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CHAMBERS

Spring 2014

Chancery – Commercial Newsletter

Spring 2014

Welcome to this, our Spring newsletter.

The coming of Spring heralds not only better weather but also the launch of Chambers' new state-of-the-art website. In keeping with Chambers' modern and efficient approach to business for which it has become known, our website now accommodates mobile devices, as well as opportunities for feedback. We hope that it will make using it that little bit easier.

In this newsletter Stephen Boyd explains what to do when a reality TV crew turns up on the doorstep, Neil Mendoza examines the pitfalls of dealing with joint tenants, Richard Clegg asks (and answers) the riddle "when is a debt not a debt?", Zoe Barton reflects on the impact of *Twinmar Holdings v Klarius UK* on dilapidations claims involving GRP rooflights, and Joe England sheds light on the Supreme Court's recent re-consideration of the tort of malicious prosecution.

We hope you will find the articles in this newsletter both interesting and useful to your practice.

As ever, I welcome any comments you may have.

MEMBERS:

ROMIE TAGER QC
AJMALUL HOSSAIN QC
MARK WARWICK QC
PHILIP KREMEN
STEPHEN BOYD
STUART CAKEBREAD
HUGH JACKSON
DAVID UFF
NEIL MENDOZA
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NICHOLAS TROMPETER
PAUL DE LA PIQUERIE
CAMILLA CHORFI
SIMON MCLOUGHLIN
DAVID WELFORD
JUSTINA STEWART
JOSEPH ENGLAND

CLERKS:

GREG PINER
PAUL BUNTING

10 Essex Street, London WC2R 3AA **Phone** 020 7420 9500 **Fax** 020 7420 9555
clerks@selbornechambers.co.uk www.selbornechambers.co.uk DX:185 London Chancery Lane

TAG ALONG?

STEPHEN BOYD

Introduction

There seems to be an endless appetite for reality television programmes. The viewer seems to find actual real-life drama even more entertaining than the made-up stuff.

The latest twist on the theme is the so-called 'tag-along raid' when a film crew accompanies bailiffs when enforcing judgments at the debtor's premises[1].

What, if anything, can a debtor do about this, or must he be an unwilling participant in the television stations' quest for viewers?

There are two possible avenues, one of which is more promising than the other.

Defamation

In showing the enforcement officer attending at premises, the innuendo would be that the subject of the execution was a judgment debtor. This would be actionable, if false.

The difficulties with this course are that in *Bonnard v Perryman* [1891] 2 Ch 269 the Court of Appeal held that an interim injunction will not be granted to restrain publication of an allegedly defamatory statement if the defendant adduces evidence that he will seek to justify the statement (in other words, prove that it is true) at trial. This case applies where the defendant intends to justify the "sting" of the allegations even though he cannot prove the precise facts stated: *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412. It also applies where the defendant intends to plead fair comment on a matter of public interest: *Fraser v Evans* [1969] 1 QB 349, 360.

Accordingly, it is unlikely save in the most exceptional case that defamation would run as a cause of action.

Privacy/Breach of Human Rights

Article 8 of the Convention provides that everyone has the right to respect for his private and family life.

There is no need for an activity subject to covert filming to have a "quality of seclusion" about it to warrant the protection of Article 8. The expression "privacy" in the Broadcasting Act, when construed in accordance with the ECHR, did extend to corporations: *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885 CA[2].

The interpretation of section 12(4) of the Human Rights Act 1998 is that the court must have particular regard to any relevant privacy codes.

According to paragraph 7.4.37 of chapter 7 of the BBC's Editor's Guidelines:

[1] 'The Sheriffs are Coming'
[2] See also s.111(1) of the Broadcasting Act 1996.

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ROMIE TAGER QC
AJMALUL HOSSAIN QC
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"A tag-along raid is when we accompany police, customs, immigration, environmental health officers or other public authorities on operational duties. We should only go on tag-along raids when there is a public interest and after careful consideration of editorial and legal issues including privacy, consent and trespass.

When we go on a tag-along raid on private property we should normally:

- Ensure people understand we are recording for the BBC
- Obtain consent from the legal occupier and stop recording if asked to do so
- Leave immediately if asked to do so by the owner, legal occupier or person acting with their authority.

Exceptions may include where we have reason to believe illegal or anti-social behaviour is being exposed, or another public interest will justify our continued recording or presence."

