DEEPAK JAIKISHAN A/L JAIKISHAN REWACHAND & ORS v DATO' SERI MOHD NAJIB BIN TUN ABDUL RAZAK & ORS

CaseAnalysis

[2020] MLJU 1282

Deepak Jaikishan a/l Jaikishan Rewachand & Ors v Dato' Seri Mohd Najib bin Tun Abdul Razak & Ors [2020] MLJU 1282

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

QUAY CHEW SOON, JC

SUIT NO. WA-23NCvC-63-11/2018

1 September 2020

Mohd Irzan Iswatt bin Mohd Noor and Nasbal bin Harun (Haniff Khatri) for the Plaintiff. David Thomas Mathews and Chong Wei Ting (Mathews Hun Lachimanan) Prem Ramachandran and Arwindar Gill (Kumar Partnership) for the Defendant.

Quay Chew Soon JC

GROUNDS OF DECISIONIntroduction

[1]The 1st Defendant ("D1") and the 2nd Defendant ("D2") jointly filed an application vide Enclosure 36 ("Encl 36") to strike out the Plaintiffs' Statement of Claim ("SOC"). Encl 36 was made under Order 18 rule 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ("Rules of Court") or under the inherent jurisdiction of the Court.

[2]Likewise the 3rd Defendant ("D3") filed an application vide Enclosure 37 ("Encl 37") to strike

out the Plaintiffs' Writ of Summons and SOC. Encl 37 was made under Order 18 rule 19(1)(a), (b), (c) and/or (d) of the Rules of Court and/or under the inherent jurisdiction of the Court.

[3]D1, D2 and D3 are collectively referred to as the "Defendants". I allowed both Encl 36 and Encl 37. These are the grounds of my decision.

The Statement of Claim

[4]The 1st Plaintiff ("P1") is a director of the 2nd Plaintiff ("P2"). The 3rd Plaintiff ("P3") is also a director of P2. P1 and P3 are brothers. P1, P2 and P3 are collectively referred to as the **"Plaintiffs".**

[5]At the material time, D1 was the Prime Minister and the Finance Minister of Malaysia. D2 is the spouse of D1. D3 is a member of the UMNO Supreme Council.

[6]The crux of the Plaintiffs' action against the Defendants is founded mainly on the tort of conspiracy to injure through coercion, duress and undue influence towards various third parties namely the Inland Revenue Board ("LHDN"), Berjaya Sompo Insurance Bhd **("Berjaya Sompo")** and Bank Kerjasama Rakyat Malaysia Bhd ("Bank Rakyat"), which had caused damage to the Plaintiffs. In addition, the Plaintiffs' action against the Defendants is also premised on breach of duty of care pursuant to principal-agent relationship, misfeasance in public office and defamation.

[7]In the SOC, the Plaintiffs averred the following. Between 2004 and 2010, P1 and P2 acted as proxy to D1 and D2 in relation to certain land and business transactions ("Transactions") under D1 and D2's instructions where the Transactions benefitted D1 and D2 monetarily. Due to the Transactions, LHDN made assessment for taxes payable by P1 and P2 to LHDN. One of the agreed terms between P1 and P2 with D1 and D2 were that all liabilities and taxes incurred in the Transactions would be paid by D1 and D2, as principal to P1 and P2. At the material time, D3 acted as an agent for D1 and D2 in communicating their instructions to P1 and P2 and facilitating the completion of the Transactions.

[8]Around 2012, the relationship between P1 and D1 and D2 became strained. The tension started when P1 refused to follow D1 and D2's instruction to appoint one Tan Sri Muhammad Shafee bin Md Abdullah ("Counsel") as P1's solicitor in Kuala Lumpur High Court Suit No. WA-22NCVC-341-07/2017 ("Bala Suit"). The Bala Suit is between A. Santamil Selvi a/p Alau Malay @ Anna Malay [Administratix to Balasubramaniam all Perumal (Deceased)] and 4 Others v Dato' Seri Mohd Najib bin Tun Abdul Razak and 8 Others. P1, D1 and D2 are defendants in that suit. The purpose of the said instruction was for Counsel to file a Statement of Defence on behalf of P1 which is favourable to D1 and D2 ("Favourable Defence"). P1 however acted against the said instruction and filed his own Statement of Defence. Due to the said tension, D1 and D2 (through and with D3) acted or omitted to do certain acts which caused detriment to P1 and P2.

[9]The Plaintiffs aver the following in relation to the alleged breach of duty of care between principal and agent:

(a) The Defendants oppressed P2 and put the Plaintiffs under undue pressure and duress to follow the Defendants' order to appoint Counsel as P1's solicitor in order for Counsel to file the Favourable Defence in the Bala Suit.

