Neutral Citation Number: [2022] EWHC 1124 (QB)

Case No: QB-2021-001248

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

(1) Simon Blake **(2) Colin Seymour** **(3) Nicola Thorp**	**Claimants**
- and -	
Laurence Fox	**Defendant**

- -
- -

Heather Rogers QC and Beth Grossman (instructed by **Patron Law Ltd**) for the **Claimants**
Alexandra Marzec and Greg Callus (instructed by **Gateley Tweed LLP**) for the **Defendant**

Hearing date: 28 April 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by e-mail and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 18 May 2022.

The Honourable Mr Justice Nicklin :

1. The is the judgment following the Defendant's application for a direction that the trial of this action be by Judge and jury. There is a separate application by the Claimants for a direction of trial of certain issues as preliminary issues (see [19(iv)] below), but this will be resolved at a subsequent hearing.

A: The parties

2. The First Claimant was a trustee of Stonewall until 30 June 2021. The Second Claimant is an entertainer who has appeared in various television programmes, including the first season of *Ru Paul's Drag Race UK*. The Third Claimant is an actor, television commentator and writer. She has appeared in the ITV drama *Coronation Street*, and other television programmes.

3. The Defendant is an actor, perhaps best known for his portrayal of the character "Hathaway" in the ITV drama *Lewis* between 2006-2015.

4. Each of the parties is active on the social media platform Twitter.

B: Events giving rise to the claim

5. On 1 October 2020, the supermarket chain *Sainsbury's* published two Tweets on its Twitter account @sainsburys.

    i) The first Tweet, at 10.11 displayed a graphic "*Celebrating Black History Month*" with the words:

    > "We are Celebrating Black History Month this October. For more information visit [website link given].
    > #blackhistorymonth"

    The hyperlink included in the first Tweet linked to a page on *Sainsbury's* website which was headed: "*Celebrating Black History Month*". Under a sub-heading, "*What we have been doing to support our colleagues*", *Sainsbury's* included: "*Recently we provided our black colleagues with a safe space to gather in response to the Black Lives Matters movement*" ("the Sainsbury's Website BLM Statement").

    ii) The second Tweet, at 15.22, contained a graphic with the words:

    > "We are proud to celebrate Black History Month together with our Black colleagues, customers and communities and we will not tolerate racism.
    >
    > We proudly represent and serve our diverse society and anyone who does not want to shop with an inclusive retailer is welcome to shop elsewhere."

6. On 4 October 2020, the Defendant published the following Tweet from his Twitter account (@LozzaFox) ("the Defendant's Tweet"):

"Dear @sainsburys

I won't be shopping in your supermarket ever again whilst you promote racial segregation and discrimination

I sincerely hope others join me. RT.

Further reading here [website link given]"

The Defendant's case is that the link given in his Tweet was to the Sainsbury's Website BLM Statement.

7. Each Claimant posted a Tweet on 4 October 2020:

   i) at 16.45, the Third Claimant Tweeted:

      "Any company giving future employment to Laurence Fox, or providing him with a platform, does so with the complete knowledge that his is unequivocally, publicly and undeniably a racist. And they should probably re-read their own statements of 'solidarity' with the black community."

   ii) at 17.11, the First Claimant quote Tweeted the Defendant's Tweet and said:

      "What a mess. What a racist twat."

   iii) at 17.19, the Second Claimant quote Tweeted the Defendant's Tweet and said:

      "Imagine being this proud of being a racist! So cringe. Total snowflake behaviour."

8. In response to the Claimants' Tweets set out in the previous paragraph, the Defendant quote-Tweeted the relevant Tweet, and:

   i) at 17.29, in response to the First Claimant's Tweet, the Defendant Tweeted:

      "Pretty rich coming from a paedophile."

   ii) at 17.30, in response to the Second Claimant's Tweet, the Defendant Tweeted:

      "Says the paedophile."

   iii) at 17.51, in response to the Third Claimant's Tweet, the Defendant Tweeted:

      "Hey @nicolathorp

      Any company giving future employment to Nicola Thorpe (sic) or providing her with a platform does so with the complete knowledge that she is unequivocally, publicly and undeniably a paedophile."

9. At 18.24, on 4 October 2020, the Defendant posted the following Tweet:

   "Language is powerful. To accuse someone of racism without any evidence whatsoever to back up that accusation is a deep slander. It carries the same stigma

> and reputation destroying harm as accusing someone of paedophilia. Here endeth the lesson."

10. At some point during the morning of 5 October 2020, the Defendant deleted the Tweets he had posted the earlier evening (set out in [8] above).

C: The Claim and the Counterclaim

(1) The Claim

11. The Claim Form was issued on 1 April 2021. The Claimants alleged that the Defendant's Tweets on 4 October 2020 had libelled them, and they claimed remedies including damages and an injunction. Particulars of Claim dated 6 April 2021 set out the detail of the Claimants' claims. The Claimants contended that each of the Defendant's Tweets bore the natural and ordinary meaning that each Claimant:

> "… was a paedophile, who had a sexual interest in children, and had (or was likely to have) engaged in sexual acts with or involving children, such acts amounting to serious criminal offences."

12. Particulars of alleged serious harm to the reputations of the Claimants were set out in the Particulars of Claim together with matters relied upon in relation to the Claimants' claims for damages.

(2) The Defence & Counterclaim

13. On 21 May 2021, the Defendant filed a Defence and Counterclaim.

14. In his Defence, the Defendant:

    i) did not dispute the fact of publication of his Tweets on 4 October 2020, or that the words of each Tweet had referred to the relevant Claimant;

    ii) disputed the natural and ordinary meaning of the Tweets and, in particular, whether they were defamatory of the Claimants. An ordinary reasonable reader would have understood that the Defendant's words were "*tit-for-tat vulgar abuse*", which did not bear a literal meaning that the Claimants were paedophiles, and that the Defendant "*was giving the Claimants a taste of their own medicine*". As to the natural and ordinary meaning, he contended:

    > "The readers' understanding of [his Tweets] (and each of them, if not all were published to a particular publishee) will have been affected by [matters set out by way of context]. Different publishees, depending how and when they read the relevant Responsive Tweet(s) would have been aware of these matters at different levels of detail. However, all publishees would have been aware of the following minimum irreducible features of the words complained of:
    >
    > (1) Each [of the Defendant's Tweets] was made by the Defendant in direct response to an allegation of racism against him by the particular Claimant.

(2) There was no apparent cause or reason for the relevant Claimant to allege that the Defendant was a racist.

(3) The Defendant retaliated by calling the relevant Claimant a 'paedophile'";

iii) contended that the publication of each Tweet had not caused, nor was each likely to cause, serious harm to the reputation of the Claimants or any of them, relying principally on the clarification he had published within an hour of the publication of the original Tweets and the deletion of the Tweets the following morning;

iv) relied upon a substantive defence of reply-to-attack qualified privilege on the grounds that each Claimant had posted a Tweet calling him a racist; and

v) made clear that he was not alleging against any of the Claimants that s/he was a paedophile.

15. By his Counterclaim, the Defendant brought a claim for libel against each Claimant arising from each Claimant's Tweet, published on 4 October 2020 (set out in [7] above). He alleged that each of the Claimants' Tweets was defamatory of him and that the meanings of the relevant Tweets were pleaded as follows:

> "The [First Claimant's] Tweet and the [Second Claimant's] Tweet each meant and was understood to mean that the Defendant was a racist.
>
> The [Third Claimant's] Tweet meant that the Defendant was unequivocally and undeniably a racist."

16. In a separate paragraph, the Defendant added, by way of clarification:

> "Although 'racist' is an ordinary English word requiring no definition, for the avoidance of any doubt it means someone who is hostile to people of different ethnicities, races or skin colours; and/or who believes that some racial or ethnic groups, or people with certain skin colours, are inferior to others; and/or who believes that people should be segregated based on their racial or ethnic origins or the colour of their skin."

17. The Defendant contended that the Claimants' Tweets had caused serious harm to his reputation. The Defendant relied upon the seriousness of the allegation of racism and that the Claimants had not deleted their Tweets, and contended that, as a consequence of their publications, "*the Claimant has become seen as a racist and has become a hate-figure for large numbers of people*". As to particular alleged harm, the Defendant alleges that, on 12 November 2021, the Claimant's agent told him that she was no longer prepared to continue to represent him, that "*the Defendant's financial prospects of well-remunerated acting work have been very greatly diminished by no longer enjoying representation from a first-class agency*" and that the Defendant "*considers that his acting career is likely over*" causing him considerable financial loss.

18. The Defendant seeks remedies from the Claimants including general damages (but not special damages) and an injunction.

