[2003–04 Gib LR 94]

ATTORNEY-GENERAL and COMMISSIONER OF POLICE v. BOSSINO, CALYPSO TRANSPORT LIMITED, CALYPSO INVESTMENTS LIMITED and BOSSROME PROPERTIES LIMITED

COURT OF APPEAL (Glidewell, P., Neill and Stuart-Smith, JJ.A.): May 20th, 2003

Administrative Law—misfeasance in public office—elements of tort—accused must be public officer acting in exercise of power as public officer, with an element of "bad faith"

Administrative Law—misfeasance in public office—bad faith—act done intentionally, knowing that beyond public officer's powers and would probably cause harm to claimant; or recklessly, being aware of serious risk of harm, he wilfully chose to disregard that risk

The claimants sought declarations in the Supreme Court that s.43 of the Drug Trafficking Offences Ordinance 1995 was unconstitutional and invalid, or alternatively not applicable in the circumstances of the case, that all actions taken pursuant to s.43 in the case were void, and an order for the return of all items seized. The claimants also sought damages for misfeasance in public office, for trespass and costs.

The first claimant, her husband, their daughter and another Gibraltarian were arrested on a trip to London by the Metropolitan Police in respect of serious offences relating to drug dealing and money laundering. The first claimant and the daughter were both released without charge the next day, but whilst the family were in London, their home in Gibraltar and the business premises of the claimant companies (owned by the claimant and

her family) were entered by police officers, and documents and other property removed. This was done under the authority of a warrant granted under s.43 of the Drug Trafficking Offences Ordinance, in order to acquire evidence for the proposed criminal proceedings in England.

The claimants then initiated the present proceedings for a declaration that s.43 of the Ordinance was either unconstitutional and invalid or not applicable to situations where the criminal proceedings were to take place in the United Kingdom (as was the case here). They also claimed for damages for misfeasance in public office, relating to the fact that the first defendant had advised the English authorities that it would be best for them to arrest the claimant's husband in an EEC country, hence avoiding the application of the Fugitive Offenders (Gibraltar) Order 1967, as well as claiming damages for trespass. The defendants applied to strike out the claimants' claims as well as applying for summary judgment. The Supreme Court (Pizzarello, A.J.) ruled against the claimants on the issue of the validity of s.43, but dismissed the application for striking out and did not comment on the application for summary judgment.

On appeal, the defendants submitted that (a) the claim should be struck out under the Civil Procedure Rules, r.3.4(2)(a) and (b) as an abuse of the court's process, since the issues had already been argued on different occasions in relation to the first claimant's husband's trial in the United Kingdom; (b) the claim alleging misfeasance in public office should also be struck out as there was no part of the claimant's pleadings which alleged any conduct or omissions of the defendants which were actually unlawful, known by the defendants to be unlawful and which they knew would, or were reckless as to whether it would, cause harm to the claimant—because it was a proper function of the defendants to advise the English authorities on such matters, there was no allegation that they were involved in the actual plan to lure the claimant and her family to London, nor were they under a duty to ensure the claimant and her family stayed in Gibraltar to enable them to be protected by the Gibraltar laws; and (c) on the evidence, the claims had no chance of success and the court should therefore have given summary judgment in the defendants' favour under the Civil Procedure Rules, r.24.2(a)(i) and (b).

The claimants, in reply, submitted that the actions of the defendants amounted to the tort of misfeasance in public office as (a) they had unlawfully assisted officers of the Metropolitan Police in London to avoid the application of the Fugitive Offenders (Gibraltar) Order 1967 by conspiring with and/or counselling the officers to bring to fruition a plan to deprive the first claimant and her husband of the protection of the laws of Gibraltar; or, alternatively, (b) by failing to impede the execution of that plan by keeping the claimant and her family in Gibraltar, having been under an obligation to do so in upholding the laws of Gibraltar.

Held, allowing the appeal:

(1) The first two requirements of the tort of misfeasance in public office, *i.e.* that the defendant must have been a public officer and that he must

have acted in the exercise of this power as a public officer, were clearly established in the present case. The third requirement—that there must have been an element of "bad faith"—meant that the act/omission must have been done/made intentionally (a) in the knowledge that it was beyond the public officer's powers and that it would probably cause the claimant to suffer harm; or (b) recklessly, because although the public officer was aware that there was a serious risk that the claimant would suffer loss due to the act/omission which he knew to be unlawful, he willfully chose to disregard that risk. In the present case, the defendants were not under a duty to take any steps to keep the claimant and her husband in Gibraltar so that the English authorities would be forced to seek extradition under the Fugitive Offenders Order; it was one of their proper functions to advise the English authorities on the matters in question; and there was no clear allegation made that they were involved in the plan to lure the claimant and her family to London. They were therefore not guilty of any unlawful act/omission and so the allegations against the defendants did not amount to misfeasance in public office. The claim could not be struck out as an abuse of the court's process simply because the matter had been argued in previous hearings in England, as the issues raised were merely similar, not identical, but because the allegations against the defendants did not actually amount to allegations of misfeasance in public office the case should be struck out under the Civil Procedure Rules, r.3.4(2) (para. 23; para. 31; para. 33; paras. 35–36).

