Lim Kok Lian (executor and trustee of the estate of Lee Biau Luan, deceased) *v* Lee Patricia (executor and trustee of the estate of Lee Biau Luan, deceased) and another [2014] SGHC 272

Case Number : Suit No 584 of 2013 (Registrar's Appeals Nos 253, 254, 255 and 256 of 2014)

Decision Date : 23 December 2014

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Nair Suresh Sukumaran and Tan Tse Hsien, Bryan (Chen Shixian) (Straits Law Practice LLC) for the appellants in RAs 253 and 254 of 2014 and the respondents in RAs 255 and 256 of 2014; Yeo Khirn Hai Alvin SC and Sim Mei Ling (WongPartnership LLP) (instructed), Wong Tjen Wee (Eldan Law LLP) for the respondents in RAs 253 and 254 of 2014 and the appellants in RAs 255 and 256 of 2014; Chin Jun Qi (Drew and Napier LLC) (on watching brief) for the plaintiff in Suit No 584 of 2013.

Parties : Lim Kok Lian (executor and trustee of the estate of Lee Biau Luan, deceased) — Lee Patricia (executor and trustee of the estate of Lee Biau Luan, deceased) and another

Civil Procedure – Striking out

23 December 2014 Judgment reserved.

Edmund Leow JC:

Introduction

1 The main issue in these appeals is whether the counterclaims brought by the defendants should be struck out under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"). After hearing the parties on 24 November 2014, I reserved judgment to give further consideration to the parties' submissions.

Background facts

2 The plaintiff in Suit No 584 of 2013, Lim Kok Lian ("KL"), is the executor and trustee of the estate of Lee Biau Luan, his late mother. KL is suing his sister and co-executor, Patricia Lee ("Pat") and her son, Mark Tan Chai Ming ("Mark") for, *inter alia*, fraudulent breach of trust. Pat and Mark in turn filed a counterclaim against KL and his two brothers, Lim Kok Kian Chiao Ki ("KK") and Peter Michael Lee Yong Pee ("PM"), their cause of action being the torts of malicious prosecution of civil proceedings, abuse of process, and conspiracy.

3 KK and PM brought Summons No 2794 of 2014 and Summons No 2305 of 2014 ("the Striking Out Summonses") respectively to strike out the counterclaims against them. They were both successful in their respective striking out applications before the Assistant Registrar ("the AR") save for the claim in conspiracy by lawful means which the AR declined to strike out. They now appeal in Registrar's Appeals Nos 253 and 254 of 2014 against the AR's decision not to strike out the remaining claim while Pat and Mark brought Registrar's Appeals Nos 255 and 256 of 2014 appealing against the AR's decision to strike out the other three claims.

The decision below

4 The AR held that the cause of action for malicious civil proceedings was legally unsustainable because Pat and Mark were unable to satisfy the requirement that a prior proceeding has been determined in their favour. Similarly, the AR struck out the claim for abuse of process because commencing an action to seek leverage to obtain a compromise of proceedings was not a collateral purpose. Since the torts of malicious prosecution and abuse of process were struck out, it was held that the claim for conspiracy by unlawful means would also be struck out. For the claim of conspiracy by lawful means, the AR declined to strike it out because the alleged predominant purpose was to further the legitimate interest of enlarging the estate, a matter which was to be determined at trial.

The parties' submissions

5 Pat and Mark's submissions can be summarised as follows:

(a) The AR adopted an unduly restrictive approach to the first element of malicious civil proceedings set out in *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another* [2013] UKPC 17 ("*Crawford Adjusters*") which requires proceedings to be concluded in favour of the party relying on the tort. In *Crawford Adjusters* itself, the court had allowed the tort to be advanced in a counterclaim without the institution of a fresh action.

(b) The AR erred in relying on *Land Securities plc and others v Fladgate Fielder (a firm)* [2010] Ch 467 ("*Land Securities*") as the decision actually turned on how the tort of abuse of process could not be extended to judicial review proceedings when leave to commence such proceedings had already been obtained.

(c) The AR erred since as long as there was an arguable case for either the tort of malicious civil proceedings or abuse of process, the claim for conspiracy by unlawful means should not be struck out.

