

SYARIKAT KEJURUTERAAN SISTEMATIK SDN BHD

....Appellant

AND

PG KARIM BIN PG BUSTAMAM

.....Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.
26th November 2018

Part 36 offers, indemnity costs and interest; Claims on behalf of minors; appropriate for orders for indemnity costs.

Ms. Wong Kah Hwa@Susanna Lim and Mr. Lim Szen (Messrs. Susanna Lim Partnership) for Appellant

Mr. Vincent Joseph and Ms Subrina Tan Yii Chun (Messrs. Sandhu and Co) for Respondents

Seagroatt, JA.:

DECISIONS ON COSTS

Consequent upon our judgment handed down on the 19th November 2018 the parties appeared before us on the 22nd November, on the plaintiff's/respondent's application for the indemnity basis of costs to be awarded from the date of the Calderbank offer (section 36 of the Supreme Court Practice) being 27th February 2018, and for a certificate for two counsel.

Indemnity costs

There was a history of offer and counter-offer of settlement involving the parties terminating with the letter referred to of 27th February 2018, shortly before the trial was due to commence. That offer allowed the defendant/appellant 24 hours in which to accept or reject it. In fact it could have accepted it at any stage before judgment by applying to the court, if necessary.

The result of the trial was a judgment for damages which comfortably exceeded the amount notified by the plaintiff to the defendant as what he would accept in settlement.

The judgment was delivered by the former Chief Justice on the 28th June 2018. By letter dated the 3rd July 2018 the plaintiff notified the court of the so-called Calderbank offer which had been exceeded by the amount of damages awarded by the judgment.

Accordingly it sought costs on an indemnity basis. It also asked for a certificate for two counsel, a matter independent of the costs consequent upon succeeding on the Calderbank offer. Somehow that letter was in a state of suspense following the retirement of the then Chief Justice pending the appointment of his successor. The

application therefore came before this court as a matter to be dealt with pending our judgment which was handed down on the 19th November 2018; that judgment dismissed the defendant's appeal on liability, allowed the plaintiff's cross-appeal on the issue of contributory negligence, and thereby awarded the damages assessed by the trial judge to the plaintiff on the basis of full liability on the part of the defendant.

The court has a discretion to award indemnity costs in the circumstances set out above. The defendant has to bear the burden of such costs where it took the risk of continuing litigation in the face of an offer to compromise the action under part 36.21 of the Supreme Court Practice. It is a proper exercise of the court's discretion so to do. Not to do so would undermine the rationale of the provisions of Part 36 (formerly termed a Calderbank offer).

We thus make the following orders:

1. The defendant is to pay interest on the whole award of damages excluding the sum for interest calculated by the judge as BN\$26,522.67 at the rate of 6% above base rate from the 28th February 2018 and thereafter until payment i.e. on BN\$216,997.44.
2. The costs order in favour of the plaintiff will be on an indemnity basis from the 28th February 2018.
3. There will be interest on such costs at the rate of 6% above base rate from the same date until payment.

In making these orders we have taken due note of the provisions of Part 36.21 subsection 5.

The Application for a Certificate for two Counsel

At trial both parties were represented by two counsel. Before us, on this application, only one counsel represented the plaintiff. That was a sensible economy of resources and costs.

This was a fatal accident claim which was far from straightforward on liability. There were no eye-witnesses and great reliance was placed on expert and quasi-expert evidence. The defendant generated for the trial judge, and ourselves, a considerable volume of documentation. Fatal accidents in the workplace more often than not involve considerable examination of the circumstances, potential difficulties in establishing the facts, and problems in assessing the credibility of witnesses. This was such a case. We have no doubt that it justified the use of two counsel. We therefore grant the certificate for the trial but not for this costs application.

The fatal claim and appropriate costs order

This action was brought on behalf of the widow and the deceased's dependants who included two minors, respectively 9 and 13 years of age, technically therefore under a disability.

Courts of many jurisdictions are concerned that in such cases the cost of litigation should not in any way fall upon the damages recovered, which include elements for the benefit of those minors who by the negligence of the defendant have been deprived of

their fathers and the future provision they would have made for them. Therefore costs orders are made on an indemnity basis to protect the damages, or funds, from any diminution. It is appropriate in this case that we should make such an order so that there can be no solicitor and client costs to be borne by the plaintiff. This order must of course be drawn to the attention of the Taxing Officer.

It follows therefore that there is an order for costs on an indemnity basis from the date of the issue of the writ throughout. We have already made an order on the same basis in respect of the costs from the 28th February 2018 to which is attached a provision for interest on those costs which marks the cut off period for the purposes of pre and post Part 36 offer costs.

The plaintiff shall have the costs of this application, also on an indemnity basis for the reasons set out hitherto, but without the provision of interest on them.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A