DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DI DALAM NEGERI SELANGOR DARUL EHSAN

[GUAMAN SIVIL NO: 23NCVC-10-06/2015]

ANTARA

1. **LEARNERGY SDN BHD**
   (NO. SYARIKAT: 842180-X)
2. **KOH MING KWANG** **... PLAINTIF**

DAN

ABDUL JALIL BIN OTHMAN **... DEFENDAN**

TORT: *Malicious prosecution - Police report - Police report was lodged to safeguard interest - Defendant lodged report following plaintiff's failure to return paintings - Inability to contact plaintiff and get updates on sale of paintings - Whether police report was lodged with malicious intent to pressure plaintiff to return paintings - Whether words in police report imputed criminal impropriety on plaintiff - Whether defendant was actuated by malice when he made police report*

CONTRACT: *Termination - Termination by conduct - Unconditional return of paintings - Absence of reservations of rights or allegations of breach of contract - Whether conduct of unconditionally returning paintings and acceptance thereof was clear indication of intention of parties to bring contract to an end - Whether principles of waiver, estoppel and termination by conduct operated*

CONTRACT: *Breach - Damages - Breach of covenant - Write ups on abstract modern paintings - Whether alleged breach of covenant wholly misplaced and untenable in law - Whether there was any request for write-up for paintings when they were put up for sale - Whether write-ups to abstract modern paintings were necessary - Whether there was waiver for requirement for write-ups - Whether there was basis to claim for damages for alleged breach of contract*

[Plaintiff's claim dismissed with costs.]

Case(s) referred to:

*Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals [2008] 6 CLJ 697 CA (**refd**)*

*Chang Nga @ Teh Siew Yoke & 8 Ors v. Lee Lang & 9 Ors [2009] 1 LNS 372 CA (**refd**)*

*Chao Yan San v. Yuen Ten Soo [2000] 1 LNS 339 HC (**refd**)*

*Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC (**refd**)*

*GP Autobat Sdn Bhd v. Battery Solutions Sdn Bhd [2018] 1 LNS 894 CA (**refd**)*

*Lim Hong Liang v. Tan Kim Lian @ Tan Kim Leong & Anor [1997] 5 MLJ 157 (**refd**)*

*Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA (**refd**)*

*Martin v. Watson [1996] AC 74 (**refd**)*

*Meteoric Civil Engineering And Construction lwn. Kekal Baru Sdn Bhd [2013] 1 LNS 358 HC (**refd**)*

*Pengarah Pejabat Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan Negeri Sabah & Ors v. Multi Inrich Sdn Bhd [2018] 3 CLJ 752 CA (**refd**)*

*Rawther v. Abdul Kareem [1965] 1 LNS 147 FC (**refd**)*

*Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA (**refd**)*

*Tan Ah Kian v. Haji Hassan [1962] 1 LNS 192 HC (**refd**)*

*Tan Hock Chan v. Kho Teck Seng [1979] 1 LNS 110 FC (**refd**)*

*Taib Awang v. Mohamad Abdullah & Ors [1984] 2 Rep 501 HC (**refd**)*

Legislation referred to:

Penal Code, s. 420

ALASAN PENGHAKIMAN

The pleadings

[1] The Plaintiffs claim damages against the Defendant for breach of contract, tort of malicious prosecution and tort of abuse of process.

[2] The 1st Plaintiff was in the business of marketing and selling antiques and art pieces and the 2nd Plaintiff was at the material time its Managing Director.

[3] The Defendant was at the material time a professor and member of the teaching faculty at the Faculty of Education, University of Malaya and a part time painter/artist.

[4] The 2nd Plaintiff made acquaintance with the Defendant at the Defendant's solo art exhibition at University of Malaya in early

October 2012. The 2nd Plaintiff offered his services to market and sell some of the Defendant's art pieces, mainly paintings. The Plaintiffs' case is that negotiations ensued between the parties as evidenced by exchange of emails between 19th and 24th October 2012. The Plaintiffs state that pursuant to these negotiations, the parties entered into Memorandum of Understanding dated 24th October 2012 ("Main Agreement"), and subsequently two collateral agreements dated 28th October 2012 ("1st Collateral Agreement") and 2nd November 2012 ("2nd Collateral Agreement") (collectively referred to as "the Agreements").