D: Procedural history

19. The parties have made little progress beyond the statements of case that I have set out above. Ordinarily, the next stage would have been for the Claimants to serve a Reply and Defence to Counterclaim. Depending on the contents of the Defence to Counterclaim, there may have been need for a Reply to the Defence to Counterclaim. Those stages have not been completed. Instead, the parties have been locked in a protracted period of unproductive and argumentative correspondence that fills almost an entire ring-binder. Briefly, the chronology is as follows:

    i) Following receipt of the Defence and Counterclaim, on 7 June 2021, the Claimants proposed to the Defendant that there should be a trial of preliminary issues as to meaning and that the time for filing the Reply and Defence to Counterclaim should be extended until the resolution of the preliminary issues.

    ii) On 18 June 2021, the Defendant's solicitors replied stating that the Defendant needed to see the defences to the Counterclaim in order to consider the merits of the proposal for a trial of preliminary issues.

    iii) On 23 June 2021, the Defendant's solicitors threatened to apply for default judgment as a result of the failure to file a Reply and Defence to Counterclaim.

    iv) That same day, the Claimants' solicitors issued an Application Notice seeking an order for trial of preliminary issues of (i) natural and ordinary meaning of the Claimants' Tweets; (ii) whether they were allegations of fact or expressions of opinion ("the Preliminary Issue Application"); and sought an extension of time for the service of the Reply and Defence to Counterclaim until after the proposed preliminary issues had been determined.

    v) On 1 July 2021, the Claimants' solicitors wrote to the Defendant's solicitors to propose a variation to the preliminary issues sought to include the publications that were the subject of the Claim as well as the Counterclaim.

    vi) On 2 July 2021, the Claimants' solicitors invited the Defendant to deal with the question of an extension of time for the service of the Reply and Defence to Counterclaim pending further discussion about the terms of any preliminary issues.

    vii) On 12 July 2021, the Defendant's solicitors issued an Application Notice seeking default judgment on the Counterclaim and sent a 9-page letter setting out the reasons why the Defendant contended that there should be no trial of any preliminary issues.

    viii) Senior Master Fontaine suggested a 1-hour hearing on 27, 28 or 29 July 2021 to resolve the issue of whether to direct a preliminary issue trial. The Defendant's solicitors contended that an hour was insufficient and so a hearing was listed for ½ day on 28 October 2021.

    ix) On 6 August 2021, the Defendant's solicitors wrote submitting their proposed directions in view of the impending deadline to file a Directions Questionnaire. The letter included the first mention of the issue of mode of trial:

> "We have included a direction for a trial by jury and we make you aware that pursuant to CPR rule 26.11(2), we intend to make the relevant application at the first CMC. We are of the view that this case is one of those rare cases that would be highly suitable for determination by a jury, and we invite you to consent to that mode of trial.
>
> A trial by jury will have obvious ramifications for the viability of your application for Trial of Preliminary Issues. We do not consider that a TPI could be ordered while the issue of mode of trial was not yet ascertained under rule 26.11. Therefore, if you intend to persist with what we consider (and irrespective of mode of trial) to be a premature application for a TPI, we suggest that determination of mode of trial take place in advance of, or as part of, the hearing of your TPI application in October…"

x) The Claimants' solicitors responded, on 9 August 2021, noting that this was the first time that mode of trial had been raised and that the Defendant had not stated why he contended that the case fell within the rare category of case in which jury trial should be directed. They argued that the case management benefits, in a case with both a claim and counterclaim, were significant and were likely to weigh heavily against directing jury trial.

xi) A hearing took placed before Senior Master Fontaine on 28 October 2021. The Senior Master made no order on the Defendant's default judgment application and reserved judgment on the Claimants' application for trial of preliminary issues.

xii) The Senior Master handed down judgment on the application for trial of preliminary issues on 22 December 2021 ([2021] EWHC 3463 (QB)). The Judge noted that the Defendant's position was that he opposed the direction of any trial of preliminary issues until the Claimants had filed their Reply and Defence to Counterclaim: [7(ii)]; and he was "*minded*" to apply for a trial by jury because the Counterclaim "*concerns the accusation of racism in a highly political climate on this particular issue*" and "*it was less appropriate for a judge to make a determination on this issue than an jury*": [7(iii)]. The Judge concluded, as was perhaps inevitable, that she could not proceed to direct trial of preliminary issues if there remained uncertainty as to mode of trial although she expressed "*very serious doubts whether any [application for trial by jury] would be likely to succeed*": [8]. The Judge also noted that the failure of the Claimants to serve a Reply and Defence to Counterclaim, without either agreement from the Defendant or order of the Court, had "*effectively derailed a CCMC being listed in the ordinary course*": [8]. In light of this, the Judge directed that the Claimants should file a written notice of their case on the preliminary issues so that the Court could make an informed decision about whether to direct trial of preliminary issues: [12]. She adjourned the Preliminary Issue Application. Separately, the Defendant was directed to notify the Claimants within 28 days of service of their written case whether he intended to issue an application for a direction for jury trial.

20. On 12 January 2022, the Claimants served their written case as directed. As to the Counterclaim, the summary of the Claimants' response was:

i) each Claimant contended that his/her Tweet on 4 October 2020 was an expression of opinion;

ii) the First Claimant denied that his Tweet was defamatory of the Defendant at common law; it was an insult or, as the Defendant had argued, "*tit-for-tat vulgar abuse*";

iii) the Second and Third Claimants do not admit that his/her Tweet was defamatory of the Defendant at common law;

iv) the Claimants denied that the publication of each of their Tweets had caused, or was likely to cause, serious harm to the Defendant's reputation; and

v) insofar as necessary, the Claimants would rely upon substantive defences of honest opinion (under s.3 Defamation Act 2013) and, if the Tweets or any of them were found to make an allegation of fact (which the Claimants denied), then the relevant Claimant would rely upon a defence of truth (under s.2 Defamation Act 2013). Summary particulars were given of the matters upon which the Claimants intended to rely in support of their substantive defences. However, the Claimants stated:

> "For the avoidance of doubt, should a need for a substantive defence arise, [the Claimants'] primary case is that the tweets they published were statements of opinion, so that the relevant substantive defence is one of honest opinion. It would be disproportionate to require them to set out the full details of that defence – and even more so, of an alternative defence of truth – prior to the determination of the question whether their statements (if defamatory at common law) were fact or opinion."

21. On 14 January 2022, the Defendant confirmed that he intended to make an application for trial by jury.

E: The Defendant's Application for trial by jury

22. The Defendant issued his Application Notice, seeking a direction for trial by jury, on 21 February 2022. The application was made pursuant to s.69(3) Senior Courts Act 1981 ("the Mode of Trial Application"). The application was supported by the witness statement of the Defendant's solicitor, Paul Tweed, dated 18 February 2022.

23. Mr Tweed exhibited extracts from the Report of the Commission for Race and Ethnic Disparities published in March 2021. The head of the Commission was Dr Tony Sewell CBE. Mr Tweed stated:

> "7. I refer in particular to the section beginning on page 33… headed '*The Language of Race*". In this section, the authors address the difficulty of defining the term racism, but notes that, despite this difficulty, '*we cannot afford the term to be misunderstood or trivialised*'. The Commission also noted that there was a tendency 'to conflate discrimination and disparities'. On page 34… the Commission stated:
>
> > 'In the call for evidence, the Commission noted a tendency to conflate discrimination and disparities; whilst they sometimes co-exist they

often do not. The Commission believes this is symptomatic of a wider, repeated use and misapplication of the term 'racism' to account for every observed disparity. This matters because the more things are explained as a result of racial bias, the more it appears that society is set against ethnic minorities, which in turn can discourage ethnic minority individuals from pursuing their goals. If more precise language does not become a feature of our national conversation or race, we can expect to see tensions increase across communities – despite determined action by government and civil society to reduce discrimination.'

At page 35:

> 'Just as racist behaviour and racist messages are being amplified, so are accusations of racism that are harder to prove, open to interpretation, or even vexatious. The internet has also exposed the problems inherent in a subjective definition of a racist incident. We can have a situation where the exact same action can be racism or not racism – depending on how someone perceives it. This means there is no clarity or consistency in identifying examples. It is now possible for any act, including those intended to be well-meaning, to be classified as racist. Without clearer definitions, it will be harder to measure the true extent of racism'

8. The Defendant concurs with these views, and in particular the importance of having a clear and general understanding of what racism is, and the dangers inherent in a subjective or fluid definition of racism.

9. Despite its careful tone and content, the Sewell Report met with heavy criticism from a number of quarters including from the UN Working Group of Experts on People of African Descent. A BBC report of such criticism is at pages 21 to 23 of Exhibit PT2. The UN Group called the Commission's Report 'an attempt to normalise white supremacy', which is not in any way a fair reading of the Report. This extreme criticism of the work of a British government commission trying to improve the lot of ethnic minorities in Britain shows the politicisation of the issue of racism and the extent of polarisation on the question."

24. Mr Tweed, in his statement, then contrasted the Commission's report with the February 2021 edition of the *Equal Treatment Bench Book* ("the ETBB"). The ETBB was updated in December 2021, but the parts relied upon by Mr Tweed have remained unchanged. Mr Tweed commented:

"10. In the chapter on race, under the heading, 'Terms for discussing racism, discrimination and prejudice', the Judicial College set out a definition of racism that expressly endorses a subjective element to racism:

> '… "Racism" is a term defined more by effects/outcomes than by motives: A racist action, or a person who acts in a racist way, is not necessarily racially prejudiced. However, the term is often used to describe a combination of conscious or unconscious prejudice and power to implement action which leads, however unintentionally, to disproportionate disadvantage for BAME people. People who use

the term 'racist' to describe the actions of others may or may not mean that the other person is personally prejudiced.'"

