Paul Patrick Baragwanath and another *v* Republic of Singapore Yacht Club [2015] SGHC 317

Case Number : District Suit No 1666 of 2014 (RAS 24 of 2015)

Decision Date : 15 December 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Siraj Omar and Alexander Lee (Premier Law LLC) for the first and second appellants; Wee Chow Sing Patrick (Patrick Wee & Partners) for the respondent.

Parties : Paul Patrick Baragwanath — Underwater Shipcare (Pte) Ltd — Republic of Singapore Yacht Club

Tort – Trespass – Land

Damages – Assessment

15 December 2015 Judgment reserved.

Choo Han Teck J:

1 This is an appeal against the quantification of damages arising from the second appellant's (Underwater Shipcare (Pte) Ltd) vessel's ("the Vessel") trespass into a marina. On 15 April 2014, the Vessel sailed into a marina belonging to the respondent, Republic of Singapore Yacht Club, to refuel. The first appellant, Mr Paul Patrick Baragwanath, is the managing director and major shareholder of the second appellant. He is also a member of the respondent club. Despite the respondent's objections and numerous requests asking the first appellant to move the Vessel out of the marina, the Vessel continued to be moored at the marina for the next 123 days. The respondent commenced an action in trespass against the appellants in the district court on 3 June 2014 and applied for summary judgment on 16 July 2014. The Vessel finally left on 15 August 2014.

2 Before the learned district judge, the respondent sought the following reliefs:

(a) damages for trespass;

(b) a declaration that the appellants were not entitled to berth the Vessel in the marina;

(c) an order for the Vessel to be removed; and

(d) an injunction against the appellants for the use of the berths of the marina to moor the Vessel, or any other vessel, without the permission of the respondent.

3 The district judge awarded a sum of $51,870.38 as damages for the trespass of the Vessel onto the respondent's property as well as costs of $5,000, inclusive of disbursements, in the respondent's favour. He dismissed the respondent's prayer for an injunction and made no order on the two remaining prayers. The district judge's grounds of decision can be found in *Republic of Singapore Yacht Club v Paul Patrick Baragwanath and another* [2015] SGDC 268. On 31 August 2015, the appellants filed an appeal against the district judge's decision in respect of the quantum of damages and the costs that were awarded. The respondent did not appeal against the decision.

4 Counsel for the respondent, Mr Patrick Wee ("Mr Wee"), argues that pursuant to s 21(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), the appellants require leave to commence an appeal given that the amount in dispute is less than $50,000. Section 21(1) of the SCJA reads as follows:

> **Appeals from District and Magistrates' Courts**
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> **21.** (1) Subject to the provisions of this Act or any other written law, an appeal shall lie to the High Court from a decision of a District Court or a Magistrate's Court –
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> (*a*) in any case where the amount in dispute, or the value of the subject-matter, at the hearing before that District Court or Magistrate's Court (excluding interest and costs) exceeds $50,000 or such other amount as may be specified by an order made under subsection (3); or
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> (*b*) with the leave of that District Court or Magistrate's Court or the High Court, in any other case.

5 Mr Wee contends that the "amount in dispute" in the present case is only $41,786.18, which is the difference between the sums submitted by the appellants (*ie*, $47,820.98) and the respondent (*ie*, $6,034.80) before the district judge on the damages that the appellants ought to pay for the trespass. Mr Wee submits that leave to appeal was therefore necessary pursuant to s 21(1)(*a*) of the SCJA.

6 Section 21(1) of the SCJA restricts the circumstances in which a party has an automatic right of appeal from a District Court or Magistrate's Court to the High Court. This is even though an appeal from the District Court or Magistrate's Court to the High Court is an appeal from the hearing at first instance. At the second reading of the Supreme Court of Judicature (Amendment) Bill, Prof S Jayakumar, the then Minister of Law, explained that the presence of a monetary threshold under s 21(1) of the SCJA was to act as "a screening mechanism to sieve out non-serious and unmeritorious appeals" (see *Singapore Parliamentary Debates, Official Report* (26 November 1998) vol 69 at cols 1629 - 1630). For cases falling below the monetary limit, appeals may still be brought albeit leave of court must first be obtained. The threshold for appeals to the High Court was increased from $5,000 to $50,000 by amendments in 1998.