[5] The Main Agreement, amongst others, states that:

(i) All the Defendant's paintings listed in the Main Agreement given by the Defendant to the 1st Plaintiff are to be exclusively marketed and sold by the 1st Plaintiff.

(ii) These paintings cannot be taken back by the Defendant and passed to other parties/companies to be marketed for at least a period of 6 years from 24.10.2012 and if there are any bookings made for purchase of any of the paintings then the 6 years period shall be extended.

(iii) If the Defendant wants to terminate the agreement and take back the paintings then the Defendant would need to compensate the 1st Plaintiff 100% of the price the 1st Plaintiff intends to sell the paintings or a minimum sum of RM350,000.00.

(iv) This compensation for termination must be paid first before the Defendant can take back the paintings.

[6] The 1st and 2nd Collateral Agreements, amongst others, provide that:

(i) The 1st Plaintiff shall be entitled to keep the difference between the sale price by the 1st Plaintiff and the reserve price agreed to by the Defendant.

(ii) The Defendant confirmed receiving an antique vase on 24.10.2012 from the 1st Plaintiff as collateral for 30 of the paintings given to the 1st Plaintiff on 24.10.2012 and that this collateral was to further extend to cover all the 62 paintings delivered to the 1st Plaintiff.

(iii) The Defendant shall return the antique vase on the day that the Defendant receives payment for the paintings.

(iv) The Defendant agreed to provide a good story which is acceptable to clients of the paintings for the purpose of the client reselling the paintings by auction.

(v) The Defendant agreed to provide past and future accolades such as media write-ups, banners, and promotional materials to assist the buyers to resell the paintings.

(vi) The 1st Plaintiff had received a booking deposit of RM2,000 in respect of some paintings and 1st Plaintiff had paid the Defendant the sum of RM100.00 being 5% of the said booking fee.

[7] The 1st Plaintiff through the 2nd Plaintiff had, pursuant to the Agreements, taken possession of 62 paintings from the Defendant. The total reserved price for the 62 paintings agreed to by the 1st Plaintiff and the Defendant was RM835,940.00.

[8] The 1st Plaintiff states that it had procured an interested buyer for the paintings, one Starmind Corporation ("Starmind") from the United States of America, who had paid a booking deposit of RM2,000.00 to the 1st Plaintiff. The 1st Plaintiff avers that it had paid the Defendant 5% of the booking deposit amounting to RM200.00 as prescribed in the contract.

[9] The 1st Plaintiff avers that it had entered into an agreement with Starmind on 5.11.2012 wherein Starmind had agreed to purchase the said paintings for USD1,000,000.00 conditional upon the Defendant producing write-ups for each of the said paintings. The 1st Plaintiff alleges that in breach of the terms of the Main Agreement, as well as the two Collateral Agreements, the Defendant had failed or neglected to provide any write-ups as agreed by him despite repeated requests made by the 1st Plaintiff.

[10] Further, the Plaintiffs avers that the Defendant had on 22.8.2013 without just or reasonable cause and/or any cause at all, wrongly and falsely lodged a police report ("Police Report") against the 2nd Plaintiff alleging *inter alia* that the 2nd Plaintiff had dishonestly induced the Defendant to deliver the said paintings to the 1st and/or 2nd Plaintiff.

[11] The Plaintiffs further aver that on 2.11.2013 whilst the 2nd Plaintiff was overseas, the Defendant gained possession of the 62 paintings from the 2nd Plaintiff's wife by using the threat of the said Police Report without making any payment of compensation to the 1st Plaintiff as stipulated under the Agreements. This, the Plaintiffs alleges is a breach of contract. The 1st Plaintiff has particularized the breaches as follows:

(a) The Defendant had failed and/or neglected and/or omitted to provide write-ups for all the said paintings, all of which are abstract modern art pieces.

