Ooi Say Peng and another *v* Koh Kai Chuan Raymond and others

[2021] SGHC 128

Case Number	: Suit No 868 of 2019 (Registrar's Appeals 53 and 54 of 2021)
Decision Date	: 27 May 2021
Tribunal/Court	: General Division of the High Court
Coram	: Philip Jeyaretnam JC
Counsel Name(s)	: Edwin Lee Peng Khoon (Eldan Law) (instructed) and Tay Siok Leng Josephine (Josephine Tay & Co) for the plaintiffs; Choa Sn-Yien Brendon and Lim Jia Xin Kimberly (Patrick Ong Law LLC) for the fourth defendant; Gokulamurali s/o Haridas, Linisha Kapur Supramaniam and Ng Si Xuan Sancia (Tito Isaac & Co LLP) for the fifth and sixth defendants
Parties	: Ooi Say Peng — Josephine Tay Siok Leng — Koh Kai Chuan Raymond — Toh Lay Keng, Vivien — Hup Soon Loong Construction Pte Ltd — Gan Geok San (trading as D'arclub Architects) — Chu Chiang Yong — ZPT Engineering Services — Wee Joon Kin

Civil Procedure – Pleadings – Striking out

Injunctions – Mandatory injunction

Tort – Breach of statutory duty

Tort – Negligence

Tort – Nuisance

27 May 2021

Judgment reserved.

Philip Jeyaretnam JC (delivering the judgment of the court *ex tempore*):

Introduction

1 These appeals concern the fourth, fifth and sixth defendants' applications to strike out all of the claims against them contained in the plaintiffs' Statement of Claim (Amendment No 1) filed on 12 January 2020 ("SOC").

Background

2 The plaintiffs are the owners of a property at 17 Richards Avenue Singapore ("17RA"). They are aggrieved by what they say happened when the first and second defendants carried out structural works ("the Redevelopment Works") on the neighbouring property ("19RA"). The first and second defendants are the owners of 19RA. 17RA and 19RA share a party wall. The plaintiffs allege that the party wall was improperly hacked in or about November 2013 and that this resulted in, broadly, cracking within 17RA, water leaks and a compromise of the structural integrity and safety of the party wall and of their own building at 17RA. For the purpose of this decision, I use the word "hacking" in its various grammatical forms to encompass the plaintiffs' various allegations in relation to interference with the party wall, which is sometimes described as embedment or recessing of structures, tampering or removal, in addition to the word "hacking".

3 The matter was investigated by the Building and Construction Authority which required

information and reports from the qualified persons, *ie* the fourth and fifth defendants. The fourth defendant was the qualified person for architectural works under Building Control Act s 8(1). The fifth defendant was the qualified person for civil and structural engineering works under Building Control Act s 8(1). The sixth defendant is a partnership firm of which the fifth defendant is a partner. Following this investigation, the Redevelopment Works continued to completion. The Temporary Occupation Permit ("TOP") in respect of 19RA was granted on 3 May 2017, and the Certificate of Statutory Completion ("CSC") followed on 31 January 2019. The plaintiffs say that the grant of TOP and CSC was made on the basis of various omissions and false statements by the fourth, fifth and sixth defendants.[note: 1]

4 The plaintiffs filed the writ of summons in this action on 31 August 2019, about two months before the expiry of six years from the original incident. Not satisfied with pursuing a claim against the first and second defendants, or just additionally against the contractor, who is the third defendant, the plaintiff included the fourth, fifth and sixth defendants too, as well as the Resident Technical Officer as the seventh defendant. These appeals concern only the fourth, fifth and sixth defendants.

5 The SOC runs to 73 pages. The plaintiffs plead Land Titles Act s 104(2), which statutorily implies cross easements between the neighbours who each own part of the party wall "to have the whole wall continue in such a manner that each building supported thereby will have the support of the whole wall".[note: 2] This, together with an averment that the party wall rights are endorsed on the titles of both 17RA and 19RA, appears to be the basis for the plea against the first and second defendants of "a non-delegable duty to observe and abide by the party wall rights and not to remove and/or withdraw and/or compromise the support of the Party Wall".[note: 3] It is unclear why the obligation is described in this way rather than simply adopting the terminology of an easement for support. The natural remedy of the plaintiffs, if their grievance is made out, would be to seek a mandatory injunction for the first and second defendants to restore the support, allegedly lost as a result of the work done on their part of the party wall, so as to prevent further damage from occurring. I would note that the right as between neighbours under their cross easements is not that the party wall must remain exactly as it has always been but rather that it must be capable of providing support.

