the "expenses scandal" Tugendhat J said at [111]:

> "The disadvantages of trial with a jury in cases where the law is complicated were noted as long ago as Richards v Naum [1967] 1 QB 620, 626 …. These disadvantages have increased in recent years with the increasing development and complexity of the law of defamation. This is in part due to the continuing need to develop the law to bring it into harmony with the European Convention on Human Rights. This has led to such major developments as the Reynolds defence, and the new understanding of malice for honest comment in Cheng (an improper purpose no longer counts as malice in honest comment). Where there is uncertainty as to the law, as there so often is today, a judge can formulate his reasons on alternative bases, and the Court of Appeal can substitute one disposal for another, according to the correct view of the law. It is less likely to be necessary to order a retrial, as may be inevitable if a jury has been misdirected as to the law."

[30] In Times Newspapers Ltd v Armstrong [2006] EWCA Civ. 519, a case arising out of suggestions that a professional cyclist had been consuming drugs, the parties had "agreed that the issues of justification and privilege were complicated so that they could not conveniently be decided by a jury". It was also agreed that the issue of meaning should be decided as a preliminary issue. The defendant wished this preliminary issue to be tried by a jury and the plaintiff asserted that the issue be tried by a judge alone. The judge at first instance decided that the trial should be conducted by judge alone overall.

[31] When the matter fell to be considered by the Court of Appeal, that court said at paragraph [24]:

> "… The law requires that 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 be directed not only as to the single meaning rule but also asked 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."

[32] Leading textbooks have adopted a similar approach. Gatley on Libel and Slander 11th Edition at paragraph 36.1 records:

> "As a preface to this chapter it is appropriate to record that in recent years the trial of defamation actions before a judge and jury have become, if not a rarity, markedly less common than in the past when it was unusual for such actions to be tried by a judge alone. There are a variety of reasons for this: Reynolds privilege cases, which are a substantial proportion of actions defended by the media or peculiarly unsuited at trial by jury, by reason of the confused division of functions of judge and jury and

> by the jury having to find specific facts, sometimes necessitating and 'exam paper' of questions for the jury to answer; jury trials take longer, particularly as witnesses give their evidence in chief orally, whereas before a judge alone the statement of the witness will usually stand as his evidence in chief, and there will be a consequential saving of costs; and judges are becoming increasingly concerned about the inconvenience and practical difficulties of managing trials with juries, especially when there are large files of documents."

The position in Northern Ireland

[33] This drift in England and Wales, leading almost inexorably to the enactment of Section 11 of the Defamation Act 2013 which has removed the right to jury trial in the defamation actions, to date reflects a position which is wholly different from that which exists in Northern Ireland. It has always been so. Even when the English defamation approach was governed by Section 69(1) of the Senior Courts Act 1981 the exceptions relating to jury trial were those set out in paragraphs [12] and [16] above. In short the requirement for "special reasons" rendering a case unsuitable to be tried by the jury (or for undue prolongation) was never part of the English legislation.

[34] Stephens J, with characteristic thoroughness, dilated at length on the matters to be taken into account in the exercise of the discretion under Section 62(2) of the 1978 Act. At [23] he indicated what he believed was a "pre-disposition to trial with a jury".

[35] At paragraphs [28] et seq the learned trial judge delved into the history of jury trial in Ireland in civil proceedings, the legislative history of jury trial and the history of the Committee stage in the House of Lords leading to Section 62 of the 1978 Act.

[36] This led him to conclude at [31]:

> "There is nothing that I can determine in the statutory provisions which are or have been applicable in Northern Ireland to limit what has sometimes been referred to as "the constitutional right" in order to remove the pre-disposition to trial by jury as a factor to be taken into account in the exercise of discretion. 'To echo the legislative debate in 1978' … that is the preferred system in Northern Ireland. The legislature clearly accepted that it is advisable to maintain that as a factor in the exercise of discretion. Whether that

> remains the position is a matter for the legislature. At present one of the advantages of trial with a jury which is considered in the exercise of discretion is that it accords with the predisposition to trial with a jury and with the legislative intent."

