Tan Shwu Leng v Singapore Airlines Limited and Another [2001] SGHC 51

Case Number : Suit 1906/1997, RA 600311/2000

Decision Date : 20 March 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : V Ramakrishnan (V Ramakrishnan & Co) for the appellant/plaintiff; Lawrence Teh (Rodyk & Davidson) for the first respondents/first defendants; Ashok Kumar (Allen & Gledhill) for the second respondent/second defendants

Parties : Tan Shwu Leng — Singapore Airlines Limited; Airbus Industrie

JUDGMENT:

Grounds of Decision On Assessment of Damages

1. The background of this action and assessment of damages is set out in the Grounds of Decision (Grounds) of the Assistant Registrar Tan Wen Shan dated 19 October 2000.

2. This action arose from a mid-air incident on board flight SQ 420 from Singapore to Dhaka on 25 November 1994, as a result of which the plaintiff Tan Shwu Leng (Ms Tan) was injured. Her main injury was a fracture of the left humerus as a result of which she was grounded instead of undertaking cabin crew duty with its various benefits. At the material time, she was employed by Singapore Airlines Limited (SIA), the owners of the aircraft, as a Leading Stewardess (LSS). On 3 November 1997, Ms Tan commenced the present action against SIA for damages for negligence and alternatively breach of statutory duty. Airbus Industrie, the manufacturers of the aircraft, were subsequently joined as co-defendants. Interlocutory judgment was entered against both Defendants on 19 September 1999 for damages to be assessed.

3. At the end of four and a half days of assessment, AR Tan awarded Ms Tan $13,000 for pain and suffering, $77,491.60 for loss of pre-trial earnings, and $225,534.21 for loss of future earnings.

4. The total amount payable to Ms Tan including interest pursuant to AR Tans assessment was less than $350,000.

5. On 24 January 2000, an offer to settle Ms Tans claim at $350,000 had been made by the Defendants (the Offer), but the Offer was not accepted.

6. In the circumstances, AR Tan ordered that:

> (a) Ms Tan be entitled to costs on a standard basis up to the date of the Offer but AR Tan limited such costs to costs in respect of work done in the matter only,
>
> (b) The Defendants be entitled to costs on an indemnity basis from the date of the Offer onwards.

7. It was not clear what costs in respect of work in the matter only meant.

8. Mr Lawrence Teh for SIA submitted that it was limited to work done for liability only as that was his argument which AR Tan appeared to have accepted.

9. The appeal before me proceeded on the basis of this interpretation.

10. After hearing arguments, I made the following order:

> (a) For pain and suffering, no change.
>
> (b) For loss of pre-trial earnings, to add $2,736.31 and $14,700 back to the sum awarded by AR Tan with interest at 3% per annum from date of the accident to date of AR Tans decision.
>
> (c) For loss of future earnings, no change.

11. I would add that I also disallowed Ms Tans claim for alleged medical expenses ($125) and alleged transport expenses ($1,652) as there was no documentary evidence before AR Tan on these items. I disallowed an attempt by Mr V Ramakrishnan for Ms Tan to adduce documentary evidence of the same at the appeal before me.

12. In the light of my order as set out in para 10 above, I was informed that the total amount payable to Ms Tan would then be $352,279.33 including interest (according to Defendants Joint Submission on Costs, para 10).

13. The quantum of damages and interest for the purpose of assessing the Offer was $351,809.82 (according to Defendants Joint Submission on Costs, para 11).

14. In the circumstances, I rescinded the order of AR Tan on costs and ordered that:

> (a) The Defendants pay the costs of Ms Tan up to the date of the Offer and this would include getting up on quantum, in addition to liability.
>
> (b) Costs thereafter, up to the date of the decision of AR Tan, was fixed at $1,000 to be paid by the Defendants to Ms Tan.

15. As for costs of the appeal before me, I ordered that the Defendants pay Ms Tan such costs fixed at $5,000.

16. The parties have appealed against different parts of my main order as well as in respect of my order on costs.

MS TANS APPEAL TO THE COURT OF APPEAL

17. I will deal with Ms Tans appeal first. It is against that part of my order:

> (a) in respect of pre-trial earnings,
>
> (b) in respect of loss of future earnings,
>
> (c) in respect of costs from the date of the Offer to the date of the decision by AR Tan.

18. In other words, Ms Tan has not appealed against my decision in respect of pain and suffering or in respect of her claim for medical and transport expenses.

Loss of Pre-Trial Earnings

19. As regards Ms Tans appeal to the Court of Appeal in respect of pre-trial earnings, Ms Tan is claiming that the $91,302.12 deducted by AR Tan as work expenses should be added back entirely or partially to her pre-trial earnings.

