

Neutral Citation Number [2023] EWHC 2236 (KB)

IN THE HIGH COURT OF JUSTICE

Claim No. KB-2022-003046

KING'S BENCH DIVISION

Royal Courts of Justice,  
Strand, London, WC2A 2LL

Date of hearing: 20 June 2023

Date Judgment given: 15 September 2023

Before: MASTER YOXALL (Sitting in Retirement)

**B E T W E E N**

**ADRIAN DALY**

**Claimant**

**And**

**INDEPENDENT OFFICE FOR POLICE CONDUCT**

**Defendant**

Representation:

Mr. Simon Cheetham KC and Ms Turan Hursit (instructed by Penningtons) for the Claimant

Ms Beatrice Collier, of counsel (instructed by DAC Beachcroft) for the Defendant

**JUDGMENT**

*This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10.30am on 15 September 2023.*

1. The Claimant is a serving police officer with the Metropolitan Police Service ["MPS"] and was the subject of criminal and disciplinary proceedings. He brings this case against the Defendant alleging malicious prosecution and misfeasance in public office in relation to those proceedings.
2. The Defendant now applies for an order that both the malicious prosecution and the misfeasance in public office claims be struck out on the basis that the statement of case discloses no reasonable grounds for bringing the claims; see CPR r.3.4(2)(a). In the alternative, the Defendant applies for summary judgment on the basis that the Claimant has no real prospect of succeeding on the claims and that there is no other compelling reason why the case should be disposed of at a trial; see CPR r.24.2.
3. Mr. Simon Cheetham KC and Ms Turan Hursit, of counsel, appeared on behalf of the Claimant and Ms Beatrice Collier, of counsel, appeared on behalf of the Defendant. I am grateful for the written and oral submissions of counsel and their skeleton arguments should be read with this judgment. I hope that I will be forgiven for not rehearsing their arguments in full.
4. In addition to the submissions of counsel, I had the benefit of a witness statement by Ms Nicola Johnston, solicitor for the Defendant, dated 20<sup>th</sup> December 2022; and a witness statement by Ms Rebecca Foster, legal executive for the Claimant, dated 5<sup>th</sup> June 2023. There is a hearing bundle of over 350 pages.
5. As far as the application to strike out the claims is concerned, I remind myself that the focus must be on the Particulars of Claim as they stand or as they might stand after amendment. As far as the application for summary judgment is concerned, it is for the Defendant to show that the Claimant has no real prospect of succeeding on the claims. I remind myself that it is not for the Claimant to show that he would win his case at trial. The key question is whether or not there is a *real* prospect of success. As is well known, a fanciful prospect of success will not do.

### *The Background*

6. There was a fatal shooting in Hackney on 26<sup>th</sup> September 2015. Acting on intelligence received, on the 29<sup>th</sup> September 2015 there was a firearms operation when a number of MPS firearms officers and detectives attended a flat in West Silvertown. In the course of that operation, a member of the public ["JS"], who was one of the residents of the flat, was assaulted by one of the firearms officers while in the stairwell of the block of flats. JS was punched in the back several times and his ankles were kicked. At the time of the assault JS was naked and handcuffed.
7. JS was not arrested and there is no evidence of any wrongdoing on his part. For some days after the assault, JS found that he was in increasing pain. He attended hospital and was diagnosed with a pneumothorax. At this point he decided to make a formal complaint. This he did on 6<sup>th</sup> October 2015. The investigation began on 3<sup>rd</sup> November 2015.

8. The Defendant investigated the complaint. The identification of the assailant was problematical. The firearms officers, who had been in the vanguard of the visit to the premises, were masked. However, JS was able to identify his assailant as the same officer whom he had spoken to at an earlier stage of the visit. JS referred to the officer's accent, the colour of his top and his footwear. The Claimant was identified as that assailant. Suffice to say this identification evidence proved to be controversial. There was evidence that the Claimant was not the assailant.
9. The Defendant compiled a report on the investigation into police contact with JS and this was referred to the Crown Prosecution Service ["CPS"] on 28<sup>th</sup> November 2016. I will return to the report and referral below.
10. Having considered the report, the CPS advised that the Claimant be charged with assault under s.20 of the Offences Against the Person Act 1861 and assault occasioning actual bodily harm. The Claimant was duly charged. The CPS then dropped the s.20 charge and the Claimant was prosecuted for the s.47 OAPA 1861 offence only. On the 22<sup>nd</sup> September 2017 the Claimant was acquitted after a jury deliberation of 21 minutes. As stated above, the identification evidence was controversial and in the course of his evidence, JS conceded that the assault might have been committed by another officer.
11. Before the criminal trial the Defendant had resolved to seek misconduct proceedings against the Claimant. Suffice to say that following the Claimant's acquittal, the MPS did not wish to pursue misconduct proceedings given the acquittal and the identification evidence. However, the Defendant directed that the MPS institute gross misconduct proceedings<sup>1</sup>. Those proceedings commenced on the 4<sup>th</sup> February 2019 and were dismissed on 6<sup>th</sup> February 2019 without the Claimant being required to give evidence.
12. Against this background the Claimant pleads malicious prosecution and misfeasance in public office by the Defendant in relation to both the criminal proceedings and the disciplinary proceedings.

