[2013] UKPC 17
Privy Council Appeal No 0054 of 2012

JUDGMENT

Crawford Adjusters and others (Appellants) *v* Sagicor General Insurance (Cayman) Limited and another (Respondent)

From the Cayman Islands Court of Appeal

before

Lord Neuberger
Lady Hale
Lord Kerr
Lord Wilson
Lord Sumption

JUDGMENTS DELIVERED

ON

13 June 2013

Heard on 22-23 January 2013

Appellant
Isaac Ellis Jacob
Conn MacEvilly
(Instructed by Hampson & Co. Attorneys-at-Law, George Town)

Respondent
Michael Roberts
Nicholas Dunne
(Instructed by Edwin Coe LLP, as agents for Walkers, George Town)

LORD WILSON:

INTRODUCTION

1. This appeal requires the Board to consider the scope of the closely related torts of abuse of process and malicious prosecution.

2. The appellants are Mr Alastair Paterson and two companies of which he is a director and which at all material times acted by him. For the purposes of this appeal I will personify all the appellants as Mr Paterson.

3. The respondent is Sagicor General Insurance (Cayman) Ltd ("Sagicor").

4. Mr Paterson appeals against an order of the Cayman Islands Court of Appeal, Cayman Islands, dated 5 April 2012. By a judgment delivered by Sir Anthony Campbell JA, with which Sir John Chadwick P and Elliott Mottley JA agreed, the court dismissed Mr Paterson's appeal against an order of the Grand Court of the Cayman Islands dated 14 February 2011. By a judgment delivered on that date Henderson J had dismissed Mr Paterson's counterclaim against Sagicor for damages.

THE FACTS

5. Mr Paterson is a chartered surveyor resident in the Cayman Islands.

6. On 11 and 12 September 2004 Hurricane Ivan made landfall in Grand Cayman and caused substantial damage. It extensively damaged Windsor Village ("the Village"), a development of 35 residential units in six two-storey blocks along the shore. The proprietors of the Village had insured it with Sagicor against damage, including by hurricane.

7. Sagicor at once accepted that much of the damage caused to the Village was covered by the policy. On 24 September 2004 it appointed Mr Paterson to act as its loss adjuster in relation to the claim. Mr Scott, the chief executive officer of Sagicor, resided in the Village and was keen that the works of restoration should begin quickly. It was he who suggested that the works might be undertaken by one or other of two building companies of which Messrs John and Robert Hurlstone were directors. I will describe both companies and both men compendiously as Hurlstone.

8. Sagicor and the proprietors of the Village were both content that Hurlstone should undertake the works. It began the initial clean-up work on about 21 October 2004. But in the aftermath of the hurricane there was considerable chaos on the island. Building materials were in short supply and their cost had increased sharply. Little heavy equipment remained in working order. There was a severe shortage of motor vehicles. Construction workers were hard to find; Hurlstone had to employ hotel and bar workers, who demanded higher than normal hourly rates of pay. Water had devastated Hurlstone's offices and its computers had been destroyed.

9. It was partly for these reasons that paperwork apt to a project of such size was lacking. Engineers had produced a structural report and drawings for the reconstruction but a detailed scope of works was never produced and its absence caused considerable difficulty. A total contract price was never agreed between Hurlstone and the proprietors of the Village. The absence of specifications and bills of quantities disabled Hurlstone from offering a firm price. But in November 2004 it gave the proprietors a preliminary estimate in the sum of just over $5.5m; and the estimate came to Sagicor's attention. In this judgment all references to dollars are references to Cayman Islands dollars.

10. Hurlstone made clear to Mr Paterson and through him to Sagicor that it expected payments in advance to cover its likely expenditure. Between October 2004 and May 2005, on the recommendation of Mr Paterson, Sagicor made seven advance payments to Hurlstone which totalled $2.9m. The final three of the payments were also approved by another loss adjuster instructed by Sagicor although he expressed concern about the lack of detail in Mr Paterson's reports. Before recommending advances to Hurlstone, Mr Paterson visited its offices, inspected its invoices and sought carefully to review its work. By June 2005 Mr Paterson was close to finalising his adjustment of Sagicor's liability under the policy. For discussion he put forward figures, which Sagicor appeared to accept, that the total cost of the works of reconstruction at the Village would be in the sum of $6.5m, of which Sagicor would be liable for $5.5m. Hurlstone was pressing for a further advance on the basis that the total of the previous advances fell significantly short of the value of the works which it had so far done; but Mr Paterson agreed with Sagicor that no further advance would be made until a contract price had been agreed.

11. In June 2005 Mr Frank Delessio joined Sagicor as Senior Vice President. He was an experienced and able loss adjuster with an aggressive personality. He and Mr Paterson had known each other for several years. They were not fond of each other. Like many others, Mr Paterson considered Mr Delessio to be confrontational. In about 2001 Mr Paterson had inquired of the Cayman Immigration Department whether Mr Delessio held an appropriate work permit; and his inquiry had come to Mr Delessio's knowledge.

12. On arrival at Sagicor Mr Delessio began a detailed study of its liability for losses caused by the hurricane and in particular for the cost of works at the Village. He became concerned that there was a serious deficiency in the documentation to support the advance

payments which had been made to Hurlstone on the recommendation of Mr Paterson. On behalf of Sagicor Mr Delessio instructed Mr Paterson to deal only with himself. He acquired scope sheets apparently prepared on behalf of Mr Paterson, which appeared to calculate Sagicor's total liability at $4.8m rather than $5.5m. He demanded that Mr Paterson should at once provide a full report outlining all costings. By that stage it would have been almost impossible for Mr Paterson to meet that demand; and, insofar as he could have met it in part, he could not have done so quickly.

13. In July 2005, apparently with the agreement of the proprietors, Mr Delessio told Hurlstone that it had been fired. It had completed about half the work and had expected to finish it in December 2005.

14. In July 2005 Mr Delessio stated that he intended to drive Mr Paterson out of business and to destroy him professionally. The judge found that Mr Delessio meant what he said. To one witness Mr Delessio seemed obsessed by a desire to damage Mr Paterson. He arranged for private investigators to place Mr Paterson under surveillance. He caused Sagicor to instruct Quin and Hampson, attorneys-at-law, to advise it; and, in its dealings with the attorneys, Sagicor acted through him. At its invitation the head of the Financial Crimes Unit of the Islands Police Service attended a meeting between him and the attorneys in case it should be concluded that Mr Paterson had committed a criminal offence.

15. In August 2005 Mr Delessio instructed Mr Purbrick, a chartered surveyor and loss adjuster in practice in England, to come to Grand Cayman and to assess the value of Hurlstone's work at the Village. Mr Purbrick spent five days on site. But, on the instruction of Mr Delessio, he did not speak to Mr Paterson or Hurlstone. Nor did he inquire of Hurlstone's subcontractors or suppliers about costs. Nor did he even consult the engineers who had produced the structural report and the drawings.

16. In September 2005 Mr Purbrick produced a preliminary report. In it he valued the work done by Hurlstone at $0.9m, of which $0.8m was said to be the responsibility of Sagicor. On Mr Delessio's instruction Mr Purbrick had made no allowance for the cost of any clean-up work. Mr Delessio thereupon caused the attorneys to instruct London counsel to advise whether Mr Paterson and Hurlstone had perpetrated a fraud on Sagicor. On the basis of Mr Purbrick's report counsel advised that Hurlstone's overcharging, approved by Mr Paterson, had been so gross as to be incapable of honest explanation. In about February 2006 Mr Purbrick wrote a second report in which he identified allegedly defective work by Hurlstone which caused him to reduce his estimate of the value of the work which it had done to $0.8m, of which $0.7m was said to be the responsibility of Sagicor. Both Sagicor and the proprietors of the Village instructed the attorneys to issue proceedings on their behalf.

17. On 28 February 2006, in the Grand Court, Sagicor and the proprietors issued a writ against Mr Paterson and Hurlstone. The statement of claim was squarely founded on Mr Purbrick's reports. The plaintiffs alleged that Sagicor had paid Hurlstone $2.9m for works for which it was liable to pay only $0.7m; that the payments had been made as a result of fraudulent misrepresentations about the value of the works on the part of Mr Paterson and Hurlstone; and that they had conspired together to make the misrepresentations. Sagicor claimed damages against them for deceit and conspiracy. The proprietors, however, soon amended their claim so that it was brought only against Hurlstone and only for breach of contract or by way of restitution; so they thereby dissociated themselves from the allegations of fraud and conspiracy.

18. On the date when the writ was issued Sagicor, not joined by the proprietors, applied ex parte to the Chief Justice for *Mareva* injunctions against Mr Paterson and Hurlstone. On the usual undertaking he granted the injunction against Hurlstone; but he held that the evidence of Mr Paterson's likely dissipation of assets was insufficient to justify an injunction against him.

19. Mr Delessio informed an officer of the proprietors that he intended to plant an article in the press about the allegations against Mr Paterson and Hurlstone in the proceedings; and the judge found that he was instrumental in alerting a journalist working for "The Caymanian Compass" to the allegations. On 22 March 2006 the Compass duly reported Sagicor's allegations that Mr Paterson had made misrepresentations which he knew were false or which he had made recklessly. The currency thereby given to the allegations caused massive damage to his reputation and to the willingness of third parties to employ him.

20. Like Hurlstone, Mr Paterson filed a defence in which all the allegations were denied. But he included a counterclaim for fees payable to him under his contract with Sagicor.

21. The progress of the action was slow; but there is no evidence to justify the allegation, first raised by Mr Paterson before the Court of Appeal and there rejected, that the plaintiffs never intended to bring it to trial. In September 2008, three months prior to the dates fixed for the trial, Hurlstone made disclosure of invoices and other documentation which indicated its extensive payments to subcontractors and suppliers. Concerned that they appeared to undermine Mr Purbrick's reports, the attorneys asked counsel to advise. His advice was that it would be professionally improper for him and the attorneys to continue to represent Sagicor in its claims of fraud and conspiracy. Only days before trial the plaintiffs discontinued the action and judgment was entered for Mr Paterson and Hurlstone. On 9 December 2008 Henderson J ordered Sagicor to pay their costs on the indemnity basis. Thereupon he granted Mr Paterson leave to amend his counterclaim so as to include a claim for damages against Sagicor for abuse of process; and he gave directions for the assembly for trial both of Mr Paterson's counterclaim, of Hurlstone's claim for

compensation pursuant to Sagicor's undertaking attached to the *Mareva* injunction and also of a claim for damages against Sagicor for malicious prosecution and/or abuse of process brought by Hurlstone in a separate action which it had recently issued.

22. Early in 2009 Mr Delessio committed suicide.

23. Over 30 days between May and December 2009 Henderson J heard the various claims. There was a regrettable delay prior to the dissemination of his judgment, which he ascribed to pressure of work and for which he apologised to the parties. But I pay tribute to the clarity and comprehensiveness of the judgment which he ultimately disseminated on 14 February 2011 and to which, at the request of counsel then appearing for Mr Paterson, he made additions on 14 March 2011.

24. By the order dated 14 February 2011 Henderson J dismissed Mr Paterson's counterclaim. He also dismissed the separate action brought by Hurlstone. But, by way of enforcement of Sagicor's undertaking, he awarded Hurlstone sums totalling $7.2m in respect primarily of economic loss which it had suffered as a result of the injunction but also of damage to reputation and by way of aggravated damages for elements of non-disclosure on Sagicor's part when obtaining the injunction. An appeal by Sagicor against the amount of the judge's award to Hurlstone was compromised on confidential terms; and Hurlstone's participation in the litigation came to an end.

25. As pleaded, Mr Paterson's counterclaim had been founded on the tort of abuse of process. Before the Court of Appeal, and in particular before the Board, Sagicor has protested that it has therefore not remained open to Mr Paterson to found his argument alternatively on the tort of malicious prosecution, which had been pleaded only by Hurlstone in its separate action. It is clear, however, that, after noting that the two torts were closely related, Henderson J treated Mr Paterson, like Hurlstone, as relying alternatively on both torts. In my view Sagicor fails to establish that Mr Paterson's omission expressly to plead that it was liable to him pursuant to the tort of malicious prosecution led to the failure of Henderson J to consider any matter arguably relevant to the existence of the tort. I would decline to accede to Sagicor's invitation to refuse to consider this alternative basis of Mr Paterson's appeal.

26. On what grounds did Henderson J dismiss Mr Paterson's counterclaim?

27. In this regard two matters were agreed or not in active dispute.

28. The first was that works done by Hurlstone at the Village for the cost of which Sagicor was responsible had a value of $3m. In that it had paid it $2.9m, Sagicor had therefore not overpaid Hurlstone at all.

29. The second, based on agreement between experts instructed on each side, was that, were Sagicor liable to Mr Paterson either for abuse of process or for malicious prosecution, his special damages, reflective of the economic loss caused to him by its allegations, amounted to $1.3m. The judge explained that, to this sum, he would have added $0.035m by way of general damages for the distress, hurt and humiliation suffered by Mr Paterson as a result of the allegations.

30. The judge received expert evidence from three surveyors about the respects in which Mr Purbrick's reports had been flawed. The evidence was not substantially in conflict; and the judge appears to have accepted it. The most obvious error was that Mr Purbrick had not included in his calculations the cost of the clean-up work which Hurlstone had undertaken. For Mr Delessio had told him that the clean-up work had been effected by a different contractor; indeed Mr Delessio had told him so even though he knew that Hurlstone had itself conducted the clean-up work and even though he possessed an invoice from Hurlstone in respect of the work in the sum of about $0.64m, which Sagicor had paid. Nor did Mr Delessio inform Sagicor's attorneys that he had told Mr Purbrick not to allow for the clean-up work. But the judge also found that Mr Purbrick's ability to reach a valid opinion had been severely fettered by Mr Delessio's instruction to him not to speak to Mr Paterson nor to Hurlstone. He had not even spoken to the engineers nor obtained their structural drawings. He had in effect no knowledge of the local market, let alone of its distortion in the aftermath of the hurricane; and he had adopted labour rates, costs of materials and allowances for overhead and profits, all of which had been demonstrably too low.

31. The judge found that Mr Delessio knew that Mr Purbrick's reports were not a proper basis for the allegations of fraud and conspiracy; and that Mr Delessio concealed this from Sagicor's attorneys. Indeed, as he had observed on 9 December 2008 when ordering it to pay the costs of its action on an indemnity basis, Sagicor had never been in possession of evidence capable of establishing fraud or conspiracy.

32. The judge made findings about the motives of Mr Delessio, which (as is not challenged) he imputed to Sagicor, in making the allegations of fraud and conspiracy against Mr Paterson. They are of great importance to the current appeal.
The judge found:

(a) that Mr Delessio had noted a number of features surrounding the size of payments to Hurlstone which might, to the reasonable and objective observer, have seemed somewhat suspicious;

(b) that, in particular, Mr Paterson's reports to Sagicor had lacked customary detail; that he could have provided a somewhat fuller response, especially in writing, to Mr Delessio's demands for information; that one of Mr Paterson's former employees might have

told Mr Delessio that the work done by Hurlstone at the Village had a value of only $1.3m; and that Mr Paterson had put himself into a position of conflict by agreeing to act as project manager for the proprietors as well as the loss adjuster for Sagicor;

(c) that, while it was reasonable for Mr Delessio to have been somewhat suspicious, it had been unreasonable for him to believe that Mr Paterson had defrauded Sagicor;

(d) that, however, Mr Delessio had believed that Mr Paterson had defrauded it;

(e) that Mr Delessio's belief that he had defrauded it was a significant contributing factor in leading Sagicor to make the allegations of fraud and conspiracy against Mr Paterson; but

(f) that the dominant factor which led it to make those allegations against him had been Mr Delessio's strong dislike and resentment of him, his wish to gain revenge on him and his obsessive determination to destroy him professionally.

CONCLUSIONS OF THE COURTS BELOW

33. In the light of the above findings Henderson J addressed each of the two torts upon which Mr Paterson relied. He concluded that Sagicor was not liable for abuse of process because it had not used the facility to sue Mr Paterson in order to secure an object for which legal action was not designed; and that 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.

34. In relation to the suggested tort of malicious prosecution, Henderson J held that, save in respect of one crucial feature of law, Mr Paterson had established all of the four elements of the tort. Thus

(a) the prior proceedings had been determined in favour of Mr Paterson;

(b) the allegations of fraud and conspiracy made against him in the prior proceedings had been made without reasonable cause;

(c) in the light of the finding set out in para 32(f) above, the allegations against him had been made maliciously; and

(d) as a result of the allegations, he had, as was agreed, suffered substantial financial loss and significant other damage.

The crucial feature which, according to Henderson J, precluded his holding Sagicor liable to Mr Paterson for malicious prosecution was that the present state of the law did not allow extension of the tort to civil proceedings. In this regard he cited observations made by Lord Steyn in *Gregory v Portsmouth City Council* [2000] 1 AC 419, pp 432-433, which I will address in para 36 below.

35. In the Court of Appeal Mr Jacob, who was appearing for Mr Paterson for the first time, conceded that, in the light of the observations in the *Gregory* case, it would in effect not be open to that court to hold that the tort of malicious prosecution had been established. There was a formal dismissal of that ground of the appeal so that, in the event of an appeal to the Board, Mr Jacob could actively press that ground by challenging its dismissal. Instead he argued that the tort of abuse of process had been established. The court held, however, that the judge had been right to reject that argument for the reasons which he had given and which I have summarised at para 33.

