JERSEY / JUDGMENT

DP v CP [2008] JRC 176 (13 October 2008)

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judgment

the deputy bailiff: 1. The matter before us this afternoon is an appeal against a decision of the Master on 30 th July, striking out the plaintiff's order of justice in its entirety on the grounds that it was frivolous or vexatious and an abuse of process. 2. The background is that the original order of justice was issued on 24 th April, 2008. It was prepared by the plaintiff personally who was, at that time, a litigant in person. It is fair to say the original order of justice was a somewhat confusing document which raised a number of alleged claims. 3. On the 19 th May, 2008, the defendant issued a summons to strike out the order of justice on the grounds that it disclosed no reasonable cause of action and/or was scandalous, frivolous or vexatious, and/or was otherwise an abuse of process of the Court. 4. On the 11 th July, 2008, the plaintiff issued a summons seeking leave to amend his order of justice by deleting a large number of factual matters pleaded in the original and limiting the extent of the claim sought in the prayer. In accordance with normal practice the Master considered the proposed amended order of justice when deciding whether to strike out the order of justice. A pleading which is defective but can be cured by amendment will not normally be met by the serious and drastic remedy of striking out. However, even as amended, the order of justice contained several alleged causes of action. They were listed by the Master in his reasons for his decision under the heading "Assault, intentional infliction of emotional distress, malicious prosecution, defamation and failing to meet the grounds of the non-molestation injunction and false imprisonment." As we have already said, the Master struck out the order of justice in its entirety, not on the grounds that it disclosed no reasonable cause of action, but on the grounds that it was frivolous or vexatious or an abuse of process. 5. The plaintiff is now legally represented by Advocate Hoy and he appeals solely against the decision to strike out the claim for malicious prosecution. No appeal is brought in respect of the other matters. Advocate Hoy has also applied for leave to further amend the order of justice by, in effect, replacing the original order of justice with a new one drafted by Voisins. 6. The background to the allegation of malicious prosecution is that the plaintiff and the defendant were married, but have separated and are now divorced. On the night of the 21 st /22 nd November, 2007, at a time when the parties were still residing together at the matrimonial home and before any proceedings had been commenced, there was an altercation between the parties as a result of which the defendant left the matrimonial home and went round to the police station complaining that the plaintiff had assaulted her. The police went round to the matrimonial home at 3am and arrested the plaintiff. He was subsequently charged with two counts of assault,

although we have not been shown the formal charge sheet. Following a trial on 24 th January, 2008, before the Magistrate's Court the plaintiff was acquitted by the Assistant Magistrate of both charges. 7. The plaintiff now wishes to bring an action against the defendant seeking damages for malicious prosecution. The elements necessary to prove the tort of malicious prosecution are conveniently summarised in paragraph 16-06 of Clerk and Lindsall on Torts th Edition as follows:- "1. That the claimant was prosecuted by the defendant.

2. That the prosecution was determined in his favour.

3. That the prosecution was without reasonable or probable cause.

4. That the prosecution was malicious." We accept that the proposed new amended order of justice properly pleads these four elements. This is not a case, therefore, of the order of justice disclosing no reasonable cause of action; indeed Miss Hall did not contend to the contrary. The issue is whether the proceedings are frivolous or vexatious or an abuse of process. 8. The test for striking out on these grounds is well established. The Master set out the relevant passages from the White Book at paragraphs 8, 10 and 11 of his reasons. We adopt those passages and we apply the tests therein described. It is also well established that, in deciding whether a claim is frivolous or vexatious or an abuse of process, the Court may receive evidence, see paragraph 23 of the judgment of Beloff JA in the Court of Appeal in Trant v AG

[2007] JLR 231 . Beloff JA went on to make certain observations about the use of evidence in such applications. We would, in particular quote the following paragraphs, although we omit the references to cases cited in those paragraphs simply for convenience:- "29. This is not an application brought solely under the rules of court asserting that there is no cause of action, when (as we accept) no evidence would be admissible and the pleaded allegations would be assumed to be true. We are entitled to take into account the state of the evidence when considering whether to strike out under the court's inherent jurisdiction or on the basis that the claim is frivolous or vexatious or an abuse of process.