The plaintiff's claim against the fourth, fifth and sixth defendants

6 Turning to the claim against the fourth, fifth and sixth defendants, the plaintiffs plead that the design intent of the structural plans for the Redevelopment Works did not include any hacking of the party wall.[note: 4] However, they allege that, when the works were carried out, such hacking in fact took place, and caused damage to the structural elements of the party wall resulting in "loss of support and/or withdrawal/removal of support".[note: 5] In the same paragraph, they also assert their entitlement to the continued support of the whole party wall by reason of their party wall rights.

7 The causes of action relied upon against the fourth, fifth and sixth defendants are in negligence, breach of statutory duty and nuisance. In the negligence and breach of statutory duty claims, there are broadly three aspects to the plaintiffs' allegations. The first is that the fourth, fifth and sixth defendants "caused and/or permitted unauthorised building and structural works".[note: 6] The second is of negligent supervision of the works.[note: 7] The third is of failure to investigate the matters raised by the plaintiffs.[note: 8]

8 None of these aspects is entirely straightforward. The first aspect, notwithstanding the length of the pleadings, is just a bare averment. Elsewhere, the plea of hacking of the party wall is made

against the first, second and third defendants only.[note: 9] Indeed, pleading that the fourth, fifth and sixth defendants *caused* the hacking is contradicted by the plea that the design intent of the approved plans was not to involve any hacking.

9 In relation to the second aspect, even if the fourth, fifth and sixth defendants were under a duty to the first and second defendants to supervise the work of the third defendant, that does not of itself mean that they were under the same duty to the plaintiffs. Despite or perhaps because of their length, the pleadings are not clear. Moreover, at times, the plaintiffs' pleadings seem to slide towards the proposition that the fourth, fifth and sixth defendants were under a duty to stop the third defendant from causing damage to the plaintiffs, a proposition that would be hard to establish.

10 In relation to the third aspect, it is unclear on the facts pleaded how, if a duty to investigate after the event existed, this duty was breached, or how this breach resulted in further damage. Certainly, any subsequent failure to investigate did not cause the original alleged damage.

11 Most striking about the claim is that the loss has not been reduced into financial terms. While there is a sweep-up prayer for damages, this appears as the twelfth item of relief, following claims for three declarations and eight mandatory injunctions. Seeking mandatory injunctions may not be unusual where there is a claim to restore loss of support removed by the owner of a neighbouring property that is subject to an easement (although some of the prayers, such as prayer (j), plainly go beyond any question of restoring the allegedly lost support). But it is highly unusual in a claim against construction professionals. It is highly unusual because ordinarily where work done has caused water seepage or leaks, cracks or compromise of structural integrity, the typical remedy would be to claim the cost of rectification to resolve these issues. The question I have to answer is whether it is not merely untypical but unsustainable in law to order a tortfeasor to repair something he has damaged in the past rather than to award damages, in the absence of any plea of a future wrong threatened by or presumed against the tortfeasor, and where the tortfeasor does not own or control any potential source of future damage. The explanation (given during oral argument) for seeking mandatory injunctions as the primary remedy is that any such works, and even proper preparatory investigation, would require access to 19RA, which according to the second plaintiff (who is herself a lawyer, and argued these appeals) has not been forthcoming.

12 I understand the grievance and frustration of the second plaintiff. She has lived with the aftermath of the incident for close to eight years as of the hearing. However, what is immediately apparent is that the core of the claim is the easement for support operating against the first and second defendants as owners of 19RA. Layering on additional claims against the fourth, fifth and sixth defendants has created a complexity that threatens to derail the efficient and expeditious determination of the dispute. This case would benefit from case management both by counsel and by the court. Case management is not the subject of these appeals and will have to wait for another occasion. Nonetheless, considerations of whether the state of the pleadings may prejudice, embarrass or delay the fair trial of the action are relevant at this stage. Clarifying the available remedies may also have a beneficial effect on the conduct of these proceedings.

Whether and to what extent the claims against the fourth, fifth and sixth defendants should be struck out

13 The subject of these appeals is only whether all or part of the claims against the fourth, fifth and sixth defendants should be struck out. This depends on whether they are unarguable and unsustainable.

14 I consider that the seeking of mandatory injunctions against the fourth, fifth and sixth

defendants as prayed for in prayers (d) through (k) of the SOC is wholly unarguable and unsustainable and should be struck out.

