



IN THE SUPREME COURT OF NAURU

CIVIL SUIT No. 42/2014

BETWEEN

RENATA BERNICKE

}

PLAINTIFFS

AND

LEON ADEANG

}

DEFENDANT

Before: Khan, J

Date of Hearing: 20 and 21 August 2015

Date of Submissions : 30 December 2015, 18 January 2016, 20 January 2016 & 8 April 2016

Date of Judgment: 20 May 2016

CATCHWORDS: Common law on malicious prosecution as it was as at 31 January 1968 altered- pursuant to section 4(b) of Custom and Adopted Laws Act 1971.

Tort of Malicious Prosecution is not dependent or confined to prosecution of criminal offences first- it is available as a tort generally- and extends to all civil cases.

Elements of Malicious Prosecution: 1. Malice - 2. Lack of reasonable or probable cause for claim- 3. Claim concluded in claimant's favor -4. Financial loss including general damages for distress, hurt and humiliation.

APPEARANCES

For the Plaintiff: Ms. G. Hartman
For the Defendant: Mr. V. Clodumar (Pleader)

JUDGMENT

INTRODUCTION

1. This is the defendant's claim for malicious prosecution against the plaintiff. He claims that the plaintiff, without any personal knowledge or information from witnesses or other sources accused him of damaging the foundation (foundation) of her house which was under construction. She also reported the matter to the police. The foundation was damaged on or about the 8 September 2014 and the complaint was lodged with the police around that time.

THE FACTS

2. The plaintiff and defendant are first cousins and they together with others are landowners in respect of land name Akauw, portion no. 377 in the District of Buada.(land).
3. The plaintiff is an Immigration Officer employed by the Department of Justice and Border Control. The defendant is a Police Officer in Nauru Police Force and at the time of incident was a police officer.
4. The defendant's sister Dandylian Obeta (sister) is also one of the land owners. She obtained an approval from the other land owners to build a house. Her house site was shown to her by the land owners after which she commenced the construction. She was only able to build up to the foundation stage and she subsequently gave her house site to the defendant.

5. The plaintiff also commenced to build her house in front of the defendant's house site. She also was only able to build to the foundation stage when it was damaged. At the time of the damage she was out of the country and did not witness the damage.
6. Upon her return she found out from her sister that the defendant and her sister had been to see her in Buada, and they had expressed concern about the location of her house site which she claimed had been allocated to her by the land owners.
7. Since the plaintiff was out of the country she did not see who damaged her foundation, nor did she have any information from any witnesses or any sources as to who had damaged her foundation.
8. Despite having any evidence or information as to who actually damaged her foundation the plaintiff filed a claim against the defendant 4 September 2014 in this court. She claimed the sum of \$2404.00 as damages, and also made an application for interim injunction. Her application for interim injunction was listed on 12 September 2104 before her Honour Hamilton White J. The defendant did not attend court as he was abroad. Ms. Hartman of counsel for the plaintiff informed the court that in the following terms:
"the defendant was unhappy about building work in Buada and bricks etc. pulled out of foundation and later destroyed more of the building".

Her Honour Justice Hamilton White made an order in the following terms:

"Interim injunction issued preventing defendant or his agents from removing damaging or in any way interfering with plaintiff's building of a dwelling house at Buada area."

9. On the 19 September 2014, the defendant through his pleader Mr. Clodumar filed his statement of defence and a counterclaim. He denied damaging the foundation, and in his counterclaim he claimed that the plaintiff had wrongfully accused him of damaging the foundation. He also stated that was a criminal

offence and that allegation upset him and he was very distressed because of his profession as a police officer. He claimed for damages in the sum of \$5000.00 and costs in the sum of \$900.00 in his counterclaim.

10. On 24 September 2014, the defendant filed an affidavit in which he again denied damaging the plaintiff's foundation. His sister also filed an affidavit on the same day in which she admitted that she had damaged the plaintiff's foundation on 8 September 2014.

11. As a result of the defendant and his sister's affidavit the plaintiff changed her stance. In her reply to the statement of defence filed on 30 October 2015, she claimed that the defendant was fully aware of the damages and he was somehow indirectly involved in damaging the foundation.

12. On the 16 January 2015, the plaintiff filed an amended statement of claim against the defendant in which she added his sister as a co-defendant. In the amended claim the direct allegation against the defendant of damaging the foundation was abandoned, and instead it was claimed that the defendant and his sister were seen around the foundation prior to it being damaged, and therefore both the defendants should therefore pay for the damages to the foundation.

