

Progress Software Corp (S) Pte Ltd v Central Provident Fund Board
[2003] SGCA 6

Case Number : CA 104/2002

Decision Date : 28 February 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Sarjit Singh Gill SC, Dylan Lee (Shook Lin & Bok) for the Appellants; Edmond Pereira, L R Penna (Edmond Pereira & Partners) for the Respondents

Parties : Progress Software Corp (S) Pte Ltd — Central Provident Fund Board

Civil Procedure – Costs – Principles – Whether successful party should be deprived of part of costs – Successful party had not acted improperly or unreasonably

Statutory Interpretation – Construction of statute – Aids to construction – Meaning of 'payable' can be determined from language of statute – Whether necessary to refer to case law – Central Provident Fund Act (Cap 36, 2001 Rev Ed) ss 2, 7, 58, First Schedule para 5

Statutory Interpretation – Definitions – Meaning of 'payable' – Whether 'payable' can be defined as actual payment – Central Provident Fund Act (Cap 36, 2001 Rev Ed)

Words and Phrases – 'Payable' – Central Provident Fund Act (Cap 36, 2001 Rev Ed)

Delivered by Yong Pung How CJ

Facts

1 The appellants were a private company incorporated in Singapore. They were a subsidiary of Progress Software Corporation, a NASDAQ listed company based in Massachusetts, United States of America. The respondents were the Central Provident Fund Board, a statutory board established under the Central Provident Fund Act (Cap 36) ("the CPF Act").

2 The appellants were required by s 7(1) of the CPF Act to make contributions into the CPF Fund for their employees. The rates for contributions were set out in the First Schedule of the CPF Act. The amount payable by each employer depended on whether the contribution was for "ordinary" or "additional" wages. The definition of "ordinary" and "additional" wages was found in s 5 of the First Schedule:

5. For the purpose of this Schedule —

(a) ...

(d) "additional wages" means any remuneration other than ordinary wages;

(e) "ordinary wages for the month" means the amount of remuneration due or granted wholly or exclusively in respect of employment during that month and payable before the due date for the payment of contribution for that month;

The important difference between these two types of wages was that an employer's CPF contribution on "ordinary" wages was capped and subject to a maximum limit (currently set at \$6,000), whereas there was no such limit for contributions on "additional" wages. The practical effect of this regime was that an employer would generally pay lower contributions into the fund if its employee's wages were classified as "ordinary" wages.

3 Under s 2 of the Central Provident Fund Regulations (Cap 36, Regulation 15), all contributions to the fund which are payable by an employer must be paid not later than 14 days after the end of the month in respect of which the contributions are payable.

4 The present appeal concerned the contributions payable for four of the appellants' former employees. These employees received a two-part remuneration package which comprised both a fixed and a variable component. The fixed component was paid as a monthly salary. No dispute arose in relation to the fixed component. The dispute in the present appeal arose in relation to the former employees' variable commission component ("VCC"), which was calculated on a monthly basis but was usually paid at irregular intervals. Under the terms of the remuneration package, the appellants had the sole discretion to defer the payment of an employee's VCC.

5 In 1996, the appellants wrote to the respondents to clarify whether the VCC should be classified as "ordinary" or "additional" wages. The respondents replied that the VCC should be classified as "ordinary wages". The appellants have accordingly been paying CPF contributions for the VCC as if it was "ordinary wages".

6 In 2000, the respondents called for the appellants' records as part of its practice of conducting periodic checks. During this check, the appellants' financial manager was summoned to produce various documents and to answer queries. Further correspondence took place between both parties, in which the appellants were asked to give additional details on the nature of the VCC. At the end of 2000, the respondents reconfirmed that the VCC should be considered "ordinary wages".

7 In 2001, the respondents wrote to the appellants informing them that the VCC had been re-assessed as "additional wages". It accordingly demanded additional payment from the appellants for their outstanding contributions and penalty interest for late payment. The appellants paid the amount demanded, but under protest.

