Neutral Citation Number: [2015] EWHC 1315 (Ch)

Case No: HC-2014-001272

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

The Royal Courts of Justice
The Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 15/05/2015

Before:

MISS AMANDA TIPPLES QC

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Between :

PETER WILLERS	**Claimant**
- and -	
ALBERT GUBAY	**Defendant**

- -
- -

Mr Hugo Page QC and Mr Adam Chichester-Clark (instructed by **De Cruz Solicitors**) for the **Claimant**
Mr Bernard Livesey QC and Miss Alicia Tew (instructed by **Laytons Solicitors LLP**) for the **Defendant**

Hearing dates: 18, 19 March 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MISS AMANDA TIPPLES QC:

Introduction

1. On 3 March 2014 the claimant issued proceedings against the defendant claiming damages for the tort of malicious prosecution of civil proceedings and interest thereon. The defendant, Mr Gubay, is resident and domiciled in the Isle of Man. These proceedings were served on him, with the permission of the Court, on 26 March 2014. The defendant applied to set aside service on him on grounds that England and Wales was not the appropriate forum for the trial of this action. That application was dismissed by Chief Master Marsh on 14 November 2014.

2. By an application notice dated 11 December 2014 the defendant applied to strike out the claim and the amended particulars of claim under CPR Part 3.4(2)(a), alternatively the inherent jurisdiction of the court, on the basis that the amended particulars of claim disclose no reasonable grounds for bringing the claim.

3. The issue on this application is whether the tort of malicious prosecution of civil proceedings is known to English law.

4. The defendant maintains that there is no such tort known to English law and I am bound by the decision of the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419, HL. This is a claim which must therefore be struck out. Mr Bernard Livesey QC, leading Miss Alicia Tew, represented the defendant before me.

5. The claimant disagrees. He relies on *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, PC where the Privy Council held by a majority that there is a tort of malicious prosecution of civil proceedings. He says I should follow the decision of the Privy Council and dismiss the application. Mr Hugo Page QC, leading Mr Adam Chichester-Clark, represented the claimant.

6. In this judgment I shall refer to *Gregory v Portsmouth City Council* [2000] 1 AC 419, HL as "***Gregory***" and *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, PC as "***Crawford Adjusters***".

7. I have decided that the claim for malicious prosecution of civil proceedings should be struck out. This is because this court is bound by *Gregory* and, in accordance with the doctrine of precedent, I cannot follow *Crawford Adjusters*. I have reached this conclusion for the reasons set out in detail below.

8. On 23 February 2015 the claimant issued an application to re-amend the particulars of claim to add a claim for the tort of abuse of process. The Chief Master adjourned that application to be dealt with by the judge hearing the strike-out application. However, the parties have agreed that that application should await the determination of the strike-out application.

The allegations in the amended particulars of claim

9. The defendant, Mr Gubay, is a successful businessman who made a substantial fortune from, among other things, the "Kwik-Save" supermarket chain and the "Total Fitness" chain of health clubs in the UK and the Republic of Ireland. The claimant, Mr Willers,

was the defendant's right hand man for 23 years from 1986 until he was dismissed by the defendant in 2009.

10. The claimant's case is helpfully summarised in the following terms at paragraphs 2 to 5 of the amended particulars of claim:

> "[2] In this claim Mr Willers contends that Mr Gubay maliciously caused proceedings for negligence and breach of fiduciary duty to be brought against him, in circumstances where Mr Gubay knew that the claim was false because he was the author of the acts complained of within those proceedings. Those proceedings are known herein as "the Langstone Action" and were brought against Mr Willers by Langstone Leisure Limited ("Langstone"), a company within a group of companies known as the Anglo Group. The Anglo Group is controlled by Mr Gubay.
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> [3] In the Langstone Action it was alleged that Mr Willers had acted in breach of his common law and fiduciary duties to Langstone as a director in causing Langstone to fund and indemnify the Liquidator of a company known as Aqua Design and Play Limited ("Aqua") for the purpose of investigating and prosecuting an action against David and Shaun Adams, Aqua's former directors, for wrongful trading and the giving of unlawful preferences. The costs incurred by the Liquidator and those of the Adams family, for which Langstone became liable after that action was abandoned shortly before trial in late 2009 on the instructions of Mr Gubay, amounted to £1.95m. The underlying action is known herein as the "Wrongful Trading Action".
>
> [4] By his Defence and Part 20 Claim in the Langstone Action Mr Willers denied liability and sought an indemnity from Mr Gubay, whom he joined into the action as Third Party. The indemnity was claimed on the grounds that Mr Gubay was the sole effective decision maker of the Anglo Group and Mr Gubay had directed Mr Willers to prosecute and carry on the Wrongful Trading Action through Aqua's Liquidator; such that he was responsible for any loss and damage caused to Langstone as a consequence.
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> [5] On 28 March 2013, 2 weeks before the date fixed for a 5 week trial of the Langstone Action, Langstone gave notice of discontinuance of the action. By order of Newey J dated 16 April 2013, Langstone was ordered to pay Mr Willers' costs and Mr Gubay's costs of the Part 20 Claim."

11. I should record that the amended particulars of claim do contain more detailed allegations grouped together under the following headings: Mr Gubay's control of the Santon Trust and Anglo Group; Mr Gubay's attitude to litigation and control over the Anglo Group's litigation; Dismissal of Mr Willers; The proceedings brought by

Langstone; and Malicious prosecution: (i) Mr Gubay's prosecution of the Langstone Action; (ii) determination in Mr Willers' favour; (iii) lack of reasonable and probable cause; (iv) malice; and (v) damage. Except for the point that the tort does not extend generally to civil proceedings, Mr Livesey QC does not take any issue with the rest of the pleading or make any complaint that the claim has not been properly pleaded. He has of course reminded me that, for the purposes of determining the defendant's application, I must proceed on the basis that the facts alleged by the claimant will be proved at trial. That, it seems to me, is all I need to say about the amended particulars of claim for the purposes of this judgment.

Malicious prosecution: general

12. The editors of *Clerk & Lindsell on Torts*, 21st ed (2014), pp 1182-1183, para 16-09 state that:

> "**Essentials of the tort of malicious prosecution** 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 [footnote 48]; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious."

13. Putting on one side footnote 48, Mr Livesey QC has told me that this passage has appeared in the same terms in many editions of *Clerk & Lindsell on Torts* over very many years. This passage was cited with approval by the House of Lords in *Martin v Watson* [1996] 1 AC 74, at p 80C and also in *Gregory* at p 426G-H.

14. Footnote 48 was added in the 21st ed. of *Clerk & Lindsell on Torts* and explains that the need for the prosecution to be on a criminal charge:

> "… will remain the case unless the English courts decide to follow the majority of the Privy Council in [*Crawford Adjusters*]..."

The contents of that footnote correspond with the issue before me.

Precedent

(a) The main submissions

15. The principal submission of counsel for the defendant, Mr Livesey QC, is based on the law of precedent. He submitted as follows:

(1) In *Gregory* the House of Lords held that the tort of malicious prosecution does not (with a few immaterial exceptions) extend beyond the abuse of criminal proceedings.

(2) The doctrine of precedent of English Law requires that a judge of the High Court should respect (but is not bound to follow) a decision of another judge of the High Court, but must follow decisions of the Court of Appeal and the House of Lords and now the Supreme Court: see, for example, *Policy Authority for Huddersfield v Watson* [1947] KB 842, CA per Lord Goddard at p 848. The House of Lords and

now the Supreme Court is not bound by its own decisions, but may depart from them in the circumstances identified in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

(3) The Judicial Committee of the Privy Council is not a court. Rather, its function is to advise Her Majesty on "appeals to Her Majesty in Council" from any court in any colony (see section 1 of the Judicial Committee Act 1844). The Privy Council does not therefore appear in the hierarchy of courts in England and Wales save exceptionally, by way of example, in appeals from Ecclesiastical cases where its decisions will be binding on the courts in that hierarchy.

