Neutral Citation Number: [2025] EWCA Civ 113

Case No: CA-2024-002073

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE JAY
[2024] EWHC 1765 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2025

Before :

LORD JUSTICE WILLIAM DAVIS
and
LORD JUSTICE JEREMY BAKER

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Between :

RICHARD HUGHES	**Appellant**
- and -	
(1) HIS MAJESTY'S REVENUE & CUSTOMS	
(2) THE CROWN PROSECUTION SERVICE	**Respondent**

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Ian Croxford KC and Sam Jacobs (instructed by **Brabners LLP**) for the **Appellant**
Alan Payne KC and Russell Fortt (instructed by **His Majesty's Revenue & Customs Solicitor's Office**) for the **First Respondent**
Jonathan Kinnear KC, Alexander Cook KC, Amy Mannion and Gideon Barth (instructed by **Government Legal Department**) for the **Second Respondent**

Hearing dates : 10th February 2025

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Approved Judgment

This judgment was handed down remotely at 14.00pm on 11 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment Approved by the court.

LORD JUSTICE WILLIAM DAVIS and LORD JUSTICE JEREMY BAKER:

1. This is the judgment of the court.

2. Richard Hughes (to whom we shall refer as the Claimant) brought proceedings against His Majesty's Revenue and Customs ("HMRC") and the Crown Prosecution Service ("CPS") for malicious prosecution and misfeasance in public office arising from charges of conspiracy to cheat and cheating the Revenue. The Claimant was charged in December 2015. In due course his case was sent for trial in the Crown Court at Birmingham. In April 2017 he (and others with whom he was jointly charged) applied at a hearing before HH Judge Drew QC for the dismissal of the charges. His application was successful. That ended the criminal proceedings against the Claimant.

3. The Claimant issued proceedings against HMRC and the CPS in December 2021. Against each he claimed that his prosecution was malicious and that they had committed misfeasance in a public office. His case was that most of the loss caused by the actions of HMRC and the CPS had been sustained by two private companies, ZCL and ZRL. The companies' rights and causes of action had been assigned to the Claimant in 2019.

4. On 18 October 2023 HMRC and the CPS applied for orders striking out the claims pursuant to CPR 3.4(2) and 24.3. The applications were heard over three days in June 2024 by Mr Justice Jay ("the judge"). He dealt with the applications by reference to the principles relating to summary judgment pursuant to CPR 24.3 on the basis that, were summary judgment not to be appropriate, the court would not be able to find that the Claimant's case should be struck out pursuant to CPR 3.4(2). In a reserved judgment the judge entered summary judgment in favour of HMRC and the CPS. He concluded that the Claimant had no real prospect of succeeding in his claim against either defendant. He further determined that the assignment of the rights and claims of ZCL and ZRL was void and unenforceable as being contrary to public policy.

5. The appellant applied to this court for permission to appeal on 9 separate grounds. His application was adjourned to an oral hearing before a two judge court. This is our judgment in relation to that application.

6. Before us the Claimant was represented by Ian Croxford KC (who did not appear in the court below) and Sam Jacobs. HMRC were represented by Alan Payne KC and Russell Fortt (both of whom appeared in the court below). The CPS were represented by Jonathan Kinnear KC, Alexander Cook KC, Amy Mannion and Gideon Barth, all of whom appeared for the CPS before the judge. We had written submissions from all counsel. They were supplemented by oral submissions.

7. In about November 2010 HMRC commenced a criminal investigation into the activity of a company named ZP Investment Products. This was in relation to a scheme in which that company played a significant role. The scheme involved high net-worth individuals investing in companies using both their own personal funds and loans provided by a financial institution. The proportion of the investment provided by each individual from their own funds varied between 12% and 18%. The balance of the sum invested came from the loan. Whilst the scheme was in operation, over 400 individuals invested in a total of 52 companies which had been established by ZP.

