SUPREME COURT OF QUEENSLAND

CITATION:	*Kencian & Anor v Watney* [2015] QCA 212
PARTIES:	**JANET KENCIAN** (first appellant) **ANTHONY WOOLEY** (second appellant) **v** **CHRISTOPHER DAUNT WATNEY** (respondent)
FILE NO/S:	Appeal No 12293 of 2014 DC No 52 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Cairns – [2014] QDC 290
DELIVERED ON:	30 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2015
JUDGES:	Carmody CJ and Morrison JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The orders made on 17 December 2014 are set aside, and in lieu thereof it is ordered that pursuant to r 475(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) the trial proceed as trial by jury at the appellants' election.** **3. The respondent is to pay the appellants' costs, of and incidental to the appeal, and the application, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – DEFAMATION – ACTIONS FOR DEFAMATION – TRIAL – TRIAL BY JURY – FUNCTIONS OF JUDGE AND JURY – IN GENERAL – where the respondent was a school principal at a school attended by the children of the appellants – where the respondent claims that he was defamed by the appellants – where the respondent started proceedings claiming damages for defamation – where the respondent's Amended Statement of Claim included an election for trial by jury – where the appellants defended the claim – where the appellants signed a request for trial date and sent it to the respondent's solicitors to action – where the respondent's solicitors returned the form without ticking Item G,

the relevant box for the trial by jury election – where the appellants commenced correspondence regarding this – where the respondent's solicitors responded that they had been instructed to give up the right to have a trial by jury, by not paying the fees – where the appellants sought orders: compelling the respondent to adhere to his election for trial by jury by paying the fees; or permitting them to do so and allowing those fees to be recovered at the end of the trial; or ordering a trial by jury on the basis that they were entitled to elect for such a trial but had not done so – where the learned primary judge dismissed that application – where the appellant seeks to challenge that decision – whether a party who elects for trial by jury can abandon that election, by refusal to pay the jury fees, in the absence of a court order – whether a trial by jury should have been ordered under *Uniform Civil Procedure Rules* 1999 (Qld) r 475

Defamation Act 2005 (Qld), s 21, s 22, s 30
Jury Act 1995 (Qld), s 65
Jury Regulation 2007 (Qld), reg 11
Uniform Civil Procedure Rules 1999 (Qld), r 472, r 475

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170; [1981] HCA 39, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Alphapharm Pty Ltd v H Lundbeck A/S (2014) 89 ALJR 1; [2014] HCA 42, cited
Borland v Makavskas (unreported, QSC, 17 May 2000), cited
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55, cited
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd [1999] QSC 384, cited
Con Ange v Fairfax Media Publications Pty Ltd & Ors [2010] NSWSC 1383, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
McLennan v Yared (unreported, QSC, 17 October 2001), cited
Mizikovsky v Queensland Television Ltd [2011] QSC 205, considered
Morgan v John Fairfax & Sons Ltd (1990) 20 NSWLR 511, cited
Nielsen v State of Queensland [2001] 1 Qd R 500, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Rubin v Buchanan & Anor [2011] QSC 275, applied

COUNSEL: J Bell QC, with T Pincus, for the appellant
M Jonsson for the respondent

SOLICITORS: Boe William Anderson for the appellant
Miller Bou-Samra Lawyers for the respondent

[1] **MORRISON JA:** In 2013 the respondent was a school principal at a school attended by the children of the appellants.

[2] The respondent claims that he was defamed by the appellants, in a letter sent by them on 26 July 2012 to school authorities. He started proceedings claiming damages for defamation. The appellants have defended the claim on the basis that there were no defamatory imputations, qualified privilege applied, and the letter expressed opinions honestly held.

[3] The respondent's Amended Statement of Claim[1] included an election for trial by jury, stating: "The Plaintiff requires this action to be tried by a jury". The Defence, and all amended versions of it, did not contain anything to signify that the appellants elected to have trial by jury.

[4] On 22 September 2014 the solicitors for the appellants signed a request for trial date, and sent it to the respondent's solicitors, asking that they make arrangements to pay the necessary jury fees, and then tick the relevant box for Item G on the request form, confirming that the fees had been paid.

[5] The respondent's solicitors returned the form, without ticking Item G and without any explanation why it had not been ticked. In subsequent correspondence they said that they had instructions to give up the right to have a trial by jury, by not paying the fee.

[6] As a result the appellants sought orders: (i) compelling the respondent to adhere to his election for trial by jury and to pay the fees; or (ii) permitting them to do so and allowing those fees to be recovered at the end of the trial; or (iii) ordering a trial by jury on the basis that they were entitled to elect for such a trial but had not done so.

