Sie Choon Poh (trading as Image Galaxy) v Amara Hotel Properties Pte Ltd [2008] SGHC 24

Case Number : Suit 914/2002, RA 214/2007

Decision Date : 15 February 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Navinder Singh (Navin & Co LLP) for the plaintiff/appellant; Adeline Chong (Rajah & Tann LLP) for the defendant/respondent

Parties : Sie Choon Poh (trading as Image Galaxy) — Amara Hotel Properties Pte Ltd

Civil Procedure – Costs – Whether offer to settle can be taken into account even though not in prescribed form

Damages – Assessment – Appeal against assessment of damages by assistant registrar – Whether assessment should be altered in light of inadequate evidence of loss

15 February 2008

Andrew Ang J:

1 This was an appeal (Registrar's Appeal No 214 of 2007) against the Assistant Registrar's ("AR") assessment of damages payable to the plaintiff in Suit No 914 of 2002 arising from the spillage of waste water into the plaintiff's shop premises from a burst waste water pipe in the defendant landlord's building of which the premises let to the plaintiff formed part. At the conclusion of the hearing, I dismissed the appeal with costs. My grounds of decision follow.

The claim

2 The following principal heads of claim were set out in the Statement of Claim:

(a) Estimated loss resulting from damage to photocopying machines and other equipment – $333,200.

(b) Damages to be assessed for loss of earnings and/or profit then estimated at $500,000.

(c) Indemnity for all sums due and owing to Hitachi Leasing Pte Ltd ("Hitachi") and Canon Singapore ("Canon") as a result of the return of its machinery then estimated at $250,000.

(d) Damages to be assessed for loss of goodwill.

(e) Damages to be assessed for distress and disappointment.

3 At the assessment of damages before the AR, the plaintiff was awarded $5,000 for loss of goodwill and $11,046.76 for loss of profits. Notably, the AR declined to make any award of damages in respect of mental distress or damage to machines and equipment. Neither was an indemnity ordered. What came across very clearly from the AR's Grounds of Decision ("GD") was that the plaintiff had failed to discharge his burden of proof, there being "a glaring lack of documentary evidence and witness testimony to support the claims he was making" (see [22] of the GD). Moreover, the AR also

formed the view that "the Plaintiff's own responses during cross-examination were equivocal at best, evasive at worst".

4 It is settled law that a judge in chambers hearing an appeal from a decision of the AR exercises a confirmatory jurisdiction. The judge deals with the matter as though it came before him for the first time and is entitled to exercise an unfettered discretion of his own: *per* Chan Sek Keong J (*obiter) in Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] SLR 1234 at 1238 affirmed by the Court of Appeal in *Augustine v Goh Siam Yong* [1992] 1 SLR 767. Nevertheless, unless there are grounds upon which he differs from the AR, he should be slow to disturb the AR's findings, particularly where the AR's decision involved an examination of witnesses. Due weight should be given to the decision of the AR: *Evans v Bartlam* [1937] AC 473 followed by the Court of Appeal in *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82.

5 One would have expected that, given the AR's finding that there was a dearth of evidence in so many respects in the plaintiff's claim, the plaintiff would have sought belatedly to introduce further evidence (if any) to support his claim. Leave would still have to be obtained of course (the plaintiff having to satisfy a modified version of the test laid down in *Ladd v Marshall* [1954] 1 WLR 1489 such modification being as set out in *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392) but at least such an effort could have lent credence to the plaintiff's claim. Instead, as may be seen below, the plaintiff offered nothing further despite gaping omissions specifically pointed out by the AR.

Damage to machinery

6 With respect to damage to machinery, the AR had found that there was no evidence that the machines were damaged by waste water. She was therefore unable to make a finding on the extent of damage. Before me, the plaintiff's counsel pointed out that the defendant had taken photographs of the plaintiff's equipment which showed the machines soiled by the waste water. He therefore argued that the AR was wrong in observing that there was no documentation of what machinery was on site at the time of the incident. However, the key finding was at [10] that:

> [T]here was no proof that the machines had been damaged by the incident, even less that they were irreparably damaged. The surveyor's report made no mention of any damage. While it stated that the machines would have to be inspected and tested, there was no evidence that this was done.

7 The AR further noted that representatives of Canon and Hitachi were not called to testify as to the state of the machines. This was despite the fact that the plaintiff had expressly listed them as among the witnesses he would call. Before me the plaintiff made no attempt to adduce any further evidence to repair the omissions. Instead, counsel repeated the submission below that "relevant papers relating to the leases of the machinery, their return, their eventual sale as scrap and the final amounts due" constituted evidence that the machines had been irreparably damaged. This was what the AR had to say:

> 11 The only concrete evidence before the court was (i) a letter from Hitachi to the Plaintiff dated 8 Oct 2001 warning the Plaintiff that he owed $39,821.51 to Hitachi, and that Hitachi would take legal action if the Plaintiff did not revert with a payment plan within 4 days; (ii) a letter from Hitachi to the Plaintiff dated 28 Nov 2001 stating that Hitachi had "taken possession" of the goods hired by the Plaintiff, and requiring the Plaintiff to pay all "costs of and incidental to the re-possession"; and (iii) a table dated May 2002 showing the "sale amount" of machinery, which the Plaintiff referred to as proof that Hitachi had had to scrap the machines.

