



Case No: F2QZ598D

IN THE COUNTY COURT AT BARNESLEY

Date: 30/09/2020

Before :

DISTRICT JUDGE BRANCHFLOWER

Between :

Total Extraction Limited

Claimant

- and -

Aircentric Limited

Defendant

Mr Richard Stubbs (instructed by **Norrie Waite & Slater**) for the **Claimant**
Mr John Boumphrey (instructed by **Bury & Walkers LLP**) for the **Defendant**

Hearing dates: 15 January 2020

**Judgment Approved by the court for handing down
(subject to editorial corrections)**

District Judge Branchflower :

1. This case came before me on 15 January 2020 for a trial of liability only. Both sides were represented by Counsel. Mr Stubbs appeared for the Claimant, Total Extraction Solutions Ltd; Mr Boumphrey appeared for the Defendant, Aircentric Ltd.
2. This reserved judgment has been inordinately delayed, and for that I apologise to the parties, and also to Counsel. That said, I would wish to assure the parties that those aspects of this judgment which deal with the evidence and the findings I have made in respect of that evidence were completed very early on – no later than mid-February of this year. The remainder of the delay has been occasioned by my consideration of the law and by other factors that I need not detail here.

The Facts

3. This case started life as a simple debt action in respect of an invoice issued by the Claimant to the Defendant for the supply and installation of a dust extraction system at the premises of a third party. The invoice was originally disputed by the Defendant in a disagreement over the scope of the contracted work to which the invoice related. There was also a dispute over the Defendant's alleged entitlement to a reduction for prompt payment. Before the issue of proceedings, however, the Defendant made a significant part payment of the sum that was said to be due. The claim for the balance, in the sum of £7247.77 inclusive of VAT, was issued online on 29 January 2019 using Money Claim Online (“MCOL”). According to the notice of issue, the claim was sent to the Defendant by first class post on 29 January 2019. It therefore would have been deemed to be served on 3 February 2019, giving the Defendant until 17 February 2019 to acknowledge service. On 30 January 2019 the Defendant paid to the Claimant a further sum of £5280.00.
4. On 12 February 2019, the Defendant’s solicitors attempted to file an acknowledgement of service electronically through the MCOL system. The attempt to do so was rejected by the MCOL portal because it transpired that, a few days earlier, on 8 February 2019, the Claimant had filed a request for judgment based on a purported admission by the Defendant that it owed all the

money still due. As a result of that, judgment was entered against the Defendant on 11 February. There had, in fact, been no such admission by the Defendant.

5. By their subsequent Reply and Defence to Amended Defence and Part 20 Claim, the Claimant's pleaded case on the issue of entering judgment is that it was a simple error. They had, they say, intended to request judgment in default of acknowledgement of service (albeit that 14 days had not, in fact, expired since the claim was issued) - requesting judgment on the basis of admission was a simple mistake.
6. In any event, when the Defendant's solicitors realised what had happened, they wrote both to the court and to the Claimant asserting that they had not admitted to the claim. By letter dated 13th of February 2019, the court wrote to the Claimant asking them to provide a copy of the Defendant's admissions within 10 days and advising that, if they had not received an admission, the Claimant was required to apply to set judgment aside, also within 10 days. Enclosed with that letter was a form headed 'Judgment entered by admission query' with a choice of two boxes to tick - one confirming that a full or part admission was received and attaching a copy as requested, the other confirming that the Claimant had not received a full or part admission and confirming enclosure of an application to set judgment aside with the appropriate fee. A copy of that form, with the second box ticked and signed by Mr Mark Willis of the Claimant, appears at page 10 of the bundle.
7. It seems that two application notices requesting that judgment be set aside, were prepared by or on behalf of the Claimant. Both appear to be dated 21 February 2019. At pages 11-12 of the trial bundle is a typed application notice. At pages 14-15 is an application notice completed in handwriting. Both applications request that judgment be set aside and both appear to have been completed by Mr Mark Willis, a director of Total Extraction. Each application puts forward a different basis for why judgment should be set aside. At paragraph 19 of his witness statement on page 68 of the bundle, Mr Willis says he is not sure why there are two different copies of the application to set judgment aside. He says there that he thinks that the handwritten application was the one that he sent to the court and that the typed application is the one that Gabrielle Toms sent to the

court. I note that at paragraph 15 of the witness statement of Mr Rob Smith of the Defendant company he refers to a letter from the court dated 11 March 2019 which stated that “The Defendant must file three copies of an amended application setting out the grounds upon which the application to set aside is made. The current N244 sets out no grounds at all”. However, that letter does not appear to be in the trial bundle and Mr Smith was not called to give evidence. It is notable however, that the grounds in support of the typed application to set judgment aside simply say, at section 10, "incorrect option selected on money claim online as no appropriate option was available on screen". The handwritten application at section 10 ends with these words: "no valid reason for withholding payment was made, then after our legal letter further payment was made on 30th of January 2019 admitting liability".