[7] The learned primary judge dismissed that application. The appellants seek to challenge that decision.

[8] The issues raised by the appeal are:

(1) can a party who elects for trial by jury abandon that election, by refusal to pay the jury fees, in the absence of a court order; and

(2) should trial by jury have been ordered under UCPR r 475.

Election for trial by jury.

[9] The *Defamation Act* 2005 (Qld) provides for election for a trial by jury. Section 21 relevantly provides:

> "(1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.
>
> (2) An election must be made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried.
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> (3) Without limiting subsection (1), a court may order that defamation proceedings are not to be tried by jury if–
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> (a) the trial requires a prolonged examination of records; or

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[1] Inferentially, also the Statement of Claim.

(b) the trial involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury."

[10] Rule 472 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) provides how the election is to be signified: "a plaintiff in the statement of claim or a defendant in the defence may elect a trial by jury".

[11] UCPR r 475 provides:

"(1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by jury but did not so elect.

(2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury."

[12] A party who elects for a trial by jury has obligations under s 65(1) of the *Jury Act* 1995 (Qld), which provides:

"If a party to a civil trial requires a jury, the party must pay to the registrar of the court before which the trial is to be conducted–

(a) the fee prescribed under a regulation before the trial begins; and

(b) the further fees required under a regulation as and when payment is required under the regulation."

[13] The relevant fee in this case was $773.60 prescribed by reg 11 of the *Jury Regulation* 2007 (Qld). That had to be paid "before the trial begins".[2] Thereafter the daily fees for the jury would arise under reg 11(2)(a) and 11(3).

[14] The abandonment of the election for trial by jury was put this way in correspondence and conversations between the respective solicitors:

(a) when the request for trial form was sent the appellants pointed out that they had not ticked Item G because the respondent had elected for trial by jury and he had to pay the jury fees;[3]

(b) some days later the respondent said that he no longer wanted a trial by jury; the appellants responded that they did want a trial by jury, and they proposed to amend the defence to so elect, and pay the fees;[4] attached to that letter was an amended request for trial form which the appellants proposed to file, ticking Item G;[5]

(c) the respondent answered, saying that his intention was to "give up the right to a trial by jury", which could be done by not paying the fee; he also said it was his view that the appellants had to seek an order under UCPR r 475 if they wished to have a trial by jury;[6]

(d) the appellants replied that the respondent could not resile from the election that he made, and the appellants intended "to exercise [their] right to a jury"; however they had decided not to file the request for trial form, but rather apply to court;

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2 Section 65(1).
3 Appeal Book (**AB**) 44.
4 AB 48.
5 AB 49-51.
6 AB 52.

they offered to pay for the jury fees,[7] and alternatively asked for consent to an order under r 475;[8]

(e) the respondent replied that an application would have to be made, and the respondent's attitude to it would be decided once the material was filed;[9]

(f) the appellants then sent the draft material, and repeated the offer to pay the fees, as a way of avoiding the application; the letter also asked for legal justification of the stance taken by the respondent;[10]

(g) the respondent replied with the arguments based on case law, and sought to know if the application would be brought;[11]

(h) the debate continued, during which the respondent's position was made clear: he would not pay the fees, and he had given up, or would give up, the right to trial by jury.[12]

Abandonment of an election for trial by jury, by refusal to pay the jury fees.

[15] The appellants' contention is that once a party has elected trial by jury that right cannot be unilaterally abandoned. The effect of s 21 of the *Defamation Act* is that the mode of trial is set by the election and the fact that the court has not ordered otherwise. Therefore, the party electing must pay the jury fees. The mode of trial can only be altered by way of an order under r 475 UCPR.

[16] In support of that contention reliance was placed on *Con Ange v Fairfax Media Publications Pty Ltd & Ors*[13] in respect of the New South Wales analogue of s 21:

> "Once a party has elected for trial by jury then the effect of the legislation is that the mode so chosen will be the mode of trial unless the Court otherwise orders. I note that it is always possible for a jury to be dispensed with by the consent of the parties."

[17] Resolution of this issue requires the terms of s 21 and several rules of the UCPR to be construed. In doing so I bear in mind that the task of construction of a statute must begin and end with the text, but that text must be considered in its context, which includes the legislative history and extrinsic materials.[14] Where possible meaning must be given to the words used.[15]

[18] In my view there are a number of reasons why that contention cannot be accepted.

