SAFEWAY STORES PLC V TATE

Case No: 2000/0382

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE

CENTRAL LONDON COUNTY COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Monday 18th December 2000

LORD JUSTICE OTTON

LORD JUSTICE MANTELL

and

SIR RONALD WATERHOUSE

SAFEWAY STORES PLC

Claimant/

Respondent

- and -

ALBERT TATE

Defendant/

Appellant

(Transcript of the Handed Down Judgment of

Smith Bernal Reporting Limited, 190 Fleet Street

London EC4A 2AG

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Official Shorthand Writers to the Court)

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Mr Adam Wolanski (instructed by Lawrence Jones for the Claimant/Respondent)

Mr Harry Boggis-Rolfe (instructed by the Bar Pro Bono Unit/Lovells & the Citizens Advice Bureau RCJ for the Defendant/Appellant)

The Hon Victoria Sharp (Amicus) (instructed by the Treasury Solicitor)

Judgment

As Approved by the Court

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LORD JUSTICE OTTON:

This an appeal by the defendant, Mr Tate, against the decision on 10 June 1999 of HHJ Barry Green QC in the London County Court to award summary judgment under CPR Part 24 to the claimant, Safeway Stores plc (Safeway). The action was brought by Safeway against Mr Tate for damages and an injunction for libel. On 17 March 2000 Roch LJ granted permission to appeal on one of Mr Tate's proposed grounds ; namely that he was denied the right to a jury trial.

At the hearing before Judge Green Mr Tate appeared in person. For the purposes of this appeal Mr Harry Boggis-Rolfe appears through the Bar Pro Bono Unit instructed by Messrs Lovells through the Solicitors Pro Bono Scheme. The Court would wish to record their gratitude both for undertaking this task and thus providing the Court with invaluable assistance.

Background

The libel action arose out of a boundary dispute between the parties. Mr Tate lives at 24 Weymouth Street, Warminster, Wiltshire one of four dwelling houses known collectively as Hall's Terrace. Mr Tate has a grievance against Safeway in relation to the alleged encroachment by Safeway on 24 Weymouth Street by means of a "fraudulent boundary" to the rear of Hall's Terrace.

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A further complaint arose in relation to the re-building of a wall. Mr Tate claims that a wall forming part of 24 Weymouth Street was damaged and then demolished during construction works on what was to become Safeway land. An offer was made by the developers involved to re-build the wall. Mr Tate was aggrieved at the location of the foundations of this wall and possibly about the fact that the wall was never in fact re-built. These matters are peripheral to this appeal.

As a result of these grievances Mr Tate produced a leaflet containing his understanding of the boundary dispute with the headline "Safeway Where Fraud Ideas Come Naturally." These leaflets do not form part of Safeway's Case. Mr Tate subsequently produced a placard with only the words of the headline written on it and

displayed the placard in the garden of his house where it was plainly visible to customers of the adjacent Safeway store. Additionally, he erected a different sign (with identical content) on his car and parked the car in the car park of six other Safeway stores. On one occasion he displayed the sign at the end of the Warminster Carnival Procession, where it was again plainly visible to customers. Judge Green proceeded on the basis of these facts which were apparently not challenged by Mr Tate at the hearing on 10 June 1999.

On 3rd December 1992, Safeway issued a writ for libel, claiming damages and an injunction. On 4 December 1992 Blofeld J. ordered that Mr Tate `be restrained from further publishing pending further Order.' There appear to have been breaches of the Order and a suspended sentence for contempt. Mr Tate commenced his own action for trespass which was automatically struck out on 12 September 1996.

On 8 September 1997 HHJ Simpson ordered that Mr Tate's purported defence of justification be struck out. On 8 May 1998 Mr Tate applied for permission to appeal which was granted whereupon the Court allowed the appeal and remitted the matter to the trial judge. Evans LJ said :

"The defendant has sought to justify the claim, but has so far failed to set out in his Pleadings the reason why he says that that allegation, that serious allegation was justified .... It may be that ... the learned judge will see a way to his making an order which will permit the defendant at least the minimum of scope for manoeuvre so that the issue can be dealt with and put to rest by proper adjudication at the trial."