11. In sharp contrast to the views expressed by the Report of the Commission for Race and Ethnic disparities (although it is to be noted that this version of the Bench Book was published before the Report), the judiciary are thus advised and indeed instructed by the Judicial College that racism does not depend on the prejudices or motives of the person alleged to be racist but is 'defined more by effects/outcomes'. Judges are also instructed that racism is an implementation of power to the disadvantage of BAME people, thereby implying that black and ethnic minorities or other disadvantaged groups are immune to racist thoughts and actions; and that it is legitimate to describe a person's conduct as racist even when that person has no personal prejudice. The Bench Book definition conflates in the way that the Commission for Race and Ethnic Disparities warned against.

12. This expansive view of racism is not accepted by the Defendant, nor, perhaps more importantly, does he believe that it is the ordinary understanding of what racism is, or what makes a person racist. In particular, he considers that racism cannot be defined by effects and outcomes, and that a person is properly said to be racist only if he or she is motivated by personal prejudice and hostility against people of different races/skin colours/ethnic groups."

25. Mr Tweed then noted that, although the Defendant had defined the term "racist" in his Counterclaim (see [16] above), the Claimants had taken issue with this definition, but had refused to make their case clear, either in correspondence or, at the hearing on 28 October 2021, when asked by the Senior Master whether they accepted the definition given by the Defendant.

26. Mr Tweed concluded his statement with the following:

"18. It is a matter of great concern relating to the fair trial of this case that judges are advised by the Judicial College, which is made up a number of highly respected jurists, to understand the term racism in a way that the Defendant believes is not the natural and ordinary meaning of that word but that, instead, endorses an expansive and ideological view of the term. This expansive view may well be close to that taken by the Claimants. The outcome of the Defendant's claims against the Claimants could depend on the outcome of this issue, which will affect determinations as to meaning, honest opinion, truth and quantum.

19. It is difficult to see how justice could be seen to be done if this case were tried by a judge sitting alone, when the Defendant and the public know that the judge will have been advised in advance by his or her senior colleagues that the Defendant's case on this issue is wrong, or at least that the consensus amongst the senior judiciary is that the Defendant's case is wrong. This situation would give rise to a very real risk that a judge, 'in spite of [his/her] own natural integrity', might have 'an involuntary bias towards those of their own rank and dignity' (*Blackstone's Commentary on the Laws of England,* Book III at p.379, as cited in ***Cook -v- Telegraph Media Group Ltd*** **[2011] EWHC 763 (QB)** [101]) that is, will be predisposed to favour and adopt the views of his own senior colleagues in the judiciary. The Defendant does not know to what extent a judge could be criticised or

even disciplined for refusing to follow the guidance in the Equal Treatment Bench Book, but it is reasonable to suppose that it is easier for a judge to follow that guidance than to reject it.

20. Furthermore, the question of what it means to be a racist is one far better decided by twelve ordinary people, bringing their experiences of life and the usage of the English language to bear, than by one person alone, however wise and well-intentioned she or he no doubt will be. A jury has the attribute, not possessed by any judge, of being composed of a diverse group of people who can pool their knowledge and experience to reach verdicts. This is especially important in a case like this one involving an issue, what constitutes racism, upon which views are highly polarised and politicised. It is therefore important that more than one point of view is represented by the verdicts.

21. Further, whichever way a judge goes on this issue, a reasoned judgment setting out what racism means is likely to be controversial, and regarded as a political statement. The verdicts of a jury on the counterclaims, are unlikely, in their simplicity, to meet with the same controversy or criticism.

22. The Defendant believes that these matters strongly point to the need for this trial, very unusually for a libel case post the 2013 Act, to be tried by a judge sitting with a jury."

27. I have set out these paragraphs in full, rather that summarise them, because it is important that the Defendant's argument, and the evidence supporting it, is properly reflected in this judgment.

28. On 22 February 2022, I made an order directing that the Mode of Trial Application should be listed for hearing ("the First Hearing"). Having considered the papers, I also made a preliminary direction that the Court would, at a subsequent hearing ("the Second Hearing"), and dependent upon the result of the Mode of Trial Application, go on to determine the following as preliminary issues:

i) in respect of the Claimants' claim

a) the natural and ordinary meaning of the three Tweets of the Defendant concerning each Claimant posted on 4 October 2020;

b) whether, in respect of each of those meanings, it was defamatory of the relevant Claimant at common law; and

c) whether, in respect of each publication complained of by the Claimants, the statement was an allegation of fact or an expression of opinion; and

ii) in respect of the Defendant's Counterclaim:

a) the natural and ordinary meaning of each of the Claimants' Tweets concerning the Defendant published on 4 October 2020;

b) whether, in respect of each of those meanings, it was defamatory of the Defendant at common law; and

c) whether, in respect of each publication complained of by the Defendant, the statement was an allegation of fact or an expression of opinion by the relevant Claimant.

29. Those represent conventional directions for the trial of preliminary issues in defamation claims. Save in very limited respects, evidence is not admissible on these issues. Reflecting the limited parameters of the exercise, my order of 22 February 2022 directed that the First Hearing would be listed for a hearing of up to a day, and gave directions for the service by the Claimants of any evidence in response to the Mode of Trial Application. Directions for the Second Hearing would be given following the resolution of the First Hearing.

30. I gave the following reasons for the orders and directions that I had made:

> "(A) The Mode of Trial Application must be heard and determined first, as this will affect whether the Court goes on to determine the Preliminary Issues. It is not practical, and risks wasting costs, to list the two Applications together. Nevertheless, I want to avoid having a further substantial delay if the Court is going to go on and determine the Preliminary Issue Application. The claim and counterclaim have not made much progress since the claim was issued on 1 April 2021. My directions will see the First Hearing fixed in the window directed with the Second Hearing following on between 14 and 28 days later. The Second Hearing must take place before 1 July 2022.
>
> (B) The Preliminary Issue Application has sought the determination of issues in relation to the publications complained of in the counterclaim. There has been no application, by any party, for the Court to resolve similar preliminary issues in respect of the publications complained of in the claim. There may be tactical reasons for that, or it may reflect some common ground that is not apparent to the Court. I have directed, in respect of the claim, determination of the issue of fact/opinion and I recognise that the Defendant has not advanced an honest opinion defence. Nevertheless, this issue seems to me to be one that needs to be resolved, not least for the purposes of any assessment of damages (should that arise). It is easily resolved and is usually done at the same stage as the determination of natural and ordinary meaning. Evidence is not generally admissible, and the test is wholly objective.
>
> (C) Ultimately, the precise parameters of the issues to be resolved as preliminary issues can be resolved (if applicable) once the Mode of Trial Application has been heard and determined. I will want there to be clarity, prior to the Second Hearing, as to each party's case on the Preliminary Issues that the Court directs to be tried. Statements of Case have been exchanged, but my present view is that they do not clearly identify each party's case on the issues identified in Paragraph above. If there is agreement on any of the Preliminary Issues, then this needs to be teased out in advance of the Second Hearing. Likewise, the extent of any dispute."

31. I was not aware, when I had made the order, that the Claimants had, following the issue of the Preliminary Issue Application, subsequently sought to have issues relating to the Counterclaim also resolved (see [19(v)] above).

32. As the order of 22 February 2022 was made of the Court's own initiative, it provided that any party could apply to vary/discharge by making an Application. On 28 February 2022, the Defendant issued an Application Notice seeking to set aside the directions that I had given for trial of the preliminary issues identified in [28(i)] and [28(ii)] above ("the Set-Aside Application"). Fundamentally, the Defendant contended that, even if his Mode of Trial Application were refused, the case was not suitable for the trial of the identified preliminary issues on the grounds of (i) complexity; (ii) inter-related issues; (iii) irrelevant and non-dispositive issues; (iv) fairness; (v) cost; and (vi) delay.

33. On 2 March 2022, I directed that the Set-Aside Application would be heard at the First Hearing with the Mode of Trial Application.

34. The Claimants, for their part, have not filed any evidence in response to Mr Tweed's witness statement in support of the Defendant's Mode of Trial Application.

F: Jury trial in civil claims: the law

35. Immediately prior to the coming into force of the Defamation Act 2013, s.69 Senior Courts Act 1981 provided (so far as material) as follows:

> "**Trial by jury**
>
> (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—
>
> (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...
>
> (2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.
>
> (3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried 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…"

36. However, from 1 January 2014, s.11(1) Defamation Act 2013 removed the words in square brackets from s.69(1)(b). Further amendments were made to s.69 by the Justice and Security Act 2013 in relation to hearings involving closed material, but these are not relevant for the purposes of the present application.

37. The Explanatory Notes to the Defamation Act 2013 stated, of the changes implemented by s.11:

> "71. This section removes the presumption in favour of jury trial in defamation cases.
>
> 72. Currently section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 provide for a right to trial with jury in certain civil proceedings (namely malicious prosecution, false imprisonment, fraud, libel and slander) on the application of any party, 'unless the court considers that the trial requires any prolonged examination of documents which cannot conveniently be made with a jury'.
>
> 73. Subsection (1) and subsection (2) respectively amend the 1981 and 1984 Acts to remove libel and slander from the list of proceedings where a right to jury trial exists. The result will be that defamation cases will be tried without a jury unless a court orders otherwise."

