

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 27

Suit No 806 of 2004 (Assessment of Damages No 23 of 2016)

Between

(1) Main-Line Corporate Holdings
Ltd

... Plaintiff

And

(1) United Overseas Bank Ltd
(2) First Currency Choice Pte Ltd

... Defendants

SUPPLEMENTAL JUDGMENT

[Civil Procedure] — [Costs] — [Principles]
[Civil Procedure] — [Offer to settle]
[Damages] — [Interest]

TABLE OF CONTENTS

| | |
|------------------------------|----------|
| INTRODUCTION..... | 1 |
| OFFERS TO SETTLE..... | 2 |
| INTEREST..... | 3 |
| PARTIES' POSITIONS | 3 |
| DECISION | 6 |
| COSTS..... | 8 |
| PARTIES' POSITIONS | 8 |
| DECISION | 10 |

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Main-line Corporation
v
United Overseas Bank Ltd and another

[2017] SGHC 27

High Court — Suit No 806 of 2004 (Assessment of Damages No 23 of 2016)
Tay Yong Kwang JA
7 February 2017

14 February 2017

Tay Yong Kwang JA:

Introduction

1 In *Main-line Corporation v United Overseas Bank and another* [2016] SGHC 285 (“the judgment on damages”), I delivered my decision for the Assessment Hearing and directed (at [94] of that decision) the parties to file and serve written submissions regarding the appropriate interest and costs orders. Pursuant to my directions, the parties filed and served their respective written submissions. As some clarification was required on the Offers to Settle (“OTS”) made by UOB and by FCC as well as on the computation of interest, I asked the parties to attend before me in chambers on 7 February 2017 for a short hearing on these points.

Offers to settle

2 Three OTS were served on the Plaintiff pursuant to O22A of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) (“the ROC”). As the OTS had an impact on my decision, I set out their terms in the following table:

| | UOB’s OTS 5 December 2012¹ | FCC’s OTS 6 December 2012² | Two OTS dated 27 May 2016, one from UOB and one from FCC (“the Joint OTS”)³ |
|--------------------|---|---|--|
| Value (S\$) | 488,696.56, representing net profits accountable to the Plaintiff after taking into account the interim payment of \$1,962,424.30 | 706,726.32, representing damages arising from all infringements of the Patent by FCC | 5,920,580.46 from FCC and 488,422,79 from UOB (in addition to the interim payment of \$1,962,424.30) |

¹ UOB’s submissions dated 26 January 2017, Annex B

² Tendered by the Plaintiff at the hearing of 7 February 2017

³ Tab 4 of FCC’s Bundle of Documents for submissions on interest and costs

| | | | |
|--|-----|---|--|
| Separate offer for interest included in the OTS | Yes | Yes | Yes |
| Condition | - | Made in conjunction with UOB's OTS of 5 December 2012 and the Plaintiff may not accept FCC's OTS unless it also accepts UOB's OTS of 5 December 2012. | The Plaintiff may not accept one OTS without also accepting the other. |
| Date withdrawn | - | - | 27 October 2016 by both UOB and FCC ⁴ |

Interest

Parties' positions

3 There was no dispute between the parties that the applicable rate of interest was 5.33% per annum.

⁴ Tab 5 of FCC's Bundle of Documents for submissions on interest and costs

4 The Plaintiff sought pre-judgment interest against UOB and FCC on the following terms, reproduced from their submissions:

| | UOB | FCC |
|---|-----------------|------------------|
| Judgment Sum Awarded (S\$) | 1,962,424.30 | 4,795,000.00 |
| Date of Commencement of Pre-judgment Interest | 10 May 2002 | 11 October 2001 |
| Date of Interim Payment/Judgment | 2 February 2010 | 29 December 2016 |
| Total Pre-judgment Interest at 5.33% per annum (S\$) | 809,267.22 | 3,891,71.21 |

5 The Plaintiff submitted that the date of commencement of pre-judgment interest ought to be the date of accrual of loss in relation to both UOB and FCC, which was in line with the general rule. For UOB, the date would be 10 May 2002, the date on which UOB's liability for infringement of the Patent commenced.⁵ For FCC, it would be 11 October 2001, the date of the MEA, as it was used as the reference point for assessment of the quantum of damages in the judgment on damages.⁶ The Plaintiff also submitted in the alternative that the date of commencement of pre-judgment interest should be 5 October 2004 at the latest, which was the date of commencement of this action.⁷

⁵ The Plaintiff's submissions dated 26 January 2017, para 7(a)

⁶ The Plaintiff's submissions dated 26 January 2017, para 7(b)

⁷ The Plaintiff's submissions dated 26 January 2017, para 11

6 In relation to UOB, the Plaintiff did not dispute UOB's position that the period of time for which pre-judgment interest is awarded ought to end on the date when the cheque for the interim payment of S\$1,962,424.30 was sent to the Plaintiff, *ie*, 2 February 2010. In relation to FCC, the Plaintiff submitted that the relevant period for pre-judgment interest should end on the date of the judgment on damages, *ie*, 29 December 2016.

