Singapore Airlines Ltd v Tan Shwu Leng and another appeal
[2001] SGCA 69

Case Number : CA 600016/2001, 600017/2001

Decision Date : 16 October 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Tan Shwu Leng and another appeal; Ashok Kumar (Allen & Gledhill) for the Appellant in CA 600017/2001; Vangadasalam Ramakrishnan (V Ramakrishnan & Co) for the respondent in CA 600016/2001 and CA 600017/2001

Parties : Singapore Airlines Ltd — Tan Shwu Leng

Civil Procedure – Appeals – Appeal from registrar to High Court – Whether such appeal an appeal in the true sense – Applicability of Powell Duffryn principles – O 56 r 1 Rules of Court

Civil Procedure – Appeals – Appeal from registrar to judge-in-chambers – Nature of appeal – Role and approach of judge in hearing appeal – Circumstances warranting court's interference – O 56 r 1 Rules of Court

Civil Procedure – Costs – Order for costs – Discretion of court – Apellants' offer to settle – Respondent's award of damages marginally higher than offer – Object of Rules of Court O 22A – O 22A rr 9(3) & 12 Rules of Court

Damages – Mitigation – Respondent's pre-trial loss of earnings – Burden of proof – Whether burden discharged by appellants

(delivering the grounds of judgment of the court): On 25 November 1994, the plaintiff, Ms Tan Shwu Leng (`Ms Tan`) was serving on board a Singapore Airlines (`SIA`) flight from Singapore to Dhaka as a leading stewardess, when a mid-air incident arose which caused her to suffer a fracture in her left humerus. Due to this fracture she could not be certified fit to carry on her duties as a leading stewardess. She had to be grounded and given other duties.

On 3 November 1997 Ms Tan commenced Civil Suit 1906/97 against SIA claiming damages for negligence, and in the alternative, for breach of statutory duty. Later Airbus Industrie, the manufacturers of the aircraft, were joined as a co-defendant. The defendants admitted liability and, on 19 November 1999, interlocutory judgment was entered against them with damages to be assessed.

An assessment was carried out by the assistant registrar who on 28 September 2000 awarded to Ms Tan the sum of $316,025.81 made up as follows:

(1)	Pain and suffering	$	13,000.00
(2)	Pre-trial loss of earnings	$	77,491.60
(3)	Loss of future earnings	$	225,534.21
Total	$	316,025.81	

On this sum, the usual interest was also awarded in respect of the first two items, making a grand total of $331,855.14.

As this sum awarded was less than an offer of $350,000 which the defendants made on 24 January 2000 to settle Ms Tan`s claim under O 22A of the Rules of Court, the assistant registrar ordered that Ms Tan would only be entitled to costs up to the date of the offer and Ms Tan would have to bear the costs of the defendants on the indemnity basis incurred after the offer was made.

Ms Tan appealed against the decision of the assistant registrar. Woo Bih Li JC heard the appeal and he increased the award for loss of pre-trial earnings by adding two sums, $2,736.31 (being excessive deduction for income tax) and $14,700 (this will be elaborated later), back into the computation and those two sums would bear interest at 3%p[thinsp]a from the date of the accident to the date of the assessment of damages as the assistant registrar had ordered in respect of pre-trial loss of earnings. In the light of these variations made by the judge, the total award granted to Ms Tan, including interest, amounted to $352,279.33.

The offer made by the defendants was $350,000. Taking into account the interest which this sum would have earned from the date of the offer up to the date of the assessment by the assistant registrar, it would become $351,809.82. As this sum was still less than the total sum of $352,279.33 awarded, Woo JC also altered the decision below on costs. The defendants were ordered to pay Ms Tan`s costs up to the date of the offer. As for the costs incurred after the offer, Woo JC fixed them at $1,000 payable by the defendants to Ms Tan. As for the costs of the appeal before the High Court, Woo JC also fixed it at $5,000, payable by the defendants to Ms Tan.

Both Ms Tan and the defendants appealed against the decision of the High Court. Ms Tan`s appeal was in respect of the pre-trial earnings and the loss of future earnings as well as the costs, from the date of the offer to the date of the assessment before the assistant registtrar, which was fixed at $1,000. The defendants` appeal was in respect of the judge`s decision to enhance the loss of pre-trial earnings by the sum $14,700 and his decision on costs.

At the conclusion of hearing the parties, we dismissed both the appeals. These grounds are issued in respect of two issues, namely: (1) the defendants` appeal against the High Court`s decision to enhance the loss of pre-trial earnings by $14,700; and (2) the question of costs generally, as both these issues raised some points of law.