(b) D1 and D2 directed LHDN to take civil action against P2 and its directors (including P1 and P3) to claim for tax arrears of approximately RM6 million in Kuala Lumpur High Court Suit No. 21NCVC-24-05/2015 ("LHDN Suit"). A Judgment in Default of appearance was entered on 29.6.2015 ("JID"). LHDN then commenced winding up proceedings against P2 in Kuala Lumpur High Court Companies (Winding up) Suit No. WA-28NCC-267-05/2017 **("Winding-Up Proceedings")** and filed a winding up petition dated 8.5.2017 **("Winding-Up Petition").**

(c) The Defendants directed Bank Rakyat to file civil suits against the Plaintiffs although the Plaintiffs had only acted as proxy to D1 and D2 for the loan received from Bank Rakyat.

(d) To prevent P1 and P2 from resolving the claim by Bank Rakyat, D1 and D2 sabotaged P1 and P2's insurance claim with Berjaya Sompo in the sum of RM120 million (which was later agreed to be reduced to RM100 million) which arose from a fire incident at P2's

factory. Berjaya Sompo had paid a sum of RM63 million on 21.6.2016, leaving a balance of RM37 million payable. The balance RM37 million was intended to be utilised by P1 and P2 to settle the claim by Bank Rakyat. However D1, as Prime Minister cum Minister of Finance at the material time, abused his power by interfering with the said insurance claim to prevent the balance RM37 million from being released by Berjaya Sompo. The Defendants promised the Plaintiffs that if P1 complies with the instruction of filing the Favourable Defence, the balance RM37 million will be released by Berjaya Sompo.

(e) As a result, P1 was compelled to appoint Counsel in the Bala Suit and allowed Counsel to file the Favourable Defence.

[10]In relation to the tort of conspiracy, the Plaintiffs allege that there was a meeting of minds and a scheme. At a meeting on 9.9.2015 between P1, P3 and D3 (acting on behalf of D1 and D2), D3 allegedly assured P1 that D1 would instruct LHDN to remit the taxes imposed provided P1 retained Counsel as his solicitor in the Bala Suit and filed the Favourable Defence. Further that D1 would use his influence to have Berjaya Sompo pay P2 the RM37 million balance insurance claim.

[11]At a telephone conference call on 13.1.2016 between D3, Counsel and one Tan Sri Mohd Shukor Mahfar (former Chief Executive Officer of LHDN), Counsel asked D3 to inform D1 that P1 had affirmed an affidavit favouring D1 and D2 in the Bala Suit. Counsel was appointed as solicitor for P1 vide a letter dated 15.2.2016.

[12]Pursuant to the alleged conspiracy, P2 applied to LHDN for a tax remittance. LHDN forwarded P2's application to D1 vide LHDN's letter dated 4.4.2016. D1 agreed to P2's application and minuted his instruction to LHDN on the said LHDN letter on 6.6.2016. The Ministry of Finance ("MOF") verified D1's instruction vide a letter dated 6.6.2016 from the Prime Minister Office's to LHDN.

[13]However, due to P1's failure to eventually follow D1 and D2's direction in relation to the Bala Suit, D1 rescinded his earlier instruction and rejected the appeal by P2 vide LHDN's letter to P2

dated 25.8.2016. Consequently, LHDN claimed all the tax arrears vide LHDN's letter to P2 dated 20.1.2017. In response, P1 wrote a letter to D1 (as the Finance Minister at the material time) to apply for reinstatement of an earlier offer letter dated 9.12.2015, which would substantially reduce the amount of tax payable to LHDN. But P1's application was not allowed. Instead LHDN issued a letter dated 2.3.2018 to P1 directing P1 and P2 to settle the tax arrears. Later the MOF issued a letter dated 19.4.2018 to LHDN stating that the matter is still under consideration and requesting LHDN to postpone any further action pending a decision by the Finance Minister.

[14]In relation to the tort of misfeasance in public office, the Plaintiffs assert the following. D1 acted beyond his capacity and abused his position as Prime Minister cum Minister of Finance at the material time when D1 usurped the duty of LHDN's Director General to decide for and on behalf of LHDN's Director General pertaining to the application for tax remittance by the Plaintiffs.

[15]In relation to the tort of defamation, the Plaintiffs assert the following. The Plaintiffs were defamed as a result of the advertisement of the Winding-Up Petition on 22.5.2017 in the newspaper by LHDN. The publication of the Winding-Up Petition exposed the Plaintiffs' reputation to odium, contempt and scandal and lowered the public estimation of the Plaintiffs' reputation. The plain and natural meaning of the Winding-Up Petition is that the Plaintiffs are insolvent and unable to (a) enter into and maintain contract, (b) receive and pay monies, (c) carry on business, as the Plaintiffs had evaded tax.

[16]As a result, the Plaintiffs suffered losses as follows:

(a) The Plaintiffs were forced to pay in full the loan facility furnished by Malayan Banking Bhd **("Maybank")** in order to regularize the Plaintiffs' cash flow. The loan facility provided by Maybank was approximately RM10 million.

(b) The immediate effect of the withdrawal of the Maybank loan facility was the unavailability of working capital required by P2 to purchase raw materials for its business. P2 was unable to meet distributor obligations, resulting in loss of sale of RM47 million.

