IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 52

Court of Appeal / Civil Appeal No 25 of 2024

Between

TOWA Corporation

… *Appellant*

And

ASMPT Singapore Pte Ltd

… *Respondent*

Court of Appeal / Civil Appeal No 26 of 2024

Between

ASMPT Singapore Pte Ltd

… *Appellant*

And

TOWA Corporation

… *Respondent*

In the matter of Suit No 359 of 2013

Between

TOWA Corporation

… *Claimants*

And

(1) ASMPT Singapore Pte Ltd

(2) ASMPT Limited

… *Defendants*

GROUNDS OF DECISION

[Damages — Assessment]

TOWA Corp
v
ASMPT Singapore Pte Ltd and another appeal

[2024] SGCA 52

Court of Appeal — Civil Appeal Nos 25 and 26 of 2024
Tay Yong Kwang JCA and Andrew Phang Boon Leong SJ
21 November 2024

22 November 2024

Andrew Phang Boon Leong SJ (delivering the grounds of decision of the court):

1 These are cross-appeals against the decision of the judge below ("the Judge") regarding the assessment of damages ("AD") in *Towa Corp v ASM Technology Singapore Pte Ltd* [2023] 5 SLR 870 (the "AD Judgment") and *TOWA Corp v ASMPT Singapore Pte Ltd* [2024] SGHC 163 (the "Supplemental AD GD", and collectively, the "AD Decisions").

2 In CA/CA 25/2024 ("CA 25") and CA/CA 26/2024 ("CA 26"), both TOWA Corporation ("TOWA") and ASMPT Singapore Pte Ltd ("ASMPT") contest different heads of damages awarded by the Judge. In the underlying dispute, TOWA sued ASMPT and its fully owned subsidiary for infringing on TOWA's Singapore Patent No 49740 (the "Patent") relating to TOWA's "YPS" auto mould machines. ASMPT was found to have breached the Patent through

its acts of making, disposing of, offering to dispose of, keeping and offering the use of its "IDEALmold" machine.

3 TOWA elected to claim damages on 8 August 2018, and the AD phase proceeded on that basis. In the AD Judgment, the Judge held that the damages should be calculated based on the profits TOWA could have made from its YPS machines in a hypothetical but-for counterfactual situation where there were no IDEALmold machines (the "But-for Scenario"): see AD Judgment at [31] and [34]. The parties interpreted the AD Judgment differently, and, it would appear, battled tenaciously as well as persistently over many of the issues therein. Indeed, after the AD Judgment had been delivered, the parties appeared before the Judge no fewer than six times in order to clarify the parameters that were to be applied in the relevant computation of the damages to be awarded to TOWA – which then resulted in the Supplemental AD GD.

4 Having carefully considered the parties' written as well as oral arguments, we allow CA 26 in part and dismiss CA 25 in its entirety. Indeed, save for two specific issues, we agree with the reasoning as well as the findings of the Judge which were set out in meticulous detail in both the judgments which he released.

5 In CA 25, TOWA appeals against the findings in the AD Decisions that resulted in it receiving less damages for the breach of its Patent. We dismiss CA 25 in its entirety. TOWA's pleadings, which claimed only for relief in relation to its YPS machines (as opposed to its other machines, *eg*, the YPM machines), were fatal to many of its arguments for more damages. We also agree fully with the Judge's reasoning relating to the issues on appeal in CA 25.

6 In CA 26, ASMPT makes three points on appeal that the damages awarded by the Judge should be reduced. We dismiss the appeal on all but one of these points, and now address the point with which we agree.

7 This point relates to whether the Judge had erred by failing to account for certain costs under the category of "general additional costs of sales". As ASMPT's expert describes, this category comprises costs arising from TOWA's sales of machines, "which cannot be linked to any specific category of equipment and accordingly need to be proportionally allocated between different categories, including YPS machines". In other words, these costs are unclassified costs, by virtue of not being specifically attributable to any of TOWA's products. These costs are to be contrasted with TOWA's costs of sales exclusively attributable to YPS machines and TOWA's costs of sales exclusively attributable to equipment other than YPS machines. The category of "general additional costs of sales" comprises the following costs: (a) "cost difference, *etc*."; (b) "cutlery manufacturing"; (c) "costs processing"; (d) "free of charge/scrap"; (e) "unclassified development costs"; (f) "unclassified disposal costs"; and (g) "unclassified valuation loss": see Supplemental AD GD at [57].