8. In any event, by order of Deputy District Judge Hynes sitting at the County Court Business Centre dated 8 April 2019, judgment against the Defendant was set aside (although that order erroneously describes the judgment that was set aside as being judgment in default of filing an acknowledgement of service and/or defence).
9. However, the Defendant contends that as a result of judgment being improperly entered against it, and prior to judgment being set aside and the County Court judgment being removed from the register, it suffered significant financial losses as a direct result of what the Claimant had done. In due course, therefore, the Defendant filed an Amended Defence and Part 20 claim alleging that the Claimant was liable under the tort of abuse of process for wrongly causing judgment to be entered against it and seeking to recover damages just short of £42,000 in respect of its counterclaim against the Claimant.
10. At an allocation and directions hearing on 10 July 2019 the court recorded that the Defendant no longer intended to actively defend the balance of the Claimant's claim on the invoice, which balance had been reduced to £1967.77. This was said to be on the basis that it was not commercially viable for the Defendant to do so. Thus it was that the trial on liability that came before me was limited solely to the issue of whether the Claimant might be liable to the Defendant on the

counterclaim for damages for the tort of abuse of process. Although this was a trial of liability only, I have proceeded to determine the issue of liability on the hypothetical assumption that the Defendant would be able to prove special damage.

11. At the outset of the hearing, both Counsel invited me to decide the matter on the basis of legal submissions only, without hearing any live evidence. Nevertheless, after some discussion, I decided that I should hear evidence limited to the issue of how it was that the Claimant company came to request that judgment be entered against the Defendant on an erroneous basis. I was also presented by Counsel with what was said to be a number of agreed facts. This was headed with the following words ‘The parties are content that consideration of the case should continue on the following basis...’. This was then followed by a series of numbered facts or propositions, as follows:

- i) The MCOL system did not physically allow entry of default judgment prior to the expiry of 14 days from service of the claim;
- ii) In order to enter a judgment by admission number of steps would have to be taken by the operator;
- iii) The steps that needed to be taken on MCOL following a decision to seek judgment by admission were different from those necessary under the system when 14 days had expired;
- iv) There is no need for a party to establish bad faith to succeed in an abuse of process claim;
- v) The Defendant accepts that judgment should be entered for £1967.77 on the basis that the Defendant accepts that it is not commercially viable to challenge this.

vi) The Claimants acknowledge that on their own case "an error" was made when incorrectly entering judgment by admission against the Defendant.

12. Pausing at this point, it is clear that the statement at (iv) on the above list is not a statement of fact. It is rather a proposition of law and, whether it is agreed between the parties or not, it is not one which the court is bound to adopt.

The Evidence

13. Having decided that I should hear live evidence on the issue of how it was that judgment came to be entered against the Defendant by the Claimant, I first heard from Mr Mark Willis, director of Total Extraction. His witness statement appears at pages 66-69 of the trial bundle and deals with this point only briefly, at paragraphs 15 and 16 on page 68. There, he says that on 8 February 2019 he telephoned Ms Gabrielle Toms ("Gabby") whilst he was working away in London. He asked Gabby whether there had been a reply from the Defendant to the claim and whether the time period for them to do so had expired. He was told by Gabby that there had not been a response to the claim and that the time period had expired. He therefore instructed her to file a request for judgment at MCOL.

14. In live evidence, having confirmed the truth of his witness statement, Mr Willis was asked questions by Mr Boumphrey. He confirmed that he had himself used the MCOL system in the past and that he was aware that it was not possible to enter judgment in default before the expiry of the relevant time period. He said that he knew that the claim had been issued on 29 January – indeed, he had instructed Ms Toms to start the claim on that day – but could not explain why he did not therefore know on 8 February that insufficient time had passed by that time to enter judgment in default, except that he said that he would rarely remember one client amongst many. That was perhaps a slightly surprising answer, given that all the correspondence and other evidence suggests that this dispute between the parties had been conducted intemperately, with Mr Willis even reporting to the police an alleged threat to kill by Mr Smith of the Defendant company against the Claimant's area sales manager, Richard Hanson. Nevertheless, Mr Willis denied being angry with, or aggravated by, Mr Smith or that any such feelings had provided motivation for him seeking judgment against

the Defendant. He further denied putting pressure on Gabby to enter judgment against the Defendant one way or another.

15. Also under cross-examination, Mr Willis told the court that there had, in contrast to what is suggested in his witness statement, in fact been two telephone calls between himself and Gabby on 8 February. The first when he asked Gabby to check the situation and enter judgment, and a second call when she rang him about an hour later to report back. When pressed by Mr Boumphrey as to what phrases had been used by him in the first telephone call, Mr Willis said that he had said "please can you ensure that the timeframe has passed before entering judgment" and also "is it possible to enter judgment? Has the timeframe past. If so, please enter judgment". When asked what Gabby had told him in the second telephone call he said "I was told that we were able to enter judgment. I was told that judgment had been made".