38. The so-called 'right' to jury trial was always subject to some restrictions. Section 69, subsections (1) and (2), required an application for jury trial had to be made and CPR 26.11(1) required that application to be made within 28 days of service of the defence. Those requirements proved to be regular a trap for the unwary, and saw several litigants lose their 'right' to jury trial. A party who had failed to make the necessary application under CPR 26.11 found him/herself having to apply under s.69(3) for a jury trial to be ordered as a matter of discretion (see ***Cook -v- Telegraph Media Group Ltd*** **[2011] EWHC 763 (QB)** [75]-[83] *per* Tugendhat J; and ***Thornton -v- Telegraph Media Group Ltd*** **[2011] EMLR 29** [15] *per* Carnwath LJ). Few succeeded.

39. Even before the changes to mode of trial implemented by the Defamation Act 2013, in cases where a discretion had to be exercised as to mode of trial, the emphasis had distinctly moved against jury trial, see e.g. ***Aitken -v- Preston*** **[1997] EMLR 415**; ***Jameel (Mohammed) -v- Wall Street Journal Europe Sprl*** **[2005] QB 904**; ***Armstrong -v- Times Newspapers Ltd*** **[2006] 1 WLR 2462**; ***Fiddes -v- Channel Four Television Corpn*** **[2010] 1 WLR 2245**; and ***Joseph -v- Spiller*** **[2011] 1 AC 852**; ***Cook -v- Telegraph Media Group Ltd*** **[2011] EWHC 763 (QB)**; ***Bento -v- Chief Constable of Bedfordshire Police*** **[2012] EWCA Civ 956**; ***Lewis -v- Commissioner of Police for the Metropolis*** **[2012] EWHC 1391 (QB)**.

40. By way of illustration from these authorities, the key reasons cited for this were:

    i) the case management benefits of trial by judge alone, issues of proportionality and corresponding savings in resources and costs:

    > "… The discretion [to order jury trial under s.69(3)] is now very rarely exercised, reflecting contemporary practice. Contemporary practice has an eye, among other things, to proportionality; the greater predictability of the decision of a professional judge; and the fact that a judge gives reasons…

… The overriding objective in rule 1.1 and rule 3.1(2)(m) are there for general case management purposes…" ***Armstrong -v- Times Newspapers Ltd*** [15] and [19] *per* May LJ;

and, from ***Cook -v- Telegraph Media Group Ltd*** *per* Tugendhat J

[112] There are very great case management advantages in trial by judge alone. Issues can be tried in a convenient order, for example in particular, the judge can rule on meaning in advance of a trial, and before much of the costs associated with a full trial have been incurred. If the judge rules on meaning shortly after the service of a defence, then there may be very large savings in costs indeed. If, as is commonly the case, and is the case here, the defence of justification or honest comment is to a meaning which is less serious than the meaning contended for by the Claimant, then if the judge upholds the Claimant's meaning, there may then be seen to be no defence at all. Correspondingly, if the judge were to uphold the Telegraph's meaning, then it may be argued that the Claimant has no real prospect of defeating the defence.

[113] A trial by judge alone is in general, and is in this case, much more likely to satisfy the overriding objective, in every element of it listed in the CPR.

[114] … Trials by jury in libel cases now commonly involve the arguing of the same point at least twice and sometimes several times over. It is often not one trial by a judge with a jury, but one trial by a judge followed by another trial by a jury. Each party commonly seeks a ruling from the judge on as many issues as possible to the effect that the opponent's case on that issue should be withdrawn from the jury. That is what is happening in this application that is now before me. If that application is unsuccessful (as this application has been in part), and there is a trial by jury, very similar arguments are redeployed before the jury. All too often there is a third or subsequent set to this match, when the same point is argued before the Court of Appeal, or even the Supreme Court as happened in Spiller. That is a real risk in the present case, where Mr Price wishes to argue the applicability of Reynolds to comments. There is not uncommonly a further set in the form of a retrial. There have been a worrying number of retrials in recent years where juries have been unable to agree. That is not a risk where trial is by judge alone.

[115] This multiplicity of opportunities to argue the same point is one of the major reasons why the costs of libel actions have become so disproportionate as to risk condemnation as an interference with freedom of expression and the right of access to the court (see ***MGN -v- UK*** **[2008] ECHR 1255**). In these circumstances the effect of the Human Rights Act 1998 is to require judges and Parliament to continue to develop the law to make it Convention compliant. Trial with a jury makes such development more difficult.

ii) the benefits to the parties and the public generally of a reasoned judgment;

> "Given the overall complexity of this case resulting from the proliferation of issues and sub-issues, the amount of detail, the body of documentation and the number of witnesses, the interests of justice are, in my view, best served by a painstaking, dispassionate, impartial, orderly approach to deciding where the truth lies. Furthermore it seems to me important in the public interest and in the interest of each of the parties that the case should culminate in findings, for or against the plaintiff, on each of the main issues in controversy. A general verdict of a jury could well leave room for doubt and continuing debate whether, on important and hotly contested issues, the plaintiff or the defendants had been vindicated. A reasoned judgment, giving the Judge's conclusions and his detailed reasons for reaching them, would by contrast settle, one would hope once and for all, whether or not the plaintiff had misconducted himself in each and every one of the ways charged": ***Aitken -v- Preston***, 427, *per* Lord Bingham CJ

and

> "… the significant national interest in this case makes it all the more important that there should be a reasoned judgment. The complexity and subject matter of the case give rise to a significant risk that a jury would be unable to reach a verdict, or that any verdict that they might reach could be successfully challenged on account of the novelty and complexity of the directions that the trial judge might be required to give. If a judge trying a case alone misdirects himself or herself on the law, then, on appeal, the Court of Appeal is generally able to substitute the verdict which is appropriate in the light of the law as the judge ought to have directed it to be. But in the case of trial with a jury, if the jury are unable to reach a verdict, or if the Court of Appeal hold that the judge has misdirected the jury, the Court of Appeal is more likely to have to order a new trial": ***Lewis -v- Commissioner of Police for the Metropolis*** [29(iii)] *per* Tugendhat J.

iii) the increasing complexity of defamation litigation, particularly the increasing importance of the public interest *Reynolds* defence, and the challenges this presented to trial by jury:

> "… The division between the role of the judge and that of the jury when *Reynolds* privilege is in issue is not an easy one; indeed it is open to question whether jury trial is desirable at all in such a case…": ***Jameel -v- Wall Street Journal*** [70] per Lord Phillips MR

> "… has not the time come to recognise that defamation is no longer a field in which trial by jury is desirable? The issues are often complex and jury trial simply invites expensive interlocutory battles, such as the one before this court, which attempt to pre-empt issues from going before the jury": ***Joseph -v- Spiller*** [116] *per* Lord Phillips;

and

> "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** and **627**. 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 ***Tse Wai Chun Paul -v- Albert Cheng* [2001] EMLR 777** (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": ***Cook -v- Telegraph Media Group Ltd*** [111] *per* Tugendhat J.

41. There has been only one case, since the abolition of the presumption of jury trial for defamation claims from 1 January 2014, in which the Court has had to consider an application, under s.69(3), for a jury trial in a defamation claim. In ***Yeo -v- Times Newspapers Ltd* [2015] 1 WLR 971**, the defendant publisher sought a direction for jury trial in a defamation claim brought by the claimant, an MP, complaining of an allegation that he had offered himself as willing to act as a paid parliamentary advocate, in breach of the House of Commons rules.

42. In his judgment, Warby J reviewed the pre-Defamation Act 2013 law: [17]-[40]. He noted the constitutional importance that had historically been attached to jury trial in defamation, as particularly explained by Lord Denning MR in ***Rothermere -v- Times Newspapers Limited* [1973] 1 WLR 448, 452-453**. In the same case, Lawton LJ had observed, at p.457C, that: "*Where the public is likely to be affected by the result of an action for defamation it may be advisable to bring the public into the administration of justice by ordering trial by jury, even though the trial may be long, the issues complex and the documentary evidence massive and formidable*".

43. The Judge noted that the exercise of discretion to order jury trial under s.69(3) was next considered by the Court of Appeal in ***Aitken -v- Preston*** in which Lord Bingham noted "*four factors which have been identified in the earlier cases, which have some general application*" (at pp.421-422):

"(1) The emphasis now is against trial by juries, and this should be taken into account by the court when exercising its discretion (***Goldsmith -v- Pressdram* [1988] 1 WLR 64** at page 68 *per* Lawton LJ with whom Slade LJ expressly agreed). This conclusion is based on section 69(3), which was a new section appearing for the first time in the 1981 Act to replace section 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision in force at the date when ***Rothermere -v- Times Newspapers*** was decided.

(2) An important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest (***Rothermere -v- Times***).

(3) The fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury (***Goldsmith -v- Pressdram*** at page 71H *per* Lawton LJ).

(4) The advantage of a reasoned judgment is a factor properly to be taken into account (***Beta Construction -v- Channel Four Television Corp* [1990] 1 WLR 1042**)."