8 Fearing that the respondents would reject their payment which was made under protest, and instead commence criminal prosecution, the appellants applied to the Court by way of Originating Summons to seek a determination as to whether the VCC should be considered "ordinary" or "additional" wages. The appellants also sought a declaration that the sums paid under protest should be refunded.

9 The respondents applied to strike out the Originating Summons on the grounds that the matter should have been commenced by judicial review. The striking out application was dismissed by the Deputy Registrar. The respondents appealed unsuccessfully against the Deputy Registrar's decision. Both parties then appeared before the trial judge in the court below.

The decision below

10 The trial judge found in favour of the appellants on the procedural issue, and held that the appellants were entitled to proceed by means of an Originating Summons in seeking a determination as to whether the VCC should be classified as "ordinary" wages. The appellants did not appeal against

the trial judge's decision on this procedural issue.

11 The substance of the present appeal stemmed from the fact that the trial judge found in favour of the respondents on the substantive issue. The trial judge stated in his grounds of decision that he was inclined towards the respondents' interpretation of "payable", which was that the VCC could not be classified as "ordinary wages" because it was not payable before the due date for the payment of contributions for each month. The trial judge thus held that the term "payable" in the CPF Act must signify that any payment that is due *will* be paid within that period. The trial judge also held that "ordinary" wages cannot include deferred payments.

12 The trial judge thus dismissed the appellants' application with costs to be taxed if not agreed.

The appeal

13 Several issues were raised before us. After hearing counsel for both parties, we dismissed the appeal, and awarded costs on the substantive issue to the respondents. We now give our reasons.

"Payable" is distinct from actual payment

14 The appellants argued that the trial judge erred in his interpretation of "payable" under the CPF Act. They argued that "payable" cannot be defined as actual payment. Rather, "payable" should be defined as a legal obligation to pay. The appellants went on to argue that the VCC should accordingly be classified as "ordinary wages" because the facts showed that they were obliged to pay the VCC on a monthly basis. The appellants relied on the following English cases in support of their proposition.

15 *Secretary of State for Employment v Crane* [1988] IRLR 238 was a case in which a company could not afford to pay its employee's salary. In deciding whether the salary still remained "payable" under the contract, the Employment Appeal Tribunal stated:

The phrase 'in which no remuneration was payable by the employer' seems to us a perfectly simple phrase. *Was the remuneration legally required to be paid by the employer to the employee during any particular week?* (emphasis added)

16 *Morton v The Chief Adjudication Officer* [1988] IRLR 444 was a case in which an employee was awarded compensation for wrongful dismissal. However, the employers in question were in liquidation. The employee argued that the compensation awarded could not be considered "payable" as there was little chance that it would actually be paid. She thus claimed to be statutorily entitled to unemployment benefits. The Court of Appeal disagreed, and held that "it is perfectly clear that a sum may properly be regarded as 'payable' ... even though it has not yet been paid."

17 It seemed clear to us that the English position on the interpretation of "payable" is that the term cannot be equated with actual payment. According to the English cases, a sum in fact remains "payable" even where its actual payment is or has become impossible.

18 With respect to the trial judge, we found it contrary to the plain and ordinary meaning of "payable" to define it as actual payment. It appeared circular to us to say that a sum must first be paid before it can be "payable". That is tantamount to suggesting that, simply because something is not broken, it is not breakable. As such, we did not agree with the trial judge's decision that "payable" under the

CPF Act must be equated with actual payment.

19 We are reinforced in this view by the fact that the CPF Act itself does not appear to equate "payable" with actual payment. In the numerous instances where the CPF Act refers to the actual payment of a sum of money, it specifically uses the terms "pay" or "paid". For example, s 58(e) of the CPF Act states that any person who "fails to pay to the Board ... any amount which he is liable to pay" is guilty of an offence.

