Liu Haixiang v China Construction (South Pacific) Development Co Pte Ltd [2009] SGHC 21

Case Number : DC Suit 2807/2005, RAS 82/2008

Decision Date : 19 January 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : N Srinivasan, Lim See Wai Victor and Belinder Kuar (Hoh Law Corporation) for the plaintiff; Goh Choon Wah (Characterist LLC) for the defendant

Parties : Liu Haixiang — China Construction (South Pacific) Development Co Pte Ltd

Damages

19 January 2009 Judgment reserved

Judith Prakash J:

Introduction

1 This appeal arises out of an award of damages granted to the plaintiff by the District Court in respect of injuries sustained by the plaintiff during the course of his employment with the defendant.

2 The defendant, China Construction (South Pacific) Development Co Pte Ltd, is a Singapore company carrying on business as a builder. The plaintiff, Liu Haixiang, is a Chinese national who was employed by the defendant as a plumber and pipefitter. The plaintiff arrived in Singapore sometime in mid February 2004 and started work immediately. The accident which injured the plaintiff took place on 10 August 2004. Thereafter the plaintiff received no salary from the defendant. Apparently, his employment was terminated immediately after the accident although his work permit did not expire until 2 March 2005.

3 This action was commenced in the District Court in August 2005. In May 2007, interlocutory judgment was entered for the plaintiff by consent. It was agreed that damages would be assessed on the basis that the defendant was liable for 75% of the same.

4 The assessment hearing took place in mid 2008. On 4 June 2008, the deputy registrar assessed the plaintiff's damages as follows:

(a)	pain and suffering	:	$25,000.00
(b)	loss of earning capacity	:	$30,000.00
(c)	pre-trial loss of earnings (S$520.00 x 6 months)	:	$3,120.00
(d)	Transport	:	nil

(e) Cost of future medical: nil
expenses

As the overall quantum of the award was less favourable than the terms of an offer to settle made by the defendant in November 2007, certain consequential orders were made in relation to costs and interest.

5 The plaintiff was not satisfied with the award for loss of earning capacity. He appealed to the District Judge on the basis that this award should be set aside and instead an award in the sum of $133,200 for loss of future earnings should be made in his favour. Having failed before the District Judge, the plaintiff appealed to the High Court.

Background facts relevant to the appeal

6 The plaintiff was born in March 1967. As stated earlier, he is a Chinese national. Before coming to Singapore, he had worked on his family farm and had also had experience as a construction worker in China. As a villager in China, the plaintiff said that he was only allowed to work in the city in jobs that involved strenuous or heavy manual work. Thus in the cities, villagers like himself usually worked as construction workers.

7 Sometime in November 2003, the plaintiff passed a Skills Evaluation Certification test in plumbing and pipefitting. Accordingly, when he came to work for the defendant in Singapore, he was considered a skilled worker under the provisions of the relevant employment legislation. As a skilled worker, he had intended to stay and work in Singapore for as long as he could. In cross-examination, the plaintiff clarified that initially he intended to work in Singapore for three years, being the period of his contract with the defendant. If he had not been injured, he would have wanted to work for a further one or two years thereafter. He then intended to return to China but if there was not much work for him to do there, he would have come back to Singapore to look for a job in the construction industry which would pay him more.

8 The defendant paid the plaintiff a basic salary and overtime pay. According to the evidence produced, whilst the plaintiff worked for the defendant his monthly earnings averaged $922.40. In addition, the defendant provided the plaintiff with free accommodation. The plaintiff valued this benefit at about $120 per month. The plaintiff did not take home the whole of his $922.40 however. There was an arrangement between him and the defendant whereby the defendant deducted $200 a month from the plaintiff's wages and paid the sum over to the agent who had procured the plaintiff's employment in Singapore.

9 On the day of the accident, the plaintiff was using a hand held grinder to cut a waste water pipe. The grinder slipped and landed on his left hand. The plaintiff suffered a partial amputation of his left thumb and a laceration of the middle phalange of his left index finger. There were also fractures in his thumb and left index finger. These injuries resulted in the plaintiff having limited use of his left hand and in the weakening of the grip strength of his left hand. The plaintiff was treated for his injuries at the National University Hospital of Singapore. He remained in hospital for four days and was subsequently given medical leave up to 14 November 2004.

