PT Master Mandiri v Yamazaki Construction (S) Pte Ltd
[2000] SGHC 213

Case Number : Suit 155/1999, RAS 600087/2000
Decision Date : 25 October 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Jeffrey Beh with Kelvin Tan (Lee Bon Leong & Co) for the plaintiffs; Thomas Lei (Engelin Teh & Partners) for the defendants
Parties : PT Master Mandiri — Yamazaki Construction (S) Pte Ltd

JUDGMENT:

Cur Adv Vult

Background

1. This is the second appeal arising out of an assessment of the damages sustained by the plaintiffs when the defendants breached their contract to sell the plaintiffs 24 pieces of heavy machinery. At the first assessment, the plaintiffs were awarded damages in the sum of $612,000 being the loss of the profit that they would have earned from sub-sales of the 24 machines. When I heard the defendants' appeal against this award, I allowed it on the basis that the plaintiffs had failed to mitigate their damages in respect of 18 of the machines. I remitted the matter back to the Assistant Registrar to assess the plaintiffs' damages in respect of the remaining six machines in respect of which no mitigation had been possible. The background of the matter and my reasons are contained in my judgment dated 6 May 2000.

2. The second assessment took place in June 2000. After considering written submissions from the parties, the Assistant Registrar awarded the plaintiffs a sum of $192,150 in damages and interest thereon at 6% p.a. from the date of judgment. The defendants were not satisfied with this award. They lodged an appeal asking for the decision of the Assistant Registrar to be set aside and replaced either by an order that the plaintiffs were entitled to only nominal damages (or no damages at all) or alternatively, that they be paid such other reasonable damages as the court considered just. They also asked that the costs of the appeal and the assessment be paid to the defendants.

Reasons for decision below

3. In making her award, the Assistant Registrar stated that the fact that it may be difficult to compute the amount of damages payable in a given case does not mean that no damages should be awarded at all. The court does not, however, simply make a guess at what the amount of damages should be. She considered that the paramount matter to be assessed was whether, based on the available evidence, on the balance of probabilities, the party claiming the damages did suffer them. In the present case, she came to the conclusion that the plaintiffs' mode of calculation of loss of profit as set out in their written submission was convincing and would be accepted.

4. In their submissions, the plaintiffs identified the relevant six machines as having the following particulars:

Item No. (as per the defendants' offer to the plaintiffs)	Description	Serial No.	Price
4	CAT 980C Wheel Loader	13B0865	S$ 25,000

5	CAT 966E Wheel Loader	35S02963	S$ 22,750
6	CAT 966E Wheel Loader	35S02762	S$ 18,250
13	Nissan CW52H Water Truck	06237	S$ 6,400
15	CAT D&L Bulldozer	53Y03924	S$ 20,950
22	DM 45E Drill Rig	3857	S$ 18,000
		Total	S$111,350

5. It should be noted that the purchase price ascribed to each machine by the plaintiffs was not the exact price which they had contracted to pay the defendants for that machine. The prices were taken from an offer which the plaintiffs had made to PT Karimun Granite ('PTKG') for all 24 machines. In their offer, the plaintiffs had priced each machine individually. Subsequently, negotiations took place between the plaintiffs and the defendants, the actual owners of the machine, and the defendants made the plaintiffs a counter offer for all 24 machines at a lump sum price of $438,000 which was $10,000 more than the total which the plaintiffs would have paid if they had bought all the machines at the prices specified in their offer to PTKG.

6. In their submissions, the plaintiffs went on to point out that they had subsequently sold the six machines to three parties namely Heng Ann Engineering Pte Ltd ('Heng Ann') (items 4, 5, 6 and 15), K.S. Chin Construction Sdn Bhd (item 13) and D C Han Corporation Sdn Bhd (item 22). The plaintiffs' contract with Heng Ann provided for a lump sum price of $210,000 for the four machines mentioned and a fifth machine, item 16 of the defendants' offer, which was a CAT 130G Motor Grader (Serial No. 12W00446) and which the plaintiffs had priced at $5,000 in their offer to PTKG. Further, item 22 had been sold to D C Han Corporation Sdn Bhd for $90,000 while item 13 had been sold to K.S. Chin Construction Sdn Bhd for $15,000.

