A new tort - malicious prosecution of civil proceedings

On 20 July 2016, a nine member panel of the Supreme Court handed down its judgment in Willers v Joyce and Anor (in substitution for and in their capacity as executors of Albert Gubay (deceased))\(^1\), in which it decided by a 5:4 majority that a claim for malicious prosecution of civil proceedings is sustainable in English law – extending the tort beyond its traditional boundaries of the malicious prosecution of criminal claims or the use of ex parte coercive measures.

The tort provides a remedy for defendants who have been faced with proceedings brought against them maliciously and without any reasonable grounds. It will deter claimants from using the civil justice system to pursue unmeritorious claims with the intention of causing harm to the defendant – not only will they be exposed to the usual costs risks but may now also face a separate claim for malicious prosecution.

In a separate judgment\(^2\) in the same case, the Supreme Court considered the status of decisions of the Judicial Committee of the Privy Council (“JCPC”) in the courts of England and Wales.

Tort of malicious prosecution of civil proceedings

The appeal reached the Supreme Court after the Judge, faced with conflicting decisions of the House of Lords and the Privy Council, granted a “leapfrog” certificate to enable the scope of the tort of malicious prosecution to be referred directly to the Supreme Court.

In Gregory v Portsmouth City Council\(^3\), the House of Lords had to determine whether the tort was available in respect of disciplinary proceedings, but it also gave detailed consideration to the boundaries of the tort generally, concluding that (other than in certain narrow areas) it did not extend to the malicious prosecution of civil proceedings.

However, more recently in Crawford Adjusters & ors v Sagicor General Insurance (Cayman) Ltd & Anor, the JCPC had (by a 3:2 majority) taken the opposite view.

How was the conflict resolved?

The Supreme Court was divided on whether historic authorities supported the existence of a general tort of malicious prosecution. Lord Toulson, who gave the leading judgment, noted that the early case law is capable of more than one interpretation, and he did not consider that the Supreme Court’s decision should depend on which side has the better argument on the scope of the law as it stood some centuries ago.

Lord Toulson then addressed questions of principle and policy. He turned first to the words of Holt CJ over 300 years ago: “if this injury be occasioned by a malicious prosecution, it is reason and justice that he should have an action to repair him the injury”. He found this statement to be “both obvious and compelling” and concluded that it would be “instinctively unjust” for there to be no compensation for a person who suffers injury as a result of the malicious prosecution of legal proceedings.

He went on to consider whether there are any countervailing factors which would justify limiting the scope of the tort – addressing in some detail the various concerns identified in the dissenting judgments.

He concluded that those countervailing factors were not sufficient to outweigh the argument that justice dictates that a claim for malicious prosecution of civil proceedings should be available. However, he noted that anyone bringing such a claim would have to establish that proceedings had been brought against him without reasonable and probable cause and that the party that brought those proceedings did not have a genuine reason to bring the claim, which would be a “a heavy burden to discharge”.

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\(^1\) [2016] UKSC 43
\(^2\) [2016] UKSC 44
\(^3\) [2000] 1 AC 419
\(^4\) [2013] UKPC 17
\(^5\) Savile v Roberts (1698) 12 Mod Rep 208
Because of how the issues raised by the appeal were framed, it was not strictly necessary for the Supreme Court to determine what precisely was meant by “reasonable and probable cause” and “malice”, but Lord Toulson did provide some guidance on their meaning:

- It is well-established that they are separate requirements.
- For a claim to be brought with “reasonable and probable cause”, it is enough that there is a proper case to put before the court – which falls short of requiring a belief that the claim will succeed.
- To establish malice the claimant must prove that “the defendant deliberately misused the process of the court”. This would, for example, include where the claimant can prove that the defendant brought proceedings in the knowledge that they were without foundation, but more generally the critical feature is that the proceedings “were not a bona fide use of the court’s process”.

Four of the Justices agreed with Lord Toulson, including Lord Clarke who added his own judgment in support. Lord Neuberger and Lord Mance each delivered detailed dissenting judgments, focusing on public policy and the historic authorities respectively. Lord Sumption and Lord Reed also delivered short dissenting judgments.

The majority decision has established that English law recognises the tort of malicious prosecution of civil proceedings, but it has left issues such as the nature and extent of the damages that can be recovered to be worked out in future cases.

Successful claims are likely to be rare, particularly as judges are likely to be vigilant to avoid the shadow of a future malicious prosecution claim becoming a tactical weapon to deter bona fide claims.

6 Lord Neuberger and Lord Sumption had given the dissenting judgments in the 3:2 decision in Crawford.