[19] First, s 21(1) of the *Defamation Act* provides that either party can elect for trial by jury, but if they do, it must be done at the time and in the manner provided under the UCPR. Rule 472 then provides that it must be in the statement of claim or the defence. The section says nothing about changing or abandoning the election.

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7 By reimbursing the respondent within seven days of his paying the fees.
8 AB 53-54.
9 AB 55.
10 AB 56-57.
11 AB 58-59.
12 AB 60-65.
13 [2010] NSWSC 1383, at [39] per Garling J. (***Con Ange***)
14 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71] (***Project Blue Sky***); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, at [39].
15 *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573, at [43]; *Project Blue Sky* at [69]-[71].

[20] Section 21(1) has, as its evident purpose, the grant of power to the court to control its own processes. Thus, even though a party, or the parties, may elect trial by jury the court can override that, as a matter of controlling the proceeding.

[21] Further, s 21(3) does not provide assistance. It is unlikely that s 21(3) could come into play before the pleadings defined the scope of the trial, as that is the usual way in which the court could decide that the prolonged examination of records was required, or that other issues in the trial made it appropriate to take the trial away from a jury. Therefore it can be seen that s 21(1) simply gives power to a court to override an election already made, if the court is satisfied that the conditions in subsections (a) or (b) exist.[16]

[22] The opening words in s 21(3), "Without limiting subsection (1)" do not give an unfettered power to the court in s 21(1). Those words deal with a specific subset of the things that might move a court to exercise power to order otherwise than trial by jury. The power under s 21(1), like that under s 21(3), is discretionary, and the discretion would have to be exercised judicially.[17]

[23] At one point of the oral argument on appeal attention was turned to the proposition that s 21(1) provided for the initial stage of the election, which the UCPR r 472 required to be made at the start of the proceedings, whereas s 21(3) referred to a later time in the proceedings. I do not consider that proposition is correct. In my view there is no reason to construe s 21 as meaning that the election in the pleadings can only be made in the first pleading of each type. UCPR r 472 does not lend support to that approach, as it simply says that the election has to be made "in the statement of claim or … in the defence". Moreover, r 472 is not applicable only to proceedings coming within s 21 of the *Defamation Act*, but jury trials generally. More importantly s 21(2) provides that the election must be "at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried". In my view that focuses attention on what the UCPR permits, not just in r 472.

[24] Secondly, there is no reason to suppose that the parties to a defamation proceeding in which one or more of them had elected trial by jury, could not agree to dispense with that mode of trial. The court would hardly have an interest in disturbing such an agreement. Yet, as Senior Counsel for the appellants conceded, the contention advanced would preclude that outcome, absent a court order.[18] That is an odd consequence and one which is contrary to *Con Ange*, where Garling J said that it is always possible for the jury to be dispensed with "by the consent of the parties".[19] One can postulate the question: if the parties can agree to dispense with an election already made, why would it be supposed that the party who made the election cannot do so by simply conveying that decision to the other party?

[25] Thirdly, reliance by the appellants on what was said in *Con Ange* as supporting this contention is misplaced. That was a case where an application was made to override the elections that had been made. It did not consider the questions which arise here.

[26] Fourthly, the contention has the opposite effect to what may be thought as the legislative purpose. Under s 21 a party is entitled to a jury trial unless that is taken away by court order, made on application by a party or the court itself. The appellants'

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16 The same view was reached in *Con Ange* at [24], [26]-[27].
17 *Con Ange* at [28]-[32].
18 Appeal transcript T 1-13 lines 6-17.
19 *Con Ange* at [39].

contention would mean that a party who elected would be forced to have a trial by jury even though that party (and even the other parties) did not want one.

[27] Fifthly, the focus placed on the aspect that the election was abandoned by refusal to pay the fees is apt to confuse the real issue. True it is that the respondent said that he would not pay the fees, but that was always said in the context of his no longer wanting trial by jury. This is not a case where the abandonment of, or resiling from, the election was simply by non-payment.

[28] This ground of appeal fails.

Refusal of the application for trial by jury under r 475 UCPR.

[29] The appellants raised two matters as warranting the order:[20]

(a) their solicitor had not elected for a jury trial because of an assumption on her part that if the respondent elected then there would be a jury trial unless the court ordered otherwise; and

(b) the solicitor believed there was no reason why a jury could not handle the issues at the trial.

