IN THE COURT OF APPEAL CAYMAN ISLANDS

CICA 3 of 2011

BEFORE:

The Rt. Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt. Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

Cause No 78 of 2006

BETWEEN

(1) CRAWFORD ADJUSTERS (CAYMAN) LIMITED
(2) BOULD PATERSON LIMITED
(3) ALASTAIR PATERSON

Defendants /Appellants

- and-

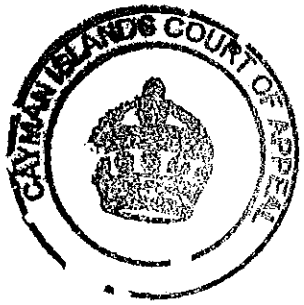
(1) SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
(2) THE PROPRIETORS OF STRATA PLAN NO.151 (KNOWN AS WINDSOR VILLAGE)

Plaintiffs /Respondents

Mr Isaac Jacob with Mr Graham Hampson of Hampson and Company appeared for the Appellants
Mr Michael Roberts with Mr Nicholas Dunne of Walkers appeared for the Respondents

Hearing dates: 21 and 22 November 2011
Judgment: delivered 5 April 2012

JUDGMENT



Sir Anthony Campbell, Justice of Appeal:

1. This is an appeal from a decision of Justice Henderson dismissing the re-amended counterclaim of the appellants that the pleading, prosecution and presentation of a case against them by the respondents constituted an abuse of the process of the Court both as to the manner in which this was done and the purpose for which it was done.

2. The factual background and the findings reached by the learned trial judge are set out in detail in his judgment. For the purposes of this appeal it suffices to summarise them.

3. Windsor Village is one of many properties severely damaged by the hurricane that hit Grand Cayman in September 2004. The corporate owner of this residential development was insured against damage to certain types of property caused by perils including hurricane under a policy held with Cayman General Insurance. Cayman General Insurance has since become Sagicor General Insurance (Cayman) Limited and as such is the first respondent in this appeal. I shall refer to it as Sagicor.

4. The first appellant, Crawford Adjusters (Cayman) Limited, was appointed by Sagicor to adjust the loss and the second appellant, Bould Paterson Limited, was engaged by the owner of Windsor Village as project manager for its reinstatement.

5. Mr Alastair Paterson, the third appellant, who is a chartered surveyor, was at all material times a director of Crawford Adjusters and of Bould Paterson. Although he does not hold any formal qualification as a loss adjuster Mr Paterson had considerable experience in loss adjusting having provided such services for more than thirty years.

6. John and Robert Hurlstone and companies bearing their name were employed to carry out the reinstatement of Windsor Village and in this judgment they will be referred to collectively as Hurlstones.

7. Hurlstones commenced work at Windsor Village in October 2004 and by 27 May 2005 they had received payments of CI $2,900,000 from Sagicor on the recommendation of Mr Paterson.

8. Mr Frank Delessio, who was described by the judge as a very competent loss adjuster, took up the post of Senior Vice-President and consultant at Sagicor on 15 June 2005. By then the payments to Hurlstones had reached CI $2,975,000. Soon after his arrival Mr Delessio expressed concern at the lack of progress with the reinstatement of Windsor Village and the lack of documentation to justify the advances that had been made. Sagicor refused to make any further advances until there was a full accounting for all of the advances that had been paid up to 27 May 2005.

9. Mr Danny Scott was the Chief Executive Officer of Sagicor and he was also a resident of Windsor Village. He shared the concern at the lack of documentation for the payments that had been made. In his case it was because he knew that an audit by the re-insurers was due to take place in the near future and it was important that the claims files were documented correctly. In early July 2005 his concern grew when Mr Delessio advised him that the value of the work that had been done at Windsor Village was around CI $1,300,000. Mr Delessio did not mention to Mr Scott that he had made arrangements to have Mr Paterson placed under surveillance at this time. The judge said that the fact that he did so could be seen as evidence of a conviction on the part of Mr Delessio that his company had been the victim of fraud.

10. From the outset Hurlstones had made it clear that they were not prepared to finance the ongoing cost of the reinstatement and required regular cash advances in order to pay deposits that were needed on building materials purchased in the United States where they were in short supply due to hurricane damage that had occurred there. Mr Paterson explained that advances paid by Sagicor were not therefore tied to the work that Hurlstones had done.

