Neutral Citation Number: [2021] EWHC 3453 (QB)

Case No: QA-2020-000085

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
ROYAL COURTS OF JUSTICE
ORDER OF MASTER DAVISON 21 FEB 2020
CASE NUMBER: QB-2018-000127
APPEAL REFERENCE: QA-2020-000085

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Seymour Young	**Appellant /Claimant**
- and -	
1. The Chief Constable of the Warwickshire Police	**1st Respondent /Defendant**
2. The Director of Public Prosecutions	**2nd Respondent /Defendant**

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Mr Rajiv Menon QC and Ms Kirsten Heaven (instructed by **Tuckers Solicitors**) for the **Appellant/Claimant**
Ms Fiona Barton QC (instructed by **Weightmans LLP**) for the **1st Respondent/Defendant**
Mr Alan Payne QC (instructed by **Government Legal Department**) for the **2nd Respondent/Defendant**

Hearing dates: 29 October 2021

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

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MARTIN SPENCER

MR JUSTICE MARTIN SPENCER :

Introduction

1. By permission of Stewart J dated 26 February 2021, Seymour Young (hereinafter the claimant) appeals against the order and judgment of Master Davison dated 21 February 2020 whereby he struck out the claimant's claim and gave summary judgment in favour of the defendants.

The Background Facts

2. I take the background facts from the judgment of Master Davison.

> "2. In the late afternoon of 26 June 2011 a group of men entered domestic premises at 32 Rugby Road, Bulkington, Bedworth. Inside the property were Luigi Prota, David Gower and two others. David Gower was stabbed multiple times. He also sustained a gunshot wound to his left flank. The stab wounds were the cause of death. Nine people were charged with murder. The lead defendant was Gary Rahim. It was the prosecution's case that Gary Rahim and Luigi Prota had been involved in a fight four days previously and that the attack was intended as retribution or revenge. The claimant in these proceedings was the fourth defendant named on the criminal indictment. The case against him was that he had taken an active part in organising the revenge attack. The prosecution's evidence in support of that case consisted largely of mobile telephone records, which included many communications between him and Gary Rahim at or around the relevant time.
>
> 3. The trial commenced in October 2012 at the Birmingham Crown Court before Victoria Sharp J (as she then was) and a jury. During the course of the trial an issue arose over the disclosure and significance of intelligence material. The material was to the effect that, in the immediate aftermath of the killing, Luigi Prota had said that he had had a gun and had fired it at someone. On 8 November 2012, the prosecution, led by Mr Andrew Lockhart QC, served a Memorandum of Disclosure describing this material and offering to admit it as hearsay evidence. The Memorandum said as follows:

> 'Within 2.5 hours of the killing of David Gower, Luigi Prota said to one or more members of the public that a group of lads had run into his house to try and rob him. He said that he (Luigi) had a gun and that he (Luigi) shot someone.
> The prosecution will admit the content of this further disclosure as hearsay, admissible in the interests of justice.'

4. The accused were not content with this and applied for full disclosure including as to the identity of the informant. The prosecution made a public-interest immunity ("PII") application. That was on 13 November 2012. The next day, 14 November 2012, the prosecution served a further Memorandum of Disclosure. This expanded somewhat on the first memorandum and offered an explanation as to why the material had not been served earlier. It said as follows:

> '1. On the evening of 26.6.11 information was passed by another police force to the Warwickshire Police Force enquiry team led by DCI Malik.
>
> 2. DCI Malik recorded the following entry in his disclosure book timed at 19.52: 'Prota may have shot one of the offenders. Gary. 3 men robbing his cannabis.'
>
> 3. Telephone records prove that this information was in fact received by DCI Malik at 22.41.
>
> 4. DCI Malik's note of the time is admitted, therefore, to be inaccurate.
>
> 5. DCI Malik was not aware of the provenance of the information.
>
> 6. The facts surrounding the provenance of the information were never directly communicated to the Warwickshire police enquiry team. This was because the information was held by a separate branch of a separate police force.
>
> 7. The material that might have led to the discovery of the fact that the words may have been spoken by Luigi Prota was reviewed by the CPS in early 2012. At that time, because the link to Luigi Prota was not immediately apparent, this material was considered not to be disclosable.
>
> 8. At trial, following the consideration of SOCO Fitzpatrick's notebook a further review was undertaken of the material upon which her note of 27.6.11 might have been based.
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> 9. Prosecution counsel sought and gained access to the material held by the other police force, analysis of which revealed evidence to suggest that the words may have been spoken by Luigi Prota."

5. On 15 November 2012, Sharp J gave her judgment on the PII application. She ruled that the accused were entitled to full information including the identity of the informant. After a short delay during which the prosecution considered the implications of the ruling, they offered no further evidence and the accused were then formally found Not Guilty by the jury."

