

Hj Osman bin Hj Abdul Rahman

... Appellant

AND

Julkifli bin Jenudin

... Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2005)**

Cons, P.; Power and Mortimer, JJ.A.
19th May, 2005.

Appeal as to costs only: Court has jurisdiction where exercise of discretion founded on an error of law.

Ms Sussanna Lim of M/S Susanna Lim Partnership for the Appellant.
Mr Yusof Halim of M/S Cheok Sankaran Halim for the Respondent.

Cases cited in the judgment:

Adlington v Conyngham [1898] 2 QB 492

Campbell v Pollak [1927] All E.R.1

Marlon R. Manalo v Hj Awg Besar Hj Hamid and Another [1998] JCBD 239

Marshall v Levine [1985] 2 All ER 177

Reid, Hewitt & Co. v Joseph [1918] AC 717

Ritter v Godfrey [1920] 2 KB 47 @ 52

Scherer v Counting Instruments Ltd reported in [1986] 2 All E.R. 529

Wagstaffe v Bentley [1902] 1 KB 124

Cons, P.:

On 16 March 2002 Julkifli bin Jenuddin, the Plaintiff in the court below, was injured in a road traffic accident. He took proceedings to recover damages against Haji Osman bin Haji Abdul Rahman (“the Defendant”) and eventually, first in default of appearance by the Defendant and later on his admission, judgment was entered upon liability in favour of the Plaintiff, with damages to be assessed.

The parties were able to come to agreement with regard to the general damages, at a total of \$11,500 and as to six of the items of special damage, at the modest figure of \$261.

However they could not agree on two further claims made by the Plaintiff, namely the value to be ascribed to his car, presumably written off in the accident, and the figure to be awarded for the loss of the use of his car from the date of the accident to sometime in February the following year. There was also disagreement as to the date from which statutory interest should run. The Plaintiff contended for the date of judgment in default, 3 July 2003, while the Defendant sought 11 August 2004, when the damages were finally assessed.

These three matters were brought before the Registrar. There were three appearances before her. In conclusion she dismissed entirely the two claims in respect of the car and the loss of its use, but found in favour of the Plaintiff on the question of the interest date. The Registrar ordered the Defendant to pay to the Plaintiff his costs of the hearing. She gave no reason for this decision.

The Defendant appealed to a judge in chambers who, earlier this year, reversed the Registrar's decision as to the interest date, thus awarding complete success to the Defendant on the contested aspect of the damages hearing. She declined, however, to interfere with the Registrar's order as to costs. The judge therefore awarded the Defendant only half of his costs of the appeal.

The Defendant lodged Notice and Petition of Appeal in this court. Soon afterwards the Plaintiff lodged a Notice of Motion applying for the appeal to be dismissed for want of jurisdiction. We considered the Motion at the outset of the appeal, and having heard argument from both sides, concluded that the Motion should be dismissed, saying that we would give our reasons later, which we now do.

Section 20 of the Supreme Court Act, Cap 5 provides:

*“(1) Subject subsection (2), an appeal shall lie as of right to the Court of Appeal from every judgment or order of the High Court in a civil cause or matter.
(2) No such appeal shall lie -(d) from any order relating only to costs;”*

With regard to a similar, albeit not identical, provision in England and Wales Sir John Donaldson MR remarked:

“One might, therefore have thought, if one was not very familiar with the law, that there was no right of appeal whatsoever”

That was in fact the view taken by this court in *Marlon R. Manalo v Hj Awg Besar Hj Hamid and Another* [1998] JCBD 239. But we must observe that the point then was taken by the court itself and reliance placed solely upon *Adlington v Conyngham* [1898] 2 QB 492. It is unfortunate that counsel for the then appellant, who was apparently given no warning and only a short adjournment in which to fashion a reply, was not able to present to the court other and more recent authority, in particular *Campbell v Pollak* [1927] All E.R.1 where the House of Lords extensively reviewed the question, both as to the position within its own House and within the Court of Appeal.

As to the practice in the House, Viscount Cave, L.C. said this, at page 5:

“There are passages to be found, both in speeches made in this House and in textbooks of authority, which lay it down in broad terms” – as does Sec. 20(2)(d) of the Supreme Court Act – “that an appeal as to costs only will not be entertained here; but it is plain that the rule, so stated, need some qualification.”

It is not necessary to set out the different words in which Their Lordships expressed their opinions. The burden of the majority may, we think with respect, and in so far as it is reflected in the present circumstances, be found succinctly set out in the following passage, also from the speech of Viscount Cave at the same page:-

“If the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party from asking to have a decision reviewed on the ground that it is wrong in law, even though the only result of a reversal of the decision would be to alter the incidence of cost. In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law” (the emphasis is our own).

Having thus affirmed the principle on which they would act within their own House Their Lordships, at a further hearing devoted to the actual appeal then before them, effectively extended the same principle to the Court of Appeal. The relevant statute was the Judicature Act of 1873, Sc 49 of which provided:

“No order made by the High Court of Justices or any judge thereof by the consent of parties, or as to costs only which by law are left to the discretion of the court, shall be subject to any appeal except by leave of the court or judge making such order.”

In his speech Viscount Cave referred to reported cases in which

“The Court of Appeal has allowed an appeal from the exercise by a judge of the Supreme Court of his discretion as to the costs of a trial without a jury, no leave to appeal having been obtained.”

