OTF Aquarium Farm *v* Lian Shing Construction Co Pte Ltd (Liberty Insurance Pte Ltd, third party)
[2010] SGHC 245

Case Number : Suit No 614 of 2005 (Registrar's Appeal No 201 of 2009)

Decision Date : 24 August 2010

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Prabhakaran Nair (Ong Tan & Nair) for the Appellant; Sanjiv Rajan Kumar, Ong Min-Tse Paul and Fazaliah Arsad (Allen & Gledhill LLP) for the Respondent

Parties : OTF Aquarium Farm — Lian Shing Construction Co Pte Ltd (Liberty Insurance Pte Ltd, third party)

Damages

Civil Procedure – Costs

24 August 2010

Kan Ting Chiu J:

1 This judgment is predominantly on damages. The damages were assessed by an Assistant Registrar and were affirmed by me. The background to the matter was a claim by the plaintiff, OTF Aquarium Farm, against the defendant, Lian Shing Construction Co Pte Ltd for damages arising from the flooding and contamination of the plaintiff's fish breeding ponds on separate occasions between December 2002 and February 2003 as a result of drainage works undertaken by the defendant on an adjacent plot to the ponds.

2 The plaintiff's claim was heard before Belinda Ang Saw Ean J. At the conclusion of an extended trial, Ang J found that the defendant was liable in negligence and nuisance for the loss of 31 fishes over the period December 2002 to June 2003, and entered interlocutory judgment with damages for the 31 fishes to be assessed by the Registrar.

3 Before the damages were assessed, the judgment went up on appeal to the Court of Appeal. The Court of Appeal modified Ang J's judgment by reducing the number of dead fishes from 31 to 30, but affirmed the rest of her decision.

4 The assessment of damages was then heard before an Assistant Registrar who ordered that:

(i) the plaintiff was to receive damages of $12,700 for the 30 dead fishes;

(ii) there was to be no damages for economic loss from the death of the 30 fishes;

(iii) there was to be no damages for the re-instatement of the ponds; and

(iv) costs of the assessment were to be taxed on the Magistrate's Court's scale and are to be paid to the plaintiff up to 26 November 2008 on a standard basis, and to the defendant from 27 November 2008 on an indemnity basis. (The defendant had made an offer to settle on 26 November 2008 which exceeded the sum awarded.)

5 The plaintiff appealed against the Assistant Registrar's orders. I dismissed the appeal. I now deal with the issues in the assessment and the appeal.

Whether the dead fishes were CBGA or RTGA

6 The dead fishes were golden arowanas. Arowanas are classified by colour *i.e*. silver, green, red and gold. Golden arowanas in turn are divided into Cross-Back Golden Arowana ("CBGA") and Red Tail Golden Arowana ("RTGA"). CBGAs are different in appearance from RTGAs and are significantly more expensive. The plaintiff claimed that the dead fishes were CBGAs, whereas the defendant maintained that they were RTGAs.

7 At the conclusion of the assessment, the Assistant Registrar found that the dead fishes were RTGAs. He explained that he came to the conclusion because photographs of the dead fishes showed characteristics more consistent with RTGAs and siblings of the dead fishes were sold at prices which were consistent with RTGA prices but were well below CBGA prices.

8 At the assessment, the plaintiff produced photographs of some of the dead fishes taken three days after a flooding. The defendant also produced photographs of other arowanas through its expert witness Leonard Lee Siew Thong ("LLST"), an arowana hobbyist and a registered arowana breeder. LLST's evidence was that the scale formation of the dead fishes in the plaintiff's photographs were of RTGAs, not CBGAs. Although counsel for the plaintiff questioned LLST's expertise during the assessment, the Assistant Registrar accepted him as an expert witness, and the plaintiff did not raise that as an issue in the appeal.

9 At the assessment hearing, the plaintiff did not call any independent witness or expert to support its claim that the dead fishes photographed were CBGAs, or to refute LLST's reasons for his opinion, and LLST's opinion was not effectively challenged.

