Neutral Citation Number: **[2024] EWHC 1765 (KB)**

Case No: KB-2021-004496

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2024

Before:

MR JUSTICE JAY

- -

Between:

MR RICHARD IAN HUGHES	**Claimant**
- and –	
(1) HIS MAJESTY'S REVENUE AND CUSTOMS **(2) THE CROWN PROSECUTION SERVICE**	**Defendants**

- -
- -

Rupert Bowers KC, Paul Chaisty KC, Sam Jacobs and Nick Taylor (instructed by **Brabners**) for the **Claimant**
Alan Payne KC, Russell Fortt and Jennie Oborne (instructed by **HMRC's Solicitor's Office and Legal Services**) for the **First Defendant**
Jonathan Kinnear KC, Alexander Cook KC, Amy Mannion and Gideon Barth (instructed by **the Government Legal Department**) for the **Second Defendant**

Hearing dates: 25th – 27th June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE JAY

MR JUSTICE JAY:

INTRODUCTION

1. Mr Richard Hughes ("the Claimant") is a businessman and financier. In December 2015 he was charged with offences of conspiracy to cheat and of cheating the Revenue. The charges were dismissed by HHJ Simon Drew QC[1] in May 2017 because they were defective. It is clear from contemporaneous documents that shortly before then it had begun to be appreciated that the prosecution was in a mess. One clear and obvious line of inquiry had not been pursued and disclosure was in a pitiful state. The Claimant applied for costs within the criminal proceedings and in a "Prosecution Statement of Position" filed in December 2017 it was conceded by the Crown that there had been improper conduct of the prosecution. In March 2018 the Claimant was informed that the Crown did not intend to recommence any prosecution by applying to a High Court judge for consent for preferring a Voluntary Bill of Indictment.

2. The Claimant instituted these proceedings against HMRC and CPS on 8 December 2021. The pleaded claims against both Defendants are in the torts of malicious prosecution and misfeasance in public office. The Claimant's preliminary schedule of loss claims vast sums. Most of the losses claimed were suffered by two companies that he regarded as his, Zeus Capital Limited ("ZCL") and Zeus Renewables Limited ("ZRL"). However, the precise ownership position requires careful examination. The companies' rights and causes of action were assigned to the Claimant in the summer of 2019.

3. Thereafter, the litigation proceeded slowly. On 18 October 2023 both Defendants filed applications asking the Court to strike out the claims under CPR Part 24 and CPR r. 3.4(2) on various bases. In short, the Defendants say that the Claimant has no real prospect of making out a number of the essential ingredients of these torts, and that the assignments are unenforceable as being contrary to public policy. This is my judgment on those applications.

4. A vast amount of evidence has been placed before the Court. I have not read each and every page in the voluminous exhibit bundles but I am fully abreast of the material. It is right to point out that both Defendants have waived privilege and that I have been in a position to examine a mass of internal documentation which frankly recognises the Crown's shortcomings. Even so, I must bear in mind that the evidential picture might be fuller at trial and that Mr Rupert Bowers KC would have the opportunity to cross-examine witnesses (and, in the event that material witnesses were not called without proper explanation, the Court would be able to draw adverse inferences, if so advised).

5. The principles governing these applications are extremely familiar. In my view, the summary judgment applications should be my focus because if the Defendants cannot succeed on those, the strike-out applications would inevitably fail. There is a good summary of the relevant principles in the White Book at paras 24.3.2 – 24.3.4. Given what I have just said about the evidential picture being incomplete, I set out the

[1] Now KC, but in this judgment I will be using the titles applicable at the relevant time.

following passage from Cockerill J's judgment in *King v Stiefel* [2021] EWHC 1045 (Comm):

> "21. The authorities therefore make clear that in the context of summary judgement the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the court will be entitled to draw a line and say - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial."

6. Broadly speaking, the issues arising in this application will be addressed in the following order:

(1) Whether the malicious prosecution claim against both Defendants has a real prospect of success.

(2) Whether the misfeasance claim against both Defendants has a real prospect of success.

(3) Whether the Claimant has a real prospect of establishing the validity of the assignments.

ESSENTIAL FACTUAL BACKGROUND

7. Given the large amount of material placed before the Court, it is neither possible nor desirable to refer to everything drawn to my attention by the parties.

8. The criminal offences for which the Claimant was prosecuted related to his involvement in the establishment of investment products in his role as a partner of Zeus Partners LLP ("ZPL"), a financial services firm regulated by what is now the Financial Conduct Authority. In November 2007 ZPL and HSBC Private Bank (UK) Limited ("HSBC") entered into an agreement which provided amongst other things for HSBC to assist ZPL with developing, and thereafter establishing and promoting, ZP Investment Products using what the Claimant describes as the HSBC framework. As para 9 of the Amended Particulars of Claim explains:

> "The ZP Investment Products ultimately comprised investments in 52 UK Limited companies. The investments comprised an investment by each high-net-worth individual, both through their own funds and in significant part through "limited recourse" loans. It was intended that, in the event that an investment failed, a claim could be made for share loss relief pursuant to sections 131 and 132 of the Income Tax Act 2007. Each of the investments suffered a fall over time in the value of its shares."

9. Further detail is provided in the witness statement of Ms Nishat Choudhury, a solicitor employed by HMRC. In all, there were five iterations of these investments or schemes: SA Film, Equicap, Games, Triton and Pharma. Over 400 high-net worth-individuals invested through the schemes in 52 UK limited companies. Ms Choudhury points out that 51 out of the 52 companies failed within 12 months of the investment having been made.

10. The "architecture" of the schemes was somewhat complex but Ms Choudhury has been able to provide the following simplified description:

> "The Schemes: - the Schemes provided a vehicle through which high net-worth individuals (the **'Investors'**) could invest in companies (the **"InvCos"**), formed by ZP using their own personal funds and 'limited recourse loans' (the **"Loans"**), by a newly incorporated finance company (the **"FinCo"**). Alliance & Leicester Corporate Financing (the **"Lender"**) provided the financing for the FinCos for the initial schemes. The Schemes were designed so that: -
>
> (i) The Lender would provide a Loan to the FinCo under a facility that any funds provided were at all times held within blocked accounts with the Lender. The FinCo would then provide the majority of the investment (82-88%) through the Loans to the Investors repayable after a period of 12 months. The Loans were limited in recourse to the value of the shares in the InvCos. The Investors had no other obligation to repay;
>
> (ii) The Lender provided the bank accounts for the FinCo and InvCos. The Loans were transferred direct from the FinCo to the InvCos on behalf of the Investors. The sums provided for the Loans were placed in secure blocked accounts and could not be expended without agreement of the Lender; and
>
> (iii) The Investor would provide the remaining 12% to 18% of the funds themselves, which were used to pay fees to those responsible for administering and selling the Schemes. As such, the remaining element of the 'investment' in the Schemes, were the Loans, which the Investor had no obligation to repay and which could not, and were not, in any event accessible by or used by the InvCos (before the Schemes failed); and
>
> (iv) When the Schemes failed, the Investors would make a claim for share loss relief pursuant to sections 131 and 132 of the Income Tax Act in relation to their investment (as augmented by the Loans)." (see para 8 of her witness statement)

11. Given that virtually all the schemes failed (and in HMRC's view, were always going to fail), the loans were never used (and, because they were never actually used, could be redeployed on a basis that has been described as "circular"), the individual investors were able to claim share loss relief (because the shares in the failed investment vehicles

had no value), and the share relief claimed by these individuals, which included the loan element, well exceeded the sums actually invested.

12. HMRC's viewpoint was (and still is) that, given that these schemes were not genuine commercial investment opportunities but rather were designed to obtain a tax advantage, there was a requirement to register them with HMRC. Further, the Targeted Anti-Avoidance Rule was introduced by the Finance Act 2007 so as to deny relief on capital losses accruing to any person as a result of, or in connection with, any arrangements where the main or one of the main purposes of the arrangement was to secure a tax advantage.

13. These basic facts provided the foundation for the criminal charges which were ultimately brought against the Claimant.

14. It is important to understand the extent to which the Claimant disputes HMRC's narrative in these proceedings. In my view, the Claimant's essential argument is that HMRC failed to undertake fundamental lines of inquiry which would, or at least might, have placed a rather different light on a state of affairs which might appear, at least superficially, to be incriminating. Putting the Claimant's case at its highest, it is said that individuals within HSBC well knew exactly how the schemes would be implemented in practice and that it was reasonable for the Claimant to rely on their advice. It is also said that when Mr David Milne QC advised on the tax implications of the schemes in January 2008 he was aware that their architecture included these limited recourse loans.

15. I will need to examine the relevance of HSBC's involvement in due course. To be fair to Mr Milne KC, who is still in active practice at the bar, I do not read his Instructions, drafted by HSBC, as specifying exactly how these particular limited recourse loans would work. He was also informed in terms that these were genuine commercial transactions.

16. To be fair to the Claimant, he would doubtless say, if given free rein, that these were genuine commercial transactions, but were high risk. The fact that so many of them failed is nothing to the point: hindsight gives a distorted perspective. He would doubtless say a number of other things too. But whether he has raised an effective challenge to the sufficiency of the evidence in the context of the CPS's charging decision and its subsequent maintaining of this prosecution is a matter which I will have to examine.

The Essential Facts from the Claimant's Perspective

17. What follows in this section of my judgment is a factual narrative which largely reflects the material Mr Bowers wished me to consider. In that sense, this narrative may be envisaged as the Claimant's best case on the facts. Mr Jonathan Kinnear KC and Mr Alan Payne KC presented a somewhat different narrative which I will be summarising later.

18. In or about November 2010 HMRC commenced a criminal investigation into the ZP Investment Products ("Operation Lunar"). In October 2012 the Claimant was made a suspect. He attended an interview under caution with HMRC officers in January 2014. In a prepared statement he said:

> "… every aspect of the transactions under investigation had been advised upon by credible professional advisers … any proper and fair evaluation, of the contention by HMRC of suspected criminal activity, should be considered against the background of, and be informed by the fact of, the involvement of the many independent professional individuals and organisations."

19. Although the Claimant highlighted the involvement of a number of individuals and organisations, his principal target was HSBC. His pleading states that HSBC responded to a production order in February 2014 by providing 22 ring binders of material. It is asserted that the centrality of HSBC's role was obvious. The Claimant says that the real reasons for not pursuing lines of enquiry relating to HSBC were that the bank was viewed as a "political hot potato" and, as the prosecutor was later to say in disciplinary proceedings brought against him, there was:

> "… a big debate as to whether we should take a reasonable line of enquiry. HMRC were very reluctant to get involved with HSBC as in their opinion it would distract the jury from the fraud and would enable [the Claimant] to blame [HSBC]."

