Ong & Ong Pte Ltd *v* Fairview Developments Private Limited
[2014] SGHC 48

Case Number : Suit No 369 of 2011 (Summons No 5235 of 2013)

Decision Date : 18 March 2014

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Mohan Pillay and Ang Wee Jian (MPillay) for the plaintiff; Hri Kumar Nair SC (instructed) (Drew & Napier LLC) and Jimmy Yap (Jimmy Yap & Co) for the defendant.

Parties : — Ong & Ong Pte Ltd — Fairview Developments Private Limited

Civil Procedure – Offer to settle – Offer to settle encompassing plaintiff's claim and defendant's counterclaim – Defendant accepting offer to settle after counterclaim was determined – Whether offer to settle remained open for acceptance – Order 22A Rules of Court (Cap 322, R 5, 2006 Rev Ed)

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 163 of 2013 was dismissed by the Court of Appeal on 23 January 2015. See [2015] SGCA 5.]

18 March 2014

Lee Seiu Kin J:

1 In this summons the defendant applied for a declaration that its acceptance on 24 September 2013 of the plaintiff's offer to settle dated 28 July 2011 was valid and that the action had been settled on the following terms:

(a) The defendant is to pay to the plaintiff the sum of S$2,588,666.

(b) The defendant is to pay to the plaintiff the plaintiff's costs of the claim and counterclaim to be taxed if not agreed:

(i) on a standard basis, from the date of commencement of these proceedings on 20 May 2011 to 11 August 2011; and

(ii) on an indemnity basis, from 12 August 2011 up to the date of the defendant's notice of acceptance (*ie*, 24 September 2013).

(c) The defendant is to pay to the plaintiff interest at 1.5% per annum, for the period from 20 May 2011 up to the date of payment.

(d) The plaintiff is to discontinue its claims against the defendant within seven days of payment of the sum of S$2,588,666, interest and costs.

2 On 5 November 2013, after hearing submissions from both sides, I made an order in terms of the application and granted costs to the defendants fixed at $5,000 plus disbursements. On the application of counsel for the plaintiff, I granted leave to appeal as the matter concerned a novel

point of law. The plaintiff filed the appeal on 2 December 2013 and I now give my grounds of decision.

3 The issue in this appeal is whether the plaintiff's offer to settle of 28 July 2011 had expired prior to the defendant's acceptance on 24 September 2013.

Background

4 The background to the matter is as follows. The plaintiff commenced this action, Suit No 369 of 2011, on 20 May 2011. The claim was for a sum of $10,138,128.28, which consisted of two parts:

(a) Loss of prospective fees for architectural works not carried out amounting to $5,626,653.31; and

(b) Fees of $4,511,474.97 for certain architectural work carried out.

5 The defendant in turn counterclaimed for the sum of $23,410,000. This was for loss and damage suffered as a result of the plaintiff's delay in providing the defendant with a letter of release after the defendant terminated the plaintiff's services.

6 On 28 July 2011, some two months after the writ was filed, the plaintiff's solicitors, M/s MPillay ("MPillay"), sent a letter ("the OTS") to the defendant's then solicitors, M/s Kelvin Chia Partnership. In it, the plaintiff offered to settle its claim against the defendant for the sum of about $2.6m. The letter stated as follows:

> The Plaintiff offers to fully and finally settle all of the Plaintiff's claims, all of the Defendant's counterclaims and all matters arising in this Suit on the following terms:
>
> 1. The Defendant is to pay to the Plaintiff the sum of S$2,588,666;
>
> 2. If this Offer to Settle is accepted by the Defendant no later than 14 days from today, i.e. by 11 August 2011:
>
> a) Parties will bear their own legal costs from the date of commencement of these proceedings on 20 May 2011 to the date of the Defendant's notice of acceptance (if any); and
>
> b) The Settlement Sum shall be inclusive of interest accrued from the date of commencement of these proceedings on 20 May 2011;
>
> 3. If this Offer to Settle is accepted by the Defendant after 11 August 2011:
>
> a) The Defendant is to pay to the Plaintiff the Plaintiff's costs:
>
> a. on a standard basis, from the date of commencement of these proceedings on 20 May 2011 to 11 August 2011,
>
> b. on an indemnity basis, from 12 August 2011 up to the date of the Defendant's notice of acceptance (if any);
>
> b) The Defendant is to pay to the Plaintiff interest at 1.5% per annum, for the period from 20 May 2011 up to the date of payment;

4. Costs to be paid pursuant to this Offer to Settle, to be taxed if not agreed; and

5. The Plaintiff is to discontinue its claims against the Defendant, and the Defendant is to discontinue its counterclaim against the Plaintiff, within 7 days of payment of the sums payable pursuant to this Offer to Settle.

7 On 8 February 2012, the plaintiff applied in summons no 603 of 2012 for bifurcation of the suit to determine the issues of liability and quantum in separate trials. The court granted the application on 7 March 2012. The trial on liability was heard in October 2012. On 26 March 2013, I issued my decision, allowing part of the plaintiff's claim and dismissed the rest. I also dismissed the defendant's counterclaim. I ordered damages to be assessed by the registrar.

8 On 22 April 2013, a few days before expiry of the period to file notice of appeal against my decision, the defendant's solicitors, M/s Jimmy Yap & Co ("JYC"), wrote to MPillay to ask if the plaintiff was *"prepared to accept the outcome of the matter without taking the matter further to the Court of Appeal"* [emphasis in original]. The letter further stated that if the plaintiff was prepared to do so, the defendant would also not appeal. MPillay replied on 23 April 2013 stating that "[i]f your client's proposal is made with the intention of avoiding further time and costs, please be reminded that our client's Offer to Settle remains open for acceptance". There was no further correspondence on this matter and on 25 April 2013, both parties filed notices of appeal against that part of my decision that found the defendant liable to the plaintiff with damages to be assessed. However the defendant did not appeal against the dismissal of its counterclaim.