8. 51 of the 52 companies identified by HMRC failed within 12 months of the investment being made. The individual investors were able to claim share loss relief in relation to the shares in each failed enterprise, those shares by then having no value. The share relief claimed included the value of the loan in each case. By that route, the relief substantially exceeded the sum invested by the investor in each case.

9. The prosecution case was that the scheme did not represent genuine commercial investment opportunities. HMRC considered that the investments were designed specifically to obtain a tax advantage. As such the scheme was a cheat on the Revenue. Those charged with criminal offences included investors and those, such as the Claimant, who had been part of the organisation of the scheme. The Claimant's position was and remains that there was nothing criminal about the scheme. It had been designed by the private bank arm of HSBC. The bank had taken advice from leading counsel at the Tax Bar.

10. The Claimant became a suspect in the investigation by HMRC in 2012. In January 2014 he was interviewed under caution. He provided a prepared statement in the course of which he said that every aspect of the questioned transactions had been the subject of professional advice. He said that a proper and fair evaluation of supposed criminal activity ought to be against the background of the involvement of many independent individuals and organisations. He referred in particular to HSBC.

11. There was a time at which HMRC conducted prosecutions of criminal allegations of tax fraud. That no longer is the position. Thus, there came a point at which the Specialist Fraud Division of the CPS became involved. An officer of HMRC, Paul Millington, prepared a lengthy report on the investigation which was sent to the CPS in November 2014. Counsel was instructed by the CPS early in 2015. In the middle of 2015 another person who was a subject of the HMRC investigation took judicial review proceedings challenging the failure of the CPS to make a charging decision. The judge who heard the application for permission to apply for judicial review did not made an order because an undertaking was given by the CPS that a charging decision would be taken by 30 November 2015. The undertaking applied only to the person who had brought the judicial review proceedings. However, the CPS made it clear to the court that all charging decisions would be made at the same time.

12. On 23 November and 9 December 2015 there were conferences with counsel. Counsel also advised in writing. As a result, it was decided to charge the Claimant and nine others with offences of conspiracy to cheat and cheating the Revenue. The Claimant was charged by written requisition on 10 December 2015. Over the course of the following 12 months schedules of unused material were disclosed. Early in 2017 the Claimant and one of the other accused lodged applications to dismiss the transfer of the charges. At around this time the CPS officer in charge of the prosecution, James Lewis, handed over to a colleague, Caroline Dorman. In the course of the hearing of the applications in April 2017, criticisms were made by those representing the Claimant of the poor management of the case by the CPS. On hearing the criticisms, Ms Dorman reviewed the case. She concluded that the disclosure exercise thus far had been wholly inadequate. She recommended that the entire disclosure exercise should be undertaken again from scratch. She asked her superiors for more resources and she advised that fresh counsel should be instructed.

13. The ruling of Judge Drew QC was handed down on 15 May 2017. He dismissed the charges because in his view they did not disclose an offence known to law. He found that making a claim for share loss relief was not in itself unlawful. It would be unlawful in certain circumstances but these had not been specified in the charges. As part of the evidence filed on the application for summary judgment the judge was provided with a copy of the ruling. We take our description of the essence of the ruling from his judgment. We have not seen the ruling ourselves. However, we are confident that the terms of the ruling were as described by the judge. Like him, we are not clear why it was not possible to amend the indictment which by then had been preferred. It does not matter what the reason was. The outcome was that the prosecution concluded in the Claimant's favour. Dismissal of charges in the Crown Court prior to arraignment cannot be the subject of any appeal. No voluntary bill of indictment was sought because it was not considered that any of the exceptional circumstances identified in *SFO v Evans and others* [2014] EWHC 3803 (QB) applied.

14. In the aftermath of the dismissal of the charges the CPS Specialist Fraud Division conducted a review of the way in which the CPS had conducted the case. A similar review was carried out by HMRC under the name Operation Ice-Rink. The judge was provided with the results of those reviews. He also had a record of a disciplinary interview conducted with James Lewis, the CPS officer who had made the charging decision.