6 KK and PM's submissions can be summarised as follows:

(a) The claim for malicious civil proceedings should fail as it is not a tort known to Singapore law. It has no application where there has been no judgment in the complainant's favour and where no damage has been suffered.

(b) The claim for abuse of process should fail as neither KK nor PM has any collateral or improper purpose in suing. Moreover, no damage had been suffered by them.

(c) The claim for unlawful means conspiracy should fail as Pat and Mark have failed to establish the torts of malicious civil proceedings and abuse of process. Also, they had not suffered any damage.

(d) The claim for lawful means conspiracy should fail as the law does not allow a conspiracy claim to circumvent the need to demonstrate wrongful conduct. Pat and Mark also had not suffered any damage.

Issues

7 The following issues to be decided in these appeals are as follows:

(a) whether the claim for the tort of malicious civil proceedings should be struck out;

(b) whether the claim for the tort of abuse of process should be struck out;

(c) whether the claim for the tort of conspiracy by unlawful means should be struck out; and

(d) whether the claim for the tort of conspiracy by lawful means should be struck out.

The threshold for striking out

8 O 18 r 19 of the ROC states as follows:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.**—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be;
>
> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(*a*).
>
> (3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

9 In the Striking Out Summonses, it was stated that the applications were made pursuant to all four limbs of O 18 r 19(1). Counsel for PM and KK, Mr Suresh Nair, stated at the hearing before the AR below that he was relying principally on the "no reasonable cause of action" limb, *ie*, O 18 r 19(1)(*a*). [note: 1] Mr Nair appears to have relied on the same limb at the hearing before me. [note: 2] In contrast, Pat and Mark seems to be responding instead to an application based on O 18 r 19(1)(*b*) although this has not been explicitly articulated.

10 I would have been better assisted by counsel if they had related their submissions to the particular limb of O 18 r 19(1) that they were relying on. Parties and the counsel representing them would do well to heed the following observations made by V K Rajah JA in *The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati 5*") at [31]:

> 31 In our view, it would be a good practice for an applicant of a striking out order to precisely correlate the arguments it advances to the *exact limb* under O 18 r 19(1) of the ROC which it seeks to rely on. Such a practice will assist the courts to better understand the thrust of the applicant's arguments and assess them. While there is some similarity and overlap amongst the four limbs of O 18 r 19(1) of the ROC, each limb, conceptually speaking, serves a specific purpose apropos the court's power to summarily dismiss a party's claim.

[emphasis in original]

11 Notwithstanding this slight ambiguity in the parties' submissions, I shall consider both O 18 r 19(1)(*a*) and 19(1)(*b*) in deciding whether the counterclaims at hand should be struck out since parties have ostensibly relied on both limbs in these appeals.

12 It is established law that the threshold for striking out a claim is a high one. The court will strike out a claim only if it is plainly or obviously unsustainable (see *Bunga Melati 5* at [32]). It must be impossible and not just improbable for the claim to succeed before the court will strike it out (see *Singapore Civil Procedure 2013* vol 1 (G P Selvam ed-in-chief) (Sweet & Maxwell Asia, 2013) ("*Singapore Civil Procedure*") at para 18/19/6).

Issue 1: Whether the claim for the tort of malicious civil proceedings should be struck out

13 It is not entirely clear whether this tort is a recognised cause of action in Singapore. On one hand, the High Court case of *Bhagwan Singh v Chand Singh* [1968-1970] SLR(R) 50 ("*Bhagwan Singh*") seems to have recognised the tort (at [28]) although it ultimately held that the claim was not made out on the facts (at [29]). On the other hand, a Singapore textbook on tort law denies its existence as expressed in the following passage (see Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*Gary Chan*") at para 17.007):

> … The tort of malicious prosecution does not, however, extend to civil proceedings and disciplinary proceedings. One reason is that in civil proceedings, the expenses incurred by the defendant in the action may be compensated for by an award of costs. …

The case of *Bhagwan Singh* does not seem to have come to the attention of the learned authors of *Gary Chan*.

