In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No: 47

DWIGHT LAMBERT

Plaintiff

-v-

(1) THE BROADCASTING COMMISSIONERS
(2) THE MINISTER RESPONSIBLE FOR TELECOMMUNICATIONS
(3) THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

EX TEMPORE JUDGMENT

(in Chambers)

Date of hearing: May 30, 2014
Date of Judgment: June 11, 2014

Mr. Michael Smith, Smith & Co., for the Plaintiff
Mr. Michael Taylor, Attorney General's Chambers, for the 1st and 2nd Defendants
Mr. Garrett Byrne, Department of Public Prosecutions, for the 3rd Defendant

Introductory

1. The Defendants in this case applied by Summons issued on the 7th May 2013 to strike out the Writ and Statement of Claim in this matter on various grounds, although the only ground that was pursued at the hearing was the contention that the claim discloses no reasonable cause of action.

2. The action was started by Writ which was issued on the 19th February 2013 and which was accompanied by a Statement of Claim. The Indorsement of Claim provided as follows:

"*The Plaintiff's claim for loss and damages occasioned to the Plaintiff's by reason of the negligence and/or breach of statutory duty of the Defendants and each of them, as more particularly set out in the statement of claim attached herewith interest pursuant to statue and costs*".

3. The Statement of Claim itself did substantiate that indorsement. The Statement of Claim avers that the 1st Defendants are a statutory body set up under the provisions of the Broadcasting Commissioners Act 1953, and operate under the general direction of the 2nd Defendant. Reference is made to the 1st Defendants' duty under section 4 of the Obscene Publications Act 1973 to "*keep under review the operation of this Act with a view of whether in their opinion any amendment of the Act is necessarily desirable. Having regard to any changes which may be in the attitudes of persons in Bermuda*", and to report and advise to the 2nd Defendant on any amendments which they recommend.

4. The 3rd Defendant, the Director of Public Prosecutions, is also referred to in reference to his consent being required before any prosecution before any prosecution for an offence under section 3 of the Obscene Publications Act 1973 can be instituted.

The pleadings

5. The background to the claim factually, according to the Statement of Claim, is that in or about 2007, the Plaintiff was charged with an offence involving the importation of obscene articles. He was tried in the Magistrates' Court and eventually acquitted, on the basis that the material was not obscene.

6. The Plaintiff claimed that had the Defendants complied with their respective duties under the Act, the material could not have been considered obscene for the purposes of the Act, and there would be no grounds for a trial.

7. The particulars of breach of statutory duty are then set out, firstly dealing with the position of the 1st Defendants, and various provisions of section 4 of the Obscene Publications Act 1973 are then set out.

8. As regards the 2nd Defendant, it is then alleged that the Minister failed adequately or at all to refer matters to the 1st Defendants and to require a definition of contemporary standards of decency from time to time. Looking at that provision on light of the statute and the arguments made, it seems to me that the true position has been somewhat reversed, in that the statute seems to require the 1st Defendants to advise the 2nd Defendant, rather than the other way around. And so one can, reading the pleading generously, infer that the complaint being made against him is that the Minister, broadly speaking, failed to update the law.

9. Then the particulars in respect of the 3rd Defendant are that he gave his consent for the prosecution of the Plaintiff negligently in the face of inadequate and/or non-existent definitions of various terms contained in the Act.

10. The Statement of Claims then moves on to particularize the loss and damage which is complained of. And that damage is, in essence, that publication and details of this case were placed on the internet and there is now a permanent record of, it is asserted, the Plaintiff having

imported pornographic materials, a state of affairs which has impaired the Plaintiff's ability to pursue employment opportunities in Bermuda and elsewhere. It must be noted, as was pointed out on behalf of the Defendants, in particular by Mr. Byrne on behalf of the DPP that, if there is any published allegation that the Plaintiff was actually guilty of importing any pornographic materials into Bermuda, any such allegation would be untrue.

Findings: Does the breach of statutory duty claim disclose a reasonable cause of action?