9 On 24 September 2013, the Court of Appeal heard the appeals. The plaintiff's appeal was allowed and the defendant's appeal dismissed. Later that same day, JYC sent to MPillay a document entitled "Notice of Acceptance of Plaintiff's Offer to Settle". This document ("the NOA") purported to accept the OTS. It stated as follows:

The Defendant accepts your Offer to Settle dated the 28th day of July 2011 on the following terms:

1. The Defendant is to pay to the Plaintiff the sum of S$2,588,666.

2. The Defendant is to pay to the Plaintiff the Plaintiff's costs of the Claim and Counterclaim to be taxed if not agreed:

a) on a standard basis, from the date of commencement of these proceedings on 20 May 2011 to 11 August 2011;

b) on an indemnity basis, from 12 August 2011 up to the date of this Notice of Acceptance.

3. The Defendant is to pay to the Plaintiff interest at 1.5% per annum, for the period from 20 May 2011 up to the date of payment.

4. The Plaintiff is to discontinue its claims against the Defendant within 7 days of payment of the aforesaid sum of $2,588,666, interest and costs.

By a letter dated 25 September 2013 from MPillay to JYP, MPillay stated, among other things, that the OTS "remained open for acceptance so long as the Court had not disposed of the matter in respect of which the OTS was made" and as "that had ceased to be the case before [the defendant's]

purported acceptance", the OTS was "no longer capable of being accepted". There was further exchange of correspondence between the solicitors on whether the defendant's purported acceptance of the OTS was valid and therefore had compromised the action, but such correspondence are not relevant for my determination of the issue.

The defendant's submissions

10 The defendant's position was that the OTS did not specify a time for acceptance. Order 22A r 3(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC") states that an offer 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 is given. Order 22A r 3(5) of the ROC provides that, if not withdrawn, the offer may be accepted at any time before the court disposes of the matter in respect of which the offer is made. As no such notice was given in this case, it remained open for acceptance at the time the NOA was served.

11 The defendant submitted that, at the time of the NOA, the court had not disposed of the matter in respect of which the OTS was made (O 22A r 3(5)). This was because the OTS was made in respect of the entire suit as it dealt with both issues of liability and damages. As at the date of the NOA, 24 September 2013, only the issue of liability had been disposed of. The issue of damages, which remain to be assessed, has not yet been disposed of.

12 The defendant highlighted that the OTS was an offer to "fully and finally settle all of the Plaintiff's claims, all of the Defendant's counterclaims and all matters arising in the Suit". While it was a term of the OTS that the defendant was to discontinue its counterclaim against the plaintiff, it had become irrelevant by 24 September 2013 because there was no counterclaim for the defendant to discontinue. The defendant further pointed out that, even after the defendant's counterclaim had been dismissed by the High Court, the plaintiff itself had maintained, by way of a letter, that the OTS remained open for acceptance by the defendant.

13 The defendant also submitted that its position made eminent sense. Its argument was as follows:

(a) The defendant's position may be tested by looking at the matter from the plaintiff's perspective.

(b) Pursuant to O 22A r 9(1) of the ROC, where an offer to settle made by a plaintiff:

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

(ii) is not accepted by the defendant, and the plaintiff obtains a judgment not less favourable than the terms of the offer to settle;

(a) the plaintiff is entitled to costs on the standard basis to the date the offer to settle was served, and costs on the indemnity basis from that date, unless the court orders otherwise.

(c) Could the plaintiff rely on O 22A r 9(1) of the ROC, and its OTS if it were subsequently awarded damages of more than S$2,588,666 (assuming the OTS was neither accepted nor withdrawn in the interim)?

(d) The answer must be "yes". Otherwise, the plaintiff would be put in the absurd situation of

its OTS being nullified, and losing the advantage of making that OTS, simply because the Court had decided on the issue of liability first.

(e) More importantly, if the plaintiff was entitled to rely on the OTS when damages are determined, then why could not the defendant accept it before that determination? If the plaintiff were to have the advantage of the OTS, it must necessarily follow that the OTS remained open for acceptance by the defendant until the issue of damages was determined.

14 The defendant further submitted that its position was consistent with the policy behind offer to settle, and the *contra proferentum* rule for the following reasons:

(a) The whole object of offer to settle was to spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time: *Singapore Court Practice 2009 (Jeffrey Pinsler gen ed) (LexisNexis, 2009)* at para 22A/1/2; *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 at [37] (*"Singapore Airlines Ltd"*).

(b) Consistent with this principle, an offer to settle made in a bifurcated action, and which dealt with both liability and damages, must remain open for acceptance after liability had been determined but before damages were assessed as a party could not benefit from its offer to settle if it were withdrawn before the disposal of the claim in respect of which the offer to settle was made: see O 22A r 9(1) of the ROC; also 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, in which the Court of Appeal held that the appellants were not entitled to indemnity costs because their offer to settle (which was valid only for 14 days) had expired before the disposal of the claim. In other words, the offer to settle was, according to O 22A r 3(4), deemed to have been withdrawn after the 14 days.

(c) Indeed, one of the benefits of bifurcation was precisely to allow parties to settle once liability had been decided.

(d) Further, if there were any ambiguity about the meaning of the OTS, the words must be construed against the plaintiff, who made the offer. Not only was this consistent with the *contra proferentum* rule, where the words of an ambiguous document will be construed against the person who put them forward: Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at para 7.08, it was also consistent with the object of offers to settle, which was to encourage the speedy termination of litigation by agreement of the parties.

(e) Indeed, after the interlocutory judgment, the plaintiff took the position that the OTS remained open for acceptance, which the defendant accepted on 24 September 2013.

The plaintiff's submissions

15 The plaintiff's submissions were threefold:

(a) The defendant's acceptance was invalid as it did not accept the OTS on its terms.

(b) The OTS was no longer capable of being accepted, as the Court has disposed of the matter in respect of which it was made.

(c) The defendant's conduct in these proceedings ran contrary to, and made a mockery of the rationale underpinning the offer to settle regime.