(4) The High Court or the Court of Appeal should not follow a decision of the Privy Council in place of a decision of the House of Lords, unless the circumstances are quite exceptional and the court is satisfied that in practice the result would be a foregone conclusion: *In re Spectrum Plus Ltd (in liquidation)* [2004] Ch 337, CA at paras 57-59, pp 373G-374C, per Lord Phillips MR; *R v James* [2006] QB 588, CA, at paras 38-44, pp 600F-602A, per Lord Phillips CJ; *Abou-Rahmah v Abacha* [2007] Bus LR 220, at para 68, p 241B, per Arden LJ; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, CA at paras 72 to 74, pp 478E-H, per Lord Neuberger MR.

(5) Given the strong dissenting judgments of Lord Sumption JSC and Lord Neuberger PSC in *Crawford Adjusters*, the court cannot be satisfied that in practice the result of any appeal to the Supreme Court in this case would be a foregone conclusion. Further, the circumstances of this case do not meet the "quite exceptional" criteria identified by the Court of Appeal in *R v James* [2006] QB 588. This means that the decision in *Crawford Adjusters*, as a decision of the Privy Council, cannot change the law in England and Wales unless and until the view of the majority has been accepted by the Supreme Court as the law which applies to England and Wales.

(6) A judge of the High Court is therefore obliged (as will be the Court of Appeal) to follow the decision of the House of Lords in *Gregory* and the defendant's claim for damages for malicious prosecution of civil proceedings must be struck out.

16. Counsel for the claimant, Mr Page QC, disagreed with the defendant's approach. He submitted that:

(1) The court should follow *Crawford Adjusters*, as it is a foregone conclusion that the Supreme Court will follow it on any appeal to the Supreme Court in this case: see *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119, Lawrence Collins J at paras 80 to 85, pp138G-139G; *Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680, HL at para 163, p 737 (per Baroness Hale JSC).

(2) Even if it is not a foregone conclusion that the Supreme Court will follow *Crawford Adjusters*, the court is entitled to follow *Crawford Adjusters* as it is a decision of the Privy Council interpreting *Gregory*. In these circumstances there is no departure from, or refusal to follow, the decision of the House of Lords as the decision of the Privy Council is a decision giving guidance as to the proper interpretation to be placed on a decision of the House of Lords as a matter of English law: see *Abou-*

Rahmah v Abaca [2007] Bus LR 220, CA at paras 64 to 70, pp 239-F-242C, per Arden LJ.

(3) The decision in *Gregory* is not binding on this court. In particular, this is because it was never argued in *Gregory* that the tort of malicious prosecution has always extended to civil and criminal proceedings; the ratio decidendi of *Gregory* is that the tort of malicious prosecution does not extend to disciplinary proceedings, and the ratio does not include whether the tort extends to all criminal and civil proceedings; and no coherent distinction was drawn between the civil cases where the tort of malicious prosecution was recognised, and those where it was not recognised.

(4) If the decision in *Gregory* is not binding, then Mr Page QC made the further submissions which I have set out at paragraph 75 below.

17. In the light of these submissions, I have to first of all consider the relevant rules of precedent, and then turn to what was decided by the House of Lords in *Gregory* and the Privy Council in *Crawford Adjusters*.

(b) Precedent: the relevant law

18. Mr Page QC relied on *Daraydan Holdings Ltd v Solland International Ltd* at paras 82 and 85, p139G-H, in which Lawrence Collins J (as he then was) said this:

> "[82] The House of Lords forcefully reaffirmed the rules of stare decisis in *Davis v Johnson* [1979] AC 264, but nothing was said about the decisions both in the Court of Appeal (eg *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518 and *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210) and at first instance which suggest that both a judge of first instance and the Court of Appeal are free to follow decisions of the Privy Council on common law principles which depart, after full argument, from earlier decisions of the Court of Appeal …
>
> [85] The system of precedent would be shown in a most unfavourable light if a litigant in such a case were forced by the doctrine of binding precedent to go to the House of Lords (perhaps through a leap-frog appeal under the Administration of Justice Act 1969, section 12) in order to have the decision of the Privy Council affirmed. That would be particularly so where the decision of the Privy Council is recent, where it was a decision on the English common law, where the Board consisted mainly of serving Law Lords, and where the decision had been made after full argument on the correctness of the earlier decision."

19. In *Daraydan Holdings Ltd v Solland International Ltd* the issue before the judge was whether *Lister & Co v Stubbs* 45 ChD 1, a decision the Court of Appeal, was binding on him or whether he could apply the Privy Council's decision in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324. On the facts of the case the judge was able to

distinguish *Lister & Co v Stubbs* but said, if he had been unable to do so, he would have applied *Attorney General for Hong Kong v Reid* (para 86, p 139H).

20. Mr Page QC submitted that, given *Crawford Adjusters* was decided: (i) relatively recently, (ii) after very full argument, (iii) by express reference to English law and authority (per Lady Hale JSC at para 83, p 402F), and (iv) by a Board composed of currently sitting Supreme Court Justices, I should follow it. He submitted that it is not open to me to conclude that a majority in the Supreme Court would come to a different conclusion. He relied on para 85 of *Daraydan Holdings Ltd v Solland International Ltd*, together with an article *Precedent from the Privy Council* (2006) 122 LQR 349, D J Conaglen and R C Nolan, in support of this submission.

21. The difficulty with this argument is that *Gregory* is a decision of the House of Lords and not the Court of Appeal. It is therefore not the type of case to which the criteria identified in para 85 of *Daraydan Holdings Ltd v Solland International Ltd* can apply. Likewise Baroness Hale JSC's obiter comments in *Re Spectrum Plus Ltd* [2005] 2 AC 737, HL at para 163, p 737B do not take the matter any further. This is because she was also referring to the possibility of what the Court of Appeal, or a judge of the High Court might do, if a decision of the Court of Appeal (and not a decision of the House of Lords) has been expressly disapproved as part of the ratio decidendi in a case in the Privy Council on appeal from a country in which the law on the subject is the same as that in England and Wales.

22. Mr Page QC then referred me to *R v James* [2006] QB 588, CA and *Abou-Rahmah v Abacha* [2007] Bus LR 220, CA. These are two recent cases where the Court of Appeal preferred to follow a decision of the Privy Council rather than an earlier domestic decision which would normally be regarded as binding (in each case a decision of the House of Lords). As Lord Neuberger MR explained in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, CA, para 74, p 278H, in each case the decision was justified "based as it was on the proposition that it was a foregone conclusion that, if the case had gone to the House of Lords, they would have followed the Privy Council decision". The circumstances in which this might arise are "quite exceptional" (see *R v James* at paras 37, 43 pp 600D, 601G-H, per Lord Phillips CJ; and *Abou-Rahmah v Abacha* at para 68, p 241B, per Arden LJ).

