Case No. QB-2019-000127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2020] EWHC 308 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2020

Before :

MASTER DAVISON

- -

Between:

SEYMOUR YOUNG — **Claimant**

- and -

THE CHIEF CONSTABLE OF WARWICKSHIRE POLICE (1)
THE DIRECTOR OF PUBLIC PROSECUTIONS (2) — **Defendants**

- -
- -

Mr Rajiv Menon QC and **Ms Kirsten Heaven** (instructed by **Tuckers**) for the **Claimant**
Ms Fiona Barton QC (instructed by **Government Legal Department**) for the **First Defendant**
Mr Alan Payne QC (instructed by **Weightmans**) for the **Second Defendant**

Hearing date: 22 January 2020

- -

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.

.....

Introduction

1. These are applications to strike out or grant to the defendants summary judgment on the claim. The claim arises out of the following facts.

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 4 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.
>
> 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

6. Letters of claim were sent by solicitors acting on behalf of Mr Young to the defendants on 3 October 2017. The cause of action relied upon was misfeasance in public office. The core of the complaint was that the intelligence that led to the collapse of the trial should have been disclosed at an earlier stage. On 10 August 2018, the claimant sought a wide-ranging order for pre-action disclosure of documents. The application came before Master Gidden. He refused it. Part of his reasoning was that he doubted that the claim was "properly arguable and [had] a real prospect of success"; (see *Rose v Lynx Express* [2004] EWCA Civ 447). He said this:

> "The reality is that criminal proceedings do collapse when the prosecution finds itself in a position of having to offer no evidence. There are situations, some may say all too numerous, where the proper process of disclosure is not followed. There are occasions when the timing of an application for PII may not be what it should or where that application is unsuccessful. There are instances where the court is misled. But these are not all attended by claims for misfeasance in public office and there is no instant correlation between individual mistakes and collective deficiencies and the various constituent ingredients that are crucial for a claimant to maintain a claim of misfeasance. Merely alighting upon these mistakes and deficiencies, even comprehensively as has been attempted in this case, and scattering them about jackdaw-fashion, veiled with an air of general indignation and suspicion, does not, to my mind, amount to a claim that will enjoy real prospects of success and in respect of which an application for pre-action disclosure can properly be made."

A little later he said this:

> "… I find that this application is so speculative … that it does not meet the relatively modest bar which I must be satisfied is met. The application scatters possibilities, propositions, questions and loose ends; it is suggestive and hopeful, but these do not amount in my estimation to a persuasive case for pre-action disclosure."

7. The Claim Form was issued on 5 November 2018. This was at the very end of the six year limitation period. As with the letters of claim, the cause of action relied upon was exclusively misfeasance in public office. Having recited the nature of the intelligence material, paragraph 55 of the Particulars of Claim stated that the "failure to disclose the said intelligence about Luigi Prota having shot someone at the crime scene to the claimant and his co-accused until 8 November 2012 was caused by the misconduct of the First Defendant's officers and / or the Second Defendant's employees / agents who acted with knowledge of and / or reckless indifference to the probability that their actions would cause harm to the Claimant and his co-accused during the criminal proceedings". There then followed three pages of Particulars. I will not set these out *verbatim*. I can summarise them as follows.

8. In the case of the first defendant (the police) the Particulars made four basic points. The first was that the material should have been disclosed earlier. (This point, which was the main

point and the point already pleaded in the body of paragraph 55, was repeated in a variety of different ways and characterised as "an act of deliberate bad faith and/or reckless indifference.) Second, the Particulars alleged that the police had failed properly to investigate such lines of inquiry as the intelligence material gave rise to. This was similarly characterised. Third, the Particulars said that two Scenes of Crime Officers provided witness statements which deliberately and falsely sought to undermine evidence given by another prosecution witness concerning the intelligence material. Fourth, the Particulars alleged that the police should have pointed out to the second defendant (the Crown Prosecution Service) that the intelligence material undermined the case as it was presented to the jury.