10 The defendant did not pay the plaintiff any wages during the period when he was on medical leave. After his medical leave expired, the defendant did not re-employ the plaintiff or assign him any work whatsoever whether of the same or a lighter nature. The plaintiff remained in Singapore in order to pursue his claim for compensation and was granted a special pass by the Ministry of Manpower for

this purpose after the expiry of his work permit in March 2005. Eventually the plaintiff returned to China in August 2005.

11 In the meantime, in July 2005, the plaintiff was reviewed by an orthopaedic surgeon, Dr VK Pillay. Dr Pillay's opinion was that the plaintiff was disabled as a result of the injuries to his left thumb and index finger. He would need to have normal use of both hands for him to carry on with his work, which was to carry heavy loads of construction material, and hold and manoeuvre tools using both hands while performing his work as a plumber and pipefitter. In August 2005, Dr Pillay was of the opinion that it would be unsafe for the plaintiff to climb up scaffolding and ladders and that he would not show any further improvement from his then state of disability.

12 On his return to China, the plaintiff undertook some light duties in his village. He also helped in the padi fields doing weeding and adding fertiliser. Subsequently he became a caretaker in a school.

13 Just prior to the assessment hearing, the plaintiff was reviewed again by Dr Pillay. Dr Pillay found that his condition was the same as described in the original report issued in August 2005 but there had been very slight improvement in the range of movement for the left thumb and index finger. He also confirmed that the plaintiff was still disabled as a result of his injuries and could not go back to the type of work that he had done previously.

14 In May 2007, the plaintiff had also been examined by Dr WC Chang, an orthopaedic specialist who had been appointed by the defendant. In the report that he subsequently issued, Dr Chang gave the following opinion:

> As a result of his accident, Mr Liu has a stiff left thumb and index finger. He is unable to oppose the thumb to the index finger effectively to pick up or hold objects. As such he would not be able to return to work as a plumber/pipe fitter. He would have difficulty holding on to pipes and tools and climb up ladders and scaffolds even though this is not his dominant hand.
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> However he can still oppose his left thumb to the other fingers to carry light objects. He can also hold a screw or nail between the thumb and middle finger and work with a normal right hand. In other words he can still be gainfully employed doing light duties.

Pre-trial loss of earnings

15 The plaintiff had claimed loss of pre-trial earnings for the period from the date of injury (10 August 2004) up to the date when he returned home to China (18 August 2005). This period was calculated on the basis that the plaintiff had had to remain in Singapore after the expiry of his medical leave in order to deal with the claim that he had lodged with the Ministry of Manpower. The amount claimed for the period was $14,765.52 being the product of earnings of $39.48 per day multiplied by the number of days in the period. The sum of $39.48 per day was derived from the plaintiff's average monthly salary of $922.40 and an additional sum of $4 per day for accommodation. The defendant, on the other hand, submitted that the pre-trial loss should be assessed at $472.40 per month from the date of the accident to the last date of medical leave ($1,472.40) or, alternatively, to the expiry of the work permit on 2 March 2005 (approximately, $2600). The sum of $472.40 was put forward as being the plaintiff's effective monthly salary because, in counsel's submission, the following sums had to be deducted from the average pay of $922.40:

(a) $200 a month paid to the plaintiff's agent; and

(b) $250 a month for monthly expenses.

The deputy registrar awarded a sum of $3,120 as the pre-trial loss of income on the basis of $520 a month for six months. No breakdown of the monthly figure was given so it is difficult to work out how he derived it.

