Neutral Citation Number: [2015] EWCA Civ 680

Case No: A2/2015/0746

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
GILBART J.
[2015] EWHC 228 (QB)

Cardiff Civil Justice Centre,
2, Park Street,
Cardiff, CF10 1ET

Date: 07/07/2015

Before :

LORD JUSTICE McFARLANE
LORD JUSTICE DAVIS
and
LORD JUSTICE LLOYD JONES

- -

Between :

The Chief Constable of South Wales Police	**Appellant**
- and -	
(1) Michael Raymond Daniels	**Respondents**
(2) John Bryan Gillard	
(3) John Howard Murray	

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- -

Jason Beer QC, Alan Payne and Cicely Hayward (instructed by **Richard Leighton Hill, Directorate of Corporate and Legal Services, South Wales Police**) for the **Appellant**
Stephen Simblet and Una Morris (instructed by **Goldstones**) for the **First and Second Respondents**
Stephen Cragg QC and Conor McCarthy (instructed by **Slater & Gordon LLP**) for the **Third Respondent**

Hearing dates : 23 and 24 June 2015

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Approved Judgment

LORD JUSTICE LLOYD JONES :

1. This is an appeal by the Chief Constable of South Wales Police ("the Chief Constable") from the order of Gilbart J. dated 12 February 2015 allowing appeals against a number of interlocutory orders of HHJ Seys Llewellyn QC dated 7 November 2014.

2. In these proceedings the three respondents and others bring claims against the Chief Constable inter alia for malicious prosecution, unlawful detention, and misfeasance in public office. The proceedings are the latest in a series of proceedings arising from the murder of Ms Lynette White in Cardiff in 1988. The respondents are former police officers who were among those officers who investigated that murder. Three men (who later became known as 'the Cardiff Three') (three of the five "original defendants") were arrested and, in November 1990, convicted of the murder. In December 1992, however, their convictions were quashed on appeal by the Court of Appeal in a judgment which severely criticised the police investigation (*R v Paris, Miller and Abdullah* (1993) 97 Cr. App. 99). In 1999 the South Wales Police commenced a review of the original police enquiry. Following further investigation Jeffrey Gafoor was arrested and, in July 2003, was convicted of Ms White's murder. Thereafter three witnesses who had given evidence in the trial of the original defendants pleaded guilty to perjury in 2008. In addition, criminal proceedings were commenced against 15 people, including the respondents, who were arrested and charged with various offences in connection with the original police investigation. The respondents were among 13 former police officers charged with conspiracy to do acts tending to and intended to pervert the course of justice. A trial, in which Mr. Daniels was one of the seven defendants, took place at Swansea Crown Court between July and December 2011 but culminated abruptly, following issues over disclosure, when the Crown offered no evidence. Mr. Gillard and Mr. Murray were to be defendants in a second trial which, in the event, did not take place. The respondents and others now bring these civil proceedings against the Chief Constable. The trial is due to begin in October 2015 before Wyn Williams J with a time estimate of 50 days.

3. The history of the pleadings in this action is convoluted and I gratefully adopt the summary at [11] – [32] of the judgment of Gilbart J.

4. At a hearing on 16 and 17 May 2013, Judge Seys Llewellyn QC considered various applications by Mr. Daniels and Mr. Gillard, including an application by Mr. Daniels to amend his pleadings to add a claim that "prosecuting the claimant and/or continuing the prosecution" constituted misfeasance in a public office. The Chief Constable opposed this, inter alia, on the basis that he had absolute immunity from suit, so that the claim had no real prospect of success. In a judgment delivered on 7 June 2013 Judge Seys Llewellyn, sitting in the County Court, held that the proposed amendments fell within the immunity and dismissed the applications.

5. At a hearing on 19 September 2014, Judge Seys Llewellyn heard new applications by Mr. Daniels, Mr. Gillard, and Mr. Murray to amend their claims. Mr. Gillard and Mr. Daniels sought to plead that the Chief Constable had committed the tort of misfeasance in public office because the police:

(a) had continued the prosecution even though it was clear that the claimant could not have a fair trial due to breaches of disclosure obligations;

(b) had concealed, destroyed, and/or withheld documentation that was important to the trial, so that the claimant could not have a fair trial;

(c) were in contact with the original defendants from the Lynette White trial and the Cardiff Three campaign and had improperly discussed the case with them, and had concealed the extent of this contact; and

(d) had destroyed documents during the trial.

6. The Chief Constable argued that these pleadings were within the scope of the immunity.

7. In a judgment delivered on 7 November 2014 Judge Seys Llewellyn held that immunity applied in respect of (a) (at para 20), (c) (para 22), and (d) (para 26) but not (b) (para 25, subject to removing the reference to withholding). He also refused to allow Mr. Gillard and Mr. Daniels to amend to add allegations that the decision to prosecute was motivated by a desire to reach a successful settlement in a civil action brought by the original defendants.

8. Mr. Murray sought to amend to plead misfeasance. Insofar as the misfeasance related to his arrest, the Chief Constable did not object. However, Mr. Murray also attempted to add allegations that the police knowingly or recklessly:

(a) acted beyond their powers by failing to organise a proper system of disclosure;
(b) destroyed or allowed to be destroyed documents which should have been retained and/or disclosed;
(c) failed to institute a system whereby the whereabouts of all relevant documents was available;
(d) continued with a prosecution which relied upon an allegation that Mr. Murray was present in an interview at which he was manifestly not present.

9. Judge Seys Llewellyn refused permission to amend to add (d) but allowed Mr. Murray to plead that the police 'knowingly or recklessly acted beyond their powers by *asserting* that the Claimant was present during… [the] interview…' (para 35). He refused the other amendments (para 36).

10. On the appeal by Mr. Daniels, Mr. Gillard and Mr. Murray against the order of Judge Seys Llewellyn dated 7 November 2014, Gilbart J. allowed the appeals and gave permission for all of the amendments which were the subject of the appeal.

