Li Siu Lun *v* Looi Kok Poh and another
[2013] SGHCR 27

Case Number : Suit No 245 of 2009/W (NA 21 of 2012/V)

Decision Date : 14 November 2013

Tribunal/Court : High Court

Coram : Jordan Tan AR

Counsel Name(s) : Roderick Edward Martin SC, Eugene Nai, Ooi Jian Yuan (Martin & Partners) instructed by Tan-Goh Song Gek Alice (A C Fergusson Law Corporation) for the plaintiff; Lek Siang Pheng, Audrey Chiang, June Hong (Rodyk & Davidson LLP) for the defendant.

Parties : Li Siu Lun — Looi Kok Poh and another

Damages

14 November 2013 Judgment reserved.

Jordan Tan AR:

Introduction

1 The 2nd defendant, Gleneagles Hospital ("Gleneagles"), consented to an interlocutory judgment entered in favour of the plaintiff, Mr Li Siu Lun ("Mr Li"), for a claim in the tort of conspiracy. The proceedings before me were for the assessment of damages between Mr Li and Gleneagles. The claim between Mr Li and the 1st defendant, Dr Looi Kok Poh ("Dr Looi") has been settled.

Background

2 Mr Li is a British citizen but is resident in Hong Kong. He speaks no English and gave his testimony in Cantonese with the aid of an interpreter. He is self-employed and trades in property and stocks. He had sought treatment from Dr Looi who was operating a clinic at Gleneagles. He had consented to a single surgical procedure, namely, "tenolysis of the right hand". On the day of the surgery, 26 April 2006, however, another procedure, namely, "ulnar neurolysis and repair", was performed in addition to the original procedure Mr Li had consented to. His consent form was also doctored to add the words "and ulnar neurolysis and repair" even though he had given no consent to such a surgery. He emerged from the procedure with his hand in a worse condition: post-surgery he could not even straighten his little finger.

3 Mr Li filed a suit against Dr Looi and Gleneagles. He did not know for certain at the time what had transpired but he suspected that his consent form had been doctored. Even though he could not read English, he surmised that the consent form had been altered because of the additional words.

4 Both defendants resisted the suit. Mr Li sought to find out the truth by making an application to the court for a Gleneagles nurse, Ms Chew Soo San ("Ms Chew"), to answer various questions. The defendants resisted that application. Mr Li succeeded and the truth emerged from Ms Chew's answer to the interrogatories. Ms Chew had altered the consent form without Mr Li's knowledge but she had done so under the instruction of Dr Looi.

5 In the light of this, Dr Looi applied for judgment to be entered against himself and the claim between Mr Li and Dr Looi was settled. Gleneagles, however, persisted in its defence. The evidence showed that Gleneagles had conducted an investigation sometime after the surgery. Although not much has been revealed about the investigation, a Gleneagles Group Senior Manager, Mrs Ruth Quek had sent an internal email dated 27 August 2007 to other staff stating that:

> Relating to the amended consent form.
>
> Pt's name Li Siu Lun
>
> Attending doctor is Dr Looi Kok Poh
>
> We need a report from S/N Chew Soo Sen [*sic*] on exactly what happened…from what I heard, Dr Looi took the consent form to her for amendment. …We have reported the case to our insurers.
>
> …

6 Therefore, it is a reasonable inference that Gleneagles was already aware of the fact that the consent form had been altered by the end of August 2007 and as Mr Roderick Martin SC, counsel for the Mr Li, put it, even if the investigations are still on-going to-date, a position Gleneagles takes, it would have known that the consent form had been altered at the time this email had been drafted and certainly at the time when this action was initiated. In cross-examining the Gleneagles representatives, Mr Martin had sought to pursue a line of questioning to find out if the lawyers for Gleneagles also knew the truth when Gleneagles had filed its defence and resisted the application for interrogatories to be served on Ms Chew. I disallowed this line of questioning as the communications between Gleneagles and its lawyers are privileged.

7 I should also note that although Gleneagles had persisted in its defence, at the trial, it consented in September 2011 to interlocutory judgment being entered against it. I turn now to set out my decision on the assessment of damages.