20 In reply, the respondents referred us to Regulation 2 of the Central Provident Fund Regulations in support of their contention that "payable" under the CPF Act can be equated with actual payment. The regulation states:

All contributions to the Fund payable by an employer ... shall be paid to the Board not later than 14 days after the end of the month in respect of which the contributions are payable.

We did not see any merit in this argument. Regulation 2 does not seek to define what is or is not "payable" – it merely prescribes the due date for the payment of contributions.

21 The respondents also argued that the CPF Fund will wither unless "payable" is defined as actual payment before a specific date. The respondents claimed that any other interpretation would allow employers to defer *sine die* the payment of their outstanding contributions. We similarly did not see any merit in this argument. It failed to account for the provisions found in Part VII of the CPF Act, which set out the various penalties for any non-payment of contributions. It is these punitive provisions which prevent the non-payment of CPF contributions, and not the definition of the term "payable".

The correct interpretation of "payable"

22 There was no need to refer to the English cases cited by the appellants in order to determine the meaning of "payable" under the CPF Act. The cases cited were instructive in that they showed that courts in other jurisdictions have been unwilling to define "payable" as actual payment. However, the High Court has stated in *Central Christian Church v Chen Cheng* [1995] 1 SLR 115 that English case law is of little assistance in the construction of a local statute. This is particularly so when dealing with provisions of the CPF Act, which is unique to Singapore.

23 We noted that the CPF Act does not define "payable" in s 2, which is the provision governing the interpretation of the statute. However, the CPF Act consistently uses the term to describe situations where a given party is liable to pay a sum of money. This is best demonstrated by s 8, which reads:

Any agreement made between any statutory body specified in the First Schedule and any of its employees under which that body is *liable to pay* any contribution to the Fund in respect of that employee in excess of the amount prescribed as *payable* for that employee shall, in so far as it relates to such liability, be void and of no effect. (emphasis added)

It was our opinion that the legislature has essentially provided a definition for the term "payable":

where a party is liable to pay a sum of money, that sum is described as "payable". Adopting this definition would be in line with the principle of purposive interpretation, as incorporated by s 9A(1) of the Interpretation Act (Cap 1) and upheld in *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201.

24 The appellants proposed that "payable" should mean "a legal obligation to pay", based on the cases cited before us. The respondents' alternative definition was "a legal or contractual duty to pay". We agreed that these definitions were perfectly adequate. However, if the definition of a statutory term can be determined from the language of the statute itself, it becomes unnecessary and undesirable for the case law to append its own definition. As stated in *Driedger on Construction of Statutes* (2nd ed) at page 87:

Today there is only one principle or approach, namely, *the words of an Act are to be read in their entire context* and in their grammatical and ordinary sense *harmoniously with the scheme of the Act*, the object of the Act, and the intention of Parliament. (emphasis added)

Furthermore, s 9A(2) of the Interpretation Act (Cap 1) states that external aids to interpretation should be used only where the statutory provision is ambiguous, obscure or leads to absurdity. None of these conditions were present here, given that the CPF Act has effectively provided a definition for the term "payable". We would therefore reiterate what the High Court emphasised in *Fay v PP* [1994] 2 SLR 154: "Express enactment shuts the door to further implication".

25 In any case, the respondents appeared willing to abandon their definition of "payable" as actual payment. It was significant that the respondents' alternative argument was that "payable" might also mean "legally recoverable", in the sense that it connotes a legal or contractual duty to pay at the latest by the 14th of the ensuing month.

26 Accordingly, we found that "payable" cannot be defined as "paid", and cannot be equated to actual payment. As such, the VCC should not be considered as "additional wages" merely because actual payment was not made before the 14th of each month.

Whether the VCC can be considered as "ordinary" wages on the facts

27 For the reasons above, we agreed with the appellants that "payable" under the CPF Act cannot be equated to actual payment. However, we found that the VCC still could not be classified as "ordinary" wages. It must be borne in mind that "ordinary" wages must be payable before the due date for payment of contribution for each month. After assessing the facts, we found that the appellants had failed to show that the VCC was payable on a monthly basis. They had also failed to show that they were under any obligation to pay the VCC before the 14th of each month. These failures were fatal to the present appeal.