7 It is not readily apparent whether the phrase "amount in dispute" refers to the amount that was claimed in the lower court, or the difference in the sum claimed and the award that was given by the lower court, or the difference in the amounts submitted by the parties in the lower court. Prior to the amendments made to the section in 2010 where, *inter alia*, the words "at the hearing before the District Court or Magistrate's Court" were added, some cases (*eg*, *Augustine Zacharia Norman v Goh Siam Yong* [1992] 1 SLR(R) 746), had taken the position that the "amount in dispute" referred to the difference between the sum awarded by the lower court and the sum that the appellant was contending for on appeal. Although the phrase "amount in dispute" was once open to these various interpretations, its meaning was settled after amendments to the sub-section in 2010 and the Court of Appeal's decision in *Fong Khim Ling (administrator of the estate of Fong Ching Pau Lloyd, deceased) v Tan Teck Ann* [2014] 2 SLR 659 ("*Fong Khim Ling*").

8 At [21] of *Fong Khim Ling*, the Court of Appeal cited the second reading of the Supreme Court of Judicature Act (Amendment) Bill 2010. In the passage that was cited, Assoc Prof Ho Peng Kee, the then Senior Minister of State for Law, explained that the 2010 amendments to the section made it clear that the computation of the monetary threshold does not include interest or costs order by the

lower court. Further, the amendments put it "beyond doubt that the respective monetary thresholds of the High Court [under s 21(1) of the SCJA] and Court of Appeal [under s 34(2)(*a*) of the SCJA] is computed by reference to the original amount claimed in the lower court and not the judgment sum awarded by the court, or the amount in dispute on appeal" (see *Singapore Parliamentary Debates, Official Report* (18 October 2010) vol 87 at col 1317). The Court of Appeal concluded as follows (at [21] of *Fong Khim Ling*):

> … The operative phrase in both ss 21(1)(*a*) … is now "the amount in dispute, or the value of the subject-matter, at the hearing before [the lower court], and Parliament intended that this amount should be the original amount claimed in the lower court, in accordance with the *Tan Chiang Brother's Marble* line of Court of Appeal authorities.

9 The Court of Appeal also held (at [27]) that the two phrases "amount in dispute" and "value of the subject-matter" should be "purposively construed as synonymous or merely alternative formulations to describe the same thing", which in the context of s 34(2) of the SCJA, would refer to the quantification of the claim before the High Court. Although the Court of Appeal was discussing the two phrases in respect of s 34(2) of the SCJA and not s 21(1), the same approach must, for the sake of consistency, apply in relation to s 21(1). The two phrases in the context of s 21(1) should, in general, refer to the amount that was claimed in the District Court or the Magistrate's Court. I am not persuaded by counsel for the appellants, Mr Siraj Omar's ("Mr Omar") submission that the injunctive and declaratory relief sought by the respondent in the lower court, which was not granted and is not being appealed against, should be factored in under the limb of "value of subject-matter".

10 The issue of whether leave of appeal is necessary in the present case is dependent on whether the amount of damages for trespass claimed by the respondent before the district judge falls below the monetary limit of $50,000. The respondent did not quantify the amount of damages that it was seeking in its statement of claim or in its summons for summary judgment against the appellants. In the affidavits filed by the respondent's general manager, Mr Tan Wui Boon ("Mr Tan") in support of the respondent's application for summary judgment, various methods were used to calculate the damages and thus differing figures were put forward. At paragraph 13 of the affidavit filed by Mr Tan on 26 June 2015, the damages were quantified as $66,578.62. In the immediate paragraph that followed, Mr Tan stated that alternatively, damages could be assessed at "visitor's rate", which would be $87,923.51 according to his calculations, and aggravated and exemplary damages be awarded at 20% to 50% of the assessed visitor's rate. Yet in Mr Tan's subsequent affidavit filed on 30 July 2015, two lower figures were given. The first figure was pursuant to an "adjusted formula" based again on the length of the berth (at paragraph 15). Under this formula, damages would amount to a lower sum of $47,820.98. According to Mr Tan, this sum included aggravated and exemplary damages (at paragraph 15.2). The second figure put forward by Mr Tan in that affidavit was calculated based on the length of the boat (and not berth), in the event that the district judge was minded to accept the appellants' position that damages should be assessed based on the length of the boat. Mr Tan stated that damages would amount to $21,591.55 under this second formula, and that aggravated and exemplary damages should additionally be awarded.

