LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd (judgment on costs) [2003] SGHC 263

Case Number : Suit 355/2002

Decision Date : 29 October 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Raymond Chan (Chan Tan LLC) for plaintiff; Wong Yoong Phin (Wong Yoong Phin and Co) for defendant

Parties : LK Ang Construction Pte Ltd — Chubb Singapore Pte Ltd

Civil Procedure – Offer to settle – Whether initial offer deemed withdrawn by final offer – Implications on costs

Civil Procedure – Offer to settle – Whether judgment sum more favourable than offer – Order 22A r 9 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed)

1. The plaintiff sued the defendant for breach of contract and libel. The plaintiff failed on the former and succeeded in the latter. I entered interlocutory judgment for the plaintiff on 18 December 2002 with damages to be assessed and reserved costs as counsel informed me that there were offers of settlement from the defendant.

2. On 25 May 2003 the damages were assessed at $15,000 with interest at 6% p.a. from the date of the writ to the date of assessment, which worked out to $424.84. The plaintiff's appeal from the assessment was dismissed.

3. The defendant had made two offers of settlement. The first offer was made on 5 August 2002 for $20,000 in full and final settlement of the plaintiff's claim. On 20 September, the defendant made a second offer of $30,000 inclusive of costs. Both offers were made on a global basis for the plaintiff's claims in contract and libel.

4. Neither offer was accepted, and the matter proceeded to trial between 30 September and 4 October 2002.

5. After the dismissal of the plaintiff's appeal on the damages, parties came back to me on the reserved costs of the trial.

6. Both parties presented their arguments with reference to the second offer. I will refer to the status of the offers in a later part of these grounds.

7. Costs in such a situation is governed by Order 22A rule 9(3) of the Rules of Court which provides that

> 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 (a) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and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.

8. The defendant contended that as the plaintiff had obtained judgment of $15,424.84 ($15,000

principal sum plus $424.84 interest) without taking costs into account, it is only entitled standard costs up to 20 September and the defendant is entitled to indemnity costs from 21 September unless the plaintiff obtained costs of more than $14,575.16 as at 20 September, so that the total judgment sum will be less than the offer made.

9. The plaintiff submitted that the $30,000 offered was less than the amount the plaintiff would recover inclusive of costs because the plaintiff's costs would exceed $15,000 if taxed. Since the costs were not determined no one can say with certainty whether the judgment sum was more or less favourable than the offer.

10. The plaintiff argued in the alternative that the offer to settle inclusive of costs is ambiguous and ineffectual. Reference was made to *Associated Confectionery (Aust) Ltd v Mineral and Chemical Traders Pty Ltd* (1991) 25 NSWLR 349. In that case, the defendants made an offer of compromise "in the sum of $135,000 inclusive of costs". The offer was not accepted and the plaintiffs eventually obtained judgment of $88,007.80 and interest of $18,216.96. The court then had to decide on costs under the Supreme Court Rules 1970 Pt 52, r 17 which appears from the report to be similar to our r 9.

11. Giles J held at p 351 –

> (I)t may be that the offer of compromise simply cannot be treated as an offer of compromise to which effect can be given because it is just not possible to determine whether or not the result of the proceedings is more favourable or less favourable than the offer. It is impossible to determine that because one does not know how much of the sum of $135,000 was or should be attributed to costs.

and that

> If the impact of costs upon an offer had to be borne in mind then whenever a court was required, … to determine whether the offer was more favourable or less favourable than the result of the proceedings it would be necessary to indulge in a taxation of costs. That is simply not practicable.

12. I do not think counsel was correct to say that the judge found the offer ambiguous. He could have no difficulty in understanding the offer. It was "We offer $135,000 in settlement, and that includes your costs." If the plaintiff accepted the offer, there would be a binding and enforceable obligation on the defendant to pay the sum offered.

13. The judge found the formulation of the offer not practicable. It is true that such an offer may require taxation to decide whether or not a subsequent judgment is more favourable when the sum awarded (without the costs) is lower than the offer.

14. Under r 9 a successful plaintiff is entitled to costs, which are the full costs if the judgment (inclusive of costs) is more favourable than the offer, or costs up to the service of the offer if it is not. In determining the costs element of the judgment for this purpose, costs should be computed as at the date of the service of the offer.

15. In some cases, taxation may not be necessary. For example, where the offer is $30,000 and the judgment sum (before costs) is $29,500, it would be safe to say that costs up to the service of the offer would exceed $500, and the judgment sum with costs is more favourable than the offer. Where the costs have to be taxed for this purpose another taxation may have to be done. If the taxed costs added to the judgment sum exceed the sum offered, the offeree is entitled to the full costs of the action which have to be taxed. That may be a little cumbersome, but it is not impractical, and it may be the only feasible solution other than deciding not to apply r 9 at all.

16. In the course of arguments two issues (a) the effect of multiple offers and (b) the criteria for determining favourability arose which should be addressed.

17. Counsel argued that when the defendant made the second offer, the first offer is deemed to be withdrawn, citing the unreported decision in *Te An Nyah v Tan Jenny & Anor (*Suit No. 1373 of 1996).

18. I do not think that an offer should be deemed to withdraw a previous offer. The rules do not provide for deemed withdrawals other than by expiration of time (r 3(4)). A subsequent offer will have that effect if it states that expressly, but that should not be a deemed effect. If no withdrawal is expressed then both offers remain open for acceptance as long as they remain and have not expired. It may be purposeless for the offeree to consider a $50,000 offer that is followed by a $100,000, but that is meaningful to the offeror if judgment is entered for less than $50,000 as his entitlement to indemnity costs runs from the date of service of the $50,000 offer. Offers of different sums may have different attractions. An offer of $50,000 to be paid immediately may not be less attractive than a $75,000 offer to be paid in instalments, and there is no reason why the offeree should not be allowed to choose between them.

19. In this case, there is no reason to deem the offer of $20,000 to have been withdrawn by the $30,000 offer. The defendant should not have to forego the benefit of the first offer if the full judgment sum is less than $20,000. However, I will stay with the $30,000 offer as both parties have treated that as the operative offer in the arguments on costs.

20. The other issue is the treatment of favourability. Singapore Civil Procedure 2003 states at para 22A/9/3 that when determining whether the judgment obtained is less or more favourable than the terms of the offer to settle, the court must consider the dollar value of what has been awarded. It refers to the unreported decision in *Tan Shwu Leng v Singapore Airlines Ltd and Airbus Industries* (Suit No 1906 of 1997) where it was said "The offer must be more favourable, i.e. more in terms of dollar value than what has been awarded before the defendant can rely on O.22A r.9(3)" (a reading of the judgment shows that reference was made to the monetary offer made in that case, and not to offers generally). The Singapore Court Practice 2003 states at p 662 that "(t)he [favourability] issue may not always be easy to determine as quantum may not be conclusive of advantage."

21. Favourability would often be measured in monetary terms, but it should not be restricted to that. If a plaintiff sues a defendant for a three-year licence, and rejects an offer of a two-year licence, then a judgment obtained for a one-year licence is less favourable than the offer.

22. Reverting to the present case, a final position on costs cannot be taken at the moment. I direct that the plaintiff tax its costs on the standard basis up to the date of service of the second offer. After that is done, then if the aggregate of the costs, the principal sum of $15,000 and interest of $424.84 is $30,000 or more, the plaintiff will have half of the costs taxed up to the date of judgment. It should not have full costs as it only succeeded on one of the two causes of action. If the aggregate amount is less than $30,000, r 9(3) shall apply and the plaintiff will have costs on the standard basis up to the service of the second offer and the defendant have costs on the indemnity basis after that date.