Section 110(1) of the Broadcasting Act 1996 (as amended) provides that it is the duty of Ofcom to consider and adjudicate upon complaints made to them in accordance with sections 111 and 114 and relate to ",,,(b) unwarranted infringement of privacy in, or in connection with the obtaining of material included in..." programmes.

Subsection (3) states that in exercising their functions under subsection (1), Ofcom shall take into account any relevant provisions of the Code maintained by them under section 107.

Section 8 of the Ofcom Code makes clear that broadcasters should avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes. Any infringement of privacy must be warranted, for example, by the public interest in revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public. Any infringements of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

Accordingly, the appropriate advice to give to a client faced with unexpected and unwelcome visitors holding cameras is:

- To ask who they are
- To refuse them entry

If, as might happen, the subject believes that the recording is part and parcel of the enforcement process, and only realises after it has begun that the cameraman is in fact taking footage for use in a television programme, he should request that:

- he stop filming and

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GREG PINER
PAUL BUNTING

- leave the premises immediately

Consideration should then be given to challenging the right of the television company to screen what footage they have on the basis of breach of the subject's Article 8 rights. They should be asked to provide, say, 10 days notice of their intention to screen the film so that appropriate steps can be taken to apply for an injunction.

In addition, it would be possible, post-broadcast, to lodge a complaint with Ofcom.

So, tag-along? No, get me out of here!

STEPHEN BOYD

MEMBERS:
ROMIE TAGER QC
AJMALUL HOSSAIN QC
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STEPHEN BOYD
STUART CAKEBREAD
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DAVID UFF
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SURRENDERING TO JOINT PAINS

NEIL MENDOZA

In the modern world in which we live, it so often happens that couples, whether married or not, split up and go their separate ways. For those owning residential property this brings familiar problems as regards beneficial interests and the dividing of a limited pot.

Different problems can arise where the property occupied is leasehold and one is considering the lessees' ongoing liability for rent and the cessation of liability upon leasehold covenants generally. From the tenants' point of view the earliest point of termination may well be desirable; for the lessor the opposite may be preferable, particularly for the avoidance of a rent void and the maintenance of a recoverable rental stream. Further issues can surface where dealings with the lessor are conducted by only one of two joint lessees and the extent to which such dealings are effective to bring the tenancy to an end.

Where the tenancy is periodic little difficulty arises since the repeated renewals of the demise depend upon the consensus of both joint tenants. Thus, a single tenant acting alone can remove that joint consensus so that the periodic tenancy does not automatically renew.

However, what if there is a fixed term tenancy that the tenants, or one of two joint tenants, wish to surrender part way through the term (and ignoring the existence of any effective break-clause)? Can tenants simply move out and hand back the keys? When can the landlord safely proceed to change the locks and re-let the property?

The basis of a surrender by operation of law is estoppel, it is not based merely on the agreement of the parties – there must, in addition, be some act that is inconsistent with the continuation of the tenancy (see the 19th century case of _Oastler v Henderson_) with the conduct of the parties amounting unequivocally to an acceptance that the tenancy has ended. The circumstances must be such that it is inequitable for the landlord, or the tenants, to dispute that the tenancy has ended. The handing back of keys has generated much judicial interest since the acceptance of a key by the landlord does not necessarily constitute evidence of surrender; it all depends upon an examination of precisely why the key was accepted. Thus, if the tenants have asked the landlord to try and re-let the premises and the landlord takes back the key so that the premises can be marketing and re-let, which would presumably be in the interests of the tenants, then there is no surrender merely by handing back the key, and the tenants would find themselves with a continuing liability to pay rent, even though they had moved out.

Similarly, a landlord taking back the key for the purpose of securing the premises would not thereby determine the landlord and tenant relationship (see _Relvok Properties v Dixon_). However, if the key is accepted as part of an agreement that possession would be delivered up and rental liability cease, the acceptance of the key marks the point of surrender (_Whitehead v Clifford_).

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MARK WARWICK QC
PHILIP KREMEN
STEPHEN BOYD
STUART CAKEBREAD
HUGH JACKSON
DAVID UFF
NEIL MENDOZA
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GREG PINER
PAUL BUNTING

Where a surrender is offered, a landlord is not obliged to re-let the premises to the first available alternative tenant so as to limit, or extinguish, the existing tenants' liability for continuing rent. If the tenants wish to leave and request the landlord to re-let the premises, and the landlord then does so, the surrender is effective as at the time of the new letting and not before (*Wallis v Hands*), even if the tenants have physically vacated.