20. On any view, the investigation was proceeding slowly. The Specialist Fraud Division of the CPS became involved in 2014. In November 2014 the CPS was sent a lengthy report on Operation Lunar which had been prepared by Mr Paul Millington of the HMRC. Counsel was instructed by the CPS in early 2015.

21. Another suspect in Operation Lunar, Mr Richard Anderson, brought judicial review proceedings challenging the failure of the CPS to make a charging decision within a reasonable time. Mr Curt Wise, a Unit Head within the Specialist Fraud Division of the CPS, provided a witness statement in connection with the judicial review in early August 2015. In it he made the following points:

    (1) At the time the papers were submitted to the CPS by HMRC, the latter said that it was HMRC's biggest investigation.

    (2) Both James Lewis and he were responsible for this investigation, although Mr Lewis had more day-to-day involvement in it.

    (3) He had been informed by HMRC that there were estimated to be 300 bankers' boxes of unused material (this excluded from account the 57 million items of digital material).

    (4) A significant number of investigative and evidential steps needed to occur, including interviewing witnesses, reviewing and scheduling the unused material, and producing an overarching narrative statement by the lead investigator (who was Mr Millington).

22. Further, Mr Wise told the Court:

> "… in my opinion I would not be acting in accordance with the Code for Crown Prosecutors if I were to make a charging decision on the Claimant in this investigation at the present time

> or within the very narrow window of time that the Claimant has suggested. The reason for that is that the investigation has not concluded. I regard it as vital that all the charging decisions in this investigation are made at the same time and with the great deal of care that the Court would expect. …
>
> Not only would making a decision before the investigation had concluded not be in accordance with the Code … it would also create very real logistical difficulties …"

23. Despite all the work that needed to be done, Mr Wise envisaged that a charging decision could be made by 30th November 2015.

24. Collins J did not make an order in the judicial review proceedings because an undertaking was given to him by the DPP that a charging decision would be made by 30 November 2015. It was for that reason that permission to proceed with the judicial review was not granted.

25. Although it is correct to say that no undertaking was given in relation to the Claimant, the CPS had made it clear to the Court that all charging decisions should be made at the same time. It follows that both HMRC and the CPS believed that this was the deadline to which they were working. There is force in Mr Bowers' submission that this belief was the reason why a premature charging decision was made in December.

26. There were conferences with counsel on 23 November and 9 December 2015, and he also provided a written advice. Nine co-defendants were charged in late November 2015 and the Claimant was charged under the written charge and requisition procedure on 10 December 2015. The charges laid against the Claimant were:

    (1) Conspiracy to cheat the public Revenue contrary to section 1(1) of the Criminal Law Act 1977, the particulars being that he "between 1 January 2007 and 31 December 2012 with intent to defraud, conspired with others to cheat the Commissioners of Her Majesty's Revenue and Customs, of public revenue, namely income tax, in respect of the use of arrangements … in order to make claim for capital loss relief"; and

    (2) Cheating the public Revenue contrary to common law, the particulars of which were that the Claimant "between 1 January 2007 and 31 December 2012 with intent to defraud, cheated the Commissioners of Her Majesty's Revenue and Customs of public revenue, namely income tax, by making claims for capital loss relief."

27. On 9 December 2016 Mr Lewis wrote to the Claimant's solicitors in the criminal proceedings assuring them that the decision to charge him was "made following detailed consideration of the evidence having applied the Code". That detailed consideration had been given "by myself, counsel and HMRC".

28. The Claimant's pleaded case is that at the time of charge: (a) there had been no investigation into the role played by HSBC, (b) no disclosure schedules had been produced, nor were any near completion, (c) there was no signed, or accurate, overarching statement from Mr Millington, and (d) HMRC had not even started to review the unused digital material. The Claimant adds (and I take this slightly out of

chronological sequence) that it was not until 3 March 2017 that Mr Lewis asked HMRC to consider investigating Mr Bowman of HSBC "with a view to prosecuting him as it is clear to counsel and I that he is very much involved in these kinds of arrangements". It is unfortunate to say the least that Mr Bowman's name had been wrongly redacted in the documents disclosed to the Claimant in the criminal proceedings.

29. During the course of 2016, schedules of some of the unused material were produced. The Claimant is highly critical of their quality, and I will be returning to that topic in the context of the misfeasance claim.

30. On 2 March 2017 Ms Naheed Hussain, Deputy Head of the Specialist Fraud Division, wrote to the Claimant's solicitors assuring them that she had read "all the prosecution material that I considered to be relevant" and was satisfied that the Full Code Test remained fulfilled.

31. On 19 April 2017 Ms Caroline Dorman took over Mr Lewis' role. She attended a three-day dismissal hearing at Birmingham Crown Court before HHJ Drew QC. Ms Dorman, concerned as she was about defence criticisms of the "shoddy" way in which the CPS had managed the case, took the opportunity to make appropriate inquiry. She soon discovered that that the case was in a complete mess. In her view, CPS records relating to disclosure were inadequate (in particular, the CPS did not have any records of what material had been disclosed to which defendant for tranche 1 disclosure), the x-drive for the case was in a state of disarray, and:

> "As the week progressed, issue after issue arose. The sheer scale of work outstanding and remedial work required and that needed to be immediately actioned was phenomenal."

32. In terms of the work to be done, this included, but was not limited to, redoing the whole of the initial disclosure exercise, owing to the errors that she had identified, and carrying out virtually all the digital disclosure exercise, in the face of a direction to complete Part 1 by the end of May 2017.

33. Ms Dorman's immediate recommendation to one of her line managers, Ms Elizabeth Bailey, was that greater resources should urgently be allocated to the case. On 25 April it was recommended that new counsel be instructed.

34. On 15 May 2017 HHJ Drew QC handed down his reserved ruling dismissing the charges on the basis that they disclosed no offence known to law. Making a claim for capital loss relief was, he said, prima facie lawful: it is only unlawful in certain circumstances and those had not been specified.

35. Mr Bowers submitted that the CPS, and HMRC as joint prosecutor, are estopped from denying that they did not have reasonable and probable cause to bring and maintain these proceedings in the light of this judicial ruling. In my view, that submission is unrealistic. Mr Bowers placed reliance on a Scottish case in support of his argument. I consider that the straightforward answer to the submission is that (1) the charge was defective because it missed out a few words, and (2) on the premise that the charge could not be amended (which I doubt, but I assume in the Claimant's favour that it could not be), there is no real prospect of proving malice in this connection. At its

highest, any incompetence in connection with the formulation of the charge was just that.

36. On 2 August 2017 Ms Elizabeth Bailey, CPS Unit Head based in Manchester, sent a report to the Head of the Specialist Fraud Division. She was highly critical of the CPS. The following extracts from Ms Bailey's report are sufficient to paint the picture:

> "I can find no evidence that either the reviewing lawyer [James Lewis] or counsel had read the evidence sufficiently to satisfy the evidential limb of the test.
>
> …
>
> Add to that:
>
> - Succumbing to pressure to charge when clearly not ready to do so;
>
> - …
>
> - Instructing counsel whose instinct about the case was sound but he did not have the time needed to read and consider the evidence and prepare charges that accurately reflected the evidence. Because the reviewing lawyer had not read the evidence, he had no idea as to the work required and therefore both leading and junior counsel's tasks and hours were understated and inadequate.
>
> - Failing to "front load" the case in relation to our disclosure duties prior to charge. In his note book, JL records at a conference on 3 March 2015 that he advised HMRC that the disclosure exercise could not be completed prior to charge, if it were to be completed first, it would delay charge by another 12 months. Instead, HMRC should continue to schedule material. Post charge, we seemly [sic] took a "keys to the warehouse" approach. Had we reviewed the unused material properly [critical words redacted]. We should also have realised that there were reasonable lines of inquiry in relation to HSBC that were necessary …"

37. Following the dismissal of the charges, the Claimant applied for costs under section 19 of the Prosecution of Offences Act 1985. To be successful he had to show that he had incurred costs "as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings". The Claimant made a large number of disclosure requests within the costs application. On 12 December 2017 a "Prosecution Statement of Position" was filed in response to the costs application. The author of the document made it clear that the position statement was on behalf of the Crown. No attempt was made to differentiate between the roles of the CPS and HMRC respectively.

38. The position statement made the following concessions:

(1) "improper" is more serious than either negligence or unreasonableness.

(2) In the light of authority, "improper" means "starkly improper, so that no great investigation into the facts or decision-making process is necessary to establish it".

(3) There was a fundamental failure of the disclosure process before dismissal which amounted by a failure by the Crown properly to apply the Criminal Procedure and Investigation Act 1996 ("the CPIA"). This failure was clear and stark.

(4) There was an equally clear and stark failure to follow reasonable lines of inquiry in relation to HSBC, an organisation flagged up by the defence at an early stage.

(5) The review was nowhere near concluded. If further concessions became appropriate, they would be made.

(6) Given the CPIA failures, it had proved necessary to begin the entire disclosure process afresh. A decision on a Voluntary Bill of Indictment was at least one year away.

39. Item (6) above amounted to tacit admissions that the Full Code test could not be met as matters stood in December 2017, and that it could not properly have been met in December 2015 and at all material times thereafter.

40. In February 2018 Ms Janine Smith, Chief Crown Prosecutor in CPS East Midlands, concluded a special investigation report into Operation Lunar. In her view, Mr Lewis had failed in his duty properly to review all the material, and he also relied too heavily on counsel's advice. Mr Lewis did not follow relevant guidance on the "front-loading" of disclosure and should have ensured that HMRC complied with their disclosure obligations under the CPIA. The guidance stated:

> "… in any serious or complex case the CPS prosecutor will not normally authorise charging notwithstanding the strength of the evidence unless the disclosure exercise is sufficiently advanced and initial disclosure can be completed and served at or shortly after charge. "

41. On 19 March 2018 the CPS wrote to the Claimant's criminal solicitors. They were told that a Voluntary Bill of Indictment would not be sought. This was because in the light of the case history it was considered to be inappropriate to make such an application. It was stressed that this was not a Code test decision but one made on the basis that the instant case did not fall within the exceptional category identified by Fulford LJ in the *Celtic Energy* case. It was not conceded, however, that the schemes the subject-matter of the investigation were either commercial or lawful.

