IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 114

Civil Appeal No 60 of 2019

Between

Michael Vaz Lorrain

… *Appellant*

And

Singapore Rifle Association

… *Respondent*

In the matter of Suit No 109 of 2017

Between

Singapore Rifle Association

… *Plaintiff*

And

Michael Vaz Lorrain

… *Defendant*

JUDGMENT

[Civil Procedure] — [Damages]
[Civil Procedure] — [Offer to settle]

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Michael Vaz Lorrain
v
Singapore Rifle Association

[2020] SGCA 114

Court of Appeal — Civil Appeal No 60 of 2019
Andrew Phang Boon Leong JA, Steven Chong JA and Belinda Ang Saw Ean J
24 September 2020

20 November 2020 Judgment reserved.

Belinda Ang Saw Ean J (delivering the judgment of the court):

Introduction

1 The appellant in CA/CA 60/2019 ("CA 60") is Mr Michael Vaz Lorrain ("Mr Vaz"). The respondent, the Singapore Rifle Association ("SRA"), is a member of the Singapore Shooting Association ("SSA"). Mr Vaz is the president of SSA's council. HC/S 109/2017 ("Suit 109") is SRA's action against Mr Vaz for breach of a mediation agreement entered into between, *inter alia*, SRA and Mr Vaz ("the Mediation Agreement") and/or a duty of confidence owed to SRA. As Mr Vaz did not dispute liability, interlocutory judgment was entered against him.

2 Following the trial for the assessment of damages, the High Court judge ("the Judge") awarded damages in favour of SRA in the sum of $8,100 along with interest and costs. In CA 60, Mr Vaz appeals against part of the Judge's

decision. SRA initially filed a cross-appeal against the Judge's dismissal of SRA's claim for punitive damages but this was subsequently withdrawn.

3 There are broadly three main issues in this appeal. The first issue is whether the judgment sum of $8,100, being legal fees and disbursements allegedly incurred by SRA, is recoverable by way of a claim for damages. The second issue is whether the Judge should have applied O 22A r 9(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) in respect of an offer to settle that was served by Mr Vaz on 3 April 2017 (the "OTS"). The second issue is related to the first issue in so far as the Judge held that the OTS sum of $25,000 ("the OTS Sum") was not more favourable than the judgment obtained by SRA (*ie*, $8,100) together with SRA's costs incurred up to the date the OTS was served (*ie*, the date of the OTS). The third issue is whether we should exercise our discretion under O 22A r 9(5) not to apply O 22A r 9(3) even if the requirements therein are satisfied.

Background facts

4 We begin with a brief summary of the background facts.

5 In 2016, the parties entered into the Mediation Agreement in an attempt to resolve certain disputes. The Mediation Agreement contained terms pertaining to the confidentiality of the mediation. Pursuant to that agreement, the parties attended a mediation session which proved to be unsuccessful.

6 Subsequently, Mr Vaz, in his capacity as president of the Singapore Gun Club Committee, sent a 12-page document to its members. This document contained a short extract which revealed details of what had transpired during the mediation session ("the Published Statement"). The document was later

uploaded onto the Facebook page of a public Facebook group named "Singapore Gun Club" by one James Blackmore ("Mr Blackmore"). Thereafter, Mr Blackmore's Facebook post was shared by Mr Vaz on his personal Facebook page. Mr Vaz's post was accessible to any member of the public.

7 SRA commenced Suit 109 on 8 February 2017. SRA contended that by disseminating the Published Statement in the manner described above, Mr Vaz had breached the Mediation Agreement and/or a duty of confidence. Apart from claiming compensatory damages, SRA also sought punitive damages, which was quantified at $1.5m in SRA's Opening Statement filed on 5 September 2018.

8 Mr Vaz filed his Defence on 2 March 2017. On 22 March 2017, SRA's solicitors noted in a letter to Mr Vaz's solicitors that Mr Vaz "ha[d] not raised any legal defences in his Defence on the issue of liability". Accordingly, SRA sought Mr Vaz's agreement for the parties to record a consent interlocutory judgment on the following terms:

> a) That [Mr Vaz] be restrained whether acting by himself, his servants, agents or any of them or otherwise howsoever from disclosing and/or using any Confidential Information or any part thereof including but not limited to the Published Statement;
>
> b) That [Mr Vaz] is liable to pay [SRA] damages;
>
> c) Damages, including punitive damages, to be assessed;
>
> d) That [Mr Vaz] pay [SRA] costs to be agreed or taxed.

9 In response, Mr Vaz's solicitors informed SRA's solicitors on 30 March 2017 that Mr Vaz was disputing SRA's claim for punitive damages. However, if SRA withdrew that claim, Mr Vaz would be prepared to consent to interlocutory judgment.

10 Meanwhile, on 3 April 2017, Mr Vaz served the OTS on SRA. The terms of the OTS were as follows:

> [Mr Vaz] offers to settle this proceeding on the following terms:
>
> 1. [Mr Vaz] be restrained whether acting by himself, his servants, agents or any of them or otherwise howsoever from disclosing and/or using any Confidential Information or any part thereof including but not limited to the Published Statement (as defined in the Statement of Claim);
>
> 2. [Mr Vaz] pays [SRA] the sum of S$25,000 within 14 days of acceptance of this Offer to Settle; and
>
> 3. Within three (3) working days of the receipt of the sum of S$25,000, [SRA] will file its Notice of Discontinuance of claim.

11 SRA did not accept the OTS. On 7 April 2017, SRA filed HC/SUM 1604/2017, an application under O 14 of the Rules of Court for, among other things, "interlocutory judgment [to] be entered against [Mr Vaz] with damages, including punitive damages, to be assessed" (the "Summary Judgment Application").

