CIVIL JURISDICTION

2006: No. 205

BETWEEN:

SIMON JEREMY FARMER **Plaintiff**

-and-

THE ATTORNEY-GENERAL **First Defendant**

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS **Second Defendant**

JUDGMENT

Dates of Hearing: 16 January and 9 February 2007
Date of Judgment: 23 February 2007

Mr. Mark Diel, Marshall Diel & Myers for the Plaintiff
Mr. Martin Johnson, Attorney-General's Chambers for the Defendants

Introduction

1. These proceedings arise from the arrest of the plaintiff ("Mr. Farmer") in November 2003, and his subsequent trial in Magistrates' Court in May and June 2004. Mr. Farmer was charged with unlawful prowling and indecent exposure, which charges against him were dismissed on the basis of no case to answer on 1 June 2004. Following that dismissal, Mr. Farmer instituted these proceedings, which seek damages on the grounds of abuse of process or alternatively malicious prosecution. Although the proceedings are taken against the Attorney-General as first defendant and the Director of Public Prosecutions ("the Director") as second defendant, the statement of claim does not mention either the Attorney-General or his office. The complaints are directed towards the Police and the Director.

This Application

2. Having entered appearance, the Attorney-General's Chambers made application for the proceedings to be struck out as a matter of law, pursuant to Order 18 rule 19 (1) (a), (b) and (d) of the Rules of the Supreme Court 1985. Those provisions empower the Court to strike out proceedings on the ground that any pleading or the indorsement of any writ in the action:

> (a) discloses no reasonable cause of action;
> (b) is scandalous, frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.

The application is also made pursuant to the inherent jurisdiction of the court.

The Proceedings

3. The writ was indorsed with a statement of claim, which set out the following material facts:

- Mr. Farmer had been arrested on 26 November 2003 on suspicion of unlawful prowling in or around the Panorama Apartment development.
- The following day he had given a voluntary statement to the Police advising them of his whereabouts at the relevant time and providing names and details of alibi witnesses.
- During his detention Mr. Farmer was the subject of harassing insults from one DS Richards.
- Neither the Police nor the Director had contacted Mr. Farmer's alibi witnesses to confirm his version of events.
- The Police obtained a warrant to search Mr. Farmer's premises, ostensibly to find a ski mask worn on previous occasions of prowling and indecent exposure in the area of Panorama Apartments.
- The Police requested a blood sample from Mr. Farmer with a view to making a DNA match with a sample obtained on the occasion of a previous offence.
- The blood test failed to disclose a match, but the results were not shared with Mr. Farmer.

- The previous occasions of prowling and indecent exposure had taken place over a number of years, and the Police and the Director had assumed the incidents to have been committed by the same individual. Hence it was said that the failure to match Mr. Farmer's DNA with the sample obtained at the time of a previous offence should have led the Police and the Director to the conclusion that Mr. Farmer had not committed the offence on 26 November 2003, with which he was charged.
- Although DS Richards in his statement referred to having arrested Mr. Farmer "on another matter", Mr. Farmer had not been informed of Police inquiries in relation to other matters (which went back to 8 October 2000). Had Mr. Farmer been so informed, he would have been able to establish that he was not in Bermuda at the relevant time.

The pleading then referred to the dismissal of the case against Mr. Farmer, and the media attention and its consequences, all of which caused Mr. Farmer to leave his employment and Bermuda.

4. For the purpose of the strike out application, the key paragraphs of the statement of claim are paragraphs 22 and 23, which in the following terms:

> "22 The Director of Public Prosecutions in charging the Plaintiff and in continuing to seek a trial of the Plaintiff despite the clear evidence of his innocence acted in breach of their (sic) duty to properly and fairly examine the facts of the case to ascertain if a prosecution should be brought or maintained.
>
> 23 The Director of Public Prosecution's action constituted an abuse of process or alternatively malicious prosecution."