11. The Chief Constable now appeals to the Court of Appeal by leave of Arden LJ given on 27 May 2015. I directed that the appeal be heard by the Court of Appeal during its sitting in Cardiff in the week commencing 22 June 2015.

12. The grounds of appeal are as follows:

Ground 1: The learned judge erred in law in concluding that the Claimants' appeals against the order of Judge Seys Llewellyn dated 7 November 2014 were not an abuse

of process or alternatively failed to give adequate reasons for his conclusion on this issue.

Ground 2: The learned judge erred in law in his interpretation of *Darker v Chief Constable of the West Midlands Police* [2001] 1AC 435.

Ground 3: The learned judge erred in law in allowing the appeal of Mr. Daniels and Mr. Gillard against the case management decision of Judge Seys Llewellyn refusing them permission to amend their particulars of claim so as to raise allegations concerning the civil claim by the original defendants.

13. It is convenient to consider Ground 2 before Ground 1.

Ground 2 – Immunity.

Applications by Mr. Daniels and Mr. Gillard.

14. The proposed amended pleadings on behalf of Mr. Daniels and Mr. Gillard are identical save as to numbering. It is convenient to refer to the pleading of Mr. Daniels. Having previously pleaded particulars of his claim in malicious prosecution, Mr. Daniels at paragraph 38 made the following averment:

> "38. Further or alternatively, the Defendant's conduct in
>
> (i) Having the claimant arrested and detained and kept on bail over a period of several years; and/or
>
> (ii) Falsely representing to the Crown Prosecution Service and to others that the Claimant was guilty of serious offences and knowing that the Crown Prosecution Service would rely upon such assertions when reaching decision about any prosecution; and /or
>
> (iii) Conducting a criminal investigation into the Claimant in an improper manner, including manipulating evidence, failing properly to disclose material advantageous to the Claimant's case and maintaining inappropriate and improper relationships with the original defendants in the Lynette White murder trial;
>
> arose out of bad faith on the part of the Defendant in the sense that the Defendant knew that the contact was unlawful or was reckless as to its unlawfulness. Further, the conduct was such that the Defendant foresaw that the Claimant would suffer loss from such conduct and the Claimant did suffer such conduct. The Defendant thereby committed the tout of misfeasance in public office."

15. The proposed pleading then set out particulars of the allegation. These provided in material part:

> "(I) The Claimant repeats the Particulars to the preceding paragraphs insofar as they can properly apply also to the tort of misfeasance in public office. …

(IV) The Defendant continued the prosecution against the Claimant, even though it was clear that due to the Defendant's conduct that the Claimant could not have a fair trial. (sic) By way of further particularity:

(a) The Defendant had the responsibility for identifying, collating and organising the disclosure of documents to the Claimant's representatives in the criminal proceedings against him;

(b) Throughout the trial, there were continued failures properly to describe and identify documentation that might be helpful to the Claimant's defence. This included significant defects in the disclosure schedules (MG6) and material misdescription of items. It is the Claimant's case that this was done deliberately, in order to conceal them from the Claimant and his legal representatives.

[10 illustrations were then set out]

(c) The above failures of disclosure were the responsibility of the Defendant and were in bad faith, there having been no reasonable explanation provided for any of them at the time.

(V) The Defendant concealed and/or destroyed and/or withheld from the prosecution documentation that was important to the trial and thus created a further basis upon which the Claimant could not have a fair trial.

(VI) The Defendant was in contact with the original Defendants in the Lynette White trial and/or the Cardiff Three campaign in relation to the action being taken and continued against the Claimant and improperly discussed the case with them and provided information to them about the action being taken against the Claimant and/or other Police Officers. This continued throughout the trial and the Defendants sought to conceal (as alleged above) the extent of its contact with the original Defendants from the Claimant, thus supporting the inference that the degree and extent of conduct was improper and further that the same influenced the conduct of the trial and that the Defendant's officers knew that they were acting improperly. The Claimant relies in particular on the misdescription of the contact in disclosure schedule in those proceedings (D30 and D31) and the continuing misleading of prosecution counsel, who were unable to comply with their disclosure responsibilities in this regard hence found themselves in the position of providing inaccurate material to the court.

> The responsibility for this state of affairs the Defendant's (sic) rather than counsel or the Crown Prosecution Service. Such failures arose deliberately and/or recklessly.
>
> (VII) It may well be the case (and the Claimant can only invite inferences to this effect) that the Defendant's officers destroyed documents during the trial to damage the fairness of the proceedings and further to seek to damage the Claimant's prospects of securing his acquittal. [Further detail is then given]."

16. In his earlier interlocutory judgment delivered on the 7 June 2013, Judge Seys Llewellyn addressed, inter alia, an application on behalf of Mr. Daniels to amend his claim form to include new claims for damages for malicious prosecution and misfeasance in public office. The Chief Constable did not resist the application to bring a claim for malicious prosecution, but objected to the amendment to allege misfeasance in public office inter alia on the ground that the Chief Constable enjoyed immunity in respect of that claim. On behalf of the Chief Constable it had been contended that a prosecutor is immune from suit in respect of the initiation, continuation and conduct of criminal proceedings. However counsel for Mr. Daniels had contended that such immunity is confined to what is said and done in court and thus did not extend to the drafting of pleadings in court or the giving of advice in relation to court proceedings, and that it was substantially confined to an immunity on the part of witnesses or those who speak in court.

17. In his judgment of 7 June 2013 Judge Seys Llewellyn referred to *Heath v Commissioner of Police for the Metropolis* [2005] ICR 329, *Gizzonio v Chief Constable of Derbyshire* (the Times, 29 April 1998) and *Darker v Chief Constable of the West Midlands Police* [2001] 1AC 435. He then expressed his conclusion as follows:

> "Given those public policy reasons, and the way in which the immunity has been formulated at the highest level, I consider that leading counsel for the Defendant is right to contend for an immunity from suit for a prosecutor in respect of his initiation, continuation and conduct of criminal proceedings; and that on authority it is not limited to what is said (or done) by witnesses as counsel for Mr. Daniels contends." (at para 23)

18. In his judgment of 7 November 2014 Judge Seys Llewellyn observed that the proposed Particulars at (I) were in substance identical to the pleading which he had disallowed in June 2013. It was not permissible to require the Chief Constable or the court to consider what individual parts of the conduct might satisfy or be argued to satisfy an exception to the core immunity. For the same reasons he refused that part of the application.