(2) For the court to be able to give summary judgment, the test to be applied was whether the claim had no real prospect of success, and in the present case, on the evidence, the misfeasance claim fell into this category. Summary judgment would therefore be given for the defendants, under the Civil Procedure Rules, r.24.2 (para. 39).

(3) In the original hearing, the court had found that the trespass claim failed, and that claim was made even weaker by the fact that in the present appeal the court had found that there had been no initial misfeasance. The action for trespass therefore also failed (para. 40; para. 42).

Case cited:

(1) *Three Rivers District Council* v. *Bank of England (No. 3)*, [2003] 2 A.C. 1; [2000] 3 All E.R. 1; [2000] Lloyd's Rep. Bank. 235; [2000] 3 C.M.L.R. 205; [2001] 2 All E.R. 513; [2001] Lloyd's Rep. Bank. 125, followed.

Legislation construed:

Drug Trafficking Offences Ordinance 1995, s.43:

"(1) If, on application made by a customs or police officer, a justice of the peace is satisfied—

(a) that criminal proceedings have been instituted against a person in a country or territory, being a Convention state, or,

as the case may be, a territory of such a state to which application of the Vienna Convention has been extended, outside Gibraltar or that a person has been arrested in the course of a criminal investigation carried on there . . .

he may issue a warrant authorizing a customs or police officer to enter and search those premises and to seize any such evidence found there.

(2) The power to search conferred by subsection (1) is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence as is there mentioned."

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.6: "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied . . ."

s.7: "(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, public morality, public health . . ."

s.32: "Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Gibraltar."

Civil Procedure Rules (S.I. 1998/3132), r.3.4(2): The relevant terms of this sub-rule are set out at para. 12.

r.24.2: The relevant terms of this rule are set out at para. 13.

J.J. Neish, Q.C. for the appellants;
C. Gomez and *I. Watts* for the respondent.

1 **GLIDEWELL, P.:**

The basic facts

The first claimant, Carmina Bossino (Mrs. Bossino) is married to Plinio Bossino. They are Gibraltarians and, until August 1998, were resident in Gibraltar. The other claimants are companies registered in Gibraltar, owned by Mr. and Mrs. Bossino and their children through a family trust. Mr. and Mrs. Bossino also owned or had interests in several *bureaux de change*, *i.e.* money-changing businesses.

2 On August 12th, 1998, Mr. and Mrs. Bossino travelled to London with their daughter. On the morning of August 13th, 1998, both Mr. and

Mrs. Bossino and their daughter were arrested by officers of the Metropolitan Police. Another Gibraltarian, Christopher Finch, was arrested in London on the same day. Mrs. Bossino and her daughter were released without charge on the following day, and there have been no further proceedings against them. Mr. Bossino and Mr. Finch were, however, charged with serious offences relating to drug dealing, including in particular a charge that they had been involved in "money laundering," *i.e.* converting, through Mr. Bossino's money-changing businesses, the proceeds of illegal drug dealing into other currencies. They have been committed for trial in England on these charges, but despite the time which has elapsed, are still awaiting trial, now on bail.

3 When Mrs. Bossino returned to Gibraltar after her release she discovered that, while she was in London, her home and the business premises of the claimant companies had been entered by police officers, and a quantity of documents and other property removed. Some of the property was subsequently returned to her, but some has been retained by the Metropolitan Police, as evidence in relation to the charges against Mr. Bossino and Mr. Finch. At Mrs. Bossino's home there had been left a document which informed her that the search had been conducted and that property had been taken by officers of the Metropolitan Police acting under the authority of a warrant granted under s.43 of the Drug Trafficking Offences Ordinance 1995.

The proceedings

4 On December 7th, 1998, solicitors acting for Mrs. Bossino and the claimant companies issued an originating summons addressed to H.M. Attorney-General for Gibraltar and the Commissioner of Police, which said:

> ". . . [T]he plaintiffs seek the determination of the court on the following questions, namely:
>
> (1) whether or not the provisions of ss. 6, 7 and 32 of the Schedule to the [Gibraltar] Constitution [Order 1969] have been or are being or are likely to be contravened in relation to the plaintiffs or any one or more of them by the provisions of s.43 of the Drug Trafficking Offences Ordinance 1995 by virtue of which and acting on a warrant issued thereunder, police officers entered and searched the plaintiffs' premises on several days including August 13th, 1998, and seized property belonging to the plaintiffs;
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> (2) that on its true construction, s.43 aforesaid does not apply where the criminal proceedings in respect of which a warrant is issued take place in the United Kingdom."