These Proceedings

3. The core of the complaint in this action is that the intelligence that led to the collapse of the trial should have been disclosed at an earlier stage. The sole cause of action pleaded is misfeasance in a public office alleged against Warwickshire Police, essentially in the person of DCI Malik, and against the CPS, essentially in the person of Mr Nigel Reader, the Senior Prosecutor who took over responsibility for this prosecution in about November 2011: although Mr Reader is not cited by name in the Particulars of Claim, it became clear in the course of the hearing that he is the person whom the claimant alleges was responsible for failing to make the required disclosure. It is accepted by Mr Menon QC for the claimant that the obligation of the police, through DCI Malik, was to pass on the information to the CPS. On the information available when the Particulars of Claim were drafted, it appeared that the police did not do so, or may not have done so, and that is why they were included in the proceedings, as explained below. However, it was accepted by Mr Payne QC on behalf of the second defendant, the CPS, that the information was indeed passed on in a meeting which probably took place at the beginning of 2012. The ambiguity about the matter was resolved by that acceptance by Mr Payne and, in those circumstances, Mr Menon conceded that the police had done all that they were obliged to do. He therefore conceded that the action could not continue against the first defendant in any event. The real issue concerns the non-disclosure of the material by the CPS, and in particular Mr Reader, to those representing the claimant in the criminal trial.

4. Mr Menon accepted before Master Davison and before me that no claim for malicious prosecution could be maintained, and indeed this is not pleaded. Thus he accepted that there was always "reasonable and probable cause" for the prosecution and the prosecution did not terminate because there had ceased to be reasonable and probable cause but because the trial judge had decided that, unless full disclosure of the intelligence material was given (including its source), the defendants could not have a fair trial. Thus, the prosecution was faced with the decision as to which was more in the public interest: the continuation of the prosecution or the protection of the source of the intelligence material. They chose the latter.
5. At the heart of the claimant's case against the CPS lies the meeting referred to in paragraph 3 above. The claimant's solicitors were given conflicting information about this meeting. On 18 January 2018, the Government Legal Department ("GLD"), the second defendant's solicitors, wrote in the following terms:

> "Warwickshire Police were the investigating police force in the criminal case. In the course of the investigation, West Midlands Police disclosed that intelligence to Warwickshire Police, sanitising it before disclosure. Warwickshire Police, in turn, disclosed the existence of the intelligence to the CPS for review in accordance with the disclosure process is under CPIA. In the course of the sanitisation process both the accuracy of the original statement crucial information concerning the source of the statement were lost. The intelligence was referred to in an MG6D (schedule of sensitive unused material) reviewed by the CPS reviewing lawyer in January 2012, but it appears that the description provided was inaccurate in two crucial respects. Firstly, the "sanitised" version of the information suggested that the man who Prota had shot was "Gary". The only "Gary" known in the investigation was the lead defendant, Gary Rahim and it was known for certain that Mr Rahim had not been shot. Secondly, the information had been assessed by the police as unreliable street gossip. In this sanitised form, it was not apparent that the statement may have been made by Mr Prota himself. On the basis of this description of the material on the MG6D provided to the CPS it is

unsurprising that the reviewing lawyer determined that the material did not meet the test for disclosure under CPIA."

6. However, by contrast, in a letter dated 22 March 2018, Messrs Weightmans, the first defendant's solicitors, stated as follows:

> "On 18 October 2011 a meeting took place to discuss the disclosure relating to the CHIS ["Covert Human Intelligence Source"] intelligence with Nigel Reader, his assistant, the SIO [Senior Investigating Officer, ie DCI Malik], and the CHIS controller from West Midlands Police. West Midlands Police compiled a disclosure package in advance of the meeting including MG6D forms which included the information as recorded in the CHIS Contact Report. The disclosure package also contained the sanitised IMS logs. This meant that all the ambiguities surrounding the CHIS information were available for scrutiny at this meeting.
>
> During the course of the meeting, the entries on the MG6D were ticked off as noted and discussed during the meeting. It is simply not the case that the Chief Constable failed to disclose this information. It was in fact disclosed on three different occasions:
>
> 1. By the West Midlands MG6D;
>
> 2. By Warwickshire Police's MG6D; and
>
> 3. At the meeting on 18 October 2011.
>
> If further disclosure or a PII application was necessary, then that was a matter for CPS advice and action. The [first] defendant had discharged his duty by bringing matters to the attention of the CPS."

On the basis of this letter and the information contained in it, the position would have appeared to be as it is now accepted to be, namely that Warwickshire Police had complied with their duty to disclose all the relevant information to the CPS and that the responsibility for further disclosure lay with the CPS.