16 Although the plaintiff did not appeal against the award in respect of pre- trial earnings, I would like to make some observations on how this award should, I think, have been calculated. First of all, while the plaintiff was on medical leave, since he was unable to work, he would be entitled to be paid (or recover) his full salary less, only, any agreed deductions which the employer actually paid out for his benefit during that period. In this case there was an arrangement between the plaintiff and the defendant for two deductions to be made from his monthly wages. The first was the sum of $50 as an appropriation towards the plaintiff's income tax liability. As the contract specifically provided that upon termination, the plaintiff would be entitled to recover any amount that had been deducted for this purpose but which he was not liable to pay as income tax, this sum of $50 would have to be paid to the plaintiff unless the employer could show that it was due to the tax authorities and had been paid to them or that it was making payment thereof on the plaintiff's behalf. Secondly, it was agreed that the sum of $200 a month would be deducted from the plaintiff's salary and paid to his agent towards settlement of the fee payable by the plaintiff to that agent. In the court below, there was no evidence at all that after the plaintiff was injured the defendant continued to pay the $200 a month to the agent. In the absence of proof that the defendant had discharged this liability on the plaintiff's behalf or was liable to continue discharging this liability, this sum should not have been deducted from the plaintiff's monthly wages for the purpose of calculating his loss of pre-trial wages.

17 In the court below, counsel for the defendant cited two district court cases in which the court had awarded pre-trial loss based on what was termed to be "effective salary". I understand that this meant that the monthly expenses incurred by the employee concerned were deducted from his gross salary in order to obtain a net figure. I do not accept this method of computation as having any basis in law or in principle. An employee has to meet his living expenses out of his monthly income and he does not cease to have living expenses simply because he ceases to have a monthly income. When the employee is unable to work due to medical reasons and is not paid his monthly salary, his loss would be the total amount that he would otherwise have received in his hand and out of which he could take his monthly expenses to whatever extent he incurs the same. The loss of salary experienced by an injured employee whilst he is on medical leave would be a loss falling within the category of special damages and not within the category of general damages. Thus the employee would be entitled to recover the total amount of salary that he should have been paid and not simply the surplus amount that would have remained with him after his living expenses had been met.

18 On another point, in the instant case, the plaintiff claimed that the defendant had provided him with free accommodation whilst he was employed by it. If that was the case and as a result of the accident the plaintiff no longer received this benefit but had instead to pay a third party for accommodation, then the plaintiff would have been entitled to claim the cost of the accommodation as special damages. It would not be correct to estimate the value of the accommodation hitherto provided by the defendant and add that to the plaintiff's wages so as to increase the quantum of the wages. Therefore, the extra sum of $4 per day should not have been included as part of the plaintiff's claim for lost wages. I note also that there was no evidence below as to the actual accommodation costs incurred by the plaintiff after the accident. In the absence of such evidence, there was no basis to make an award to reflect this expense (if indeed it was incurred) and the claim for the extra $4 a day was rightly disregarded.

19 Having regards to what I have said above, it follows that the quantum of the plaintiff's pre-trial loss of earnings should have been calculated using the average earning figure of $922.40 per month as that was the best evidence of what the plaintiff would have earned but for the accident. The

claim for the $200 deduction should have been rejected unless the defendant proved it had paid that amount to the agent. The same would go for the $50 tax contribution. No credit should have been given at all to the defendant for the plaintiff's monthly expenses.

20 As regards the multiplier, the plaintiff still had a valid work permit allowing him to work for the defendant after his medical leave ended. Despite the existence of the work permit, the plaintiff's employment with the defendant had *de facto* been terminated on the date of the accident. The defendant did not, however, assign him any work to do after his medical leave ended and treated him as an ex-employee rather than as an existing employee. In these circumstances and bearing in mind the difficulty which a foreign worker with a work permit for one employer would find in getting a job with another employer especially after an accident as in this case, the period for the loss of pre-trial earnings should have been calculated up to the date of expiry of the work permit at least. Although the deputy registrar did not state so, this in effect is the period he accepted when he used a multiplier of 6 months. Whether the period should have been extended up to August 2005, depended on whether the court was willing to accept the plaintiff's evidence that he had to remain in Singapore for that additional period in order to process his claim with the Ministry of Manpower. It appears that this explanation was not accepted in this case. I will not comment on the merit of that decision since that award is not the subject of the appeal. I would observe, however, that it is up to a plaintiff, who finds himself in the situation that this plaintiff did, to prove that he had no choice but to stay on in Singapore to deal with various procedures and that during the prolonged stay he made efforts to find some sort of employment but was not successful. Here, there was no evidence of any effort made by the plaintiff to find alternative employment in Singapore after the expiry of his work permit and the statement that he had to be here physically up to August 2005 in order to process his claim seems to have been an assertion rather than a fact that was proved. I also note that the plaintiff could have, but did not, put a claim for pre-trial loss of earnings for the period between his return to China and the trial date. To succeed on such claim he would have to adduce evidence of his actual earnings during the period and his efforts to find employment.