12 On 23 May 2017, the parties appeared before the Judge for the hearing of the Summary Judgment Application. At that hearing, Mr Vaz consented to interlocutory judgment being entered against him after, *inter alia*, it was clarified that his liability for punitive damages was to be determined at the trial for the assessment of damages. Accordingly, the Judge made the following orders pursuant to O 14 r 3:

> 1. Interlocutory judgment be entered against [Mr Vaz] for damages to be assessed.
>
> 2. The matter is to proceed to trial before a judge as respect to damages pursuant to O 37 r 4(b). For the avoidance of doubt, the question of whether [Mr Vaz] is liable for punitive damages is to be determined at the trial as respect to damages.

> 3. [Mr Vaz] be restrained whether acting by himself, his servants, agents or any of them or otherwise howsoever from disclosing and/or using any Confidential Information or any part thereof including but not limited to the Published Statement.
>
> 4. Costs of this action (including costs of the [Summary Judgment Application]) to be reserved to the judge hearing the assessment of damages.

The decision below

Assessment of damages

13 On 25 February 2019, the Judge gave his decision in respect of the assessment of damages. We briefly summarise the Judge's oral grounds.

14 The Judge allowed SRA's "claim of $8,100 as legal fees and disbursements incurred to respond to Mr Vaz's breach of his confidentiality obligations in relation to the mediation". For convenience, we refer to these legal fees and disbursements as the "Legal Advice Costs".

15 The Judge did not allow SRA's claim for the time, effort and expense incurred by SRA's council members to investigate and uncover Mr Vaz's breaches. The Judge also did not allow SRA's claim for the expenses it had incurred for the mediation.

16 Regarding SRA's claim for punitive damages, the Judge held that "mediation agreements or, at the minimum, confidentiality provisions in mediation agreements fall within the exception to the general rule that punitive damages should not be ordered for breach of contract". However, on the facts, the Judge found that SRA had not succeeded in proving that Mr Vaz's conduct was "outrageous", so as to warrant the imposition of punitive damages. The Judge therefore dismissed SRA's claim for punitive damages.

Costs orders and OTS

17 On costs, the Judge held that costs would follow the event. The Judge was satisfied that the costs ought to be assessed on the High Court scale "as there were sufficient reasons to bring [Suit 109] in the High Court in the light of the novelty, complexity and public interest significance of the issues raised". The Judge made various costs orders in favour of SRA, amounting to $62,300 in total, with reasonable disbursements to be agreed or taxed.

18 For ease of reference, we summarise the costs orders made by the Judge in the following table:

S/N	Description	Amount	Whether appealed by Mr Vaz
1	Costs of trial for assessment of damages	$50,000 to be paid by Mr Vaz to SRA.	Yes
2	Costs of Summary Judgment Application	$4,000 to be paid by Mr Vaz to SRA.	Yes
3	Costs of SRA's application to amend statement of claim ("Amendment Application")	No order as to costs as no amendments were occasioned to the Defence.	Yes
4	Costs of Mr Vaz's application to set aside service of the subpoena against him ("Setting Aside of Service Application")	No order as to costs as the court did not rule on the application. The parties agreed that the subpoena would be re-served.	Yes
5	Costs of summons for directions	$300 to be paid by Mr Vaz to SRA.	No

6	Costs of Mr Vaz's application to transfer proceedings to the State Courts	$3,000 to be paid by Mr Vaz to SRA.	No
7	Costs of Mr Vaz's application to set aside the subpoena against him	$5,000 to be paid by Mr Vaz to SRA.	No
Total		$62,300 and reasonable disbursements to be agreed or taxed	

19 On Mr Vaz's OTS, the Judge held that O 22A r 9(3) did not apply because he concluded that "the offered settlement sum of $25,000 [*ie*, the OTS Sum] is not more favourable than the damages award of $8,100 plus [SRA's] costs (on a party-to-party basis) incurred up to the date of OTS". This must have meant that the Judge was of the view that SRA's costs up to the date of the OTS would have amounted to more than $16,900.

Parties' respective positions on the three main issues to be determined in this appeal

20 We have already outlined broadly the three main issues in this appeal at [3] above.

21 On the first issue, Mr Vaz contends that the Judge erred in awarding $8,100 to SRA in respect of the Legal Advice Costs. SRA had failed to discharge its burden of proving that it incurred the Legal Advice Costs. If anything, the Legal Advice Costs ought to have been recovered as *costs* rather than by way of a claim for *damages*. On the contrary, SRA submits that Mr Vaz has not shown that the Judge's finding that SRA had incurred the Legal Advice Costs was "plainly wrong". SRA also contends that the Legal Advice Costs do not relate to the conduct of Suit 109 and cannot be claimed as costs.

22 On the second issue, Mr Vaz's position is that the Judge ought to have applied O 22A r 9(3). On the premise that SRA is only entitled to nominal damages along with interest, and considering SRA's own estimation of the costs it had incurred up to the date of the OTS, the OTS was more favourable than the judgment obtained by SRA. In contrast, SRA's position is that O 22A r 9(3) does not apply. Citing *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 ("*Michael Vaz Lorrain (Preliminary Judgment*"), SRA argues that since the OTS could no longer be accepted after the first instance judgment, it had "expired before the disposal of the claim" and O 22A r 9(3)(*a*) is not satisfied. Furthermore, O 22A r 9(3)(*b*) is also not satisfied because the judgment was more favourable than the OTS. In this regard, the court should accord due weight to the "non-monetary value" of the judgment.

23 Finally, on the third issue, SRA contends that even if the requirements in O 22A r 9(3) are fulfilled, we should exercise our discretion under O 22A r 9(5) not to apply O 22A r 9(3). Among other reasons, there were novel and complex issues of significant public interest in Suit 109. In such circumstances, the public interest is served by the courts making a legal pronouncement on these issues and the purpose underlying the O 22A regime, namely, to bring litigation to an expeditious end without judgment, has limited force. On the other hand, Mr Vaz submits that none of the reasons put forward by SRA provide a sufficient basis for O 22A r 9(3) not to be applied.