Note that if rent is payable in advance, and the surrender takes place between rent days then, unless otherwise agreed, the tenant is not entitled to a repayment of any of the rent already paid. If rent is paid in arrears the landlord can require payment of an apportioned part of the rent.

A very useful distillation of the relevant principles was provided by Mr. Justice Morgan, sitting in the Court of Appeal, in *QFS Scaffolding Ltd –v- Sable and Sable* [2010] EWCA Civ 682.

So, what of the position with joint tenants wishing to surrender? Unlike the situation appertaining to a periodic tenancy, with a surrender of a fixed term tenancy all the tenants must join in the surrender – *Leek & Moorlands Building Society v Clerk*. As observed by Morgan J. in the QFS case, where the tenant requests the landlord to re-let the premises, it is essential that the new letting is effected with the consent of the original tenant, and where there are joint tenants that must mean both of them. In the absence of such consent there will be no surrender although the original tenants' consent can be inferred from conduct or long acquiescence in the new arrangement.

At the outset above, reference was made to a situation where a landlord is dealing with only one of two joint tenants. Where a relationship between joint tenants has ended, the landlord may well be ignorant of the break-up and so a landlord approached by only one of joint tenants requesting surrender must exercise care. It may be that the other tenant has temporarily moved away or has, perhaps, gone on holiday and in the absence of that party, the other has seized the opportunity to try and get rid of the premises and terminate the ongoing rental liability. In such circumstances, not only will dealings with the single tenant not operate as an effective surrender but, when the other, temporarily absent, joint tenant resurfaces, the lessor may find himself uncomfortably on the receiving end of an injunction and proceedings (including potentially criminal proceedings) under the Protection from Eviction Act 1977. This is not desirable.

Such an unsatisfactory position may be tempered if the lessor can establish that the single joint tenant acted as agent, and with the authority of, the other joint tenant – such authority being actual, ostensible or implied; but the mere fact of the joint tenancy will not, of itself, operate to establish such authority.

Accordingly, if acting for a lessor in such circumstances, it would be wise to ensure that all joint tenants actively participate in the surrender of a fixed term tenancy in order to avoid the pitfalls engendered by becoming embroiled in the messy business of relationship turmoil – something that property practitioners would all agree is best avoided!

NEIL MENDOZA

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JOSEPH ENGLAND

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GREG PINER
PAUL BUNTING

When is a debt not a debt?

RICHARD CLEGG

The punch line is: when there is an arbitration clause, sometimes. Neither amusing as a joke, nor for the party to whom the 'debt' is owed.

The scenario: A Ltd loans US$600k to B Ltd. B Ltd fails to repay when the time comes for repayment, giving no good reason. A Ltd serves a statutory demand for the US$600k. B Ltd applies for an injunction to restrain presentation of a winding-up petition based upon the statutory demand relying on an arbitration clause. B Ltd succeeds. Those were broadly the facts and the result of the case decided by Warren J in *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm). He granted the injunction notwithstanding that the reason for non-payment proffered did not amount to a bona fide dispute: "so, apart from the arbitration agreement, the conclusion is that I would not grant an injunction". However, because the loan contract contained an arbitration agreement under which any dispute or claim was to be referred to arbitration, he granted the injunction. He did so on the basis that section 9 of the Arbitration Act 1996 (stay in favour of arbitration) would require a winding up petition based on the statutory demand to be stayed in favour of arbitration: "In my judgment, section 9 applies. I should not therefore allow the petition based on this debt in reliance on the statutory demand to proceed."

It is suggested that the same principle ought equally to apply in bankruptcy.

This decision reverses an earlier obiter view expressed by Park J in *Best Beat Ltd v Michael Joseph Rossall* [2006] EWHC 1494 (Com) to the effect that section 9 of the 1996 Act may not apply to a winding up petition. It is also in conflict with the reasoning of Blackburne J in *Shalson v DF Keane Ltd* [2003] EWHC 599 (Ch) when deciding (in a bankruptcy context) an application to set aside a statutory demand based upon an arbitration agreement. He refused to set the statutory demand aside, saying of the possibility of a stay of the bankruptcy petition under section 9 of the 1996 Act that: "...unless and until the proceedings have been started and the defendant has applied for a stay, the question of a stay does not arise; and until it arises it cannot be said with confidence that a stay will be granted, limited though the court's right may be to withhold a stay once it is asked for".

