



20 July 2016

## PRESS SUMMARY

**Willers (Appellant) v Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased)) (Respondent) (1) [2016] UKSC 43**  
*On appeal from [2015] EWHC 1315*

**JUSTICES:** Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Toulson

### BACKGROUND TO THE APPEAL

For the purposes of the appeal, the Court was invited to assume that Mr Gubay controlled a leisure company, Langstone, of which Mr Willers was a director. Mr Willers was later dismissed as director of Langstone and in 2010 Langstone sued Mr Willers for alleged breach of contractual and fiduciary duties in pursuing litigation. On 28 March 2013, Langstone discontinued its claim against Mr Willers. Mr Willers claimed that the claim brought against him by Langstone was part of a campaign by Mr Gubay to do him harm. Consequently he sued Mr Gubay for malicious prosecution. It was not disputed that the alleged actions of Mr Gubay constituted the necessary ingredients for a claim in malicious prosecution (on the assumption Mr Willers could substantiate such claims at trial); the question was whether a claim in malicious prosecution could be brought in relation to civil proceedings by an individual against another individual. Malicious prosecution already exists in relation to criminal proceedings. If a malicious prosecution did exist in relation to civil proceedings as between private individuals, then Mr Willers' claim would be permitted to go to trial.

### JUDGMENT

The Supreme Court allows Mr Willers' appeal by a majority of 5 to 4 ruling that the entirety of Mr Willers' claim should be permitted to go to trial. Lord Toulson (with whom Lady Hale, Lord Kerr and Lord Wilson agree) gives the lead judgment. Lord Clarke delivers a concurring judgment. Lords Neuberger, Mance, Sumption and Reed give dissenting judgments.

### REASONS FOR THE JUDGMENT

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]. The tort will not deter those who have valid claims. This was the argument advanced for not allowing the tort in criminal proceedings. It has no greater merit in civil proceedings [44]. There is a public interest in finality and in avoiding unnecessary satellite litigation, but an action for malicious prosecution does not amount to a collateral attack on the outcome of the first proceedings [46]. The tort does not create a duty of care. There is a great difference between imposing a duty of care and imposing a liability for maliciously instituting proceedings without reasonable or probable cause [49]. Over the last 400 years there has been a volume of case law

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about malice, and the related requirement of absence of reasonable and probable cause, for the purposes of the tort of malicious prosecution [53].

To make out malicious prosecution it is well established that the requirements of absence of reasonable and probable cause and malice are separate requirements although they may be entwined. In order to have reasonable and probable cause, the defendant does not have to believe that the proceedings will succeed. It is enough that, on the material on which he acted, there was a proper case to lay before the court. Malice is an additional requirement. As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation. But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process [54-55]. The combination of requirements that the claimant must prove not only the absence of reasonable and probable cause, but also that the defendant did not have a bona fide reason to bring the proceedings, means that the claimant has a heavy burden to discharge [56].

Lord Clarke delivers a concurring judgment by reference to the arrest of ships, the ingredients of the tort of misfeasance in public office and the close affinity between malicious prosecution of criminal proceedings and malicious prosecution of civil proceedings [60-91].

Lord Neuberger delivers a dissenting judgment with twelve reasons for why the tort of malicious prosecution should not be available in respect of civil proceedings between one private litigant and another as well as in criminal proceedings. The key reasons are that the tort would be inconsistent with the general rule that a litigant owes no duty to his opponent in the conduct of civil litigation [157], inconsistent with witness immunity from civil liability [158], create a danger of satellite litigation [163] and may have a chilling effect on the bringing of civil proceedings [166].

Lord Mance delivers a dissenting judgment. The extension of malicious prosecution is not supported by the authorities [95-129] or by policy because, for example, there is no duty of care owed between litigants [130-140, see 135].

Lord Sumption adds a dissenting judgment. When recognising new species of non-consensual liability, the common law must develop coherently. The recognition of a general liability for maliciously prosecuting civil proceedings circumvents the principled limits that the courts have imposed on the tort of abuse [178]. Its developments must also be warranted by current values and social conditions. The courts have far more extensive powers today than they did a century and a half ago to prevent abuse of their procedures [179].

Lord Reed adds a dissenting judgment in agreement with Lords Neuberger and Mance adding observations including a caution against relying on 16<sup>th</sup> to 18<sup>th</sup> century cases in a judgment's reasoning, especially when constructing their historical context may be difficult [182-3].

#### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [www.supremecourt.uk/decided-cases/index.html](http://www.supremecourt.uk/decided-cases/index.html)**