7. The conflict of evidence and information contained in these two letters is obvious. The first defendant was asserting that there had been a meeting in October 2011 at which all relevant information had been imparted to Mr Reader. The second defendant was not acknowledging a meeting at all but was asserting that the reviewing lawyer (clearly referring to Mr Reader) had only been given sanitised information, which was materially inaccurate, thus suggesting that he had been misled into concluding that the material was not disclosable.
8. The situation was then compounded by the presentation by the defendants jointly of a document headed "AGREED STATEMENT OF FACTS BETWEEN THE FIRST AND SECOND DEFENDANT" which stated:

> "i. It is agreed that a meeting took place between DC Austin from West Midlands Police and Nigel Reader from the Crown Prosecution Service in early 2012 in order to discuss the West Midlands Police disclosure. It is agreed that at this meeting disclosure was discussed by DC Austin and Nigel Reader and that all documents referred to in the MG6D were available for inspection, but were taken away by DC Austin at the end of that meeting.

ii. The existence of the West Midlands Police MG6D was disclosed by the First Defendant to the Second Defendant by way of an MG6D schedule dated 3 May 2012 as part of the First Defendant's phase 13 disclosure. The document itself was not supplied at that time.

iii. The existence of SOCO Alison Fitzpatrick's workbook was disclosed by the First Defendant to the Second defendant by way of an MG6D schedule dated 10.8.12 as part of the First Defendant's phase 16 disclosure. The workbook was not supplied at that time.

iv. SOCO Alison Fitzpatrick's workbook was copied by the First Defendant and provided to the Second Defendant during the course of the criminal trial on the 6 November 2012."

It has now been made clear by both defendants (and this was stated to the Master) that it is agreed there was only ever one meeting: on the basis of the second defendant's information, that could not have been in October 2011 as Mr Reader only first became involved in November 2011. It was probably in January 2012. However, the date of the meeting is perhaps of less importance: more significantly, the agreed statement of facts did not refer to Warwickshire Police being at the meeting as well as the CHIS controller and it is now agreed that all the information which Mr Reader required to make an informed decision in relation to disclosure was put before him at that meeting.

9. In the above circumstances, and given the ongoing concerns over disclosure, I find it completely understandable that the claimant's lawyers considered it necessary to include both Warwickshire Police and the CPS in the litigation until there could be some clarity as to whether there was a meeting (not accepted by CPS in their letter), when that meeting was (October 2011 according to D1 but not D2), who was present, what was said and what information or material was disclosed. It is disappointing, to say the least, that inaccurate or misleading information was being given to the claimant's solicitors, particularly by GLD, and particularly when it is now acknowledged that disclosure should have been made and the failure to make disclosure by Mr Reader of this important information was an error. However, such disappointment should not lead one to lose sight of the question that arises in this case, namely whether the claimant has a good arguable case that it was more than an error for Mr Reader to have failed to disclose the intelligence material, but that there has been misfeasance in a public office.

The Judgment of Master Davison

10. In a judgment which, if I may say so, is conspicuous for its thoroughness, clarity and the care obviously taken in its preparation, Master Davison set out, at paragraphs 24 to 26, the law in respect of misfeasance in public office which is not challenged as an accurate exposition of the legal position, and whereby it cannot be asserted that the learned Master misdirected himself in law:

"The law - misfeasance in public office

24. Misfeasance in public office requires proof of the following ingredients:

(a) The defendant must be a public officer;

(b) The conduct complained of must be in the exercise of public functions;

(c) Malice: the requisite state of mind is one or other of the following:

(i) "Targeted malice", i.e. the conduct "is specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of a public power for an improper or ulterior motive". Or

(ii) "Untargeted malice", i.e. the public officer acts knowing that he has no power to do the act complained of or with reckless indifference as to the lack of such power and that the act will probably injure the claimant.

(d) Damage: the public officer must have foreseen the probability of damage of the type suffered.

25. Because the damage element is important in this case, I will set out two passages from *Three Rivers DC v Bank of England* (No. 3) [2003] 2 AC 1 which illustrate the requirement in relation to untargeted malice (*the emphasis is mine*):

> "The element of knowledge is an actual awareness but is not the knowledge of an existing fact or an inevitable certainty. It relates to a result which is yet to occur. It is the awareness that a certain consequence will follow as a result of the act unless something out of the ordinary intervenes. The act is not done with the intention or purpose of causing such a loss but is an unlawful act which is intentionally done for a different purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences: *Garrett v Attorney General* [1997] 2 NZLR 332, 349-350. per Lord Hobhouse at 231 A-B.
>
> It is not, of course, necessary that the official should foresee that his conduct will certainly harm the plaintiff. Nothing in life is certain. Equally, however, I do not think that it is sufficient that he should foresee that it will probably do so. The principle in play is that a man is presumed to intend the natural and probable consequences of his actions. This is the test laid down by Mason CJ writing for the majority of the High Court of Australia and Brennan J in *Northern Territory v Mengel* 69 ALJR 527 viz that it should be calculated (in the sense of likely) in the ordinary course of events to cause injury. But the inference cannot be drawn unless the official did foresee the consequences. It is not enough that he ought to have foreseen them if he did not do so in fact, per Lord Millett at 236 F-G."

26. The requirements at (c) and (d) above are onerous. In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularise the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable

to be struck out. The claimant must also specifically plead and properly particularise both the damage and why the public officer must have foreseen it. A pleading that fails to do so is similarly liable to be struck out. These propositions have been established in a series of cases, including *Three Rivers* (see above), *Thacker v Crown Prosecution Service* CA, 16 December 1997 (unrep) and *Carter v Chief Constable of Cumbria* [2008] EWHC 1072 (QB). The closing words of Chadwick LJ in *Thacker* are of general relevance to claims brought against prosecuting authorities:

> "The fact that someone in the Crown Prosecution Service may have been negligent or incompetent in the course of reaching a decision to commence or to continue the prosecution – whether by failing to evaluate the evidence correctly at the outset, or in failing to review the evidence after committal or in the light of new material – cannot, in itself, justify an inference of malice. If that is all the evidence that there is, the question of malice cannot be left to the jury. It is because, in many of these cases, that will be all the evidence there is, an attempt to dress up a claim in respect of negligence or incompetence in the guise of malicious prosecution must fail."