[30] As to the first point, the appellants' solicitor explained why they did not elect themselves. Notwithstanding that her instructions had always been that the appellants sought trial by jury, she mistakenly assumed that if the respondent elected then there would be a jury trial unless the court ordered otherwise.[21]

[31] As to the second point the solicitor deposed that:

> "I am not aware of, and do not believe there are, any factors in this case of the kinds referred to in section 65A of the *Jury Act 1995* or 22(3) of the *Defamation Act 2005*, nor or any other reasons why a jury could not appropriately deal with the matter."[22]

[32] The respondent filed an affidavit deposing that the total disclosure (that is, on both sides) amounted to 181 documents comprising about 936 pages.[23] Those numbers are misleading as they do not take account of the fact that there are at least 23 documents that are common to both lists, and there may well be more depending on the way that the parties have described them. That has the effect that the number of pages for potential consideration would be less than the solicitor estimated.

[33] The learned primary judge refused to grant the appellants' application for the trial to be by jury. In so doing he identified the real question as being that under UCPR r 475(2), namely whether "a jury could appropriately deal with the matter".[24] His Honour cited *Nielsen v State of Queensland*[25] as support for that conclusion. In so doing his Honour misapprehended that the application was under r 475(1), not r 475(2). However that error has no consequence as the correct test was applied in any event.

[34] The reasons given for the refusal to order a jury trial were:[26]

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20 Reasons below at [40], AB 158.
21 Reasons below at [41].
22 AB 41; original emphasis. The reference to s 22(3) was an evident error and should be read as s 21(3).
23 AB 73.
24 Reasons below, [39]-[40] and [43].
25 [2001] 1 Qd R 500 at 502 per Byrne J. (***Nielsen***)
26 Reasons [45]-[47], AB 159.

(a) in order to determine the defamatory meaning of the alleged publication, and the defences, the jury would have to scrutinize:

(i) various investigations and responses by persons at the school, in response to complaints; and

(ii) the conduct and outcomes of two independent investigations commissioned to enquire into and report on the complaints;

(b) the disclosed documents consist of 935 pages spread across 181 documents; and

(c) the just and expeditious resolution of the proceedings was likely to be frustrated, because of the complications and risks arising from:

(i) the need to navigate through the labyrinth of defences; and

(ii) prolonged examination of documents.

Applicable legal principles.

[35] Because the order below was discretionary, an appeal from an exercise of discretion requires that the appellants establish appealable error as identified in *House v The King*:[27]

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

[36] The appellants challenge the findings as to the labyrinth of defences and the prolonged examination of documents on the basis that they involve mistakes of fact, and are therefore within the categories of error in *House*. The respondent contends the decision was open, and the trial would be "far more expensive and time consuming than a Judge alone trial".[28]

[37] The respondent contends that the right to elect a jury trial is a "procedural right", but neither the appellants nor the respondent contended that the power exercised under UCPR r 475 results in a discretionary decision as to a matter of practice or procedure. Therefore no question arises as to the application of the principles in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*.[29]

[38] The test to be applied to this application under r 475(1) UCPR has been considered before, in several cases culminating in *Rubin v Buchanan & Anor*,[30] in which Boddice J said:

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27 (1936) 55 CLR 499 at 504–505 (Dixon, Evatt and McTiernan JJ).

28 Outline paragraph 25.

29 (1981) 148 CLR 170, 177.

30 [2011] QSC 275, at [21]-[23] per Boddice J. (***Rubin***). See also: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [1999] QSC 384; *Nielsen v State of Queensland* [2001] 1 Qd R 500; *McLennan v Yared* (unreported, QSC, 17 October 2001); *Borland v Makavskas* (unreported, QSC, 17 May 2000).

> "[21] Rule 475(1) provides an unfettered discretion to change the mode of trial in specified circumstances. The exercise of that discretion is not subject to r 475(2), which provides a separate power for the Court, of its own volition, to order trial by jury in specified circumstances. The existence of a separate power for the Court, of its own volition, to order trial by jury is compatible with the power given to the Court in r 474, to order that a trial be held by judge alone rather than by a jury in specific circumstances.
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> [22] The plaintiff's application is to be determined on the basis the Court has a discretion to order trial by jury, if satisfied the proceeding could appropriately be tried by jury. That discretion is not qualified by any requirement that the party seeking that order need show that the proceeding could 'more appropriately be tried by a jury'.
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> [23] The discretion to order trial by jury is to be exercised having regard to all of the circumstances of the case. Relevant factors include, but are not limited to, the nature of the proceeding, the issues in dispute, whether there is likely to be extensive expert evidence, and whether any trial is likely to be unduly and unnecessarily lengthened by an order that it be tried by jury. Another relevant factor is that the parties were entitled to elect trial by jury in the pleadings, and have not done so."

