

In the High Court of Justice of the Isle of Man
Civil Division - Ordinary Procedure

Between

COURTENAY ADAM LAWRENCE HEADING

and

DAVID JOHN ASHFORD

Claimant

Defendant

Approved Transcript of Ex Tempore Judgment
by
His Honour The Deemster Corlett
delivered on 22 March 2022

Introduction

1. Now what I am going to do is to read out from notes a judgment in this matter. I would be grateful if you could stay quiet while I read it out please. It will not be a very perfect rendition because I have not had the time to prepare a written judgment but what will happen is that a transcript will be prepared of that judgment and I will correct any grammatical errors and so on and any infelicities in the language and that will be made available to you in due course.
2. This is my judgment on the Defendant's application to strike out and grant summary judgment in respect of Mr Heading's claim for misfeasance in public office.
3. I am going to freely quote from the Defendant's written submissions which I found to be extremely helpful in setting out the legal position. I also will quote from Mr Heading's skeleton argument which has also been helpful in setting out his position.

Procedural History

4. Just to remind everyone that this case has been before the court on a couple of occasions and the application to strike out the case was originally listed for hearing on 2 February 2022. Due to Mr Heading's illness the hearing did not take place on that day but it has been re-arranged for today.
5. The claim itself was initiated by claim form dated 24 August 2021. That claim alleged "misconduct" in public office by David John Ashford while doing business as Isle of Man Health Minister. That claim was then amended by a document entitled Particulars of Claim presented on 1 December 2021, and the Claimant, Mr Heading, amended his claim alleging that Mr Ashford committed "misfeasance" in public office.

6. Quoting from Mr Heading's skeleton argument of 13 January 2022 I will refer to the first three paragraphs:-

"David John Ashford acting in the role of Minister of Health and Social Care made assertions across all media of Covid-19, tests and testing for a SARS-CoV-2 virus, together with the contagiousness of that pseudo virus. In doing so, acting in bad faith, he failed his duty of care, duty of candour, and Isle of Man Ministerial Code causing unnecessary suffering to many people and animals.

David Ashford perpetuated a covid narrative dishonestly and wilfully over a period of 18 months by means of relentless propaganda. His actions were done with reckless indifference as to the adverse consequences to Courtenay Heading, his family and numerous others.

David, along with Howard Quayle (Isle of Man Chief Minister), and Henrietta Ewart (Director of Public Health) were front and centre in driving forward a fear based agenda, one without any scientific basis. David Ashford's words and actions in this regard were from a single unsafe and unverified narrative."

7. Mr Heading goes on to say at page 2 of his skeleton argument:-

"These wilful acts by David have contributed to ongoing society wide emotional trauma, dramatically increased suicides and domestic violence, for some. David's repeated, deliberate, wilful ignorance was done dishonestly and with reckless indifference to the mental, physical, and emotional anguish of others. David, aided by police enforcement of health dogmas, has coerced us all into unsafe, unproven policies. David's admonitions have directly caused significant psychological burdens, physical, emotional and spiritual suffering to Courtenay Heading and his family who enjoyed previously peaceful lives but who can no longer enjoy uninterrupted free travel, nor a full family life off island."

8. Finally if I might quote from page 3 of his skeleton argument:-

"The claimed 'SARS-CoV-2' is a pseudo virus being a fake, test tube only, unphotographed, imaginary entity – never in reality a thing isolated from all others, in actual saliva, mucus, blood nor urine in pure form – from a man nor woman nor animal."

The Law on Misfeasance in Public Office

9. This being a court of law it is necessary to look in some detail at the requirements imposed by the common law in relation to misfeasance in public office. As Mr Jelski says in his skeleton argument at paragraph 7, the key case is Three Rivers DC v Bank of England [2003] AC 1, which was a House of Lords case which has been applied by many successive courts and courts in this Island as well. Lord Steyn explained in that case that there are two different forms or limbs of the tort:-

"First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second

form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."

