

Tanner Sheridan Wayne v NRG Engineering Pte Ltd
[2013] SGHC 233

Case Number : District Court Suit No 324 of 2012 (Registrar's Appeal Subordinate Courts No 152 of 2013)
Decision Date : 07 November 2013
Tribunal/Court : High Court
Coram : Quentin Loh J
Counsel Name(s) : Rasanathan s/o Sothynathan and Nazirah d/o Kairo Din (Colin Ng & Partners LLP) for the plaintiff; Kelvin Chia Swee Chye (Samuel Seow Law Corporation) for the defendant.
Parties : Tanner Sheridan Wayne — NRG Engineering Pte Ltd

Civil Procedure – offer to settle

7 November 2013

Judgment reserved.

Quentin Loh J:

Introduction

1 This appeal raises the issue: when is an offer made pursuant to the offer to settle regime under O 22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") validly withdrawn such that the offeree can no longer accept it?

2 The plaintiff Tanner Sheridan Wayne ("the Plaintiff") says that there is a statutorily implied minimum period of one day after a notice of withdrawal in Form 34 of the Rules of Court is served before it can be validly withdrawn. The defendant NRG Engineering Pte Ltd ("the Defendant") contends otherwise. The Deputy Registrar of the Subordinate Courts ruled in favour of the Defendant and dismissed the Plaintiff's application to enter judgment pursuant to an "acceptance" of an offer to settle under O 22A. The Plaintiff appealed and the District Judge dismissed the appeal. However the District Judge granted leave to appeal.

The facts

3 Disputes arose between the Plaintiff and the Defendant under an employment contract resulting in the Plaintiff suing the Defendant for unpaid salary, bonuses and commission. The parties understood the benefits of the O 22A settlement regime and so sought to invoke that process.

4 On 30 April 2013, the Defendant served an offer to settle in the prescribed Form 33 of the Rules of Court proposing a settlement of the Plaintiff's claim at a sum of \$45,000 with interest thereon and costs ("the Offer to Settle"). This Offer to Settle was not expressed to be limited as to the time within which it was open for acceptance (see O 22A r 3(2)). On 5 June 2013, the Plaintiff's solicitors spoke to the Defendant's solicitors by telephone, suggesting that the offer should be higher at \$60,000 inclusive of interest, legal costs and disbursements. This conversation was confirmed and repeated in a letter sent to the Defendant's solicitors on the same day.

5 On 18 June 2013 at 8.11am, the Defendant's solicitors sent a letter to the Plaintiff's solicitors

by facsimile transmission informing them that the Defendant was rejecting their proposal of 5 June 2013, and that they had instructions to withdraw the Offer to Settle. The letter stated:

... Pursuant to **Order 22A, Rule 3(2)** of the Rules of Court, we hereby serve you the requisite one (1) day's prior notice of our clients' intention to withdraw the said [Offer to Settle]. ...

On the same day at 11.37am, the Plaintiff purported to accept the Defendant's Offer to Settle by way of a letter via facsimile transmission. However, the purported acceptance was not in the form prescribed by O 22 r 6(1) of the Rules of Court which provides that the acceptance shall be in Form 35 and served on the offeror. Further, the Defendant's solicitors did not accept service by facsimile transmission.

6 On the next day, 19 June 2013, at 9.39am, the Defendant's solicitors served a "Notice of Withdrawal of Offer" in Form 34 by way of electronic service using the Electronic Filing System withdrawing the Offer to Settle of 30 April 2013. This was followed, "for good measure", by service of a hard copy of the "Notice of Withdrawal of Offer" by hand at the offices of the Plaintiff's solicitors at 2.30pm.

7 Finally, on 20 June 2013 at 8.56am, which I note was some 23 and a half hours after the Defendant had served Form 34 on the Plaintiff electronically, the Plaintiff's solicitors served an "Acceptance of Offer" of the 30 April 2013 Offer to Settle in Form 35 ("the Purported Acceptance") on the Defendant at the offices of its solicitors.

8 On 1 July 2013, the Plaintiff filed his application for judgment to be entered against the Defendant in terms of his 20 June 2013 "Acceptance" of the Defendant's 30 April 2013 Offer to Settle. The Defendant contended that its Offer to Settle had already been withdrawn.