10 In the appeal, counsel for the plaintiff argued that the Assistant Registrar had erred in accepting LLST's opinion because the photographs were grainy and unclear, and the fishes shown were decayed and discoloured. These complaints were not justified. It was not put to LLST that the photographs were so poor in quality that the scale formation on the fishes could not be seen. To the contrary, LLST observed that the fishes were not badly composed. He pointed out that the photographs were stated to have been taken three days after a flooding, not that the fishes were dead for three days when the photographs were taken. He added that the fishes looked quite fresh to him and did not appear to have been dead for three days.

11 The Assistant Registrar had also relied on the plaintiff's records of the subsequent sale of the siblings of the dead fishes which survived the flooding. The records showed that the fishes had been sold for between $235 and $400, against the agreed minimum price of $800 for CBGAs, but within the price range for RTGAs.

12 In the appeal, the plaintiff argued that the Assistant Registrar erred in relying on the records because the price of CBGAs may vary according to the aesthetic quality of each fish. While it is likely

that some specimens may aesthetically fall below the general standards, that cannot explain the sale of all the siblings at the consistently low prices if they were CBGAs. Although the records did not specify the particular class of the fishes, the Assistant Registrar was entitled to regard the sale prices as strong corroborative evidence that the fishes sold (and their dead siblings) were RTGAs.

The price of the replacement fishes

13 The Assistant Registrar ruled that the dead fishes should have been replaced three to six months after they died. As he had held that the dead fishes were RTGAs, he relied on the price information of 2002/2003 provided by the defendant:

Description of fish	Number of fish	Price range	Total Price
RTGA aged 9 to 12 months	18	$250 to $350	$4,500 to $6,300
RTGA aged 8 to 22 months	1	$250 to $350	$250 to $350
RTGA aged 2 years to 2 years 3 months	11	$450 to $550	$4,950 to $6,050
		Grand total =	$9,700 to $12,700

and awarded the plaintiff $12,700, using the figure at the high end of the range.

14 The Assistant Registrar only had the defendant's prices to work with because the plaintiff did not adduce any evidence on the prices of RTGAs, and Ong Kay Yap, its manager and witness, accepted the prices of RTGAs provided by the defendant. The plaintiff's position was that the award should be for replacement CBGAs of the ages which the dead fishes would have reached at the time of assessment if they had not died. The plaintiff presented figures at three levels, *i.e.*, optimistic, neutral and pessimistic, at $86,160, $41,160 and $3,840 respectively.

15 The plaintiff argued that the Assistant Registrar should have made the award on the prices it had presented. There were two difficulties with this argument. First, the prices presented by the plaintiff were CBGA prices, not RTGA prices. Second, the replacement prices should be for fishes of the ages of the dead fishes at prices prevailing at the time of their death or within a reasonable period. The plaintiff should be allowed time to attend to the ponds and to source for suitable replacement fishes but it cannot wait till the time of assessment. The Assistant Registrar had allowed a fair period of three to six months.

16 In this situation, the maxim *restitutio in integrum*, which means literally "restoration to the original position" (*Osborne's Concise Law Dictionary*, (Leslie Rutherford & Sheila Bane, ed) (Sweet & Maxwell, 8th Ed, 1993) comes into operation. That requires, per Lord Blackburn, *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39

> [T]hat sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

A party which has suffered a loss should put itself back to the position that it was in before the loss took place. In this case, the plaintiff should have taken steps to replace the 30 fishes. The plaintiff was entitled to the replacement cost if replacements were available and if the plaintiff was in a

position to purchase the replacement fishes. It was not the case that replacement fishes were not available, or that the plaintiff did not have the funds to purchase them. After doing that, it can claim from the defendant the cost of replacing the fishes. The plaintiff was not entitled to claim replacement cost in the way it did.