Issue 1: Whether the Legal Advice Costs could be recovered as damages

24 We first address Mr Vaz's contention that SRA did not discharge its legal burden to prove that it *in fact* incurred the Legal Advice Costs. The only evidence in support of this claim for damages was a bare assertion made by the

president of SRA, Mr Eng Fook Hoong ("Mr Eng"), in his affidavit of evidence-in-chief ("AEIC"). At the hearing before us, SRA's counsel, Mr Wendell Wong ("Mr Wong"), confirmed that there was no invoice tendered in Suit 109 for the Legal Advice Costs.

25 We see some merit in Mr Vaz's submission. As we have previously emphasised, "a claimant cannot make a claim for damages without placing before the court sufficient evidence of the quantum of loss it had suffered, even if it would otherwise have been entitled in principle to recover damages" [emphasis in original omitted] (see *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 at [41]). Here, if the Legal Advice Costs were incurred, both the nature of the expenditure and the quantum were matters that should have been entirely capable of being established by SRA through documentary evidence. Yet, no documentary evidence was produced.

26 Instead, SRA contends that it was not specifically put to Mr Eng in cross-examination that SRA ought to have adduced documentary evidence to prove the Legal Advice Costs. This was said to have infringed the rule in *Browne v Dunn* (1893) 6 R 67, which was affirmed by this court in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [48] (citing *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 at [42]):

> … [W]here a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission. …

27 As we indicated at the hearing of the appeal, we do not accept SRA's contention. In the present case, Mr Vaz has consistently maintained the position that SRA did not incur the Legal Advice Costs. Indeed, this was put to Mr Eng in cross-examination. In the circumstances, it was incumbent on SRA to adduce sufficient evidence to discharge its legal burden of *proving* the Legal Advice Costs. The fact that it was not put to Mr Eng that there was no documentary evidence to support this claim does not in any way change this analysis.

28 Nonetheless, for the purposes of this appeal, it is not necessary for us to conclusively determine whether the Legal Advice Costs were in fact incurred. This is because we are satisfied that even if these costs were incurred, they cannot, as a matter of principle, be recovered as damages. It is clear that the Legal Advice Costs were in the nature of legal fees and disbursements in relation to Suit 109 (see [36] below).

29 In *Ganesan Carlose & Partners v Lee Siew Chun* [1995] 1 SLR(R) 358 at [18], this court endorsed the proposition that "[a] party to court proceedings may not recover his costs of those proceedings from any other party to them *except by an award of costs by the court*" [emphasis added]. This is a trite principle that is also well established in other jurisdictions. For instance, in *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1, the Federal Court of Australia noted that "[a] distinction has long been drawn between damages and legal costs, such that a successful plaintiff cannot recover its costs of the proceedings from the defendant as damages, even though the defendant's wrongful act caused the plaintiff to incur those costs" (at [15]).

30 An *application* of this general principle can be found in this court's recent decision in *Singapore Shooting Association and others v Singapore Rifle*

Association [2020] 1 SLR 395 ("*Singapore Shooting Association*"). Incidentally, the parties to the present appeal were also involved in that matter. There, SRA pursued a claim in the tort of unlawful means conspiracy against the members of SSA's council, including Mr Vaz. In the court below, the Judge had held that the legal fees and disbursements incurred by SRA in investigating, detecting and responding to the conspiracy could amount to actionable loss or damage (at [44]).

31 On appeal, this court disagreed with the Judge on this point, and held that (at [97]):

> … generally, the legal fees incurred in investigating a conspiracy will not be recoverable as damages in a claim in conspiracy. That said … such fees may constitute actionable loss or damage if, for some reason, they cannot be recovered as costs instead. … [emphasis in original omitted]

32 Among other reasons, we noted that allowing legal fees that were recoverable as costs to be recovered as damages instead "would subvert the costs regime put in place to regulate the recoverability of such fees". This court explained as follows (at [94]):

> Our second reason is that allowing solicitors' fees that are recoverable as costs to be recovered as damages instead would subvert the costs regime put in place to regulate the recoverability of such fees. We observed in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 that a legal system's rules on costs (which include how legal costs should be recovered in litigation) are necessarily a matter of social policy: at [29] and [33]. This includes the important policy of 'enhancing access to justice for all' [emphasis in original omitted]: at [34]. The costs regime achieves this objective by requiring, amongst other things, the costs awarded to be reasonable and proportional: see *Lin Jian Wei and another v Lim Eng Hock Peter* [2011] 3 SLR 1052; see also *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* [2008] 2 SLR(R) 455. The application of such principles involves a different assessment, and will likely lead

> to a different result, from that involved in an inquiry into damages, which is instead subject to rules on causation, remoteness and mitigation: see Louise Merrett, "Costs as Damages" (2009) 125 LQR 468 at 470. It will often, although not invariably, be the case that the former will result in a figure lower than the latter. Thus, the courts have been careful to distinguish between those expenses which properly fall to be recovered as the costs of the action and those which can constitute actionable loss or damage in the tort of conspiracy. …

33 Although the relevant cause of action in *Singapore Shooting Association* was the tort of unlawful means conspiracy, the aforesaid rationale applies with equal force to any cause of action, including claims for breach of contract and breach of confidence.

34 At the hearing before us, Mr Wong accepted that if the Legal Advice Costs were incurred for the purposes of Suit 109, they could not have been recovered as damages. That said, Mr Wong seemed to suggest that this principle would only have been apparent in the light of this court's decision in *Singapore Shooting Association* ([30] *supra*). However, as we pointed out in the course of the arguments, *Singapore Shooting Association* did not *change* the law. The general principle, as set out at [29] above, is well established.

