Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd and Others (No 2) [2004] SGHC 105

Case Number : Suit 352/2001

Decision Date : 21 May 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Manjit Singh and Sree Govind Menon (Manjit Govind and Partners) for plaintiff; Hong Heng Leong, Ng Wai Hong and John Wang (Ang and Partners) for fourth defendants; Edwin Lee and Looi Ming Ming (Rajah and Tann) for fifth defendants

Parties : Afro-Asia Shipping Co (Pte) Ltd — Da Zhong Investment Pte Ltd; Ong Hoo Kim Constructions (Pte) Ltd; Falcon Piling Pte Ltd; Trevi Contractors (S) Pte Ltd; Chin Kok Kwong Design and Build Pte Ltd

Civil Procedure – Costs – Principles – Defendants electing not to call any witnesses late into trial – Plaintiffs failing in action – Whether defendants should bear costs incurred by plaintiffs in preparing to cross-examine defendants' witnesses – Whether defendants should bear costs of hearing fees thrown away – Order 35 r 4(3), O 59 r 3(2) Rules of Court (Cap 332, R 5, 2004 Rev Ed)

Civil Procedure – Costs – Principles – Offer to settle made by defendants – Whether offer reasonable or genuine – Whether defendants entitled to costs on indemnity basis – Order 22A r 9(3) Rules of Court (Cap 332, R 5, 2004 Rev Ed)

Civil Procedure – Costs – Principles – Plaintiffs managing to prove only one minor portion of claim – Whether plaintiffs should pay defendants' costs – Order 59 r 3(2) Rules of Court (Cap 332, R 5, 2004 Rev Ed)

Civil Procedure – Costs – Principles – Whether plaintiffs entitled to raise arguments on substantive issues for justifying award of costs in their favour

21 May 2004 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This judgment deals only with the issue of costs in relation to the plaintiffs' claims against the fourth and fifth defendants in this action, namely Trevi Contractors (Singapore) Pte Ltd ("Trevi") and Chin Kok Kwong Design & Build Pte Ltd ("CKK"). The action was tried before me over an extended period of time in 2002 and 2003. On 21 November 2003, I issued my judgment ([2004] 2 SLR 117) dealing with the substantive issues in the case. In that judgment, I dismissed the plaintiffs' claim against Trevi and, whilst I entered judgment for the plaintiffs against CKK, I did so on the basis that the plaintiffs had proved only one minor portion of their claim against CKK. I indicated in my judgment that I would hear the parties on costs.

2 The parties appeared before me on the issue of costs in January and February this year. Thereafter the plaintiffs and Trevi both put in written submissions. The situations of Trevi and CKK are not the same and distinct issues arise in each case. I will deal with these in turn.

Trevi's claim for costs

3 The plaintiffs' action against Trevi failed completely. Applying the usual rule prescribed by O 59 r 3(2) of the Rules of Court (in those circumstances would mean ordering the plaintiffs to pay Trevi's costs. There was only one reason that I hesitated to make such an order. I had a concern over Trevi's decision not to call any evidence. As I explained in my earlier judgment, before the trial started, Trevi had filed affidavits from seven witnesses whom they intended to call to give evidence on their behalf. They had also made disclosure of voluminous documents. The plaintiffs' case closed on 10 April 2002. When the case resumed on 2 September 2002, the first three defendants opened their joint defence. This was concluded on 14 January 2003. At that stage, Trevi elected not to call any evidence. As the fifth defendants, CKK, also made that same election, the case then concluded. It had been anticipated that it would take a further eight days for Trevi and CKK to each present their evidence. Those eight days were vacated. After considering the evidence, I found that the plaintiffs had not proved their case against Trevi. I reserved the issue of the costs payable to Trevi, however, as I wished to give further consideration to the question whether Trevi should have to bear some of the costs incurred by the plaintiffs in preparing to cross-examine Trevi's witnesses since such costs were thrown away by reason of Trevi's election not to call evidence.

