

## UK: Supreme Court recognises tort of malicious prosecution of civil proceedings and clarifies authoritative weight of all Privy Council decisions.

*In Willers v Joyce & Anor [2016] UKSC 43, the Supreme Court decided by a 5-4 majority that a claim for malicious prosecution of civil proceedings generally exists in English law. In reaching its decision, the Supreme Court addressed conflicting House of Lords and Privy Council decisions on the point and, accordingly, also issued a separate judgment [2016] UKSC 44 regarding the status of Privy Council decisions before the courts of England and Wales.*

### Introduction and background facts

The litigation was brought by a former company director (the “Claimant”) against a successful businessman (the “Defendant”). The Defendant had employed the Claimant for over 20 years until he dismissed him in 2009. Part of the work the Claimant undertook was as director of a company (the “Company”) which was controlled by the Defendant. Prior to the Claimant’s dismissal, the Company pursued an action for wrongful trading against the directors of another business which had gone into liquidation. That action was abandoned shortly before trial in late 2009 on the Defendant’s instructions. In 2010, the Company pursued a claim against the Claimant for alleged breach of contractual and fiduciary duties in causing it to incur costs in pursuing the 2009 claim.

In March 2013, two weeks before the date fixed for a five-week trial, the Company gave notice of discontinuance. The Claimant then brought his claim against the Defendant for malicious prosecution.

### Malicious prosecution – what does it mean?

Malicious prosecution is a tort intended to provide a remedy to a party who has suffered injury through being subjected to legal proceedings improperly instituted against him. The party claiming malicious prosecution must show that he was prosecuted by the defendant, that the prosecution was determined in his favour, that the prosecution was without reasonable and

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probable cause and that it was malicious. Until now the tort has been limited in English law to malicious institutions of criminal prosecutions and certain exceptional categories of civil claims which involve specific immediate damage as a result of their commencement. This was illustrated by the House of Lords in *Gregory v Portsmouth City Council*<sup>1</sup>. That case related to disciplinary proceedings but Lord Steyn stated that he was not persuaded that an extension of the tort to generally cover civil proceedings and any damage arising from them was necessary. However, in the more recent Privy Council decision of *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*<sup>2</sup>, it was decided by a 3-2 majority that it was wrong to dismiss the claimant's claim for malicious prosecution. Lord Wilson gave the leading majority opinion and concluded that Lord Steyn's remarks in *Gregory* were *obiter* and that the basis of his comments lost its force where no other tort was capable of application.

### Malicious prosecution in context - the Claimant's arguments

In his claim for malicious prosecution, the Claimant claimed damages for loss of reputation, health and earnings, and for his legal expenses over the amount the Defendant had already been ordered to pay. The Claimant alleged that the claim brought against him by the Company was part of a campaign by the Defendant to do him harm. In the High Court Chancery Division, Deputy Judge Tipples QC<sup>3</sup> noted the Privy Council decision in *Crawford* but struck out the Claimant's claim, holding that she was bound to follow the House of Lords decision in *Gregory* and therefore to conclude that English law recognised no cause of action. She granted a "leapfrog" certificate for the Claimant to appeal the decision to the Supreme Court.

### Decision of the Supreme Court: malicious prosecution

In a 5-4 split, with the leading majority opinion delivered by Lord Toulson (with whom Lady Hale, Lord Kerr and Lord Wilson agreed), the Supreme Court decided that the tort of malicious prosecution to cover civil proceedings generally did exist. Essentially, Lord Toulson's view was that earlier authority had never ruled out the existence of such a tort and that the common law should recognise it. He said that the "...*appeal to justice is both obvious and compelling. It seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person responsible for instigating it.*" [43]. Lord Clarke delivered a judgment, essentially agreeing with Lord Toulson.