20. Ms Tan had been claiming various allowances which she would have earned as a cabin crew but for the injury.

21. However AR Tan had decided that expenses which Ms Tan would have incurred in earning the lost income had to be deducted relying on *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174 at 191. Such expenses would be for, inter alia, meals and transport while Ms Tan was not in Singapore, had she still been a cabin crew.

22. Before me, Mr Ramakrishnan argued that such a deduction should not have been made.

23. As a matter of law, he relied on *Lim Poh Choos* case (cited above) and *Dews v National Coal Board* [1988] 1 AC 1.

24. However, *Lim Poh Choos* case did not assist Mr Ramakrishnan. It is authority for the principle that expenses incurred in earning income may be deducted from damages to be awarded to avoid over-compensating a plaintiff. While expenses which Ms Tan would have incurred are not literally spent to earn the income, they had to be deducted to avoid over-compensating Ms Tan.

25. The case of *Dews* also did not assist Mr Ramakrishnan. The passage he cited, at p 13 states:

> One is, however, left with the fact that wherever a man lives he is likely to incur some travelling expenses to work which will be saved during his period of incapacity, and they are strictly expenses necessarily incurred for the purpose of earning his living. It would, however, be intolerable in every personal injury action to have an inquiry into travelling expenses to determine that part necessarily attributable to a chosen life-style. I know of no case in which travelling expenses to work have been deducted from a weekly wage, and although the point does not fall for decision, I do not encourage any insurer or employer to seek to do so.

26. However, the passage goes on to say:

> I can, however, envisage a case where travelling expenses loom as so large an element in the damage that further consideration of the question would be justified as, for example, in the case of a wealthy man who commuted daily by helicopter from the Channel Islands of London. I have only touched on the question of travelling expenses to show that in the field of damages for personal injury principles must sometimes yield to common sense, and to acknowledge the force of Mr. Alexanders submission that the calculation of loss in personal injury cases should be kept simple as a matter of policy, particularly where the sums involved do not justify the costs likely to be incurred by elaborate investigations.

27. Therefore, usually the travelling expenses of a plaintiff are too small to be inquired into.

28. However the situation before me was different. Ms Tan was claiming allowances which she would have earned if she had not been injured but, at the same time, she would have incurred various expenses if she had not been injured.

29. Mr Ramakrishnan also cited another passage from *Dews* at p 14:

> In respect of this part of his earnings the object of which is to provide income available for current expenditure the tortfeasor is, subject to sums necessarily

> spent to earn the income, entitled to no credit for expenditure saved as a result of the injury; the principle that it is no concern of the tortfeasor how the plaintiff chooses to spend his income applies.

30. In my view, this passage did not assist him and, on the contrary, supported the Defendants position. It reflected the same principle as *Lim Poh Choos* case.

31. Mr Ramakrishnan also cited the following passage from the judgment of Selvam JC, as he then was, in *Balasubramaniam s/o Rajoo a minor suing by his father v Singapore Airlines Limited and another* (apparently unreported) which said:

> Laundry and incentive allowance were given only for full attendance. However, there was no suggestion that the plaintiff was prone to absenteeism. Accordingly it should be included in the salary.

32. It was clear from the passage cited that it was in respect of different facts.

33. Furthermore, Ms Tan had conceded in her evidence that any damages for loss of earnings should take into account expenses normally incurred whilst flying (see NE of 31 July 2000 at p 6D).

34. On this point, evidence had been given by one Peter Chong, Assistant Manager (Check/Training), Crew Performance Department, for SIA, that cabin crew spend about 40% of their (entire) monthly allowances on such expenses.

35. The $91,302.12 deducted by AR Tan represents the 40% deduction in the assessment of loss of pre-trial earnings.

36. Mr Ramakrishnan then argued that the 40% deduction should not apply to the Inflight Allowance as it was more of an incentive allowance and not a reimbursement for expenses to be incurred. He also pointed out that Mr Tehs Closing Submission at p 13 para 43 admitted that it should be excluded. Following this line of argument, he also argued that the 40% deduction should not apply to Turnaround Allowance.

37. Mr Ramakrishnan also argued that a deduction of 40% was excessive because:

> (a) Crew meals are provided on most flights;
>
> (b) Options to have meals consumed outside crews hotel, eg. eateries in Chinatown, fast food outlets and take aways and etc would result in lower costs than dining via room-service or in-house restaurants and cafeteria and crews hotels during overseas layover;
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> (c) Options for laundry done at home instead of sending to a launderette;
>
> (d) Option to travel by bus and MRT to get to and from the airport instead of relying on taxi for turnaround flights.