15. It is not necessary for us set out in detail the reasoning of the judge. His judgment is reported at [2024] EWHC 1765 (KB). His conclusion that the Claimant had no real prospect of establishing a claim of malicious prosecution against HMRC is not challenged on appeal. It now is acknowledged that HMRC was not a prosecutor of the criminal case against the Claimant. All other findings in respect of the claims made by the Claimant are challenged.

16. Three grounds of appeal are put forward in relation to the claim against the CPS for malicious prosecution. First, it is said that the judge applied the wrong test when considering whether the CPS had "reasonable and probable cause" to prosecute the Claimant. The argument is that the judge failed to apply what was said in *Abbott v Refuge Assurance Co Ltd* [1961] 1 QB 432 at 454, namely that there is an objective element to the "reasonable and probable cause" test. By reference to the objective element a reasonable prosecutor would "take reasonable steps to inform himself of the true state of the case". In the context of this case it is said that would have required the CPS properly to have investigated the position of HSBC. The judge's conclusion that this factor was not reflected in the later decision of the House of Lords in *Glinski v McIver* [1962] AC 711 failed to acknowledge what was said in *Glinski* at 768, namely "….did the prosecutor actually believe and did he reasonably believe that he had cause for prosecution?...provided that the defendant has made sufficient inquiry, the facts on the basis of which the question has to be answered are those, and only those, known to the defendant at the material time." The reference to "sufficient inquiry" is critical. In association with this proposition it is argued that the CPS had to be satisfied that there was a "case fit to be tried". Mr Croxford's submission is that this required consideration of whether the case was ready to be tried on the day after the charge was laid.

17. We do not consider that the references in *Abbott* and *Glinski* relied on by the Claimant are of assistance in the context of his claim against the CPS. *Abbott* involved proceedings against an insurance company acting as a private prosecutor following its

own investigation into an alleged fraud. *Glinski* was a claim against the investigating police officer. What was said in relation to reasonable inquiry was in the context of the prosecutor being the investigator. To establish that a prosecution was malicious, the party making the allegation must show that the prosecutor did not have reasonable and probable cause for prosecuting the person concerned. The judge concluded that this test involved the prosecutor having an honest belief that there was a sufficiency of evidence to prosecute. This was what was meant by the term "a fit case to be tried" as used by Lord Devlin in *Glinski*. The judge referred to *Coudrat v Commissioners of HMRC* [2005] EWCA Civ 616 and *Rudall v CPS* [2018] EWHC 3287 (QB) as authority for his conclusion. We have no doubt that the judge was correct in his conclusion.

18. We reject the proposition that the requirement of "a fit case to be tried" means that, were the case not ready to be placed before a jury the day after the charges were laid, it would not meet that test. This is not what evidential sufficiency to support the charges means. The argument betrays a profound misunderstanding of the criminal justice system. The laying of a criminal charge is the first step in a multi-stage process. For any number of reasons the prosecution case as put at the outset will evolve. It may be that, whether in response to matters raised by the defence or otherwise, the nature and focus of the prosecution case will change completely. That does not mean that the original decision to prosecute lacked reasonable and proper cause.

19. The Claimant argued that, even if the judge was correct in his use of a "sufficiency of evidence" test, he was wrong in his finding that the test was satisfied. The judge said that the Claimant's pleading did not suggest that there was not sufficient evidence. The submission is that this statement was plainly wrong. The Claimant's argument is that there was no sufficiency of evidence because no investigation had been made into HSBC. This fact was set out in extenso in the Amended Particulars of Claim. We find this argument to be misconceived. The evidence filed by the Claimant's solicitor for the purposes of the applications before the judge makes the position clear. He said that the core issue was whether the deficiencies in the investigation and in disclosure demonstrated a lack of reasonable and proper cause. Those deficiencies did not relate to the sufficiency of the evidence. The Claimant's case throughout has been that the prosecution should not have been commenced when no steps had been taken to investigate the position of HSBC as a party involved in the scheme alleged to have been fraudulent. Unless the absence of evidence relating directly to the position of HSBC meant that the prima facie case against the Claimant could not be made out, such absence could not have any relevance to reasonable and proper cause. We have no doubt that the prima facie case against the Claimant and others involved in the scheme could be established without evidence concerning HSBC. The nature of the investments as we have already described them did not depend on what HSBC had or had not done. That is not to say that the scheme **was** criminal. That was not the issue to be determined by the judge nor by us. The question is simply whether there was sufficient evidence to establish a prima facie case that it was. The judge was right when he found that insufficiency of evidence per se was not pleaded.