(a) Acceptance not on terms of OTS

16 The plaintiff first referred to *Fuyawa Enterprise Pte Ltd v Lim Han Tee trading as Wifu Marketing* [1996] SGHC 300 ("*Fuyawa Enterprise"*) for the proposition that an offeree's acceptance must mirror the terms of the offer to settle. The defendant in that case had accepted the plaintiff's offer to settle dated 23 September 1995. The disputed term stated that "the Defendant will bear taxed costs of the Plaintiff's claim and the Defendant's counterclaim which the Plaintiffs are entitled to of this matter to-date". The High Court recorded consent judgment on 3 November 1995, and held that the order for costs was for costs up to 3 November 1995. The defendant sought clarification on the period covered by the costs order, arguing that costs should be ordered only up to 23 September 1995, *ie*, the date of the offer to settle. The judge disagreed and held that the expression "to-date" in the offer to settle referred to the date of acceptance and not the date of offer. The judge reasoned as follows:

> It may be unfortunate that the Plaintiffs' offer of settlement did not say costs as at the date of acceptance, but *in the scheme of things under O 22A of the Rules of Supreme Court, a party must accept the offer in the prescribed form. The acceptance by the Defendant in this case was not in the prescribed form. Had he done so he would have been obliged to set out the terms in consecutively numbered paragraphs and the acceptance would be dated the 3 November 1995.* The phrase "to-date" in paragraph 5 of the Plaintiffs' offer must be read to mean the date of acceptance and not the date in which the offer was dated as *the offeree's acceptance must necessarily mirror this term* and the date of the acceptance must be 3 November 1995 and not 23 September 1995. … [emphasis added]

17 With respect, I do not see anything in this authority that assists the plaintiff's position. If anything, it shows that the courts look at the substance of the offer and acceptance rather than the strict form when considering whether a purported acceptance is valid. In my opinion, this is necessary because there is no standard manner of formulating an offer as there is an infinite variety of circumstances as well as differing quality of drafting. In *Fuyawa Enterprise*, despite the fact that, on the face of a document dated 23 September 1995 the offer was for "costs to-date", the court interpreted this to refer to costs as at the eventual date of acceptance and not the date of the document.

18 The plaintiff next referred to *Ip Yun Ha v Dennis Wee Realty Pte Ltd* [2011] SGDC 15 ("*Ip Yun Ha*") and to *Re Desanto et al v Cretzman et al* 53 OR (2d) 732; 1986 CanLII 2663 ("*Re Desanto*"), a District Court of Ontario decision, for the proposition that an acceptance must be done without any amendment or variation and must be unqualified and unconditional. If a party qualified its acceptance of the offer to settle, it would amount to a counter-offer, not an acceptance. This is correct in principle, but it is a question of fact and law whether the purported acceptance is an acceptance of the offer or is a counter-offer.

19 The plaintiff submitted that the NOA did not mirror the terms of the OTS as it did not make reference to (a) the S$2,588,666 concurrently settling defendant's counterclaim, and (b) the defendant's obligation to discontinue its counterclaim. The nub of this submission is as follows. The OTS required the defendant to pay the plaintiff $2,588,666 in full and final settlement of all the plaintiff's claims and defendant's counterclaims arising in the suit along with certain terms as to costs and discontinuance of the claim and counterclaim. Upon expiry of the period for appeal against the decision to dismiss the counterclaim, such counterclaim was finally determined. The defendant was therefore unable in the NOA to mirror the terms of the OTS and state that it was to settle both the claim and counterclaim. Further, the OTS obliged both parties to discontinue the claim and

counterclaim. However the defendant was not able to discontinue the counterclaim as it had been dismissed by the High Court and was made final when the defendant did not file an appeal within time.

(b) OTS no longer capable of being accepted

20 The plaintiff submitted that the OTS was no longer capable of being accepted as the court had disposed of the matter in respect of which it was made, *ie*, both the claim and the counterclaim, in the sense that the counterclaim was already disposed of, even though the quantum of the claim was not. This argument relied on an interpretation of the OTS not apparent on its face, *ie*, that the OTS would no longer be open for acceptance if the claim was finally determined.

(c) Defendant's conduct contrary to offer to settle regime

21 The plaintiff referred to *The "Endurance 1"* [1998] 3 SLR(R) 970 at [41], which cited *Data General (Canada) Ltd v Molnar Systems Group Inc and Corporation of the Town of Lindsay* (1991) 85 DLR (4th) 392 ("*Data General*") for the proposition that the purpose of the offer to settle regime was to "encourage the termination of litigation by agreement of the parties – more speedily and less expensively than by judgment of the court at the end of the trial. *The impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early (that is, when the offer is served) and careful consideration of the merits of the case*" [emphasis in original]. The plaintiff also cited *Singapore Airlines Ltd* at [37], which stated that the whole object of this regime was to "spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time".

22 The plaintiff submitted that the defendant's conduct was contrary to the spirit of the regime. Its acceptance was served very late in the proceedings, *ie*, after a two-week trial, judgment, and the hearing and disposal by the Court of Appeal of its subsequent appeal, on 24 September 2013. This was more than two years after the OTS had been made, *ie*, on 28 July 2011. The defendant had refused, contrary to the aims of the offer to settle regime, to "*give early and careful consideration*" [emphasis in original] of the proposed settlement sum in relation to the merits of both the plaintiff's claim and its own counterclaim. The defendant's conduct in these proceedings clearly ran contrary to the rationale underpinning the offer to settle regime. In essence, the defendant was seeking to utilise the offer to settle regime after a two-week trial of the action and a further appeal to the Court of Appeal, when the OTS, made before the close of pleadings, was designed to avoid such costs. The defendant's actions made a mockery of the purpose underpinning the offer to settle regime.

My reasons

23 To understand the law relating the offer to settle regime established by O 22A of the ROC, it would be instructional to trace its origins. I now do so.