This was supported by an affidavit sworn by Mrs. Bossino on the same

date, in which she made it clear that she sought orders to the following effect, that—

(a) s.43 be declared invalid;

(b) alternatively, s.43 be declared not to apply in respect of criminal proceedings in the United Kingdom;

(c) all actions taken in respect of the plaintiffs pursuant to that section be declared in breach of the Constitution; and

(d) the Royal Gibraltar Police be ordered to provide detailed lists of all the items seized, returned and removed from the jurisdiction, and be ordered to return the originals and all copies of documents.

The Attorney-General acknowledged service on his own behalf and on behalf of the Commissioner, and on January 25th, 1999 the Chief Justice gave directions for the lodging of skeleton arguments and that the trial should be in open court. No skeleton arguments were lodged.

5 On May 12th, 1999, the claimants' solicitors gave notice of application for leave to amend the originating summons. The amendments sought were the addition of two further claims, namely:

(a) a declaration that the warrants issued by the Stipendiary Magistrate under s.43 on August 13th, 1998, were issued as the result of a misrepresentation or otherwise in breach of s.43(1)(a) and (2) and were accordingly null and void; and

(b) a declaration that—

> "the defendants, by their acts or omissions, unlawfully assisted officers of the Metropolitan Police in London to avoid the application of the Fugitive Offenders Act 1967, so that the first plaintiff's husband was enticed to leave the jurisdiction of this honourable court by way of a 'disguised extradition' and travel to London where the first plaintiff, having accompanied her said husband, was arrested on August 13th, 1998."

This latter claim was, of course, totally new. On June 2nd, 1999, the claimants' solicitors further sought leave to administer interrogatories. Mr. Gomez swore an affidavit in support of the application for leave to amend, and three affidavits were sworn in support of the defendants. An issue arose as to whether the search warrant had been granted by the Stipendiary Magistrate before or after Mr. and Mrs. Bossino were arrested in London on August 13th, 1998.

6 There was a hearing of these applications before the Chief Justice on June 30th, 1999. The hearing was not concluded on that day, but was adjourned to a date to be fixed. No other order was made. Nothing then happened in the proceedings for nearly two years.

7 In the meantime there had been the following proceedings in England relating to Mr. Bossino and Mr. Finch:

(a) On February 23rd, 1999, a Metropolitan Stipendiary Magistrate, Mr. Inigo Bing, committed them for trial at Southwark Crown Court.

(b) Both sought leave to apply to quash that decision by judicial review. One of the grounds advanced on behalf of Mr. Bossino was that the committal was an abuse of process because he had been tricked into travelling to London so that he could be arrested there. The Magistrate decided, and the Divisional Court agreed, that the Magistrate had no jurisdiction to consider such a challenge. The applications were therefore refused.

(c) Judge Bathurst-Norman, the trial judge in the Crown Court, heard an application to stay the proceedings against Mr. Bossino and Mr. Finch as an abuse of process on the same ground as that advanced before the Divisional Court. The judge refused the stay. I shall consider a short part of his judgment later.

(d) On October 5th, 2000, Rose, L.J., with Astill and Richards, JJ., sitting both as a Court of Appeal Criminal Divison and a Divisional Court, dismissed a challenge to that decision by Judge Bathurst-Norman either by way of judicial review or by appeal, deciding that they had no jurisdiction to rule on it.

(e) On November 1st, 2000, Mr. Bossino petitioned the House of Lords for leave to appeal against that last decision, but leave was refused.

8 On May 2nd, 2001, Mrs. Bossino's solicitors gave notice of intention to restore the hearing of the applications for leave to amend the originating summons and to administer interrogatories. The renewed applications came back before the Chief Justice on May 25th, 2001. He then ordered that the proceedings should continue as if begun by writ, and that particulars of claim should be filed and served. This was done on July 2nd, 2001. The relief claimed in these particulars of claim was as follows:

"(1) **All the claimants:**

Without prejudice to the matters referred to in the originating summons issued herein on December 7th, 1998, if it should be found that the relevant provisions of the Ordinance are *intra vires* the local legislature, declarations that the search warrants were issued—

(i) in excess of jurisdiction; and

(ii) in manner contrary to natural justice,

and therefore null and void.

(2) **The first claimant:**

(i) Against both defendants damages for misfeasance in public office arising from their collaboration with the Metropolitan Police to disregard and degrade the laws of Gibraltar particularly the extradition laws;

(ii) Against the second defendant:

(a) damages for trespass to her home at 4/23 Gardiner's Road; and

(b) damages for trespass to her personal property.

(3) **The corporate claimants:**

(i) damages for trespass to their respective business premises; and

(ii) damages for trespass to their respective personal property.

(4) **All claimants:** Costs."