16. I found Mr Willis to be a far from convincing witness. At one stage in cross-examination, he was adamant that it had been he who rang the County Court Business Centre after the mistake was discovered. He gave details about what he was told he should do - that he should fill out a form to set judgment aside and send it off by post. It was only when it was pointed out to him that, both in his own witness statement and that of Gabby's, it was said to be Gabby who made enquiries with MCOL as to what should be done that he said that it was not he, after all, who had made the phone call, but rather Gabby. The second phone call with Gabby on 8 February is not described at all in his witness statement. What he told the court in live evidence about what he was told by Gabby in that second phone call came across as being crafted to omit confirmation from Ms Toms that it was judgment in default that had been entered, as opposed to confirmation from her that it had been possible to enter judgment, of one sort or another.

17. At one stage in his evidence, Mr Willis was asked whether he understood that judgment had been entered on the wrong basis. Mr Willis said yes, that it had been done before 14 days had elapsed. Mr Boumphrey put to him that it was also wrong to request judgment on the basis of an admission. Mr Willis accepted that and said that, because of emails the Claimant held, he thought that there had been

an admission. He was never pressed on this point. Nevertheless, that answer perhaps explains the reference to the Defendant admitting liability when it made the further payment of £5280 on 30 January that appears on the handwritten version of the application to set judgment aside. Whether or not that version was ever submitted to the County Court Business Centre it appears to have been filled in and signed by Mr Willis himself.

18. However, it has never been part of the Claimant's pleaded case, nor is it suggested anywhere in the witness statements of either Mr Willis or Ms Toms that the Claimant believed, erroneously, that there had been such an admission from the Defendant. Rather, the Claimant and its witnesses asserted that this was a simple error of entering judgment on an admission when, in fact, they had intended to enter judgment by default, albeit, that due to a further mistake, the time for legitimately being able to do so had not yet arrived.

19. I gained the clear impression Mr Willis was not being entirely frank in his evidence, either in his witness statement nor in the answers he gave to questions put to him at court.

20. I next heard from Ms Gabrielle Toms. Her witness statement appears at pages 73-74 of the bundle wherein she describes having been employed by the Claimant since July 2017 and says that she would be involved in issuing a claim form at MCOL about twice a month. She covers the erroneous entering of judgment against the Defendant at paragraphs 6 and 9 of that statement. Once again, she appears to only describe one phone call on 8 February between herself and Mr Willis, when he asked her if they had received any reply to the claim and whether the 14 day period for doing so had passed. At paragraph 9 she says that she can only think that she miscalculated the days passing between the date of issue of the claim and the date when she spoke to Mr Willis, or perhaps that she was mistaken about the date when the claim had been issued. She asserts in her witness statement that this was an honest error on her part. Her witness statement also says that she does not "fully remember" whether it was herself or Mr Willis who actually filed the request for judgment.

21. In her live evidence, she accepted that she had had training on MCOL, that she had read parts of the guidance notes (copies of which appear at section 7 of the trial bundle) and that she was aware of the difference between entering judgment in default and entering judgment on admission. In answer to questions from Mr Boumphrey, she said that she had never before tried to enter judgment in default before the expiry of 14 days from service of the claim and had never previously attempted to enter judgment on admission. When asked why she had done so in this case, she said that she must have miscalculated the time after she got the telephone call from Mr Willis. She was taken to page 13 of the bundle which shows a screenshot chronology of transactions on the MCOL system. She accepted that she would have checked the online chronology on 8 February prior to attempting to enter judgment. She also accepted that, at that stage, the chronology would have only shown two entries, i.e. the date upon which the claim was submitted and the date on which the claim was issued. She was unable to explain how, therefore, she had come to miscalculate the dates, other than to assert that she was working in a busy office. When asked about the content of the telephone conversation with Mr Willis on 8 February she said that he had asked her to see if judgment could be made. She said that she thought she had simply then clicked the wrong box as to which type of judgment she was requesting be entered.

22. Ms Toms was more confident in her oral evidence than in her witness statement that it had in fact been she who applied for judgment to be entered, rather than Mr Willis. Overall, however, her evidence was vague. There was much that she claimed not to remember, including whether she had in fact been taken to different screens requiring further information to be filled in when she selected online the radio button for judgment on an admission, as opposed to that for judgment in default.

23. As with Mr Willis, I found Ms Toms is to be an unimpressive witness.

The Findings

24. Having considered the evidence as a whole, I find as a fact that it was Ms Toms who requested judgment against the Defendant after she had been requested to do

so by Mr Willis in a telephone call on 8 February. I reject, on the balance of probabilities, the contention that Ms Toms simply made a mistake by selecting the wrong sort of judgment to be entered. On her own evidence, she had used this process on the MCOL system many times before, but only for requesting judgment in default. It is clear from the guidance and the screenshots that appear in the bundle that the person requesting judgment is confronted online with a clear choice as to which sort of judgment to request. There is a warning against the option of selecting judgment by admission that the operator should only do so if they have a copy in writing and that they can produce this if the court asks for it.