30. Where evidence (even in affidavit form) is admissible, it should be considered in its totality. If only one side has adduced evidence, unless it is manifestly implausible, a court will have little, if any, choice but to accept it. If a party chooses not to adduce evidence when able to do so (especially when faced with a case to meet), his decision not to do so permits adverse inferences to be drawn. ...

32. We consider that the "clear error" in the Royal Court's analysis was at the end of the process not to evaluate the state of the evidence as it stood, but rather to speculate that the appellants might be able to adduce evidence at trial to sustain their (so far wholly unsupported) allegations." 9. So what is the evidence in this case? The defendant has sworn an affidavit for the proceedings before the Master in which she states, at paragraph 29.3, in connection with the allegation of malicious prosecution, that "I have never lied to the police." She also exhibited to her affidavit the affidavit which she had sworn on 23 rd November, 2007 in support of her application for a non-molestation injunction. In that

affidavit she sets out in some detail, at paragraph 7(e), her evidence as to the alleged assaults on the night of 21 st /22 nd November, which formed the basis of the prosecution against the plaintiff. She also asserts, at paragraph 20 of the affidavit sworn for the proceedings before the Master, as follows:- "I believe that the Plaintiff is attempting to use Court proceedings to cause me difficulties. The Plaintiff is aware that I am not in receipt of legal aid and therefore every time he issues proceedings or changes his mind after agreeing to do something, it costs me money. Although having said that, I must confirm that I have been successful in obtaining three costs orders against the Plaintiff. The Plaintiff has frequently told me (see paragraphs 33-35 and 41 of my Affidavit in Exhibit "CJP 7") that he will bankrupt me. The Plaintiff has also told my father and my work colleague, Pieter Williams, that he will bankrupt me. I honestly think he believes that by bringing frivolous actions such as this he will succeed in doing so." 10. Most importantly the Court has before it the reasons of the Assistant Magistrate for acquitting the plaintiff of the charges of assault. Although they have not been exhibited to any affidavit we think that, as they are a Court record, we can properly treat them as evidence in the case. I think it necessary to read out the reasons in their entirety. Judge Christmas:- "I have listened very carefully to all the evidence that I have heard today and it of course is exceedingly sad when a marriage results, as it seemingly for DP and CP on the evening of the 21 st November last year, in the sort of exchange of emotions, words and physicality that we have heard of today. It could be said that there is nothing particularly unusual about a relationship which deteriorates to this point resulting in this kind of altercation. The fact of the matter is that CP landed up at the police station in the early hours of the morning, she was clearly the worse for drink and she was wearing a dressing gown on top of her clothing and was wearing no shoes. It is also true, by any stretch of the imagination, that both CP and DP, before the incidents which gave rise to these charges are alleged to have occurred, had consumed an inordinate amount of wine. They were both, to put it mildly, the worse for drink. When the incident in the small bedroom is said to have taken place, and I have noted comments about what was said before CP went to bed and so forth, it is quite clear that CP had some memory of certain things and no memory of others. I am not saying for one moment that that memory is necessarily selected, but whatever memory she had was clearly influenced by the emotional situation which prevailed in that household at the time and the amount of alcohol that she had consumed that evening. DP for his part was also in a highly volatile and emotional state and when CP ultimately went to the doctor, or she was examined I should say by the police surgeon in the early hours of that morning, clearly there was some evidence of physical contact in the lower region of her neck, and the doctor made it quite clear that in his opinion it was unlikely that she had caused those injuries, although he did accept that if, as she maintained today, she may have pulled the hands away, some of these marks may have been caused indirectly by that. What I have to accept is that the only corroboration of the allegations made today is the medical evidence disclosed by Dr Holmes. If I accept that those injuries and markings disclosed on the photographs produced to the Court in Exhibit 1 were made by the defendant I then have to go on and ask myself were those marks consistent with an assault which was either deliberate or reckless against CP. I have heard