15 The pleading of the prayers for mandatory injunctions does not specify the fourth, fifth and sixth defendants. Instead, in those prayers other than (j), the fourth, fifth and sixth defendants would fall within the phrase "and/or such other Defendants as this Honourable Court deems fit". In prayer (j), the phrase within which the fourth, fifth and sixth defendants fall is "all the Defendants and/or one or more of them". Hence, the striking out would have to be effected by introducing words excluding the fourth, fifth and sixth defendants from all these prayers.

16 The action continues against the fourth, fifth and sixth defendants for damages.

17 I will now set out brief reasons for striking out the claims for mandatory injunctions as against the fourth, fifth and sixth defendants, and then brief reasons for not striking out the remaining causes of action against them, namely in negligence and breach of statutory duty. I will lastly deal with the pleadings in relation to trespass and nuisance. In relation to nuisance, there are parts of the pleading that are embarrassing and which I strike out.

The mandatory injunctions

18 Essentially, adopting the letters of the respective prayers concerned, the plaintiffs seek mandatory injunctions for the fourth, fifth and sixth defendants to:

(d) remove certain structures said to have been wrongly recessed into the party wall and restore the party wall to its prior condition;

(e) submit to the plaintiffs for their consideration and agreement proper investigation reports and method statements;

(f) waterproof and plaster the plaintiffs' side of the party wall;

(g) remove Styrofoam said to be stuffed in a gap between 17RA and 19RA and remove or close up the gap;

(h) remove the recessed columns and beams wrongly embedded in the party wall and an alleged encroaching beam;

(i) investigate and make good various cracks within 17RA;

(j) make good all the damage sustained in 17RA; and

(k) take immediate temporary/interim water protection measures to prevent and stop further ingress or leakage of water.

19 A striking feature of these prayers is that what is sought is painted in the broadest of possible brush-strokes. Indeed, the first step that the plaintiffs seek to compel is a "proper and full investigation", with investigation reports and proposed method statements to be submitted for the plaintiffs' consideration and agreement. The prayers as they stand are far too imprecise for orders to be made under threat of proceedings for contempt. They invite the court to enter into a long period of judicial supervision over whether its orders have been complied with, as opposed to the simple finality and end to litigation that an award of damages affords.

20 There is an even more fundamental objection. Where an architect or engineer has caused damage to the property of another through his past negligence or breach of statutory duty, his liability lies in damages if at all. He cannot be ordered personally to repair or make good what he has damaged, any more than a surgeon, who has caused injury to a patient through negligent surgery, will be ordered to remedy that injury by operating on that injured person. Even where non-repair may result in further damage to the wronged party's property, the tortfeasor will not be ordered to undertake the repair of such property himself. Take the example of a car that is dented in an accident, and which may rust, allow the ingress of water and cause damage to other parts of the car if not repaired. The person who negligently caused the accident will not be ordered to repair the dent. Indeed, on ordinary principles, the wronged party must mitigate his loss by repairing damaged and deteriorating parts of his own property promptly. If he does not do so he would not be able to recover compensation for the reasonably avoidable further loss.

21 This differs from the vindication of a property right such as an easement, where the mandatory injunction is ordered *against the owner of the servient property* to comply with his obligation under that easement and put an end to the infringement of the property right. It is the owner of the servient tenement who owns the property in question, whether it is a structure providing support or a stretch of land affording a right of way. It is because he owns the property, that the remedy may be for him to carry out remedial or preventative works. The wronged party is not in a position to do such work, because it is not on his own land. Even in that situation the court would have to consider what would be the fair result as a matter of discretion, and whether damages should be ordered in lieu of a mandatory injunction.

22 In relation to the claims brought against the fourth, fifth and sixth defendants, the remedy of a mandatory injunction is not available as a matter of principle. They are tortfeasors, not owners of a servient tenement. As far as the fourth, fifth and sixth defendants are concerned, their alleged wrongful conduct lies wholly in the past. There is no plea of any threatened or presumed future wrong on their part. Following the grant of the CSC, the fourth, fifth and sixth defendants have no current or future work to undertake in relation to 19RA. The loss pleaded by the plaintiffs can be compensated for in money, which the plaintiffs can use to effect repairs or as reimbursement for repairs already done, or even potentially to compensate for loss of amenity or diminution in value. There is no reason that the works sought by the plaintiffs must be considered, planned, designed and carried out specifically by the fourth, fifth and sixth defendants, rather than by other architects or engineers.

23 It is worth noting that the scheme of the Building Control Act permits a qualified person to resign: see s 9(5). The owner who has engaged the qualified person may have a claim in damages against the qualified person if he resigns in breach of his terms of engagement, but he is not able to obtain specific performance and must engage a replacement qualified person. If the owner cannot compel a qualified person to act against his will, *a fortiori* the owner's neighbour cannot do so.