25. In order for judgment on admission to have been entered against the Defendant by mistake in the way in which the Claimant contends, there would, in fact, have to have been two separate errors made. First, Ms Toms would have had to miscalculate the number of days that had expired since the claim was served, which both she and Mr Willis assert in their witness statements she was asked to check by Mr Willis. It is hard to understand how that miscalculation could have occurred when Ms Toms was checking the system on 8 February and the most recent date entry which would have appeared on the system was that of the date of issue, being 29 January. But the matter does not end there. Even supposing that Ms Toms had somehow miscalculated those dates, she would then have had to go on to make a further error in selecting the wrong sort of judgment that she sought to have entered. Had she selected judgment in default the system would have all automatically calculated that insufficient time had passed and would have prevented such judgment from being entered. Instead, Ms Toms selected judgment by admission, something she had never done before, ignoring the warnings that accompany that selection.

26. Such an explanation for what occurred is inherently implausible, and I find as a fact on the balance of probabilities that Ms Toms knowingly, and not by mistake, selected the option for judgment by admission. It is clear that Ms Toms was aware that the Defendant had made a further payment of £5280 after the claim was issued. That is clear because the judgment sum which Ms Toms requested be entered takes that further payment into account. I understand that one of the later

stages of entering judgment via MCOL is for the operator to enter judgment details including any amount that has been paid since issue of the claim. It is clear that Ms Toms completed that step.

27. It might have been the case that Ms Toms or Mr Willis erroneously, but innocently, believed that the further payment made by the Defendant amounted to an admission, as is perhaps suggested by the answer given by Mr Willis to one of Mr Boumphrey's questions that I have cited above, and by the handwritten application to set judgment aside. Nevertheless, that is not the Claimant's case, and the Claimant has put forward no positive evidence upon which a finding to that effect could be safely founded. Accordingly, I find as a fact that the Claimant had no reasonable or probable cause for entering judgment against the Defendant and, further, that the Defendant had no honest belief that it was entitled to enter judgment against the Claimant, whether in default or on an admission. By that I mean not only that the Claimant was not entitled to enter judgment as a matter of fact (that is self-evident – the time for entering judgment in default had not yet arrived and the Defendant had not, in fact made an admission), but also that the Claimant, through its servants and agents Mr Willis and Ms Toms, did not have a reasonable or honest belief that it was entitled to do so.

The Law

28. Abuse of process is a tort of some antiquity and considerable obscurity. Although sometimes commented upon, the authorities do not clearly delimit its ingredients or parameters and it is rarely held to have actually been made out. It is said to have originated in the 1838 case of Grainger v Hill & a'or (1838) 4 Bing NC 212. In that case, the Plaintiff, the owner of a sailing vessel, borrowed money from the Defendants and put up his vessel as security. Before the time for payment became due, the Defendants became concerned about the security for the loan and threatened to arrest him if he did not repay it immediately. When he refused to do so, the Defendants swore an affidavit of debt and took out a writ of *capias ad respondendum*, endorsed for bail. When threatened with arrest under the writ by the sheriff's officers, unless he either found bail or gave up the ship's register to them, the Plaintiff, being unable to procure bail, did the latter. Without the ship's

register, the Plaintiff was unable to carry on his business with the vessel and lost four voyages.

29. Subsequently, the Plaintiff came to an arrangement with the Defendants, repaid the money he had borrowed and costs, and procured the release of the mortgage on the vessel. No further steps were taken by the Defendants in the debt action.

30. However, the Plaintiff brought an action alleging that the ship's register had been extorted from his possession by duress under threat of arrest (or actual arrest). He also brought an action in trover (conversion) in respect of the ship's register.

31. On demurrer, the points were taken (amongst others) that the action was bad both for failing to show that the original action – that is, the assumpsit (debt) claim – had concluded, and for failing to allege no reasonable or probable cause. The Court of Exchequer Chamber held that these points might have been relevant had the action been one of malicious prosecution or malicious arrest. However, the action in Grainger was a new action on the case – one of abusing the process of the law in order to obtain something (here, the ship's register) to which the Defendants had no right. For this new tort, it was not necessary either to show that the main action had terminated nor that it had been brought without reasonable or probable cause. It is interesting to note at this point that, despite the submissions made on behalf of the Defendants that the Plaintiff had not shown that the *capias* was sued out without reasonable and probable cause, the judgments of Tyndall CJ (at 221), Park J (at 222) and Vaughan J (at 223) all refer to the lack of the need to show reasonable or probable cause in respect of the suit itself. The judgment of Bosanquet J is silent on the matter.

32. Thus, it appears that it is not necessary in a claim of abuse of process for the Claimant to show that the main proceedings have terminated in his or her favour, as it would be in an action for malicious prosecution. Nor is it necessary to establish lack of reasonable and probable cause – at least in respect of the main action.