He then quoted with approval, at page 40, the words of Lord Sterndale MR in *Ritter v Godfrey* [1920] 2 KB 47 @ 52

“This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by

refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court cannot interfere with his decision. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine.”

Lord Atkinson likewise quoted the same passage, at page 42. Viscount Cave went on to comment

“These authorities appear to me to indicate a progressive tendency on the part of the Court of Appeal to review the exercise by trial judges of their discretion as to costs, with the result that the court has travelled far from the categorical terms of s. 49 of the Act of 1873.”

and later, in a passage which may usefully be set out in full:

“It appears to me that the true view is substantially that taken by LORD STERNDALE, M.R., in the passage in his judgment in Ritter v Godfrey (3) which I have quoted. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court award them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must, of course, be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if – to put a hypothesis which in our courts would never in fact be realized – a judge were to refuse to give a party his costs on the ground of some misconduct – wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.”

Since *Campbell v Pollak* this principle has been applied by the English Court of Appeal, notably in *Scherer v Counting Instruments Ltd* reported in [1986] 2 All E.R. 529, which appears to have given its name to the principle, and later in *Marshall v Levine* [1985] 2 All ER 177, where Sir John Donaldson added to the remark we quoted earlier:

“However, in exceptional cases, the Court of Appeal has entertained, or considered that it has a jurisdiction to entertain, appeals in cases which prima

facie fall within the prohibition contained in para (f). As an example, I would mention Scherer v Counting Instruments Ltd [1977] FSR 569. The basis of the jurisdiction has been variously stated in the case, but I think it can fairly be summarised as saying that the judge has wholly failed to exercise any judicial discretion.”

We appreciate that the English Legislation in question contained provision for the relaxation of the prohibition with the leave of the trial judge and also that the prohibition was expressly limited to costs which by law are left to the discretion of the court. Mr Halim, who appears now for Plaintiff, relies strongly on these two features of the legislation to distinguish the situation in England from that here in Brunei. However, we are unable to accept them as a valid distinction. Firstly we note that these features do not appear to have played any part in the reasons which led Their Hardships to their conclusions. They are nowhere mentioned, other than in passing. Secondly, they appear to us as distinctions without a difference. While the leave of the judge below could doubtless have given jurisdiction to the court in England, in the absence of that leave the court there was in precisely the same position as is the court here now in Brunei. And the costs which are sought to be put in question in these proceedings are in any event costs which by law are left to the discretion of the court.

Mr Halim also sought to draw an inference from the fact that the Supreme Court Act was passed in this jurisdiction subsequent to the decision in *Campbell v Pollack*, which must, of course, be taken to have been known to those responsible for the legislation. From this it would follow, be suggested, that a literal and strict interpretation was intended. We cannot so accept. Those responsible might well have taken the view, having regard to that decision, that the same provisions previously included in the relevant Order in Council, which he kindly and quickly found for us, had become mere surplusage. We are not persuaded that the present absence of these words, whether deliberate or otherwise, is sufficient justification for this court to depart from such a well established principle.

It was for these reasons that we dismissed the Motion to dismiss.

Turning to the appeal itself we have concluded that the order for costs was indeed, as Viscount Cave put it, founded on an error of law, in that the judge appeared to accept, as a settled rule, that where a person brings proceedings to recover damages, and does in fact do so, albeit not to the extent claimed, he is entitled nevertheless to recover all his costs of the proceedings. The judge did not put it in as many words, but having rejected at length a submission that the costs should be apportioned, she said simply

“The Registrar has rightly exercised her discretion in ordering costs to follow the event based on the fact that the plaintiff/respondent has suffered damages for which a judgment has been issued in his favour. I do not think the Registrar erred in ordering costs against the appellant. For these reasons, the appellant fails in the second limb of his appeal.”

With respect to the judge, there is no such rule as she envisaged. It may be a course that a judge would take in proceedings where both general and special damages are claimed and everything, including liability, is dealt with at the same time, and the Plaintiff fails upon some of the special damages claims, which in themselves have taken no significant amount of court time. But it is well established by cases such as *Wagstaffe v Bentley* [1902] 1 KB 124 and *Reid, Hewitt & Co. v Joseph* [1918] AC 717 that where there are distinct and separate issues, the award of costs on these issues should, in the absence of special circumstances, follow the outcome of the individual issues. *Wagstaffe* was a case where the separation was, as in the present, primarily between negligence, i.e. liability and damages. The rule must apply more strongly where, again as in the present, not only are there separate issues, but separate hearings.

Mr Halim did not strongly contest the appeal itself, merely observing that the Registrar was in fact concerned with 11 issues, 8 of which were entered in the Plaintiff's favour, only 3 being contested, and then finally conceding that if this court were, in the circumstances, minded to interfere, he would not object to a variation of the order before the Registrar such that the Plaintiff should receive his costs up to the commencement of the hearing before the Registrar and that thereafter the costs of the hearing should be to the Defendant. Miss Lim, for the Defendant, did not contest that suggestion.

In our view that would be a reasonable and proper order to make in the circumstances. We therefore allow the appeal, for the reasons we have just set out, set aside the order of the judge below as to the costs before the Registrar, and substitute in its place an order in the terms we have just mentioned. We will hear counsel as to costs here and in the court below.

Appeal allowed