42. On 22 March 2018 Ms Helen Malcolm QC prepared what she called, "CPS Note for Hearing" due to take place the following day. She informed the Court, in line with the letter I have just referenced, that a decision had now been taken not to apply for a Voluntary Bill of Indictment, and on behalf of "the Crown" made the following additional concession:

> "The prosecution accepts that the charging decision in the particular circumstances of this case was premature. This admission should be read in the context of the two admissions made previously the bear on the question of whether the decision was premature and whether the investigation had been completed. It is further accepted that not all available evidence (including material capable of informing the quality of that evidence) had been properly considered at the time that the charges were brought. It is accepted that these acts and emissions are stark and clear errors for the purposes of section 19 POA."

43. On 11 May 2018 Ms Dorman wrote directly to the Claimant. She went further than the concessions made in the March documents. She accepted on behalf of the CPS that Mr Millington's statement contained inadmissible material and that it should not be "construed as a definitive or accurate … summary of the evidence". Further:

> "… other elements of the case were not fully set out or explained. Please note in this context that at the time the decision not to apply for a VBI was made we were not in a position to apply the Full Code Test. It follows that we cannot say with certainty how any new case summary would have been framed."

Ms Dorman did not specify the inaccuracies in Mr Millington's statement.

44. Mr Bowers draws on these additional concessions in support of his overarching argument that, if – as it appears to be accepted – the Full Code Test was not met in March 2018, it must follow that it was not met at all material times beforehand.

45. On 11 May 2018 Mr Lewis received a final warning at the conclusion of disciplinary proceedings. I would rather not dwell on the detail in this public judgment although I have considered the terms of the letter that he was sent. It is certainly one possible reading of Mr Lewis' "defence" in these disciplinary proceedings was that he was placed under undue pressure by his line manager to complete the charging decision within four months. I consider that this is highly likely to be a reference to the period between early August and the end of November 2015.

46. HMRC initiated "Operation Ice-Rink" to review the quality of its performance in investigating these schemes. The key adverse findings of the investigation for present purposes were that officers of HMRC failed to comply with disclosure obligations under the CPIA by failing to provide appropriate management and oversight of the case; that officers of HMRC failed to comply with disclosure obligations by mis-managing unused material; and officers of HMRC failed to comply with disclosure obligations under the CPIA by not making the necessary and appropriate revelation to the prosecutor of material obtained during the investigation.

47. Mr Bowers referred me to other Defendant documents in support of his case. I bear these in mind but I have not thought it necessary to refer to them.

The Essential Facts from the Perspective of the CPS

48. Mr Kinnear urged me to pay particular attention to the contemporaneous documentation rather than the views of others who arrived on the scene later.

49. The Amended Particulars of Claim target Mr Lewis, Mr Wise and Ms Hussain. I have already set out their respective roles and responsibilities, although I need to add that for the purposes of the prosecution Mr Lewis was technically "the prosecutor" at all material times between 10 December 2015 and 19 April 2017, and he was also the reviewing lawyer from November 2014. Mr Wise ceased being Mr Lewis' line manager around the end of December 2016. Ms Hussain was Deputy Head of the Specialist Fraud Division between March 2015 and July 2017.

50. The obligation to comply with the Full Code Test reposed with Mr Lewis. The key elements of that test are extremely familiar, and in my view I need refer to just three paragraphs of the Code to Crown Prosecutors issued under section 10 of the Prosecution of Offences Act 1985:

> "4.2 In most cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed …
>
> 4.3 Prosecutors should any take such decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and the decision taken later in accordance with the Full Code Test set out in this section.
>
> 4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be."

51. Mr Kinnear accepted that the Full Code Test requires an objective assessment of the available evidence. He also accepted that the proper application of the test requires an objective appraisal of whether sufficient information exists to justify a decision being taken at the point in time under consideration. In my opinion, that assessment includes an evaluation of whether further lines of inquiry should be undertaken and whether the process of disclosure is sufficiently far advanced. Although, as I will explain, the obligation to perform the disclosure process fell on HMRC as investigator, that did not absolve the CPS from its responsibilities in connection with the overall conduct of the prosecution. Under section 3(2)(ee) of the Prosecution of Offences Act 1985, one of the functions of the DPP is:

> "to give, to such extent as he thinks appropriate, and to such persons as he considers appropriate, advice on matters relating to:
>
> (i) a criminal investigation by the Revenue and Customs; …"

Although the principal focus of this provision is the giving of high-level advice by the DPP herself in connection with an HMRC investigation, I consider that if a prosecutor is aware that obvious lines of inquiry have not been undertaken by HMRC and/or its disclosure is in a pitiful state, he is duty-bound to do something about it.

52. There was a case conference with counsel on 9 December 2015. In attendance were Mr Lewis as well as, representing HMRC, Mr Chris Hyland (team leader), Mr Paul Millington (case officer), Ms Celestine Taylor (disclosure officer), and Ms Emma Mulligan (team member). Counsel was provided with copies of detailed representations made on behalf of the Claimant. Counsel provided his written advice on charge shortly after the conference. It is not clear from this document exactly when that was, but it must have been before the charges were laid under the requisition procedure on 10 December.

53. I have examined counsel's advice closely. Although it does not condescend to much detail, the advice does highlight the key features of these arrangements, namely that each of them "was designed to fail, or at the very least had as their main purpose the securing of a tax advantage". As counsel explained:

> "Accordingly, any person who deliberately designed, formed, promoted or used such an arrangement/arrangements in order to gain a tax advantage for themselves and/or another/others, knowing that they were not entitled to do so, is prima facie guilty of cheating HMRC. …"

54. Counsel did not advise that there was sufficient evidence to justify charging all the suspects. That, submits Mr Kinnear, is an important point.

55. As for the position of the Claimant, counsel's advice was as follows:

> "A partner in Zeus. Not as visible as Mr Ryder in respect of the arrangements. Nevertheless, he was a party to relevant emails from the very beginning of the enterprise, in 2007, and was the recipient and author of other key emails/correspondence throughout the operation of the enterprise which are indicative of knowing involvement in the formation and promotion of arrangements which had as their main purpose the securing of a tax advantage, and therefore is an enterprise to cheat HMRC as it primary purpose. [The Claimant] was also an "investor" and latterly financier and director in respect of [three schemes]."

56. Counsel also put his name to the Case Summary, the version of which I have seen is dated April 2016. I infer that this summary was a running document which was intended to be amended in advance of the trial. It is also reasonable to deduce that counsel relied heavily on Mr Millington's statement.

57. In November 2016 a co-defendant, Mr Richard Royden, applied to dismiss the charge of cheating HMRC. On 21 November 2016 HHJ Drew QC refused the application, holding that there was a case to answer.

58. On 21 April 2017, which was just after Ms Dorman's advent on the scene, counsel (that is to say, two QCs and one junior), provided a Note as to the current state of play. By way of summary, counsel advised as follows:

    (1) The Indictment was in proper form and represented the optimum manner of presenting the allegations against the defendants.

    (2) Although there remained a substantial amount of ongoing work in relation to disclosure, which would require considerable resource, they could be "content" with the manner in which disclosure was being conducted. In particular, initial disclosure of the hard copy material had taken place and "significant progress" had been made in respect of electronic material.

59. This "Note" was prepared just before this counsel team was removed from the case. Given Ms Dorman's concerns about the state of disclosure and the later admissions made on behalf of the Crown which I have summarised, it is not clear (1) how abreast counsel were of the detail, and (2) what counsel had been told by Mr Lewis.

60. As is made clear from para 37 of the CPS's Defence, counsel were also heavily involved in the decision-making process in relation to the position of HSBC. There were conferences with counsel on 10 August 2015, 24 January 2017 and 23 February 2017. Mr Lewis' position in his disciplinary proceedings has been set out under §19 above. In an email sent by Mr Lewis to Mr Millington on 24 March 2017, the latter was asked to reconsider investigating Mr Bowman of HSBC with a view to prosecuting him.

61. Mr Kinnear's submissions on the merits rightly focused on the case against Mr Lewis. Although he did not put the matter quite in these terms, if the Claimant's case on malice does not succeed against Mr Lewis (taking his case at its reasonable pinnacle), it could not succeed against Mr Wise and Ms Hussain. In the disciplinary proceedings Mr Lewis was criticised for relying too heavily on counsels' advice. In his final warning letter, it was not remotely suggested that he had acted in knowing dereliction of his duties.

The Essential Facts from the Perspective of HMRC

62. The Amended Particulars of Claim target the following individuals: Mr Paul Millington; Mr Joe Rawbone; Mr David Cook; and, Ms Celestine Taylor.

63. Mr Millington was the case officer and lead investigator from November 2014 and February 2015 respectively, and he remained the lead investigator until the investigation concluded with the dismissal of the charges. There is some dispute between the parties as to whether he was the disclosure officer before May 2012 but in my view it does not matter. It is not arguable that any failures that occurred before that date could have been causative of anything.

64. Mr Rawbone was Assistant Director of the investigation from November 2010 until January 2015. He was OIC from August 2013 until February 2015.

65. Mr Cook was the disclosure officer from August 2013 until February 2014. Thereafter, he appears to have had some continuing involvement in the case. For example, he attended a case meeting with the CPS on 2 February 2015.

66. Ms Taylor was, at least according to the Amended Particulars of Claim, the disclosure officer from April 2014 to July 2016. Para 100 of HMRC's Defence pleads that she was disclosure officer between June 2015 and 12 December 2017. Although Ms Taylor had some involvement earlier, her witness statement confirms those dates, and in my view I should proceed on that basis. Regardless of the precise timings, I have reservations about the Claimant's forensic decision to involve her at all, but for the time being she remains in the picture.

67. HMRC's investigatory obligations were governed by a Code of Practice issued under section 23(1) of the CPIA in 2015 ("the CPIA Code"). This placed specific and well-known duties on the officer in charge of an investigation, investigators and disclosure officers. The principal duties are to retain and record the relevant material, to review it and then to reveal it to the prosecutor. The Attorney General's Guidelines on Disclosure emphasise the need for investigators and disclosure officers to work together with prosecutors to ensure that disclosure obligations are met, that there should be a lead disclosure officer who is the focus for inquiries etc., and for investigators and disclosure officers to be deployed on cases which are commensurate with their skills, training and experience. SFO guidance in fraud cases is that the disclosure process should be "front-loaded" if possible.