35 In its attempt to justify why the Legal Advice Costs could be recovered as damages, SRA submits that the Legal Advice Costs "do not relate to the conduct of Suit 109 and cannot be claimed as costs in [Suit 109]". Instead, SRA incurred the Legal Advice Costs "while (among other things) instructing its solicitors on the facts with a view to [the] making of a police complaint for a potential breach of the Administration of Justice Act".

36 We do not accept this submission. It is significant that in the court below, prior to the issuance of this court's decision in *Singapore Shooting Association*,

SRA did not take the position that the Legal Advice Costs related to work done outside of Suit 109. Furthermore, the evidence before us does not support SRA's submission. It is plain from the face of Mr Eng's AEIC that the Legal Advice Costs were not incurred exclusively or predominantly for the purposes of making a police complaint for a potential breach of the Administrative of Justice (Protection) Act 2016 (Act 19 of 2016). Nor is there any suggestion that the Legal Advice Costs pertained wholly to work done outside of Suit 109. The relevant paragraphs of Mr Eng's AEIC state as follows:

> 38. As a consequence of Mr Vaz's dissemination of the Published Statement, SRA has suffered loss and damage.
>
> 39. First, SRA had to instruct lawyers and seek legal advice on SRA's options in light of Mr Vaz's Published Statement including investigating the said matters and the possible lodgment of a police complaint for a potential breach of certain provisions of the Administration of Justice Act.

<table>
<tr><th>Description</th><th>Breakdown</th><th>Quantum</th></tr>
<tr><td rowspan="2">Legal fees and disbursements paid to solicitors

(Instructing solicitors on the facts, seeking advice from solicitors on investigating the breaches, seeking advice from solicitors on the appropriate reactions and seeking advice from solicitors on the relevant provisions under the Administration of Justice Act) and other related work</td><td>12 hours of work for a team of 3 solicitors: S$8,000</td><td rowspan="2">S$8,100</td></tr>
<tr><td>Disbursements: S$100</td></tr>
</table>

37 In our judgment, the Judge's award of $8,100 as damages is erroneous. Only nominal damages might be awarded given SRA's inability to prove that it had suffered any loss as a result of Mr Vaz's breach including the quantum of its loss, if any. Accordingly, the Judge's damages award of $8,100 is set aside and nominal damages of $1,000 is awarded to SRA.

Issue 2: The applicability of O 22A r 9(3) of the Rules of Court

38 We turn now to the second issue. Order 22A r 9(3) would apply if the two requirements stated in that rule are satisfied:

> (3) 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.

39 We refer to the requirement in O 22A r 9(3)(*a*) as the "Validity Requirement" and the requirement in O 22A r 9(3)(*b*) as the "Favourability Requirement".

Validity Requirement

40 To recapitulate, the Judge found that O 22A r 9(3) did not apply because the OTS Sum was not more favourable than the damages award of $8,100 and SRA's costs incurred up to the date of the OTS (see [19] above). We have held that the first part of the Judge's decision is erroneous and have awarded nominal damages of $1,000 instead of $8,100. The other part of the Judge's decision that

we now deal with is the costs incurred by SRA up to the date of the OTS (the "Pre-OTS Costs").

41 To determine whether the Judge should have applied O 22A r 9(3), this requires us to consider whether the Validity Requirement and the Favourability Requirement were satisfied *at the time of the Judge's decision*. In this regard, there can be no dispute that the OTS had not been accepted, withdrawn nor had it expired when the Judge made his decision. Hence, the Validity Requirement is satisfied. In the context of this appeal, we note that the parties have unnecessarily invited this court to examine one particular aspect of this court's earlier decision in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 1043 ("*NTUC Foodfare*"). In that case, this court noted that the expression "the disposal of the claim" in O 22A r 9(3)(*a*) refers to "the final disposal of the claim on appeal if an appeal is filed" (at [17]). Significantly, the issue in *NTUC Foodfare* was whether the offer to settle served by the defendants before the trial had expired at the conclusion of the trial (see *NTUC Foodfare* at [16]). That issue is irrelevant for present purposes because, as stated above, the Validity Requirement is clearly satisfied and the only remaining consideration is whether the Favourability Requirement is also satisfied which we now turn to examine.

Favourability Requirement

42 The applicable principles were set out in *NTUC Foodfare*, where this court endorsed the broad approach taken by the High Court in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd (judgment on costs)* [2004] 1 SLR(R) 134 ("*LK Ang*"). This court reiterated the relevant principles (at [25]):

(a) Order 22A r 9(3) provides that the defendant should be awarded costs on an indemnity basis from the date on which the offer to settle was served if the Validity Requirement and the Favourability Requirement are satisfied. It is based on the notion that where those requirements are fulfilled, the plaintiff should have accepted the offer to settle instead of proceeding to judgment.

(b) In determining if the Favourability Requirement is satisfied, the court is to compare the judgment and the terms of the offer to settle. This comparison is to be made *as of the date of the offer to settle*.

(c) The comparison under O 22A r 9(3)(*b*) must be between like and like:

(i) Where the offer to settle states a monetary sum, but is either silent on interest and costs, or states that the settlement sum is inclusive of interest and costs, it should be interpreted as an "all-in" offer inclusive of interest and costs. The court should compare the settlement sum with the judgment sum *together with interest and costs up to the date of the offer to settle*.

(ii) Where the offer to settle provides for the plaintiff to receive a fixed sum in addition to interest and costs, it would typically suffice for the court to compare the judgment sum (without accounting for interest and costs) with the fixed sum in the offer to settle to determine whether the Favourability Requirement is satisfied.

Whether the approach in NTUC Foodfare *should be modified*

43 Before we apply these principles to the present case, we first address SRA's contention that the approach in *NTUC Foodfare* should be modified. In particular, SRA submits that the relevant comparison should not be made with the Pre-OTS Costs but with *the full quantum of costs awarded to the plaintiff*. This is to properly reflect the two options available to the plaintiff: (a) to accept the offer to settle and receive the settlement sum; or (b) to proceed to judgment and receive the judgment sum, interest and costs.