24 If the plaintiffs say that their intention is that the fourth, fifth and sixth defendants may pay others to carry out the works on their behalf, and so there would be no compulsion of personal service, then that point necessarily concedes that damages would be an adequate remedy. Inasmuch as the fourth, fifth and sixth defendants could pay for someone to repair the plaintiffs' damaged property, or waterproof their home, then the plaintiffs could do so, and claim the cost as damages.

25 The plaintiffs' argument that mandatory injunctions are needed because they do not have any right of access to 19RA for works and investigations does not explain, let alone justify, why joint and several mandatory injunctions binding the fourth, fifth and sixth defendants should be granted. The fourth, fifth and sixth defendants are likewise not in a position to gain unilateral access for

themselves to 19RA. It would not be possible for the fourth, fifth and sixth defendants to perform these injunctions without the cooperation of the first and second defendants (where the work would be done on the first and second defendants' property), and, for compliance with some parts of the orders sought, the cooperation of the plaintiffs themselves (where the intended repairs would be of the plaintiffs' own property). This provides another reason why the law of negligence does not mandate injunctions to investigate and repair as a remedy for past damage caused to another's property.

26 Turning back to whether the alleged breaches of statutory duty would found the mandatory injunctions sought, I hold that they do not, for the same reasons that I have outlined in relation to the tort of negligence. What remains arguable is that there may be a private right of action sounding in damages, with the scope and extent of that duty, and the damage caused by any breach of such duty, remaining to be considered. What is not sustainable is the suggestion that a qualified person can be ordered to investigate or make repairs by way of a mandatory injunction in a private action.

The causes of action

27 I decline to strike out the causes of action in negligence and statutory duty. The existence and scope of the duty of care is best determined at trial. The question whether the statutory duty on a qualified person appointed in respect of a building project on one plot of land under Building Control Act s 9 affords a civil remedy in damages to the owner of a neighbouring plot is also best determined at trial.

28 In relation to nuisance, the SOC pleads it only against the first and second defendants.[note: 10] This is what one would expect, as the tort of nuisance lies against an occupier of land. However, the plaintiffs draw the fourth, fifth and sixth defendants into the nuisance claim by saying that they "knew or know or ought to have known, that the creation and existence of the Gap" would result in water seepage and leakage (SOC para 91), and then asserting that they "have failed to make good" the damage so as "to abate the nuisance" (SOC para 95). The source of the alleged duty on the fourth, fifth and sixth defendants to abate a nuisance alleged against the first and second defendants is not specified. These references made to the fourth, fifth and sixth defendants in connection with the cause of action in nuisance are unsustainable if they are meant to found a claim against them in nuisance and embarrassing if they are included for some other purpose. Accordingly, paras 91 and 95 of the SOC must be amended to remove references to the fourth, fifth and sixth defendants.

29 Finally, I note that the cause of action in trespass is not pleaded against the fourth, fifth and sixth defendants.[note: 11]

Conclusion

30 Accordingly, I allow the appeal in part, and order that SOC paras 91 and 95 and prayers (d) through (k) be amended to remove references to the fourth, fifth and sixth defendants.

31 My decision eliminates or reduces the prejudice, embarrassment and delay to the fair trial of the dispute between the plaintiffs and the fourth, fifth and sixth defendants created by the pleadings, in particular the prayers for mandatory injunctions against them. It will aid the just, efficient and expeditious resolution of these proceedings if the plaintiffs proceed to quantify their claims. The plaintiffs should certainly be able to quantify the cost of making their premises waterproof and structurally sound, as well as the cost of repairing or replacing the various items of alleged damage to their own property. It would require compelling expert evidence to establish that it would be impossible to make 17RA waterproof and structurally safe without access to 19RA, as opposed to

such work just being more expensive. Nonetheless, nothing in my decision stops the plaintiffs from proceeding with their claims for mandatory injunctions against defendants other than the fourth, fifth and sixth defendants, as these appeals only involve the fourth, fifth and sixth defendants.

32 I will now hear parties on costs.

[note: 1]See, for instance, the particulars at SOC para 80(o), (p), (q), (r) and (s), as well as para 86.

[note: 2]SOC para 13.

[note: 3]SOC para 10.

[note: 4]SOC para 31.

[note: 5]SOC para 75.

[note: 6]SOC para 48.

[note: 7]SOC para 49.

[note: 8]SOC para 43.

[note: 9]See, for instance, SOC para 76.

[note: 10]SOC paras 91 and 92.

[note: 11]SOC para 97.