19. With regard to (IV) Judge Seys Llewellyn in his judgment of 7 November 2014 referred to paragraph 23 of his judgment of June 2013, set out above, and adhered to that conclusion. He observed:

> "The focus is upon whether functionally the acts or omissions complained of are intimately associated with the trial, or the conduct of the trial, as opposed to the investigation prior to and the preparation of evidence or presentation to prosecuting authorities"

In his judgement the allegation in (IV) was an allegation of activity intimately associated with the judicial phase of the criminal process as distinct from the administrative or investigatory role, the former attracting immunity and the latter not. In his view the particulars under (IV) were all allegations of and in support of the contention that the Chief Constable continued the prosecution and each of these matters fell within the core immunity.

20. With regard to (VI) Judge Seys Llewellyn considered that the allegation that the Chief Constable was in contact with the original Defendants and/or the Cardiff Three campaign, was intimately associated with the trial itself and the presentation of material for and within the trial itself, and that it was artificial to characterise it as merely administrative or investigative in a manner divorced from the trial itself. Accordingly he considered that these matters fell within the core immunity.

21. With regard to (VII), Judge Seys Llewellyn considered that the allegation was hybrid. It alleged that the Defendant's officers had destroyed documents during the trial and that the Defendant had misled the court and the Crown Prosecution Service on that issue. As to the latter, Judge Seys Llewellyn considered that the failure to give explanation, or even a concealment of the fact of or an explanation for earlier destruction, fell intimately within the functional aspect of involvement with and support of the prosecution during the trial and therefore fell within the core immunity.

22. The judge considered the first limb of (VII) and Particulars (V) together. He drew attention to the fact that in *Darker* the House of Lords had ruled that the core immunity did not extend to cover the fabrication of false evidence. He considered that the corollary applied to an allegation of the deliberate destruction of documents.

> "Deliberate destruction of documents which are material to a prosecution cannot, in my judgement, fairly be said to form part of the participation of police officers in the judicial process." (at para 25)

In his view, however, it was important that an imprecise pleading should not lead to "creep" into an allegation of negligence or recklessness. He permitted amendments so as to plead "the Defendant wilfully concealed and/or destroyed documentation that was important to the trial and thus created a further basis on which the Claimant could not have a fair trial". The proposed amendment alleging withholding was disallowed. Finally, in his view Particulars (VII) would add nothing to what was permitted under (V) and he therefore refused permission in respect of it.

<u>The application by Mr. Murray</u>

23. Mr. Murray applied to amend to plead misfeasance in public office. The Chief Constable did not object in principle to a claim in misfeasance being advanced in respect of Mr. Murray's arrest. Moreover he did not object to certain amendments relating to the investigation. However he did oppose amendment to plead the following particulars of the conduct of "the Defendant's officers involved in the investigation and prosecution of the Claimant":

> "8(C)
>
> … (d) Knowingly or recklessly acting beyond their powers by failing to organise a proper system of disclosure during the first trial, contrary to statutory duties. The failings are well documented and the Defendant is well aware of them. Throughout the trail process in the first trail there were a number of systematic failures in the disclosure process, which led to the collapse of that trial;
>
> (e) Knowingly or recklessly acting beyond their powers by destroying or allowing to be destroyed documents which should have been retained and/or disclosed during the first trial;
>
> (f) Knowingly or recklessly acting beyond their powers by failing to institute a system whereby the whereabouts of all relevant documents was available during the first trial;
>
> (g) Knowingly or recklessly acting beyond their powers by continuing with a prosecution against the Claimant which relied upon an assertion that the Claimant was present during an interview with Grommeck on 22 November 1988, when this was manifestly not the case.
>
> …
>
> (10)(A) The Claimant had to endure a prosecution which lasted until on or around 2 December 2011"

24. Judge Seys Llewellyn considered that insofar as the Claimant asserted that the Defendant "undertook, continued or maintained a prosecution", it was clear that the acts complained of fell within the core immunity. Accordingly in paragraph 8(C)(g) the words "by continuing with a prosecution against the Claimant which relied upon an assertion" had to be deleted, leaving the amended passage to read "knowingly or recklessly acting beyond their powers by asserting that the Claimant was present during an interview with Grommeck on 22 November 1988 when this was manifestly not the case".

25. The Judge observed that if the core immunity were restricted to witnesses only, he would accept that the proposed amendment in paragraph 8(C)(d)-(g) could be maintained. However, he concluded;

> "Given the public policy reasons in play, the way in which the immunity has been formulated at the highest level, and for the reasons more fully set out in my written judgment of June 2013, I consider that the core immunity from suit is not limited to what is said (or done) by witnesses; and that accordingly the particulars proposed would infringe the core immunity"

26. To the extent that the allegation was that the Defendant by his officers wilfully destroyed or wilfully permitted to be destroyed documents which should have been retained or disclosed, whether before or during the trial, the Judge considered that amendment should be permitted. However, he considered that the allegations in question were, otherwise, allegations of acts or omissions intimately associated with the prosecution and trial process and fell within the core immunity.

The judgment of Gilbart J.

27. On the appeal, Gilbart J., having considered the judgment of the House of Lords in *Darker* in considerable detail, observed that he was not persuaded that it was always possible to draw an immutable and immobile bright line of separation between investigation and the process of trial and litigation. In his view, much would depend on the context and therefore on the evidence.

