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Tort Of Collateral Abuse Of Process Remains A Distinct Cause Of Action In Malaysia

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Imagine this scenario – “A” is a young, aspiring entrepreneur who sees an opportunity to make a fortune in a new and promising industry. The moment A takes that leap of faith, “B” (a competitor in the industry) floods A with lawsuits, as a ploy to stifle A gaining traction in the industry.

Ultimately, A may be successful in defending the lawsuits but damage has been done. A was already put through the wringer, going through the long and arduous Court process.

Is A forced to take this lying down? What recourse is available to A? Can B abuse the court process with impunity?

One of the possible avenues would be to give B a taste of his own medicine (albeit in a legal manner). A may commence an action against B for the ‘tort of collateral abuse of process’.

Definition

It would come to no surprise that the term tort of collateral abuse of process (TCAP) is foreign to non-lawyers. Not only is it a mouthful but it is also laced with legal jargon.

In brief, the law allows for the recipient of a legal action like A to commence litigation against a litigant (like B) who utilised the court process for ulterior motives.

The 3 conjunctive ingredients that A would need to fulfil are:

1. B must have initiated a court action.
2. B’s dominant purpose of filing the action must be to obtain a collateral advantage or it must be for some purpose other than to obtain genuine redress which the process offers.

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3. A must have suffered damage.

Conweld Engineering Sdn Bhd & 2 others v Goh Swee Boh @ Goh Cheng Kin & another

The 1st Plaintiff (Company) was founded by the 1st Defendant (D1). The 2nd Plaintiff (P2) was allotted shares and was D1's protégé. P2 brought in his elder brother, the 3rd Plaintiff (P3). As part of the process of succession, D1 then brought in his son, the 2nd Defendant (D2). P2 and P3 shall be referred to as the "Low Brothers", and D1 and D2 as the "Goh Family".

The final shareholding of the Company was 65% with the Low Brothers and the remaining 35% with the Goh Family.

Winding Up Petition

Irreconcilable differences ensued, resulting in discussions for the sale of the Goh's Family shares in the Company to P2. However, the discussions fell through.

The Goh Family subsequently filed a petition to wind up the Company, alleging that the Low Brothers did not act in the best interest of the Company (Petition). The Low Brothers were not named as parties to the Petition.

The Goh Family was successful in obtaining several ex parte orders (Ex Parte Orders), on the condition that they gave an undertaking for damages.

Naturally, the Company filed to set aside the Ex Parte Orders. The Court allowed the Company's setting aside application and struck out the Petition. During the assessment of damages, the High Court concluded that the Company had not proven it suffered substantial damages and merely awarded RM5,000 as nominal damages.

High Court Proceedings

The Company and the Low Brothers were convinced that the Petition was an attempt at holding them for ransom – to put pressure on the Low Brothers to buy the Goh Family's shares

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in the Company at a higher price. As such, the Company and the Low Brothers commenced an action for TCAP against the Goh Family (Action).

One of the main contentions by the Goh Family was that Malaysia ought to follow our common law sibling from across the straits (i.e. Singapore) which would result in the demise of TCAP as a distinct cause of action.

The High Court held that:

1. TCAP remains a valid cause of action in Malaysia and declined to follow the Singapore position.
2. The Goh Family was guilty of abusing the court process as the predominant purpose of filing the Petition was to procure a higher selling price of the Goh Family's shares in the Company.
3. The Plaintiffs claim for TCAP was nevertheless dismissed as the Plaintiffs failed to establish the 3rd constituent element of TCAP i.e. damage.

Appeal

Dissatisfied with the findings of the High Court, the Plaintiffs appealed and the Defendants cross appealed.

The Defendants rehashed its argument that the Malaysian Courts should cease to recognise TCAP as a distinct tort. Amongst the reasons was that the TCAP would encourage satellite litigation, open the litigation floodgate and make litigants hesitant to commence litigation (even if they have a valid cause of action) in fear that they may be sued or found liable for TCAP.

The Court of Appeal affirmed the decision of the High Court and held that TCAP is a distinct tort. Although the Petition was for the predominant purpose of putting pressure of the Low Brothers, the Company failed to prove the essential element of damage. In other words, the Company was not able to prove that it had sustained any damages consequent

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upon filing of the Petition and/or the grants of the Ex Parte Orders.

Further, the Low Brothers' attempt to claim legal costs to the tune of RM228,430.00 as damages for defending the Petition on behalf of the Company was also dismissed by the Court of Appeal. This proposition was untenable as the Low Brothers were not a party to the Petition and thus, had no cause of action for TCAP.

Commentary

The Court of Appeal's decision gives us certainty that TCAP remains a valid cause of action in Malaysia (even though it has been renounced in Singapore). In fact, parallels may be drawn between TCAP and the remedy against groundless threats which was introduced into our trademark regime in 2019.

As such, potential litigants ought to be wary that if they utilise court process for ulterior motives, they may be exposed to a countersuit for TCAP.

Authored by Alex Choo, Senior Associate with the firm's Intellectual Property practice.

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