The increase by $14,700

The putting back of $2,736.31, being the excessive deduction for income tax, was not challenged by the defendants before us. The challenge was only in respect of the judge putting back the sum of $14,700 which the assistant registrar deducted from what was assessed to be Ms Tan`s loss of pre-trial earnings on account of Ms Tan`s failure to mitigate her loss from January 1999 to the date of assessment. The assistant registrar was of the view that once the plaintiff learned that SIA would not put her back on flying duties then she should have, after the Asian economic crisis had subsided in late 1998 and early 1999, looked for an alternative non-cabin crew job.

However, Woo JC disagreed with that decision and held that the plaintiff had not acted unreasonably in failing to seek alternative employment in a different industry when she was still employed by SIA and earning a decent salary. Furthermore, there was insufficient evidence to show that the plaintiff would have been likely to obtain alternative employment at a higher salary. The determination of the figure of $700 per month was arrived at without any basis. He therefore restored the sum of $14,700 back to the plaintiff.

The appeal

On this appeal before us, the question that arose for consideration in regard to the sum of $14,700 was in relation to the principles applicable to the hearing of an appeal from an assessment made by the assistant registrar to the High Court. This was raised by the first defendant, SIA. Was the hearing before the High Court a hearing de novo? Was the High Court entitled to vary the quantum awarded as it pleased or was it governed by the same principles applicable to an appeal against an award made by the High Court to the Court of Appeal, namely, that the appellate court could only vary the quantum of damages awarded if it were shown that (1) the court below acted on wrong principles, or (2) misapprehended the facts, or (3) had for these or other reasons made a wholly erroneous estimate of the damages: see **Davies v Powell Duffryn Associated Collieries** [1942] AC 601 per Lord Wright.

The position taken by the first defendant was that the principles applicable to an appeal from the High Court to the Court of Appeal are similarly applicable to an appeal from the Registrar to the High Court. The appellate court, having not seen and heard the witnesses, should be slow to interfere and must be satisfied that the court below was clearly wrong before it should substitute its own decision for that of the court below.

There is no doubt that the principles in ***Davies v Powell Duffryn*** (supra) have been accepted and applied by this court in relation to appeals on damages from the High Court to the Court of Appeal, eg **Chow Khai Hong v Tham Sek Khow** [1992] 1 SLR 4 , **Lim Hwee Meng v Citadel Investment** [1998] 3 SLR 601 and **Peh Eng Leng v Pek Eng Leong** [1996] 2 SLR 305 at 310.

What the defendants, however, sought to argue was that the ***Powell Duffryn*** principles should also be applicable to an appeal on assessment from the Registrar to the High Court. But in this connection there were two authorities of this court which they had to overcome. The first was **Chang Ah Lek v Lim Ah Koon** [1999] 1 SLR 82 , and the second **Ho Yeow Kim v Lai Hai Kuen** [1999] 2 SLR 246 .

Mr Lawrence Teh Kee Wee, counsel for the first defendants, went into a detailed analysis of ***Chang Ah Lek*** (supra). He had to do it as this case stared right at him. This was a case where the plaintiff was injured in a motor accident. Liability was determined by the trial judge with assessment of damages being carried out by the assistant registrar who awarded the plaintiff, inter alia, $30,000 for general damages. On appeal, the High Court judge increased the amount to $35,000. On the defendants` further appeal to the Court of Appeal, one of the issues raised was that in enhancing the award for general damages by $5,000, the judge had overlooked the principles in ***Powell Duffryn*** .

It is true, as contended by Mr Teh that this court in ***Chang Ah Lek*** (supra) did, in fact, find that the assistant registrar had misapprehended the facts and the law and had come to a wholly erroneous estimate of the damages suffered, applying the ***Powell Duffryn*** principles. But the parties there did argue that the High Court, on hearing such an appeal, was to apply the same principles and, it was in response to this argument, that the court there proceeded to examine the question and offered its opinion.

The court first referred to s 62(1) of the Supreme Court of Judicature Act (Cap 322) which provided that the Registrar shall have the same powers and jurisdiction as the masters in England. Next, it referred to O 58 r 1 of the English Rules of the Supreme Court 1965 (like our O 56 r 1 of the Rules of Court) which provided that an appeal from the master laid to a judge-in-chambers. It next cited para 58/1/2 of the ***Supreme Court Practice 1997*** which stated that an appeal from the master to the judge-in-chambers was dealt with by way of an actual rehearing of the application and the judge treated the matter as though it came before him for the first time; while the judge would give the weight the previous decision of the master deserved, he was in no way fettered by the previous

exercise of discretion by the master. On appeal from the judge-in-chambers, the Court of Appeal would treat the substantial discretion as that of the judge, not of the master.