68. In his careful and patient oral presentation, Mr Payne sought to highlight a number of evidentiary matters in support of his overarching contention that the claims have no real prospect of success. I do not propose to set out all the points he made; I shall focus on the most important.

69. First, Mr Payne submitted, and I agree, that there is no evidence to suggest that Mr Millington deliberately withheld information about HSBC and/or any disclosure failings from the CPS, and there is no pleading to that effect. Indeed, I would go one step further. By 9 January 2015 at the latest, the CPS had been made fully aware of all relevant aspects of the case, including the state of the investigation and disclosure.

70. Secondly, Mr Payne drew my attention to a number of passages in Mr Millington's statement dated November 2014. This is a very lengthy document which I have read in full. To be fair to Mr Millington, he did say in terms that Mr Bowman had a clear understanding of the nature of the transaction and in the concluding section, under "status of parties", the further point is made that Mr Bowman did not comply with his duties under the Finance Act 2007 to submit documents relating to these tax avoidance arrangements to HMRC. At the same time, Mr Millington fairly stated that it was the Claimant's defence that he acted at all material times under the cloak of professional advice. On the other hand:

> "CPS have indicated that the number of suspects and nature of the complexity of the case requires consideration of reducing the number of suspects. I recommend that in order to bring this to manageable levels a number of trials are sought."

71. Thirdly, Mr Payne took me through some of the contemporaneous documentation bearing on the thinking of HMRC officers at the time. In the time available, he could not include everything that he wished to draw to my attention but I have ensured that I have read all the documents referenced in his skeleton argument.

72. On 2 February 2015 there was a case meeting between various CPS and HMRC officers. The handwritten notes of the meeting were taken by Ms Taylor. The following was discussed:

> "Evidence
>
> Additional evidence available and scanning process started. Expect it available in a couple of months. Not to worry on timescale as have enough to charge now.
>
> Disclosure
>
> Essential disclosure officer knows the case. No approach into charging decision until disclosure done. Front load but somewhat [?] continuous process until up to and including trial. Good to have substantial unused (non-sensitive) in place. Need a protocol for digital material. …"

Someone else's notes of the same meeting indicates that there was "6 months disclosure from HMRC".

73. On 3 March 2015 there was a conference with counsel attended by officers of the CPS and HMRC. In relation to disclosure Mr Lewis advised:

> "… that this will not and cannot be finished before charge, to do so would delay charging by a year. There should be sufficient time to complete this provided HMRC continue to schedule the material."

74. In his disciplinary proceedings Mr Lewis stated that he expected that HMRC would be scheduling the material although in March or April 2015 he found out that it had not. He agreed that he should have checked on these matters earlier.

75. There was another case conference with counsel on 10 June 2015. Counsel advised on the need for everything to be scheduled, and Mr Millington stated that HMRC would try to get hard copy schedules by August. The position of HSBC was also discussed:

> "Counsel: not chase Alliance & Leicester/HSBC or individuals.
>
> Mr Millington: only thing to be aware is Ryder and Hughes both say HSBC etc. involved.
>
> Counsel: Jury will have to decide … HSBC not promoting scheme. Not in public interest. Another player amongst others not being prosecuted."

76. On 16 February 2017 (the same) counsel was asking HMRC "whether there is a case to be taken forward against employees of HSBC". On 20 February a solicitor employed by HMRC sent an email to amongst others Mr Millington following a conversation that they had. Based on what he had been told by Mr Millington, the solicitor summarised the position and stated that it seemed to him that:

> "there was plenty of evidence that the HSBC employees were aware of the big lie at the heart of the fraud [and] there seemed to me to be plenty to suggest that the HSBC employees knew that this was in fact a loss generating enterprise designed for the dominant (sole) purpose of generating losses against income tax."

77. At a conference with counsel on 23 February 2017:

> "it was generally agreed that we must consider the way forward with reviewing the HSBC/Bowman case re charging for the offence of facilitating tax evasion. This is an on-going matter."

78. Fourthly, Mr Payne drew attention to various features of the report into Operation Ice-Rink which supported his case. The Claimant for his part does not accept that these findings went anything like far enough. According to the report, HMRC obtained a quantity of material from HSBC in 2014. At a conference with counsel in March 2015, the HMRC case team apparently "pushed the case" against HSBC. The CPS were against this course of action, wishing to minimise the number of suspects. By March 2017, when Mr Lewis seems to have changed his mind, "it may have been considered far too late to include them in the prosecution".

79. Further:

> "Operation Ice-Rink has not identified any evidence that there was any political motivation not to pursue HSBC and its employees. Nor has any material been provided by [the Claimant] or his team to contradict this view.
>
> The available evidence indicates that active consideration was given to the position of HSBC and decisions were made by Prosecutors on matters to do with case management rather than on any other grounds."

80. Fifthly, Mr Payne drew my attention to the role of Ms Taylor. In her witness statement dated 12 October 2023 she made clear that, although she had received some training, Operation Lunar was her first case as a disclosure officer. When she took over there were no MG06Cs and MG06Ds. She started preparing draft schedules and sent them to Mr Lewis for comment. He said that the "descriptions are really good". According to her statement, considerable progress was made in the scheduling of unused material with the assistance of at least 12 colleagues. She, and no doubt they, were oblivious to any difficulties until Ms Dorman arrived on the scene in April 2017. The latter was soon to advise, perhaps on newly-instructed counsel's advice, that the whole disclosure exercise would need to begin afresh.

THE CLAIM IN THE TORT OF MALICIOUS PROSECUTION

81. The four ingredients of the tort are too well-known to merit exposition.

82. In my judgment, the Claimant has no real prospect of establishing that (1) HMRC was the prosecutor, and (2) regardless of the identity of the prosecutor, that there was no

real and probable cause for bringing and continuing this prosecution. These are straightforward issues which may readily be addressed summarily.

Only the CPS was the prosecutor

83. Mr Bowers' argument is that both the CPS and HMRC were prosecutors in this case, and that it would be artificial to hold otherwise. They were "joined at the hip" or acted "symbiotically". The Amended Particulars of Claim do not go so far as to allege a conspiracy, and in my opinion the Claimant's restraint in that regard was realistic.

84. Both Mr Kinnear and Mr Payne submit that there was only one prosecutor in this case and that was Mr Lewis. I agree.

85. In *Martin v Watson* [1996] 1 AC 74, the issue was whether a complainant who had falsely and maliciously made a complaint (in that case, of a sexual offence) could be regarded as the prosecutor notwithstanding that she had not signed the charge sheet. Lord Keith of Kinkel, giving the leading Opinion for the House of Lords, held that she could. This was because she was in substance the person responsible for the prosecution having been brought. Further:

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court on the matters in question, it is properly to be inferred that he desires and intends that the person named should be prosecuted." (at 86G)

86. Lord Keith also endorsed the approach adopted by the trial judge, who found that the complainant was "indeed actively instrumental in setting the law in motion against the plaintiff" (at 87E).

87. In *Commissioner of Police for the Metropolis v Copeland* [2014] EWCA Civ 1014, the Court of Appeal, Moses LJ giving the sole reasoned judgment, held that the "simple quest" is to identify the person who is responsible for the prosecution (para 27). In my opinion, that formulation does not permit the kind of wide-ranging and unprincipled inquiry urged on me by Mr Bowers. What Moses LJ said was in the context of applying Lord Keith's reasoning and conclusion. Further, it is implicit in Moses LJ's judgment that there could be only one prosecutor.

88. The Court of Appeal returned to this issue in *Rees and others v Commissioner of Police for the Metropolis* [2018] EWCA Civ 1587. On the facts of that case, a police officer suborned a witness to give a false statement. The trial judge stated that the officer "contaminated the source of justice". McCombe LJ reviewed a number of earlier cases where the courts had been addressing situations where deliberately false accounts were given by X to the relevant prosecuting authority, thereby rendering it impossible for the latter to exercise an objective and independent judgment. In short:

> "58. It seems to me that the case falls squarely within what this court said in *AH(unt) v AB*. DCS Cook deliberately manipulated the CPS into taking a course which they would not otherwise have taken (Sedley LJ). The decision to prosecute was

> "overborne and perverted" (c.f. Wall LJ) by DCS Cook's presentation of the material to the CPS with the implicit suggestion that its procurement was not tainted in the manner that it was.
>
> 59. This is not to say, as Mr Johnson submitted it was, that the mere provision of false information to a prosecuting authority leading to a prosecution makes the provider a prosecutor. I accept that the test is, as he argued, "drawn more restrictively". However, the cases are fact specific: see in this respect the very different results reached in not entirely dissimilar cases in *Martin v Watson* and in *AH(unt) v AB.* This present case was one in which DCS Cook took it upon himself to present to the independent prosecutor for a prosecution decision a case which he knew included an important feature procured by his own criminality. There is nothing more likely to have "overborne or perverted" the decision to prosecute. The CPS were deprived of their ability to exercise independent judgment."

89. Mr Bowers also relied on para 37 of the judgment of the Court of Appeal, Criminal Division (Rose LJ, Vice-President, Astill and Richards JJ) in *AG's Reference No 44 of 2000* [2001] 1 Cr App R 416. However, in the passage relied on it seems to me that the Court was addressing a rather different issue, namely the indivisibility of the Crown in the context of a criminal prosecution, and whether representations made by other than the CPS were binding.

90. In the instant case, there is no evidence of any deliberate manipulation of the CPS by HMRC, or that the former's decision to prosecute was overborne and perverted by the latter. As I have already said, in early 2015 the CPS was fully aware of the state of the investigation *vis-à-vis* HSBC and the progress, or lack of it, in relation to disclosure. In any event, it is extremely difficult to see how omissions in these respects could possibly amount to deliberate manipulation. When counsel advised Mr Lewis in December 2015 that it was appropriate to charge the Claimant, he was able to give independent and objective advice which was not tainted by anything HMRC had done or failed to do.

91. It is not arguable that HMRC was the prosecutor, and for this reason alone the claim in the tort of malicious prosecution cannot succeed against the First Defendant.

92. In the circumstances, it is not necessary for me to decide whether, as a matter of principle, there can be only one prosecutor. That probably is the law. The real point here is that HMRC was not the prosecutor.

Reasonable and probable cause

93. The claim in the tort of malicious prosecution cannot succeed if the Claimant has no real prospect of showing that the CPS did not have reasonable and probable cause for initiating and maintaining the prosecution.