13. On 25 May 2015, both parties appeared before the Registrar Mr. D. Toganivalu. The plaintiff's counsel withdrew the amended claim against the defendant. She advised the Registrar that the plaintiff had reached certain compromise with the defendant's sister. No orders for costs were made for withdrawal of the claim against the defendant and his counterclaim was listed for hearing.

HEARING OF THE MATTER

14. The matter was heard by me on the 20 and 21 August 2015.

EVIDENCE

15. The defendant's evidence was that the plaintiff had initially made a report against him to the police and she subsequently complained directly to the Commissioner of Police (Commissioner) that he had damaged her foundation. As a result of the complaint the defendant was summoned by the Commissioner to his office. He was asked as to whether he was able to cope with his work. He felt very hurt and humiliated. In cross examination it was suggested to the plaintiff that she had made a complaint against the defendant to the Commissioner. She did not deny that and said that she cannot recall that. The defendant was questioned by the plaintiff's counsel as to whether he had been disciplined by his superiors. He said that he had not been disciplined but he was questioned as to his ability to perform his work.
16. Despite withdrawing the claim against the defendant he was still cross examined as to whether he had incited his sister to do the damage.
17. As a result of the report by the plaintiff to the police and in particular to the Commissioner, the defendant became very depressed and was unable to do his work properly so he took 2 months leave without pay. He lost wages in the sum \$2240.00 for that period.
18. The plaintiff's counsel in her closing written submissions filed on the 18 January 2016 stated that:

“ The plaintiff in closing submits that the emotional distress as claimed by the defendant is nothing more than a bruised ego and that the defendant has not one bit proven mental stress and anxiety. The defendant is a lying, arrogant cousin who obviously took his position in power within the Police Force to manipulate the plaintiff's case.”

There is no evidence before me that the defendant ever used his position within the police force to manipulate the plaintiff's case and submission made by the plaintiff's counsel is completely without any basis.

CLAIM

19. The defendant is making a total claim of \$5500.00, which is inclusive of the sum of \$2240.00 as loss of salary for taking leave without pay and costs in the \$1500.00.

MALICIOUS PROSECUTION

20. The defendant's claim is for malicious prosecution and there are two lines of authorities and cases on malicious prosecution which are:

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

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

21. The above definition was adopted by the House of Lord in **Gregory v Portsmouth City Council [2002] 1AC 419.**

22. If I were to follow this line of authority then the defendant's claim would not even meet the threshold, as the first limb would not be satisfied, that is, there was no criminal charges so on that basis alone the his claim would fail.

23. The other line of authority is the Privy Council decision (a split decision 3to 2) in the case of **Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another [2013] UKPC 17(Sagicor).** (Members of the Judicial Committee of the Privy Council: Lord Neuberger, Lady Hale, Lord Kerr, Lord Wilson, Lord Sumption.)(Sagicor).

In this it was held that the tort of malicious prosecution is not, as has been the law in England for centuries, confined to the prosecution of criminal offence (and a small disparate collection of civil claims) but is available as a tort generally, and extends to all civil claims.

24. The Sagicor case is a very lengthy decision and the facts and determination together with the dissenting views is contained in the press summary of the Judicial Committee of the Privy Council dated 13 June 2013 which is as follows:

“BACKGROUND TO THE CASE

This appeal concerns the scope of two closely related torts. The first is the tort of abuse of process, which concerns the abuse of civil proceedings for a predominant purpose other than that for which they were designed. The second is the tort of malicious prosecution, which concerns the launch of ultimately unsuccessful proceedings instituted with malice and without reasonable or probable cause.

In 2004, Hurricane Ivan struck Grand Cayman, and extensively damaged a residential village insured with Sagicor General Insurance (Cayman) Limited (“Sagicor”). Sagicor appointed Mr. Alastair Paterson to act as its loss adjuster in relation to a claim arising from the insurance. On Mr. Paterson’s recommendation, advance payments of CI\$2.9m were made to a company known as Hurlstone, which had been appointed to repair the damage. Mr. Frank Delessio, who joined Sagicor as Senior Vice President, became concerned that there was a serious deficiency in the documentation to support the advance payments. He instructed another loss adjuster, who valued the work completed by Hurlstone at on CI\$0.8m, of which CI\$0.7m was said to be the responsibility of Sagicor. Mr. Delessio stated that he intended to drive Paterson out of business and to destroy him professionally.

