Man B and W Diesel S E Asia Pte Ltd and Another v PT Bumi International Tankers and Another Appeal
[2004] SGCA 22

Case Number	: CA 75/2003, 79/2003
Decision Date	: 19 May 2004
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s)	: N Sreenivasan and Collin Choo (Straits Law Practice LLC) and Charles Lin Ming Khin (Donaldson and Burkinshaw) for appellants; Philip Tay Twan Lip (Rajah and Tann) for respondent
Parties	: Man B and W Diesel S E Asia Pte Ltd; Mirrlees Blackstone Ltd — PT Bumi International Tankers

Civil Procedure – Offer to settle – Appellant made offer in settlement of claim at trial – Respondent rejected offer – Respondent lost on appeal – Whether appellant entitled to indemnity costs from date of offer – Order 22A r 9(3) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

19 May 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 On 9 March 2004 we delivered a judgment (reported at [2004] 2 SLR 300) allowing an appeal by the appellants-defendants against a decision of the High Court granting damages to the respondent-plaintiff in an action in tort, on account of the fact that an engine supplied by the appellants for use on a vessel of the respondent was defective, thus resulting in the respondent suffering economic losses. We ruled that, in the circumstances of the case, the respondent was not entitled to claim in tort for the economic losses against the appellants.

2 There was also a related appeal which was filed by the respondent who was dissatisfied with the quantum of damages awarded by the judge. In view of our ruling on the defendants' appeal, it followed that the respondent's appeal had to be dismissed. The full facts of the case were set out in our earlier judgment and we do not propose to repeat them here.

3 Following our judgment, the appellants' solicitors wrote to inform this court that on the third day of the trial, 24 April 2002, the appellants made an offer in the prescribed form to pay the respondent the sum of US$1.5m in settlement of its claim. The offer, which was open for acceptance within 14 days, was not accepted.

4 In our judgment, we awarded costs to the appellants in respect of both the appeal as well as the trial below. What the appellants now seek is that, in view of the respondent's non-acceptance of their offer, they be awarded, pursuant to O 22A r 9 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed), indemnity costs instead of just standard costs.

5 The governing provision for our present purposes is O 22A r 9(3), and it reads:

> 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.

6 The respondent made the following points to argue that the appellants should not be granted indemnity costs:

(a) The offer was not serious and genuine, being substantially less than what the trial judge held to be the damages which the respondent was entitled to.

(b) The offer was made very late, after the trial had commenced. The respondent failed in the claim because this court held that the appellants did not owe the respondent a duty of care, a point which was only raised at the start of the trial when leave to amend the defence was obtained. This court has a wide discretion in the matter and should consider all the circumstances before awarding indemnity costs.

(c) The issue of law in question was a highly controversial one and the court only came to its conclusion after much deliberation. It was a novel point.

(d) Much of the time at trial was spent on establishing the fact that the engine supplied by the appellants was defective and the cause of it.

7 Quite clearly, the court is not obliged to award indemnity costs just because the offer made by one party is more favourable than what the opposing party eventually obtained from the court. This is explicitly spelt out in O 22A r 9(5) which reads:

Without prejudice to paragraphs (1), (2) and (3), where an offer to settle has been made, and notwithstanding anything in the offer to settle, the Court shall have full power to determine by whom and to what extent any costs are to be paid, and the Court may make such a determination upon the application of a party or of its own motion.

and in O 22A r 12 which reads:

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 plaintiff's judgment is more favourable than the terms of the offer to settle.

8 In *The Endurance 1* [1999] 1 SLR 661, this court, recognising that O 22A was of recent origin, took into account the approaches taken by some Commonwealth countries, where provisions similar to our O 22A exist, *eg*, Canada and Australia, and held that, generally speaking, the element of compromise should be present in an offer to settle. It said at [43] that "the lack of compromise would be a material consideration in determining whether the plaintiff or the defendant should be penalised with higher costs in cases where there are genuine issues of liability raised". This is because the rationale behind O 22A is to encourage the speedy termination of litigation by agreement of the parties. The offer to settle should therefore be a serious and genuine offer and not just to entail the

payment of costs on an indemnity basis. It should contain in it an element which would induce or facilitate settlement: see *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd (No 2)* [2001] 1 SLR 532 ("*SIA v Fujitsu*") at [10]:

> Even though the relevant [New South Wales] rules are not identical in wording with ours, we would respectfully agree with those views. In our opinion, for an offer to have the effect contemplated in O 22A r 9, it must contain in it an element which would induce or facilitate settlement. When such an element is missing, then, as held in *Data General* [see [63] *infra*], that would be a ground for the court to exercise its discretion to vary the norm relating to costs laid down in r 9.

9 However, we would add one rider to this. Where there is no defence of any substance to a liquidated claim, then compromise is not a necessary element in an offer to settle: see *The Endurance 1* at [43]. The reason for this was explained by Morden ACJO in *Data General (Canada) Ltd v Molnar Systems Group Inc* (1991) 85 DLR (4th) 392 ("*Data General*") at 399 as follows:

> The purpose of the rule is to discourage a defendant from using the judicial process, at the increased cost to the plaintiff, to delay the granting of the inevitable judgment and, in my view, there is no valid policy reason why a plaintiff should have to forgo part of its claim in order to be able to avail itself of the benefit of the rule. In such a case, I do not think there is any unfair prejudice to the defendant in being faced with such an offer.

10 What would constitute a serious and genuine offer to settle must depend on the circumstances and issues of the case. In *Data General*, the plaintiff offered to settle at 100% of the liquidated sum claimed. In view of the complexity of the case which gave rise to uncertainty as to liability, the Ontario Court of Appeal did not consider it appropriate to order costs against the defendant on an indemnity basis.

