In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 116

BETWEEN:

PETER FREDERICK BROMBY

1st Plaintiff

and

JOHN MARK BROMBY

2nd Plaintiff

-and-

HENRY A. TALBOT

Defendant

Date/s of Hearing: Thursday 6th March 2008
Date of Judgment: Wednesday 19th March 2008

Richard Horseman of Wakefield Quin, for the Plaintiffs; and
Kenrick James of James & Associates for the Respondent.

RULING

1. This Judgment is given on the defendant's application to strike out the specially endorsed writ as disclosing no cause of action and as frivolous, vexatious and an abuse of process. The plaintiffs also have a cross-application for discovery.

2. The background is as follows. The parties are neighbours. On 16th May 2004 the defendant had workmen and an excavator working on a beach which adjoins their properties. The plaintiffs, who objected to the work, armed themselves with a piece of

pipe and a stick respectively and went to the beach, where they had an altercation first with the driver of the mechanical excavator, and then with the defendant. The police were called, and various officers attended the scene at the beach. At some point thereafter the defendant made a statement to the police, and subsequently the plaintiffs were charged with unlawful assault contrary to section 314 of the Criminal code, and uttering threatening words, contrary to section 12 of the Summary Offences Act 1926. They were tried before a Magistrate, and on 18th May 2005 convicted of the charges, but given absolute discharges.

3. Notwithstanding the discharges, the plaintiffs were aggrieved by this outcome and appealed to the Supreme Court. On 10th March 2006 Bell J quashed the convictions and directed "that a judgment of dismissal of the informations as against both appellants be entered". He did so because of the learned Magistrate's failure to address and resolve conflicts in the evidence at trial:

> "77. If the learned magistrate had, in his judgment, reviewed the evidence and made proper findings of fact in relation to that evidence, he would no doubt have identified the conflicts in the evidence which I have referred to in paragraphs 34 and 40 above, and having identified such conflicts, it would obviously have been necessary for him to resolve them. Hence the learned magistrate would necessarily have needed to explain why it was that he preferred the evidence of Mr. Talbot to that of PS tucker on one issue, why he preferred the evidence of Mr. Talbot to the three police officers and Mr. Waldron on another issue, and how he felt able to disregard the evidence Ms. Lima and Mr. Simons in relation to yet another issued"

Bell J concluded –

> "It is the lack of proper findings of fact which render the judgment as a whole unsafe."

4. The matter may have rested there, but it did not. More than a year later, on 3rd May 2007, the plaintiffs issued the writ in this action, alleging that "On or about 28th October 2004 the Defendant maliciously and without reasonable and probable cause made a complaint to the Police which resulted in an information laid in information (sic) before . . . a Magistrate". It is then alleged that the Magistrate issued a summons to the plaintiffs to appear in the Magistrates' Court on 28th April 2005, where, after a summary trial, they were eventually convicted.

5. The plaintiffs plead the following particulars of malice and lack of reasonable and probable cause –

(i) "The Defendant knew that the charges alleged were false.

(ii) The Defendant requested that his employees, namely Earl Waldron, Fernando Landingin and another employee known as "Rudi", to give false evidence against the said Peter and John Bromby.

(iii) That the charges alleged were false in that both Peter and John Bromby on the day of the alleged offence, did approach the First Defendant and did have a conversation with him but at no time did they unlawfully assault, use threatening words to either the First or Second Defendant (*sic*);

(iv) The First Defendant was motivated to make a false charge against the Plaintiffs due to an ongoing dispute between the Plaintiffs and the First Defendant over a right of way and planning violations committed by the First Defendant.

(v) Earl Waldron gave false evidence against the Plaintiffs and was motivated to give false evidence in order to support the Defendant who was his employer at the time."

6. The defendant has filed a Defence, denying the allegations, and in particular pleading that the charges against the plaintiffs' were true, and denying that he requested his employees to give false evidence. He also pleads:

> "As to paragraph 4 of the Statement of Claim, the Defendant regards it as frivolous as he is not responsible for the exercise of the Crown's Prerogative in

> bringing Prosecutions and the subsequent exercise of the Court's role to determine evidence".

The defendant also counterclaims for the injuries he says he suffered as a result of the assault, being an abdominal aneurysm, and he claims $43,777.10 in special damages and general damages for pain and suffering.

7. In order to make out a case in malicious prosecution the plaintiff must plead and establish that[1]:

(a) he was prosecuted by the defendant, i.e. that proceedings on a criminal charge were instituted or continued by the defendant against him;

(b) the proceedings were terminated in the claimant's favour;

(c) the proceedings were instituted without reasonable and probable cause;

(d) the defendant instituted the proceedings maliciously; and

(e) the claimant suffered loss and damage as a result.