11. It is helpful to actually look at the provisions of the Act, which were helpfully provided to the Court by Mr. Smith for the Plaintiff, and to consider the key provisions. As regards to present action, section 4 is the key provision which provides as follows under the heading "Functions of Broadcasting Commissioners":

> *"(1) The Commissioner shall-*
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> *(a) keep under review the operation of this Act with a view to ascertaining whether in their opinion any amendment of the Act is necessary or desirable, having regard in particular to any changes which there may be in the attitudes of persons in Bermuda;*
>
> *(b) report to the Minister any amendment of the Act which they recommended;*
>
> *(c) advise the Minister on any other matter concerning the operation of the Act which he may refer to them.*
>
> *(2) In this section "Minister" means that the Minister responsible for Telecommunications."*

12. The Act then proceeds to provide into Section 8 as follows:

> *"8. No prosecution in respect of any offence under section 3 or section 3A shall be instituted except by or with the consent of the Director of Public Prosecutions."*

13. The Minister is then empowered to make regulations controlling the publication of magazines, and those regulations, may first of all, control the publication of salacious material in or through magazines in Bermuda under subsection (2) of section 10. Section 11 of the Act also contemplates that regulations made under section 10 may empower the Commissioners to classify any particular magazines in such ways that they deem appropriate.

14. So broadly speaking, the Act creates offences for importing and otherwise dealing with obscene articles and creates a regulatory mechanism under which the Broadcasting Commissioners and the Minister are required to review and monitor the Act, which would include any regulations. It is also envisaged that the Minister will make regulations which classify certain magazines as being salacious and, by necessary implication, other magazines as being completely prohibited. The Act also envisages that members of the public would have the ability under Regulations to apply to have particular magazines classified in a particular way.

15. The Regulations were not referred to in the course of argument, but I do note that the Obscene Publications (Classifications and Restrictions as to Sale) Regulations 1981 appear to be the only Regulations which have been passed under the Act. Those Regulations specify certain magazines in the Schedule as being salacious and prescribe how they should be kept in stores. It appears that these Regulations have not been updated since at least 1989 when the Revised Laws of Bermuda were last revised. And it also appears to be the case that no Regulations have ever been passed which give the public an opportunity to apply to the Minister or the Commissioners to have new magazines classified in any appropriate way.

16. And so in general terms, it is easy to understand the broad complaint that the Plaintiff seems to have. That the relevant laws have not been updated and as a result he was exposed to a trial in which he was acquitted in circumstances where perhaps, if more modern regulations had been formulated, he might not have been prosecuted at all. In saying that the Court is obviously speaking in very general terms, because there is no material before this Court which would justify the conclusion that, had the Commissioners looked at the magazines in question, they would have decided that they were, having regard to modern standards, not obscene. All the information before this Court shows, it is common ground, is that a court applying the criminal standard proof was not satisfied beyond reasonable doubt that the materials in question were in fact obscene.

17. So the broad picture, and the question of the way in which the Act interferes with the freedom of expression, which is protected by section 9 of the Constitution, is something that might be explored in the concept of an application for relief under section 15 of the Bermuda Constitution. But what this Court is charged with on the present application is an analysis of two causes of action, asserted as a matter of private law. And the two issues that have been raised on this application are as follows:

    (1) is breach of statutory duty an obviously unsustainable cause of action as regards the pleaded breaches of section 4 of the Obscene Publications Act;

    (2) is the negligence claim asserted against the Director of Public Prosecutions and his decision to prosecute, an obviously unsustainable cause of action?

18. In my judgment, both of these questions must be answered in the affirmative and resolved in favour of the Defendants. The reasons for this conclusion are as follows.

19. The basic argument that was advanced on behalf of the Commissioners and the Minister I accepted, albeit on slightly different grounds. The central point made by Mr. Taylor, on behalf of the first two Defendants was that section 4 of the Act gave the Commissioners a discretion as to what advice they can render to the Minister and that that type of statutory obligation did not give rise to a claim in damages for breach of statutory duty, in the event of non- compliance. He fortified that argument by reference to the presumption of the constitutionality, which I did not consider to be directly on point.

20. But the other point that was advanced was that, in effect, the Plaintiffs claim against the first two Defendants was seeking in an indirect way to compel the Defendants to change the law. And it

was rightly submitted that no cause of action can arise in circumstances where the complaint is in substance that a public authority has failed to change the law.

