

The plaintiff's claim against the defendant is for special, general and aggravated damages for malicious prosecution, selective prosecution and negligence which arose out of the bankruptcy proceedings taken out by the defendant against the plaintiff. The special damages comprise of loss of income, proceeds from the sale of his wife's land and loss of profit from a joint venture project.

THE FACTS

The plaintiff was a former civil servant and an advocate and solicitor practising under the name and style of Messrs Yusof Abdullah & Co. He was admitted as an Advocate and Solicitor of the High Court of Malaya in 1969. The plaintiff, Tan Sri Dato Abu Zarim (TSAZ) and Datin Aishah @ Ashah bt Abdul Manan (Datin Aishah) were the directors of Spectre Consult Sdn Bhd (Spectre Consult) and Proget Sdn Bhd (Proget). Both Spectre Consult and Proget had banking facilities with the defendant. The plaintiff was also an Executive Chairman of Azam Bakti Sdn Bhd (Azam Bakti). Azam Bakti was a joint venture company set up by the plaintiff with one Mr Paolo Martignon to undertake a project in Tumpat, Kelantan for the development of a marina encompassing a housing project (the Tumpat project).

Vide an order dated 1.10.1987 the defendant obtained an O 14 judgment against Spectre Consult, the plaintiff, TSAZ and Datin Aishah (the judgment) for the recovery of a term loan of RM50,000.00 and an overdraft of RM30,000.00 granted by the

defendant to Spectre Consult. The plaintiff, TSAZ and Datin Aishah were the guarantors for the said banking facilities. Although the order dated 1.10.1987 was against Spectre Consult, the plaintiff, TSAZ and Datin Aishah, the judgment filed by the defendant's solicitors stated that the judgment was only against Spectre Consult. The judgment was subsequently amended to include all the three guarantors.

Pursuant to the judgment, the defendant took out several execution proceedings against the plaintiff, namely a Writ of Seizure and Sale vide Kuala Lumpur A/E No. 37-114-1990 (the Writ of Seizure and Sale); Bankruptcy Notice D2-29-3956-1990 (the 1990 bankruptcy proceeding); Bankruptcy Notice D2-29-887-97 (the 1997 bankruptcy proceeding) and Bankruptcy Notice D3-29-2228-1998 (the 1998 bankruptcy proceeding). In his statement of claim, the plaintiff had only pleaded the 1997 and the 1998 bankruptcy proceedings. During the trial, the plaintiff applied to amend the statement of claim to include the other execution proceedings. I allowed the application. The court file however showed that the plaintiff had failed to file the amended statement of claim pursuant to O 20 r 9 of the Rules of the High Court 1980. In the circumstances the amendment that had been allowed will be ignored as it had ceased to have effect.

As at 19.2.1990 TSAZ made a payment of RM54,500.00 towards the account of Spectre Consult. TSAZ also paid RM150,000.00 in respect of both accounts of Spectre Consult and Proget in three instalments i.e. on 31.3.1990; 30.4.1990 and

31.5.1990. Pursuant to those payments, the defendant vide a letter dated 12.6.1990 discharged TSAZ from all obligations to the defendant as a guarantor. As against Datin Aishah two (2) execution proceedings were taken out against her which were subsequently discontinued. Datin Aishah passed away in 2000.

Vide a letter dated 20.11.1991 the plaintiff wrote to the defendant enquiring about the payments made by TSAZ and the outstanding sum in respect of the judgment for purposes of a settlement proposal. The defendant responded vide a letter dated 4.12.1991 informing the plaintiff that the total amount paid towards Spectre Consult's account was RM38,500.00.