7. The plaintiffs argued that the total cost of the six machines to them would have been $111,350 whereas the total proceeds of their sub-sales would have been $315,000. This meant their loss of profit was $203,650. The plaintiffs conceded, however, that that sum included the profit which would have been made for item 16 which was not one of the six machines for which damages had been allowed. They therefore had to deduct the profit made on item 16. The plaintiffs did this by pointing out that they had offered $5,000 for item 16 and it had been valued by their valuer at $15,000 whereas the defendants' valuer had valued it at $10,000. They submitted that a fair approach would be to split the difference between the two valuations and value the item at $12,500. On that basis, they would have earned a profit of $7,500 from item 16.

8. The plaintiffs admitted that they had agreed to pay the defendants an extra $10,000 for all 24 machines. They agreed that this extra $10,000 would have to be reflected as part of their purchase price and submitted that the way to do it would be to take the proportion of the $10,000 that the total cost of the six machines ($111,350) bore to the total cost of the 24 machines ($428,000) and add this to the cost of the six machines. They worked out that the six machines cost approximately 25% of the total cost of the 24 machines and therefore proposed that a sum of $2,500 be added to the cost of the six machines bringing that total to $113,850.

9. The plaintiffs went on to consider the cost of transporting the six machines from Indonesia to Singapore. They would have needed two barges at $3,000 per barge to transport the 24 machines and they therefore calculated the proportionate cost of transporting six machines would have been 25% of the total cost of $6,000, ie $1,500.

10. The plaintiffs submitted that the final figure due to them as loss of profit was therefore:

Sale price for the six machines		S$315,000
Less: Cost price as in BA32		S$111,350
	Sub-Total:	S$203,650
Less: Proportionate increase of cost price in BA33		S$ 2,500
	Sub-Total:	S$201,150
Less: Projected profit for item 16 (BA32)		S$ 7,500

	Sub-Total:	S$193,650
Less: Proportionate cost for transportation		S$ 1,500
	Total:	S$192,150

The defendants' arguments

11. The defendants made the same arguments before me as they had before the Assistant Registrar. They contended that there had not been sufficient evidence before the Assistant Registrar to allow Her Honour to make an intelligent award. They further submitted that the plaintiffs were entitled to either nil or nominal damages because of the insufficiency of evidence.

12. The defendants had four points in support of their submission. These were:

> (1) the four machines which the plaintiffs had allegedly resold to Heng Ann were sold on a lump sum basis together with one other machine with no individual price being allocated to any of these machines. The plaintiffs' resale price to Heng Ann could not therefore be used to calculate the loss of profit that the plaintiffs sustained for those four machines;
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> (2) the defendants had offered to sell the plaintiffs the 24 machines for a lump sum price of $438,000. They did not specify the individual prices of the six machines. The plaintiffs had accepted the lump sum offer and therefore they could not and had not shown what the cost prices of the six machines were so as to enable a calculation of loss of profits;
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> (3) the defendants submitted, on the authority of *Victoria Laundry v Newman Industries Ltd* [1949] 2 KB 528, that the court would not grant extraordinary loss of profit or lucrative contracts, but only usual and ordinary amounts and that in this case the plaintiffs' loss of profit was extraordinary because:
>
> > (i) the plaintiffs' resale prices were excessive in the light of the actual and real transacted prices between the plaintiffs and the defendants and between the defendants and their sub-buyers and also in the light of the PSA auction price for 52 machines;
> >
> > (ii) the report of the plaintiffs' surveyor could not be used to substantiate the value of the six machines as it was not clear on what basis he had valued them except for the words 'estimated open market value' under which he inserted the figures; and
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> (4) alternatively, there was no valid subcontract between the plaintiffs and Heng Ann and therefore no basis to claim any loss of profits for the four machines involved in that alleged subcontract.