This was soon afterwards amended (leave for the amendment not being necessary) to add a further claim relating to the validity of s.43 of the Drug Trafficking Offences Ordinance 1995. The allegation was that s.43 was in excess of the powers of the House of Assembly by virtue of s.32 of the Gibraltar Constitution Order.

9 On July 31st, 2001, the Attorney-General, acting on his own behalf and on behalf of the Commissioner of Police, applied to strike out the claimants' claims. The relief claimed was in the following terms:

"(1) The first claimant's claim against both defendants for damages for misfeasance in public office and such other parts of the particulars of claim as relate thereto be struck out pursuant to CPR, Part 3, r.3.4(1)(a) and (b) and the inherent jurisdiction of the honourable court.

(2) The first, second, third and fourth claimants' respective claims against the second defendant for damages for trespass to—

(i) the first claimant's home at 4/23 Gardiner's Road, Gibraltar;

(ii) the second, third and fourth claimants' respective business premises; and

(iii) all the claimants' personal property

be struck out, pursuant to CPR, Part 3, r.3.4.(1)(a) and (b) and the inherent jurisdiction of this honourable court.

(3) Alternatively, that pursuant to CPR, r.24.2(a)(i) and (b), summary judgment be given against the respective claimants in relation to the claims set out in paras. 1 and 2 above.

(4) Further, or in the alternative, that the whole action be stayed pending final determination of the criminal proceedings in England against the first claimant's husband, Mr. Plinio Bossino."

10 That application came on for hearing before Pizzarello, A.J. in September 2001. Two days were set aside for the hearing, but at the end of that time Mr. Neish, Q.C., for the Attorney-General and the Commissioner, had only just completed his opening submissions. The hearing therefore had to be adjourned. However, following Mr. Neish's submissions, the judge granted leave to the claimants to re-amend the particulars of claim, and also leave to the Attorney-General to amend the wording of the application to strike out. I shall refer later to these documents in the form they have finally assumed. Unfortunately, owing to health problems suffered first by the learned judge and then by Mr. Neish, it was not possible to renew the hearing until late in 2002.

11 Pizzarello, A.J. gave judgment on February 12th, 2003. He dismissed the applications to strike out. He did not in terms deal with, but must be assumed also to have dismissed, the applications for summary judgment for the defendants and for a stay of the proceedings pending the completion of the criminal trial in England. The Attorney-General and the Commissioner of Police now appeal against this decision.

The substance of the applications

12 The applications to strike out are made under r.3.4(2)(a) and (b) of the Civil Procedure Rules 1998, which provides as follows:

"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 or defending 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 . . ."

A "statement of case" is defined as including particulars of claim. Mr. Neish agrees that, on an application to strike out on ground (a), the court is restricted to considering whether the words of the particulars of claim disclose a reasonable ground for bringing the claim. On the application to strike out on ground (b) it may, however, be appropriate to consider evidence. Particulars of claim may be struck out under sub-r.(2)(a) if they disclose no valid claim as a matter of law. However, "a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence" (see note 3.4.2 in *Civil Procedure* (2001), vol. 1, at 52). The term "abuse of the court's

process" in sub-r.(2)(b) is not defined in the Rules, but it may include the bringing of two sets of proceedings in respect of the same subject-matter which amounts to harassment of the defendant. As a general rule, a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction. However, a court deciding an application to strike out on this ground should take account of all the public and private interests involved and of the apparent merits of the claim.

13 The application for summary judgment for the defendants is made in accordance with r.24.2 of the Civil Procedure Rules, which provides:

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

The power to give summary judgment against a claimant is a relatively recent introduction in the rules. In *Three Rivers District Council* v. *Bank of England (No. 3)* (1), Lord Hope explained the test to be applied when considering whether to give summary judgment under this rule as follows ([2003] 2 A.C. 1, at paras. 90–91):

> "The test which Clarke J. applied, when he was considering whether the claim should be struck out under R.S.C. Ord. 18, r.19, was whether it was bound to fail (see third judgment). Mr. Stadlen submitted that the court had a wider power to dispose summarily of issues under CPR, Pt. 24 than it did under R.S.C. Ord. 18, r.19, and that the critical issue was now whether, in terms of CPR, 24.2(a)(i), the claimants had a real prospect of succeeding on the claim. As to what these words mean, in *Swain* v. *Hillman* [2001] 1 All E.R. 91 at 92, Lord Woolf M.R. said:
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> > 'Under r.24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr. Bidder Q.C. [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'

> The difference between a test which asks the question 'is the claim bound to fail?' and one which asks 'does the claim have a real prospect of success?' is not easy to determine. In *Swain*'s case Lord Woolf M.R. (at 92) explained that the reason for the contrast in language between r.3.4 and r.24.2 is that under r.3.4, unlike r.24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In *Monsanto plc.* v. *Tilly* (1999) Times, 30 November, Stuart-Smith L.J. said that r.24.2 gives somewhat wider scope for dismissing an action or defence. In *Taylor*'s case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it has no reasonable prospect of success, it should be stopped before great expense is incurred."