8 Both experts appear to agree that the "general additional costs of sales", as a *category*, should be allocated proportionally to the YPS machines when calculating TOWA's loss of profit. What they (and the parties) disagree on is whether costs (e), (f) and (g) in the preceding paragraph should be accounted for when calculating TOWA's loss of profit. We shall refer to these three costs collectively as "the Contested Unclassified Costs".

9 The background to the parties' disagreement is as follows. The supporting documents provided by TOWA included a summary breakdown

which identified, among other costs, the costs falling under the general additional costs of sales (*ie*, costs (a) to (g)). These documents had been prepared on the instructions of Mr Nishizuka, TOWA's then Senior Manager of its Finance Department. Mr Nishizuka also testified in cross-examination that the costs under "general additional costs of sales" should be proportionally allocated to YPS machines. TOWA's expert had, in his report, mentioned some of the costs (*ie*, costs (a) to (d)) identified in the supporting documents. He proceeded to proportionally allocate those costs to the YPS machines. The costs which he failed to mention (and thus proportionally allocate) were the Contested Unclassified Costs. ASMPT's expert contended that TOWA's expert had left out the Contested Unclassified Costs from the additional general costs of sales, and that this omission would lead to TOWA being overcompensated. TOWA's expert, however, alleged in a subsequent expert report that he had not included the Contested Unclassified Costs in his previous report because the portion of those costs attributable to the YPS machines was "inconclusive" – in particular, that there were no records of such costs being directly attributable to YPS machines, and/or some of these costs were "negligible".

10 In the Supplemental AD GD at [61], the Judge held that the Contested Unclassified Costs were not costs attributable to the YPS machines. This was because "they were each an amorphous collection of costs that applied to the whole of [TOWA's] product range". He relied on TOWA's subsequent expert's report which stated that the portion of the Contested Unclassified Costs attributable to the YPS machines was "inconclusive", and there were no records of such costs being directly attributable to YPS machines.

11 In our view, this argument by TOWA's expert does not pass muster. By definition, *all* costs falling under the category of "general additional costs of sales" are precisely unclassified costs which cannot be attributed to any specific

category of equipment, and which thus apply to the *whole* of TOWA's product range (including the YPS machines). In our view, the most reasonable inference to draw is that such unclassified costs, including the Contested Unclassified Costs, would *increase* with more sales of the YPS machines. Put another way, the impossibility of directly attributing the Contested Unclassified Costs to any one of TOWA's product lines points *towards*, rather than away from, proportionally allocating those costs to the YPS machines.

12 The evidence also shows that TOWA's own witnesses believed that the Contested Unclassified Costs ought to be proportionally allocated. This can be seen from TOWA's supporting documents, Mr Nishizuka's admission that the "general additional costs of sales" are to be proportionally allocated, as well as the fact that TOWA's expert had proportionally allocated costs (a) to (d) to the YPS machines. Indeed, TOWA's expert has not produced a persuasive reason as to why he treated the Contested Unclassified Costs differently from costs (a) to (d). His explanation as to why he did not proportionally allocate the Contested Unclassified Costs appears to be an afterthought, crafted to illegitimately maximise the compensation to be received by TOWA.

13 ASMPT has, in our view, discharged the evidential burden of showing that the most reasonable inference to draw is that the Contested Unclassified Costs would *increase* with more sales of the YPS machines. The evidential burden then shifted to TOWA to show that this was not the case. Not surprisingly, TOWA has not done so.

14 As for TOWA's expert's opinion that some of the Contested Unclassified Costs were "negligible", that alone is not a good reason to refrain from proportionally allocating those costs. The quantum of the proportionally allocated Contested Unclassified Costs, however, may be relevant to costs.

15 For the above reasons, the Judge, with respect, erred by not proportionally attributing the Contested Unclassified Costs to the YPS machines.