28. He noted that Judge Seys Llewellyn in his judgment delivered in 2013 had placed some reliance on *Heath* and *Gizzonio*, both of which, in the view of Gilbart J, had been overtaken by *Darker*. Gilbart J. considered that it was clear that a decision by a police officer to mount an investigation may well not be covered by immunity from suit for misfeasance. In addition, the immunity would not protect an officer who sets out to manufacture a case against a Defendant. He then observed:

> "If part of that process involves the calling of false evidence, or running false arguments, I think it strongly arguable that if there has been a process started as a misfeasance in public office, that immunity is not necessarily acquired by the fact that the process also includes the calling of evidence. The planting of the brick remains an actionable tort, even though it is later described in evidence, and even though it is done with a view to the giving of evidence. The fact that the plan is carried through to a trial should not enable the Defendant police officer in such a case to be able to persuade the court to excise from the pleadings the allegations that he sustained his wrongful conduct up to and beyond the start of the trial process." (at para 78)

Gilbart J. noted that the allegations which were not struck out in *Darker* included allegations relating to preparation for trial.

29. Gilbart J. also observed that where malicious prosecution is alleged, as it is by Daniels and Gillard, evidence of misconduct after proceedings were instituted may well be admissible as evidence from which an inference can be drawn that the prosecution was malicious. It followed that upholding the objections to the amendments was unlikely to save much if any time at trial. (at para 80)

30. Gilbart J. addressed the question of information given by the Defendant to those who prosecuted the criminal trial of the officers. While he considered that it was tolerably clear that the conduct of the prosecuting solicitors and counsel fell within the core immunity, he thought it less clear that acts and omissions by a police force in informing or instructing him might do so.

31. In the view of Gilbart J. much might turn on the evidence as it is called. Subject to issues of case management and the over-riding objective, he thought it wrong in principle to exclude the argument at that stage unless it was clearly without any prospect of success. Accordingly he allowed the appeal in relation to these proposed amendments.

The scope of the immunity.

32. The competing submissions of the parties in relation to Ground 2 have concentrated on the scope of the absolute immunity or privilege, variously described in the authorities, which is enjoyed by a witness who gives evidence in civil or criminal proceedings. On behalf of the appellant Chief Constable it is submitted that it applies to participants in criminal proceedings whose function is intimately associated with the judicial phase of such proceedings. It is submitted that it extends to statements made out of court which could fairly be said to be a part of the investigation of crime with a view to prosecution and therefore extends to written statements in schedules of unused material served in criminal proceedings in compliance with Criminal Procedure and Investigations Act 1996. On behalf of the respondents it is submitted that the absolute immunity is limited to the giving of evidence and that there is therefore no justification for granting it to police officers who deliberately or recklessly fail to make proper disclosure or provide misleading disclosure.

33. It is well established that the immunity or privilege, where it applies, bars a claim whatever the cause of action, with the exception of suits for malicious prosecution (and analogous claims involving malicious initiation of criminal proceedings) and prosecution for perjury and proceedings for contempt of court. It is to be contrasted with the qualified privilege which protects all those who participate in a criminal investigation in good faith. However, as Lord Hope pointed out in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (at p219E) this is an imperfect protection because qualified privilege has to be pleaded and established as a defence and no action can be struck out on grounds of qualified privilege. Accordingly, unlike the absolute immunity, it does not prevent a collateral investigation in subsequent proceedings.

34. In *Jones v Kaney* [2011] UKSC 13; [2011] 2AC398 Lord Phillips (at [16]-[17]) summarised the justifications for witness immunity given by the House of Lords in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 as follows:

    (1) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims;

    (2) To encourage honest and well meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;

    (3) To secure that the witness will speak freely and fearlessly; and

(4) To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.

However, it must be emphasised that the effect of a successful plea of immunity is to deny access to the courts and, in many cases, to leave a wrong without a remedy. As Lord Cooke observed in *Darker* (at p. 453 D-E) absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. Accordingly, the immunity must be limited to cases where it is necessary to achieve the objectives identified above.

35. The leading modern authority on the scope of the absolute witness immunity is *Darker*. There, the House of Lords was unanimous in concluding that an action for conspiracy to injure and misfeasance in public office based on allegations that the police had fabricated evidence against the Claimants did not attract the absolute immunity. However, different views were expressed in the five speeches in the House of Lords as to the scope of the immunity.

36. A number of the speeches in *Darker* emphasised that the immunity is essentially a witness immunity. Thus Lord Hope observed (at p. 448 D-E):

> "But there is no good reason on grounds of public policy to extend the immunity which attaches to things said or done by [police officers] when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. The purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators." (See also pp. 445 H-446 B)

Lord Mackay explained (at p.450 D-F) that by the end of the 19th century it was settled that witnesses taking part in a trial could not be sued for anything written or spoken in the course of the proceedings. He explained that in *Taylor v Director of the Serious Fraud Office*, the House of Lords had held that that immunity had extended also to out of court statements which could fairly be said to be part of the process of investigating crime with a view to prosecution. Similarly, Lord Hutton stated at p. 472 C-D:

> "In my opinion the police officers against whom the allegation of conspiracy and misfeasance in public office are made are not entitled to absolute immunity save insofar as the allegation against them is grounded on their statements of the evidence which they would give when the case came to trial".

Similar statements appear in the speeches of Lord Cooke (at pp. 453 H - 454B) and Lord Clyde (at pp 456F, 457 E-H). At p. 458 C-D Lord Clyde stated:

> "The immunity attaches essentially to what persons who may be called to give evidence say or do before the court."

37. However, other passages in the speech of Lord Cooke are relied on by the appellant as supporting a wider immunity. Referring to the citation of American jurisprudence he observed that it was not surprising in this difficult field that there had been line-drawing differences. However, he considered that there had been general agreement on a functional test.

> "A convenient starting point is *Imbler v Pachtman* [1976] 424 US409 where the United States Supreme Court held by a majority that a State prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case was absolutely immune from a civil suit for damages for alleged deprivations of the Defendant's constitutional rights; and that the absolute immunity was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt on the State's testimony. It was said that these activities were intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory role." (at p454h-455b).

Lord Cooke contrasted this decision with other US cases where immunity had been denied on the grounds that the conduct was a part of the investigatory or administrative function rather than the prosecutorial function.