(c) Due to the publication of the Winding-Up Petition and a travel ban imposed on P1, a contract between IKEA and P2 was cancelled. The loss suffered by the Plaintiffs due to the contract cancellation was RM74 million.

[17]In the SOC, the Plaintiffs sought the following relief:

(a) declaration that D1 and D2 are liable to pay the taxes owed by the Plaintiffs to LHDN;

(b) damages of RM500,000 which was paid to Maybank;

(c) damages of RM47 million for P2's inability to fulfil contractual obligations;

(d) damages of RM74 million for cancellation of the contract between P2 and IKEA;

(e) damages of RM200 million for defamation;

(f) damages of RM37 million for misfeasance of public office by D1;

(g) aggravated damages of RM50 million;

(h) exemplary damages of RM50 million.

[18]I observe here that quantification of general damages is prohibited under Order 18 rule 12(1A) of the Rules of Court.

The Law

[19]The law pertaining to striking out of a party's pleading under Order 18 rule 19 of the Rules of Court ("**O.18 r.19**") is well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence. (See the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7).

[20]The court must be satisfied that there is no reasonable cause of action or that the claims are

frivolous or vexatious or that the defences raised are not arguable. The court is not concerned at this stage with the respective merits of the claims. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

[21]In *Raja Zainal Abldin bin Raja Haji Tachik & 3 Ors v British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 at 612, the Supreme Court remarked that the lower court should have scrutinized the evidence in order to decide whether the action was bound to fail. The court held that an action can be summarily disposed if there is an absence of conflict of material evidence or of conflict of affidavits on material points. So that seemingly triable or difficult issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

[22]Whether it is plain and obvious that a suit should be struck out does not depend on the length of time it takes to argue an application to strike it out. Rather the question is whether, when the point has been argued, it becomes plain and obvious that there can be but one result. It can become plain and obvious that a claim cannot succeed after a relatively long and elaborate hearing. (See the English Court of Appeal cases of *McKay and Another v Essex Area Health Authority and Another* [1982] 1 QB 1166 at 1176-1177; *Drummond-Jackson v British Medical Association and Others* [1970] 1 WLR 688 at 695-696).

[23]Thus in a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should not be a reason for refusing relief under O.18 r.19. If the court is satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See the Court of Appeal case of *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173 at 182).

Decision

[24]I find that the SOC discloses no reasonable cause of action and therefore ought to be struck out under O.18 r.19(1)(a). I was mindful of O.18 r.19(2) which states that no evidence shall be

admissible on an application under O.18 r.19(1)(a). Hence in determining that the SOC discloses no reasonable cause of action, I only considered the pleadings as they stood.

[25]I considered affidavit evidence only with respect to the other limbs of O.18 r.19, namely O.18 r.19(1)(b), (c) and (d). (See the Court of Appeal case of *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11 at 35). In arriving at my decision in that regard, I have avoided conducting a trial on affidavits. (See the Court of Appeal case of *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd & Ors* [2012] 1 MLJ 510 at 515). I did not attempt to resolve conflict of evidence on the affidavits of the parties. (See the Court of Appeal case of *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235).

[26]P cited authorities to the effect that where the pleadings are defective or insufficient and the opposing party seeks to strike out the pleadings, the court must be wary and ought not to act summarily if an amendment can correct the defect. (See the Court of Appeal case of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520 at 538). However, P did show how the SOC can be cured by an amendment nor filed any application to amend the SOC.

I. No reasonable cause of action *(O.18 r.19(1)(a))*

[27]The SOC does not disclose a reasonable cause of action against the Defendants as the necessary elements in respect of each of the causes of action have not been pleaded. Further the SOC fails to comply with the mandatory requirements of Order 18 rule 12 of the Rules of Court as the necessary particulars to support the causes of action were not pleaded.

[28]During submission, the Plaintiffs argued that any insufficient plea or lack of particulars in the SOC may be rectified by providing the same in their Reply to the Defence. I disagree. The function of a Reply is to answer matters raised in the defence, and its contents must relate to matters raised in the defence. The Plaintiffs may not supplement the SOC by including in their Reply matters which ought to have been included in the SOC. (See the Singapore High Court case of *Nirumalan K Pillay and others v A Balakrishnan and others* [1996] 2 SLR(R) 650 at 655).

[29]As stated by the Court of Appeal in *Tan Sri Norian Mai & Anor v Suzana Md Aris* [2011] 1 LNS 1912 at paragraph 26:

> *"The* ***bare allegation*** **of negligence** ***in*** **he** ***plaintiff's*** **reply to the statement of defence** ***is not a*** **substitute for the** ***plaintiff's claim*** *based on negligence.* **Negligence as a cause of action** ***and its particulars ought*** **to be pleaded** ***in*** **the statement of** ***claim*** **itself. The basic function of the reply is to answer the points raised in the defence so that the defendant is given notice of matters which are intended to defeat a defence and explain a matter raised on the defence."**

Conspiracy to injure

[30]Conspiracy is the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. There are 2 types of conspiracy. One is unlawful means conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law). The other is lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done with the sole or predominant purpose of injuring the claimant — it is in the fact of the conspiracy that the unlawfulness resides. In the instant suit, the SOC does not distinguish whether the claim for conspiracy is based on lawful or unlawful means.