16 We turn now to ASMPT's appeal on the Judge's decision on pre-judgment interest. Relying on *Main-Line Corporate Holdings Ltd v United Overseas Bank* [2017] 5 SLR 175 ("*Main-Line (Interest & Costs)*"), ASMPT first submits that where the suit is bifurcated, pre-judgment interest should run from the date of election of remedy. Hence, pre-judgment interest at 5.33% should run from 8 August 2018 (*ie*, the date of TOWA's election of remedy) rather than 19 April 2013 (*ie*, the date of the writ). ASMPT also submits, again relying on *Main-Line (Interest & Costs)*, that where a plaintiff refuses to accept an offer to settle ("OTS") more favourable than the judgment sum, pre-judgment interest should end 14 days after the date of that OTS. Hence, in this case, pre-judgment interest should run only until 25 March 2021 (14 days after the date when ASMPT submitted its OTS) instead of 15 March 2024 (the date on which the Judge had formally recorded down the judgment sum), since TOWA refused to accept ASMPT's OTS which was more favourable to TOWA than the judgment sum.

17 In response, TOWA submits that the recoverability and quantum of pre-judgment interest is entirely up to the court's discretion, and that the factors considered in *Main-Line (Interest & Costs)* are not of general application to all cases concerning an election of remedy or an OTS (or both).

18 In so far as ASMPT's arguments on the date of election are concerned, TOWA submits that the purpose of pre-judgment interest is to compensate a "successful claimant for the time value of money the use of which was lost between the date on which the claimant's cause of action arose and the date of

judgment" on the basis "that the unsuccessful defendant had wrongfully kept the successful claimant out of moneys to which he has been shown to be entitled, during which time, the defendant instead had the use of it": see the decision of this court in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137]. Thus, even if the infringer may not have known the precise amount payable to the successful plaintiff prior to the plaintiff's election of remedy, this ought not to negate a successful plaintiff's entitlement to pre-judgment interest on the amount payable from the time it was wrongfully withheld.

19 As regards ASMPT's arguments on the OTS, TOWA submits the following:

(a) An operative OTS ought not to impact pre-judgment interest because O 22A r 5(2) of the Rules of Court 2014 contemplates that "no communication respecting the offer shall be made to the Court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined". If the existence of an OTS cannot even be communicated until after all questions of the relief to be granted (which includes pre-judgment interest) is determined, it follows that the OTS cannot impact the determination of pre-judgment interest.

(b) Bearing in mind the purpose of awarding pre-judgment interest, which is to compensate the plaintiff for the lost time-value of moneys wrongfully deprived from the plaintiff by the defendant (see [18] above), whether there is an operative OTS is irrelevant to the court's consideration of how much of such compensation should be awarded.

20 We agree with TOWA that the matters of whether to award pre-judgment interest, and if so, how much to award, lie within the discretion of the first-instance court. *Main-Line (Interest & Costs)* should thus not be taken to fetter this discretion, or to lay down any bright-line rule regarding the duration of pre-judgment interest.

21 In *Main-Line (Interest & Costs)*, the court awarded pre-judgment interest from the date of election of remedy due to the convoluted facts of that case. The Judge in this case was not bound by *Main-Line (Interest & Costs)*, and thus was not wrong, on the facts of this case, to award pre-judgment interest from the date of the writ. As for the effect of a favourable OTS, the Judge was entitled, in his discretion, to order pre-judgment interest to run to the date on which the Judge had formally recorded down the judgment sum, despite a more favourable OTS. We thus do not disturb the Judge's orders on the pre-judgment interest payable to TOWA.

22 For the reasons set out above, we allow CA 26 in part and dismiss CA 25. The parties' experts shall jointly derive the quantum of the Contested Unclassified Costs. Whilst parties are at liberty to apply if they cannot agree on the quantum of the aforementioned costs, we do not expect to see any disputes on this front as the calculations should be relatively straightforward.

23 We award costs to ASMPT in the sum of $70,000 (all-in) in relation to both appeals. The usual consequential orders are to follow.

Tay Yong Kwang
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

Low Chai Chong, Long Ai Ming, Foo Maw Jiun, Ng Ah Sock Angie and Chia Jung Yeong Mark (Dentons Rodyk & Davidson LLP) for the appellant in CA 25 and the respondent in CA 26;
Lim Ying Sin Daniel and Lakshmanan s/o Anbarazan (Joyce A. Tan & Partners LLC) for the appellant in CA 26 and the respondent in CA 25.
