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.
17th April 2019

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.:

DECISION ON FURTHER SUBMISSIONS ON COSTS AND INTEREST

This is an application, post-judgment and post-decision on costs by the appellant employer, the appeal itself having been dismissed in our judgment dated 19th November 2018, and the decision on costs being dated the 26th November 2018.

The application is submitted on paper after the last sitting of the Court of Appeal in November 2018. It calls into question our decision to award indemnity costs and interest in the context of the respondent's success following the Calderbank offer or offers before trial and the rationale of the provisions of Part 36 offers of the CPR.

It is suggested that the Court is not entitled to take note of or apply the rationale of the statutory provisions which do not yet find their way into the Bruneian Supreme Court Practice because the respondent, or plaintiff as he was in the original action relied upon a Calderbank offer, a judicial precedent from the decision of the English Court of Appeal in 1975.

The statutory formulation in the CPR Part 36 offers, has evolved from the principle enunciated in Calderbank vs Calderbank and refined the courts' approach where those successful offers of settlement, termed Calderbank offers, are regarded as reinforcing the benefit for parties to an action who have made sensible efforts, on record, to bring to a timely and economic end litigation which imposes on the parties risks, stress and serious financial considerations.

This was a case which should have been settled years ago. The fatal accident occurred in August 2013. Judgment was given after a full trial in June 2018, a lapse of almost five

years. During November 2017 and the early months of 2018 up to trial, the respondent plaintiff made five formal efforts by way of the Calderbank offers to effect a settlement.

The appellant/defendant declined to accept any of those proposals. At first instance and on appeal the respondent plaintiff achieved a result better than every one of its five offers. These tactical steps were properly used.

As a consequence, the unsuccessful party which has pursued such litigation to an unsuccessful conclusion has to incur the reasonable sanctions which flow from such an action. They are not intended to be punitive but to provide proper protection from what would otherwise have been the vicissitudes of litigation, in particular in respect of costs and the value of damages recovered.

Even though the offer was not made under the statutory provisions of the CPR because they are not yet part of the Bruneian Supreme Court Practice, the court, in its discretion, can adopt any or all of the provisions of the CPR applicable to other jurisdictions if they fit with the rationale of the Calderbank case, whether expressly identified as the basis of the offer of settlement or not. The court is empowered to apply common law jurisprudence and practice where it considers it is just and fair so to do. Not to do so would be perverse and against its traditional function and would suggest that it can be inhibited from adding to the common law, or from adopting the statutory measures of statutory provisions elsewhere, as part of that common law approach. No court should be deterred from this course.

Accordingly our decision is exercised on the basis of the very wide discretion, endowed in the court, in enhancing the Calderbank provisions to adopt any costs provisions provided by the CPR, where we deem appropriate, in the interests of the successful party.

It is unfortunate that the court's mistaken reference to the Calderbank offer being equated with a Part 36 offer, instead of specifying that the rationale and sanctions of Part 36 offer can be applied by common law in the court's discretion in the context of a Calderbank offer, is misleading. The clarified approach is set out earlier.

There also appears to be a misunderstanding on the question of interest. There is no risk of interest upon interest arising.

The figure for interest upon the damages calculated by the trial judge as part of the judgment debt remains as such viz. $26,522.67.

This figure has to be taken out of the equation for the calculation of interest up to the date of trial so that there is no calculation of interest upon such interest. But the figure reverts to the judgment sum after trial as part of the interest calculation.

We confirm therefore that the order is, as sought by the successful respondent

1. The appellant/defendant is to pay interest on the whole award of damages at the rate of 6% above base rate from the 28th February 2018 until payment i.e. on $216,997.44. That sum excludes the award of interest by the trial judge of

BND26,522.67 because part of that sum covers the period 28 February 2018 to the date of judgment, 28 June 2018 and so credit must be given for the proportion of the trial judge's award of interest which covers that four month period following the Calderbank offer. Once that has been calculated, the resulting net figure must be added back to the whole award of damages viz. BND$216,997.14 to form the total judgment figure on which interest will then run from the 28 June 2018.

2. The costs order in favour of the respondent plaintiff will be on an indemnity basis from the issue of the writ for the reasons already set out in our earlier decision.
3. The appellant/defendant will also pay interest on the costs at the rate of 6% above base rate from the date of the last Calderbank offer i.e. 28 February 2018 until payment.
4. The application for a certificate for two counsel for both the trial and the appeal is granted.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**