Singapore Airlines Ltd and Another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and Others [2001] SGCA 1

Case Number : CA 21/2000

Decision Date : 05 January 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : P Selvadurai, Lok Vi Ming and Lawrence Teh (Rodyk & Davidson) for the appellants; Belinda Ang Fong SC and Gerald Yee (Ang & Partners) for the respondents

Parties : Singapore Airlines Ltd; Another — Fujitsu Microelectronics (Malaysia) Sdn Bhd

Civil Procedure – Appeals – Ancillary matters – Certificate for two counsel on appeal – Whether appeal raises issues of great complexity – Whether certificate should be issued

Civil Procedure – Interim payments – Refund of judgment sum paid – Rate of interest payable on refund – Whether court should concentrate on restitution from respondent or compensation to appellants

Civil Procedure – Offer to settle – Whether offer falling within O 22A r 9(3) – Whether offeror entitled to costs on indemnity basis from date of offer to settle – O 22A r 9(3)Rules of Court

(delivering the judgment of the court): On 30 November 2000 this court allowed the appeal of the appellants where it held that the appellants were entitled to the protection of the limitation of liability laid down by the Warsaw Convention, as amended by the Hague Protocol, (amended Convention) in relation to the loss of a package (one of seven packages) carried by the first appellant from Tokyo to Kuala Lumpur via Singapore. [See [2001] 1 SLR 241.] However, as requested by the appellants, the question of costs was reserved. Parties were directed to make their submissions in relation thereto.

Offer to settle

These are the additional material facts, relating to costs, which were brought to our attention. The writ in this action was instituted on 16 April 1998 and served on the appellants on 2 October 1998. On 20 January 1999, the appellants offered to settle the action `for the sum of S$347 including interest, in full and final settlement of the [respondents`] claim against [the appellants] with costs, up to and including the service of the notice, to be assessed.` This offer was not accepted by the respondents and it was never withdrawn by the appellants.

The appellants say that in view of the fact that as the judgment sum obtained by the respondents for the loss of the package (based on the limitation of liability) is not more favourable than the offer to settle, the appellants should be entitled, pursuant to O 22A r 9(3), to costs for the action and the appeal, on an indemnity basis from the date of the offer to settle.

Relevant provisions

We will now set out the relevant rules of court:

> *Order 22A r 9(3)*
>
> *Where an offer to settle is made by a defendant -*

(a) ...

(b) is not accepted by the plaintiff, and the plaintiff obtains judgment not more favourable than the terms of the offer to settle,

the plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise.

Order 22A r 12

Without prejudice to Rules 9 and 10, the Court, in exercising its discretion with respect to costs, may take into account any offer to settle, the date the offer was made, the terms of the offer and the extent to which the plaintiff`s judgment is more favourable than the terms of the offer to settle.

In **The Endurance 1** [1999] 1 SLR 661 this court had the occasion to consider the rationale and scope of O 22A rr 9 and 12, and having reviewed some decisions of other jurisdictions (Ontario, Canada and New South Wales, Australia) where similar procedures existed, said (at pp 679-680):

The rationale or the principle behind O 22A is perfectly clear ... it is to encourage the termination of litigation by agreement of the parties - more speedily and less expensively than by judgment of the court at the end of the trial.

In our considered view where there is no defence of any substance to a liquidated sum, then in line with the principle behind O 22A, compromise is not a necessary element in the offer to settle. However, the lack of compromise would be a material consideration in determining whether the plaintiff or the defendant should be penalised with higher costs in cases where there are genuine issues of liability raised. This applies to both liquidated and unliquidated claims. In each case an exercise of discretion is called for (see O 22A r 9(1) and (2) `... unless the Court orders otherwise` and also O 22A r 12).

In our considered view, also, it is axiomatic to the proper application of O 22A that the offer to settle should be a serious and a genuine offer and not just to entail the payment of costs on an indemnity basis. This is particularly so where the claim is for an unliquidated sum to be ascertained. In our view an offer to settle for a percentage of an unliquidated sum to be ascertained, as the claims in this case for damages to be assessed, cannot by any means be said to be a serious and a genuine offer to settle. It runs counter to the principle behind O 22A as stated in [para] 43 above. An assessment of damages, even where liability is a matter of course, can give rise to numerous complexities and result in protracted hearings and expense.

What, in our view, is required is for the plaintiff to make his own estimate of what the unliquidated sum ought to be or his own assessment of what the damages ought to be and to offer that sum as being a fair and reasonable sum which the defendant ought to pay in settlement of his claim.