94. Here, Mr Bowers' argument is that there never was a fit case to be tried. That much was conceded in the documents I have highlighted under §§36-43 above. In my judgment, however, Mr Bowers is asking me to apply the wrong test. For "reasonable and probable

cause", the only issue to address is whether there was sufficient evidence to prosecute the Claimant at the time it was initiated, and at all material times thereafter.

95. The classic formulation of the test is Lord Devlin's in *Glinski v McIver* [1962] AC 711, at 751-752:

> "This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives "reasonable" and "probable") for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v Faulkner*. This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson v Vandasseau*. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a fit case to be tried. As Dixon J (as he then was) put it, the prosecutor must believe that "the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted: *Commonwealth Life Assurance Society Ltd v Brain*."

96. Two points should be made about this formulation. First, "fit case to be tried" is capable of being misunderstood. Lord Devlin was not of course referring to the Full Code Test which did not exist in the early 1960s. The test was, and is, sufficiency of evidence; and "fit case to be tried" is another way of making the same point. Secondly, Lord Devlin did not comment on Upjohn LJ's somewhat broader formulation in *Abbott v Refuge Assurance Co Ltd* [1961] 1 QB 432, at 454, although that authority was cited to the House of Lords. In my view, what Upjohn LJ (as he then was) said cannot be regarded as authoritative.

97. *Glinski* was applied, without refinement or gloss, by the Court of Appeal in *Thacker v CPS* [1997] The Times, 29 December 1997. In *Coudrat v Commissioners of Her Majesty's Revenue and Customs* [2005] EWCA Civ 616, Smith LJ (sitting with Mummery LJ and Sir Martin Nourse), encapsulated the position, at para 42:

> "When considering whether to charge a suspect, consideration must be given to the elements of the offence with which it is intended to charge him. There must be prima facie admissible evidence of each element of the offence. Although anything plainly inadmissible should be left out of account, we do not think that, at the stage of charging, it is necessary or appropriate to consider the possibility that evidence might be excluded at the trial after full legal argument or in the exercise of the judge's discretion, Nor is it necessary to test the full strength of the defence. An officer cannot be expected to investigate the truth of every assertion made by the suspect in interview."

98. Next, in *Qema v News Group Newspapers Ltd* [2012] EWHC 1146 (QB), Sharp J (as she then was) held, at para 71:

> "Although the matter has been put in various ways in the decided cases, in my view, it is clear (whatever the language used) that whether one considers the objective or subjective element of reasonable and probable cause, the focus is and always has been on the sufficiency of evidence to support the prosecution of the offence in question., and the defendant's knowledge of and honest belief in that. …"

99. In *Rudall v CPS* [2018] EWHC 3287 (QB), Lambert J explained that "reasonable and probable cause" imported a lower test (from a prosecutor's perspective) than the Full Code:

> "80. I do not accept that the evidential Code test is the correct test to apply for the purpose of examining whether there is reasonable and probable cause. The exercise undertaken by the prosecutor in that context is to identify whether there is a realistic prospect of conviction which is a different, and higher, threshold than that which I must apply when considering whether there is a case fit to be tried or a proper case to lay before the court. The intensiveness of the scrutiny to be applied to the evidence is correspondingly different and greater than that relevant to the consideration of reasonable and probable cause. The evidential stage of the Code test includes an analysis of, not just the admissibility of the evidence, but the importance of the evidence, whether the evidence is reliable and credible and the impact of any defence or other information put forward by the suspect. By contrast, my role, in examining whether there is a reasonable basis for an honest belief in the charge by the prosecutor, is to address the question of whether there is prima facie admissible evidence in respect of each element of the offence (see Smith LJ in *Coudrat*), setting aside evidence which is plainly admissible. I accept that there may in some circumstances be a feature (which is, or should be, obvious to the reasonable prosecutor) which raises such a large question mark over whether otherwise admissible evidence could be "used in court" (to adopt the expression used in the Code) that a wider consideration including, for example, of the reliability of the evidence is reasonably justified. But, even in those circumstances, the degree of scrutiny will be at a level consistent with the need to establish whether the evidence could prima facie be used in court and not whether at trial there may be a successful argument mounted by the defence to exclude it."

100. Mr Bowers relied on paras 74 and 75 of McCombe LJ's judgment in *Rees*, in particular the latter's references to a case fit to be tried. In my opinion, these paragraphs do not bear the weight placed on them by Mr Bowers. Apart from doing no more than applying Lord Devlin's oft-cited passage in *Glinski*, all that McCombe LJ was saying was that a case founded on tainted evidence was not based on sufficient evidence.

101. I am not suggesting that the failure to pursue a straightforward and plainly necessary line of inquiry could never generate the absence of reasonable and probable cause,

particularly if, without conducting that inquiry, a fair and objective assessment of the evidence obtained to date showed that it was tenuous. It is unnecessary for me to define the limits of any such exceptional principle because the present case is so far away from falling within its scope.

102. In my judgment, there clearly was sufficient evidence to enable the CPS at all material times to form the view that the Claimant could and should be prosecuted, and it is unsurprising that the Amended Particulars of Claim do not suggest otherwise. Although he disavowed it at various places in his oral argument, Mr Bowers' case came close to equating "reasonable and probable cause" with the fulfilment of the Full Code Test, or something close to it. I consider that there was a clear *prima facie* case that this was an unlawful tax avoidance scheme which involved transactions which were destined to fail, or were highly likely to fail, and lacked any genuine commercial purpose. As part and parcel of that *prima facie* case, there was also clear evidence that the Claimant was fully sighted on the key salient aspects of these schemes, and therefore had the requisite *mens rea* for the common law offence of cheating the Revenue. Apart from various contemporaneous emails which I have been referred to, from which inferences as to his mental state are, at least arguably, capable of being drawn, the Claimant as an experienced commercial man would, at least arguably, have known the score.

103. The Claimant has a real prospect of proving that the failure to investigate HSBC was unwise, forensically naïve and wrong. The Claimant said from the outset that he acted with the benefit of the finest professional advice. Rather than just let the jury decide, that in and of itself should have led HMRC down the path of investigating HSBC. There was a brief discussion between Mr Kinnear and me as to where the HSBC investigation might have led. My conclusions on this topic are as follows. If it revealed that HSBC was aware in general terms of the "architecture" of these schemes but had not been made aware of relevant detail, no amount of evidence relating to HSBC could ever have availed the Claimant. If it revealed that HSBC was equally dishonest, that would be unlikely to have helped the Claimant either. If it revealed that HSBC was fully aware of how these schemes would be implemented in practice but believed that they were within the law, that *might* have assisted the Claimant. My assessment is that it was more likely that further investigations would implicate HSBC (my second category), which does appear to have been the position when they were eventually pursued. To say, as the Claimant does, that pursuing HSBC would have been likely to provide him with a solid line of defence is, in my judgment, untenable.

104. On any view, HSBC should have been investigated for the obvious forensic reason that the Claimant would have to be cross-examined on his contention that HSBC knew everything and yet gave the green light.

105. The authorities which I have cited demonstrate that the CPS's failure to undertake a line of inquiry which *might* just have been relevant to the Claimant's defence does not negative the existence of reasonable and probable cause.

106. In my judgment, the disclosure failures, whoever's fault these were, fall into the same category: they do not bear on the existence of reasonable and probable cause visualised in terms of the sufficiency of evidence. Timely discharge of disclosure obligations was of course essential to getting this case tried (and here I am not holding that because only HMRC had duties under the CPIA the CPS has a complete defence to the allegation). However, even taking the matter at its very highest I do not think that full disclosure

was capable of more than indicating *possible* lines of defence for the Claimant. That is not relevant to the existence or otherwise of reasonable and probable cause.

107. Given my conclusion that the Claimant has no real prospect of establishing that the prosecutor did not have reasonable and probable cause for beginning and then maintaining these proceedings, the issue of malice does not arise. Even so, I consider that I should comment on just two matters. First, there is force in the Claimant's case that a charging decision was made prematurely in December 2015 because the CPS believed that the undertaking given in the related judicial review proceedings applied to them. However, although relevant to the fulfilment or otherwise of the Full Code Test, this factor is not relevant to the issue of malice. A rushed decision does not have the hallmarks of a decision taken with an improper motive. Secondly, although there is some indication that the reluctance to pursue lines of inquiry against HSBC was generated by a perception in the CPS, at least at one stage, that to do so would be a "political hot potato", I do not believe that the Claimant has a real prospect of showing an improper motive. Not merely did the reasoning and motives of the CPS (and, indeed, HMRC) fluctuate on this issue, proof of an improper motive would require showing that relevant officers believed that an investigation of HSBC would be likely to help the Claimant and for that reason was not pursued. That is not the state of the evidence.

MISFEASANCE IN PUBLIC OFFICE

The Amended Particulars of Claim

108. The Amended Particulars of Claim identify as malicious the officers of HMRC and the CPS whom I have specified. In relation to HMRC, it is alleged that the relevant officers acted unlawfully and in breach of their statutory duties in connection with their disclosure obligations under the CPIA Code; that Mr Millington and Mr Rawbone acted unlawfully in failing to investigate HSBC; that Mr Millington signed a witness statement that he either knew or did not believe to be true; and that Ms Taylor unlawfully failed to discharge her obligations as disclosure officer in a number of ways. In relation to the CPS, it is alleged that Mr Lewis and Mr Wise, in breach of their duties under the Prosecution of Offences Act 1985 and the Code for Crown Prosecutors, took the charging decision prematurely in that it was taken at a time when it was known that not all reasonable lines of inquiry had been pursued, and it was also known that Mr Millington's evidence could not be relied on; and failed in their disclosure obligations in a number of respects. As against Ms Hussain, it is said that she failed to review the case in line with her statutory duty; and that, in doing so, she either knew that she was abusing her authority or was recklessly indifferent as to whether she was discharging her duty.

