

MALICIOUS CLAIMS ACTIONABLE

by Christopher Cope and Lorcan O'Mahony

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Although he passed away earlier this year at the age of 87, the affairs of Albert Gubay have not been laid to rest. The recent UK Supreme Court decision in *Willers v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased))* is of great interest, not simply because it concerns the late Island resident Mr Gubay, but because it confirms the existence of the tort of malicious prosecution of a civil suit.

BACKGROUND

Mr Willers was Mr Gubay's right hand man for over 20 years, and director of Langstone Leisure Ltd. After a falling out in 2009, Langstone, which was assumed by the Court of Appeal to be controlled by Mr Gubay for the purpose of the appeal, brought an action against Mr Willers for alleged breach of his contractual and fiduciary duties. Mr Willers argued that he had at all times acted under Mr Gubay's direction, and so the action was abandoned.

Mr Willers brought proceedings against Mr Gubay for the malicious prosecution of the Langstone claim against him, contending that it had been part of a campaign to do him harm and had caused damage to his reputation, health and earnings. Mr Gubay's defence was that there was no cause of action for malicious prosecution of a civil suit (in contrast to criminal proceedings, where it is well established).

Mr Willers failed at the first hurdle. The Judge held that she was bound by the doctrine of precedent to follow a decision of the House of Lords in *Gregory v Portsmouth City Council* [2000], which held that the tort of malicious prosecution did not extend to civil proceedings. In the light of a recent conflicting decision of the

justices sitting in their different capacity as members of the Judicial Committee of the Privy Council (JCPC) in an appeal from the Cayman Islands (*Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014]), Mr Willers was granted leave to appeal to the Supreme Court.

THE SUPREME COURT DECISION

The Supreme Court, by a 5 to 4 majority, allowed Mr Willers' appeal and held that the tort does apply to civil proceedings.

The dissenting minority of justices did not find sufficient support in historical case law, arguing that the tort would be inconsistent with longstanding rules of law, and expressing concerns that the decision could spawn undesirable satellite litigation.

However, the majority held that it seemed instinctively unjust for a person who has suffered injury as a result of the malicious prosecution of civil proceedings against him to not be compensated for it. Addressing the concerns about 'satellite litigation', the majority emphasised that to make out a claim for malicious prosecution of civil proceedings it must be proved that the original proceedings were not a bona fide use of the court's process, such as where proceedings were wholly without foundation or where the party sought some extraneous benefit to which he has "no colour of a right". This means that the claimant has a heavy burden to discharge, and as such successful claims are likely to be rare.

SO WHERE DOES THIS LEAVE ISLE OF MAN LAW?

Technically, neither *Willers* nor *Crawford v Sagicor* are binding on the Isle of Man Court; it is open to Manx common law to follow a different path with regard to this important development. In his Judgment, Lord Neuberger recognised that the local common law in some JCPC jurisdictions can develop in different ways, but stated that "it is highly desirable that all common law judges generally try and march together".

In the authors' opinion, given that the policy considerations in the Isle of Man are unlikely to be materially different to those analysed by the Supreme Court, Isle of Man law is most likely to follow *Willers* and accept that a claim for malicious prosecution can be brought in relation to civil proceedings.

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