4 The plaintiffs submitted that Trevi should pay, on the indemnity basis, for all work done by them in preparing to cross-examine Trevi's seven witnesses including their review of Trevi's documents and other material and the getting up required. They pointed out that the work had been considerable. The affidavits of evidence-in-chief and documents filed by Trevi totalled 17,000 pages. Further, Trevi's election not to call any witnesses had taken place only on the 33rd day of the trial. This was after hearing dates had been taken for Trevi's witnesses. Despite the plaintiffs' efforts to recover the costs of the hearing dates vacated because Trevi and CKK had not called witnesses, the amount recovered was $4,960 less than the sum that had been paid to the Registry. The plaintiffs submitted that Trevi should pay that sum of $4,960.

5 The plaintiffs filed supplementary submissions on 24 February 2004. In these they argued that Trevi had had actual knowledge of the damage and subsidence caused by their work to AA Building and that Trevi had contracted with the first defendants, for a financial consideration, to assume responsibility for dismantling certain collective supports which had been erected at AA Building. Various items of evidence were cited in support of the contention that Trevi's work had caused damage to AA Building. The plaintiffs also argued that Trevi had caused actual damage by failing to remove the collective supports and to replace them with a permanent solution. Submissions were also made on alleged suppression of documents by Trevi over the course of the proceedings. The plaintiffs contended that all these matters should be taken into account in the decision on costs. I find the contents of the supplementary submissions totally irrelevant to costs and, further, to be misplaced. My judgment set out my reasons for finding that the plaintiffs had not proved that Trevi's works had damaged AA Building. The plaintiffs have appealed against that finding. They are entitled to do so and to argue in the Court of Appeal that my finding was against the weight of the evidence. They are not, however, entitled to bring up to me their arguments on the substantive issues as a ground for justifying an award of costs in their favour when they have lost the substantive case.

6 Trevi also put in extensive submissions on costs. Much of their submissions consisted of replies to the plaintiffs' arguments on the evidence and the alleged suppression of documents. I need not detail those replies here. On the specific question as to whether there should be any modification of the normal rule that costs follow the event to reflect the impact on the plaintiffs of Trevi's decision not to call evidence, Trevi made the following points:

(a) The work undertaken by the plaintiffs in preparing to cross-examine Trevi's witnesses was part of basic trial preparation and must have been completed long before Trevi's election not to adduce evidence. There was no causal link between Trevi's election and the plaintiffs'

preparatory work. Most counsel would commence preparing cross-examination questions after the exchange of the affidavits of evidence-in-chief. If that had happened in this case, the plaintiffs would have prepared for the cross-examination of Trevi's witnesses in February 2002.

(b) The trial was set down originally for more than 20 days and parties must have expected to complete the entire trial within that period. As such, in any event, the plaintiffs must have been prepared for the cross-examination of Trevi's witnesses by the date the trial started, which was 4 March 2002.

(c) Again, when the trial was rescheduled for another 15 days in September 2002, the plaintiffs must have been prepared by then to cross-examine Trevi's witnesses.

(d) As preparing to cross-examine an opponent's witnesses is a basic part of trial preparation, that preparation is very much part and parcel of the basic costs in any litigation that goes to trial and should not be used to penalise a defendant who elects to call no evidence.

(e) There is no causal link between the two. The preparation did not cause the election. As such there is no reason to penalise Trevi in costs for the plaintiffs' preparation which was totally unrelated to the election.

7 Trevi submitted that there was nothing in O 35 r 4(3) of the Rules of Court that provides for a plaintiff to be compensated for the costs of preparing cross-examination that subsequently goes to waste. Order 35 r 5(3) gives a defendant a right not to call any evidence. It is therefore a wholly legitimate course of action for a defendant to choose to exercise that right if he deems it the most appropriate course to take in the circumstances of the action.

