APPEAL COURT REFERENCE NO: CF035/2013A

IN THE CARDIFF COUNTY COURT

Case No: BS614159-MC65
CF101741
CF204141

BETWEEN:

MAURICE JOHN KIRK

Appellant/Claimant

and

THE CHIEF CONSTABLE OF THE SOUTH WALES CONSTABULARY

Respondent/Defendant

RESPONDENT/DEFENDANT'S SKELETON ARGUMENT

INTRODUCTION

1. This Skeleton Argument is filed pursuant to the Direction of the Honourable Mr Justice Morgan of the 14th May 2013.

2. The three above named actions are presently being heard in the Cardiff Civil Justice Centre by His Honour Judge Seys Llewellyn QC. Subject to any order made in this Appeal, the Learned Judge has heard all the evidence in this case. Directions have been given concerning the making of final submissions, to be heard on 23rd July 2013. It is apprehended that thereafter, the Learned Judge will reserve Judgment.

3. The trial of these actions commenced upon 18th February 2013 and the Court has sat on some 50 days since that date. During the course of the trial, the Learned Judge has been obliged to make various case management decisions, in particular concerning how the evidence of the parties was to be adduced or presented to the Court. It appears that the Claimant now seeks to Appeal against at least two decisions made by the Learned Judge. These are:

(i) In Section 5 of the Appellant's Notice, the Claimant indicates an intention to Appeal against an order made by the Learned Judge that the Claimant must erase any recordings made by him by 7th May 2013. A full explanation concerning this matter will be set out below, but it appears to relate to a direction made by the Learned Judge giving the Appellant permission to record some of the evidence provided by a limited number of the respondent's witnesses. There are four such orders.

(ii) In Section 9, Part C, paragraphs 2 to 14, the Appellant identifies witnesses who he believes should be required to give evidence in this case. This appears to relate to a ruling made by the Learned Judge on 30th April 2013, when he identified witnesses in respect of whom the Appellant was entitled to issue a witness summons, and identifying those witnesses in respect of whom the Appellant was not entitled to issue a witness summons. The particular context within which this ruling was given will be explained below.

For the purposes of this skeleton argument, it will be assumed that the Appellant seeks to appeal against both decisions, albeit that at the present time, it is not known precisely what orders the Appellant seeks.

BACKGROUND

4. In these three actions, the Appellant is seeking damages against the South Wales Constabulary in respect of some 34 separate incidents, the first taking place on 2nd January 1993, and the last taking place on 23rd May 2002. The claims made by the Appellant are many and varied, but in substance, he alleges wrongful arrest and detention, malicious prosecution and misfeasance in a public office. In essence, he alleges that there was an overarching conspiracy by a number of officers in South Wales Constabulary aided and/or abetted by various other constabularies, local magistrates and Circuit Judges, the Crown Prosecution Service as well as various, as yet, unidentified Freemasons.

5. The Appellant has three or more other actions which have been issued against the South Wales Constabulary, which contain numerous other allegations, all

those actions being stayed until the completion of the trial of these three actions.

6. The first action was originally issued in Bristol County Court, where it was case managed until transferred to the Cardiff County Court by order of 29th September 2000, at which time the case management of that action, as well as the two subsequent actions, was taken over by His Honour Judge Chambers QC. Subsequently, the case management of these three actions was taken over in early 2009 by His Honour Judge Seys Llewellyn QC, with a view to that Judge taking these matters up to the trial of the actions.

7. These three actions have been listed for trial on a number of occasions, from 2010 to 2012. On 6th September 2010, the Learned Judge commenced the hearing of these actions, but, as a result of the Appellant's ill-health, the Learned Judge dealt simply with certain preliminary issues of law, and adjourned the hearing of evidence in the actions. Subsequently, following three weeks of legal argument, the Learned Judge, by Judgment of 30th November 2010, struck out a number of elements of the Appellant's claims.

8. Eventually, these actions were listed for trial commencing on 18th February 2013. The Appellant has represented himself during the course of the hearing since that date. The Court has heard from some 85 witnesses called on behalf of the Respondent, the Appellant himself, as well as 13 witnesses called on behalf of the Appellant.