11 With so many different figures put forward by the respondent, it is unclear whether its claim before the district court exceeded $50,000. The two figures in the earlier affidavit exceed the monetary limit, whilst the other two in the later affidavit, which should represent the respondent's final position before the district court, fall below the limit. It is conceivable that there may be instances where it is difficult to ascertain the amount claimed by the plaintiff in the lower court, either because the trial was bifurcated or damages are unliquidated. In dealing with the issue of whether leave to appeal was required in a case involving a bifurcated trial where damages had yet been assessed, Quentin Loh J held that unless the damages bore no specific value and were truly at

large, the parties and the court had to ascertain, as best as they could, the amount in dispute (see [35] of *Ong Wah Chuan v Seow Hwa Chuan* [2011] 3 SLR 1150).

12 Although the Court of Appeal held in *Fong Khim Ling* that the "amount in dispute" refers to the original claim before the district court and not any other sum such as the judgment sum awarded by the district judge, this case presents quite a different situation and may thus call for a different approach. Here, the district judge awarded a sum of $51,870.38 as damages for the trespass of the Vessel. This sum exceeds the monetary threshold in s 21(1) of the SCJA. It is also higher than the two figures put forward by the respondent in Mr Tan's second affidavit (which were $47,820.98, and $21,591.55 plus aggravated damages respectively). This differs from a usual situation where the sum awarded by the district judge would either be the same as, or lower than, the sum claimed by the plaintiff. I do not think that such a situation was contemplated in *Fong Khim Ling*. While I accept that a judgment sum that is lower than the sum claimed in the lower court should not prevent an appellant from having an automatic right of appeal where the latter exceeds the monetary limit, I am of the view that the judgment sum should be taken into account in a situation like the present, where the judgment sum exceeds the monetary limit even though the claimed amount in the lower court does not clearly exceed the limit. Given that this is a borderline case where it is not clear whether the sum claimed before the lower court exceeds $50,000 and that the district judge had awarded $51,870.38 as damages, I am of the view that the appellants do not require leave to appeal. The notice of appeal is therefore not defective. To hold otherwise would lead to a patent incongruity in finding that the "amount in dispute" is less than $50,000 when the judgment sum obtained from this "dispute" is, in fact, in excess of $50,000.

13 Moving on to the appeal proper, the main issue in this appeal is whether the district judge had correctly quantified the damages for trespass. The Vessel is a 58-feet long single hull commercial vessel. The parties are in agreement that commercial vessels are required to pay rates that are 50% higher than non-commercial vessels for using the berths in the marina, and that a 7% Goods and Services Tax ("GST") will have to also be computed in the calculation of the damages.

14 The parties are also in agreement that the measure of damages for trespass of land is the market value of the property occupied or used for the period of wrongful occupation, but they dispute the rates for the computation of the damages. Before the district court, the appellants took the position that damages should be based on the rates that members are charged and are to be calculated according to the length of the Vessel. On the other hand, the respondent's position has been that damages should not be based on the preferable rates that are offered to members but should be based on rates even higher than what visitors are charged. It is also of the view that damages ought to be calculated according to the length of the berth, and not the Vessel.

15 The district judge held that the measure of damages should not be based on rates which are accorded to members or visitors as "[t]o do so would be to accord to a trespasser the same privileges that lawful users of the marina were eligible for" (at [17] of his judgment). Despite this, the district judge reluctantly adopted the visitor's rates for his calculations because no other basis for computing the damages had been given. He declined to accept Mr Wee's submission that a factor of 1.5 could be added to the visitor's rate as he was of the view that it was arbitrary to adopt a figure of 1.5 as opposed to any other figure. The district judge then held that the berthing rates ought to be based on the length of the berth instead of the length of the Vessel. He noted that the respondent's website stated that for members, "berthing charges are based on length of fingers or length of boat, whichever is the greater". After accepting the respondent's evidence that "fingers" meant berth, the district judge found that the berthing charges of a vessel belonging to a member would depend on the greater of the length of the berth it was moored at and the length of the vessel. As for the berthing charges of visitors, the district judge found that although the relevant part of the website could be

read to suggest that these were based on the length of the vessel, it was unlikely that the respondent would have conferred more favourable terms to visitors than to members. He thus came to the view that the berthing charges for visitors should also be based on the greater of the length of the berth and the length of the vessel.

16 The district judge divided the Vessel's stay in the marina could be divided into the following three parts:

(a) Part I: 15 April to 17 May 2014 (a period of 33 days). This was from the time the Vessel first entered the marina to the final date that was given by the respondent to the appellants for them to remove the Vessel from the marina. During this period, the Vessel was moored at Berth I in the marina, which is 160 feet in length. The Vessel was sharing the berth with another vessel, the *Grande Explorer*, which was about 70 feet in length.