(b) The Defendant had taken back all the said paintings without making any compensation to the 1st Plaintiff.

[12] The Plaintiffs state that as result of the Defendant's breach of contract, the 1st Plaintiff had suffered the following loss and damage:

(a) Loss of profit from the sale of the said paintings amounting to RM2,664,060.00; and

(b) consequential loss of goodwill and reputation arising from the 1st Plaintiff's breach of its agreement with Starmind, as allegedly the 1st Plaintiff w

as unable to honour the sale of the paintings to Starmind.

[13] The Plaintiff further alleges that arising from the said Police Report, the 2nd Plaintiff was charged in the Petaling Jaya Magistrates' Court for an offence under section 420 of the Penal Code. The Magistrates' Court on 8.9.2014, i.e. after some 9 months later, granted the 2nd Plaintiff a discharge not amounting to acquittal.

[14] The 2nd Plaintiff thus alleges that the Defendant had committed the tort of malicious prosecution against the 2nd Plaintiff, the particulars of which as:

(a) The Defendant had lodged the said Police Report which had led to the 2nd Plaintiff being arrested, incarcerated in the police lock-up and criminal charges being laid against the 2nd Plaintiff at the Petaling Jaya Magistrates' Court;

(b) The Defendant had lodged the said Police Report without any reasonable or probable cause, as at all material time the 1st Plaintiff had fulfilled the terms of the Agreements and procured a buyer for the said paintings.

(c) The statements in the said Police Report were false and untrue and/or were recklessly made with malicious intent, and that it amounts to an abuse of process.

(d) The 2nd Plaintiff was given a discharge not amounting to acquittal by the Petaling Jaya Magistrates Court after 9 court attendances from January 2014 to September 2014.

(e) The Defendant had refused or omitted to withdraw the complaint in the said Police Report even after the paintings had been returned to the Defendant.

[15] The Plaintiffs further aver that the Defendant had misused the legal process when he recklessly made statements in the Police Report regarding the 2nd Plaintiff which allegedly were false and made with the ulterior motive of circumventing his contractual obligations under the Agreements and to wrongfully regain possession of the paintings.

[16] Wherefore, the 1st Plaintiff claims damages for breach of contract, and the 2nd Plaintiff damages for the tort of malicious prosecution and abuse of process.

[17] The Defendant denies the Plaintiffs' allegations of breach of contract, tort of malicious prosecution and abuse of process. The Defendant states that he had reasonable and probable cause to lodge the Police Report as the 2nd Plaintiff had for a long period of time after taking possession of the paintings not been contactable and the 2nd Plaintiff had not given any proper updates to the Defendant. The Defendant was fearful of losing the paintings.

[18] As to the Plaintiffs' allegation that the Defendant had failed or refused to provide write-ups for all the paintings, the Defendant states that there is no time period stated in the Agreements for such write-ups to be provided and that in any event the paintings were modern abstract pieces for which write-ups are never the norm. The Defendant further states that he never used the Police Report to apply pressure on the Plaintiffs to return the paintings. The Defendant states that the 2nd Plaintiff's wife, who is a director of the 1st Plaintiff, of her own free will called to return the paintings, thus evincing an intention to bring the contract to an end. The Defendant accepted the 1st Plaintiff's offer of return of the 62 paintings

[19] As for the allegations of malicious prosecution and abuse of process, the Defendant states that when he lodged the Police Report, there was probable and reasonable cause for him to do so. The 2nd Plaintiff was charged by the Public Prosecutor following independent police investigations and the Defendant states that he had no say in whether charges were laid against the 2nd Plaintiff. The Defendant states that when the criminal trial was to commence on 8.9.2014, there was a discussion in court between parties and the Defendant, based purely on compassionate grounds, agreed to amicably resolve the matter and have the charge against the 2nd Plaintiff withdrawn. The Deputy Public Prosecutor then in exercise of his discretion informed the court that the prosecution wished to have an order of discharge not amounting to acquittal recorded against the 2nd Plaintiff. The learned Magistrate then proceeded to record the order of discharge not amounting to acquittal recorded against the 2nd Plaintiff and released the 2nd Plaintiff. However, despite the aforesaid resolution of the matter, the Plaintiffs had then proceeded to file this action.