[37] Whether or not one it is correct to characterise the position as to jury trial in defamation actions in Northern Ireland as constituting a "predisposition" or "a constitutional right", the fact remains that the starting point for defamation trials in Northern Ireland is with a judge and a jury. Section 62(2) of the 1978 Act specifies closely defined circumstances in which that right to a jury can be removed. There are no other grounds for removing the right to a jury. Even then the court must exercise a discretion.

[38] It may well be that there is merit in the views expressed in the authorities that we have cited from England and Wales concerning the suitability of jury trials in Reynolds actions in particular and jury actions in defamation cases in general.

[39] However that is a matter for our legislature to determine. Judges must not enter into policy making. The judge's role is to uphold the law in force from time to time. Nevertheless, it is an accepted convention that it is appropriate for the judiciary to comment on matters relating to the administration of justice and for the judiciary to point to possible unintended consequences of proposed Government policy.

[40] There is current strong debate surrounding the issue .Reform may be in the air. The recent paper "Reform of Defamation Law in Northern Ireland. Recommendations to the Department of Finance" by Dr Andrew Scott from the Department of Law, London School of Economics and Political Science of June 2016 captures the tone of the debate that is currently progressing on the question of maintaining jury trial in Northern Ireland. He states at paragraph 2.116:

> "The Northern Ireland Law Commission consultation paper noted the anomalous position that defamation trials, alone in civil law proceedings, currently involve a presumption in favour of trial by a judge with a jury. It noted a number of reasons why jury trials can be more cumbersome and expensive to pursue and the impact that this has on decisions by litigants and whether to settle actions in advance of trial. The consultation paper also noted that there are powerful arguments of principle that push for retention of the current approach."

[41] The Scott Report cites at paragraph 2.121 the judgment of Stephens J in the instant case noting:

> "The argument that the historical and constitutional importance of the jury in Northern Ireland context should not lightly be undermined. Especially where decisions to be taken by the court have a factual character, their legitimacy in the eyes of the wider public may be peculiarly dependent in some socio-political context on community involvement in the reaching of outcomes.
>
> …. This issue is finely balanced. Hence whilst it is recommended that a measure equivalent to Section 11 of the Defamation Act 2013 should be introduced into Northern Irish law, it is also suggested that the issue be revisited should any decision be taken to limit the task to be undertaken by the court … a provision that would achieve the purpose of reversing the presumption in favour of trial by jury and judge is set out in the draft Bill that is included at the Appendix 1 to this report."

[42] The recent preliminary "Review of Civil and Family Justice" Report of October 2016 in Northern Ireland has recommended that the powers of the judges under Section 66(2) of the 1978 Act should be expanded to include a broad discretion to order a trial without a jury "in matters of complexity".

[43] All of this serves to underline our view that the current position of juries in Northern Ireland is distinguishable from that which exists, or indeed has existed for many years, in England and Wales. Wholly different arguments in this jurisdiction inform that distinction. Whilst many lawyers may view the presence of juries in these complex cases with an air of tolerant scepticism, the fact remains that trial by judge and jury remains the starting point for such actions and can only be taken away in tightly controlled circumstances.

Special reasons

[44] Invocation of the use of "special reasons" has a lengthy statutory history both in the UK and elsewhere particularly in road traffic legislations. We have considered its employment in cases in the United Kingdom such as Brown v Dyerson [1968] 3 All ER 39 at p. 41-42 per Bridge J, in Australia in R v Ferri [2002] SASC 217 in relation to police disciplinary proceedings, in New Zealand in Basile v ATWILL [1995] 2 NZLR 537 at 539 in relation to interpretation of the Fisheries Act 1983 , in Profitt v Police [1957] NZLR 468 at 470 in relation to transportation matters, and R v Crossen [1939] N.I. 106 in this jurisdiction in relation to road traffic matters.

[45] Whilst these cases are all set in different contexts to that now before us and there is no algorithmic formula for distilling their presence, nonetheless we consider

that special reasons draw their hue from the definitions arising in such cases. Accordingly, when considering the concept of special reasons, we consider the following principles should apply.

(i) "Special reasons" necessarily connotes the existence of some situation which is, patently, a substantial departure from the normal position.

