

Client Update

The UK Supreme Court Arms Successful Defendants With a Remedy Against the Malicious Pursuit of Civil Litigation

INTRODUCTION

The prospect of defending civil litigation is hardly enticing, particularly where there does not appear to be any justifiable basis for the claimant's action. Regrettably, claimants occasionally bring proceedings for bad faith reasons: perhaps as a tactical weapon in a commercial battle, or simply to damage the reputation of another. The English courts already have several mechanisms at their disposal – such as strike-outs, summary judgments, indemnity costs, and the enforcement of cross-undertakings – to bring wrongful litigation swiftly to an end, or to punish those who have pursued it. But what if a defendant has suffered further damage, such as to reputation or earnings, or incurred other costs? Should it be able to recover these from the unsuccessful claimant?

On 20 July 2016, by the slimmest of majorities, the UK Supreme Court held 5:4 that a prevailing defendant/respondent should have such a right. The Supreme Court determined that such damages can be claimed under the tort of malicious prosecution.¹ Historically, this tort has provided redress for the wrongful pursuit of criminal proceedings. With some exceptions, for centuries its application in the civil context had been almost non-existent.

The Supreme Court's decision changes that, and we are likely to witness litigation defining the contours of the tort in the coming years. Claimants will need to conduct their litigation in a manner which will not expose them to the risk of such a claim in the event that they are unsuccessful in their initial action. Equally, defendants/respondents ought to consider whether such claims can legitimately be threatened during the course or at the end of proceedings.

¹ *Willers v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased)) (1)* [2016] UKSC 43.

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THE TORT OF MALICIOUS PROSECUTION

In order to claim under the tort of malicious prosecution, a party must show an absence of reasonable and probable cause in the initial action against it, and malice in the pursuit of the claim. The majority of the Supreme Court perceived this to represent a “heavy burden”.² Essentially, the victim of the tort must prove that the perpetrator deliberately misused the process of the court – the “critical feature” being that the proceedings “were not a bona fide use of the court’s process”.³

As claims for malicious prosecution of civil proceedings begin to feature in the English courts, it will become clear just how heavy this burden is. The minority of the Supreme Court expressed concerns that, following the majority judgment, liability will arise simply “if the claimant’s ‘dominant’ motive is to injure, even if [the claimant] believes the claim to be well-founded and intends to ‘injure’ the defendant by pursuing it to judgment”.⁴ Exactly what constitutes a “dominant motive” in this context will likely be the subject of future litigation, including whether a claimant must have an actual appreciation that the original claim is unfounded.

In addition, it is unclear whether the action needs to have been unfounded at the outset of proceedings, or whether it could become malicious during the course of the proceedings (for example, at a point where the claimant’s evidence collapses). Again, this is an issue likely to be litigated down the track. In any event, litigants should be prepared for the Supreme Court’s decision to increase the cost and time involved in some civil litigation, as defendants may start to manoeuvre throughout proceedings “in one way or another with a view to setting up a malicious prosecution claim if the other party’s case fails”.⁵

WHAT DAMAGES ARE RECOVERABLE?

The majority’s decision provides for wide-ranging damages to be available to the successful party in a malicious prosecution action, including damages to reputation, earnings, and health. In addition, the majority held that damages can

² *Ibid.*, at para. 45 (Lord Toulson).

³ *Ibid.*, at para. 55 (Lord Toulson).

⁴ *Ibid.*, at para. 139 (Lord Mance).

⁵ *Ibid.*, at para. 167 (Lord Neuberger).

include the excess of a party's legal expenses over the amount awarded under any costs order made in the initial proceedings.

However, the minority considered that the majority had created "a whole further area for litigation, very likely at the appellate level", as regards what damages are recoverable for malicious prosecution of civil proceedings.⁶ The minority was concerned that the majority's decision means that it follows that once liability for malicious prosecution is established, "all adverse consequences of their pursuit, in terms of damage to reputation, earnings, health and extra costs, are recoverable without further enquiry into their precise nature or causation".⁷ Further, the minority considered that extra costs between parties to the original proceedings should be irrecoverable.⁸

Given these differences in views, a party pursuing a malicious prosecution action should consider how best to particularise any claim for damages, including by showing that any losses suffered truly flowed from the claimant's wrongful pursuit of proceedings. Parties should also be wary that any attempt to secure a more favourable costs outcome through an action for malicious prosecution might backfire if it is itself perceived to be a malicious action.

MALICIOUS PROSECUTION OF INTERNATIONAL ARBITRATION

Following the Supreme Court's decision, it is conceivable that a respondent to a claim governed either substantively or procedurally by English law might seek to advance a claim for malicious prosecution of arbitration by way of counterclaim. The broad scope of arbitral jurisdiction, which almost always encompasses torts relating to the contractual relationship between the parties, could be deemed to cover a counterclaim for the tort of malicious prosecution of a claim under the contract. The mechanisms available to most domestic courts to deal with unfounded claims are notably absent from international arbitration – but innocent respondents might now have a weapon to fight back against malicious claims. Parties may wish to consider the availability of this new tort under English law when deciding on their preferred arbitral seat.

⁶ *Ibid.*, at para. 141 (Lord Mance).

⁷ *Ibid.*, at para. 139 (Lord Mance), para. 141.

⁸ *Ibid.*, at para. 145 (Lord Mance).

CONCLUSION

The Court's President noted the "particular irony" that the Supreme Court's decision comes at a time when English courts "have more powers than ever before to control litigation".⁹ Whether these powers are sufficient to preclude damages arising from malicious claims, and the minority's fears turn out to be well-founded, should become obvious over the coming years. In the meantime, both current and prospective litigants should become acquainted with the ramifications of the Supreme Court's decision for the conduct of their ongoing or threatened court and arbitration proceedings.

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Please do not hesitate to contact us with any questions.

⁹ *Ibid.*, at para. 168 (Lord Neuberger).