Plainly, those remarks would apply with equal or greater force to a claim of misfeasance in public office."

In the present case, it is accepted that the first two ingredients are satisfied, Mr Reader being a public officer and the conduct complained of being in the exercise of public functions. As Master Davison correctly recognised, the issue focuses on the third and fourth ingredients: malice and foresight of the probability of damage of the type suffered.

11. In the light of the above, it is first necessary to turn to the Particulars of Claim and see the way in which the claimant puts the case against the second defendant. This is set out at paragraphs 55n) and o) as follows:

> "n) By the end of the meeting with DCI Naveed Malik and the WMP CHIS controller on 18 October 2011 (and possibly even earlier), the second defendant had been fully appraised as to the content of the said intelligence and would have known that the said intelligence was plainly relevant and disclosable pursuant to section 3(1) CPIA;
>
> o) the Second Defendant's failure to disclose the said intelligence to the Claimant and the co-accused until 8 November 2012 was an act of deliberate bad faith and/or reckless indifference."

The loss and damage alleged is pleaded at paragraph 56, namely the claimant's deprivation of liberty for a period of over fifteen months as a result of being remanded in custody from 27 July 2011 when he was arrested until 16 November 2012 when he was acquitted and released. It is pleaded that if the Second Defendant had disclosed the intelligence promptly the prosecution of the Claimant would have collapsed many months, if not a year or more, before it did, or alternatively the claimant's prospects of being granted bail prior to the discontinuance of the proceedings would have been considerably enhanced. It is also pleaded that if the Second Defendant had made the PII application promptly, the prosecution would have collapsed many months, if not a year or more, before it did.

However, it must be observed that nowhere is it pleaded that these matters and the probability of such damage was foreseen by Mr Reader.

12. In acceding to the Defendants' applications for strike-out and/or summary judgment, Master Davison relied on what he considered to be deficiencies in relation to both the pleading of the case and the substance of the case.

13. So far as the pleading is concerned, he said:

> "49. … No facts or circumstances are set out that would not, on the face of them, the equally explicable by mistake or want of care. The cautionary words expressed by the Court of Appeal in Thacker had resonance here. I should scrutinise the claim carefully to ensure that the allegations of misfeasance in public office amount, or are capable of amounting in reality, to something more than "mere" negligence. They do not. And I should make it clear that a pleading that does not or cannot give proper particulars of bad faith is not saved by the "bootstraps" operation of a legend that this is the "only explanation" when, on the facts pleaded, that is quite clearly not the case.
>
> 50. The Particulars of Claim are also deficient in relation to the requirement of damage. In relation to both defendants, the claimant has not pleaded that any police officer or any Crown Prosecutor actually foresaw that the withholding of the intelligence material would cause the claimant damage by the circuitous route of an accelerated PII application leading to the prosecution collapsing and his earlier release."

It is also relevant to point out that the learned Master considered that no amendment was possible to remedy these deficiencies.

14. Turning to the substance of the case, Master Davison also considered the claim to be wholly unrealistic. He stated:

> "56. In relation to the claim against the CPS, an explanation was given at trial by Mr Lockhart QC as to why the material had not been disclosed earlier. The explanation was that the link to Luigi Prota was not immediately apparent. Mr Lockhart QC would not have put his name to the memorandum of 14 November 2012 if he knew or suspected that this explanation was false. And the claimant did not then and has not since challenged the bona fides of that statement. Further, and as I have already observed, the intelligence material was confusing, equivocal and of questionable reliability and the explanation given in court by Mr Lockhart QC was and remains obviously plausible. I would add that the notion that Mr Reader (or any other Crown Prosecutor) would have acted towards the claimant with targeted malice or reckless indifference is, by contrast, wholly implausible. A public servant in the position of Mr Reader would have no motive to act towards the claimant with either type of the malice required and none has been suggested. In these circumstances there is no "real prospect" of the court drawing an inference of malice.

Furthermore, Master Davison considered the damages claim, as well as lacking an allegation of actual foresight, to be "entirely speculative". He said:

> "57. … The claim set out in paragraph 56 of the Particulars of Claim is that earlier disclosure to the defence of the intelligence material would have resulted in an earlier PII application which would in turn have resulted in the collapse of the prosecution

> "many months" earlier. It is speculation that there would have been a PII application at all because evidence in this category is very frequently admitted by "gisting" or by agreement but if there had been a PII application, it would have been made at this stage before the defence teams had formulated the defences they intended to present to the jury, before the prosecution had opened their case, before Mr Prota had been cross-examined and without the prosecution having, as part of the application, to admit a prior failure to disclose. In short, there would have been less prejudice to the defence and less explaining to do on the part of the prosecution. It is far from clear that the outcome of an earlier PII application would have been the collapse of the case (and hence, had actual foresight of this consequence been pleaded – which it has not – such a pleading would carry no conviction)."