[39] The test stated in paragraph [22] of *Rubin*, reflects that in *Nielsen*, where Byrne J (as he then was) said:[31]

> "Therefore, pursuant to r. 475, it is not necessary before an order may be made for trial by a jury that the applicant establish that there is an issue of fact to be tried which could more appropriately be tried by jury. It is enough, if it is shown that a jury could appropriately deal with the matter. The question then is whether, despite the omission for quite some time to have sought trial by jury, it ought to be granted."

[40] I respectfully adopt that as the test to be applied and what was said above in *Rubin* as the appropriate approach to the exercise of the discretion.

The labyrinth of defences.

[41] It is true to say that there are three basic defences: (i) no defamatory imputation, (ii) qualified privilege, and (iii) honest opinion. It is also true to say that the Reply makes relevant the reports and investigations carried out. However it seems to be an overstatement to characterize that as a "labyrinth of defences", or to describe this trial as more burdensome than the average defamation trial.

[42] The alleged defamatory material is contained in one letter, sent to school authorities. No doubt it is true to say that in order to decide if what was said was defamatory the jury would need to assess it against the background of the complaints against the respondent, and that may involve consideration of the investigations and responses concerning those complaints.

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31 *Nielsen* at page 502.

[43] However, to say that means that the jury will have to navigate through a labyrinth of defences mistakes the role of the jury in such a trial. Juries in defamation cases are called upon to decide questions of fact, namely whether the imputations pleaded are conveyed, whether or not the publication is defamatory in the sense complained of, and whether the publication has been defended under defences such as truth, honest opinion or fair report.[32] The relevant defence here is honest opinion.

[44] Matters of law are the task of the court. Thus the question whether the publication occurred on an occasion of qualified privilege is a matter for the court, not the jury,[33] though it is for the jury to decide disputed questions of fact on which the ultimate resolution of that question will depend.[34]

[45] Therefore to the extent that the jury has to examine the defences from the point of view of a factual analysis. The judge assists in that task, often by the formulation of specific questions that the jury is required to answer specific questions. Further, it is in the interests of each side to simplify the jury's task, and one could expect that to be done here.

[46] In my respectful view the learned primary judge has overstated the extent and impact of the defences, and, for that reason, has proceeded on a mistake as to the facts, or allowed irrelevant matters to guide or affect him.

Prolonged examination of documents.

[47] The learned primary judge did not appear to dissect the evidence from the solicitor for the appellants, as to the state of the documents. On the face of his affidavit there were 936 pages encompassed by 181 documents.

[48] However, a cursory examination reveals that at least 23 of those 181 documents are included in both lists. In other words the total number of actual documents is less than that which the learned trial judge took into account.

[49] That, in turn, has the effect that the total pages that the jury might be required to consider is less than the 936 that the learned trial judge found. Just how much less is unclear, as the affidavit material did not descend to that level of particularity. Indeed the affidavit did not reveal just where the burden of the volume of the documents lay. For instance, it may be that there are some very voluminous documents that really did not matter to the real issues in the trial.

[50] It is trite to observe that just because the parties have disclosed documents as being, in their view, directly relevant, does not mean that the jury will be burdened with them. Long experience in litigation reveals that parties tend to over-disclose, as a matter of caution, and that as the trial approaches the number of documents that are truly relevant tends to contract. That experience is reflected in *Mizikovsky v Queensland Television Ltd & Ors*,[35] where Boddice J said:

> "[15] There is no doubt, on the present pleadings that extensive evidence will be required to be given in any trial by jury. The particulars relied upon by the defendants suggest that that evidence, which

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32 See s 22(2) of the *Defamation Act*.
33 Section 30 of the *Defamation Act*.
34 See, for example, *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511.
35 [2011] QSC 205, at [15]-[16]. (***Mizikovsky***) Internal footnotes omitted.

> will come from numerous lay witnesses, will include a requirement to consider contractual documentation of some complexity. However, complexity in itself is insufficient to satisfy the requirement that there will be 'a prolonged examination of records'. What must be established is that the trial will require a prolonged examination of records.
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> [16] Having regard to the context in which the documentation will be considered, I am not satisfied the trial will require a 'prolonged examination of records'. Whilst there will be detailed cross-examination of witnesses, and that cross-examination will include reference to lengthy contractual documentation, the parts of the documentation to which reference will be made will be limited. In this respect, the observations of Lord Denning MR in *Rothermere & Ors v Times Newspapers Limited & Ors* are apposite:
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> 'The figures given by the plaintiffs may make things look very alarming. But, I do not think they are nearly so bad as they appear. ... I think this assertion of 'prolonged examination of documents' may well turn out to be a bogey which, in capable hands, can be cut down to size. I have tried cases with masses of documents on many occasions. It is remarkable how often they can be reduced to manageable proportions.'"