9. In order to assist the Appellant, as well as to provide some structure around which this case could be heard, the Learned Judge has made various directions, including the following:-

   (a) That, contrary to the usual practice, the Respondent would call its witnesses first, so as to enable the Appellant to advance and develop his case by cross-examining the Respondent's witnesses. The Appellant has been given considerable leeway by the Learned Judge both as to the manner and the extent to which he has cross-examined the Respondent's witnesses;

(b) The Respondent was directed to file a skeleton argument setting out in detail the nature of the claims being advanced by the Appellant, and how the Respondent intended to deal with those claims, both by way of legal argument and by reference to the evidence it intended to call. Subsequently, the Respondent was directed to file an extended skeleton argument, the purpose of which was to assist the Appellant to identify precisely which witnesses dealt with which incident, and identifying within the numerous trial bundles the precise documents which were relevant to each particular incident;

(c) The Learned Judge has expected those representing the Respondent to assist the Appellant at all stages of the trial, in particular by helping him identify which documents were relevant to his case as he cross-examined the Respondent's own witnesses.

(d) The Respondent gave an undertaking to call all of those witnesses in respect of whom it had served a witness statement who were still serving or employed by the South Wales Police at the commencement of the trial. In fact, in order to allow the Appellant to advance his case by cross-examining the Respondent's witnesses, the Respondent has called all of its witnesses (most of whom are now retired) save for those who have died, who were too ill to attend, or who had emigrated.

10. During the last four years, there have been numerous case management hearings, when detailed directions have been given by the Learned Judge regarding both the issue of disclosure and the manner in which the trial would be conducted, especially in respect of the calling of witnesses. Of particular importance is the order made by the Learned Judge on 16th April 2012, when the Learned Judge handed down a judgment, which enclosed within it various directions, which dealt with a number of issues, in particular the Appellant's desire to issue witness summonses upon witnesses who were at least potentially hostile to his case (a copy of the order/judgment is attached to this skeleton argument at Appendix Item 1, with the relevant paragraphs of the judgment being paragraph 23 to 26). The Appellant wholly failed to comply with those directions.

11. During the same period, the Appellant has launched numerous appeals against judgments, decisions and directions given or made by the Learned Judge, all which such appeals have failed.

TRIAL – THE RECORDING OF WITNESSES

12. During the course of cross-examining the Respondent's witnesses, the Appellant expressed a desire to record the evidence, both in chief and cross-examination of some of the Respondent's witnesses. There were two prime reasons given by the Appellant for his wish to record their evidence. Firstly, he claimed that, notwithstanding that he was on occasions attended at Court by friends, family and other supporters, he was, to an extent, infirm, and was unable to make a proper note either of their evidence in chief or of cross-examination. Secondly, he made it clear to the Learned Judge that he wished to use the recordings in order to bring private prosecutions against these witnesses, or to hand the recordings on to other police forces so as to persuade them to bring prosecutions against these witnesses. The Respondent objected to the making of such recordings. After giving careful consideration to the Appellant's application, and no doubt wishing to ensure that the Appellant had every opportunity of fully presenting his case, the Learned Judge permitted the Appellant to record some evidence on his mobile telephone.

13. The Respondent's Junior Counsel's note of the Learned Judge's judgment (approved by the Learned Judge), is attached to this skeleton argument at Appendix item 2. Both in that judgment, and subsequently, the Learned Judge was at pains to emphasise that insofar as he was permitting the Appellant to record the evidence of some witnesses, he was taking a wholly exceptional course of action. The Learned Judge made it clear that the recordings could only be used to enable the Appellant to make up his notes of the witnesses evidence, so that he would have a complete note of that evidence in order to assist him in cross-examination of the witnesses (and to assist him in making his submissions at the end of the trial). The Appellant was allowed to record the oral evidence of Mr Robert Nelson Roe, Mr Steven Smith, Mr Phillip David Roche and Mr Phillip Lewis Thomas.

