Subramaniam s/o Muneyandi and another *v* Pandiyan John
[2011] SGHC 102

Case Number	: Suit No 9 of 2011 (Registrar's Appeal No 37 of 2011 and Summons No 1148 of 2011)
Decision Date	: 28 April 2011
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Jeya Putra and Chandrayogan Yogarajah (Island Law LLC) for the Plaintiffs/Respondents; Eugene Thuraisingam and Mervyn Cheong (Stamford Law Corporation) for the Defendant/Appellant
Parties	: Subramaniam s/o Muneyandi and another — Pandiyan John

Civil Procedure – Privileges – Privileged Communication

Civil Procedure – Striking out

28 April 2011

Woo Bih Li J:

Introduction

1 In this action, both plaintiffs ("the Plaintiffs") sought a rescission of a settlement agreement they had entered into with the defendant ("the Defendant") dated 23 September 2010 ("the Settlement Agreement") on the basis of certain misrepresentations. The Plaintiffs also sought to claim a refund of moneys paid to the Defendant under the Settlement Agreement and to resurrect a claim that the transfer of shares to the Defendant in various companies, which I shall refer to as "the Seagull group", be declared void.

2 The Defendant's position was that the Plaintiffs were bound by the Settlement Agreement. The Plaintiffs disputed that they were so bound because of the misrepresentations.

3 The Plaintiffs' writ of summons (and statement of claim) was filed on 7 January 2011. The defence (amendment no 1) was filed on 14 February 2011. The reply was filed on 22 February 2011.

4 On 14 January 2011, the Defendant filed Summons No 182 of 2011 to strike out the statement of claim and for the action to be dismissed.

5 On 8 February 2011, an Assistant Registrar dismissed the Defendant's application. On 10 February 2011, the Defendant filed an appeal. I heard the appeal as well as an application to adduce further evidence. Eventually on 7 April 2011, I decided to allow the appeal. I struck out the statement of claim on the ground that it was frivolous, vexatious and was otherwise an abuse of process of the court. I set out my reasons below.

An application to adduce further evidence

6 The Defendant was a director and shareholder in several Singapore companies (including

Seagull Marine Pte Ltd) and two Indian companies in the Seagull group. He commenced an action in Suit No 382 of 2010 in Singapore against Seagull Marine Pte Ltd and the Plaintiffs to seek relief against alleged acts of oppression by the Plaintiffs in respect of Seagull Marine Pte Ltd.

7 As mentioned above, there was a settlement as found in the Settlement Agreement between the Plaintiffs and the Defendant. Recital D and cll 1 and 2 thereof state:

> D. Disputes have arisen between the parties in relation to or in connection with Singapore Companies and/or Indian Companies and/or the operations thereof. John Pandiyan has commenced an action in the High Court of the Republic of Singapore in Suit No. 382 of 2010 against Seagull Marine Pte Ltd, Subramaniam s/o Muneyandi and Vasandamallar Mrs Subramaniam Vasandamallar [*sic*] in relation to his claims with respect to Seagull Marine Pte Ltd (the action filed in the High Court of Singapore is hereinafter referred to as the "Singapore action" and all disputes between the parties are hereinafter collectively referred to as the "Disputes").
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> E. ...
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> IN CONSIDERATION of the mutual terms and covenants set out in this Agreement, the parties hereby agree as follows:-
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> 1. This Agreement is a full and final settlement of all Disputes between the parties as shareholders and/or officers of the Singapore Companies and the Indian Companies respectively. This settlement is agreed without any admission of liability on the part of either party. Neither the execution of this Agreement nor any action taken by either party previously or in relation to this Agreement, including payment, shall be deemed or construed as an admission or acknowledgement of liability or wrongdoing by either party.
>
> 2. Each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, *whether or not presently known to the parties* or to the law, and whether in law or equity, that it ever had, may have or hereafter can, shall or may have against the other party in relation to, arising out of or connected with the Disputes.
>
> [emphasis added]

8 The crux of the misrepresentations alleged by the Plaintiffs was that in 2003, the Defendant had made certain representations about his tertiary qualifications, which led to his obtaining permanent residency in Singapore, and about his working experience relating to civil engineering and the handling of industrial equipment ("the Representations"). The Plaintiffs said that they have since discovered that the Representations were false. Had they known about the falsity of the Representations, they would not have issued or transferred shares in the Seagull group to the Defendant and would not have entered into the Settlement Agreement.