[31]The elements to a conspiracy claim are: (a) a combination or agreement between two or more individuals; (b) an intent to injure; (c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and (d) resulting loss and damage to the claimant. (See the Court of Appeal case of *Cubic Electronic Sdn Bhd (in Liquidation) v MKC Corporate & Business Advisory Sdn Bhd & another appeal* [2016] 3 CLJ 676 at 683).

[32]To succeed in a claim for conspiracy, the SOC must plead with great particularity all the elements which make up the conspiracy. In *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259 at 269, the High Court said:

> *"However, apart from the* ***dare assertion of conspiracy*** *based on the joint filing of the action,* ***no particulars*** *of any kind were alleged against these six defendants to* **show how they were** *linked tothe* ***misdemeanours*** **alleged against the fifth**

defendant. Just as fraud *must* be pleaded *with* greaf particularly *so also* ***all*** **the *constituent* ingredients *going to make up* the conspiracy, *must be pleaded.*** *On this ground alone, the claim for conspiracy fails."*

[33]In *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 at 409, the Court of Appeal held that there was no cause of action in the tort of conspiracy. The court noted that the statement of claim failed to plead the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy. The statement of claim also failed to set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy.

[34]Here the Plaintiffs allege in broad sweeping terms that:

(a) D1 and D2 directed LHDN to commence the LHDN Suit and the Winding-Up Proceedings against P2 to exert pressure on P1 to file the Favourable Defence in the Bala Suit.

(b) D1 and D2 influenced decisions made by:

  (i) Berjaya Sompo pertaining to the insurance claim by P2; and

  (ii) Bank Rakyat to commence a civil action against a company called Radiant Splendour Sdn Bhd **("Radiant Splendour")** and P1 and P3 as directors of Radiant Splendour.

(c) D3 acted as agent of D1 and D2 in communicating and performing orders from D1 and D2 to P2.

[35]However, without particulars of the overt acts committed by each of the Defendants, the claim in conspiracy is unsustainable. The Plaintiffs failed to plead sufficient or material particulars to establish the elements of the tort of conspiracy. Instead, the Plaintiffs merely resorted to using phrases such as 'on the instructions/direction/order of the Defendants' or the 'Defendants instructed/directed/ordered' to suggest a conspiracy between the Defendants.

[36]The Plaintiffs allege that a 'meeting of minds' is evident from a meeting held between D3, P1 and P2 wherein D3 acted as agent of D1 and D2. However, the purported instructions of D1 and

D2 to D3 are not set out and therefore the allegations are nothing but vague, unsubstantiated assertions. By merely alleging that D3 was acting as D1 and D2's agent without particulars of the alleged overt acts of D1 and D2 is insufficient to establish that the Defendants acted in concert. At best, the allegations only suggest that D3 took part in certain meetings, but that is inadequate to satisfy the requirement for a plea of conspiracy.

[37]In my view, the allegations in the SOC are insufficient to make out a case in conspiracy. Thus the SOC discloses no reasonable cause of action based on the tort of conspiracy to injure.

[38]The Plaintiffs said that 'the Defendants' involvement in the conspiracy to injure was a complex case where it is hard to only explain and prove through affidavit evidence'. However, this does not justify the Plaintiff's failure to sufficiently plead material particulars in the SOC.

[39]In their written submission, the Plaintiffs said that their cause of action against D3 is for the tort of conspiracy to injure. Accordingly, the other causes of action discussed below concerns only D1 and D2.

Breach of duty of care pursuant to a principal-agent relationship

[40]An action under the tort of negligence involves establishing the following elements: (a) a duty of care owed by the defendant to the plaintiff; (b) a breach of that duty by the defendant; (c) the breach caused the damage; and (d) the damage is foreseeable and not too remote. (See the Court of Appeal case of *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49 at 56).

[41]Here the SOC does not identify the specific duties said to be owed by D1 and D2. Neither does it plead with sufficient particularity how the said duties were breached by D1 and D2. Save for the bald assertion that D1 and D2, as principals, are liable for the tax levied on the Transactions, the SOC is bereft of any particulars as to:

(a) How, why, when and in what manner P1 and P2 were appointed as proxies;

(b) What were the terms of the appointment as proxies;

(c) What were the instructions in relation to the Transactions;

(d) Whether P2 and P1 discharged their duties in accordance with the instructions of D1 and D2 as their principals;

(e) What are the Transactions;

(f) What was the income that was derived from the Transactions for which tax was levied;

(g) Did D1 and D2 obtain any benefit/gain from the income derived from the Transactions for which tax was levied.