8 Trevi also argued that their election not to call evidence had saved the plaintiffs eight days of court time and the additional costs that those days would have given rise to. If the plaintiffs had won their case against Trevi, they would have won it at a much lower cost than if the election had not made. Even though the plaintiffs lost the case against Trevi, that defeat would still cost them less than if they had lost after cross-examining Trevi's witnesses for eight days. In these circumstances, it would not be right in principle to reduce the costs payable by the plaintiffs to Trevi by recognising costs that the plaintiffs would have incurred in any case whether or not the election was made.

9 Having given the matter more consideration, I have concluded that in this case there is no reason not to apply the normal rule that costs follow the event. In my judgment, Trevi, having been successful in their defence of the plaintiffs' claim, are entitled to recover the costs of that claim. No allowance need be made for the time spent by the plaintiffs in preparing to cross-examine Trevi's witnesses. I accept that time taken to prepare cross-examination questions is a basic part of the preparation process whenever a matter goes to trial. The Rules of Court allow a defendant to elect at the end of the plaintiff's case whether or not to call evidence. By the time the end of the plaintiff's case arrives, all preparatory work in relation to the defendant's witnesses should have been completed. It would not be right to penalise a defendant for adopting a course which the Rules of Court make available to him and which will also lead to the saving of costs in that the case will not be prolonged by the cross-examination of the defendant's witnesses. If I were to reduce the costs payable to Trevi because they elected not to call evidence, I would be undermining the application and utility of O 35 r 4(3).

10 Whilst an election by a defendant not to call evidence should not result in him having to pay for the plaintiff's costs of preparing for cross-examination, that does not mean that such an election

can never have any consequences in relation to costs. When O 35 r 4(3) was first enacted, no hearing fees were payable by litigants. We now have a system whereby hearing fees are payable and, in the first instance, these hearing fees are payable by the plaintiff. If hearing days are paid for but not used, the Registry may, at its discretion, refund all or part of the fees depending on the circumstances. In many instances, no full refund of fees is made.

11 In this case, the plaintiffs paid a considerable sum of money to obtain hearing dates so that they could cross-examine the witnesses who were being called for Trevi and CKK. When these parties elected not to call evidence, those dates were vacated and although most of the hearing fees paid were refunded, the plaintiffs were unable to recover a sum of $4,960. They now seek to recover that sum from Trevi and CKK. Should they be able to do so? In the usual case, I think that if a trial ends early because the defendant has chosen not to adduce any evidence, this should not have an impact on the payment of hearing fees. If the plaintiff goes on to win the case, he will be able to recover all hearing fees paid (including hearing fees for the unused days to the extent that these have not been refunded by the Registry). On the other hand, if the plaintiff should subsequently lose the case, he would have to bear those fees as part of the costs of his unsuccessful litigation. The plaintiff should not be able to recover any part of these hearing fees from the defendant because under the Rules the defendant has the right to hear and test all the plaintiff's evidence before electing not to call his own evidence. Since hearing dates are given (and hearing fees are paid) on the basis of the estimated time it would take for both the plaintiff's and the defendant's evidence to be heard, to impose a general rule, that a defendant who elects not to call evidence after the plaintiff rests his case must pay the hearing fees for the unused days, would be to impose a financial consequence for such election in circumstances where the relevant Rule does not provide for, or contemplate, such a consequence. This, however, does not mean that in all cases, it would be incorrect to make the defendant bear the hearing fees for the unused days.