My decision

Damages for legal costs incurred for the application for interrogatories to be served on Ms Chew

8 Mr Li claims $25,000 in legal costs for the application it had taken out for interrogatories to be served on Ms Chew as well as the $1,500 in legal costs he was ordered to pay her. Mr Li relies on the rule laid out in *Ganesan Carlose & Partners v Lee Siew Chun* [1995] 1 SLR(R) 358 ("*Garnesan Carlose*") that a plaintiff is entitled to claim his legal costs incurred in other proceedings if such proceedings were necessitated by the defendant's wrong.

9 I agree with Gleneagles' argument that the rule in *Garnesan Carlose* applies only to legal costs incurred in *other proceedings*. The rationale for this limitation is that the legal costs for the proceedings before the court, as distinguished from a separate set of proceedings, is for the court seized of the matter to decide. Where the costs of the proceedings before the court are in issue, the court may decide it as part of the ordinary course of the proceedings. It is not necessary for such costs to be claimed as damages and therefore the rule in *Garnesan Carlose* is so limited (see also the Court of Appeal's explanation of the rationale in *Garnesan Carlose* at [19]).

10 Mr Li had also argued that the assessment of damages proceedings should be construed as

"other proceedings". In making this argument, he relies on the following passage in *Garnesan Carlose* at [19]:

> … Where costs are incurred by a plaintiff in other proceedings as a result of the defendant's wrongdoing, there is no possibility of the plaintiff recovering those costs from the defendant in those other proceedings. Subject to the principle of remoteness, such a claim has to be by way of a subsequent action with the costs incurred in those other proceedings being a claim in damages….

11 I am unable to accept Mr Li's contention that the assessment of damages proceedings constitutes "other proceedings". It is an unarguable proposition. An assessment of damages is very much a part of the proceedings on the determination of liability and the bifurcation of the proceedings does not make it "other proceedings". Mr Li's contention breaks down when one considers a case where there is no bifurcation and the assessment of damages and liability are determined at the trial. There is no magic in bifurcation. It does not make the assessment of damages proceedings "other proceedings" for the purposes of the rule in *Garnesan Carlose*. The Court of Appeal also expressly referred (at [19]) to the taking up of a "subsequent action" in making the claim for legal costs of the other proceedings. Finally, I should note that there have been mixed developments in the commonwealth pertaining to the cognate rule to that in *Garnesan Carlose* on the recoverability of costs in previous proceedings as damages in fresh proceedings (see *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009), Chapter 17). It arises in situations where, for example, A brings an action against B for breach of contract but conducts itself in such a way in the proceedings to suppress evidence to B's detriment which B had to ward off, incurring additional legal costs. B may bring a separate claim in subsequent proceedings against A on the basis of A's conduct in the previous proceedings. It is an interesting discussion but it is not in issue before this court and so I comment no further save as to highlight it.

12 Where the costs of the interrogatories application is concerned, while of course the decision of the court on costs for the application for interrogatories to be served on Ms Chew was made before the truth emerged in Ms Chew's answers to the interrogatories so that there is reason to revisit this costs order, this would be within the province of the trial judge. Again, the rule in *Ganesan Carlose* is not applicable to grant Mr Li damages for the legal costs expended for that application.

13 Before the trial judge, Gleneagles and Mr Li consented to an interlocutory judgment which stated as follows:

> 1. the 2nd Defendant is liable to the Plaintiff for its nurse adding the words "and ulnar neurolysis and repair" to the "Consent for Operation or Procedure" form dated 26 April 2006 after the surgery on the Plaintiff and supplying a copy of the said form to the Plaintiff on 12 September 2007 without informing the Plaintiff of such addition,
>
> 2. the Plaintiff's damages thereon be assessed; and
>
> 3. costs be awarded to the Plaintiff.

14 It is clear from the terms of this consent judgment that the parties had agreed that the costs of the action between Gleneagles and Mr Li would be paid by Gleneagles to Mr Li. The costs would be assessed on a standard basis (see O 59 r 27 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed Sing)).