Analysis of the facts, issues and law

[20] The Defendant contends that the Main Agreement, 1st and 2nd Collateral Agreements are merely memorandums of understanding and are not contracts binding on the parties.

[21] In *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1995] 3 MLJ 141 the Court of Appeal held that in construing whether a document contain a binding contract, the court is not bound by labels ascribed to it by the parties. Instead the court must construe the document as a whole and to determine from its language the true nature and purport of the parties in order to determine the true relationship of the parties in that document. Similarly, in *Lim Hong Liang v. Tan Kim Lian @ Tan Kim Leong & Anor* [1997] 5 MLJ 157, the court held that in construing whether a document has legal effect or not, the label attached to the document say, 'memorandum of understanding', is not the criteria for construing such a document. The court must go on to examine the document and ascertain from its language used, its contents and other evidence, whether the parties intended to enter into a legally binding relationship, the breach of which would give rise to enforceable rights.

[22] In applying these principles to the facts herein, I find that when the language of the documents, namely, the Main Agreement, 1st and 2nd Collateral Agreements are construed in light of the overall evidence, I find that, despite the documents being termed as Memorandum of Agreement, all the elements required to form a contract, i.e. intention to form a legal relation, consideration, offer and acceptance, privity, are all present in these documents. There is no stipulation that the terms contained in these documents are subject to a formal contract to be entered in the future. Thus, I find that the Main Agreement, 1st and 2nd Collateral Agreements are legally valid and binding contracts between the 1st Plaintiff and Defendant.

[23] Now, I move on to the next question. Was there a breach of contract by the Defendant? The agreement is essentially for the sale of the Defendant's paintings by the 1st Plaintiff. The 2nd Plaintiff, being one of the two directors of the 1st Plaintiff had dealt with the Defendant at all material times in the beginning leading to the Agreements. After the 2nd Plaintiff, on behalf of the 1st Plaintiff, collected the 62 paintings from the Defendant (originally 63, and 1 was returned), there was a long lapse of time, almost 10 months, where the Defendant did not receive any feedback from the Plaintiffs. The Defendant had become apprehensive and lodged the Police Report to safeguard his interest. The contents of the Police Report reads as follows:

> *"Pada 28 Oktober 2012 jam lebih kurang 7.00 malam saya berada di alamat No. 1, Jalan 3/69B, Seksyen P/Jaya, didatangi seorang lelaki Cina yang dikenali sebagai David Koh Ming Kwang kerumah saya dan telah mengambil 63 buah lukisan dengan tujuan membantu saya menjual kepada pelanggan beliau. Namun demikian setelah menunggu hampir sepuluh bulan tiada sebarang berita daripada beliau. Saya telah menghubungi beliau namun tidak berhasil. Segala urusan yang dijanjikan tidak menjadi kenyataan dan bermacam alasan telah diberikan oleh beliau untuk tidak memulanginya. Saya memohon supaya beliau memulangkan kesemua lukisan. Namun beliau tidak mahu memulangkan. Tujuan saya membuat lapuran ini adalah untuk menuntut kesemua lukisan dipulangkan secara baik. Anggaran kesemua lukisan adalah RM553,200. Ini lah lapuran saya."*

[24] Following the lodgment of that Police Report, the police carried out investigations and the 2nd Plaintiff's wife (SP1), who is the other director of 1st Plaintiff, of her own volition contacted the Defendant and offered to return the 62 paintings, thus evincing an intention to terminate the contract between the 1st Plaintiff and Defendant. The Defendant accepted SP1's offer and accordingly the 62 paintings were unconditionally returned to the Defendant.