12 In the present instance, the trial took place in several tranches. As mentioned earlier, the plaintiffs closed their case on 10 April 2002. On 2 September 2002, the first to third defendants opened their joint defence. By 19 September 2002, when the case was adjourned part heard for the second time, it was clear that the first to third defendants were about to conclude their case and that the next tranche of the trial would deal with the evidence of Trevi and CKK. On 25 September 2002, Trevi filed an application to strike out the plaintiffs' claim against them. I dismissed this application. The trial resumed on 13 January 2003 and the first to third defendants concluded their case the next day. At that stage, counsel for Trevi informed me that his client would be making a submission that there was no case to answer and consequently they were electing not to call any evidence. I rejected the submission of no case to answer but Trevi went on to elect not to call any evidence in any case. From the submissions that Trevi filed in the suit, it was clear that the main factor influencing their decision was the nature of the evidence given by the plaintiffs' expert witness, Dr Pugh, and that given by a consultant engineer called by the first to third defendants, Dr Soh Kok Kee. Bearing in mind the period of time of more than three months between the end of the second tranche of the case (by which date all evidence from these two witnesses had been taken) and the start of the third tranche, Trevi could well have indicated their intended course of action to the plaintiffs before the latter had to pay hearing fees for the third set of dates. They did not do so and the plaintiffs were obliged to pay the hearing fees in order to get the new dates so that they could cross-examine Trevi's witnesses. In these circumstances, I think Trevi should bear most of the hearing fees that the plaintiffs were not able to recover. I say "most" because a small portion of the time allocated for the third hearing would have been used to cross-examine CKK's witnesses and therefore Trevi should not have to bear all the fees that were not recovered. I think it would be fair to make Trevi pay 85% of those fees.

13 The next issue that arises is whether the plaintiffs should bear any part of Trevi's costs on

the indemnity basis rather than on the standard basis. Trevi submitted that the plaintiffs should be ordered to bear their costs on the indemnity basis from either 7 March 2002 or 11 March 2002 onwards. On 6 March 2002, the plaintiffs' solicitors served a formal offer to settle under O 22A of the Rules of Court on Trevi's solicitors. The plaintiffs offered to settle their action against Trevi on the basis that Trevi admitted liability for "such defects caused by them during their periods of work on the worksite" and that there be an assessment of the damages occasioned by such defects. The next day Trevi's solicitors ("A&P") wrote to the plaintiffs' solicitors ("M&P") stating that the plaintiffs' offer to settle was not a genuine attempt at settlement and proposing that the plaintiffs discontinue their suit against Trevi and pay Trevi's costs up to that stage. M&P rejected this position. After further exchange of correspondence, on 11 March 2002, Trevi served their own formal offer to settle the plaintiffs' claim on the basis that Trevi would pay the plaintiffs $5,000 in full and final settlement of all damages and interest but that the plaintiffs would pay Trevi their costs of the action. The plaintiffs did not accept this offer.

14 Trevi submitted that it was clear that they had obtained a better result than the offers that they had made to the plaintiffs on 7 March 2002 and 11 March 2002. It was also clear, Trevi said, that those offers had been very reasonable given the comments in [97] of my judgment. There, I had described the claim against Trevi as being "*de minimis* and frivolous" on the basis that an expert engineer consulted by the plaintiffs had told them that the cost of rectifying all cracks at the second storey of the rear façade of AA Building would be $3,600 and that this figure was a really small amount in the context of the entire claim mounted by the plaintiffs against Trevi.

15 Trevi's arguments were based on O 22A r 9(3). They contended that as the plaintiffs had not obtained a judgment that was more favourable than the terms of either of the offers to settle, they should have to bear Trevi's costs on the indemnity basis as from the date, at the least, of the second offer. I should point out that there was only one offer to settle. The first proposal, contained in A&P's letter of 7 March 2002, was not an offer to settle under O 22A. It was just a proposal that the suit be discontinued and it reflected the situation that would exist if the plaintiffs had voluntarily discontinued. It did not contain an offer. The only offer was that served on 11 March 2002. As regards this offer, on the face of it, Trevi would seem to be entitled to an order for indemnity costs since under the offer, they would have paid the plaintiffs $5,000, although the plaintiffs would have had to pay their costs. The effect of the judgment and my decision on costs is that Trevi will not pay the plaintiffs any money towards the claim but the plaintiffs will still be obliged to pay Trevi's costs. Thus, the judgment is not more favourable to the plaintiffs than the terms of the offer to settle were.