14 The existence of the tort was also doubted recently in *Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd and others (Tan Choon Wee and another, third parties)* [2013] 4 SLR 662 ("*Sandz Solutions HC*") where Judith Prakash J observed that a claim for malicious prosecution "generally applies to criminal prosecution only" (at [93]). Although the appeal against this decision was allowed in part by the Court of Appeal in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 ("*Sandz Solutions CA*"), the court made no mention of Prakash J's observation regarding the tort of malicious prosecution.

15 In sum, there appears to be at least some doubt in relation to the existence of the tort of malicious civil proceedings in Singapore. It is also apparent that the arguments for and against adopting such a cause of action has not been fully considered by our courts. As observed in *Sandz Solutions HC* at [93], the tort was recognised in the recent Privy Council decision of *Crawford Adjusters v Sagicor General Insurance (Cayman) Limited* [2013] UKPC 17 ("*Crawford Adjusters*") but that decision has yet to be applied in Singapore.

16 In my judgment, the uncertainty surrounding the tort outlined above does not necessarily lead to the conclusion that the claim should be struck out. I agree in principle that a novel and complex case that requires rigorous examination of law and policy should proceed to trial instead of being struck out in its nascent state (see *Singapore Civil Procedure* at para 18/19/6).

17 However, the difficulty with Pat and Mark's claim here is that even if such a cause of action were to be adopted in Singapore, it would be impossible for them to mount the claim successfully because the first element would plainly not be satisfied; there are no prior proceedings that have

been determined in favour of them (see *Crawford* at [34]).

18 At the hearing before me, instructed counsel for Pat and Mark, Mr Alvin Yeo SC, referred me to a passage from *Bullen & Leake & Jacob's Precedents of Pleadings* (Jack I H Jacob and Iain S Goldrein eds) (Thomson Sweet & Maxwell, 13th Ed, 1990) ("*Bullen & Leake*") at p 644 which suggested that a successful claim for the tort of malicious civil proceedings could be asserted by counterclaim did not require prior proceedings to have been determined in the plaintiff's favour. Mr Yeo contended that the main claims and counterclaims should be tried together before the same Judge and there was no reason to have a separate action for malicious civil proceedings.

19 In Pat and Mark's written submissions, it was argued that the AR had erred in finding that the main action in *Crawford Adjusters* had ended before the claim for malicious prosecution was brought because the appellant, Mr Paterson, had amended his counterclaim "to allude to malicious prosecution" and the amendment dated back to the original date of the pleading. [note: 3]

20 I find this submission somewhat misleading because it is clear from the judgment of *Crawford Adjusters* at [21] that Mr Paterson only amended his counterclaim to include a claim for abuse of process and *not* malicious civil proceedings. Unlike the tort of malicious civil proceedings, the tort of abuse of process does not have a requirement for a prior proceeding to have been determined in favour of the party relying on the tort. Hence, I do not read *Crawford Adjusters* as setting down the principle that the claim for malicious civil proceedings can be brought by way of a counterclaim.

21 As far as the passage from *Bullen & Leake* is concerned, I note that the passage is found in a slightly dated edition of the book and it therefore did not consider the position stated some 13 years later in *Crawford Adjusters*. I also do not think that it can possibly be said that this outdated academic opinion dispenses with the onus placed on Pat and Mark, assuming the tort applies in Singapore, to prove the first element of the tort stated in *Crawford Adjusters*.

22 I should mention for completeness that Mr Nair referred me to passages from the 2012 edition of *Bullen & Leake* at the hearing before me (see *Bullen & Leake & Jacob's Precedents of Pleadings* (Justice Blair *et al* gen eds) (Sweet & Maxwell, 17th Ed, 2012) ("*Bullen & Leake 2012*") at paras 2-12 and 2-13). He argued from these passages that no action lies in malicious prosecution if the action against the claimant is still pending and has not been determined in the claimant's favour.

23 I have some reservations on Mr Nair's reliance on those passages. The general tenor of the discussion and the cases cited at paras 2-12 to 2-15 seem to be that of malicious prosecution of criminal proceedings, and not malicious civil proceedings. This becomes clear from a reading of the following section, "Abuse of Civil Process". The first paragraph of this section, para 2-16, also states that proceedings do not need to have been determined in the claimant's favour. More generally, this edition predates *Crawford Adjusters* and would therefore not have been able to reflect or comment on the position reached in that case. I thus placed little reliance on the passages in *Bullen & Leake 2012* cited by Mr Nair.

