Koperasi Kampung Keriam Dengan Tanggungan Berhad … 1st Appellant
Insol Anak Gaing … 2nd Appellant

AND

Taty Tjhai … Respondents
(suing as the administrator of the estate of CHANDRAWATI TJHAIM deceased)

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 19 of 2008)

Before: Power, P; Mortimer and Davies, JJ.A.
23rd May, 2009.

Appeal against costs order allowed. Application of 0.22A – Payment into court.

Ms. Melissa Ang of Messrs. CCW Partnership for the Appellants.
Mr. Adrian Chan of Messrs. Veerasamy Associates for the Respondents.

Cases cited in the Judgment:

Campbell v Pollak [1927] ALLER 1 at p.5.
Findlay v Railway Executive [1950] 2 ALLER 969 at 972.
Hj Osman Bin Hj Abdul Rahman v Julkifli Bin Jenudin (Civil Appeal No. 2 of 2005).
Jones v McKie and another [1964] 1 W.L.R. 960 at page 966.

Power, P.:

In this matter Taty Tjhai, the respondent in this appeal was the plaintiff in an action she brought as the administrator of the estate of her deceased sister, Chandrawati Tjhai, who died after having been struck by a truck owned by the appellants on 23rd August 2005. The appellants admitted liability and on 20th April 2007 made a settlement offer of $75,000 under 0.22A of The Rules of the Supreme Court. This offer was not accepted and on 1st October 2007 the offer was increased to $80,000. The assessment of damages was heard by Acting Senior Registrar Norismayanti who on 19th February 2008 awarded damages of $42,932.35. This award was appealed to Judicial Commissioner Findlay who allowed the appeal and increased the damages to $62,742.35 which with interest made a total award of about $70,000. Findlay J.C. ordered that the appellant, the respondent in this appeal, be entitled to the costs up to the date of the offer and that thereafter each party should bear its own costs including the costs of that hearing.

He set out his reasons for sodoing as follows:

> *"There remains Mr Chan's argument that I should exercise my discretion in this matter by not awarding costs against the appellant. As Mr Chan points out, and as I emphasized in my judgment, there is no certain method of assessing damages in cases such as this. It is essentially a matter of educated guesswork and an award may vary considerably case-by-case and judge-by-judge. I indicated in my judgment that I might well have awarded somewhat more in respect of pain and suffering and another judge might well have awarded more under the claim for dependency.*
>
> *Order 22A is a provision designed to encourage settlements. It is not there, in my view, to penalize plaintiffs who have advisers who reasonably feel that, on a proper assessment of the matter, their clients have a good chance of recovering an award more than the offer made. The provisions are meant to discourage the pressing of ill-advised claims, not reasonable assessments that prove to be wrong only with the benefit of hindsight.*
>
> *I put to Mr Chan that I should approach this matter by considering whether or not the appellant's decision to reject the offer was reasonable. He agreed that this was the proper approach and Ms Ang also accepted that this was right.*
>
> *In my judgment, the appellant did not act unreasonably in rejecting the offer of $80,000. Having regard to the cases cited by Mr Chan, there were entirely reasonable grounds for believing that the appellant could recover a sum in excess of $80,000. The fact that the appellant did not do so, but recovered only $70,000, was, it might be said, just bad luck in the draw. I do not think that the appellant should be greatly penalized because of this. However, I think it would be just to give recognition to the fact that the respondent's conduct in making the offer was also not unreasonable. It was, in my view, a fair offer."*

There is now an appeal to this court against that costs order.

The first hurdle faced by Ms. Melissa Ang, who appears for the appellants, arises because of s.202(a) of the Supreme Court Act which provides:

> *"20(1) Subject to subsection (2) an appeal should be 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 appeal shall lie –*
> *(d) from any order relating only to costs."*

This is such an appeal however the effect of that section has been tempered by a judgment of this court, *Hj Osman Bin Hj Abdul Rahman v Julkifli Bin Jenudin* (Civil Appeal No. 2 of 2005), which involved s.20(2)(d). It was an appeal to this court from a decision in the High Court awarding a successful defendant only half of his costs of the

appeal from the decision of a Registrar to the High Court. Reliance was placed by the Court of Appeal on the following passage from the speech of Viscount Cave *Campbell v Pollak* [1927] ALLER 1 at p.5

> *"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).