(ii) A special reason is one that is not found in the common run of cases. While not necessarily being categorised as "exceptional" or "extraordinary" it is one that may properly be characterised as not ordinary, common or usual.

(iii) It must be special to the facts constituting the particular case under consideration.

The appellant's case

[46] The contentions advanced by Mr Humphreys can be summarised as follows:

- The starting point for this action should be that it *shall* be tried with a jury if a party so requests.

- The problems advanced by Stephens J in relation to the issue of meanings is true in all cases where Reynolds privilege is being argued.

- There is nothing in the list of questions which the learned trial judge raised at paragraph [52] which would take this case outside the normal factual enquiries to be made in any case where the defence of Reynolds privilege is raised. There is therefore no special reason to depart from the conventional approach of trial with judge and jury.

The plaintiff/respondent's case

[47] Mr Lavery advanced the following contentions:

- The test should be in the interests of justice.

- There are no rational grounds in which it may be argued that the interests of justice required different modes of trial in the present case. On the contrary the present case is one of which there are distinct dangers of a false result should the cause of the action or any part therefore be tried by a jury.

- 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

should be against that mode of trial. The learned trial judge referred to his concerns about the difficulty the jury would have in fully understanding his charge.

- In this case there are a range of possible meanings, a need for directions on the "single meaning rule" and directions on the "repetition rule".

- The likely inability of a jury to understand the evidence sufficiently amounts to a special reason which makes an action unsuitable to be tried by the jury.

- The argument that all Reynolds privilege cases will involve similar considerations does not necessarily prevent it from being treated as a special reason.

- The judge's ruling has not exceeded the generous ambit within which reasonable disagreement is possible insofar as he decided to try the Reynolds defence without a judge and jury.

- All other aspects of the trial should be heard by a judge without a jury given the confusion that would be caused by two separate modes of trial.

Conclusions

[48] We commence by recognising that an appeal will not be entertained from an order which was within the discretion of the judge to make unless it has been shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, that he took into account irrelevant matters or that the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible". (Moffatt v Moffatt [2015] NICA 61).

[49] We find no basis to challenge the exercise of the discretion of the learned trial judge in concluding that the issues in relation to meaning and identification are relatively simple and can be hived off to be dealt with by a jury without inconvenience. Both parties envisaged that it would only be necessary to look at the article complained of and to apply the guidance found in a number of well-known authorities.

[50] The learned trial judge considered the disadvantages of trial with a jury in relation to the issues of meaning and identification and concluded that there was no substantial or overriding weight in them to the effect that he should order the issues of meaning or identification be tried without a jury.

[51] Similarly he considered the issue of trial with a jury in the matter of justification and of damages. We find no reason whatsoever to conclude that he exercised his discretion under Section 62(2) of the 1978 Act in this regard under a mistake of law, in disregard of principle, under a misapprehension as to facts or that he took into account irrelevant materials. A generous ambit of discretion is given to a trial judge in such matters particularly where the starting point is to afford trial by judge and jury. Juries can be trusted to deal with these issues under the appropriate judicial guidance. Accordingly we dismiss the counter-appeal mounted by the plaintiff and affirm the judge's decision that these matters should be tried by judge and jury.

[52] Where we depart from the learned trial judge is in the exercise of his discretion in relation to the Reynolds defence and his conclusion that special reasons related to that issue leading him to determine in his discretion that that matter be tried without a jury.

[53] Our reasons are as follows. We are conscious that the term "special reasons" dictates that such reasons must be related to the particular case under scrutiny. It is solely the facts of the instant case that must be sufficiently unusual to justify what amounts to a substantial departure from the normal approach that such trials are by way of judge and jury at the request of one party.

[54] We do not believe that principle had been observed in this instance. The relevant order made by the learned trial judge in essence specifies three special reasons:

(i) The complicated factual questions which require to be addressed by the jury in determination of the Reynolds defence ("Number 1").

(ii) The confused division of functions of the judge and jury in relation to the Reynolds defence ("Number 2").

(iii) The difficulties presented to the jury in considering the different means between the Reynolds defence and other issues in this action ("Number 3").

