Yip Jenn Yeuan v Ng Ah Chen
[2005] SGHC 21

Case Number : DC Suit 5375/2003, RAS 56/2004

Decision Date : 31 January 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Lim Chor Pee (Chor Pee and Partners) for plaintiff; Chong Pik Wah (Lim Kia Tong and Partners) for defendant

Parties : Yip Jenn Yeuan — Ng Ah Chen

Contract – Contractual terms – Rules of construction – Whether cause of action could arise from "without prejudice" negotiations between solicitors on behalf of clients

Contract – Formation – Whether parties intended to agree on liability and damages together or separately – Whether agreement on liability and/or quantum reached

Tort – Negligence – Damages – Whether plaintiff could pursue assessment of damages as contract claim based on agreement as to liability after tort action became time-barred

31 January 2005 *Judgment reserved.*

Choo Han Teck J:

1 This was an action commenced by the plaintiff to enforce a settlement agreement that he alleged had been concluded between his solicitors and the defendant's solicitors in respect of a previous suit filed as Magistrate's Court Suit No 14645 of 2002. In that action ("the tort claim"), the plaintiff sued the defendant for damages in negligence arising from a road accident on 27 September 2000. On that day, the plaintiff's motorcycle collided with the defendant's car when the defendant's car emerged from the driveway of a motor car showroom at 911 Bukit Timah Road. The plaintiff, then 28 years old, suffered serious injuries.

2 Eventually, the solicitors agreed on the question of liability, namely, that the defendant would agree to be liable for 90% of the blame and the plaintiff would accept contributory negligence of 10% on his part. There was no agreement on quantum at all. The plaintiff's Writ expired in the meantime and the action became time-barred on 27 September 2003. The plaintiff then commenced this action ("the contract claim") on 2 November 2003. It was in the contract claim that the plaintiff sought a summary judgment for damages to be assessed. His application was dismissed by the deputy registrar on 6 May 2004 and he appealed to the district judge, Ms Foo Tuat Yien, who dismissed his appeal on 8 October 2004. The plaintiff then appealed to this court against the District Court's judgment ([2004] SGDC 281).

3 The events should now be set out in detail in chronological order before the law is considered. The accident on which the tort claim was based occurred on 27 September 2000. On 3 April 2002, the plaintiff's solicitors wrote to the defendant's solicitors notifying them that the plaintiff was holding the defendant liable for the accident, and on 4 June 2002, the plaintiff issued the Writ of Summons in the tort claim. The defendant's solicitors wrote to the plaintiff's solicitors on 11 June 2002 to say that they had just been briefed and requested the plaintiff "to hold [his] hands in the matter". That is legal parlance, particularly in tortious actions, which is understood by lawyers to mean that no further steps in the proceedings are to be taken without notifying the other party. The

plaintiff's solicitors replied the following day to say that they had not served the Writ but in any event, the Writ was inadvertently commenced in the Magistrate's Court instead of the District Court. The letter further stated that the plaintiff would withhold service of the fresh Writ pending the defendant's reply to the plaintiff's solicitor's letter of 3 April 2002 asking if the defendant would admit liability. Negotiations continued and on 14 October 2002, the defendant's solicitors replied. The relevant portions of the reply state:

> We would therefore be grateful if you could persuade/advise your client to reconsider our proposal on liability and revert.
>
> On quantum, please be informed that our clients would like to obtain a 2nd opinion on the need for the further operations on your client's left ankle. Kindly let us know if your client has any objection to be re-examined by a specialist appointed by us/our clients.
>
> On your quantification for general damages, please let us know if quantum for pain and suffering can be agreed at $20,000. For the loss of earning capacity and future medical expenses, we will revert with our clients' instructions on same after we have received our own specialist's report on your client's injury.
>
> Please let us have your client['s] instructions on liability and on our clients' request for a re-examination.