### *Malicious Prosecution*

13. I must mention at the outset that Mr. Cheetham concedes that a claim in malicious prosecution cannot be made in respect of disciplinary proceedings; see *Gregory v Portsmouth City Council [2000] 1 A.C. 419*. However, Mr. Cheetham submits that there was malice in relation to those proceedings and that malice may be taken as evidence of malice in the criminal prosecution.

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<sup>1</sup> There is no dispute that the Defendant has the statutory power to direct or require the institution of disciplinary proceedings. The Defendant has no such power in relation to criminal proceedings.

*Is the Defendant a prosecutor?*

14. As far as malicious prosecution in the criminal proceedings is concerned, the first point taken by the Defendant is that it was not the prosecutor – the CPS was the prosecutor. If the Defendant was not the prosecutor then, obviously, the claim in malicious prosecution cannot stand.
15. I proceed on the basis that if the CPS was in substance the prosecutor coming to an independent decision to prosecute then it alone is the prosecutor and the malicious prosecution claim against the Defendant must fail.
16. I take the point that a complainant or third party might become so wrapped up in a prosecution (for example by providing deliberately false evidence) that the complainant or third party may be regarded as a prosecutor; see *Martin v. Watson* [1996] 1 A.C.74; and *AH v. AB* [2009] EWCA Civ 1092.
17. In *AH v. AB*, it was held that the complainant in a prosecution for rape was not in the circumstances the prosecutor and so was not amenable to an action for malicious prosecution.

At paragraph 47, Sedley LJ said:

47. It follows – and I understand all members of the court to assent to this – that while the fact that the (complainant) did nothing designed to promote the prosecution of the appellant was a sufficient ground for the judge's decision that she was not the prosecutor, it was not a necessary one. Even if she had gone directly to the authorities, the professional responsibility for the case assumed first by the police and then by the CPS would prima facie have made the latter for all legal purposes the prosecutor. It would have been necessary to establish that *she had deliberately manipulated them into taking a course which they would not otherwise have taken* if, pursuant to *Martin v Watson*, she was to be regarded in law as the prosecutor. The assertion that the claimant was telling the truth and the defendant was not, even if a jury were satisfied of it, would not establish this. [My emphasis].

At paragraph 68, Wall LJ said:

68. In *Martin v Watson* Lord Keith, having approved the statement of principle in *Clerk & Lindsell* to which I have referred, identified at page 80E of the report the question at issue as being “whether or not the defendant is properly to be regarded, in all the circumstances, as having set the law in motion against the plaintiff.” In my view, it is essential for a correct understanding of later passages in his Lordship's speech to keep that question well in mind. Mr. Warby submitted that the test is essentially one of causation: it is satisfied whenever an informant provides information and gives evidence which is fundamental to the success of a prosecution, *but in most cases the chain of causation is broken by the exercise of independent judgment on the part of the prosecuting authorities. Where, however, an informant has knowingly given false information, he cannot rely on the actions of the authorities as relieving him from responsibility and the chain of causation remains intact.* [My emphasis].

18. The Claimant's immediate difficulty on this point is how the malicious prosecution claim is pleaded. Paragraph 9 of the Particulars of Claim states:

9. On 1st November 2016, the MPS contacted IOPC challenging the findings of the report. In particular, issue was taken with the identification evidence; the MPS' position was that the Claimant had no case to answer. On 28th November 2016, the IOPC referred the matter to the CPS for a charging decision and on 11th January 2017, based on the IOPC's case file, *the CPS decided to charge the Claimant with an assault causing actual bodily harm.*

