**[2007–09 Gib LR 137]**

## SHIMIDZU v. ATTORNEY-GENERAL and FABRE

SUPREME COURT (Dudley, J.): August 10th, 2007

*Administrative Law—misfeasance in public office—elements of tort—public officer liable for misfeasance if power exercised for improper purpose, knowingly acted beyond power, or subjectively reckless to consequences of actions—to prove misfeasance, claimant must at least show public officer recklessly indifferent to illegality of actions*

*Courts—recusation—bias—judge may hear application in civil proceedings if no bias from involvement in previous criminal proceedings with same parties—if judge hearing application for different cause of action arising out of previous proceedings and full assessment of evidence from previous proceedings not required, unnecessary for judge to recuse himself*

The claimant brought an action against the Attorney-General and the second defendant (a police officer) for damages for misfeasance in public office and malicious prosecution.

The claimant was accused of being in possession of cannabis by the second defendant who was a police officer. The second defendant allegedly assaulted, beat and falsely imprisoned the claimant who was then charged with assault, resisting arrest and obstructing the police. The Stipendiary Magistrate committed him for trial in the Supreme Court where he was prosecuted by the Attorney-General. At trial, although the claimant's submission of no case to answer failed, he was acquitted by the jury. He then brought the present proceedings for damages and his particulars of claim contained allegations of misfeasance in public office by the Attorney-General and of malicious prosecution.

The claimant submitted that (a) his prosecution by the Attorney-General was both malicious and an example of misfeasance in public office as the Attorney-General was exercising a public power, knowing that the evidence was likely to be false and that it would cause him loss; (b) the defendants' actions had been oppressive, unconstitutional and had injured his feelings of dignity and pride; and (c) his case would be adversely affected if Dudley, J. were to deal with the Attorney-General's application in the Supreme Court, given that he, Dudley, J., had been sitting as the Stipendiary Magistrate in the criminal proceedings and the application required a re-examination of the evidence used at his trial.

In reply, the Attorney-General submitted that (a) his alleged misfeasance could not be proved since the claimant needed to (but could not) show that he had committed an unlawful act and done so with either targeted or untargeted malice; and (b) there was no evidence of his acting unlawfully, and therefore no evidence of misfeasance, since there had been a valid prosecution of the claimant, demonstrated by the claimant's committal for trial and the failure of the submission of no case to answer. The Attorney-General applied to have the parts of the claim relating to the alleged misfeasance struck out.

**Held,** granting the Attorney-General's application:

(1) There was no proof of the Attorney-General's misfeasance in public office and the allegations of misfeasance in the particulars of claim should therefore be struck out. The offence of misfeasance was either an exercise of power by a public officer to achieve an improper purpose or knowing that his actions were beyond his power or being subjectively reckless as to the consequences of his actions. To support the allegations of misfeasance, the claimant therefore needed at least to demonstrate that the Attorney-General's state of mind in bringing the prosecution was that of a reckless indifference to the illegality of his actions, which could not be established on the particulars of claim or the evidence (para. 10; para. 13).

(2) Although there had been no misfeasance by the Attorney-General, the failure of the claimant's submission of no case to answer did not necessarily defeat the allegation. The proceedings could have been brought with sufficient evidence for the claimant to have a case to answer but it did not follow that the proceedings were brought without malice (para. 12).

(3) The involvement of Dudley, J. in the claimant's initial committal for trial (sitting as Stipendiary Magistrate) did not affect his ability to hear the present application since it dealt with the particulars of claim and their striking out, which did not require a full assessment of the evidence in the criminal proceedings and it was therefore unnecessary for Dudley, J. to recuse himself (para. 5).

**Case cited:**

(1) *Three Rivers District Council* v. *Bank of England (No. 3*), [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220; [2000] 3 All E.R. 1; [2000] 3 C.M.L.R. 205; [2000] Lloyd's Rep. Bank. 235, applied.

*D. Hughes* for the claimant;
*R.R. Rhoda, Q.C., Attorney-General*, appeared in person;
*A.J. Trinidad* for the second defendant.

1 **DUDLEY, J.:** There is an application before me by the first defendant seeking the striking out of the claim against him in so far as it relates to

relief arising from alleged misfeasance in public office, to malicious prosecution and any other part of the particulars of claim which relate to the first defendant, save to the extent that it arises by virtue of s.12 of the Crown Proceedings Act and, in the alternative, summary judgment on that issue.

2 The action relates to an incident which took place on September 26th, 2000 at Europa Point, in respect of which, it is said by the claimant that the second defendant (at the time a constable in the Royal Gibraltar Police), after asserting that the claimant was in possession of cannabis in the form of a reefer, assaulted, beat and falsely imprisoned the claimant.

3 The claimant, it is also said, was subsequently charged with the following offences—

(i) assault occasioning actual bodily harm;

(ii) obstructing the police;

(iii) resisting a police officer in the execution of his duty; and

(iv) assault on police.

4 It is not in issue that the matter proceeded by way of a s.130 committal under the Criminal Procedure Act 1961—that is to say when I, on consideration of the evidence and at the time holding the office of Stipendiary Magistrate, committed the claimant for trial at the Supreme Court. It is also not in issue that, subsequently, a submission of no case to answer before the trial judge failed and that the matter was left before the jury and the claimant was acquitted.