[42]In my view, the necessary elements and particulars to establish a claim in negligence has not been made out against D1 and D2. Thus the SOC discloses no reasonable cause of action based on the tort of breach of duty of care pursuant to principal-agent relationship.

Misfeasance in public office

[43]The tort of misfeasance in public office relates to deliberate dishonest conduct and abuse of power by a public officer. The key ingredients of the tort are:

(a) an abuse of public power or authority by a public officer;

(b) who either (i) knew that he was abusing his public power or authority; or (ii) was recklessly indifferent as to the limits of his public power or authority; and

(c) who acted or omitted to act either with (i) the intention of harming the plaintiff (targeted malice); or (ii) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff.

[44] In *Tony Pua Kiam Wee v Government of Malaysia & Another Appeal* [2020] 1 CLJ 337 at 385, the Federal Court said:

> *"It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, ie the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tour* ***hard to plead and to prove as it is only in rare circumstances that such facts subsist as would allow the plea to*** *remain on the record.* ***In many instances the*** **plea** ***is struck*** **out as** ***it is simply*** **insufficient. This is because, it is not every act or omission on the part of a public officer which lends itself to the bringing of**

an action premised on this tort. It requires outrageous conrfnct with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated."

[45]The Plaintiffs claim that D1 abused his position and rescinded the tax remission approval on 25.8.2016 due to P1's refusal to follow D1 and D2's instruction in relation to the Bala Suit. Further, that D1 committed misfeasance in public office by causing LHDN to file the Winding-Up Petition when P2 was solvent/insolvent (the SOC states both — *"sebenarnya solven ("insolvent")').*

[46]The Plaintiffs failed to plead the 'outrageous conduct' of D1 or the targeted malice against the Plaintiffs. As explained in Tony Pua *(supra),* not every action by a public officer can be the basis to claim misfeasance of public office.

[47]In my view, the SOC does not contain the necessary elements to establish a claim under this cause of action. Furthermore, D2 was not a public officer and no claim can be sustained against her in this respect. Thus, the SOC discloses no reasonable cause of action based on the tort of misfeasance in public office.

Defamation

[48]In a suit for defamation, there is an obligation to give particulars under Order 78 rule 3(1) of the Rules of Court which reads:

"Obligations to give particulars (O. 78, r.3)

(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies on in respect of such sense."

[49]It is well established that the actual words used must be set out as the material facts so that the defendant knows the precise charge against him. In *Tlow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761 at 781, the Court of Appeal held that the alleged defamatory words should be set out in verbatim in the particulars of the claim and usually in the form of a

quotation. A description or summary of the content, purport or effect is insufficient. Any other defamatory statements, other than that specifically pleaded, ought not to be considered or adjudicated upon. Additional alleged defamatory statements must not be allowed to be adduced at trial.

[50]The Plaintiffs alleged that the publication of the Winding-Up Petition by LHDN has defamed the Plaintiffs and caused the Plaintiffs' reputation to be lowered. However, the Plaintiffs failed to identify the alleged defamatory statement. Moreover, the Plaintiffs failed to provide material particulars such as: (a) Who is the author of the defamatory statement? (b) In which newspaper was the defamatory statement published? (c) When was the defamatory statement published?

[51]In my view, the Plaintiffs' failure to reproduce the statement(s) which they claim to be defamatory and failure to particularise material facts, are fatal to their action. In any event, if the Plaintiffs claim that they have been defamed by the advertisement of the Winding-Up Petition by LHDN, the proper party to sue would be LHDN and not D1 and D2. By reason thereof, the SOC discloses no reasonable cause of action based on the tort of defamation.

II. P3 has no locus standi

[52]The issue of whether a plaintiff has locus standi ought to be decided by the court as a threshold issue before going into the merits of the case. If a plaintiff is found to lack standing to sue, then the action fails in limine at the threshold stage and there is no inquiry into the merits of the case. (See the Court of Appeal case of *Shahidan Shafie v Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 at 803).

[53]In the SOC, P3 alleges that he is a director of P2 without setting out: (a) any wrongdoing/misconduct towards him personally; and (b) the remedy he is entitled to as a result of the wrongdoing/misconduct. The only other allegation in the SOC involving P3 is at paragraph 22A concerning his attendance at a meeting on 9.9.2015. However, the SOC fails to show how P3, as an individual, is aggrieved.

[54]In my opinion, P3 does not have locus standi to sue to recover losses suffered by P2 when

P2 is already suing as a plaintiff in the present suit. It is trite that when a company incurs a contractual obligation or a liability in tort, that obligation or liability is that of the company and not of its members or officers. (See the High Court case of *Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insurance (M) Bhd and another suit* [2011] 3 MLJ 379 at 407). Therefore, P3's action against the Defendants is unsustainable.