Similarly, Lord Clyde stated (at p459):

> "A helpful distinction has been drawn in the American jurisprudence between matters of advocacy and matters of detection. In *Imbler v Pachtman* … it was recognised that an absolute immunity was appropriate to the conduct of prosecutors which was intimately associated with the judicial phase of the criminal process."

38. I do not understand Lord Cooke or Lord Clyde to have been suggesting that the absolute immunity should apply to the prosecutorial function generally, even where the conduct challenged is unconnected with the giving of evidence or the making of statements. In this regard I note that the majority of the United States Supreme Court in *Imbler v Pachtman* emphasised (at para 33) that it held only that, in initiating a prosecution and in presenting a State's case, the prosecutor is immune from a civil suit for damages. Moreover, such a reading would be difficult to reconcile with the other statements of Lord Cooke and Lord Clyde in *Darker* referred to above. In any event, I consider that the ratio of *Darker* is to be found in the reasoning of Lords Hope, Mackay and Hutton who emphasized its character as a witness immunity.

39. In order to achieve the objective of enabling witnesses to speak freely in judicial proceedings it has been necessary to extend the absolute immunity beyond the giving of evidence by witnesses when they are actually in the witness box. Thus it has been

extended to statements made by a witness in the course of the preliminary examination of witnesses to find out what they can prove (*Watson v M'Ewan* [1905] AC 48). It has also been extended to statements made out of court which could fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution. An example of this second category is *Taylor v Director of the Serious Fraud Office.* There the first defendant was investigating a fraud where money had passed through the hands of the first plaintiff, a solicitor practising in the Isle of Man, or the second plaintiff, a company controlled by him. An employee of the Serious Fraud Office wrote a letter to the Attorney General of the Isle of Man requesting assistance in the investigation and setting out the facts as they appeared to the SFO. That employee also spoke to the fourth defendant, an employee of the third defendant, The Law Society, and made a file note which recorded their view that the first plaintiff was a co-conspirator and should be struck off as a solicitor. The plaintiffs were not charged with any offence. However, when criminal proceedings were commenced against others, the SFO disclosed to their solicitors the unused material in the investigation including the letter and the file note. The plaintiffs commenced proceedings in defamation based on the contents of the letter and the file note. Significantly, they also relied upon a publication of both documents by their disclosure in the schedule of unused material served on the defendants in the criminal proceedings. (See Lord Hoffmann at p. 206 D). The House of Lords held that the absolute immunity in respect of statements made in court extended also to out of court statements which could fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution. Accordingly the publications were subject to absolute immunity from suit. Lord Hoffmann justified this extension in the following passage (at pp. 214-215):

> "It would be an incoherent rule which gave a potential witness immunity in respect of the statements which he made to an investigator but offered no similar immunity to the investigator if he passed that information to a colleague engaged in the investigation or put it to another potential witness. In my view it is necessary for the administration of justice that investigators could be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the enquiry without fear of being sued if such statements are disclosed in the course of the proceedings. I therefore agree with the test proposed by Drake J. in *Evans v London Hospital Medical College (University of London)* [1981] 1WLR 184, 192: "the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution or a possible prosecution in respect of the matter being investigated." This formulation excludes statements which are wholly extraneous to the investigation – irrelevant and gratuitous libels – but applies equally to statements made by persons assisting the enquiry to investigators and by investigators to those persons or to each other."

40. In *Heath v Commissioner of Police of the Metropolis* [2004] EWCA Civ 943; [2005] ICR 329 Auld LJ rejected the submission that the absolute immunity attaches only to defamatory statements. In doing so he said:

> "… it attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement, except pursuits for malicious prosecution and prosecution for perjury and proceedings for contempt of court."

This passage is relied upon by the Chief Constable. However, to my mind the description is too broad. As Lewison LJ pointed out in *Singh v Reading Borough Council* [2013] EWCA Civ 909; [2013] ICR 1158, the statement cannot be taken literally. For example the immunity from liability and negligence given to advocates was abolished by *Arthur J. S. Hall & Co v Simons* [2002] 1 AC 615 and in *Jones v Kaney* the Supreme Court decided that an expert witness should no longer enjoy immunity from being sued for negligence in relation to an expert report prepared for the purpose of litigation or in relation to evidence that he gave litigation. In this regard Lewison LJ also drew attention to *Smart v Forensic Science Service Limited* [2013] EWCA Civ 783, which is considered below. I would add that this description in *Heath* also fails to recognise that the immunity is essentially a witness immunity concerned with the giving of evidence and the making of statements in judicial proceedings, which has necessarily been extended in the various ways indicated above. Moreover, the inclusion of the words "or done" in the references to "anything said or done" which frequently appear in judgments describing the absolute immunity (see e.g. *Dawkins v Lord Rokeby* LR 8 QB 255 per Kelly CB at p264; *Darker* per Lord Hope at p.446 A, D-E, H) is not, to my mind, intended to extend the immunity to conduct unconnected with the giving of evidence or the making of statements. As Lord Hutton observed in *Darker* (at p. 464) the reference in *Dawkins* to "anything done" was probably intended to cover the submission of a written statement to a court.

41. A recent decision of this court which provides considerable support to the respondents' case is *Smart v Forensic Science Limited* [2013] EWCA Civ 783; (2013) PNLR 32. Mr. Smart was arrested on suspicion of possession of a live bullet. His account was that he believed that it was ornamental not live. The police obtained a forensic analysis from the defendant. R, a forensic scientist employed by the defendant, reported that the bullet was live. Mr. Smart then pleaded guilty and was sentenced. Some months later the Crown Prosecution Service informed Mr. Smart's solicitors that a review had identified that the bullet was not live. The conviction and sentence were set aside. Mr. Smart then brought a civil claim for damages against the defendant. The defendant denied that it owed any duty of care to Mr. Smart and asserted that R was immune from suit as a witness. The judge struck out Mr. Smart's claim holding that R was immune from suit. Mr. Smart appealed. During the course of the appeal he sought and was granted permission to add a claim against the defendant for deceit, alleging that changes to the draft report had been made falsely or recklessly and with the intention that Mr. Smart would act upon them to his detriment. The Court of Appeal allowed the appeal. It considered that witness immunity covers the giving of evidence in court and the preparation of evidence with a view to giving it in court, but does not cover the fabrication or creation of evidence where that

fabrication was never intended to appear in any statement. The court considered that the inclusion of the allegations of deceit removed the rationale for witness immunity applying to R. Furthermore, as the boundaries between those circumstances in which an immunity exists and those where it will not depended on the facts, the court declined to strike out the allegations of negligence or to uphold the conclusion that no duty of care was owed. (See Moses LJ at para 28, Aikens LJ at para 36.)