[55] Other than in the Order, Number 2 does not seem to find expression in the decision-making process set out in the course of this judgment or, according to Mr Humphreys, in the argument by counsel before the judge. The precise wording seems to have been adopted from Gatley 12th Edition at paragraph 34.1 which states:

> "At the time of writing, there have been two jury trials of defamation actions in England and Wales since July 2009. There are a number of reasons for this. Reynolds privilege cases, which represent a substantial proportion of actions defended by the

> media, are peculiarly unsuited to trial by jury, by reason of the confused division of functions of judge and jury …"

[56] Our concern is that this is a general statement of principle which would be applicable to every case involving a Reynolds defence. It would require careful analysis in the particular context of the facts of this case to find a solid basis for a special reason. What is there special to the facts of what appears to us to be fairly conventional Reynolds type case that would lead to such a conclusion?

[57] Number 3 similarly reflects a general proposition which would be applicable to every Reynolds defence. A jury will always have to consider the different meanings arising between the Reynolds defence and other issues. It is clear however that this alone cannot justify a special reason for departure from the conventional approach unless in some way it can be specifically related to the facts of the case under consideration. Otherwise a Reynolds defence could never be left to a jury. We have to question what was the special reason in this case that rendered the different meanings in the Reynolds defence and other issues in the action sufficient to constitute special reasons rendering the issue unsuitable for trial by jury. We do not find sufficient examination of this issue in the course of the judgment to justify such a conclusion which would render this case one that merits a substantial departure from the norm.

[58] If the learned trial judge had recognised that Numbers 2 and 3 did not constitute special reasons in the context of the instant case, would Number 1 have been sufficient to persuade him to act as he did? We are not convinced that it would have done so.

[59] In any event, Number 1 – "the complicated factual questions" requiring to be addressed by the jury in determining the Reynolds defence-would appear to be those set out in paragraph 52 of the judgment. We have difficulty imagining any Reynolds defence of responsible journalism which would not have thrown up almost identical issues and questions. What was there in these factual questions which rendered them "special reasons"? We are of the view that if the factual issues in this case, common as they are, constituted special reasons, it would be difficult to envisage any Reynolds defence surmounting the same hurdle.

[60] In terms we consider therefore that the exercise of his discretion as regards Number 1 was a conclusion outside the generous ambit within which reasonable disagreement is possible.

[61] In all the circumstances therefore we quash the decision to try the Reynolds defence by judge alone in order that all the issues in this case would be tried by judge and jury. We invite the parties to address us on the issue of costs.

Treacy J

Introduction

[1] I do not lightly dissent from the majority judgment of my distinguished colleagues but I consider that this case raises an issue of public importance regarding the scope and interpretation of the term "special reasons" within the meaning of Section 62(2) of the Judicature (NI) Act 1978 ("the 1978 Act"). The case also raises the issue of the scope of this Court's power to overturn the exercise of discretion by the Trial Judge under Section 62(2) to order a trial without a jury when he has rationally formed the requisite opinion required by Section 62(2) which is a pre-condition to the exercise of the statutory discretion conferred.

Background

[2] The background to this appeal and cross-appeal are clearly set out in the majority judgment. Stephens J had previously held that the Plaintiff's action against the Sunday World be tried without a jury [2015] NIQB 53 (Judgment No.1). The Sunday World appealed and the Court of Appeal referred the matter back to him as the Order did not specify the 'special reasons' underpinning his decision to order a trial without a jury as required by Section 62(2)(d) of the 1978 Act'. His detailed judgment did however contain such reasons. In his second detailed judgment, following the referral back, he ordered that (i) the Reynolds defence part of the action be tried without a jury, it being unsuitable to be tried with a jury; (ii) that the issues of identification, meanings, justification and damages be tried with a jury. The Sunday World appealed against (i) and the Plaintiff appealed against (ii).

[3] The learned trial judge ordered that the Reynolds defence aspect be tried without a jury, it being unsuitable for trial by judge and jury for special reasons namely:

> "The complicated factual questions which will require to be addressed by the jury in determining the Reynolds defence, the confused division of functions of the judge and the jury in relation to the Reynolds defence and the difficulties presented to the jury in considering the different meanings between the Reynolds defence and other issues in this action."