The Plaintiff's arguments

9 The Plaintiff did not contend below or in this appeal that his first purported acceptance of the Offer to Settle on 18 June 2013 at 11.37am by way of a letter sent through facsimile transmission, which was not in the prescribed Form 35, was a valid acceptance. If it was in the prescribed Form 35 and properly served, this would have undoubtedly been a valid acceptance as it would have been made before the Defendant filed the "Notice of Withdrawal of Offer" the next day. Instead, the Plaintiff relies on his Purported Acceptance served on 20 June 2013 at 8.56am and which was in the prescribed Form 35. However, as I have noted, this was some 23 and a half hours after the Defendant had served on him the "Notice of Withdrawal of Offer" in Form 34 by electronic service.

10 The Plaintiff contends that after a "Notice of Withdrawal of Offer" in Form 34 is filed and served, there is a statutorily implied minimum one day (*ie*, 24-hour) period during which the Offer to Settle can still be accepted. Counsel for the Plaintiff, Mr Rasanathan s/o Sothynathan ("Mr Rasanathan"), argues this from two fronts:

(a) first, this is the correct conclusion when one takes a "deeper, more robust" construction of O 22A r 3(2) read with r 3(3) of the Rules of Court ("the construction argument"); and,

(b) secondly, this is the holding of the judgment of the High Court in *Chia Kim Huay (litigation representative of the estate of Chua Chye Hee, deceased) v Saw Shu Mawa Min Min and another* [2012] 4 SLR 1096 ("*Chia Kim Huay*") at [32] (reproduced below at [25]).

11 In respect of the latter argument, the Plaintiff had argued in the courts below that the

judgment in *Chia Kim Huay* at [32] was *ratio decidendi* and binding on the Subordinate Courts. Mr Rasanathan submits that as a court of coordinate jurisdiction, I am not bound by it, even if the Plaintiff was right that it formed the *ratio decidendi* in *Chia Kim Huay*, but it was commended to me as “highly persuasive authority”.

My decision

The statutory provisions

12 Order 22A rr 1, 3 and 6 read as follows:

ORDER 22A

OFFER TO SETTLE

Offer to settle (O. 22A, r. 1)

1. A party to any proceedings may serve on any other party an offer to settle any one or more of the claims in the proceedings on the terms specified in the offer to settle. The offer to settle shall be in Form 33.

...

Time for acceptance and withdrawal (O. 22A, r. 3)

3.—(1) An offer to settle shall be open for acceptance for a period of not less than 14 days after it is served. If an offer to settle is made less than 14 days before the hearing of the matter, it shall remain open for a period of not less than 14 days unless in the meanwhile the matter is disposed of.

(2) Subject to paragraph (1), an offer to settle which is expressed to be limited as to the time within which it is open for acceptance shall not be withdrawn within that time without the leave of the Court. *An offer to settle which does not specify a time for acceptance may be withdrawn at any time after the expiry of 14 days from the date of service of the offer on the other party provided that at least one day’s prior notice of the intention to withdraw the offer is given.*

(3) The notice of withdrawal of the offer shall be in Form 34.

(4) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires.

(5) Where an offer to settle does not specify a time for acceptance, it may be accepted at any time before the Court disposes of the matter in respect of which it is made.

...

Manner of acceptance (O. 22A, r. 6)

6.—(1) An offer to settle shall be accepted by serving an acceptance of offer in Form 35 on the party who made the offer.

(2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the Court has disposed of the matter in respect of which it was made.

(3) Where an offer is accepted, the Court may incorporate any of its terms into a judgment.

[emphasis added]