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An ineffectual attempt was made to put the Pleadings in order but on the 10th August 1998 HHJ Simpson struck out those paragraphs of the defence alleging justification. The matter proceeded to trial.

On the 1st June 1999 (the date fixed for the hearing) due to a lamentable administrative error no jury panel had been arranged. Mr Tate applied for the trial to be adjourned on the ground of ill-health. Without any proper notice Safeway applied for summary judgment on the ground that "There is no defence of any substance to the

claimant's case." Both applications were heard by HHJ Green on 10th June. Mr Tate's application to adjourn on the ground of ill-health was dismissed. The judge entered a judgment for Safeway for damages for libel to be assessed by a jury and granted an injunction to restrain Mr Tate from publication of the words "Safeway, Where Fraud Ideas Come Naturally." He ordered Mr Tate to pay Safeway costs and refused leave to appeal.

The learned judge found that "After no less than four attempts to amend his defence to plead justification, the only live defence is -- a general traverse or general denial, the effect of which is that the claimant is put to proof that the words bear a defamatory meaning and that they were published as above." Mr Tate has never denied publication and accordingly the learned judge directed himself that he had only to consider whether the words complained of "tend to lower a person or a company in the estimation of other people." Safeway submitted that Mr Tate stood no real prospect of success on this point and the learned judge acceded to that submission. He held that "the power to give summary judgment is discretionary," and considered that the costs of a jury trial, and the unfair adverse publicity which Safeway would suffer even on a successful trial, left him in "no doubt" that it was right to avoid a jury trial. The learned judge considered the effect of section 69 of the Supreme Court Act 1981 which provides for an unqualified right to a jury, but held that the plain wording of CPR Part 24(3) made no exception for libel to a right to summary judgment.

As indicated, on 17th March 2000 Roch LJ ordered that permission to appeal be granted but limited to the ground that Mr Tate was denied the right to a jury trial.

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Roch LJ also invited the Attorney-General to appoint an amicus curiae to assist the Court with the point in issue. The Hon Victoria Sharp, was so appointed and she prepared a skeleton argument and appeared before us. In the meantime Mr Boggis-Rolfe undertook to appear for Mr Tate.

Section 69 Supreme Court Act 1981 provides :

"**Trial by jury**

69.- (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."

Civil Procedure Rule (CPR) 24.2 provides:

"Grounds for summary judgment

24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -

(a) it considers that -

(i) that claimant has no real prospect of succeeding on the claim or issue ; or

(ii) that defendant has no real prospect of successfully defending the claim or issue ; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

The Appellant's Case

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Mr Boggis-Rolfe conceded that on its face and as worded CPR 24.2 enables summary judgment to be given in appropriate circumstances even in defamation cases and if there is no other reason for trial. He points out that although the present matter was decided under 24.2 in its original

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form, the proviso in 24.2(b) now reads "other **compelling** reason" by amendment from July 2000. Thus 24.2 in its modified form is wider in applicability than it was.

He submitted that although this provision reflects the overriding objectives of the CPR to enable litigation to be resolved proportionately and expeditiously and to save costs it is not sufficient to deprive a party in a defamation suit of his fundamental right to trial by jury. This right is so engrained in our constitution that only a jury can decide if the words complained of actually are defamatory and what they mean. The now extinct Order 14 RSC did not apply to actions for libel and slander. Order 18 Rule 19 RSC and the Courts inherent powers in cases of abuse of process did not enable a plaintiff to obtain summary judgment because meaning was always for the jury even if the Court was persuaded to strike out other defences. Moreover Order 82 Rule 3A which provided for preliminary rulings on meanings is still preserved by CPR 53(PD030). Thus the Court can still non-suit a plaintiff and deprive him of trial by jury if the judge found that the words were incapable of a defamatory meaning. It could also deprive a defendant of a particular defence of justification, but only in relation to a meaning that the words were incapable of bearing. Thus the statutory right to a jury trial, and in particular that of a defendant, was recognised in the procedural limitations.