THE *GREGORY* CASE

36. At the outset of the interesting legal excursion which this appeal invites the Board to undertake, it is worthwhile to assess the extent to which the observations made in the *Gregory* case, cited above, impede – or do not impede – Mr Paterson's ability to succeed in establishing what, as I will explain, I regard as otherwise the more arguable of the torts upon which he relies, namely that of malicious prosecution.

37. In the *Gregory* case C was a councillor on D City Council and was a member of some of its committees. Following an allegation against him of misuse of insider knowledge in property dealings, D set up a committee which found the allegation true and purported to remove him from the committees. A court later held that the committee had thereby acted beyond its powers. C's subsequent action against D for malicious prosecution was struck out by a district judge as disclosing no cause of action; and on appeal a High Court judge upheld the strike-out. By a majority, the Court of Appeal dismissed C's further appeal: (1997) 96 LGR 569; but Schiemann LJ delivered a powerful dissenting judgment. The House of Lords dismissed C's yet further appeal. Lord Steyn, with whom the other members of the House agreed, gave the only substantive speech. He said:

(a) that, whatever the extent of the tort of malicious prosecution, its paradigm was of the prosecution of criminal proceedings (p 426);

(b) that a distinctive feature of the tort was that the defendant had abused the coercive powers of the state (p 426);

(c) that a claimant had to prove that the criminal prosecution was determined in his favour, that it was brought without reasonable and proper cause, that it was malicious and that he had suffered damage (p 426);

(d) that the extension of the tort in the US to the prosecution of civil actions was related to the absence there of a general power to award costs against a claimant in favour of a successful defendant (p 429);

(e) that the academic criticism in Australia, Canada and New Zealand of the apparent absence of redress for malicious prosecution of civil proceedings did not extend to criticism in relation to the prosecution of disciplinary proceedings (p 431); and

(f) that, in relation to statements made in disciplinary, as opposed to in legal, proceedings, privilege under the law of defamation was only qualified, thus defeasible by proof of malice, and that a remedy in defamation was therefore a tort which (together with three other torts) might well be available to the victim of a malicious prosecution of disciplinary proceedings such as C claimed to be (pp 431-432).

38. The holding in the *Gregory* case was that the tort of malicious prosecution did not extend to disciplinary proceedings: p 432. Then, however, Lord Steyn added as a post-script, at pp 432-433:

> "My Lords, it is not necessary for the disposal of the present appeal to express a view on the argument in favour of the extension of the tort to civil proceedings generally. It would, however, be unsatisfactory to leave this important issue in the air. I will, therefore, briefly state my conclusions on this aspect. There is a stronger case for an extension of the tort to civil legal proceedings than to disciplinary proceedings Both criminal and civil legal proceedings are covered by the same immunity. And as I have explained with reference to the potential damage of publicity about a civil action alleging fraud, the traditional explanation namely that in the case of civil proceedings the poison and the antidote are presented simultaneously, is no longer plausible. Nevertheless, for essentially practical reasons I am not persuaded that the general extension of the tort to civil proceedings has been shown to be necessary if one takes into account the protection afforded by other related torts. I

> am tolerably confident that any manifest injustices arising from groundless and damaging civil proceedings are either already adequately protected under other torts or are capable of being addressed by any necessary and desirable extensions of other torts. Instead of embarking on a radical extension of the tort of malicious prosecution I would rely on the capacity of our tort law for pragmatic growth in response to true necessities demonstrated by experience."

39. In my view Lord Steyn's observations should in no way discourage the Board from concluding, were it otherwise minded to do so, that the tort of malicious prosecution applies to Mr Paterson's case. It cannot be doubted that he suffered manifest injustice as a result of groundless and damaging civil proceedings brought maliciously. If, as I will conclude, no other tort is capable of extension so as to address the injustice of the present case, the rationale behind Lord Steyn's hesitation loses all its force. And, if, as he had earlier observed, a distinctive feature of the tort is an abuse of the coercive powers of the state, the Board will need to ask why it does not generate liability as much in the case of malicious prosecution of civil proceedings as in that of criminal proceedings. Unfortunate though it may be for members of the Board to favour such different constructions of Lord Steyn's apparently straightforward observations, I find myself unable to subscribe to Lord Sumption's conclusion, at para 146, that the House of Lords thereby "decided" and "declared" that the tort of malicious prosecution did not extend to civil proceedings; nor, for reasons which will become apparent, can I associate myself with his suggestion that this area of the law is "relatively well-trodden".

EARLY DEVELOPMENT OF THE LAW

40. In 1285 the Parliament of Edward I provided a right to damages for the victims of malicious appeals (ie prosecutions) of homicides and other felonies against those who had conspired to procure them (Anno 13, Edw I, stat 1, c12); and in 1305 the Parliament ordained that the judges should be provided with a transcript of its definition of conspirators for these purposes, namely those who, in an early translation from law French, "do confeder or bind themselves by Oath, Covenant or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to... cause [a person] to be indicted..." (Anno 33, Edw I, stat 2).

41. By Elizabethan times it was recognised that the writ of conspiracy failed to recompense all deserving victims of malicious prosecution. Obviously the writ did not lie against the single prosecutor; moreover it covered malicious prosecutions for felony but not for misdemeanour; and furthermore the acquittal had to be by verdict rather than for any other reason. The engine behind the development of the common law of tort, namely the action on the case, came to the rescue. The action on the case required consideration, first, of whether D had caused C to suffer damage and then, if

so, of whether D's conduct in so doing had been so reprehensible as to make him liable to C for it. The action on the case began to supplant the writ of conspiracy for use by victims of malicious prosecution and it was not shackled by the three limitations to which I have referred.

42. I am reluctant to appear to submerge this judgment in ancient legal history. On the other hand I am concerned to demonstrate that, with respect, Lord Sumption is wrong to state, in para 145 of his judgment, that the tort of malicious prosecution has never previously applied to civil proceedings and, in para 159, that therefore to apply it to civil proceedings would be to create a wholly new tort. In *The Present Law of Abuse of Legal Procedure*, Cambridge University Press, 1921, Sir Percy Winfield, wrote, at p202, that the writ of conspiracy had lain for improper civil actions and, at p199, that, equally, the action upon the case was not confined to malicious indictments. I will confine myself to two of Sir Percy's examples. The first is *Bulwer v Smith* (1583) 4 Leon 52, 74 ER 724, in which, knowing that C owed H £20 under a judgment debt and that H had died, D unlawfully arrogated H's name to himself and thereby maliciously caused C to be outlawed for non-payment of the debt, as a result of which he was imprisoned for two months and suffered forfeiture of his goods. C successfully sued D for compensation for the loss and damage sustained as a result of the outlawry. The second is *Gray v Dight* (1677) 2 Show KB 144, 89 ER 848, in which C successfully sued D for having maliciously prosecuted him in the ecclesiastical court, as a result of which he had been excommunicated. "And resolved" states the report, "the action lies though nothing ensued but an excommunication, and no [arrest], nor any express damage laid".

43. Although therefore, as Diplock J correctly recognised in *Berry v British Transport Commission* [1961] 1 QB 149, at p 159, it could be founded upon any form of legal proceedings, whether civil or criminal, the action on the case for malicious prosecution was usually brought in the wake of unsuccessful criminal proceedings; and in that regard an important aspect of public policy was engaged. It surrounded the fact that, until the nineteenth century, criminal prosecutions were brought almost entirely by victims of the alleged crimes or, if they were dead, by their kinsmen: see *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484, para 11. In that enforcement of the criminal law therefore depended upon private initiative, it was important not to discourage the initiative by too easy a remedy for the defendant against the prosecutor in the event of his acquittal. One device was based on the need for an acquitted defendant who wished to sue for malicious prosecution to obtain from the judge in the criminal proceedings a copy of the record of the indictment and of his acquittal. As Blackstone explains in his *Commentaries*, 1765, Book Three, Chapter 8,

> "but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable case to found such prosecution upon. For it would be a very great discouragement to the public justice of the Kingdom, if prosecutors, who had a tolerable

ground of suspicion, were liable to be sued at law whenever their indictments miscarried."

44. In 1698 the Court of King's Bench delivered its seminal judgment in *Savile v Roberts*. It was regarded as so important that ten different law reporters reported it. The report principally cited has been that of Lord Raymond: 1 Ld Raym 374, 91 ER 1147. D had maliciously caused C to be indicted for riot. Following his acquittal C sued D for malicious prosecution. The court affirmed the judgment which had been given for C. It was held to be irrelevant that D had not been part of a conspiracy. Chief Justice Holt observed, at p 378, that whether the action would lie had been a point "much unsettled in Westminster Hall, and therefore to set it at rest is at this time very necessary". Lord Raymond's report of the judgment of the Chief Justice continues as follows:

"He said that there are three sorts of damages, any of which would be sufficient ground to support the action.

1. The damage to a man's fame, as if the matter whereof he is accused be scandalous... But there is no scandal in the crime for which the plaintiff in the original action was indicted.

2. ...damages...such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty... but these kinds of damages are not ingredients in the present case.

3. ...damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself."

45. The Chief Justice proceeded, at pp 379-380, pp1150-1151, to observe, no doubt subject to what he was about to add, that, where a civil action was sued without cause, no action would lie in favour of the successful defendant; for, in civil as opposed to in criminal proceedings, claimants had been required to post pledges which could be drawn down in favour of victims of false claims and, more recently, they could be ordered to pay costs to their victims directly. Then, however, he added that "if A sues an action against B for mere vexation, in some cases upon particular damage B may have an action; but it is not enough to say that A sued him *falso et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the Court to be manifestly vexatious". Or, in the words of another of the reports, at 12 Mod 208,

88 ER 1267, at p 211, p 1269, "if he shew any special matter, whereby it appears to the court that it was frivolous and vexatious, he shall have an action".

46. In support of his assertion that an action could lie for the "malicious prosecution" of civil proceedings, the Chief Justice cited *Daw v Swaine* (1668) 1 Sid 424, 82 ER 1195. In order to cause C to be imprisoned for inability to lodge the sum claimed as bail, D had there maliciously sued him for £5000 rather than for £40 which was the amount of C's debt to him. C's action succeeded. I respectfully disagree with Lord Sumption's suggestion, at para 140, that C's cause of action was subsequently subsumed in the action for abuse of process; as I will explain, the latter requires a purpose not within the scope of the action but D's purpose, namely to cause C to be imprisoned for want of bail, was entirely within the scope of his action.

47. Other of the reports of *Savile v Roberts* show that the Chief Justice also cited with approval two yet further examples of recovery for the malicious prosecution of civil proceedings: see the reports at 5 Mod 394, 87 ER 725, for his citation of *Waterer v Freeman* (1617) Hobart 205, 80 ER 352, and at 12 Mod 208, 88 ER 1267, for his citation of *Skinner v Gunton* (1669) 1 Saund 228, 85 ER 249.

48. At the end the Chief Justice added, at p 381, p 1151, of Lord Raymond's report, that "though this action will lie, yet it ought not to be favoured, but managed with great caution".

49. It is fair to say that the Chief Justice, at p 379, p 1150, of Lord Raymond's report, pointed out that, in a civil action as opposed to in a criminal prosecution, the assertion was of a private right. But, had he intended to use that distinction as a reason for excluding the malicious prosecution of a civil action from the scope of an action on the case, he would not have proceeded to stress the availability to a defendant to civil proceedings of an order for costs nor to have indorsed the previous jurisprudence that some victims of civil actions brought in such circumstances could recover. The basis of the action on the case was *damage* caused by D to C; and, for the purpose of this particular species of it, the crucial additional element was *malice*. In my view the best encapsulation of the central decision in *Savile v Roberts*, which makes no distinction between criminal and civil proceedings, is to be collected from the report at 5 Mod 394, 87 ER 725, as follows:

> "It is the *malice* that is the foundation of all actions of this nature, which incites men to make use of law for other purposes than those for which it was ordained."

50. The judgment of Holt CJ has had an extraordinary impact upon the development of the law of tort throughout the common law world. In *The History of*

Conspiracy and Abuse of Legal Procedure, 1921, Cambridge University Press, Sir Percy Winfield, at p129, describes the three types of damage identified by the Chief Justice as "the plinths upon which English Law has been reared".

51. In relation to each plinth a question arises.

52. First, why was there no scandal, and thus no damage to fame, in being prosecuted for riot? The answer is that the word "fame" is linked with that of "defamation" and that the word "scandal" was used in a special sense: if the oral accusation of a crime would have amounted to slander actionable *per se*, there was "scandal" in being prosecuted for it. At that time riot did not fall into that category: see the exegesis of Diplock J in the *Berry* case, cited above, at pp 161-2.

53. Second, why had C not been put in danger of losing his liberty? For riot was a trespass, punishable with imprisonment. It seems, however, from other reports of the case (for example 12 Mod 208, 88 ER 1267), that the Chief Justice had said, or intended to say, that actual loss of liberty, whether by arrest or detention on remand, was his second alternative pre-requisite.

54. Third, does the fact that over 300 years ago the court referred to financial loss in terms apt to the case before it, namely in terms of out-of-pocket expenses, mean that today the court should decline to reimburse the victim of a malicious prosecution for other sorts of financial loss which were the foreseeable, or, as in the present case, the intended, consequences of it? The question answers itself. But, in case my question is regarded as loaded, and my answer glib, I will address recovery for economic loss more fully at paras 74 to 77.

55. The decision in the *Savile* case was enthusiastically approved by Chief Justice Parker, sitting again in the Court of King's Bench, in *Jones v Givin* (or more probably *Gwynn)* (1713) Gilb Cas 185, 93 ER 300. D had unsuccessfully prosecuted C for exercising the faculty of a badger (ie the right to deal in corn) without a licence. C successfully sued D for malicious prosecution and recovered damages equal to his costs of £100 expended in the criminal proceedings. As an aside, Parker CJ reiterated, at p197, p303, that an action would lie for the malicious prosecution of civil proceedings if the claimant could "show special matter which shows malice". Later at p209, p307, he said:

> "The difficulty, which stood most in the way of these actions, was the fear of discouraging prosecutions, and the regard to what was done in a legal course to bring offenders to punishment...[But] requiring satisfaction from those who proceed out of meer malice and wickedness

without any reasonable ground, will be no discouragement at all to him who honestly proceeds on reasonable grounds."

56. It was the decision of the Court of Exchequer Chamber in *Grainger v Hill* (1838) 4 Bing (NC) 212, 132 ER 769, which gave birth to the related tort of abuse of process. D1 and D2 lent C £80 repayable in 1837, secured by a mortgage on C's vessel. C was to be free to continue to use the vessel in the interim but the law forbade its use if he were to cease to hold its register. In 1836 the Ds became concerned about the strength of their security. They resolved to put pressure on C to make early repayment. In an action for assumpsit they falsely claimed that the loan was already repayable. They swore an affidavit of debt, which in those days entitled them, without judicial authority, to cause to be sued out of court a writ of *capias ad respondendum* directed at C. This obliged the local sheriff to capture C with a view to his being brought before the court and made to respond. The sheriff indicated to C that the Ds would be content for him not to be arrested if he were to surrender the vessel's register. He did so. He soon repaid the loan but in the interim the absence of the register had required his vessel to forego four voyages to Caen. The court upheld the judgment for C in his action on the case. The judges, led by Tindal CJ, held that the tort committed by the Ds was not malicious prosecution but abuse of the process of the law to effect an object not within the scope of the process which they had initiated, namely to "extort" the register, to which they had no right, from C or to obtain it from him by "duress".

57. In *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 the Court of Appeal saw fit to make categorical observations about the continued availability of a tort of the malicious prosecution of civil proceedings. D wished urgently to realise the value of his shares in the C company. Wrongly believing that his brokers had failed to sell them, he issued a petition that C be wound up on the basis of a false allegation that it would never be able to carry on business at a profit. D advertised the petition in accordance with the rules but, prior to its service on C, he withdrew it. In its action for malicious prosecution against D the trial judge non-suited C but the Court of Appeal ordered a retrial so that a jury could determine whether D had been activated by malice and whether the petition had been filed without reasonable cause.

58. Unfortunately, in upholding C's entitlement to allege malicious prosecution of that form of civil proceeding, the court in the *Quartz Hill* case drew a distinction between a petition to wind up a company and an ordinary civil action, which, particularly in England and Wales, has had negative repercussions long after the distinction has ceased to be valid, indeed right up until today. The court accepted that in principle the tort of malicious prosecution extended to all civil proceedings. It held that the effect of the requirement to advertise a petition for bankruptcy or for a winding-up prior to the hearing was to injure the credit of the respondent before he could show that the foundation of the petition was false. It observed, however, that

the malicious prosecution of ordinary civil actions could not lead to any of the three types of damage identified in the *Savile* case, cited above, in that by then orders made in such actions could not be enforced by imprisonment; that expenses incurred in resisting them would, so far as was just, already have been the subject of an order for costs; and that, by contrast with a petition for bankruptcy or for a winding-up, fair fame would not have been damaged. Brett MR explained, at p 684-685, that "the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial". Bowen LJ expressed his observations in terms which are surprisingly categorical and indeed (as the editors of *Fleming's The Law of Torts*, 10th ed (2011), suggest) peremptory, at p 688, as follows:

> "I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action."

Bowen LJ went on, at p689, to explain that, unlike a petition for a company to be wound up, the mere bringing of an ordinary action did not have "the necessary and natural consequence" of damage to a defendant's fair fame and that, when the action was tried in public, his fair fame would be cleared if it deserved to be. Bowen LJ added, at p 690:

> "I do not say that if one travels into the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to shew that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution. It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day."