[4] The background to this matter has been helpfully summarised at paras [4]-[11] of the majority judgment which I adopt but, for reasons of economy, do not repeat.

The Judicature Act

[5] Section 62 of the 1978 Act provides as follows:

> "(1) Subject to subsection (2), an action or an issue of fact in an action in the High Court in which a claim is made in respect of—
> (a) libel;
> (b) slander;
> (c) malicious prosecution;
> (d) false imprisonment;
> *shall, if any party to the action so requests, be tried with a jury*.
> (2) The court *may*, on the application of any party to an action referred to in subsection (1), order that the action or any issue of fact in the action shall be tried without a jury *if it is of the opinion* that such trial—
>
> (a) will substantially involve matters of account;
>
> (b) will require any protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury;
>
> (c) will be unduly prolonged; or
>
> (d) *is for any special reason (to be mentioned in the order) unsuitable to be tried with a jury*.
>
> (3) Subject to subsection (4), any other action or any issue of fact therein shall be tried without a jury." [emphasis added]

[6] The first observation I make is that Section 62(1) is expressly *subject to* S 62 (2). It follows that the entitlement to a jury arising under S 62(1) is specifically subject to the freestanding discretionary power of the court, on application by a party, to order trial without a jury of the action or any issue of fact in the action "if it is of the opinion that such trial….(d) is for any special reason (to be mentioned in the order) unsuitable to be tried with a jury". The trigger factors permitting the court to exercise this discretion are (i) that there is an application by one of the parties to the action for such an order and (ii) that the court must be of the requisite opinion under (a),(b) (c) *or* (d). For present purposes this court is concerned with (d). Thus if the court "is of the opinion" that jury trial is for "any special reason… unsuitable to be tried with a jury" it may so order. Stephens J was of such opinion and so ordered. In my view this was within the four corners of the discretionary power conferred upon him. This exercise involved an evaluative, discretionary judgment by the experienced trial judge who has been case managing this case, who has thus been exposed to the intricacies of the action and who is therefore best placed to form the requisite opinion. The only basis upon which the formation of that opinion and the consequent exercise of discretion founded upon it can be interfered with by this court is if it is irrational. This is a high hurdle and has not been met in this case.

[7] The term "special reason" is nowhere defined in the 1978 Act. The reasons empowering the court to order a trial without a jury in (a)-(d) are disjunctive and freestanding. Together they form a class of reasons empowering the court to order that the action or issue of fact be tried without a jury. Thus the court may order that the action or any issue of fact be tried without a jury if the court is of the opinion that such trial (a) will substantially involve matters of account; (b) will require any protracted examination of documents ….which cannot conveniently be made with a jury; (c) will be unduly prolonged; or (d) is for any special reason ….unsuitable to be tried with a jury. Broadly (a) and (b) appear to be concerned with the length of a jury trial and/or its complexity either because it will substantially involve matters of account or protracted examination of documents etc which cannot "conveniently" be tried with a jury. Reasons (c) and (d) are deliberately non-prescriptive emphasising the wide area of discretionary judgment afforded to the court. The clear statutory purpose of Section 62(2) is to equip the trial court with the power to exclude a case from jury trial where, in the opinion of the first instance court, such trial appears to be unsuited to the use of a jury for one or more of the adumbrated reasons. Sub-para (d) is a free-standing provision designed to extend the discretion of the court to cases beyond (a)-(c), in furtherance of the statutory purpose. Having granted this wide discretion to the court of first instance it is unlikely that Parliament intended the exercise of that discretion to be overturned on appeal except in

cases of manifest error. One consequence of the present litigation has been the proliferation of appeals around this discretionary judgment in a manner which is hard to reconcile with the overriding objective.