23. In *R v James* the Criminal Division of the Court of Appeal followed the Privy Council's decision on provocation in *Attorney General for Jersey v Holley* [2005] 2 AC 580 (on which nine members of the Appellate Committee of the House of Lords sat) in preference to the decision of the House of Lords in *R v Smith (Morgan)* [2001] 1 AC 146. The exceptional reasons for doing so were explained by Lord Phillips CJ as follows (pp 601G-602A):

> "[43] What are the exceptional features in this case which justify our preferring the decision in *Holley's* case to that in the *Morgan Smith* case? We identify the following. (i) All nine of the Lords of Appeal in Ordinary sitting in *Holley's* case agreed in the course of their judgments that the result reached by the majority clarified definitively English law on the issue in question. (ii) The majority in *Holley's* case constituted half the Appellate Committee of the House of Lords. We do not know whether there would have been agreement that the result was definitive had the members of the Board divided five/four. (iii) In

> the circumstances, the result of any appeal on the issue to the House of Lords is a foregone conclusion.
>
> [44] We doubt whether this court will often, if ever again, be presented with the circumstances that we have described above. It is those circumstances which we consider justify the course that we have decided to take, and our decision should not be taken as a licence to decline to follow a decision of the House of Lords in any other circumstances."

24. The element of dishonesty required for liability as an accessory in a breach of trust arose in *Abou-Rahmah v Abacha* and, in particular, whether the trial judge was correct to proceed on the basis that the law as laid down in *Twinsectra Ltd v Yardley* [2003] 2AC 196, as interpreted in the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, represented the law of England and Wales. Arden LJ was satisfied that exceptional circumstances did exist which justified the trial judge taking this course (although Rix LJ and Pill LJ did not think it was necessary to resolve this "controversy", paras 23 and 91, p 226D-E, and p 247C).

25. Arden LJ's reasons for doing so included the following (para 68, 241C-242A):

> "(1) The decision in *Twinsectra* [2002] 2 AC 164 is of course binding on this court and the judge. But the *Barlow Clowes* decision [2006] 1 WLR 1476 does not involve a departure from, or refusal to follow, the *Twinsectra* case. Rather, the *Barlow Clowes* case gives guidance as to the proper interpretation to be placed on it as a matter of English law. It shows how the *Tan* case [1995] 2 AC 378 and the *Twinsectra* case can be read together to form a consistent corpus of law.
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> (2) … It would appear therefore that the Privy Council was also intending to clarify English law since that is the only logical implication from the methodology of interpretation of an English authority…
>
> (3) Furthermore, the members of the Privy Council in the *Barlow Clowes* case are (or were at the date of the hearing of the appeal) all members of the Appellate Committee of the House of Lords. Their number was five, and that does not represent a majority of the Appellate Committee as in *Holley*. But the approach in *Barlow Clowes* was to clarify the meaning of the speeches of Lord Hutton and Lord Hoffmann in the *Twinsectra* case. The view expressed by Lord Hutton represented the view of the majority. Two members of the constitution of the Appellate Committee which sat in *Twinsectra* (Lord Steyn and Lord Hoffmann) were parties to the decision of *Barlow Clowes*. It is difficult to see that another constitution of the Appellate Committee would itself come to a different view as to what the majority in *Twinsectra* had meant. Put another way, I do not see how in these particular circumstances this court could be criticised for adopting the interpretation of the *Twinsectra* decision unanimously adopted by the Privy Council, consisting of members of the Appellate Committee at least two of whom were parties to the *Twinsectra* decision, in preference to its own."

26. Therefore, if the decision of the House of Lords in *Gregory* is binding on this court, I can only follow the decision of the Privy Council in *Crawford Adjusters* and not strike out the claim for damages for malicious prosecution of civil proceedings if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council in *Crawford Adjusters* and the outcome will therefore be the same.

27. I now turn to the decisions in *Gregory* and *Crawford Adjusters*, which I must deal with in some detail.

(c) Gregory

28. Mr Gregory was an elected member of Portsmouth City Council. The council removed him from all the committees on which he sat following disciplinary proceedings against him for breach of the council's code of conduct. Mr Gregory successfully applied for judicial review and obtained an order from the Divisional Court quashing the council's decision. He then began an action claiming damages for malicious prosecution against the council. The council applied to strike the action out on the basis that the tort of malicious prosecution did not in law extend to the malicious institution of domestic disciplinary proceedings. The council's application to strike out the action was successful before the district judge. Mr Gregory's appeals against that decision were dismissed by the Judge, the Court of Appeal and the House of Lords.

29. In the House of Lords the only substantive speech was given by Lord Steyn and the four other law lords, Lord Browne-Wilkinson, Lord Nicholls, Lord Hobhouse and Lord Millett, all agreed with it. Lord Steyn began by stating (p 422H):

> "My Lords, on this appeal the question is whether the tort of malicious prosecution is in law capable of extending to the malicious institution of domestic disciplinary proceedings by a local authority against a councillor."

30. Lord Steyn explained what happened in the Court of Appeal as follows (pp 424H-425F):

> "Mr Gregory appealed to the Court of Appeal… On 5 November 1997 by a majority (Simon Brown and Robert Walker LJJ) the Court of Appeal dismissed the appeal: *Gregory v Portsmouth City Council* (1997) 96 LGR 569. Schiemann LJ dissented. Simon Brown LJ gave the leading judgment. He pointed out that on existing authority most but not all criminal proceedings, and certain specific civil processes, will ground the tort. He rejected an argument that the law should be developed beyond these categories to extend the tort to disciplinary proceedings… In a separate judgment Robert Walker LJ expressed agreement with the reasons of Simon Brown LJ. He too accepted that the present boundaries of the tort of malicious prosecution are not easy to justify. He said, at p 595, that the proposed extension is likely to lead to numerous practical difficulties, and was a matter for Parliament. In an important and valuable judgment Schiemann LJ saw the matter differently. He observed, at p 593:
>
> > "Such rationale as there was for the various fine distinctions which we find in this branch of the law sprang from history and historical

> circumstances which no longer appertain. I see no advantage in retaining them. It is a commonplace of legal history that a rule is established for perfectly sensible reasons and yet is adhered to for years after the underlying reasons no longer apply… While of course I accept that the common law judge will look at how the law has developed from its origins, I myself find the concept of 'true scope' of a particular tort conceptually unhelpful in the sort of exercise upon which the court is currently engaged. As I have indicated, I prefer to start from the other end, as it were. In my judgment, if the facts are as pleaded in the statement of claim, it is consonant with the general approach of our law as it now stands that the plaintiff has a remedy. I can see no policy reason for not giving him one … I prefer to be guided by principle than by dicta echoing down the generations."

These contrasting observations capture some measure the essentials of the debate on the present appeal before the House."

31. Lord Steyn recorded that the statement of facts and issues formulated the questions arising for decision as follows (p 425G-H):

> "(1) Do the following agreed and assumed facts give rise to a cause of action in malicious prosecution, namely: (i) the agreed fact that disciplinary proceedings were instituted by a local authority against Mr Gregory, a councillor; and (ii) the assumed facts that the proceedings were instituted maliciously and without reasonable and proper cause, and that Mr Gregory thereby suffered loss of reputation, injury to health, mental anguish and legal costs? (2) Is there a general tort of maliciously instituted civil proceedings? (3) Does the tort of malicious prosecution extend to the malicious institution of domestic disciplinary proceedings by a local authority against a councillor?"

32. In relation to these issues, Lord Steyn added this (p 426B):

> "While he contended that in principle the tort of malicious prosecution should extend to all civil proceedings, counsel for Mr Gregory [Mr Richard Lissack QC] submitted that, even if this was not accepted, nevertheless the tort should extend to disciplinary proceedings on the ground that such proceedings are quasi criminal. Counsel invited your Lordships to develop the law in this way in the present case."