It follows that 24.2 is ultra vires section 1(3) of the 1996 Act insofar as it purports to deprive or impinge upon the right to trial by jury. If 24.2 is not ultra vires then it has to be read, as suggested by the editors of the White Book, to mean that the fact that respondent may have a right to trial by jury may, of itself, be a reason for a trial. Extreme caution is appropriate before removing such a fundamental right.

The Respondent's Case

Mr Adam Wolanski (on behalf of Safeway) contended that Part 24.2 removes the express exclusion of defamation claims from the summary judgment regime which existed under Order 14. The learned judge was correct in holding that there was a discretion to give summary judgment against the defendant and he did not err in principle in exercising his discretion in the claimant's favour.

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Counsel mounted a spirited attack upon the concept that the right to trial by jury is a fundamental right. He submitted that this right is not (and never has been) an unqualified or absolute right, it is subject to significant limitations. A party to a libel action has never had the right to have a jury return a perverse verdict in his favour. In support of this proposition he cited Gatley, 9th Edition, at paragraph 36.20 :

"Where the words are obviously incapable of any but a defamatory meaning, and there is no question that they were published of the plaintiff, and the jury have nevertheless found a verdict for the defendant, the Court will set aside the verdict as perverse and unreasonable and order a new trial."

Counsel also cited **Broome v. Agar (1928) 44 TLR 339** and Sankey L.J. at 341 :

"It is not, however, open to the judge to say that the words do bear a defamatory meaning, that is for the jury, but the jury must have evidence upon which they can found their verdict and if there is no evidence upon which they can find that the words were not defamatory, or if it can be conclusively proved that they have not exercised any reasonable discretion at all, an Appellate Court may grant a new trial."

Moreover, the Court of Appeal has the power to make an award of damages where it decides that the jury's verdict in favour of the defendant is perverse. Part 52.10(3) provides that the Court may, instead of ordering a new trial, make an award of damages or vary an award of damages made by the jury.

Mr Wolanski's argument that the plaintiff is never entitled to a "perverse verdict" can be disposed of briefly. The issue of whether a verdict is perverse can only be raised after a jury's verdict has been given. The decisions cited by counsel in support of his proposition are all decisions of the Court of Appeal. None is authority for the proposition which he states or that the judge is entitled to take away an issue of fact from the jury merely because he considers that the jury might reach a perverse verdict.

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Mr Wolanski also advanced a novel argument that when granting the injunction in September Blofeld J. must have concluded that the words complained of were "unarguably defamatory." In support he cited **Gatley on Libel & Slander** Ch.25.2 and **Coulson & Sons v. James Coulson &**

Co (1887) 3 TLR 846 where Lord Esher M.R. when considering the Court's power to grant an interim injunction stated :

"The jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous and where if the jury did not so find the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all

probability the alleged libel was untrue, and if written on a privileged occasion that there was malice -- it followed -- that the Court could only on the rarest occasions exercise their jurisdiction --- in the present case (I) could not go to the length of saying that it would be unreasonable in the jury to find that this was not a libel, therefore, -- the Court ought not to grant an interim injunction."

I was not impressed by this argument. Suffice it to say that these observations were made in the context of interlocutory injunctions and have no bearing on the particular circumstances of this case where an application was made ex parte, the defendant was a litigant in person who disregarded the injunction and made no application to discharge it before trial.