16 The law, however, is that the matters set out in [15] are not conclusive on this issue. Under O 22A r 12, the court, in exercising its discretion with respect to costs, is permitted to take into account, among other things, the date and the terms of the offer. Thus, the Court of Appeal has held that an offer to settle must be serious and genuine before it will attract the costs consequences of rr 9 and 12 of O 22A (see *The Endurance 1* [1999] 1 SLR 661) and that in order for a proposal to be an effective offer to settle, it must contain an element which would induce or facilitate settlement in relation to the dispute (see *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd (No 2)* [2001] 1 SLR 532). In the present case, it does not appear to me that the offer to settle made by Trevi contained an element which would induce or facilitate settlement. In it, Trevi did offer to pay the plaintiffs $5,000. That was not, however, a real inducement towards settlement since, as Trevi well knew, it was the plaintiffs' position that Trevi were responsible for a great deal more damage than could be repaired by spending $5,000. To the plaintiffs at that stage, offering them $5,000 would have seemed ludicrous. Further, one of the plaintiffs' complaints, as it appeared from the correspondence exchanged in March 2002, was that Trevi had made a blanket denial of liability and had not accepted that any damage at all could have been caused by their works. If the plaintiffs were to accept $5,000 but at the same time agree to pay all Trevi's costs up to date as proposed by

the offer to settle, there would be an implicit agreement that the plaintiffs' case was groundless. Trevi must have known from the plaintiffs' correspondence that there was no hope of such a position being accepted by the plaintiffs. Additionally, the payment of $5,000 to the plaintiffs would not have been substantial in relation to the costs that would have been recoverable from the plaintiffs at that stage (the offer was made a few days after the trial had started) had the plaintiffs accepted the offer. Bearing all these matters in mind, it is hard to believe that Trevi considered that their offer had an element that could tempt the plaintiffs to settle. In my opinion, the offer was not a reasonable nor genuine one and it did not, objectively, contain any element that could have induced a settlement. In the circumstances, I do not think that Trevi are entitled to recover costs on the indemnity basis.

The plaintiffs' claim for costs against CKK

17 In my judgment, I held that the plaintiffs had, in respect of their claim against CKK, only proved that certain minor damage to the roof of AA Building had been caused by CKK's negligence in the conduct of the construction works at the adjoining site. I ordered that the damages payable by CKK for this item should be assessed on the basis of the diminution in the value of AA Building caused by the damage to the roof. I also considered that it was unlikely that the building's value would have been diminished by more than $25,000 (the cost of repairing such damage) and that the action against CKK should have been brought in the subordinate courts. These holdings give rise to the arguments on the costs payable in relation to the plaintiffs' claim against CKK.

18 The plaintiffs' position was that my judgment had established CKK's liability to the plaintiffs based on the finding that CKK's work had caused damage to AA Building. Since liability had been established and this issue had gone against CKK, costs should follow the event and the plaintiffs should be paid their costs by CKK. CKK had denied liability throughout. They had been invited, on 9 May 2001, to admit liability and to leave the matter of assessing damages to the Registrar. CKK had rejected the plaintiffs' offer to settle dated 6 March 2002. Had CKK admitted liability, the matter would have proceeded only for assessment and there would be no necessity for a trial involving CKK. The plaintiffs therefore further submitted that they were entitled to costs on the standard basis up to 5 March 2002 and to costs on the indemnity basis from 6 March 2002 up to judgment. I should state here that I would not, in any case, consider that the plaintiffs would be entitled to indemnity costs from the date of their offer to settle. That was not a genuine or serious offer to settle. All they did was invite CKK to admit they caused damage to AA Building without the plaintiffs specifying what damage they were asserting CKK had caused. By accepting that offer CKK would have admitted causing all the damage asserted against them in the statement of claim. Since CKK's consistent position was that they had not caused any of that damage, there was nothing in the offer to induce or facilitate a settlement. The plaintiffs did not discount their claim against CKK in the slightest way.