Discussion

42. I consider that Judge Seys Llewellyn took too broad a view of the absolute immunity. Both in his judgment of 7 June 2013 and in his judgment of 7 November 2014 he proceeded on the basis that there exists a general immunity from suit for a prosecutor in respect of his initiation, continuation and conduct of criminal proceedings and that the immunity is not limited to what is said or done by witnesses. For the reasons set out above, I consider that the immunity applies essentially to statements made by witnesses in the course of giving evidence and to certain limited but necessary extensions of that principle. The fact that an activity may be intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory function, does not, in itself, necessarily give rise to immunity. Neither the decisions in previous authorities nor the identified objectives of the immunity justifies a rule of the breadth which he identified. Accordingly, his application of that over-broad principle to the draft pleadings was erroneous.

43. In his submissions before us Mr. Beer has argued that the service of the schedule of unused material on the respondents can be considered an express or implied statement to the court of compliance with the disclosure requirements in the Criminal Procedure and Investigations Act 1996 and the Criminal Procedure Rules. This, he submits, should be considered as falling within the scope of the immunity because it is a statement intimately connected with the prosecution of the criminal proceedings. In this regard, he is also able to point to *Taylor v Director of the Serious Fraud Office* where the claim in defamation was founded in part on the further publication by serving the schedule of unused material and where the immunity was held to apply. However, I consider that even if this submission is accepted, there remain at least two substantial difficulties in the path of the immunity argument.

44. First, the authorities on witness immunity include frequent statements that for the immunity to apply the cause of action must be in respect of the evidence given or the statement made. Thus, for example, in *Roy v Prior* [1971] AC 470 Lord Morris of Borth-y-Gest said (at p. 477);

> "It is well settled that no action would lay against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given. …
>
> This, however, does not involve that an action which is not brought in respect of evidence given in court but is brought in respect of an alleged abuse of process of court must be defeated if one step in the course of the abuse of the process of the court involved or necessitated the giving of evidence."

As Lewison LJ pointed out in *Singh v Reading Borough Council* (at [60]), the key point is that an action will be allowed to proceed if it is not "brought on or in respect of any evidence given". Similarly, in *Taylor v Director of the Serious Fraud Office* Lord Hoffmann observed:

> "As the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action." (at p. 215 C)

In the same way in *Darker* Lord Hope emphasised that, for the immunity to apply, the cause of action must be founded on the contents of the statements made.

> "The immunity extends only to the content of the evidence which the witness gives or is preparing to give based on that material." (at p. 449 H)

> "In the present case the allegations that have been made against the police officers are not related only to the content of evidence that they might have given if they had been called upon to give evidence at the trial." (at p. 450 A-B)

Similarly in *Darker* Lord Mackay observed:

> "In my view there are materials in these allegations which do not depend as a cause of action on alleged statements relating to the preparation of evidence for proceedings and go beyond matters of freedom of speech either at, or in the course of preparation for, a criminal trial. It follows that in my opinion the immunity claimed cannot apply to these allegations and consequently the action cannot be struck out." (at p. 451 B)

and subsequently:

> "The essential character of the immunity as described in the passages I have quoted from Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* … limits the application of the immunity to conduct which can be called in question only by a founding on a statement in court or a statement which is part of the preparation of evidence for court proceedings." (at p. 452 F)

45. I consider, therefore, that Lewison LJ was correct in his conclusion in *Singh* (at [66]) that where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity.

46. To my mind the proposed claim for misfeasance in public office in the present case is not founded on the content of any express or implied statement associated with service of the schedule of unused material. On the contrary, the substance of the complaint relates to the way in which the disclosure exercise was performed.

47. The second difficulty arises from the nature of the complaint which is essentially that the Defendant deliberately or recklessly with-held documents that might have been

helpful to the respondents' defence. In *Darker* all of the members of the House of Lords were agreed that the immunity did not extend to the fabrication of false evidence, although they may not have come to that conclusion for precisely the same reasons. (See Lord Hope at p. 449 G-H, Lord Mackay at p. 451 B, Lord Cooke at p. 454 A, Lord Clyde at p. 460 B-C and Lord Hutton at p. 469 E-H). In the present case Judge Seys Llewellyn held that a corollary of this decision in *Darker* was that the deliberate destruction of documents which may be of assistance to the defence in a criminal prosecution must equally fall outside the scope of the absolute immunity. This part of the judge's ruling has not been appealed. In my judgement this conclusion is entirely correct. It would be a surprising and unsatisfactory state of affairs if, notwithstanding that the deliberate destruction of potentially relevant documents does not attract immunity, their concealment or withholding, as alleged in the proposed amended pleading, were to do so. To my mind, the rationale which denies immunity to the fabrication or destruction of evidence applies equally to its concealment or withholding.

48. For these reasons, I consider that, at the very least, the appellant has failed to establish that the conduct alleged in the proposed amended pleadings would clearly fall within the scope of the absolute immunity. In these circumstances, and given that the trial will begin in early October 2015, I agree with Gilbart J. that the most appropriate course is to grant leave to make the contested amendments and for the issue of immunity to be revisited by the trial judge on the basis of his findings of fact. I note that a similar approach was adopted by this court in *Smart*.

