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A rare case of conspiracy by lawful means

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SINGAPORELAWBLOG

A Rare Case of Conspiracy by Lawful Means

A rare case of conspiracy by lawful means

Conspiracy by lawful means is a well-known anomaly in the law of torts. The anomaly lies in the fact that the tort imposes liability on two or more persons acting in concert to pursue a course of conduct that is otherwise lawful when committed by a sole actor. Of course, it is a critical element of the tort that the conspirators must have acted with the predominant intention to cause harm to the victim, but it is well settled that malicious intent is not, by itself, a sufficient basis for founding liability. It would thus seem that it is the fact of combination that somehow magically transforms a lawful course of action into a tortious one. Despite its somewhat perplexing foundation, however, no serious attempt has been made to expunge this tort from the law. Perhaps, it is thought that the tort would in any event have little or no application in the commercial context, where the motive for injuring another usually lies in the desire to advance one's own interests, in which case the injurer could not be said to have acted with the predominant intention to injure another. Against this backdrop, the case of *SH Cogent Logistics Pte Ltd v Singapore Agro Agricultural Pte Ltd*[2014] SGHC 203 ("*SH Cogent*") is remarkable, for in this case the High Court upheld an allegation of lawful means conspiracy in the context of a purely commercial dispute.

In *SH Cogent*, the current tenant ("Cogent") of Turf City ("the Site") alleged that the former tenant ("SAA") had conspired with its director and other related persons to cause it harm. In essence, the plaintiffs' complaint was that the defendants had, on the pretext of having to "reinstate" the premises in order to hand it back to Singapore Land Authority ("SLA"), deliberately embarked on a "scotched-earth policy" of destroying various fittings, equipment and structures and evicting existing sub-tenants and licensees after it had failed to secure a new tenancy for the Site. This disrupted the businesses of the sub-tenants and licensees, causing some to relocate rather than enter into fresh tenancy or licensing agreements with Cogent. Justice Woo Bih Li found that SAA, which was under no legal obligation to reinstate the premises, had done so with the predominant purpose of harming Cogent. This finding was based not only on evidence of SAA's unrelenting disruptive conduct at its own loss and expense, but also on its overt threats to embark on a destructive course of conduct unless Cogent paid a sum of "compensation". SAA's unmistakable intention was

therefore to extract from Cogent a benefit to which it was not entitled. Woo J also found that the fact that the defendants had acted in concert could be inferred from the injurious course of conduct as well as the relationship between them. On these findings, the plaintiffs succeeded in their claim for lawful means conspiracy.

As possibly the first and only instance of lawful means conspiracy in Singapore, *SH Cogent* is of undoubted significance. It demonstrates that despite the familiar criticism of the tort as “anomalous”, it may nevertheless have a useful role to play in remedying losses caused by extortionate behavior. While the doctrine of economic duress may enable a party coerced into an improvident *bargain* to set it aside, and someone threatened with *unlawful* conduct may sue for loss on the ground of tortious intimidation, no cause of action is otherwise available to a victim who has incurred losses by reason of extortionate conduct founded on *lawful acts*. The tort of lawful means conspiracy appears to fill this apparent lacuna. If this were right, *SH Cogent* would have introduced, as it were, by the back door, a tort of intimidation by lawful means.

But the case is not an unassailable authority for the proposition just described as the means employed by the defendants were not, on closer examination, entirely lawful in nature. In fact, the court had found that SAA’s disruptive conduct was in breach of its agreement with SLA, and also contravened an injunctive order that restrained SAA from the perpetrating the same (though this order was subsequently discharged). Given these contraventions, it would seem that some illegality had in fact been employed by the defendants. Seen in this light, *SH Cogent* may perhaps be better explained as an instance of conspiracy by unlawful means, for in characterising its conduct as tortious the court was clearly influenced by the fact that SAA had no right to do what it did. That said, the court might ultimately have preferred the analysis of lawful means conspiracy so as to avert any uncertainty concerning the legality of some aspects of SAA’s conduct. In particular, it was unclear if SAA was legally obliged to facilitate the transition of the sub-letting and licensing arrangements to the plaintiffs, even though it was repeatedly requested to do so by SLA. Its failure to do so might not, therefore, have amounted to unlawful acts. All the same, the point remains that *CH Cogent* was not an unambiguous case of lawful means conspiracy. And one might ask if the court would have arrived at the same conclusion had SAA been entirely free to remove the items and structures that it had installed on the Site, and to terminate the sub-leases and licences upon expiry.

Another question triggered by the unusual facts of *SH Cogent* is whether, assuming that some unlawful means had in fact been employed, the court could nevertheless be free to base its judgment on lawful means conspiracy alone (provided, of course, that its elements are established). There is some suggestion by the High Court in the earlier case of *The Dolphina* [2012] 1 SLR 992 that it is inappropriate to proceed on the basis of lawful means conspiracy once fraud is established. This may suggest, more generally, that the proof illegal acts being undertaken by the defendants would automatically preclude a claim for lawful means conspiracy. It is suggested that the better view is that it does not. If, in fact, the elements of lawful means conspiracy may be

established *independently* of the extant illegality, there is no reason why the court may not prefer that analysis.

As a final observation, it is noteworthy that whilst upholding the plaintiffs' claim, Woo J was careful in *SH Cogent* to acknowledge the deficiencies in the juridical underpinning of the lawful means conspiracy tort:

I recognise the force in the argument that the tort of conspiracy appears to be an aberration in the common law. It is difficult to explain why an act, when committed pursuant to an agreement between a number of persons triggers liability, while the very same act, when committed by one person alone does not.

Indeed, in the earlier case of *EFT Holdings, Inc v Marineteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860, the Court of Appeal had also doubted (*obiter*) the continued relevance of the tort of conspiracy by unlawful means. Taken together, these observations would suggest that our courts are likely to take a cautious view of any attempt to utilise the conspiracy tort to extend liability beyond existing boundaries. Nevertheless, the decision in *SH Cogent* serves as a poignant illustration of the potential potency of the conspiracy by lawful means tort in transforming an otherwise lawful course of action into a tortious one.

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