III. Scandalous, Frivolous or Vexatious *(O. 18 r. 19(1)(b))*

[55]In *Indah Desa Saujana Corp Sdn Bhd & Ore v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* (supra) at page 35, the Court of Appeal defined scandalous, frivolous or vexatious as follows:

> *"In the context of O 18 r 19(1)(b), 'scandalous' is taken to mean wholly unnecessary and irrelevant.*
>
> *'Frivolous' or 'vexatious' means that the pleadings are obviously unsustainable. In considering this ground, affidavit and undisputed facts may be referred to."*

Tax Liabilities

[56]It is evident that the unpaid tax are the tax liabilities of the Plaintiffs and no one else.

(a) P1 and P2 defaulted and owed substantial amounts of taxes in 2015. That is their statutory liability. As a result of the Plaintiffs' failure to pay the tax arrears, the LHDN Suit was filed against P2 and its directors (including P1 and P3). The JID was then entered.

(b) P1 and P2 made applications and appeals to LHDN pleading for remission and/or reduction of tax which finally were not approved by the MOF. Thereafter LHDN wrote to P2 on 25.1.2017, demanding for full settlement of the tax arrears owed by P1 and P2.

(c) As a result of P1 and P2's failure to settle the tax arrears in full, LHDN commenced the Winding-Up Proceedings. Thereafter P1 and P2 again appealed vide letter dated 26.7.2017 for reinstatement of a lapsed offer previously made by LHDN on 9.12.2015 **("Appeal for Reinstatement").** The Appeal for Reinstatement was forwarded by D1 to MOF for consideration.

(d) The Appeal for Reinstatement was partially allowed to the extent that only the remission of the penalty imposed on the tax in arrears was allowed. Further, the total outstanding tax could be paid in 24 instalments. Despite all the indulgences granted, the outstanding tax was never settled by the Plaintiffs.

(e) A settlement was agreed upon between LHDN and P1 together with P2 on 2.3.2018. This shows that LHDN had valid claims against the Plaintiffs.

[57]From the above, it appears that the Plaintiffs have repeatedly acknowledged the tax liabilities owed by P1 and P2 by making various requests for tax remission and making the Appeal for Reinstatement in 2015. This suggest that the instant suit, which was filed in 2018, is an afterthought and aimed at evading the Plaintiffs' tax liabilities. The allegations against D1 and D2 in relation to the Plaintiffs' tax liabilities were raised for the first time in the present suit.

[58]From the pleadings filed by P2 in opposing the Winding-Up Proceedings:

(a) P1 made a bare denial to LHDN's demand and said that he was considering filing an application to set aside the JID. To date, no such application has been made.

(b) The Plaintiffs have never sought hitherto to make D1 and D2 liable for the tax levied on income from the Transactions. Neither were there any accusations of conspiracy to injure, breach of duty of care, misfeasance in public office or defamation. The allegations against D1 and D2 are afterthoughts.

[59]For the reasons above, the SOC is obviously unsustainable and ought to be struck out.

Alleged Abuse of Power

[60]The Plaintiffs seem to suggest that D1 had unfettered discretion to approve the application for tax remission. However, D1 in his Affidavit in Support affirmed on 8.10.2019 filed herein offered the following explanation on the exercise of discretion in approving requests for tax remissions:

(a) Under section 129(1)(b) of the Income Tax Act 1967 and section 26(1)(b) of the Real Property Gains Tax Act 1976, the tax payable by any person may be remitted by the Minister of Finance, on grounds of justice and equity.

(b) The approval for the application for tax remission is subject to extensive evaluation and deliberation by both LHDN and MOF. Thus, the discretion of the Minister of Finance, as D1 then was, is not unfettered.

(c) When faced with requests for remissions, D1 consulted with and relied and acted on the recommendations and advice of officers from MOF and LHDN. D1 never gave approvals or rejections based on personal considerations. If D1 did what he was accused of doing, there would be no need for him to have the matter referred to the officials.

(d) Therefore, based on the explanation above, D1 did not have unfettered discretion and did not abuse his power. He took the recommendations and advice of officers from MOF and LHDN.

Alleged control over Berjaya Sompo and Bank Rakyat

[61]Berjaya Sompo and Bank Rakyat are corporate entities operating through their respective board of directors. They act in accordance with the provisions of their constitution (Articles and Memorandum of Association) and the Companies Act 2016. Due regard must be given to the statutory scheme of decision making by corporate entities.

[62]Further, both these entities are regulated financial institutions and subject to strict supervision by Bank Negara Malaysia. As an insurance company, Berjaya Sompo is governed by the Financial Services Act 2013. As a financial institution incorporated under the Co-operative Societies Act 1993, Bank Rakyat is governed by the Development Financial Institutions Act 2002.

[63]D1 and D2 are therefore incapable of influencing commercial decisions by Berjaya Sompo and Bank Rakyat. The Plaintiffs' allegation that D1 and D2 had control over Berjaya Sompo and Bank Rakyat is misconceived and unsustainable.