9. In the case of the second defendant, the Particulars alleged that the intelligence material and/or some Notes that referred to it (or raised a line of enquiry in relation to it) should have been disclosed earlier, (a repeat of the headline point in paragraph 55). As with the first defendant, the Particulars went on to allege failures properly to investigate or clarify the intelligence material and to recognise its damaging effect on the case as presented to the jury. All save the last of these allegations were characterised as acts of "deliberate bad faith and/or reckless indifference".

10. It is important to note that the Claim Form and Particulars of Claim did not include a claim for malicious prosecution. It was (properly and reasonably) conceded by Mr Menon QC, who appeared for the claimant, that there was always "reasonable and probable cause" for the prosecution. The prosecution did not terminate because there ceased to be reasonable and probable cause. The prosecution terminated 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. The prosecution were unwilling to make such disclosure and so the trial collapsed. Ms Barton QC, who appeared for the first defendant, described that as a "windfall" for the claimant. By that she meant that, notwithstanding evidence tending to show that he and his co-accused were guilty of murder or conspiracy to murder, they were found Not Guilty on the direction of the court.

The intelligence material and how it emerged

11. The description of the intelligence material set out at paragraphs 3 to 5 above is a summary and some further detail is required.

12. On the evening of the killing a West Midlands Police covert human intelligence source ("CHIS") stated the following:

> "A group of lads ran into Luigi's house to try to rob him. Luigi had a gun; Luigi shot someone. I think he was called Gary".

13. Thirty minutes later the CHIS informed West Midlands Police that:

> "Two white lads and two black lads ran into Luigi's house in Bulkington. Inside were Luigi's son and Dave Gower. Gower was taken to the kitchen and shot in the face.''

14. This information was passed from West Midlands Police to Warwickshire Police in the form of a verbal briefing to the Senior Investigating Officer, DC Malik. The understanding of the Warwickshire police at this time was recorded in an intelligence report made that day which stated:

> "Intelligence suggests that Gaz has attempted to Rob Luigi PROTA tonight for money. Intelligence further suggests that Luigi PROTA has shot and hit Gaz wounding him."

15. DC Malik briefed the lead Scenes of Crime Officer ("SOCO") Alison Fitzpatrick. Her work-book contained the following entry (dated 27 June 2011):

> "PROTA had shot one of the offenders during robbery. Intel from W Mids. Shot Gary."

16. Warwickshire Police did not receive hard copies of the information from West Midlands Police until 3 days later, 29 June 2011. These were in the form of IMS reports which had been sanitised and stated:

> "Gaz has attempted to rob Luigi Prota tonight for cannabis and money. Luigi Prota has shot and hit Gaz, wounding him".
>
> "Two white males and two black males ran into Luigi Prota's (22nd June 70) house in Bulkington and shot David Gower (29.11.73)"
>
> "Following the shooting incident at 32 Rugby Road, Bulkington, Luigi Prota (22nd June 70) made a call ' to ' other persons saying "that Gower had been shot"

17. When the initial intelligence information was sanitised it included a name change from "Gary" (the name used in the first piece of intelligence) to "Gaz" and included a motive for the attack (attempted robbery of cannabis and money). West Midlands Police were unable to account for the name change during the sanitization of the information and it is unknown whether the CHIS referred to Gary or Gaz. The precise name was important because the main suspect Gary Rahim was named Gary, but David Gower, the victim, was also known as 'Gaz' or 'Gazza' (though it is not clear at what point that was appreciated).

18. On 30 June 2011, SOCO Fitzpatrick made a request to Claire Morse, a Biologist, to attend the crime scene (which included a log cabin in the garden of the premises) and to comment on the blood patterning to be found there. Claire Morse made a statement dated 11 July 2011 which contained the line:

> "I understand that one of the witnesses states that he shot at the offenders before he got out of the log cabin."

19. Claire Morse said explicitly in a further statement dated 20 July 2012 that this information had been provided to her "from initial information … prior to my attendance at the scene".