The court then examined the decision of the House of Lords in **Evans v Bartlam** [1937] AC 473 where the House had to consider the question whether a master`s exercise of discretion in refusing to set aside a judgment in default of appearance and giving leave to defend could be supplanted by the discretion of the judge-in-chambers to whom an appeal from the master lay. The judge-in-chambers set aside the judgment and gave the defendant leave to defend on terms. The Court of Appeal, by a majority, held that the judge could not substitute his discretion in place of the master. The House reversed the Court of Appeal when it held that the judge was entitled to do so. The following passage of Lord Wright (at p 484), which was also quoted by this court with approval, was pertinent:

> *The master had, in the exercise of his discretion under Order XXVII r 15, or Order XIII r 10, refused to set aside the judgment. But it is clear that where the Court of Appeal is required to review a discretionary order of a judge reversing the master the substantial discretion is that of the judge, and it is the judge`s order which must particularly be considered by the appellate court: **Cooper v Cooper** [1936] WN 205. The masters admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is properly for the judge who will no doubt consider carefully the order of the master. If a further appeal is taken to the Court of Appeal it is the judge`s discretion which that court has either to support or vary or reverse.*

The court then concluded:

> *19 The same in our view applies to the assessment of damages. As Lord Wright said in his speech in **Davies v Powell Duffryn Associated Collieries Ltd** which we have quoted in [para]8 above, `the assessment of damages is more like an exercise of discretion than an ordinary act of decision`. It is for this reason that an appellate court is particularly slow to reverse the trial judge on a question of the assessment of damages.*
>
> *20 But registrars are not trial judges as we have seen from the observations of Lord Atkin and Lord Wright in **Evans v Bartlam** nor do we think is an appeal from the registrar to a judge-in-chambers an appeal in the true sense as an appeal from the judge-in-chambers or a judge sitting in open court to the Court of Appeal is. As Lord Atkin said in **Evans v Bartlam** the judge-in-chambers deals with an appeal from the registrar `as though the matter came before him for the first time`.*

We should point out that in ***Davies v Powell Duffryn*** (supra), Lord Wright`s pronouncement was that `an appellate court is always reluctant to interfere with a finding ***of the trial judge*** on any question of fact, but it is particularly reluctant to interfere with a finding on damages`.

Essentially, two points were made by Mr Teh on ***Chang Ah Lek*** (supra). The first was that the views

of the court in ***Chang Ah Lek*** were obiter. We did not agree with that. It was clear that what the court did was also to hold the High Court judge was entitled to enhance the award from $30,000 to $35,000, for the reason that the ***Powell Duffryn*** principles did not apply to an appeal to the High Court against the assessment of an assistant registrar. In any case, even if the views of the court on the point were obiter and not ratio decidendi, they must be given the highest consideration.

The second point was that the court in ***Chang Ah Lek*** failed to appreciate that our O 56 r 1 was not entirely in pari materia with the English O 58 r 1 because r 1 expressly stated it was subject to r 2 and r 2 provided that as far as assessment of damages was concerned, an appeal lay direct from the master to the Court of Appeal, by-passing the High Court. So in England an appeal against an assessment of damages made by the master was to be heard by the Court of Appeal and not by a High Court judge. The Court of Appeal in England, when hearing such an appeal on assessment, would apply the ***Powell Duffryn*** principles. Therefore, on an appeal against the Registrar/assistant registrar`s decision on assessment, the judge-in-chambers should also have applied the same principles.

Ordinarily, in England, on a matter of discretion when an appeal lay to the High Court, the latter was entitled to examine and decide the case without being affected by the decision of the master, but of course, the judge would no doubt give due weight to the decision of the master. Order 58 r 2 of the English Rules of the Supreme Court provided for an exception in respect of an appeal from a master`s decision on assessment of damages which would go direct to the Court of Appeal. Our Rules did not provide for such an exception and therefore all appeals from the Registrar would first go to the judge-in-chambers and there was no reason why the ordinary manner in which the judge would carry out his function in this regard should be any different just because the appeal was on a question of quantum of damages. Therefore, in considering the English practice, we must bear in mind their special rule, which was not present in our Rules of Court.