The Claimant's Submissions on this Appeal

15. At the heart of the submissions of Mr Menon QC on behalf of the claimant is his reliance on the fact that, following the meeting referred to in paragraph 3 above, a positive decision was made by Mr Reader not to disclose the intelligence to the defence, as acknowledged by Mr Dyton of GLD at paragraph 16 of his witness statement dated 12 March 2019 in support of the Second Defendant's strike-out application. Mr Dyton stated:

> "During the meeting intelligence which might suggest that Luigi Prota may have shot "Gary" was discussed (the "Intelligence"). A decision was taken that the Intelligence was not at this stage disclosable."

Mr Menon referred to the conflict of evidence coming from each of the defendants and submitted that this conflict by itself indicated that this was not an appropriate case for strike-out or summary judgment. But, more than that, he submitted that the picture that has emerged as a result of the various concessions made by the defendants, and in particular the Second Defendant, shows that this is a proper case where a court could draw an inference of malice.

16. Mr Menon relied in particular on the decision of the majority of the Privy Council in *Gibbs v Rea* [1998] AC 786, a case which concerned the alleged malicious procurement of search warrants in the Cayman Islands. The Plaintiff gave unchallenged testimony at the trial that he had never done anything which could have caused anyone to suspect him of carrying on or benefiting from drug trafficking or to suspect that any material relating thereto would be in his home or office. The defendants merely denied the plaintiff's allegations and called no evidence. The Privy Council held that where defendants elected to give no evidence and to contend that the plaintiff's case was not proved, their silence in circumstances in which they would be expected to answer might convert evidence tending to establish the plaintiff's claim into proof; that there was a circumstantial case that there were no grounds on which the plaintiff could reasonably have been suspected of drug trafficking or benefiting therefrom; that, in the circumstances, the plaintiff's case called for an answer and the first defendant's silence supported the inferences that he did not have sufficient grounds on which to suspect that the plaintiff had carried on or had benefited from drug trafficking and had used the court process for an improper purpose; and that, accordingly, the Court of Appeal had been entitled to find that the first defendant had acted with malice and, since damage was not contested, that the plaintiff had proved all the elements of the tort. Giving the judgment of the majority, Gault J cited a dictum of Lord Tenterden CJ from *Taylor v Willans* 2 B&Ad 845, 847:

> "The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is, in some degree, a negative, and the plaintiff can only be called upon to give some, as Mr J le Blanc, a most accurate judge, says, slight evidence of such want. As then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact?"

Gault J then continued:

> "The burden on the plaintiff was to prove on the balance of probabilities that the detective inspector did not believe in good faith that there were grounds for suspicion that the plaintiff had carried on or benefited from drug trafficking. The state of a person's mind can be proved by evidence of what he or she has said or done. It can be proved also by circumstantial evidence.
>
> Mr Glasgow's approach in argument was to take each matter said to support the inference the plaintiff contended for and to submit that while it might be consistent with malicious procurement of their warrants it was also consistent with other credible explanations encompassing a belief in reasonable grounds for suspicion. But in the absence of any evidence supporting other explanations that Lordships see no reason to speculate for the benefit of the parties within whose knowledge the true state of affairs rests."

17. Mr Menon further relied on the decision of the Court of Appeal in *Paul v Chief Constable of Humberside* [2004] EWCA Civ 308 where Lord Justice Brooke referred to *Gibbs v Rea* at paragraph 44 and having referred to the citation from Lord Tenterden CJ, he said:

> "44. … *Gibbs v Rea* turned on the significance of the decision by the defence to call no evidence at the trial, but it is a useful reminder of the fact that a claimant cannot ordinarily be expected to produce direct evidence on these matters."

So here, submitted Mr Menon, the claimant could not be expected to produce direct evidence of Mr Reader's malice and reliance on inference should have been the Master's approach.

18. In the present case, Mr Menon submitted that a careful and thorough scrutiny of the specific facts and circumstances of the disclosure failure in this case demonstrates that misfeasance, involving bad faith or reckless indifference, is a more realistic explanation than inadvertent mistake or want of care. He submitted that it is difficult, if not inconceivable, to comprehend how a qualified criminal lawyer could possibly have concluded that intelligence unequivocally placing a gun in Mr Prota's hand and accusing him of shooting someone during the attack on his home, whoever the original source of the intelligence or the alleged victim of the shooting, could properly be withheld from the accused. Even if that is wrong, he submitted that there will often appear to be a thin line between reckless indifference and incompetence or negligence, particularly at an early stage of civil proceedings, when most disclosure is still outstanding, and no witness statements have as yet been exchanged. Consequently this is precisely the type of issue that should only be resolved on the basis of actual facts found at a trial as opposed to hypothetical facts assumed to be true, possibly wrongly, for the purposes of strike-out or summary judgment. In circumstances where Mr Reader knew everything that he needed to know as a result of the meeting in January 2012, and where, on Mr Dyton's evidence, a positive decision was taken that the material was not disclosable, Mr Menon submitted that

Master Davison erred in concluding, at this stage of the proceedings, that it could be explained by want of care or negligence. He submitted that the CPS must have realised that the material was disclosable, just as this was immediately apparent to Mr Lockhart QC at the trial.