> *We respectfully adopt the words of Morden ACJO in* ***Data General (Canada) Ltd v Molnar System Group*** *that `the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her* ***estimate of the value of the claim*** *which will require the defendant to give early ... and careful consideration to the merits of the case`. [Emphasis added.]*

In a recent Canadian case, **Burton v Global Benefit Plan Consultants Inc** [1999] 93 ACWS (3d) 223, the court struck out the claim of the plaintiffs against the fifth defendant and dismissed the action. Prior to the dismissal, the fifth defendant offered to settle the plaintiffs` claim for $1 `in full settlement of all costs, damages and interest,` which offer was not accepted. The question that arose was whether the fifth defendant should be entitled to only party-and-party costs or solicitors and client costs from the date of the offer. The court held it was clear that the offer was a nominal offer, agreeing only to forego any claim for costs up to the date of the offer; it was an instance where the plaintiffs were asked to capitulate and receive little, if anything, in return. Orsborn J agreed with the decision of the Ontario Court of Appeal in **Data General (Canada) Ltd v Molnar System Group** [1991] 85 DLR (4th) 392, that an element of compromise was not an essential element to constitute an offer to settle within the rules but the absence of such an element might be taken into account in deciding whether or not, in any particular case, the interests of justice and fairness required a departure from the presumptive solicitor-client costs consequences of the rule. Orsborn J also, having reviewed some Canadian cases on how the discretion should be exercised, lamented that they did not demonstrate any predictability. While recognising that this was unfortunate, he said:

> *but if the interests and fairness and justice demand a different outcome than that required by predictability the interests of justice and fairness should prevail.*

Thus in this instance, while there was an offer to settle, is it an offer on which we should allow the prima facie consequences of O 22A r 9(3) to apply or should we order otherwise. The present action was for the recovery of the loss suffered by the respondents on account of the package which was not delivered, the actual value of which was US$286,344.14. However, if the limitation of liability under the amended Convention were to apply, the appellants` liability would be limited to S$312. While it is true that at the trial the appellants did dispute their liability for the loss, that was not the main issue. It is ludicrous to suggest that any sensible litigant would go through a trial of some twenty days only to defend a claim for S$312. We think that the denial of liability was taken for strategic reasons, rightly or wrongly, in order not to jeopardise in any way their real defence of limitation of liability. This was obvious from the fact that the appellants offered to settle in accordance with the limitation laid down in the amended Convention. The respondents would have known as much.

The present situation is not unlike that in ***Data General*** where the plaintiffs offered to settle for 100% of the liquidated sum claimed and the Ontario Court of Appeal of Canada held that due to the complexities of the case which reasonably gave rise to uncertainties as to liability, it was not appropriate to allow costs on an indemnity basis.

Similarly in **Tickell v Trifleska Pty Ltd & Anor** [1991] 25 NSWLR 353the plaintiff made an offer to compromise for 100% of the amount claimed. The Supreme Court of New South Wales, Australia, held that costs on an indemnity basis should not be awarded to the plaintiffs. The following observations of Roger CJ are germane:

> *It was never in the minds of the draftsmen of the rule, or members of the Rule Committee responsible for the passing of this rule, that Pt 22 should be utilized simply as a statutory demand which, other circumstances being equal, will automatically entail the payment of costs on an indemnity basis.*

Even though the relevant NSW rules are not identical in wording with ours, we would respectfully agree with those views. In our opinion, for an offer to have the effect contemplated in O 22A r 9, it must contain in it an element which would induce or facilitate settlement. When such an element is missing, then, as held in ***Data General*** , that would be a ground for the court to exercise its discretion to vary the norm relating to costs laid down in r 9.

In the context of the present case, we had no hesitation in holding that the offer to settle of 20 January 1999 was not really an offer to settle as it did not in substance contain any incentive to settle. The crux of the dispute related to the difference between the actual value of the lost package and the sum laid down in the amended Convention as being payable to the respondents for the loss. On that real issue, there was no genuine or serious effort to seek a compromise.

For these reasons, we would, in exercise of our discretion, order that costs against the respondents for the action (from the date of the offer), as well as the appeal, be on the standard basis.

However, the respondents further contend that the appellants should only be entitled to 60% of the standard costs for both the trial and the appeal, as the appellants had failed in their defence of denial of liability. Here, we note that in our main judgment we stated, mistakenly, that the question of liability was not taken up by the appellants at the trial. Be that as it may, at the appeal it was certainly not an issue. We could see some merits in this contention, as far as the trial was concerned. The issue of liability was taken by the appellants, though perhaps for strategic reasons. Nevertheless, they should not be given costs on an issue on which they failed. Thus for the trial we order that the appellants should only be entitled to 80% of the costs. As for the appeal, no issue on liability was taken. The appellants` case dealt entirely with the question of limitation of liability under the amended Convention. Therefore, there will be no reduction of costs for the appellants as far as the appeal is concerned.

We should add that the appellants have conceded that the respondents should be entitled to the costs of the action from the institution of the writ up to the date of the offer on the Subordinate Courts scale (as the sum on which the respondents succeeded fell well within the Subordinate Courts` jurisdiction), and we do so order.