This is the approach which we must adopt.

The particulars of claim

14 Since in relation to the application to strike out under r.3.4(2)(a) it is necessary to consider the wording of the particulars of claim, we must look at the whole of this document in its final form, including the amendment permitted by Pizzarello, A.J. during the hearing before him.

15 In sub-para. 4 of the particulars of the first defendant's bad faith, intention or recklessness as to consequences in the particulars of claim, it is said that "the first claimant relies on the content and effect of a file note made by Det. Chief Insp. Hobbs of the meeting of July 16th, 1998." The content of this note, in so far as it is relevant to the Attorney-General, is therefore part of the pleadings. Much of what was said in the note is accurately repeated or summarized in para. 10 of the particulars of claim. However, the note also contains the following material passages:

(a) Det. Chief Insp. Hobbs said that "the purpose of the meeting was to identify potential problems surrounding the arrest, evidence retrieval and possible extradition from Gibraltar of the two principal offenders" (*i.e.* Messrs. Finch and Bossino).

(b) After summarizing the advice given by the Attorney-General, Det. Chief Insp. Hobbs said:

> "the Gibraltan [*sic*] authorities will be pleased to conduct the prosecutions of any persons involved with Finch and Bossino who are outside of our jurisdiction (*i.e.* England and Wales) provided that we make our evidence available to them. This of course is on the proviso that the offences are committed in Gibraltar."

(c) At the end of his note, Det. Chief Insp. Hobbs recorded his recommendations to his superiors. It is not alleged that the Attorney-

General knew at the time of these recommendations. These started with the following words: "arrests should not be requested in Gibraltar and should be avoided at all costs there, as an alternative, we should devise a scam so that the principal subjects are arrested together in the United Kingdom or some other EEC country such as Spain."

16 Det. Chief Insp. Hobbs has subsequently made a statement in which he said: "The report reflected my understanding of what I was told and does not represent itself as a *verbatim* account of the meeting." On June 7th, 2000, the Attorney-General sent a message saying that he had seen a copy of the note of the meeting of July 16th, 1998 for the first time on June 5th, 2000. He said:

> "I am particularly concerned at the words attributed to me on the second page, *viz.* 'Mr. Rhoda strongly recommended that extradition from Gibraltar be avoided at all possible costs, and that if extradition is the only option, it should be arranged in any EEC country such as Spain.' This form of words suggests that I was criticizing the administration of the law in Gibraltar. I was not. I believe I have been misinterpreted. I was merely pointing out, as is the fact, that extradition to the United Kingdom from an EEC country is far quicker and simpler than extradition to the United Kingdom from a Commonwealth country where the old common law rules still apply and which is not a party to the European Convention on Extradition."

It is apparent that there is an issue of fact arising out of the note and the Attorney-General's message, but we are not concerned with this issue. For the purposes of the application under sub-r. (2)(a) we must consider only the words of the pleading and of Det. Chief Insp. Hobbs's note as they stand.

17 It will be seen that the claims in the particulars of claim are—

(i) a claim by Mrs. Bossino against both defendants for damages for misfeasance in public office, based upon the allegations in paras. 6 to 18 inclusive of the particulars of claim;

(ii) claims by Mrs. Bossino and the company claimants against the Commissioner of Police for damages for trespass to their premises and property, based upon the allegations in paras. 19 and 21 to 24 inclusive of the particulars of claim; and

(iii) claims for declarations that the search warrant issued by the Stipendiary Magistrate was issued under legislation which exceeded the powers of the House of Assembly, as alleged in para. 20, or was null and void for the reasons set out in paras. 21, 23 and 24 of the particulars of claim.

18 The arguments in support of the claims for declarations as to the validity of s.43 of the Drug Trafficking Ordinance were carefully considered by Pizzarello, A.J. He ruled against the claimants on all these issues. There is no cross-appeal. We therefore need not consider the claims under head (iii) above.

The claim for damages for misfeasance in public office

19 The classic statements of the ingredients of this tort are to be found in the speeches in the House of Lords in *Three Rivers District Council* v. *Bank of England (No. 3)* (1). Lord Steyn ([2003] 2 A.C. 191 *et seq.*), described these ingredients. The first is that the defendant must be a public officer, and the second that he must have acted (or in appropriate cases have omitted to act) in the exercise of his power as a public officer. Both these criteria were undoubtedly satisfied in the present case. What is particularly in issue is Lord Steyn's third ingredient, which concerns the state of mind of the defendant.

20 As to this ingredient, Lord Steyn said (*ibid.*, at 191):

> "The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, *i.e.* conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."