15 Because the rule in *Garnesan Carlose* is inapplicable for the reasons I had already stated, Mr Li has to abide by the interlocutory judgment to which he had consented and which is determinative of

the issue of costs of the action.

16 Mr Li had also advanced the alternative argument that he can also claim his legal costs for the interrogatories application under O 59 r 3(5) of the Rules of Court which provides that a party who refuses or neglects to admit a fact under a Notice to Admit Facts served on him under O 27 r 2 shall pay the costs of proving that fact, unless the court orders otherwise. In my view, this was a viable argument but is extinguished by the parties' decision to consent to the interlocutory judgment which is clear in its disposal of the costs of the action and which makes no alteration to the extant costs order for the interrogatory application.

Damages for legal costs incurred in proceedings against Dr Looi

17 Mr Li also claims $45,000 to $66,000 in legal costs incurred in proceeding against Dr Looi which is the difference between the costs he had expended and the costs he may recover as party-and-party costs against Dr Looi.

18 Mr Li had sought to ground this head of damages on an alleged breach of a common law right of access to medical records fortified by Regulation 12 of the Private Hospital and Medical Clinics Regulations which imposes on the hospital a duty of maintaining proper medical records. Gleneagles argues in its written submissions that this claim was never pleaded. I agree with Mr Li that this claim was pleaded in paragraph 62 and 64(a) of the statement of claim (amendment no 5). For example, paragraph 62 provided as follows:

> In pursuance of the said conspiracy (by unlawful means or otherwise), the Defendants did the following overt acts, namely, in breach of (A) the provisions of the Act and Regulations which require the 2nd Defendants to keep proper and accurate medical records; …
>
> (d) The 2nd Defendants failed to inform the Plaintiff that (A) the Operation Consent Form was amended with an additional procedure and (B) that the other medical records of the Plaintiffs were amended/altered/exchanged/switched or otherwise falsified by the 1st Defendant during all material correspondences with the Plaintiff…

19 However, in making this claim, Mr Li is seeking damages for legal costs expended in the present proceedings on the basis of a breach of a common law right of access to medical records. Again, these are costs incurred in these proceedings and for the reasons I had already stated are not allowed to be recovered as damages in the same proceedings. This issue is within the province of the trial judge in deciding costs and the judge had already recorded a consent interlocutory judgment which makes provision for costs.

Compensatory damages

20 Although Mr Li fails in his claim for damages for legal costs, it is beyond question that Gleneagles' conspiracy had cost him pecuniary loss. Mr Li had to expend efforts to uncover the truth concealed by Gleneagles which had, even at a time when it knew the truth, provided him with the altered consent form without telling him that it had been altered. Mr Li is self-employed. I will award him general damages for the time he had expended in uncovering the truth. Mr Li had only alluded to this and not put in evidence in its fullness on this issue as he was focused on his claim for legal costs. That being so, this does not disqualify him from a claim for pecuniary loss on the basis that he had expended time to uncover the truth. However, because Mr Li had not put in the evidence in its fullness on this issue, I will award him damages of $10,000, which works out to approximately $2,500

for each year of his time that he had expended in uncovering the truth. This is a modest amount considering the time he had expended from 2007 to the time the consent interlocutory judgment was entered into to uncover the truth in September 2011. Having awarded Mr Li compensatory damages of $10,000, I turn to consider his claim for aggravated damages.

Aggravated damages

21 Mr Li claims aggravated damages of $200,000 or more. To claim aggravated damages, the plaintiff needs to show that there is contumelious or exceptional conduct or motive on the part of the defendant and that the plaintiff suffered an intangible loss, injury to personality or mental distress as the case may be (see *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR(R) 513 at [82]). Generally, in actions in tort, where damages are at large, aggravated damages may be awarded (see Andrew Tettenborn, *The Law of Damages* (London: LexisNexis UK, 2010 at [2.22]).