10. In the case of Irving v Harding [2012] MLR 86 again cited by Mr Jelski, the Appeal Division in this Island applied the Three Rivers case and said that the "six necessary ingredients" comprise:-

- "[i] the defendant must be a public officer;*
- [ii] there must be an exercise of power by a public officer;*
- [iii] the public officer must have a state of mind either of [a] an intention to injure (this requires bad faith or the exercise of power for an improper or ulterior motive) or [b] knowing he has no power to do the act complained of and that the act will probably injure the claimant (also requiring bad faith or no honest belief that the act was lawful i.e. subjective reckless indifference);*
- [iv] a duty to the claimant / sufficient interest to sue;*
- [v] causation; and*
- [vi] damage and remoteness."*

The Present Applications by the Defendant

11. The applications which are before me today are dated 28 September 2021 and just for the record, those orders being sought by the Defendant are that the claim be struck out pursuant to Rule 7.3(2)(a) of the 2009 Rules of Court for disclosing no reasonable grounds for the bringing of the claim and/or pursuant to Rule 7.3(2)(b) that the Claimant's case be struck out as amounting to an abuse of process and/or pursuant to Rule 10.46 that summary judgment be given against the Claimant on the basis that the Claimant's claim has no real prospect of succeeding at trial and there is no compelling reason why the case or issue should be disposed of at trial.

12. The test to be applied by the court is well known to lawyers. I briefly refer to the requirements which Mr Jelski has helpfully set out at paragraph 14 of his skeleton argument:-

"An application to strike out should not be granted unless the court is certain that the claim is bound to fail... a claim should not be struck out unless it is effectively unarguable, has no chance of succeeding and as such is a plain and obvious case."

13. As to the issue of summary judgment:-

"The rule is designed to deal with cases that are not fit for trial at all... it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the issue."

14. Mr Jelski has referred to cases which have discussed in particular the required element of bad faith. He referred to the case of Carter v Chief Constable of the Cumbria Police [2008] EWHC 1072 (QB) where it was said that:-

"allegations of misfeasance in public office are amongst the most serious – short of conscious dishonesty – that can be made against police officers, or any public official."

The Claimant's Case

15. I agree with Mr Jelski when he says, at his paragraph 22:-

"... the high point of the Claimant's case is that he takes issue with the generally accepted scientific views referenced in paragraph 23 hereof..."

I will refer to these paragraphs in a moment.

16. Mr Jelski states that "the issues which the Claimant seeks to put in dispute are the subject of common knowledge and are not reasonably disputable". What he submits is that these issues and the way the matter was handled by the Isle of Man Government were based on a corpus of expert opinion of which the court is entitled to take judicial notice.

17. The various headings of the Claimant's claim relate to first of all the existence of the virus. Does Covid-19 exist? And in relation to that, Mr Jelski points to the fact that on 11 March 2020 the World Health Organisation declared a global pandemic of coronavirus disease 2019 (Covid-19). So far as the Isle of Man is concerned, on 16 March 2020 and pursuant to the Emergency Powers Act 1936, the Lieutenant Governor of the Isle of Man issued the first of a series of emergency proclamations on the basis that "... there is a pandemic of coronavirus (also known as Covid-19)..." and that "... that disease is affecting the Island and causing serious damage to human health on the Island...".

18. As is well known the powers exercised by the Lieutenant Governor pursuant to the Emergency Powers Act 1936 were replaced later in 2020 by Regulations made under the Public Health Act 1990. On 23 December 2020 in accordance with Regulation 3(1) of the Public Health Protection (Coronavirus) Regulations 2020, the Council of Ministers declared that "the incidence or transmission of coronavirus disease (Covid-19) constitutes a serious and imminent threat to public health".

19. Thus, it seems unarguable, as Mr Jelski submits, that in making any assertion as to the existence of coronavirus disease Mr Ashford can have committed no wrong.

20. Dealing with the issue of testing, as Mr Jelski rightly points out, it is a fact known to everyone that the National Health Service both here and in the United Kingdom recommends the use of rapid lateral flow tests and polymerase chain reaction (PCR) tests. While no test is 100% accurate, both are still considered reliable.

21. Testing is a globally accepted practice and it is a critical component of the overall management and control strategy for Covid-19. Mr Jelski refers to testing being at the forefront of the international (and national) response to combat coronavirus and reflects the

advice issued by the Director General of the World Health Organisation – "We have a simple message for all countries: test, test, test".

22. Moving on to the issue of vaccines. The simple fact is that as everyone in this Island well knows, it is beyond question that vaccines have apparently been developed and approved. Many vaccines have been approved for use by the World Health Organisation, approval has been given by the UK's Medicines and Healthcare Products Regulatory Agency (MHRA), and the Joint Committee on Vaccination and Immunisation (JCVI). The conclusions of all of those apparently august bodies have been approved also by the Isle of Man authorities.

23. As to the issue of contagiousness of the so called "pseudo-virus", once again it is commonly accepted knowledge that covid-19 is a respiratory disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) virus. I agree with Mr Jelski's assertion in his skeleton argument that the fact that Covid-19 is an infectious disease transmissible between humans is currently beyond sensible debate. Once again it must be the case that Mr Ashford was acting in accordance with a reasonable body of expert evidence and he was entitled to rely on the virtually united global response to covid-19 in making any statements and committing any acts throughout this matter.