[8] In light of the authorities summarised at paras 26-31 of the majority judgment and the approach of the major libel textbooks replicating the clear jurisprudential thrust of established case-law I find it unsurprising that Stephens J decided as he did. Gatley on Libel and Slander 11th Edition at paragraph 36.1 states:

> "As a preface to this chapter it is appropriate to record that in recent years the trial of defamation actions before a judge and jury have become, if not a rarity, markedly less common than in the past when it was unusual for such actions to be tried by a judge alone. *There are a variety of reasons for this: Reynolds privilege cases, which are a substantial proportion of actions defended by the media are peculiarly unsuited to trial by jury;* by reason of the confused division of functions of judge and jury and by the jury having to find specific facts, sometimes necessitating an 'exam paper' of questions for the jury to answer; jury trials take longer, particularly as witnesses give their evidence in chief orally, whereas before a judge alone the statement of the witness will usually stand as his evidence in chief, and there will be a consequential saving of costs; and judges are becoming increasingly concerned about the inconvenience and practical difficulties of managing trials with juries, especially when there are large files of documents."

[9] Reynolds was decided in 2001. The jurisprudence has been much developed in the intervening years. What is plain is that the courts in England & Wales and the leading textbooks acknowledge that Reynolds defence cases are not just "unsuitable" (the language of Section 62(2)(d)) but "particularly unsuitable" for trial by jury. I acknowledge that the starting point is that, *subject to Section 62(2),* Section 62(1) creates an entitlement to a jury if one of the parties so requests. This is plainly not a "constitutional right" nor can it be correct to characterise it as a "predisposition". It is a displaceable entitlement mediated by the consideration that the entitlement was made expressly subject to Section 62(2). Characterising the entitlement to a jury as a

constitutional right or a predisposition is inconsistent with the intention of parliament as expressed in the opening words of Section 62(1) "Subject to subsection 2.…". Moreover for a trial judge or this court to approach the discretionary evaluative judgment required by Section 62(2), weighed down by a view of the entitlement to a jury which characterises it as a constitutional right/predisposition, is inconsistent with the free-standing nature of the discretion conferred by that subsection. Having raised, but not answered, the question whether it is correct to so characterise the position as to jury trial in NI the majority at para[37] of its decision then said:

> "*... the fact remains that the starting point for defamation cases in NI is with a judge and a jury*. Section 62(2) … specifies closely defined circumstances in which the right to a jury can be removed. There are no other grounds for removing the right to a jury. Even then the courts must exercise a discretion".

I very respectfully part company with my learned brethren on this approach. First, even this formulation continues to elevate the entitlement to a jury to some revered place beyond the displaceable right which parliament created. The fact that the current position regarding juries in NI is distinguishable from that which exists in England and Wales in my view tells us little about the separate consideration that the Section 62(2) exercise requires. Secondly, the passage quoted does not reflect the express terms of Section 62(2) and the wide discretionary judgment to order trial without a jury "if [the court] is of the opinion that such trial – …. (d) is for any special reason ….unsuitable to be tried with a jury". Provided the court has formed the requisite opinion the court is permitted to exercise its discretion to order trial without a jury. Section 62(1) confers a displaceable statutory entitlement, no more and no less, to a jury if one of the parties to the action so requests. But that entitlement can be displaced by the exercise of the free-standing power under Section 62(2)(a)-(d) to order trial of the action or an issue of fact without a jury.

[10] Further at para[45] the majority said that when considering "special reasons" the three enumerated principles should apply. The three "principles" substantially overlap – "substantial departure from the normal position", "not found in the common run of cases" and "must be special to the facts constituting the particular case under consideration". Having elevated the entitlement to a jury under Section 62(1) to some revered and unjustified place, the breadth of the free-standing power to order trial without a jury contained in Section 62(2) is then closely confined in the majority judgment to a restrictive and unwarranted interpretation of "special reasons" and the

approach, it is said by the majority, should be taken by the trial court to the consideration of that issue. Building on this approach the majority then say at para [53] that "… the term "special reasons" dictates that such reasons must be related to the particular case under scrutiny. It is *solely* the facts of the instant case that must be sufficiently unusual to justify what amounts to *a substantial departure from the normal approach* that such trials are by way of the judge and jury at the request of one party"[my emphasis].