However, it is suggested that the real principle underlying the result in *Rusant* ought to be the negative promise implicit in an agreement to arbitrate, namely the promise not to engage the other party in a different forum. It is suggested that it is that which the injunction is to enforce, not the prospective application of s.9 of the 1996 Act[3]. The Supreme Court has re-affirmed that this is the basis for restraining foreign proceedings brought in breach of an arbitration agreement in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, and in a decision given shortly before *Rusant*. Their Lordships were all of the view that:

[3] That section is merely one aspect of that broader principle, as well as being separately required by article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations 1958).

MEMBERS:
ROMIE TAGER QC
AJMALUL HOSSAIN QC
MARK WARWICK QC
PHILIP KREMEN
STEPHEN BOYD
STUART CAKEBREAD
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NICHOLAS TROMPETER
PAUL DE LA PIQUERIE
CAMILLA CHORFI
SIMON MCLOUGHLIN
DAVID WELFORD
JUSTINA STEWART
JOSEPH ENGLAND

CLERKS:
GREG PINER
PAUL BUNTING

"...the source of the power to grant such an injunction is to be found...in section 37 of the [Supreme Court Act 1981]. Such an injunction is...for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitration proceedings are on foot or proposed."

Indeed in _Rusant_ Warren J referred in his reasoning to the "policy" of the 1996 Act as being "clear that disputes between parties should be decided in the forum which they have chosen"[4], although ultimately he based his decision on the (prospective) application of section 9 of the 1996 Act to a winding up petition.

Since not paying a contractual sum when due ought ordinarily to constitute a sufficient 'dispute' for the purposes of engaging an obligation to arbitrate disputes arising out of the contract, on the basis that a claim which is simply not admitted ordinarily constitutes a sufficient dispute[5], the bankruptcy or winding up process is not therefore an available option for a party to such a contract when such a sum falls due (and is not admitted as due); unless that party is able to identify grounds other than the 'debt' as the basis for the petition.

From a transactional point of view, in drafting an arbitration agreement it is possible to avoid the above problem, and indeed make available court ordered summary judgment (not ordinarily available in arbitration), by appropriate wording such as a 'carve-out' provision (excluding certain disputes from the obligation to arbitrate and instead subjecting them to court proceedings) or a unilateral option (giving one party the option to insist upon court proceedings rather than arbitration). Those are not without their own potential for problems, such as giving scope for a dispute as to the extent of the 'carve-out', or the validity of the unilateral option[6]. Unilateral options are frequently used in finance agreements precisely so as to make available to the lender the short form disposal mechanisms available in court proceedings, amongst other reasons.

From a litigator's point of view it is of course important as a matter of routine to check the terms of any dispute resolution clause if considering a bankruptcy or winding up petition on the basis of a contract debt. Whilst some comfort may previously have been drawn from the words of Park J in _Best Beat_, that is no longer so.

RICHARD CLEGG

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ROMIE TAGER QC
AJMALUL HOSSAIN QC
MARK WARWICK QC
PHILIP KREMEN
STEPHEN BOYD
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HUGH JACKSON
DAVID UFF
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GREG PINER
PAUL BUNTING

[4] Paragraph 20.
[5] _Halki Shipping Corporation v Sopex Oils Ltd_ [1998] 1 Lloyd's Rep 49.
[6] They have been found invalid in a number of countries, including France and Russia. Their validity might be challenged in England in for example the consumer context.

SHEDDING LIGHT ON GRP

ZOE BARTON

Glass fibre reinforced polyester, known as GRP, has been used in the manufacture of profiled rooflights since the 1950s, but not until the recent Technology and Construction Court decision of Edwards-Stuart J. in *Twinmar Holdings Ltd v Klarius UK Ltd* earlier this year has there been any judicial consideration of this form of building material or its repair.

GRP rooflights have been improved since their introduction in the 1950s and since the 1970s have been coated with protective gelcoats and films that form a smooth surface and protect against degradation caused by ultraviolet light exposure and abrasion. These processes can result in the material becoming brittle and cracking, resulting in leaks, which in *Twinmar* it was perhaps unsurprisingly agreed by the parties was a form of disrepair. However, the resin can also discolour turning a straw or eventually brown colour and abrasion by the elements left untreated will eventually expose the fibres, which will trap dirt. These are problems with which many landlords and tenants of warehouses and industrial units will be familiar. The result is that the transmission of daylight suffers, leading to a poorer quality working environment and the use of more artificial light to compensate together with higher electricity bills.

