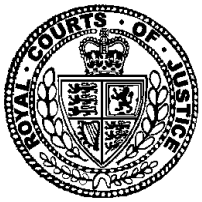

Neutral Citation Number: [2019] EWHC 748 (QB)

Case No: HQ17X02568

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

(1) BES Commercial Electricity Limited	**Appellants**
(2) Business Energy Solutions Limited	
(3) BES Water Limited	
(4) Commercial Power Limited	
- and -	
Cheshire West and Chester Borough Council	**Respondent**

- -
- -

Mr Philip Marshall QC and **Mr Matthew Morrison**
(instructed by **Weightmans LLP**) for the **Appellants**
Miss Fiona Barton QC (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: 12 and 13 March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. This is an appeal against the decision of Master Davison of 3 August 2018 granting the respondent's applications to strike out and give summary judgment against the appellants in respect of certain distinct parts of their claim. For ease and consistency of reference, I will henceforth refer to the appellants and respondent as the claimants and defendant respectively.

BACKGROUND

2. The first and second claimants are in the business of supplying energy to commercial customers. The third claimant was established with the intention that it should operate as a non-domestic water supplier. It has not, as yet, started to trade. The fourth claimant is an energy aggregator. Energy aggregators act as intermediaries through which suppliers, such as the first three claimants, pass details of their products on to a network of brokers.

3. The first and second claimants compete against their larger "big six" rivals, at least in part, by pursuing a business model which targets those potential customers with lower credit ratings.

4. Historically, the claimant suppliers have been concerned at what they perceive to be a lower than expected success rate in attracting those businesses which have chosen to change supplier. This disappointment is coincident with, and the claimants would say related to, the actions of the defendant.

5. For some considerable time, the defendant has been carrying out a trading standards related investigation into allegedly fraudulent conduct on the part of the claimant suppliers. The claimants challenge the integrity and genuineness of this investigation. In particular, they contend that two individuals, Mr Scrivener and Mr Mooney, have been conspiring with one David Bourne of the defendant to propagate deceitful claims about the claimants' trading practices in order to divert business in the direction of competing suppliers. It is unnecessary for the purposes of this judgment to descend into further particularisation of the means by which the claimants allege such deceits have been perpetrated. Suffice it to say that the enthusiasm of Messrs Scrivener and Mooney to malign the claimants is alleged to have been fuelled by payments received from rival suppliers who were set to benefit from the bad press which the claimant suppliers were being given.

THE SEARCH WARRANTS

6. Of central importance to this appeal is an application which was made without notice by the police to Preston Crown Court on 22 July 2016 seeking to obtain search warrants targeted at the claimants' premises. It is not in issue that this application was instigated by the defendant in purported pursuance of its investigation into the activities of the claimants.

7. The claimants allege that the warrants, which were granted by HH Judge Brown, the Recorder of Preston, were obtained by the provision of false, misleading and

inadequate information. Again, for the purposes of this judgment, it is unnecessary to elaborate further upon the detail of these allegations.

THE CLAIMANTS' CASE

8. After the warrants had been acted upon, the claimants commenced proceedings against the defendant alleging, *inter alia*, misfeasance in public office and trespass to goods to the extent that some of the property actually seized was said to have fallen outside the scope of the search warrants obtained. In respect of these claims, the defendant accepts that the issues raised are not susceptible to summary determination.

9. However, the claimants also rely upon their rights under Article 8 and Article 1, Protocol 1, of the European Convention on Human Rights ("the Convention"). In short, the claimants contend that the defendant acted in breach of those rights in instigating the application for the search warrants on flawed grounds. In this regard, they seek just satisfaction from the defendant pursuant to section 8 of the Human Rights Act 1998 ("the HRA").

10. The defendant applied to strike out and/or obtain summary judgment in respect of the claimants' HRA claims. It contends that there could be no breach of the claimant's Convention rights unless and until after the moment of entry upon the claimants' premises and the removal of their property. Since these actions were carried out in pursuance of and in accordance with the terms of the warrants, the defendant asserts that they are not susceptible to challenge - so long as the warrants themselves have not been quashed.

