[2022 Gib LR 72]

ALLEN and WOOD v. PANORAMA LIMITED and OLIVERO

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): April 27th, 2022

2022/GCA/04

Tort—defamation—trial by jury—right to jury trial still applies in Gibraltar notwithstanding legislative changes in England and Wales restricting jury trials in defamation claims—right to jury trial is important substantive right unaffected by Supreme Court Act 1960, s.15

The appellants brought a libel claim against the respondents.

The respondents applied for a trial by jury, which was opposed by the appellants. The respondents submitted that although legislative developments in England and Wales had made jury trials in defamation claims the exception rather than the norm, the position in Gibraltar reflected the position in England and Wales prior to the reforms, namely that a party to a defamation claim was entitled to a jury trial. The appellants submitted that because the Supreme Court's practice and procedure followed the law and practice in England and Wales, there was no proper basis to order a trial by jury.

The Supreme Court (Restano, J.) held that the respondents were entitled to a jury trial. The right to trial of a defamation action by a jury in Gibraltar had survived the legislative change enacted in England and Wales by the Defamation Act 2013.

The appellants appealed, submitting that (a) the Common Law Procedure Act 1854 began a process whereby the earlier common law right to trial by jury was changed into a matter governed by statute and procedural rules in England and Wales; (b) in Gibraltar the governing statutory provision was the Supreme Court Act 1960, s.15 of which provided that "the jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice"; (c) the law and practice in England and Wales was now to be found in the Defamation Act 2013, s.11 and the Civil Procedure Rules, which required that defamation trials be by judge alone "unless the court orders otherwise" and subsequent

authorities demonstrated that trial by jury in defamation cases had become exceptional; and (d) absent a specific statutory provision referable to Gibraltar, the post-2013 position in England and Wales had become part of the law of Gibraltar, pursuant to s.15 of the Supreme Court Act 1960.

The respondents submitted that the common law right to trial of a defamation action by jury in Gibraltar had never been replaced by statutory restrictions or procedural rules. The right to trial by a jury in Gibraltar was an important substantive right, not merely a matter of practice and procedure, and it was unaffected by s.15 of the Supreme Court Act. Even if the right to trial by jury was not strictly a substantive right, it was nonetheless a procedural right of high importance which could not be statutorily limited or abrogated save by express and clear language.

Held, dismissing the appeal:

The right to trial by jury of a defamation action in Gibraltar remained untouched by the change in the law in England and Wales which was brought about by the Defamation Act 2013. The right to trial by jury could not be categorized simply as a matter of practice and procedure. It was an important substantive right and as such it was unaffected by s.15 of the Supreme Court Act, which was solely concerned with the exercise of the jurisdiction of the court "as far as regards practice and procedure." In the context of substantive legal rights, which must include the right to trial by jury, the mere enactment of a significant change to the law of England and Wales by an Act of the Westminster Parliament could not be taken, without more, to change the law of Gibraltar. The Defamation Act 2013 was a controversial piece of domestic legislation which followed extensive consultation and debate about problems in defamation litigation in England and Wales. There was no consideration as to whether the same, different or any problems were affecting defamation litigation in Gibraltar. Furthermore, even if the right to trial by jury was not strictly a substantive right, the language of s.15 of the Supreme Court Act was not sufficient to limit or abrogate the right. It was worth observing that the Supreme Court Act came into force in September 1960, and that another Gibraltar statute, the Defamation Act 1960, which was drafted on the assumption that the mode of trial would be by jury, was passed and came into force in December 1960 (paras. 7–13).

Cases cited:

(1) *Almeda* v. *Att.-Gen.*, 2001–02 Gib LR 156; on appeal, 2003–04 Gib LR 307, considered.
(2) *R. (Simms)* v. *Home Secy.*, [2000] 2 A.C. 115; [1999] 3 W.L.R. 328; [1999] 3 All E.R. 400, referred to.
(3) *Safeway Stores plc* v. *Tate*, [2000] EWCA Civ 335; [2001] Q.B. 1120; [2001] 2 W.L.R. 1377; [2001] 4 All E.R. 193; [2001] C.P. Rep. 56; [2001] EMLR 13, considered.
(4) *Yeo* v. *Times Newspapers Ltd.*, [2014] EWHC 2853 (QB); [2015] 1 W.L.R. 971; [2014] 5 Costs LO 823; [2014] EMLR 32, referred to.

Legislation construed:

Supreme Court Act 1960, s.15: The relevant terms of this section are set out at para. 3.

English Law (Application) Act 1962, s.2: The relevant terms of this section are set out at para. 4.