59. In *Wiffen v Bailey and Romford Urban District Council* [1915] 1 KB 600 Buckley LJ memorably summarised the effect of the *Quartz Hill* case, at p 607:

> "So the exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that in civil proceedings the poison and

> the antidote are presented simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made. If there be no scandal, if there be no danger of loss of life, limb, or liberty, if there be no pecuniary damage, the action will not lie."

Phillimore LJ added, at p 613, that an action for malicious prosecution of civil proceedings lies only when "the bane comes before the antidote, and mischief may be done which it will be too late to overtake".

60. In a judgment of conspicuous erudition in the significant decision of the Supreme Court of Victoria, Appeal Division, in *Little v Law Institute of Victoria (No 3)* [1990] VR 257, Ormiston J sought to explain why in the *Quartz Hill* case the court had been so confident that the bringing of a civil action could not, prior to trial and his vindication if appropriate, damage a defendant's reputation. He referred, at pp 283-286, to three features in relation to civil litigation in England and Wales in 1883. First, pleadings, though required to be served, did not have to be filed; and, even in relation to documents which were filed, there were considerable legal and practical constraints on the ability of a member of the public to secure access to them. Second, it was a contempt of court to publish, prior to trial, the contents of pleadings and affidavits referable to civil proceedings. Third, the defence of qualified privilege to a libel action seems then to have extended only to reports of what had been stated in open court at the trial. Thus, for one reason or another, the public seldom came to learn, prior to trial, of allegations made in ordinary civil proceedings.

61. Today, in the light of the right of the public in relation to most civil proceedings to inspect and take copies of the pleadings which now have to be filed, and of the media, without fear either of contempt of court or of the law of libel, fairly and accurately to report their contents even if defamatory, the basis of the distinction drawn in the *Quartz Hill* case has crumbled away. As Lord Steyn said in the passage of his judgment in the *Gregory* case quoted in para 38, it "is no longer plausible". Or, as was said in the *Little* case, it is now rare for the antidote to be simultaneous with the poison (Kaye and Beach JJ at p 267) and the substratum of the reasoning of Bowen LJ has been subverted (Ormiston J at p 288). Substantial damage to the reputation of a defendant can be caused by false allegations made in civil proceedings long before it is restored, even if full restoration is then possible, by his vindication at trial. If you seek a monument, then look around you at this present case before the Board.

ABUSE OF PROCESS: LATER DEVELOPMENT

62. It is hard not to regard abuse of process as a tort distinct from malicious prosecution if only because, apart from the need to establish a purpose not within the

scope of the action (ie a "collateral" or, more helpfully, an "improper" purpose), abuse of process requires neither that the action should have been brought without reasonable cause nor that it should have terminated in favour of the alleged victim: Tindal CJ said so in the *Grainger* case itself, at p 221, p 773, and it has never been gainsaid. Nevertheless the two torts sprang from the same tree and one would not expect issues common to them both, such as whether they enable recovery for economic loss, to be resolved differently.

63. What is an improper purpose? A helpful metaphor suggested by Isaacs J in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35, at p 91, is that of a stalking-horse:

> "if the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose..."

The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper. See the discussions in the joint judgment in the High Court of Australia of Mason CJ, Dawson, Toohey and McHugh JJ in *Williams v Spautz* (1992) 174 CLR 509, at paras 34 to 36, and also in *Winfield and Jolowicz on Tort*, 18th ed (2010), at para 19 -14.

64. But the settlement of an action is often reached upon terms which, had it proceeded, the court could not have ordered; and not infrequently claimants reasonably initiate actions in the hope that some such settlement might eventuate. In *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 Bridge LJ neatly allowed for this possibility in suggesting, at p 503, that "when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance". Then, however, he proceeded to notice what he described as "a difficult area", namely whether a claimant was guilty of abuse if behind his action lay two purposes – one legitimate and one improper. He had "very much doubt" whether such would be an abuse.

65. There Bridge LJ was not, at any rate expressly, considering a case where the improper purpose is predominant and the legitimate purpose is subsidiary. But his observations seem to have been influential in leading Teare J to conclude in *JSC BTA Bank v Ablyazov* [2011] EWHC 1136 (Comm) that any legitimate purpose negatived abuse even if an improper purpose was predominant. With respect to Teare J, his conclusion fails in my view to allow for the ease with which a claimant with a predominantly improper purpose can point to a legitimate purpose, however slight. In any event it runs clearly counter to the weight of modern legal opinion: see *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391 at p 469, *Land Securities plc v Fladgate Fielder* [2009] EWCA Civ 1402, [2010] Ch 467, at paras 89 and 95, and the *Williams* case in the High Court of Australia, cited above, at para 42.

66. A curious feature of the tort of abuse of process is the requirement, held to exist, for example, in decisions in the U.S., in the Superior Court of Justice, Ontario (see for example *Westjet Airlines Ltd v Air Canada* (2005) CANLll 47722 (ONSC), at para 20) and in some of the older cases in Australia, that the claimant should prove an overt act or threat on the part of the defendant, beyond issue of the proceedings, in furtherance of the alleged improper purpose. Perhaps the perceived requirement reflects the high regard in which *Fleming's The Law of Torts* is held. In the 10th edition (2011), the editors note, at para 27.100:

> "In addition to the improper purpose, there must be some overt act or threat, distinct from the proceedings themselves, in furtherance of that purpose, such as in the *[Grainger]* case the extortion accompanying the capias. Were it otherwise, any legal process could be challenged on account of its 'hidden agenda'."

In the *Williams* case, cited above, the four judges of the High Court of Australia to whose joint judgment I have referred, concluded, at paras 38 to 43, for reasons not entirely clear, that the need for an overt act might be more justifiable in the case of the tort of abuse of process than in the case, which was before them, of an application by a defendant to stay proceedings as an abuse of process. If the rationale behind the suggested need for proof of an overt act or threat is no more than that, in its absence, the defendant in an application for a stay, or indeed a claimant in an action based on the tort, might fail to establish that the other party's purpose had been improper, it would readily be understandable. But, insofar as in some quarters the overt act or threat has taken root not just as having likely evidential importance but as being a substantive requirement, whether for the defendant's application or for the claimant's tort, I struggle to understand the reason for it.

MALICIOUS CIVIL PROSECUTION: LATER DEVELOPMENT

67. The result of the effective prohibition by the comments in the *Quartz Hill* case of any general development in England and Wales of a tort of malicious prosecution of civil proceedings has been to confine the tort to a few disparate situations, linked only by the occurrence of prejudice to the victim at or close to the outset of the proceedings. They include:

(a) a petition for bankruptcy: *Johnson v Emerson* (1871) LR 6 Ex 329;
(b) a petition for winding-up: the *Quartz Hill* case itself;
(c) a writ to arrest and detain a judgment debtor who had in effect already paid the debt: *Gilding v Eyre* (1861) 10 CB (NS) 592, 142 ER 584;
(d) the procurement of a bench warrant to arrest and produce a person for failure to respond to a witness summons which had not been served on him: *Roy v Prior* [1971] AC 470;
(e) a writ to arrest a ship in the course of a dispute about a contract for its sale: *The Walter D Wallet* [1893] P 202;
(f) a writ to arrest an aircraft in the course of a dispute about an alleged lease of it: *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709;
(g) an order for the attachment of the claimant's assets in advance of an arbitration: *The Nicholas M* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479; and
(h) a search warrant: *Gibbs v Rea* [1998] AC 786.

68. In comparison with other common law jurisdictions, England and Wales has been slow to recognise that, because the reasoning in the *Quartz Hill* case no longer applies, there may, subject to policy considerations to which I will refer and which demand caution, be a need for reversion to the old, principled, law which made no distinction between the malicious prosecution of criminal and of civil proceedings. Indeed the paradox is that nowadays, at any rate in England and Wales, there is much less chance of being a victim of a criminal prosecution brought maliciously and without reasonable cause than of a civil action so brought. For most criminal prosecutions are brought at the direction of the Crown Prosecution Service, which, by its code, must first be satisfied that the evidence in support of it is such as to render the chance of a conviction greater than even; and, more importantly for present purposes, it is the policy of the Director of Public Prosecutions to take over a private prosecution and to discontinue it unless in his opinion the evidence in support of it crosses that same threshold: see the *Gujra* case, cited above.

69. In Australia there is the decision of the Supreme Court of Victoria, Appeal Division, in the *Little* case, cited above. C was a solicitor and D was a professional association which had obtained an injunction against his continuation in practice on the basis that he was in breach of regulations which required him to procure professional insurance. The regulations were later held to be invalid and the

injunction was discharged. He thereupon sued D for malicious civil prosecution in having obtained the injunction. His action was allowed to proceed. In their joint judgment Kaye and Beach JJ held, at p 267:

> "In our opinion, there is no longer justification for confining to a bankruptcy petition and an application to wind up a company the remedy for malicious abuse of civil proceedings where the damages claimed is to the plaintiff's reputation."

Ormiston J added, at p 289:

> "the risk that maliciously made allegations in civil proceedings may cause perceptible harm to a person's reputation is now a real risk under current law and procedures..."

As I will explain in para 77(d), the reference of the justices to damage to reputation was clearly not intended to exclude a claim for consequential economic loss.

70. In New Zealand there are the statements made by the Court of Appeal in *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84. C had been a member of D but had resigned. D had sued him for the misappropriation of its assets but had discontinued its action. Following other unsuccessful proceedings then brought by him against D, C issued proceedings against it for malicious prosecution of that action. In the light of his previous proceedings, his action was struck out as an abuse of process. In passing, however, Cooke J noted, at p 88, that in *Jones v Foreman* [1917] NZLR 798 a Full Court of the Supreme Court had adopted the observations in the *Quartz Hill* case in concluding that there was no general tort of civil malicious prosecution; that in modern times textbook writers had widely criticised the conclusion; and that in an appropriate case there was reason for the Court of Appeal to review it. Casey J added, at p 98, that the existence of the tort was certainly arguable. In *Rawlinson v Purnell Jenkison and Roscoe* (1999) 1 NZLR 479 an action in the High Court of New Zealand for malicious civil prosecution failed if only for want of proof of malice but Hammond J discussed whether, had malice been proved, the action could have been sustained. He recognised that, in the light of the statements in the *New Zealand Social Credit* case the existence of the tort was a live issue and, after addressing rival arguments of policy, he conjectured, at p 488, that it would be possible "to...constrain the cause of action, by confining it to the institution of proceedings which are really quasi-criminal in character, or reflect a particular kind of odour".

71. In the United States there is the jurisprudence in relation to the tort of malicious prosecution of civil proceedings of which, at paras 165 to 196, Lord Neuberger

provides a valuable survey. He demonstrates that the states of the union are almost equally divided between their adoption of the English Rule, which is set out in §677 of the Restatement of the Law, Torts, 2d (1977), and which broadly reflects the law of England and Wales following the curtailment of the extent of the tort by the observations in the *Quartz Hill* case, and their adoption of the American Rule, which is set out in §674 of the Second Restatement. There is no doubt that the general inability of a successful defendant to obtain an award of costs against the claimant in the states of the union has provided an extra spur to the adoption in many of them of the American Rule; so it would be wrong to place their approach in the front of the present analysis. It does not follow, however, that the ability in England and Wales to make an award of costs, even on an indemnity basis, eliminates the need for the law to be able to recompense the victims of malicious actions who have suffered substantial damage beyond the costs of defending themselves.

72. Lord Neuberger's citations from U.S. authorities and his comments upon them usefully precipitate a consideration of the arguments of policy against renewed recognition of a general tort of malicious prosecution of civil proceedings. I discern six arguments:

(a) (i) The spectre of being sued for malicious prosecution in the event of failure would inhibit litigants from bringing cases with merit and in good faith (Lord Neuberger, para 181). Ugly threats by prospective defendants with long pockets would drive prospective claimants from the seat of justice (para 184).

(ii) This argument deserves considerable respect. But it was, as it happens, considered and rejected by Parker CJ as long ago as 1713: para 55 above. Is his rejection still valid? If the litigant with a reasonable case and a proper purpose would otherwise be minded to trust the court fairly to appraise it, should we assume that he would not be minded to trust the court to discern the demerits of a case of malicious prosecution brought against him in the event of failure? The requirement of proof first of malice (notwithstanding that the concept extends beyond spite to where the predominant purpose is something other than the vindication of the law: *Winfield and Jolowicz on Tort*, 18th ed (2010), para 19-11) and then of the absence of reasonable cause places two high hurdles before a claimant. No evidence has been presented to the Board, for example from the states of the US which adopt the American Rule, of the chilling effect of the tort upon the honest bringing of litigation of arguable merit which this argument foretells. Should the law be shaped by concern about ugly threats of its misuse?

(b) (i) Litigation must have an end and so lack of success in one action should not generate another. A failed action for malicious prosecution might even generate a further such action by the original claimant (para 182).

(ii) But the law recognises the need to give victims of malicious prosecution the opportunity to initiate consequential litigation in relation to criminal prosecutions and to the disparate situations broadly encompassed by the English Rule. The law has therefore already seen fit to override the argument in the first sentence and the only remaining question relates to the extent to which it should do so. Is the scenario posed by the second sentence fanciful?

(c) (i) A perspective which ascribes curative power only to law-suits has limitations which should be cast off (para 183).

(ii) But what other curative power (Mr Paterson might ask) does the American progenitor of this reflection have in mind?

(d) (i) If few claimants will recover in the subsequent action, is there any point in recognising the expanded cause of action (para 183)?

(ii) But is this a principled approach to an analysis of legal rights?

(e) (i) Recognition of the general tort might open "floodgates" which would cause the legal system to be flooded and so would contaminate its ability to function effectively (para 190).

(ii) But how powerful is this argument in the absence of empirical evidence in support of it?

(f) (i) The present law draws a "bright line" on a "principled" and "logical" basis and departure from it would be "potentially confusing" and would cause "unnecessary uncertainty" (paras 194 and 195).

(ii) The whole drift of my judgment to this point shows why, with great respect to Lord Neuberger, I cannot subscribe to any part of this final proposition.

73. In the end I conclude that the arguments against renewed recognition of a tort of malicious prosecution of civil proceedings fail to override the need for the law to be true to the reason for its very existence. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 Sir Thomas Bingham MR referred, at p663, to "the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied". The word in the rule is "wrongs" as opposed to "misfortunes": see *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, at para 2 (Lord Steyn). In *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, Lord Dyson said, at para 113:

> "The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional...any justification must be necessary and requires [to be] strict and cogent..."

The cumulative force of the suggested justifications for denying Mr Paterson a remedy for what can only be described as the wrong done to him by Sagicor fails in my view to measure up to these demanding standards. In determining his claim of malicious prosecution, the Board should be true to its primary loyalty.

BOTH TORTS: RECOVERY FOR ECONOMIC LOSS

74. Can general economic loss qualify as damage recoverable within the torts of malicious prosecution, whether criminal or civil, or of abuse of process? In the *Land Securities* case, cited above, C obtained planning permission to develop a site and D, who had offices opposite a related site owned by C, challenged the planning authority's grant of permission by judicial review. C sued D for abuse of process, alleging that the purpose behind the application for judicial review was to put pressure on C financially to assist D to relocate its offices. C claimed damages for the loss occasioned by the delay in its ability to develop the site. The Court of Appeal held that C's action had rightly been struck out. One ground was that the alleged purpose was sufficiently related to a successful outcome of the application for judicial review as not to be wrongful. But the main ground was that the tort did not enable recovery for general economic loss. Etherton LJ said that:

(a) in the *Savile* case, being one of malicious prosecution, Holt CJ had referred only to reimbursement for charges and expenses (para 54);

(b) Holt CJ had appeared to limit damages for purely pecuniary loss to the costs of defending them and there was nothing whatever in the *Savile* case to indicate that general economic loss was recoverable (para 55);

(c) the suggested recovery for general economic loss was "contrary to the whole approach" of the House of Lords in the *Gregory* case, in which Lord Steyn had gone no further than to quote Holt CJ's description of the third type of recoverable damage (para 56);

(d) recovery for malicious prosecution of civil proceedings is confined on policy grounds to the three established heads of damage identified by Tindal CJ and recognised in the *Quartz Hill* case (para 67); and

(e) there was no sense behind having rules for recoverable damage which were more generous for abuse of process than for malicious prosecution (para 68).

75. I agree with the point made by Etherton LJ at (e) above. But, with respect, I disagree with the rest of his reasoning. I consider that he treats the words uttered by the Chief Justice 300 years ago too much as if they were enshrined in statute. He makes no allowance for the fact that the only claim there made was for out-of-pocket expenses, with the result that they were the focus of the judgment. Nor do I perceive Lord Steyn in the *Gregory* case to have grappled in any way with recovery for general economic loss. Indeed, having noted, at p424, that the claimant was including a claim for damages for financial loss consequent upon alleged damage to his employment prospects, Lord Steyn never reverted to it as constituting some further obstacle in his path to success.