[51] Long experience in trials suggests that the observations of Lord Denning MR are accurate. Routinely the volume of documents disclosed does not represent the volume that matters for the trial itself. To simply accept the total of documents or pages deposed to by the solicitor, with no further attempt at discernment, is to proceed either on a mistake as to the facts, or to allow extraneous or irrelevant matters to guide or affect the decision.

[52] In my view the learned primary judge has proceeded on a misapprehension of fact in relation to the number and burden of those documents in disclosure that matter to the jury's task. And, to the extent that the learned primary judge proceeded on the basis of the unadjusted figures, his Honour has allowed extraneous or irrelevant matters to guide or affect the decision.

Conclusion.

[53] The test to be applied is whether the Court is satisfied the proceeding could appropriately be tried by jury. In my view there is nothing compelling in the matters raised by the evidence below to suggest that the jury could not do so. Indeed the following matters show that the proceeding could be appropriately tried by jury:

(a) the defamation alleged concerns what was said in one document;

(b) there are quite a number of documents disclosed, but not very great in overall terms, and experience suggests that by the trial that number will be much reduced;

(c) nothing has been identified about the documents, or their contents, to suggest that a jury could not comprehend them perfectly well;

(d) in truth the jury's task will not be overly burdened by the documents, or the defences pleaded, for the reasons given in paragraphs [43] to [45] above;

(e) therefore it could not really be concluded that the number or content of the documents was so burdensome that the proceeding could not be appropriately tried by jury; and

(f) the defences are in three categories: (i) no defamatory imputation, (ii) qualified privilege, and (iii) honest opinion; none of those are novel defences; they are ones that juries have routinely been dealing with on defamation cases.

[54] Furthermore, it is important to bear in mind that:

(a) the appellants have always wanted a jury trial and did not elect because of an incorrect assumption as to the legal effect of the respondent's election;

(b) the combined effect of s 21(1) of the *Defamation Act* and r 472 UCPR is that the election does not have to be made in the first iteration of a party's pleading; r 472 simply requires the election to be in the statement of claim or the defence; whilst the appellants are parties who were entitled to elect but did not, the fact that they did not should not present any additional barrier to doing so where the electing party wishes to resile from the election;

(c) the respondent maintained his election for trial by jury long after disclosure was complete and the size and complexity of the documents would have been well apparent; the last disclosure list was dated 13 August 2013;[36] the correspondence concerning the decision to forego trial by jury commenced on 31 October 2014;[37] and

(d) there is no evidence that the respondent will suffer prejudice by the fact that the trial will be by jury, as opposed to by judge alone.

[55] I cannot agree, with respect, that the just and expeditious resolution of the proceedings is likely to be frustrated by the issues as to documents and defences.[38] In my view the application should have been allowed. For the reasons expressed above I would allow the appeal.

Costs.

[56] Even though the appellants have not succeeded on the first ground of appeal they have succeeded on the ground relating to their application under r 475(1) UCPR. That means they have succeeded over all, and should have their costs of the appeal, and at first instance.

[57] I would propose the following orders:

1. The appeal is allowed.

2. The orders made on 17 December 2014 are set aside, and in lieu thereof it is ordered that pursuant to r 475(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) the trial proceed as trial by jury at the appellants' election.

3. The respondent is to pay the appellants' costs, of and incidental to the appeal, and the application, to be assessed on the standard basis.

[58] **BODDICE J:** I have had the considerable advantage of reading the reasons for judgment of Morrison JA. I agree with those reasons and with the proposed orders.

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36 AB 80, 86.
37 AB 48.
38 See the Reasons below at [47], AB 159.

[59] **CARMODY J:** This is an appeal, heard on 12 May 2015, against a decision of the District Court of Queensland dismissing an application for certain orders relating to the election, and procedure, for trial by jury under the *Defamation Act* 2005 (Qld) and other related legislation.

[60] I have considered the reasons for judgment of Morrison JA, circulated on 21 October 2015. I agree with his Honour's proposed orders, and reasons for decision at [23] – [28], and [53] – [55].