[11] The majority judgment, at para[56], considered that reason "Number 2" for ordering that the Reynolds defence be tried without a jury is a general statement of principle applicable to every case involving a Reynolds defence. ("the confused division of functions of the judge and jury in relation to the Reynolds defence"). Gatley 12th Edition at para 34.1 states:

> "At the time of writing, there have been two jury trials of defamation actions in England and Wales since July 2009. There are a number of reasons for this. Reynolds privilege cases, which represent a substantial proportion of actions defended by the media, are peculiarly unsuited to trial by jury, by reason of *the confused division of functions of judge and jury …*" [my emphasis]

Similarly in respect of reason Number 3 ("the difficulties presented to the jury in considering the different means between the Reynolds defence and other issues in this action") the majority judgment considered that also reflected a general proposition which would be applicable to every Reynolds defence [para57]. The court considered that Numbers 2 and 3 did not constitute special reasons in the context of the instant case.

[12] If, as a matter of *principle,* a Reynolds privilege case is particularly unsuited to trial by jury there should be no difficulty with the trial court, in the exercise of its discretion, ordering trial without a jury if it is of the opinion that for that special reason the action (or issue of fact) is unsuitable to be tried with a jury. If such an issue is particularly unsuitable for trial by jury in England and Wales it seems unlikely that it would be any less suitable for a jury in Northern Ireland. Indeed the fact that such issues are recognised as systemically unsuitable for trial by juries seems to me to be an *a fortiori* special reason. The fact that something is not special to the facts of the case under consideration or is one that is common to Reynolds privilege cases cannot thereby preclude the judge from forming the opinion that it is a special reason making trial by jury unsuitable. The mischief that Section 62(2) is seeking to

prevent is actions or issues of fact which are unsuitable for trial by juries being heard by juries.

[13] The majority judgment sets out its definition of 'special reasons' at para[45]. It says a 'special reason' 'connotes….some situation which is…. a substantial departure from the normal position'; is a 'reason…that is not found in the common run of cases…' and is 'special to the facts constituting the particular case under consideration…'. The issue arises: Can a case, which is one of a cohort of civil cases that all raise the same complexity, ever use that complexity as a 'special reason' justifying exemption from trial by jury? The answer depends on how one defines 'the normal position' and 'the common run of cases'. We can use a *broad lens* and ask ourselves 'what are juries in civil cases normally asked to deal with?' If we review the usual demands that such juries face it may appear that the level of complexity arising in this (and in many) defamation cases is indeed 'a substantial departure from the normal position' and does indeed qualify as a 'special reason'. Or alternatively we can use a *narrow lens* and ask ourselves 'what are juries in defamation cases normally asked to deal with?' If we take this starting point then the complexity raised by a Reynolds Defence, in the majority judgment, does not constitute a 'reason … that is not found in the common run of (defamation) cases…' and therefore the level of complexity would not qualify as a 'special reason' justifying exemption.

[14] So how should the Court of Appeal select which of the two lenses to apply to this case? In my view it should select the lens which most favours efficient delivery of a just result which is, after all, the objective of every trial.

[15] The trial judge used a broader lens and decided in his discretion that this case fits into a category of cases which tend to display levels of complexity which take them outside the 'the common run of cases…'. On that basis he decided that he could exempt this specific aspect of the case from trial by jury. I believe that this is the correct approach or, at least, that it is not an approach which exceeds the limits of the discretion given to trial judges in such cases, and that therefore the original decision ought not to be upset by this court.

[16] The original decision also commends itself because it allows for a situation where a subset or cluster of cases which <u>all</u> display unusual levels of complexity or all place exceptional demand on jurors can, collectively, be exempted from a process which may not be best suited to achieving just results in any one of those cases.

[17] On the other hand the approach now suggested by the majority judgment poses the risk that, where a subset of cases exists in which all the cases present a common difficulty, then not one of those cases may qualify for exemption simply because the same difficulty arises in every other case within that set.

[18] In the majority judgment's approach, the repetition of an exceptional difficulty in a subset of cases is used as a basis for saying that the difficulty is not exceptional at all, and therefore that no more suitable process can be used for any case within that subset. This is equivalent to saying that the 0.1% of patients who suffer from a rare form of cancer do not have a 'rare' cancer at all because each patient within that 0.1% has the same cancer.

[19] For these reasons I respectfully dissent from the views expressed by the majority on this issue. I also consider that the trial should not, in the context of the present case, be split and that it should either be trial by judge alone or trial with a jury.