



February 1998 it is admitted that there was published on the company bulletin board a notice which read:

*“Arrest warrant  
for: Gary (the bullshitter Kulisak) (sic). Gary is  
wanted in five countries for being a compulsive  
liar, bullshitter, child-molester, rapist and for giving  
order that have had men KILLED.”*

2.

By its defence, the second defendant, who in fact employed the plaintiff, denies authorship of that notice but alleges that it was the unauthorised activity of his Secretary. In respect of that matter, the plaintiff alleges libel. The real defence relied upon is that the words (some of which were allegedly erased after publication) amounted to a “spoof-joke-lampoon” and could not be taken as otherwise by those who read it. In the alternative it is pleaded that so far as the allegations as to having men killed was concerned it was true in that the plaintiff had frequently made such boasts.

3.

On the 20<sup>th</sup> February 1998 the second defendant wrote to the Immigration Department of the Cayman Islands in the following words, these words are also alleged to be defamatory of the plaintiff.

*“I write to advise that Mr. Kulisek’s employment with this company was terminated on the 7<sup>th</sup> February 1998 for conduct which was unacceptable and unprofessional at any level of employment. His behaviour has severely impacted my company image and reputation locally and internationally. I must say that employing him in my operation is the single largest business mistake I have ever made.*

*I would like to further add that he does not deserve the privilege of continuing residency in our country”.*

Those last twenty words will be dealt with in more detail later.

In respect of that letter the defence is one of fair comment and/or qualified privilege.

4.

By way of reply to the matters relied upon as justifying the summary dismissal and an assertion of express malice in respect of the plea of qualified privilege, some very serious allegations concerning the conduct of the second defendant are pleaded. Those matters were originally prematurely pleaded in the first version of the Statement of Claim. The allegations amount to the plaintiff, having obtained the opinion of three named experts, informed the second defendant that four air pressure vessels on the first defendant’s premises were dangerous and unfit for use. The suggestion was that they amounted to a “nuclear bomb”. The

plaintiff alleges that he suggested that there should be an investigation as to the replacement of those pressure vessels. It is alleged that the second defendant was not interested in the complaints made to him and that the dismissal, which took place three months later, was in reality executed to prevent the plaintiff disclosing his concerns. There were other complaints of unethical and improper behaviour on the part of the second defendant in respect of work permits and other matters. In the event, those vessels or some of them, did explode on the 20<sup>th</sup> March 1998 with the result that one employee was killed and another maimed.

5.

I record it as a fact that when the explosion took place on the 20<sup>th</sup> March 1998 it was heard by every resident of George Town. For days afterwards the matter was extensively reported in both the printed and electronic media and was a subject for discussion amongst many of the residents of Grand Cayman. Mr. Ross urges me to ignore my knowledge of those events in the event that no affidavit has been filed on behalf of the plaintiff alleging them as a reason why a jury trial should not take place. On the other hand, Mr. Alberga Q.C. suggests that a judge sitting in a jurisdiction of this size simply cannot ignore facts as notorious as those and that no affidavit of facts need to be made in respect of a matter on which judicial notice can be taken. I agree with with Mr. Alberga's

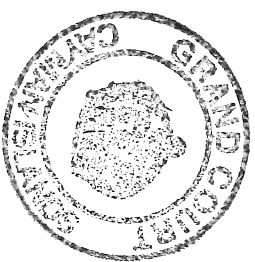
submission in that respect and I reject that of Mr. Ross. These matters were matters of public knowledge and controversy and there is no escape from that.

6.

Mr. Ross, on behalf of the first and second defendants, applies to me under Section 21 of the Judicature Law (1995 Revision) for an order for the trial of the joint causes of libel and unlawful dismissal by a jury.

Section 21 reads as follows:-

*“When one party to a civil cause before the Court applies for the cause to be tried by a jury and the Court is of opinion that the matter is one that can properly be so tried a jury of seven persons shall be empanelled for the trial of the issues between the parties.”*



In other words once the application is made and the Court is of opinion that the matter is one that can be properly be tried by a jury it must be so tried. The Court is therefore charged with the duty of deciding whether it is of opinion, in the light of all the relevant facts and the surrounding circumstances that the matter can properly be so tried in the overall interests of justice. This unusual feature of our law is reflected in the criminal law as well. Section 121 (A) of the Criminal Procedure Code,

introduced in 1975, provides a right to a person accused of crime upon indictment to elect trial by judge alone:-

*“If he is opinion that, due to the nature of the case or the surrounding circumstances, a fair trial with a jury may not be possible.”*

It is a fact that such trials frequently take place.

Z.

I am urged by Mr. Ross to have in mind the criteria set out in Section 69 of the English Supreme Court Act of 1981 in deciding this application. In England and Wales the majority of defamation actions are in fact tried by a jury. I reject that submission as a proper basis for me to decide this application. As I have demonstrated Cayman law is quite different. I am further invited to consider that as the character, honour and integrity of the second defendant is at stake I should give great weight to the criteria in Section 69 in deciding whether in my opinion this matter can properly be tried by a jury. That is the wrong test. In this context I note the dicta of the House of Lords in Williams v. Beesley [1973] 1 WLR 1295 to the effect that when allegations of dishonourable behaviour are made, comments made in the past, notably by Lord Denning should not be followed. I respectfully agree with that opinion repeating my view that in any event it is not relevant to the exercise which I am required to

perform under Section 21. For similar reasons I reject the submission which has been made to me on the basis of Rothermere v. Times Newspapers Ltd. [1973] 1 WLR 448. That case involved the application and construction of Section 6 (1) of the Administration of Justice (Miscellaneous Provisions Act of 1933), to the meaning of the words “production and examination of accounts”. In any event the House of Lords in Williams v. Beesley has made it clear (whilst considering the English legislation) that in cases where integrity and honour were involved there might be weighty considerations in ordering a trial by a jury at the instance of the party whose integrity or honour was impugned but it was not a sufficient ground for ordering trial by jury against the wishes of that person at the instance of the other party. It is to be noted that in this case each side has made serious allegations impugning the honour and integrity one of the other and the plaintiffs strongly opposes trial by a jury.