9 I first heard the Defendant's appeal on 14 March 2011 after which I reserved my decision. On 17 March 2011, counsel attended before me to receive my oral decision. By then, the Defendant had filed an application on 16 March 2011 in Summons No 1148 of 2011 ("Summons 1148") to file and serve an affidavit to exhibit a written complaint which the first plaintiff ("Subramaniam") had apparently made to the Indian police, *ie*, the Deputy Superintendent of Police, Mamallepuram Town, Kancheepuram District. The complaint was undated. The Defendant said he received it on or about 7 March 2011.

10 The Plaintiffs opposed Summons 1148. I gave leave to the Defendant to file an affidavit to elaborate why the complaint to the Indian police was introduced late to this court and for the Plaintiffs to file an affidavit in response (to both the first affidavit supporting Summons 1148 and the second affidavit of elaboration) and adjourned the hearing to 7 April 2011 for directions.

11 On 7 April 2011, counsel attended before me again. By then, the Defendant had filed an affidavit on 21 March 2011 to elaborate on the delay in introducing the written complaint to the Indian police. The Defendant said that on 28 February 2011, he had received a summons to attend at a police station in India. On 4 March 2011, he attended accordingly and was shown Subramaniam's complaint to the Indian police. He asked for a copy and was told he could collect it from Subramaniam's lawyer in India, one G. Ezhil Arasan. He did so on 7 March 2011. The Defendant corrected an earlier affidavit of his in which he said he had received a copy of the written complaint from the Indian police. The Defendant explained that he sent a copy to his Singapore solicitors on 13 March 2011 (a Sunday) who only saw it on 14 March 2011.

12 The Defendant had two reasons why it took him about one week to send a copy to his Singapore solicitors. First, he had not realised that the written complaint might be relevant to the civil proceedings in Singapore. Second, he was busy instructing Indian lawyers and dealing with the complaint.

13 Subramaniam filed an affidavit on 31 March 2011. He did not dispute that he had made the written complaint to the Indian police which he said was lodged on 26 January 2011. However, he objected to the introduction of that complaint as evidence. He also referred to an earlier complaint he had lodged with the Singapore police in December 2010.

14 Accordingly, when counsel appeared before me on 7 April 2011, the Defendant's counsel Mr Thuraisingam said that he had served on the Plaintiffs' solicitors a notice to produce the complaint to the Singapore police.

15 The Plaintiffs' counsel Mr Jeya Putri agreed to this and eventually the complaint to the Singapore police was produced and a copy provided to Mr Thuraisingam and the court.

16 Mr Thuraisingam then said that he would be applying under Summons 1148 for leave to file an affidavit to exhibit the complaint to the Singapore police as well as the complaint to the Indian police, the latter being the initial subject of the application. He said that both complaints showed that the Plaintiffs were aware of the alleged falsity of the Representations before they entered into the Settlement Agreement.

17 The hearing before me on 7 April 2011 was originally for directions. However, with the consent of counsel from each side and to avoid their having to attend before me on another day, I proceeded to hear arguments in respect of Summons 1148.

18 Mr Jeya Putri did not contest the application to adduce a copy of the complaint to the Singapore police as evidence since that was mentioned by Subramaniam himself in his affidavit of 31 March 2011. However, he objected to the application in respect of the complaint to the Indian police.

19 The principles for allowing evidence at an appeal from a registrar to a judge in chambers were discussed in two Court of Appeal decisions: *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR(R) 392 and *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133. It is not necessary to repeat them here.

20 The Defendant alleged that he received a copy of the complaint to the Indian police on or about 7 March 2011. This was clearly after the decision of the Assistant Registrar on 8 February 2011. Therefore, he did not have this evidence before that decision.

21 Nevertheless, the Plaintiffs stressed that the attempt to introduce this evidence was made after I had heard the appeal but before I had delivered my decision. They relied on *Ho Seek Yueng Novel and another v J & V Development* Pte Ltd [2006] 2 SLR(R) 742 in which a litigant sought to introduce new evidence after a hearing had been conducted. However, that case was of no assistance to the Plaintiffs because the court noted that the late application was part of a pattern of conduct which bordered on an abuse of the process of the court. No such pattern could be attributed to the Defendant before me. True, he could have provided a copy of the complaint to the Indian police more promptly so that it would have been raised about a week earlier but the slight delay was immaterial in the circumstance since it was available to the Defendant only after the hearing before the Assistant Registrar in any event.