The Submissions of Counsel

5. In his written submissions, Mr. Johnson had contended that paragraph 22 of the statement of claim constituted an allegation of negligence against the Director and paragraph 23 alleged malicious prosecution against the Director. However, at the start of his oral presentation, Mr. Johnson indicated that in consultation with Mr.

Diel he had clarified that the reference to breach of duty in paragraph 22 of the statement of claim was not intended to constitute a pleading of negligence, and the case for Mr. Farmer was being put only on the basis of abuse of process, or alternatively malicious prosecution, as pleaded in paragraph 23.

6. In relation to the Director, Mr. Johnson's first submission was that because the present holder of the office, Mrs. Vinette Graham-Allen, had not been appointed as Director until after the Magistrates' Court proceedings against Mr. Farmer had been dismissed, she could not have been the person listed as the Director in the proceedings. Next, it was said that she was not the prosecutor in the matter and had not charged Mr. Farmer with any offence. This could be seen as duplication of the argument based on the date of Mrs. Graham-Allen's appointment as Director, but as I understood Mr. Johnson, it was also an argument that it was the Police, and not Mrs. Graham-Allen's predecessor as Director, who had caused charges to be laid against Mr. Farmer and had prosecuted the matter.

7. As against the Attorney-General, Mr. Johnson submitted that he had no control over any criminal prosecution, and had taken no action whatsoever in relation to any such prosecution. The naming of the Attorney-General in these proceedings was, submitted Mr. Johnson, based on a misunderstanding of the provisions of section 14 of the Crown Proceedings Act 1966 ("the Act").

8. Mr. Johnson continued that even if the pleaded facts were true, the writ of summons and statement of claim disclosed no reasonable cause of action against the Director or the Attorney-General, since neither of them was responsible for the Police.

9. Mr. Johnson then moved to his next submission, which was that even if the Director as the representative of the Crown had instituted a prosecution against Mr. Farmer, no action would lie by reason of section 3 (5) of the Act, which provides:

> "No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibilities of a judicial nature which may be vested in him, or while discharging or purporting to discharge any responsibility which may rest upon him in connection with the execution of any judicial process."

Mr. Johnson relied upon the Canadian authority of *Nelles –v- Ontario* [1989] 2 SCR 170 as authority for the proposition that any decision to prosecute any

person is a judicial decision, and hence the Crown (and thus the Director) is immune from liability.

10. In relation to malicious prosecution, Mr. Johnson relied upon the authorities of *Martin –v- Watson* [1996] 1 AC 74, *Amin –v- Bannerjee* [1947] AC 322, and *Casey –v- Automobiles Renault Canada* [1965] SCR 607.

11. In the course of his submissions in relation to these authorities, Mr. Johnson submitted that the Director had not laid any information against Mr. Farmer, the information having been laid by the Police. This contention was disputed by Mr. Diel, who indicated that his instructions were that the prosecution was in consequence of a decision made by the Director both to prosecute and to maintain the prosecution against Mr. Farmer, and it had in fact been undertaken by a member of the Director's office. Mr. Johnson conceded that there was no evidence to support the position for which he contended, and sought an adjournment to enable him to produce affidavit evidence, to which Mr. Diel did not object.

12. Accordingly the proceedings were adjourned, to enable Mr. Johnson to ascertain the true position, and to file evidence if the position was as he understood it, with Mr. Diel having the right to file reply evidence if he wished. In the event, Mr. Johnson filed two voluminous affidavits, one of which, by DS Richards, did not address the issue of whether the prosecution against Mr. Farmer had been initiated and maintained by the Police Prosecutions Department or the Director's office. Instead, it sought to justify Mr. Farmer's arrest and prosecution. The second affidavit, by Acting PS Raynor, did confirm that he as a Police prosecutor had sworn the information against Mr. Farmer. However, the affidavit did not indicate which office had undertaken the prosecution, something which both he and DS Richards would presumably have known, and it did indicate that in swearing the information, Acting PS Raynor had acted on the basis of advice from a member of the Director's office. However, this affidavit also trespassed into areas beyond those for which the adjournment had been sought and granted.