44 In our judgment, this contention is untenable for the following two reasons.

45 First, as explained in *NTUC Foodfare* ([41] *supra*) at [25(a)], O 22A r 9(3) operates on the notion that the plaintiff should have accepted the offer to settle if the judgment eventually obtained is not more favourable than the offer. The need to account for the Pre-OTS Costs is due to the fact that the plaintiff would invariably have incurred some costs prior to the service of the offer to settle. The plaintiff should therefore be entitled to account for these costs in determining whether to accept the offer. In our view, it would not promote the purpose of O 22A if an offeror is required to account for the offeree's "Post-OTS Costs" in formulating the offer to settle, given that the scheme of O 22A is intended precisely to incentivise parties not to incur these further costs. As we have emphasised previously, "the whole object of O 22A is to spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time" (see *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 ("*Tan Shwu Leng*") at [37]). Simply put, reliance on the full quantum of costs awarded to the plaintiff at the end of the trial as a basis of comparison would be wrong. It ignores the point that such Post-OTS Costs

would not have been incurred had the plaintiff accepted the offer to settle. In fact, it has been held that the interest or benefit that would have accrued to the plaintiff had it accepted the offer to settle at an early date is a relevant consideration in assessing the Favourability Requirement (see [62] below).

46 Second, the approach in *NTUC Foodfare* is consistent with O 22A r 9(4), which stipulates that in considering the Favourability Requirement, the court should *only* account for the interest awarded in respect of the period *before* the offer to settle was served:

> (4) (*a*) Any interest awarded in respect of the period before service of the offer to settle is to be considered by the Court in determining whether the plaintiff's judgment is more favourable than the terms of the offer to settle.
>
> (*b*) Any interest awarded in respect of the period after service of the offer to settle is not to be considered by the Court in determining whether the plaintiff's judgment is more favourable than the terms of the offer to settle.

47 Hence, we affirm the approach in *NTUC Foodfare* and do not see any reason to depart from it.

Whether the judgment is more favourable than the OTS

48 We have held that SRA is only entitled to $1,000 in nominal damages (see [37] above). Even after accounting for interest and the Pre-OTS Costs (based on SRA's costs estimate of $18,068.65 in its submissions before the Judge), it is clear that the judgment is not more favourable than the OTS.

49 In its written submissions for the appeal, SRA contended that "it would be eminently defensible for the Pre-OTS Costs to be in excess of $25,000" [emphasis in original omitted]. According to SRA, the issues involved were "novel, complex and of significant public interest" and "necessitated a

significant amount of work that had to be done in the initial stages of Suit 109". We note that Mr Wong did not advance this submission at the hearing before us and instead submitted that the Pre-OTS Costs amounted to around $18,000. Indeed, this is consistent with the position taken by SRA in the court below. Before the Judge, SRA had estimated in its costs submissions that the Pre-OTS Costs would amount to around $18,068.65. There were three components to this estimated sum:

(a) First, $10,000 for the costs of the work done up to the close of pleadings. This was also reflected in SRA's costs schedule which Mr Vaz's counsel, Mr Anthony Lee, drew this court's attention to.

(b) Second, $6,500 for the Summary Judgment Application, given that some of the costs would have been incurred before the service of the OTS on 3 April 2017. The Summary Judgment Application was filed on 7 April 2017 (see [11] above).

(c) Third, $1,568.65 for disbursements incurred before the OTS was served.

50 Thus, even if we were to accept SRA's estimation of its Pre-OTS Costs ($18,068.65), and combine that sum with the nominal damages awarded ($1,000) and interest, the Favourability Requirement would still be amply satisfied. In the present case, we are of the view that it would be appropriate to fix the Pre-OTS Costs and to award to SRA costs of $15,000 inclusive of disbursements. The reduction, which is fair and reasonable, can be justified on the basis that SRA had sought $8,000 in costs for the Summary Judgment Application but was only awarded $4,000 by the Judge (see [18] above). The

costs that it is entitled to for the work done before the service of the OTS should therefore also be reduced accordingly.

51 For completeness, we briefly comment on the applicable scale that ought to apply to the Pre-OTS Costs. We note that SRA's estimation of the Pre-OTS Costs was made on the premise that it is entitled to costs on the High Court scale. As stated in *NTUC Foodfare* ([41] *supra*) at [25(c)(i)]:

> … [w]here the judgment sum does not exceed the District Court limit or the Magistrate's Court limit, the costs should generally be assessed on the applicable State Courts scale, unless there was sufficient reason for bringing the action in the High Court or (one of) the defendant(s) objected to the transfer of the action to a State Court: see ss 39(1) and 39(4) of the State Courts Act (Cap 321, 2007 Rev Ed) and O 59 r 27(5) of the Rules of Court.

52 Given that the judgment sum of $1,000 does not exceed the Magistrate's Court limit, the starting position should be that the Pre-OTS Costs are to be assessed on the Magistrate's Court scale. However, the Judge was satisfied that the costs ought to be assessed on the High Court scale "as there were sufficient reasons to bring [Suit 109] in the High Court in the light of the novelty, complexity and public interest significance of the issues raised" (see [17] above).

53 We do not see any reason to disturb the Judge's assessment. We accept that the Judge had to grapple with what was put forward as novel issues, such as whether a breach of a mediation agreement constitutes an exception to the general rule that punitive damages cannot be awarded for breach of contract: see *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 ("*PH Hydraulics*") at [135]. The Judge held that punitive damages may, in principle, be awarded for a breach of a mediation agreement if the defendant's conduct was "outrageous". For the avoidance of

doubt, since this issue is not before us, we neither affirm nor overrule the Judge on this point.