12 The Plaintiff argued that the reference in the 28 Nov 2001 letter to "re-possession" should not be taken literally, and that the letter actually referred to Hitachi taking the machines back upon the Plaintiff's request because they no longer worked. However, there was no evidence whatsoever to support this argument. Neither Ms Neo, who had supposedly liaised with Hitachi, nor a Hitachi representative, testified. I was more inclined to take the contents of the letter at face value and to conclude that the machines were taken back because the Plaintiff had failed to keep up with his instalment payments. Similarly, the Plaintiff argued that the table dated May 2002 showed that Hitachi had scrapped the machines which were rendered useless by the water ingress. Again, there was no representative from Hitachi to explain what the figures in the table actually meant, or to show that the sales figures referred to the scrap value of the machines. Instead, PC tried to turn the tables on the Defendant, arguing in his reply submissions that the Defendant should have written a letter to Hitachi to establish that Hitachi did not repossess the machines. This would all be very well if the Plaintiff had actually established that Hitachi had taken the machines back because they were not in working order, but as I have noted, the Plaintiff was a long way from establishing this to my satisfaction.

I found no reason to disagree with the AR.

Loss of profit

8 With respect to loss of profit, the plaintiff sought an award of $425,000 for five years' loss. The defendant argued that the plaintiff's shop unit was operable by 25 April 2001. Furthermore, any interruption to the plaintiff's business was due in part to the plaintiff's unreasonable behaviour in denying access to the defendant's workers to undertake repairs. Besides that, the plaintiff had produced two sets of conflicting trading and profit and loss accounts for his business in 2000 and 2001. He failed to produce documents to show his outgoings and expenses. His answers to questions in cross-examination caused the AR much unease largely because of his "cavalier attitude".

9 Owing to the conflicting accounts and the lack of documentary evidence as regards the plaintiff's outgoings, the AR was unable to arrive at an estimate of the plaintiff's yearly profits. The plaintiff made no attempt to furnish the missing evidence of outgoings. There was also no evidence to justify a multiplier of five for loss of yearly profits.

10 In the view of the learned AR, an award of two months' loss of profits (which she would have been inclined to give) was on the generous side. Given the lack of evidence as to the profits, she chose to award damages equivalent to two months' rental. I saw no reason to disturb that.

Loss of goodwill

11 With regard to loss of goodwill, the plaintiff made no attempt to justify his claim for $150,000. Besides, the defendant had successfully contended that any long term loss of goodwill was due to the plaintiff's own decision to leave the premises the day after the incident without affording the defendant the opportunity to repair the damage caused.

12 In my view, the fact that the defendant had initially taken the unreasonable stand *vide* its solicitors' letter of 30 April 2001 that the defendant's sole obligation was to carry out repair work does not alter the situation. The plaintiff could have stayed on at the premises and pursued its entitlement to damages (such as there might be).

13 Accordingly, the AR's award of $5,000 for some minimal loss of goodwill occasioned by the soiling of the plaintiff's client's documents and possible delay in processing orders represented a

reasonable estimate in the round.

Damages for distress and disappointment

14 Finally, as regards the plaintiff's claim for damages for mental distress, there was again a paucity of evidence. The plaintiff had only consulted a neurologist five years after the incident. There was no evidence that the plaintiff had sought treatment at any time prior thereto.

15 Apart from referring the plaintiff to a psychiatrist, all that the neurologist could say in his report was that the plaintiff "seemed somewhat depressed but otherwise normal". The psychiatrist made a provisional diagnosis of depression but, as the AR observed, there was no evidence of any follow-up and no report followed.

16 In those circumstances, it would have been impossible to conclude, on a balance of probabilities, that any mental distress (assuming there was) had been caused by the incident five years earlier. The AR's decision not to make any award for mental distress could not be faulted.

17 For all the foregoing reasons, I dismissed the appeal with costs.

18 Finally, in regard to my order as to the costs below, there was a disagreement between the parties as to what the AR intended when she ordered costs to be taxed but failed to specify whom it was in favour of.

19 For the defendant, it was argued that as the AR's award was, to her knowledge, below what the defendant had earlier offered the plaintiff, the learned AR must have intended costs to be for the defendant. This was challenged by the plaintiff. In those circumstances, I decided that I would determine the question afresh. I took account of the fact that the defendant's offer to settle had been made since 11 March 2005, more than two years before the assessment of damages was disposed of by the AR. Although the offer to settle was not in the form prescribed by O 22A r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), I was of the view that I was not precluded from taking it into account. In the result, taking the middle ground, I ordered that there be no order as to costs below.