33. Mr Page QC raised a point in relation to this. He submitted that Mr Gregory's counsel "did not argue what the law was" and simply conceded that, bar a few exceptions, the tort was restricted to criminal proceedings. Mr Page QC says this was a concession that Mr Gregory's counsel should not have made. I have not seen Mr Gregory's statement of case, but the relevant part of the argument is set out at p 421D-E of the report:

> "The original boundaries of malicious prosecution derived from a legitimate desire not to discourage citizens from assisting in the law enforcement process. The tort was therefore restricted to criminal proceedings. However, those

> boundaries were set in a different age when there was no police force and the legal system and social conditions were quite unlike what they were at present. Therefore malicious prosecution should now be reconsidered and extended to cover disciplinary proceedings."

34. It is fair to say that the report does not record that counsel for Mr Gregory argued in terms that the common law originally recognised the tort of malicious prosecution extended as much to that of civil as to that of criminal proceedings. However, if one looks at the dissenting judgment of Schiemann LJ in the Court of Appeal (which Lord Steyn described as an important and valuable judgment), he quotes (at p 579B-c) from *Fleming, The Law of Torts* 8th ed (1992), p 611 in which Professor Fleming wrote:

> "Extending the action to wrongful civil proceedings has encountered anything but enthusiastic response. Admittedly, there is nothing in the history of the action nor any pronouncement of binding authority to suggest that the action is confined to criminal proceedings…"

The 9th ed (1998) of *Fleming, The Law of Torts* was before the House of Lords because, at p 427B-C, Lord Steyn refers to p 687 of this text book. Further, and crucially, the agreed issue before the House of Lords was "Is there a general tort of maliciously instituted civil proceedings?". In these circumstances I am unable to accept Mr Page QC's submission that this issue was not properly argued by counsel before the House of Lords.

35. Returning to Lord Steyn's speech, he then turned to "The law as it stands", which was the heading of the next section of his speech. Lord Steyn explained the position in the following terms at pp 426C-428E:

> "*The law as it stands*
>
> The paradigm is the tort of malicious prosecution of criminal proceedings. A distinctive feature of the tort is that the defendant has abused the coercive powers of the state. The law recognises that an official or private individual, who without justification sets in motion the criminal law against a defendant, is likely to cause serious injury to the victim. It will typically involve suffering for the victim and his family as well as damage to the reputation and credit of the victim… 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 tort of malicious prosecution is also defined against the backcloth that there are criminal sanctions, such as perjury, making false statements to the police, and wasting police time, which discourage the mischief under consideration. Moreover, the tort must be seen in the context of overlapping torts, such as defamation and malicious falsehood, which serve to protect interests of personality.
>
> *The inquiry must proceed from the premise of the law as it stands.* The tort of malicious prosecution is narrowly defined. Telling lies about a defendant is not by 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. *To ground a claim for malicious prosecution a plaintiff must prove (1) that the law was set in motion against him on a criminal charge*; (2) that the prosecution was determined in his favour; (3) that it was without reasonable and proper cause, and (4) that it was malicious: *Martin v Watson* [1996] AC 74, 80. Damage is a necessary ingredient of the tort. This element of the tort was explained in a dictum of Holt CJ in Saville v Roberts (1698) 12 Mod Rep 208. Holt CJ defined the interests protected by the tort as follows:

> "there are three sorts of damages, any one of which is sufficient to support this action. First, damage to [the plaintiff's] fame, if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses."

The result of this test of damages is that most, but not all, criminal proceedings are capable of satisfying the requirements of the tort...

In English law the tort of malicious prosecution is not at present generally available in respect of civil proceedings. It has only been admitted in a civil context in a few special cases of abuse of legal process. Sometimes these cases are described as constituting a separate tort of abuse, but in my view *Fleming, The Law of Torts*, 9th ed. (1998), p 687 is correct in observing that they "resemble the parent action too much to warrant separate treatment." The most important is malicious presentation of a winding up order or petition in bankruptcy: *Johnson v Emerson* (1871) L.R. 6 Ex. 329; *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674… It has long been recognised to be an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice: *Gibbs v Rea* [1998] AC 786. In *Roy v Prior* [1971] AC 470 the House of Lords allowed an action by a plaintiff to proceed where the plaintiff alleged that the obtaining ex parte of a bench warrant, and his arrest, was an abuse of process inasmuch as the solicitor responsible acted without reasonable cause and maliciously. An action in tort will also be available for setting in train execution against property without reasonable cause and maliciously: *Clissold v Cratchley* [1910] 2 KB 244. These instances may at first glance appear disparate but in a broad sense there is a common feature, namely the initial ex parte abuse of legal process with arguably immediate and perhaps irreversible damage to the reputation of the victim…. 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 at 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 Law 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…

> *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*. Specifically it has never been extended to disciplinary proceedings of any kind …" (*emphasis* added)

36. Mr Livesey QC submitted that under the heading "The law as it stands" Lord Steyn defined and declared the limits of the tort of malicious prosecution and, as part of those limits, identified that the proceedings must be set in motion on a criminal charge. Mr Page QC, on the other hand, criticised this section of Lord Steyn's speech and, in particular, argued that it failed to draw any coherent distinction between cases where the tort is recognised in a civil context, and those where it is not.

37. I agree with Mr Livesey QC's submission. In the lengthy passage I have just quoted at para 35 above Lord Steyn explained the existing boundaries of the tort in detail. Having identified those boundaries, he answered the second question arising for decision and held that there is no general tort of maliciously instituted civil proceedings in English law. Rather, in English law the tort of malicious prosecution is not available beyond the limits of criminal proceedings and special instances of abuse of civil legal process. It was only having identified the boundaries of the tort of malicious prosecution that Lord Steyn then moved on to consider whether the tort could be developed or extended to disciplinary proceedings.

38. Next Lord Steyn dealt with Mr Gregory's argument for a development of the law which was based on the submission "that the existing boundaries of the tort fail a test of rationality" (p 428F). Counsel for Mr Gregory argued that (p 428F-G):

> "it would be better not to concentrate on types of proceedings in which groundless allegations are made but rather on the fact of malicious and unwarranted abuse of any proceedings resulting in serious damage to an individual."

To support the feasibility of such a development Mr Gregory's counsel drew attention to the development of the tort of malicious prosecution in the United States in which the tort extends to all civil proceedings.

39. On this point Lord Steyn concluded:

> "On balance though it 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... The fact that the courts in the United States do not have a general power to award costs against a plaintiff who has brought a groundless claim is a significant difference. 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… And that was the springboard for the extension of the tort to administrative tribunals. 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. It does not necessarily follow, however, that a similar development is not justified in the context of the particular circumstances and needs of our legal system. That question still remains to be considered."

40. The principal submission made by counsel for Mr Gregory on the appeal was that disciplinary proceedings are quasi-criminal in concept and involve severe penalties affecting the lives and livelihoods of individuals (p 430F). Therefore, he argued, even if the tort is not extended to all civil proceedings, it should be extended to disciplinary proceedings. Lord Steyn said that this proposed development would be a "radical reform", given that the tort had never in England been held to extend beyond legal proceedings (p 431B-C). He held that the tort of malicious prosecution did not extend to disciplinary proceedings (p 432E) and his reasons are set out at p 432C-E:

> "One must consider the generality of cases of groundless disciplinary proceedings. From my part the existence of closely related torts, which protect individuals subjected to unwarranted and malicious disciplinary proceedings, destroys the simplistic case that there is no alternative remedy. Indeed, it makes it unnecessary and undesirable to make the extension of the tort of malicious prosecution advocated by counsel. If the existing protection afforded to such victims by other torts is shown by the experience of the courts to be inadequate a better solution may be the development of other torts, such as the Court of Appeal undertook in *Khodaparast v Shad* [[2000] 1 WLR 618]. *For these reasons I would hold that the tort of malicious prosecution does not extend to disciplinary proceedings...*" (*emphasis* added)

41. That holding by Lord Steyn which I have emphasised above is that the tort of malicious prosecution, with the boundaries he had already defined at pp 426C-428E of his speech and which I have explained at para 37 above, does not extend to disciplinary proceedings.