Whether the non-monetary value of the judgment should be considered

54 We turn now to address SRA's submission that in considering the Favourability Requirement, the court should account for the "non-monetary value" of the judgment. On this basis, although the monetary value of the judgment and the Pre-OTS Costs fall short of the OTS Sum, SRA claims that the judgment would nonetheless be more favourable than the OTS.

55 SRA elaborates on the non-monetary value that it derived from the judgment. According to SRA, the judgment vindicated its "legitimate expectation of utmost confidentiality in the mediation process". In addition, the court had agreed with its claim that Mr Vaz breached his confidentiality obligations and ought to be sanctioned. Finally, SRA vindicated its "reputational interests that were compromised and/or damaged by Mr Vaz's repeated circulation of the Confidential Information to the shooting fraternity and members of the public".

56 In our judgment, the court is entitled to consider the non-monetary *remedies* obtained from the judgment, such as the injunction (which was also one of the terms of the OTS) (see [10] and [12] above). However, in so far as the alleged non-monetary *value* derived from the judgment is concerned (as described by SRA), we do not see any basis to account for that when considering the Favourability Requirement.

57 First, as a matter of principle, the Favourability Requirement must be considered by reference to the *terms* of the offer to settle and the remedies

obtained from the judgment. However, the non-monetary value of the judgment would invariably be subjective and incapable of precise quantification. As we have noted previously, "[t]he O 22A regime is a regime which seeks to promote certainty and encourage settlement of the action between the parties so that they will not face the uncertain costs consequences that litigation entails" (see *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] 2 SLR 470 at [47]). If the non-monetary value of a judgment has to be accounted for in assessing the Favourability Requirement, this would introduce considerable uncertainty into the O 22A regime.

58 Second, SRA's contention is not supported by the case law that it cites – *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 ("*CCM Industrial*") and *Ram Das V N P v SIA Engineering Co Ltd* [2015] 3 SLR 267 ("*Ram Das*").

59 In *CCM Industrial*, Chan Sek Keong CJ explained the Favourability Requirement in the following terms (at [40]):

> … The word 'favourable' has to be interpreted in the context in which it is used. What is favourable has to be determined on the terms of the offer to settle, and it may contain many terms. In an ordinary case of a debt or damages claim, it would apply to the sum offered, although not *only* to the sum offered. In [*Tan Shwu Leng*], the Court of Appeal was concerned only with the sum offered in the offer to settle, comparing it with the judgment sum. In that situation, it is easy to see which is more favourable in terms of the amount. The Court of Appeal insisted on absolute certainty in numbers. That is a reasonable approach where the only term is the amount offered. But r 9(3) goes beyond that. The statement in [*Tan Shwu Leng* at [30]] should be read in that light. ***In an offer to settle which contains many terms, the sum offered in settlement is only one factor to be taken into account in determining whether the plaintiff's judgment is more favourable than the offer to settle.*** [emphasis in original in italics; emphasis added in bold italics]

60 These propositions were endorsed in *NTUC Foodfare* ([41] *supra*) (at [22]). The point emphasised by Chan CJ was simply that in determining whether the Favourability Requirement is satisfied, the court should consider *all the terms* of the offer to settle. There is nothing in the passage above which suggests that the court should take into account the non-monetary value of the judgment.

61 In *CCM Industrial*, the defendant made an offer to settle with a settlement sum of $2,018.32, which the plaintiff did not accept. Eventually, the parties recorded a consent judgment in the sum of $2,018.32, with interest thereon at 5.33% per annum from the date of writ to the date of judgment. The District Judge, taking into account the relevant *interest* on the judgment sum, held that the judgment was more favourable than the OTS by *$8.96*. Hence, the Favourability Requirement was not satisfied (at [4], [9] and [13]).

62 It was in this context that Chan CJ made the propositions excerpted at [59] above. He noted that the *duration* of the offer to settle should be considered in determining the Favourability Requirement. The offer to settle was open for acceptance for at least eight months. The interest or benefit that would have accrued to the plaintiff had it accepted the offer to settle at an early date was a relevant consideration. On that basis, and contrary to the District Judge's finding, the judgment obtained by the plaintiff was *not* more favourable than the terms of the offer to settle (at [41]–[43]).

63 Accordingly, *CCM Industrial* ([58] *supra*) does not stand for the proposition that the court should consider the non-monetary value of the judgment. In fact, *CCM Industrial* weakens SRA's case in so far as it suggests that the court should account for the interest or benefit that would have accrued to SRA had it accepted the OTS at an early date.

64 Next, in *Ram Das* ([58] *supra*), Hoo Sheau Peng JC (as she then was) stated that "favourability should not be restricted only to monetary terms" (at [45]). However, this statement should not be read out of context. The full passage in which that statement is contained reads:

> Although favourability is normally determined on the basis of a dollar amount in the offer compared to that awarded in the judgment, this does not always have to be the case. As observed by Kan Ting [Chiu] J, as he then was, in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd* [2004] 1 SLR(R) 134 at [21], favourability should not be restricted only to monetary terms. Kan J gave the example of a licence – if the defendant had been sued for a three-year licence, and the plaintiff rejected an offer of a two-year licence, judgment for a one-year licence in favour of the plaintiff would be, in Kan J's judgment, a less favourable judgment than the offer. Similarly, in *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 ("*CCM Industrial*"), Chan Sek Keong CJ, as he then was, held that favourability must be determined in the context in which it was used. Thus, in an offer to settle that contained many terms, the monetary sum offered is only one factor to be taken into account in determining whether the plaintiff's judgment is more favourable than the offer to settle (at [40]).

65 Read in context, the point made by Hoo JC was no different to the one made by Chan CJ in *CCM Industrial*. In addition, the reference to *LK Ang* ([42] *supra*) was to illustrate that O 22A has been held to be available for non-monetary *claims*, such as where a plaintiff sues a defendant for a license. However, whether or not the court should consider the non-monetary *value* of the judgment is a separate issue altogether.