*[My emphasis].*

19. On this pleading, the malicious prosecution claim cannot stand. In argument, I did ask Mr. Cheetham if the Claimant wished to amend to plead that the Defendant was a prosecutor. Mr. Cheetham told me that he had no application to amend but that there would be an application to amend if the case was allowed to proceed. I should add that paragraph 18 of the Particulars of Claim pleads that the case was instituted by the Defendant and that it arose despite the fact that the Defendant acted without reasonable and probable cause.
20. Even if the Particulars of Claim were amended in some way, I do not consider that the Claimant has a real prospect of establishing that the Defendant was a prosecutor. I accept that the Defendant initiated proceedings in that it made a referral to the CPS but it was the CPS who took an independent decision to prosecute. What has been referred to above as the chain of causation was broken. I bear in mind that the CPS has a statutory obligation to decide whether a person should be prosecuted and to conduct the consequential prosecution; see s.3 of the Prosecution of Offences Act 1985. I bear in mind also that the Defendant itself operates under a statutory regime; paragraph 23 of Schedule 3 to the Police Reform Act 2002. The effect of the latter provisions is that the Defendant has the responsibility for determining whether the investigation report indicates that a criminal offence *may* have been committed and, if so, notifying the DPP, sending him a copy of the report and awaiting a response from him.
21. The independent investigator's report - which first went to Mr. Colin Sparrow, the Commission delegate, and which was then referred to the CPS - comprised a review and analysis of the evidence and Appendices which included DVDs, CCTV footage, numerous witness statements by police officers and by JS and his flatmates, transcripts of interviews and so on. Appendix 1 of the report deals with the role of the Defendant and states that it is the CPS which decides whether to bring a prosecution. In my view, the nature and contents of the report show that it was the CPS alone which was the prosecutor.
22. Accordingly, I will strike out the malicious prosecution claims.

23. In case I have fallen into error, I must consider the other ingredients of the tort. In order for a claim for malicious prosecution to succeed, a claimant must prove each of the following: see *Martin v Watson*.

- [1] that the proceedings were prosecuted by the defendant (dealt with above);
- [2] that the defendant must have acted without reasonable and probable cause;
- [3] that the defendant acted maliciously; and
- [4] that the proceedings were unsuccessful.

*Reasonable and Probable Cause?*

24. I do not consider that the Claimant has a real prospect of successfully proving that the Defendant must have acted without reasonable and probable cause. The Claimant has the heavy burden of proving a negative. There was evidence for and against the Claimant. It was circumstantial evidence and the case against the Claimant was finely balanced but there was evidence to put a court.

25. Reading the investigation report, I consider that the Claimant has no real prospect of proving that the Defendant (assuming it was a prosecutor) did not have a subjective honest belief in the charge. I note that it is not necessary for the prosecutor to believe that a defendant is guilty or that a defendant would probably be convicted. The prosecutor need only believe that there is a fit and proper case to put before the court. It is not sufficient for the Claimant to point to some weakness or inconsistency in the case against him to show that there was no reasonable and probable cause.

26. The CPS considered the investigation report and the referral and advised that the Claimant be charged. This also indicates that there was reasonable and probable cause.

27. Ms Collier helpfully summarised the evidence in her skeleton argument. Dealing with the identification evidence she stated in paragraph 36 of her skeleton argument:

(e) As to the identity of the officer/officers that had assaulted him, as [JS] was, on his account, assaulted from behind his back, he did not have a clear view of the officer who he asserted kicked and punched him. He did provide a description as follows [100]:

- The AFO who punched and kicked him said “you don’t fucking lie to the police!” as he did so;
- he recognised this AFO’s voice as being that of the firearms officer who was wearing a light blue top who spoke to him outside the flat as he was being handcuffed;
- he thought that the AFO had ‘black clunky boots’ as well as a light blue or teal top.

(f) All the firearms officers were wearing masks. PC Daly was one of the two officers who handcuffed [JS] outside the flat [177]; PC Hughes, who was wearing a dark blue top being the other one [177], [218]-[222].

(g) PC Daly said in his statement of 7.3.16 that whilst in the stairwell (which is where [JS] alleges the assault occurred) he had accused [JS] of having lied to him [203].

(h) The CCTV footage shows [JS] being taken down the corridor away from the flat's front door to the door to the stairwell; he then disappears out of the range of the CCTV camera. PC Daly follows [JS] out of range of the CCTV and is absent for 8 seconds. During those 8 seconds three of the AFOs within the corridor simultaneously look round towards the stairwell as if they had heard something [81].

(i) Several of the detectives waiting in the stairwell said in their statements that they did see physical contact between a firearms officer and [JS] as [JS] was being handed over to the detectives' team in the stairwell (described variously as a 'push', 'pull', 'shove', 'spin'): DI McKeeve [155]; DC Bartle [162]; DC Bailey [165]; DS Garvey [168].

37 It follows that there was evidence which indicated that [JS] had suffered injuries during the police operation; that one of the firearms officers had 'laid hands' on him in the stairwell (whilst [JS] was handcuffed and naked). The critical issue was the identification of the officer who had made physical contact with [JS]: there was evidence that pointed towards PC Daly as being that officer, and evidence which pointed away from PC Daly being that officer and/or gaps and inconsistencies in the evidence.