14. The Learned Judge allowed the evidence of these witnesses to be recorded, on the basis that the Appellant claimed that these witnesses were crucial to his case, and therefore it was important for him to have an accurate record of their evidence. As is clear from the terms of the orders, the Appellant was prevented from using the recording for any other purpose, and in particular, was prevented from passing on the recording to any other person, or from allowing the recording to be published in any way whatsoever. The latter provision was required because the Appellant maintains his own website, where, both before and during the trial, the Appellant has posted documents relevant to the case, including statements and commentary on the evidence, as well as exhibits.

15. Although wholly exceptional, it is accepted for the purposes of this Appeal, that the Learned Judge was entitled to make a direction granting permission to the Appellant to record the evidence of certain named witnesses. This was within the ambit of the Learned Judge's discretion to permit an "unofficial" recording of the proceedings, pursuant to CPR Practice Direction 39A, paragraph 6.2, which provides that:

"No party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court. To do so without permission constitutes a contempt of court."

The prohibition on unofficial recordings, and the discretion to grant leave to make such a recording, can be found in s.9 of the Supreme Court Act 1981, which provides as follows:-

"9.— Use of tape recorders

(1) Subject to subsection (4) below, it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted may be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.

(3) Without prejudice to any other power to deal with an act of contempt under paragraph (a) of subsection (1), the court may order the instrument, or any recording made with it, or both, to be forfeited; and any object so forfeited shall (unless the court otherwise determines on application by a person appearing to be the owner) be sold or otherwise disposed of in such manner as the court may direct.

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings."

16. For the reasons identified by the Learned Judge, both in the judgment which granted permission for such recordings to be made, and his reasons for refusing permission to appeal (attached to this skeleton argument at Appendix Item 3), it is submitted that the granting of such permission must be strictly controlled. It is imperative that there is only one official recording of the evidence of witnesses. Insofar as it was necessary and appropriate to allow the Appellant to record the evidence of some witnesses, it was both proportionate and reasonable that that recording could only be maintained by the Appellant for a limited period of time sufficient for him to produce his own note of that evidence, so as to enable him to further advance his case or to prepare submissions at the end of the case. The time allowed to the Appellant was sufficient to enable that process to be carried out. In our respectful submission, the Judge's order was well within the broad discretion allowed to a trial judge in the case management of the trial.

THE CALLING OF WITNESSES

17. Notwithstanding numerous orders made by the Court, the Appellant failed prior to the commencement of this trial to identify which witnesses he wished to call, and in respect of whom witness summonses would have to be issued. As the Respondent's witnesses have been called, the Appellant has prepared a list of witnesses who he would like to give evidence in this case. These witnesses fall into two parts. Firstly, there are those witnesses from whom he has obtained

statements and whose evidence may, however tangentially, be relevant to the Appellant's case. Notwithstanding the fact that the Appellant has failed to comply with numerous directions in respect of witnesses, the Learned Judge has indicated that those witnesses may be called to give evidence, if necessary directing that witness summons should be issued in order to ensure their attendance. Secondly, the Appellant has produced a list of witnesses who he would like to give evidence, but from whom he does not have a statement, and, who, it is clear, are likely to be hostile to the Appellant's case. In essence, the Appellant wishes the Court to call witnesses, by the issuing of witness summons, in respect of whom he does not have a witness statement, who will not give him a witness statement, who will not attend voluntarily and who will not provide evidence which is likely to assist the Appellant's case. Rather, the Appellant wishes to force these witnesses to attend court so that he may be permitted to cross-examine these witnesses, notwithstanding the fact that they will be called as his witnesses.

18. On 30th April 2013, the Learned Judge made a ruling in respect of the witnesses which the Appellant wished to call (a copy of the ruling is attached to this Skeleton Argument at Appendix Item 4). The ruling dealt with both categories of witnesses, namely those from whom Mr Kirk had or might be expected to obtain witness statements and who were likely to give evidence which would assist the Claimant's case, as well as the second category of witnesses from whom the Claimant did not have and was unlikely to obtain a witness statement, and who were likely to be hostile to the Appellant. This ruling bears careful consideration. The Learned Judge sets out the history of the directions made during the course of the directions hearings in relation to witnesses. The Learned Judge thereafter carefully analysed each particular witness that the Appellant wished to call, considering in detail whether or not they fell into the first category or the second category.