Counsel further submitted that the limitations on the right to a jury trial are intended to ensure that the correct balance is struck between the efficient administration of justice, ensuring that proceedings are conducted rationally and in a manner which is acceptable to public opinion, and a party's right to a jury trial. Section 69 SCA, whilst preserving the pre-existing right, nevertheless created exceptions. The word "conveniently" makes it clear that the efficient administration of justice is a significant fact to be taken into consideration by the Court in exercising its discretion as to whether to order trial by judge alone. Slade L.J. in **Goldsmith v. Pressdram Ltd (1988) 1 WLR 64** Slade L.J. stated (at page 74G) :

"... I infer that the legislator, in using the particular word "conveniently" in the context of the sub-section, was directing its attention to the efficient administration of justice, rather more than the probable difficulty or otherwise of the issues involved."

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In giving the Rule Committee the power to make rules "with a view to ensuring the civil justice system is accessible, fair and efficient" the CPA was proving a wide power to reform the procedural code in its entirety. Consequently the judge exercised his discretion correctly. The judge's

finding that the defendant had "no prospect **at all**" of successfully defending the claim was amply justified in the circumstances of the case.

The Submissions of the Amicus Curiae

The Hon Victoria Sharp submitted that the learned judge was wrong to give summary judgment for the complainant under CPR Part 24.2. for three reasons

(1) defendants in libel actions had at that time, a statutory right to have the material question answered by the learned judge (i.e that the words complained of were in fact defamatory of the complainant) determined by the jury ;

(2) the statutory and specific right had not been impliedly amended by the general permissive words of CPA 1997, nor of the CPR 24.2, delegated legislation under the Act. ;

(3) the right to trial by jury is a substantive and important legal right, which it is beyond the power of the CPR Committee to abolish or limit by its general powers to reform the rules of practice and procedure of the Courts. Such a right may be amended by statute, indeed has since been amended by a provision of the Defamation Act 1996, not then in force, but not by subordinate legislation founded on an Act conferring a broad general power.

She further submitted that in the particular circumstances of this case, there existed "a reason" why the case or issue raised by the defendant should have been

disposed of at a trial, and the learned judge should have exercised his power to make that direction under Part 24.2(b).

Discussion and Conclusion

I take as my starting point the history and development of the statutory provision of trial by jury in defamation. Originally the question "libel or no libel" - whether the words were defamatory of the plaintiff - was a question of law for the Court (see **R. v. Shipley (1784) 4 Doug KB 73** at 169)). The Libel Act passed in 1792 (Fox's Act) is still in force, its short title is "An Act to remove Doubts respecting Function of Juries in Cases of Libel." Although the Act was confined to criminal proceedings, the rules as to the respective functions of judge and jury in civil and criminal proceedings became assimilated. The effect of the Act was that the Court could still give judgment for the defendant if in law the words complained of could not be a libel (see **Mulligan**

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v. Cole (1875) L.R.10 QB 549 cited and approved in **Counties Bank v. Henty (1882) 7 App Cas 741** at 782)). If the words were capable of being defamatory and of bearing the meaning complained of by the plaintiff, the question whether the publication complained of was **in fact** libellous was for the jury (see **Neville v. Fine Art General Insurance Company (1897) AC 68** at p.72 et seq).

All counsel contributed to the history of the material enactments leading up to the Supreme Court Act 1981. It is clear that the right to trial by jury in libel actions is preserved, save in special circumstances which are identified in the SCA and which are not relevant here. The right is indelibly enshrined in statute and can only be removed or modified by subsequent Act of Parliament. Thus either party to an action for libel or slander in the High Court can claim as of right to have the action tried by a jury, unless the Court or judge is of the opinion that the trial requires any prolonged examination of documents or accounts or any specific or local investigation which cannot conveniently be made with a jury. Section 69(1) is mandatory in its terms :

"Where on the application of any party to an action ... the Court is satisfied that there is in issue ...

(b) a claim in respect of a libel, slander ...

the action **shall** be tried with a jury unless ..."

Moreover the concept of "convenience" is confined to the three express statutory exceptions. These cannot be relevant to the determination of the ambit of the right given under section 69(1) or even how the right should be construed in the light of subsequent legislation (as Ms Sharp succinctly put it).