Whether the plaintiff was entitled to claim for economic loss

17 The plaintiff claimed for economic loss following from the death of the 30 fishes which it quantified between $193,411 and $600,647, as well as the cost for replacing the fishes. The defendant, on the other hand, argued that the plaintiff was only entitled to the replacement cost. The Assistant Registrar agreed with the defendant and rejected the plaintiff's claim for economic loss.

18 When the appeal came before me, this was the main issue raised. It should be apparent that the plaintiff was double claiming. While the death of the fishes would result in the loss of income from the sale of the fishes and their prospective off-springs, the plaintiff's expectations to the income would be restored if the dead fishes were replaced. If the plaintiff had succeeded on both its claims, it would have 30 replacement fishes (or the money to procure them) which would yield income, and compensation for the income the 30 dead fishes would have produced. Clearly the plaintiff was not entitled to such a windfall.

19 Counsel for the defendant cited two American cases which touched on this point. The first is *Rosche v Wayne Feed Division, Continental Grain Co* 152 Wis. 2d 78 (1989) ("*Rosche*"). In this case, the plaintiffs' pigs became dead, sick and sterile after eating the defendant's feed products. At the trial damages were awarded to the plaintiffs which included the replacement cost of the affected pigs as well as lost profits. On appeal to the Court of Appeals of Wisconsin, Brown J ruled that:

> [T]he basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with an appropriate reduction for any salvage value.

The award was set aside and a new trial ordered on the question of damages.

20 In the second case, *Wayne F Schrubbe v Peninsula Veterinary Service, Inc* 204 Wis. 2d 37 (1996), another decision of the Court of Appeals of Wisconsin arising from the death of dairy calves, *Rosche* was discussed and explained thus:

> The reasons underlying this general rule of damages [the rule enunciated in *Rosche* set out in the foregoing para] are at least threefold. First, the market value of replacement animals is based in part upon their expected future productivity. Because future productivity is considered in assessing market value of livestock, additional recovery for the expected future productivity of the livestock would duplicate damages. *Id*. Once the owner acquires a replacement animal, the loss of future productivity is eliminated. If future productivity were allowed together with the replacement cost, the owner would be twice compensated for the future productivity of the animal.
>
> The measure of damages stated in *Rosche* is also designed to minimize damages and avoid economic waste. This rule excludes recovery for damages that should have been avoided and deemed economically wasteful. By acquiring replacement animals, livestock productivity will be maintained and the damages measured in a way that will not exceed the economic potential of the lost property.

These pronouncements reflect simply and clearly *restitutio in integrum*. The same principle and logic

must apply to the plaintiff's claim, and the plaintiff cannot recover economic loss in addition to the replacement cost of the 30 fishes.

21 I should add that even if the plaintiff had claimed for the economic loss alone, without the replacement cost, it was still not entitled to that because the claim was fundamentally flawed.

22 The plaintiff cannot claim for the lost prospective income because the loss could be mitigated by the replacement of the dead fishes. Viscount Haldane L.C. made clear in *British Westinghouse Electric And Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 that there is a principle of compensation which:

> imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

23 In the same vein, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) stated in para 7-014 that:

> [T]he law requires [a plaintiff] to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss.

24 The plaintiff cannot sit back and cash in on the death of the fishes, and recover in one award the lost prospective income for the dead fishes. It is only entitled to recover the cost and expenses that are incurred to restore it to the position to derive income from growing, breeding and selling the fishes.

Damages for re-instating the ponds

25 The Assistant Registrar had not declined to assess any damage under this head. He had explained that:

> Had the Plaintiff correctly pleaded its case, it would have succeeded in claiming this head of damage. Unfortunately, the judgment clearly does not state that the Plaintiff is entitled to this damage.

The plaintiff had made a claim for unquantified special damage in connection to the damage to its ponds, and had put up a figure of $48,000 during the assessment. Ang J did not disclose the reason for not making any order regarding the re-instatement. It could have been that she found that the claim was not properly pleaded, or it could be that she was not satisfied that the ponds required re-instatement.