33. It is sometimes said that there is also no need to show malice (in the legal sense of the word). Lord Sumption said as much in what were, in fact, obiter remarks in Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd [2014] AC 366 at paragraph 149. But it is not clear to me that this is right. Bosanquet J in his judgment in Grainger said this at page 224: "the action is not for maliciously putting process in force, but for **maliciously** abusing the process of the court." (emphasis added).
34. Again, in Gilding v Eyre & a'or (1861) 10 CB (NS) 592 – widely considered to be the only other case in which the supposedly distinct tort of abuse of process has actually succeeded, as opposed to having been raised or discussed – malice and lack of reasonable and probable cause (in relation to the taking out of the writ, rather than in relation to the original action) seemed to have been assumed to be essential ingredients of the action in that case. In Gilding v Eyre, the Defendant, having obtained judgment against the Plaintiff for a certain sum which was subsequently reduced by part payment by the Plaintiff, wrongfully endorsed a writ of *capias ad satisfaciendum* for the whole amount originally due and procured the Plaintiff's arrest and imprisonment, despite the Plaintiff offering to pay the whole of the balance actually due together with costs.
35. On demurrer, it was held that it was not necessary for the Plaintiff to show that the action had terminated in his favour by obtaining his discharge by order of the court. Willes J said, at page 604,
- "But, 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 already been paid and was no longer due on the judgment." (emphasis added)
36. It is also important, in my view, to note that the writs in both Grainger and Gilding v Eyre were obtained by way of an *ex parte* process. That is a matter to which I return later in this judgment.

37. On the issue of 'bad faith' (which is to be distinguished from malice), both counsel referred me to the case of Broxton v McClelland [1995] EMLR 485 as an authority for the proposition that there is no requirement for 'bad faith' to succeed in an abuse of process claim (the fourth of the "agreed facts" upon which counsel invited me to proceed). However, although Grainger is referred to and discussed in the judgment of Simon Brown LJ in Broxton, what was being considered in that case was an appeal against the striking out of an action as an abuse of process. That is somewhat different from the tort of abuse of process as a freestanding action. It is also clear that what was being referred to as 'bad faith' in that case was meant in the sense of spite or ill-will rather than malice in its legal sense. At page 497 of Broxton, Simon Brown LJ said this

"Motive and intention as such are irrelevant (save only where "malice" is a relevant plea); the fact that the party **who asserts a legal right** is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point... Accordingly the institution of proceedings with an ulterior motive is not **of itself** enough to constitute an abuse; an action is only that if the court processes are being misused to achieve something not properly available to the Plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process: (i) the achievement of a collateral advantage beyond the proper scope of the action – a classic instance was Grainger v Hill..." (emphasis added).

38. At first blush, these dicta (which are also congruent with the reasoning of the majority decision in Goldsmith v Sperrings Ltd & ors [1977] 1 WLR 478 – another case where strike out for abuse of process, rather than the tort of abuse of process, was at issue) are hard to reconcile with the decision in Speed Seal Products Ltd v Paddington & a'or [1985] 1 WLR 1327. In that case, the Court of Appeal permitted the Defendants to amend the counterclaim in order to plead that the Claimant's action for breach of confidence and an injunction restraining the use of communication of allegedly confidential information amounted to the tort of abuse of process because it was said that the Claimant intended to use the

existence of the action as a weapon to persuade the Defendants' potential customers not to deal with them. This is perhaps a surprising decision in that it might be seen as conflating the idea of malice in the sense of spite or ill-will or bad faith with malice in the legal sense. The answer is perhaps to be found in the fact that the Court of Appeal held in that case that, if the allegations of fact pleaded in the draft counterclaim were established, then there was an arguable case that there had been an actionable abuse of the process of the court. One of these allegations of fact was that the Plaintiffs had falsely pleaded, and knew, that they had no legal interest in the confidential information - in other words, what might be described as the Plaintiffs having no reasonable or probable cause. In any event, the decision in Speed Seal with regards to the counterclaim appears to have primarily focused, on the lack of the need to show that the original action had terminated for a claim in tort of abuse of process to be brought, as distinct to an action for malicious prosecution

39. When discussing 'bad faith', 'malice' etc, it is important, in my view, to differentiate between the meanings of 'motive', 'intention' and 'purpose' – a distinction that some of the authorities have perhaps not always focused upon. If 'motive' is taken to be the state of mind which provides the reason for doing something, then one can readily see that a motive – for instance, ill will, bad faith or spite – in the pursuit ('purpose') of a legal right will not, of itself, render that action unlawful (see Bradford Corporation v Pickles [1895] AC 587). 'Purpose', on the other hand, may be taken to be the intended outcome of the action taken. A collateral or improper purpose, whether or not accompanied by a bad motive, may form the basis of an action for abuse of process. 'Intention' is the relationship between the state of mind of the actor (including foreseeability) and the outcome actually achieved. Having said that, there may of course be a considerable degree of overlap between these concepts in any given set of facts. A person's motive may drive his or her purpose; that purpose may be intended. Nevertheless, for the purposes of the law, the concepts should be properly treated as distinct.
40. The meaning of malice as an ingredient of those torts of which it is unquestionably a part has been much discussed. The differentiation between the everyday meaning of malice, in the sense of spite or ill will, and the way that the

word is used in a legal sense is fully set out in the extensive discussion of the concept by Baroness Hale in O (a Child) v Rhodes & a'or [2016] AC 219 at paragraphs 35 to 45. In that discussion, Baroness Hale cites with approval two extracts from the opinion in the House of Lords case of Alan v Flood [1898] AC 1. The first from the Wright J (cited at paragraph 40 of the judgment in O v Rhodes)

"These and other authorities show that in general wherever the term 'malice' or 'is maliciously' is forms part of a statement of the cause of action or other crime, it imports not an inference of motive to be found by the jury, but a conclusion of law which follows on a finding that the Defendant has violated a right and has done so knowingly, unless he shows some overriding justification."

