Willers v Gubay
[2016] UKSC 43

Summary

This case arose out of a fall-out between two friends. Gubay was a businessman, and Willers was his right hand man for over 20 years. Willers was a director of a company, Langstone, that was controlled by Gubay. At Gubay's instigation, and while Willers was still director of Langstone, Langstone sued the directors of another company, Aqua Design, that had gone into liquidation. The action was abandoned in late 2009, on Gubay's instructions. By then Gubay and Willers had fallen out and Willers had been dismissed as director of Langstone. In 2010, Langstone sued Willers, claiming that he had breached contractual and fiduciary duties in causing Langstone to sue the directors of Aqua. Willers defended the claim, arguing that he had been acting under Gubay's direction in bringing the claim against Aqua, and Langstone abandoned the case two weeks before it was due to go to court. Willers then sued Gubay, claiming that he had committed a tort – the tort of malicious prosecution of civil proceedings – in getting Langstone to sue him, and that Willers had suffered various losses as a result of Gubay's actions: (i) damage to his health, (ii) a loss of earnings as, Willers alleged, it had been impossible to find alternative employment as a company director while Langstone's action was hanging over him, and (iii) the difference between the full amount of costs that he had incurred in defending the Langstone claim against him (£3.9m) and the actual amount he had recovered under a costs order that had been made when the Langstone claim was abandoned (£1.7m).

The claim was dismissed at first instance on the basis that there was binding House of Lords authority – in the shape of *Gregory* v *Portsmouth City Council* [2000] 1 AC 419 – that it was not a tort maliciously to sue someone else. However, the fact that there was a more recent Privy Council decision – *Crawford Adjusters* v *Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 – recognising that there *was* a tort of maliciously bringing civil proceedings against another led the first instance judge to grant a 'leapfrog' certificate allowing an appeal against her decision to be made direct to the UKSC. A nine member panel in the UKSC ruled, by a 5:4 majority, to recognise that the tort of malicious prosecution extended to cases where (i) a defendant was responsible for civil proceedings being brought against a claimant, (ii) those proceedings were brought without reasonable cause and were ultimately unsuccessful, and (iii) the defendant acted maliciously in having civil proceedings brought against the claimant.

Lord Toulson gave the leading judgment (with the agreement of Lady Hale, Lord Kerr, and Lord Wilson; Lord Clarke gave a short supporting judgment indicating his agreement with Lord Toulson's judgment and focussing mainly on the law on when the owner of a ship could sue for the wrongful arrest of that ship). Lord Toulson observed (at [43]) that 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.' He dismissed a number of different arguments that had been made against recognising the existence of such a tort (call it the 'MCP tort' for short): (i) recognising the MCP tort would not add much to the existing deterrents to bringing civil claims against other people (uncertainty, time, expense, the prospect of being subject to a costs order if you lose) ([45]); (ii) recognising the MCP tort would not allow defendants who had lost a civil case to make a collateral attack on the correctness of that decision ([46]); (iii) it was not the case that any losses caused by the launching of groundless and damaging civil proceedings could be remedied through other torts ([47]); (iv) recognising the existence of the MCP tort would not

undermine witness immunity in civil cases, any more than the tort of maliciously bringing a criminal prosecution undermine witness immunity in criminal cases ([48]); (v) the MCP tort was not inconsistent with the fact that parties to a civil case do not owe each other duties of care ([49]); (vi) there was no reason why the malicious prosecution tort should be confined to cases where public officials 'take it on themselves to exercise the coercive powers of the state' ([50]); (vii) there was no reason why recognising the MCP tort should mean that it was a tort maliciously to raise groundless defences to a civil case – 'There is an obvious distinction between the initiation of the legal process itself and later steps which may involve bad faith (for which the court is able to impose sanctions) but do not go to the root of the institution of legal process' ([51]); (viii) the volume of case law on the malicious prosecution tort meant that there would be no real uncertainty as to what amounts to 'malice' for the purposes of the MCP tort: the claimant simply has to prove 'that the defendant deliberately misused the process of the court... 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' ([55]); (ix) there was nothing improper in Willers' attempting to recover via the MCP tort the costs of defending the Langstone claim that he had not been able to recover via a costs order when that claim was discontinued: had the judge in the Langstone case refused to award Willers his full costs on the basis that 'the claim had not been conducted improperly, then to attempt to secure a more favourable costs outcome by bringing an action for malicious prosecution would itself have been objectionable as an abuse of the process of the court' ([58]) but that was not the case here.

The four dissentients were Lords Mance, Neuberger, Sumption, and Reed. They each gave separate judgments. A few points emerging out of their judgments were:

(1) Lord Mance pointed out that 'in an era when private prosecutions have largely disappeared, the tort of malicious prosecution of criminal proceedings is virtually instinct. To create a tort of malicious prosecution of civil proceedings might in these circumstances be thought to come close to necromancy' ([131]).

(2) Lord Mance argued that once the existence of the MCP tort were recognised, there would be no logical stopping point preventing the courts from holding that it was a tort maliciously and without foundation to take or make 'any individual application or step in the course of a civil action' or to give false witness in a civil case ([133]). Lord Neuberger also observed that there was no reason why the MCP tort should not extend to all kinds of private legal proceedings ([162]).

(3) Lord Neuberger expressed concern that recognising the existence of the MCP tort would spawn a mass of satellite litigation around civil cases ([163]) and pointed to the vast increase in claims for wasted costs orders prompted by Parliament's extending the ability of litigants to seek such orders against barristers under s 4 of the Courts and Legal Services Act 1990 ([171]).

(4) Lord Sumption thought that the majority position violated two limits on the ability of the courts to develop the law: (i) 'that where the courts develop the law, they must do so coherently' ([178]), and (ii) 'that the proposed development of the law should be warranted by current values and current social conditions' ([179]). The recognition of the MCP tort cut across too many immunities and limits on when a claimant could sue someone else in tort, as well as rules on the recovery of costs in the event of being successful in a civil case, to be regarded as a coherent development of the law. And the fact that judges have over time acquired more and more powers to control the conduct of civil litigation made the case for recognising the MCP tort weaker and weaker over time, not stronger.

(5) Lord Reed also questioned (at [184]) whether the recognition of the MCP tort would subvert the law of defamation in that part of the claim being made in this case was for

the damage to Willers' reputation, and consequent economic loss, that he had suffered as a result of being sued by Langstone.

Comments

(1) Just as with the *Patel* v *Mirza* case (noted elsewhere on this website), the majority in this case felt itself entitled to make a major change in the law in the face of substantial dissent from a minority of judges only slightly smaller than the majority. There really should be an informal agreement between the members of the UKSC that only a nine member panel will be entitled to make such big changes in the law, and only if there is a 7-2 majority or bigger in favour of making such a change.

(2) One objection to recognising the existence of the MCP tort which was not really raised by either party is the potential for the existence of that tort to give rise to an infinite series of legal actions. Suppose, for example, that Willers' claim in this case is eventually dismissed on the basis that there was no basis for it – for example, that all the heads of damage that he pointed to in this case were illusory (the first two – damage to health and loss of income arising from being unable to secure alternative employment – are, in particular, both hard to prove/disprove). What is then to stop Gubay (or, rather Gubay' estate, as he died before the UKSC heard the appeal in this case) then suing Willers for maliciously bringing civil proceedings against Gubay? And if *that* claim is lost, what is then to stop Willers then suing Gubay for maliciously bringing *those* proceedings (for maliciously bringing civil proceedings against Gubay) against Willers? And so on, and so on, without end.

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