38. In addition, he also argued that Ms Tan would have incurred transport and meal expenses while grounded which she need not have incurred while flying. The suggestion was that there was some overlap if a deduction was already being made for similar type of expenses she would have incurred overseas while flying.

39. Mr Teh argued that the 40% deduction should be deducted from all allowances as that was Mr Chongs unchallenged evidence. Mr Chong had not said that a distinction had to be made between on the one hand, allowances for transport, uniform and meal and on the other hand, inlight allowance and any other allowance. Mr Teh also submitted that his Closing Submission for SIA at p 13 para 43 had erred in so far as it had suggested that the 40% deduction should not apply to the Inflight Allowance.

40. Mr Ashok Kumar for Airbus Industrie adopted Mr Tehs arguments.

41. During arguments before me, Mr Ramakrishnan suggested that he did challenge Mr Chong on his evidence about the 40% deduction. He referred to the second set of notes of evidence at p 91 at C to D which states:

> Q: Overnight and meal allowances. Agree that some crew spend all of it and others do not?
>
> A: No first-hand knowledge. It is certainly possible.
>
> Q: And some crew would eat at cheaper restaurants and others at more expensive restaurants?
>
> A: That is possible.

42. I was of the view that these questions did not amount to a challenge to the figure of 40% from Mr Chongs evidence and the answers also did not contradict the 40% figure.

43. In any event, Mr Ramakrishnan eventually accepted that he had not challenged the 40% figure.

44. Ultimately, no other figure was suggested by Mr Ramakrishnan to Mr Chong as the appropriate percentage to be deducted. Neither did Ms Tan in her evidence suggest any such figure. However, in the appeal before me, Mr Ramakrishnan suggested a 10% deduction instead of 40%. This submission came too late.

45. In the circumstances, I had to allow the 40% deduction, amounting to $91,302.12, to remain in respect of the loss of pre-trial earnings. The 40% deduction also applies to the loss of future earnings and AR Tan has taken this into account.

Loss of Future Earnings

46. As for loss of future earnings, I would refer to paras 11 to 14 and 28 to 32 of AR Tans Grounds:

> 11. As for loss of future earnings, which counsel for the Plaintiff labelled as "loss of future earning capacity" in his closing submissions, it was argued that the Plaintiff was entitled to a sum of $1,086,495.00 comprising the following elements.
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> | | | |
> |---|---|---|
> | (i) | "Loss of earning capacity" based on a multiplicand of $5,739.00 per month and a multiplier of 15 years, less the $900.00 per month which the Plaintiff might earn if she left the 1st Defendants and took up alternative employment | ($5,739.00 x 12 x 15) ($900.00 x 12 x 15) = $871,020.00 |
> | (ii) | 13th month Annual Wage Supplement ("AWS"), taking a basic salary of $2,970.00 per month | $2,970.00 x 15 = $44,550.00 |
> | (iii) | Yearly bonus pegged at 3.5 times the basic monthly salary of $2,970.00 per month | (3.5 x $2,970.00) x 15 = $155,925.00 |
> | (iv) | Gratuity for female cabin crew pursuant to cl 23 of the 1998 agreement between the 1st Defendants and its staff union as to terms of employment ("1998 Collective Agreement") | $15,000.00 |
>
> 12. The multiplicand of $5,739.00 in item (i) was derived by calculating the

average basic pay of a LSS, a CSS [Chief Stewardess] and an in-flight supervisor ("IFS"), which is the next rank in the cabin crew hierarchy after the post of CSS. Counsel for the Plaintiff explained that this approach had been taken to reflect the Plaintiffs chances of promotion in the future. Given the Plaintiffs excellent track record with the 1st Defendants, counsel argued, but for the accident, she could and would have been promoted first to the post of CSS and then to IFS.

13. In this respect, the Plaintiffs position was diametrically opposed to that taken by the 1st Defendants. Testifying on behalf of the 1st Defendants, Mr Peter Chong stated that even if the Plaintiff had not been injured on 25 November 1994, she would probably still be at the rank of LSS currently and was likely to remain at that position for some time to come. He explained that this was because the Plaintiffs performance appraisal fell within the middle of the range of appraisal scores given to other FSSes who had been promoted to LSSes at around the same time as the Plaintiff. Furthermore, compared to those of her fellow LSSes who had been promoted to CSSes in 1995, the Plaintiffs performance appraisal score was ranked the 10th lowest. This indicated that the Plaintiff was not an outstanding candidate for promotion. Mr Chong also drew attention to the higher attrition rate in general amongst female cabin crew as compared to male cabin crew. In his view, the Plaintiff might have left the 1st Defendants employment for, inter alia, personal reasons prior to being promoted to CSS even if she had not been injured. Mr Chong further pointed out that in any event, there had been a surplus of CSSes since 1998 in light of the 1st Defendants decision to change the cabin crew composition for all types of aircraft apart from the Airbus A310. This change consisted of placing IFSes in charge of these aircraft in lieu of CSSes, thus reducing the need for CSSes within the organisation. According to Mr Chong, the combination of these factors made it unlikely that the Plaintiff would have been promoted to CSS.