109. The allegations of bad faith are set out under paras 109-112 of the Amended Particulars of Claim, and I propose to set these out in full:

> "109. In acting unlawfully as particularised above, each of the identified public officers acted in bad faith and with targeted or untargeted malice. In particular:
>
> 110. First, each of the public officers either knew that the particularised acts were unlawful, or were recklessly indifferent as to whether they were lawful. Each unlawful act was a breach

> of a basic and essential requirement upon an OIC and/or DO and/or prosecutor in a criminal prosecution. Each public officer had a sufficient understanding of the statutory obligations upon investigators and/or prosecutors in a criminal prosecution to have known and appreciated that they were acting unlawfully, or must at least have been recklessly indifferent to the lawfulness of their acts.
>
> 111. Second, in acting unlawfully as particularised above, each of the public officers identified above foresaw, or were recklessly indifferent to, there being at least a *"serious risk"* (*Three Rivers (No.3)* [2003] 2 AC 1 at 247C, per Lord Hope), of the following harm being caused:
>
> (a) That the Claimant would be charged and prosecuted with a serious criminal offence (and/or that prosecution being maintained) in circumstances that there was no fit case to be tried;
>
> (b) That the Claimant, as a result of being charged and prosecuted, would suffer serious detriment to his reputation and to his business interests;
>
> (c) That those companies with whom the Claimant was closely associated would similarly suffer significant financial losses, including those of the assignors.
>
> 112. In support of the averment above, the Claimant will say that any prosecutor would have appreciated that a successful financier being charged with a significant criminal offence is likely to be caused significant harm to their business interests. Further, and in any event, the Claimant pointed to the devastating effect that a criminal prosecution would have upon his business reputation in his voluntary interview on 22 January 2014."

110. At the end of the hearing, in answer to a concern of mine and in the light of para 111 of the skeleton argument of HMRC, Mr Bowers clarified para 111(a) above. He adhered to his submission that there were unlawful acts perpetrated by the individuals whom his pleading had identified. He further submitted that, in the event that the Court found that there *was* reasonable and probable cause, it had been admitted by the Crown that the Full Code Test was not met in December 2015 and could not have been met at all material times thereafter. It follows that there should have been no prosecution at all. The relevant officers were aware that the Full Code Test could not be met and yet proceeded regardless, or were recklessly indifferent as to that fact. Accordingly, the pleader of para 111(a) was not using "fit case to be tried" as a synonym for sufficiency of evidence (c.f. Lord Devlin in *Glinski*, who *was* using the phrase exactly in that way), but was saying that the Full Code Test was not and never could have been fulfilled.

Relevant Authority

111. The principles laid down in *Three Rivers (No 3)* are well established and extremely familiar. The parties did not address me upon them (save to the extent that Mr Bowers made a short submission about untargeted malice, which I largely accept), and there is no need to go further.

112. Malice "covers not only spite and ill-will but any motive other than a desire to bring a criminal to justice": see Lord Devlin in *Glinski*, at page 766.

113. I was referred to *Carter v The Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) (Tugendhat J, at paras 35-38, and 66-71) and *Sandhu v HMRC* [2017] EWHC 60 (QB) (Lavender J, at paras 35-38, and 40-41). The need to provide proper particulars of allegations of bad faith is clear, as is the need to identify the individuals who are said to have been malicious.

114. In *Thacker*, Chadwick LJ set out the general approach to inferring malice in malicious prosecution claims:

> "The fact that someone in the Crown Prosecution Service may have been negligent or incompetent in the course of reaching a decision to commence or to continue the prosecution – whether by failing to evaluate the evidence correctly at the outset, or in failing to review the evidence after committal or in the light of new material – cannot, in itself, justify an inference of malice. If that is all the evidence that there is, the question of malice cannot be left to the jury. It is because, in many of these cases, that will be all the evidence there is, an attempt to dress up a claim in respect of negligence or incompetence in the guise of malicious prosecution must fail."

115. In *Young v The Chief Constable of Warwickshire Police and another* [2021] EWHC 3453 (QC), Martin Spencer J cited with approval para 26 of the judgment of Master Davison in the case under appeal, and applied the passage I have cited from *Thacker* to a misfeasance case "with equal or greater force":

> "26. The requirements at (c) and (d) above [in *Three Rivers (No 3)*] are onerous. In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularise the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable to be struck out. The claimant must also specifically plead and properly particularise both the damage and why the public officer must have foreseen it. A pleading that fails to do so is similarly liable to be struck out. These propositions have been established in a series of cases, including *Three Rivers* (see above), *Thacker v Crown Prosecution Service* CA, 16 December 1997 (unrep) and *Carter v Chief Constable of Cumbria* [2008] EWHC 1072 (QB)."

116. I pressed counsel on the meaning of "reckless indifference". At first blush, this concept appears to weaken or relax the mental element of the tort, and is more generous to claimants than malice *simpliciter* in the context of the tort of malicious prosecution where reckless indifference is not available. In my judgment, the test is undeniably a subjective one. At para 18 of his judgment in *Keegan v Chief Constable of Merseyside* [2003] EWCA Civ 936; [2003] 1 WLR 2187, Kennedy LJ explained that an essential ingredient of the tort is the presence of an improper motive, and – in appearing to endorse a submission of counsel – the claimant may prove a state of mind "of reckless indifference to the illegality of his act". That formulation was drawn from Lord Steyn's Opinion in *Three Rivers (No 3)*, at 192C-D. Lord Steyn also emphasised "the meaningful requirement of bad faith in the exercise of public powers which is the *raison d'être* of the tort".

Discussion

117. Mr Bowers had a metaphorical field day with the admissions made on behalf of the Crown in the costs proceedings and thereafter. Given that I had not read all this material in advance of the hearing, I probably gave the impression that I was finding the admissions as concerning as they were frank. I do not agree with Mr Kinnear that these may be dismissed on the basis that they are no more than the opinions of Helen Malcolm QC, Ms Caroline Dorman et al. The admissions of clear and stark failures clearly avail the Claimant in this litigation, at least to the extent that the current exercise is concerned with the identification of a real prospect of success. Nor am I particularly attracted by the submissions of both Mr Kinnear and Mr Payne to the effect that admissions made on behalf of the Crown are too general and unspecific to be relevant to their respective clients. Although HMRC would not, for example, be responsible for a clear and stark failure that was only the fault of the CPS, or *vice versa*, these admissions are more than useful ammunition for the Claimant against each Defendant taken individually, provided that care is taken to apply the relevant principles.

118. As is perhaps inevitable in cases of this sort, I detected a certain amount of "buck-passing" between Mr Kinnear and Mr Payne, each counsel indulging in this to the same degree.

119. A more significant difficulty for the Claimant is that "improper" conduct for the purposes of section 19 of the Prosecution of Offences Act 1985 imports an objective test. Here, I must apply a subjective one. However clear and stark the admitted failings, I do not read the admissions as conceding that Messrs Lewis and Millington, for example, believed at the time that they were guilty of them.

120. In my judgment, the claim in the tort of misfeasance in public office cannot succeed for these present purposes unless, in relation to the case against the person under consideration (whether it be Mr Lewis, Mr Millington or whomever), that individual knew that the criminal prosecution failed the Full Code Test when it began *and* that there was a real risk that it never would or could meet that test, and was at the very least recklessly indifferent as to that state of affairs. The further risk that the Claimant might suffer financial harm (untargeted malice) falls for consideration only if he proves the foregoing. The real prospect of success test continues to apply for these purposes.

121. This formulation recognises as it must, given my conclusions thus far, that reasonable and probable cause existed for this prosecution when it was begun and at all material

times thereafter. On that premise, the only reasonable inference is that the officers under scrutiny believed that there was a sufficient evidential case to place before the jury. The disclosure and investigatory failures did not serve to undermine that belief in any way, although they did bring about a state of affairs which undermined the viability of the prosecution.

122. In my judgment, it is not arguable that any of the officers in question knew that there was a real risk that this prosecution would collapse. My reasons, taken both individually and cumulatively, are as follows.

123. First, none of the contemporaneous documentation comes close to showing that anyone thought that anything was seriously amiss. We have seen the evolution of thinking in relation to HSBC but, for the reasons I have already given, impropriety of motive is not in my view realistically on the agenda. We have seen that counsel gave positive advice on a number of occasions. It is true that after the event question-marks were raised within the CPS as to whether counsel were sufficiently on top of the material, or sufficiently up-to-speed with progress (or the lack of it), but I have seen nothing to suggest that their advice should not have been taken at face value or, more seriously, that counsel may have been misled by Mr Lewis.

124. Secondly, there is nothing to suggest that anyone knew, believed or even suspected that there was a real risk that this prosecution would come off the rails in the way in which it did. Frankly, it is fanciful to suggest that anyone wanted that to happen. The overwhelming inference from all the available material is that everyone believed that there was a sufficiently strong case to go before the criminal court, and that they wanted the Claimant, and others, to be brought to justice. The investigatory and disclosure failures cannot be seen as somehow undermining that overwhelming inference: that would be contrary to common sense. Instead, the competing inference of gross negligence on the part of certain individuals (taking the matter at its highest) is so strong that there is no real prospect of proving the contrary.

125. Thirdly, looking at the material in a more granular way, and focusing on the cases as advanced against the individual officers, I consider that there is no remotely arguably case against anyone apart from Mr Lewis and Mr Millington. I take, for example, Ms Taylor, the disclosure officer from June 2015 to December 2017. It is clear that she was inexperienced, and she asked Mr Lewis for assistance. Mr Lewis' approach to disclosure was not always helpful: for example, marking as "I" (for "Inspect") the vast majority of documents in the unused schedule. Not merely is there nothing to suggest that she knew that the disclosure process was not being undertaken properly, an even more fundamental difficulty for the Claimant is that she could not have known that the whole trial process was in jeopardy. When the charges were dismissed in May 2017 no trial date had been fixed. Further, she was simply not in a position to know, or foresee, how matters would continue to pan out thereafter.

126. I do not propose to deal with all the officers individually, save very briefly. Mr Cook ceased to be the disclosure officer in June 2015: his position is *a fortiori* that of Ms Taylor. Mr Rawbone was Assistant Director until January 2015 and OIC until February 2014. Even if all the somewhat generalised allegations pleaded against him are true, and some are admitted in HMRC's Defence (see, for example, para 94), the prosecution did not of course commence until December 2015. It is not arguable that Mr Rawbone could have been aware that his failings would or might lead to the eventual collapse of

the prosecution. At its highest, he appreciated that a charging decision was likely to be made before the process of disclosure was anything like complete. Turning now to the CPS, Mr Wise was Mr Lewis' line manager until December 2016. He occupied a managerial and oversight role. I have been taken to no document which suggests, or indicates, that he might have been aware that this prosecution would or might founder. As for Ms Hussain, what is really being said against her is that in her oversight role she should have reached the same conclusions as did Ms Dorman – the latter admittedly very quickly. Maybe that is so, but the pleaded case does not support an allegation of malice.

127. In my judgment, the Claimant's case in misfeasance stands or falls in establishing a real prospect of success in relation to Mr Lewis and Mr Millington. If the Claimant cannot win against them, he cannot win against anyone.