38 Whilst the evidence was not conclusive, it does not have to be..."

28. I agree with Ms Collier's submissions.

*Malice?*

29. There are particulars of malicious prosecution under paragraph 18 of the Particulars of Claim. The particulars are helpfully placed under headings as follows:-

- [1] Failures in the conduct of the investigation;
- [2] Failure to hold a formal identification procedure;
- [3] Failure to appoint a sufficiently experienced investigative officer;
- [4] Failure to give adequate disclosure to the CPS;
- [5] Failure to act in a fair and impartial manner.

30. In my judgment these alleged failures and the matters pleaded under the various sub-headings, even if proved, do not establish malice. These failures, if made out, may equally show incompetence or want of care. That is no basis for a claim in malicious prosecution. The Claimant has no real prospect of successfully establishing malice.

31. In any event, some of the criticisms are obviously flawed. For example, the failure to hold an Identification Procedure is dealt with in the investigation report at paragraphs 144 and 145, one of the reasons being that the Claimant had been wearing a mask and a cap.

32. In paragraph 12(a) of her witness statement Ms Foster alleges that one may infer malice from the Defendant deciding to proceed with the case despite an

email/report dated 4<sup>th</sup> April 2017 from the Defendant's lead investigator Ms Faye Wiles to Ms Rebecca Richards in which concerns were raised about the evidence. I consider that the Claimant has no real prospect of successfully persuading a court to infer malice from this. Firstly, it must be noted that this email post dates the referral of the report to the CPS. The email was probably prepared with the misconduct proceedings in mind. Then one must note that the email is not in itself evidence of anything. It is the analysis of evidence.

33. In paragraph 18 (iii) of the Particulars of Claim, as a particular of malicious prosecution, the Claimant pleads that the Defendant failed in its duties under the CPIA Code of Practice and the Attorney General's Guidelines in that the Defendant's lead investigator failed to interview a key witness, a PS Sullivan.<sup>2</sup> It appears that the Defendant was not told of PS Sullivan and the report to the CPS states that the officer in question (presumably PS Sullivan) could not be identified. No other officer identified PS Sullivan during the investigation and the Claimant himself refused to identify his colleagues in interview.
34. In the circumstances, the malicious prosecution claims must be struck out.

#### *Misfeasance in Public Office*

35. It is not disputed that the Claimant must prove that the Defendant's officers acted dishonestly or in bad faith in order to make out the tort of misfeasance in public office; see *Three Rivers District Council v. Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1.
36. In particularising the alleged misfeasance in public office the Claimant repeats paragraphs 18 (i) to (Xii) of the Particulars of Claim which go to the malicious prosecution. As I have already stated, the Claimant has no real prospect of proving malice in relation to the criminal prosecution. In the circumstances, I consider that the Claimant has no real prospect of proving dishonesty or bad faith in relation to those criminal proceedings.
37. As stated above, notwithstanding the Claimant's acquittal, and objections by the MPS the Defendant required the MPS to institute the misconduct proceedings. By a letter dated 16<sup>th</sup> November 2017, the Defendant's operations manager, Mr. Orbell, wrote to the MPS Professional Standards Directorate explaining the Defendant's stance – principally, that it remained open to a tribunal to find misconduct or gross misconduct given the lower civil standard of proof which applied. Mr. Orbell also made the point that the purpose of the police misconduct regime was to: maintain public confidence in and the reputation of the police service; uphold high standards in policing and deter misconduct; and protect the public.
38. I should add that there is no dispute before me that an acquittal, in itself, does not mean that a misconduct hearing cannot follow.

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<sup>2</sup> It is not alleged that he was the assailant.



39. By a pre-action letter dated 29<sup>th</sup> September 2017, the Claimant's then solicitors wrote to the Defendant threatening judicial review proceedings to challenge the Defendant's decision directing the misconduct proceedings. By a letter dated the 21<sup>st</sup> December 2017 the Defendant replied, at length, maintaining its decision to direct a misconduct hearing. Judicial review proceedings were never instituted.
40. In argument, Ms Collier made the point that even if the decision to maintain the direction for a misconduct hearing was unlawful in public law terms, which she did not accept, that did not mean that the Defendant's officers were acting dishonestly or in bad faith. I accept that submission.
41. In the circumstances, I find that the Claimant has no real prospect of establishing bad faith by Mr. Orbell, or any of the Defendant's officers or that they knowingly exceeded their powers. Error of judgment, even serious error of judgment, is not sufficient to establish liability.

#### *Conclusion*

42. I understand that the Claimant may well feel aggrieved that he was made the subject of criminal and disciplinary proceedings. However, I will strike out the claim in malicious prosecution under CPR r.3.4(2)(a) and give summary judgment for the Defendant on the misfeasance in public office claim. Accordingly, I will dismiss that claim.
43. A draft of this judgment was sent to the parties on 11<sup>th</sup> July 2023.