The second from Lord Herschel in the same case (cited at paragraph 41 of O v Rhodes)

"More than one of the learned judges who were summoned refers with approval to the definition of malice by Bayley J in the case of Bromage v Prosser: 'Malice in common acceptance of the term means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' It will be observed that this definition eliminates motive altogether."

41. These observations, of course, accord entirely with the decisions in Goldsmith, Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc & a'or [1990] 1 QB 390 and Broxton that motive or bad faith is not a part of the tort. Spite or ill will is neither necessary nor sufficient; malice is a wrongful act done intentionally without justification.

42. In the case before me, the Defendant company has not expressly pleaded that the judgment was entered without reasonable or probable cause, save that it was entered "improperly". Nor has it pleaded that it was done maliciously (although much of Mr Boumphrey's cross-examination of both witnesses was directed at

challenging the Claimant's case that it was done by mistake and suggesting that Mr Willis might have been actuated by anger in pressing Ms Toms to enter judgment).

43. Rather, the counterclaim alleges that in so improperly entering judgment the Defendant achieved a "collateral advantage" (the phrase used in Metall und Rohstoff when discussing the tort of abuse of process and also by Lord Denning MR in his dissenting judgment in Goldsmith). In his skeleton argument before this court, Mr Stubbs for the Claimant referred to a "predominant purpose" different to the claim, an "ulterior purpose" and a "collateral purpose" as an element of the tort and no point was taken that these formulations amounted to something different from the improper gaining of a collateral advantage.
44. What, then, are the parameters of what may constitute a collateral or improper purpose or a collateral advantage? Does the tort necessitate or involve the concept of malice, (as Grainger and Gilding v Eyre seem to suggest), or not (as Lord Sumption in Crawford Adjusters declares)? In Grainger the improper purpose was the obtaining of the ship's register; in Gilding v Eyre it appears to have been the extortion of money which the Defendant knew had already been paid and was no longer due on the judgment. In the other authorities that discuss the point, the scope is far from clear.

Thus, this ingredient of the tort has been variously described as invoking a process of law "to effect an object not within the scope of the process" (per Tyndall CJ in Grainger at 221), "for an ulterior purpose" (per Bosanquet J in Grainger at 224) "a purpose not within the scope of the action (i.e. a "collateral" or, more helpfully, and "improper" purpose)" (per Lord Wilson JSC in Crawford Adjusters at paragraph 62), "to achieve an end which is improper in itself" (per Lord Denning MR in his dissenting judgment in Goldsmith at 489), "a predominant purpose" other than that for which the legal process was designed (per Slade LJ in Metall und Rohstoff at 470), "to achieve something not properly available to the Plaintiff in the course of properly conducted proceedings" (per Simon Brown LJ in Broxton at 497), "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" (per Lord Sumption JSC in Crawford Adjusters at paragraph 149).

45. It seems to me that all these formulations refer to examples that demonstrate malice in the legal sense. If malice means doing a wrongful act intentionally without justification, then one can readily see that using the court process to achieve an improper purpose amounts to malice. This was the point made by Lord Toulson in the Supreme Court case of Willers v Joyce & a'or [2018] AC 779 – the case that finally confirmed, by a majority, the extension of the tort of malicious prosecution to civil proceedings as well as those of a criminal nature. At paragraph 25 of his judgment Lord Toulson says this:

"Grainger v Hill has been treated as creating a separate tort for malicious prosecution, but it has been difficult to pin down the precise limits of improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution. This is not entirely surprising because in Grainger v Hill itself there plainly was no reasonable or probable cause to issue the assumpsit proceedings, since the debt was not due to be paid for another ten months as the lenders well knew. It might be better to see it for what it really was, an instance of malicious prosecution, in which the pursuit of an unjustifiable collateral objective was evidence of malice, rather than as a separate tort."

46. (On this potential congruence, it is also notable that Baroness Hale at paragraph 83 of Crawford Adjusters opined "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", before going on to say that such a task was better suited to the Law Commission than to the Privy Council.)

The Decision

47. In the case before me, the entering of judgment against the Defendant by the Claimant was undoubtedly a wrongful act. Further, by reason of the findings I have made having listened to the evidence of the Claimant's witnesses, I have found that that act was done intentionally, and not by mistake. But was the

purpose in entering judgment a collateral or improper purpose? Mr Stubbs for the Claimant, understandably says not. He argues that the entire purpose of the action was for the Claimant's invoice to be paid, or, in the alternative, that judgment should be entered for the Claimant in the sum outstanding on that invoice. That purpose, he says, cannot in any sense be said to be, for example, “a predominate purpose” other than that for which the legal process was designed (Metall und Rohstoff) or “to effect an object not within the scope of the process” (Grainger).