44. Warby J also considered Tugendhat J's decision in ***Cook -v- Telegraph Media Group Ltd*** and noted:

[37] One main conclusion of a closely-reasoned analysis was that the crucial distinction underlying Lord Denning MR's reason for favouring jury trial "*when the defendant has ventured to criticise the government of the day, or those who hold authority or power in the state*" was that the state was a party. The cases cited by Lord Denning MR, at pp 452–453, were criminal cases and Fox's Libel Act of 1792 (32 Geo 3, c 60) had served to put right an anomaly whereby juries in criminal libel cases were deprived of the right they enjoyed in civil cases to decide the meaning of the words complained of. Thus, concluded Tugendhat J, at [100]:

> "the crucial distinction is … between cases in which the state is opposed to the individual on the one hand and, on the other hand, cases in which individuals or other non-state parties are opposed to one another."

See also [103].

[38] A second main conclusion was that the perceived importance of jury trial in cases involving "*prominent figures in public life*" (see ***Aitken -v- Preston*** principle (2)) derived from a concern identified by Blackstone in the passage cited by Lord Denning MR in ***Rothermere*** 453F: the risk that a judge, "*selected by the prince or such as enjoy the highest office in the state*" may have an "*involuntary bias towards those of their own rank and dignity*": see ***Cook*** [101]–[102]. Tugendhat J went on to provide reasons why this was unlikely to be a significant factor in many cases in modern conditions. Those reasons included the independent appointment procedures for judges, appeal rights and other guarantees of judicial impartiality.

[39] In ***Cook*** the claimant was a former MP and the case concerned the expenses scandal. The judge held that neither party was the state or a public authority, there was nothing in the case which could lead to an appearance of bias, however involuntary, on the part of a judge sitting alone, and that all the relevant factors tended to favour trial by judge alone.

[40] The discretion to order jury trial under section 6(1) of the 1933 Act and section 69(3) of the 1981 Act also applied, and still applies, to causes of action other than libel and slander. However, to the best of my knowledge an order for jury trial of a claim in any cause of action other than those listed in section 69(1) has been unheard of for many decades. Two cases where the issue arose are referred to in ***Lewis -v- Commissioner of Police of the Metropolis* [2012] EWHC 1391 (QB)**. In ***H -v- Ministry of Defence* [1991] QB 103**, the Court of Appeal held that it was not appropriate to order jury trial of a personal injury claim by a serviceman in which the defendant was accused of negligence. In ***Racz -v- Home Office* [1994] 2 AC 45** the House of Lords upheld decisions of the judge and Court of Appeal not to order trial by jury of claims, including claims for aggravated and exemplary damages,

for assault, battery and misfeasance in respect of injuries allegedly suffered by the claimant at the hands of prison officers.

45. The defendant in ***Yeo*** had argued that, by retaining the broad discretion in s.69(3), Parliament had intended that the considerations identified in cases like ***Rothermere*** should continue to have relevance. Warby J rejected that argument:

> [45] … the amendment to section 69(1) must be treated as affecting the considerations to be taken into account by the court to this important extent: a principle identified in the pre-amendment authorities cannot hold sway after the amendment to the extent that it rests on the existence of a constitutional right to trial by jury, or a presumption in favour of such a mode of trial. And that is the case in relation to a substantial part of the reasoning in ***Rothermere*** on which in turn ***Aitken -v- Preston*** principle (2) is based…

And went on to explain:

> [47] Many legal actions involve prominent figures or issues of considerable public and national interest or both and many of these are brought in the Queen's Bench Division so that the discretion under s.69(3) of the 1981 Act is available in respect of them. As noted above it appears that an order for jury trial is unknown in such cases. Parliament has now chosen to accord defamation cases the same status, so far as jury trial is concerned, as these other kinds of claim. I conclude that the statutory amendment means that much of the reasoning in ***Rothermere*** has lost its force, as has that part of Aitken principle that derives from the passages just mentioned. Parliament no longer regards jury trial as a right of "the highest importance" in defamation cases. It is no longer a right at all.

> [48] The government itself cannot now sue in defamation: ***Derbyshire CC -v- Times Newspapers Ltd* [1993] AC 354**. Even if the claimant is a person who "*holds power or authority in the state*" that now gives neither the claimant nor the defendant any special claim on jury trial. The fact that the case involves "*questions of great national interest*" no longer constitutes an "*important consideration*" in favour of a jury. All these factors, if present, will be relevant but will now be of no greater intrinsic weight in a defamation case than they would be in any other class of case that enjoys no right to trial by jury. As to the importance of jury trial in a case which concerns "*a prominent figure in national life*", Tugendhat J's analysis of ***Rothermere*** identifies the true criterion. This is whether, despite all the modern safeguards of judicial impartiality, there are in the particular case such grounds for concern that judge might show involuntary bias towards one or other of the parties on grounds of their status or rank that "*a judge might not appear to be as impartial as a jury*": ***Cook*** [108]. Such cases will be rare.

46. In ***Yeo***, the defendant had submitted that the '*enhanced impartiality*' of a jury, compared to a judge, was a factor of significance in a case where the claimant was a Member of Parliament. The Judge concluded:

> [57] Mr Millar QC further submits that judges like Select Committee Chairs are powerful figures in public life such that although there is no suggestion of bias on that account "*sometimes justice has to be seen to be done in a particular way*". He submits that "*if the decision takers are members of the*

public the decision in the case, whichever way it goes, will be free of any suspicion of bias of this sort." This is a version of the point that appealed to Lord Denning [in ***Rothermere***] in respect of Mr Levin and it survives the statutory amendment with undiminished force. As I have indicated, however, it will be a rare case in which this consideration has real weight. Mr Yeo has a prominent position but it does not afford any grounds for giving this factor any substantial weight here. As Lord Bingham pointed out in ***Aitken*** at 427, where issues are controversial there are risks of adverse perception going both ways:

> "Those convinced that the charges made against the plaintiff were true might be tempted to criticise a judicial decision in the plaintiff's favour as a whitewash. Similarly, those convinced that the charges against the plaintiff were false might criticise the jury's verdict as a lottery or the product of incomprehension (a not unfamiliar complaint when a jury returns a surprising or unpopular verdict)."

47. As to the value to be attached to a reasoned judgment over a general verdict of a jury, Warby J noted the conclusions of Lord Bingham CJ in ***Aitken*** (quoted in [40(ii)] above) and held:

> [60] These observations related to the case at hand. They may not apply to all defamation cases. It is possible to envisage a simple libel action concerning a single factual allegation in which meaning is not in dispute and the sole issue is truth. In such a case the meaning of a general jury verdict for or against the claimant would, when considered in conjunction with the judge's directions, be clear enough. Such actions are rare in practice, however. In a case involving disputes as to meaning and alternative defences of justification and fair comment a general jury verdict would be open to a variety of interpretations. A general verdict based on a conclusion as to meaning or a finding of fair comment could be misinterpreted as one based on a finding of truth, or vice versa.
>
> [61] This is unsatisfactory in all cases and from all reasonable perspectives but the greater the public interest in the subject-matter of a particular dispute the more unsatisfactory this will be from the perspective of the public. Where, as in ***Aitken*** and the present case, the subject-matter is political it is especially desirable that the court's judgment explains what conclusions it has reached and why. In ***Lewis*** Tugendhat J held at [29(iii)] that the "*significant national interest*" in that case, which concerned the phone hacking scandal, made it "*all the more important that there should be a reasoned judgment*". In my view the same is true in this case.
>
> [62] Mr Millar QC submits that this case is simple enough for the court's reasoning to be apparent from a combination of the summing up (which might include a written "route to verdict") and the jury's answers to questions put to them for determination. Such special verdicts have been sought and obtained from time to time in defamation cases. They are capable of eliciting clear reasons in more straightforward cases and on occasion in more complex ones. However, not all the questions that arise for determination in a multi-issue libel action admit of a yes or no answer and juries are not generally expected to provide narrative verdicts. In this case a jury would be entitled to conclude that the Front Page and Inside Articles

bear a defamatory factual meaning representing part but not all of the meaning complained of by Mr Yeo, or a meaning similar to but less serious than that, or that they convey defamatory comment to part but not all of the effect defended by TNL. A jury could find these articles included a mixture of defamatory factual meanings and defamatory comment.

[63] In these circumstances I cannot envisage a set of questions that could be asked of a jury in this case, which could be confidently predicted to yield a clear statement of the reasons for their verdicts. If I am wrong and such a set of questions could be devised it would doubtless be a complex one, of the kind which practitioners (echoing Lord Denning MR in ***Rothermere*** at 454D) have tended to call an 'examination paper'. It would need to be accompanied by detailed directions, written or oral or both, on the approach to be taken to each question. It is generally undesirable to set a jury such a task, with the accompanying risk of confusion and error; and the outcome would still fall well short of providing the explanatory detail afforded by a reasoned judgment.

[64] If the content of the relevant legal rules is complex or debatable this can also favour the reasoned judgment that comes with a trial without a jury, as explained by Tugendhat J in ***Cook*** at [111] [the passage quoted in [40(iii)] above].