two versions of events and as I hinted earlier I find myself in a position of frankly being unable to be certain exactly what happened, when it happened and to whom. A husband and a wife, at a point in which their relationship had critically reached an end, had a spat which resulted in the sort of situation that we have heard about all day. I am not prepared, on the basis of what I have heard today, to convict this defendant of assault and for that reason DP is acquitted of both these charges because the evidence in relation to the latter allegation is equally [inexact] and I cannot be sure that these offences occurred, it is for that reason the defendant is acquitted." [personal typographical error corrected]. It is clear from this judgment that there is no question of the Assistant Magistrate having concluded that the defendant had lied. He found that her memory was influenced by her emotional state and by the amount of alcohol consumed. There also appears to have been medical evidence which supported her evidence to some degree. At the end of the day it is clear from the judgment that it was simply a case where the Assistant Magistrate could not be sure what had happened and therefore felt that he could not properly convict. It is a far cry from a decision on the part of the Assistant Magistrate that the defendant's evidence was made up or she was lying. 11. There is, therefore, considerable evidence, filed on the part of the wife that she did have reasonable and probable cause and that she was not acting out of malice when she made the complaint which lead to the prosecution against the plaintiff. We accept that it is arguable that, for the purposes of the tort of malicious prosecution she is the prosecutor and that accordingly the first two elements of the four criteria in Clerk and Lindsall may be satisfied. The issue is whether the plaintiff has an arguable case on the third and fourth elements. 12. So what evidence does the plaintiff file in response to that of the defendant? As in Trant he has in fact chosen not to file an affidavit or to respond to the evidence of the defendant. The sole evidence to which Mr Hoy is able to point is an exchange of emails on the 20 th December, 2007, i.e. about 1 month after the complaint of assault. The first email is from the then lawyers to the plaintiff. It is a without prejudice attempt to resolve matters. It is an email to Advocate Blomfield who was, and still is, the advocate for the defendant. Having explained that the plaintiff did not want a divorce, the plaintiff's advocates went on to put forward a six point proposal for resolving matters. The relevant part began by saying this "Bearing this in mind I am instructed to put forward the following proposals" and as we say there then followed six specific proposals. Mr Hoy has pointed in particular to proposal number two which read as follows:- "Your client forthwith informs the Police that she wishes to withdraw and discontinue with her complaint regarding to the alleged incident on 21 November 2007." Advocate Blomfield replied to the email later the same day and put forward some counterproposals. In relation to proposal number two, Advocate Blomfield said this:- "My client will agree to do this but only in the event that your client agrees to a divorce and the other terms of this counter offer. By doing so my client will not be conceding that the assault did not take place." 13. Mr Hoy argues that this exchange of emails, and in particular the response to proposal two of Advocate Blomfield, is evidence of malice on the part of the defendant. He says that it showed that the motive for making the complaint was not that the defendant believed in fact that it had happened, but that she intended to use the complaint as a bargaining tool in the negotiations. There was, accordingly, a collateral motive for

making the complaint which gives rise to malice. 14. We do not agree. The complaint was made on the night of the st /22 nd November; it was in the middle of the night when the parties were still residing at the matrimonial home together. The first suggestion that the complaint might be withdrawn as part of a package to resolve matters generally came not from the defendant but from the plaintiff. It was only in response to that suggestion that Advocate Blomfield said that the defendant would withdraw the complaint if other matters were agreed. We have to say that we think that Advocate Blomfield's response was somewhat ill-advised; the criminal and the civil should be kept separate. However, we can well understand the defendant feeling that she would be willing to withdraw the complaint for the sake of securing an overall agreement. 15. The Court is familiar with cases where strong emotions lead to parties wanting to resolve matters and being willing to forgo various mattes if that can be secured. We can particularly understand her coming to that conclusion when the matter was suggested by the other side. Accordingly, given that it was initially a suggestion by the plaintiff and that it took place well after the initial complaint, we think that the email is of minimal evidential value in establishing malice. 16. Taking the evidence on the part of the defendant, which we have mentioned, namely her two affidavits making it clear that she was acting because she said there had genuinely been an assault, and also the judgment of the Assistant Magistrate with its findings as we have described them above, and weighing that against the lack of any evidence from the plaintiff, except the point in relation to the emails which we have just discussed, we have no hesitation in concluding that the plaintiff's claim that the defendant acted with malice and that there was no reasonable and probable cause for her complaint is obviously unsustainable and is doomed to failure. Accordingly we agree with the Master that it was frivolous or vexatious and an abuse of process and we dismiss this appeal. [Application for costs is made]. 17. Cost on a standard basis but not to be enforced without leave. Authorities Clerk and Lindsall on Torts 19 th Edition. White Book. Trant v AG

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