4 The plaintiff's solicitors replied on 22 October 2002 to say that the plaintiff did not accept the defendant's proposals in respect of quantum, and added that "[i]n any event, our client would like to resolve the issue of liability first before considering any reduction in quantum". The two crucial letters forming the alleged agreement were then exchanged after that. The defendant's solicitors wrote on 19 November 2002 to say:

> We refer to your letter dated 22 October 2002.
>
> We have our clients' instructions to settle your client's claim at 90%. Please take your client['s] instructions.
>
> As regards paragraph 4 of your letter, our clients will bear the costs of the medical re-examination and would pay the usual $50 for your client's time and transport expenses. Please confirm your client's agreement before we proceed to make the necessary arrangements. We will give your client at least 7 [days'] notice of the appointment date.

The plaintiff's response on 20 November 2002 stated:

> We refer to the above matter and your letter dated 19 November 2002 on which we have taken our client's instructions.
>
> Our client is willing purely for the sake of settlement to accept your client's offer on liability (ie 90%-10% in our client's favour)
>
> Further, our client is agreeable to the terms of the last paragraph of your letter. Please let us know the appointment date.

5 More letters were subsequently exchanged concerning the medical examination of the plaintiff and, eventually, a proposal by the defendant's solicitors on the issue of quantum. Their letter

of 21 March 2003 proposed as follows:

> Subject to our clients' instructions and for an amicable settlement, we would propose agreeing to quantum on 100% as follows:
>
> a. pain and suffering, loss of amenities … $20,000.00
>
> b. loss of earning capacity … $12,000.00
>
> c. medical expenses (RM310) … $155.00
>
> d. medical expenses … $8,420.88
>
> e. transport expenses … $268.75
>
> f. repair costs (RM744) … $372.00
>
> g. towing expenses … $120.00
>
> h. damaged personal items … $100.00
>
> i. costs and disbursements to be determined/agreed
>
> As for the future medical expenses, we are prepared to advise our clients to follow Dr Ngian's recommendation and to allow future medical expenses for a Pan Talar Fusion. We would however like to check with the NUH on the costs of a Pan Talar Fusion in that hospital before we revert with our clients' offer on future medical expenses. We would therefore be grateful if you could arrange for your client to sign the enclosed Consent Form to enable us to obtain the aforesaid information.

6 Reminders were sent by the defendant's solicitors on 28 April 2003 and 19 May 2003 for the plaintiff's response. On 27 May 2003, the plaintiff's solicitors wrote to reject the defendant's offer and made a counter-offer. The defendant's solicitors did not respond. In the meantime, the plaintiff's Writ expired on 4 December 2002 and he had six months from that date to apply for the renewal of the Writ. This was not done, and the cause of action expired on 27 September 2003.

7 On 22 August 2003 and 16 October 2003, the plaintiff's solicitors wrote to the defendant's solicitors. The relevant paragraphs of the two letters stated:

> We refer to our letter of 27 May 2003.
>
> To date, we have not received any reply from you.
>
> If your clients are not minded to accept our client's proposal for settlement, we shall proceed with the matter, which will escalate costs.
>
> …
>
> We refer to the above matter and our letters to you dated 22 August 2003 and 27 May 2003 to which we have not received any reply.
>
> As you are aware, liability was agreed 90%:10% in favour of our clients on 20 November 2002,

leaving only quantum to be agreed or assessed.

8 On 21 November 2003 the plaintiff filed the contract claim based on the agreement concluded in November 2002 by the letters of 19 and 20 November 2002 of the defendant and the plaintiff respectively. The Statement of Claim in the contract claim pleaded as follows:

> 9.1 The Defendant admits 90% liability in respect of the said accident with the Plaintiff bearing the remainder 10% of liability.
>
> 9.2 The issue of quantum is to be disposed of by mutual agreement of the parties.
>
> 9.3 As part of the agreed process of assessing quantum, the Plaintiff, at the Defendant's insurers' request via the Defendant's Solicitors' letters dated 14 October 2002 and 19 November 2002, attended a medical re-examination on 16 December 2002 at the Defendant's insurer[s'] own cost.
>
> 9.4 The issue of quantum is to be settled within a reasonable period of time from when the said agreement was formed in or about 20 November 2002.
>
> 9.5 Once quantum is agreed, the said agreed sum shall be paid to the Plaintiff or the Plaintiff's Solicitors within a reasonable period from the date of agreement of quantum.