[65] These points have resonance in the present case given the human rights context referred to above and the need for care in assessing whether statements are fact or comment in the light of the Strasbourg jurisprudence. These suggest that a reasoned judgment is preferable to a jury verdict or verdicts based on directions which, if held wrong on appeal, could be corrected only by a re-trial. The fact that this case involves the new statutory defences under the 2013 Act is a further factor in favour of a reasoned judgment.

48. The Judge explained why the principle of proportionality usually favoured trial by judge alone ([67]-[68], citing [114]-[115] from ***Cook*** – see [40(i)] above), before turning to the case management benefits of trial without a jury. Warby J referred again to Tugendhat J's observations from ***Cook*** (see [40(i)] above) and noted that, since the abolition of trial by jury, defamation actions had now benefited from more innovative case management:

[70] Early rulings on meaning are likely in general to give effect to the overriding objective in various ways including in particular by "*saving expense*" (CPR 1.1(2)(b)) and "*ensuring that [the case] is dealt with expeditiously*" (CPR 1.1(2)(d)). Early determination of meaning, including whether it is factual or comment, is a way in which the court is likely to meet the requirements of CPR 1.1(4) that the court should further the overriding objective by "identifying the issues at an early stage" (CPR 1.4(b)) and "deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others" (CPR 1.4(c)).

[71] Where there is to be a trial by jury the court is largely if not completely disabled from exercising its powers in these ways. The parties are entitled to complain of and defend any meaning which a reasonable jury properly directed could find the words complained of to bear. By definition, this may

not be the true meaning of the words. One consequence is that a claimant may pursue up to verdict a claim in respect of a defamatory imputation which is not in fact borne by the words complained of. A defendant may expend considerable resources unnecessarily and wastefully, seeking to prove the truth of such an imputation. Equally, a defendant may advance a defence of justification in respect of a meaning less grave than the true meaning of those words, the truth of which if proved could therefore not afford a defence. Further problems arise if the case involves a defence of fair comment and a dispute over whether the words are fact or comment or both. Where trial is to be by jury these issues will, if arguable, remain open until verdict. A libel trial with a jury may thus be largely concerned with irrelevant evidence and argument, and evidence which may also be wholly or at least partly irrelevant or excessive for the purposes of assessing damages. These drawbacks of an order for trial by jury risk involving a disproportionate interference with Convention rights under articles 8 and 10.

[72] The summary of the issues in the present case set out above shows that resolution of the issues relating to meaning, fact and comment could be critical to the outcome of the action as a whole, or at least affect in important ways the shape of the case and the issues that need to be tried. If, for instance, it was held that the words complained of do not consist of or contain any defamatory comment, opinion or value judgment but convey only Chase Level 1 factual defamatory meanings as alleged by Mr Yeo it would seem that the only remaining issue as to liability would be the validity of the Reynolds defences. It would seem unnecessary to try any issue of justification/truth, fair comment/honest opinion.

[73] If on the other hand TNL are right to submit, as they do, that the Front Page and Inside Articles conveyed no defamatory factual meaning at all but only comment, opinion or value judgment then the need to justify or prove the truth of those articles would fall away. As the statements of case stand, the dispute in relation to those articles would then be likely to focus on whether there was objectively a sufficient factual foundation for the comment, opinion or value judgment; that is to say, whether an honest person could have formed that opinion. It might in that event be argued that Mr Yeo has no answer to the comment/opinion defences in respect of those articles. There are various permutations in between these extremes. A publication may of course include both defamatory factual meanings and defamatory comment: ***British Chiropractic Association -v- Singh*** **[2011] 1 WLR 133** [16] *per* Lord Judge CJ.

[74] A further advantage of trying issues of meaning as preliminary issues is that the exercise can be carried out in isolation from other issues, without the distraction that could flow from awareness of evidence relevant only to those other issues. This is a point made by Gray J in ***Charman v Orion Group Ltd*** **[2005] EWHC 2187 (QB)** [2], when he observed that trying meaning as a preliminary issue means that "*the argument on meaning will be determined as it should be, without the mind of the tribunal being clouded by evidence bearing on the issue of justification, which is of course irrelevant so far as the meaning of the words is concerned.*" In the present case the bundle for the hearing before me includes two items which would probably be before a jury at trial but are irrelevant to meaning: a transcript of the edited sequence of events from the covert filming and a copy of the Standards Report.

> These could be relevant to one or more of the issues but not to the meaning of the published articles. Bearing that in mind I have avoided reading either of these documents.
>
> [75] The case management arguments in favour of non-jury trial have been reinforced by the amendment made to the definition of the overriding objective in 2013 when the words "*and at proportionate cost*" were added.

49. Finally, the Judge considered the complexity of the issues that would be required to be determined by any jury:

> [76] I have so far focused on the issues of meaning, justification and fair comment, leaving to one side the public interest defences under *Reynolds* and s.4 of the 2013 Act. These defences raise different considerations. The desirability of a reasoned decision poses no difficulties here. Such a defence will always be the subject of a reasoned decision by a judge. If there is a jury it may be required to return special verdicts on specific issues of fact but it will not return a verdict on whether the defence is made out. *Reynolds* defences can however pose case management challenges if there is a jury.
>
> [77] The distinction between the roles of judge and jury in these cases is not always an easy one, and in ***Jameel (Mohammed) -v- Wall Street Journal*** **[2005] QB 904** [70] the Court of Appeal suggested that this casts doubt on whether jury trial is appropriate in *Reynolds* cases. Here, the fact that the *Reynolds* defence is run in tandem with defences of justification and fair comment seems to me to risk undesirable complexities.
>
> [78] For example, whilst s 4(5) of the 2013 Act makes clear that the defence under that section "*may be relied on irrespective of whether the statement complained of is a statement of fact or a statement of opinion*" the question of whether *Reynolds* is available as a defence to comment seems to remain open: ***Singh*** [31]; ***Cook*** [69]. The interplay between the two defences at common law and under the Act would need attention and seems rife with the potential for complications. In addition, if there is an order for jury trial the court's freedom as to the order in which issues are tried and their timing would be limited, for practical reasons, for as long as any factual issue arose or might arise that was relevant to the *Reynolds* s.4 defences.

50. For all those reasons, Warby J exercised his discretion, under s.69(3) against directing trial by jury:

> [79] … The factors supporting the statutory presumption in favour of an order for trial by judge alone are powerful and are not outweighed by those relied on as supporting jury trial, which are unpersuasive. I would have reached the same conclusion if approaching the case on the basis of the analysis in ***Cook***. Neither party is a public authority. Mr Yeo, whilst holding an influential position, is not in government and exercises no state power. I have already held that there is no risk of "*involuntary bias towards those of their own rank and dignity*" such as referred to by Blackstone in the passage relied on by Lord Denning. An order for trial without a jury is more proportionate, there are major potential case management advantages, and the significance

of the issues raised means in any event that a reasoned judgment is important.

[80] Mr Millar QC points out that Parliament envisaged that the discretion to order jury trial might be exercised in some cases and suggests that if it is not exercised in this case it is difficult to see when it might be exercised. One answer is that there may be cases in which it would be desirable to introduce a jury to avoid any perception of "*involuntary bias*". This is not the time to attempt any definition of when that might be. An instance could however be a libel claim brought by a judge, of which there have been examples in recent history though none that have reached trial. There could be other cases not involving "*rank or dignity*" but subject matter.

51. Since ***Yeo*** was decided, in 2014, the practice of the Media & Communications List has been able to harness the benefits available from greater opportunities for early and active case management of defamation claims that the abolition of jury trial has provided. Preliminary issues as to natural and ordinary meaning, whether a publication is defamatory of the claimant at common law, and whether the publication is or contains an allegation of fact or expression of opinion are now routinely determined, in suitable cases, at hearings lasting usually only a matter of hours (or even on the basis of written submissions) often before the Defence is filed: see ***Bokova -v- Associated Newspapers Ltd*** **[2019] QB 861** [3]-[10]; ***Morgan -v- Associated Newspapers Ltd*** **[2018] EWHC 1850 (QB)** [8]-[10]; ***Greenstein -v- Campaign Against Antisemitism*** **[2019] EWHC 281 (QB)** [10]; and ***Bindel -v- PinkNews Media Group Ltd*** **[2021] 1 WLR 5497** [27]-[29]. Defamation litigation, so often in the past criticised for its cumbersome procedures and expense, can now be conducted expeditiously and at proportionate cost, with important issues in a claim capable of resolution early in the proceedings.

G: The parties' arguments

(1) Defendant's submissions

52. The Defendant argues that this is a one of the rare cases where the Court should direct trial by jury because of the appearance of "*involuntary bias*" on the part of the judiciary. Ms Marzec made clear during her submissions that the contention is not that there is the appearance of bias in respect of any individual judge, still less actual bias, but that the issues that call for determination in the proceedings – principally the issues connected with "racism" – raise a real prospect of the appearance of "involuntary bias" on the part of any judge who was called upon to try the case. The Defendant submits that this is a case where the 'enhanced impartiality' of a jury justifies an order for trial by judge and jury.