20. The second ground of appeal in respect of the claim for malicious prosecution is that the judge conducted a "mini-trial" as to whether reasonable and proper cause for the prosecution had been made out. In the course of his oral submissions Mr Croxford made trenchant criticism of the judge's consideration of the scheme which HMRC considered to be a cheat on the revenue. Mr Croxford said that the judge had concluded

that the Claimant had the requisite mens rea for the offence and that the Claimant was a dishonest man. Had the judge reached such conclusions, Mr Croxford's criticisms would have been well founded. In our view, the criticisms were based on a misreading of the judgment. The judge was concerned to consider whether there was sufficient evidence to justify the charges laid against the Claimant. In the light of the Claimant's pleaded case and given the evidence filed in these proceedings by HMRC and the CPS, the judge was entitled to conclude that there was a prima facie case of the elements of the offences charged. The judge did not begin to reach any conclusion on whether the offences could be proved. Given the outcome of the criminal proceedings, that is not surprising. The judge did not "condemn the Claimant as a dishonest man" as Mr Croxford would have it. That may be the Claimant's perception of what the judge found. If so, his perception is misconceived.

21. The final ground of appeal relating to the claim for malicious prosecution is that the judge fell into error in his consideration of the motives of the CPS which were influenced by HMRC. Although the judge did not consider the issue of malice in detail because he had found that the Claimant had failed to show a lack of reasonable and probable cause, he made reference to two matters: the charging decision being rushed because of the undertaking given in the judicial review proceedings; the reason why HSBC was not investigated. The Claimant's submission is that both issues demonstrated malice on the part of the CPS. If a charging decision is taken prematurely because the prosecutor is concerned to meet an undertaking given to a court, the decision by definition will have been taken for a legally improper reason. Further, if HSBC was not investigated because it was a "political hot potato" (an expression used at one point by a prosecutor), that infected the decision to prosecute.

22. We are in the same position as the judge in that we have determined that the Claimant had no real chance of showing a lack of reasonable and probable cause to charge the Claimant. Thus, the issue of malice does not arise. However, we are satisfied that, in any event, the Claimant had no real prospect of establishing malice. A malicious prosecution involves bad faith or, at the very least, reckless indifference to the consequences of an unlawful act. The paradigm of a malicious prosecution is where the proceedings are brought not for the purpose of determining whether the accused has committed the offence but to secure some extraneous benefit. Negligence or incompetence will not establish malice. To make a charging decision more quickly that the prosecutor wished to in order to meet some external deadline is not unlawful. An ulterior motive in relation to the investigation of HSBC might have been some evidence of malice had the absence of investigation infected the decision to prosecute. For the reasons we have given already, it did not.

23. There was evidence that one motivation behind the decision not to investigate the position of HSBC was to avoid the complication that would have been introduced into the case by the addition of further defendants. There was a suggestion that the Claimant would have been able to deflect blame onto any HSBC defendant, something which the prosecution wished to avoid. We find that proposition difficult to follow. Those accused in criminal cases often will wish to pass blame onto others. They will be best able to do that if those whom they wish to blame are not part of the proceedings. However, our observation on that point is tangential to the issues.

24. There is a further point to be made in respect of malice. Counsel with substantial experience in prosecuting cases of alleged serious fraud was instructed early in 2015.

He advised on the decisions to charge. As the judge observed, his advice in some cases was that there should be no charge. The fact that counsel's advice was taken and accepted in the charging process is not determinative of the issues of reasonable and probable cause and/or malice. Nonetheless, it is a very significant factor. It is not easy to see how bad faith can be said to have underpinned a decision to prosecute when the decision was one to which independent counsel was a party.