76. In the *Land Securities* case Moore-Bick LJ adopted a somewhat softer approach to recovery for economic loss. He accepted, at para 99, that "there are arguments in favour of recognising other kinds of damage, including consequential economic loss, at least in cases where the predominant purpose of instituting proceedings has been to inflict such loss as a means of coercion but there is no clear authority which supports such a development of the law". He accepted that some support for it was to be found in Australian cases and in the decision of the Court of Appeal in *Speed Seal Products Ltd v Paddington* [1985] 1 WLR 1327 but again, taking his cue from the generalised doubts expressed by Lord Steyn in the *Gregory* case, Moore-Bick LJ concluded at para 101, as did Mummery LJ at para 107, that there were insufficient grounds for holding that the tort of abuse of process extended to recovery for general economic loss.

77. I have reached the conclusion that the main ground of the decision in the *Land Securities* case is wrong. If economic loss has been caused by malicious prosecution of proceedings, whether criminal or civil, or by abuse of process, and if its causation was foreseeable (irrespective of whether, as in the present case, it was intended), preclusion of recovery for it should be the subject of principled justification. Yet I discern none. *McGregor on Damages*, 18th ed (2009), says, at para 38-007, under the heading of Malicious Criminal Prosecution, "as to pecuniary loss, loss of general business and employment should be recoverable; authority however is lacking". But, reaching out to cases of malicious civil prosecution and to abuse of process, one can at least notice the following:

(a) In the *Grainger* case itself the claim included damages for loss "of all the benefits, profits and advantages" which would have accrued to the claimant from the four lost voyages to Caen (p 215, p

771). There seems to have been no issue but that the claimant should recover in that regard.

(b) In the *Speed Seal* case, cited above, D was a former employee of C, who sued D for alleged misuse of its confidential information in his new business. The question was whether D should be allowed to amend his defence so as to allege, by counterclaim, that, in so suing him, C was abusing the process of the court. It is not clear why the allegation was not framed as the foundation of an application to stay C's action. At all events the decision of the Court of Appeal was that D's invocation of the tort of abuse of process was arguable and could be pleaded by amendment. As Moore-Bick LJ observed in the *Land Securities* case, at para 99, D was clearly seeking to recover economic loss in one form or another resulting indirectly from the institution of the proceedings.

(c) In the *Gibbs* case, cited above, being, like the present, an appeal to the Board from the Court of Appeal of the Cayman Islands, C was the managing director of a bank and D was a detective inspector who had successfully applied to the court for a warrant to search C's home on the basis that there were reasonable grounds for suspecting that he had benefited from drug-trafficking. The bank dismissed C. But the search yielded nothing which incriminated him. He was never charged. His action against D for malicious prosecution, namely of the application for the warrant, was upheld in the Court of Appeal and, by a majority, by the Board. D's appeal to the Board did not include a challenge to the amount of the damages which had been awarded to C in the Court of Appeal, namely $616,281. But perusal of the judgment of Collett JA in that court, 1994-95 CILR 553, at p 610, shows, unsurprisingly, that they primarily comprised damages "for loss of employment remuneration and benefits forfeited since his enforced retirement from his former post".

(d) Todd, the *Law of Torts in New Zealand*, 5th ed (2009), writes, at para 18.2.07, that "the third head of damage which may found a claim [for malicious prosecution] is property damage or economic loss. Loss in the practice of the plaintiff's profession is an example". The author there cites the *Little* case, in which the claimant alleged that the damage caused to him by the injunction included damage in the practice of his profession. In allowing most of the claim to proceed, the Appeal Division included the claim for economic loss.

MALICIOUS CIVIL PROSECUTION: SUMMARY OF CONCLUSIONS

78. (a) For my part, 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.

(b) But the early availability of an order for costs in favour of a successful defendant of civil proceedings often disabled him from proving the damage required by the tort, which for that reason, as well as for others, became – in practice – mainly focussed on criminal proceedings.

(c) The limitation on the scope of the tort of malicious prosecution of civil proceedings, cast by the observations made in the Court of Appeal in the *Quartz Hill* case, was justified by reasoning which is no longer valid.

(d) The disparate situations to which the tort of malicious prosecution of civil proceedings has been confined as a result of the observations in the *Quartz Hill* case are a rag-bag which include cases in which the gravity of the wrong (such as in the *Roy* case, in which the intended witness had, as a result of the malicious application for a bench warrant, been the subject of wrongful arrest and detention for 10 hours) would not approach its gravity in other cases of malicious prosecution of civil proceedings, such indeed as in the case before the Board.

(e) Insofar as the rationale for the tort of malicious prosecution is the inability of a successful defendant to sue a claimant for defamation in respect of allegations made maliciously in legal proceedings, it applies as much to civil as to criminal proceedings.

(f) In that (as Lord Steyn suggested in the *Gregory* case: see para 37 (b) above) a distinctive feature of the tort is that the defendant has abused the coercive powers of the state, it applies as much to civil as to criminal proceedings. There is no principle behind a redefinition of the distinctive feature as being an abuse of the coercive powers of the state only in *criminal* proceedings: that would be to generate a delineation of the contours of the tort in line only with what the draftsman of the redefinition subjectively preferred.

(g) Irrespective of the malice which may prompt assertions made in a defence and of the damage which may thereby be done to another person, it may be that defendants, like witnesses, cannot be said to be abusing the coercive powers of the state. They may therefore be beyond reach of the tort and their immunity may remain absolute. But I would leave this

point open, as, albeit with a different emphasis, does Lord Kerr at paras 111-113.

(h) If no tort other than malicious prosecution is available to remedy the sort of wrong done to Mr Paterson, Lord Steyn's observations in the *Gregory* case form no impediment to its recognition. On the contrary, they encourage it.

(i) A tort of malicious prosecution of civil proceedings should enable a claimant to recover damages for foreseeable economic loss beyond out-of-pocket expenses.

(j) The arguments of policy against restoration of a general tort of malicious prosecution of civil proceedings are worthy of respect but they are insufficiently strong to override the rule which has first claim. Perhaps also they fail to allow for the height of the hurdles which, as Lord Kerr explains in paras 109 and 110, confront a claimant in establishing, or even mounting an arguable case, not only that the defendant's action lacked reasonable cause but that he prosecuted it maliciously.

(k) It might be possible to limit the ambit of the tort of malicious prosecution to civil proceedings of which the basis was an allegation which might have been the subject of a criminal charge. Sagicor's allegation of Mr Paterson's conspiracy to defraud would fall within that limited ambit and so, strictly, the Board does not need to consider whether it has any wider ambit. But, provisionally, I would oppose the introduction of that potentially troublesome distinction and would deprecate, as illogical, the denial of a remedy for damage done to the victim of a malicious prosecution, brought without reasonable cause, of any action irrespective of its basis.

(l) In that, as Lady Hale points out at para 84, control of abuse of legal proceedings is particularly well-suited to development in judge-made law, courts in future will need to monitor whether today's reinstatement of a remedy for abuse of civil proceedings by their malicious prosecution is itself productive of abuse and, if so, to make any necessary adjustments to its effect.

DETERMINATION OF THE APPEAL

79. Sagicor did not commit the tort of **abuse of process**. Henderson J found that the predominant factor which led Sagicor to allege fraud and conspiracy against Mr Paterson had been Mr Delessio's obsessive determination to destroy him professionally. But he did not proceed to find that Mr Delessio intended to achieve Mr Paterson's professional destruction other than through the initiation and successful prosecution of the action. One can only speculate why, in that he was aware that Mr Purbrick's reports were not a proper basis for the allegations, Mr Delessio anticipated that the action would succeed. But Mr Jacob failed in his attempt to persuade the Court of Appeal that the judge should have found that Mr Delessio, and thus Sagicor, had no intention of bringing the action to trial. In the absence of a finding of that character Mr Delessio's purpose cannot be regarded as outside the scope of the action.

80. But in my view Sagicor committed the tort of **malicious prosecution**. Sagicor does not challenge the judge's conclusion that, if the tort applied to civil proceedings, all four of its ingredients were present. The predominant purpose of Mr Delessio amounts to malice. Moreover the fact that he believed that Mr Paterson had defrauded Sagicor counts for nothing because of the absence of reasonable cause for any such belief. I propose that the Board should humbly advise Her Majesty that the appeal be allowed and that judgment be entered for Mr Paterson in the sum of $1.335m, the composition of which I have explained in para 29.

LADY HALE:

81. It is always tempting to pray in aid what Sir Thomas Bingham MR referred to as "the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied" (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, at 663). But by itself that wise dictum does not tell us what the law should define as a wrong. Some conduct is wrongful whether or not it causes any damage – that is the essence of the tort or torts of trespass; other conduct is only wrongful if it causes particular types of damage – that was the essence of the action on the case; but not all conduct which causes such damage is wrongful. The tort or torts of wrongfully bringing legal proceedings are actions on the case and therefore can only lie if there is damage of the kinds specified in *Savile v Roberts* in 1698. But that is not enough. Instigating legal proceedings in good faith and with reasonable cause, even if they fail and even if they do damage in the *Savile v Roberts* sense, is not wrongful. Even maliciously instigating legal proceedings is not always, or even often, wrongful. So how is the wrong done by instituting legal proceedings to be defined?

82. It would be understandable if there were no such wrong at all. Two policy reasons are cited against it. First, people should not be deterred from instigating criminal charges or bringing lawsuits by the fear of being sued if they fail. It does not matter that such tit-for-tat suits would usually fail. There would still be the so-called

"chilling effect" of a potential liability, as Lord Hope pointed out in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, at paras 130, 131. Second, once proceedings are over, the courts should not be troubled with further claims. Clearly, it cannot be open to every successful defendant to round upon his unsuccessful claimant or prosecutor, no matter how great the collateral damage. Defining the circumstances in which he can do so is fraught with difficulty, as this case shows. Hence both of the principal policy reasons given for declining a remedy in this case would support the denial of any remedy to anyone.

83. But that such a wrong has been recognised by the law for centuries is incontrovertible. It is not suggested that this Board either can or should abolish the torts of malicious prosecution and abuse of process. We are faced with the task of discerning some rational principles which will enable us to define their boundaries. In an ideal world the separate torts of malicious prosecution and abuse of process might be brought together in a single coherent tort of misusing legal proceedings. This looks like a task much better suited to the Law Commission than to this Board. This Board can research the existing state of the law in this country (which will apply in the Cayman Islands unless there is some local legislation to the contrary). It can research the law in some comparable common law jurisdictions, but by no means all. But it does not have the resources to research and develop the policy arguments, conduct empirical research and consult the legal and general public on possible ways forward. It was for those reasons that I did not support the abandonment of the long-established principle of witness immunity in order to impose a duty of care upon certain professional witnesses in *Jones v Kaney*.

84. But that was a case where there was (and remains) a clearly established immunity which the court was being invited to curtail. The majority felt able to take that radical step in the light of modern developments in the law and in pursuit of the first rule of public policy. They also felt that the judiciary were particularly well suited to develop the law relating to their own proceedings. This too is a case which is particularly well suited for judicial development: it is about the use and misuse of judicial proceedings; the law is entirely judge-made; and some would say that it is in a judge-made mess. If so, the judges should do what they can to sort it out. It is unfair to expect Parliament to do so.

85. Here we have an established cause of action, for malicious prosecution or abuse of process, the boundaries of which are either unclear or make little sense in today's world. We can all read *Savile v Roberts* in one or more of the ten law reporters' versions. It was a case of malicious prosecution of criminal proceedings for riot. It contemplated that the action might also lie for the malicious prosecution of some proceedings of a civil nature. But for most civil actions there would be no damage of the requisite sort. That was clearly the view taken in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, where a remedy was

granted for the malicious presentation of a winding up petition on the analogy of the previously recognised remedy for the malicious presentation of a bankruptcy petition.

86. It is possible to characterise the list of cases in which claims for malicious prosecution of civil proceedings have been recognised as a "rag bag" or as a rational list of ex parte processes which do damage before they can be challenged. But that can be the only principle upon which they were singled out and today bringing an ordinary action can also do damage before it can be challenged, as this case shows only too well. It is particularly ironic that Mr Paterson would have done much better had he, too, been the subject of a freezing order, as the Hurlstone parties were. The judges who invented this modern form of advance protection also recognised that an unjustified grant might do damage which could not be compensated in other ways, so they extracted a so-called "undertaking in damages" which in fact is an undertaking to compensate. Such an undertaking bites even if the unsuccessful claimant was entirely without malice. But if he were malicious, the tort of malicious prosecution ought surely to extend to this modern form of pre-emptive coercive relief. The old reasons why the judges might have thought that simply bringing an action could do no damage have been exploded, as Lord Steyn recognised in *Gregory v Portsmouth City Council* [2000] 1 AC 419. If damage is done, why should it matter that it is done by the malicious obtaining of a search warrant or the malicious filing (and publicising) of a pleading alleging fraud?

87. Nor does the distinction between bringing criminal proceedings in the public interest and bringing civil proceedings in one's own private interest make much sense today, if it ever did. In the days when the Queen's peace depended upon private citizens bringing criminal prosecutions, it might have been thought even more important that they should not be deterred from doing so by the prospect of allegations of malice if the prosecution failed. While it is obviously reprehensible maliciously and unjustly to put a person at risk of condign punishment, it is also obviously reprehensible maliciously and unjustly to bring proceedings in the hope of personal gain. Some might think it the more so, as the protection available to the accused in criminal proceedings is so much greater than that available to the defendant in civil proceedings. (In other words, the chances of your wicked plot succeeding are so much greater.) The importance of deterring claimants from bringing false and malicious claims and protecting their victims from this injustice is at least as great as the importance of not deterring honest claimants from bringing just claims. We do not know how real the claims of a chilling effect can be; we do know how real the injustice of being the victim of malicious proceedings can be.

88. In *Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] AC 853, Mr and Mrs Jain were ruined when their business was closed down in an ex parte procedure brought by the regulator without good cause. The House of Lords held that there was no duty of care, partly because the parties to litigation do not generally owe one another a duty of care and partly because regulators do have a duty of care

towards the vulnerable people whom they are protecting, which could conflict with a duty of care to the people they are regulating. All that makes sense, although the Jains undoubtedly suffered a grievous injustice. But had the regulator been malicious, why should they not have had a cause of action in malicious prosecution? It is one thing to say that the regulator should not be liable for carelessness, and quite another to say that they should not be liable for malice.

89. The Jains, of course, suffered from an ex parte remedy of the sort which has previously given rise to liability for malicious prosecution. They also suffered at the hands of a body performing public functions, which is a distinction favoured by Lord Sumption. But it cannot be accepted that malice only turns right into wrong when public officials are concerned. Intentionally causing physical or psychological harm is a tort which can be committed by anyone. Intentionally causing economic damage is not a tort, because that is the object of most business competition. But intentionally abusing the legal system is a different matter. That is not simply doing deals to damage the competitors' business. It is bringing claims which you know to be bad in order to do so.

90. For all these reasons, and for the reasons given by Lord Wilson and Lord Kerr, I agree that bringing a civil claim which you know to be bad and which results in damage to the defendant's reputation, person, liberty, property or finances, comes within the scope of the tort of malicious prosecution and this appeal should succeed.

LORD KERR:

Introduction

91. That Frank Delessio wanted to ruin Alastair Paterson is no longer open to doubt. It has been established that in July 2005 he said that he intended to drive Mr Paterson out of business and destroy him financially. He set about his mission in a determined fashion, engaging attorneys, having private investigators carry out surveillance of his intended victim, meeting a senior police officer about possible criminal activity on Mr Paterson's part and issuing proceedings against him alleging fraud. He did not stop there. He caused an immensely damaging article concerning the allegations made against Mr Paterson in the proceedings to be published in the local press. It is not in dispute that the action brought by Sagicor and the publication of the article caused enormous damage to Mr Paterson's professional reputation and that his business suffered hugely. The trial judge fixed the amount of professional losses suffered by Mr Paterson at CI$1.3m. He found that, if Mr Paterson had been able to maintain an action for abuse of process or malicious prosecution, damages of CI$35,000 would have been awarded for the distress, hurt and humiliation that he suffered.

92. Mr Delessio failed to bring about Mr Paterson's utter ruin. Although they do not amount to an unqualified vindication, the judge's findings for the most part restore his reputation. But, if Mr Paterson fails in his claim for compensation, Mr Delessio's campaign against him will have succeeded to no small extent.

Policy as an incentive for development of the law

93. This appeal gives rise to intense focus on the policy arguments for and against the extension (or renewed recognition) of liability for malicious prosecution to civil proceedings. (For the reasons given by Lord Wilson, the remedy of abuse of process is not available to Mr Paterson).

94. The policy considerations which militate in favour of this species of tortious liability and those which are opposed to it have been marshalled and powerfully analysed by Lord Wilson and Lord Sumption. I do not attempt to rehearse all of these but will touch briefly on those that I consider are the most significant. As a general observation, however, it is right to recognise that conclusions on matters of policy in the legal context are not usually the product of empirical research. Customarily, they are formed instinctually and constitute, at most, informed guesswork about the impact that the selection of a particular policy course will have. While, therefore, policy considerations can, and on occasions must, underlie decisions as to how law should develop, it is necessary to recognise the inherent impossibility of making an infallible prediction about the outcome of a policy choice. Where possible, therefore, such a choice should be aligned with principle. In my view, fundamental principle has a large part to play in the resolution of the debate in this case. And the pre-eminent principle at stake here is that for every injustice there should be remedy at law.

95. Mr Paterson has undoubtedly suffered an injustice. And, so far, the law has not afforded him a remedy. Those responsible for the injustice have been held to be immune from liability. As this court has said in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, such an immunity must be justified. It is not enough that there are policy reasons, even compelling policy reasons, for retaining the immunity. Justification for its retention must be sufficiently powerful to warrant its retention as "necessary in the public interest" – per Lord Dyson at para 108 of *Jones v Kaney*.