The fact that the VCC is computed monthly does not make it payable monthly

28 The terms of the compensation plans clearly showed that the VCC was computed on a monthly basis. This fact was not in dispute. The appellants relied on this fact to argue that the VCC was intended to be paid on the same monthly basis. We found this to be an unjustifiable leap of logic. The fact that the VCC was calculated every month did not translate into an obligation to pay the sum upon calculation.

The terms of the compensation plans do not provide for the VCC to be payable monthly

29 The appellants argued that the former employees' compensation plans provided for the VCC to be payable on a monthly basis. This was simply not true. We found that the evidence used to support this assertion did not survive close scrutiny.

30 The former employees' compensation plans were all structured similarly, and generally did not provide for the VCC to be paid on a monthly basis. However, the appellants chose to refer to the compensation plan of one Wong Jak, which they claimed to be representative of all the other employees' plans. In particular, the appellants referred us to a clause in Wong Jak's 1994 compensation plan which expressly stated that "commissions on billings are paid monthly".

31 We were unable to accept the appellants' contention on this point. The clause referred to us was not found in any of the other employees' compensation plans. Moreover, that same clause was conspicuously omitted from subsequent versions of Wong Jak's own compensation plan. It was not reasonable for the appellants to use this clause as evidence that all the employees' compensation plans generally provide for monthly payment of the VCC. This clause was unique to one employee, and it did not even survive the annual revision of that employee's own compensation plan.

32 We accordingly found that the former employees' compensation plans did not provide for the VCC to be payable on a monthly basis. As such, the VCC could not be considered "ordinary" wages under the CPF Act.

The VCC is not payable before the 14th of each month

33 The First Schedule to the CPF Act expressly requires that the VCC must be "payable before the due date for the payment of contribution for the month" before it is considered "ordinary wages". As noted above, the Central Provident Fund Regulations prescribe the due date for contribution as the 14th of each subsequent month.

34 The appellants simply glossed over this issue. They did not provide any evidence to show that the VCC was payable before the 14th of each month. In fact, we found that there was nothing in any of the former employees' compensation plans which obliged the appellants to make payment of the VCC before the 14th of each month. The VCC thus could not be classified as "ordinary" wages, because it failed to satisfy this express statutory requirement.

The former employees do not admit that the VCC was payable monthly

35 The appellants claimed that the former employees admitted that the VCC was payable on a monthly basis. We found this assertion to be patently untrue. With the exception of one Toh Kok Leong, the former employees consistently stated in their affidavits that the VCC was never intended to be payable on a monthly basis. Their affidavits go on to state that if there was any such intention on the appellants' part, it was never communicated to the staff.

36 Toh Kok Leong was the only former employee whose affidavit stated that the appellants intended to pay the VCC on a monthly basis. However, the affidavit also stated that this intention was never communicated to the staff and was never carried out in practice.

37 Under these circumstances, we did not accept the appellants' contention that the former employees had admitted that the VCC was intended to be payable on a monthly basis.

Actual payment of the VCC took place at irregular intervals

38 The facts showed that the appellants persistently made payment of the VCC at irregular intervals of more than one month. The irregularity of payments was striking, with the VCC being left unpaid for up to eight months at any given time.

39 We found that the irregular payment of the VCC strongly indicated that it was not payable on a monthly basis. The appellants sought to explain the irregular payments as being caused by "administrative difficulties". We were unable to accept this explanation. The pattern of irregular payment was one which spanned several years. Unless one was willing to believe that the appellants brazenly ignored their obligation to pay their own employees' wages, the logical conclusion was that irregular payment was made possible only because the VCC was *not* payable on a monthly basis. In fact, we found that the appellants did not have any system in place to ensure the timely payment of their employees' VCC each month. This in turn strongly suggested that they were never under an obligation to make monthly payment of the VCC in the first place.