11. In broad terms, the defendant sought to persuade the Master to accede to its application for summary determination on two main grounds:

    i) It was a prerequisite to the making of the claim in respect of the actions taken to enforce the warrants that the warrants themselves should be quashed in judicial review proceedings. It was not open to the claimants to circumvent the procedural requirements of CPR Part 54 by seeking a private law remedy;

    ii) In any event, the defendant enjoyed immunity from suit to the extent that its alleged misconduct fell within the scope of the protection afforded by the common law to those such as advocates, parties and witnesses and others against civil claims.

12. I propose to deal with each of these points in turn.

JUDICIAL REVIEW

13. The defendants successfully persuaded the Master that the claimants' HRA allegations, to the effect that the defendant had obtained and executed search warrants unlawfully, could not be pursued unless and until the warrants had been quashed. The defendant contended that it followed that the only basis upon which the claimants would have been entitled to proceed would be by way of judicial review following the procedure laid down in CPR Part 54.

14. In support of this proposition, the defendant relies upon the case of ***O'Reilly v Mackman*** [1983] 2 AC 237 at p. 285 D-E in which Lord Diplock observed:

> "It would…as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53."

15. As the claimants point out, however, Lord Diplock was not intending to impose a blanket prohibition upon the deployment of private law procedures in cases in which there was, at least, an element of public law. In particular, he held, at p. 284 F-G, that a private law claim would not be precluded:

> "…where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law"
>
> And went on to comment that:
>
> "...other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis."

16. I have been referred by the parties to many, and more recent, decisions relating to the respective magisteria of public and private law claims. It would be disproportionate, in the context of a summary process, for me to undertake a minute analysis of how the law in this area has developed over recent years. Suffice it to say, however, that, with the passage of time, the courts have, in general, allowed for a greater degree of flexibility than was formerly the case. In ***Richards v Worcestershire CC*** [2017] EWCA Civ. 1998 Jackson LJ, having reviewed the authorities, concluded:

> "The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient."

17. The claimants further point out that any adjudication upon the status of the search warrants would, in turn, be ineluctably dependent upon the resolution of issues of fact. It would be necessary, in particular, for the court to determine whether and, if so, in what way HH Judge Brown was misled and what, if any, was the causative impact of any such alleged failures.

18. Again, there is no shortage of authority on this point. Of particular note is the case of ***R (Fitzpatrick) v CC Warwickshire*** [1999] 1 WLR 564 in which the Divisional Court held at p. 579:

> "Judicial review is not a fact finding exercise and it is an extremely unsatisfactory tool by which to determine, in any but the clearest of cases, whether there has been a seizure of

> material not permitted by a search warrant. In my judgment a person who complains of excessive seizure…should not, save in such cases, seek his remedy by way of judicial review but should rely on his private law remedy when he will have a tribunal which will be able to hear evidence and make findings of fact unfettered by *Wednesbury* principles."

19. In addition, the claimants argue that it would be inappropriately burdensome to categorise their HRA claims as ones which could only be brought under the umbrella of a public law challenge when the misfeasance in public office and excessive seizure claims are already properly brought in private law.

20. Reminding myself, once more, of the relatively low threshold which any party must surmount in order to frustrate an application for summary judgment or striking out, I am satisfied that the Master was wrong to categorise the HRA claims as being unarguably exclusively justiciable in the public law arena. My adjudication on this issue does not, of course, preclude the defendant from continuing to rely upon this point. I am not, after all, determining a preliminary issue. There is, however, sufficient merit in the claimants' contentions to render it inappropriate to resolve matters summarily. One option would be to resolve the question by way of a preliminary issue but that is a case management decision for another court to make.

IMMUNITY

21. In ***Darker v Chief Constable of the West Midlands Police*** [2001] 1 AC 435 Lord Hope identified the scope of immunity enjoyed by those participating in civil litigation thus:

> "…when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause… The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."