7 UOB took the position that a party is not liable to pay interest until it receives notice of the claim that it has to meet.⁸ It follows that the date of commencement of pre-judgment interest ought to be the date when UOB received notice of the Plaintiff's election for an account of profits, *ie*, 16 July 2008.⁹ Until the Plaintiff's notice of election of 16 July 2008, UOB was unaware that it had to meet a claim for an account of profits and therefore could not have paid the sum of S\$1,962,424.30 to the Plaintiff. Alternatively, UOB submitted that interest should commence from 8 October 2004, which was the date that it was served with the writ of summons.¹⁰

8 FCC took a similar position in arguing that a party is not liable to pay interest until it receives notice of the claim that it has to meet. FCC argued that because the Plaintiff did not provide evidence that FCC was notified of the claim in the action prior to the date of the writ of summons, *ie*, 5 October 2004, FCC should only be liable to pay interest from that date. FCC argued that the Plaintiff should not be awarded interest for the entire period due to the Plaintiff's dilatory conduct. FCC argued that the Plaintiff was responsible for a

⁸ UOB's submissions dated 26 January 2017, para 5

⁹ UOB's submissions dated 26 January 2017, para 7

¹⁰ UOB's submissions dated 26 January 2017, para 8

delay of nearly 4 years, from September 2012 to July 2016, by embarking on a fruitless attempt to claim the 3% Uplift from UOB.¹¹ FCC therefore argued that the Plaintiff was entitled to no more than half of the interest calculated on an accrual basis from 5 October 2004 to 28 February 2017, which FCC valued at no more than S\$1.884m.¹²

Decision

9 I accepted UOB's position regarding the date of commencement of pre-judgment interest. In this case, the issue of liability and the issue of remedies were dealt with at different stages due to the bifurcation of the action. I agreed that until UOB received the Plaintiff's notice of election of remedy on 16 July 2008, it was unclear to UOB how it was to work out the amount that would be payable to the Plaintiff. Therefore, the date of commencement of pre-judgment interest should be 16 July 2008. The period would end on the date when interim payment was effected since the judgment amount finally awarded against UOB did not exceed the interim payment amount. The payment was effected on 2 February 2010 when UOB's solicitors wrote to the Plaintiff's solicitors enclosing the cheque for the interim payment.¹³ I therefore ordered UOB to pay interest at 5.33% per annum on the interim payment amount from 16 July 2008 to 2 February 2010. This sum was calculated by UOB to be S\$162,483.89.¹⁴

¹¹ FCC's submissions dated 26 January 2017, para 36

¹² FCC's submissions dated 26 January 2017, para 38; there appears to be a calculation error by FCC in stating the sum as S\$1.892m.

¹³ Tab 3 of UOB's Bundle of Documents

¹⁴ UOB's submissions dated 26 January 2017, Annex A

10 The same reasoning for UOB's case applied to FCC in relation to the date of commencement of pre-judgment interest. Therefore, I held that the date of commencement of pre-judgment interest against FCC should also be 16 July 2008. I did not accept FCC's argument that the Plaintiff was entitled to no more than half of the interest calculated on an accrual basis in the light of my finding at [92] of the judgment on damages that the parties were equally responsible for the delay in the conduct of the Assessment Hearing. However, ordering the interest to run until the date of the judgment on damages would be unfair to FCC given the Plaintiff's refusal to accept the Joint OTS in 2016, which would have put the Plaintiff in a better position as compared to its position at the end of the Assessment Hearing. Accordingly, I ordered that the interest in FCC's case should accrue at 5.33% per annum on the judgment sum of S\$4.795m from 16 July 2008 to 10 June 2016, which is the end of the 14-day period that the Joint OTS should remain open for acceptance pursuant to O 22A r 3(1) of the ROC.

Costs

Parties' positions

11 The Plaintiff argued that all parties to the Assessment Hearing should bear their own costs, with the exception that FCC should pay the Plaintiff's disbursements in relation to expert fees incurred for the Assessment Hearing.¹⁵ The Plaintiff argued that disbursements for expert fees were substantial and ought to be borne by FCC. The basis for the Plaintiff's general position was that the Plaintiff had succeeded in its claim for damages against FCC while failing in equal measure in its claim for account of profits against UOB. Since

¹⁵ The Plaintiff's submissions dated 26 January 2017, paras 14 and 17

FCC was indemnifying UOB for the costs of the entire proceedings, the costs that UOB would obtain from the Plaintiff were likely to be offset by the costs that FCC would have to pay the Plaintiff.¹⁶ The Plaintiff also argued that indemnity costs should not be ordered against it in relation to its claim against UOB because there were no exceptional circumstances warranting such an order. The Plaintiff argued that it had not been unreasonable in its pursuit of its claim against UOB because there were inconsistencies in UOB's position, something which was admitted by its own witnesses.¹⁷

12 UOB did not dispute that the Plaintiff ought to be entitled to costs on a standard basis up to 2 February 2010, the date of the interim payment. UOB submitted that from 2 February 2010 up to 5 December 2012, it ought to be entitled to costs on a standard basis and from 5 December 2012 onwards to date, it ought to be entitled to costs on an indemnity basis. This was because of UOB's OTS of 5 December 2012, which did not stipulate a time for acceptance and which was not withdrawn. Therefore, under O 22A r 9(3), since the Plaintiff did not obtain a more favourable judgment than the OTS, UOB ought to be entitled to costs on an indemnity basis from 5 December 2012 onwards.¹⁸ UOB also sought to have the court certify costs for more than two solicitors given the complexity of the case, the number of issues and the complexity of the submissions. However, this point was not argued at the hearing before me and in any case, I did not think the Assessment Hearing warranted such an order.