Reasoning

(i) Cost price of the six machines

13. In my judgment, the defendants' contention that there was no way of determining the cost price of the six machines because they had offered a lump sum price for all 24 machines was a disingenuous and specious one. The defendants well knew how

much the plaintiffs were initially willing to pay for each of the 24 machines since the defendants were privy to the offer that had been made by the plaintiffs to PTKG. The fact that the defendants chose not to ascribe an individual price to each machine when they made their own offer to the plaintiffs and simply raised the total amount payable by a round $10,000 does not mean that the cost of the individual machines to the plaintiffs could not be ascertained. The very fact that the difference between the total offered by the plaintiffs and that asked for by the defendants was only $10,000 indicates that the defendants had no real difficulty with the prices ascribed to the machines by the plaintiffs but simply wanted slightly more money. Even though the plaintiffs' offer was not made to the defendants, if the plaintiffs had gone ahead and accepted the 18 machines which were still available to mitigate their loss, it would have been difficult for them to argue that they could acquire those machines for anything less than the amounts offered to PTKG for the same.

14. In my opinion, the notional cost to the plaintiffs of the six machines was properly worked out by the plaintiffs in their submissions by using first, the individual figures contained in the plaintiffs' offer to PTKG and second, adding to those a proportion of the extra $10,000 asked for by the defendants for all 24 machines. I agree that the apportionment of the $10,000 between the six machines and the other 18 machines would be effected reasonably by adopting the method submitted by the plaintiffs ie taking the proportion which the cost of those six machines bore to the cost of the other 18. The cost of the six machines would therefore be the prices set out in the plaintiffs' offer plus the additional sum of $2,500 giving a total of $113,850.

(ii) Sub-sale prices of the machines

15. In respect of two out of the six machines, the intended resale prices do not pose a problem because these machines were the subject of separate sales and were individually priced. Determining the sale price of the other four machines is, however, more complicated because these were sold to Heng Ann as part of a parcel of five machines for a lump sum price of $210,000. I do not accept, however, the defendants' submission that because of the lump sum nature of the sub-sale, it is not possible at all to make a reasonable estimation of the profit which the plaintiffs would have earned in respect of the four relevant machines.

16. This is because there is sufficient evidence to indicate what the value of the fifth machine was and once that value is subtracted from the lump sum the remaining figure can be taken as the aggregate value of the four machines in question. It is not necessary to determine the value of each of those machines separately. I should note here that I do not agree with the plaintiffs' method of calculation which was simply to deduct the profit they thought they would have made on the fifth machine from their total profit because this method involved double-counting. The total figure which they would have received in respect of the fifth machine had to be deducted from the lump sum price and not only the estimated profit of that machine.

17. The fifth machine included in the sale to Heng Ann was a motor grader bearing serial no. 12W00446 which appeared as item 16 of the defendants' offer to the plaintiffs. The plaintiffs had originally priced this item at $5,000. At the original assessment, both parties produced valuation reports in respect of all the machines. Both valuers gave evidence. The plaintiffs' valuer valued the motor grader at $15,000 whereas the defendants' valuer valued it at $10,000.

18. The plaintiffs in their submissions argued that the resale price of the motor grader should be the average of the two valuations. Since, however, it was the plaintiffs who had the onus of showing at what price they were reselling each machine, I do not think that they were entitled to simply take this average. Instead, the higher figure should be used as this would be, theoretically, the maximum amount a third party would be willing to pay for the motor grader. The plaintiffs, having lumped this machine together with the others, should not be entitled in their quest for compensation to calculate its value at less than the theoretical maximum. If they were permitted to do so, there would be a danger of over-compensation.

19. On this basis, the resale price of the four machines to Heng Ann would be $195,000 being $210,000 less $15,000 (the maximum possible resale price of the motor grader). When this figure is added to the $90,000 and $15,000 that the plaintiffs received for the items sold to K.S. Chin Construction and D C Han Corporation, the plaintiffs would have received a total of $300,000 rather than the amount of $315,000 which they used as the basis of their calculation for loss of profit. If you deduct from $300,000 the cost price of the six machines ie $113,850, the gross loss of profit would be $186,150. The plaintiffs' evidence was that they would

have had to hire two barges to transport all 24 machines. The correct deduction for transport costs would, however, have been $3,000 and not $1,500 as there was no evidence that the plaintiffs could simply have hired half the space on one barge rather than one whole boat to move the six machines. Thus the net loss of profit would be $183,150.

20. The figure of $183,150 could, however, only be awarded to the plaintiffs as damages if it was accepted that first, the plaintiffs' sub-sales were genuine transactions, and secondly, that the profits that the plaintiffs would have made on these sales were not excessive or unreasonable.

(iii) Were the sub-sales genuine transactions?