Future loss of earnings or loss of earning capacity

21 Although the plaintiff's claim was for post-trial loss of earnings, the deputy registrar made an award for loss of earning capacity only. In doing so, he must have accepted the submissions made on behalf of the defendant. It should be noted that the same submissions were proffered before the district judge during the first appeal. These were as follows. First, it was argued that there was no evidence given to the court of the precise job description filled by the plaintiff when he was employed as a plumber/pipefitter. Secondly, it was stated that there was no clear measurable loss to the plaintiff. He did not provide evidence on how much he would have earned if he obtained the position of a restaurant worker or an office despatch clerk, both of which are jobs he said he would be able to hold. The doctors had also testified that he could be a forklift driver or a driver in other industries and the plaintiff had not provided evidence of any loss in income that he would have suffered had he taken up such jobs. Thirdly, the plaintiff did not give evidence of any mitigating steps taken by him. His only mention that he was employed on a farm came during cross-examination. An adverse inference had to be drawn against for not volunteering this information.

22 It was further argued that the plaintiff, being married with a wife and two teenaged children, was unlikely to remain in Singapore indefinitely. Even while he was here, his earnings were not likely to be so high. The defendant's witness, Mr Shi Qi, had testified that even after the third and fourth years of employment, the defendant's Chinese employees would still need to pay commission to their labour agent. Such payments would reduce the amount they would effectively earn in Singapore.

23 The defendant concluded that it was incumbent on the plaintiff to show the appropriate

damages would be loss of future earnings. He would have to show the difference in salary, if any, between jobs for which he was suitable such as that of a waiter and despatch clerk, and the salary of a construction worker in Singapore. In the facts of this case, since no such figures had been provided, loss of earning capacity would be the more suitable measure.

24 The basic guidelines on when an award for loss of earning capacity rather than an award for loss of earnings should be made were set out in the case of *Teo Sing Keng v Sim Ban Kiat* [1994] 1 SLR 634 ("*Teo Sing Keng*") where Yong Pung How CJ, delivering the judgment of the Court of Appeal stated (at p 646):

> Although loss of earnings and loss of earning capacity have sometimes been used interchangeably, they are separate heads of damage. Lord Denning MR in *Fairley v John Thompson* (Design & Contracting Division) Ltd at p 42 alluded to this difference:
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> > It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.
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> The above passage was quoted with approval by Browne LJ in the leading English case on loss of earning capacity, *Moeliker v A Reyrolle & Co Ltd* at p 15, where the learned judge said:
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> > This court made it clear in *Robert v Heavy Transport (EEC) Ltd* and *Herod v Birds Eye Foods* that *Smith v Manchester Corp* laid down no new principle of law, and I entirely agree. *Smith v Manchester Corp* is merely an example of an award of damage under a head which has long been recognised – a plaintiff's loss of earning capacity where, as a result of his injury, his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by the injury. This court made an award under this head in *Ashcroft v Curtin* three years before *Smith v Manchester Corp*. This head of damage generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.
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> …
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> An award for loss of earning capacity, as opposed to an award for loss of earnings, is generally made in the following cases:

(1) where, at the time of trial, the plaintiff is in employment and has suffered no loss of earnings, but there is a risk that he may lose that employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job;

(2) where there is no available evidence of the plaintiff's earnings to enable the court to properly calculate future earnings, for example, young children who have no earnings on which to base an assessment for loss of future earnings.