19 CKK submitted, however, that they should be awarded the costs of defending the action brought by the plaintiffs and that no costs should be payable to the plaintiffs. They said that on the facts of this case, despite the plaintiffs being awarded judgment for the damage to the roof, CKK had effectively succeeded in defending the claim against them and therefore the application of the rule that costs follow the event would mean that the plaintiffs should pay CKK's costs of the action and not *vice versa*. They argued that the plaintiffs had only been awarded damages for one minor item of their claim and that such damages, when assessed, were unlikely to exceed $25,000. That sum had to be contrasted with the plaintiffs' claim against CKK for over $2.5m (being the costs of rectifying AA Building, the plaintiffs' loss of rental income and the claim for special damages). This meant that the amount ultimately awarded to the plaintiffs was likely to be less than one per cent of their claim.

20 In relation to CKK's submission that the plaintiffs were in fact the unsuccessful party and CKK were the successful party, CKK relied on the English Court of Appeal case of *Oksuzoglu v Kay* [1998]

2 All ER 361. There the plaintiff brought proceedings against the defendant medical practitioners claiming damages for failing to refer him to hospital when he first consulted them, alleging that as a result of delay in treatment, his leg had to be amputated when a malignant tumour in an advanced condition was thereafter diagnosed. The question of liability was determined as a preliminary issue before the question of quantum. The judge found that both defendants had been negligent in not referring the plaintiff to hospital earlier but that amputation would have been inevitable in any event. He directed judgment to be entered against both defendants for damages to be assessed but limited the inquiry into damages to the plaintiff's pain, discomfort and distress. After damages had been assessed at some £3,000, the judge directed that the defendants should pay all the plaintiff's costs of the action. The defendants successfully appealed against the costs order. In the course of his judgment, Brooke LJ observed at [55], [56] and [58]:

> [T]here is still no doubt that the defendants essentially won the trial on liability and causation. All the plaintiff got out of it was a decision which reduced the potential value of his claim, as then put forward, by 99%, from about £300,000, inclusive of interest, to about £3,000. In a situation like this, where on the trial of preliminary issues the plaintiff wholly failed on the big claim (that the defendants' negligence caused the amputation) and only succeeded on the tiny claim (that the defendants ought to have referred the child earlier and are liable in damages for the effects of the delayed diagnosis) the decision of this court in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207 should be applied with appropriate caution. …
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> In my judgment, there are parts of the judgment of Stuart-Smith LJ, with which Balcombe and Peter Gibson LJJ agreed, in *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464, [1995] QB 137, to which Judge Rivlin was also referred, which were of much more moment in the present context. In that case the value of the plaintiff's claim, inclusive of interest, was about £1m (see [1994] 4 All ER 464 at 469, [1995] QB 137 at 145), and the effect of the judge's judgment, at the end of an expensive trial, was that the only damages the plaintiff was entitled to recover were likely to be no more than the £21,574.28 claimed for one item and might well be less (see [1994] 4 All ER 464 at 479, [1995] QB 137 at 156). Although this judgment was mainly concerned with the appropriate order for costs on a very late reamendment, this court also accepted the third submission made by Mr Stow QC, to the effect that the first defendant was substantially the successful party because the plaintiff was aiming at recovering a sum in the order of £1m, whereas all that it succeeded in getting was judgment for damages to be assessed, which on any basis were likely to be more modest (see [1994] 4 All ER 464 at 477, 478, [1995] QB 137 at 153, 155).
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> In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: 'Who was essentially the winning party?' It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted …

21 The principle applied in the *Oksuzoglu* case was implemented again by the English Court of Appeal in *Swale Storage and Distribution Services Limited v Sittingbourne Paper Company Limited* [*The Times*, 30 July 1998]. There, Buxton LJ, after repeating that principle, commented that the court in *Oksuzoglu* had entered upon a detailed reconstruction of the effect of the decision on liability and the effect on the different issues in what was a complicated medical negligence trial. He then went on to say:

> One gathers from that that in the appropriate case the court should look at the substance of the matter and the substance of the result of the trial. It can also be drawn from *Oksuzoglu* that where there is a limited recovery by the plaintiff, questions of a particular order for costs do not

arise only and exclusively where the plaintiffs' success has been purely nominal. Brooke LJ refers to recovery of between 1% and 3% of the original claim: I am not seeking to lay down the strict parameters, but that is by way of illustration.