22 Secondly, Subramaniam accepted that he had made the complaint to the Indian police. His dispute was that the Defendant had not received a copy of the complaint from Subramaniam's Indian lawyer who had denied giving a copy to the Defendant. The Plaintiffs pointed out that the Defendant himself said initially that he had received a copy from the Indian police before saying that that was due to a miscommunication with his Singapore solicitors and he had received it instead from Subramaniam's Indian lawyer. I was of the view that even if there was an inconsistency as to how the Defendant obtained a copy of the complaint, it had no bearing on the authenticity of the complaint.

23 Thirdly, I was of the view that the complaint to the Indian police might have an important influence on the outcome of the appeal even though Subramaniam sought to explain certain parts of the complaint which Mr Thuraisingam was relying on. I will elaborate later on the significant parts of the complaints to the Indian police and to the Singapore police.

24 Nevertheless, the Plaintiffs raised the argument of privileged communication to oppose the introduction of the complaint to the Indian police. Reliance was placed on ss 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed). Section 128 prohibits an advocate or solicitor from disclosing any communication made to him in the course and for the purpose of his employment as an advocate and solicitor. Section 131 protects anyone from disclosing to the court any confidential communication which has taken place between him and his legal professional adviser subject to a qualification which is irrelevant for the present purposes.

25 Section 128 was raised by the Plaintiffs because the Defendant said he had obtained a copy of the complaint to the Indian police from Subramaniam's Indian lawyer which that lawyer had denied.

26 In any event, ss 128 and 131 did not determine whether the complaint to the Indian police constituted privileged communication between a client and his solicitor in the first place.

27 The Plaintiffs argued that Subramaniam had sought the assistance of an Indian lawyer to advise on initiating proceedings in India in respect of the ownership of assets and/or moneys in Singapore and in India ("the Underlying Dispute") which was settled. In the course of giving instructions, Subramaniam had informed the lawyer about his suspicions of the falsity of the Representations and he was advised to seek the assistance of the Indian authorities to initiate investigations. The lawyer drafted the complaint in the course of receiving instructions from Subramaniam about the Underlying Dispute.

28 I am of the view that while the discussions between Subramaniam and his Indian lawyer were privileged, they were no longer confined to discussions as such. With the benefit of advice from his Indian lawyer, Subramaniam had chosen to put allegations in writing by way of a complaint to a third party, *ie*, the Indian police. That complaint was not the subject of solicitor and client privilege. The mere fact that the complaint emanated from discussions with a solicitor did not accord it such a privilege otherwise even a letter of demand from a lawyer to a debtor would enjoy such a privilege too.

29 The Plaintiffs argued that there was also some sort of litigation privilege which had not been waived. They relied on *British Coal Corporation v Dennis Rye Ltd* (1988) 1 WLR 1113 ("*British Coal*"). The headnotes of the law report states:

> The plaintiff brought an action claiming from the defendants the return of moneys had and received, being sums overpaid on invoices issued by the defendants, and damages for fraudulent, alternatively negligent, misrepresentation and conspiracy to defraud. Documents, which had been created for the purpose of the civil proceedings, were handed to the police to assist with an investigation as a result of which criminal charges were brought against, inter alia, the defendants. Pursuant to the Attorney-General's Guidelines on the Disclosure of Information to the Defence, the documents were supplied to the defendants by the police prior to the criminal trial. In the course of that trial the judge ordered the plaintiff to disclose to the defendants further documents relevant to the criminal proceedings, and the plaintiff thereupon disclosed those documents and others which were not directly relevant to those proceedings. All the documents disclosed in the course of the trial had been created for the purpose of the civil proceedings. The defendants were acquitted, and the plaintiff applied in the civil proceedings for the return of all the documents. Judge Fox-Andrews Q.C., sitting on official referees' business, ordered the defendants, inter alia, to deliver up to the plaintiff all the documents and all copies of, or notes taken from, them, and granted an injunction restraining the defendants from making any use of the documents, copies or notes or any information derived therefrom for the purpose of pleading, evidence, cross-examination or otherwise for the purpose of the civil proceedings or any other proceedings between the plaintiff and the defendants.
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> On the defendants' appeal, on the ground, inter alia, that the plaintiff's privilege had been lost because the documents had properly come into the defendants' possession with the approval or acquiescence of the plaintiff, or in circumstances where the plaintiff ought to have foreseen that they would be disclosed to them pursuant to the Attorney-General's guidelines, and the plaintiff had failed expressly to reserve its privilege:—
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> *Held*, dismissing the appeal, that all the documents had been protected since their creation by the plaintiff's legal professional [*sic*] privilege; that the plaintiff's actions in making them available for the limited purposes of assisting in the conduct of a criminal investigation and of a criminal trial did not constitute any waiver of that privilege for the purpose of the civil proceedings; and that, accordingly, the plaintiff was entitled to the return of the documents, and the judge's order should be upheld.
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> Order of Judge Fox-Andrews Q.C., sitting on official referee's business, affirmed.