14. In his closing submissions, counsel for the Plaintiff contended that the above evidence of Mr Chong was unreliable for several reasons. First, Mr Chongs conclusion on the Plaintiffs promotion prospects, in terms of her performance appraisal score, was based only on her job performance. Other relevant factors such as the Plaintiffs educational qualifications, her years of work experience, and her good disciplinary and attendance record had not been taken into account, which Mr Chong conceded in cross-examination he ought to have done. Counsel pointed out that the difference between the Plaintiffs performance appraisal score of 18 and that of the successful candidates in the 1995 promotion exercise (score of 24) was only six points, which difference might have been bridged if these other factors had been considered. Second, it was argued that Mr Chongs omission to take relevant factors apart from job performance into account amounted to a deliberate suppression of evidence. Third, counsel submitted that Mr Chong had "deviously" introduced into his affidavit of evidence-in-chief figures and graphs which did not form part of the Agreed Bundle of Documents. This allegation appeared to be targeted at exhibit "PC-1A" of Mr Chongs affidavit, which is a table setting out the attrition rates for the 1st Defendants cabin crew from February 1999 to March 2000. The attrition figures had initially been set out in exhibit "PC-1", but a fresh table (exhibit PC-1A) was substituted in its place with the courts leave subsequently after Mr

Chong alerted the parties of a calculation error which he had made in preparing exhibit PC-1.

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28. In terms of calculating the quantum to be awarded to the Plaintiff, I did not think that the approach canvassed by counsel for the Plaintiff (11, supra) would reflect accurately the loss in income which the Plaintiff is likely to suffer in future as a result of her injury. I was of the view, instead, that the award for loss of future earnings should be divided into two different time frames, namely (i) the period from the present date up to the end of her current contract with the 1st Defendants (5 October 2001); and (ii) the five-year period thereafter from 6 October 2001 to 5 October 2006.

29. As I highlighted above (27, supra), the Plaintiff is still employed by the 1st Defendants presently. Notwithstanding her unfitness to perform cabin crew duties and the strain which this Suit must have had on her working relationship with the 1st Defendants, I thought it more likely than not that the 1st Defendants would retain the Plaintiff in its employment till the end of her current contract, which expires on 5 October 2001. Since the Plaintiff would continue to receive her basic pay and CPF contributions for this period, her loss in income would be limited to the allowances which she would have earned had she been able to continue with her cabin crew duties. Taking a putative gross monthly salary of $5,185.00 (17, supra) and deducting the Plaintiffs basic pay and CPF contributions which come up to $1,889.20 per month ($1,718.37 + $171.83), the Plaintiff would be receiving $3,294.80 in allowances at present, if not for her injury. Of these allowances, approximately 40% would be spent on work-related expenses (20, supra). Thus, the Plaintiffs loss in income from the present date up to 5 October 2001 (rounding off this period of 12 months) would be $23,722.56 ([60% x $3,924.80] x 12 months).

30. As for the period from 6 October 2001 onwards, I thought it unlikely that the 1st Defendants would renew the Plaintiffs contract for a further five-year term given her unfitness for cabin crew duties. If the Plaintiff had not been injured however, given her good service record, the 1st Defendants would most probably have extended her contract for a fourth five-year term. This would also have been her final contractual extension in light of cl 21(5)(d) of the 1998 Collective Agreement, which provided that a LSS should be employed on fixed term contracts consisting of four five-year contracts. Thus, even if the accident had not occurred, the Plaintiff would have had to leave the 1st Defendants employment by 5 October 2006 at the very latest.