21. The authorities which set out the guiding principles on when a cause of action for breach of statutory duty exists were identified by the Court as being the following authorities. Firstly, the case of *Cullen v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39. And there were two passages that seemed to me to be relevant. First of all, in paragraph 41, Lord Bingham said this:

> *"41. In my opinion damages are awarded for a breach of statutory duty in order to compensate a person for loss or damage suffered by him by reason of the breach of that duty. This principle was stated by Lord Bridge of Harwich (with whose speech the other members of the House concur) in Pickering v Liverpool Daily Post Plc [1991] 2 AC 370 , 420A where he said that in order to award damages for breach of statutory duty.*
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> > *'It must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach. In the well known passage in the speech of Lord Simonds in Cutler v Wandsworth Stadium Ltd [1949] AC 398 , 407-409, in which he discusses the problem of determining whether a statutory obligation imposed on A should be construed as giving a right of action to B, the whole discussion proceeds upon the premise that B will be damnified by A's breach of the obligation. I know of no authority where a statute has been held, in the application of Lord Diplock's principle, to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages.'"*

22. That *dictum* seemed to me to apply with even greater force to section 4 of the Obscene Publications Act, which to my mind is very far removed from the sort of provision that is classically deemed as capable or arguably capable of giving rise to a cause of action for breach of statutory duty. The other passages in the case of *Cullen*, which I consider to be supportive of the arguments that were advanced on behalf of the first two Defendants, were found in Lord Millet's Judgment starting in paragraph 62, where he said this:

> *"62. In X (minors) v Bedfordshire County Council [1995] 2 AC 633 Lord Browne-Wilkinson emphasised that an action for breach of statutory duty is a private law action. He said at p 730 that:*
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> > *'It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce*

the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages.'...

64. At p 731 Lord Browne-Wilkinson summarised the principles which are applicable in determining whether a cause of action for breach of statutory duty exists. He said:

> *'The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer.'*

65. In that case Lord Browne-Wilkinson was considering the effect of statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large. He observed that the House had not been referred to any case where a statute of this kind had been held to give rise to a private right of action for damages for breach of statutory duty. He acknowledged the fact that regulatory or welfare legislation affecting a particular area of activity did in fact give protection to individuals particularly affected by that activity, but said that such legislation was not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Such legislation may be contrasted with the kind referred to by Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 , 185:

> *'where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation.'*

66. Although not referred to by Lord Browne-Wilkinson, the cases show that there is a further aspect to be considered before a cause of action for breach of statutory duty can arise. It is not enough that Parliament shall have imposed the duty for the protection of a limited class of the public. It must also be shown that breach of the duty is calculated to occasion loss of a kind for which the law normally awards damages."

23. And so Mr. Smith, very bravely, sought to argue that if persons such as his client were unable to sue for damages, how else would the statute be enforced? The answer to that question is that the

statute can be enforced by way of judicial review. That obviously is of no assistance to the Plaintiff as regards to the specific events of 2007 of which he complains in this action. But in a general sense, the Minister and the Commissioners continue to be subject to ongoing duties that can be enforced by judicial review. But section 4, in my judgment, is quite plainly and obviously not the sort of statutory provision which gives rise to a claim in damages. It is not designed to protect people from the sort of injury that normally sounds in damages.

24. This Court has recently affirmed similar principles in the case of *Harold Joseph Darrell v. The Board of Enquiry appointed under the Human Rights Act and the Minister of Culture and Social Rehabilitation* [2013] Bda LR 75. Hellman J (at paragraph 38) cited an abbreviated version of the same passage in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 which was cited with approval by the House of Lords in *Cullen*. What is interesting about that case is that there was in fact in that statute a statutory provision that expressly gave a right of action in damages. In paragraph 39, Hellman J noted:

> "*Section 20A of the 1981 Act does provide for a private right of action for breach of statutory duty where it is alleged that the respondent has committed an act of discrimination against the claimant which is unlawful under Part II of the 1981 Act. The alleged failure of the Board to determine the merits of Mr. Darrell's claim would not satisfy this definition and hence would not give rise of action under section 20A. The 1981 Act does not provide for any other claim for breach of statutory duty.*"

25. In the present case there is no provision at all in the Obscene Publications Act which expressly creates any right to sue for breach of statutory duty.

Findings: Does the negligence claim against the DPP disclose a reasonable cause of action?