24 Finally, as correctly pointed out by Mr Nair in oral submissions, a party bringing a counterclaim for malicious civil proceedings has to be in a position to prove the elements of his claim. However, on the facts here, Pat and Mark simply cannot show that a prior proceeding has been concluded in their favour – the outcome of the main action depends entirely on the judge hearing the matter and it is not something that the defendant would be able to prove when the pleadings are filed. In other words, it seems contrary to principle and logic to allow a party to bring a claim when one of the elements for that claim is entirely contingent on a future event that is outside the party's control. Moreover, that future event may not even come to pass, *ie*, the main action may not even be

resolved in that party's favour.

25 Therefore, in my judgment, the AR correctly struck out the claim.

Issue 2: Whether the claim for the tort of abuse of process should be struck out

26 It is also not entirely clear whether the tort of abuse of process is a recognised cause of action in Singapore. However, as mentioned above, the claim should not be struck out only because it has not been raised or considered before in Singapore.

27 One key element in the tort is the requirement for a collateral or improper purpose to be established. The question on the facts at hand is whether such a purpose is discernable on Pat and Mark's case. It was stated in their Defence & Counterclaim (Amendment No 3) dated 28 March 2014 that:

> **5 Malicious Civil Proceedings**
>
> …
>
> 311 The said action has been brought without reasonable and proper cause and/or in bad faith and maliciously and with the ulterior motive of *damaging the Defendants* and in the hope of *obtaining bargaining leverage* against the 1st Defendant and/or 2nd Defendant *to facilitate a compromise* of the proceedings for the economic benefit of the Plaintiff, Kian and/or Peter, rather than for furthering any legitimate interest of the Estate. The action herein is accordingly an abuse of process.
>
> [emphasis added]

28 A few difficulties are immediately apparent from a perfunctory reading of this paragraph. First, it is not at all clear whether Pat and Mark are pleading the tort of abuse of process as a separate cause of action from malicious civil proceedings since both causes of action are mentioned under the same heading, "Malicious Civil Proceedings".

29 Second, obtaining bargaining leverage to facilitate a compromise does not, on the authority of *Land Securities*, appear to qualify as a collateral purpose. However, Pat and Mark did plead that the main action was brought against them "with the ulterior motive of damaging [them]" and this may, also on the authority of *Land Securities*, arguably constitute a collateral purpose. The word "damaging" in the quoted paragraph is somewhat vague but I am minded to grant leave for Pat and Mark to amend the pleadings in this particular regard (see *Singapore Civil Procedure* at para 18/19/2). I note parenthetically that the holding in *Land Securities* that the tort of abuse of process did not enable recovery for general economic loss was doubted in *Crawford Adjusters* at [74]–[77]. This however does not affect my analysis in any way because the AR's decision and the parties' submissions did not rely on that part of the decision in *Land Securities* that was doubted.

30 Notwithstanding the difficulties highlighted above, I do not find it *impossible* for the claim of abuse of process to succeed. The mere fact that the case is weak or not likely to succeed is no ground for striking it out (see *Singapore Civil Procedure* at para 18/19/10) and I thus allow the appeal in relation to the tort of abuse of process.

Issue 3: Whether the claim for the tort of conspiracy by unlawful means should be struck out

31 Since at least one of the above causes of action is sustainable, unlawful means can be established and the issue is then whether costs may constitute actionable damage for the torts of conspiracy by unlawful means. The determination of this issue would equally apply to the action in conspiracy by lawful means.

32 It appears that there are two conflicting recent Court of Appeal decisions on the issue of whether costs *per se* can constitute actionable damage for a claim in conspiracy. In the earlier case of *Raffles Town Club v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 ("*Raffles Town Club*"), the claim in conspiracy was allowed even though the court itself recognised that the only damage suffered was the legal costs incurred by the former directors of Raffles Town Club in defending Suit No 46 of 2006. More recently, the Court of Appeal in *Sandz Solutions CA* confirmed the trial judge's finding that the appellants had suffered no damage as a result of the alleged conspiracy. Crucially, the court did not regard legal costs as damage but at the same time noted that the appellants did not challenge the trial judge's findings on this point.