19. Referring to paragraph 55 of Master Davison's judgment, Mr Menon submitted that the Master, having conducted a "mini-trial" (such being forbidden on a strike-out or summary judgment application), ignored four critical matters in concluding that Mr Lockhart QC had given Mrs Justice Sharp an explanation for the disclosure failure that was obviously plausible:

    (i) There was no evidence before the Master that either Mr Lockhart QC or Mrs Justice Sharp were ever made aware of the irreconcilable differences between the Defendants as to the disclosure process and who knew what and when;

    (ii) The Master was not actually privy to the full explanation for the disclosure failure, as this had only been given *ex parte* during the PII application;

    (iii) Whatever the full explanation for the disclosure failure given *ex parte*, it was not sufficiently plausible so as to prevent Mrs Justice Sharp from ordering the prosecution to disclose the identity of the informant(s);

    (iv) After the jury returned Not Guilty verdicts on her direction, Mrs Justice Sharp observed that what had occurred raised serious issues which needed to be carefully examined by those with responsibility for overseeing the prosecutorial process. Consequently, she referred the case to the Director of Public Prosecutions so that an investigation could be undertaken into the events which led to the decision by the prosecution to offer no evidence and the collapse of the trial. The results of this investigation have never been disclosed.

    Generally, Mr Menon submitted that the conclusions reached by the Master in his judgment should only have been reached after the evidence had been fully and properly tested at trial, and not on a hypothetical or speculative basis on the papers.

The Second Defendant's arguments on Appeal

20. As I have stated, once it was agreed between the defendants that Warwickshire Police had disclosed the intelligence to the CPS in the meeting in January 2012, and once Mr Menon had conceded that, in those circumstances, Warwickshire Police had complied with their disclosure duty, the case against the first defendant fell away and I called on Mr Payne QC for the Second Defendant to respond first.

21. Mr Payne first referred to the Particulars of Claim where the first Memorandum of Disclosure served by the prosecution at trial on 8 November 2012 is referred to at paragraph 45 and the second Memorandum of Disclosure served by the prosecution at trial on 14 November 2012 is referred to at paragraph 48. He referred to paragraph 7 of the second Memorandum where it was stated:

    "The material that might have led to the discovery of the fact that the words may have been spoken by Luigi Prota was reviewed by the CPS in early 2012. At that time,

> because the link to Luigi Prota was not immediately apparent, this material was considered not to be disclosable."

Mr Payne submitted that there was nothing in the intelligence to suggest that the words were spoken by Luigi Prota as the source was never stated. He made it clear that he was not suggesting that the decision not to disclose the material was a correct decision but rather that the reason had been given in the Memorandum of Disclosure and the adequacy of that explanation had not been challenged. This was a submission which had been made clearly to the Master as shown by paragraphs 36-37 of the skeleton argument of the Second Defendant for the hearing below.

22. Mr Payne further submitted that, at the relevant time, there was no witness statement from Luigi Prota suggesting that he did not have a gun and the person who made the decision not to disclose the material (presumably a reference to Mr Reader) would not have known that Mr Prota was denying that he had a gun at that stage. Mr Payne was able to tell me that there was a witness statement from Mr Prota dated 14 March 2012 in which he denied ever having guns in his house. Mr Payne submitted that the real significance of the intelligence only became apparent when Luigi Prota was cross-examined and there was no evidence to suggest that the credibility issue that arose at trial in relation to Mr Prota could have been foreseen when the disclosure decision was made, in the absence of a statement from Mr Prota that he did not have a gun. Mr Payne submitted that where an explanation for the non-disclosure has been provided, and is not challenged, there is no room for an inference of malice without more.

23. Mr Payne also relied upon the pleading deficiencies which had been referred to by the Master. A critical component of the tort of malfeasance in public office is that the individual foresaw the damage and this is not pleaded. The pleading deficiencies were pointed out when the second defendant made his application in March 2019 and that gave the claimant ten months to remedy these deficiencies, but it was never done. Even now, there is no draft amended Particulars of Claim before the court to remedy the deficiencies. He pointed out that there is a duty on the claimant in such a claim as this arising from the fact that such a claim should not be made unless properly supported by the facts and there is no evidence to suggest that Mr Reader foresaw that the likely consequence of not disclosing the information would result in the need for the prosecution to make a PII application, nor that the PII application would be unsuccessful.