Payment into Court

24 Prior to 1993, the Rules of the Supreme Court (the predecessor to the ROC) provided a specific regime under O 22 to make an offer to settle with consequences on costs. That order sets out in detail the manner in which parties may make payment into court as an offer to settle a claim or counterclaim or both. Aside from minor amendments to O 22 to insert r 1(7) and to reflect the changes to (a) Form numbers as set out in the Rules, and (b) section numbers of the Civil Law Act, its present form is unchanged. Order 22 r 1 provides as follows:

1. —(1) In any action for a debt or damages any defendant may at any time after he has entered an appearance in the action pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where 2 or more causes of action are joined in the action, a sum or sums of money in satisfaction of all or any of those causes of action.

(2) On making any payment into Court under this Rule, and on increasing any such payment already made, the defendant must give notice thereof in Form 31 to the plaintiff and every other defendant (if any); and within 3 days after receiving the notice the plaintiff must send the defendant a written acknowledgment of its receipt.

(3) A defendant may, without leave, give notice of an increase in a payment made under this Rule but, subject to that and without prejudice to paragraph (5), a notice of payment may not be withdrawn or amended without the leave of the Court which may be granted on such terms as may be just.

(4) Where 2 or more causes of action are joined in the action and money is paid into Court under this Rule in respect of all, or some only of, those causes of action, the notice of payment —

(*a*) must state that the money is paid in respect of all those causes of action or, as the case may be, must specify the cause or causes of action in respect of which the payment is made; and

(*b*) where the defendant makes separate payments in respect of each, or any 2 or more, of those causes of action, must specify the sum paid in respect of that cause or, as the case may be, those causes of action.

(5) Where a single sum of money is paid into Court under this Rule in respect of 2 or more causes of action, then, if it appears to the Court that the plaintiff is embarrassed by the payment, the Court may, subject to paragraph (6), order the defendant to amend the notice of payment so as to specify the sum paid in respect of each cause of action.

(6) Where a cause of action under section 10 of the Civil Law Act (Chapter 43) and a cause of action under section 20 of that Act are joined in an action, with or without any other cause of action, the causes of action under those sections shall, for the purpose of paragraph (5), be treated as one cause of action.

(7) For the purposes of this Rule, the plaintiff's cause of action in respect of a debt or damages shall be construed as a cause of action in respect, also, of such interest as might be included in the judgment, if judgment were given at the date of the payment into Court.

25 Strict clarity is required on the terms of any payment into court. Rule 1(4) requires the offeror to specify which of several causes of action the payment is made for and r 1(5) empowers the court to order a party to clarify an ambiguous offer. Rule 6 provides that rules apply with necessary modifications to a counterclaim. Rule 3(5) provides as follows:

Where money is paid into Court by a defendant who made a counterclaim and the notice of payment stated, in relation to any sum so paid, that in making the payment the defendant had taken into account and satisfied the cause or causes of action, or the specified cause or causes of action in respect of which he claimed, then, on the plaintiff accepting that sum, all further proceedings on the counterclaim or in respect of the specified cause or causes of action, as the

case may be, against the plaintiff shall be stayed.

These requirements are encapsulated in the prescribed notice of payment, Form 31, which requires a statement as to the cause or causes of action for which payment is made and whether it includes settlement of the counterclaims.

26 Under O 22 r 3 of the ROC, a plaintiff has 14 days from the receipt of the notice of payment, or within 14 days of receipt of an amended notice, to accept the payment or amended payment, but such acceptance must be done prior to the commencement of the trial or hearing. After such commencement of the trial, the plaintiff has two days of receipt of notice of payment or amended notice but this must be done before the Judge has begun to deliver judgment. Upon acceptance, all further proceedings in the action, or in respect of the causes of action and counterclaims, the subject of the payment into court shall be stayed – O 22 r 3(4) and (5).

27 It should be noted that O 22 is silent on the situation where a counterclaim is finally determined before the claim is determined. As to withdrawal, O 22 r 1(3) states that a payment into court "may not be withdrawn or amended without leave of the Court which may be granted on such terms as may be just" although a defendant may, without leave, give notice of an increase to any payment into Court.

28 The cost consequences of payment into court are set out in O 59 r 5(*a*) and r 10(2) of the ROC. Rule 5(*a*) provides that the Court shall take into account any payment of money into Court and the amount of such payment. Rule 10(2) states that a plaintiff who accepts money paid into Court is entitled to costs up to the time of receipt of the notice of payment, unless the Court orders otherwise.

29 In addition, O 59 r 3(8) deals with costs of counterclaim in the following manner:

> Where a plaintiff accepts money paid into Court by a defendant who counterclaimed against him, then, if the notice of payment given by that defendant stated that he had taken into account and satisfied the cause of action or, as the case may be, all the causes of action in respect of which he counterclaimed, that defendant shall, unless the Court otherwise directs, be entitled to his costs of the counterclaim incurred to the time of receipt of the notice of acceptance by the plaintiff of the money paid into Court.

30 The payment into court regime contemplates that the court may take into account money paid into court to settle all or some of the causes of action and all or some of the counterclaims. The default position is that where a party accepts the payment, he is only entitled to costs up to the time of receipt of the notice of payment. However there is a residual discretion on the part of the court to make a different order in accordance with the circumstances of the case.

Calderbank offer

31 A significant lacuna in O 22 of the ROC is that it is only applicable where the action pertains to the payment of a sum of money. Furthermore, it is only available to a defendant, or a defendant to a counterclaim. It is not available where the subject of the dispute did not turn on payment of a sum of money, or where a plaintiff wished to make an offer to settle for a lower sum than what he claimed. Finally this procedure is only available after the writ is filed. The courts eventually developed an extra-statutory inducement for parties to settle through the exercise of its discretionary powers to order costs.