49. It is necessary to refer to one further matter under this ground of appeal. The order of Gilbart J. made on 12 February 2015 had the effect of setting aside the order made by Judge Seys Llewellyn refusing Mr. Daniels and Mr. Gillard permission to amend their pleadings so as to rely in Particulars (I) on the particulars previously provided in relation to the claim for malicious prosecution "insofar as they can properly apply also to the tort of misfeasance in public office". This matter was not addressed by Gilbart J. in his judgment. I consider the Judge Seys Llewellyn was clearly correct in his view that the defendant ought to be able to see in a properly particularised pleading exactly what is relied upon by way of conduct and that it is not appropriate to require the defendant to work out for himself what might or might not be argued to satisfy an exception to the core immunity. (Judgment of 7 November 2014, at [10]). I also note that this proposed pleading was in substance identical to a pleading which Judge Seys Llewellyn had previously disallowed in June 2013. Accordingly, to that extent only, I would allow the appeal on Ground 2.

Ground 1: Abuse of process

50. On behalf of the appellant it is submitted that the fact than none of the parties challenged the order of Judge Seys Llewellyn arising from his judgment of June 2013 makes an appeal from his judgment of November 2014 on the issue of immunity an abuse of process. The appellant says that none of the respondents reserved his position in relation to the June 2013 judgment nor did any of them provide any explanation for failing to appeal that judgment.

51. This ground of appeal fails for a number of reasons.

52. The relevant part of the judgment of June 2013 is the judge's ruling on the application by Mr. Daniels to amend his claim form to claim damages for misfeasance in public office. Judge Seys Llewellyn refused the application on the basis of his conclusion as to the scope of the absolute immunity. In his judgment of November 2014 Judge Seys Llewellyn was concerned with an application to make different amendments which went further. The Judge refused the application, reaffirming his previously expressed conclusion as to the scope of the immunity. In these circumstances, I do not consider that the failure to appeal the judgment of June 2013 should bar Mr. Daniels from challenging Judge Seys Llewellyn's conclusion as to the scope of immunity by way of an appeal against the later judgment.

53. In any event it was only Mr. Daniels who was a party to the relevant application addressed in the June 2013 judgment. Only Mr. Daniels could have appealed that part of the Order made in June 2013 and his failure to do so cannot affect the position of Mr. Gillard or Mr. Murray.

54. Finally, I agree with Gilbart J. that the parties are entitled to a judgment on the presently proposed amendments. In my view, Judge Seys Llewellyn took an erroneous view of the scope of the immunity and, in those circumstances, Gilbart J. and this court must be entitled to rule on what we consider to be the correct approach.

Ground 3; The apology pleading.

55. Ground 3 relates to an application by Mr. Daniels and Mr. Gillard to amend their pleadings on malicious prosecution by inserting further particulars which have become known as "the apology pleading". It is described in paragraph 41-42 of the judgment of Judge Seys Llewellyn delivered in November 2014

> "41. The allegation at 36(xii) is in essence that the Defendant decided to prosecute and/or encourage prosecution in order to assist his position in the civil litigation brought about by the original defendants in the criminal trial, whose convictions were quashed on appeal in December 1992. It is asserted that the Defendant settled claims, publicly stated by those Defendants' lawyers to have a value of around £3 million, for sums of money "that are currently unknown but which the Claimants invite the court to infer was substantial"; and that the Defendant sent them or at least some of them letters of apology in late May 2009, coincident or closely timed to the decision to prosecute the Claimant in March 2009.
>
> 41. At 36(xiii) – (xvi) the Claimants invite an inference that the Defendant Chief Constable achieved a benefit in prosecuting them in that "it was able to come to reach terms with those of the original Defendants that had brought claims, and that part of the satisfaction given to the original Defendants in their claims was the prosecution of the Claimant". In short, these particulars centre on the apology given to the defendants in 2009 and the inferences properly to be drawn from the fact of apology at a time when the Defendant was negotiating settlement".

56. In his judgment of 7 November 2014 Judge Seys Llewellyn addressed in turn the reasons advanced by the Chief Constable in opposition to the amendments.

57. First, the appellant maintained that the proposed amendment had no real prospect of success in that it proceeded on the basis that the decision to prosecute was made by the Chief Constable whereas it was abundantly clear from the documents that the decision to prosecute was made by the Director of Public Prosecutions. The judge considered this a powerful submission, but one that individually might be better resolved at trial.

58. Secondly, the Chief Constable pointed to the fact that the respondents invited the court to draw an inference from the juxtaposition of the initiation of the prosecution of the respondents in March 2009 with the issuing of a letter of apology in late May 2009. However it was said to be a matter of public record that the Chief Constable had apologised to the original defendants in July 2003. Judge Seys Llewellyn considered that, if taken on its own, this simply meant that the inference sought to be drawn appeared to be "very frail, rather than one which the Court could presently simply dismiss as impossible of success."

59. Thirdly, the appellant contended that there was an important public interest in protecting the confidentiality that attaches to discussions in the course of mediation. In the present case the settlement and its terms were subject to a condition of confidentiality. Judge Seys Llewellyn considered that the response on behalf of the respondents did not fully recognise the difficulty in which the Chief Constable had been placed by a condition of confidentiality.

60. Fourthly, Judge Seys Llewellyn rejected the submission on behalf of the Chief Constable that the amendment was embarrassing in that it had been accepted in a statement of case served contemporaneously with the proposed amended pleading that there was no suggestion that the Chief Constable's legal representatives were involved in misfeasance in the matter of apology.

61. Fifthly, on behalf of the Chief Constable it was said that to allow the amendments would be contrary to the overriding objective of the Civil Procedure Rules because it would give rise to very significant additional costs, duplication of work (and having to revisit disclosure and witness statements already completed, or largely already completed) and, potentially, delay. Judge Seys Llewellyn had no doubt that there would be some need to revisit disclosure and witness statements and that this needed to be considered when considering the countervailing *Cobbold* principle.