20. The intelligence material presented a confused picture. The identity of the person who spoke the words was unknown. (I was told and I have no reason to doubt that it was Mr Lockhart QC who eventually deduced that it was Luigi Prota – though this does not, of course, mean that Mr Prota was the CHIS.) The intelligence stated, or seemed to state, that "Gary" or "Gaz" had been shot and also that David Gower had been shot. "Gary" or "Gaz" might reasonably have been assumed to have been the assailant Gary Rahim. But it was known that he was uninjured. By contrast, David Gower was known to have been shot (though not fatally). He was known as "Gaz" or Gazza". But there was no animosity between him and Luigi Prota. Four further pieces of information can be added to this confused picture: (1) the intelligence information was classified as of low reliability ("street gossip"); (2) forensic evidence demonstrated that there had only been one shot; (3) Luigi Prota had a previous conviction for a firearms offence; (4) although no firearm was recovered from the property, there was a holdall there containing ammunition of the same type and calibre as the bullet recovered from David Gower.

21. Disclosure by the police to the CPS 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 26 separate tranches. The prosecutor in overall charge was Mr Nigel Reader. The intelligence material referred to above was disclosed by Detective Sergeant Austin of West Midlands Police to Mr Reader in a meeting the precise date of which is unclear but which took place in the last quarter of 2011 or the first quarter of 2012. (Nothing turns on the precise date.) A form "MG6D" dated 18 October 2011, the relevant box of which has been ticked, demonstrates that this disclosure took place. The form MG6D was taken away at the end of the meeting so that Mr Reader did not retain it or the underlying intelligence material. But its existence was referred to again on 2 May 2012 as part of Phase 13 of the disclosure exercise.

22. As between prosecution and defence, the intelligence material came to light as a result of a train of enquiry that originated with the brief reference in Claire Morse's statement to "one of the witnesses" having "shot at the offenders". But this did not happen until the trial had commenced and after Luigi Prota had been cross-examined. The precise sequence of the disclosure is, for present purposes, unimportant. Suffice it to say that SOCO Fitzpatrick's work-book, with its reference to Prota having shot Gary, was disclosed. At or about the same time, statements from her and from her fellow SOCO, Jeffrey Lloyd, were served. SOCO Fitzpatrick's statement, whilst admitting briefing Claire Morse, denied providing her with the information that one of the witnesses had shot at the offenders before he got out of the log cabin. This was, as Mr Lockhart QC readily acknowledged, somewhat at odds with the content of her work-book.

23. It was in these circumstances that (a) Mr Lockhart QC served the memorandums of 8 & 14 November 2012 describing the intelligence material and explaining the omission to disclose it earlier and, (b) Sharp J gave her ruling on the PII application.

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 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.

The law on strike out and summary judgment

27. The law on these topics is very familiar. CPR rule 3.4(2)(a) & (b) is in these terms:

> "The court may strike out a statement of case if it appears to the court – (a) that the statement of case discloses no reasonable grounds for bringing … the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

28. In relevant part, CPR rule 24.2 says:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if – (a) it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue … and (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

29. The approach to summary judgment applications was set out by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15:

> "The correct approach on applications by defendants is, in my judgment, as follows:
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;

> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

The applications to strike out or for summary judgment

30. These were issued in March 2019 (second defendant) and June 2019 (first defendant). The applications and the evidence in support of them ranged quite widely. I can summarise as follows.

31. The defendants made a number of submissions that were common to them both.

32. Both submitted that the claimant's concession that there was always reasonable and probable cause to prosecute him was fatal to his claim. If there was always reasonable and probable cause such that an action for malicious prosecution could not be maintained, it was not open to the claimant to circumvent the demands of that tort by framing his cause of action in misfeasance. The authority relied upon was *Gizzonio & Anor v Chief Constable of Derbyshire*, The Times, April 29, 1998 (Court of Appeal). In that case, the allegation was that the claimants were wrongly denied bail – albeit that they eventually pleaded guilty to mortgage fraud and were sentenced to terms of imprisonment. Henry LJ said:

> "Here the plaintiffs could not succeed in an action for malicious prosecution (or any of that family of torts) because (i) there was reasonable and proper cause for their prosecution; and (ii) they had been convicted. It would be quite wrong to ignore those inconveniences and artificially to isolate bail decisions from all other decisions in the investigation and prosecution of the defence in order to bring a civil action based on misfeasance in public office (or, as in *Silcott*, a conspiracy to pervert the administration of civil justice)."