42. Mr Page QC submitted that the statement by Lord Steyn at 431B that "given the tort has never in England been held to extend beyond legal proceedings the proposed development [ie that the tort should be extended to disciplinary proceedings] would be radical reform" meant that, when Lord Steyn held that the tort of malicious prosecution did not apply to disciplinary proceedings at 432E, he was not drawing any distinction between civil and criminal proceedings. I disagree. This seems to me to be a complete misreading of Lord Steyn's speech and, in particular, his identification of the boundaries of the tort set out at pp 426C-428E, and which I have explained at para 37 above.

43. Finally, although it was not necessary for the determination of Mr Gregory's appeal, Lord Steyn briefly stated obiter his conclusions on the argument in favour of the extension of the tort to civil proceedings generally. Lord Steyn did so because he said it was "unsatisfactory to leave this important issue in the air" (p 432F). His conclusions were as follows (pp 432F-433A):

> "There is a stronger case for an extension of the tort to civil legal proceedings that 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 present 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 extension 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."

44. Mr Page QC also submitted that another weakness in Lord Steyn's analysis is that he assumed that another tort would "step in" to cover the position. However, in *Crawford Adjusters* there was no other tort, and the position is the same in relation to the facts of this case. Mr Page QC said that Lord Steyn was considering disciplinary proceedings and, in that context, he was correct to find that other torts could cover the situation in relation to the facts of *Gregory*. Nevertheless, if there is no other tort available, then the tort should be extended to cover civil proceedings and this is not prevented by the dicta of Lord Steyn at pp 432F-433A. I do not see that this argument assists Mr Page QC, given the conclusions I have reached in relation to Lord Steyn's identification of the boundaries of the tort of malicious prosecution at pp 426C-428E of his speech.

45. In *Tibbs v Islington Borough Council* [2002] EWCA Civ 1682 the ingredients of the tort of malicious prosecution were explained by reference to Lord Steyn's speech at p 426G-H (per May LJ at para 8). May LJ then said: "The tort of malicious prosecution is not generally available in respect of civil proceedings. It is capable of applying in a civil context only to a few special cases of abuse of process" (para 8). In that case, the claimant had alleged that the defendant, a supporting creditor in her bankruptcy and who never became the petitioning creditor by substitution, was liable for the tort of malicious prosecution. The claim was struck out by the Judge, and the claimant's appeal against that decision was dismissed by the Court of Appeal because the claimant was unable to show that the bankruptcy proceedings were determined in her favour (paras 12, 17, 18, per Clarke LJ; 21, 23, per Simon Brown LJ).

46. More recently *Gregory* was considered by the Court of Appeal in *Land Securities Plc v Fladgate Fielder (a firm)* [2010] Ch 467. However, this was in the context of the tort of abuse of process.

(d) Crawford Adjusters

47. I now turn to *Crawford Adjusters*, which I also need to deal with in detail.

48. In 2004 Grand Cayman was hit by Hurricane Ivan. The hurricane caused substantial damage to a residential development, which had been insured with Sagicor General Insurance (Cayman) Limited ("**Sagicor**"). The owners of the development made an insurance claim, which Sagicor accepted. Sagicor appointed a Mr Paterson as the loss adjuster, and two companies ("**Hurlstone**") were appointed to do the restoration works

to the development. Hurlstone expected payments in advance to cover the cost of the restoration works and Sagicor made advance payments totalling $2.9m. In 2005 a Mr Delassio joined Sagicor. He knew Mr Paterson, did not like him and within weeks of joining Sagicor had stated that he intended to drive Mr Paterson out of business and destroy him professionally. Mr Delassio instructed an English surveyor and loss adjuster to come to Grand Cayman and assess the value of Hurlstone's works at the development. However, Mr Delassio provided instructions to the surveyor on a deliberately incomplete basis. The upshot of this was that by February 2006 the surveyor had valued Hurlstone's work at $0.8m, of which he said that Sagicor was liable for $0.7m.

49. Sagicor, at the instigation of Mr Delassio, then issued proceedings against Mr Paterson and Hurlstone alleging that Sagicor had over-paid Hurlstone $2.2 million for the works, 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 for deceit and conspiracy. Mr Delassio then told a journalist about Sagicor's proceedings and the allegations made against Mr Paterson were reported in the local press which, in turn, caused massive damage to Mr Paterson's reputation and the willingness of third parties to employ him. Very shortly before trial Sagicor discontinued the action and judgment was entered for Mr Paterson and Hurlstone. Sagicor was ordered to pay their costs on an indemnity basis.

50. Mr Paterson was then given leave to amend his counterclaim (which at that stage was just a claim for unpaid fees) to include a claim against Sagicor for damages for abuse of process. Hurlstone had, in the meantime, issued a separate action claiming damages against Sagicor for abuse of process or malicious prosecution. Mr Paterson's counterclaim founded on abuse of process, and Hurlstone's separate action for abuse of process or malicious prosecution, were tried together and dismissed. The trial judge treated Mr Paterson, like Hurlstone, as relying on the tort of abuse of process or the tort of malicious prosecution as alternatives (*Crawford Adjusters* at para 25, p 382G, per Lord Wilson JSC). In relation to the tort of malicious prosecution the trial judge held that, save in respect of one crucial feature of law, Mr Paterson had established all of the four elements of the tort. The crucial feature was that the present state of the law did not allow for the tort of malicious prosecution to be extended to civil proceedings. In this context the trial judge cited the observations made by Lord Steyn in *Gregory* at p 432-433 (*Crawford Adjusters* at para 34, p 384D-F, per Lord Wilson JSC). Mr Paterson appealed the judge's decision in respect of abuse of process and malicious prosecution. In the Court of Appeal Mr Paterson's counsel conceded that, in the light of the observations in *Gregory*, it was not open to that court to hold that the tort of malicious prosecution had been established (para 35, p 384F, per Lord Wilson JSC). This ground of appeal was formally dismissed so that, in the event of a further appeal, the point could be pursued before the Privy Council. Mr Paterson's appeal against the judge's decision on abuse of process was also dismissed.

51. Mr Paterson appealed to the Privy Council. In June 2013 the Privy Council allowed Mr Paterson's appeal. The Board of the Privy Council decided by a majority that the tort of malicious prosecution applies to civil proceedings and Sagicor had committed the tort. The majority were Lord Wilson JSC, Baroness Hale of Richmond JSC and

Lord Kerr of Tonaghmore JSC. Lord Sumption JSC and Lord Neuberger of Abbotsbury PSJ dissented.

52. Lord Wilson JSC reviewed the law from 1285 to the present day and, in the light of that review, he held that the common law originally recognised that the tort of malicious prosecution extended to civil and criminal proceedings (para 78, p 400B). He also concluded that, if no tort other than malicious prosecution is available to remedy the sort of wrong done to Mr Paterson, Lord Steyn's obiter observations in *Gregory* at p 432F-433A formed no impediment to its recognition, "on the contrary they encourage it" (para 78(h), p 400G-H).

53. Lord Wilson JSC considered *Gregory* at paras 36-39 of his judgment. He began by stating (p 384H):

> "[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 on which he relies, namely that of malicious prosecution."

The observations made in the *Gregory* case that Lord Wilson JSC is referring to are the obiter conclusions expressed by Lord Steyn at p 432F-433A (see para 35, p 384F) under the heading "The extension of the tort to civil proceedings", which I have set out at paragraph 43 above.