The policy reasons for immunity from liability for malicious prosecution

96. It is suggested that the refusal to extend liability for malicious prosecution to civil proceedings is an instance of the law declining to afford a remedy for an obvious wrong because of the need to preserve intact the inviolability of legal proceedings from satellite or subsequent challenge; and that the demands of overall legal policy that the right to invoke the jurisdiction of the court should remain unfettered are so

strong that they must trump Mr Paterson's otherwise valid claim that his predicament should be legally recognised and alleviated.

97. A second and related argument is that malicious prosecution is anomalous in that it runs counter to the well-established principles that there should be absolute immunity for things done and said in the course of legal proceedings and that malice does not transform an otherwise lawful act into a tortious condition. As a corollary to this, the claim is made that the exceptional nature of the tort is justified because it is a form of misfeasance in public office and that this public function foundation of the tort is not present in civil proceedings between private parties.

98. Thirdly, it is suggested that to recognise the existence of the tort in the circumstances of Mr Paterson's case will inevitably lead to its deployment in all manner of civil litigation. The fact that there are substantial difficulties in proving malicious prosecution will not operate as a deterrent to those aggrieved by the outcome of litigation.

99. Finally, it is argued that if there is to be a tort of malicious prosecution of civil proceedings there must be a tort of malicious defence. Theoretically, at least, as much damage can be done by the filing of a malicious defence which is publicised as in pursuing a malicious claim.

The need for inviolability of legal proceedings and immunity from things done and said in legal proceedings

100. Those contemplating legal proceedings should not be deterred by the prospect of subsequent litigation challenging the propriety of their having invoked the jurisdiction of the court. But it is surely too glib to say that this will be the inevitable consequence of rendering liable those who have pursued baseless claims for improper motives. A litigant in this jurisdiction (and in the Cayman Islands) must confront the likelihood of an award of costs in the event of his failure. In the case of a claimant with a genuine and reasonable belief in the rightness of his cause, will that habitual deterrent be enhanced by the possibility that his opponent will embark on further proceedings against him? Lord Sumption suggests that the fact that few may succeed will not deter the many who will allege malice. I cannot share his confidence in that assertion. True it may be, as he suggests, that litigation sharpens men's conviction of their own rightness and their suspicion of their opponents' motives. But those who launch proceedings rarely do so without regard to the possibility of failure. And the possibility of failure in all but the clearest cases of malicious prosecution is very real indeed.

101. Absolute immunity for things done and said in legal proceedings is not, in my opinion, infringed in any unacceptable way by recognition of liability for malicious prosecution in civil proceedings. Manipulation of the legal system lies at the root of the tort. A person will only be liable if he pursues a claim which has no foundation and which has, as its dominant purpose at least, an objective other than success in the claim. The underlying reason for immunity for what is said or done in litigation is surely the need to protect litigants who legitimately use the legal system to have perceived wrongs redressed or claims resisted. It should not be used as a charter for improper resort to legal proceedings to achieve an aim unrelated to their professed purpose.

102. Evidence given in the course of proceedings – even perjured evidence – will continue to enjoy the immunity that Lord Hope described in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 if tortious liability for malicious prosecution of civil proceedings is recognised. It is not sufficient to show that a claimant (or, for that matter, a defendant) has proffered perjured evidence for the tort to be made out. It must be established that a baseless claim has been pursued for a reason other than that ostensibly advanced by way of action or defence. What Lord Sumption describes (in para 125) as the underlying policy of the immunity will remain intact.

103. The need for finality in legal proceedings and to avoid prolongation of unnecessary disputes must, of course, be considered. The suggestion made in some of the American cases, notably *Norcross v Otis Bros & Co* 25 A575 (1893) and *Engel v CBS Inc* 711 N E 2d 626 (1999), that permitting malicious prosecution claims in civil proceedings would lead to endless litigation seems somewhat fanciful. There is no evidence that this has in fact occurred in those states of America where the tort is recognised. And as Lord Atkin remarked in *Ras Behari Lal v King Emperor* (1933) 50 TLR 1, [1933] All ER Rep 723, "finality is a good thing, but justice is better". Moreover, the evidential difficulties faced by a litigant seeking to establish the ingredients of malicious prosecution will militate strongly against the pursuit of pointless litigation in this field.

Does the tort of malicious prosecution require a public function element?

104. I do not agree that the tort of malicious prosecution is limited to a form of misfeasance in public office. Nor do I believe that there is any logical or sound policy reason that it should be so confined. The essence of the tort is the illegitimate use by an individual of coercive legal powers to cause harm to another. There is no reason that these should be state sanctioned. As Lord Wilson has explained (in para 43), malicious prosecution claims were usually brought after unsuccessful criminal proceedings and the ingredients of the tort were fashioned so that victims of crimes (who were customarily the prosecutors) should not be unnecessarily deterred from

bringing prosecutions by the prospect of a ready remedy against them following acquittal. But that incidental historical circumstance should not be used as a basis for introducing the further condition on the availability of the remedy that there must be a public function dimension in the malicious prosecution of proceedings.

105. In *Berry v British Transport Commission* [1961] 1 QB 149, 159 Diplock J said that "the action on the case for malicious prosecution was available against a single defendant, and could be founded upon any form of legal proceedings, whether civil or criminal, brought maliciously and without any reasonable or probable cause against the plaintiff by the defendant." Although this was obiter dictum, its correctness was not questioned in the Court of Appeal, [1962] 1 QB 306, despite the fact that Diplock J's decision was reversed on other grounds.

106. The decision in *Savile v Roberts* (1698) 1 Ld. Raym. 374 has been fully considered by Lord Wilson in paras 44-54 of his judgment. It is not necessary to discuss it further other than to point out that, as Lord Wilson has demonstrated in para 45, the reason that the action was not generally available in civil proceedings was that claimants were required to post pledges which could be drawn down in favour of victims of false claims. Moreover, Holt CJ observed that an action for mere vexation might lie on proof of "particular damage". There is no suggestion in the judgment that a public function element was a prerequisite for a claim of malicious prosecution.

107. Finally, the decision in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, although it asserted that malicious prosecution of ordinary civil actions could not lead to the types of damage that had been identified in *Savile*, did not suggest that the nature of the tort was as a form of or akin to misfeasance in public office. On the contrary, the issue of a winding up petition, which the court held could found an action for malicious prosecution, bears none of the hallmarks of state sanctioned action.

The possible proliferation of actions

108. The United States of America is the country where malicious prosecution of civil proceedings is most widely available. Lord Neuberger has conducted an extensive review of US jurisprudence in this area. As he has pointed out, there are sharply divided views among the judiciary of America as to whether what has been described as the American rule should be preferred to the English rule. What is notably absent from the various cases that Lord Neuberger discussed is any suggestion that adoption of the American rule has led to a significant increase in the number of cases based on malicious prosecution of civil proceedings. Colourful language has been used in some cases forecasting an avalanche of litigation but evidence for that having happened is conspicuously missing.

109. This is unsurprising. Establishing the various rudiments of the tort of malicious prosecution is no easy task. Two particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly, malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in *A v NSW* [2007] HCA 10; 230 CLR 500, at para 91:

> "What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law - an 'illegitimate or oblique motive'. That improper purpose must be the sole or dominant purpose actuating the prosecutor".

110. There is no reason that proof of malice in the civil context should be any less stringent. Together these requirements present a formidable hurdle for anyone contemplating the launch of a claim for malicious prosecution. In my view, no convincing case has been made that these substantial requirements will not act as a deterrent to frivolous claims.

The availability of claims for malicious defence

111. There is obvious logic in the suggestion that if a claim for malicious prosecution of civil proceedings is to be available, so must a claim for malicious defence of such proceedings. In *Aranson v Schroeder*, 671 A 2d 1023 (1995), the Supreme Court of New Hampshire recognised the "tort of malicious defense". The court outlined the basis of the tort in the following passage from its judgment:

> "One who takes an active part in the initiation, continuation, or procurement of the defense of a civil proceeding is subject to liability for all harm proximately caused, including reasonable attorneys' fees, if:
>
> (a) he or she acts without probable cause, i.e., without any credible basis in fact and such action is not warranted by existing law or established equitable principles or a good faith argument for the extension, modification, or reversal of existing law,
>
> (b) with knowledge or notice of the lack of merit in such actions,

(c) primarily for a purpose other than that of securing the proper adjudication of the claim and defense thereto, such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation,

(d) the previous proceedings are terminated in favor of the party bringing the malicious defense action, and

(e) injury or damage is sustained."

112. Other states in America have been less ready to countenance the existence of a tort of malicious defence. In *Young v Allstate Ins Co*, 198 P.3d 666 (2008), the Supreme Court of Hawaii decried the possibility of such a basis for tortious liability, stating that as the party "hauled into court" the defendant had the right to vigorously defend itself against the plaintiff's claims.

113. Whatever view one takes about recognition of a tort of malicious defence, it is possible, I believe, to remain sanguine about its likely prevalence. Again it must be proved that the defendant knew or had notice of the lack of merit of the basis on which the claim was resisted and persisted in it for a reason unrelated to its legitimate defence. These are not insubstantial requirements of proof. They represent significant evidential hurdles. There is no reason to suppose that the theoretical possibility of such a claim being made will translate to an explosion in the number of actions based on malicious defence.

Historical reasons for not extending liability for malicious prosecution to civil proceedings

114. It is interesting to trace the various reasons given in the past for not recognising liability for malicious prosecution in civil proceedings. In *Savile* the availability of pledges posted by plaintiffs was considered to be an adequate means of compensating the victim of such proceedings. In the *Quartz Hill* case the judgment of the court rejecting the malicious allegation was considered to provide appropriate redress to the wronged defendant. Likewise in *Wiffen v Bailey and Romford Urban District Council* [1915] 1 KB 600 the simultaneous presentation of the poison (the unfounded allegation) and the antidote (its rejection by the court) was deemed a sufficient recompense for the wrongly accused defendant. In *Quartz Hill*, the recovery of costs against the unsuccessful claimant was treated as a factor justifying the refusal to contemplate the availability of a further remedy for malicious prosecution of civil proceedings. And this was perceived to be the basis for the English rule in some of the decided cases in America – see, for instance, Lord Neuberger's reference at para 177 of his judgment to Ciparick J's discussion of this issue in *Engel*.

115. In *Gregory v Portsmouth City Council* [2000] 1 AC 419 Lord Steyn concluded that many of these reasons were no longer valid. At pp 427-428 he said:

> "The traditional explanation for not extending the tort to civil proceedings generally is that in a civil case there is no damage: the fair name of the defendant is protected by the trial and judgment of the court. The theory that even a wholly unwarranted allegation of fraud in a civil case can be remedied entirely at trial may have had some validity in Victorian times when there was little publicity before the trial: see *Little v Institute of Victoria (No* 3) [1990] VR 257. However realistic this view may have been in its own time, it is no longer plausible. In modern times wide dissemination in the media of allegations in litigation deprive this particular reason for restricting the tort to a closed category of special cases of the support of logic or good sense. It is, however, a matter for consideration whether the restriction upon the availability of the tort in respect of civil proceedings may be justified for other reasons."

116. At page 432 Lord Steyn addressed the question whether the ambit of the tort should be extended to civil proceedings in the following passage:

> "There is a stronger case for an extension of the tort to civil legal proceeding than to disciplinary proceedings. Both criminal and civil legal proceedings are covered by the same immunity. And as I have explained with reference to the potential damage of publicity about a civil action alleging fraud, the traditional explanation namely that in the case of civil proceedings the poison and the antidote are presented simultaneously, is no longer plausible. Nevertheless, for essentially practical reasons I am not persuaded that the general extension of the tort to civil proceedings has been shown to be necessary if one takes into account the protection afforded by other related torts. I am tolerably confident that any manifest injustices arising from groundless and damaging civil proceedings are either already adequately protected under other torts or are capable of being addressed by any necessary and desirable extensions of other torts"

117. This passage is highly significant, in my opinion. In the first place. Lord Steyn felt that it was not *necessary* to extend the tort to civil proceedings. It seems to me implicit in this statement, that had he considered it necessary to do so, there was no impediment of principle that would have made the extension impossible. Secondly, he considered that extension was not required because manifest injustices arising from groundless and damaging proceedings *were already catered for* or were *capable of being adequately addressed* by appropriate extensions of other torts.

118. Underlying Lord Steyn's reasoning – and, indeed, the reasoning of earlier cases which refused to extend the tort to civil proceedings – is the rationale that manifest injustices suffered by victims of malicious prosecution of civil proceedings could be adequately redressed by other means – the verdict of the court, the award of costs, the availability of an action for defamation or the extension of other areas of tortious liability. No such rationale is possible here. In this case, the Board must frankly confront the reality that a manifest injustice will not be put right if Mr Paterson is denied the right to recover for the malicious prosecution of proceedings against him. To borrow Lord Steyn's language, one cannot be "tolerably confident" that manifest injustices are adequately protected in the way that he envisaged. On the contrary this case is a graphic illustration of the inadequacy of alternative torts to afford Mr Paterson justice.

Conclusion

119. The case for recognising the existence of the tort for civil proceedings as well as in criminal proceedings seems to me far more grounded in logic than the case for refusing to extend it. Although the private prosecutor may take on the mantle of the state in criminal proceedings and although the coercive power of the state may be present in the prosecution by the DPP of offences, the central and critical species of wrongdoing is the same in malicious prosecution of civil proceedings. It is the procuring by malice of the discomfiture (at least) or the ruin (not infrequently) of the person against whom the action is taken for reasons disassociated with the professed purpose of the proceedings. Proceedings motivated by nothing more than malice are capable of wreaking devastation whether in pursuit of criminal prosecution or private action. Where it can be demonstrated that the court's procedures do not provide an adequate remedy (or in this case no remedy at all) there can be no logic for denying the person who has suffered the same harm by the institution of civil proceedings as he who has been the victim of criminal proceedings. Indeed, it is not difficult to envisage cases where the harm will be considerably greater.

120. I therefore agree with Lord Wilson and Lady Hale that the Board should humbly advise Her Majesty that the appeal be allowed and that judgment be entered for Mr Paterson in the sum that Lord Wilson has proposed.

LORD SUMPTION (DISSENTING):

121. The tort of malicious prosecution was created in the seventeenth and eighteenth centuries to deal with the problem of abusive private prosecutions, which was then a serious social evil but has now almost entirely vanished as a result of the creation of public prosecuting authorities. As a result, the tort in its traditional form is now all but defunct. The majority of this court, however,

proposes to expand its ambit so that it covers all civil litigation. I regret that I cannot agree that this is a justifiable development of the law. I would therefore have advised that the appeal should be dismissed and the judgments of the courts below affirmed. Both of them applied the law as the English courts right up the House of Lords have always held it to be.

General Considerations

122. Mr Paterson has clearly suffered an injustice. He has been dragged through the courts to answer allegations of dishonesty which were known to Mr Delessio to be unfounded but were maintained until a late stage of the proceedings. He has been publicly discredited in his profession. He and his companies have lost much of their business. He has been put to great expense to defend himself, not all of which will be recoverable as costs. That this has happened to him is, on the Judge's findings, the result of the malice and dishonesty of Sagicor's Vice-President. However, the injustice which he has suffered is not the only factor which can determine whether the law recognises a cause of action in tort. Defining the legal elements of a tort and the legal limitations upon its ambit will commonly involve a large element of policy which may conflict with the simple principle that for every injustice there should be remedy at law.

123. Claims in respect of the initiation or conduct of litigation give rise to particular difficulty. The court has an inherent jurisdiction and extensive procedural powers to control its proceedings. The ordinary assumption is that these are apt to prevent abuse and injustice. In a case where their exercise is inappropriate or incapable of achieving that purpose, that is because the claimant is entitled to prosecute his proceedings and the only appropriate intervention by the court is to resolve them on their merits. In dealing with the risk that its process may be abused, the law has always been extremely reluctant to go beyond the exercise of the court's procedural powers in a way that may fetter or deter access to justice or the right of parties to prosecute legally intelligible claims as they see fit.

124. This is the basis of the general rule that a litigant owes no duty to his adversary in relation to the conduct of proceedings: see *Commissioners of Customs & Excise v Barclays Bank plc* [2007] 1 AC 181, *Elguzouli-Daf v Commissionerr of the Metropolis* [1995] QB 335. These and similar cases were rationalised by the House of Lords in *Jain v Trent Strategic Health Authority* [2009] AC 853. The Defendant local authority in that case made a successful ex parte application to a magistrate to close down a registered nursing home on the basis of a slipshod investigation and inaccurate information. The proprietors of the business successfully applied to have the order set aside, but

the process took four months and by that time the business had been ruined. The House of Lords held that it owed no duty to the proprietors of the home for the basis on which they made the application. Lord Scott, with whom the rest of the committee agreed, said at para 35:

> "Where the preparation for, or the commencement or conduct of, judicial proceedings before a court, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, has the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, a remedy for the damage cannot be obtained via the imposition on the opposing party of a common law duty of care. The protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation must depend upon the control of the litigation by the court or tribunal in charge of it and the rules and procedures under which the litigation is conducted."

