

Mohd Fahkri bin Ishak & Anor ... **Appellant**

AND

Metussin bin Hj Hashim & 4 Others ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 13 of 2009)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
29th May, 2010.

Order 22A rule 9. The defendants made offers to a number of plaintiff's under order 22A. Some plaintiff's accepted the offers about 8 months later when the hearing to assess damages was nearly complete. The defendants claimed that under the rule they were entitled to their costs against those plaintiff's on an indemnity basis. Held: the necessary conditions were not present and the rule did not apply as 1) these plaintiff's had accepted offers and 2) there was no judgment equal to or less favourable than the offer. Appeal dismissed.

Ms. Susanna Lim of Messrs. Susanna Lim Partnership for the Appellants.
Ms. Subrina Tan of Messrs. Sandhu & Co. for the Respondents.

Cases cited in the Judgment:

Campbell v Pollak [1927] All.E.R. 1 at p.5.

Hj Osman Bin Hj Abdul Rahman v Julkifli Bin Jenudin (Civ. App. No. 2 of 2005).

Koperasi Kampung Keriam Dengan Tanggungan Berhad & Anor v Taty Tjhai (Civ. App No. 19 of 2008).

Mortimer, P.:

1. This is a defendant's appeal on costs only against an award by Findlay J. on 19 September 2009. The action was by five plaintiffs for damages for personal injuries sustained in a road accident on 21 December 2006. Liability was admitted on 9 February 2008 and shortly after a writ was issued. On the 20 August 2008 there was an interim judgment on liability with damages to be assessed.
2. Thereafter the defendants made offers under Order 22A of the R.S.C. In summary on 4 April 2009 the 3rd and 4th plaintiffs accepted offers made on 3 April 2009. On 15 September 2009 the 1st plaintiff accepted an offer made on 3 April 2009, the 2nd plaintiff accepted an offer made on 8 September 2009, and the 5th plaintiff accepted an offer made on 9 April 2009.
3. The hearing to assess the damages in respect of the 1st, 2nd and 5th plaintiffs came before the judge on 14 September 2009. The offers were accepted by these 3 plaintiffs on the second day of the hearing. The costs were not agreed and the judge heard submissions on 17 September. He awarded each plaintiff

standard costs up to the date on which the relevant offer was made. After the date of each relevant offer until acceptance the defendants were awarded their standard costs. He was wrong in thinking the 1st plaintiff had accepted an offer made on 3 April on the 4th April. He did not accept this offer until 15 September. We will return to this.

No Judgment below

4. When the action was settled in front of Findlay J. he did not give final judgment for the agreed damages and agreed interest. It seems that neither party formally asked for judgment at the hearing and no application for it to be drawn up was made later. At the outset therefore this appeal was not properly constituted. In order to remedy this we exercised the powers of the judge and gave the judgment appealed against as of 15 September 2009. This is not the first time that this court has found it necessary to exercise its powers in this way.
5. The parties indicated that they could draw up and agree the appropriate orders in that judgment but have not been able so to do. We will hear them on this matter at 9 am Tuesday, 1 June 2010.

The issue

6. The issue on this appeal is whether under order 22A rule 9 it was incumbent upon the judge to grant the defendants indemnity costs, not standard costs, after the date of each relevant offer was made and before it was accepted. The defendants/appellants argued this point of law in front of the judge relying on the above rule. He found against them.

Background

7. We have heard this appeal on costs only in spite of the provision in section 20 (2) (d) of the Supreme Court Act that;

No appeal shall lie from any order relating only to costs

Here the defendants contend that the judge erred in law. We have jurisdiction to hear the appeal as ‘the court will not refuse to hear an argument that an order as to costs is founded on an error of law.’ See *Campbell v Pollak* [1927] All.E.R. 1 at 5; *Hj Osman Bin Hj Abdul Rahman v Julkifli Bin Jenudin* (Civ. App. No. 2 of 2005; and *Koperasi Kampung Keriam Dengan Tanggungan Berhad & Anor v Taty Tjhai* (Civ. App No. 19 of 2008).

8. The relevant parts of order 22 A rule 9 provide:

(2) where an accepted offer to settle does not provide for costs,....

(3) where an offer to settle made by a defendant –

(a) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and

(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.