24. Consequent upon the Proclamation of a State of Emergency there followed the making of a number of Regulations approved by Tynwald for the purpose of preventing, controlling and containing the spread of the virus.

Causation

25. This last point raises a key issue which relates to the matter of causation. The Claimant, Mr Heading, says that the measures which were enacted and which, undoubtedly, restricted his freedom, are attributable solely to the Defendant, Mr Ashford. That cannot be right. As Mr Jelski points out, the "lockdown" Regulations were first enacted on 26 March 2020 and therefore they could not have resulted from any of the Defendant's actions occurring thereafter. It will be recalled that in his original claim, Mr Heading references the Defendant's conduct at a meeting said to have taken place on 26 July 2021. He also says that Mr Ashford continued to make assertions throughout 2020 and 2021.

26. It is important of course to note that while Mr Ashford may have made certain Regulations in his position as Minister for the Department of Health and Social Care, the Emergency Powers Regulations were first of all made by the Lieutenant Governor. All the Regulations, as I understand it, were subject to Tynwald approval. Thus, it may be said that if any damage has been caused, that would be an effect of our own parliament enacting or passing the relevant Regulations rather than as a result of Mr Ashford's actions.

No claim for Judicial Review

27. It is important to note that this is not a claim for judicial review (or doleance, in Manx terms) of the relevant Regulations. If it were, and this is all to some extent hypothetical, it is highly likely that this court would follow the authority of the English Court of Appeal in the case of R v Secretary of State for Health and Social Care and Secretary of State for

Education ex parte Dolan and Others [2020] EWCA Civ 1605 which considered the lawfulness of equivalent lockdown regulations.

28. I will refer to three paragraphs in that judgment. It is important to note that this a very strong and learned Court of Appeal consisting of The Lord Chief Justice of England and Wales, Lady Justice King and Lord Justice Singh. At paragraph 89 the court said this:-

"We also bear in mind that this is an area in which the Secretary of State had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in R v Secretary of State for Health, ex parte Eastside Cheese Co [1999] 3 CMLR 123, at para. 47: "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers"."

29. Then at paragraph 96 the Court of Appeal discusses an alleged breach of Article 8 of the European Convention on Human Rights, which is part of the law of this Island by virtue of the Human Rights Act 2001. At paragraphs 96 and 97 the Court said:-

"96. There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with the law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate."

97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgment must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of these expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."

30. With the greatest respect to the Court of Appeal I agree entirely with what was said in that case.

31. I agree also with what Mr Jelski says in paragraph 27 of his skeleton argument:-

"In making public statements in acknowledgement (and in support) of recognised scientific opinion (including the World Health Organisation, the Joint Committee on Vaccination and Immunisation and the Medicines and Health Care Products Regulatory Agency), the Defendant committed no wrong let alone while acting in bad faith... , the Claimant sets himself against the overwhelming majority of scientific opinion."

Justiciability

32. I move along then to deal with the issue of justiciability, which again is a crucial point against Mr Heading's claim. Mr Jelski submits at paragraph 30:-

"The matters in respect of which the Claimant criticises the Defendant... are not appropriately decided by a court or by the application of legal principles. The existence of the virus, its nature (transmissibility) and the manner in which it is tested/diagnosed are matters of scientific evidence."

33. It seems to me that this claim is simply not justiciable. It is a matter for political debate and perhaps also public inquiry. Public inquiries into the handling of the pandemic will be held throughout the world as I understand it. Whether one is to be held in the Isle of Man I do not know. But these issues that Mr Heading raises it seems to me are classically matters for political debate and public inquiry.

Summary

34. So in summary it seems to me that there is simply no realistic chance or prospect of Mr Heading's allegations amounting to misfeasance in public office so far as Mr Ashford is concerned. There is no prospect of success on the key issue of the required mental element. There is no prospect of success in his endeavouring to establish targeted malice or the other mental element which is knowledge of a lack of power but an act which will probably injure the Claimant.

35. I am going to turn back very briefly, if I may, to the text book to which I recall referring Mr Heading at an earlier stage of this case, namely Winfield and Jolowicz on Tort (Nineteenth edition) at paragraph 8-024 where the learned authors have set the matter out with characteristic clarity:-

"The purpose of the tort [of misfeasance in a public office] is to give compensation to those who have suffered loss as a result of improper abuse of public power, it being based on the principle that such power may be exercised only for the public good and not for ulterior and improper purposes."