The Plaintiff's construction argument

13 The Plaintiff relies on the language of O 22A r 3(2) and the words used in Form 35 as required pursuant to r 3(3). Because the Offer to Settle did not specify a time for acceptance, r 3(2) provides that after the expiry of 14 days from the date of its service, it may be "withdrawn ... provided that at least one day's prior notice of the intention to withdraw the offer is given" (see above at [12]). The Defendant's position is that it gave this prior notice when its solicitors sent the letter of 18 June 2013 at 8.11am. The Form 34 "Notice of Withdrawal of Offer" which was served one day later on 19 June 2013 at 9.39am therefore marked the withdrawal of the Offer to Settle so that no purported acceptance thereafter could be valid. The Plaintiff on the other hand submits that the one day period started to run only upon the Plaintiff's receipt of service of the "Notice of Withdrawal of Offer" in Form 34. In other words, the Plaintiff still had 24 hours from 9.39am of 19 June 2013 within which to accept the Offer to Settle; and as the Purported Acceptance was sent on 20 June 2013 at 8.56am in the correct form the Offer to Settle must be held to have been validly accepted. Mr Rasanathan relies on the words used in the headings of the prescribed forms in Appendix A of the Rules of Court. Form 33 uses the title "Offer to Settle", while the title for Form 35 reads "Acceptance of Offer". Mr Rasanathan submits that in contrast, Form 34 is rather conspicuously titled "*Notice of Withdrawal of Offer*" [emphasis added] rather than "Withdrawal of Offer" *simpliciter*.

14 Mr Rasanathan says that the words "Notice of" in the title to Form 34 lead to the conclusion that the filing of the "Notice of Withdrawal of Offer" does not withdraw an offer to settle forthwith, but only gives notice of the impending withdrawal and starts the clock ticking for the expiry of a minimum one day period. Mr Rasanathan was relying on the prospective and forward-looking connotations that the words "Notice of ..." bear when contradistinguished with the words "Withdrawal of Offer" *simpliciter*.

15 Mr Rasanathan submits that the Plaintiff's case is further buttressed by the fact that the offer to settle regime in O 22A was formulated and implemented in our Rules of Court before the advent of electronic service in Singapore. This, he says, meant that Form 34 had to be served either by hand, post, or facsimile transmissions (where expressed as permitted), and in all three cases this would have been done with a covering letter. The covering letter which would accompany Form 34, he says, would allow the offeror to state in it a time period which may be any number of days before the offer to settle is withdrawn, thus putting the other party under pressure to settle quickly or thereafter lose the chance to do so. In the case that no time period is stipulated, Mr Rasanathan says that the words in r 3(2) have the effect of implying a minimum one day (*ie*, 24 hour) period.

16 I cannot agree with the Plaintiff's arguments in this regard. First, the use of the words "*Notice of Withdrawal of Offer*" [emphasis added] is no doubt curious when contrasted with the language used in Forms 33 and 35 and may be, at worst, as counsel for the Defendant, Mr Kelvin Chia ("Mr Chia") says, "somewhat unfortunate", but this can hardly be conclusive of the matter. I am satisfied on a plain reading of the statutory rules and forms that the Plaintiff's contentions are erroneous. It will be noticed that the words used in O 22A r 3(3) are substantially the same ("*notice of withdrawal*

of the offer" [emphasis added] (see [12] above)) as that used in the title to Form 34 ("Notice of Withdrawal of Offer"). Further the text of Form 34 does not cater for a notice period and in fact uses language that states unequivocally that the offeror "withdraws the offer to settle dated ..."

17 A simple and cursory consideration of the statutory regimes in other jurisdictions, which are *in pari materia* to ours, reinforces the conclusion that the use of the words "Notice of" does not have the substantive effect the Plaintiff argues it does.

18 The regime in England is found in Part 36 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) ("the CPR 1998"). Under the CPR 1998, an acceptance of an offer to settle is made by serving a "notice of acceptance" on the offeror (see r 36.9(1)), and the offeror may within the allowed period withdraw the offer by serving a written "notice of withdrawal" on the offeree (see r 36.3(6) and (7)). Yet, the use of the words "notice of" in the CPR 1998 does not have the effect of implying an additional time period after service during which any "acceptance" or "withdrawal" remains effective. For instance, it is clear from the language of r 36.9(2) that an offer can no longer be accepted once the "notice of withdrawal" is served on the offeree.

19 Similarly in New South Wales under the Uniform Civil Procedure Rules 2005 (Reg 418 of 2005) (NSW) ("the UCPR 2005"), an offer to compromise is made "by notice in writing" (see r 20.26(1)) and an offer is accepted by serving "written notice of acceptance" on the offeror (see r 20.27(1)). The UCPR 2005 does not allow for offers to be withdrawn except by court order (see r 20.26(11)). However, where an acceptance is sought to be withdrawn (where permissible), the UCPR 2005 uses the words "notice of withdrawal" to describe what must be served on the offeror (see r 20.28(1)). Again, in the UCPR 2005, the use of the words "notice of" does not impose an additional time period after service before each offer, acceptance, or withdrawal of acceptance takes effect.