31. In reaching the above conclusion, I discounted the possibility that the Plaintiff might have been promoted to CSS with the corollary guarantee of alternative ground employment after the end of her fourth five-year contract if she so opted (cl 21(7) of the 1998 Collective Agreement) if she had not been injured. This was because her prospects of promotion were fraught with uncertainties. As Mr Peter Chongs evidence revealed, whether or not a cabin crew employee is promoted to a particular rank depends heavily on first, whether

there are vacancies for that rank, and second, whether the 1st Defendants decide to hold a promotion exercise. Mr Chong pointed out that it is not inevitable that a promotion exercise for a particular rank will be held if there is a shortage of cabin crew of that rank. For instance, a change in the business climate or the crew composition on flights might obviate the need for a promotion exercise for a particular rank even though there is or is likely to be a shortfall in cabin crew of that rank. In the case of CSSes, the first Defendants had decided not to elevate any of its employees to this rank with effect from 1998 due to the change in the cabin crew composition for its aircraft (13, supra). In light of this, I thought it unlikely that the Plaintiff would be made a CSS in the future. As for whether the Plaintiff would be a CSS by now if she had not been injured in November 1994, I thought this to likewise be unlikely. Mr Chong had indicated that the Plaintiffs performance vis--vis the other successful candidates in the 1995 exercise for promotion to the rank of CSS was not outstanding (13, supra). Admittedly, his conclusion was reached without the benefit of other relevant factors such as the Plaintiffs educational qualifications, work experience, and good disciplinary record. I did not, however, regard this omission as detracting from the weight to be placed on his evidence since a candidates job performance is the most important factor in the service record component of the 1st Defendants promotion process. Besides, even if the other factors had been taken into account, it is questionable if they would have improved the Plaintiffs performance appraisal vis--vis that of the other candidates significantly, since the Plaintiff was relatively junior in terms of her length of service with the 1st Defendants, and since most of the other candidates were likely to have had education and disciplinary records comparable to hers. For these reasons, I did not think it likely that the Plaintiff would be either a CSS by now or promoted to that rank in future if she had not been injured. I thus assessed her loss of future earnings on the basis that she would continue to remain at her current position of LSS until 5 October 2006.

32. I should add at this point that I found the submissions of counsel for the Plaintiff on Mr Chongs unreliability as a witness entirely devoid of merit. On the contrary, from the manner in which he gave evidence, I found Mr Chong to be a honest and truthful witness who did not shy away from admitting he had made mistakes in reaching the conclusion stated in his affidavit of evidence-in-chief when these errors were pointed out to him in cross-examination. There was also no question of his deliberately withholding evidence from the court or deviously introducing new evidence at the eleventh hour in the form of exhibit PC-1A of his affidavit. I allowed that exhibit to be substituted in lieu of exhibit PC-1 as I was satisfied that Mr Chong had made a genuine arithmetic error in working out the figures stated in the latter exhibit.

47. Ms Tan had suggested in her affidavit that the multiplier should be 12 years. However during cross-examination, she said her lawyer would be in a better position to deal with this point.

48. In closing submissions before AR Tan, Mr Ramakrishnan had submitted that the multiplier should be 15 years based on a retirement age of up to 67 under the Retirement Age Act. He referred to a number of authorities but mainly to two.

49. One of the cases he relied on was *Lai Wee Lian v Singapore Bus Services (1978) Ltd* [1984] 1 MLJ 325.

50. However the facts there were different. In that case, the plaintiff had sustained serious injuries when she was thrown off a bus, to the extent that her mental powers had been greatly reduced and at most she could do simple work on a part-time basis. The Privy Council in that case considered the plaintiffs age of 23 at the time of the accident and the retirement age of 55 and then took into account the uncertainties of human life and the fact that the plaintiff would be paid her damages as a lump sum. In these circumstances, the Privy Council was of the view that a multiplier of 15 years was appropriate.

51. Another case cited by Mr Ramakrishnan was *Balasubramaniam s/o Rajoo*, which was cited earlier for a different aspect of Ms Tans claim (see para 31 above). There, a multiplier of 16 years was used by the court. However this was also a case where the mental powers of the plaintiff had been affected.

52. In Ms Tans case, there was no such suggestion. She can carry on working up to age 55 or 60 or beyond. Even without the injury, she might or might not have continued working with SIA as a cabin crew up to the expiry of the last of the five year terms mentioned by AR Tan in her Grounds. It was much less likely that she would have continued working as a cabin crew after the last of these terms.

53. In these circumstances, I was of the view that AR Tan was correct in using a multiplier based on the expiry of the last of the five year terms and not based on when Ms Tan would retire.

54. The next main argument by Mr Ramakrishnan on loss of future earnings was that Ms Tan might have been promoted to the post of Chief Stewardess (CSS) and then Inflight Supervisor (IFS). Ms Tan had made a claim based on the average pay of an LSS, CSS and IFS. She said this was based on her having an equal chance of being promoted to CSS and then to Inflight Supervisor.

55. On the other hand, Mr Chong did not think she would have been promoted to CSS and then to IFS for the reasons mentioned by AR Tans Grounds.

56. Counsel for the Defendants also argued that there were so many uncertainties in Ms Tans claim on this item (see the Grounds of AR Tan).