40 Such irregular payment of the VCC indicated that it must be classified as "additional wages". The definition of "additional wages" in the CCH/SNEF Singapore Employer's Handbook was adopted by the court in *Trevor Griffiths v Oceanroutes (SEA) Pte Ltd* (unreported) (Suit No 952 of 1995). In that handbook, "additional wages" is understood to include "annual bonus, incentive payments and *other payments made at intervals of more than one month*". (emphasis added)

41 In light of the above, we found that the facts did not support the appellants' contention that the VCC was payable on a monthly basis before the 14th of each month. The VCC thus could not be classified as "ordinary" wages.

The respondents' previous classification of the VCC as "ordinary wages"

42 The appellants argued that they should not have to pay the outstanding contributions because it was the respondents who had consistently classified the VCC as "ordinary wages" in the past. The appellants also suggested that the respondents were guilty of a sudden change in position in 2001 and had arbitrarily re-classified the VCC as "additional wages".

43 We found these assertions misleading. The appellants conveniently omitted the fact that the respondents' previous classification was based on descriptions of the VCC provided by the appellants. The respondents claimed that the appellants had led them to believe that the VCC was payable monthly, which was why they had classified it as "ordinary" wages. A perusal of the correspondence between the parties supported the respondents' contention. The first letter written by the appellants to the respondents on this issue was on 18 June 1996, and the VCC was specifically described in that letter as being "payable on a monthly basis".

44 On 13 October 2000, the appellants again wrote to the respondents to give more details on how the VCC was paid. In that letter, the appellants stated that "commission is usually paid out the following month". It was significant that the letter of 13 October 2000 included the following paragraph:

We understand that additional salary in the form of a commission based on an employee's sales performance, *which is paid on a monthly basis in arrears*, is considered "ordinary wages" ...

Please confirm our understanding that the commission would be regarded as ordinary wages. (emphasis added)

The language used was clearly designed to create the impression that the VCC was payable on a monthly basis. It was thus unsurprising that the respondents duly agreed that the VCC should be considered "ordinary wages". It was equally unsurprising that the respondents re-classified the VCC as "additional wages" after a detailed examination of the actual compensation plans, which did not in fact provide for the VCC to be payable on a monthly basis.

45 We thus found no merit in the appellants' complaint that the respondents had previously classified the VCC as "ordinary wages". That classification was the result of inadequate information, the blame for which lay squarely on the appellants' own shoulders.

Whether "ordinary wages" may include deferred payments

46 The appellants also appealed against the trial judge's finding that a sum that was payable monthly could not include deferred payments. The trial judge held that the VCC could not be "ordinary wages" because the employees' compensation plans included a clause which allowed that:

The commission payment may be deferred at [Progress Software's] sole discretion until receipt of payment and expiration of any conditions which may require reversal of revenue recognition.

The appellants strongly disputed the trial judge's decision on this issue. They argued that the right to defer payment of the VCC did not affect whether or not it was payable. Unless the deferment clause was actually exercised, the appellants stressed that they remained obliged to pay the VCC. The appellants also stressed that they had never actually exercised the deferment clause.

47 We turned first to the issue of "reversal of revenue recognition". This referred to a situation where an employee's VCC may be reduced if he has an invoice which remains unpaid after 90 days. At first glance, this affected only the quantum of the VCC, and not whether it was payable. However, the fact remained that the appellants could claw back from their employees sums which were previously paid as part of the VCC. This must be taken into account when determining whether the entire deferment clause had the effect of taking the VCC outside the definition of "ordinary" wages.

48 Having considered the deferment clause as a whole, we were of the opinion that the appellants' contractual right to defer payment of the VCC must affect whether or not it is payable. The deferment clause here was drafted in such a manner as to give the appellants an extremely wide and discretionary right to withhold payment of their employees' VCC. The right of deferment was so widely drafted that it in fact left the employee without an enforceable right to receive the VCC. We thus agreed with the trial judge that the appellants' right to defer payment in the present case was another element which took the VCC outside the definition of "ordinary wages".