62. However, Judge Seys Llewellyn then went on to state that these objections did not stand alone. Both Mr. Gillard and Mr. Daniels had previously sought to rely on the same matters in a reply which read as follows:

> "The motive of scapegoating the claimants was one held by senior officers in the South Wales Police, who had previously sought to assuage public disquiet at their own incompetence and mendacity by a number of measures, including the giving of a public apology which, apparently, was drafted by Leading

> Counsel now instructed on behalf of the Defendants. The court may well be invited to draw inferences about the extent to which the Defendant's case in these proceedings can credibly be advanced in these circumstances".

Judge Seys Llewellyn set out the history of attempts to obtain further particulars of this averment. The respondents had refused to provide further information requested by the appellant. The appellant then applied for an order that the information be given. That application was resisted and an Order was made on 16 December 2013 requiring the service of particulars as to what inferences the respondents maintain should be drawn concerning the advancement of the Chief Constable's case. The order required that those particulars be set by 18 December 2013. No such particulars were provided. Judge Seys Llewellyn observed that it was plain to him that Mr. Daniels and Mr. Gillard were now seeking to do that which they had been ordered to do on 16 December 2013.

63. Judge Seys Llewellyn had been shown at the hearing a copy of the letter of apology. He considered that he was entitled to take into account that there was no suggestion on the face of the letter of apology that police officers will or would be prosecuted as a part of, or contingent upon, the settlement. Furthermore, he considered that the fact of a public apology in 2003 rendered flimsy the invited inference from juxtaposition in time.

64. While Judge Seys Llewellyn made clear that he did not treat the application as one to be dealt with within the "straightjacket of relief from sanction", he considered that the Chief Constable was right to complain both of the very late attempt to resurrect the matter and of the significant additional cost and duplication of work and/or delay which would be involved. He noted that the original application to amend the claim had not included the presently proposed amendments. In his view the court had a duty to deal with a case justly and at proportionate cost, including, insofar as was practicable, ensuring that the parties were on an equal footing, saving expense, and dealing with the case in ways which were proportionate, ensuring that it was dealt with expeditiously and fairly and enforcing compliance with the Civil Procedure Rules, Practice Directions and orders. He considered that there was a real prospect that the Chief Constable would not be on an even footing if the original defendants, as they would be entitled to, resisted disclosure of that which they themselves required to be confidential as a condition of settlement. Furthermore, the amendments, if they were to be pursued, should have been pursed promptly and/or particulars should have been given of them as required by the order of 16 December 2013. In all the circumstances the judge had no doubt that he should refuse the applications to amend. He noted however that it would remain open to the respondents in any event to deploy their overarching case that the Chief Constable or his senior officers were motivated in the investigation and presentation of the case for prosecution of these respondents by desire to assuage public disquiet and/or to distract from criticism.

65. On appeal against this decision Gilbart J. dealt with the matter relatively briefly. He stated that he regretted to say that he took a "very different view" from the judge. He set out his views on the potential relevance "if an apology was given" and "if it was the case that there was a civil action brought against the Chief Constable". He noted that the apology was given in an Alternative Dispute Resolution context, which was a point of substance, but he did not see how that could outweigh the importance of

doing justice as between the claimants and the Chief Constable. He also said that he was quite unconvinced that permitting the amendment would lead to any significant extension of the trial.

66. On this appeal, it is submitted on behalf of the Chief Constable that Gilbart J. approached the appeal on an incorrect basis and failed to address the reasons given by Judge Seys Llewellyn for his decision.

67. This was an appeal against a case management decision. It is well established that an appellate court should not interfere with a case management decision by a judge who has applied the correct principles, who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge. (See, for example, *Royal & Sun Alliance plc v Smith* [2002] EWCA Civ 1964 per Chadwick LJ at para 38). Unfortunately, in the present case Gilbart J. did not approach this aspect of the appeal before him on the correct basis. He simply substituted his own view of the case for that of the judge below. Moreover, in doing so, he failed to address the competing considerations that were carefully set out and balanced in the judgment of Judge Seys Llewellyn.

68. Furthermore, at paragraph 90 of his judgment he seems to have misunderstood the nature of the case which was being advanced. It was common ground that an apology had been given. The proposed amended pleading related not to what inferences might be drawn from the apology but whether an inference might properly be drawn that the prosecution of the respondents was motivated by the Chief Constable's desire to reduce the sums which would be payable in damages to the original defendants.

69. Before us Mr. Simblet made great play of the contention that he had been prevented from complying with the order for further particulars of the reply because it was necessary to make an application to the Crown Court and this had been obstructed and delayed by the Chief Constable. In his reasons for refusal of permission to appeal, however, Judge Seys Llewellyn stated that this matter was not the subject of mention or argument before him at the September 2014 hearing which resulted in the November 2014 judgment. While we accept that brief reference to this matter may have been made at earlier hearings and that an earlier skeleton may have contained a reference to this matter, we are satisfied that it was not a matter relied on at the full hearing. In these circumstances, the judge is not to be criticised for having failed to deal with this matter in his judgment.

70. For the reasons set out above, I would allow the appeal on Ground 3. Gilbart J. approached the appeal on this point on an incorrect basis. Moreover, Judge Seys Llewellyn properly took account of all relevant matters and reached a conclusion which was well within the scope of his discretion. I would therefore allow the appeal on Ground 3 and restore the order of Judge Seys Llewellyn in relation to this proposed amendment.

71. Finally, I should add that Mr. Beer on behalf of the Chief Constable sought to place before us material which has been prepared for a pending application for summary judgment on the issues raised by this pleading. It was not necessary for us to hear his *Ladd v Marshall* application in the light of the conclusion to which we have come on

this ground of appeal. The members of this court have not read that material. The sheer volume of material which is said to be relevant to the issues raised by the proposed pleading would, however, seem to lend further support to Judge Seys Llewellyn's view as to the possible impact on the proceedings of allowing these amendments.

LORD JUSTICE DAVIS:

72. I agree.

LORD JUSTICE McFARLANE:

73. I also agree.