57. While it is true that there were many uncertainties in respect of Ms Tans claim that she would have been promoted, the fact is that she has lost the opportunity to be considered for promotion if a promotion exercise were to be conducted.

58. However, a claim for loss of opportunity would have to be presented differently, ie. as a percentage of the pay of a CSS and an even smaller percentage of the pay of an IFS to reflect the loss of opportunity.

59. Ms Tans claim was not presented on this basis and there was no evidence as to what a fair percentage to represent the loss of opportunity should be.

60. Furthermore, Ms Tan is to be paid her damages in a lump sum. This factor was not taken into account in determining the multiplier.

61. In the circumstances, I decided not to grant her any sum for the loss of opportunity.

62. As regards Ms Tans appeal against my decision on costs, I will deal with that later below together with the Defendants appeal against my decision on costs.

THE DEFENDANTS APPEAL TO THE COURT OF APPEAL

63. The Defendants appeal is against that part of my order:

(a) which adds $14,700 to the sum awarded by AR Tan for loss of pre-trial earnings,

(b) in respect of my consequential order on costs.

The $14,700

64. The $14,700 was a sum deducted by AR Tan in respect of loss of pre-trial earnings for Ms Tans failure to mitigate her damages.

65. I refer to paras 22 to 25 of AR Tans Grounds regarding this:

> 22. Fourth, I was of the view that a deduction had to be made from the Plaintiffs lost (*sic*) pre-trial income to reflect her failure to mitigate her loss arising from the accident.
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> 23. During cross-examination, the Plaintiff stated that after the 1st Defendants informed her in February 1997 that she was unfit to resume her cabin crew duties, she made some attempts to seek a cabin crew position with other airlines. She did not, however, pursue her inquiries beyond the preliminary stage as she thought it unlikely that other airlines would employ her given the condition of her hand and she "did not think [she] could bear the rejection if [she] were to go on". As for alternative non-cabin crew employment, the Plaintiff testified that she did not make any attempts to look for such jobs as the remuneration from these jobs was likely to be less than what she was receiving in 1997 as a grounded LSS. She subsequently conceded, however, that there might be some non-cabin crew positions which were more well-paid than her current post as a grounded LSS vis--vis her salary both in 1997 and at present.
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> 24. In light of the Plaintiffs evidence, counsel for both Defendants submitted that she had failed to mitigate the loss which she suffered pursuant to the Defendants wrong. It was argued that once she realised the 1st Defendants would not re-deploy her on flights again, the Plaintiff could and should have taken reasonable steps to minimise her loss in income by seeking alternative employment either with other airlines or outside the airline industry. Counsel suggested that the Plaintiff could, for instance, have resumed a job in the banking industry where she previously worked before joining the 1st Defendants, or pursued career opportunities in the hotel, advertising or service industry.
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> 25. I was of the view that the Plaintiff did not act unreasonably in not seeking alternative employment immediately after the 1st Defendants informed her in February 1997 that she was unfit to work on board flights, given the uncertain economic climate then and the financial crisis which was soon to hit the Southeast Asian region. Even after economic conditions improved in late 1998/early 1999, the Plaintiff could not be faulted for failing to seek employment with other airlines as the residual weakness in her left hand made it highly unlikely that she would be able to secure any other cabin crew position. The Plaintiff should, however, have tried to look for an alternative *non-cabin crew* job

> [emphasis added] from that time onwards. Given the Plaintiffs good service record with the 1st Defendants, attractive personality, and commendable grades in the Malaysian equivalent of the GCE "O" and "A" levesl, I was of the view that she could have obtained non-cabin crew employment, for instance as a secretary, which would have ameliorated the loss in allowances which she suffered after she was taken off cabin crew duties. To reflect this failure to mitigate her loss, a deduction of $700.00 per month for the period from January 1999 onwards i.e. a total of $14,700.00 ($700.00 x 21 months) ought to be made from the lost earnings to be awarded to the Plaintiff.

66. In cross-examination, it was put to Ms Tan that as regards alternative non-cabin crew employment she did not make sufficient effort to reduce any loss which she said she had suffered as a result of her injury. She agreed (NE of 31 July 2000 at p 7 at C).

67. In my view this was merely an agreement by Ms Tan that she did not really try to seek alternative non-cabin crew employment. She did not concede that she had acted unreasonably in failing to seek alternative non-cabin crew employment.

68. I was of the view that Ms Tan had not acted unreasonably in failing to seek alternative employment in a different industry when she was still employed by SIA and earning a decent salary.

69. Moreover, SIA might have had fringe benefits which other industries might not have eg. their staff might only have to pay a small percentage for air fares on its flights.