On 27.3.2000 an Adjudication Order and Receiving Order (AORO) was granted against the plaintiff vide the 1998 bankruptcy proceeding. On 25.10.2001 the AORO was stayed and on 5.3.2002 upon the application of the plaintiff the AORO was annulled by the Senior Assistant Registrar. The defendant's appeal to the Judge in Chambers was dismissed on 18.3.2003. Zulkefli Ahmad Makinuddin J (as his Lordship then was) made the finding that as at 19.2.1990 the debt owing to the defendant was RM33,864.05 and that a Writ of Seizure and Sale was executed on 8.3.1990. From the Writ of Seizure and Sale the learned judge found that there was a sale proceed of RM34,772.35. Taking that into account the learned judge further found that the debt of the plaintiff had been settled. The defendant's appeal to the Court of Appeal was dismissed on 22.9.2004. No further appeal to the Federal Court was filed by the defendant.

THE EVIDENCE

In his testimony the plaintiff said that:-

- (i) the defendant had concealed the material facts on the payments made to the account of the judgment;
- (ii) he could not obtained his practicing certificate due to the bankruptcy proceedings and he could not officially practice since 2002 until 2005 for approximately 4 years because of the AORO;
- (iii) in those 4 years he has lost RM1,012,129.60 as income;
- (iv) on 27.3.1997 Azam Bakti entered into an agreement with the State Government of Kelantan for the Tumpat project which was valued at RM300 million and that the bankruptcy proceeding had caused the failure of the Tumpat project;
- (v) he owns 51% of the shares in Azam Bakti and his partner Paolo Mortignon who had initially shown great faith and confidence in the plaintiff lost this confidence when the bankruptcy notice was issued against the plaintiff, resulting in all efforts to obtain loan from overseas for the project halted;
- (vi) Azam Bakti was wound up on 9.6.1998 on the petition of Prisma Harapan Sdn Bhd for its failure to pay a debt of RM1,599,908.00;

- (vii) prior to 1995 he was in reasonably good health and that he suffered stroke twice in 1995. The deterioration in his health was due to him being under tremendous stress when the defendant started legal proceedings against him.

PW2, the plaintiff's wife testified that she sold her land for RM950,000.00 in July 2002 to help the plaintiff as he was in financial difficulties due to the bankruptcy order and that the plaintiff's health has deteriorated since the bankruptcy proceedings by the defendant.

PW3 the accountant who prepared the Reports and Accounts of Messrs Yusof Abdullah & Partners (the firm) for the years 1996 (exh P2), 1997, 1998 and 1999 (exhs P3-A, 3B, 3C) said that except for the year 1997, the firm was losing money; that the firm was not sound financially and depended on credit to survive; that he could not comment on the figure of RM253,030.40 stated by the plaintiff as being the average income for the legal firm for the years 1996-1997 and that he does not know where the plaintiff got the figure from.

Dr Zainal Abidin bin Abdul Hamid (PW4) gave evidence that the plaintiff was admitted to Institut Jantung Negara in August 1995 and November 1995; that the plaintiff had suffered stroke and was not a healthy man since 1995; that the contributory causes for stroke would be diabetes, hypertension and high cholesterol level.

Dr Haizal bin Haron Kamar (PW5) gave evidence on his care for the plaintiff in 2006.

The former Assistant General Manager of Bank Pertanian Malaysia (PW6) testified that Bank Pertanian did not give any funding to Azam Bakti for the project although vide a letter dated 17.10.1995 Bank Pertanian had confirmed that they were able and willing to support Azam Bakti in the project.

For the defendant, DW1, the Vice President, Special Asset Management of the defendant gave the following evidence:-

- (i) that the defendant discharged the liability of TSAZ on 12.6.1990 after TSAZ made payments to the defendant in the sum of RM54,500.00;
- (ii) In respect of Datin Aishah a Writ of Seizure and Sale was taken out vide A/E No. 37 – 113 – 1990 but the proceeding was discontinued because the attachment was unsuccessful as the premises was locked. The bankruptcy proceeding against Datin Aishah vide Shah Alam High Court No. 29 – 1537 – 98 was withdrawn on 14.6.2000 as Datin Aishah had passed away on 25.4.2000;
- (iii) that as at 22.7.1998 the outstanding amount under the Spectre Consult Sdn Bhd was RM82,728.45 after deducting the payment of RM54,500.00 from Tan Sri Dato Abu Zarim;