30 I was of the view that *British Coal* did not assist the Plaintiffs. The dominant purpose of the complaint to the Indian police was not to advance the Plaintiffs' case in litigation proceedings between the Plaintiffs and the Defendant but to persuade the Indian police to investigate the matters complained of. There was no litigation privilege and therefore no question of a waiver of litigation privilege.

31 In the circumstances, I allowed the Defendant to file an affidavit to exhibit both the complaints to the Singapore police and to the Indian police.

32 As the complaints were already before the court, counsel for both sides agreed to my continuing with the main appeal without waiting for the affidavit to be filed so that they would not have to attend before me on another day to complete the arguments on the main appeal.

33 As regards the main appeal, the Plaintiffs had contended (in the initial hearing before me on 14 March 2011) that while cl 2 of the Settlement Agreement (see [7] above) was wide enough to cover claims by the Plaintiffs for misrepresentation, the Plaintiffs could nevertheless rely on s 3 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) which states:

> **Avoidance of provision excluding liability for misrepresentation**
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> 3. If a contract contains a term which would exclude or restrict—
>
> (*a*) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (*b*) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act, and it is for those claiming that the term satisfies that requirement to show that it does.

34 In other words, cl 2 of the Settlement Agreement was tantamount to excluding any remedy available to the Plaintiffs against the Defendant by reason of the Representations and therefore it had no effect except in so far as it satisfied the requirement of reasonableness.

35 The Plaintiffs had also relied on *Gilbert v Endean* (1878) 9 Ch D 259 ("*Gilbert*"). In that case, a plaintiff had obtained an order against a defendant whereby the defendant was to give a bond for payment of a certain sum of money to the plaintiff and to deposit some shares as security for compliance. Subsequently, the plaintiff entered into a compromise with the defendant by which the plaintiff agreed to accept payment of a smaller sum. However, the plaintiff later sought to proceed under the initial order on the basis that the compromise was reached because the defendant had concealed a material fact, that is, the defendant's father had died during the negotiations for the compromise whereas the plaintiff had been led to believe that the father was alive and would not help the defendant. In other words, the defendant was not in the penniless state that he had led the plaintiff to believe. The court at first instance allowed the plaintiff to enforce the initial order and this decision was upheld by the Court of Appeal. Therefore, the plaintiff was not bound by the compromise.

36 I was of the view that *Gilbert* did not assist the Plaintiffs. The Representations which they were relying on were not representations which induced them to enter into the Settlement Agreement but representations which induced them to enter into the underlying transactions which were the subject of the Underlying Dispute between the parties and which were then compromised by the Settlement Agreement.

37 It seemed to me that it was not open to the Plaintiffs to say that had they known that they had a stronger case against the Defendant in respect of the underlying transactions, they would not have settled their claims against him. Otherwise, every settlement could be easily set aside.

38 It also seemed to me that s 3 of the Misrepresentation Act applies only to representations made in respect of the contract entered into, which in the present case is the Settlement Agreement, and not to representations made in respect of the underlying transactions before the Settlement Agreement was entered into. Otherwise any party wishing to resile from a settlement could do so quite easily on the basis that there was a misrepresentation in respect of the underlying transaction which was settled.

39 In any event, even if s 3 of the Misrepresentation Act applies, it allows the term in question to be effective if it satisfies the requirement of reasonableness (as stated in s 3). While the burden would then be on the Defendant to satisfy that requirement, I was of the view that the reasonableness of cl 2 was obvious on the face of it. Indeed, when I asked the Plaintiffs' counsel (on 14 March 2011) why cl 2 of the Settlement Agreement would be unreasonable, he did not suggest any reason except to say that that would be a matter for trial.

40 Therefore, I would have allowed the appeal even without the assistance of the new evidence which the Defendant was relying on.