125. It may fairly be said that there is a difference between the negligent and the dishonest conduct of litigation. But it is not a difference which has influenced this area of the law. Perjured evidence is necessarily dishonest, but it is well established that the perjurer is absolutely immune from civil liability. The rule was restated by Lord Hope, delivering the leading speech in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, 445-446:

> "This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause: *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 264, per Kelly CB. The immunity extends also to claims made against witnesses for things said or done by them in the ordinary course of such proceedings on the ground of negligence."

The immunity applies in subsequent proceedings which seek to assert liability not just for things said or done in the face of the court in earlier proceedings but

also for statements sufficiently closely connected with them, for example by a potential witness when a witness statement is taken from him: *Watson v M'Ewen* [1905] AC 480; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. As a general rule, it applies not just in subsequent actions for defamation but irrespective of the cause of action: *Hargreaves v Bretherton* [1959] 1 QB 45, and *Marrinan v Vibart* [1963] 1 QB 528. No doubt, in recent years, some inroads have been made into the full breadth of the principle. It no longer applies to expert witnesses: *Jones v Kaney* [2011] 2 AC 398. Nor does it exclude the liability of a barrister in negligence to his own client: *Arthur J S Hall & Co v Simons* [2003] 1 AC 615. But these inroads reflect the voluntary and contractual character of the participation of experts and lawyers. They do not discredit the underlying policy.

126. All of this derives from two developed legal instincts, both of them based on long experience, and both endorsed comparatively recently by Lord Steyn, giving the reasoning of the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419 in terms which make more copious citation unnecessary. The first is a concern about the deterrent effect of potential liability upon litigants, who may be inhibited from invoking the jurisdiction of the courts; and upon witnesses, who may be inhibited from freely assisting in the administration of justice. Lord Steyn put it this way at p 426D of *Gregory*:

> "In a democracy which upholds the rule of law, it is a delicate matter to allow actions to be brought in respect of the regular processes of the law. Law enforcement agencies are heavily dependent on the assistance and co-operation of citizens in the enforcement of the law. The fear is that a widely drawn tort will discourage law enforcement: it may discourage not only malicious persons but honest citizens who would otherwise carry out their civic duties of reporting crime. In the result malevolent individuals must receive protection so that responsible citizens may have it in respect of the hazards of litigation."

The second instinct reflects a concern, in the interests of the efficient deployment of resources, to discourage secondary litigation in which the parties complain of the conduct of earlier litigation in what is potentially an unending sequence of actions upon actions. Explaining why the tort of malicious prosecution is narrowly defined, Lord Steyn said at p 426F-G:

> "Telling lies about a defendant is not itself tortious: *Hargreaves v Bretherton* [1959] 1 QB 45. A moment's reflection will show what welter of undesirable relitigation would be permitted by any different rule."

127. These are not new problems. In England and other common law jurisdictions, actions seeking to impeach the propriety of earlier proceedings or the manner in which they were conducted have a long history, and the issues to which they give rise have provoked much judicial reflection. The case-law is testimony to the irrepressible persistence and optimism of litigants in cases good, bad or indifferent. It establishes two cognate torts both of which are subject to carefully formulated limits. The first is the tort of malicious prosecution which, with limited and anomalous exceptions, is confined to claims arising out of criminal prosecutions. The second is the tort of abuse of process, which enables a party to civil proceedings to recover damages in carefully circumscribed cases where the process of the court has been used for a wholly collateral purpose.

Malicious prosecution

128. It is convenient to consider the tort of malicious prosecution first, because historically it was the first of the two torts to make its appearance in English law, and because it provides the background to the later development of the tort of abuse of process.

129. The legal elements of the tort are defined in *Clerk & Lindsell*, *The Law of Torts*, 20th ed (2012), at para 16-09 as follows:

> "In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him by the defendant on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly that it was without reasonable and probable cause; fourthly, that it was malicious."

This definition has appeared in successive editions of the work, and was adopted by the House of Lords in *Gregory v Portsmouth City Council* [2002] 1 AC 419, 426, and before that in *Martin v Watson* [1996] AC 74, 80.

130. On the findings of the judge in the present case, all of these elements are present except for the first. Mr Delessio did not set in motion proceedings on a criminal charge. He caused Sagicor to initiate a civil claim for damages. It follows that the appellants' case under this head depends on the argument that

the ambit of the tort should be extended from malicious criminal prosecutions to any malicious civil proceedings.

131. This question was directly considered by the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419. The appeal did not arise out of a civil action but out of the internal disciplinary proceedings of a local authority. Mr Gregory was a councillor of the City of Portsmouth. He had been removed from all the committees on which he sat after a disciplinary proceeding for breach of the Council's code of conduct. He successfully applied for judicial review, obtained an order quashing the decision, and then began an action for malicious prosecution. The action came before the House on his appeal from the decision of the courts below to strike it out. The appeal was dismissed on the ground that an action for malicious prosecution was not available for the abuse of disciplinary proceedings. However the case necessarily raised the broader question whether the tort was or should continue to be confined to the abuse of criminal prosecutions. This issue had been fully argued in the Court of Appeal by reference to English, Commonwealth and United States authority, and had generated an eloquent dissenting judgment from Schiemann LJ proposing its extension to civil proceedings generally (1997) 96 LGR 569. In the House of Lords, it was expressly raised in the statement of issues: see [2000] 1 AC 419, pp 425-426. After full argument on the point, Lord Steyn, giving the leading judgment of a unanimous committee, held that "in English law, the tort of malicious prosecution has never been held to be available beyond the limits of criminal proceedings and special instances of abuse of civil legal process." In response to the Appellants' invitation to extend the ambit of the tort, Lord Steyn declined to extend them to disciplinary proceedings: pp 428-432. And, while recognising that there was a stronger case for extending them to civil actions, he declined to do so for "essentially practical reasons", namely that "any manifest injustices arising from groundless and damaging civil proceedings are either already adequately protected under other torts or are capable of being addressed by any necessary and desirable extensions of other torts": pp 432-433. In other words, the House did not envisage an extension of the tort of malicious prosecution, but a possible extension of other torts to cater for the more egregious injustices.

132. It has sometimes been suggested that the rationale for the distinction between civil and criminal proceedings is that in a civil proceeding the judgment of the court rejecting the allegation is a sufficient vindication of the defendant's reputation and the award of costs a sufficient compensation for the expense. This appears to have been the view of Bowen LJ in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, 690. The same suggestion was made by Buckley LJ in *Wiffen v Bailey and Romford Urban District Council* [1915] 1 KB 600, 607, and Sir John Beaumont delivering the advice of the Privy Council in *Mohamed Amin v Jogendra Kumar Bannerjee* [1947] AC 322, 331. But as Lord Steyn pointed out in *Gregory* at p 432G-H,

the factual premise of this explanation is not convincing. In the Court of Appeal 96 LGR 569, 594, Walker LJ doubted whether it ever had been. I respectfully agree. The defendant may suffer serious and irreversible damage to his reputation and business before the proceedings can be brought to judgment, as the facts of this and other cases illustrate. Assessed costs, even if awarded on an indemnity basis, are almost always less than a full indemnity and do not extend to losses attributable to the diversion of the defendant's time and energy to the litigation. But the explanation is unsatisfactory for a far more fundamental reason than this, namely that it does not explain the particular elements of the tort. In particular it does not explain why proof of malice should be required in order to give rise to tortious liability for a baseless criminal prosecution.

133. Malice is as a general rule irrelevant to liability in tort. The principle was finally established by the decision of the House of Lords in *Bradford Corpn v Pickles* [1895] AC 587. It was restated by Lord Watson in *Allen v Flood* [1898] AC 1, 92, in terms which have been adopted or paraphrased by judges and writers ever since that case was decided:

> "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law."

134. There are two significant exceptions to this principle. The first is the tort of conspiracy to injure, where the existence of a dominant intention to injure the plaintiff may make actionable conduct which would otherwise be lawful. This has generally been regarded as sui generis, and is usually justified by reference to the especially pernicious effect of combinations. The second exception comprises a limited category of causes of action in which the essence of the tort is the abuse of a public function for some collateral private purposes of the person performing it. This may be (and generally is) established by proof of targeted malice. The paradigm case is the tort of misfeasance in public office, which in its modern form dates back to the decision in *Ashby v White*

(1704) 14 St Tr 695. The tort may be committed by any person performing a public function notwithstanding that he is not actually employed in the public service: *Henly v Lyme Corporation* (1828) 5 Bing 91, 107-108. As Lord Steyn put it in *Three Rivers District Council v Governor and Company of the Bank of England* (*No 3*) [2003] 2 AC 1, 190, malice is a condition of liability notwithstanding the general rule that it is irrelevant in the law of tort, because "the rationale of the tort is that in a legal system based on the rule of law, executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

135. It is to this latter category of malice-based torts that the action for malicious prosecution belongs.

136. The origins of the tort are colourful, archaic and technical. It arose out of the peculiarity of English legal history that until the creation in the 1830s of the first public police forces with prosecuting powers, almost all prosecutions were private prosecutions. They were brought by private individuals, generally the victims, or occasionally by public officers in their personal capacity. The private prosecutor nevertheless brought his indictment in the name of the Crown, and performed an essentially public function. The fact that the state's coercive powers were invoked by a private individual, who controlled both the initiation and conduct of the proceedings, gave rise to frequent abuse, which was a constant preoccupation of the law from the thirteenth to the nineteenth centuries. It led to the early development of the tort of conspiracy, one of the first torts to be recognised in English law. Originally statutory, but subsequently developed by the common law in the course of the fourteenth and fifteenth centuries, the essential features of the early tort of conspiracy was the combination of two or more persons falsely and maliciously to indict or appeal another person of treason or felony: see *Holdsworth, A History of English Law*, 2nd ed, viii (1937), 378-379, 385, and the citation from *March's Actions for Slaunder* at p 385n[5]. It was not available for the malicious prosecution of civil actions.

137. The action on the case for malicious prosecution emerged from the shadow of the law of conspiracy in the sixteenth century. The most satisfactory account of this development is that of Professor Baker in *The Oxford History of the Law of England*, vi (2003), 797. It appears to have originated in the qualified privilege enjoyed by a prosecutor in a subsequent action for slander. The prosecutor's defence of lawful prosecution was anticipated by a plea of malice which, if proved, defeated the privilege. The analogy with defamation was occasionally drawn in later periods, notably by Bowen LJ in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, 692. But, it has never been exact, and as a rationalisation of the tort it became redundant once

statements in the course of legal proceedings were recognised as enjoying not just qualified but absolute privilege.

138. For many years, actions for malicious prosecution were rare, because the judges discouraged them. In 1664, the judges adopted the practice when presiding at criminal trials of refusing to release the original indictment to a defendant who had been acquitted, unless they were convinced that there had never been any foundation for the prosecution. This made it impossible under the then rules of evidence to bring an action for malicious prosecution. The reason for this judicial hostility, as Blackstone explained in his *Commentaries*, III.8, was the state's dependence on private prosecutors to enforce the criminal law and the danger that they would be inhibited if they were exposed to retaliation. "It would be a very great discouragement to the public justice of the Kingdom," he wrote, "if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried." In 1811, however, the judges' practice fell away when it was held that the plaintiff in an action for malicious prosecution could prove the contents of the indictment without the original. This development opened the floodgates to unmeritorious actions in tort by acquitted defendants. The first half of the nineteenth century was the great age of such actions, many of which were tools of blackmail, harassment and extortion. The consequences are vividly described by Professor Hay in his essay "Prosecution and Power. Malicious Prosecution in the English Courts, 1750-1850" (*Policing and Prosecution in Britain 1750-1850*, ed. Hay and Snyder (1989), Chapter 8). Against this background, the tort of malicious prosecution provided the only means available to the common law of deterring the abuse of private prosecutions.

139. Eighteenth and nineteenth century judges were no more inclined than their modern successors to declare large general principles beyond the requirements of the case in hand. It is, however, clear that the rationale of the tort, the relevance of malice as one of its elements and the reason why it was treated as an exception to the absolute immunity attaching to things done and said in the course of legal proceedings, all lie in the public character of the function performed by the prosecutor. This accounted for both the continued existence of the tort and its limitations. In particular, it accounted for the fact that it was confined to the abuse of criminal proceedings.

140. Lord Wilson considers, adopting the view of Fleming, that the limitation of the tort to criminal proceedings was a distortion introduced into the law by the obiter dictum of the Court of Appeal in *Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674. But this view is unsound. It has been a cardinal feature of the law relating to malicious prosecution from its inception. For nearly three centuries, the leading case on the elements of the tort was *Savile v Roberts* (1698) 1 Ld Raym 374. This famous case was

decided just six years before the closely analogous tort of misfeasance in public office was authoritatively defined in *Ashby v White* (1704) 14 St Tr 695. Holt CJ reaffirmed the existence of the action for malicious prosecution of criminal proceedings and defined its ambit in the face of objections that it had become anomalous and redundant. One of the objections was that "there is no more reason that an action should be maintainable in this case than where a civil action is sued without cause, for which no action will lie." Rejecting this argument, at p 379, Holt CJ said that the two processes were not comparable, for two reasons. One was that the malicious prosecution of crime was an abuse of a public function, whereas a civil action was undertaken for private purposes. The other was that costs were recoverable in civil proceedings but not in criminal ones. Holt CJ dealt with the point as follows:

> "There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action... If then the law will permit a man to make a false claim out of a court of justice, a fortiori when he proceeds to assert his right in a legal course. The common law has made provision, to hinder malicious and frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced, if the claim was false; which judgment the court heretofore always gave, and then a writ issued to the coroners, and they affeered them according to the proportion of the vexation. See 8 Co 39 b F N B 76 a. But that method became disused, and then to supply it, the statutes gave costs to the defendants. And though this practice of levying of amercements be disused, yet the court must judge according to the reason of the law, and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action."

In a passage that at first sight may be thought to contradict his rejection of liability for the malicious conduct of civil proceedings, Holt CJ added:

> "If A sues an action against B for mere vexation, in some cases upon particular damage, B may have an action; but it is not enough to say that A sued him falso et malitiose, but he must shew the matter of the grievance specially, so that it may appear to the Court to be manifestly vexatious. 1 Sid 424, *Daw* v *Swaine*, where the special cause was the holding to excessive bail."

It is clear from the reference to *Daw v Swaine* that Holt CJ in this passage was talking about the action for malicious and vexatious arrest or distraint of goods,

which was subsequently subsumed in the action for abuse of process. In Salkeld's report of the same case (1 Salk 13, 14), it is expanded as follows:

> "...but yet if one has a cause of action to a small sum, and take out a *latitat* to a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff to the intent to imprison him for want of bail, or do him some special prejudice, an action of the case lies; but then it is not enough to declare generally, that he brought an action against him *ex malitia & sine causa, per quod* he put him to great charge, &c. but he must shew the grievance specially, as in 1 Sid. 424, sc. whereas he owed the defendant 100l. he sued him for 500l and to hinder him from bail affirmed to the sheriff 500l was due, *per quod* he was imprisoned for want of bail; or 1 Saund. 228, for that the defendant intending to procure his imprisonment, where there was no cause of action, or without any cause of action, sued him in an action for 300l whereupon he was arrested and imprisoned, &c."

141. Of Holt CJ's two reasons, the first, relating to the public character of the functions of a criminal prosecutor was much the most significant and has proved to be the most fertile in the subsequent development of the law. The same point was made a decade later by Parker CJ in *Jones v Givin* (1713) Gilb KB 185, 186-187, where a similar objection was raised to the tort of malicious prosecution, namely that it had no counterpart in civil litigation. His response was that a civil litigant was allowed a degree of latitude which was not appropriate for a prosecutor seeking the punishment of the accused by the state:

> "I choose to say there is a great difference between the two cases. Because the demand of right or satisfaction is more favoured than the bringing to punishment. An action is to recover his right, or satisfaction for it, perhaps his subsistence... And it is observable, that in actions of conspiracy, in cases of appeals, the plaintiffs in appeals never were made defendants, but in case of judgments the prosecutors for the most part were."

142. From the outset of the modern history of the tort, the reason why proof of malice was required was that it negatived the public character of the prosecutor's performance of his functions, and exposed him to liability which would not have attached to the proper albeit misguided performance of a public function. Restating the position in the leading modern case, *Gregory v Portsmouth City Council* [2000] 1 AC 419, 426, Lord Steyn observed that "a distinctive feature of the tort is that the defendant has abused the coercive powers of the state." As the context of this remark demonstrates, what Lord Steyn meant by the "coercive power of the state" was its power to punish.

143. There is a small and anomalous class of civil cases in which an action has been held to lie for maliciously procuring an order of the court. Of these the only one of any real significance in modern conditions is the action for maliciously presenting a winding up petition (*Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674). Other, less common special cases are procuring a search warrant without reasonable cause (*Gibbs v Rea* [1998] AC 786) or a bench warrant of arrest (*Roy v Prior* [1971] AC 470), maliciously setting in train a process of execution against property (*Clissold v Cratchley* [1910] 2 KB 244), and maliciously procuring the arrest of a ship (*The Walter D Wallet* [1893] P 202). All of these cases involved ex parte interlocutory orders improperly procured by the person initiating the proceedings, in circumstances where in the nature of things there would never be a final order. Such orders give rise to rather special considerations. They were reviewed by the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419, 427-428 and treated as examples of the ex parte abuse of the court's coercive powers whose existence did not in itself justify a wider ambit for the tort of malicious prosecution. I respectfully agree with the analysis of these cases in Lord Neuberger's judgment, by reference to the United States case-law.