8. The identity of the prosecutor is at the heart of the application to strike out the claim. The nominal prosecutor was a police constable, Angela Cox, and it was she who swore and laid the Informations which instituted the prosecutions against the plaintiffs. It is, however, the plaintiffs' pleaded case that the prosecution was instigated by the complaint of the defendant (see paragraph 4 above).

9. As to the identity of the prosecutor, at the hearing the plaintiffs' counsel put before me Bullen & Leake & Jacob, Precedents of Pleading, 16th ed. (2008), which states that –

> "It is a question of fact whether a defendant is a prosecutor (*Martin v Watson* [1995] 3 A.E.R. 559, HL) A person may be a prosecutor even thought the charge is laid by the police: *Martin v Watson*, above."

[1] This is taken from paragraph 2-12 of Bullen & Leake & Jacob, Precedents of Pleading, 16th ed. (2008)

However, this issue was confused at the hearing by reference to Clerk & Lindsell on Torts, 17th ed. (1995), paras. 15-10 and 15-11, which the plaintiffs' counsel had also put before me. That says that " a private person who sets in motion the train of events leading to a prosecution will rarely be liable in malicious prosecution because she will not be found to be the prosecutor." That, however, is based upon Martin v Watson at the Court of Appeal stage[2]. That was overturned in the House of Lords, and no longer represents the law.

10. I take the law to be definitively set out in the headnote to the report of the House of Lords decision in Martin v Watson [1995] 3 All ER 559, HL:

> "A person who in substance was responsible for a prosecution being brought against the plaintiff was liable to the plaintiff for malicious prosecution if the other essentials of the tort were fulfilled. The mere fact that a person gave information to the police which led to their bringing a prosecution did not make that person the prosecutor, but if that person falsely and maliciously gave a police officer information indicating that some person was guilty of a criminal offence and stated that he was willing to give evidence in court of the matters in question, it was properly to be inferred that he desired and intended that the person he named should be prosecuted. Where the circumstances were such that the facts relating to the alleged offence could be within the knowledge only of the complainant . . . then it was virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution was instituted by the police officer the proper view was that the prosecution had been procured by the complainant. The fact that he was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having been brought."

11. Given the law, it seems to me beyond question that the plaintiffs have pleaded an adequate case, and so the matter cannot be struck out as disclosing no cause of action. To the extent that the defendant seeks to argue that it is bound to fail on the facts, that is not a judgment I could properly attempt at this stage. The law is clear on this, and I take it to be as stated by Auld LJ in Electra Private Equity Partners & Ors. v KPMG Peat Marwick & Ors. [1999] EWCA Civ 1247:

[2] [1994] 2 All ER 606

> "It is trite law that the power to strike out a claim under RSC order 18, r. 19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleadings and the possible facts of the matter when they are know. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undermined facts, should not attempt to try the case on the affidavits."

12. Whether the defendant's complaint did in fact initiate the prosecution is a matter for trial. None of the defendant's other points are sufficient to warrant striking out the action. In particular the truth or falsity of the original complaint is not decided by the Magistrate's findings, which were set aside. I therefore decline to strike out the proceedings.

13. I turn now to the summons for discovery. The plaintiffs seek access to the defendant's telephone records. They say that they are relevant to their case, which is that[3] –

> ". . . the Plaintiffs believe that the Defendant made contact with high-ranking officers and/or political contacts that resulted in the Plaintiffs being prosecuted."

And

> "We also have been informed that the police prosecutor recommended that there be no prosecution instituted, however, our file was sent to be further reviewed due to 'politics'".

14. The defendant's counsel responds that the plaintiffs are merely fishing. I agree. In any event, the test is that set out in RSC Ord. 24, r. 8:

[3] See the second plaintiff's affidavit of 3rd February 2008.

> **“24/8 Discovery to be ordered only if necessary**
>
> 8 On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

The central issue in the case is likely to be the truth or falsity of the original complaint, and the telephone records can have no bearing on that. I do not think, therefore, that they are necessary for fairly disposing of the matter, and I dismiss the plaintiffs’ application for specific discovery.

15. In summary, therefore, I dismiss both the defendant’s application to strike out the writ, and the plaintiffs’ application for specific discovery. I will hear the parties on costs.

Dated the 19th of March 2008

_____

Richard Ground
Chief Justice