

**CHONG MING LOO
KUAN CHEE MING**

... **1st Appellant**
... **2nd Appellant**

AND

**NATIONAL INSURANCE
COMPANY BERHAD**

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2014)

Before: Mortimer P, Davies and Burrell JJ A.
29th May, 2014

Headnote: Appeal against the grant of a certificate for 2 counsel allowed. Certificate quashed.

Mr Vincent Joseph and Ms Subrina Tan Yii Chun (M/S Sandu & Co) for Appellant
Mr P.Rajiv CV Prabhakaran (M/S YC Lee & Lee) for Respondent

Cases referred to:

Hj Osman bin Hj Abdul Rahman v Julkifli bin Jerudin (Civil Appeal No 2 of 2005)

Koperasi Kampung Keriam and Another v Taty Tjhai (suing as administrator of the estate of Chandrawati Jhai deceased)

Mortimer. P:

Having heard counsel we allowed the appeal and made orders for costs. We now give our reasons and appropriate orders.

Background

Damages were awarded against the plaintiffs/appellants in this case following a motor accident. They were respectively the owner and driver of one vehicle involved.

The owner had insured the vehicle with the respondent insurer but there was a dispute whether the owner had given permission for the driver to drive the car. If he had given permission the insurers were liable but not otherwise.

This dispute led to this action by the owner and driver (plaintiffs/appellants) against the insurer (the defendant/respondent). Having heard the evidence Findlay J found for the insurer. He held the evidence for the insurer was utterly convincing and without answer from the plaintiffs to the

extent that the action ought never to have been brought. Consequently he awarded costs of the action to the insurer on an indemnity basis.

The relevant finding

Additionally on the insurer's application he granted it a Certificate for two counsel. He gave his reasons as follows:

“This case was conducted, in my view, not prudently, but without due care as to the consequences of pressing it to trial. Accordingly, I award costs against the plaintiff on the basis of full indemnity.

I should say that otherwise I would not have awarded a certificate for two counsel. This was essentially a simple case”

(Emphasis ours)

The appeal

The appeal is limited to a challenge of the judge's award of a certificate to the insurer for 2 counsel. The appellants contend that having found that this was “*essentially a simple case*” the judge wrongly exercised his discretion. This amounted to an error of law which this court ought to rectify.

The respondent on the other hand contends that the judge's order was properly made but even if not he still ought to have made the order on the grounds that the appellants continued to raise issues of law, made serious allegations against a lawyer and generally conducted the case so that it was reasonably and necessary for 2 counsel to be instructed.

Discretion in the award of costs

This court has jurisdiction to hear an appeal against a judge's award of costs if he errs in law. A judge has a very wide discretion in awarding costs but the discretion must be exercised judicially. He must take into account only relevant matters. Where the judge takes into account matters he ought not to take into account or fails to take into account matters he ought to take into account, an error of law is involved. For the jurisdiction of the court to hear an appeal against an order relating only to costs see:

Hj Osman bin Hj Abdul Rahman v Julkifli bin Jerudin (Civil Appeal No 2 of 2005)
Koperasi Kampung Keriam and Another v Taty Tjhai (suing as administrator of the estate of Chandrawati Jhai deceased)

At some time in the future the court may return to its jurisdiction to hear an appeal against costs alone after full argument.

Was the judge in error?

In order to determine whether the judge was in error it is not necessary to look beyond his reasons above. A certificate for two counsel may be granted on a number of grounds the most important of which is the complexity of the case. The real test is whether in all the particular circumstances instructing 2 counsel to conduct the case was necessary and reasonable. General guidance is found in RSC Order 62 note 62/A2/12 but this guidance applied to a jurisdiction with a divided profession unlike Brunei. The reasons for granting a certificate for 2 counsel are not closed.

Having tried the case the judge was in the best position to determine whether a certificate ought to be granted. He determines the point with great clarity. Having considered the complexity of the case and the manner in which the plaintiffs presented their case he said this was '*essentially a simple case*' and points out that he would not have granted the certificate had he not made an order for indemnity costs. This reason is not a proper exercise of his discretion. The instruction of 2 counsel may or may not be justified even when such an order for costs is justified.

The consequence is that the order was made against the plaintiffs was not justified on his own findings.

Decision

It then falls to this court to exercise the judge's discretion. The issue in the trial was a relatively simple one of fact, 'Did the driver have the insured's permission to drive at the time of the accident.' The issues raised by the plaintiffs concerning legal privilege and the allegations against counsel were simply untenable as the judge also found.

For these reasons we allow this appeal and quash the certificate for two counsel.

Costs

The appellants originally appealed against all the judge's orders. Only on the 2 May did the appellants abandon the appeal save for against the certificate for 2 counsel. We order that the respondent shall have the costs of the appeal up to 2 May 2014 and that the appellants shall have the costs of the appeal thereafter to be taxed if not agreed.

Orders:

- 1) Appeal allowed. Certificate for two counsel is quashed.
- 2) The respondent to have the costs of the appeal up to and including 2 May 2014. The appellants to have the costs of the appeal thereafter to be taxed if not agreed.

Davies, J.A.

Mortimer, P.

Burrell, J.A.