The principles which were enunciated in ***Chang Ah Lek*** were reviewed and affirmed by this court in the subsequent case of **Ho Yeow Kim v Lai Hai Kuen** [1999] 2 SLR 246 .

In the result, we held that Woo JC was entitled to enhance the quantum of loss of pre-trial earnings by $14,700.

Application of Powell Duffryn principles

Furthermore, we would add that, even if we were to apply the ***Powell Duffryn*** principles to this case, the circumstances here warranted the interference, as we were satisfied that the assistant registrar had erred on a matter of law and had also failed to appreciate the facts. It is necessary that we now set out how the assistant registrar viewed the question and why she thought the deduction for failure to mitigate was justified:

> *I was of the view that the plaintiff did not act unreasonably in not seeking alternative employment immediately after the first defendants informed her in February 1997 that she was unfit to work on board flights, given the uncertain economic climate then and the financial crisis which was soon to hit the Southeast Asian region. Even after economic conditions improved in late 1998/early 1999, the plaintiff could not be faulted for failing to seek employment with other airlines as the residual weakness in her left hand made it highly unlikely that she would be able to secure any other cabin crew position. The plaintiff should, however, have tried to look for an alternative* ***non-cabin crew*** *job from that time onwards. Given the plaintiff`s good service record with the first defendants, attractive personality, and commendable grades in the*

> *Malaysian equivalent of the GCE `O` and `A` levels, I was of the view that she could have obtained non-cabin crew employment, for instance as a secretary, which would have ameliorated the loss in allowances which she suffered after she was taken off cabin crew duties. To reflect this failure to mitigate her loss, a deduction of $700 per month for the period from January 1999 onwards - ie a total of $14,700 ($700 x 21 months) - ought to be made from the lost earnings to be awarded to the plaintiff. [Emphasis is added.]*

What we could not understand was, why should Ms Tan be required to look for an alternative non-cabin crew job when she was already in a non-cabin crew job with SIA as a grounded leading stewardess. If an employer of the size of SIA, and who no doubt had a wide range of jobs available, and who also were in possession of her qualifications and work experience, could not offer her any other job, we did not think it reasonable to infer that another company or individual would have offered her a job which was better than what she was given by SIA and would even pay her as much as $700 more per month. There was simply no evidence of that. The suggestion made was that she could be a secretary. Then why did SIA not engage her as a secretary and instead only offered her a position as a grounded hostess? After all, SIA knew her better. Her previous job was with Public Bank Malaysia, as a clerk. There was no evidence that a clerk would be paid more than what SIA was paying her as a grounded leading hostess.

It was thus understandable that Ms Tan did not make any effort to look for alternative employment. It was not as if she was out of employment. If she were, then she would have failed in her duty to obtain a suitable job to mitigate her loss. Here, her own employer, who was liable for her injury, had offered her alternative employment. It must be assumed that that was the best SIA could offer her.

Counsel for SIA, while conceding it was difficult to assess the quantum of damages which could have been reduced if Ms Tan had not failed to mitigate, argued that in a situation such as this, the court should apply the principle in **Chaplin v Hicks** [1911] 2 KB 786. This was what Assistant Registrar Tan did in arriving at the figure of $700 per month. But, in our opinion, the situations were hardly similar. ***Chaplin v Hicks*** was a case concerning breach of contract where a candidate in a beauty competition, who had successfully passed the earlier stages of the competition, was, in breach of contract, not allowed by the organisers to compete in the later stages. Notwithstanding that it was difficult to assess damages, substantial damages were awarded to the candidate for the loss of the chance of being successful.

But the position here was quite different. It is settled law that the onus of proof on the issue of failure to mitigate is on the defendant: see the decision of this Court in **Teo Sing Keng v Sim Ban Kiat** [1994] 1 SLR 634 and **McGregor on Damages** [1997] at p 190. Evidence should have been led by the defendants on alternative employment the plaintiff could apply for and which could have paid her more. There was simply no evidence on these. This was not a question of assessment. It was a question of discharging the burden of substantiating the allegation of failure to mitigate and the defendants had failed to discharge that burden.

Costs

We now turn to the question of costs. In the light of the decision of Woo JC, and as the amount of the offer made by the defendants was less than the total amount awarded on appeal by the High Court, there could be no question of O 22A r 9(3) coming into play as that rule applied only when the judgment obtained by the plaintiff was not more favourable than the terms of the offer. Here, the

judgment obtained by Ms Tan was more favourable, though only slightly. Therefore, we would agree with the judge below that once it was shown that the offer was less than the judgment sum no matter how slightly, O 22A r 9(3) did not apply. Otherwise, there would be great difficulties in drawing any line: what was slight and what was not so slight?

