Misfeasance in Public Office.

Case Note: *Three Rivers District Council and others v Bank of England (No 3)* [1996] 3 All ER 55

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An *ultra vires* action by a public official or authority does not, simply of itself, give rise to an action for damages. In *Lonrho Ltd v Shell Petroleum Co Ltd*[1] the House of Lords resisted the development in the UK of a tort, proposed in an Australian case, by which "a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another"[2] should have a right to damages. The Australian case, *Beaudesert Shire Council v Smith*[3] has, in any case, now been overruled in Australia.[4] An action for damages in English law must be based on additional factors other than simple unlawfulness.[5] One of these is that the requirements of the tort of misfeasance in public office have been made out.

Though its existence is not doubted, misfeasance in public office is a "developing tort...the precise scope of which is not yet settled".[6] A major landmark in its recent development was *Bourgoin SA and others v Ministry of Agriculture, Fisheries and Food.*[7] Here, for the purposes of a preliminary ruling, the minister accepted that his revocation of an import licence was done in the knowledge firstly, that it violated the directly effective rights of the plaintiff under Article 30 of the Treaty of Rome, secondly that it would harm the plaintiff and thirdly that the purpose behind the revocation was the protection of domestic producers which was not a legitimate purpose under

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1 [1981] 2 All ER 456.

2 *Ibid*, 463.

3 (1996) 120 CLR 145.

4 *Northern Territory v Mengel* (1995) 69 ALJR 527, High Court of Australia.

5 See, Arrowsmith S, *Civil Liability and Public Authorities,* Winteringham Earlsgate Press, 1992, pp 234 - 235, for a list of the grounds for an action for damages in respect of unlawful administrative actions and references to the body of the text.

6 De Smith & Woolf *Judicial Review of Administrative Action*, p 784.

7 [1985] 3 All ER 585 QBD Mann J; CA

Community law. The minister argued, successfully, that the proper remedy for breach of Article 30 was judicial review rather than damages[8] and, unsuccessfully, that these facts did not disclose the grounds for misfeasance in public office since the minister had not acted with malice. *Bourgoin SA and others v Ministry of Agriculture, Fisheries and Food*[9] is authority for the view that misfeasance in public office can be committed without having to show that the official acted with the specific purpose of inflicting harm on the plaintiff. The case identified a second limb to the tort. In the absence of malice plaintiffs can recover damages if they can prove, first, that the public official knew at the time that he or she had no legal power to do that which was done, and, second, that he or she knew at the time that the act done would cause damage to the plaintiff. *Three Rivers District Council and others v Bank of England (No 3)*[10] continues the attempt to specify the scope of the tort by addressing, in particular, the issue of what must be established regarding the official's state of mind in relation to the second limb. The case is an action for damages brought by depositors with the Bank of Credit and Commerce International against the Bank of England on the grounds that the latter had failed adequately to supervise BCCI's operations in the UK either by wrongly granting or wrongly failing to revoke, a licence. The case is a judgment on two preliminary issues: the scope of misfeasance in public office and the impact of the 1977 Banking Directive (Council Directive EEC 77/780). This note is mainly concerned with the first issue.

To establish misfeasance in public office without having to show malice, the plaintiff must establish, first, that the official knew that his or her act was not authorised by law. The type of knowledge required is discussed in *Three Rivers District Council and others v Bank of England (No 3)*.[11] One possibility considered[12] was that a form of constructive knowledge is sufficient. The argument was that negligence as to whether the power existed would be sufficient to establish that part of the tort; ie, that the requirement

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8 But see now: *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.

9 [1985] 3 All ER 585 QBD Mann J; CA

10 [1996] 3 All ER 55

11 [1996] 3 All ER 55

12 [1996] 3 All ER 578, c - e.

of knowledge is satisfied if a reasonable official should have known there was no lawful authority to act. Clarke J rejected this approach and the case, therefore, gives no support to those who argue that an action for damages should lie in respect of a possible "duty to take care to ensure that action is *intra vires*".[13] Clarke's rejection of the argument that negligence is sufficient, is based on a wide ranging review of the case law which, he held, supported or was not inconsistent with his view that the "basis of the tort is abuse of power"[14] and that "That involves at least some element of deliberate abuse or dishonesty".[15] Throughout his discussion of the tort, Clarke J finds support in the judgment of the High Court of Australia in *Northern Territory v Mengel*[16] and it is clear in that case that establishing misfeasance involves showing that there was a lack of an "honest attempt to perform the relevant duty".[17] From that general perspective on the tort it follows, in Clarke J's view, that, whilst negligence is not sufficient, recklessness by the official as to the existence of a power to act does satisfy this part of the tort; it is not necessary to prove actual knowledge of unlawfulness. In this context an official is reckless if he or she suspects that what they are doing may be unauthorised but they wilfully refuse to make reasonable inquiries about their powers or choose to turn a blind eye despite their suspicions.[18]

In the absence of malice it is, secondly, necessary to prove that the official knew that his or her unlawful actions would cause damage to the plaintiff. For the same reason as applied to the first issue of whether there was lawful authority to act, Clarke J has decided that it is not necessary to prove actual knowledge by the official of damage to the plaintiff and that recklessness, in the sense identified above, is sufficient. Proof that damage

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13 Arrowsmith S, *op cit,* p 178.