21. As pointed out in para 6 above, the plaintiffs' stand was that they had on-sold the six machines to three different parties. The defendants did not specifically challenge the authenticity of the sub-sale contracts made between the plaintiffs and K.S. Chin Construction Sdn Bhd and between the plaintiffs and D C Han Corporation Sdn Bhd. They concentrated their efforts on the sub-contract between the plaintiffs and Heng Ann and submitted that the glaring contradictions in the testimony of the plaintiffs' witnesses militated against a finding that a firm contract existed.

22. In support of their stand, the plaintiffs called one Mr Pek Choon Heng, who affirmed that he was the managing director of Heng Ann. Mr Pek testified that on or about 2 December 1998, Heng Ann had entered into an agreement with the plaintiffs to buy five units of heavy machinery for $210,000 from the plaintiffs. This contract had been concluded after Mr Pek had inspected the said machines and negotiated with one Mr Lenggawa acting on behalf of the plaintiffs. The witness referred to a letter dated 2 December 1998 from the plaintiffs to Heng Ann whereby the plaintiffs confirmed the sale of the five machines to Heng Ann at the said price. This letter was annexed to the witness's affidavit of evidence-in-chief and at the top of the letter there was a printed endorsement showing that it had been received by Heng Ann's fax machine at about 9 o'clock in the morning of 8 December 1998.

23. The witness went on to state that during the negotiations with Mr Lenggawa, he had made it clear that Heng Ann was buying the machines in order to resell them. Further, as the plaintiffs were Indonesians, they had appointed a Mr Christopher Choy who traded as Trade Castle International to handle the financing on their behalf. Thus, upon confirmation of the purchase, Heng Ann had paid the sum of $30,000 as deposit for the machines to Trade Castle International. Heng Ann's cheque for this amount was exhibited and it was shown to be dated 9 December 1998. Subsequently, around 18 December 1998, Mr Pek had been informed by Mr Choy that the plaintiffs would not be able to deliver the five machines to Heng Ann.

24. Mr Lenggawa Lautan, a director of the plaintiff company, did not give evidence at the assessment although he filed two affidavits of evidence-in-chief. The plaintiffs called only one officer, Madam Wiwik Wahyuningsih, their chairman, to testify on the damages that they had sustained by reason of the breach of the contract. In her affidavit, she stated that representatives from Heng Ann had visited the quarry on a few occasions in October and November 1998. On 16 October 1998, Heng Ann had made an offer to the plaintiffs to purchase five pieces of machinery. Once the plaintiffs had secured their own contract with the defendants for the purchase of these machines, they had written to Heng Ann to confirm the sale of the five items for a lump sum of $210,000. There had, however, been some subsequent negotiations and it was only on 8 December 1998 that the plaintiffs' agent in Singapore, Trade Castle International, had sent a letter confirming the terms of the contract. The next day, Heng Ann had made a part payment of the purchase price.

25. The defendants pointed out various areas where they considered cross-examination had elicited significant discrepancies between the evidence of Mr Pek and that of Madam Wiwik. First, there was a difference of view as to when the contract between Heng Ann and the plaintiffs had come into existence. At one point, Mr Pek said that an oral agreement was made on his third visit to the quarry on 27 October 1998 and, at another, he said that plaintiffs had committed themselves to sell the machines to Heng Ann on 16 October 1998. Madam Wiwik denied this. She was shown a copy of Heng Ann's letter to the plaintiffs dated 16 October 1998 whereby they stated that they were pleased to confirm the purchase of the five machines in question for $210,000 and asked for the plaintiffs' invoice. Her position was that the plaintiffs had not accepted this offer at first because they had

wanted $225,000 for the machines. Finally, they agreed to Heng Ann's price but in their letter of 2 December 1998, had asked for a downpayment of 30% to be made within a week of the purchase order and 70% to be made on delivery. Heng Ann had not agreed to this which had led to further negotiations and it was only on 8 December that the plaintiffs had accepted Heng Ann's terms.

26. The defendants then pointed out that Mr Pek had said that when he went to inspect the machines at the quarry, he had been alone and escorted only by Mr Lenggawa whereas Madam Wiwik had testified that Mr Pek had been accompanied by a friend and escorted by both Mr Lenggawa and herself. Then Mr Pek testified that the price of $210,000 had been offered to him by the plaintiffs whereas Madam Wiwik asserted that the first offer of that price had been made by Mr Pek. The two witnesses also did not agree on whether Heng Ann had been informed that the sale was subject to the ability of the plaintiffs to obtain export permits for the machines.