Mr Teh had sought to rely upon **Roache v News Group Newspapers** (Unreported) , where the plaintiff, in a libel action, was awarded the same sum as damages as that which was paid into court by the defendants. The plaintiff also obtained an injunction against re-publication. The English Court of Appeal held that, in the circumstances, it was the defendants who were, in substance, the successful party. Sir Thomas Bingam MR put the position as follows:

> *The defendants did not wish to fight this action. If they had wished to do so they would not have paid o50,000 into court. Plainly they wished to settle if they could do so at an acceptable cost. Given that wish, it is in my view incredible that they would have allowed a settlement to founder for want of an undertaking by them not to republish. No reason has been suggested why they should have acted in such an uncommercial way, I do not accept the judge`s view that "the plaintiff had to pursue the matter to judgment in order to obtain an injunction". The overwhelming probability is, in my view, that if he had chosen to accept the money in court he could have had an undertaking, equivalent in effect to an injunction, for the asking. That he chose to go ahead can only, in my view, have been because he wanted to win a large sum from the jury than the defendants had offered. There can in my view be no doubt that the defendants emerged from this trial as the substantial winners: they had held the award to a sum no greater than was already on offer. The injunction was a matter of no significance to them because they did not intend to republish anyway.*

We do not disagree with that reasoning. But it would be seen that the situation in ***Roache*** is quite different from that in the present case. There, the plaintiff got the same sum as that paid into court by the defendants. The fact that the plaintiff was also granted an injunction was not treated as a matter of any great moment, as it was not really a point of contention.

We would, of course, hasten to add that this is not the end of the matter. There is still O 22A r 12 to consider.

It would be noted that Woo JC granted Ms Tan only $1,000 as costs, for work done after the offer, including the assessment before the assistant registrar. It seemed to us clear that the judge had only granted her nominal costs. In Ms Tan`s appeal she had contended that as the judgment she obtained was more favourable than the offer, which rendered inapplicable O 22A r 9(3), she should be entitled to the full costs of the assessment on the standard basis, instead of only a sum of $1,000.

At this juncture we would set out O 22A r 12:

> *Without prejudice to Rules 9 and 10, the Court, in exercising its discretion with respect to costs, may take into account any offer to settle, the date the offer was made, the terms of the offer and the extent to which the plaintiff`s judgment is more favourable than the terms of the offer to settle.*

It will be seen that r 12 tempers the rigours of r 9 and gives the court a wide discretion to do justice as between the parties even in a case where the offer is less than the sum awarded in the judgment.

Here, the judge, in deciding to grant Ms Tan only $1,000 costs, took into account all the circumstances, including the fact that the difference between the offer and the judgment was marginal, that she had some six months to consider the offer, and that her claim of $1.1m was manifestly excessive, about $750,000 more than what she was awarded by the court.

In our opinion, the judge was entitled to take all the circumstances into consideration in awarding the plaintiff only nominal costs in respect of costs incurred after the offer was made. It must be emphasised that the whole object of O 22A is to spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time. In the words of Morden ACJO in the Ontario Court of Appeal case, **Data General (Canada) v Molnar Systems Group** [1991] 85 DLR (4th) 392 at 398:

> *The purpose of r 49 [in pari materia with our O 22A] is to encourage the termination of litigation by agreement of the parties - more speedily and less expensively than by judgment of the court at the end of the trial.*

The scheme of things under O 22A is verily to encourage the plaintiffs to be realistic in their assessment of what they are entitled to and on the part of the defendants, to make reasonable offers, on pain of having to bear the costs on the indemnity basis if they should persist in their exaggerated claims or maintain their unreasonable position (in respect of an offer from the plaintiff). The order seeks to promote responsible conduct on the part of both parties. It discourages obstinacy. The wide discretion given to the court in r 12 is to enable the court to take all pertinent facts and circumstances into account and arrive at an order on costs which is fair and just. In the present case, the excessively high claim of Ms Tan had no doubt caused the assessment proceedings to run into some 4[half] days. The judge below had taken all the pertinent factors into consideration. It was not shown that he had erred on any matter of principle. Thus, we could see no reason to interfere in the exercise of his discretion.

Outcome:

Appeals dismissed.