22. The Master was persuaded that the defendant was entitled to the protection of this immunity observing that it was "a party in all but name" to the application for search warrants made by the police.

23. The claimants seek to challenge this finding on three grounds:

i) The defendant's conduct does not, in fact, fall within any of the categories to which immunity may apply;

ii) The HRA claims are properly categorised being akin to the tortious family of abuse of process claims in respect of which the immunity affords no protection; and

iii) The immunity does not cover ex parte applications.

I propose to deal with each contention in turn.

24. In ***Darker*** Lord Hope held at p. 447 D-G:

> "It is clear that, if that objective is to be achieved, it would not be satisfactory to confine the immunity to evidence given by witnesses while they are actually in the witness box. Witnesses seldom enter the witness box without having been interviewed beforehand by a solicitor or an investigating police officer… In ***Taylor v Director of the Serious Fraud Office*** [1999] 2 AC 177 it was held that the immunity extended also to statements made out of court which could fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution."

Then at p. 448 C-F:

> "But there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, and their conduct at earlier stages in the case when they are performing their functions as enforcers of the law or as investigators. The actions which the police take as law enforcers or as investigators may, of course, *become* the subject of evidence. It may then be necessary for the police officers concerned to assume the functions of witnesses at the trial to describe what they did or what they heard or what they saw. But there is no good reason on grounds of public policy to extend the immunity which attaches to things said or done by them when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. The purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators. The rule of law requires that the police must act within the law when they are enforcing the law or are investigating allegations of criminal conduct. It also

> requires that those who complain that the police have acted outside the law in the performance of those functions, as in cases alleging unlawful arrest or trespass, should have access to a court for a remedy."

25. The claimants further contend that, even if the involvement of the defendant encroached upon the territory normally protected by immunity, this would not protect it where, as here, the claim is based on an abuse of process allegation. In ***Roy v Prior*** [1971] AC 470, Lord Morris held at p. 477 H:

> "It must often happen that a defendant who is sued for damages for malicious prosecution will have given evidence in the criminal prosecution of which the plaintiff complains. The essence of the complaint in such a case is that criminal proceedings have been instituted not only without reasonable and probable cause but also maliciously. So also in actions based upon alleged abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process…"

26. The defendant does not seek to challenge this general principle of law but points out that the common law has always required a claimant to establish the ingredient of malice as prerequisite to establishing liability under the abuse of process torts.

27. The question arises, however, as to whether, in respect of HRA claims, the ingredient of malice is indeed essential. In ***Keegan v The United Kingdom*** [2007] 44 EHRR 33, police obtained a warrant to search the applicants' house for stolen cash. Having broken into the property, they found nothing. The applicant brought proceedings against the Chief Constable under the HRA with respect to an alleged breach of Article 8 of the Convention and in the tort of maliciously procuring a search warrant. At first instance, the judge held that their claim failed because they had not established that the police had acted maliciously. The decision was upheld by the Court of Appeal. The matter progressed to the European Court of Human Rights, which concluded that in respect of the applicants' claim under Article 8 at paragraph 34:

> "34. The fact that the police did not act maliciously is not decisive under the Convention which aims to protect against abuse of power, however motivated or caused… The Court cannot agree that a limitation of actions for damages to cases of malice is necessary to protect the police in their vital functions of investigating crime. The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being. In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively carried out, the resulting police action, which caused the applicants

> considerable fear and alarm, cannot be regarded as proportionate.
>
> 35. As argued by the applicants, this finding does not imply that any search, which turns out to be unsuccessful, would fail the proportionality test, only that a failure to take reasonable and available precautions may do so."

28. The claimants contend that the decision in ***Keegan*** affords an HRA remedy which does not require proof of malice but which falls within the abuse of process family of remedies the deployment of which has the effect of stripping the defendant of itd defence of immunity from suit.