3 2 *Calderbank v Calderbank* [1976] Fam 93 (CA) concerned divorce proceedings in England in which the wife sought a declaration that she was the sole beneficial owner of the matrimonial home which she had paid for but was held in the husband's name. The wife had also purchased a house in her name for the occupation of the husband's mother. The court granted the declaration sought by the wife and ordered her to make a lump sum payment of £10,000 to the husband out of the proceeds of sale. The judge made no order as to costs. The wife appealed. The English Court of Appeal dismissed her appeal on the substantive order. When it came to the wife's appeal against the order that each party was to bear its own costs, her solicitor asked for guidance of the Court of Appeal in relation to the wife's offer, by a letter from her solicitors marked "without prejudice", to settle the matter by transferring the house occupied by the husband's mother which was worth substantially more than the £10,000 the husband obtained. The offer had not been accepted. The Court of Appeal held that as the letter was marked "without prejudice", it could not be brought up for consideration of the court even on the question of costs. Addressing counsel's point that it was difficult for a party in such a situation to make an offer to a claimant in order to save cost, Cairns LJ suggested that it was possible for a party to make an offer which was without prejudice to the issue of damages but with the right to be used on the question of costs. The judge stated as follows (at 105-106):

> … Mr. Hordern then indicated the difficulty that a party might be in in proceedings of this kind when he or she was willing to accede to some extent to an application that was made and desired to obtain the advantages that could be obtained in an ordinary action for debt or damages by a payment into court, that not being a course which would be appropriate in proceedings of this kind.
>
> There are various other types of proceedings well known to the court where protection has been able to be afforded to a party who wants to make a compromise of that kind and where payment in is not an appropriate method. One is in proceedings before the Lands Tribunal where the amount of compensation is in issue and where the method that is adopted is that of a sealed offer which is not made without prejudice but which remains concealed from the tribunal until the decision on the substantive issue has been made and the offer is then opened when the discussion as to costs takes place. Another example is in the Admiralty Division where there is commonly a dispute between the owners of two vessels that have been in collision as to the apportionment of blame between them. It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in.
>
> I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances as we have been concerned with.
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> Mr. Millar drew our attention to a provision in the Matrimonial Causes Rules 1968 with reference to damages which were then payable by a co-respondent, provision to the effect that an offer might be made in the form that it was without prejudice to the issue as to damages but reserving the right of the co-respondent to refer to it on the issue of costs. It appears to me that it would be equally appropriate that it should be permissible to make an offer of that kind in such proceedings as we have been dealing with and I think that that would be an appropriate way in which a party who was willing to make a compromise could put it forward. I do not consider that any amendment of the Rules of the Supreme Court is necessary to enable this to be done.

33 However Cairns LJ ruled that the wife was entitled to costs in the court below because she had made an offer in an affidavit filed in the proceedings to transfer to the husband the house occupied

by his mother, then worth about £12,000. The husband ought to have accepted that offer but he had persisted in the proceedings and recovered a sum smaller than the value of the house. For the proceedings in the court below, the husband was awarded costs up to the date of the affidavit and the wife was awarded her costs from that date.

34 Following this decision, the dictum of Cairns LJ was adopted in matrimonial proceedings, in which a party made a written offer to settle "without prejudice save as to costs": see *Cutts v Head and another* [1984] 1 Ch 290 at 302 ("*Cutts*"). Such letters became known as a Calderbank offer. The English Court of Appeal in *Cutts* considered the authorities and held that the Calderbank offer was not restricted to matrimonial proceedings. This position was followed in Singapore. If the outcome was less favourable than a Calderbank offer, the letter would be shown to the court and taken into consideration on the question of costs: see *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 at [54]–[55].

35 However a Calderbank offer, unlike the statutory regime under O 22 and O 22A of the ROC, does not bind the court to award costs in any particular manner but is one factor that the court will take into consideration in the exercise of its discretion to award costs: see *SBS Transit Ltd (formerly known as Singapore Bus Services Limited) v Koh Swee Ann* [2004] 3 SLR(R) 365 ("*SBS Transit*") at [21] and [24]. Further, a Calderbank offer is terminated by the other party's rejection of it: see *SBS Transit* at [23].

36 Hence it is not surprising that no consistent treatment was given by the courts to Calderbank offers as there is a wide variation in circumstances of each case. In *Lie Djioe Boei alias Lee Yew Wee Executor of the Estate of Lioe Soei Tjin alias Liu Swee Chin (or Lie Soei Tjin also known as Liu Swee Chin, deceased) v Huang Han Jiang (alias Huang Han Jiang)* [2000] SGHC 107 at [9], the defendant made a Calderbank offer near the end of the trial. It was rejected by the plaintiff. The judgment resulted in an outcome that was substantially similar to the offer and much lower than the plaintiff's claim. The court took the view that the plaintiff was entitled to some costs and awarded him one-third costs up to the date of the Calderbank offer. In *Colgate Palmolive Ltd and another v Markwell Finance and another* [1990] RPC 197, the circumstances of the defendants' Calderbank offer was such that it would be inappropriate to deprive the plaintiffs of any part of their costs of the action (at 201, [25]). The court held that the offer was inadequate in three respects: (a) it was delivered four days (including a weekend) before the trial in which the plaintiffs' witnesses had to travel from abroad; (b) the letter did not offer all the relief to which the plaintiffs were entitled; and (c) the offer related to part of the subject matter of the actions and thus, a settlement on that basis would have no, or no significant, reduction in the time occupied by the trial. In contrast, in *Butcher v Wolfe and another* [1999] 2 FCR 165, the plaintiff was ordered to pay all the costs of the action. The defendant made a Calderbank offer to buy out the plaintiff's interest in the land on a tenanted basis and stated that, if the sum was not acceptable but the basis of valuation was agreed, parties should agree on a procedure for determining an independent valuation. It was met with an outright refusal by the plaintiff because she disagreed with the basis of valuation. In the course of the action, however, she accepted the offer, and it was on the basis for which the defendants had always contended and which she had always opposed (at 173). Accordingly, the plaintiff had obtained nothing in the action that she could not have obtained more cheaply by accepting the letter (at 178), and the court unanimously upheld the decision below that the plaintiff should pay costs.

37 As can be seen from the foregoing, the court has broad discretion as to costs in assessing Calderbank offers. Generally, the court's consideration will bear on reasonableness or otherwise of an offeree's refusal to accept the Calderbank offer: see *Chrulew and others v Borm-Reid & Co* [1992] 1 WLR 176 (per Waller J at 185). This will, as illustrated above, will turn upon the terms of Calderbank offer and the specific circumstances surrounding it.