Certificate for two counsel

The appellants have also argued for a certificate for two counsel in respect of the appeal on the ground that `the issues of aviation law with which the appeal was concerned were complex` and required `specialist knowledge`. The appellants also contended that the appeal gave rise to questions of general public importance.

We do not think the nature and the circumstances of the case warrant the issue of a certificate for two counsel for the appeal. The central issues in the appeal related to the construction of the relevant provisions of the amended Convention and the application of the appropriate construction of those provisions to the facts. In this regard, we concur with the views of Barwick CJ in **Stanley v Phillips** [1966] 115 CLR 470 where he said:

The question is whether the services of more than one counsel are reasonable necessary for the adequate presentation of the case.

We do not think the appeal presented issues of such complexity which required the services of two counsel. There was nothing very technical. The facts were all in the record of appeal. Accordingly, we would refuse the request.

Refund of payment made with interest

Finally, an ancillary matter raised by the appellants relates to the repayment of the payments made by the appellants to the respondents in satisfaction of the judgment of the court below. The appellants seek the refund of those payments with interest at 6%.

We are informed by the respondents that they had placed the monies received (judgment sum plus interest) in an interest bearing account with a reputable financial institution in Singapore. The respondents are willing to release the monies received, plus any interest earned and less bank charges incurred.

There does not appear to be any statutory provision which lays down the rate of interest payable in respect of the return of judgment sum paid pursuant to a judgment which is reversed on appeal. Order 42 r 12 prescribes a rate of 6% but that applies only to a judgment debt.

There is, however, high authority which declared that such a return of money should be with interest. In **Rodger v Comptoir** [1871] LR 3 PC 465 the Privy Counsel stated:

> *It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all courts to arrive at will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.*
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> *...*
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> *Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found to be in favour of a restitution of the money with interest. They are quite satisfied, that this practice is in accordance with the true principle to be applied to this case, and with what the justice of such a case demands ...*

It will be noted that the governing principle enunciated in ***Rodger*** was restitution. The principle of restitution was adopted and reiterated by, inter alia, the Court of Appeal of the State of Victoria, Australia, in **Meerkin v Rossett Pty Ltd** (Unreported) , where Callaway JA also dealt with the question of the rate of interest, as follows:

> *Counsel`s alternative submission was that we should prefer the `wider view` identified by Fitzgerald P in* ***Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd*** *[1966] 1 Qd R 26 in preference to the `narrower view` adopted by Brooking J in the* ***Bond Brewing Holdings*** *case. The wider view is, in substance, that the court should focus on the loss that the appellant has sustained by satisfying the judgment. The narrower view is that the court should focus on the fruits of the judgment that the respondent has, or is presumed to have, enjoyed. Counsel submitted that the authorities to which Brooking J referred may be interpreted in a different sense, but I am not persuaded that his Honour`s analysis is wrong and I note that, notwithstanding the reservation expressed by Davies JA in the* ***Idemitsu*** *case at p 51 line 49 to 52 line 3, the rest of his Honour`s judgment refers exclusively to the position of the respondents. See also* ***State Bank of New South Wales v Commissioner of Taxation*** *[1995] 62 FCR 371 at p 380-381. An appellant court is concerned to do justice to the parties, not solely to the appellant. The error was made by the court below, not by the respondent. There is no right to compensation as against the respondent not only to restitution. If interest measured by the appellant`s loss is awarded, all that the court will do is to shift the injustice occasioned by the erroneous judgment from the appellant to the respondent.*
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> *...*
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> *The position of the respondent to an appeal is sui generis. It has had the benefit of a judgment and the moneys that it has received are its own, but there is a risk that the judgment may be set aside. The presumption in favour of the judgment and the fact that the moneys belong to the respondent favour a higher rate, for the respondent will not be heard to say that it did not earn a reasonable rate of return on its own moneys. If it dissipated them, that was by choice, whether the choice was made then or at some earlier time, as in the case of moneys that have to be applied to reduce an overdraft. The respondent`s position is not, however, indefeasible and that consideration points towards a lower rate. It will be entitled to say that it dealt with the moneys mindful of the fact that, if the appeal were allowed, it would be ordered to repay them. A cautious, or perhaps ultracautious, respondent might invest the judgment sum in a series of bank bills or term deposits while the appeal is waiting to be called on and thereafter at call. The court is concerned with the fruits, or presumed fruits, of the judgment rather than the costs of borrowing equivalent funds. In my opinion an appellate court should not apply the trustee rate or the mercantile rate as such or commercial rates struck for quite different purposes. It should apply a rate of interest which, taking all the relevant circumstances into account, does justice as between the appellant and the respondent to an appeal.*

In our judgment, in order to do justice to both the parties, the court must focus on restitution from the respondents rather than compensation to the appellants. Here, the respondents had acted reasonably when they placed the moneys received with a reputable financial institution earning interests. All that justice requires is that they should return the sums received, plus whatever interest

earned thereon, to the appellants and we accordingly so order.

Outcome:

Order accordingly.