33 In the light of the seemingly inconsistent pronouncements made by the Court of Appeal in two recent appeals, it is open for the defendants to argue that costs constitute actionable damage on the basis of *Raffles Town Club*. Consequently, I am of the view that the high threshold for striking out has not been met.

34 With regards to the High Court case of *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 and the appeal against this decision in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2014] SGCA 55 ("*Maryani*"), I do not think these cases take Pat and Mark's case for striking out any further because the issue in those proceedings was whether the appellants could recover as damages the unrecovered legal costs of *previous* proceedings. The Court of Appeal in *Maryani* resolved this issue by reference to the general rule that unrecovered costs in relation to previous legal proceedings cannot be recovered in a subsequent claim for damages. The court also held that this general rule applied in a third party case. In coming to its decision, the court discussed certain policy considerations underlying the law on costs such as promoting finality in litigation and increasing access to justice.

35 However, I think it is crucial to note that the Court of Appeal in *Maryani* did not discuss the issue of whether costs *per se* can constitute actionable damage in a claim for the tort of conspiracy. I note further that neither *Raffles Town Club* nor *Sandz Solutions CA* was cited in *Maryani* and the Court of Appeal certainly did not resolve the apparent inconsistency in those two earlier Court of Appeal decisions.

36 To conclude, I think that the Court of Appeal case of *Raffles Town Club* appears to provide Pat and Mark the platform to argue that costs alone could possibly be recognised as actionable damage for claims in conspiracy by unlawful and lawful means. For the avoidance of doubt, I am not expressing a definitive view on the merits of Pat and Mark's claim at this early stage of the proceedings but only holding that striking out is inappropriate here because their claim is not obviously unsustainable and it is not impossible for their claim to succeed.

Issue 4: Whether the claim for the tort of conspiracy by lawful means should be struck out

37 In the previous section, I have already dealt with the main argument that KK and PM raised in relation to whether costs *per se* constitutes actionable damage for a claim in conspiracy and I see no necessity to repeat myself here.

38 I should deal with one other submission made by KK and PM. They argue that Pat and Mark failed to plead the damage allegedly suffered by them, *ie*, the enlargement of the estate to their detriment [note: 4] and that the AR erred in relying on this unpleaded point. In my view, this submission is without merit because KK and PM in making this submission have conflated Pat and Mark's allegation of the predominant purpose (*viz*, the enlargement of the estate to their detriment) with the damage suffered (*viz*, substantial loss and expense by way of legal costs in defending the action). The predominant purpose and damage suffered are two separate elements of the tort of conspiracy by lawful means and, without expressing a view on the merits of the claim, it is clear that these two elements have been pleaded by Pat and Mark.

Conclusion

39 For the foregoing reasons, I decline to strike out Pat and Mark's claims for the tort of abuse of process, conspiracy by unlawful means, and conspiracy by lawful means. These claims shall proceed to trial. I also grant leave for Pat and Mark to amend [311] of their Defence & Counterclaim (Amendment No 3) to clarify what is meant by the phrase "with the ulterior motive of damaging [them]". Lastly, I affirm the AR's decision to strike out the claim for malicious civil proceedings.

40 Accordingly, Registrar's Appeals Nos 253 and 254 of 2014 are dismissed with costs while Registrar's Appeals Nos 255 and 256 of 2014 are allowed in part with costs. The costs of all four appeals are to be agreed or taxed.

[note: 1] Notes of Evidence, 9 July 2014; Plaintiff by Counterclaim's Bundle of Documents/Pleadings Vol 1 at Tab 7 and Tab 5.

[note: 2] Written submissions of 2nd and 3rd defendants in counterclaim at para 56.

[note: 3] Written submissions of the plaintiffs by counterclaim at para 33.

[note: 4] Written submissions of 2nd and 3rd defendants in counterclaim at para 63.