The award below

9. The judge awarded each plaintiff standard costs up to the date when the defendants made an offer which was later accepted. He awarded the defendants standard costs between the date when a relevant offer was made until it was accepted. In the case of the 1st plaintiff he awarded costs on the basis that he accepted on 4th April 2009 an offer made on 3 April 2009. This was an error. The parties are agreed that he did not accept this offer until 15 September 2009. This was an understandable error from a reading of the correspondence but it probably would have been corrected if judgment had been given and drawn up at the time.
10. Miss Lim, who appeared for the defendants here and below, contended that the defendants were entitled to indemnity costs for the periods between the offer and the date of acceptance in each case. She relied upon rule 9 (3) (b) above. In short her argument is that the rule is intended as a means whereby a defendant can protect itself against orders for costs by making appropriate offers to settle. If thereafter a plaintiff delays acceptance allowing a defendant to incur unnecessary costs after the date of the offer and acceptance the plaintiff ought to pay those costs on an indemnity basis. This, she says, is within the spirit and purpose of the rule if not literally within its terms.
11. The judge did not agree:

“In my judgment, rule 9 (3) does not apply to the situation before me because the offers were accepted by the plaintiffs and judgment has not been obtained.”

The appeal

12. Miss Lim submits that the judge was wrong and for the reasons she advanced before him contends that he ought to have applied rule 9 (3) and have granted her indemnity costs for the relevant periods, there being no good reason for exercising his discretion under the rule in any other way. She does not advance any error of law other than the rule. Nor, if it became necessary for this court to exercise discretion, is she able to point to any basis other than the rule for awarding indemnity costs to the defendants.
13. Miss Tan, who appears for the plaintiffs/respondents, submits that the rule does not apply in the circumstances of this case. She points out that in each case the offer was accepted at a time before any judgment was entered. There are two conditions specified in the rule which must apply, first the offer must not be accepted and second there must be a judgment which complies with the rule. Neither condition was present here and the rule does not apply.

Discussion and conclusion

14. The purpose of order 22A is clear and well known. It is to provide a means whereby a defendant can protect itself against unnecessary costs and it encourages parties to settle cases by making and accepting appropriate offers. It also provides a sanction to discourage plaintiffs to pursue cases

unnecessarily after proper offers have been made with the consequent waste of time and expense.

15. The sanction against a plaintiff who fails to better an offer if he fights the case through to judgment is stringent and may have serious financial consequences. But for the rule, in similar circumstances, the usual order would be for the plaintiff to pay the defendant's costs on the standard scale. It follows from its possible draconian consequences that order 22 A rule 9 must be strictly interpreted.
16. In the circumstances we are satisfied that for order 22 A rule 9 (3) (b) to apply there must be an open offer (rule 9 (b)), which has not been accepted and also a judgment not more favourable than the offer. Neither of these last 2 conditions applied in the circumstances of this case and the rule did not apply. On this in the judge's ruling was correct there was no other basis upon which he could properly exercise his discretion to award costs other than on the standard scale.
17. Also before the judge at the same time there was an application for costs in an appeal from the registrar which he had dismissed. He concluded that the application to the registrar by the defendants related substantially to costs and was made prematurely. In the circumstances he ordered that there should be no order for costs for the appeal before him and the application before the Registrar. There was no error of law in the judge's exercise of discretion and this court has no jurisdiction to entertain any appeal relating to it.
18. For these reasons we dismiss the appeal with an order nisi for costs against the appellant here and below.

Orders

We make the following orders:

1. The appeal is dismissed.
2. The 1st plaintiff will have his costs of the action on a standard basis until 3 April 2009. From 3 April 2009 until 15 September 2009 the defendants will have standard costs against the 1st plaintiff.
3. The judge's award of costs in relation to the 2nd, 3rd, 4th and 5th plaintiffs will stand. That is:
 - (a) the 3rd and 4th plaintiffs will have their costs of the action until 3 April 2009.
 - (b) the 2nd plaintiff will have her costs of the action until 8th of September 2009. The defendants will have standard costs against the 2nd plaintiff from 8 September 2009 until 15th of September 2009.
 - (c) the 5th plaintiff will have standard costs of the action until 9 April 2009. The defendants will have standard costs against the 5th plaintiff from 9 April 2009 until 15th of September 2009.
4. An order nisi that the plaintiffs/respondents will have the costs of this appeal and the costs below relating to the judge's hearing on costs on 17

September 2009. This order will become final unless one of the parties gives notice to the other and the registrar by 4 pm Tuesday, 1 June 2010. Any application will be heard at 9 am on Wednesday, 2 June 2010.

Mortimer, P.

Davies, J.A.

Rogers, J.A.