36. Then at paragraph 8-026 dealing with the mental element:-

"The mental element relates both to the validity of the act and its effect upon the claimant. As to the first, the officer must act in bad faith, that is to say he must either be aware that his act is unlawful or be consciously indifferent as to its lawfulness – mere negligence is not enough. As to the effect on the claimant there are two situations. The first is what has been called "targeted malice", that is to say, the case where the defendant acts with the purpose of causing harm to the claimant. An example of this category is *Roncarelli v Duplessis* ... where the defendant, Prime Minister and Attorney General of Quebec, deprived the claimant of his restaurant licence as act of revenge for standing bail for members of the Jehovah's Witnesses sect, against whose activities there had been a campaign. Alternatively, the defendant will be liable if he is aware that his act will probably (or in the ordinary course of things) cause damage of the type in fact suffered by the claimant or he is consciously indifferent to that risk. So, turning a blind eye to either invalidity or consequences will do, but not failure to appreciate the risk of those matters."

37. This, the authors conclude, in a short quote from the Three Rivers case:-

"Represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions."

38. I have concluded that this is indeed one of those unmeritorious actions.

39. I have concluded that these claims are not justiciable in any event, so thus they have no prospect of success.

40. As I have said the issue as to whether covid-19 exists as a virus is a matter for a public inquiry or political debate. It is not a matter which is properly dealt with in this court.

41. I also repeat that the claim must be struck out because the Regulations i.e. the regime which gave rise to the alleged damage, were not given legal force by the Defendant but were approved by Tynwald. There can be no question also of negligence on the part of Mr Ashford. This is also not a claim for judicial review of the lawfulness of the Regulations and I have also concluded that there is no prospect of success on the grounds of misfeasance.

42. I consider in addition that the claim amounts to an abuse of process since the issues raised are self-evidently matters for political judgment and political action or maybe in the context of a public inquiry or maybe, as has been posited during this hearing, in relation to inquests into the deaths of particular individuals.

43. I note in particular that Mr Heading refers to an alleged breach of the ministerial code by Mr Ashford. Once again, this highlights that this is not a matter for this court. It is a matter for political action, if any.

44. There is no claim for financial loss. Mr Heading was quite clear about that. He is not doing this for financial gain at all. This may well be said to be another missing element essential to a misfeasance claim. I agree with Mr Jelski that if this claim is allowed to go forward and to take up the time of this court it would essentially amount to a public inquiry "dressed up" as a misfeasance claim and would amount to an abuse of the process of the court.

Additional Issues

45. I just want to make two very brief comments about a couple of cases that Mr Heading mentions in his skeleton argument. The first is the case of Bayley v Chief Secretary (which I decided in December 2021). For the record I want to say that Mr Heading has misinterpreted an email to which he refers at the bottom of page 4 of his skeleton argument in which he quotes from an email from somebody in the Cabinet Office stating that "With regard to PCR tests, these are not accepted in the island". What was meant by that email was that PCR tests taken in a jurisdiction other than the Isle of Man were not accepted at that time. That was what was meant by my reference to that email in that case.

46. I have also noted Mr Heading referring to a claim by a Dr White, at page 7 of his skeleton argument. He refers to Dr Sam White bringing legal action against various bodies for misfeasance in public office. The only judgment I have been able to find on the BAILII website is one whereby Dr Sam White brought a claim in relation to a restriction which had been placed on his right to practise as a GP. He successfully managed to lift an injunction which had been placed on him preventing him from making statements on social media while he was a GP. So he was successful in that regard but I cannot see that he has brought forward any claim for misfeasance. If he has done it has not been reported and it does not form any precedent for what Mr Heading is now claiming.

47. In relation to disclosure of documents. This was a matter that was raised at an earlier stage by Mr Heading. I agree with Mr Jelski, and he put in a helpful position statement about this. What I am dealing with here is a claim for strike out and summary judgment. The issue of disclosure simply does not arise if the court concludes that the case has no prospect of success and should be struck out on the grounds of abuse of process or is otherwise likely to be wholly unsuccessful. So disclosure is not an issue with which I need to be concerned at this stage.

48. My final comment is that I am grateful to Mr Jelski as advocate for Mr Ashford for setting out the position so clearly and I am also grateful to Mr Heading for conducting himself politely and appropriately in court. I appreciate he has very sincere opinions about all this but it is simply not a matter for this court.

49. That concludes my judgment.

His Honour The Deemster Corlett