33. Another way of putting substantially the same point was to focus on the damage. To succeed in a claim for misfeasance in public office, the claimant had to demonstrate some loss of liberty "additional" to the loss of liberty which his lawful prosecution (of which he could not complain) had given rise to. In *Karagozlu v Commissioner of Police for the Metropolis* [2006] EWCA Civ 1691 this took the form of being transferred from an open prison to a closed category B prison, with the loss of "residual" liberty that that implied. But there was no such "additional" loss here.

34. Both defendants (and especially the second defendant) submitted that the claimant had not pleaded a claim for misfeasance with sufficient particularity. In essence, it was submitted that what the claimant complained about was as (or more) consistent with mistake or negligence

than with malice. Further, the claimant had not pleaded a case of knowledge on the part of the defendants as to the consequences for the claimant of their acts and omissions.

35. Each defendant then made discrete submissions concerning the case specifically pleaded against them.

36. The first defendant submitted that he had discharged the burden of disclosing to the second defendant material which was reasonably capable of undermining the prosecution case and/or of assisting the defence case. This burden had been discharged by showing the material to the CPS at the meeting attended by DS Austin and Mr Nigel Reader described in paragraph 21 above.

37. As to that part of the case that rested on the witness statements of the two SOCOs, those were statements prepared for the purpose of the criminal trial and were covered by witness immunity.

38. The second defendant submitted that if the claim was adequately pleaded, it was doomed to failure because an explanation for the late disclosure had been offered in open court by Mr Lockhart QC and the *bona fides* of that explanation had not been challenged. Mr Payne QC made some additional comments attacking various aspects of the merits of the claimant's claim. He placed considerable emphasis on the essentially neutral and impartial role of the CPS and the fact that there was no case where a claim of misfeasance in public office had yet succeeded against the CPS. To claim that the CPS was motivated by malice was fanciful and unrealistic.

39. Mr Menon QC responded to these points as follows. (Again, I summarise.) He submitted that there was no rule of law to the effect that in circumstances where there was no claim for malicious prosecution a claim in misfeasance was bound to be an abuse of process. A claimant was entitled to frame his case as he chose. In *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 the claimants had claimed in the torts of misfeasance and conspiracy to injure and the claim had not been struck out. Similarly, there was no rule of law that he had to demonstrate an absence of reasonable and probable cause in order to claim damages for loss of liberty. If the intelligence material had been disclosed earlier, then the outcome of the criminal process would have been the same, namely the termination of the prosecution. But this would have occurred at an earlier point in time and hence the claimant had suffered a loss of liberty, for which he could claim. He submitted that witness immunity did not apply to the two statements of the SOCOs, because these had not, in reality, been prepared for the criminal trial but as part of an ancillary investigation into the existence and provenance of the intelligence material. He submitted that the claim was adequately pleaded and that the claim had merit. In support of the claimant's case that the defendants acted with malice, he reminded me of what Brooke LJ said in *Paul v Chief Constable of Humberside* [2004] EWCA Civ 308 at paragraph 44:

> "In *Gibbs v Rea* [1998] AC 786 it was common ground between the majority and the minority of the members of the Judicial Committee of the Privy Council that a claimant may rely on circumstantial evidence in support of his case on malice and the absence of reasonable and probable cause. Where they differed was on the application of this principle to the facts of that case. For the majority, who included Lord Steyn and Lord Hutton, Gault J cited a passage from the judgment of Lord Tenterden CJ in *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 slight evidence of such want.'
>
> *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."