54. Lord Wilson JSC then summarised the facts of *Gregory* and what was said by Lord Steyn in his speech (para 38, p 385A-E). In particular, Lord Wilson JSC recorded at p 385C that Lord Steyn said:

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

55. I have read p 426 of *Gregory* over and over and, for my part, I cannot find any reference to Lord Steyn using the words, or words to the effect, "whatever the extent of the tort of malicious prosecution". Rather, as I have explained above, Lord Steyn identified the boundaries of the tort of malicious prosecution at pp 426C-428A of his speech. He does not say that the existing boundaries were uncertain.

56. Lord Wilson JSC then identified that the holding in *Gregory* was that the tort of malicious prosecution did not extend to disciplinary proceedings: p 432 (p 38, p 385F). He then quoted in full the paragraph of Lord Steyn's speech under the heading "The extension of the tort to civil proceedings" and, with regard to the obiter conclusions contained in that paragraph, Lord Wilson JSC said (p386B-D):

> "[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 JSC'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 law is "relatively well-trodden"."

57. Baroness Hale JSC agreed with the reasons of Lord Wilson and Lord Kerr JJSC, and gave some reasons of her own. In doing so, she said that "We are faced with the task of discerning some rational principles which will enable us to define [the] boundaries [of the torts of malicious prosecution and abuse of process]" (para 83, p 402). She then said at para 85, p 403A: "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". She concluded 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" (para 90, p 404E).

58. Lord Kerr JSC agreed with Lord Wilson and Baroness Hale JJSC that the appeal should be allowed. Lord Kerr JSC gave his own reasons for reaching this conclusion. He recorded at para 93, p 405B, that the appeal gave rise to an "intense focus on the policy arguments for and against the extension (or renewed recognition) of liability for malicious prosecution to civil proceedings". He concluded that "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" (para 119, p 411B).

59. Lord Kerr JSC referred to *Gregory* at paras 115-118, pp 410A-411B of his judgment and, in particular, the final section containing Lord Steyn's obiter conclusions that the tort should not be extended to civil proceedings generally at p 432F-H. Lord Kerr JSC said (p. 410F-411A):

> "[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 the 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."

60. Lord Sumption JSC disagreed with the majority, and would have dismissed the appeal. He concluded his dissenting judgment by stating (para 159, pp 426H-427A):

> "[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 to either of the two torts relied on in this case [malicious prosecution and abuse of process] was "necessary and desirable". Nor can he have thought that there would 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."

61. Lord Sumption JSC considered that Mr Paterson's case in respect of malicious prosecution depended on the argument that the ambit of the tort should be extended from malicious criminal prosecutions to any malicious civil proceedings. He then said that "this question was directly considered by the House of Lords" in *Gregory* (paras 130-130, p 414G-H). Having summarised the facts of *Gregory* Lord Sumption JSC then explained (para 131, p 415A-D):

> "The action came before the House on [Mr Gregory's] 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 [2000] 1 AC 429, 425-426. After full argument on the point, Lord Steyn, giving the leading judgment

> of a unanimous committee, held, at p 428, 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 civil legal process."

62. The history and current state of the English law in relation to malicious prosecution is described at paras 128 to 148 of Lord Sumption JSC's judgment (a description which in Lord Neuberger PSC's view was accurate and comprehensive (para 162, p 427C-D)). Lord Sumption JSC's opinion was that it was 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 (para 144, p 420E-F). He then continued (para 144, p 420F-G):

> "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 to cut off the head of Lernaean Hydra merely to see it grow two more in its place."

63. Lord Sumption JSC was not prepared to develop the law because first of all he did not consider the distinction between civil proceedings and criminal prosecutions to be either arbitrary or unsatisfactory (para 145, p. 420G). Second, within the last few years, the House of Lords has held in *Gregory* 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" (para 146, p 421B-C). He then explained that (p 421C-F):

> "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 for 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 on the Board, was rejected. Nothing has changed since 2000 to undermine the authority of the Committee's statement of the law. There are no features in the present case which distinguish it from *Gregory* except that one is bound to have more sympathy with Mr Paterson. The conduct of Mr Delassio, 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 the law."

64. The third reason Lord Sumption JSC gave for refusing to develop the law was that the precise ambit of the tort, if it extends to civil proceedings of a private nature, will be both uncertain and potentially very wide (para 146, p 421G).

65. Lord Neuberger PSC agreed with Lord Sumption JSC's reasons as to why the appeal should be dismissed, and added some supplementary points of his own based on the United States jurisprudence (para 198, p 435E-F).

66. Recently in *Energy Ventures v Malabu Oil & Gas Ltd* [2014] EWHC 1390 (Comm) Males J had to consider *Crawford Adjusters*. In that case the claimant sought an order for alternative service of a claim form in a new action against the defendant by service on the English solicitors who acted for the defendant in previous litigation. The claim the claimant sought to make was a claim for damage caused by the defendant's alleged malicious conduct of its defence in the previous action and it therefore relied on the tort jurisdictional gateway to establish jurisdiction in the new action. The claimant relied on *Crawford Adjusters* to say that the tort of malicious prosecution is no longer confined to malicious prosecution of criminal proceedings but extends to any form of civil claim (para 13). Counsel for the defendant submitted that the tort of malicious prosecution of civil proceedings was the law of the Cayman Islands, that being the jurisdiction from which the appeal in *Crawford Adjusters* was made to the Privy Council, and the law of England was set out in the House of Lords in *Gregory*. This submission was not accepted by Males J who said:

> "However, it seems to me that the judges in the [*Crawford Adjusters*] case considered the extent if at all to which *Gregory* precluded the holding which they made. They were applying the English law cases and there is no suggestion in the judgments (or at least none that I was referred to) to suggest that they were drawing any distinction between the law of England and Wales on the one hand and the law of the Cayman Islands on the other. They clearly considered that there was no relevant distinction and that *Gregory* did not preclude the conclusion which they reached."

67. Males J then referred to the discussion in the judgments of the Privy Council as to whether, if a tort of malicious prosecution was available in the case of civil proceedings, there would also have to be an equivalent tort of malicious defence. This point, he said, was left open by the Privy Council and did not need to be decided and, as a result, he was prepared to accept that there was an argument with a real prospect of success that the existence of the tort [of malicious defence] does now represent English law. However, he was not able to say that the claimant had much the better of the argument and he concluded that the claim failed, and the claimants' applications should be dismissed, as the claimant did not satisfy the test of having a good arguable case in respect of a claim in tort (paras 16 and 20).

68. In relation to this decision, it does not appear from the judgment that Males J received any detailed submissions in relation to what the House of Lords actually decided in *Gregory* or in relation to the precedent value of decisions of the Privy Council. Indeed, in the opening paragraph of his judgment Males J said that he would have preferred to have taken some time to consider his judgment more fully. However, it was 4.30pm on the last day of term and the funds with which the application was concerned were about

to be released from the Court Funds Office and it was in those circumstances that he had to give judgment straight away.

(e) Precedent: conclusion

69. In my judgment the House of Lords in *Gregory* decided that in English law the tort of malicious prosecution is not available beyond the limits of criminal proceedings and special instances of abuse of civil legal process. The decision in *Gregory* is binding on this court and the facts of this case do not fall within one of the special instances of abuse of civil proceedings.

70. Mr Page QC invited me to look "realistically" at the Privy Council's decision on English law in *Crawford Adjusters* in relation to the tort of malicious prosecution and treat it as binding. He submitted that I should do this because the Privy Council's decision was made after full argument and, in those circumstances, it should not be necessary for this matter to have to go to the Supreme Court, in order to get a decision with the same outcome.