Sagicor claimed damages against Mr. Paterson and Hurlstone for deceit and conspiracy, and alleged that (i) Sagicor had paid Hurlstone CI\$2.9m for works for which it was liable to pay only CI\$0.7m, (ii) the payments were made as a

result of fraudulent misrepresentations about the value of the works, (iii) Mr Paterson and Hurlstone had conspired together to make the misrepresentations. Mr. Delessio was instrumental in alerting a journalist to the allegations, and "The Caymanian Compass" subsequently reported them. Three months prior to the dates fixed for trial, Hurlstone made disclosure of documents which indicated its extensive payments to subcontractors and suppliers. Sagicor discontinued the action. Henderson J ordered Sagicor to pay the costs of Paterson and Hurlstone on an indemnity basis, and granted Paterson leave to amend his counterclaim (for fees payable under his contract with Sagicor) so as to include a claim against Sagicor founded on the tort of abuse of process, and treated this amendment as relying alternatively on the tort of malicious prosecution.

Henderson J concluded that Sagicor was not liable for abuse of process, nor for malicious prosecution. However, he concluded that, save in one respect, Mr. Paterson had established all of the elements of the torts of malicious prosecution: prior proceedings had been determined in his favour; allegations of fraud and conspiracy had been made maliciously, and without reasonable cause; and, as a result of the allegations, he had suffered substantial financial loss and significant other damage to the sum of CI\$1.33m. However, Henderson J held that he was precluded from holding Sagicor liable to Mr. Paterson, because in the light of the observations of the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419, the present state of the law confined the tort of malicious prosecution to criminal proceedings, and did not allow for its extension to civil proceedings, The Court of Appeal dismissed the appeal.

ADVICE

The board humbly advises Her Majesty (i) unanimously, that Sagicor is not liable for abuse of process, and (ii) by a majority of three to two (Lord Neuberger and Lord Sumption dissenting), that Sagicor committed the tort of malicious prosecution, and therefore that the appeal should be allowed and judgment entered for Mr. Paterson in the sum of CI\$1.335m. Lord Wilson gives the lead judgment for the majority.

REASONS FOR THE ADVICE

The tort of abuse of process

Sagicor did not commit the tort of abuse of process. It was not alleged that the legal process was used for any purpose for which it was not designed, and such an allegation could not have been made out on the facts [79],[93],[158],[163].

The tort of malicious prosecution

The majority consider that the common law originally recognised that the tort of malicious prosecution extended to civil and criminal proceedings [40]-[56]. The arguments against renewed recognition of the tort in civil proceedings fail to override the need for the law to be true to the rule of public policy that wrongs should be remedied [73],[81],[94]. There is no evidence that the tort deters the honest bringing of litigation [72],[87],[100], or that it leads to interminable litigation [72],[103],[108]. The requirements to demonstrate both malice and the absence of a reasonable or probable cause for the launch of the proceedings present a formidable hurdle to prospective claimants [789],[109]-[110]. It is unnecessary to impose a further condition that there must be a public function dimension in the malicious prosecution of proceedings [87],[104]-[106]. The disparate situations to which the tort has been confined in the context of civil proceedings are a rag-bag of cases, linked only by the occurrence of prejudice to the victim at or close to the outset of the proceedings [58],[67],[78],[86]. Substantial damage to the reputation of a defendant can be caused by false allegations made in civil proceedings long before it is restored, even if full restoration is then possible, by his or her vindication at trial [61]. As no other tort is capable of extension so as to remedy the wrong in this case, the observations of the House of Lords in Gregory should not discourage application of the tort [36]-[39],[115]-[118]. Further, control of abuse of legal proceedings is particularly well-suited to judge-made law [78],[84].

Lady Hale queries whether the Law Commission might consider the desirability of consolidating malicious prosecution and abuse of process into a single tort of misusing legal proceedings [83].

Lord Kerr adds that there is obvious logic in the suggestion that if a claim for malicious prosecution of civil proceedings is available, a claim for malicious defence of civil proceedings must also be available [111], although he deems it possible to remain sanguine about its likely prevalence [113].

The minority consider that confinement of the tort to the abuse of criminal proceedings has been a cardinal feature of the tort from its inception [136]-[142]. The class of civil cases in which the tort has been invoked all involve ex parte interlocutory orders, which give rise to special considerations [143],[178]-[179]. The distinction between civil proceedings and criminal prosecutions is neither arbitrary nor unsatisfactory. A malice-based tort makes no sense in the context of private litigation where the plaintiff is not exercising any public function [145]. The law has always been extremely reluctant to go beyond the exercise of the court's procedural powers to control its proceedings in a way that may deter access to justice [123]-[125]. The precise ambit of the tort will be both uncertain and potentially very wide [147],[194], and offers litigants an occasion for prolonging disputes [148]. Nothing has changed since Gregory to undermine the authority of the decision [131],146],[159].