Discussion

40. I do not think that the authorities support the broad proposition that the defendants relied upon to the effect that for the claimant to frame his case in misfeasance in public office was an abuse of process. In the case of *McDonagh v Commissioner of Police*, The Times, December 28, 1989, Popplewell J refused to allow an amendment by which the claimants sought to add misfeasance in public office to their existing claim for malicious prosecution. His basis for the refusal was that if the claimants were permitted their amendment, they would have bypassed the requirement to demonstrate an absence of reasonable and probable cause to prosecute (which was an ingredient of the cause of action in malicious prosecution, but not of misfeasance). The view that he took was that that would be contrary to public policy and could "only be done by legislation". This decision was referred to with apparent approval by the Court of Appeal in *Gizzonio*; see above.

41. However, Mr Menon QC was right to point out that the decision of the House of Lords in *Darker* was, on the face of it, inconsistent with there being any such rule of public policy because in *Darker* the House had refused to strike out the claim of misfeasance. The view expressed in the textbook *Civil Actions Against the Police* 3rd Ed, by Clayton & Tomlinson, is that it must follow from the refusal to strike out that the policy argument that prevailed in *McDonagh* and *Gizzonio* did not find favour with their Lordships; see at 11-031. It is, perhaps, significant that, by contrast, the Lords drew attention to the public policy interest in recognising that an action should lie when a person has been damaged as a result of a police officer abusing his power in the course of a prosecution.

42. Mr Menon QC was also correct to point out that the court should be wary of dismissing a claim in a developing area of law on the basis of assumed facts; see the speech of Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 500 at 557 where he said:

> "In my speech in the Bedfordshire case [1995] 2 AC 633 , 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

43. It is clear that this is indeed an area of law that is uncertain and developing. As Clayton & Tomlinson observe in *Civil Actions Against the Police*: "the limits of *Darker* misfeasance claims have yet to be worked out by the courts".

44. Lastly on this topic, I do not think that defendants' submissions on the principle of the damage element of the tort are correct – or so obviously correct as to justify striking out the claim. The view expressed by Clayton & Tomlinson is that a claim for misfeasance may fail because the claimant has not suffered any damage beyond that already caused by the prosecution itself (assuming that to be lawful); see at 11-032. But if a claimant was able to plead and demonstrate that a public officer had maliciously done an act which that officer actually foresaw would prolong the claimant's detention, then it is at least arguable that the claimant could claim in respect of the loss of his liberty – even if there remained throughout reasonable and probable cause to prosecute him. At any rate, this is not a strike-out point.

45. But the matter does not end there because, as it seems to me, the defendants' other arguments are manifestly well-founded.

46. The case against each defendant rests on the allegation that the intelligence material should have been disclosed "promptly" because it was "plainly relevant and disclosable" within the meaning of the test set out in section 3(1) of the Criminal Procedure and Investigations Act 1996. This is the central allegation to which Mr Menon QC's submissions and Mr Clovis's witness statement of 9 January 2020 were almost exclusively directed. All the other

allegations in the Particulars of Claim are parasitic on this central allegation. They are parasitic in that they say, in a variety of ways, that, the intelligence material having not been disclosed, it was then either not properly investigated, or not followed up, or that the material and/or its significance were suppressed. They all stem from the one central allegation and if there is no substance to the central allegation then they all fall away.

47. The central allegation of failure to disclose is described as "an act of deliberate bad faith and/or reckless indifference". Although this is undeveloped in the Particulars of Claim, Mr Clovis's witness statement said that the withholding of the material could not have been the product of inadvertence or incompetence or mistake but "could only" have been the result of "bad faith" or "reckless indifference"; see paragraph 10. Later on in his statement, he said that the non-disclosure was "flagrant and deliberate" and that there was "no reasonable, credible explanation justifying non-disclosure of such plainly disclosable material"; see paragraph 55. Mr Menon QC, in his skeleton argument and in his oral submissions, submitted that the decision not to disclose was so plainly wrong that it was only consistent with malice. This was, he submitted, an inference which a court would be entitled to draw.

48. Even if I treat the Particulars of Claim as amended, or capable of amendment, in the way set out in Mr Clovis's witness statement or Mr Menon QC's submissions, it is clear to me that both as a matter of pleading and of substance, the claim must fail.