He continued (*ibid.*, at 192):

> "The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals. It is not every act beyond the powers vesting in a public officer which will ground the tort. The alternative form of liability requires an element of bad faith.
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> . . .
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> It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form."

Lord Hope of Craighead agreed, as did Lord Millett. Lord Hutton said (*ibid.*, at 221):

> "The principal issue which arises for determination on the present appeal is whether in order to succeed the plaintiffs must prove that

> the public officers of the Bank of England knew that their unlawful acts or omissions would probably injure them or persons of the class of which they were members or that the officers were subjectively reckless as to such likely injury."

He added (*ibid.*, at 227):

> "I consider that dishonesty is a necessary ingredient of the tort, and it is clear from the authorities that in this context dishonesty means acting in bad faith. In some cases the term 'dishonesty' is not used and the term 'in bad faith' or acting from 'a corrupt motive' or 'an improper motive' is used . . . However, as the term 'dishonesty' in some contexts implies a financial motive I consider that the term 'in bad faith' is a preferable term to use and as I have stated I consider that it is an essential ingredient in the tort."

Lord Hobhouse said (*ibid.*, at 230):

> "The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In *Mengel*'s case (at 357), the expression 'honest attempt' is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest."

21 In the adjourned hearing, Lord Hope of Craighead again summarized the essential elements of the tort, though numbering them slightly differently from the numbering given by Lord Steyn. For present purposes the relevant elements are Lord Hope's second and third. Of these he said (*ibid.*, at 247, para. 44):

> "As to the second and third requirements, the claimants do not allege that the Bank did or made the acts or omissions intentionally with the purpose of causing loss to them. The allegation is that this is a case of what is usually called 'untargeted malice'. Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer; (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. In regard to this form of the tort, the fact that the act or omission is done or made without an honest belief that it is lawful is

sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b), it is demonstrated by recklessness on his part in disregarding the risk. The claimants rely on each of these two alternatives."

The application to strike out

22 I turn now to consider the application to strike out those parts of the particulars of claim which allege misfeasance in public office. I start by reminding myself that we are here concerned with a decision by Pizzarello, A.J., made in the exercise of his discretion with which we can only interfere on established principles, *e.g.* if the learned judge misdirected himself in law, or took into account some irrelevant consideration or failed to take account of some relevant consideration.

Striking out for abuse of process

23 It is convenient to consider first the application to strike out on the ground that the claimant's allegation of misfeasance in public office is an abuse of the court's process. The case for the Attorney-General is summarized in his notice of application in the following words:

"The principal issue raised by the first claimant in relation to this claim, *i.e.* 'the veiled extradition' issue has already been fully argued on different occasions on behalf of the first claimant's husband, who on all those occasions has failed. Those occasions were:

(a) before the Stipendiary Mr. Inigo Bing;

(b) at application for judicial review of Mr. Inigo Bing's decision before a Divisional Court presided over by Auld, L.J.;

(c) before Judge Bathurst-Norman;

(d) before the Court of Appeal in October 2000 by way of judicial review decisions of Southwark Crown Court;

(e) at an application for leave to appeal to the House of Lords.

The following comment of Judge Bathurst-Norman . . . is particularly relevant:

'I am quite satisfied that the plan was to lure both these gentlemen to this country in circumstances where they would both be here at the same time and so could both be arrested within this jurisdiction. I am satisfied that the Attorney-General for Gibraltar was not a party to this plan.'

> By bringing this claim the first claimant is allowing herself to be used as a stalking horse and proxy by her husband to re-litigate issues which he is barred from litigating further in England and is bringing this case as a means of fishing for something which might be of use in the English proceedings. This is exemplified by the request for further and better particulars filed on December 7th, 1998."

Pizzarello, A.J. dealt with this part of the application in a half sentence of his judgment when he said "there is no abuse as this action does raise a quite different issue to that addressed by the courts in England." Briefly though that conclusion is phrased, in substance I agree with it. If this appeal fails and the action proceeds to trial, the issues may to some extent overlap those which were canvassed before the Stipendiary Magistrate and Judge Bathurst-Norman, but they will not all be identical. Moreover the decisions of the higher courts in England—the Divisional Court and the Court of Appeal Criminal Division—were based on lack of jurisdiction; they were not decisions on the merits. Finally, if this action continues, the court will not be bound by Judge Bathurst-Norman's finding that the Attorney-General of Gibraltar "was not a party to this plan." In that situation it would not, in my judgment, be an abuse for Mrs. Bossino's counsel, on appropriate evidence, to seek to persuade the Supreme Court here to reach a different conclusion. For these reasons I would reject the Attorney-General's application to strike out on this ground.

