A recent Supreme Court judgment confirms that claims for malicious prosecution of civil proceedings can be brought under English law. It was previously unclear whether malicious prosecution claims were limited to the conduct of criminal proceedings and a few special cases of abuse of civil legal process.

In *Willers v Joyce and Anor* [2016] UKSC 43 a majority of five to four Supreme Court Justices held that the tort of malicious prosecution extends to civil proceedings generally. They held that it would be unjust for a person to suffer injury as a result of 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 the litigation. Policy arguments to the contrary were not sufficiently weighty to displace that straightforward proposition.

**Background**

It was assumed for the purposes of the appeal that the defendant to the action, Mr Gubay, controlled a leisure company, Langstone. The claimant, Mr Willers, was a director of Langstone, but was later dismissed. Langstone sued Mr Willers for alleged breach of contractual and fiduciary duties in causing Langstone to incur costs in pursuing certain third party litigation. Mr Willers defended the action and claimed an indemnity from Mr Gubay on the basis that he had acted under Mr Gubay's directions in pursuing the litigation. Two weeks before trial, Langstone discontinued its claim against Mr Willers and was ordered to pay him costs on the standard basis.

Mr Willers sued Mr Gubay for malicious prosecution, claiming that the action brought against him by Langstone was part of a campaign by Mr Gubay to do him harm. The heads of damage claimed were: damage to reputation; damage to health; loss of earnings; and the difference between the full amount of costs incurred in defending Langstone's claim (£3.9m) and the amount of costs he had recovered on the standard basis on discontinuance (£1.7m).

The claim was struck out on the basis that no such tort existed in English law. The issue for the Supreme Court was whether a claim in malicious prosecution could be brought in relation to civil proceedings by one individual against another.

**Judgment**

The judgment reviewed historic case law dating back to the seventeenth century, to see whether that case law supported the existence of a general tort of malicious prosecution, but ultimately the decision was based on issues of policy.
Lord Toulson’s leading judgment addressed the following issues:

- **Floodgates**: allowing the tort would not open the floodgates and encourage unmeritorious claims for malicious prosecution. The argument that a good claim should not be allowed for fear of it leading to somebody else pursuing a bad one, was not attractive;
- **Deterrence**: the tort would not deter those with valid civil claims from pursuing them for fear of them facing a vindictive action for malicious prosecution;
- **Finality**: while there was undoubtedly public interest in avoiding unnecessary satellite litigation, an action for malicious prosecution did not amount to a collateral attack on the outcome of the initial proceedings;
- **Duplication of remedies**: manifest injustices arising from groundless civil proceedings are not adequately protected by other torts;
- **Inconsistency with witness immunity from civil liability**: if this were a valid objection, it would apply to all forms of the tort of malicious prosecution, including prosecution of criminal proceedings;
- **Inconsistency with the absence of a duty of care by a litigant to the other party**: the tort of malicious prosecution does not create a duty where none had previously existed. There was a significant difference between imposing a duty of care and imposing a liability for maliciously instituting proceedings without reasonable or probable cause;
- **Now obsolete in criminal proceedings**: the tort of malicious prosecution in criminal proceedings is not obsolete and it would not be inappropriate to introduce it into civil proceedings now;
- **Reciprocity**: it was not an inevitable consequence of the recognition of civil liability for malicious prosecution of civil proceedings that there should be liability for bad faith denial of a claim; and
- **Uncertainty about malice**: there was a suggestion that allowing the appeal would take the courts into "new and uncertain waters about the meaning of malice". Lord Toulson rejected this argument on the basis that there is already a volume of case law about the requirements for malice and the related requirement of reasonable and probable cause for the purposes of the tort of malicious prosecution.

**Comment**

The decision clarifies the principle as to whether a claim for malicious prosecution of civil proceedings is sustainable as a matter of law. What is not yet clear is the detail of how it will all work in practice. We will have to wait for new case law to establish what sorts of loss might be recoverable and what the parameters are.

The decision does however create the possibility of banks and their employees being able to recover damages against the more aggressive and misguided claimants who commence proceedings against them.

It seems unlikely however that the courts will apply this decision in a way that creates a "free for all" of satellite litigation. In order to succeed in such a claim, a claimant will need to be able prove:

- an absence of reasonable and probable cause in its opponent bringing the original claim against it; and
- malice (i.e. that its opponent did not have a bona fide reason to bring the original claim and deliberately misused the process of the court).

Proving both elements is likely to be a heavy burden to discharge.

Also, if a corporate entity such as a bank brings such a claim, the damages which it might recover are likely to be confined to the unrecovered costs of the earlier proceedings together with, possibly, damages for lost management time. A claim for the latter might be difficult both to prove and to justify in a large organisation. Banks could find themselves in the unattractive position of incurring further irrecoverable legal costs in an attempt to recover previous legal costs.

Where individual bank employees have been subject to maliciously prosecuted proceedings, there may be scope to recover other losses if, for example, the employee’s health has been affected by the litigation.

Clearly it will only ever be worth commencing a malicious prosecution claim against an opponent if they have the financial resources to meet any award of damages. For those without financial means, the Civil Restraint Order probably remains the most effective tool to curb multiple unmeritorious claims.

Finally, banks should note that where customers have successfully defended claims brought against them by
banks, particularly claims involving allegations of fraud or conspiracy, they may initiate their own claims for malicious prosecution. We anticipate that success in such claims is likely to be rare.

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