11. The late Mr Delessio (he died before the trial of the counterclaim) and Mr Paterson met for the first time when Mr Delessio came to Cayman in the 1990's as the director of a loss adjusting firm. Mr Paterson, who was then the local agent for this firm, found Mr Delessio to be aggressive and confrontational. The judge concluded that they were not fond of each other. This was supported by evidence that at meetings Mr Delessio treated Mr Paterson with "total disdain." Mr Harrigan, the chairman of the Windsor Village executive committee, said that he found Mr Delessio to be aggressive, agitated and extremely unpleasant and, on occasions, "obsessed by a desire to damage Mr Paterson."

12. On 5 July 2005 Mr Scott and Mr Delessio consulted Sagicor's attorneys, Quin and Hampson. As there was a possibility that a crime may have been committed a meeting was arranged with the head of the Financial Crimes Unit of the Royal Cayman Islands Police Service. It appears that this was at the suggestion of the attorneys. The head of the Cayman Islands Monetary Authority, which regulates the insurance industry, was also informed. From then on because of a possible conflict of interest on the part of Mr Scott, through his ownership of a property in Windsor Village, it was left to Mr Delessio to be the contact with Quin and Hampson.

13. Mr Stuart Dack who was Chief Executive officer and President of Cayman National Corporation, the parent company of Sagicor, accepted at the trial that considerable trust had been placed in Mr Delassio by leaving him to deal with the attorneys and to provide them with accurate information. Mr Simon Dickson, the attorney at Quin and Hampson advising Sagicor, said that from the outset Mr Delessio alleged that there had been dishonesty. The judge found nothing in the extensive evidence of Mr Dickson from which he could infer that Mr Delessio did not believe that Sagicor had been overcharged.

14. Mr Delessio arranged for Mr Alan Purbrick, a chartered surveyor, to assess the value of the work that had been done. Mr Purbrick knew Mr Delessio through business and he said that Mr Delessio made it clear to him that he was contemplating a court case.

He told Mr Purbrick that there was a big disparity between the amounts that had been paid by Sagicor and the value of the work that had been done and instructed him not to speak to Mr Paterson or to Hurlstones as it would not get him anywhere.

15. Although Mr Purbrick asked for drawings and to be given access to any sub-contracts, invoices, day work sheets or cancelled cheques paid to subsidiaries none of these was forthcoming. He regarded his report as a preliminary one and intended it to serve as a guide that would inform further investigations.

16. The conclusions reached by Mr Purbrick in this report were in Mr Scott's words "consistent with both my own perceptions with the extent of works completed at the site and that of Frank Delessio." Mr Scott said that he was very angry when he read Mr Purbrick's findings and concluded that Sagicor had been defrauded.

17. At a meeting on 28 November 2005 the directors of Sagicor were told of Mr Purbrick's conclusions and that the opinion of counsel was being taken in London. The opinion of Mr Moran, was received on 11 January 2006 and he advised that there was no explanation for the discrepancy in figures other than dishonesty. This reinforced Mr Scott's view and at a meeting of the board on 20 February 2006 the directors agreed that in light of this opinion it had no alternative but to initiate proceedings.

18. Mr Dack who was a director of Sagicor until after January 2008 had no recollection of Mr Delessio having attended any board meetings and this indicates that he would not have been present when the decision was made. According to Mr Scott it was the advice received from Mr Purbrick and from the attorneys that influenced the decision to issue proceedings.

19. A week after the decision was made to issue proceedings Sagicor obtained a Mareva injunction against Hurlstones. This was subject to the usual undertaking as to damages. The *ex parte* application was supported by affidavits from Mr Scott, a Mr Ulrich and two reports from Mr Purbrick. A similar application for an injunction against Mr

Paterson and the other appellants was refused due to the absence of any evidence of a possible dissipation of assets.

20. Following the issue of proceedings the action progressed slowly towards trial and on the eve of the hearing Sagicor sought leave to discontinue. The judge in granting leave awarded each of the defendants their costs on an indemnity basis. He took account of the serious allegations that had been made in the pleadings, including fraud and conspiracy against Mr Paterson and the other defendants. These allegations had received wide publicity through an article that appeared in the Caymanian Compass in March 2006. The article was based on the court file and the judge found that Mr Delessio had been instrumental, in some undisclosed manner, in causing this story to appear without communicating himself with the journalist who wrote it.

21. The appellants claim that as a consequence of the allegations in the pleadings and the publicity given to them in the Caymanian Compass their reputations were gravely damaged and their businesses were effectively destroyed.

22. In addition to being awarded costs by the judge on an indemnity basis Hurlstones received damages for loss of profit and the judge directed an enquiry into the damage suffered by them as a result of the Mareva injunction.