70. Secondly, while there might be some non-cabin crew positions which were more well-paid than Ms Tans current position as a grounded LSS, there was insufficient evidence to persuade me that she would have been likely to obtain alternative employment at a higher salary.

71. Thirdly, the deduction of a sum of $700 per month (x 21 months = $14,700) to reflect the alleged failure to mitigate on Ms Tans part was without basis.

72. I should mention that during re-examination, Ms Tan had made a concession. At NE 61 at B to D (of the notes of evidence on 31 July 2000 onwards), her evidence was:

> Q: What would be the salary that you would draw as a clerk or receptionist?
>
> A: In Singapore?
>
> Q: Yes.
>
> A: Not very well-versed with job market in Singapore. Probably $950 to $1,000 per month.
>
> Q: Would you agree to deduction of this amount from the future earnings allowances by the Court:
>
> A: Yes.

73. This concession was made in respect of future earnings and not pre-trial earnings and applied by AR Tan to the former only. Furthermore it was made in the context that some time in the future she might leave SIA and obtain alternative employment.

74. Even then I was puzzled as to why the concession was made because Ms Tan did not say that the $950 or $1,000 per month was additional income over and above her basic salary as a grounded LSS. However, as the concession was not withdrawn, I need not say any more thereon except that her concession is not to be considered in the context of pre-trial earnings.

75. In the circumstances, I decided that the $14,700 deduction should not have been made and added this sum back to the amount to be awarded to Ms Tan for loss of pre-trial earnings.

76. I had also added back $2,736.31 being excessive income tax deducted by AR Tan in her computation of loss of pre-trial earnings (see para 10(b) above). However, there is no appeal by the Defendants or Ms Tan in respect of the $2,736.31.

Costs

77. The Defendants were not so much concerned with the $14,700 added back as the effect it would have on the issue of costs. With the $14,700 added back, the total amount payable to Ms Tan turned out to be slightly more than the Offer (see paras 12 and 13 above). This put the Defendants claim for indemnity costs (from the date of the Offer) in jeopardy.

78. However, both the Defendants Counsel still argued before me that Ms Tan should be ordered to pay their costs on an indemnity basis under O 22A r 9(3) of the Rules of Court.

79. Order 22A r 9(3) states:

> (3) Where an offer to settle made by a defendant
>
> > (a) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and
> >
> > (b) is not accepted by the plaintiff, and the plaintiff obtains judgment not more favourable than the terms of the offer to settle,
>
> the plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise.

80. They argued that, in substance, Ms Tan had not got more than what had been offered and accordingly she should have to pay the costs of both Defendants on an indemnity basis from the date of the Offer.

81. On the other hand, Mr Ramakrishnan argued that a sum of $162,920.18 which Ms Tan had been receiving based on her current job should be also taken into account in determining costs. He said that with this figure, Ms Tan would be receiving about $460,000 (without even taking into account the sums which I had added back) and this was well in excess of the Offer.

82. I did not agree. The $162,920.18 was not part of Ms Tans claim as she was receiving it anyway. She was claiming more and the question before me was how much more she should receive.

83. Mr Ramakrishnans other argument was that with the two sums which I had added back, the total figure to be paid to Ms Tan was still more than $350,000. It did not matter that it was slightly more. So long as it was not less favourable than the Offer, the Defendants were not entitled to rely on O 22A r 9(3) to claim indemnity costs.

84. Furthermore, he argued that I should make the usual order on costs following the event ie. that the Defendants continue to pay Ms Tan the costs from the date of the Offer on a standard basis.

85. The Defendants relied on *The Birmingham and District Land Company Limited v The London and North-Western Railway Company* [1887] 57 L.T. (the *Birmingham* case) and *Roache v News Group Newspapers Ltd* [1992] Times Law Reports 23 Nov.1992.

86. As regards the *Birmingham* case, the Defendants referred to p 187 of the report where Kekewich J said:

> That leaves me the only question about costs. The rule which I have always adopted, and intend to adopt until corrected by a higher authority, is, that an offer made after litigation commenced must, if it is to have any effect to avoid costs by an unsuccessful party, amount in substance to an offer of everything which the court eventually hold the successful party entitled to.

87. However, this was a general statement referring to the avoidance of having to pay costs. It did not deal with a rule which allowed the court not only to let the offeror avoid paying costs but to order the offeree to pay costs and that on an indemnity basis.

88. As for the *Roache* case, the Defendants referred to the principle summarised in the Times ie:

> Where a plaintiff in a libel action was awarded the same sum as the defendants had paid into court before the trial, and had obtained an injunction against re-publication, for the purposes of costs it was the defendants who were in substance the successful parties since the claim for injunctive relief had not been a significant factor in the plaintiffs prosecution of his claim.
>
> Accordingly, the plaintiff would be ordered to pay the defendants costs after the date of their payment into court.