27. I do not agree that these discrepancies indicate that there was no genuine contract between the plaintiffs and Heng Ann. It was clear from the documents produced that there had been an interest expressed in the machines by Heng Ann from as early as October 1998 and that the plaintiffs had eventually agreed to sell the machines to Heng Ann at the price proposed by Heng Ann itself. I have no doubt that Heng Ann had sent out its offer on 16 October 1998 and that the plaintiffs' acceptance was sent out, at the latest, on 8 December when the issue of the payment terms had been resolved. Small factual discrepancies cannot take away from the underlying truth which was that a contract between the two existed and that this contract predated the defendants' breach. It should also be noted that Heng Ann's interest was adverse to the plaintiffs in one respect and that is that Heng Ann would not want its contract to be subject to the obtaining of export permits as such a term might impact on Heng Ann's ability to recover damages from the plaintiffs for their non-performance. This would account for one of the more important discrepancies between the testimony of the two witnesses.

28. The Assistant Registrar who had the benefit of observing the witnesses did not accept the defendants' submissions on the weight of the evidence. She obviously found the witnesses to be truthful on the basic point in issue ie the authenticity of the sub-sale. Having studied the evidence, I can find no reason to differ from that finding.

(iv) Was the plaintiffs' loss of profits excessive?

29. In my first judgment on this case, I cited a passage from *McGregor on Damages* (17th Ed, 1997) which dealt with the recovery of damages on the basis of a lost sub-sale. It is apposite to quote para 846 of that authority again. It says:

> '846. Where damages are allowed for loss of profit on a resale of which the seller knew the actuality or the probability, he will not be liable for an exceptional loss of profits unless he has been informed of the details of the sub-contracts and only then if he can be said to have taken the risk of such loss on his shoulders. This appears from the speeches in *Hall v Pim.* Lord Dunedin said: "The contracts … must be contracts in accordance with the market, not extravagant and unusual bargains." And Lord Shaw said: "It is not suggested that these prices were out of the ordinary course of business. Had this been so, different considerations might quite well have arisen." Thus in *Household Machines v Cosmos Exporters*, where the seller knew of the plaintiff's intention to resell but did not know the details of the sub-contract, Lewis J. did not award the plaintiff the 12 per cent. by which the sub-contract price was higher than the contract price, but gave only ten per cent. Similarly, in *Coastal International Trading v Maroil* where the sub-contract, of which the defendants were fully aware, contained unusual terms rendering the plaintiffs' profit under it unreasonable and such as would not have been within the contemplation of the parties, the profits awarded to the plaintiffs was arrived at after eliminating the extravagant effect of the unusual terms.'

30. The defendants submitted that the profits which the plaintiffs would have made from their sub-sales, in particular that to Heng Ann, were excessive. They relied on the valuation made by their valuer Mr Tiang and also on the actual transacted resale

prices obtained by the defendants themselves after the termination of the contract with the plaintiffs. They further submitted that the plaintiffs' valuation report was unreliable because it purported to give an estimated 'open market' value for each machine and I had ruled that there was no 'available market' for the machines concerned.

31. In my view, neither the valuation report by the plaintiffs' valuer nor that by the defendants' valuer is of very much assistance in ascertaining whether the plaintiffs' resale prices were excessive. As I stated in my previous judgment, the evidence was that these machines were unique specimens and it was not possible in Singapore to find similar machines readily available for purchase so as to be able to obtain evidence as to the market price of the machines. Instead, the evidence appears to be that the prices at which the machines could be sold would be very much a question of supply and demand at the time of each individual sale and would also depend on the contacts which the seller had with companies or persons who were interested in acquiring machines of this kind. The defendants' valuer rested his valuation, to some extent, on the prices fetched by other machines sold by auction. Unfortunately, insufficient details of these sales were given to enable either the Assistant Registrar or myself to determine whether the machines sold there were of similar types to those involved in this case or whether the same were in working order or required repairs.