Unsustainable Assertions

[64]J The Plaintiffs' assertions in the SOC appear to be unsustainable for the following reasons:

(a) The allegation that the relationship between D1 and D2 and P1 became tense in 2012 due to P1's refusal to follow their instructions in relation to the Bala Suit appears to be implausible as the Bala Suit was only filed in July 2017.

(b) The allegation that the commencement of the LHDN Suit on **14.5.2015** and the filing of the Winding-Up Petition on **8.5.2017** were to exert pressure on P1 in the Bala Suit appears to be implausible as the Bala Suit was only filed in July 2017.

(c) The allegation concerning a settlement agreement in respect of a financing facility obtained by P2 from Bank Rakyat as D1 and D2's proxy appears to be implausible as the settlement agreement dated 19.4.2013 reveals that P2 did not take any financing facility from Bank Rakyat (it was Radiant Splendour instead).

(d) The allegation that the withdrawal of the approval for remission of tax in LHDN's letter dated 25.8.2016 was on D1's order due to P1's refusal to follow his instructions in relation to the Bala Suit appears to be implausible as the Bala Suit was only filed in July 2017.

(e) The allegation that the Winding-Up Proceedings caused the contract between P2 and IKEA to be rescinded and resulted in the Plaintiffs suffering losses amounting to RM74 million appears to be implausible as:

(i) The said contract was not between IKEA and P2 but another entity known as Carpet Prima Sdn Bhd; and

(ii) The DHL Shipment Notification email enclosing a termination letter by IKEA Supply AG (which appears to be on 5.4.2016), pre-dates the commencement of the Winding-Up Proceedings.

[65]Through P1's Affidavit in Opposition affirmed on 30.10.2019 filed herein and their written submission, the Plaintiffs attempted to clarify or rectify the deficiencies in the SOC. In particular,

the Plaintiffs sought to explain matters pertaining to the relationship between P1 and D1 and D2 which allegedly became strained in 2012 due to matters arising out of the Bala Suit (which was only initiated in 2017). The Plaintiffs' explanation using that the issues in the Bala Suit flow from an earlier suit in Kuala Lumpur High Court Suit No. 22NCvC-281-06/2014 (which was struck out) and continuing disclosures made by P1 in relation to certain events occurring in 2008.

[66]It is trite that parties are bound by the four corners of their pleadings. A defect in a pleading cannot be rectified by affidavit evidence or submission. In *Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor* [1999] 2 MLJ 473 at 479, the High Court held that the matters stated in the affidavit of the plaintiff in reply to a striking out application cannot be relied upon to make good the omissions in the statement of claim so as to clothe the plaintiffs with a cause of action against the defendants. The court cited a line of authorities, including the Federal Court case of *UMBC Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, to the effect that an omission or defect in a statement of claim cannot be made good by affidavit evidence.

[67]J In my view, the Plaintiffs' claim is scandalous, frivolous and vexatious. It contains improbable allegations, which remain unsupported by any material evidence. The Plaintiffs' assertions are inconsistent with the contemporaneous documents and are inherently improbable. (See the High Court case of *Tan Sri Halim Saad v Tan Sri Nor Mohamed Yakcop & Ors* [2014] 11 MLJ 379 at 398). There is no reason why this matter should proceed to trial.
IV. Prejudice, Embarrass or Delay a Fair Trial *(O. 18 r. 19(1)(c)*)

[68]The vague and imprecise allegations contained in the SOC make a fair trial difficult or impossible. If a trial is allowed to proceed on such vague and imprecise allegations, the Plaintiffs will gain an unfair advantage over the Defendants by having the opportunity to reformulate their case while the trial is ongoing. The Defendants will be at a disadvantage as they may be caught by surprise at the trial and may not be prepared to answer the newly formulated case.

[69]It is trite that a pleading is embarrassing where it is not clear what is being pleaded. (See the High Court case of *Abdul Jalal Ahmad & Ors v Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors* [2004] 7 CLJ 293 at 302). The following passage from the Singapore High Court

case of *Philip Morris Products Inc v Power Circle Sdn Bhd & Ors* [1999] 1 SLR(R) 964 at 965 is instructive:

> *"I had perused the statement of claim in advance. To explain how the statement of claim came across to me I must restate my view on the concept of cause of action. In Multi-Pak Pte Ltd v Intraco Ltd* [1992] 2 SLR(R) 382 *I explained that the concept has two dimensions. First, it means the legal basis which entitles the plaintiff to succeed. Next, it signifies the factual situation which entitles one person to obtain from the court a remedy against another person.*
>
> *The importance of the second limb lies in its purpose.'* **there must be ample and clear allegations to inform the opponent and the court in advance of the case the opponent has to meet** *and settle the defence and prepare for the trial.* ***Without thaf the defendants will be embarrassed****. It may even* ***amount to denial of justice to the defendants*** *as he might be able to assemble and preserve the necessary evidence to establish his defence. In other words, Stich incompetent and* ***incomplete pleading might make a fair trial difficult or impossible."***