- (iv) that the bankruptcy proceedings were taken against the plaintiff based on an unsatisfied judgment dated 1.10.1987;
- (v) that there was no mala fide on the part of the defendant against the plaintiff and neither has the defendant acted negligently or recklessly;
- (vi) that as at 19.2.1990 TSAZ made a payment of RM150,000.00 towards both accounts of Spectre Consult Sdn Bhd and Proget Sdn Bhd;
- (vii) that these sums were never reflected in the statement of Spectre Consult;
- (viii) that the RM150,000.00 was paid into and reflected in the Proget account.

DW2 and DW3 the Managers of Credit Administration at the Central Branch of the defendant, also maintained that the proceedings against the plaintiff were taken based on an unsatisfied judgment. Both denied practicing selective prosecution and denied acting negligently or recklessly against the plaintiff. In respect of the payment of RM150,000.00 by TSAZ both DW2 and DW3 admitted that they were not the officer in charge of receiving the money and thus were not able to explain the same. The witnesses for the defendant agree that the defendant owes a duty to the plaintiff to make sure the accounts are managed properly and the figures are correct. The witnesses maintained that they have no intention to conceal and have no malice and further maintained that the

bankruptcy proceedings were taken against the plaintiff because the plaintiff owed the defendant.

THE SUBMISSION

Learned counsel for the defendant submitted inter alia that:-

- (a) negligence and selective prosecution cannot found an action in law and that the only recognized actions in law would be that of malicious prosecution and an abuse of the court process.
- (b) no particulars of malice and lack of reasonable and probable cause have been pleaded in the statement of claim.
- (c) even assuming that there is no debt owing by the plaintiff to the defendant under the judgment (which was not admitted), the bankruptcy proceedings taken out against the plaintiff by itself would not amount to malice or lack of reasonable and probable cause.
- (d) there is no evidence to show that the defendant was aware that no debt was owing under the judgment when the bankruptcy proceedings were taken out against the plaintiff or at the time when the AORO was entered against the plaintiff on 27.3.2000.

- (e) the AORO subsequently annulled is no evidence of want of reasonable and probable cause.
- (f) the plaintiff has not proven his losses from his legal firm.
- (g) the failure of the Tumpat Project has nothing to do with the bankruptcy proceedings or the AORO against the plaintiff.
- (h) since the AORO was annulled on 5.3.2002 by which the bankruptcy was wiped out altogether, there is no basis for the claim for damages in respect of the plaintiff's health.

The submissions of learned counsel for the plaintiff are inter alia as follows:-

- (i) that the plaintiff had fulfilled the 1st element for malicious prosecution as the 1998 bankruptcy was initiated by the defendant and dismissed by the High Court and the Court of Appeal on 18.3.2003 and 22.9.2004 respectively. There was no further appeal to the Federal court.
- (ii) that based on the learned judge's finding the defendant had no reasonable and probable cause to prosecute the plaintiff.
- (iii) that the documentary evidence showed that the debt under the judgment had been fully repaid.

- (iv) that had the RM150,000.00 or any part thereof been credited into or reflected in the Spectre Consult's account, the judgment would have been fully satisfied.
- (v) that there was malice on the part of the defendant by deliberate and wilful concealment of the payments made in the amount of RM54,500.00 and RM150,500.00.
- (vi) that being a former civil servant and a senior advocate and solicitor of the High Court of Malaya, it cannot be denied that there was injury to the plaintiff's reputation.
- (vii) that the bankruptcy proceeding had serious repercussions on the plaintiff's health;

Learned counsel for the plaintiff in his written submission only dealt with malicious prosecution. I take it that the plaintiff has abandoned the issues of selective prosecution and negligence.