9 Mr Lim Chor Pee, counsel for the plaintiff, submitted that the defendant had "agreed to pay 90% of damages". He argued that "an agreement to pay damages to be assessed is a good agreement even though damages are left to be assessed". Miss Chong Pik Wah, counsel for the defendant, submitted that there was no agreement because the issue of quantum was not agreed. For his part, Mr Lim relied on the authority of *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 ("*Tomlin*").

1 0 *Tomlin* also concerned a tort claim in which the solicitors for the plaintiff and defendant respectively negotiated over the issues of liability and quantum. The court, at first instance, found that the series of letters exchanged between the lawyers resulted in a concluded agreement as to liability. Quantum was not agreed. In that case, the plaintiff commenced proceedings only after there was no agreement on quantum. His solicitors then sought to shorten legal proceedings by confining the case to quantum only. The defendants disputed that an agreement on liability had been reached. The Court of Appeal upheld the trial judge's finding that the issue of liability had been settled by agreement. It referred to a letter written by the plaintiff's solicitors as follows:

> Whilst, as you appreciate, I take the opposite view to yourself on the question of liability, my client has instructed me to say that he will agree to settle his case on a 50/50 basis as you propose and accordingly this leaves only the question of quantum to be disposed of.

11 Dankwerts LJ, on appeal, noted that the above letter was, significantly, not refuted in subsequent letters. He found (at 1382) that the correspondence proceeded "on the basis that there was a concluded agreement on the basis of a 50/50 liability, and, as stated, it would appear there was only a question of quantum to be decided after that by way of further negotiation or, as it might appear, by recourse to the court". Sir Gordon Willmer concurred with Dankwerts LJ but "not without some doubt and hesitation". He drew upon his experience from admiralty practice and reminded parties that liability was almost universally dealt with separately from quantum, and concluded at 1386 that he could "see no reason why it should not be possible to carve out of [the] correspondence an agreement as to liability, leaving the question of quantum of damages open for

further negotiation". Omrod J dissented on the ground that the "agreement" was reached on a "without prejudice" basis. He was of the view that the negotiations were "an attempt to settle this case for a sum of money, and that the 'without prejudice' umbrella remains up and protects the parties negotiating up to the point when they agree on a figure" (at 1385).

1 2 *Tomlin* was fully argued before the district judge. She drew on her own experience in the Primary Dispute Resolution Centre in the Subordinate Courts, and noted (at [10]) that:

> Although parties may first agree on liability, both parties (especially an insurer) are understandably wary of finally committing themselves on liability without reaching agreement on quantum of damages payable at 100% as they do not know the ultimate amount of damages, which the plaintiff will receive and which the defendant will have to pay. Although there may be an in-principle agreement on liability before agreement on quantum or vice versa, parties know that they can be frank and open in their negotiations, because if they do not agree on quantum/liability, they can both retract from their agreed positions on either liability/quantum and contest both liability and quantum in the action. There are times, where after a writ is filed and served, parties, who are still unable to agree on quantum but are able to agree on liability, will, to save costs of trial, agree to enter interlocutory judgment on liability with damages to be assessed by the court.

13 The district judge distinguished Dankwerts LJ's decision on the facts, noting that in the present case the plaintiff did not proceed with the original Writ and had issued a Writ in a fresh action based on the agreement. Secondly, the district judge relied on the dissenting judgment of Omrod J to support her opinion that since the negotiations between the parties were made under "without prejudice" letters, there was therefore "no settlement reached between the parties although they had agreed on liability".