13. In the circumstances, I disallowed the affidavit of DS Richards in its entirety, and struck those parts of the affidavit of Acting PS Raynor which sought to deal with the merits of the underlying prosecution of Mr. Farmer. In response to my question as to who had been responsible for the prosecution of Mr. Farmer in Magistrates' Court, Mr. Johnson confirmed that prosecution had indeed been undertaken by a member of the Director's office.

14. In relation to the joining of the Attorney-General in the proceedings, Mr. Diel indicated that this had been done out of an abundance of caution, and did not

press the point, saying that he had no difficulty with the Attorney-General being taken out of the proceedings.

15. Mr. Diel then turned to the provisions of section 3 (5) of the Act, and the case of *Nelles –v- Ontario* cited by Mr. Johnson. He referred to the subsequent case of *Krieger –v- Law Society of Alberta* [2003] 3 LRC 249. In that case, the plaintiff at first instance had been the prosecutor of an accused charged with murder. He had received the results of certain DNA tests but had advised counsel for the accused that those results would not be available in time for the preliminary inquiry. Following complaint, the prosecutor had been disciplined by the Deputy Attorney General of Alberta, but a subsequent complaint to the Law Society of Alberta led to a dispute over the Law Society's jurisdiction to review the exercise of prosecutorial discretion.

16. However, the case of *Krieger* was primarily concerned with professional conduct rather than prosecutorial discretion, although there are certainly some helpful passages on the role of the Attorney General in Canada. During the course of argument I asked Mr. Diel whether there was in Alberta any statutory equivalent to section 3 (5) of the Act, and his response was to refer to *Nelles*, and particularly that passage which Mr. Johnson had cited which referred to the provisions of section 5 (6) of the Ontario Proceedings Against the Crown Act, which was said to exempt the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities which he had in connection with the execution of judicial process. So that language mirrors closely the wording of section 3 (5) of the Act, which is no doubt why in the headnote of the case, the statement is made that the Crown enjoys absolute immunity from a suit for malicious prosecution. But what Mr. Diel referred me to was the statute in Ontario, not that in Alberta.

17. The passage on which Mr. Diel relied in *Krieger*, and for which the judgment gave *Nelles –v- Ontario* as the appropriate authority was one which read:

> "Within the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for 'malicious prosecution'".

18. The reason for this apparent contradiction is the distinction made in Canada, and demonstrated in the case of *Nelles –v- Ontario*, between the immunity of the Crown, and that of the Canadian Attorney General and Crown Attorneys, who are not immune from suits for malicious prosecution. Further, the judgments

demonstrate that the position in Ontario is not one which is followed throughout Canada. Lamer J. noted that there were different approaches to immunity and the position did not seem to be uniform throughout the country. He noted that the New Brunswick Court of Appeal had followed the authority of Ontario cases, especially the case at bar, but carried on to say that by contrast the appellate courts of Nova Scotia and Alberta had cast some doubts on the existence of an absolute immunity. Lamer J. concluded with the following passage:

> "Therefore the Canadian position ranges from a strong assertion of absolute immunity in Ontario to acceptance of the possibility of suing the Attorney General and Crown Attorneys if bad faith or malice can be proven as evidenced by the cases from Nova Scotia and Alberta".

And the situation in Quebec differed because of the terms of the Code of Civil Procedure there.

19. So the suggestion made by Mr. Diel that the case of *Krieger –v- Law Society of Alberta* casts doubt on the decision in *Nelles –v- Ontario* does not seem to me to be one which can be maintained. The reason for the difference of approach is because of the difference in the underlying statute, and nothing in *Krieger* should be taken as derogating from the view of the Ontario courts and the Supreme Court of Canada as to the effect of the Ontario statute. Nevertheless, Mr. Diel submitted that section 3 (5) of the Act could not provide immunity in respect of an exercise of a prosecutorial discretion in circumstances of flagrant impropriety or in actions for malicious prosecution.