128. I have already addressed the HSBC issue. I focus now on the issue of disclosure.

129. Given the admissions made in the costs proceedings etc., the Claimant is entitled to submit to me that at the very lowest this was a prosecution that was improperly conducted and grossly incompetent. It is not appropriate for me to conduct a mini-trial on these issues at this stage. Both Mr Millington and Mr Lewis occupied centre-stage over a sufficiently long period of time that the arguments available to their colleagues are simply not open to them.

130. Impropriety and incompetence are objective concepts, and the Claimant must demonstrate a real prospect of subjective malice or reckless indifference. That issue must be evaluated against the inherent improbability of either or both men harbouring the relevant mental state. As I have said, there is nothing in the contemporaneous documentation to suggest that they did possess a malicious state of mind. More specifically, there is nothing to suggest that one or the other, or both of them, knew that the Full Code Test was not fulfilled in December 2015 and that it would and could not be fulfilled at any stage before the case eventually collapsed.

131. Mr Lewis may not have read the material with the appropriate care and attention for detail, and will have been aware that the disclosure process had not been "front-loaded" at the time of charge. However, (1) he was acting on counsel's advice, and (2) there is nothing to indicate that he was aware, or believed, that the disclosure process could not be completed by the date of any trial. In that regard, no trial date had been fixed before the charges were dismissed in May 2017. Even when Ms Dorman arrived on the scene in April 2017, her level of concern was not such that in her opinion at least the case had already become un-triable. What she was saying was that the disclosure process would have to be redone, the work entailed was phenomenal, and that no trial could take place within the forthcoming 12 months.

132. Turning to Mr Millington, I have found no evidence to support the Claimant's pleading that he knew that his witness statement was untrue. Operation Ice-Rink made no such finding, and no particulars of the allegation have been given. Once the CPS took charge of the prosecution, the role of HMRC become subordinated to that body. Accordingly, from December 2015 onwards Mr Millington's position, in the context of his mental state, is *a fortiori* that of Mr Lewis.

133. The charges were dismissed in May 2017 on a basis which had nothing to do with the failures now alleged by the Claimant. I have already explained why the Claimant cannot rely on that basis. Thereafter the CPS, working no doubt in conjunction with HMRC, clearly attempted in good faith to get the prosecution in a sufficient state to enable a Voluntary Bill of Indictment to be preferred. It is not remotely arguable that Mr Lewis or Mr Millington were intent on sabotaging that endeavour, or knew that the case could never be brought into such a state. The decision not to apply to a High Court Judge to prefer a Voluntary Bill seems to have been founded on two considerations: first, that there were no exceptional circumstances; and, secondly, that there would be very considerable delay before an application could be made. However, neither of those two considerations was the fault of Mr Lewis and/or Mr Millington, and the Claimant does not suggest that they were. After May 2017 the conduct of the prosecution was under the overall control of Ms Dorman working with the assistance of a new Counsel team.

134. In my judgment, the Claimant has no real prospect of establishing that at all material times before May 2017 Mr Lewis and/or Mr Millington knew that the case was unfit to be tried and could never be fit to be tried. There is no direct evidence to support that inference (and here I bear in mind in particular the disciplinary findings and the Operation Ice-Rink report) and the circumstantial evidence points the other way. I have already made it clear that where there are competing reasonable inferences the Court proceeds on the footing that there is no real prospect of proving the more serious inference.

135. Finally, I should comment on the pleaded allegation that the failures at issue were unlawful. In my view, one should be precise about what "unlawful" means in this context. HMRC had obligations under the CPIA and the accompanying Code to investigate and to undertake disclosure. The CPS' overarching obligation to prosecute the Claimant in line with its duties under the (different) Code probably included a concomitant obligation to satisfy itself that reasonable lines of inquiry were being pursued by HMRC and that disclosure obligations were being discharged. The exact parameters of CPS's twin obligations in the light of HMRC's primary duties do not require resolution at this stage, although the formal process of providing documents to the Claimant in the criminal proceedings is undertaken by the CPS and not by HMRC.

136. But these statutory duties do not, without more, generate private law rights of action. If they are not fulfilled and the breach is sufficiently extreme, the accused may at the appropriate time be in a position to apply to stay the prosecution as an abuse or apply for costs under section 19 of the Prosecution of Offences Act 1985. Breach of these statutory duties are a necessary but not a sufficient condition for proving tortious liability. Private law rights of action are generated only if all the ingredients of the tort of misfeasance in public office are proved.

137. For all these reasons, I accede to both Defendants' applications to order summary judgment on the misfeasance claim.

138. The policy of the law is to deny an accused the ability to sue the Crown in relation to prosecutorial incompetence. Further, the law affords a statutory remedy, limited to the recovery of costs, in the event of improper conduct. In a situation where incompetence is likely to be the explanation rather than malice, and the latter can only be an inference, because there is no direct evidence to support it, a misfeasance claim will always

struggle. The present case, admittedly grounded as it is on a series of troubling admissions in the costs proceedings and thereafter, rather exemplifies the difficulty.

THE ASSIGNMENTS

Introduction

139. By a deed of assignment ("the ZRL assignment") dated 22 August 2019 by ZRL and Mrs Hughes (in her stated capacity as "the controlling shareholder of ZRL"), and a similar deed of assignment dated 9 September 2019 ("the ZCL assignment") by ZCL, Zeus Group Limited ("Zeus Group") and Mrs Hughes (in her stated capacity as the "controlling party" of Zeus Group), the assignors declared that they assigned to the Claimant "all of their rights, benefits, interests, claims and causes of action whether in equity, tort or otherwise, against the CPS and HMRC … arising out of and/or in relation to" the investigation and prosecution of the Claimant. Under these assignments the assignors purported to assign and transfer "absolutely and unconditionally such right, title, interest and causes of action" as they may have in these claims.

140. Under the ZRL assignment the proceeds of the pursuit of the assigned causes of action, after deduction of all irrecoverable costs and expenses, were to be divided between the Claimant and Mrs Hughes, the latter receiving 80% of the total. Under the ZCL assignment, the division was 86.328% in Mrs Hughes' favour.

141. The CPS and HMRC contend that these two assignments are instruments which purport to assign bare causes of action in tort, are contrary to public policy, savouring of maintenance and champerty, and are void and/or unenforceable.

142. The factual background to the assignments is set out in the witness statement of the Claimant dated 24 May 2024. For present purposes the Claimant's account must be regarded as correct, unless obviously wrong.

143. ZRL was incorporated in October 2012 to acquire, develop and operate assets within the renewable energy infrastructure market. At incorporation the Claimant was the sole shareholder in ZRL and was a director until 14 September 2015. Given the nature of HMRC's investigations, the Claimant was concerned to insulate ZRL from their damaging effects as best he could. For that reason there was a corporate restructuring which resulted in the Claimant divesting himself of his interest in the company, Mrs Hughes owning 70% of the issued shareholding and the balance being held by others. In the Claimant's mind, the transfer of the shares to ZRL made little difference to him as they remained an asset in the family.

144. The Claimant's reasons for procuring the assignment of ZRL's claims to himself were as follows:

> "I am intimately connected with the subject-matter of ZRL's claims against HMRC and the CPS as they concern misfeasance in public office by those defendants in their investigations of me in advance of prosecution, the making of the decision to charge me and the subsequent conduct of the criminal proceedings. It would be exceptionally difficult if not impossible for ZRL to progress its claims … without my knowledge of those matters,

> the documents in my possession relating to such matters which the CPS has sought to restrict being used in any other proceedings and the witness evidence that I am able to give. ZRL is also wholly dependent on me for funding generally and, in the context of the ZRL assignment, it would have been dependent on me for the funding of any claim pursed by it against HMRC or the CPS. … In any talks with any prospective future funders of ZRL projects … it would have been routine to all interested parties to disclose any litigation and so it was advantageous to ZRL to have the pursuit of the claim sit outside ZRL so that any stigma associated with the investigation and charge did not continue to pollute its business activities."

145. I have three brief observations to make. First, the Claimant does not assert that he could sue in respect of the companies' losses in his own right. Secondly, and relatedly, the companies had no right of action against these Defendants in the tort of malicious prosecution: they were not prosecuted. As for the misfeasance claim, I would incline to think - without expressing a concluded view - that, even in the context of untargeted malice, it would have been very difficult for the companies to have advanced claims in their own right, rather than the Claimant. Thirdly, although post-assignment there would have been no obligation on the part of the companies to disclose the fact of this litigation to prospective future funders, it is difficult to believe that in the particular world in which they were operating, and given the Claimant's connection with these companies, such funders would not know about the subject-matter of these claims and that the prosecution had collapsed in tatters.

146. ZCL was incorporated in April 2002 in order to advise entrepreneurs and growth businesses on how to fulfil their potential in the corporate finance sector. The Claimant always held a significant shareholding in ZCL, and by 2012 if not before (the exact date matters not) he was the controlling shareholder. After the Claimant was interviewed under caution by HMRC in January 2014, he became concerned to protect ZCL, its minority shareholders, its employees and its clients. He resigned as a director in March 2014 and on 18 September 2014 transferred the whole of his shareholding to his wife for nil consideration.

147. The Claimant continued to work for the benefit of ZCL. As he explains, he was the main source of ZCL's clients and the company's shares remained in his immediate family.

148. The Claimant's reasons for procuring the ZCL assignment are broadly similar to those for procuring the ZRL assignment. He adds this:

> "Although I held no shares in ZCL (or ZRL) at the time of the two deeds of assignments I had treated ZCL and ZRL as family assets and I continued to be integral to their commercial operations of both of these companies. I was also going to return to being the ultimate owner of the controlling interest in each company following the dismissal of the criminal charges against me and this has now occurred."

149. The Claimant become the ultimate owner of the controlling interest in both companies before these proceedings were begun. The process by which this occurred is complex and nothing turns on the detail.

150. The Claimant's Preliminary Schedule of Loss pleads the value of his claim in relation to ZRL's losses as being slightly less than £300M. The value of ZCL's losses is difficult to follow without further explanation but appears to be well in excess of £100M. The Claimant sues in his own right (i.e. without having to rely on the assignments) for general, aggravated and exemplary damages (in total, £600,000) and for lost bonuses in the sum of approximately £3.3M.