Striking out under Part 3, r.3.4(2)(a)

24 In order to succeed in her action against either the Attorney-General or the Commissioner of Police, Mrs. Bossino must prove, in relation to either defendant—

(i) that he acted, or omitted to act, unlawfully; and

(ii) that he knew that his act or omission was unlawful, *i.e.* that he had no power so to act; and

(iii) either that he deliberately intended, by his act or omission, to cause harm to Mrs. Bossino ("targeted malice") or that he knew that his act or omission would probably cause her harm and was reckless whether it did or not ("untargeted malice");

(iv) under the last head it is sufficient for the plaintiff to prove that the particular defendant knew, or was reckless as to whether, the act or omission would cause harm to members of Mr. Bossino's family.

These tests are derived from the passages I have already quoted from the two *Three Rivers District Council* (1) appeals.

25 When considering whether to strike out under r.3.4(2)(a), the court must decide whether the allegations set out in the particulars of claim would, if proved at trial, satisfy all of these requirements. In the present case it is necessary to ask that question in relation to each of the defendants separately.

26 Before doing so, however, it is necessary to revert to other passages from the speeches of Lord Hope and Lord Hutton in the second *Three Rivers District Council (No. 3)* appeal. Lord Hope said ([2003] 2 A.C. 1, at para. 55):

> "Of course the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out."

To the same effect Lord Hutton said (*ibid.*, at para. 122):

> "Bad faith is an essential element in the tort of misfeasance. In accordance with a well-established rule it is necessary that bad faith (or dishonesty—the term used in some authorities) should be clearly pleaded."

Their Lordships in those passages were, of course, restating a well-established rule of pleading.

The allegations of unlawful conduct and bad faith

27 The allegation of unlawful conduct is contained in paras. 15 and 16 of the particulars of claim. I set out the wording again:

> "(15) . . . [T]he defendants conspired with and/or counselled and assisted officers of the Metropolitan Police to bring to fruition a plan to deprive the first defendant and her husband of the protection of the laws of Gibraltar (specifically the extradition legislation).
>
> (16) Further, or in the alternative, the defendants having been kept informed of the said plan had the authority and obligation to impede the execution of the said plan but failed to do so."

The particulars of claim contain no other particulars of bad faith on the part of the Commissioner, but particulars with regard to the Attorney-General are given.

28 Mr. Neish submits that the absence of particulars in relation to the Commissioner is fatal to the pleading, which should therefore be struck out. With some hesitation, I conclude that there is sufficient in the particulars of claim to put the Commissioner properly on notice as to the nature of the case against him.

29 The important issue in this part of the appeal is therefore whether Mrs. Bossino's pleading alleges conduct, or an omission, by either defendant which was unlawful and was known by that defendant to be unlawful and which he knew, or was reckless as to whether, the act or omission would cause harm to Mrs. Bossino.

The Fugitive Offenders Act 1967

30 This Act, with appropriate modifications, was incorporated into the law of Gibraltar by the Fugitive Offenders (Gibraltar) Order 1967, and it is this Order which contains the provisions which apply here. Nevertheless it is convenient to continue to refer to the legislation as "the Act." The essence of Mrs. Bossino's case is that the Act contains substantial safeguards for persons in Gibraltar who are accused of committing offences in England, safeguards which are lost if the suspect leaves Gibraltar, and in particular if he or she travels to England. Both the Attorney-General and the Commissioner of Police are under a duty to uphold the laws of Gibraltar. If they act, or omit to act, in a way which deprives the suspect of the safeguards, knowing that this is the likely consequence, they are, she alleges, in breach of duty and thus act or fail to act unlawfully.

31 In my judgment, the case so argued is based on a misunderstanding of the Act. The provisions contained in it only take effect when an application is made to extradite somebody from Gibraltar. If there is no attempt to extradite, the Act, and the "safeguards" contained in it, have no application. In the context of the present case, the effect of the argument for Mrs. Bossino is that the Attorney-General and the Commissioner, knowing that the Metropolitan Police wished to charge Mr. Bossino in England, were under a duty to take steps to keep him in Gibraltar, so that the English authorities would be obliged to seek extradition under the Act. I have no doubt that they were under no such duty and thus in this respect were not guilty of an unlawful act or omission.

32 Particular No. 6 in para. 10.5 of the particulars of claim refers to a procedure for apprehending Mr. Bossino and Mr. Finch "by means other than those imposed by the Act." The Act imposes no such means. This phrase merely illustrates the misreading of the provisions of the Act to which I have referred.

33 The case against the Attorney-General is also put in a different way, *i.e.* that by giving the advice to Det. Chief Insp. Hobbs on July 16th, 1998, which is alleged in para. 10 of the particulars of claim, he was in breach of his duty to uphold the laws of Gibraltar. I disagree. Although the Attorney-General might perhaps have expressed his advice in less trenchant terms (assuming, as he does not accept, that he was understood correctly), I believe that it was a proper function of his office, when asked

by a senior English police officer enquiring about the procedure for extradition from Gibraltar of a person suspected of major offences in relation to international drugs smuggling, to give an explanation. Moreover, in my view, it was quite proper for him to explain that if that person were not in Gibraltar, but were in England or Spain, the prosecuting authority might find it simpler to achieve the aim of bringing him before a court in England.