(b) Part II: 18 May 2014 to 15 June 2014 (a period of 29 days). During this period, the Vessel continued sharing Berth I with the *Grande Explorer*.

(c) Part III: 16 June 2014 to 15 August 2014 (a period of 61 days). The Vessel was moved from Berth I to Berth J on 16 June 2014 because Berth I was required for use by another vessel. Berth J is 130 feet in length. No other vessel shared Berth J with the Vessel during this period.

17 The district judge thus arrived at the figure of $51,870.38 in the following manner:

(a) For Part I, he held that it was reasonable to consider the Vessel to be occupying half of Berth I (*ie*, 80 feet) given that it was sharing the berth with the *Grande Explorer*. After considering the rates that were provided by the respondent, the district judge found that the applicable daily rate for the Vessel's use of the berth ought to be $88. He adopted this rate presumably because (i) Berth I was a single berth (as opposed to a double berth) and (ii) the Vessel was 58 feet in length and the closest applicable rate was $88 for 70 feet (though it is not clear – and is disputed on appeal – whether the measurement of 70 feet was in relation to the length of a vessel or the length of the berth). The total damages he awarded for that the duration of 33 days in Part I was $4660.90.

(b) For Part II, the district judge held that although the Vessel was still sharing Berth I with the *Grande Explorer*, its status was that of a trespasser and thus, a higher rate than that in Part I should be used for computing damages. Instead of using the daily rate of $88, he decided to use a rate of $175 for this period. According to the table provided by the respondent, $175 was the rate for 71 to 80 feet (though again, it is not clear if this refers to the length of the vessel or the length of the berth). The total damages he awarded for the duration of 29 days in Part II was $8,145.38.

(c) For Part III, the district judge held that since the Vessel was occupying Berth J by itself and its status was that of a trespasser, the daily rate of $399 should be used. According to the table provided, the rate of $399 was for 121 to 140 feet. The total damages awarded for this period, which comprised 61 days, was thus $39,064.10.

18 Mr Omar submits that the district judge erred in using the wrong rates to calculate the damages for the trespass. He argues that the district judge erred in applying different rates for the period when the vessel was moored with the respondent's consent as compared to the period during which it was trespassing. Relying on academic and case authorities, counsel submits that the appropriate measure of damages for trespass is the market value of the property occupied or used for the period

of the wrongful occupation. The market value in this case, he submits, ought to be the rates that the respondent charges its visitors for using the marina.

19 It is well-established that damages in trespass may be based on the reasonable hire of the property that has been unlawfully occupied or used by the defendant. This is often referred to as the "user principle". The juridical basis of the user principle, which has an impact on the principles to be applied in relation to the measure of damages, is not settled. The High Court in *Yenty Lily v ACES System Development Pte Ltd* [2013] 1 SLR 577 ("*Yenty Lily (HC)*") and *Thomas Teddy v Kuiper International Pte Ltd* [2013] SGHC 7 was of the opinion that the user principle is of "mixed nature", being both compensatory and restitutionary, whilst Chan Seng Onn J in *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 endorsed a purely restitutionary analysis.

20 In the later case of *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1417 ("*Yenty Lily (CA)*") (which was the appeal of *Yenty Lily (HC)*), the Court of Appeal rejected the "mixed nature" analysis. It was of the view that if the user principle was viewed as embodying elements of both compensation and restitution, "it would result in the court applying competing interests viewed from different ends of the same problem, thereby obscuring the reasons for the result arrived at by the court itself" (at [41]).

21 The Court of Appeal in *Yenty Lily (CA)* held that the same result that the High Court judge had arrived at could have been reached by applying a conventional compensatory measure, without any need to rely on a hybrid explanation of the user principle. The Court of Appeal was of the view that the compensatory principle is independent of the user principle, even though they may at times coincide. The compensation principle, as described by the Court of Appeal at [14], "prescribes that when a tortious wrong is committed by the defendant, the plaintiff ought … to be put in the same position (as far as it is possible) as if the tort had not been committed". On the other hand, the user principle does not focus on the plaintiff's loss and is often invoked where the application of the general compensation principle yields only nominal damages in favour of the plaintiff because the plaintiff suffered no substantive loss calculable on the compensation principle (at [20] of the judgment). The user principle is the judicial implement to disgorge the wrongdoer's gain or benefit (see Denning LJ's observations at 254-255 of *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 ("*Strand Electric*") and [43] of *Yenty Lily (CA)*)).