32. The defendants also relied on the sub-sale prices they had obtained from third parties for these 24 machines. Whilst they had contracted to sell these machines to the plaintiffs for $438,000, after the contract was breached, they were only able to collect a total of $388,200 from their resales. They argued that this showed that the plaintiffs could not have made the profits they claimed to have made from their resale contracts and that the plaintiffs' valuer's report, since it showed the value of the machines to be approximately the same as the plaintiffs' resale prices, was obviously wrong.

33. I have two comments in this connection. First, the Assistant Registrar heard the evidence of all the sub-buyers at the first assessment. When she made her award, she made it on the basis of the sub-sale contracts and therefore must have found those sub-purchasers to be truthful witnesses and their contracts to be genuine ones. Secondly, whatever may be the position vis--vis the 18 machines which the plaintiffs refused to take delivery of, in respect of the six machines which are the subject of the present appeal, it is clear that the defendants themselves were able to sell these machines for much more than they had, notionally, contracted to sell them to the plaintiffs for. Thus, it would seem that the six machines in question were the best, ie most saleable, of the bunch.

34. The defendants were not able to deliver these six machines to the plaintiffs because PTKG wanted to buy them instead and refused to allow them to be exported. The defendants then sold these six machines to PTKG for $180,000 which means that they received $66,150 more than they would have received from the plaintiffs for the same. This was a profit of approximately 58%. The plaintiffs on the other hand would have made a profit of approximately 260% if their sales to Heng Ann and the other two sub-purchasers had gone through. By most standards, this would seem to be an exceptional and unusual profit.

35. I have come to the conclusion that, in the special circumstances of this case, the profit that the plaintiffs would have earned from the resale of the six machines should not be considered exceptional and unusual. This is because the sales were 'one-off' transactions. There was no available market in Singapore where persons wanting such machines could easily find them or determine what a normal resale profit would amount to. There was, however, obviously a demand for such machines which was evidenced not only by the plaintiffs' own purchase of the machines since the plaintiffs themselves had no physical use for the machines and bought them solely for the purposes of trade but also by the defendants' ability to resell the machines rejected by the plaintiffs and by the various sub-sales concluded by the plaintiffs themselves. The profit which could be gained in such a situation depended on market knowledge and matching the right machine with the right purchaser. Since there was no competition in terms of supply, the plaintiffs were able to ask for high prices for the machines once they had located persons who needed them.

36. It is also significant that PTKG was willing to compensate the defendants for the loss of the sale to the plaintiffs by paying the defendants a premium of 58% even though they were well aware of the prices that the plaintiffs had offered and even though there was an on-going relationship between the defendants and PTKG which allowed PTKG to impose their will in respect of the sale of these six machines and force the defendants to break their contract with the plaintiffs or any other person who wanted to buy the machines.

37. In the result, the plaintiffs are awarded damages of $183,150 with interest thereon as previously ruled. Although the award is slightly smaller than the sum assessed by the Assistant Registrar, the difference has arisen from slight adjustments in the calculation and not because the defendants have succeeded in any of the main points they have argued. Accordingly, the defendants have substantially failed on this appeal although the order to be made will vary the award of damages.

Costs

38. Subsequent to making my decision on the appeal against the first assessment, I ordered (on 29 June 2000) that the costs of that appeal be awarded to the defendants and the costs of assessment and re-assessment to be awarded to the plaintiffs as one set of costs. After the re-assessment took place, the Assistant Registrar made an order to similar effect ie that the costs of the assessment be agreed or taxed together with the costs of the assessment as one set of costs. In the defendants' notice of appeal dated 4 July 2000 and filed in respect of the decision on the re-assessment, the defendants asked that the costs of the appeal and the re-assessment be paid to them.

39. As far as the costs of the re-assessment are concerned, the defendants cannot, on this appeal, change the decision that I made on costs on 29 June 2000. If they were dissatisfied with that decision, their remedy was to appeal to the Court of Appeal. The order made by the Assistant Registrar on costs after she conducted the re-assessment was not an independent order but essentially a reiteration of what I had ordered. It could not be the subject of an appeal to the Judge in chambers. It is therefore not necessary for me to deal with this aspect of the notice of appeal.

40. As far as the costs of this appeal are concerned, since the plaintiffs have succeeded substantially, I award them 90% of their costs as taxed.

Judith Prakash

Judge