The manufacturers of GRP rooflights have typically recommended regular cleaning of their products to best maintain them. However, those responsible for the maintenance of buildings are often reluctant to incur the expense of such work and this is all the more true when working at height with its associated safety measures and additional expense. In *Twinmar*, the landlord brought a terminal dilapidations claim after the tenant determined its lease of warehouse premises by exercising a break clause after 15 years. The premises had been newly constructed at the beginning of the term, and save for a short sub-lease towards the end of the term, had been occupied throughout their life by the tenant. Although there were a number of items of disrepair in dispute, the principal one related to the rooflights which the landlord alleged had become eroded by wind-borne dirt. The landlord included within the scope of works having the rooflights cleaned and treated with a proprietary coating system to replace the gel coating that had been eroded. The nature of this material in rooflights is such that they are classified as fragile and require appropriate health and safety procedures to be adopted. In this case, perimeter edge protection around the roof and safety netting underneath it were used whilst the rooflights were cleaned and the treatment applied.

Despite, or perhaps because of, the high costs of works to GRP rooflights, there was no prior judicial consideration of the appropriate repair of this material. The starting point regarding the appropriate standard of repair is to keep the premises in such repair as, having regard to their age, character, and locality would make them reasonably fit for the occupation of a tenant of the class who would be likely to take them: *Proudfoot v Hart* (1890) 25 QBD 42. A material factor in this case was the fact that the building had been new when demised to the tenant. In *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, the test in *Proudfoot* was considered in the context of a building that was newly constructed when demised and the Court of Appeal held that the proper standard of repair in such a case is that which would make the premises reasonably fit

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STUART CAKEBREAD
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DAVID UFF
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DAVID WELFORD
JUSTINA STEWART
JOSEPH ENGLAND

CLERKS:
GREG PINER
PAUL BUNTING

for occupation by the appropriate class of tenant under the conditions prevailing at the commencement, not the end, of the lease.

In *Twinmar* Edwards-Stuart J. held that a visible and a significant reduction in the translucence of the rooflights, such that the light coming through them had to be augmented by artificial lighting in conditions that would not have required additional lighting at the start of the lease was a breach of the repairing covenant. His assessment of the evidence led him to conclude there had been such a breach and that the landlord was entitled to the cost of the repairs to the rooflights. In making that assessment, he treated with a pinch of salt a description from the manufacturer of the proprietary coating of the rooflights given prior to the works, as a manufacturer could be expected to paint a gloomy picture in the interests of securing a contract to repair them. The Judge also considered an alternative argument that such rooflights fell to be classed as windows and were thus the subject of an express covenant in the lease to replace and renew and keep clean windows when necessary. He rejected this argument, as unlike Velux-style skylights which he considered were windows, the GRP rooflights were neither glazed with glass or a glass equivalent, nor in a frame.

The judgment in *Twinmar* serves as a useful reminder that obvious failure is not necessary to establish disrepair. However, it is equally important to remember that the tenant is not required to perform preventative work as there will be no breach of covenant unless and until the building becomes out of repair during the term of the lease. However, if that time will and does arrive during the term, the tenant will become liable. In those circumstances the tenant, particularly where the term is a long one, may have lost the opportunity to comply with its lease obligations in what might have been a cost-effective manner by preventing the deterioration at an earlier date. Such an approach may also have cash-flow advantages for a tenant by reducing the liability for significant expenditure at the determination of the lease.

Interest on damages is awarded by reference to the relevant circumstances, key of which is the rate the landlord would have expected to have been charged in borrowing money to perform the works. In *Twinmar*, 3% above base rate was awarded, but 3% above LIBOR, 3% and 4.5% have all featured in recent Technology and Construction Court decisions.

ZOE BARTON

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GREG PINER
PAUL BUNTING

CIVIL MALICIOUS PROSECUTION

JOE ENGLAND

Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another [2013] UKPC 17

Introduction

Between September 2012 and August 2013, I was on secondment from Chambers having been selected to be a judicial assistant at the Supreme Court to Lord Sumption and Lord Wilson.

It is not particularly well known that around 40% of the Supreme Court's work is in fact taken up by their role as the Judicial Committee of the Privy Council hearing appeals from various commonwealth countries. This may partly explain the relative lack of coverage of the case on which I focus in this article.