71. I am quite satisfied that this is not the correct approach. It is not, in my view, a foregone conclusion that, if this case goes to the Supreme Court, the Supreme Court will follow *Crawford Adjusters* in preference to *Gregory*. This is because:

(1) The decision in *Crawford Adjusters* does involve a departure from the decision of the House of Lords in *Gregory*. *Crawford Adjusters* is not, in my view, a decision which seeks to give guidance as to the proper interpretation to be placed on *Gregory* as a matter of English law. Rather, the law of England and Wales was developed and extended in *Crawford Adjusters* as the Privy Council held that the tort of malicious prosecution applies generally to civil proceedings as well as to criminal proceedings.

(2) The members of the Privy Council in *Crawford Adjusters* are all justices of the Supreme Court. There are 12 justices of the Supreme Court. The decision in *Crawford Adjusters* was by a majority of three of the members of the Privy Council and that does not represent a majority of the justices of the Supreme Court (cf the position in relation to the Appellate Committee of the House of Lords in *Holley*). Further, there is no overlap between the constitution of the members of the Privy Council in *Crawford Adjusters* and the members of the Appellate Committee in *Gregory* (cf *Twinsectra* and *Barlow Clowes*).

(3) In *Crawford Adjusters* there were two very strong dissenting judgments from the other members of the Board, namely from Lord Sumption JSC and Lord Neuberger PSC. It is clear from those judgments that the difference between the majority and the minority as to the reasons for their conclusions were very fundamental indeed.

(4) The circumstances of this case are therefore very different from the exceptional situations that existed in *R v James* [2006] QB 588, CA and *Abou-Rahmah v Abacha* [2007] Bus LR 220, CA.

72. I must therefore follow the decision in *Gregory* and strike out the claimant's claim for damages for malicious prosecution.

Precedent: the parties' alternative argument

73. In case the conclusion I have expressed above is wrong, then I should also deal with the defendant's alternative argument, in respect of which I have also received detailed submissions.

(a) The parties' submissions

74. Mr Livesey QC's fallback position is that, if *Gregory* is not binding on this court, there is no decision either at first instance or in the Court of Appeal whose ratio is effective to extend the tort of malicious prosecution of criminal proceedings generally, that is to say, beyond the "few special cases of abuse of legal process" referred to by Lord Steyn in *Gregory* at 427B. On the contrary, there are decisions including those in the Court of Appeal in which it was expressly held that the tort did not extend to civil proceedings generally.

75. Mr Page QC responded to this by submitting that, if *Gregory* is not binding, then the court should apply and follow the Privy Council's interpretation of *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674, CA (see, in particular, per Lord Wilson JSC at paras 57 to 61, pp 390G-392G). In *Crawford Adjusters* the majority of the Privy Council interpreted the Court of Appeal in *Quartz Hill v Eyre* as: (i) accepting in principle that the tort of malicious prosecution extended to all civil proceedings; (ii) holding that the effect of the requirement to advertise a petition for the winding up prior to the hearing of the petition was to injure the credit of the respondent company before he could show that the foundation of the petition was false; (iii) observing obiter that the malicious prosecution of ordinary civil actions could not lead to any of the three types of damage identified by Holt CJ in *Savile v Roberts* (1698) 1 Ld Raym 374 (per Lord Wilson, para 58 at p 391A-C). Point (iii) is not binding on this court, as it is obiter, and it is in any event now generally accepted to be wrong (see, for example, Lord Wilson JSC at para 61, p 392E-F). Finally, Mr Page QC submitted that, if there is no binding authority, then the Court should follow *Crawford Adjusters* unless there is some extremely good reason not do so. Or, put another way, the decision of the majority in *Crawford Adjusters* should be regarded as being of great weight and very persuasive.

(b) The decisions before Gregory

76. The decisions before *Gregory* in which the question of malicious prosecution of civil proceedings was touched upon were all considered closely in *Crawford Adjusters*. The main authorities are *Savile v Roberts* (1698) 1 Ld Raym 374, 5 Mod 394, 12 Mod 208, 1 Salk 13, *Jones v Givin* (1713) Gilb Cas 185, *Grainger v Hill* (1838) 4 Bing NC 212, *The Quartz Hill Consolidated Gold Mining Company v Eyre* (1883) 11 QBD 674, CA and *Berry v British Transport Commission* [1960] 1 QB 129. These authorities, together with a number of other cases, were considered by Lord Wilson JSC (paras 40 to 61, pp 386E-392G, and paras 67 to 73, pp 394F-397H) and Lord Sumption JSC in his dissenting judgment (paras 128 to 148, pp 414E-422C).

77. Damage is an essential ingredient of an action for malicious prosecution, being an action on the case. In *Savile v Roberts* Holt CJ classified damage for the purpose of this tort as three kinds, any one of which might ground the action, namely damage to a person's fame (ie his character), or to the safety of his person, or to his property by

reason of being put to charges and expenses. The "classic judgment" of Holt CJ was regarded as so important that ten different law reporters reported it. However, "the most valuable being found in 1 Lord Raymond's Reports at p 374, and 5 Modern Reports at p 405. Although the former report is most frequently cited, there are phrases in it which raise apparent difficulties that are only soluble by comparing it with the reports of the same judgment": *Berry v British Transport Commission* [1960] 1 QB 149, at p 160 per Diplock J).

78. *Savile v Roberts* was analysed in detail by both Lord Wilson (paras 44-49, pp 387H-389D) and Lord Sumption JJSC (paras 140-141, pp 418C-419H) in *Crawford Adjusters*. What is interesting is that, having done so, they each came to a very different conclusion as to what the case had established.

79. Lord Wilson JSC at para 49, 389C-D explained:

> "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, 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.""

80. Whereas Lord Sumption JSC at para 140, p 418D-E in his dissenting judgment said this:

> "For nearly three centuries, the leading case on the elements of the tort [of malicious prosecution] was *Savile v Roberts* (1698) 1 Ld Raym 374… 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 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 cases."

81. *Savile v Roberts* was approved by Parker CJ in *Jones v Givin* (1713) Gilb Cas 185.

(c) Quartz Hill v Eyre

82. In *Crawford Adjusters* at para 58, pp390H-391A Lord Wilson JSC:

> "Unfortunately, in upholding [the company's] entitlement to allege malicious prosecution of that form of civil proceedings, the court in *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 ceased to be valid, indeed right up until today."

83. In *Quartz Hill v Eyre* the defendant was a shareholder in the plaintiff company. He instructed his brokers to sell his shares, but initially they were unable to do so. Thinking the shares had not been sold, the defendant presented a petition to wind up the company (a trading company, with substantial assets and trifling debts) on the ground, amongst other things, that it was impossible for the company to carry on business at a profit. The petition was advertised in the *London Gazette* the day after it had been presented. Immediately after the petition had been presented the defendant discovered that his shares had been sold and he gave notice that the petition would be withdrawn. The hearing of the petition was 10 days later and, at the hearing, the petition was dismissed without costs. The plaintiff brought an action against the defendant for falsely and maliciously and without reasonable or probable cause presenting the petition. The trial judge nonsuited the plaintiff because at the trial there was no proof of special damage to the company beyond the liability to pay its own costs of defending itself against the petition. This decision was upheld by the Queen's Bench Division (Pollock B and Manisty J) who refused a rule for a new trial.