I now turn to consider the effect upon this right of the CPA and CPR Part 24.2 and whether the right already identified, which existed prior to the introduction of the CPR, has been removed by Part 24.2.

Under the former regime there were limited circumstances in which libel actions could be determined under RSC Order 18 Rule 19 and Order 82 Rule 3A. However summary judgment could not be obtained by a plaintiff in any action which included a claim for libel or slander (Order 14 Rule 1 (2)(a)). The commentary on Order 14 stated in terms :

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"The Order does not apply to any action specified in Rule 1(2) which are those in which there is a right to trial by jury (see Order 33 Rule 5(1) and the SCA in 1981, section 69)"

CPR Part 24.2 is in general terms only :

"(a) It considers that -

.....

(ii) The defendant has no prospect of successfully defending the claim, or issue ; "

I am satisfied that an application under Part 24.2(a) can properly be made in order to determine certain questions which fall within the jurisdiction of the judge in a libel action. These include, for example, whether the words complained of were published on an occasion of absolute privilege. On the other hand, the Rule does not permit a judge alone to determine questions of fact which Parliament has determined should be decided by a jury, and in particular, whether the words complained of are defamatory of the claimant.

In my judgment, the right to trial by jury, and in particular to have the jury determine the question "libel or no libel" is not a matter of mere procedure, but an important and substantive legal right. As such it is beyond the power of the Civil Procedure Rules Committee to abolish or limit by its general powers to reform the rules of practice and procedure. Thus although the right may be amended by statute this cannot be achieved by subordinate legislation founded on an Act conferring a broad general power.

Since neither the CPA nor Part 24.2 makes express reference to defamation actions, I am satisfied that the general provision in the CPR does not override the specific provisions of section 69(1) SCA. This is so notwithstanding the terms of section 1(3) CPA which creates the power to make procedural rules with a view to securing that the civil justice system is accessible, fair and efficient. Section 4 enables the Lord Chancellor to amend repeal or revoke any enactment to the extent he considers necessary or desirable. This is a very wide power and is not confined to

amendments etc which are merely consequential. In my judgment it does not enable delegated legislation to repeal or amend primary legislation which embodies a fundamental (as opposed to a procedural) right such as trial by jury. Even if this power were wide enough it is intrinsically unlikely that delegated legislation which purports to abolish such a fundamental right would do

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so without express reference to the statutory right. To do so would be to remove the right by a casual change or a mere sidewind. This is particularly so where the right is intertwined with a defendant's freedom of speech.

In reaching this conclusion I derive support from the structure of Defamation Act 1996 (DA) which came into force on 28 February 2000 together with its subordinate legislation for summary disposal provided by Part 53.2. The Act specifically provides for the summary disposal of libel actions and for that disposal to be determined without a jury, albeit subject to specific limitations on the amount of damages which can be recovered under this procedure. If the application for summary judgment had come before HHJ Green on or after 28 February 2000 it would have been within his power to determine that the words were defamatory of the complainant, to give summary judgment for Safeway, to award the damages up to £10,000 and to issue an injunction. The fact that Parliament considered it necessary to make such separate provision for defamation claims is an indicator that the CPR did not have the effect contended for by the respondent

In summary therefore it is beyond the power of the CPR Committee to limit the right to trial by jury or the right to have the question "libel or not libel" determined by the jury, by its general powers to reform the rules of practice in procedure of the courts. As the editor of Bennion Statutory Interpretation, 3rd Edition, states at section 269:

"The more fundamental the change, the more thorough going and considered should be the provisions by which it is implemented."

Finally, I return to consider the functions of the judge and jury in a defamation action. As Lord Denning MR said in **Ward -v- James (1966) 1 QB 273** at 295:

"It (trial by jury) has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime or when in a civil case a man's honour or integrity is at stake ... then trial by jury has no equal."