[70]In *Wharf Properties Ltd And Another v Erlc Cumine Associates, Architects, Engineers And Surveyors* [1991] HKCU 0413, the Privy Council said:

> *"It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate if and that it should, there/ore, be allowed to continue unspecified in the hope that, when it comes to trial, he may be able to reconstitute his case and make good what he then feels able to plead and substantiate."*

V. Abuse of Process *(O. 18 r. 19(1)(d))*

[71]What constitutes abuse of process was decided in *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145 at 151 where the Federal Court said:

> *"We would also like to state here that it is the court which is empowered to deal with the abuse of its process in the* ***inferest of justice*** *and on grounds of* ***public policy****. ... On this point, we would like to refer to the case of Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 *where His Lordship Yong Pun How CJ, in delivering the judgement of the Court of Appeal of Singapore had this to say at p 384:*
>
> > *"The term, 'abuse of the process of the cout', in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of the public policy and the interest of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process*

of litigation ... if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court."

The allegations in this Action are nerthoughts

[72]The Plaintiffs have never previously asserted that D1 and D2 are liable for P1 and P2's taxes. The allegations that D1 and D2 are liable for the said taxes are clearly afterthoughts.
Multiplicity of Proceedings

[73]In the SOC, the Plaintiffs include matters and issues which have already been raised and are the subject matter of other pending legal proceedings.

(a) The Plaintiffs pleaded matters pertaining to the loan facility given by Bank Rakyat and D1's interference on the Berjaya Sompo insurance claim. These form the subject matter of Kuala Lumpur High Court Civil Suit No. WA-22NCVC-793-11/2018 ("**Bank Rakyat Suit**"). The Bank Rakyat Suit was brought against all the Defendants herein and two others, premised on similar facts and causes of action namely conspiracy to injure, fraud, malfeasance. The Bank Rakyat Suit was struck out by the High Court, and the Plaintiffs' appeal is currently pending before the Court of Appeal.

(b) Prior to the commencement of the Bank Rakyat Suit, the Plaintiffs issued a writ against Bank Rakyat vide Kuala Lumpur High Court Suit No. WA-22M-225-06/2018 ("**Earlier Suit**"). The subject matter and the reliefs sought in the Earlier Suit were the same as that in the Bank Rakyat Suit. This is supported by the fact that the Plaintiffs themselves applied to consolidate the Bank Rakyat Suit with the Earlier Suit. (The Earlier Suit has since been withdrawn as a settlement was reached between the Plaintiffs and Bank Rakyat).

(c) The allegation concerning P1's refusal to follow D1 and D2's instructions to appoint Counsel as P1's solicitor and file the Favourable Defence was raised in the Bala Suit. P1 applied to add D1 and D2 as third parties in the Bala Suit, which application was dismissed by this Court.

(d) In an application for committal filed in the Bala Suit, the plaintiffs therein sought to commit D3, Counsel and one other to prison on similar allegations as pleaded in the instant suit. Particularly via a police report dated 14.9.2018 exhibited in P1's Affidavit in Opposition affirmed on 22.11.2019 filed herein. P1 filed affidavits in support of the said committal proceedings.

[74]Issues that are matters for consideration in the Bank Rakyat Suit and the Bala Suit ought to be dealt with in those actions. The rule against multiplicity of proceedings would justify the instant suit being struck out to avoid the possibility of inconsistent findings. The rule against multiplicity of proceedings is contained in paragraph 11 of the Schedule of the Courts of Judicature Act 1964 which confers the High Court with the following power:

> *"Power to dismiss or stay proceedings where the matter in question is res judicata between the parties, or where* ***by reason of multiplicity of proceedings in any coud or courts the proceedings ought not to de continued."***

[75]In *Gasing* Heights (supra) at page 275, the High Court held that the filing of a collateral action is an abuse of process which must result in the action being struck out.

[76]It was held in *Penang Pot Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686 at 697 that multiplicity of actions was reflected in that case where the plaintiff filed an originating summons whilst the plaintiff's writ action was awaiting trial. The Court of Appeal said that both actions:

> *"do not go well together and they give rise to multiplicity of actions and that would in turn amount to an abuse of the process of court".*

[77]In *Pilecon Engineering Bhd v Malayan Banking Bhd* [2012] 3 MLJ 100 at 121, the High Court said:

> *"With the multiple suits filed, all in respect of the same complaint, there is what I would term action akin to abuse of process in such repeated exercises on the part of the plaintiff. Such acts must be stopped to prevent abuse and loss of confidence in the legal and judicial system".*

[78]In my view, the present suit ought to be struck out on the grounds that the multiplicity of actions filed by the Plaintiffs amount to an abuse of process.

Conclusion

[79]For the reasons above, I am satisfied that this is a plain and obvious case for striking out. The SOC is obviously unsustainable and is bound to fail if it was to proceed to trial. I therefore allowed both Encl 36 and Encl 37. I ordered P to pay 2 sets of costs. A sum of (a) RM15,000 to D1 and D2, and (b) RM10,000 to D3.

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