84. The Court of Appeal granted a rule for a new trial and the defendant showed cause and objected (p 677). The three arguments relied on by the defendant were (i) there was no evidence of legal damage to the plaintiff company; (ii) there was no evidence either of malice or of want of reasonable or probable cause (a point which does not concern us for present purposes); (iii) no action of this kind would lie under any circumstances (p 677). The plaintiff company's principal argument was that the action was maintainable because it was analogous to maliciously presenting a bankruptcy petition.

85. The issue before the Court of Appeal was, as the Master of the Rolls explained, reduced to the following question: is a petition to wind up a company more like an action charging fraud or more like a bankruptcy petition? (p 685, per Brett MR; p Bowen LJ, p 692-3). The issue reduced to this question because the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, would not support a subsequent action for malicious prosecution. This was because the subsequent action does not "produce some damage of which the law will take notice", ie one of the three heads of damage necessary to support an action for malicious prosecution identified by Holt CJ in *Savile v Roberts* (per Brett MR at pp 682-683; Bowen LJ pp 689-691). Whereas an action could be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because:

> "… by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can shew that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss… By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial."

(per Sir Baliol Brett at p 684-5).

86. Bowen LJ also explained at p 691 that the legal proceedings which do necessarily and naturally involve damage of which the law will take notice are "all ordinary indictments for ordinary offences" because:

> "In its very nature the presentation or prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable and probable cause, is a foundation for a subsequent action for a malicious prosecution."

87. The two judges of the Court of Appeal both concluded that the petition to wind up the company was more like a bankruptcy petition and therefore the plaintiff company's action would lie. Sir Baliol Brett MR concluded at p 685:

> "In my opinion it is more like a bankruptcy petition, and the very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is heard and adjudicated upon;… Therefore I venture to differ from the judges of the Queen's Bench Division in their decision that this case is to be governed by the rule applicable to an action, and I differ from them when they held, as in effect they must be assumed to have done, that although a petition to wind up a trading company be presented falsely and maliciously and without reasonable and probable cause, an action will not lie; I think that under those circumstances the action will lie."

88. Bowen LJ expressed his conclusion in these terms at pp 692-3:

> "In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other – whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however, maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow to its credit… I therefore answer the two first questions – whether this action will lie, and whether it will lie without further proof of special damage – in the following manner: I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which ex hypothesi are unjust and without reasonable or probable cause) for the purpose of winding up a going company."

89. Therefore, it seems to me that the Court of Appeal regarded a winding up petition as an exception to the general rule that an ordinary civil action could not ground the tort of malicious prosecution. This was because, if the winding up petition could have been equated with an ordinary civil action, such as an action for fraud, then the Court of Appeal would have held that no action could lie for the tort of malicious prosecution and the plaintiff company's appeal would have been dismissed. In reaching this

decision, the Court of Appeal did not hold that the tort of malicious prosecution was generally available in civil proceedings.

90. Lord Steyn referred to *Quartz Hill v Eyre* in *Gregory* and described it as a "special case" (p 427C-E). He also said, as is clear from the passage of his speech I have quoted above, that it was "no longer plausible" that in the context of a civil action a defendant's fair fame is protected by trial and judgment of the court (pp 417H-428B). Nevertheless, *Quartz Hill v Eyre* was not disapproved by the House of Lords in *Gregory*. Rather, it was categorised as a special instance of abuse of civil legal process to which the tort of malicious prosecution applied.

91. For my part, I agree with Mr Livesey QC's submission. I do not see that the decision in *Quartz Hill v Eyre* allows me to find that the tort of malicious prosecution applies to civil proceedings generally. Rather, that decision points in the opposite direction. Indeed, as Lord Steyn said in *Gregory* "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" (p 428B-C) and that is highly relevant, whether or not that statement formed part of the ratio of *Gregory*.

(d) Berry v British Transport Commission

92. In *Berry v British Transport Commission* [1961] 1 QB 149 the plaintiff issued a writ against the British Transport Commission claiming damages for malicious prosecution of criminal proceedings in which she was alleged, without justification, to have pulled a communication cord on a train. The claimant pleaded not guilty, but was convicted by the justices and fined. However, she successfully appealed before the Quarter Sessions. The defendant maintained that the statement of claim disclosed no damage of which the plaintiff was entitled to complain in law and, as a result, the statement of claim disclosed no cause of action. This was tried as a preliminary point before Diplock J. *Quartz Hill v Eyre* was cited by counsel for both parties.

93. In the first four paragraphs of his judgment Diplock J summarised the allegations in the statement of claim and then, by reference to the amended defence, set out the question of law he had to determine. In the fifth paragraph (p 159) Diplock J moved on to the law and said this:

> "The action for malicious prosecution was an action on the case in consimili casu to the action brought by the old writ of conspiracy which lay only when there was a combination between two or more persons maliciously to indict the plaintiff for treason or felony. 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. As the action was in case, however, damage was an essential ingredient."

He then turned to consider the cases, starting with *Jones v Given* and *Savile v Roberts*.

94. In *Crawford Adjusters* Lord Wilson JSC said that in *Berry v British Transport Commission* Diplock J "correctly recognised [the tort of malicious prosecution] could be founded on any form of legal proceedings, whether civil or criminal …" (para 43, p 387D-E). Lord Kerr also referred to this passage and said "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 referred on other grounds". In the Court of Appeal in *Berry v British Transport Commission* at p 384 Danckwerts LJ said "the action of malicious prosecution (which lies for wrongful and malicious civil proceedings as well as criminal proceedings) was an action on the case and consequently damage is essential to support it".

95. There is no dispute that Diplock J's statement on the law at the start of his judgment is obiter dictum, and that this dictum was not questioned in the Court of Appeal. However, it seems to me that the dictum was set out in general terms before Diplock J turned to analyse the case law and, as Mr Livesey QC submitted, when one looks at the report of the arguments in the Court of Appeal, counsel did not argue that the tort applied to civil proceedings, which was perhaps unsurprising given the case concerned the malicious prosecution of criminal proceedings and did not concern civil proceedings. There was therefore no holding in *Berry v British Transport Commission*, whether by Diplock J or the Court of Appeal, that the tort of malicious prosecution applies to civil proceedings generally.

(e) Conclusion

96. If I am not bound by *Gregory*, then I see no reason for departing from the approach of the Court of Appeal in *Quartz Hill v Eyre*. That decision has not been overruled and is binding on me. This facts of this case relate to an ordinary civil action and, as such, do not support the tort of malicious prosecution. If the Court of Appeal's decision in *Quartz Hill v Eyre* is no longer good law, then it would seem that it is a matter for the Supreme Court to overrule that decision if it is appropriate to do so (see, for example, *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] 453, CA at paras 72-74, pp 478E-H per Lord Neuberger MR). I therefore reach the same conclusion on the defendant's fall back argument. The claimant's claim for damages for malicious prosecution should be struck out as disclosing no cause of action known to English law.

Defendant's argument in relation to policy

97. Finally I should mention that the final section of Mr Livesey QC's skeleton submission was entitled "the alternative argument for the status quo on the merits". The status quo he referred to is the position set out in *Gregory*. He then identified a number of policy considerations for not extending the tort to civil proceedings generally and concluded by submitting that, if there is a need for the law to provide a coherent and appropriate response to the malicious prosecution of civil cases, the Law Commission is best suited to finding a solution. Mr Page QC's answer to this submission was that no change in the law is required as the tort of malicious prosecution has applied to civil proceedings generally since *Savile v Roberts* and, even if a change is required, the present situation is, as Lady Hale explained in *Crawford Adjusters*, "a judge-made mess" (para 84, p 403A). In these circumstances any change required to the law can and should be made by judges.

98. Given the conclusions I have reached, it is unnecessary for me to express any view in relation to the defendant's alternative argument on policy.