5 Mr. Hughes submits that, given my involvement in the criminal case, it would be inappropriate for me to deal with the CPR, r.24 (summary judgment) application, given that that would involve an assessment of the evidence. It is not necessary for me to consider whether or not it is appropriate for me to recuse myself from hearing such an application given that, in my view, the substantive issue before me relates exclusively to the particulars of claim and to whether aspects of it are to be struck out pursuant to the CPR, r.3.

6 Although in his submissions Mr. Hughes suggests that the action against the Attorney-General is framed both as a misfeasance in public office and malicious prosecution, to my mind the particulars of claim do not bear this out. The claim for malicious prosecution (contained in paras. 10–11 of the particulars of claim) is as against the second defendant only.

7 The particulars of claim are also drafted in what appear to be contradictory terms. At para. 2, it is pleaded: "The first defendant is sued pursuant to s.12 of the Crown Proceedings Act." Section 12 of the Crown

Proceedings Act, 1951 provides that "civil proceedings by or against the Crown shall be instituted by or against the Attorney-General."

8 Albeit not thereafter pleaded, this would suggest that the action against the Attorney-General is as against the Crown on the basis of alleged vicarious liability. However, the position as asserted subsequently in the particulars of claim is otherwise, in that it is apparent that the allegations relate to misfeasance in public office by the Attorney-General himself. It is useful to set out the more relevant paragraphs:

> "12 From October 22nd, 2000, the first defendant prosecuted the claimant. The first defendant, in prosecuting the claimant, exercised a public power, knowing or being recklessly indifferent to the fact that the evidence against the claimant did not stand up to examination and was likely to be false; and with the knowledge that the prosecution would cause loss to the claimant.
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> **Particulars:**
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> 13 (a) The first defendant was aware, or ought to have been aware, that the second defendant had been the subject of a number of complaints by members of the public, and had been spoken to about becoming involved in incidents involving members of the public whilst off duty; and (b) the first defendant was aware (or should have been aware) that Europa Point is a notoriously windy area.
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> . . .
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> Further, the claimant claims aggravated damages.
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> **Particulars:**
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> 15 In acting in the manner complained of, the defendants (and each of them) acted in such a manner as to injure the claimant's proper feelings of dignity and pride.
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> Further, the claimant claims exemplary damages.
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> **Particulars:**
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> 16 In acting in the manner complained of, the defendants (and each of them) acted in an oppressive, arbitrary and/or unconstitutional manner."

9 It is against this backdrop that the application is made under the CPR, r.3.4(2) which provides:

> "The court may strike out a statement of case if it appears to the court—
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> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim. . ."

10 The elements of the tort of misfeasance in public office were defined by the House of Lords in *Three Rivers District Council* v. *Bank of England (No. 3)* (1). The conclusions of the House of Lords are distilled in the headnote to the case in *The All England Law Reports* ([2000] 3 All E.R. at 1):

> "Held—(1) The tort of misfeasance in public office had two forms, namely (i) cases where a public power was exercised for an improper purpose with the specific intention of injuring a person or persons, and (ii) cases where a public officer acted in the knowledge that he had no power to do the act complained of and that it would probably injure the claimant. In the second category of cases, an act performed in reckless indifference as to the outcome was sufficient to ground the tort. Recklessness in that sense was subjective recklessness, and thus the claimant had to prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act. Moreover, if he were seeking to recover damages for consequential economic losses, the claimant was also required to establish that the public officer acted in the knowledge that his act would probably injure the claimant or a person of a class of which he was a member, i.e. that the public officer himself foresaw the probability of damage or was reckless as to the harm that was likely to ensue."

11 The thrust of the Attorney-General's submission is that the claimant must plead and prove an unlawful act on the Attorney-General's part and that he acted with either targeted or untargeted malice.

12 As regards the unlawful act, the Attorney-General urges that there is no evidential basis for this, and suggests that this is made out by the fact that the claimant was committed for trial and that a submission of no case to answer failed. Whilst no doubt of significant evidential value and indeed relevant in the context of an application for summary judgment, I do not think that as a matter of law the determination of there being a case to answer necessarily negatives a cause of action for misfeasance in public office. A prosecution, albeit evidentially sound, but which is brought maliciously, and which would not have been brought absent malice could, in my view, be capable of coming within the scope of the tort of misfeasance.

13 The crucial issue for the purposes of the present application relates to the Attorney-General's state of mind in prosecuting the claimant. Paragraph 13 of the particulars of claim pleads the case in the alternative—"knowing or being recklessly indifferent." An allegation of bad faith must of course be supported by particulars. The particulars which follow the allegation do not, however, in my view, substantiate either allegation. Although Mr. Hughes argues that that is a matter for determination at trial upon the evidence, that, I think, is an insufficient answer. The generic

references to complaints by members of the public as against the second defendant and the prevalence of wind by the lighthouse do not remotely support the allegation of malice and therefore such parts of the pleadings as relate to the allegation of misfeasance in public office by the first defendant are to be struck out.

14 I shall make orders accordingly, and I shall hear the parties as to costs.

*Application granted.*