[25] There is no evidence showing that the Defendant had lodged the Police Report with the malicious intent to pressure the Plaintiffs to return the paintings. If indeed the 1st Plaintiff was of the view that it had every right to possession of the paintings pursuant to the agreement between the parties, then SP1 need not have made the offer to return the paintings to the Defendant. The Plaintiffs could have informed the police officer investigating the complaint that they have secured a purchaser for the paintings and that they had the contractual right to possession of the paintings and that they would not return them and that they wish to enforce their contractual rights. If indeed the 1st Plaintiff had wanted to retain its rights under the contract to claim for damages, then the return of the 62 paintings to the Defendant should have been done on that basis. However, it is pertinent to note that when the paintings were returned, it was unconditional, and without any reservations of rights or allegations of breach of contract on the part of the Defendant. The conduct of the 1st Plaintiff in unconditionally returning the 62 paintings and the acceptance thereof by the Defendant is clear indication of the intention of parties to bring the contract to an end. In the circumstance, the principles of waiver, estoppel and termination by conduct operated against the 1st Plaintiff and the 1st Plaintiff cannot be now allowed to raise issues of breach of contract and the like. See *GP Autobat Sdn Bhd v. Battery Solutions Sdn Bhd* [2018] MLJU 860 CA.

[26] The 1st Plaintiff further states that the Defendant had breached the contract by his failure to provide the write-ups for the paintings. There is no time stipulation within the Agreements for the Defendant to provide the write-ups. The Defendant states that in any event there were no requests from the 1st nor the 2nd Plaintiff for the Defendant to provide the write-ups. The Defendant further states that he is completely unaware of any contractual arrangement between the 1st Plaintiff and Starmind as to the purported sale of the paintings nor that Starmind had required the write-ups. The Defendant was desirous of having his paintings sold and if indeed the 1st Plaintiff had secured a deal with Starmind for the sale of the paintings sometime on or about 5.11.2012, i.e. 3 days after the 2nd Collateral Agreement, then it would have been incumbent upon the 1st and 2nd Plaintiff to have notified the Defendant of the Starmind sale and request for the write-ups, if such write-up was indeed essential for the sale. However, the evidence shows that there was complete silence on the part of the Plaintiffs for some 10 months after the 2nd Collateral Agreement. The Defendant had tried to contact the 2nd Plaintiff during this time for updates but to no avail. The Defendant in desperation had then gone on to lodge the Police Report.

[27] I am in agreement with counsel for the Defendant that there is no time stipulation in the contract for the Defendant to provide the write-ups for the paintings. Thus, when time is not specified in the contract and the 1st Plaintiff wishes to rely on that particular covenant and allege breach therefor, the 1st Plaintiff would have to first give notice of intention to do so and require the Defendant to remedy the alleged breach within a specified time. The 1st Plaintiff's right to rescind the contract or to seek specific performance of the contract only arises immediately after the lapse of such reasonable time as given in the notice. See: *Tan Hock Chan v. Kho Teck Seng* [1980] 1 MLJ 308; *Tan Ah Kian v. Haji Hassan* [1963] MLJ 400. In this case, the 1st Plaintiff did not give any such notice to the Defendant, and as such, I find that the allegation of breach of the covenant by the Defendant to provide the write-ups is wholly misplaced and untenable in law.

[28] The Defendant also testified that the 62 paintings were abstract modern art and that there is never any request for write-up for such paintings when they are put up for sale. When the evidence is considered in is totality, I find that the Plaintiffs did not request the Defendant to provide the write-ups within a specified time. In fact, when police investigations were in progress following the Defendant's Police Report, the Plaintiffs could have informed the police that the Defendant was in breach of the contract in failing to provide the write-ups and followed up on that with a written notice of the alleged breach to the Defendant and demanding that the Defendant remedy the breach. This, the Defendant did not do. This, to my mind is supportive of the Defendant's contention that such write-ups to abstract modern paintings are unnecessary and unheard of.