14 [1996] 3 All ER 578, d.

15 *Ibid.*

16 (1995) 69 ALJR 527, Aust HC

17 [1996] 3 All ER 581, j.

18 [1996] 3 All ER 558, 579 - 582. For Clarke J either the concept of "knowledge" included not making reasonable inquiries about suspicions or turning a blind eye, or it did not, in which case the liability in the tort in the absence of malice could be based on recklessness (578, j.)
Cf, Arrowsmith S, *op cit,* p 228.

to the plaintiff is only a reasonably foreseeable consequence of the unlawful act is not, however, sufficient.[19] Clarke J has also held that the relevant object of actual knowledge of, or recklessness as to damage, is that loss to the plaintiff is probable rather than necessary or inevitable.[20] It is also knowledge of, or recklessness as to damage to a class of persons of which the plaintiff is one, rather than knowledge of damage to the plaintiff in particular.[21] Clarke J allows the tort to include knowledge of damage to a class rather than only to the plaintiff in particular, because he considers the defendant authority, given the stringent requirements of the tort, already has sufficient protection. There is no compelling reason that officials, in the circumstances in which the tort can be made out, should enjoy the additional, policy-based, protection of not having to risk actions from an indeterminate group of possible plaintiffs forming the membership of a class. Such protection may be appropriate in actions based on negligence but not in relation to officials knowingly acting outside their powers.[22] It is also worth noting that actions based on negligence may also be restricted in relation to the rules on economic loss. Though the losses in *Three Rivers District Council and others v Bank of England (No 3)*[23] are entirely economic there is no discussion by Clarke J of the economic loss rules, thus illustrating that they have no bearing on the tort and indicating further reasons for its attractiveness for plaintiffs when compared with Negligence.[24]

One of the arguments canvassed before Clarke J was that in order to succeed in the tort the plaintiff had to prove the infringement of an existing legal right by the official's misfeasance. In other words the tort, it was argued, should be confined to situations where the plaintiff can show an existing private right which is infringed or where the state and its emanations already owe a duty (there is no mention in the discussion of "legitimate

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19 [1996] 3 All ER 558, 578 e.

20 [1996] 3 All ER 558, 583 c - e.

21 *Ibid.*

22 [1996] 3 All ER 558, 632, a - f.

23 [1996] 3 All ER 55

24 Arrowsmith S, *op cit,* p 228.

expectations") to the plaintiff. For Clarke J such a limit to the tort is not required by modern authority and he goes on to reject it in principle. The essence of the tort is to provide a remedy in damages for those who suffer losses, including economic losses, from the deliberate, but not merely negligent, abuse of public power. There is no justification for imposing an additional requirement of proving pre-existing rights infringed or duties not performed. Of course the existence of a pre-existing right or duty may be highly relevant in relation to the identification of the class of persons to whom the infliction of probable damage was known by the official. In Clarke J's example, no damage is done to someone prevented from voting who has no pre-existing right to vote.[25] The knowledge that an official has of the classes of persons who will probably be affected by his or her actions will be, in fact, largely influenced by the official's knowledge of the rights and duties in issue.

In *Three Rivers District Council and others v Bank of England (No 3)*[26] Clarke J also gives preliminary rulings on whether plaintiffs may have grounds for bringing an action for damages in respect of a breach of European Community Law, namely the "1977 Banking Directive":- Council Directive (EEC) 77/780 on the "coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions". His general conclusion is that no such grounds exist. The case involves a long discussion of the issues involved. It is not, however, the intention of this note to discuss these issues in detail. Clarke J interprets the Banking Directive as having, as one of its purposes, the protection of investors. However the directive does not impose on the relevant regulatory bodies duties which are owed to individual investors. It is not intended that the benefits of the directive are to be achieved by the creation of individual rights. The purpose of benefiting investors and others can be achieved by other means. His reasoning, that intending a benefit does not necessarily create individual rights to the benefit, follows that of the Privy Council in

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[25] [1996] 3 All ER 558, 584. The obvious reference is to *Ashby v White* (1703) 92 ER 710, 92 ER 126, discussed by Clarke J [1996] 3 All ER 558, 585 h.