R. Clayton, *Q.C.* assisted by *D. Hughes* (instructed by Phillips Barristers and Solicitors) for the appellants;
D. Feetham, *Q.C.* assisted by *D. Martinez* (instructed by Hassans) for the respondents.

1 **KAY, P.:** In this action the appellants are seeking damages for libel from the respondents. We are not concerned with the detailed allegations at this stage. On May 17th, 2021, Restano, J. ordered that the mode of trial be trial by jury as sought by the respondents but opposed by the appellants (reported at 2021 Gib LR 271). He held that the right to trial of a defamation action by a jury in Gibraltar had survived the legislative change enacted in England and Wales by the Defamation Act 2013, as a result of which jury trials in defamation actions in that jurisdiction have become rare almost to the point of non-existence.

2 The case for the appellants on this appeal is that that fundamental change has also become part of Gibraltar law, although there has been no express statutory modification in this jurisdiction.

The essential submissions

3 It is common ground that before the Common Law Procedure Act 1854, the common law embraced a right to trial by jury. Indeed, it was the only mode of trial recognized in the common law courts. We have been taken through the subsequent legislative history in some detail, particularly in the appellants' skeleton argument. Mr. Richard Clayton, Q.C. submits that it demonstrates that:

(1) The Common Law Procedure Act 1854 began a process whereby the earlier common law right was changed into a matter governed by statute and procedural rules in England and Wales.

(2) In Gibraltar the governing statutory provision is the Supreme Court Act 1960, s.15 of which is headed "Practice and Procedure" and provides:

> "The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

(3) The law and practice in England is now to be found in the Defamation Act 2013, s.11, and the Civil Procedure Rules which require that defamation trials be by judge alone "unless the court orders otherwise" and subsequent authorities, most notably *Yeo* v. *Times Newspapers Ltd.* (4), demonstrate that trial by jury in defamation cases has become highly exceptional.

(4) Absent a specific statutory provision referable to Gibraltar, the post-2013 position in England and Wales has become part of the law of Gibraltar, pursuant to s.15 of the local Supreme Court Act 1960.

4 On behalf of the respondents, Mr. Daniel Feetham, Q.C. submits that the common law right to trial of a defamation action by jury in Gibraltar has never been replaced by statutory restrictions or procedural rules. He relies on s.2 of the English Law (Application) Act 1962 which provides:

> "2.(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by—
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> (a) any Order of Her Majesty in Council which applies to Gibraltar; or
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> (b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or
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> (c) any Act."

5 His primary contention is that the right to trial by a jury in Gibraltar is, and always has been, an important substantive right, not merely a matter of practice and procedure and, accordingly, it is unaffected by s.15 of the Supreme Court Act. He made further and alternative submissions but what I have just attributed to counsel on both sides is the central battle ground.

Analysis

6 In support of his primary submission, Mr. Feetham relies on *Safeway Stores plc* v. *Tate* (3), in which the corporate claimant sought libel damages from the defendant, a protestor who had displayed uncomplimentary remarks about the claimant on publicly sited placards. The claimant sought summary judgment under the Civil Procedure Rules. The defendant maintained that that would deny him his statutory right to trial by jury pursuant to s.69 of the Supreme Court Act 1981, which was the governing statute before the mode of trial provision was turned on its head by the Defamation Act 2013. The Court of Appeal held that the CPR had not and

could not have eroded a fundamental substantive right such as the right to trial by jury in a defamation case. Otton, L.J. with whom Mantel, L.J. and Sir Ronald Waterhouse agreed, said ([2001] Q.B. at 1131–1132):

> "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 Rule Committee to abolish or limit it by its general powers to reform the rules of practice and procedure. Thus although the right may be amended by statuts this cannot be achieved by subordinate legislation founded on an Act conferring a broad general power . . .
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> Even if this power were wide enough it is intrinsically unlikely that delegated legislation which purports to abolish such a fundamental right would do 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 . . .
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> This recognition of the importance which English law has ascribed to trial by a jury over the centuries has been frequently endorsed at the highest level before Blackstone and after Lord Devlin: see *Devlin, Trial by Jury,* The Hamlyn Lectures, 8th series (1956), pp 164–165, 'Jury as lamp of freedom'). This is still as true today as it has ever been."

7 In my judgment those passages resonate in the context of the present appeal. They demonstrate that the right to trial by jury cannot be categorized simply as a matter of practice and procedure. It falls to be treated as an important substantive right and as such it is unaffected by s.15 of the Supreme Court Act, the sole concern of which is with the exercise of the jurisdiction of the court "as far as regards practice and procedure." On this basis, the present appeal is bound to fail. Section 15 was supposed to be its catalyst.