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This recognition of the importance which English law has ascribed to trial by jury over the centuries has been frequently endorsed at the highest level before Blackstone and after Lord Devlin (see Trial by Jury Lord Devlin pages 164-5 "Jury as Lamp of Freedom"). This is still as true today as it has ever been.

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The determination as to whether the words are defamatory normally involves a two-stage process : first, deciding what the words mean, second, deciding whether the meaning is defamatory of the claimant (see Gatley 9th Edition, para. 2.1). Thus unless there is any amendment express or implied of Fox's Act or the subsequent legislation it is for the jury to decide whether the facts are in fact defamatory, and what meaning the words in fact bear. Thus the jury has an exclusive role and is subject only to the restriction that it is for the judge to rule whether the words are capable of defamatory meaning. The seminal statement of this principle is to be found in **Jones v. Skelton (1953) 1 WLR 1362** where Lord Morris at page 1371 said :

"It is well settled that the question whether the words complained of are capable of conveying a defamatory meaning

is a question of law and is therefore one calling for the decision of the Court. If the words are so capable it is a question for the jury whether the words do in fact convey a defamatory meaning."

It may be that the learned judge overlooked the distinction between the roles of the judge and jury in this respect. Alternatively he was not reminded of the distinction when the application was made. Whatever the cause the learned judge unfortunately fell into error in assuming that he had the power to assume the role of the jury, when due to administrative error there was none available. The position created by sections 8 and 9 of the DA 1996 apart, the issue of whether the words complained of are defamatory is still a question of fact to be determined by a jury because the question is reserved by Fox's Act and because actions for libel must, save in special circumstances which do not apply to this case, be tried by a jury. In this regard, I accept Mr Boggis-Rolfe's submission that meaning and damages are connected and that it is not sensible to separate them and both ought to be before the jury. He cited in support the Neill Report on Defamation Practice Procedure **1991 XXXIV 5**-6. The fact that the plaintiff in the instant case did not seek damages but merely an injunction did not permit the judge to usurp unwittingly the jury's function in the way that he did.

I wish to conclude by expressing considerable sympathy for the learned judge, and indeed, Mr Tate the defendant. They both anticipated that there would be a trial by jury on the date fixed for trial. The jury had not been summoned and thus a gap appeared in the judge's busy schedule. Without prior notice the claimants sprang the application upon both of them. The absence of the jury did not create a situation to enable such an application to be made. Even if it did exist, it had

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existed from some time since the strike out of the purported defence of justification and should have been made on proper notice under the County Court Rules. There was no skeleton argument from the claimant. Mr Tate was a litigant in person without access to legal advice or assistance. It is perhaps not surprising that even this experienced judge acceded to the application without the assistance from counsel that he would normally be entitled to expect. The law of defamation is a specialised field and he may not have had readily to mind the distinct roles of judge and jury (or have had them pointed out to him). This is in sharp contrast to the assistance we have received in this Court from counsel who are specialists in this field. Thus, although I can well understand the temptation to the learned judge to dispose of what might well have proved an expensive and time consuming piece of litigation it was not open to him to rule that the words complained of were defamatory of the complainant and to enter judgment for Safeway.

I would allow this appeal, set aside the judgment in favour of the plaintiff and discharge the injunction granted by HHJ Green. As suggested by Mr Boggis-Rolfe, I would remit the case to the County Court for a short jury trial at which the issues of meaning and damage can be decided by the jury. If a proper application or notice is made by the defendant that the words complained of are not capable of being defamatory this should be decided by the judge before the jury is empanelled. If the jury decides in favour of the plaintiff it will then be appropriate for the judge to consider the need for an injunction. In the meantime, in the absence of an undertaking by the defendant, the injunction of Blofeld J. must remain.

LORD JUSTICE MANTELL:

I agree.

SIR RONALD WATERHOUSE:

I agree that this appeal should be allowed for the reasons stated by Otton L.J.

(Order does not form part of approved Judgment)

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