22 I accept Mr Li's argument that Gleneagles' act of giving him the consent form without informing him that it had been altered as well as failing to reveal the truth to him all the way up to the point in time of the entering of the interlocutory judgment is an exceptional act which justifies the granting of aggravated damages. Although Mr Li also relied on Gleneagles' conduct in the assessment of damages subsequent to the entering of the consent interlocutory judgment, there is nothing to this. After Gleneagles admitted liability, I found that there was nothing aggravating in its conduct in the assessment of damages proceedings before me. Gleneagles through its representatives simply maintained that it did not reveal the truth to Mr Li because the matter had been referred to the legal department which then dictated the actions and the position the hospital had to take. The cross-examination of Mr Li was also hardly as relentless as counsel for Mr Li had suggested. A perusal of the transcript will show this. Therefore, the basis of my granting of aggravated damages lies on the acts which precede the entering of the interlocutory judgment.

23 As for Mr Li's mental distress and anguish, it may be summarised in the following way. Mr Li's appreciation of Singapore's reputation was such that he had taken the propriety and transparency of one of Singapore's premier private hospitals as a given. He had expected the same high standards of its doctors. After he had undergone the botched surgery and had suspected that the consent form was altered, he had expected the hospital to come clean with the truth. Instead, the hospital handed him an altered consent form without telling him that it had been altered. The hospital continued to hide the truth from Mr Li for the years following the operation up to the bringing of the action. Even after the action was brought, the hospital still did not reveal the truth and in fact resisted Mr Li's attempts to uncover the truth by resisting Mr Li's application for interrogatories to be served on Ms Chew. In this entire process, Mr Li had tried to confide in his friends who instead laughed at him and exclaimed that such a cover-up was not possible in Singapore. The entire episode made Mr Li become more withdrawn. He could not believe that this was happening to him. He started to distrust doctors and hospitals. He persisted in bringing the action because he wanted the truth to be uncovered. He also wanted the hospital to be accountable and to prevent this from happening to another person.

24 Mr Li broke down on the stand when he explained that he was worried that this would happen to his wife and child. After all, if it could happen to him, it could happen to anyone. He also explained that he was able to persist in bringing the suit because he had the financial means to do so and he could imagine that if it had happened to another patient who was not of equal means, the injustice would go unpunished. Mr Li also made it clear that he had not brought the suit for the money. He brought this suit so that the hospital would not repeat its actions with any other person who may not have the means to take legal action against the hospital. Mr Li also said that he would donate whatever damages he could recover to charity after deducting the legal costs he had incurred.

25 Whether Mr Li will donate the damages he recovers to charity or not is irrelevant to me in the making of my decision. But his statements and the sincerity of his testimony in totality convinced me that he had truly suffered great mental anguish and distress and for a protracted period of time from June 2007 to the time when the consent interlocutory judgment was entered. That is approximately 4 years. It is important to note that despite the differences in the views of the expert witnesses hired by the parties as to Mr Li's mental state, both doctors agreed that Mr Li had a form of reactive depression.

26 I award Mr Li $240,000 in aggravated damages for his mental distress. It is difficult to compare Mr Li's case with the plethora of defamation cases referred to by counsel in which aggravated damages were granted. Instead, I found the case of *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143 ("*Kay Swee Pin*") more appropriate for comparison. In that case, the plaintiff was wrongfully suspended as member of the Singapore Island Country Club for one year on the ground that she had falsely declared one Mr Ng Yong Yeam as her husband and so afforded him the privilege of using club facilities even before 2005 when they did not have a marriage certificate. The notice of her suspension was posted all over the club premises for the full year. She was eventually vindicated in court and was awarded $40,000 for the mental distress suffered for the events leading up to and including the one year in which her membership at the Singapore Island Country Club was wrongfully suspended. Although she was awarded $40,000 as damages for mental distress and not aggravated damages per se, I found the sense of injustice visited upon her and the consequent mental distress to be, while not perfectly commensurate with that experienced by Mr Li, at least within the same spectrum of comparison and certainly a better yardstick than the defamation cases referred to by counsel. As I had stated, as compared to the plaintiff in *Kay Swee Pin*, Mr Li had suffered even greater anguish and for a more protracted period from 2007 until the interlocutory judgment was entered in September 2011. Furthermore, unlike in *Kay Swee Pin* where there was not enough evidence of the plaintiff's mental distress, I found it abundant in the present case (and I have summarised the account given by Mr Li which I had accepted above at [23]-[25]).