26 In the event, Ang J's judgment was:

> I order interlocutory judgment in favour of the plaintiff with damages to be assessed by the Registrar for these 31 dead arowanas.

without reference to the re-instatement of the ponds.

27 The Assistant Registrar did not decide on the heads of damages that the plaintiff was to receive; his role was to assess the damages he was directed to assess. There was clearly no direction to assess damages for the re-instatement of the ponds. On appeal, the Court of Appeal merely reduced the number of dead arowanas to 30. The Assistant Registrar was right to decline to assess damages for re-instating the ponds in the circumstances.

Costs of the assessment

28 The Assistant Registrar ordered that the costs for the entire proceedings be taxed on the Magistrate's Court's scale. Ang J had ordered that interlocutory judgment be entered in favour of the plaintiff and that the defendant was to pay the plaintiff the costs of the action.

29 After he assessed the damages payable to the plaintiff at $12,700, the Assistant Registrar ordered that the costs of the proceedings are to be taxed on the Magistrate's Court's scale. The Assistant Registrar's order was consistent with the provisions of the Subordinate Courts Act (Cap 321 Rev Ed 2007) ("SCA") and the Rules of Court ("ROC").

30 Section 39(1)(b) of the SCA provides that in an action commenced in the High Court, if a plaintiff recovers a sum not exceeding the Magistrate's Court limit (which is $60,000), he shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a Magistrate's Court. Section 39(4)(a) of the SCA provides that if the High Court is satisfied that there was sufficient reason for bringing the action in the High Court, it may allowing costs on the High Court scale. Order 59 r 27(5) of the ROC also provides that:

> [I]f any action is brought in the High Court, which would have been within the jurisdiction of a Subordinate Court, the plaintiff shall not be entitled to any more costs than he would have been entitled to if the proceedings had been brought in a Subordinate Court, unless in any such action a Judge certifies that there was sufficient reason for bringing the action in the High Court.

Both provisions have the effect of restricting the costs to the costs of the court of appropriate jurisdiction unless there was a sufficient reason for bringing the action in the High Court.

31 In this case, where the damages were assessed at $12,700, should the costs be taxed on the High Court scale? The plaintiff's submission was that:

> [The plaintiff] seeks a reversal of this Order as [the plaintiff's] claim for damages and for loss is not an ill-conceived claim. Furthermore, the Defendants' former lawyers agreed that the High Court was the proper forum for the claim. The entire proceedings were conducted in the High Court including an appeal by the Defendants to the Court of Appeal. It would be unfair and inequitable to only award costs on Magistrate's Court scale. [The plaintiff] seeks costs on the High Court scale regardless of the fact that the final compensation may be below its jurisdiction.

32 Was there any "sufficient reason" for the plaintiff's action to be brought in the High Court? On the best-case basis, the claim for the replacement of the fishes, economic loss and pond re-instatement was for:

(i) replacement cost - $ 86,160

(ii) economic loss - $600,647

(iii) re-instatement cost - $ 48,000

$734,807

Such a claim would come within the jurisdiction of the High Court, and the defendant could not have objected to the claim being brought in the High Court even when it disputed the claim.

33 However, to constitute sufficient reason under s 39(4) of the SCA and O 59 r 27(5), the plaintiff must show not only that its claim came within the High Court jurisdiction, but also that it was a proper claim.

34 Without the huge claim for economic loss, the plaintiff's claim would have come up to $134,160 at the highest, well within the jurisdiction of the Subordinate Courts (which is $250,000). The issue is therefore: was the claim for economic loss a "sufficient reason"? It may be sufficient reason if there was a proper basis for such a claim, even if it failed ultimately. But as the plaintiff's claim was misconceived and should not have been made at all, it was not a sufficient reason. In the circumstances, the Assistant Registrar was correct to order that the costs be taxed on the Magistrate's Court's scale as the plaintiff only recovered $12,700.