23. There was evidence before the judge that was highly critical of Mr Purbrick's report. Mr Purdom, a civil engineer with quantity surveying experience, pointed to a number of deficiencies in the report and described it as being fundamentally flawed. In his opinion Mr Delessio as a very experienced and competent loss adjuster should have appreciated immediately on reading the report that it was deficient in a number of respects. Another witness, Mr Thomas, a chartered quantity surveyor and qualified loss adjuster, said that the report from Mr Purbrick contained "glaring errors which any professional in the field should have seen and questioned." He found it "... incomprehensible that given the various glaring errors that Mr Delessio and/ or Mr Scott with years of experience in insurance and loss adjusting did not question the

aforementioned issues and did not seek second opinions before making the accusations of fraud." While the judge concluded that Mr Delessio knew that Mr Purbrick's report was badly flawed and not a proper basis in itself for the commencement of a fraud and conspiracy action and concealed this from the attorneys, the judge went on to say "He also had his own (inaccurate) opinion, fortified by his aggressive personality and excessive self- confidence in his own ability as a loss adjuster, that the work he had observed at WV was not worth $3,000,000".

24. The judge decided also that Mr Delessio's actions and state of mind were so closely connected with his employment that if liability were established Sagicor would be vicariously liable

25. He went on to find that Mr Delessio's dislike of Mr Paterson and his desire to harm him was the dominant factor which led him to present what should have seemed like an ordinary case of overcharging as one of fraud but he could not conclude on the evidence that the destruction of Mr Paterson personally was the sole reason for the litigation. Mr Delessio's unreasonable but genuinely held belief that Sagicor had been defrauded was also a contributing factor.

26. The judge was satisfied that liability for the tort of abuse of process on the part of Sagicor was not established due to lack of proof of an object not within the scope of the process.

27. So far as the tort of malicious prosecution was concerned the judge followed the decision of the House of Lords in *Gregory v Portsmouth City Council* [2000] AC 419 in which it was held that the tort was available only in respect of criminal proceedings and a few special cases of abuse of civil legal process and declined to extend its ambit.

28. Mr Jacob who appeared with Mr Hampson for the appellants, (on the hearing of the appeal but not in the court below) accepted that the judge was bound, as is this court, to follow the decision in *Gregory*. However, he wished to keep the issue open should

the appeal go to the Privy Council. For this reason leave was given to amend the notice of appeal by the addition of paragraph 47.

29. The appeal before this court was confined therefore to the tort of abuse of process.

30. Mr Jacob accepted the judge's findings of fact save for his finding that although the dominant purpose of Mr Delessio was to destroy Mr Paterson this was not his sole motive. He submitted that the proceedings were not instituted or pursued with a view to obtaining any relief and the sole motive was to destroy Mr Paterson. The proceedings were based on a report that Mr Delessio knew, as an experienced loss adjuster, to be flawed and he failed to disclose this to the lawyers. He then proceeded to obtain an injunction against Hurlstones. The delay that followed demonstrated that he had no intention of bringing the action to trial and this coupled with the disclosure of the pleadings to the press leads to the conclusion that the sole purpose of issuing proceedings was to damage Mr Paterson.

31. If, as the judge found, this was the predominant purpose though not the sole one Mr Jacob submitted this was sufficient to establish the tort of abuse of process.

32. It was argued further that the judge was wrong in holding that there was no reliable evidence of any overt act such as a threat by Sagicor to Mr Paterson or of an attempt to exert pressure upon him in connection with the original proceedings. If contrary to the case made by the appellants this had to be established then such extraneous factor did exist.

33. Mr Roberts who appeared with Mr Nicholas Dunne for the respondents referred to the absence of any factual findings to support the suggestion that the delay had been deliberate so as to prevent the action reaching trial. He relied on the judge's reference to the absence of any allegation that the legal process itself was used in some way for which it was not designed. In response to Mr Jacob's submission that a predominant purpose even if not a sole purpose was sufficient Mr Roberts relied on a passage in the judgment of Teare J. in *JSC BTA Bank v Ablyazov and others* [2011] EWHC 1136

(Comm.) at [22] where he concluded in a review of the authorities that "If one of two purposes is legitimate it seems to me right in principle that the Claimant should be entitled to proceed with his claim."