During my time at the Supreme Court, I worked on many headline grabbing cases, from whether the right to life applied to the armed forces to the status of the corporate veil in matrimonial finance. However, one development went remarkably unnoticed by the general legal community and even in some of the mainstream law reports. That was a case from the Cayman Islands called *Crawford Adjustors v Sagicor General Insurance (Cayman) Limited* reintroducing the tort of civil malicious prosecution. The importance of the case can be seen from the simple fact that, very much against the usual rule for Privy Council decisions, all five Justices gave judgments comprising of a majority of three and a minority of two.

I had a particular interest in the case, not just because of its legal subject matter (and a connection with the Cayman Islands including the effects of Hurricane Ivan), but also because both my Justices (as was not uncommon) came to completely differing views. In fact, I recall being asked to find all the cases one day by one Justice that supported a particular proposition, and then on the very next day, being asked to find all the cases against the very same proposition by the other. Luckily, I had anticipated this so had kept a record of the unhelpful cases as I went through the task for the first Justice!

Background

The tort of abuse of process concerns the abuse of civil proceedings for a predominant purpose other than that for which they were designed. The right to claim damages for malicious criminal prosecutions dates back to 1285. The leading modern authority is the House of Lords decision in *Gregory v Portsmouth City Council* [2000] 1 AC 419 in respect of disciplinary proceedings. Lord Steyn held that the tort of malicious prosecution did not extend to civil proceedings on the basis that it was typically seen in criminal proceedings and that there were other torts available to the claimant in that case.

Facts

Hurricane Ivan hit the Cayman Islands in 2004 and caused devastating damage, including to a residential development called "The Village" located on Grand Cayman (the largest of the three islands that comprise the Cayman Islands, the other two being

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Cayman Brac and Little Cayman). The development was insured by Sagicor General Insurance (Cayman) Limited ("Sagicor"). Sagicor appointed a loss adjuster, Mr Paterson. Contractors called Hurlstone were appointed to complete the works. Mr Paterson recommended payments of $2.9m Cayman Island dollars (CI) were made to Hurlstone.

A new vice president, Mr Delessio, joined Sagicor and was concerned about the payments and the lack of documentation supporting the conclusions they rested upon. He also had a difficult history with Mr Paterson. He appointed a new loss adjuster, Mr Purbrick, who valued the works for which Saigor were responsible at a lower amount of CI$0.7m. Mr Delessio fired Hurlstone even though they had not completed the works and became, it is fair to say, obsessed by a desire to damage Mr Paterson and to destroy his business.

Sagicor brought proceedings against Mr Paterson and Hurlstone for deceit and conspiracy alleging that fraudulent misrepresentations had been made about the repair work. Mr Delessio had publicly stated that he intended to drive Mr Patterson out of business and to destroy him professionally and he alerted a journalist to the allegations and they were reported in the press.

Three months before trial, Hurlstone disclosed documents which showed extensive payments to sub-contractors and suppliers. This led Sagicor to discontinue its action. Henderson J of the Grand Court of the Cayman Islands ordered Sagicor to pay Mr Patterson and Hurlestone's costs on the indemnity basis and granted Mr Patterson leave to amend his counterclaim for fees so as to also include a claim against Sagicor for damages founded on the tort of abuse of process or alternatively, the tort of malicious prosecution.

Henderson J subsequently concluded that Sagicor was not liable for abuse of process nor for malicious prosecution. He concluded that Sagicor was not liable for abuse of process because it had not sued Patterson in order to secure an object for which legal action was not designed. The fact that Sagicor's dominant motive in making the allegations against him was improper did not convert its use of the legal process into an abuse. As to malicious prosecution, Henderson J found that, save in one respect, Mr Patterson had established all of the elements of the tort. The missing crucial feature, which precluded him from holding Sagicor liable for malicious prosecution, was the House of Lords' decision in *Gregory* which stated that the tort of malicious prosecution was confined to criminal proceedings. This was upheld by the Caymans Islands' Court of Appeal who said that they were bound by Gregory and then the matter was appealed to the Privy Council.

The Board's Decision

The Privy Council held by a majority of 3:2 (Lord Wilson, Lady Hale and Lord Kerr in the majority; Lord Neuberger and Lord Sumption in the minority) that the tort of malicious prosecution should be extended to civil cases and Sagicor committed that tort and damages were awarded accordingly.