38 The Calderbank offer was much more flexible than the payment into court procedure as it was available even before the writ was filed and applicable to the plaintiff as well as the defendant. It could also handle circumstances that did not involve cash. An important and practical difference between a Calderbank offer and payment into court was that the latter procedure required a defendant to actually come up with the money to make the payment into court. This was an inconvenient procedure compared to the Calderbank offer, especially at an early stage in the proceedings. In practice, this meant that the payment into court procedure became otiose as defendants would simply resort to Calderbank offers as opposed to coming out with cash at the outset. In *Cutts*, Oliver LJ cautioned that a Calderbank offer cannot be used as a substitute for payment into court, stating as follows (at 312):

> I would add only one word of caution. … it should not be thought that this involves the consequence that [the Calderbank offer] can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a *Calderbank* offer as carrying the same consequences as payment in.

39 The caution sounded by Oliver LJ was incorporated in the UK Rules of the Supreme Court by the addition of O 22 r 14 in 1986. This rule gave legislative effect to the Calderbank offer but excluded from its ambit any offer that, at the time it was made, was capable of being the subject of a payment into court under the same order. Following the changes to the English rules, a similar change was enacted in O 22 r 13 of the Singapore's Rules of the Supreme Court and Rules of the Subordinate Courts in 1992. As with the UK amendment, the Singapore amendment ensured that the "Calderbank letter is only available to a party who could not have protected his position by payment into court": see *Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another* [2006] SGHC 20 at [12].

O 22A: Offer to Settle

40 In 1993, the Rules of the Supreme Court and the Rules of the Subordinate Court were amended to include O 22A, which implemented the offer to settle regime. At that time, various statutory procedures relating to offers to settle were in place in a number of Canadian and Australian states. They included r 37 of the British Columbia Supreme Court Rules, r 49 of the Ontario Rules of Civil Procedure, Pt 22 and Pt 52 r 17 of the New South Wales Supreme Court Rules 1970 and r 26 of the Victoria General Rules of Procedure in Civil Proceedings 1986. It was against this backdrop that O 22A was introduced via S 278/93 and S 279/93 and took effect on 1 July 1993. Importantly, O 22A bore significant similarities to the provisions in British Columbia, Ontario, New South Wales and Victoria. For example, except in Victoria, the offer to settle procedure applied to all actions (not just monetary claims), and was equally available to plaintiffs and defendants: see O 22A r 1 of the Rules of the Supreme Court and the Rules of the Subordinate Court, r 37(2) of the British Columbia Supreme Court Rules, r 49.02(1) of the Ontario Rules of Civil Procedure and Pt 22 r 2 of the New South Wales Supreme Court Rules 1970. Another example was where a plaintiff, in several of these jurisdictions, would *prima facie* be entitled to costs on an indemnity basis or a solicitor and client basis if he made an offer to settle (which was not accepted by the defendant) and the judgment he eventually obtained was not less favourable than the offer: see O 22A r 9 of the Rules of the Supreme Court and the Rules of the Subordinate Court, r 49.10(1) of the Ontario Rules of Civil Procedure, Pt 52 r 17(4) of the New South Wales Supreme Court Rules 1970 and r 26.08(2) of the Victoria General Rules of Procedure in Civil Proceedings 1986. [note: 1]

41 As the provisions in British Columbia, Ontario, New South Wales and Victoria constituted important background to the enactment of O 22A of the ROC, it would be useful to briefly examine their underlying purpose.

42 In British Columbia, the offer to settle mechanism was established as early as in 1977, though in its earliest form, only a plaintiff may "at any time before the commencement of the trial" make an offer to settle, and only for an "action for damages": r 57(13)(a) of the Supreme Court Rules. Even then, the policy articulated in r 57 was to "[reward] parties who offer to settle": see *FSM v Clarke et al* [2000] BCSC 96 at [7]. However, the limited scope in which the offer to settle operated restricted the efficacy of the regime. Thus, in 1984, when the British Columbia Law Reform Commission studied the procedures for offer to settle and payment into court, it was concerned with the way the procedures were "impaired by their confinement to liabilities that sound in money" and their inability to "be used by an impecunious [defendant]". Recommendations to broaden the scope of the procedures were made, such as providing that the procedure for offers to settle should be open to any party to litigation and for both monetary and non-monetary relief. The British Columbia Law Reform Commission also thought that it was "desirable to encourage parties to litigation to negotiate in good faith". To this end, the possibility of increased costs following a refusal of a reasonable offer was proposed as a solution. If costs could be increased, it would encourage parties to consider the merits of their case carefully and to either make an offer to settle or to consider seriously whether to accept the offer to settle: see Law Reform Commission of British Columbia, *Report on Settlement Offers* (LRC 77, September 1984). The offer to settle regime went through a major revision. On 1 April 1993, when the revised r 37 was enacted, the gist of these recommendations materialised; the revised rule contained cost consequences favouring a party who made a reasonable offer that was refused by the other party: rr 37(2), 37(23)–(26) of the Supreme Court Rules.