34. The origin of the tort of abuse of process is found in *Grainger v Hill* 4 Bing NC 212 where the defendants were concerned as to the adequacy of the security for a loan against a ship and issued proceedings for the repayment of the debt before this became due. They used the proceedings to instruct the sheriff's officers to obtain the ship's register, to which they were not entitled, in order to improve their security. The plaintiff refused to repay the debt as it was not due. He was unable to obtain bail and although he was ill in bed he was arrested and imprisoned. In order to obtain his release he surrendered the ship's register to the defendants. The court held that it was an abuse of the process of the law to use it to extort property to which the defendants had no right. Tindal C.J. (at 221) described it as "an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution..." Park J. (at 222) said "...the Defendants are charged with having abused to process of the law, in order to obtain property to which they had no colour of title;" and Bosanquet J (at 224) said "The action is not for maliciously putting process in force, but for maliciously abusing the process of the Court."

35. In *Gilding v Eyre* (1861) 10 CBNS 592 the defendant had obtained judgment against the plaintiff for a debt. After the plaintiff had made a substantial repayment the defendant sought to recover the full amount. The plaintiff, who was arrested by the sheriff's officers, brought proceedings to recover the overpayment on the ground of malicious arrest. The Court held in favour of the Plaintiff on the basis that the defendant had by means of an irregular writ of execution extorted money which he knew had already been paid.

36. Any doubts that may have existed as to whether the tort has survived were dispelled by the decision of the Court of Appeal in *Goldsmith v Sperrings Ltd* [1977] 1 W.L.R

478 and subsequently in *Speed Seal Products Ltd v Paddington* [1985] 1 W.L.R. 1327. However, as Etherton LJ remarked in *Land Securities Plc v Fladgate Fielder* [2010] 2 W.L.R. 1265 at 1278:

> "If *Gildings* case is properly to be regarded as an example of a *Grainger v Hill* tortious abuse of process then it is the last reported case in which such a claim has succeeded in this jurisdiction. If not then *Grainger v Hill* is the first and last such case. Accordingly, the last reported successful action in this jurisdiction for the tort of abuse of process was either about 140 or 170 years ago."

37. The obvious explanation for this is that the courts recognise the risk of deterring those with legitimate claims from bringing them if they are to be open to having their purpose in doing so called into question. It is not unusual for litigants to foresee unrelated benefits that they may gain through pursuing such a claim.

38. This issue was considered by Bridge LJ in *Goldsmith v Sperrings* [1977] 1 W.L.R. 478 where he said at page 503:

> "In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance . On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain: but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it. But on the view of the facts that I take in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract."

This approach received approval from Simon Brown L.J. in *Broxton v McClelland (No 2)* [1997] EMLR 157 and from Etherton L.J.in *Land Securities.*

39. Support for the view that the tort of abuse of process should not be allowed to act as a deterrent is found in *Metall & Rohstoff* v *Donaldson Inc.* [1990] I Q.B. 391 where Slade L.J. in delivering the judgment of the Court said at 470:

> " The substance of the complaint against the defendants is that they abused the process of the court by adducing false evidence and submitting a false case for the primary purpose of defeating claims by M&R in the proceedings to the return of their metal and other assets and to prevent the defendants from dealing with such assets in the meantime.
>
> No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way of a penal order for costs or even a prosecution for perjury. In our judgment, however, it does not expose him to an action for damages in tort under the principles of *Grainger v Hill*, 4 Bing.N.C. 212.
>
> No authority has been cited to which satisfies us that it does. If the use of court process is to expose a party to liability under this principle, the court must, in our judgment, have been used for a predominant purpose "outside the ambit of the legal claim upon which the court is asked to adjudicate ..." compare *Varawa v. Howard Smith Co. Ltd.* (1911) 13 C.L.R. 35, 91 *per* Isaacs J. Relief in tort under the principle of *Grainger v Hill* is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in civil proceedings. This may well cause hardship to an injured party who cannot be sufficiently compensated by an appropriate order for costs. However, if there is a gap in the law it rests on sound considerations of public policy, as does the rule of law which gives immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. If the position were otherwise, honest litigants might be deterred from pursuing honest claims or defences and honest witnesses might be deterred from giving evidence: compare generally *Business Computers International Ltd. v Registrar of Companies* [1987] Ch. 229, 235 per Scott J. and the cases there cited."