53. This appearance of "involuntary bias" is said to arise because the judiciary – as a whole – have been given guidance, in the ETBB, as to the definition of racism. The ETBB is published by the Judicial College, the chair of which is, currently, Eleanor King LJ, a senior member of the judiciary and member of the Court of Appeal and who sits, with the most senior judges in England & Wales, on the Judicial Executive Board. The Judicial College – as a result of delegated responsibility from the Lord Chief Justice – is responsible for maintaining appropriate arrangements for the training of the judiciary, imposed by s.7(2)(b) Constitutional Reform Act 2005.

54. The 'Foreword' to the 2021 edition of the ETBB, written by the chair of the Judicial College, begins:

> "The Equal Treatment Bench Book has, particularly since its last major revision, published in February 2018, become a key work of reference. It is used, daily, by the Judiciary of England & Wales. It is referred to in their training courses and commended by the appellate courts. It is admired and envied by judiciaries across the world.
>
> It is also a living document, constantly updated and amended to reflect changing circumstances and to incorporate the most up to date knowledge."

55. The Defendant submits that the Acknowledgments in the ETBB make clear that many, if not most, contributors are themselves serving members of the judiciary, including at least one sitting Judge of the Court of Appeal, and several Judges of the High Court.

56. Ms Marzec argues that a judge who has been trained in accordance with, and presumably seeks to apply, the recommendations of the ETBB "*might well be thought to feel some reluctance in holding that a party's case on the meaning of "racism" which entirely accords with the ETBB is wholly wrong*". It is submitted that this is exactly what the Defendant asks the Court to find, in his definition of racism (set out in [16] above). In her skeleton argument, Ms Marzec contended:

> "[The Defendant's] case is that racism is <u>not, as the Judicial College asserts,</u> a term that is defined more by effects/outcomes than by motives. The ETBB definition does not reflect the way ordinary people use the word. The instruction in the ETBB, running directly contrary to [the Defendant's] case, gives rise to strong apparent bias and involuntary bias against [the Defendant] on a key issue in the Counterclaims" (emphasis in the original).

57. In consequence, the Defendant submits that the perceived advantages of a reasoned judgment could be "*a positive disadvantage*". Ms Marzec argues that there is little risk of a jury verdict in this case being impugned, but there are several very serious problems with a judge being required to give a reasoned judgment choosing the right definition of "racism", whether that advanced by the Defendant or the Claimants (and by extension, the Judicial College). The Defendant argues that whatever definition is chosen, there would be, "*inevitable excoriation of not only the judgment and the judge, but the judiciary as an institution, by those who are supportive of the perspective of the losing side threatens the perception of political and ideological impartiality that the judiciary rightly works so hard to preserve*."

58. Further, it is contended, a reasoned judgment in this case would be "*an open invitation to appeal*" (with the attendant increase in cost). Ms Marzec cites the decisions of ***Forstater -v- CGD Europe*** **[2022] ICR 1** and ***R (Miller) -v- College of Policing*** **[2021] EWCA 1926** as support for the submission that "*culture war cases are magnets for appeals*", whereas a determination on the facts of this case by a jury would reduce the prospect of the unsuccessful party being able to bring an appeal.

59. The Defendant advances a further ground in support of a direction for trial by jury. He contends that, even if his Counterclaim succeeds at trial, "*the quality and nature of the vindication he seeks could be undermined by the lack of diversity of the judiciary itself*". He relies upon publicly available data as demonstrating that the number of High

Court Judges who do not identify as 'white' "*will not be more than a handful at most*". In the skeleton argument filed on his behalf, the Defendant explained:

> "The vindication that [the Defendant] can obtain from a jury – selected from London, and so very likely to properly reflect the racial diversity of the capital – will be worth all the more, not least for being incapable of being undermined on the lazy basis that a white judge sided with a white man who denied being racist. A single person, especially one statistically highly likely to be white, does not enjoy the 'enhanced impartiality' of a jury when dealing with a determination of whether something constitutes 'racism'".

60. Ms Marzec recognises that, since the Woolf reforms which led to the Civil Procedure Rules, there has been a greater emphasis on case management, and the need to dispose of cases in a way that is cost-effective and efficient, and that this has been held to weigh heavily against jury trial. She also accepts that it could not be contended that a jury should be empanelled in every defamation case involving publications on social media simply because of it is argued that jury members were likely to be more experienced social media users than judges. Nevertheless, Ms Marzec contends that a jury would bring distinct benefits. Twelve, randomly selected, jurors would bring their collected life experience to bear on the determination of the issues related to "racism" that were required to be resolved in the case. They would be more likely to reach the "*social consensus*" of the notional right-thinking ordinary member of society by whose judgment the Court approaches the objective assessment of several important issues in defamation claims.

61. Finally, the Defendant submits that the Court should not attach undue importance to the fact that, if jury trial is ordered, the Court will be unable to resolve, by trial of preliminary issue, the conventional issues that are now routinely resolved in this way early in defamation claims. Ms Marzec submits that this is a "*paradigm case*" in which the Court would conclude that it was inappropriate to order a preliminary issue trial (principally for the reasons advanced in support of the Set-Aside Application – see [32] above).

(2) The Claimants' submissions

62. Ms Rogers QC for the Claimants submits that Judges, particularly those in the Media & Communications List, are highly experienced in considering cases touching upon controversial issues. She gives as examples: ***Greenstein -v- Campaign Against Anti-Semitism*** **[2020] EWHC 2951** (antisemitism); ***Riley -v- Murray*** **[2022] EMLR 8** (publication in the course of a campaign against antisemitism in the Labour Party); ***R (Miller) -v- The College of Policing*** **[2020] 4 All ER 31** (transgender); ***Hijazi -v- Yaxley-Lennon*** **[2021] EWHC 2008** (whether incident referred to in publication by the defendant was racially motivated); ***Aven -v- Orbis Business Intelligence Ltd*** **[2020] EWHC 1812** and ***Gubarev -v- Orbis Business Intelligence Ltd*** **[2021] EMLR 5** (alleged Russian interference in elections in the USA); ***Depp -v- News Group Newspapers*** **[2020] EWHC 2911** (nature of physical and verbal abuse in a marital relationship). She argues that it is in the nature of defamation claims that they may engage hotly – and often bitterly – contested contemporary issues, which can be (and are) fairly determined by judges. There is nothing in the nature of the issues in this case that renders it unsuitable for trial by a judge sitting alone.

63. Ms Rogers QC notes that, in the Defendant's skeleton argument for the hearing before Senior Master Fontaine on 28 October 2021, the claim was described as "*procedurally complex*". In her skeleton argument, Ms Rogers identified the issues that were likely to require resolution in the Claim and the Counterclaim as follows:

    i) in relation to all Tweets complained of:

        a) natural and ordinary meaning;

        b) whether defamatory at common law;

        c) whether fact or opinion;

        d) whether publication has caused, or is likely to cause, serious harm;

    ii) in relation to the Tweets the subject of the Claim, additionally

        a) whether they are protected by qualified privilege; and, if so,

        b) whether the defence is defeated by malice;

    iii) in relation to the Tweets the subject of the Counterclaim:

        a) whether the defence of honest opinion applies (if opinion); or

        b) truth (if fact).

    iv) in relation to any Tweet where liability is found, the appropriate remedies, including damages and any injunction.

64. A point fairly made by Ms Rogers QC is that the Claimants invited the Defendant to provide a draft 'route to verdict' to indicate the questions that a jury would be required to address to resolve these issues. None was forthcoming. Ms Rogers QC nevertheless submitted that any 'route to verdict' would have to cater for different possibilities (for example between truth and honest opinion) and would have to be accompanied by careful directions (likely now to be given also in writing) as to how they should approach the various issues they had do decide.

65. The Claimants attached significant weight to a reasoned judgment that would follow if the trial were conducted by judge alone. Ms Rogers submitted that the parties were entitled to know not only what the decision is, in respect of each claim, but also the reasons for it. On the Counterclaim, for example, if the Defendant were to lose his case, it would not be clear from a general jury verdict whether that was because the jury had found that the relevant Tweet was not defamatory of him at common law, that the Defendant had failed to show that the relevant Tweet had caused serious harm to reputation, that the relevant Tweet was an expression of opinion and protected by the honest opinion defence; or that the Tweet was a statement of fact, but had been proved to be substantially true. In relation to the Claim, although the Defendant has made clear that he does not allege that an allegation that the Claimants are paedophiles is true, Ms Rogers contends that there is a risk, absent a reasoned decision, that a jury verdict on the Claim in the Defendant's favour could be misunderstood or misinterpreted.

66. As to case management and proportionality, Ms Rogers contends that these overwhelmingly favour trial by Judge alone for the reasons that have been canvassed in the authorities, most recently in ***Yeo***.

H: Decision

67. It seems to me that I must approach the determination of the Defendant's application in two stages. If I were to be persuaded that the Defendant had demonstrated that there was a real prospect of the appearance of "involuntary bias" on the part of any judge who was called upon to try the issues in this case, then, if I was satisfied that the appearance of "involuntary bias" could be overcome by ordering trial by judge and jury, then I would so order. It does not seem to me that there can be any question of weighing the appearance of "involuntary bias" against other factors that would conventionally be considered under s.69(3). If, however, the Defendant has not satisfied me that there is a real risk of the appearance of "involuntary bias", then I would determine the application under s.69(3) by exercising my discretion having regard to the various factors that have been identified in the authorities.