25 It can be seen from the above discussion that where there is a measurable loss of earnings, the correct award is for loss of future earnings. In this case, there was a measurable loss of earnings because, due to his injury, the plaintiff was no longer able to work as a construction worker in

Singapore and at the time of the trial he was, in fact, no longer in such employment. Both doctors stated in their medical reports that the plaintiff could not return to heavy manual construction work. The plaintiff's evidence, which was unchallenged, was that prior to coming to work in Singapore, he had earned about $400 a month as a construction worker in China and it was the prospect of higher wages in Singapore which motivated him to apply for a work permit here. In fact, the plaintiff did earn more than double his Chinese wages during his first year of employment here. It was clear from the evidence that once the plaintiff was injured, whatever his capacity for doing light work was, he would no longer be able to do the job of a plumber/pipefitter which involved carrying heavy pipes. It was also clear from the evidence that once the plaintiff was injured, the defendant had no other tasks to assign to the plaintiff. It would seem that he no longer had any value as a worker for the defendant whether in heavy construction work or otherwise and in that circumstance it does not lie in the defendant's mouth to argue that the plaintiff would be able to find light work in the same or another industry in Singapore and that there was no measurable loss.

26 The fact of the matter is that once it was clear the plaintiff's injury had resulted in a permanent disability which incapacitated him so that he was unable to resume his former employment here, it was also clear that he would no longer be able to work as a construction worker holding a work permit in Singapore. The competition for such jobs is fairly intense and there is no incentive for an employer to employ a partially disabled worker to fill a vacant position when he can very easily find able-bodied workers to meet his manpower needs. The same holds true in China where the plaintiff's evidence that villagers with basic education mostly end up as construction workers when they move to the cities was uncontroverted. Even if the plaintiff with his disability was able to get a job in the construction industry in China, he would not be able to earn more than he had previously *ie* $400 per month, so there would be a loss of income of at least $520 per month or, during the first two years of employment, $320 per month after deduction of the agent's fee.

27 It would be recalled that in *Teo Sing Keng,* the Court opined that a loss of earning capacity award would also be appropriate where there was no available evidence of the plaintiff's earnings to enable the Court to properly calculate future earnings. This was not the case here. The documentation established what the plaintiff earned during his stay in Singapore. The plaintiff also gave evidence of what he had earned in China prior to coming to Singapore and that evidence was not challenged. Whilst there may be some gaps in the evidence relating to the possible salary that the plaintiff might achieve in the future, such gaps mean that the calculation of the plaintiff's damages might lead to a lower figure than the plaintiff would like but those gaps do not make it impossible to derive an award on the basis of loss of future earnings. The evidence in this case supports the plaintiff's claim that the proper award would be for loss of future earnings.

28 Turning to quantum, the plaintiff argued that a split multiplicand ought to be adopted: part of the multiplicand should be calculated on the basis of the plaintiff's wages in Singapore while the balance would be based on his possible earnings in China. As for the Singapore multiplicand, the plaintiff used a figure of $942.40 per month on the basis that his salary was $1,142.40 (inclusive of housing benefit) per month but that the agent's fees of $200 per month had to be deducted from the same. I do not accept the figure of $1,142.40 per month. The plaintiff's average monthly salary was $922.40 and there was no evidence that he would be paid more than this sum by another employer who did not also provide him with accommodation. Thus the housing benefit that he enjoyed provided by the defendant should not be monetarised and added to his monthly salary. I agree that the sum of $200 a month being the payment towards settlement of his agency's fees should be deducted from his salary in order to obtain his true loss. Having said that, the evidence was that this amount was payable for two years only and Mr Shi Qi, while asserting that a similar fee would be payable during the third and fourth years of employment in Singapore, also testified that repeat workers do not need an agent to find work abroad. Thus, it was not established that the plaintiff would, if he had worked

in Singapore for more than two years, have necessarily been liable to pay more agency fees. I therefore would not deduct the $200 from the plaintiff's salary for the whole period under consideration.