¹⁶ The Plaintiff's submissions dated 26 January 2017, para 16

¹⁷ The Plaintiff's submissions dated 26 January 2017, paras 22-23

¹⁸ The Plaintiff's submissions dated 26 January 2017, paras 13-16

13 FCC took the position there should be no order as to costs between the Plaintiff and FCC for a variety of reasons.¹⁹ It argued that no more than 30% of the Plaintiff's costs of Assessment Hearing were attributable to the Plaintiff's claim against FCC. FCC argued that the bulk of the work done by the Plaintiff from around September 2012 to 25 April 2016 were in connection with its claim against UOB. Further, the Plaintiff could not be said to have substantially succeeded against FCC given that the damages finally awarded to the Plaintiff were much less than what was claimed. In the alternative, FCC submitted that the Plaintiff was at best entitled to attribute 15% of its total costs to FCC given its unreasonable conduct in pursuing the 3% Uplift against UOB. FCC also pointed out that the entire matter could have been settled if the Plaintiff had acted reasonably and accepted the Joint OTS served on 27 May 2016, which would have put it in a much better position than what was finally awarded by the court. FCC submitted that the court has the discretion to take the Joint OTS into account notwithstanding the fact that it was subsequently withdrawn.²⁰

Decision

14 It was undisputed that the period that any costs orders would relate to the period that starts on 31 October 2007, the date of the Court of Appeal's judgment in *First Currency Choice Pte Ltd v Main-Line Corporate Holdings Ltd and another appeal* [2008] 1 SLR(R) 335.

15 Under O 22A r 9(3) of the ROC, where an offer to settle is made by a defendant and —

¹⁹ FCC's submissions dated 26 January 2017, para 2

²⁰ FCC's submissions dated 26 January 2017, paras 26-27

- (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,
- (c) 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.

16 Although the Joint OTS was withdrawn just before the Assessment Hearing, the Plaintiff had five months to consider it. No argument has been made before me that this period was not sufficiently long in the circumstances of this case. The Joint OTS was also more favourable to the Plaintiff than the judgment amounts in the Assessment Hearing.

17 I therefore made the following orders relating to costs. In respect of UOB:

- (a) The Plaintiff is awarded costs on the standard basis from 31 October 2007 (the date of the judgment of the Court of Appeal on liability) to 2 February 2010 (the date of the interim payment by UOB), save where costs have already been awarded by any other court.
- (b) UOB is awarded costs on the standard basis from 3 February 2010 (the day after the interim payment) to 19 December 2012 (the end date of the 14-day period for acceptance of its first OTS).
- (c) UOB is awarded costs on the indemnity basis from 20 December 2012 to date.

(d) In order not to prolong this long-running case, I directed the Plaintiff and UOB to try to settle amicably the amounts of costs to be worked out in the manner as stated above. In the event that they are unable to reach an agreement, they are to set out their respective proposed amounts by letter to me and I will decide the amount of costs either without a hearing or at a short hearing.

18 In respect of FCC, unlike UOB, it did not have the benefit of its first OTS as the amount offered there was way below the judgment amount. However, for the same reason as applicable to UOB, the Plaintiff ought to have accepted the Joint OTS. The Plaintiff and FCC were in general agreement that while the Plaintiff should have an order for costs in its favour against FCC for the nine years or so since the judgment of the Court of Appeal on liability, FCC should have an order for costs in its favour after the 14-day period for acceptance of the Joint OTS expired on 10 June 2016. The said nine years had intermittent and low intensity legal activity with costs to be assessed on the standard basis while the period after June 2016, although short in comparison to the nine years, was marked by intense legal activity, including the six days of the Assessment Hearing, and with costs to be assessed on the indemnity basis. In the circumstances, both parties were amenable to having both sets of costs cancel each other out.

19 I agreed that a fair and pragmatic order on costs in respect of the Assessment Hearing was that there be no order as to costs between the Plaintiff and FCC. The Plaintiff and FCC will therefore each bear its own costs for the Assessment Hearing.

Tay Yong Kwang
Judge of Appeal

Wong Siew Hong, Gavin Foo and Regina Lim (Eldan Law LLP) for
the plaintiff;
Eddee Ng, Leonard Loh and Sherlene Goh (Tan Kok Quan
Partnership) for the first defendant;
Alban Kang and Oh Pin-Ping (Bird & Bird ATMD LLP) for the
second defendant.