29. Some, albeit limited, support for this proposition is to be found in the Scottish case of ***McCaffer v Lord Advocate*** (2014) WL 7255774 in which the pursuer sought compensation for an alleged breach of Article 5 of the Convention. He had been arrested and remanded in custody on what he contended were actions based upon failures of the defenders to disclose relevant evidence. The defenders challenged the pursuer's case alleging that, in order to succeed, he would have to establish malice and want of probable cause.

30. The Sheriff held at paragraph 46:

> "I disagree with Mr Cameron's contention that the implications of the decision in ***Keegan*** are limited to situations of unjust interference with article 8 rights. It is true that the statements of principle contained in paragraphs 34 and 35 – that the exercise of powers "must be confined within reasonable bounds to minimise the impact of such measures" and that it is only "a failure to take reasonable and available precautions" which "would fail the proportionality test" – are expressed in the context of an article 8 violation were an *ex facie* lawful search proceeded upon a warrant which had been obtained through police negligence. Be that as it may, I can see no reason in logic why those principles should not apply equally to the exercise of powers by any organ of the state. That the court intended to state a general objection to "a limitation of actions for damages to cases of malice" is clearly indicated by its preceding observation that the ECHR "is geared to protecting against abuse of power"; power generally."

31. Also helpful to the claimants in this case are the following observations of the Sheriff:

> "*In respect of a claim for compensation against a prosecutor under article 5 (5) by a victim of detention in contravention of article 5 is it necessary to show that the detention was unlawful?*
>
> 51. Again following ***Keegan*** the answer to this question must be no. The search warrant obtained by Merseyside Police in that case was lawful but that did not prevent the court from

> holding that the police action in terms of that warrant was not proportionate. The police were liable because they had failed to take basic steps to verify the connection between the address and the offence under investigation; they had been negligent and therefore had acted unreasonably."

32. Finally, with respect to the issue of immunity, the claimants contend that, in any event, such immunity does not extend to participation in *ex parte* proceedings. In ***Roy***, Lord Wilberforce remarked at p. 480 E-G:

> "But none of this applies as regards such evidence as was given in support of the application for a bench warrant. It was given *ex parte: Dr. Roy* had no means, and no other party any interest, in challenging it: so far from the public interest requiring that it be given absolute protection, that interest requires that it should have been given carefully, responsibly and impartially. To deny a person whose liberty has been interfered with any opportunity of showing that it was ill founded and malicious, does not in the least correspond with, and is a far more serious denial than, the traditional denial of the right to attack a witness to an issue which has been tested and passed upon after a trial. Immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest. So checked, the present case provides no justification for protecting absolutely what the solicitor said in the court. I need not add that I am not prejudging in any way whether what he said was well founded or lacking in malice. That is for the action to decide."

DISCUSSION

33. The power to strike out a statement of case under CPR Part 3.4, in so far as is material to this appeal, arises when "the statement of case discloses no reasonable grounds for bringing or defending the claim". As the Court of Appeal observed in ***Hughes v Colin Richards & Co*** [2004] EWCA Civ. 266, an application to strike out should not be granted unless the court is certain that the claim is bound to fail. In particular, where the relevant area of law is subject to some uncertainty and is developing it is highly desirable that the facts should be found so that any further development of the law will be on the basis of actual and not hypothetical facts.

34. Similarly, CPR 24.2 provides that the court may give summary judgment against a claimant if it considers that he has no real prospect of succeeding on the claim or issue. So long as the prospects of success are real he is not required to show that his case will probably succeed at trial.

35. I have reached the clear conclusion, without commenting further on the substantive merits of the legal issues raised by the parties on this appeal, that this is not an appropriate case for summary disposal either by way of strike out or summary judgment. In particular, the "public law" and "immunity" points relied upon by the defendant are not sufficiently compelling to have justified the course which the Master was persuaded to take. In so far as it is necessary, I give the claimants

permission to appeal on all matters not covered by the adjudication of the single judge and allow this appeal with the effect that the claimants will be permitted to proceed further with all of the claims presently identified in the most recent manifestation of their pleaded case.

36. This appeal, therefore, is allowed.