The Court of Appeal held

> *"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"* (Emphasis supplied)

Order 22A is in the following terms:

> *"Costs. (0.22A, r.9)*
>
> *9. (3) Where an offer to settle 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."*

In the present case Findlay J.C. exercised his discretion to award costs on the basis that 0.22A was not enacted to "penalize plaintiffs" whose advisers "reasonably feel that on a proper assessment" there is a good chance of recovering more than the offer. He also seems to have taken into account that it "was just bad luck in the draw" that the respondent did not recover more.

What we must decide is whether these are matters which could properly be taken into account in the exercise of discretion. If that be not so then the decision was founded on an error of law and this court must quash the order of the judge and exercise its own discretion.

Mr Chan for the respondent relies upon the following passage from the judgment of Lord Willmer in *Jones v McKie and another* [1964] 1 W.L.R. 960 at page 966:

> *"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."* (Emphasis supplied)
>
> *What it comes to, I think, is that, in order to justify an appeal as to costs only, this court must be able to say that the judge in the court below, however much he may have been purporting to exercise his discretion, has not really exercised his discretion at all. This court can say that, but can say it only, as I see it, if it is satisfied that the judge in the court below has taken into consideration wholly extraneous and irrelevant matters."*

He submits that the Judicial Commissioner took into account "facts connected with" the litigation when observing that 0.22A was not enacted to penalize a plaintiff who had acted upon what was, on its face, sound advice and that it was "bad luck of the draw" that she was not awarded more than the amount paid in.

We cannot agree that either was a proper matter for consideration in the exercise of the judge's discretion. 0.22A was made to ensue that plaintiffs who did not accept the amount paid in should be penalized in costs. It is quite wrong to suggest that it was made to discourage the pressing of ill-advised claims and not reasonable assessments that prove to be wrong. The fact of the matter is that it arises are not only to enable defendants to protect themselves in costs but also to penalize plaintiffs, however reasonable or unreasonable the advice they received may have been, who have refused to bring to an end the litigation, with all its attendant costs, by accepting an offer which, in the outcome, was more than they received. The proper approach was succinctly put by Lord Denning in *Findlay v Railway Executive* [1950] 2 ALLER 969 at 972 as follows

> *"The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs."*

We turn to the statement that it was the respondent's "bad luck" not to have got more. This was clearly, we are satisfied, not a matter which could be properly weighed in the exercise of discretion. The discretion must be exercised by having regard to the amount

actually awarded and not based upon speculation of the amount the litigant, might have been awarded if she had been lucky.

Mr Chan finally relies upon the concluding words of 0.22A r.9(3) which set out the order to be made "unless the court orders otherwise". He submits that the court is empowered to order otherwise and that it has done so in the present case. The answer to this need hardly be stated. The order otherwise in the present case was a wrongful exercise of discretion and cannot stand. Indeed the discretion to order otherwise is limited only to an order that the costs be on a standard or indemnity basis and there nothing in the present case that would warrant an order otherwise than on an indemnity basis.

We are satisfied that the Judicial Commissioner was wrong in law to exercise his discretion as he did and that an appeal does, therefore, lie against his decision.

There is nothing that would warrant a departure from the terms of 0.22.

The appeal must be allowed.

We make the following order nisi as to costs. The respondent is entitled to her costs on the standard basis until the date of service of the offer. The appellants are entitled to their costs on an indemnity basis from that date.

This order will become absolute unless application is made before 9 a.m. on Thursday 4th June.

Power, P.

Mortimer, J.A. **Davies, J.A.**