144. It is in my opinion entirely clear that on the law as it presently stands there is no action for the malicious prosecution of civil proceedings outside the special case of malicious winding up petitions and a small number of analogous ex parte proceedings. The question is therefore whether the Board should develop the law so that this long-standing limitation on the reach of the tort is swept away. I acknowledge the attraction of doing so on the extreme and unpleasant facts of this case. But if the law is to be developed, it must be done in a manner which is principled, leaves it coherent across cognate subject areas, and does not simply resolve one problem at the cost of creating many more. Even if judges were Herculean, it would be pointless for them cut off the head of the Lernaean Hydra merely to see it grow two more in its place.

145. First, and fundamentally, the distinction between civil proceedings and criminal prosecutions is neither arbitrary nor unsatisfactory. Malicious prosecution is in modern conditions an anomalous tort. It was devised to meet a particular social problem, associated with the private prosecution of crime, which hardly exists today. It would be eccentric to enlarge the anomaly by extending liability to civil proceedings to which it has never previously applied. The tort is an exception to two well-established principles of English law, namely the principle that things done and said in the course of legal proceedings are absolutely immune from civil liability, and the principle that malice does not make an otherwise lawful act tortious. These exceptional features of the tort of malicious prosecution are justifiable only because the tort of malicious prosecution is a form of misfeasance in public office. It is a tool for constraining the arbitrary exercise of the powers of public prosecuting authorities or private persons exercising corresponding functions. A malice-

based tort makes no sense in the context of private litigation where the plaintiff is not exercising any public function. Nor is there any justification in that context for making a further substantial inroad into the immunity from civil liability for things said and done in the course of legal proceedings.

146. Secondly, within the last few years, the House of Lords has held in *Gregory v Portsmouth City Council* [2000] AC 419 that the tort of malicious prosecution does not (with immaterial exceptions) extend beyond the abuse of criminal proceedings, and has declined to expand its scope. The House's refusal to expand the scope of the tort so as to embrace civil proceedings other than disciplinary proceedings was obiter. However, there are dicta and dicta. The application of the tort to the abuse of civil proceedings was decided in *Gregory* because it was important to settle it: see Lord Steyn at p 432F-G. It had been fully argued both in the Court of Appeal and in the House, and the answer given at both levels was as carefully considered as any ratio decidendi. Schiemann LJ's dissenting judgment in the Court of Appeal, which raised all of the points which are now urged upon the Board, was rejected. Nothing has changed since 2000 to undermine the authority of the Committee's statement of the law. No considerations have been urged upon the Board to suggest that the common law of the Cayman Islands on this point should differ from that which applies in England and will continue to apply in England, at least until the point reaches the Supreme Court. There are no features of the present case which distinguish it from *Gregory* except that one is bound to have more sympathy for Mr Paterson. The conduct of Mr Delessio, for which the respondent is vicariously liable, was appalling. But the respondent was nevertheless entitled to defend the counterclaim on the basis of the common law as the House of Lords had so recently declared it, and Henderson J and the Court of Appeal were both entitled and bound to apply it. Litigants are entitled to a measure of stability and predictability in this relatively well-trodden area of law.

147. Third, the precise ambit of the tort, if it extends to civil proceedings of a private nature will be both uncertain and potentially very wide. The Board would have created a new malice-based tort the gist of which is the malicious initiation of baseless proceedings in a manner which damages the reputation of the victim. But if that is to be the essence of the tort, then it ought in principle to apply to the malicious abuse of disciplinary proceedings, the very proposition which the House of Lords was not prepared to accept in *Gregory*. Logically, it would also apply to any factual case advanced in civil proceedings which maliciously and baselessly discredited another party, including a case advanced by a defendant or a third party. Logically it would extend to cases where the action was not maliciously brought but the plaintiff gave malicious evidence, or indeed to a case where a witness who was neither the plaintiff nor the directing mind and will of the plaintiff gave malicious evidence. In the case presently before the Board, the particular abuse consisted in the introduction of a baseless allegation of fraud. But if the tort is extended to the conduct of civil

proceedings, there is nothing in logic to suggest that liability can be limited to such cases.

148. Finally, there are real concerns about the practical consequences of any extension of the law in this area which would offer litigants an occasion for prolonging disputes by way of secondary litigation. It is no answer to these concerns to say that the bar can be set so high that few will succeed. Malice is far more often alleged than proved. The vice of secondary litigation is in the attempt. Litigation generates obsession and provokes resentment. It sharpens men's natural conviction of their own rightness and their suspicion of other men's motives. It turns indifference into antagonism and contempt. Whatever principle may be formulated for allowing secondary litigation in some circumstances, for every case in which an injustice is successfully corrected in subsequent proceedings, there will be many more which fail only after prolonged, disruptive, wasteful and ultimately unsuccessful attempts.

Abuse of process

149. Abuse of process emerged as a tort considerably later than malicious prosecution and differs from it in significant respects. It applies to the initiation or conduct of civil proceedings. It is not necessary to prove malice. It is not necessary to show that the proceedings have gone to judgment. It is not even necessary to show that they were baseless, although in practice they often will be. The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do. Such cases are extremely rare. Although there is a moderately substantial body of case-law, there are only two reported cases in England in which the action has succeeded, both involving the now obsolete procedures for the arrest of debtors, which had an obvious potential for abuse. No case has succeeded in England since 1860, although Australian litigants appear to have been both more persistent and more successful. Like the tort of malicious prosecution as it was conceived to be before this case, abuse of process is on the verge of extinction, the only recent sightings being in Australia.

150. The origin of the tort is the decision of the Court of Common Pleas in *Grainger v Hill* (1838) 4 Bing NC 212, a case expressly decided on the footing that there was no previous authority. It arose out of the right of a creditor to sue for a writ of *capias ad respondendum*, an ex parte administrative process by

which a writ was issued to a creditor upon his verifying the debt on affidavit. The writ directed the sheriff to arrest the debtor to require him to answer the claim. These particular creditors had lent money to a shipowner, secured by a mortgage of his ship. Being concerned about the adequacy of their security, they threatened to have him arrested before the debt was due, unless he repaid it early. They then procured the writ and endorsed it with a direction to the sheriff's officers that if the defendant could not find bail, they were to take the ship's register, without which it could not trade. Neither the creditors nor the sheriff's officers had any right to the ship's register. In a subsequent action by the debtor on the case, the creditors applied for a non-suit, arguing that the merits of their earlier action had never been decided judicially and that there was no averment in the pleadings of a want of "reasonable and probable cause". This argument was substantially based on the law relating to malicious prosecution. Rejecting it, Tindal CJ said, at 221:

> "The second ground urged for a non-suit is, that there was no proof of the suit commenced by the defendants having been terminated, But the answer to this, and to the objection urged in arrest of judgment, namely the omission to allege want of reasonable and probable cause of the defendants' proceeding, is the same, that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ: here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ... [The plaintiff's] complaint being that the process of the law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."

151. The only other reported English case in which such an action has succeeded is *Gilding v Eyre* (1861) 10 CB (NS) 592, which concerned another ex parte process by way of enforcement. The defendant was a judgment creditor who had obtained a writ of *capias ad satisfaciendum*. This was a writ directing the sheriff to arrest the debtor and unless he satisfied the judgment to produce him in court. The writ in *Gilding* was endorsed with a direction to levy a sum substantially exceeding the true amount due. The debtor tendered the amount actually due but refused to pay the balance. He was therefore arrested by the sheriff's officers and had to pay the balance to obtain his release. Willes J, delivering the judgment of the Court of Common Pleas, said at p 604:

> "In the present case, the complaint is not that any undetermined proceeding was unjustly instituted. The alleged cause of action is, that the defendant has maliciously employed the process of the court in a terminated suit, in having by means of a regular writ of execution extorted money which he knew had been already paid and was no longer due on the judgment."

152. Summarising the effect of these authorities in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35, 91, Isaacs J observed that:

> "In the sense requisite to sustain an action, the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse of process for this purpose, and as, *ex hypothesi* the final judgment however given will have no reference to the ulterior purpose, there is no necessity to await the irrelevant determination."

153. Once the tort had been established, the courts consistently declined to extend it so as to cover cases in which the defendant was genuinely seeking the relief prayed in the writ but for an ulterior motive, even if that motive were malicious or improper. Insolvency proceedings were, and perhaps still are commonly initiated with a view to obtaining some benefit which will flow from the insolvency other than the recovery of the debt or a dividend. In *King v Henderson* [1898] AC 720, the creditor intended to obtain the dissolution of his partnership with the debtor, which would automatically follow from his bankruptcy. In the Australian case of *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509, the creditor hoped to discover from the bankrupt's examination who had instigated him to make certain defamatory statements. In neither case was the creditor's conduct tortious. He truly wanted a bankruptcy order, which was the purpose for which the proceedings were designed. Once that was demonstrated, the reason why he wanted it no longer mattered. In *Dowling*, Isaacs J put the point in this way at pp 521-522:

> "If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the

> process is outside the lawful scope of the process, and is fraudulent, then - both circumstances concurring - it is a case of *abuse* of that process, and the court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse."

154. In England, perhaps the most striking modern illustration is the decision of the Court of Appeal in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478. The background to this decision was the well-established rule of English law that the distributors as well as the authors and publishers of a libel, are liable in an action for defamation. The question at issue was whether Sir James Goldsmith was entitled to sue the distributors of *Private Eye* for libel, with a view to making it impossible for the magazine to continue in business. This was to be achieved by putting pressure on the distributors to settle on terms that they ceased to distribute it. An application to stay or dismiss the proceedings as an abuse of process failed for a number of reasons, one of which was that Sir James's objective was not in the relevant respect extraneous to the proper purpose of the proceedings. This was because, although he could not have got an order from the court preventing the distribution of *Private Eye*, a claim for damages against the distributors was a proper use of the court's process and a settlement of such a claim on whatever terms the parties might fairly agree was simply a consequence of the distributors' potential liability. It could not therefore be regarded as an abuse. Bridge LJ, at p 503 dealt with the applicant's submissions on abuse of process in terms which go to the heart of the issue. Answering the question what is meant by a "collateral advantage" in the context of this tort, he said:

> "The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of

> process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

155. Perhaps the most illuminating analysis of the question is to be found in the majority judgments in the High Court of Australia in *Williams v Spautz* (1992) 174 CLR 509. Dr. Spautz had been dismissed from his lectureship at the University of Newcastle for persisting in a campaign against another academic member of the university after being required by the university's council to desist. He instituted 32 actions against the university and various of its members, in which he made allegations of criminal libel, conspiracy, perverting the course of justice and the like. Some of those whom he had sued began separate proceedings against him seeking declarations that his actions were an abuse of process. The trial judge found that Dr Spautz's predominant purpose was to put pressure on the university to reinstate him or to settle his claims on favourable terms. Other, subordinate, purposes, included the vindication of his reputation and the collection of material for his research into corruption at Australian institutions. Mason CJ and Dawson, Toohey and McHugh JJ reviewed the principal English and Australian authorities and summarised the essence of the tort as being that "the party who has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers": para 27. In a valuable concurring judgment, Brennan J adopted the view of Bridge LJ in *Goldsmith v Sperrings Ltd* and concluded at para 12 that:

> "An abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding."

156. It is sometimes said, for example in *Fleming*, *The Law of Torts*, 10th ed (2011), 708, that in addition to the extraneous purpose, it is necessary to prove some "overt act" other than the proceedings themselves, such as the extortionary threat in *Grainger v Hill*. The better view, however, is that this is not an additional requirement but merely evidence of the extraneous purpose. As Mason CJ and Dawson Toohey and McHugh JJ observed in *Williams v Spautz* (1992) 174 CLR 509, at para 41, in practice "the conclusion which the court reaches is more likely to be founded upon objective evidence rather than subjective evidence of intention." In the great majority of cases, an overt act may be the only way of proving the abuse. But it is not a legal element of the

tort. The abuse may sometimes be the inevitable inference from the surrounding circumstances, as it was in Dr Spautz's case.

157. These limitations on the scope of the tort are not technicalities, but arise from a principled reluctance on the part of the courts to countenance civil liability for invoking the jurisdiction of the court. As Slade LJ observed, delivering the judgment of the Court of Appeal rejecting a claim for abuse of process in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 470F, the limitation may well cause hardship, but if there is a gap in the law it rests on the same considerations of public policy which give immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. He added that "if the position were otherwise, honest litigants might, be deterred from pursuing honest claims or defences and honest witnesses might, be deterred from giving evidence."

158. In the present case, the Judge recorded that it had not been alleged that the legal process was used by Mr Delessio for any purpose for which it was not designed, and that in any event such an allegation could not have been made out on the facts. This conclusion was inevitable once he had found that Mr Delessio genuinely believed that Sagicor had been overcharged. Relief was genuinely being claimed in order to recover the overcharge, which was a proper purpose of such an action. Mr Delessio's dislike of Mr Paterson did not explain why the relief claimed was sought. It was only "the dominant factor which led him to present what should have seemed like an ordinary case of overcharging as one of fraud" (para 239). It is true that the allegation of fraud was both baseless and malicious, but neither baselessness nor malice are relevant to this cause of action.

Conclusion

159. In a passage which I have already cited from his speech in *Gregory v Portsmouth City Council* [2000] 1 AC 419, 432-433, Lord Steyn expressed the view that any manifest injustices arising from the limitation of the tort of malicious prosecution to criminal prosecutions were capable of being addressed by "any necessary and desirable extensions" of other torts. Lord Steyn had a number of possible torts in mind in addition to abuse of process. In my opinion he cannot be read as saying that an extension of either of the two torts relied upon in this case was "necessary and desirable". Nor can he have thought that there would necessarily be a remedy in every case of "groundless and damaging civil proceedings". His earlier observations about the problems of secondary litigation suggest that he did not. The principal difficulty faced by the appellants in this case is that on the Judge's findings of fact the only tort which would avail them would not in fact be an extension of any existing tort.

It would be a wholly new tort of maliciously making damaging allegations of fact in the course of advancing a genuine but unfounded claim in civil proceedings. In my opinion the law has never been prepared to countenance such a tort in the past and should not be prepared to do so now.

LORD NEUBERGER (DISSENTING):

Introductory

160. The issue on this appeal is whether we should extend the scope of either or both the established torts of abuse of process and malicious prosecution.

161. The facts giving rise to this issue are fully set out in paras 5 to 35 of Lord Wilson's judgment on behalf of the Board, and I do not propose to repeat them.

162. In paras 128 to 148 and paras 149 to 158 respectively of his dissenting judgment, Lord Sumption has comprehensively, and in my view accurately, set out the history and current state of English law in relation to malicious prosecution and abuse of process.

163. Lord Wilson would use this opportunity to extend the law of malicious prosecution to cover a case such as the present, and Lord Sumption would not. Neither of them would extend the law of abuse of process. I agree with them about abuse of process and it is unnecessary to say any more about it. So far as extending the law of malicious prosecution is concerned, I agree with Lord Sumption. I do so with great sympathy for the appellants, because, as Lord Wilson's opinion graphically establishes, one's instinctive reaction as a human being is that Mr Paterson and his company should be entitled to compensation for their emotional and financial losses resulting from Mr Delessio's actions.

164. However, there are sound reasons for not following this instinctive reaction, and for rejecting the suggestion that we should extend the scope of malicious prosecution. These reasons are contained in paras 144 to 148 of Lord Sumption's opinion, when viewed in the context of the principles he sets out in paras 122 to 127, and, in my view, they strike the right balance between preventing malicious proceedings, and maintaining access to the courts.

The relevance of the United States jurisprudence

165. My conclusion is reinforced by consideration of a relatively large number of decisions of courts in the United States of America in this area of law. I believe that it is helpful to look at these cases for four reasons.

166. First, on this sort of issue, it is generally helpful to look at the experience of other common law jurisdictions. In the recent decision of the Supreme Court in *Jones v Kaney* [2011] 2 AC 398, para 76, Lord Collins said this:

> "It is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the Court should be informed about the position in other common law countries. This Court is often helped by being referred to authorities from other common law systems, including the United States."

167. Secondly, in this case, as in *Jones*, the position is as Lord Collins immediately went on to describe it, namely, "[i]t is only in the United States that there has been extensive discussion in the case law of the policy implications of" the issue in this case, extension of the scope of the tort of malicious prosecution, and in that case, "removal of immunity for actions by disappointed clients against their experts".

168. Thirdly, in *Gregory v Portsmouth City Council* [2000] 1 AC 419, where, as Lord Sumption explains, the House of Lords decided that it would be wrong to extend the scope of the tort, Lord Steyn considered in some detail, at pp 428-430, the position which, as he understood it, had been taken by the courts in the United States. Having quoted passages from §674 and §680 of *The American Law Institute, Restatement of the Law, Torts, 2d* (1977) ("the Restatement"), and having referred to two decisions of state Supreme Courts and a decision of the District of Columbia Court of Appeals, he said that:

> **"**[I]t seems realistic to take into account that the difference in the way in which the tort of malicious prosecution has developed in the United States and England is to a considerable extent the result of structural differences between the two legal systems. In England the award of costs in the discretion of the court is an important weapon in deterring groundless actions. But in the United States there is no such general judicial power. … In the United States the absence of a general judicial power to award costs in respect of a groundless claim apparently played a part in the development and extension of the tort of malicious prosecution to all civil proceedings …. In these circumstances the development in the United States, while undoubtedly relevant to the issue before the House, must be seen in the light of two legal systems which in material respects diverge."