34 Of course, the Attorney-General, when executing the functions of his office, was under a general duty to act honestly. If he did not—if he himself were guilty of deceit—then he would have been in breach of that duty. Is it clearly pleaded in the particulars of claim that he did himself act deceitfully?

35 The nearest the pleadings come to such an accusation is para. 15, which I have quoted above, which refers to "a plan to deprive [Mrs. Bossino] and her husband of the protection of the laws of Gibraltar." There were two "plans" made by the Metropolitan Police in late July/early August 1998 in relation to Mr. Bossino. The first was the plan to lure Mr. Bossino to London by a trick; the second was the decision to seek a search warrant and to send officers to search his premises in Gibraltar. The second of these is the plan referred to in paras. 14.2 to 14.6 of the pleadings. Those passages do not allege that either defendant acted deceitfully. Is para. 15 a sufficiently clear allegation that either defendant was a party to the plan to lure Mr. Bossino to London? That would of course involve them knowing and actively agreeing to the details of the plan. The reference to "the plan" in para. 15 is unspecific if not vague. In my view, when properly analysed, para. 15 means, or is capable of meaning, no more than that after the Attorney-General had given his advice on July 16th, 1998, he and the Commissioner took no steps to ensure that Mr. Bossino, and thus Mrs. Bossino, remained in Gibraltar. I have already said that they were under no duty to do this.

36 In my judgment, therefore, the particulars of claim do not with sufficient clarity allege that either defendant was guilty of deceit, or of being party to a plan of which they knew, to deceive Mr. or Mrs. Bossino. There is therefore a strong case for striking out those parts of the particulars of claim which relate to the misfeasance in public office claim under r.3.4(2)(a).

Summary judgment under Part 24, r.24.2

37 Before reaching a firm conclusion about striking out, however, I turn to consider the alternative application for summary judgment for the defendants on this part of the claim. Pizzarello, A.J. did not refer to this in his judgment at all, perhaps because the argument on this issue was not put before him clearly. There is therefore no question in this respect of

agreeing or disagreeing with his exercise of his discretion. Consideration of this matter involves looking at the evidence at present available as to the relevant state of mind of the defendants, and particularly that of the Attorney-General.

38 This evidence can be summarized as follows:

(a) the Attorney-General knew what advice he had given on July 16th, 1998, which for present purposes I assume was as set out in the note made by Det. Chief Insp. Hobbs;

(b) there is no evidence that either the Attorney-General or the Commissioner knew what means had been devised to induce Mr. Bossino to travel to London, if indeed either of them knew it was in London and not in Spain that the Metropolitan Police sought to arrest him; it was no doubt this which caused Judge Bathurst-Norman to conclude: "I am satisfied that the defendant in Gibraltar was not a party to this plan".

(c) on August 10th, 1998, or shortly afterwards, the Attorney-General received the letter of request for assistance in authorizing the issue of a search warrant; that depended on Mr. Bossino (not Mrs. Bossino) being arrested somewhere out of Gibraltar; and

(d) there is no evidence that the Attorney-General knew that the Metropolitan Police had any suspicions about Mrs. Bossino. Indeed, there is no evidence as to what he knew about Mrs. Bossino, or that he ever gave any thought to her.

39 In that state of the evidence, I am of a firm opinion that Mrs. Bossino has no real prospect of succeeding in her claim for damages for misfeasance in public office. I would therefore enter summary judgment for both the Attorney-General and for the Commissioner in respect of this part of the claim. It is unnecessary to consider further the application to strike out this part of the claim.

The claim in trespass

40 Pizzarello, A.J. concluded that, provided that the Attorney-General was not guilty of misfeasance in public office, the search was conducted and the property taken under the authority of warrants validly issued. He considered all the points as to the validity of the warrants argued before him, and reached conclusions on all of them in the Commissioner's favour. Even if the judge were correct in his view that there was some interconnection between the Attorney-General's alleged misfeasance and the validity of the warrant (which I doubt), as it is my opinion that judgment should be given for both defendants on the misfeasance claim, it follows that the trespass claim must therefore also fail.

41 It is therefore not necessary for us to consider the argument on the

question whether the Commissioner was vicariously liable for the acts of his officers in executing the search warrant or whether he was under any personal liability. Those interesting questions can remain to be decided in some other case.

42 As with the claim for misfeasance, it is therefore also my view that judgment should be entered for the Commissioner on the claim in trespass against him.

Conclusion

43 I would therefore allow the appeal, enter judgment in the action for both defendants on the claim for misfeasance and for the Commissioner on the claim in trespass, and make no order on the claim for declarations.

44 **NEILL** and **STUART-SMITH, JJ.A.** concurred.

Appeal allowed.