(A) The statement of case

49. Bad faith is synonymous with dishonesty and must be properly particularised; see the judgment of Tugendhat J in *Carter* at paragraph 68. It is clear from the three following paragraphs of his judgment that Tugendhat J considered that the requirement of proper particularity applied to an allegation of reckless indifference as well. The particulars in this claim (even if amended as I have indicated) do not support either allegation. No facts or circumstances are set out that would not, on the face of them, be equally explicable by mistake or want of care. The cautionary words expressed by the Court of Appeal in *Thacker* have 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 alleging 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.

51. For these reasons, the claim falls to be struck out as "disclosing no reasonable grounds for bringing it".

(B) The merits of the claim

52. The problems with the claim are not merely a matter of form or pleading. Applying the *Easyair* principles, particularly principles i) to iv), I have reached the clear conclusion that the claim is wholly unrealistic. In this respect, I agree with the remarks made by Master Gidden in August 2018. And it is relevant that (a) the test he had to apply (that there was a properly arguable claim with a real prospect of success) was practically the same test as I must apply and that (b) the material before him was substantially the same.

53. There are two insuperable difficulties for the claimant.

54. In relation to the claim against the police, the duty was to disclose relevant material to the CPS. It is clear that they discharged this duty at an early stage of the disclosure exercise when DS Austin showed the material to Mr Reader of the CPS. They did disclose the

relevant material and the case against them is bound to fail on the basis of this simple, hard fact.

55. 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.

56. There are subsidiary, but equally compelling, points.

57. In relation to both defendants, the damages claim – as well as lacking an allegation of actual foresight – is entirely speculative. 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 or both. But if there had been a PII application, it would have been made at a 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.)

58. In the light of the above, the more specific arguments taken by Ms Barton QC and Mr Payne QC do not arise for consideration. However, the submissions concerning the statements by SOCOs Fitzpatrick and Lloyd deserve mention. This is because the pleading that these statements "falsely sought to undermine Ms Morse's credibility" is, at least on one reading of it, capable of standing as an allegation that is not merely parasitic on the central allegation of failing to disclose the intelligence material.

59. The difficulty facing the claimant so far as this allegation is concerned is that it falls squarely into the immunity from suit extended to witnesses and other participants in legal proceedings. In *Marrinan v Vibart* (1963) 1 QB 528 it was stated:

> "Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of evidence which is to be so given." per Sellers LJ at 535

60. *Marrinan* was approved in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 and that case confirmed that the immunity applied not only to acts or omissions in court but also to statements made for the purposes of proceedings and acts done in the preparation of those statements.

61. Ms Barton QC relied upon this immunity so far as the statements of Ms Fitzpatrick and Mr Lloyd were concerned. (Given the clarity and breadth of the principle, it was understandable that her submissions simply cited the authorities and put forward the proposition that the authorities covered the situation under consideration. Had she needed a fallback position,

she would no doubt also have argued that statements from these witnesses seeking to explain and clarify their instructions could hardly amount to misfeasance in public office on their or anyone's part. Indeed, it was not even pleaded that the statements were sought, prepared or given maliciously and with the requisite foresight of harm to the claimant.)

62. Mr Menon QC's response to this was to submit that the statements had been prepared as part of an investigative process initiated by prosecution counsel and intended to assist him. They could not, he submitted, fairly be said to have formed part of the SOCOs' participation in the judicial process as witnesses. Mr Menon QC relied upon *Darker* for this submission. But *Darker* was a case where the allegation was that the police had fabricated a case against the claimants. It was alleged that there were antecedent and unlawful acts whereby the police sought to create or procure false evidence. The House of Lords held that the witness immunity did not extend to that stage of the proceedings.

63. The distinction drawn in *Darker* does not assist the claimant in this case. The statements prepared by SOCOs Fitzpatrick and Lloyd 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. She had been cross-examined about it. And, indeed, according to paragraph 29 of Mr Clovis's first statement, Mr Prota too had been cross-examined about whether he had discharged a firearm. Mr Clovis's statement records that the defence teams sought clarification and it was in these circumstances that the statements were prepared. 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 inquiries 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.

Conclusion

64. For these reasons, the claim must be struck out and summary judgment must be given in favour of the defendants.