48. That is a superficially powerful submission but I consider that it is misconceived. Obtaining judgment on an admission is only an object within the scope of the process where there has been an admission, just as default judgment is only within the scope of the process where a Defendant has failed to file and acknowledgement of service or a defence. The purpose for which those parts of the legal process were designed is to provide a judgment where the appropriate circumstances pertain, and not otherwise. The Claimant may (or may not) have been entitled to obtain a judgment on determination in due course, but judgment on an admission was something to which they had no right. It was a judgment “not properly available to [the Claimant] in the course of properly conducted proceedings” (Broxton).
49. Whilst purpose (in the sense of motive) will not, of itself, render the pursuit of a legal right unlawful (Bradford Corporation; Goldsmith, but *quaere*, maybe, Speed Seal), here, the entering of judgment by admission was not something the Claimant had a right to. Further, given that I have found that the Claimant entered judgment by admission intentionally and not by mistake (ie believing judgment in default was being entered), and that it had no honest belief in its entitlement to do so, it follows in my judgment, that it may be inferred that the Claimant had some ulterior, collateral or improper purpose” in doing so. Malice (in the legal sense) may be inferred from a lack of probable and reasonable cause (but not vice versa) - see Glinski v McIver [1962] at 744 and an improper purpose may be inferred from a lack of explanation – see Gibbs v Rea [1998] 1 AC 786 at 800-801 (or, as here, an explanation held not to be truthful).

50. Furthermore, if, as Lord Toulson supposed in Willers v Joyce, the tort of abuse of process is really an instance of malicious prosecution (albeit one where it is not necessary to show the termination of the action in the Claimant's favour) in which the pursuit of an unjustifiable collateral objective is evidence of malice, then it is also instructive, in my view, to consider the common features of the so-called "ragbag" of disparate situations to which the tort of malicious prosecution in civil proceedings was confined prior to the extension of the tort, first in Crawford Adjusters and subsequently confirmed by the Supreme Court in Willers v Joyce.

The "Special Cases of Abuse"

51. The term "ragbag" was used by Baroness Hale at paragraph 86 of Crawford Adjusters where she described it as "a rational list of *ex parte* processes which do damage before they can be challenged". These instances are extensively discussed in Gregory v Portsmouth City Council [2000] 1 AC 419 (where Lord Steyn said of them, at 427C "Sometimes these cases are described as constituting a separate tort of abuse of process, 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."), in Crawford Adjusters, and finally in Willers v Joyce, both in the majority judgments, but particularly in the dissenting judgments of Lord Neuberger PSC (who examines the instances in the context of United States jurisprudence) and Lord Sumption JSC in Crawford Adjusters and the dissenting opinions of Lord Neuberger PSC, Lord Mance and Lord Sumption JSC in Willers v Joyce.

52. This "small and anomalous class of civil cases in which an action has been held for maliciously procuring an order of the court" (per Lord Sumption at paragraph 143 in Crawford Adjusters) includes: malicious presentation of a petition in bankruptcy Johnson v Emerson (1870-1871) LR 6 Ex 329; the malicious presentation of a winding up petition – Quartz Hill Consolidated Gold Mining C v Eyre (1883) 11 QBD 674; maliciously procuring a search warrant – Gibbs v Rea [1998] AC 786; (potentially) maliciously endorsing a writ of *fi fa* – Clissold v Cratchley & a'or [1910] 2 KB 244; maliciously procuring a bench warrant – Roy v Prior [1971] AC 470, the wrongful arrest of a ship – the Walter D Wallet [1893] P 202 (in which it was confirmed that what must be shown is either malice (*mala*

fides) or "that *crassa negligentia*, which implies malice", approving the test in The Evangelismos (1858) Sw 378, 12 Moore PC 352) and the wrongful attachment of assets in maritime proceedings – Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M) [2009] All ER (Comm) 479.

53. In all three cases, the particular circumstances that these "special cases of abuse of civil legal process" (per Lord Steyn in Gregory v Portsmouth) have in common were set out - in the dissenting judgments and opinions in the latter two cases as justification for not extending the tort of malicious prosecution to civil proceedings in general. They all involve "the initial *ex parte* abuse of legal process with arguably immediate and perhaps irreversible damage", either to the reputation of the victim or, in the case of the wrongful arrest of a ship, financial loss (Gregory v Portsmouth at 427G). They concern "the group of *ex parte* procedural measures involving damage to person, property or reputation" (per Lord Mance discussing Quartz Hill in Willers v Joyce at paragraph 115 in which he concludes that a petition to wind up was an *ex parte* procedure which directly affected the company's trading reputation). They are "exceptions which were limited to cases where the potential Claimant loses his liberty or his property as a result of a malicious and baseless *ex parte* application or the like", per Lord Neuberger in Willers v Joyce at paragraph 149. Or "the limited category of cases in which the coercive powers of the court are invoked *ex parte* at the suit of the former Claimant, without any process of adjudication" per Lord Sumption in Willers v Joyce at paragraph 174. Or "examples of the *ex parte* abuse of the court's coercive powers", per Lord Sumption previously in Crawford Adjusters at paragraph 143. Of course, since all of the "special cases" involve an *ex parte* or administrative application or process causing the damage, the issue of prior termination of the main action in the Claimant's favour did not arise.