20 Ontario, Canada, has a similar regime in their Rules of Civil Procedure (O Reg 575/07) ("the RCP"). What is notable about the regime in the RCP is that like our rules, the terms "offer to settle" (see r 49.02) and "acceptance" (see r 49.07(1)) are used on the one hand, but on the other hand, in relation to a withdrawal of an offer, the words "notice of withdrawal of the offer" are employed (see r 49.04(1)). This is mirrored in the headings of the respective Forms 49A, 49C and 49B which may be used for these purposes. In particular, Form 49B of the RCP, like our Form 34, is headed "Notice of Withdrawal of Offer". It appears that this particular nomenclature used in our O 22A of the Rules of Court may have been adopted from that in the RCP, thus explaining why we have the same peculiarity (as referred to above, at [13]). However, unlike our O 22A r 3(2), r 49.04 of the RCP does not require that "at least one day's prior notice of the intention to withdraw the offer is given" (see above at [12]). It is plain, in my judgment, that the use of the words "notice of" in "notice of withdrawal" in our rules or in the rules of other jurisdictions in this context is of neutral significance. Contrary to the Plaintiff's submission, it does not have the effect of imputing a prospective or forward-looking connotation such that an additional time period is implied after service of the "Notice of Withdrawal of Offer" in Form 34 before the withdrawal is effective.

21 The proviso to O 22A r 3(2) governing withdrawals that "at least one day's prior notice of the intention to withdraw the offer is given" plainly means what it says. There is no prescribed form for the prior notice of an intention to withdraw and a clearly worded letter evincing such an intention will suffice. After that notice period has expired, the Offer is withdrawn by serving Form 34. The Plaintiff's submission that the words "notice of" in Form 34 point to a time period which starts running only *after* service of the "Notice of Withdrawal of Offer" is, with respect, erroneous.

22 The purpose of an offeror having to give prior notice of the intention to withdraw his offer to settle before he serves the "Notice of Withdrawal of Offer" is so that the offeree has fair warning that

the offer is about to lapse and thus has time to consider whether he should accept the offer (see *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased)* [2013] SGHC 178 at [4]). There is no necessity for implying an additional time period *after* service of Form 34, even as a matter of policy, for the self-same purpose.

23 I also do not accept the Plaintiff's reliance on the fact that such "Notice of Withdrawal of Offer" can be served with a covering letter in which it should be stipulated the time period after service before the offer to settle is to be withdrawn (see above at [15]). If this was the intended manner of the regime, as noted above, one would expect that Form 34 (which use is *mandatory* under O 22A r 3(3)) would prescribe for such information to be included in its body. Mr Chia validly pointed out that it *is* possible to serve Form 34 electronically, and thus, *without* a covering letter.

24 In my judgment, provided the notice period stipulated in O 22A r 3(2) is complied with, an offer to settle is effectively withdrawn upon the service of the "Notice of Withdrawal of Offer" in Form 34. In the present case, the Offer to Settle was validly withdrawn by the Defendant on 19 June 2013 at 9.39am when Form 34 was served electronically on the Plaintiff and there was no implied additional one day (*ie*, 24 hour) minimum period within which it was still open for the Plaintiff to accept the Offer to Settle.

The decision in Chia Kim Huay

25 Mr Rasanathan's second front of attack is the case of *Chia Kim Huay* ([10(b)] *supra*), where the High Court stated (at [32]):

32 Order 22A r 3(2) mandates that the offer to settle which does not specify a time for acceptance may only be withdrawn after 14 days by giving at least one day's prior notice of the intention to withdraw. Order 22A r 3(3) requires the notice of withdrawal to be in Form 34. ***This means that after the party making the offer gives notice to withdraw the offer in Form 34, the party who received the offer still has one day to accept the offer before it is withdrawn***. [emphasis added in bold italics]

Mr Rasanathan submits that this statement forms part of the *ratio decidendi* in *Chia Kim Huay* which the lower courts were bound to follow, and which should be highly persuasive authority now in this appeal.