25. There are two grounds of appeal against the finding of the judge that the Claimant had no real prospect of demonstrating misfeasance in a public office against either HMRC or the CPS. It is argued that the judge failed properly to analyse the pleaded claim of misfeasance. It is further submitted that the judge was in error to find that the Claimant had no real prospect of establishing bad faith or malice.

26. The judge did not set out the principles of the tort of misfeasance other than to observe that they were well established by the House of Lords in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1. In short, the principles are as follows: misfeasance in a public office involves an element of bad faith; the tort arises when a public officer exercises their power specifically intending to injure the claimant or in acting in knowledge of or with reckless indifference to (a) the unlawfulness of their act and (b) the probability of causing injury to the claimant; subjective recklessness was sufficient.

27. The pleaded case of the Claimant as to the unlawful acts of the various officers of HMRC and the CPS was that they were under a statutory duty to engage in a proper disclosure exercise and to follow all reasonable lines of inquiry. In relation to the CPS there was specific reference to duties under the Prosecution of Offences Act 1985 and the Criminal Procedure and Investigations Act 1996. It was alleged that in consequence HMRC and the CPS had acted unlawfully. The judge found that these statutory duties did not generate private law rights of action. We agree with that finding. The Claimant argued that this was immaterial. We accept that it was not determinative. Equally, it was of significance. The pleaded case in relation to each individual was that they failed to comply with their statutory duties and acted unlawfully. It appeared to be said that, at least in part, the breaches of statutory duty supported a cause of action. That was not correct.

28. The only sensible way in which the Claimant could put his case on misfeasance was that the officers of HMRC and the CPS had acted knowing that they had failed to comply with their duties of disclosure and that the Claimant probably would suffer injury thereby. The judge analysed the issues in some detail at [117] to [136] of his judgment. It is said that the judge did not grapple with the issues raised in the pleaded case. We disagree.

29. More to the point misfeasance in a public office requires the element of bad faith. The Claimant relied on the same matters as those to which we have referred in the context of the claim for malicious prosecution. The judge cited what was said by Chadwick LJ in *Thacker v CPS* (1997), namely that negligence and incompetence cannot justify an inference of bad faith or malice. The Claimant in this case could not go beyond showing that the prosecution in its various forms had been incompetent. In some respects, the negligence and incompetence had been gross. But the judge was right to conclude that the Claimant had no real prospect of establishing bad faith. At [138] he explained the policy reasons for the position of prosecution authorities. For the Claimant to be found

to have had a real prospect of success in his claim of misfeasance would have required the judge to extend the ambit of the tort of misfeasance beyond current limits.

30. In an early forensic flourish Mr Croxford posed the overarching question as follows. If the judge in Birmingham Crown Court decided that the indictment against the Claimant disclosed no criminal offence, how could the case ever have been fit to be tried? With great respect to him, this misses the point. Many criminal cases fail prior to trial for a variety of reasons. To conclude from such failure that there was never a case fit to be tried within the meaning of the term as used in *Glinski* would (subject to the issue of malice) lead prima facie to the conclusion that all such cases were liable to fall under the heading of malicious prosecution. That is not a tenable proposition.

31. We have concluded that the judge was right in his conclusion that the Claimant had no real prospect of establishing either malicious prosecution or misfeasance in a public office. In those circumstances, we see no reason to consider the issue of the validity of the assignments of the right and causes of action by ZCL and ZRL. Their relevance arose in the context of the claims for malicious prosecution and misfeasance. It would not be appropriate to consider the point as an academic exercise. The judge did consider the issue. It may be that he had in mind the possibility of a successful appeal in relation to the substantive claims. To forestall any further litigation on the topic, we agree with the judge's analysis of the authorities and with his overarching conclusion as set out at [172] of his judgment.

32. For all of these reasons we refuse permission to appeal.