41 I come now to the new evidence.

42 The material part of the complaint to the Singapore police states:

> On 16/08/2010 – 01/09/2010, while I was clearing the office of an ex-colleague namely, John Pandiyan, I found some documents showing that he managed to attain his PR status using forged documents. I wish to state that the forged documents of which he used to attain his PR status are Pachaiyappa's College Certificate, Megamac 88 Technology Pte Ltd recommendation letter and Race Consulatants Pvt Ltd Service Certificate.
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> I had engaged a lawyer to make a check with Pachaiyappa's College on whether he had actually attended school there. However, the Principal-in-charge replied to my lawyer informing that no student by the name of John Pandiyan had attended the mentioned school.
>
> I made a check on the recommendation letter issued by Megamac 88 Technology Pte Ltd's Managing Director namely, Maliha Beevi D/o Abdul Majeed and discovered that the information written in the letter is false as it state in the letter that John Pandiyan has a strong knowledge in Civil Construction. However, I affirm that he does not have any knowledge mentioned as he was working in a Sembawang Shipyard from 1986 to 1993.
>
> I then made a check on his service certificate issued by Race Consulatants Pvt Ltd Service Certificate which is based in India and discovered that the information given was also false. The period of service, (02/02/1990-15/09/1994) which is stated in the letter was false as at that point of time he was still working with Sembawang Shipyard.
>
> I wish to state that his recent passports are also forged documents. ...

43 The material parts of the complaint to the Indian police state:

> In Oct/Nov 2003, Ramalingam Pandian call me from India as got my mobile number through a common friend Mr Prakasan s/o Maniam (Singaporean), he also came to know I am starting a company and he insist join me and he promised to contribute by bringing Indian labour to singapore, he show proof that he has build contact in this area through a company call Megamac. I accepted him as Director and my wife Mrs Vasandamallar was an another director in the

> Company. I disclosed all my details to John Pandiyan but he never told me that he illegally obtained Permanent Resident status in Singapore, we came to know about his illegal status in June 2010, when I ask him why his name changed has been changed as John Pandiyan and he did not reply. ("the first material part of the complaint to the Indian police").
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> ...
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> On 16.8.2010 while I was clearing my office at Singapore, I found some papers of John Pandian and through which I came to know that all his representations are wrong and he has cheated me in my business. I found that he managed to obtain PR Status and obtained 4 Passports (Passport Nos: by forging several certificates in India as detailed below: (details were then set out). ("the second material part of the complaint to the Indian police").

44 The Settlement Agreement was entered into on 23 September 2010. The Defendant's position was that each of the complaints showed that Subramaniam was aware in June 2010 and in August 2010 about the alleged falsity of the Representations but the Plaintiffs nevertheless decided to enter into the Settlement Agreement.

45 Subramaniam's explanation was that, as regards the complaint to the Singapore police and the second material part of the complaint to the Indian police, he had uncovered some documents in August or early September 2010 which aroused his suspicions and it was only after he investigated further that he discovered, after the Settlement Agreement was signed, that the Representations were false.

46 As regards the first material part of the complaint to the Indian police, Subramaniam explained that all he knew in June 2010 was that the Defendant had changed his name (from Ramalingam Pandian to John Pandiyan).

47 Yet, the first material part of the complaint to the Indian police said more than that. It stated quite clearly that "we", meaning the Plaintiffs, came to know in June 2010 that the Defendant had obtained his permanent resident status in Singapore illegally. That was one of the Representations which they relied on before me. In my view, that part of the complaint precluded the Plaintiffs from relying on that representation to set aside the Settlement Agreement.

48 Even if I were not to rely on any part of the complaint to the Singapore police or to the Indian police, Subramaniam had conceded in an affidavit that he had been suspicious of the Defendant before the Settlement Agreement was signed. In para 9 of his affidavit of 31 March 2011, he said:

> 9. I will concede that prior to the signing of the Settlement Agreement I was suspicious of the Defendant. We were at the time in a bitter dispute and I obviously had misgivings about him. However, I did not know as a fact that he had misrepresented me about his tertiary qualifications and accordingly the validity of his permanent residency. I would also state that I did not take any steps to verify or analyze this until December 2010.

49 Were Subramaniam's suspicions only about a change of name? I did not think so. His own account suggested that he had been suspicious about something more. That is why he undertook investigations.

50 The Plaintiffs were advised by solicitors. They chose to enter into the Settlement Agreement notwithstanding the suspicions. It was too late for them to backtrack.

51 In the circumstances, the new evidence reinforced my view that the Plaintiffs could not resile from the Settlement Agreement and start a fresh action. Hence, I allowed the appeal with costs.