22 Although the Court of Appeal stated that there was no need to decide the jurisprudential debate concerning the nature of the user principle given that it had found that the compensatory principle applied, it went on to express the view that the user principle should be analysed as being restitutionary in nature. It held that the confusion in the juridical nature of the user principle was caused by the different and contradictory views expressed by the judges in the English Court of Appeal case of *Strand Electric*. Denning LJ (as he then was) expressed the view (at 255) that that the user principle "resembles … an action for restitution", whilst Sommervell and Romer LJJ were of a contrary view (see in particular Romer LJ's comment at 256 that in determining the amount of damages, "the question of quantifying the profit or benefit which the defendant has derived from his wrongful act does not arise"). The Court of Appeal was of the view that the differing stances can be reconciled by analysing the various views in *Strand Electric* as being the application of two distinct principles – with Denning LJ applying the user principle and the other two judges applying a compensatory principle. The Court of Appeal, however, emphasised (at [54] of the judgment) that they were not expressing a conclusive or definitive view on this issue. The debate on the juridical nature of the user principle is probably still open for discourse.

23 For the purposes of the present appeal, there is no need for me to venture into that discourse because the conventional compensatory approach applies. In this regard, it is conceivable that an

argument may be made that there was no loss to the respondent because the berths were largely unoccupied and may not have been rented out even if the Vessel had not trespassed. This argument will not assist the respondent. As Romer LJ observed at 257 of *Strand Electric*:

> … It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all. …
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> … some reliance was placed by counsel for the defendants on the principles which have become established in assessing damages for negligence … These principles seem to be to have no relation to cases where a wrongdoer detains property of another and uses it for this own purposes; one can postulate, as I have already indicated that such a wrongdoer would have preferred to pay for the use of the property than have gone without it, but no such assumption can be made where negligence and not improper user is involved. …

24 By reason of the Vessel's trespass into the respondent's marina, the respondent has suffered loss – that being the market value that it charges for a vessel's use of its berth. I agree with Mr Omar that there is no basis to adopt a higher rate for punitive reasons just because the Vessel was trespassing. In the context of this case, the market value for the use of the berths would be the amount that the respondent charges a visitor for use of its berths. The applicable rate should be the daily rate, as opposed to the preferable monthly rate, that it charges a visitor. This is not to penalise the trespasser but flows from the logic that the appellants should not be able to enjoy the preferable monthly rate that is offered by the respondent to visitors in order to encourage a longer term business relationship, when the Vessel's stay in the marina was always against the respondent's wishes.

25 The parties gave differing submissions on what the daily rate for the use of the berths as a visitor would be. Mr Omar submits that the rate ought to be calculated on the basis of the length of the Vessel (*ie*, 58 feet), while Mr Wee submits that the rate ought to be calculated according to the length of the berths (where Berth I is 160 feet long and Berth J is 130 feet long). The district judge's calculations were mainly based on the length of the berths.

26 Berthing fees for visitors are published on the respondent's website and are also recorded in the respondent's table of rates for members and visitors (Annex A of the appellant's submissions and Appendix 1 of Mr Tan's affidavit filed on 25 June 2015). I am of the view that the length of the Vessel is the only proper measure for calculating the rate of berthing fees for visiting vessels. As submitted by Mr Omar, the respondent's website states that the berthing fees for visitors "are based on the measured length of the yacht and not the registered length". The table provided by the respondent also suggests that the rates are based on the length of the vessel. The main heading of the table (above the lengths set out in ascending order) reads: "Boat Length". These words are clear and unambiguous, whereas the rate for members is expressly provided to be the greater of the length of the berth and length of vessel. If the respondent intended to impose the same rate for visitors and members, the published rates or the method of calculating them must be clear and consistent.

27 Damages ought to thus be calculated by taking the rate of $88 per day, that being the visitor's rate that a vessel up to the length of 70 feet would be charged for using a single berth, and multiplying it by 123 days, that being the number of days that the Vessel occupied the berths. The multiplier for commercial vessel (*ie*, 1.5) and GST (*ie*, 1.07) would also have to be factored in. This amounts to a sum of $17,372.52 (123 days x $88 x 1.5 x 1.07).

28 Lastly, on the issue of aggravated or exemplary damages, the respondent cannot seek to re-open these issues before me given that it did not appeal against the district judge's refusal to award these items.

29 For the reasons above, the appeal is allowed and the award of damages is reduced to $17,372.52. Apart from the quantum of damages, the appellants have also appealed against the district judge's award of $5,000 as costs to the respondent. I will hear parties on this part of the appeal, as well as the issue of costs arising from this appeal, at a later date.