Lord Wilson, giving the lead judgment for the majority, considered that the tort of malicious prosecution had a place in civil proceedings and the common law originally

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recognised this. Lord Wilson held that Lord Steyn's comments in Gregory did not stop the Privy Council deciding otherwise, particularly in circumstances where there was a clear wrong done to Mr Paterson and no other torts were available to him. He held:

"I am convinced that the common law originally recognised that the tort of malicious prosecution extended as much to that of civil as to that of criminal proceedings … the limitation on the scope of the tort of malicious prosecution of civil proceedings … was justified by reasoning which is no longer valid… A tort of malicious prosecution of civil proceedings should enable a claimant to recover damages for foreseeable economic loss beyond out of pocket expenses."

It was also noted that early availability of a costs order in favour of a successful defendant of civil proceedings meant he was often unable to prove the damage required by the tort. It could be said that for that reason, the tort became, in practice, mainly focussed on criminal proceedings.

It was recognised that there were arguments against renewed recognition of the tort in civil proceedings. However, the majority considered that such arguments should not override the need for the law to be true to the rule of public policy that wrongs should be remedied (per Lord Bingham, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633).

It could not be said that the tort would deter the honest bringing of litigation, because a litigant should trust the court to discern the demerits of a case of malicious prosecution brought against him in appropriate circumstances. Those claiming damages for malicious prosecution also had two high hurdles placed before them: (1) the requirement to show malice; and (2) the absence of reasonable cause.

As to the tort causing interminable litigation, it was accepted that there was a need for there to be finality in litigation. However, this argument had been overridden in relation to criminal proceedings. Further there was no evidence that the tort caused endless litigation in those states in America where the tort was recognised.

There was no need to impose a further condition that there must be a public function dimension in the malicious prosecution of proceedings. The tort of malicious prosecution should not, therefore, be limited to a form of misfeasance in public office.

The majority disagreed with the suggestion of the Lords in Gregory that other torts could protect against the wrong that had been done in this case. They considered that no other tort did so or could be extended to do so.

Having ruled on the scope of the torts of abuse of process and malicious prosecution, the majority also suggested further reform. Lady Hale suggested that the Law Commission might consider consolidating malicious prosecution and abuse of process into a single tort of misusing legal proceedings. Lord Kerr considered that if a claim for malicious prosecution was available, then there might also be a claim for malicious defence of civil proceedings. He noted, however, views from America that, as the party "hauled into court", the defendant had the right to vigorously defend itself. He also indicated that there would be substantial requirements of proof for such claims. It would have to be proved that the defendant knew or had notice of the lack of merit

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on which the claim was resisted and persisted in it for a reason unrelated to its legitimate defence.

The minority (Lords Sumption and Neuberger) saw the confinement of the tort of malicious prosecution to criminal cases as a cardinal feature of the tort. They also did not consider that a malice-based tort made sense in the context of private litigation. They further recognised that the law had always been extremely reluctant to go beyond the court's procedural powers to control its proceedings as this could deter access to justice. They believed that extension of the tort would mean that it could potentially be both uncertain and very wide and they were concerned about it prolonging litigation.

Comment

- With respect to Lord Bingham, who coined the phrase, I see circularity and fallacy in the idea that "every legal wrong must have a remedy", which creates more questions than it answers.[7] However, in my view, the Privy Council were right to be bold and try to find a remedy for those like Mr Paterson who suffer significant financial and reputational damage through no fault of their own, and who would otherwise be left with no remedy.

- Given the Privy Council is the very same panel that would decide the issue under English law, and that there is no apparent difference for these purposes in the law relied upon, this is, at worst, highly persuasive and should apply to English civil proceedings.

- Despite Lord Sumption's fears, such claims will be rare. The majority were keen to discourage any idea that such extension would result in the floodgates being opened regarding such claims, emphasising that the requirements of the tort (malice and lack of reasonable cause) are stringent.

- It remains to be seen if the suggestions for future reform are followed through in respect of a single tort of misusing legal proceedings.

- Meanwhile, solicitors acting for clients encountering the types of behaviour faced by Mr Patterson (or even for solicitors acting for individuals who pursue litigation for similar reasons to Mr Delessio), should take note of this extension of tortious liability.

JOE ENGLAND

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[7] For those interested in this subject, see the 2009 Annual Bar Reform Lecture given by Lord Hoffmann, "Reforming the Law of Public Authority Negligence", 17 November 2009.