I draw from the two cases that I have mentioned, bearing in mind that one has the benefit in *Oksuzoglu* of the review of these previous authorities, the proposition relevant to this case that where there are separate claims in a trial and only on some of which the plaintiff succeeds; or, and this may often be the same thing, there is a recovery of very much less than the total; the court should at least consider whether it should ask itself: who was the real winner? What was the event? I emphasise that that does not mean, and there is no justification in the authorities for supposing, that in the ordinary run of cases the court should, or even may, try to determine costs by minute examination of what are not, in truth, clear and distinct issues of liability, but rather only facets of, or ways in which it is sought to prove, a single issue. That warning is, in particular, to be drawn from the criticism that the Court of Appeal made in *Elgindata* of the approach that had been adopted by the trial judge in that case.

22 Drawing on those principles, in this case, the plaintiffs had claimed against all the defendants including CKK substantial damages for loss sustained by reason of physical damage to AA Building which encompassed cracks, soil settlement or subsidence, sinking of floors, tilting of the building and water seepage, amongst other complaints. Most of these allegations had been made against all the defendants without distinguishing between them and specifying the nature of the duty each of them owed the plaintiffs. The failure to distinguish between damage caused by CKK and that caused by the other defendants had resulted in CKK having to answer almost all of the allegations made by the plaintiffs. In the end, the only claim proved against CKK by the plaintiffs was the minor damage to the zinc roof. This was only one item out of the 100 items of damage that had been listed in Schedule A of the statement of claim. CKK submitted that in monetary terms, the amount that the plaintiffs were likely to recover from them would be less than one per cent of the original claim.

23 In *Oksuzoglu,* the final order made was that the defendants would be entitled to recover 90% of their costs of the action up to the date of the judgment on the issues of liability and causation and that thereafter they should pay the plaintiff his costs. This meant that the defendants had to bear the costs of the assessment of damages but that the plaintiff who had been successful on part of his claim paid 90% of the defendants' costs of defending the claim on liability. In *Swale*, there were two separate and discrete issues (exclusivity and arbitration) that had to be addressed by the trial judge. Two-thirds of the trial were taken up with the exclusivity issue on which the defendants won and one-third of the trial was devoted to the arbitration issue which the plaintiffs won. The defendants were awarded two-thirds of their costs of the trial and the plaintiffs were awarded one-third of their costs.

24 Here, the main issue in dispute between the plaintiffs and CKK was whether CKK's work had undermined the stability of AA Building leading to the extensive cracking experienced by AA Building. There was also an issue of whether CKK's work had caused ground movement and subsidence. There were other issues of nuisance caused by noise and vibration. These were the substantial issues that CKK had to meet in the course of the trial and they related to the periods when CKK carried out excavation work at the site between July 1996 and January 1997 and in and around September 1998. None of these allegations were established by the plaintiffs. They were only able to substantiate their claim that in June 2000, whilst CKK were constructing the superstructure of the building on the site, damage had been caused to a portion of the zinc roof of AA Building. In the context of the overall claim, that damage was insignificant. Accordingly, I find much merit in CKK's submission that CKK were essentially the winning party in respect of the plaintiffs' claim against them. I consider therefore that application of the rule that costs follow the event must mean that CKK are entitled to be awarded

most of their costs incurred in defending the plaintiffs' claim. Some discount has to be made, however, for the fact that the plaintiffs did succeed in establishing a small discrete part of their case.

Conclusion

25 In relation to Trevi, I award them the costs of defending the plaintiffs' claim. I also order them to pay the plaintiffs $4,219 being 85% of the hearing fees thrown away.

26 In relation to CKK, I award them 85% of their costs of defending the plaintiffs' claim with respect to liability. As regards the costs of assessment, that decision must be made by the Registrar adjudicating the damages hearing.