20. Before turning to malicious prosecution, I should first record that in relation to the pleaded claim of abuse of process, Mr. Diel indicated that this was not pursued, and said that this was to be treated as a malicious prosecution case only.

21. He then turned to the requisite elements of malicious prosecution, relying upon the statement appearing in the Fourth Edition Reissue of Halsbury's Laws of England, volume 45 (2) at paragraphs 467 and 470. Particularly, Mr. Diel relied upon the statement made at the end of paragraph 470 that:

> "Malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause is not to be inferred from malice."

22. The authority for this statement is the speech of Viscount Simonds in *Glinski –v- McIver* [1962] AC 726 at 744. But the operative words of the passage quoted in

Halsbury are "may be inferred". Viscount Simonds was not suggesting that such an inference was always to be drawn; rather, he was concerned to emphasise that want of reasonable and probable cause could not be inferred from even the most express malice. But the submission which Mr. Diel made was that "malice is to be inferred from the want of reasonable and probable cause".

Findings

22. As I indicated in relation to the submissions of counsel, Mr. Diel did not press the position in relation to the application to strike out the Attorney-General from the proceedings. I will nevertheless deal with the point, because it is a short one. As I have indicated, there was no mention whatsoever of the Attorney-General in the statement of claim. The only basis for the inclusion of the Attorney-General in these proceedings would therefore need to be a particular provision of the Act, and as Mr. Johnson submitted, the only possible such provision is section 14 of the Act, subsection 1 of which is in the following terms:

> "Proceedings against the Crown under this Act shall be instituted against the appropriate Minister in his style as such or, as the case may be, against the appropriate Government Board, in the corporate name of the Government Board, or if none of the Ministers or Government Boards is appropriate or the person instituting the proceedings has any reasonable doubt whether and if so which Minister or Government Board is appropriate, then against the Attorney-General in his title as such."

23. There is no question of proceedings against any Minister or Government Board in this case, so that the provision enabling proceedings to be taken against the Attorney-General is not applicable. I agree that the proceedings against the Attorney-General should be struck out, on the basis that the proceedings disclose no reasonable cause of action against him, and I so find.

24. I now turn to Mr. Johnson's first argument in relation to the position of the Director, namely that based on the date upon which Mrs. Graham-Allen took up her post.

25. It seems to me that this argument is based on a misunderstanding as to the nature of these proceedings. They are taken against the Director in her capacity as the holder of a public office, and not in her personal capacity. The irrationality of any other conclusion is demonstrated by the example which I put to Mr. Johnson during the course of argument. That example involved a situation where liability

was not an issue; the hypothetical cause of action arose the day before the retirement of a particular Director, who immediately left the jurisdiction to take up residence in some distant land. It could surely not be the case that a litigant would need to pursue the former office holder personally, in proceedings which would ultimately need to be enforced wherever that office holder chose to reside. In my view that cannot be a sensible view of the position, and I reject the argument that a particular cause of action follows a particular office holder upon completion of his or her office, instead of being sustainable as against his or her successor. I also note that if the proceedings could properly be said to be against the office holder, as opposed to the office, there would be an issue whether the office holder could pray in aid the immunity afforded by section 3 (5) of the Act. That subsection affords relief to the Crown, not to the individual office holder in his or her personal capacity.

26. I next turn to the position in relation to section 3 (5) of the Act. In this regard, I accept that the decision of the Director's office in relation to the prosecution of Mr. Farmer was indeed a judicial decision on the part of the Director's office, so that it follows that the provisions of section 3 (5) apply to afford the Crown absolute immunity, as was the case in *Nelles –v- Ontario.*

27. That finding is sufficient for me to conclude that these proceedings are bound to fail and accordingly should be struck out as sought in the summons. However, in case I am wrong in regard to my view of section 3 (5) of the Act, I should consider Mr. Diel's arguments in relation to malicious prosecution, and its ingredients.