In fact, as a fuller analysis of the United States jurisprudence shows, it is by no means the general rule that the scope of the tort of malicious prosecution is significantly wider than it is in England and Wales following *Gregory*.

169. Fourthly, the United States jurisprudence casts illuminating light on, and helps to shape the contours of, "the small and anomalous class of civil cases in which an action has been held to lie for maliciously procuring an order of the court", which are referred to by Lord Sumption in para 143 above, and renders those cases less anomalous than they appear at first sight.

The United States jurisprudence: an overview

170. It is convenient to start with the Restatement, which has various sections dealing with the torts which are the focus of this appeal. §653 is concerned with malicious prosecution of criminal proceedings, §674, §677 and §680 are concerned with malicious prosecution of civil and administrative proceedings, and §682 is concerned with abuse of process. For present purposes, one need, I think, focus only on §674, §677 and §680.

171. §674, which was quoted and relied on by Lord Steyn in *Gregory*, is to this effect:

> "One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

§680, also referred to by Lord Steyn, is to similar effect, save that it applies to "civil proceedings … before an administrative board".

172. On the other hand, §677 of the Restatement is in these terms:

> "One who by taking an active part in the initiation, continuation or procurement of civil proceedings against another causes him to be arrested or deprived of the possession of his land or chattels or other things is subject to liability to him for the harm done thereby if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings were based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

This section appears to be unnecessary as it is a subset of §674. However, as the comment in the Restatement explains:

> "This Section is a special application of §674 […] . It receives separate statement only because some courts that have been unwilling to accept the broader rule stated in §674 have applied the rule here stated."

§674 is often referred to by United States judges and textbooks as "the American Rule" or "the Restatement Rule", whereas §677 is often referred to as "the English Rule".

173. The American Rule is summarised in *Dobbs, Hayden and Bubick, The Law of Torts* (2nd ed, 2011) , at p 408, in these terms:

> "The plaintiff can recover if the defendant had participated in instigating or continuing a civil proceeding, including a declaratory judgment action or even a quasi-judicial administrative proceeding, without probable cause and for an improper purpose, provided that the proceeding had been terminated favourably to the now-plaintiff."

174. *Dobbs* explains the English Rule as mirroring the American Rule, but with the added requirement that the plaintiff must establish that the previous proceedings were not merely without probable cause and unsuccessful, but that they caused him "special injury", i.e. what the Restatement refers to as "caus[ing] him to be arrested or deprived of the possession of his land or chattels or other things". At pp 416-417, *Dobbs* says this:

> "[S]pecial injury must be something more than the expense, distress, and reputational loss that is ordinarily suffered as a result of wrongful litigation. Rather, the interference must result directly from the suit itself or the court's pre-judgment orders.

> The wrongful litigation claim is allowed when the defendant has repeatedly brought unjustified suits. It is also allowed when a single suit directly results in pre-judgment impairment or suspension of the plaintiff's rights in property, income, or credit, or detention of the plaintiff's person. Unjustified insanity proceedings are actionable, at least when they constrain the plaintiff's person for examination or otherwise, while unjustified bankruptcy proceedings are actionable because they put the plaintiff's property under the control of the bankruptcy court."

175. Examination of the cases suggests that courts in the United States are almost as likely to adopt the English Rule as the American Rule. According to *Dobbs*, p. 415, "a majority of American courts" follow the American Rule. In terms of numbers, there is a list of jurisdictions which applied each Rule as at 1977 in footnotes 3 and 4 of the judgment of the Supreme Court of Oregon in *O'Toole v. Franklin*, 569 P.2d 561 (1977), 564. These footnotes identify 23 states (including California, Florida, Massachusetts and Missouri) which then adopted the American Rule, and 17 states (including Illinois, New York, Ohio and Texas) which then adopted the English Rule. However, since then, legislation has intervened in some states, and some states have changed their approach. Thus, in Illinois, statute has removed the requirement for a plaintiff to show "special injury" where he has been the defendant in what he now claims was a malicious medical malpractice claim; and New Mexico used to adopt the English Rule but now adopts the American Rule, although it has gone further still and restated the tort in its entirety.

The "small and anomalous class of civil cases"

176. It is, I think, convenient first to examine how the courts in the United States which have adopted the English Rule, have justified and applied the exceptions to the general rule that the tort of malicious prosecution does not extend to civil, as opposed to criminal, claims. As is apparent from §677 of the Restatement and the extract cited above from pp 416-417 of *Dobbs*, malicious prosecution can only be invoked by a former defendant to proceedings under the English Rule where the proceedings have caused him "special injury" – i.e. injury over and above the ordinary emotional and financial damage, including, as the Supreme Court of Texas put it, the "inconvenience [and] embarrassment", normally caused by litigation – see *Texas Beef Cattle Co v Green*, 921 S.W.2d 203 (1996), 208.

177. In the New York Court of Appeals in *Engel v CBS Inc*, 711 N.E. 2d 626 (1999), at 629, Ciparick J explained the origin of "the special injury requirement" in these terms:

> "The requirement had its genesis in England, and the original reasons for it do not pre-dominate in this country. In England, a defendant need not worry about being saddled with the costs of a successful defense. The English rule is that generally the loser must pay the winner's attorneys' fees. Thus, an English plaintiff who brings a frivolous suit does so as the peril of paying his adversary's litigation expenses […] . It was only where an English defendant endured some special injury that the action for malicious prosecution was needed […] . Otherwise, the English defendant really did not suffer redressable harm."

178. It appears to me that this satisfactorily explains and justifies the various established exceptions to the rule that the tort of malicious prosecution does not extend to civil proceedings. Those exceptions are set out by Lord Sumption in para 143. They all involve either *ex parte* or interlocutory orders being made against a defendant, and, because they are *ex parte* or interlocutory, they could quite conceivably have been granted in proceedings which could subsequently be established as having been "malicious". Final relief will never be granted in such proceedings (save, I suppose, where the final order is subsequently set aside), as it is an essential ingredient of a claim in malicious prosecution that the proceedings in question will have failed. However, where interlocutory relief is granted, any loss thereby caused will be "special injury", as it is not part of the normal emotional and financial detriment typically caused by litigation.

179. An obvious type of case where special injury could be caused is where interlocutory relief (or, in United States nomenclature, a provisional remedy) is granted against a defendant in the allegedly malicious proceedings. In practice, however, it would normally be unnecessary for the former defendant to resort to a malicious prosecution claim to recover compensation for such loss, as the interlocutory relief will have been an injunction, for which the former claimant normally will have given a cross-undertaking in damages.

180. In conclusion on this aspect, then, it seems to me that the "special injury" rule which United States jurisprudence has identified as the distinguishing ingredient of the English Rule, as against the American Rule, satisfactorily explains the otherwise seemingly anomalous exceptions to the general rule that a malicious prosecution claim does not lie in respect of civil proceedings. It is also interesting to note that its justification is said at least partially to lie in the fact that a successful defendant in English civil proceedings can expect to recover his costs. And, I would add, where such proceedings were "malicious", he should recover them on an indemnity basis.

The United States jurisprudence: a little more detail

181. As is clear from the summary in para 175, the issue whether to adopt the English Rule or the American Rule has been considered by a large number of different courts at different levels in the great majority of the fifty states of the United States. It would be inappropriate, indeed it would be well-nigh impossible, to discuss each of them in this judgment. Whatever the ultimate decision, the nature of the court's function in this field was well summarised by Freeman CJ in the Illinois Supreme Court decision of *Cult Awareness Network v Church of Scientology International*, 685 N.E. 2d 1347 (1997), p. 1356, as being the "responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights". Courts must "respon[d] to these competing interests" whilst maintaining that balance - per the District of Columbia Court of Appeals, *Morowitz v Marvel*, 423 A. 2d 196 (1980), pp 197-198.

182. Various judges have suggested that adopting the American Rule would mean that "there would be no end of litigation", as "the parties could keep on suing each other to the end of time", as it was put in the Supreme Court of Pennsylvania by Paxson CJ in *Norcross v Otis Bros & Co*, 25 A. 575 (1893), at 578. A successful defendant, "seeking additional vindication", might be tempted to sue for malicious prosecution, "and, if unsuccessful in that claim, their opponents will be all too willing to return the favour", as the New York Court of Appeals put it in *Engel*. However, these points did not impress the dissenting judges in the Supreme Court of Michigan, who, in expressing their support for the American Rule, did not, as Coleman CJ put it, "normally find significant the fact that unsuccessful suits may be brought", as this was a factor which should not "be given added importance simply because the wrong to be compensated is itself a lawsuit", see *Friedman v Dozorc*, 312 N.W.2d 585 (1981), at 612.

183. The English Rule was, however, supported by the majority in *Friedman*, in a judgment given by Levin J, who pithily said that "[t]he cure for an excess of litigation is not more litigation", and that it was desirable "to cast off the limitations of a perspective which ascribes curative power only to lawsuits". He also justified the English Rule on practical grounds, in the light of the heavy burden of proof the plaintiff in a malicious prosecution claim bears:

> "[I]f few plaintiffs will recover in the subsequent action, one may wonder whether there is any point in recognizing the expanded cause of action. If the subsequent action does not succeed, both parties are left to bear the expenses of two futile lawsuits, and court time has been wasted as well."

184. The chilling effect of the American Rule has also been cited as a reason for adhering to the English Rule. Thus, again in *Friedman*, Levin J referred to "defense litigators […] whose clients can afford to devote extensive resources to prophylactic intimidation", and warned against "arm[ing] all prevailing defendants with an instrument of retaliation". To the same effect, the New York Court of Appeals in *Engel* emphasised the importance of "plaintiffs remain[ing] relatively free from the threat of retaliatory law suits in bringing their good faith claims".

185. However, many judges who prefer the American Rule make the point that the English Rule "denie[s] free access to the courts for all those who have suffered harm but not 'special injury' from wrongful litigation", as Coleman CJ put it in *Friedman*. He and Moody J also characterised the English Rule's requirement for special injury as arbitrary. Moody J thought that

> "The strict requirements of lack of probable cause and malice, i.e., improper purpose, are more appropriate guardians of free access to the courts and of promoting the honest use of the judicial process than the artificial requirement of special injury."

186. A number of judges who prefer the American Rule have relied on the fact that, unlike successful English defendants, American defendants who successfully defeat a claim generally cannot recover their costs, even if the claim can be shown to have been "malicious". This point was well made by Lockwood J giving the judgment of the Supreme Court of Arizona in *Ackerman v Kaufman*, 15 P.2d 966 (1932), when justifying the application of the American Rule. However, the distinction was considered and rejected as a good enough reason for departing from the English Rule in Pennsylvania – see per Paxson CJ giving the Supreme Court judgment in *Norcross v Otis Bros & Co*, 25 A. 575 (1893), essentially on the ground that otherwise "there would be no end of litigation". It is also interesting to note that Myerscough J in the Appellate Court of Illinois, when refusing to depart from the English Rule, relied on the court's power to "impose sanctions, which may include an order to pay the other party's expenses incurred as a result of" a pleading which "harass[ed] or [caused] unnecessary delay or needless increase in the cost of litigation" - in *Thomas v Hileman*, 775 N.E.2d 231 (2002), at 237.

187. It is instructive to see some of the developments which have occurred in states whose courts have adopted the American Rule. In *DeVaney v Thriftway Mktg. Corp.*, 953 P.2d 277 (1997), the Supreme Court of New Mexico concluded that the special injury requirement should be abandoned – ie that the American Rule should be followed. In so doing, the Court concluded that, in the light of the similarities between the tort of malicious prosecution and the

tort of abuse of process, "there [was] no longer a principled reason for characterizing these two forms of misuse of process as separate causes of action", and restated the elements of these two torts as the tort of malicious abuse of process. In *Durham v Guest*, 294 P.3d. 19 (2009), the Supreme Court of New Mexico overruled *DeVaney* in certain respects, so that, for instance, a claim of "malicious abuse of process" could be raised by a defendant in relation to a plaintiff's improper use of any aspect of the court's procedure.

188. In *Aranson v Schroeder*, 671 A.2d 1023 (1995), the majority of the Supreme Court of New Hampshire, which follows the American Rule, recognised the tort of "malicious defense", where a defendant to proceedings raises a defence "without probable cause, …with knowledge … of the lack of merit …, [and] primarily for a purpose other than that of securing the proper adjudication of the claim […]", and the defendant loses, thereby causing loss to the plaintiff. If, as Levin J considered in *Friedman*, the American Rule "push[es] the pendulum too far in favour of the defense", one might more readily see why the Supreme Court of New Hampshire sought to level the playing-field. After all, "a plaintiff [is not] less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively", although, quite understandably, the Supreme Court of Hawaii has criticised this extension in strong terms for "chilling legitimate defenses" – see *Young v Allstate Ins Co* 198 P.3d 666 (2008).

189. Principally because of concerns over its chilling effect, the Supreme Court of California, while adhering to the American Rule in relation to malicious prosecution claims based on civil proceedings, has described the tort as a "disfavored cause of action" and has consequently declined to extend its scope further - see *Sheldon Appel Co v Albert & Oliker*, 765 P.2d 498 (1989).

190. In *Bidna v Rosen* (1993) 23 Cal. Rptr. 2d 251, the Californian Court of Appeal interpreted *Sheldon Appel* as "enunciating a basic judicial policy in favour of curing the evil of abusive litigation at its source rather than allowing it to metastasize into yet more litigation", and so decided that malicious prosecution claims could not be brought in respect of family law proceedings. Sills PJ said that "the inadequacy of the husband's family law remedies" had to be "'balanced' against the 'floodgates' and 'chilling' effects" and that "this balance tilts against malicious prosecution", as there were "several and substantial" arguments for "a bright line rule" in family cases, namely their "unique propensity for bitterness", the desirability "to swiftly discourage litigious nonsense at its source", the requirement for "special sensitivity and flexibility", and the consequent concern about the chilling effect, and "albeit perhaps tangentially, […] the impact […] on lawyers' malpractice insurance premiums". However, a different view was taken by the Oregon Court of

Appeals in *Vazquez v Reeves*, 907 P.2d 254 (1995), which found these points "ultimately unpersuasive".

Conclusions to be drawn from the United States experience

191. There is no doubt that there is support both for maintaining the present English Rule and for adopting the American Rule in the United States jurisprudence. A person who wants to read a single case where both sides of the argument are articulately advanced, would be well advised to turn to the Michigan Supreme Court decision of *Friedman*.

192. The arguments summarised in paras 181 to 185 above do not specifically arise out of the United States jurisprudence, and they cut both ways. Accordingly, I do not propose to rehearse them again. There are, however, in my view, some more specific reasons why the United States experience supports the conclusion which Lord Sumption has reached.

193. First, and most obviously, even in a jurisdiction where successful defendants rarely can expect to recover their costs, there seems to be as strong judicial support for the English Rule as for the American Rule. That might at first sight appear to be a somewhat cheap or lazy point, but I believe that it has real force. In a highly developed common law country, where the issue has been considered in far greater depth and by almost infinitely more judges than here, there is about as much support for adhering to the English Rule as there is for departing from it, even though there is a significantly stronger case for departure than there is here.

194. Secondly, it is clear that departing from the English Rule would have the disadvantage of potentially confusing the law, causing unnecessary uncertainty. The present position is clear: there is a "bright line", as identified in *Bidna*. However, if the law was to be changed, so that the American Rule became the norm, judges would have to consider questions such as whether to exclude family law proceedings from the ambit of the tort, whether to extend the tort to cover malicious defence, and whether to extend the law to cover the unjustifiable issue of applications or other steps in proceedings.

195. Thirdly, and more marginally, the United States jurisprudence, with its "special injury" requirement in the English Rule, justifies on a principled basis what would otherwise appear to be anomalous exceptions to the principle that a claim in malicious prosecution cannot be based on civil proceedings. Where a rule has apparently anomalous exceptions, it is, in my view, easier to justify

departing from that rule or adding to the exceptions. Once, however, the exceptions are logically explained, it is harder to justify departing from the rule or adding to the exceptions other than on a logical basis.

196. Fourthly, the United States jurisprudence provides a reminder that wrongful civil litigation should not be viewed in isolation. The courts have procedural mechanisms at their disposal to preserve and strengthen the civil litigation process, and to target proceedings brought wrongfully or mistakenly. As Levin J recognised in *Friedman*, "[g]roundless civil litigation is […] more than an affliction visited upon a few scattered individuals; it besets the judicial system as a whole". In circumstances where a party has not suffered special injury, the use of procedural mechanisms is preferable to "randomly providing a fortuitous amount of compensation in a handful of isolated cases".

Other common law jurisdictions

197. In this judgment, I have concentrated on the United States jurisprudence, because it represents an extraordinarily rich seam of learning and thought on the topic which we are being invited to consider. The only other jurisprudence to which we were taken in argument was that of the Australian courts. In that connection, it would seem that the furthest the courts have gone is to refuse to strike out or stay claims based, to put it shortly, on the American Rule: see, for instance, *Little v Law Institute of Victoria (No 3)* [1990] VR 257; *Kinghorn v HKAC Asset Management Services* [2010] NSWDC 232. While Australian judgments always merit considerable respect, I believe that decisions which simply result in a refusal to strike out a claim are rarely of great assistance. While they no doubt help establish that the point raised is arguable, and often that it is important, they throw relatively little light on the issue of whether the point is right.

Conclusion

198. Accordingly, for the reasons given by Lord Sumption, as supplemented by the points made in this judgment, I would, for my part, have humbly advised Her Majesty that this appeal be dismissed.