66 For these reasons, we hold that the Favourability Requirement is satisfied in the present case.

Issue 3: Whether the court should exercise its discretion under O 22A r 9(5) not to apply O 22A r 9(3) even when the two requirements have been satisfied

67 We turn now to the final issue, which is whether we should exercise our discretion under O 22A r 9(5) not to apply O 22A r 9(3). Order 22A rule 9(5) confers on the court an overriding discretion to deal with costs in matters involving offers to settle:

> (5) 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.

68 It has been observed that "[t]here is a *prima facie* rule that the courts should apply the costs consequences provided for in [O 22A r 9], unless the interest of justice requires otherwise, because of the policy behind [O 22A] and the importance of reasonable predictability": see *Singapore Civil Procedure 2020* vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2020) at para 22A/9/5; see also *Ram Das* ([58] *supra*) at [78].

69 In the present case, we are not persuaded by SRA's submissions as to why the costs consequences in O 22A r 9(3) should not apply. We address each of these submissions in turn.

Novel and complex issues of significant public interest

70 SRA submits that Suit 109 concerned issues that were "novel, complex and of significant public interest". Accordingly, while the O 22A regime is intended to encourage the parties to bring litigation to an expeditious end without judgment, SRA contends that "this consideration should have limited

force when the public interest is served by the [c]ourts making a legal pronouncement on the issues in the suit".

71 In our judgment, the mere fact that there are novel and complex legal issues of public interest, does not, in and of itself, ordinarily provide a sufficient basis not to apply O 22A r 9(3). In fact, as this court has previously observed, "[i]t is precisely in a case … where the question of law involved is of some complexity, that there should be some give and take on both sides" (see *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 3 SLR(R) 267 at [17]).

72 Furthermore, although there were novel issues in Suit 109, the strength of SRA's claim must still be considered in the final analysis. In that regard, we emphasised in *PH Hydraulics* ([53] *supra*) that even if we were minded to depart from the general rule that punitive damages cannot be awarded for breach of contract, the breach must be of "a particularly outrageous type" (at [136]). In the present case, we do not see how SRA could have seriously maintained the position that Mr Vaz's conduct was sufficiently "outrageous" to warrant the imposition of punitive damages of *$1.5m*. Accordingly, SRA should have accepted the OTS, and the application of O 22A r 9(3) is merely a consequence of its failure to do so.

The OTS was a serious and genuine attempt to settle Suit 109

73 SRA contends that the OTS was not a serious and genuine attempt to settle Suit 109. According to SRA, there was "no logic" behind the OTS Sum and the OTS was merely a "tactical ploy to attract the application of [O 22A r 9(3)]".

74 In our view, this contention is untenable. In *Resorts World at Sentosa Pte Ltd v Goel Adesh Kumar and another appeal* [2018] 2 SLR 1070 ("*Resorts World at Sentosa*"), this court stated that "[i]n determining whether an offer to settle is reasonable, serious or genuine, it would suffice that there is a legitimate basis for the offer made and the offer is not illusory" [emphasis in original omitted]. We explained that this means that the offer should not be made just to entail the payment of costs on an indemnity basis and should not be one where the offeror effectively expects the other party to capitulate (at [22]).

75 SRA submits that the present case is analogous to *Singapore Airlines Ltd and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2001] 1 SLR(R) 38 ("*Singapore Airlines*"). However, that case is distinguishable. There, the plaintiffs sued the defendants for the loss of a package valued at US$286,344.14. The defendants successfully argued on appeal that their liability was limited to $312 under the Convention for the Unification of Certain Rules Relating to International Carriage by Air (12 October 1929) 137 LNTS 11 (entered into force 13 February 1933), as amended by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (28 September 1955) 478 UNTS 371 (entered into force 1 August 1963). This court observed that whilst the defendants denied liability for the loss of the package carried by the first defendant, the defendants had made an offer of $347 to settle the claim. However, on the facts, the offer did not contain any incentive to settle nor was there a genuine or serious effort to seek a compromise (at [11]). In *Resorts World at Sentosa*, this court explained that the court in *Singapore Airlines* had rightly decided not to apply O 22A r 9(3) because "the offer was considered to lack any legitimate basis because it had been made *purely* to secure for the [defendants] the payment of costs of the action by the [plaintiffs] from the date

of the offer on the indemnity basis in the event that the [defendants] prevailed at the trial" [emphasis added] (at [24]).

76 Conversely, in the present case, we are satisfied that the OTS was a serious and genuine attempt to settle Suit 109. The OTS Sum of $25,000 was by no means an illusory one. At the time the OTS was served, SRA had not quantified its claim for punitive damages and it was only in its Opening Statement filed on 5 September 2018 that SRA revealed that it was claiming $1.5m as punitive damages. In its Statement of Claim, SRA had only quantified its claim for special damages of $22,170, comprising $8,100 for the Legal Advice Costs and $14,070 for the alleged losses arising from the time, effort and expense incurred by SRA's council members to investigate and uncover Mr Vaz's breaches. We are also satisfied that there was a legitimate basis for the sum proposed and that it was not a strategic or tactical offer made purely to secure indemnity costs. In fact, bearing in mind that SRA did not prove it suffered any discernible losses (as reflected in the fact that it is only entitled to nominal damages), the OTS Sum was arguably generous towards SRA.

SRA's purported reasons as to why it did not accept the OTS

77 In its written submissions as well as at the hearing before us, SRA provided various reasons as to why it did not accept the OTS, and submitted that O 22A r 9(3) should not apply in view of these reasons. To begin with, we do not think that it matters whether or not we accept SRA's reasons for not accepting the OTS. Besides, the reasons advanced are simply lawyers' arguments without legal and factual foundation:

(a) First, it was "inherently difficult" for SRA to assess whether the OTS should be accepted given the "unique circumstances" of the case.