28. Of the five essentials for a claim for malicious prosecution, as set out in paragraph 467 of the relevant volume of Halsbury, there is no issue over the first, second and fifth essentials. There was a prosecution which was undertaken by the Director's office against Mr. Farmer before a competent tribunal in the form of the Magistrates' Court. Those proceedings were terminated in Mr. Farmer's favour, and for the purpose of the issues before me, I will assume that he suffered damage. So the outstanding issues are whether the Director's office instituted or carried on the proceedings maliciously and whether there was an absence of reasonable and probable cause for the proceedings.

29. Mr. Diel's first submission was that it must follow from the fact that the magistrate hearing the case dismissed the charges against Mr. Farmer on the basis of no case to answer that there was an absence of reasonable and probable cause for the proceedings. There may be room for argument in relation to that contention, but for the purpose of this application I am prepared to accept the lack of reasonable and probable cause for the proceedings. But I cannot accept what

Mr. Diel submitted was the corollary to that, which was that malice can properly be inferred from the lack of reasonable and probable cause. As I put to Mr. Diel during the course of argument, if that were the case, the consequence of every successful no case submission would be that the acquitted defendant would thereupon have a cause of action based on malicious prosecution. That cannot be right, and I reject the argument. It may be that there are circumstances in which malice can properly be inferred from a lack of reasonable and probable cause for the issue of proceedings, but the mere fact that a prosecution has failed on the basis of a no case submission does not, in my judgment, mean that the proceedings were instituted maliciously.

30. I then turn to the other points made by Mr. Diel in relation to malice in the context of malicious prosecutions. This he said could be seen from:

- The comments of the Police officers;
- The refusal of the Police and then the Director to examine properly or at all Mr. Farmer's alibi evidence;
- The failure to consider properly or at all Mr. Farmer's blood test results; and
- The failure to disclose the blood test results to Mr. Farmer.

31. So it can be seen that some of the complaints are directed at the Police officers. I have to bear in mind also that the blood test results were relevant to the offence which was committed at a much earlier date than the offence with which Mr. Farmer was charged. As against the Director, one is effectively left with the complaint that the Director failed to examine properly or at all Mr. Farmer's alibi evidence. That would be something which in the normal course the Director's office would refer to the investigating Police officer. The omission was no doubt a serious one, but that does not make it a malicious act on the part of the Director. Had it been necessary for me to decide the position in regard to malicious prosecution, I would have held that there was nothing in the statement of claim to support the contention that the Director had instituted or carried on the proceedings against Mr. Farmer maliciously, and I would have struck out the proceedings on those grounds.

32. In this regard, I would also refer to the requirements for a pleading of malice. I have referred in paragraph 4 above to the manner in which the case of malicious prosecution was pleaded, and I have referred in paragraph 3 to the various factual matters which were recited, virtually all of which related to the acts or omissions

of the investigating Police officers, rather than the Director. So there were no particulars given in paragraph 23 of the pleading of the facts on which Mr. Farmer sought to rely to establish that the Director had in fact instituted or carried on the proceedings maliciously.

33. During the course of argument, I raised that aspect of matters with Mr. Diel, and my note of his response was:

> "Don't need to plead malice. All requisite elements pleaded."

34. With respect to Mr. Diel, he does not appear to have had regard to Order 18 rule 12 (1) (b) of the Rules of the Supreme Court 1985, which requires that every pleading must contain the necessary particulars of any claim. Then there is a requirement "where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge," for that party to give particulars of the facts on which he relies.

35. It does not seem to me that the pleading in this case contains any or any proper particulars of malice as against the Director. So even if there were other matters from which malice on the part of the Director might properly have been inferred, I would have struck the proceedings out on the basis that no proper particulars of malice had been given.

Costs

36. I would expect that costs should follow in the usual way, but I am willing to hear counsel on the matter of costs should they wish.

Dated the 23rd of February 2007.

Hon. Geoffrey R. Bell
Puisne Judge