19. It will be apparent that in respect of those witnesses who fall into the second category, namely hostile witnesses, the Learned Judge was at pains to ensure that he clearly understood precisely why the Appellant wished to call the witness, and thereafter gave appropriate consideration as to whether,

notwithstanding the absence of a witness statement from any individual witness in that category, and notwithstanding the fact that they would be a hostile witness, it would be appropriate, in order to do justice to the Appellant, to issue a witness summons so as to ensure their evidence was before the Court. Those witnesses now identified in the Appellant's notice, Section 9 Part C, paragraphs 2 to 14 were considered by the Learned Judge in his ruling. The Respondent relies upon the Learned Judge's analysis of those witnesses and their potential relevance, if any, to this trial. One of the witnesses, namely Kevin Fairman, has in fact given evidence, as he fell into the first category of witnesses, namely those who did give a statement to the Appellant.

20. We submit on behalf of the Respondent, that insofar as the Learned Judge declined to issue witness summonses in respect of any individual witness, that his decision was appropriate, carefully reasoned, and was well within the ambit of his discretion in considering: (i) whether to permit witness evidence outside of the timeframe originally set by the Court in its earlier case management directions (referred to above) and, (ii) the discretion exercised under CPR Part 34.3(2) in considering the grant of permission to issue a witness summons during the trial[1], and accordingly, the Appellant's appeal against that ruling should be dismissed.

The Law

PERMISSION TO APPEAL

21. Pursuant to CPR, Part 52.3 (6), permission to appeal may be given only where:–

    (a) the court considers that the appeal would have a real prospect of success; or

    (b) there is some other compelling reason why the appeal should be heard.

In considering whether to grant permission, the Court should exercise its discretion in accordance with the overriding objective in CPR r.1.1. A "real prospect of success" has been defined to be a realistic, rather than a fanciful,

[1] CPR Rule 34.3(2)(a) provides that permission is required to issue a witness summons less than 7 days before the commencement of trial.

prospect of success (see commentary in The Supreme Court Practice "White Book" 2013, vol I, at page 1724f.)

22. CPR Practice Direction 52A, para. 4.6 sets out the additional criteria which the Court may take into account in respect of an application for permission to appeal case management decisions. These are whether:-

(a) the issue is of sufficient significance to justify the costs of an appeal;

(b) the procedural consequences of an appeal (eg. loss of trial date) outweigh the significance of the case management decision;

(c) it would be more convenient to determine the issue at or after trial.

It may be felt that criteria (b) and (c) above are of less relevance given the stage proceedings have reached in the hearing of the Claimant's claims, ie. that the hearing of evidence has now been concluded.

23. It is submitted that there is a high threshold for the grant of permission in appeals against case management decisions, which are decisions made within the broad discretion of the Judge. The Court is respectfully referred to the commentary in the Supreme Court Practice, "White Book" vol I, page 1726, note 52.3.9, and the judgments of the Court of Appeal in:

a. ***Royal & Sun Alliance v T & N Ltd.*** [2002] EWCA Civ 1964, at paragraphs 37 and 38, and

b. ***Walbrook Trustee (Jersey) Ltd. v Fattal*** [2008] EWCA Civ 427, at paragraph 33.

SUBMISSIONS IN THE EVENT THAT PERMISSION TO APPEAL IS GRANTED

24. In the event that permission to appeal is granted to the Claimant, it is submitted on behalf of the Respondent that neither of the criteria for a successful appeal pursuant to CPR r.52.11(3) are made out. The decisions made by the Learned Judge were both case management decisions, made well within the ambit of his broad discretion, after careful consideration and evaluation, and cannot be said to be either:

a. Wrong, or

b. Unjust because of serious procedural or other irregularity in the proceedings in the lower court.

As to whether the Learned Judge's decisions were "wrong", it is submitted there has been no error of fact or law on the part of the Learned Judge, particularly in relation to his careful evaluation of the witness evidence in the case, nor any error in the exercise of the generous ambit of his discretion. He took all relevant factors into account. As to the latter criterion, no serious procedural irregularity has taken place, or is indeed alleged in the Notice of Appeal, save perhaps for the general contention of "conspiracy" in the Welsh Courts which the Claimant frequently advances.

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28th May 2013

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