Lord Neuberger considers that the minority's conclusion is reinforced by analysis of decisions of courts in the United States of America, which is the only jurisdiction in which there has been extensive discussion of the policy implications of extension of the scope of the tort. [165]-[196]."

25. In Sagicor case, the trial judge found that all the elements of malicious prosecution were made out which are:
- (a) Malice;
 - (b) Lack of reasonable or probable cause for the Sagicor claim;
 - (c) The Sagicor claim had been concluded in Mr. Patterson's favour, as it had been abandoned;
 - (d) Financial loss. The judge quantified Mr. Patterson's recoverable loss at CI\$1.335m (CI\$1.3m for economic loss, and \$0.35m for general damages for distress, hurt and humiliation.)

Custom and Adopted Laws Act 1971

26. The cases from England and the Privy Council cases are not directly binding on this court and they are only of persuasive nature. However, under the Custom and Adopted Laws Act 1971 the common law as it stood on 31 January 1968 was adopted as the laws of Nauru.

27. As at 31 January 1968 the common law with respect to the laws on malicious prosecution was that one of the requirements was that the claimant must first show that a criminal charge was laid against him and that it was resolved in his favour. I have discussed the law of malicious prosecution in England in more detail in paragraph 20 above.

28. In this case there were no criminal charges and the both counsel did not address me on Sagicor's case. As it was important development in the area of law on malicious prosecution I brought it to their attention. On 23 March 2016 I made orders for the parties to file further submissions as to whether I should accept the law as at 31 January 1968 or whether I should accept the changes brought about by Sagicor and thus alter the common law. The defendant's submissions were filed as ordered but Ms. Hartman has not filed her submissions to date. I had the matter called twice in this session on 16 May and 19 May 2016 and Ms. Hartman did not attend court on both days and instead got Mr. Tolenoa to appear on her behalf with very limited instructions. I have therefore decided to complete my judgments only on the basis of submissions filed by Mr. Clodumar.

29. Section 4(4)(b) provides as follows:

“A principle or rule of common law or equity adapted by this Section shall not be altered or adapted in its application to Nauru unless the Court which makes the authorization or adoption is satisfied the principle or rule so altered or adapted will suit better the circumstances of Nauru than does the principle or rule without that alteration or adaptation”.

30. Nauru is a very unique country. It is one of the world's smallest island nations, but it has a very complex land law system and consequently there are lots of disputes between the land owners and many land dispute cases are pending before the courts and Nauru Lands Committee.
31. This is a case between land owners who are tenants in common. As can be seen from the facts of this case that it is very easy to make reports which are completely unfounded. I am convinced that the law as stated in Sagikor should be adopted here because it will have many benefits to Nauru at large, most importantly people would feel more restrained in making unfounded allegations or reporting matters to the police or filing cases without any basis as they would know that consequences would be serious and dire. Making of unfounded claims or reports has all the potentials of inflaming the situation between the land owners. So if the law as stated in Sagikor is adopted people will think twice before making unfounded allegations or report and filing baseless claims in courts. For these reasons I accept that the law in Sagikor suits the circumstances of Nauru and to that extent the common law as it stood on 31 January 1968 is altered.
32. In this case the plaintiff did not have any evidence at all to say that the defendant had damaged her foundation and that satisfies paragraph 25(b) above; the claim was concluded in the defendant's favour as it was withdrawn or abandoned and that satisfies paragraph 25(c); the defendant suffered loss of income by taking 2 months leave without pay and is also entitled damages for distress, hurt and humiliation and lastly there is very strong evidence of malice on the part of the plaintiff in the conduct of her claim and her subsequent report to the Commissioner, the conduct of the trial itself and including the submissions filed on the plaintiff's behalf.

WITHDRAWAL OF CLAIM

33. When the plaintiff withdrew or abandoned her claim against the defendant before the Registrar, he did not make any orders for costs, nor did he invite any submissions thereon, so obviously costs were reserved. I make an order for costs against the plaintiff for withdrawing her claim against the defendant in the sum of \$1500.00


COSTS ON COUNTERCLAIM

34. In so far as the counterclaim is concerned the defendant is the successful party and is entitled to costs. Although the defendant was only claiming costs in the sum of \$1500 I think he is entitled to more than that considering the time and the way the plaintiff conducted this trial through her counsel. In all the circumstances I think costs in the sum of \$3000.00 would be fair and I award costs against the plaintiff in the sum of \$3000.00.

35. The total award against the plaintiff is the sum of \$9500 which is as follows:

- | | |
|--------------|-----------|
| (a) Damages- | \$5000.00 |
| (b) Costs - | \$4500.00 |

Dated this day of 20 May 2016


Mohammed Shafiullah Khan
Judge