43 Likewise, the Ontario procedure was established with a mind to encourage settlement. In *Data General*, Morden ACJO had stated (at 398(h)):

> The purpose of Rule 49 is to encourage the termination of litigation by agreement of the parties – more speedily and less expensively than by judgment of the court at the end of a trial. *The impetus to settle is a mechanism which enables a plaintiff to make a serious* offer *respecting his or her estimate of the value of the claim which will require the defendant to give early (that is, when the* offer *is served) and careful consideration of the merits of the case*. … [emphasis added]

44 Insofar as r 49 was envisaged to encourage settlement of litigation, the rule bore fruit. Within four years of its implementation in Ontario, the fact of "formal offers and their attendant cost consequences" compelled counsel to "[assess] the merits of a claim more quickly and more seriously": see Ian R Stauffer, "Offers to Settle: A Review of Recent Developments" [1989] 10 Advoc Q 344 at 344. The success of r 49 could, in large part, be attributed to the cost sanctions in r 49.10 that brought pressure to bear on the offeree to settle. Indeed, because the Ontario High Court of Justice in *Jacuzzi Canada Ltd v A Mantella & Sons Ltd et al* (1988) 31 CPC (2d) 195 recognised that the intent of the r 49.10 was to induce settlement and avoid trials, it took the view that tinkering with its *prima facie* operation would destroy the predictability necessary for r 49.10 to accomplish its purpose. This was echoed by Morden JA in *Niagara Structural Steel (St Catharines) Ltd v WD LaFlamme Ltd* (1987) 19 CPC (2d) 163 at [11]:

> … The general, or basic, rule contained in r. 49.10(1) is intended to be an incentive to the settlement of litigation. While r. 49.10(1) does not set forth the basis for resorting to the exception to it, it is reasonable to assume that the occasions for the application of the exception should not be so widespread or common that the result would be that the general rule is no

longer, in fact, the general rule. If this were to happen, the presumption in favour of the general rule and the resulting reasonable degree of predictability respecting the incidence of costs would disappear and the incentive policy of the rule would be substantially frustrated. …

45 Subsequently, r 49 of the Ontario Rules of Civil Procedure formed the basis upon which the Australian rules were derived and a similar procedure, called "offer of compromise", was adopted in, among other Australian states. New South Wales (Supreme Court Rules 1970, Pt 22 and Pt 52 r 17) and Victoria (General Rules of Procedure in Civil Proceedings 1986, r 26): see *The Laws of Australia* vol 5 (5.1–5.6) (Sheryl Jackson, Chris George, BC Cairns & Grant T Riethmuller eds) (Thomas Reuters) at para 60; Bernard C Cairns, *Australian Civil Procedure* (The Law Book Company Limited, 3rd Ed, 1992) at p 376.

46 The New South Wales Court of Appeal in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 held that the obvious purpose of legislating cost consequences (with respect to the failure to accept a reasonable offer to settle) was to facilitate the proper compromise of litigation by equal measures of a "carrot" and "stick". The court elaborated (at 724(c)):

> … Relevantly, the "carrot" is the promise of indemnity costs to a plaintiff in the event that the defendant is found unreasonably to have refused an offer of compromise. The "stick" is the threat of the penalty of the imposition of an indemnity costs order against a defendant in such circumstances. It is the obvious intention of the rule to oblige a defendant, which has received an offer of compromise, to give serious thought to the risk which it may run of losing the proceedings and then being ordered to pay costs on an indemnity basis.

47 The same rationale was expressed in Victoria. In *Mutual Community Ltd v Lorden Holdings Pty Ltd and others* (unreported, SC (Vic), No 10561/90, 28 April 1993, BC9303878). Byrne J identified the Court's policy "to encourage litigating parties to undertake genuine settlement negotiations and, for the purpose, to face up to serious offers of settlement" (at 12). While Byrne J found that "[t]he response of a litigant in receipt of an offer of settlement will always be affected by the prospect that the sum which the Court might order … may be less advantageous than the terms of the offer", he observed that "this prospect alone is not always sufficient to compel a litigant to face up to the offer". As such, "[t]he further prospect of a super-added costs penalty if a reasonable offer be not accepted is a salutary inducement to an offeree to undertake this often painful task" (at 13).

48 To summarise, the offer to settle procedure in all four jurisdictions had a common purpose of encouraging settlement. This purpose was effected by a common measure of penalising a party who rejected a reasonable offer with costs (and correspondingly, rewarding the other party with such costs). Put another way, the imposition of certain cost consequences effectively encouraged settlement by providing parties with a tangible incentive to offer to settle and to treat offers to settle seriously.

49 The experiences in these jurisdictions also demonstrated, firstly, the feasibility of instituting an offer to settle regime that is considerably broader in scope than payment into court or Calderbank offer and, secondly, that having such a regime could save legal costs and judicial time in ways that were not possible with payment into court or Calderbank offer. Furthermore, the arguments in favour of settlement that underlined payment into court or Calderbank offer would apply with equal force to an offer to settle regime. Hence, there appeared to be no reason why Singapore should not similarly introduce a formal procedure for making offers to settle. In fact, there were several advantages O 22A of the ROC had over payment into court and Calderbank offer, and these are concisely laid out in *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell, 2013) at para 22A/0/2 and needs no repeating here.

50 In *Singapore Airlines Ltd*, Chao JA set out the policy behind the O 22A procedure in the following terms (at [38]):

> The scheme of things under O 22A is verily to encourage the plaintiffs to be realistic in their assessment of what they are entitled to and on the part of the defendants, to make reasonable offers, on pain of having to bear the costs on the indemnity basis if they should persist in their exaggerated claims or maintain their unreasonable position (in respect of an offer from the plaintiff). The order seeks to promote responsible conduct on the part of both parties. It discourages obstinacy. The wide discretion given to the court in r 12 is to enable the court to take all pertinent facts and circumstances into account and arrive at an order on costs which is fair and just. …

51 There is one final point to be made. To the extent that O 22A of the ROC, when enacted, overlapped with payment into court as a means to initiate settlement, it rendered the latter otiose. This is to be expected given that O 22A did not require a party making an offer to pay money into court, and was, on the whole, a more convenient and flexible method. In the scheme of things, the availability of O 22A as a tool to promote settlement meant that payment into court would dwindle in significance, although it would still have its uses in other areas, such as the payment into court to fulfil a condition for obtaining leave to defend. Along with the enactment of O 22A, O 22 r 13 was repealed and the Calderbank offer was effectively replaced by the offer to settle mechanism in O 22A.