[29] Thus, from the 1st and 2nd Plaintiff's long silence of 10 months since the contract was entered into, and the complete lack of any notice to remedy breach issued by the 1st Plaintiff, it can be safely surmised that the 1st Plaintiff has waived the requirement for the write-ups to be produced by the Defendant. Hence, the 1st Plaintiff cannot belatedly be allowed to allege breach of covenant by the Defendant. See: *Meteoric Civil Engineering And Construction lwn. Kekal Baru Sdn Bhd* [2013] 1 LNS 358. Thus, I find that there is no basis for the 1st Plaintiff to claim damages for alleged breach of contract.

[30] As to the claim for malicious prosecution and abuse of process, I also find that the Plaintiffs have failed to establish both these claims. The essential elements of the tort of malicious prosecution that the 2nd Plaintiff needs to plead and prove are that:

(a) the Defendant set the criminal law in motion against the 2nd Plaintiff;

(b) the Defendant did not have any reasonable or probable cause for setting the law in motion against the 2nd Plaintiff;

(c) the Defendant was actuated by malice in the sense that he had a motive other than to carry the law into effect;

(d) the proceedings terminated in the 2nd Plaintiff's favour; and

(e) the 2nd Plaintiff had suffered damages.

(See *Rawther v. Abdul Kareem* [1965] 1 LNS 147; [1966] 2 MLJ 201 (FC))

[31] In the present case, the 2nd Plaintiff avers that the criminal charge against him at the Petaling Jaya Magistrates Court emanated from the Police Report lodged by the Defendant. To that extent, the 2nd Plaintiff argues that the Defendant had set in motion the criminal law against the 2nd Plaintiff, for it was the Defendant's Police Report that was the first information report that became the basis of police investigations and subsequently the charge against the 2nd Plaintiff. Thompson LP in *Rawther v. Abdul Kareem* [1965] 1 LNS 147; [1966] 2 MLJ 201 (FC) in construing whether a police complaint made by the defendant had the effect of setting the criminal law in motion in a claim for malicious prosecution held as follows:

> ... it is clearly impossible to hold the defendant responsible for the prosecution unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause."

[32] And more recently, the Court of Appeal in *Pengarah Pejabat Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan Negeri Sabah & Ors v. Multi Inrich Sdn Bhd* [2018] 3 CLJ 752 had held that:

> <u>Setting the criminal law in motion in the context of the tort of malicious prosecution means in our view the institution of a criminal prosecution by the Public Prosecutor and not the commencement of a criminal investigation by an enforcement agency.</u>
>
> ......
>
> It is settled law that the power to institute criminal prosecution and the general control of criminal proceedings are vested in the

Public Prosecutor, who is the ultimate and sole authority to decide whether or not any person is to be prosecuted for any offence known to law: *Long bin Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80; [1974] 2 MLJ 152 and *Johnson Tan Han Seng v. Public Prosecutor & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66.

[33] Similarly, in *Chao Yan San v. Yuen Ten Soo* [2000] 1 LNS 339; [2000] 3 AMR 3057, Richard Malanjum J (now CJ) after having referred to *Rawther v. Abdul Kareem* (*supra*) had held:

> Accordingly, the principle as regards the ingredient 'to set the criminal law in motion against the plaintiff' in an action for malicious prosecution appears to be thus: that merely lodging an information or complaint with the authorities such as the Police that a person may be guilty of an offence does not necessarily make the complainant answerable in damages for malicious prosecution in the event the prosecution does not proceed or fails. "The mere fact that an individual has given information to the police which leads to their bringing a prosecution does not make that individual the prosecutor". (see: *Martin's* case (*supra*). But if the falsity of the information or complaint made is solely within the knowledge of the complainant thereby producing a situation where it can be said that the authority responsible for the commencement of the criminal prosecution could not have been in a position to exercise his independent discretion or that the complainant has misled the authority in one way or another or that he has influenced the authority or instrumental to have the person alleged to be guilty of an offence to be brought to trial then such complainant should be answerable to a claim for malicious prosecution even though technically the power to initiate criminal prosecution lies elsewhere. In this country it is with the Public Prosecutor.