> "The law on remedies for breaches of mediation confidentiality was (and remains) in a state of flux" and the "damages were inherently hard to quantify with precision".
>
> (b) Second, SRA had suffered "deep and irreparable intangible losses" and "needed vindication and some measure of restoration". The OTS contained no admission of liability.
>
> (c) Third, SRA was, as Mr Wong put it, troubled by the operation of the OTS as it required SRA to discontinue its claim, notwithstanding the fact that Mr Vaz had consented to interlocutory judgment.

78 As we pointed out to Mr Wong in the course of the arguments, there is no *evidence* before us that any of these considerations had influenced SRA's decision not to accept the OTS. There was therefore no basis for us to consider these submissions from the Bar.

79 In any event, none of the reasons provide a sufficient basis for us not to apply O 22A r 9(3). On the point about SRA not accepting the OTS because it did not contain an admission of liability, Mr Wong confirmed that SRA did not at any time counter-propose for the OTS to include such a term. Furthermore, if SRA was indeed concerned about there being no admission to liability, SRA could have accepted the OTS *after* Mr Vaz had consented to interlocutory judgment. We also do not understand what was troubling about the term requiring discontinuance of the action, given that the issue of damages had not been decided by the Judge and it was open for SRA to discontinue the action at that stage. Moreover, the fact that SRA saw fit to accept the OTS after the first instance judgment puts paid to the suggestion that it was troubled by the term requiring discontinuance. We digress to note that in *Michael Vaz (Preliminary*

Judgment) ([22] *supra*), this court held that SRA's purported acceptance of the OTS after the first instance judgment was not valid, for reasons which we do not need to go into in this judgment.

80 In our view, given that SRA was claiming punitive damages of $1.5m, the inference must be that SRA had deemed the OTS Sum to be derisory and not worthy of consideration. That, in our view, was the likely reason why the OTS was not accepted.

Mr Vaz's alleged wasteful conduct

81 Finally, SRA submits that Mr Vaz's conduct was wasteful and protracted the proceedings. However, we note that the Judge did not make any finding on Mr Vaz's allegedly wasteful conduct. Furthermore, Mr Vaz has made similar allegations against SRA. Having regard to the entirety of the record, it appears to us that both parties could have conducted the litigation in a more proportionate manner. We therefore do not think that either party's conduct ought to have a material bearing on whether O 22A r 9(3) should apply.

The appropriate costs orders

82 In the circumstances, applying O 22A r 9(3), we make the following costs orders:

(a) Mr Vaz shall pay SRA's costs incurred in Suit 109 on a standard basis on the High Court scale up to 3 April 2017 (*ie*, the Pre-OTS Costs). We have fixed this at $15,000 inclusive of disbursements (see [50] above).

(b) SRA shall pay Mr Vaz's costs incurred in Suit 109 on an indemnity basis on the High Court scale from 3 April 2017 (*ie*, the Post-OTS Costs). This would comprise the costs of the trial for the assessment of damages, the Summary Judgment Application, the Amendment Application and the Setting Aside of Service Application (*ie*, the costs orders appealed against by Mr Vaz).

(c) The costs orders made by the Judge which are summarised at S/N 1 to 4 of the table at [18] above are set aside (*ie*, the costs orders relating to the trial for the assessment of damages, the Summary Judgment Application, the Amendment Application and the Setting Aside of Service Application).

(d) The costs orders made by the Judge which are summarised at S/N 5 to 7 of the table at [18] above shall remain and Mr Vaz is not to be awarded any costs for these applications.

83 We elaborate on the last two orders stated above. In the present case, the Judge made various costs orders in respect of the interlocutory applications in Suit 109 (see [18] above). These interlocutory applications relate to work done after the OTS was served (with the exception of the Summary Judgment Application where we have accepted SRA's submission that some costs would have been incurred before the service of the OTS, see [50] above).

84 Having found that O 22A r 9(3) is applicable, the starting position should be that all the costs orders made in relation to the interlocutory applications should be set aside. This is because SRA is not entitled to any costs after the service of the OTS. Instead, it is Mr Vaz who is entitled to such costs, which would necessarily include the costs incurred for the interlocutory applications

filed in Suit 109. However, Mr Vaz has not appealed against three of the costs orders made by the Judge and is not asking for costs in respect of these applications. We are therefore of the view that it would be appropriate to exercise our discretion under O 22A r 9(5) to allow those orders to remain and to order that Mr Vaz is not to be awarded any costs for these applications.

85 The remaining issue is whether the quantum of the Post-OTS Costs should be remitted to the Judge or should be determined by a taxing registrar. In our view, the former option is preferable given that the Judge would be familiar with the issues in this case and would be in a better position to determine the reasonableness of the costs sought by Mr Vaz. The usual review of taxed costs under O 59 r 34 and O 59 r 35 of the Rules of Court can also be avoided.

Conclusion

86 In conclusion, we allow Mr Vaz's appeal. The Judge's award of $8,100 in damages is set aside and we award nominal damages of $1,000 to SRA. We also fix the Pre-OTS Costs in favour of SRA at $15,000 inclusive of disbursements. On this basis, the judgment is not more favourable than the OTS and O 22A r 9(3) applies. Mr Vaz is entitled to the Post-OTS Costs on an indemnity basis to the extent set out at [82] above. Unless the parties are able to come to an agreement within 14 days of the date of this judgment, we remit the issue of the quantum of the Post-OTS Costs to the Judge.

87 Finally, for the costs of the appeal, having regard to the parties' costs schedules, we order SRA to pay Mr Vaz the sum of $20,000 inclusive of disbursements. The usual consequential orders, if any, shall apply.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Lee Hwee Khiam Anthony and Huineng Clement Chen (Bih Li & Lee LLP) for the appellant;
Wong Hin Pkin Wendell, Chen Jie'an Jared, Wong Zi Qiang, Bryan and Andrew Chua Ruiming (Drew & Napier LLC) for the respondent.