Has the Defendant demonstrated that there is a real risk of involuntary bias if the case were determined by a Judge alone?

68. Neither party addressed me on the test to be applied on determining apparent bias. That may be because the test is so well-established that it did not need stating. I can take the relevant principles from ***Bubbles & Wine Limited -v- Lusha*** **[2018] EWCA Civ 468** *per* Leggatt LJ:

> [17] … [T]he test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see ***Porter -v- Magill*** **[2002] 2 AC 357** [102]-[103]. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see ***Flaherty -v- National Greyhound Racing Club Ltd*** **[2005] EWCA Civ 1117** [28]; ***Secretary of State for the Home Department -v- AF (No.2)*** **[2008] 1 WLR 2528** [53].
>
> [18] Further points distilled from the case law by Sir Terence Etherton in ***Resolution Chemicals Ltd -v- H Lundbeck A/S*** **[2014] 1 WLR 1943** [35], are the following:
>
> (1) The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: ***Lawal -v- Northern Spirit Ltd*** **[2003] ICR 856** [14] (Lord Steyn).
>
> (2) The facts and context are critical, with each case turning on "an intense focus on the essential facts of the case": ***Helow -v- Secretary of State for the Home Department*** **[2008] 1 WLR 2416** [2] (Lord Hope).
>
> (3) If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: ***Man O' War Station Ltd***

> ***-v- Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28** [11] (Lord Steyn).
>
> [19] In ***Helow -v- Secretary of State for the Home Department*** Lord Hope observed that the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the test ensures that there is this measure of detachment: [2]; and see also ***Almazeedi -v- Penner* [2018] UKPC 3** [20]. In ***Resolution Chemicals*** Sir Terence Etherton also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [40].

69. Those principles apply when it is contended that there would be an appearance of bias in respect of a particular judge hearing a case, but they must apply when the contention is that there would be an appearance of bias if *any* judge heard the case.

70. The Defendant has not satisfied me that a fair-minded and informed observer would conclude that there was a real possibility that a judge trying this case alone would suffer from "involuntary bias".

71. The fair-minded and informed observer must be taken to know that, faithful to his/her judicial oath, the Judge in this case would be required to apply the law to the determination of the issues in the case, without fear or favour, affection or ill-will. I accept that "racism" is a term upon which there is not a settled meaning and that what amounts to "racism" is a subject of controversy. But this is a defamation claim. The three Claimants used the word "racist" in their respective Tweets. Three issues (at least) that require resolution in the case are therefore (1) the natural and ordinary meaning of this term as it is used in the relevant Tweet; (2) whether the meaning found is defamatory at common law; and (3) whether each Tweet was or included an expression of opinion or a statement of fact. These three issues will be resolved by application of the well-established principles: ***Koutsogiannis -v- Random House Group Ltd* [2020] 4 WLR 25** [11]-[17] (and approved, together with a statement of test of the assessment of whether a statement is defamatory at common law, by the Court of Appeal in ***Millett -v- Corbyn* [2021] EMLR 19** [8]-[9]).

72. Of importance, for the present application, is the well-established principle that no evidence, beyond publication complained of, is admissible in determining these issues. In ***Stocker -v- Stocker* [2020] AC 593** upheld a decision of the Court of Appeal that it was not appropriate to have regard to dictionary definitions of words when deciding meaning of a publication. Lord Kerr explained [25]:

> "Therein lies the danger of the use of dictionary definitions to provide a guide to the meaning of an alleged defamatory statement. That meaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made."

73. Consequently, any Judge considering the issues I have identified in the preceding paragraph will not consider definitions given to "racism" whether provided in a dictionary or in the ETBB. A Judge in this case will determine the natural and ordinary meaning of the relevant Tweets solely by application of the principles I have identified to the relevant publications complained of. In particular, s/he will do so without regard

for the definition of "racism" in the ETBB. Whether ultimately a truth defence is advanced in answer to the Counterclaim is a matter that would depend on future developments in the case, but even if it were necessary for the Judge to determine whether the Claimants have proved substantially true that the Defendant is a "racist", s/he will do so on a dispassionate assessment of the evidence. Insofar as any Judge trying the case was already aware of the guidance given in the ETBB on this issue, then s/he would put this out of his/her mind. It is well-recognised, and would be understood by the fair-minded and informed observer, that Judges are able to exclude irrelevant material from consideration. In my judgment no fair-minded and informed observer could conclude that there was a real possibility that the Judge who ultimately tries this case would be involuntarily, but institutionally, biased because of the definition of "racism" used in the ETBB.

74. Perhaps more importantly, because the definition to be applied to "racism" in this case is a core issue, necessarily the Judge deciding this issue will have to give a reasoned judgment on this very point. That is a better safeguard of avoiding error than directing a jury trial. Ms Marzec appeared to argue that the difficulty of challenging a jury verdict on this issue was a virtue. I disagree. The reason that a jury verdict is difficult to appeal on such a point is not because, being a verdict of a jury, it is in some way unassailable. Rather, unless the jury has given a narrative verdict, it is very difficult to identify whether they have gone wrong, and if so, on what issue. If the judge has made an error in his/her approach to determination of the issues relating to "racism", then the Court of Appeal, and ultimately the Supreme Court, exist to put right that error. To do so, the appeal court's task is made immeasurably easier with a reasoned judgment. I reject the suggestion that a reasoned judgment is any 'invitation' to appeal. Permission to appeal is given on the basis that the grounds of appeal have a real prospect of success or that there is some other compelling reason to grant permission. Permission is not given on the basis that the decision relates to a "*culture war*".

75. It may well be that a Judge may be required, as part of the resolution of the issues in this case, to define "racism", whether as part of the determination of meaning of the relevant Tweets, or in the assessment of any truth defence. The definition applied may provoke criticism, even "*excoriation*" to use Ms Marzec's term. Public criticism of the decisions of the Court is an important dimension of freedom of expression in a liberal democracy. It must be – and is – accepted by every Judge as an occupational hazard; it is one which, when discharging his/her duty to "*do right to all manner of people*" each Judge, by his/her oath or affirmation, has sworn not to fear. Nor is such controversy a justification for abdicating responsibility for what may prove to be controversial decisions to juries, who may themselves not escape public criticism (see Lord Bingham's observations in ***Aitken*** – quoted by Warby J in ***Yeo*** at [57]).

76. I therefore reject the Defendant's contention that jury trial should be directed in order to avoid the appearance of "involuntary bias".

77. Turning to the broader issues of discretion under s.69(3), I have no hesitation in rejecting the application for trial by jury, largely for the same reasons as were carefully and compellingly explained by Warby J in ***Yeo***.

    i) I have already explained the importance of a reasoned judgment generally. In her submissions, Ms Rogers correctly identified the importance of such a judgment in this case (see [65] above).

ii) Proportionality, effective case management and furtherance of the overriding objective weigh very heavily against trial by jury. Jury trial effectively disables the court from performing any meaningful case management. Not only does that mean that a defamation action will cost more and take longer during its procedural and trial phases, it raises, as it always did, the spectre of the waste of enormous costs on the trial of issues that are ultimately found to be irrelevant. A return to such an inconvenient mode of trial would require the most compelling justification before the Court would exercise the discretion under s.69(3) to order jury trial. In this case, for example, if the Court were to direct trial, as a preliminary issue, whether the Claimants' Tweets contained or were an allegation of fact or expression of opinion, that determination would ensure that time, costs and resources were not expended on a trial of a substantive defence that was irrelevant.

iii) The substantive law of defamation has become more complicated since jury trial was effectively abolished by the 2013 Act. The former *Reynolds* defence has been abolished and a new public interest defence put on a statutory footing in s.4 Defamation Act 2013. The need to prove serious harm to reputation has been added by s.1. I considered at the hearing what would be required in terms of jury directions in light of the issues in both the Claim and Counterclaim as they appear now. Although the Defendant had refused the invitation to put forward a draft 'route to verdict', I am satisfied that such a document – and the directions of law that would have to accompany of them – would be complex and challenging.

iv) The only factors raised by the Defendant in favour of jury trial are what is said to be the "*enhanced impartiality*" of jury trial over judge alone, in the particular circumstances of the case and particularly in light of the issues surrounding "racism", and that the Defendant believes that the quality and nature of his vindication (were he to achieve that) would be undermined if it came in a judgment from a High Court Judge. In respect of the first point, I am simply not persuaded that the value of this – somewhat nebulous – factor makes up in any way for the substantial and obvious disadvantages of jury trial. Equally, the Court cannot take important decisions of case management in an effort to avoid some people thinking less of any vindication of the Claimant because they believe that it has come from a "*white judge [who] sided with a white man who denied being a racist*".

78. If the decision were therefore purely an exercise of discretion under s.69(3), I would refuse to direct trial by jury. As recognised in ***Yeo***, since the removal of the statutory presumption in s.69(1), jury trials in defamation claims are now as likely to be tried by a jury as a personal injury claim or a contractual dispute.

79. As indicated at the hearing, at the hearing on 26 May 2022, the Court will decide the consequential orders to be made following this judgment and will give directions for the determination of the Preliminary Issue Application.