26 In my view, it is clear that that statement at [32] by the High Court in *Chia Kim Huay* (at [32]) is *obiter dicta*. The question the court had to decide in *Chia Kim Huay* was whether an offer to settle had been validly accepted and whether the death of the plaintiff had determined the defendant's offer to settle. The plaintiff's claim there arose from a motor accident. The second defendant's insurer, who had stepped in to defend the suit, made an offer to settle to the plaintiff. The solicitors for the plaintiff purported to accept the offer to settle by service of Form 35 through facsimile transmission and by post on a Saturday, 27 August 2011. The purported acceptance by facsimile transmission was only seen by the insurer's solicitors when they opened for business on Monday morning, 29 August 2011, at 9.00am. The plaintiff passed away at 11.06am later that same Monday. The acceptance served by post was received two days later on 31 August 2011. The insurer resisted an application for judgment to be entered on the terms of the offer to settle mainly on the argument that the offer had determined on the death of the plaintiff. The High Court held that the first purported acceptance sent through facsimile transmission on the Saturday was invalid for bad service as the insurer's solicitors did not accept service of court documents through facsimile transmission. The court however held that the second purported acceptance was valid; the plaintiff's death did not determine the offer to settle and so when the insurers received the acceptance by post on 31 August

2011, the form was deemed properly served and the offer was accepted.

27 The issue in *Chia Kim Huay* did not involve any purported withdrawal of the offer to settle by service of a "Notice of Withdrawal of Offer" in Form 34. The effect of such a "Notice of Withdrawal of Offer" therefore did not feature in so far as the real dispute between the parties was concerned. The High Court in *Chia Kim Huay*, in making the statement relied upon by Mr Rasanathan, was only setting out the wider legal backdrop against which the issue stood. It did not form the *ratio decidendi* of the case; it was not "expressly or impliedly treated by the Judge as a necessary step in reaching his conclusion" (see the description of the generally accepted understanding of *ratio decidendi* in Rupert Cross, *Precedent in English Law* (Clarendon Press, 3rd Ed, 1977) at p 76, cited by Michael Hwang JC in *Sheriffa Taibah bte Abdul Rahman v Lim Kim Som* [1992] 1 SLR(R) 375 at [76] and *Indo Commercial Society (Pte) Ltd v Ebrahim and another* [1992] 2 SLR(R) 667 at [14]). With respect, I decline to follow *Chia Kim Huay* on its construction of O 22A, r 3(2) read with r 3(3) and Form 34.

28 Mr Chia, on the other hand, relies on the Court of Appeal's decision in *SBS Transit Ltd (formerly known as Singapore Bus Services Limited) v Koh Swee Ann* [2004] 3 SLR(R) 365 ("*SBS Transit*"). The Court of Appeal observed (at [20]):

If the Calderbank letter was an [offer to settle under O22A], then it could only be withdrawn by following the procedure in O 22A r 3, *ie*, by ***giving at least one day's prior notice of the intention to withdraw the offer and thereafter serving a notice of withdrawal in Form 38B*** .
[emphasis added in bold italics and underlined bold italics]

Form 38B was in Appendix A of the old Rules of Court (Cap 322, R 5, 1997 Rev Ed). Order 22A under the old rules and its prescribed forms are for all intents and purposes identical to the ones in force now and which govern the present case. The parties agree that this remark by the Court of Appeal was *obiter dicta*.

29 In my judgment the observation of the Court of Appeal in *SBS Transit* is the correct construction of O 22A r 3(2) read with r 3(3) and Form 34 and one which I, respectfully, adopt.

Conclusion

30 In my judgment, there is no statutorily implied minimum one day period after the service of the "Notice of Withdrawal of Offer" in Form 34 during which it is still open to an offeree to accept the offer to settle. Accordingly, there was no valid acceptance of the Offer to Settle by the Plaintiff when it served an "Acceptance of Offer" in Form 35 on the Defendant on 20 June 2013 at 8.56am as the Offer to Settle had been withdrawn by service of the "Notice of Withdrawal of Offer" in Form 34 on 19 June 2013 at 9.39am. For the reasons set out above, this appeal is accordingly dismissed.

31 Costs of the application for leave to appeal, which was ordered to be in the cause below, and the costs of this appeal are awarded to the Defendant which I fix at \$3,500, inclusive of disbursements.

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