FINDING

The plaintiff has to prove that the defendant had no reasonable and probable cause to issue the bankruptcy proceedings; that the proceedings were malicious and that he has suffered damage. For the plaintiff to succeed, each ingredient of malicious prosecution has to be proved and not by inference of the others or any of them upon proof of one ingredient (see *Chao Yan San v Yuen Ten Soo* [2000] 3 AMR 3057).

From the evidence, it has been proven that the accounts of Spectre Consult were not properly maintained by the defendant such that the payments made by TSAZ were not reflected in the Spectre Consult's account but in the Proget account. I am thus of the view that the defendant had been negligent in maintaining the said account. Apart from being negligent, there is no other evidence to show that the defendant was actuated by spite or ill-will against the plaintiff. Negligence per se, does not create liability on the part of the defendant. In *Ng Ah Ho v Hong Leong Finance Bhd* [1997] 3 CLJ 591 RK Nathan JC (as he then was) said, which I respectfully adopt:-

“In my view reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. The defendant must actually and honestly believe in his cause. But this genuine belief must be entrenched on reasonable grounds. As to whether the grounds are reasonable is a matter of fact resting on the evidence adduced. But it is abundantly clear that no action will lie for commencement of legal proceedings, even in the absence of reasonable and probable cause unless such action is instituted maliciously. Both malice and the absence of reasonable and probable cause must co-exist if the plaintiff is to establish liability against the defendant. I totally accept the passage from *Salmond and Heuston* (supra) at p. 411 quoted by the defendant to the effect that so long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability.”

DW1 testified that the Writ of Seizure and Sale was not in fact carried out and there was actually no proceeds received from the Writ of Seizure and Sale. I am in no position to disturb the finding made by the learned judge as confirmed by the Court of Appeal in respect of the Writ of Seizure and Sale. But what is significant from this testimony is that the defendant actually and honestly believed that the judgment debt remains unsatisfied and thus there was a reasonable and probable cause to issue bankruptcy proceedings against the plaintiff. In the circumstances the plaintiff has failed to prove the elements of malicious prosecution.

The plaintiff has also failed to prove the damages. Given the fact that the AORO was stayed on 25.10.2001 and annulled on 5.3.2002, even if the plaintiff did not have the practicing certificate for the years 2002 – 2005, it could not be attributed to the AORO. As agreed by the plaintiff in cross examination, he could have obtained the practicing certificate for the year 2002 when the AORO was stayed on 25.10.2001. Consequently, any loss of income from the legal firm for those years could not be the result of AORO. In any event, the evidence showed that the practice was suffering from losses. It follows therefore that the financial support given by the wife is not necessarily due to the AORO. The plaintiff's claim for the sale price of his wife's land cannot therefore be sustained.

As for the Tumpat project, the plaintiff was in fact asked in re-examination as to the termination notice from the State Government of Kelantan and his answer was "because they have given me five years to complete project and its more than five years". When asked further he

said “we got TOL – but we didn’t get Federal Government approval.” As to a further question why didn’t he get further approval, the plaintiff said “Because Kelantan is PAS state.”

The documentary evidence showed that the failure of the Tumpat project was not due to the AORO but due to Azam Bakti not having the capital as the company was not able to secure the financing. That the inability to secure the financing has nothing to do with the AORO is clear from the letter written by Azam Bakti to Unit Perancang Ekonomi Kelantan dated 28.1.2000 (exh D 17) wherein the reason is stated thus “...malangnya pihak bank tersebut tidak dapat meluluskan pinjaman kami atas alasan bahawa syarikat kami belum lagi mempunyai hakmilik bagi tanah-tanah yang sedia ada di kawasan projek tersebut...”. It is also to be noted that Azam Bakti was already wound up on 9.6.1998. Based on the above, the plaintiff’s claim is dismissed with costs.

**(DATO’ TENGKU MAIMUN BINTI TUAN MAT)
HAKIM
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BAHAGIAN SIVIL
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Dated 28th May 2009

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