26. It remains to consider the second main issue which is the question of whether or not it is possible to sue a prosecutor for deciding to prosecute. This point was dealt with by Mr. Byrne, who referred the court to the case of *Brookes (FC) v. Commissioner of Police for the Metropolis and Others* [2005] UKHL 24;[2005] 1 WLR 1495. This case makes it clear that the notion of suing a prosecutor for negligence in respect of the decision to prosecute is inconsistent with the notion of prosecutorial independence. At paragraph 22 of that case, in the judgment again of Lord Bingham, he cited his own judgment in the case of *Elguzouli-Daf v Commissioner of Police* [1995] QB 335 where he said this:

> "*That bring me to the policy factors which, in my view, argue against the recognition of a duty of care owned by the CPS to those it prosecutes. While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the CPS. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act as to protect themselves from claims of negligence. The CPS would have to spend valuable time and use scarce resources in order to prevent law suits in negligence against the CPS. It would generate a great deal of paper to guard against the*

> *risks of law suits. The time and energy of CPS lawyers would be diverted from concentrating on their prime functions of prosecuting offenders. That would be likely to happen not only during the prosecution process but also when the CPS is sued in negligence by aggrieved defendants. The CPS would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials. That is a spectre that would bode ill for the efficiency of the CPS and the quality of our criminal justice system."*

27. Those sentiments apply with equal force to the Director of Public Prosecutions under the Bermuda Constitution. That does not mean to say that the exercise of the Director's powers are immune from legal scrutiny all together. It is clear from the case of *Farmer A-G Attorney General v. DPP* [2008] Bda LR 57, which was also placed before the Court by the Defendants, that it is possible to sue the DPP for malicious prosecution. It is also possible, as Mr. Byrne pointed out, to challenge the decision of the DPP by way of judicial review, as the case of *Middleton-v-DPP* [2007] Bda LR 28 (Ground CJ) illustrates.

28. In addition, it is important to remember that the Bermuda Constitution provides very strong support for those common law principles for independent prosecutorial functions. First of all, section 71 of the Constitution in subsection 6 provides:

> *"(6) In the exercise of the powers conferred on him in this section, the* [Director of Public Prosecutions] *shall not be subject to the direction or control of any other person or authority".*

29. In addition, in a provision which one might think is overly protective of the prosecutorial function, section 12 of the Constitution guarantees the right not to be discriminated against on the grounds of, inter alia, race. But subsection (9) of that section provides that:

> *"(9) Nothing in subsection (2) of this section shall affect any discretion relation to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vest in any person by or under this Constitution or any other law."*

30. So it is not possible to challenge the discretion to prosecute, even under section 15 of the Constitution, to the extent that you seek to allege that discretion has been exercised on discriminatory grounds. That is all the more reason for concluding that at common law, it cannot be possible to sue the Director of Public Prosecution for a negligent exercise of his discretion to prosecute. And so for these reasons I find that the Plaintiff's claim against the 3rd Defendant is liable to be struck out.

31. Mr. Smith sought to persuade the Court to afford the Plaintiff the opportunity to amend, to add a new cause of action in malicious prosecution. In my judgment, there is no reasonable basis for believing that any genuine cause of action for malicious prosecution can be formulated. Generally, the Court takes a liberal attitude towards amendments but in this particular case we are concerned with the events that happened approximately seven years ago and the notion of a malicious prosecution claim being formulated against a public prosecutor, when there has been no hint of any malice asserted by the Plaintiff before, really beggars belief.

32. In these circumstances, I refuse the application for an opportunity to amend. In my judgment, it would only increase the Plaintiff's cost exposure in pursuing a hopeless claim further than it deserves to be pursued.

Conclusion

33. Having said that, I do have considerable sympathy for the Plaintiff's general position. It does appear to me to be the case that the way in which the obscene publications are currently dealt with under the law does leave room for prosecutions to be launched in circumstances of doubt, where clearer and more modern rules enacted through regulations might well reduce the room for such doubt. And the courts should not really be exercising the function of policy-maker. The courts should be deciding prosecutions under the Act where it is clear that prosecutions should be laid.

34. And it does appear to me, admittedly on the basis of very limited information and a very cursory analysis of the Act and the only regulations that appear to be passed under it, that the Plaintiff's central grievance that the law is not up to date does have some substance to it.

35. Unfortunately, the particular legal route that Plaintiff has sought to channel those grievances through has no merit. And it is for these reasons that the Plaintiff's claim is struck out.

[After hearing counsel and with the assent of the Defendants, no order was made as to costs].

Dated this 11th day of June, 2014

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IAN RC KAWALEY CJ