29 As for the China portion, the plaintiff submitted that the average monthly salary of a construction worker in August 2004 was $400. Since China has had rapid economic growth over the past fifteen years with an average growth rate of ten percent per annum, the plaintiff postulated that such percentage would continue to increase and the per capita wages of workers in China would increase accordingly. He therefore postulated that if he was to work as a construction worker in ten years' time, he would be able to earn RBM $5,000 per month (or S$1,000). The plaintiff contended that if at all he was able to get a job in China it would be in the sector for lighter jobs and therefore his salary would be very much reduced. Based on the Chinese National Statistics Report, the average earnings for the respective sector for comparatively lighter jobs are as follows:

Vocation	Salary (Annual)
Catering Services	RMB 14,204 (S$236 per month)
Retail Trade	RMB 15,751 (S$259.50 per month)
Services in Support of Agriculture	RMB 13,187 (S$219.80 per month)
Baker	RMB 676 monthly (S$135.20)

The plaintiff therefore submitted that a multiplicand of $500 for the loss of future earnings in China would be reasonable.

30 Before I state my conclusions on the appropriate multiplicand, I should deal with the appropriate multiplier. The plaintiff submitted a total multiplier of twelve years made up of seven years in Singapore and five years in China.

31 At the time of the assessment hearing, the plaintiff was aged 41. On the basis of previous authorities and the present trend for workers to continue in paid employment up to the age of 62 at least, I think a multiplier of twelve is acceptable. However in the case of this plaintiff who was working in the construction industry and is a foreigner, I do not think that it is appropriate to allot seven years to the Singapore portion and only five years to the China portion. In my view the portions should be reversed so that the Singapore portion is five years and the China portion is seven years. This would more accurately reflect the vicissitudes of life and particularly of working life for a foreigner in the construction industry who needs a work permit and has to compete for jobs with younger foreign workers.

32 I would make the following award in respect of the plaintiff's loss of earnings:

Singapore

First year:	Multiplicand	$922.40 - $200 - $300 = $422.40

	Multiplier	12 months
	Award	$5068.80
Next 4 years:	Multiplicand	$922.40 - $300 = $622.40
	Multiplier	48 months
	Award	$29875.20

China

Multiplicand	$600 - $300 = $300
Multiplier	84 months
Award	$25200

Thus, the total award would be $60,144.

33 I explain my award. First I had to determine what the plaintiff would be capable of earning in China in his present condition. The plaintiff was not forthcoming on what he actually earned as a caretaker and part time farmer. However, his counsel did produce the Chinese National Statistics Report which showed the earnings of persons who worked in physically less taxing jobs that did not require the full use of both hands. I disregarded the salary figures for the baker as the plaintiff does not have that ability and I then took the average of the monthly salaries of the other three vocations shown in [30] above. This gave me the figure of $238.43 and I rounded this up to $300 a month to reflect the growth in the economy over the years. As far as the Singapore portion of the loss of earnings is concerned, it can be seen that I used the plaintiff's average salary from the defendant and deducted his notional earnings in China and also, for the first year, the payment to the agent. As far as the Chinese portion of the loss of earnings is concerned, I did not accept the plaintiff's postulation that a construction worker in China would be able to earn $1000 a month in a few years time. I agreed that such a worker would be able to earn more than the $400 a month that the plaintiff himself earned when he worked as a construction worker in China. I estimated that earnings of $600 a month would be achievable and I think that this is a reasonable estimate since it only reflects a 50 percent growth over a period of twelve years. I deducted from the figure of $600 a month, the same $300 a month that I thought the plaintiff ought to be able to earn if he undertakes a lighter vocation.

Conclusion

34 For the reasons given above, I set aside the award for loss of earning capacity made by the deputy registrar and instead make an award for loss of future earnings in the sum of $60,144. The plaintiff's appeal is thus allowed. As the total amount now awarded to the plaintiff (even after the apportionment of 75%) is more favourable than the terms of the defendant's offer to settle dated 27 November 2007, I order that the costs of the entire proceedings fixed at $10,000 by the deputy registrar be paid to the plaintiff by the defendant. Further, the defendant shall pay the plaintiff's disbursements in the action. As for interest, the defendant shall pay the plaintiff interest on damages (except for the sum awarded for future earnings) at 5.33 per cent per annum for the period ordered

by the deputy registrar. The defendant shall also pay the plaintiff's costs of this appeal and the appeal before the district judge as taxed or agreed.