11 In *Tickell v Trifleska Pty Ltd* (1991) 25 NSWLR 353, the plaintiff made an offer to compromise for 100% of the amount claimed. There the court held that there was no element of compromise in the offer and refused to grant costs on an indemnity basis.

12 At the other end of the spectrum, in *Burton v Global Benefit Plan Consultants Inc* (1999) 93 ACWS (3d) 223; (1999) 556 APR 86, the fifth defendant offered to settle the plaintiffs' claim for $1 in full settlement, inclusive of costs. The plaintiffs, who eventually lost the action, did not accept the offer. The court held the offer to be a nominal one as it effectively asked the plaintiff to capitulate. Indemnity costs were refused to the fifth defendant.

13 Another interesting comparison is *SIA v Fujitsu*, where the issue was whether the defendant air carrier was entitled to enjoy the limitation of liability under the amended Warsaw Convention in respect of goods conveyed by the carrier. The plaintiff was the owner of the goods. The defendant offered to pay a sum based on the limitation of liability prescribed in the Convention. The defendant succeeded in the defence of limitation. However, this court refused to grant indemnity costs to the defendant because (at [11]):

> [T]he offer to settle … was not really an offer to settle as it did not in substance contain any incentive to settle. The crux of the dispute related to the difference between the actual value of the lost package and the sum laid down in the amended Convention as being payable to the respondents for the loss. On that real issue, there was no genuine or serious effort to seek a compromise.

14 It would be noted that one common feature in all these four cases discussed above is the fact that in each instance the offeror effectively expected the other party to capitulate.

15 The offer in the present case was US$1.5m, though without mentioning costs. The trial judge who ruled in favour of the respondent quantified its loss at US$2,979,589. It could broadly be said that the sum offered was about half of the actual loss, even taking costs into account. Bearing in mind that the question of liability was complex and to an extent novel, the offer could not be said to be anything other than serious and genuine. It was a substantial offer with a view to seeking a speedy and amicable solution.

16 We now turn to the other arguments raised by the respondent to resist an indemnity costs order. The first is that the offer was made rather late, after trial had started. There is nothing in O 22A which restricts the time by which an offer to settle may be made. In the scheme of things, such an offer could be made at any time. Obviously, the later it is made, the less it would serve the purpose of the scheme which is to resolve a litigation speedily and less expensively. The trial of the action commenced on 22 April 2002. It was part-heard. The resumed hearing was in October 2002. This was followed by submissions of the parties. Judgment was delivered only on 18 July 2003. An acceptance of the offer would, of course, have brought the action to an early close and saved costs.

17 Next is the point that the question of law in issue in the action was a highly controversial one. That is not in dispute. It will be recalled that in *Data General* the offer by the plaintiff to settle was at 100% of the sum claimed but in view of the complex nature of the case, the court exercised its discretion in not ordering indemnity costs against the defendant. In the present case, it was not the plaintiff (the respondent) who made the offer but the defendant (the appellants), and, more importantly, the offer was substantial and constituted more than 50% of the sum eventually awarded by the court below (not including costs). It is precisely in a case such as this, where the question of law involved is of some complexity, that there should be some give and take on both sides. Viewed in this light, the offer of the appellants was a serious one, deserving of consideration.

18 The last point of the respondent is that much of the time at the trial was spent in establishing the fault of the engine. This is neither here nor there. To establish its claim, the respondent had to prove three things: (a) a duty of care on the part of the appellants; (b) there was a breach of that duty; and, (c) the respondent had suffered losses. The fact that the respondent managed to establish two of the three elements does not mean that the respondent should only bear the costs relating to the element on which it failed. The respondent failed in the action and must bear the costs of the action. It would be different where a defendant raised unmeritorious defences which were rejected by the court and if the defendant should nevertheless succeed on one of the defences the court would be entitled to refuse the defendant costs in relation to work done on those failed defences.

19 However, there is one other matter that may stand in the way of the appellants in their claim for indemnity costs. In [59], we have set out O 22A r 9(3) which governs an offer to settle made by a defendant. For a defendant to be entitled to indemnity costs from the date of the offer to settle, two conditions must be satisfied. First, the offer must be on the table up to the disposal of the claim. Second, the plaintiff has obtained a judgment which is not more favourable than the terms of the offer. In our present case, the appellants' offer to settle was valid only for 14 days. Thus the first condition is not satisfied. However, the appellants say that r 9(3) is not applicable to a case like the present, where the plaintiff fails completely. There appears to be some merit in this point as r 9(3) talks about the plaintiff being "entitled to costs on the standard basis to the date the offer was served". The appellants aver that they are relying on the general discretionary powers of the court under O 22A r 9(5) and r 12. These two rules are quoted in [61] above.

20 The question which remains is whether the court, in the exercise of its discretionary power, should have regard to the fact that the offer made by the appellants was valid only for 14 days and had lapsed long before the trial judge rendered her verdict and even longer still by the time the action was concluded on appeal. The term "disposal of the claim" in O 22A r 9(3) must refer to the final disposal of the claim where there is an appeal. The corresponding provision applying to an offer to settle emanating from a plaintiff, which is set out in O 22A r 9(1), also contained a similar condition. Therefore, the question is whether the court should apply a different consideration where the plaintiff fails completely. We are unable to see any rational basis for waiving that condition just because a plaintiff fails completely instead of partially. It seems to us that the rationale for requiring an offer to remain on the table until judgment, before penalising the offeree party with indemnity costs, is that that party would have been able to accept the offer at all times but had refused to do so.

21 Accordingly, in the circumstances of the present case, we are not inclined to accede to the appellants' request for indemnity costs.