24. In relation to the third limb of a claim for misfeasance - the need for targeted or untargeted malice - Mr Payne submitted that this needs to have "teeth" and this is lacking where it is not suggested that the prosecution was malicious. He said that, as far as he was aware, there was no previous instance where a claim in misfeasance arising out of a disclosure failure had succeeded against the CPS which goes to emphasise the very high threshold which the court applies to the claim such as this. Thus, it is insufficient that a disclosure failure might cause some damage. He relied on the speech of Lord Hobhouse in *Three Rivers District Council v Bank of England No 3* [2003] 2 AC 1 at p.230H where he said:

> " Secondly, there is what is sometimes called "untargeted malice". Here the official does the act intentionally being aware that it will in the ordinary course directly cause loss to the plaintiff or an identifiable class to which the plaintiff belongs. The element of knowledge is in actual awareness but is not the knowledge of an existing fact or an inevitable certainty. It relates to a result which has yet to occur. It is the awareness that a certain consequence will follow as a result of the act unless something out of the

> ordinary intervenes. The act is not done with the intention or purpose of causing such a loss but is an unlawful act which is intentionally done for a different purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences: *Garrett v Attorney General* [1977] 2 NZLR 332, 349-350.
>
> Thirdly, there is reckless untargeted malice. The official does the act intentionally being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official wilfully disregards that risk. What the official is here aware of is that there is a risk of loss involved in the intended act. His recklessness arises because he chooses wilfully to disregard that risk."

Lord Millett agreed with Lord Hobhouse on this issue, saying at page 235B:

> "The tort is an intentional tort which can be committed only by a public official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind.
> …
> The tort is generally regarded as having two limbs. The first limb, traditionally described as "targeted malice", covers the case where the official acts with intent to harm the plaintiff or a class of which the plaintiff is a member. The second is said to cover the case where the official acts without such intention but in the knowledge that his conduct will harm the plaintiff or such a class. I do not agree with this formulation. In my view. In the first limb it is established by evidence; in the second by inference."

In the context of these dicta, Mr Payne submitted that there is no reason that Mr Reader should have thought that had this material (based on street gossip, as it was thought) would cause the trial to collapse and, significantly, it is not suggested that he did foresee this and it is not pleaded. For a person to commit misfeasance, he has to know or foresee the likely damage. However here, even on the claimant's case, all Mr Reader is doing is not disclosing a relevant document.

25. Responding to Ground 1 of the Grounds of Appeal, namely that the Master erred in failing to consider whether the pleaded facts might establish misfeasance, Mr Payne submitted that the Master, in scrutinising with care whether "the allegations of misfeasance in public office amount to or are capable of amounting in reality to something more than "mere" negligence", was simply applying well established law, relying on *Carter v Chief Constable of Cumbria Police* [2008] EWHC 1072 where, in a case involving a strike-out application, Mr Justice Tugendhat stated:

> "66. In my judgment they should have in mind in this case the words of Judge LJ cited above, as adapted to the law of misfeasance in public office. It is essential that before this action of misfeasance is allowed to be pursued through the courts anxious scrutiny should be made of it to ensure that the Defendant's immunity against actions of negligence is not circumvented by pleading devices of converting what is in reality not more than allegations of negligence into claims for misfeasance in public office."

In the present case, submitted Mr Payne, there is nothing that the claimant can point to beyond the fact of the error of non-disclosure to suggest that Mr Reader took a decision knowing it would cause harm to this claimant or category of claimant. Mr Payne pointed

to the fact that, as had been alluded to by the Master, the prosecution of the case against the Claimant and his co-defendants had involved a huge disclosure exercise and it was as a result of the evolution of the case including the disclosure of the statement of Claire Morse, the cross-examination of Mr Prota, and the applications made by defence counsel at trial that the significance of the intelligence became fully apparent, whereupon the CPS took all the steps they were asked to by Mr Lockhart QC. By contrast, the non-disclosure decision of which complaint is made had been taken at a very early stage in the process.

Discussion

26. In my judgment, the starting point must be to establish the factual basis upon which the claim is put. Although the defendants contradicted each other about what was disclosed, by whom, to whom and when, this all resolved itself when the second defendant conceded that, at the meeting which probably took place in January 2012, the CPS were given full disclosure of the intelligence material, that meeting being attended to by Mr Reader, the senior investigating officer (DCI Malik) and the CHIS controller. Although the documentation was not all left with Mr Reader, he had knowledge of its existence and what it contained so as to be able to make an informed decision about disclosure. Furthermore, as Mr Menon submitted, it is important to get to the heart of the significance of the intelligence, which was to put a gun in Mr Prota's hand at the time of the events which led to the killing of Mr Gower. It ought to have been clear that such intelligence was significant in the case where the four defendants who entered the house were alleged to have gone with murderous intent, armed with guns and knives, and where this claimant was said to have been part of a conspiracy to attack Mr Prota and therefore be guilty as an accessory although many miles away. Thus, it is not surprising that it is conceded on behalf of the Second Defendant that an error was made and that the material should have been disclosed.