89. The Defendants also referred to the following passage in the Times report:

> The judge had to look closely at the facts of the particular case before him and ask: Who, as a matter of substance and reality, had won? Had the plaintiff won anything of value or anything he could not have won without fighting the action through to a finish? Had the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?

90. On the other hand, Mr Ramakrishnan referred to the following two passages, in the Times report:

> The second principle was that where a plaintiff claimed a financial remedy in debt or damages and the defendant paid into court a sum not accepted by the plaintiff which was equal to or greater than the sum recovered by the plaintiff in the action the plaintiff ordinarily was ordered to pay the defendants costs from the date of the payment in.
>
> In the ordinary way the plaintiffs failure in the present case to recover more than the sum paid into court would have led to an order that he pay the defendants costs from the date of payment in.

91. He reinforced his argument by pointing out the Defendants had not offered a sum equal to or greater than what Ms Tan

had recovered.

92. I was of the view that the facts in the *Roache* case were different from those before me. There, the plaintiff had obtained the same sum as the defendants had paid into court and the question was whether the injunction he had also obtained was sufficient to make him the successful party for the purpose of costs. The Court of Appeal decided in the negative.

93. I was also of the view that the Defendants argument on the application of O 22A r 9(3) was without merit.

94. First, if it was open to the Defendants to argue that they could still rely on O 22 r 9(3) notwithstanding that Ms Tan was awarded slightly more, then it would have been equally open to Ms Tan to argue that O 22 r 9(3) should not apply if she had been awarded slightly less than $350,000. This would not be correct.

95. Secondly, the Defendants were effectively asking the court to ignore the excess awarded, for the purpose of O 22 r 9(3), on the basis that it was only slightly more. I was of the view that to do so would open the Pandoras box. For example, how much of the excess should be ignored, $1,000 or $10,000 or should it be in percentage terms like 1% or 2% of the Offer?

96. Thirdly, bearing in mind the severe consequences of O 22A r 9(3), I was of the view that it was incumbent on the Defendants to ensure that the Offer comes within the scope of the rule. The Offer must be more favourable ie. more in terms of dollar value than what has been awarded before the Defendants can rely on O 22A r 9(3).

97. I was of the view that this was the correct conclusion because there is another rule on costs ie. O 22A r 12 which allows me to still take into account the Offer even though the Offer is for a sum less than that eventually awarded.

98. Order 22A r 12 states:

> Discretion of Court (O.22A, r.12).
>
> 12. Without prejudice to Rules 9 and 10, the Court, in exercising its discretion with respect to costs, may take into account any offer to settle, the date the offer was made, the terms of the offer and the extent to which the plaintiffs judgment is more favourable than the terms of the offer to settle.

99. In other words, it did not follow that just because the Offer had failed to come within O 22A r 9(3), Ms Tan was entitled to be awarded costs on a standard basis.

100. I took into account:

> (a) the date of the Offer and its terms,
>
> (b) the fact that the sum awarded to Ms Tan under my decision was, as at the date of the Offer, around $2,000 more whereas she had claimed a total of about $1.1 million in her affidavit ie. about $750,000 more.

101. The amount awarded to Ms Tan did not justify four and a half days of assessment before AR Tan. On the other hand, she did receive more than the Offer.

102. In the circumstances, I awarded Ms Tan $1,000 as fixed costs from the date of the Offer to the date of AR Tans decision. It is this aspect of my order on costs for which Ms Tan is appealing to the Court of Appeal.

103. As for the costs before the date of the Offer, I saw no reason why it should be confined to costs on liability only. If, as at the date of the Offer, no work had yet been done by Ms Tans solicitors on the issue of quantum, then, she would not be entitled to claim such costs. However, I was of the view that it was wrong to make a pre-emptive order which would have denied her

solicitors the opportunity of trying to establish that they had done work on the issue of quantum as at that date.

104. Accordingly, I awarded Ms Tan costs prior to the date of the Offer on a standard basis, such costs to include getting up on quantum in addition to liability.

105. As for costs of the appeal before me, Ms Tan had succeeded only partially and had lost on the major items. However the partial success was sufficient to turn around AR Tans order on costs from the date of the Offer such that Ms Tan no longer had to pay the Defendants costs on an indemnity basis from the date of the Offer. That would have been quite substantial.

106. In the circumstances, I decided that Ms Tan should be entitled to some costs for the appeal before me but fixed it at $5,000.

Woo Bih Li

Judicial Commissioner