8.

I have had a number of local authorities cited to me.

- (i) Farrington v. Brandon (1968) 1952-1979 CILR 113
- (ii) Bush v. Caribbean Ash Contractors Ltd (1969) 1952 – 1979 CILR
- (iii) Bodden v. Bob Sotos Diving Ltd. 1988/1989 CILR 171
- (iv) Rea v. Gibbs 1993 (Unreported) and

(v) Thompson v. Cayman Airways Ltd. 1992-1993 CILR 571.

I note that in all of these case the application for a jury trial was refused. That fact does not assist me in making up my mind on this application as each application must be treated on its merits. Nor does the interesting remark made by Mr. Alberga Q.C. that no civil trial by jury has ever taken place in the Cayman Islands in the past forty years. Whilst, that is interesting from the historical perspective it does not assist me in carrying out the exercise required by the section in this case.

9.

The judgment of Schofield J, as he then was, in Thompson v. Cayman Airways Ltd. is very helpful in this particular case. His Lordship, in refusing an application made by the plaintiff for a jury trial in respect of an allegation of a breach of contract of his employment, made a series of observations: he observed, on the authority of Barnett v. Bob Soto's Diving Ltd., that one of the relevant factors was the length and expense of a trial with a jury and that in his view it would not be proper to impose the risk of additional costs on civil litigants unless some specific and cogent reason in favour of a jury trial had been shown.

His Lordship then continued:

*“Another factor which may operate against trial by jury being the proper method of trial is the small size of the Cayman population and the possibility that jurors know, or know of, one or other of the parties and have heard “on the marl road” of the dispute between them. In this context it is not lost on the Court that matters relating to Cayman Airways are, and have been for some time, under close public scrutiny. It would be difficult to find a Caymanian who does not have views on how Cayman Airways is or should be operated. More particularly, the matters which are the subject of this suit have been aired in the press. It would be difficult to find a jury in which all the members come into the trial without some preconceived notions about the case. A judge who is trained to set aside his preconceptions is surely a better forum in these circumstances than a jury which is not so trained. I would go further. The pleadings could lay down a minefield or irrelevancies which it may be difficult for a judge on his own to pick through but which it would be a nightmare for him to pick through with a jury.”*

10.

The difficulties for a jury in dealing with shifting evidential burdens, questions of privilege, justification, fair comment and express malice, not to mention damages have only to be stated to be understood.

The reality of these proceedings is at that the second defendant is a member of a large and distinguished Caymanian family. He is a large employer and it may very well be that some or many of the witnesses will be employees of his with an extended family of their own. His extended family is well-known on the Islands. By way of contrast, the plaintiff is a stranger to these Islands and seeks even-handed justice from the Court.

The second defendant has large financial resources whereas the plaintiff does not, on the information presently available. Although it is by no means the most important factor in my evaluation of the matter it is a fact that a jury trial will be much longer and more expensive than a trial by a judge alone. It is suggested by Mr. Ross that a careful sifting of the jury panel by the judge by asking potential jurors to declare any interest or affiliation and by dint of careful directions as to their approach all obvious problems can be removed. I do not agree. The reality is that as some of the relevant facts are so notorious and so much a matter of dispute that potential jurors may come to their task either with very positive views on the Merren family and the second defendant in particular or, in the alternative, highly adverse views on the family and the second defendant. In the first set of circumstances the plaintiff is likely to be prejudiced and in the second set of circumstances the defendants are liable to be prejudiced. What the Court must ensure is that no one is prejudiced and the matter must be approached by the relevant tribunal with strict impartiality. The conclusions of the judge will be in writing and open to inspection by all. It is also to be recalled that a factor in the case may be that the second defendant chose, on one possible view of the facts, to play the Caymanian /expatriate card in his letter to the Immigration Board. This is a topic upon which every single Caymanian has, quite understandably, strong views. This is a situation

which has been caused by the second defendant by his choice of words in the letter he wrote to the Immigration Board. There is a discernible risk that by doing so he has possibly introduced an extraneous factor into the evaluation of the evidence in this matter. Again Mr. Ross seeks to persuade me that by a careful direction to the jury such a danger can be obviated. I do not agree with him.

11.

Taking into account all the factors and matters which I have referred to I must put to myself the question: Am I of the opinion that this civil case containing as it does matters of great controversy and public debate is one which can be properly be tried by a jury? I must positively come to that opinion to satisfy the terms of the section. My conclusion is that I am not of that opinion. Accordingly, this application is dismissed with costs to be taxed if not agreed.



Hon. Mr. Justice Graham  
Judge

19<sup>th</sup> July 1999