54. In Gregory v Portsmouth, Lord Steyn opined (at 427H) "the traditional explanation for not extending the tort [of malicious prosecution] to civil proceedings generally is that in the civil case there is no damage: the fair name of the Defendant is protected by the trial and judgment of the court." This was a proposition that, even by the time of Gregory v Portsmouth, Lord Steyn considered to be "no longer plausible". Nevertheless, one can readily see why it is

usually an essential element of the tort of malicious prosecution that the action has been terminated in favour of the Claimant. That does not apply, however, to the tort of abuse of process nor, indeed, to the examples of "the small and anomalous class of civil cases in which an action has been held for maliciously procuring an order of the court". In both cases the damage is immediate, and is not undone by a subsequent finding that the action or process was wrongfully pursued.

55. If I am wrong in holding that the action of the Claimant in the case before me of wrongfully entering judgment on admission amounted to the tort of abuse of process within the parameters supposedly defined by Grainger, then it seems to me that it should undoubtedly be treated as one of the special cases of abuse of civil legal process.
56. Firstly, proceeding as I do (with the agreement of Counsel) on the hypothetical assumption that the Defendant will be able to prove special damage arising from the lost contracts and the inability to procure parts and supplies caused by the withdrawal of credit lines occasioned by the entering of judgment against it (a pleaded loss of almost £42,000.00), the Claimant has caused immediate damage to the Defendant by its wrongful entry of judgment on admission using the automated MCOL process.
57. Secondly, the damage was one (if not two) of the kinds identified by Holt CJ as being necessary to support an action for malicious prosecution in Savile v Roberts (1868) 1 Ld Raym 374; 5 Mod 394; 12 Mod 208; 1 Salk 13, 3 Ld Raym 264; Carthew 416; 3 Salk 16; 5 Mod 405. As Bowen LJ observed in Quartz Hill at 691 when considering these categories of damage, "But a trader's credit seems to me to be as valuable as his property..." Lord Wilson JSC in Crawford Adjustors (at paragraph 77) considered that foreseeable economic loss should be recoverable in both malicious prosecution and abuse of process (concluding that the decision in Landgate Securities v Fladgate Fielder [2010] Ch 467 was wrong in that regard).
58. Thirdly, the entering of judgment on admission via MCOL is essentially an *ex parte* process; it involves no adjudication or scrutiny by the court. The Defendant

can, of course, (and the Claimant should) apply to have judgment set aside when it has been wrongfully entered. But apart from the issue of the costs of such an application, that process provides no remedy to the Defendant for the damage already suffered (see Gilding v Eyre, and, indeed, the cases involving the wrongful arrest of ships).

59. Fourthly, the Claimant had no reasonable or probable cause to enter judgment on admission against the Defendant, either on an objective basis (a point which appears to be accepted), nor, on the findings I have made, on a subjective basis.
60. Fifthly, in causing judgment to be entered against the Defendants on admission, on the findings I have made, the Claimant acted maliciously in the legal sense of the word. That is, it was a wrongful act done intentionally without justification.
61. I am cognisant, as I have already mentioned, of the fact that the Defendant has not pleaded malice per se in its counterclaim. Nor has it referenced the "special cases" that I have referred to above, rather pleading the tort of abuse of process in the Grainger sense - assuming that those two causes of action are really distinct, which must in my view be doubtful.
62. Nevertheless, having decided to hear evidence from the Claimant's witnesses on their purported explanation as to how it came to be that judgment on admission was entered against the Defendant, and having made findings on that evidence, it seemed to me to be only right to fully set out in this judgment those findings and what I consider to be the consequences in law.
63. The MCOL system has been in existence for less than 20 years. The process of entering judgment on admission within MCOL is a fully automated, *ex parte* process. Whatever warnings may be generated by the system during that process, there is, at the end of the day, nothing to prevent a Claimant wrongfully and intentionally entering judgment and thereby potentially causing the Defendant considerable financial loss for which, were there not a cause of action in respect of the same, the Defendant would have no recourse to remedy.

64. Stepping back, it seems to me that the words of Lord Campbell CJ in Churchill v Siggers (1854) 3 E & B 929, (cited no fewer than four times in Willers v Joyce), apply:-

"To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in the property or person, there is that conjunction of injury and loss which is the foundation of an action on the case."

65. For all the above reasons, I find the Claimant in this case liable to the Defendant on the counterclaim.

66. I will give directions for the determination of the issue of quantum at the handing down of this judgment.