Legal Framework

151. A useful overview of the applicable legal principles, although I was referred to others, is to be found in Treitel, *The Law of Contract*, 15th edn., paras 15-060 to 15-067. Assignments which savour of maintenance and/or champerty are unenforceable. An assignment of a bare right of action in tort is generally ineffective, although the rigidity of this principle has been questioned. However, an assignment of a bare right of action is effective if the assignee has a "genuine commercial interest", even if the latter has no proprietary interest. The current author of Treitel, Professor Edwin Peel, cites the *locus classicus* of *Trendtex Trading Ltd v Crédit Suisse* [1982] AC 679 as authority for this last proposition.

152. The facts of *Trendtex* were that a bank had financed the sale of cement by one of its customers. It was held that the bank could validly have taken an assignment of the claim for damages for wrongful failure to pay for the cement: see Lord Wilberforce at 694D-E ("Crédit Suisse had a genuine and substantial interest in the success of the CBN litigation"), and Lord Roskill at 703F-H. The problem with the assignment as actually made was that it was expressed to have been taken for the purpose of enabling the bank to resell the customer's right of action to a third party so that the profit resulting from its enforcement could be divided between the third party and the bank: see Lord Wilberforce at 694F-G, and Lord Roskill at 704A-C.

153. Lord Roskill's explanation for the vice of this arrangement, such that it savoured of maintenance and champerty, was that "it was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the spoils" (704B).

154. Both Lords Wilberforce and Roskill used the perfect tense, "had". This suggests that the existence of a genuine commercial interest falls to be assessed at the time the assignment was made, and not thereafter. To my mind, that is consistent with clear contractual principles. The same emphasis on judging the position at the time of the assignment was made by Lloyd LJ in his judgment in *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] All ER 499, at 509B and F, and in other cases. There is no authority to which my attention was drawn which takes a broader view.

155. In *Turner v Schindler* [1991] 28 June, Lexis Citation 3353, the Court of Appeal was considering a case where the assignee had no interest in the assignor company, the assignee was a creditor to the tune of £5,000, the consideration paid was £1, the alleged value of the assigned benefit to the assignee was £16,071, and the assignor would receive none of the proceeds. Nourse LJ held that the assignee had no genuine

commercial interest in taking the assignments and enforcing them for his own benefit. The fact that he was a creditor did not avail him, because the assignment was taken for his exclusive benefit and not the benefit of other creditors. Parker LJ came to the same conclusion, and stated that the fact that the assignee was the natural brother to the company shareholders was irrelevant.

156. In *Advanced Technology Structures Ltd v Cray Valley Products Ltd and another* [1993] BCLC 723, the assignee had no interest in the assignor company, it was a creditor to the tune of £10,000, the consideration paid was £1, the alleged value of the assigned benefit was over £10M, and the assignor would receive two-thirds of the proceeds. The reason why the assignment was not upheld in that case was that there was a "massive disproportion" (per Hirst LJ at 734B) between the assignee's payment and his share of the proceeds, or the share was "absurdly disproportionate" to his interest (per Leggatt LJ at 734H). There would have been nothing objectionable about the assignee obtaining a reasonable profit.

157. In *Circuit Systems Ltd (in liquidation) and another v Zuken-Redac (UK) Ltd* [1997] 1 WLR 721, the assignee owned 98% of and was a former director in the assignor company, it was not a creditor, the consideration paid was £1, the alleged value of the assigned benefit was in excess of £277,000 and the assignee would receive 60% of the proceeds. Simon Brown LJ (as he then was) gave a characteristically crisp and elegant judgment supporting Staughton LJ's reasons for upholding the assignment. He could not see for the life of him why a 98% shareholding did not justify an assignment on terms that the first 60% went to the assignee (at 734G).

158. In *Massai Aviation Services and another v AG (The Bahamas) and another* [2007] UKPC 12, the Privy Council was considering a case where the assignee owned the assignor, it was not a creditor, the consideration paid was $10, the alleged value of the assigned benefit was over $324,000 and the assignor would derive no benefit from the transaction. Baroness Hale gave the judgment of the Board. Looking at the transaction as a whole, there was nothing objectionable about it at all. In short:

> "21. This was not wanton and officious intermeddling in another person's litigation for no good reason. It was simply the original owners retaining part of what they owned while disposing of the rest. There is nothing contrary to public policy in allowing Aerostar to pursue the claim against these defendants and no good reason why these defendants should be permitted to escape any liability that they may have. This is not, of course, to say that a shareholder will always have a genuine and substantial commercial interest in taking an assignment of the company's claims. To take an extreme example, for a minority shareholder to buy a substantial claim for a nominal sum in the hope of making a substantial profit may well be contrary to public policy. But that is not this case. Aerostar owned all the shares in CAASL and taken as a whole the transaction was a perfectly sensible business arrangement."

159. In *Hurst and Hurst v Glentree Estates Ltd and others* [2012] EWHC 4024 (Ch); [2013] BPIR 331, Arnold J (as he then was) held that there was no genuine commercial interest in the transaction. An additional factor was that Mrs Hurst, as assignee, chose to assign

her interest to her husband because she did not like litigation and did not wish to litigate the matter herself (at para 41, page 338).

160. In the recent case of *Farrar and another v Candey Ltd and another* [2022] EWCA Civ 295, Arnold LJ affirmed the *Trendtex* principle (at para 22).

161. The Claimant in the present proceedings sees a chink of light in two cases to which I shall now turn.

162. In *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149; [2012] All ER 1423, the Court of Appeal was examining a case where Mrs Simpson's husband died after contracting an infection in the defendant's hospital. Her claim on behalf of the estate was settled, but in order to allow her to press her concerns about the quality of hygiene in this hospital she took an assignment of another claim by someone who had suffered the same infection. The consideration was £1 and the alleged value of the claim was £15,000.

163. The lead judgment was given by Moore-Bick LJ. At para 7 he said this:

> "Whether a right to recover compensation for personal injury caused by negligence can properly be regarded as a form of property might at one time have been open to argument, but in my view the expression "legal thing in action" is wide enough to encompass such a claim and support for that conclusion can be found in the decision in *Ord v Upton* [2000] Ch. 352, to which I shall return in a moment. It is difficult to see why a claim for damage to property caused by negligence should not be regarded as a chose in action and capable of assignment and if that is so, I can see no reason in principle why a claim for damages for personal injury should not be regarded in the same way. Indeed, the reasons given in the authorities for not permitting the assignment of a bare cause of action, namely, that to do so would undermine the law on maintenance and champerty, tends to support the conclusion that a claim of that kind is to be regarded as a chose in action and inherently capable of assignment."

164. Although a bare right of action in tort is *capable* of assignment, the reasoning of the Court of Appeal in *Simpson* was to the effect that even if the assignee could invoke an interest which went beyond being a genuine commercial interest, this appellant's collateral interest was insufficient. The Court of Appeal did not consider it necessary to explore the parameters of any wider principle (para 23 and 24).

165. In *Recovery Partners GP Ltd and another* v *Rukhadze and others* [2018] EWHC 2918 (Comm), Cockerill J examined a number of decisions and stated that there should not be too narrow a focus on commercial interests (para 463). She referenced *Brownton*, *Massai* and *Giles v Thompson* [1994] 1 AC 492, which was not an assignment case. On the facts of *Recovery Partners* there was a genuine commercial interest: see para 464.

166. Despite these faint glimmers of hope from the Claimant's perspective, my reading of all the authorities is that *Trendtex* remains good law, and I note that Professor Peel is of a similar view.

The Claimant's Submissions

167. Mr Paul Chaisty KC on behalf of the Claimant put forward a beguilingly compelling series of submissions. I summarise his principal arguments as follows.

(1) The law in this area is developing, and the present format is an inappropriate way in which to resolve these questions.

(2) Even if the assignment arguments fail, the Court will still have to deal with the Claimant's personal claims. That is a further and independent reason for refusing the Part 24 application.

(3) The facts of the present case are very different from *Hurst and Hurst*, where the wife clearly had no interest of whatever sort in the litigation. Mrs Hughes' interest in the assignors should therefore be taken into account.

(4) The Court must examine the circumstances in which the Claimant, through the Defendants' wrongdoing, decided to divest himself of his proprietary interest in these companies and then take the assignments.

(5) The Court must examine the transactions as a whole and in the light of all relevant circumstances, including those arising after the dates of the assignments and before the bringing of these claims.

(6) The Court must eschew the excessive rigid and narrow approach invoked on behalf of the Defendants.

(7) The Claimant and Mrs Hughes were creditors in ZRL in the sum of £25,000. Medusa LLP, a company in which the Claimant has an ownership interest, was a creditor for £306,000.

Discussion

168. Given that I am taking the Claimant's evidence at its highest, save in one respect (see §145 above), there is no reason why the assignment issue should not be resolved in the context of a Part 24 application, and every reason why it should be. Further, the Defendants are entitled to know whether they are on risk for less than £4M or over £400M.

169. The overwhelming weight of authority supports the quest for a genuine commercial interest. The most recent decision of the Court of Appeal which supports this approach was given as recently as 2022. It is not for me to develop the law, and I confess that this case excites in me no particular desire to do so. The facts are, to my mind, clear and the merits are not with the Claimant.

170. The authorities clearly demonstrate that the commerciality of these assignments must be judged at the dates the deeds were executed. There is no principled reason for taking any later date.

171. Furthermore, it is only the commercial interests of the assignee that fall to be considered. The position of Mrs Hughes is irrelevant. Although in a loose sense of the term these were family companies, the law is entitled to require that close attention be

given to the identities of the legal persons under scrutiny. The law applies the same approach to taxation and corporate matters. That approach may work to the advantage of an individual; it may work to his disadvantage.

172. At the date of these assignments, the Claimant had no interest in these companies. Why that had become so does not matter, but there was nothing to prevent the Claimant reacquiring his shareholdings before assignment. To the extent that he was a creditor in his own right, this was to a very modest extent and is in any event irrelevant. ZRL and ZCL would receive none of the proceeds. Nothing was paid for the assignments. The alleged value of the proceeds was in excess of £400M overall, with about £65M (on the Defendants' reckoning) going to the Claimant. In my opinion, this disproportion was both "massive" and "absurd". In my judgment, this is a paradigm example of assignments savouring of both maintenance and champerty, and I must decline to enforce them.

173. Mr Alexander Cook KC for the CPS, who presented both Defendants' arguments on the assignment issue with commendable clarity and economy, also had an interesting submission on reflective loss. During the course of the hearing I decided to postpone consideration of that issue should the need arise.

DISPOSAL

174. The Part 24 applications of the CPS and HMRC succeed in relation to (1) the claim in the tort of malicious prosecution, (2) the claim in the tort of misfeasance in public office, and (3) the invalidity or unenforceability of the assignments.