[26] [1996] 3 All ER 55

Yuen Kun-yeu v A-G of Hong Kong[27] and *Davis v Radcliffe*[28], two cases involved with interpretation of the Banking Acts 1979 and 1987. Although these Acts were designed, in part, for the protection of investors, there was, given the nature and context of the regulatory task, no intention to create for investors individual rights against the regulator. In Clarke J's opinion, the Privy Council's view should influence the proper interpretation of the 1977 Banking Directive, first because the Banking Acts were designed to put the directive into effect and should, therefore, have been interpreted to achieve the purposes of the directive (even in the context of cases not involving EU members) and, secondly, because such a view is right in principle: the range of matters that a banking regulator needs to take into account means that it would be inappropriate for there to be investors' rights of protection correlative to the regulator's duties. Since the 1977 Banking Directive is not intended to lead to the creation of individual rights, a remedy in damages under EC law is not available. The intended creation of individual rights is a necessary condition for finding that a directive has direct effect or for damages against the state under the principle in *Francovich v Italy*[29] or under the reasoning in *Factortame III*[30]. All the parties were agreed that they did not want, at first instance, an Article 177 reference to the European Court of Justice.

It is clear from Clarke J's judgment that the development of misfeasance in public office is unlikely to be the best way forward for English law to provide the remedy in damages that is required by European law. The criteria for establishing the tort and for establishing a right to damages in respect of EC law are different. In particular, with the requirement of knowledge (including recklessness) of unlawfulness and probable loss, and with the rejection of negligence as to those matters as sufficient to ground the tort, misfeasance is not flexible enough to meet the

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27 [1987] 2 All ER 705.

28 [1990] 2 All ER 536.

29 [1991] ECR I-5357.

30 *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex parte Factortame Ltd* [1996] QB 404.

requirements of EC law.[31] In Clarke J's opinion it may be necessary for the common law to develop a discrete remedy in damages for a breach of duty or infringement of a right imposed by Community law.[32]

The essence of the tort of misfeasance in public office is the lack of good faith by officials. However, in *Three Rivers District Council and others v Bank of England (No 3)*,[33] two different objects of "good faith" can be discerned. One is good faith in relation to acting lawfully; ie, the official has attempted to act within his or her power. The other is good faith in relation to motive; ie, that the official has acted for a good motive such as a morally reasonable conception of the public interest or to benefit a class of persons it is morally reasonable for the official to benefit and not for a bad motive such as self-interest. This second, motivational, sense of good faith does not depend upon the lawfulness of the official's actions since there is no necessary contradiction between acting for a good motive and acting unlawfully. In the case, the extent to which an official has a good faith defence available is unclear. If good faith in the first sense (relating to lawfulness) is made out then obviously there can be no liability under the tort since the official will not know that he or she is acting unlawfully. Clarke J relies on good faith in the second, motivational, sense. He does so as part of his argument that liability should be confined to situations where the official has actual knowledge of, or is reckless as to probable harm to, the plaintiff and does not extend to the reasonable foreseeability of such harm. In his view, a known unlawful act done in good faith in the second sense (ie, to further an official's conception of the public good) should not attract liability where harm to a class of persons is only reasonably foreseeable.[34] However, where harm to a class of persons is known then, by the implication of insisting that lack of good faith is the essence of the tort, there is no good

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31 Although in one respect, whether it is necessary to establish a pre-existing right or duty, misfeasance in public office is more flexible than is allowed under EC law.

32 [1996] 3 All ER 558, 624 c - e.

33 [1996] 3 All ER 55

34 "...an officer may do something knowing it to be unlawful and in circumstances where it was reasonably foreseeable that a class of persons might suffer loss, but he might nevertheless do it in the best interests either of another class of persons or indeed of the plaintiff or of the class of persons of whom the plaintiff is one. In my judgment such a person would not be acting in abuse of power, whereas it is abuse of power that is the essence of the tort." [1996] 3 All ER 558, 578 f - h.

faith and damages may lie.[35] It is hard to see why lack of good faith is the decisive point. An official's act done in the public interest but in the knowledge that it is unlawful does not lose its good faith (in the second sense) just because losses are foreseen and not just foreseeable. An official could act in the second sense of good faith when the benefits of a policy outweigh the burdens and that is true whether the burdens are foreseen or merely foreseeable. This argument is less strong when the official is reckless rather than knowing as to losses since, with recklessness, he or she is simply refusing to consider losses and hence is not prepared to weigh them against the benefits. That point amounts to an argument for confining the tort to recklessness as to losses and there is no authority for so doing in *Three Rivers District Council and others v Bank of England (No 3).*[36] It is submitted that in so far as good faith is in issue in the tort it should be confined to the first sense: that, irrespective of motive, there has not been an honest attempt to exercise a lawful power. This view follows from the elimination of malice as a necessary component of the tort. It is hard to understand why the official's motive should be thought to be a sufficient explanation for the requirement that losses need to have been foreseen. In the end, the tort is, perhaps, best linked back to its public law context. The essence of the tort is that an official has deliberately acted in the knowledge that what he or she has done is unlawful. The restriction in terms of foreseen rather than just foreseeable loss is then best explained by a policy of restricting the range of possible plaintiffs.

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35 [1996] 3 All ER 558, 583, c - d.

36 [1996] 3 All ER 55