49 Furthermore, the appellants' reliance on the English case of *Kent Management Services Ltd v Butterfield* [1992] ICR 272 was misconceived. Counsel for the appellants described the case as being "almost on all fours with the present case". That was true only in that both cases revolved around whether a commission was payable even though the employer had the right to refuse its payment. However, the deferment clause in question in *Kent Management* was significantly different. It stated:

There are circumstances, *however unlikely*, when payment may be either not justified or not possible. *An extreme example would be bankruptcy!!* (emphasis added)

It was clear that the clause in *Kent Management* bore no resemblance to the one in the present case, and was of little value as precedent case authority here.

The issue of costs

50 Three issues were raised in the court below. Two were preliminary issues of procedure. These were decided in favour of the appellants. The third issue was the substantive dispute over the definition of "ordinary" wages. This was decided in favour of the respondents. The trial judge accordingly dismissed the appellants' application with costs. The appellants now argued before us that the respondents should have been entitled to one third of their costs below, as they had succeeded in only one out of the three issues raised at trial. We did not agree with the appellants on this point. The general rule is that costs follow the event, as enshrined in Order 59 Rule 3(2) of the Rules of Court (Cap 322, Rule 5). This Court emphasised in *Tullio v Maoro* [1994] 2 SLR 489 that the general rule did not cease to apply simply because the successful party did not succeed in every issue or allegation.

51 In *Tullio v Maoro*, this Court held that an appellate court will not readily interfere with the discretion of the court below on the question of costs, unless that discretion had been manifestly exercised wrongly or exercised on wrong principles. We found that there was nothing to suggest that the trial judge had wrongly exercised his discretion in the proceedings below.

52 The appellants relied on Order 59 Rule 6A of the Rules of Court in support of their claim that the respondents were not entitled to full costs: -

In addition to and not in derogation of any other provision in this Order, where a party has failed to establish any claim or issue which he has raised in any proceedings, *and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings*, the Court may order that the costs of that party shall not be allowed in whole or in part, or that any costs occasioned by that claim or issue to any other party shall be paid by him to that other party, regardless of the outcome of the cause or matter. (emphasis added)

The crux of Order 59 Rule 6A is thus whether the party has unnecessarily or unreasonably added to the costs of the proceedings. In the present case, we saw no evidence that the respondents had acted in such a manner. The trial judge certainly did not consider the procedural issues raised before him as either unnecessary or unreasonable. The trial judge stated in his grounds of decision that he in fact saw merit in the respondents' procedural arguments. However, the facts of the case did not allow him to accept those arguments.

53 This made the present case very different from the authorities cited by the appellants. In those cases, the court clearly expressed its distaste for arguments raised by a particular party, notwithstanding the fact that that party was eventually successful on the merits. The court thus refused to award full costs to the ultimately successful party. For example, in both *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors (No 2)* [1998] 2 SLR 489 and *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 2 SLR 204, the court expressly stated that the party had acted unreasonably in putting forward unmeritorious arguments.

54 We thus found no reason to vary the order as to costs in the court below.

Conclusion

55 For the reasons above, we found that the definition of "payable" in the CPF Act is that where a party is liable to pay a sum of money, that sum is described as "payable". With respect to the trial judge, we did not agree that "payable" can be equated to actual payment. We thus agreed with the appellants on the issue of the interpretation of "payable" under the CPF Act. However, we did not agree that the trial judge erred in classifying the VCC as "additional" wages. The facts did not allow for the VCC to be classified as "ordinary" wages. It was not payable on a monthly basis, and there was no obligation on the appellants to make payment before 14th of each month. We therefore agreed with the trial judge that the VCC must be classified as "additional" wages.

56 The appeal was dismissed, with costs in the substantive issue awarded to the respondents.

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