27. The main force of the claimant's case is that the relevance of the intelligence material, and the need for it to be disclosed, was so blindingly obvious that, at this stage, the court cannot rule out a judge at trial drawing an inference of malice sufficient to amount to misfeasance. In my judgment, though, and as the Master essentially found, what may have become blindingly obvious to Mr Lockhart QC at trial would not necessarily have been as obvious to Mr Reader in January 2012. By then, the defence statements would not have been served and the issues would not have been refined. In particular, it was not clear at that time that Mr Prota was denying that he ever had a gun in his hand and that no guns were ever kept at his house. Furthermore it would not have been clear to Mr Reader just how reliable the intelligence was and if at that stage it appeared to amount to no more than "street gossip", then its probative value to the defence might have appeared weak or even non-existent. In order for a case in misfeasance to get off the ground, it would be necessary for the material to have been of such a nature that no reasonable prosecutor in the position of Mr Reader, looking at it, could have said to himself anything other than that "this needs to be disclosed to the defence immediately". I have no doubt that, at the relevant time, which is January 2012, the material would not have appeared to be in that category. It must also be remembered that, as the Master remarked, disclosure in this case was "an enormous exercise given the number of defendants and the complexity of the case. It ran to thousands of documents and was given in twenty-six separate tranches." Mr Reader took over the responsibility for the prosecution on or about 22 November 2011 and he would undoubtedly have been assimilating the material in stages and grading the material in terms of its "disclosability" as he got on top of the case and became *au fait* with the issues and the roles

played by the defendants. The result is that, in order for a claim in misfeasance to be arguable, the claimant must be able to point to something more than they have at present to show that Mr Reader acted with malice. However, there is nothing more pleaded or relied upon and I agree with the Master that, in those circumstances, the claim is doomed to failure.

28. Additionally, the failure on the part of the claimant to plead his case in relation to the fourth element of misfeasance, namely foresight of damage, is a serious omission. It was suggested to me by Mr Menon that this would be a simple, one line amendment, which should not cause the action to fail at this stage but that the claimant should be given a chance to amend. However, I do not think that is right: the trial took an unusual turn with the service by the prosecution on the defence of the first Memorandum of Disclosure, then the PII application, then the service of the second Memorandum of Disclosure and then the ruling of Mrs Justice Sharp. This led to the collapse of a prosecution which it is conceded was properly brought. Exactly what it is alleged Mr Reader should have foreseen or known in January 2012 and how that translates into damage (and therefore damages) for the claimant is obscure and would, in my judgment, be very difficult to draft in a way which is both coherent and satisfies the fourth limb of the misfeasance tort. I do not know whether it was recognition of this substantive difficulty which led to the issue being "ducked" in the Particulars of Claim, but what is clear to me is that it represents a substantive difficulty for the claimant and it is therefore a pleading point with significant substance.

29. In the end, despite the able submissions of Mr Menon on behalf of the claimant, I found myself being drawn more and more to full agreement with Master Davison. His reliance upon what Chadwick LJ said in *Thacker* (see paragraph 10 above) was wholly apposite, and I agree with him in relation to what he said both as regards the way in which the case is pleaded and also as to the merits of the claim. The "bottom line" is that Mr Lockhart QC gave the court an explanation at paragraph 7 of the second Memorandum of Disclosure which, however inadequate it might seem, has not been challenged as being a genuine explanation for why the material was not disclosed. Once that point was established, the case in misfeasance was, in my judgment and as Master Davison found, doomed and it was right for the claim to be struck out. On an appeal, in order for the appeal to succeed, it is necessary for the appellant to show that the judgment below was "wrong". Far from being wrong, it seems to me that Master Davison's judgment was right for all the reasons that he articulated

30. Finally I should mention, for the sake of completeness, that the Claimant has also pleaded (at paragraph 55j of the Particulars of Claim) that when Claire Morse, an independent prosecution witness, revealed that she had been told by scenes of crime officers ("SOCOs") that one of the witnesses stated that he had shot at the offenders, SOCO Alison Fitzpatrick and SOCO Jeffrey Lloyd provided witness statements that deliberately and falsely sought to undermine Ms Morse's credibility. At paragraph 59 of his judgment, the Master stated that the difficulty facing the claimant so far as this allegation is concerned is that it falls squarely within the immunity from suit extended to witnesses and other participants in legal proceedings, relying on *Marrinon v Vibart* (1963) 1 QB 528 where it was stated:

> "Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings suffer the same fate of being barred by a rule which protects witnesses in their evidence before the court and in the preparation of evidence which is to be given"

(per Sellers LJ, approved in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198).

Before the Master, Mr Menon QC had submitted that the statements had been prepared as part of an investigative process initiated by prosecution counsel and intended to assist him and so could not fairly be said to have formed part of those witnesses' participation in the judicial process as witnesses, and this submission was repeated for me. However, in my judgment, the submission is wholly answered by what the master said at paragraph 63:

> "The statements … were very clearly intended to address what was said to be (and was in fact) a lacuna in the evidence then before the court, namely what was the source of Claire Morse's understanding that one of the witnesses had shot at the offenders. This part of her statement was very much in evidence. … The statements formed part of the evidence in the case that was being presented to the jury to the extent that they assisted the prosecution's own enquiries into the intelligence material, that cannot possibly be said to have removed them from the category of statements which were a part of the judicial process and to which the immunity applied.

I agree with the Master's reasoning.

31. In all the circumstances the appeal must be dismissed.