14 Both counsel submitted before me that this appeal ought to be dealt with on a point of law, as the essential facts were not in dispute. They agreed that it would make little sense to proceed to trial because the relevant evidence would be based on the undisputed facts presently before me. Having heard both counsel, I agree that this matter need not proceed to trial because the decision on law would be sufficient to end the dispute. Unfortunately, the point of law was not specifically set out, as it should be. However, on the facts as well as the arguments of both counsel, there appears to be two questions, both of which are quite clear, and for the convenience of the parties, I shall state them as follows:

(a) Whether a cause of action in contract can arise from the "without prejudice" negotiations between solicitors on behalf of their clients; and

(b) If so, whether such a cause of action exists on the facts.

15 The context in which an agreement is made is relevant in helping one understand what that agreement really was. In this case, we are examining the effect of the negotiations between solicitors in a personal accident claim. It is, of course, a claim in tort. I will accept that the court can take judicial notice of the practice, especially in this country, where solicitors often begin by engaging in a cautious exchange of proposals. The early stage of negotiations is important because it might there be established whether the parties had decided to negotiate on a global basis, that is to say, that they will carry on until both issues, namely liability and quantum, are agreed. Alternatively, they might have decided to complete the negotiations in two stages, that is to say, they might have wished to determine liability before proceeding to negotiating on quantum. In this case, the plaintiff's solicitors' letter of 22 October 2002 stated that they wished to "resolve the issue of liability first before

considering any reduction in quantum". The onus thus shifted to the defendant's solicitors to correct that path if they so wished, but they did not. The district judge could not be faulted for forming the view that there was no settlement because the "parties intended to settle only if they resolved both liability and quantum", because the letter from the plaintiff continued to make reference to quantum. However, upon closer scrutiny, I am of the opinion that liability had, in fact, been settled. This case, therefore, is similar to *Tomlin*. The parties had decided to negotiate on liability before quantum. Like *Tomlin,* the parties did reach an agreement on liability.

16 When that stage has been reached, the parties can carry on and negotiate the issue of quantum. Alternatively, they can enter interlocutory judgment with damages to be assessed. At this point, if either party reneges on the agreement on liability, the court can hold, as was the case in *Tomlin*, that that issue is closed. It can then allow judgment to be entered *in that action* and order damages to be assessed. If, for some reason, the parties do not proceed to the assessment of damages, the case ends with no result for the plaintiff, because the agreement on liability means nothing to him, other than that parties may proceed to have damages assessed *in that action*. It does not confer on the plaintiff a deferred right to pursue his right to damages by switching from a tort claim to a contract claim. In the present case, the plaintiff's claim in tort has been extinguished by the limitation of time. What he has is a bare agreement that the defendant is responsible for 90% of the accident in which the plaintiff was injured. Nothing more can be inferred or implied, unlike the circumstances in a tort action where it will be implied that once liability is firmly decided, the plaintiff has the right to ask for damages to be assessed. If he does nothing, and that right expires, as it did in this case, he cannot return to court by way of a contract claim, in the hope of completing the right in tort, which he has forsaken.

17 Mr Lim submitted that the contract was complete, and although the quantum of damages was not settled, the mechanism is there to be applied, and that mechanism is the assessment of damages by the court. In my view, this submission overlooks the fact that the plaintiff is now claiming in contract. And this is one case where, if price is not settled, no contract exists. It is not always correct to assume that an order for the assessment of damages is the only, or even an appropriate, mechanism for determining price in this situation. Since the present action is a contract claim, any inference as to what, if any, mechanism for settling price, must lean in favour of a consensual agreement as that mechanism. The court is not involved in such a situation. If price is not achieved, nothing is gained. No contract is made.

18 I should address the question of "without prejudice" negotiations in such cases since it was an issue that resulted in a dissent in *Tomlin*, and the judge below had placed some importance to it. It is true, as the district judge observed, that the plaintiff's solicitors' letter of 16 October 2003 was marked "without prejudice", but that letter was in reference to the issue of quantum. Their letter accepting the offer on liability, written on 20 November 2002, was an open letter. An open letter ends the "without prejudice" correspondence.

19 For the reasons above, this appeal is dismissed. Costs are to follow the event, and to be taxed if not agreed.