Conclusion

52 Having traced the origin of the O 22A procedure and the policy upon which it is founded, I turn to consider the facts of the present case in the light of that policy. The following are the salient features of the case:

(a) Unequal pressure on the parties: The writ was filed on 20 May 2011. The defendant filed its defence and counterclaim on 27 June 2011 and an amended defence and counterclaim three weeks later on 20 July 2011. The plaintiff had made the OTS under O 22A on 28 July 2011. By operation of O 22A r 9, the plaintiff could be entitled to costs on an indemnity basis from that date onwards. The action proceeded to trial which lasted some ten days and one appeal which was disposed of in September 2013, more than two years from the date of the OTS. The peril for the defendant was that it could face substantial indemnity costs were the plaintiff to recover a sum higher than the amount offered in the OTS. Since the OTS was on the basis that the defendant would pay indemnity costs from 12 August 2011, had the defendant not accepted the OTS, it would still be liable for indemnity costs for the proceedings to follow, which would be the assessment of damages. The plaintiff, on the other hand, had no such pressure. It had, at a very early stage, been prepared to accept the sum in the OTS. If it did obtain more than that sum at the end of the assessment of damages, the costs advantage it had accrued from 12 August 2011 meant that it would recover a sum that is close to its full legal costs.

(b) Plaintiff had full control: The plaintiff was in full control of the situation. It was open to the plaintiff (but not the defendant) to withdraw the OTS at any time subject to giving one day's notice under O 22A r 3(2).

(c) Terms of OTS determined by the plaintiff: Most importantly, the terms of the OTS were the plaintiff's. It was open to the plaintiff to limit the period of validity or phrase it in any fashion but did not do so.

53 The nub of the plaintiff's position is that the OTS had a self-destruct provision. Because the

OTS states that the settlement is for "all of the plaintiff's claims, all of the defendant's counterclaims and all matters arising in this Suit", upon the defendant's counterclaim being finally determined (when the defendant did not file an appeal in respect of the dismissal of its counterclaim), the OTS was no longer capable of being accepted. The problem is that this position, even if it is tenable, is not explicit. This means that it is equally possible for the plaintiff to argue, if the OTS was not accepted and the plaintiff obtained judgment for a more favourable sum, that the OTS had all the time remained open for acceptance and asked for indemnity costs all the way back to August 2011. Consequently, it means that the defendant faced an uncertain state of affairs, and unfairly so. At the juncture when the time for appealing on the counterclaim had just passed, it was not wholly clear whether the OTS had expired. If the defendant adopted the position that the OTS had remained valid, it would be compelled to seriously consider settlement and the costs consequences of not doing so. If the defendant assumed instead that the OTS had expired, it would be taking a chance that the proper interpretation of the OTS was that the OTS was still valid and that there would be adverse cost consequences for failing to accept it. Either way, the defendant could not have eliminated the possibility that it would be made to pay costs on an indemnity basis by virtue of O 22A r 9 of the ROC.

54 The question in the end is, faced with an ambiguity, where should the court draw the line. To me, it is clear from the features set out in [52] above that the court should come down in favour of clear drafting in terms of unambiguous offers and expiry dates. These factors are entirely within the control of the offeror. There should be no scope in the O 22A regime for the offeror to turn it into an instrument of oppression against the offeree. A party making an offer to settle must state clearly the time within which it is open for acceptance if there is to be such a limitation. If the acceptance is to be limited by circumstances rather than a date (*eg*, first day of the trial of the action), then it must be stated in the clearest of terms. Any ambiguity will be interpreted *contra proferentem*. To hold otherwise in this case would be to arm the plaintiff with a double edged sword against the defendant.

55 Keeping in mind that the offer to settle regime was aimed at promoting settlement, it is most unfortunate that the OTS in this case had spurred parties to further litigate on the offer itself (rather than to settle) because the ambiguity of the terms had attracted conflicting interpretations. In my view, favouring clear and certain terms in an offer to settle can only accord with the policy of encouraging settlement. If an offer to settle is to come to an end according to its own terms, it is sensible that the terms should be clear enough, such that both parties are able to pinpoint when exactly the offer expires and the offeree can make a considered decision on whether, and if so, when to accept.

56 The plaintiff made three points in its submissions (see [15] above). My responses are as follows:

(a) Acceptance not on terms of OTS: I have pointed out in [17] above that *Fuyawa Enterprise* showed that the court would look at the substance of the offer rather than the strict form when considering whether a purported acceptance is valid. If the acceptance is qualified or has conditions attached to it such that *it amounts to a counter-offer*, then it will not be valid, as was held in *Ip Yun Ha* and in *Re Desanto*; see [18] above. In the present case, there was no qualified or conditional acceptance in the way that was envisaged in *Ip Yun Ha* and *Re Desanto*. This was simply a case where, by the time of the defendant's acceptance of the OTS, the counterclaim had been determined and therefore there was no need for the defendant to undertake to discontinue it.

(b) OTS no longer capable of acceptance as counterclaim had been determined: As alluded to in [20] above, this argument relies on an implied term that the OTS would no longer be open for

acceptance if the counterclaim was settled. I have held in [54] above that the OTS will be interpreted *contra proferentem* and therefore that interpretation is not available to the plaintiff.

(c) Defendant's conduct: I can see nothing in the manner in which the defendant accepted the OTS that could operate to deprive them of the right to accept the OTS where they otherwise would be entitled to do so. Order 22A does not impose any limitation on the acceptance so long as the offer has not been withdrawn. Indeed the Order envisages acceptance at any time before final determination. If a party chose to accept near the conclusion of the suit it is because that party has deemed it to be in its best interest to do so. It must be remembered that the defendant in this case had elected to pay indemnity costs up to the date of acceptance even when the possibility was still there that he may only incur standard costs should the final award be less favourable than the offer. So long as the offer has not been withdrawn, and the risk of indemnity costs being incurred continues, there cannot be any reason why the court would disallow acceptance at any stage.

57 For the reasons given above, I held that the OTS had not expired on 24 September 2013 and it was therefore validly accepted by the defendant on that date. Accordingly I gave the declarations prayed for in this summons.

[note: 1] Rule 37(23) of the British Columbia Supreme Court Rules provided for "double costs" (instead of costs on an indemnity or a solicitor and client basis).