> And to put it briefly, a person making a complaint to an authority should not *per se* be held responsible for the prosecution of the person complained against since the decision to prosecute lies with the Public Prosecutor "unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause." (See: *Rawther's* case (*supra*)).
>
> And the burden lies with the plaintiff to prove that such is the case.

[34] This principle was derived in part from the judgment of Lord Keith of Kinkel in *Martin v. Watson* [1996] AC 74 where the learned judge had canvassed the position in several Commonwealth jurisdictions before making the following pronouncement:

> Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.

[35] In applying these principles to the facts herein, I find that there is nothing in evidence indicating that the statements made by the Defendant to the police in the Police Report were made without a belief in their truth for which he had reasonable and probable cause. The Defendant had laid the complain to the police when he was unable to contact the 2nd Plaintiff and get updates on the sale of the paintings for a period of some 10 months. The 2nd Plaintiff was being evasive and not responding to the Defendant's queries. Thus, I find that the Defendant had probable cause to make the Police Report.

[36] The mere fact that the Defendant had laid the complaint to the police in itself does not mean that the Defendant had set in motion the criminal law against the 2nd Plaintiff. The words of the Police Report do not make any acquisition of criminal impropriety against the 2nd Plaintiff. Neither do I find it to contain any material untruths of false averments. The criminal charge against the 2nd Plaintiff would not emanate solely from the contents of the Police Report. The police would have carried out their own independent investigations and collated the evidence necessary for the Public Prosecutor or his deputies to apply their independent mind to the evidence contained in the investigation papers to lay the charge against the 2nd Plaintiff. There is nothing in evidence to suggest that the criminal charge against the 2nd Plaintiff arose from falsity of the information or complaint made by the Defendant to the investigation and/or prosecuting authorities. Therefore, it cannot be gainsaid that the Defendant in making the Police Report knew of its falsity or was reckless as to its truth or that he did not have any reasonable or probable cause to make the complaint. In fact, contrary position is made out by the facts, i.e. that the Defendant had every reason to lodge the Police Report.

[37] The trial against the 2nd Plaintiff did not proceed on the appointed date as the parties, following a discussion in court, had decided to amicably settle their dispute, which led to the Deputy Public Prosecutor applying to court for an order of discharge not amounting to acquittal in respect of the charge against the Defendant. Again the agreement by the Defendant to amicably settle his dispute with the Plaintiffs cannot be equated to an admission of culpability, civil or otherwise, as regards his Police Report or the initiation of criminal proceedings against the 2nd Plaintiff.

[38] I also find that the 2nd Plaintiff has failed to prove another essential ingredient of the tort, i.e. that the Defendant was actuated by malice in the sense that he had a motive other than to carry the law into effect when he made the Police Report. In *Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals* [2008] 6 CLJ 697; [2008] 3 MLJ 492, in dealing with the issue of malice, Mohd Ghazali JCA (as he then was) had observed:

> What is malice? According to Osborn's Concise Law Dictionary (7th Ed) the word 'malice' means: ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. <u>So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair</u> (*Horrocks v. Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v. Pickles* [1895] AC 587).

[39] The testimony of the Defendant is that he made the Police Report entirely to protect his interest in the 62 paintings and I do not find any evidence that controverts that stand. Further, I find that there is no evidence to support the 2nd Plaintiff's contention that the Police Report was made for the collateral purpose of threatening the 2nd Plaintiff or his wife (SP1) to regain possession of the 62 paintings without making any compensation to the 1st Plaintiff.