8 In the course of submissions, in this court and below, there was a sterile debate as to whether the right to trial by jury is a "constitutional" right. As Gibraltar has a written constitution, and the right to trial by a jury is not referred to in it, the language of Otton, L.J. suffices. It is "an important and substantive legal right." Further taxonomy is unnecessary. Moreover, it is a legal right which was derived from the common law of England and Wales which continues to hold sway because it has not been modified or excluded by any of the three mechanisms envisaged by s.2(1) of the English Law (Application) Act.

9 Although the above analysis is sufficient by itself to dispose of this appeal, it is appropriate to refer to the second of Mr. Feetham's submissions.

It is essentially a point of construction based on the principal of legality; see *R. (Simms)* v. *Home Secy.* (2). It is submitted that even if, contrary to my view, the right to trial by jury is not strictly a substantive right, it is nonetheless a procedural right of high importance which cannot be statutorily limited or abrogated save by express and clear language. In these circumstances, can it be said that s.15 of the Supreme Court Act 1960 contains language sufficient to achieve such a limitation or abrogation? In my judgment the answer is plainly in the negative. At that time and thereafter, there is nothing to suggest that the Legislative Council contemplated removing a right which was to continue in the law of England and Wales for another 50 years. And the language with which it expressed itself, being limited to "practice and procedure," cannot be said to have achieved such a remarkable development.

10 In this context it is worth observing that the Supreme Court Act 1960 came into force on September 1st, 1960. Another Gibraltar statute, the Defamation Act 1960, was passed and came into force in December 1960. When dealing with the consolidation of libel actions under s.28, the Defamation Act was drafted on the assumption that the mode of trial would be by jury. That is entirely consistent with the construction of s.15 of the Supreme Court Act which the principle of legality compels.

11 I do not consider that much more need be said about this appeal. Mr. Feetham drew our attention to *Almeda* v. *Att.-Gen.* (1) (2001–02 Gib LR 156 (C.A.) and 2003–04 Gib LR 307 (P.C.)). At common law, a highway authority enjoyed immunity for nonfeasance in relation to the maintenance and repair of highways. In England and Wales the legislature took away that immunity by s.1 of the Highways (Miscellaneous Provisions) Act 1961. The appellant sustained personal injuries in a fall on a highway in Gibraltar which she sought to attribute to negligence in the maintenance of the highway. The defence pleaded the common law immunity but the appellant submitted that the abolition of the defence by the 1961 Act applied also to Gibraltar by reason of s.2 of the English Law (Application) Act 1962. Both the Court of Appeal and the Judicial Committee rejected that submission and the common law immunity survived in this jurisdiction. The case is not on all fours with the present appeal but it does highlight similar issues. In the Judicial Committee, Lord Rodger of Earlsferry said (2003–04 Gib LR 307, at para. 13):

> "The 1961 Act is therefore irrelevant to the situation in Gibraltar, which is only to be expected since, when enacting the 1961 Act, Parliament would have taken account of the situation in England, but certainly not the situation in Gibraltar. The nonfeasance rule . . . therefore continues to form part of the law of Gibraltar."

12 What this means is that in the context of substantive legal rights, which must include the right to trial by jury, the mere enactment of a

significant change to the law of England and Wales by an Act of the Westminster Parliament cannot be taken without more to change the law of Gibraltar. Section 2(1)(b) of the English Law (Application) Act contemplates circumstances where that may occur but only by express provision or necessary implication. When, as with s.1 of the Highways (Miscellaneous Provisions) Act 1961 or s.11 of the Defamation Act 2013, the Westminster Parliament legislates for substantive legal change, following detailed consideration of circumstances in England and Wales which are thought to justify or necessitate the change, it will not normally follow that the same change *ipso facto* percolates into the law in Gibraltar, where the local circumstances have not been considered by the Westminster Parliament. The Defamation Act 2013 was a controversial piece of domestic legislation which followed extensive consultation and debate about problems in defamation litigation in England and Wales. No one considered whether the same, different or any problems, were affecting defamation litigation in Gibraltar.

Conclusion

13 For all these reasons, in my judgment, the right to trial by jury of a defamation action in Gibraltar remains untouched by the change in the law of England and Wales which was brought about by the Defamation Act 2013. Accordingly, I would dismiss this appeal.

14 **RIMER, J.A.:** I agree.

15 **ELIAS, J.A.:** I also agree.

Appeal dismissed.