27 In the circumstances, I award Mr Li $240,000 for aggravated damages which works out to approximately $60,000 per year in which he had to bear the anguish of trying to uncover the truth. Of course, the complexion and the intensity of his mental distress and anguish will vary within that time period but the damages for the totality of his mental distress and anguish I found it appropriate to quantify at $240,000.

Punitive damages

28 Mr Li seeks punitive damages of $500,000. Mr Li relies on the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129 ("*Rookes*") which laid out the three categories of cases for which punitive damages may be granted: first, oppressive, arbitrary or unconstitutional action by servants of the government; second, wrongful conduct which has been calculated by the defendant to make a profit for himself which may exceed the compensation payable to the plaintiff; and where punitive awards are expressly authorised by statute. Counsel for Mr Li pointed out that Prakash J in *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR(R) 117 opined that *Rookes* is good law in Singapore. However, counsel also conceded that the Court of Appeal more recently has left open the position on punitive damages in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*").

29 In *MFM Restaurants*, the Court of Appeal repeated (at [53]) the following observations of the High Court in *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR(R) 202 ("*Vikas Goel*"):

> 65 … Indeed, the rather limited circumstances under which exemplary damages will be granted

under English (and, presumably, Singapore) law appears to be in a state of transition, even flux (compare, for example, the House of Lords decisions of *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co Ltd v Broome* [1972] AC 1027 on the one hand with both the House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 and the New Zealand Privy Council decision of *A v Bottrill* [2003] 1 AC 449 on the other; further reference may be made to the English Law Commission's Report on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997)).

66 There is the yet further issue as to whether or not exemplary damages could be awarded for cynical breaches of contract (see generally, for example, the *Canadian Supreme Court decision of Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257). All these issues raise important questions of great import but fall outside the purview of the present decision.

30 The Court of Appeal in *MFM Restaurants* left open the position on punitive damages because no arguments were made in the appeal on punitive damages (see *MFM Restaurants* at [52]). Likewise, the High Court in *Vikas Goel* did not make a determination on the issue because it was not before the court.

31 In this case, not only were arguments made on punitive damages, Mr Li is expressly making a claim for such damages. Although the law on punitive damages is in a state of flux and while the position is more suitable to be determined by the superior courts, as the superior courts have not had the occasion to make a pronouncement on the position and as it is in issue before me, it falls to this court to determine the applicable position in the ebb and flow of the law to dispose of this claim.

32 The issues of whether punitive damages should even be recognised and the applicable guiding principles on the scope of its application and the extent of the damages to be awarded rest on policy considerations. A perusal of the arguments for and against punitive damages in the decisions of the House of Lords in the aforementioned cases (referred to in the passage above at [29]) and the English Law Commission's Report on Aggravated, Exemplary and Restitutionary Damages make it clear that the position is not one which may be determined by the *ascertainment* of rules already laid down as if there exists a firm position which simply needed to be uncovered through a reading of the cases or the synthesis of existing rules. It is a policy decision in the sense that the court needs to choose between competing rationales, in particular, whether damages should be compensatory or whether it could serve other functions.

33 In the present case, although it falls on this court to determine the position on punitive damages, because of the way in which Mr Li had argued his claim for such damages, this court need only decide the position in a limited sense, namely, whether to accept an expanded version of *Rookes*. Mr Li's argument is as follows. Mr Li relies on the first and second categories in *Rookes*. With regard to the first category, Mr Li has argued that that category was widened in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 ("*Kuddus*") by Lord Nicholls who expressed the following view at [66]:

> In *Rookes* …, Lord Devlin drew a distinction between oppressive acts by government officials and similar acts by companies or individuals. He considered that exemplary damages should not be available in the case of non-governmental oppression or bullying. Whatever may have been the position 40 years ago, I am respectfully inclined to doubt the soundness of this distinction today. National and international companies can exercise enormous power. So do some individuals. I am not sure it would be right to draw a hard-and-fast line which would always exclude such companies and persons from the reach of exemplary damages.