[40] Another requirement of the tort of malicious prosecution is that the proceedings must have terminated in the 2nd Plaintiff's favour with a degree of finality. In the present case, the Magistrates Court has merely recorded an order of discharge not amounting to an acquittal. Such an order does not dispose off the case against the 2nd Plaintiff with finality. The Public Prosecutor can always lay the same charge against the 2nd Plaintiff at some future date.

[41] In *Taib Awang v. Mohamad Abdullah & Ors* [1984] 1 CLJ 413; [1984] 2 (Rep) 501; [1983] 2 MLJ 413, Eusoff Chin J (later CJ) held that in an action for malicious prosecution it is essential that the proceedings complained of is "finally determined". Further, Mahadev Shankar J (later JCA) in *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259 observed that to launch a claim for malicious prosecution, the impugned proceedings must be "finally resolved". Both the learned judges have alluded to the proceedings being finally resolved or determined in favour of the accused person before a cause of action in malicious prosecution can be commenced. And to my mind final determination or resolution of a criminal charge can come about only when the proceedings has run its complete course in its entirety without any prospects for its lawful continuance or re-litigation. In this regard, I find that an order of discharge not amounting to acquittal does not equate to a final determination of the criminal charge, as the matter has not been heard and determined on its merits, and it is still open to the Public Prosecutor to bring the same charge against the accused person.

[42] It is trite law that each and every element must be proven before a case of malicious prosecution can be successfully established. (see *Chao Yan San v. Yuen Ten Soo* [2000] 1 LNS 339; [2000] 3 AMR 3057). The 2nd Plaintiff has fallen very short of this requirement for he has failed to prove all the essential elements of the tort of malicious prosecution. Hence, from the totality of evidence I find that the 2nd Plaintiff has failed to prove his case of malicious prosecution against the Defendant.

[43] As for the tort of abuse of process the Court of Appeal in *Chang Nga @ Teh Siew Yoke & 8 Ors v. Lee Lang & 9 Ors* [2009] 1 LNS 372 recognised this tort in our jurisdiction and explained its rationale as such:

> In so far as the latter tort is concerned, the starting point, we think, is the dissenting judgment of Lord Denning MR in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478:
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> > "In a civilised society legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from it is true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

[44] Further, the Court of Appeal in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 held that the essential elements to establish the tort of abuse of process are that:

(1) The process complained of must have been initiated;

(2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process

offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process;

(3) The plaintiff must have suffered some damage or injury in consequence.

[45] The Plaintiffs allege that the Defendant had abused the process of law as allegedly the purpose of the Defendant in lodging the Police Report was to unlawfully regain possession of the paintings in breach of the Defendant's obligations in the Agreements and to further maliciously cause the 2nd Plaintiff to be charged with a criminal offence and utilizing the Police Report to prevent the 2nd Plaintiff from taking civil action against the Defendant.

[46] In this regard, I find that, for reasons discussed earlier, the Plaintiffs have failed to establish the fact that it was the Defendant who had initiated the process, i.e. the criminal proceedings. Though the Defendant lodged the first information report that set the police investigations in motion, the court's process was initiated by the Public Prosecutor exercising his absolute prosecutorial discretion. There is no evidence whatsoever showing that the Defendant had in anyway influenced or affected the decision of the Public Prosecutor to initiate the criminal proceedings and/or prefer the charge against the 2nd Plaintiff. As explained earlier, I also do not find any collateral purpose in the Defendant lodging the Police Report, least of all to exert pressure on the Plaintiffs to return the 62 paintings without payment of any compensation as alleged by the Plaintiffs. Thus, I find that there is a total lack of evidence to support the Plaintiffs' claim for the tort of abuse of process.

[47] Wherefore, I dismissed the Plaintiffs' entire claim with cost.

Dated: 31 JULY 2018

(VAZEER ALAM MYDIN MEERA)
Judge
High Court in Malaya
Shah Alam

COUNSEL:

For the plaintiff - TK Pang; M/s Edwin Lewis

For the respondent - Fahmi Adilah; M/s Fahmi Zhafri & Co