Lord Mance provided the main dissenting opinion. He said that to recognise a general tort of malicious prosecution would ignore the teaching of history. He was concerned it would take the law into "uncharted waters" [132] and, with no reason to limit an extension to civil claims, there would be potential for it to

<sup>1</sup> [2000] 1 AC 419

<sup>2</sup> [2014] AC 366

<sup>3</sup> [2015] EWHC 1315 (Ch)

also extend to family court, domestic tribunal or arbitral tribunal proceedings. He was also troubled about the definition of “malice” and was of the view that effective remedies already exist for the pursuit of an unfounded claim such as strike out, judgment or costs. He called the proposed extension “unjustified and unwise” [136]. Lord Sumption, Lord Neuberger and Lord Reed also dissented for similar reasons.

Lord Toulson’s majority judgment recognised the several policy-based arguments which had been raised but rejected each in turn. As to the tort’s requirements, he said that a claim for malicious prosecution generally in civil proceedings would require both malice and the absence of reasonable and probable cause. For the latter, there must be a lack of a proper case to lay before the court. As for the former, this is an additional requirement which requires the claimant to prove that the defendant deliberately misused the process of the court; the most obvious case would be where the claimant can prove that the defendant brought the proceedings in the knowledge that they were unfounded. Lord Toulson concluded that the combination of requirements a claimant would need to prove for a claim of malicious prosecution means that he has a very heavy burden to discharge [56].

### **Decision of the Supreme Court: Privy Council authority**

Lord Neuberger delivered the unanimous opinion on the status of Privy Council decisions before the courts of England and Wales. The Supreme Court dealt with this point after Deputy Judge Tipples QC said in the first instance judgment that if there was a decision of the House of Lords (or the Supreme Court) which was binding on her as a first instance judge, she could follow a decision of the Privy Council to the opposite effect “*if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council.*”<sup>4</sup>

Lord Neuberger summarised the doctrine of precedence as it applies to Privy Council judgments. Firstly, the Privy Council is not a UK court so its decisions cannot be *binding* on any judge in England and Wales and cannot override any decision of a court of England and Wales which that judge would, in accordance with the rules on precedence, be bound to follow (such as the Court of Appeal) or of the Supreme Court. However, in cases where there is no binding precedent from such a court, given that all or the majority of the Privy Counsellors who sit on any Privy Council appeal will almost always be Justices of the Supreme Court and given that they apply the common law, a Privy Council decision should be regarded as being highly persuasive. Finally, the Privy Council itself, when applying the law of England and Wales, should regard itself as bound by any decision of the House of Lords / Supreme Court.

Lord Neuberger concluded, however, that one modification could be made to the first rule discussed above (i.e. the obligation of English courts to follow a

<sup>4</sup> [2015] EWHC 1315 (Ch), paragraph 26

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binding English decision over a Privy Council decision). That was that where a party appeals to the Privy Council and wishes to challenge the correctness of an earlier decision of the House of Lords / Supreme Court or the Court of Appeal on English law, the Privy Council should be capable of departing from that earlier decision to the same extent and with the same effect as the Supreme Court is able to do. This means that the Privy Council will be able, if it thinks it appropriate, not only to decide that the earlier decision of the House of Lords / Supreme Court or Court of Appeal was wrong, but also to expressly direct that domestic courts should treat the Privy Council decision as *representing the law of England and Wales* (with the effect that those courts would be bound to follow the decision as effectively being a Supreme Court judgment). Lord Neuberger described this approach as “convenient” and “sensible” [21] and saw it as a way of taking advantage of the fact that the panels of the Privy Council normally consist of Justices of the Supreme Court. He also proposed some procedural modifications intended to assist the approach.

## Comment

This is a significant decision by the Supreme Court. With only a 5-4 majority on the decision on malicious prosecution, there was a real difference of opinion amongst the Justices, which is perhaps unsurprising given the long, much-debated history of the tort. That a claim for malicious prosecution of civil proceedings is recognised more generally is a major departure from previous authority and it will remain to be seen whether the “heavy burden” on claimants dissuades future reliance on the tort.

The unanimous decision on the status of Privy Council decisions is likely to be viewed as a practical solution which will help clarify the precise status of Privy Council judgments in future.

Click [here](#) for the full judgment on malicious prosecution and [here](#) for the full judgment on Privy Council authority.

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A32334794/0.1/29 Jul 2016

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