40. Mummery L.J. pointed out in *Land Securities* at 1297 that "the institution and pursuit of legal proceedings is an exercise of the fundamental right of access to the courts. As a general rule, the exercise of a legal right is not an unlawful abuse of that right merely

by reason of predominant improper or ulterior purpose: *Bradford Corpn. v Pickles* [1895] AC 587." In the present case the judge found that "Mr Delessio's unreasonable but genuinely held belief that Sagicor had been defrauded was also a contributing factor of significance." Even if it is accepted that in issuing the proceedings Mr Delessio had the motive of damaging Mr Paterson as Simon Brown L.J. remarked in stating the central principles in *Broxton* : "a Plaintiff is entitled to seek the Defendants' financial ruin if that will be the consequence of properly prosecuting a legitimate claim."

41. In an amended Statement of Claim the plaintiffs alleged that the defendants (including the Hurlstones) had made false representations and in doing so had acted in combination. It was further alleged that they had acted fraudulently. The judge found that it was Mr Delessio's dislike of Mr Paterson and desire to cause him harm which led him to present what should have seemed like an ordinary case of overcharging as one of fraud but he could not conclude that the destruction of Mr Paterson was the sole reason for the litigation. He went on to find that "Mr Delessio's unreasonable but genuinely held belief that Sagicor has been defrauded was also a contributing factor of significance." While an allegation of fraud is not be made lightly in legal proceedings (see for example the Code of Conduct of the Bar of England and Wales at para 704 (c)) in light of these findings it cannot be said that to have made such a case amounted to an abuse of process. It is not unusual for a party to overstate its case in the pleadings and even to make a false case but as Slade L.J. said in *Metall & Rohstoff* the remedy lies in a penal order for costs such as was made in this case.

42. The appellants invite this court to infer that there was no intention on the part of Mr Delessio to bring the action to trial. His purpose to destroy the appellants was to be served by bringing the proceedings and disclosing the pleadings alleging fraud to the press. Mr Jacob relied on delay to make good this case. The judge did not make any findings of fact on this issue though the evidence of Mr Dickson on delay is summarised at paragraphs 166-177 of the judgment. An examination of the transcript

(at 2514 and 2515) shows that his evidence was that there was no question of deliberately dragging heels. He explained that one cause of delay lasting a full year was the preparation by the parties of the Scott schedules that had been ordered by the court. According to Mr Dickson he was preparing for trial and it was only when disclosure of invoices from Hurlstones was made that it was decided that the allegation of fraud would have to be withdrawn. In the face of this evidence it is not possible for this court to draw the inference that the delay was deliberate.

43. With regard to the judges finding that Mr Delessio believed that Sagicor had been defrauded this again is supported by the evidence of Mr Dickson (at page 2487 of the transcript) where he said "there clearly seemed to be a belief that Cayman General Insurance [Sagicor] had been defrauded. That is what I picked up from Mr Delessio and Mr Scott." Later (3622) the witness in agreeing with the suggestion put to him that Mr Delessio was convinced that Sagicor had been defrauded; the witness responded "Absolutely".

44. On the basis of the evidence that was before the judge there are no grounds upon which it can be said that he was wrong in concluding that the tort of abuse of process by Sagicor had not been established. Accordingly the appeal is dismissed.

Sir Anthony Campbell, Justice of Appeal

Elliott Mottley, Justice of Appeal

45. I agree.

Sir John Chadwick, President

46. I also agree.

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C.I.C.A. (Civil) # 3 of 2011
(GC Cause No. 78 of 2006)

BETWEEN:

1. CRAWFORD ADJUSTERS (CAYMAN) LIMITED
2. BOULD PATERSON LIMITED
3. ALASTAIR PATERSON

Appellants

-and-

1. SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
2. THE PROPRIETORS OF STRATA PLAN NO 151 (KNOWN AS WINDSOR VILLAGE)

Respondents

CERTIFICATE OF THE ORDER OF THE COURT

Appeal from the order of the Grand Court made on 14th day of February 2011 by the Honourable Mr Justice Henderson. This appeal coming on for hearing on the 21st & 22nd days of November 2011.

BEFORE: The Rt. Hon. Sir John Chadwick, President
The Hon. Mr. Justice A. Campbell, J.A.
The Hon. Mr. Justice E. Mottley, J.A.

In the presence of Mr Isaac Jacob. with Mr Graham Hampson of Hampson & Company for the Appellants and Mr Michael Roberts with Mr Nicholas Dunne of Walkers for the Respondents.

I HEREBY CERTIFY that an Order was made on 5th day of April, 2012 as follows:

1. Appeal dismissed.
2. Costs to the Respondents to be taxed if not agreed.

Given under my hand and the Seal of the Court this 12th day of April 2012.

Registrar
Civil Form 5, Rule

CAYMAN ISLANDS COURT OF APPEAL