In this passage, Lord Nicholls expresses his support for an extension of the first category in *Rookes*.

34 As for the second category in *Rookes*, Mr Li says that Gleneagles' actions were calculated to maintain their good reputation and the profitable business relationship with Dr Looi. While this may well be the general motivation of Gleneagles for its actions, I do not see how it fits within the second category in *Rookes* which requires, in a sense, a cynical calculation by the defendant that in perpetuating a wrong, it would still come out the better because the consequences of that wrong would be outweighed by the benefits it would bring. Mr Li's argument would require an extension of the position in *Rookes*. I note that in *Kuddus*, Lord Nicholls had opined (at [67]) that for the second category, it should be extended to malicious motives and not simply motives calculated to profit the defendant.

35 To allow the claim for punitive damages, I would have to accept Mr Li's argument on the expansion of the categories in *Rookes.* I am reluctant to do so. The reason for my reluctance to accept Mr Li's contention for an expanded reading of *Rookes* is as follows. The determination of the position on punitive damages has important rule of law implications. All power has legal limits (see the legality principle enunciated by the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [15]). Although the legality principle was pronounced with the legislative and executive power in mind, it applies to the judicial power which is also bounded by law. For example, the avenue of the exercise of judicial power restricts the use of that power. A court may only exercise the judicial power where it is seized of jurisdiction and the nature of the power which may be exercised varies depending on the type of jurisdiction. Apart from the avenue of the exercise of judicial power, the nature of the power is likewise restrained by written law.

36 The recognition of punitive damages, the determination of its scope and the extent of the quantum which may be awarded have rule of law implications. The recognition of punitive damages affords the court an expansive mode of imposing liability without reference to a particular loss suffered by the innocent party or profit made by the wrongdoer (save perhaps for the cases which fall in the second category of *Rookes* or for which the principles in *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 apply so that the quantification of damages may be made with reference to the outstanding benefit retained by the wrongdoer). This point of reference which furnishes a key legal restraint on the exercise of judicial power in deciding liability in civil cases is absent where punitive damages are concerned. While one may instinctively point to proportionality as a form of legal restraint in the sense that the award of punitive damages has to be proportionate to the reference act of wrongdoing, this is very much an elastic limitation as it depends on the characterisation of the egregiousness of the reference act and proportionality furnishes no guidance on such characterisation.

37 It is this inherent lack of legal restraint in the award of punitive damages that creates the tension with the rule of law. Of course, this tension may well be diffused by crafting a narrow scope for the award of such damages (as is arguably the case in *Rookes* with its limited three categories) or by Parliament creating a legislative limit on the quantum which may be awarded for punitive damages, as has been done in certain jurisdictions.

38 Furthermore, while punitive damages may seem to be handy as a remedy to right certain wrongs, it is to be remembered that apart from punitive damages and other civil remedies, there could be other legal responses found beyond the civil law. When viewed through the lenses of a civil suit, certain wrongs may seem to go without remedy if the suite of civil remedies is inadequate and so there is some attractiveness to punitive damages as a sort of residual civil remedy for egregious wrongs, but when one considers the entire system of law, not just civil law, there could be other modes of dealing with such wrongs which would put in perspective (and thus diminish) the

attractiveness of punitive damages, especially given its tensions with the rule of law.

39 I am reluctant for the foregoing reasons to accept the expanded version of *Rookes* argued for by Mr Li. I am therefore rejecting Mr Li's claim for punitive damages based on this expanded version of *Rookes*. There is no need for me to go beyond what I need to consider by examining whether the position in *Rookes* itself represents the entirety of the position on punitive damages in Singapore. I have no doubt this issue will be taken up another day in a more appropriate case.

Conclusion

40 I award the plaintiff $10,000 in compensatory damages and $240,000 in aggravated damages.

41 The defendant is to pay costs on the High Court scale to the plaintiff to be taxed unless agreed upon.