IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 111

Suit No 328 of 2016
(Registrar's Appeal No 329 of 2017)

Between

The Management Corporation
Strata Title Plan No 3563

… *Plaintiff*

And

(1) Wintree Investment Pte Ltd
(2) Greatearth Construction Pte Ltd
(3) P & T Consultants Pte Ltd
(4) Maxbond Singapore Pte Ltd
(5) Leng Ee Construction Pte Ltd
(6) Akzo Nobel Paints (Singapore) Pte Ltd

… *Defendants*

And

Greatearth Corporation Pte Ltd

… *Third Party*

GROUNDS OF DECISION

[Civil procedure] — [Offer to settle]

TABLE OF CONTENTS

Management Corporation Strata Title Plan No 3563
v
Wintree Investment Pte Ltd and others (Greatearth Corp Pte Ltd, third party)

[2018] SGHC 111

High Court — Suit No 328 of 2016 (Registrar's Appeal No 329 of 2017)
Lee Seiu Kin J
15 January 2018

2 May 2018

Lee Seiu Kin J:

Introduction

1 The present case is an appeal against the cost orders of the assistant registrar ("AR") made in summons no. 2628 of 2017, which was an application by the respondent to strike out the appellant's claim. After ordering the claim to be struck out, the AR made certain cost orders against the appellant, which took into account an offer to settle ("OTS") made by the respondent. On 15 January 2018, after hearing submissions from counsel for the parties, I dismissed the appeal. I now give the grounds for my decision.

Background facts

The parties

2 The appellant, who is the plaintiff in this Suit, is Management Corporation Strata Title Plan No 3563 at 398 Kallang Road ("the Development").

3 The first defendant is Wintree Investment Pte Ltd, who was the developer of the Development.

4 The second defendant is Greatearth Construction Pte Ltd, who was engaged by the first defendant as the main contractor for the Development.

5 The third defendant is P&T Consultants Pte Ltd, who was engaged by the first defendant as the architect for the Development.

6 The fourth and sixth defendants (Maxbond Singapore Pte Ltd and Akzo Nobel Paints (Singapore) Pte Ltd) were engaged by the second defendant as sub-contractors of the Development.

7 The respondent in this appeal is the fifth defendant, Leng Ee Construction Pte Ltd, who was engaged by the second defendant as its sub-contractor to undertake part of the works in the Development.

The dispute

8 The appellant brought the claim on 4 April 2016 in respect of various alleged defects in the Development, which supposedly demonstrated *inter alia* a failure to construct the Development in a good and workmanlike manner and

a failure to ensure that the Development was reasonably fit for the purpose for which it was intended. The claim against the first defendant was one in contract and tort, whereas the claims against the second to sixth defendants were in tort.

9 In the appellant's statement of claim, various defects of the common property of the Development were listed[1] but there was no explicit allegation that any of them was caused by the negligence of the respondent. On 27 June 2016 the respondent filed its defence in which it averred that none of the listed defects pertained to the respondent's scope of works under its agreement with the second defendant.

10 On the same day, 27 June 2016, the respondent served the OTS on the appellant. The substantive term of the OTS was that "[the] 5th Defendant offers to settle this proceeding by the Plaintiff withdrawing their claim against the 5th Defendant". The OTS was silent as to the issue of costs. It is not disputed that there was no acceptance of the OTS by the appellant.

Procedural background

11 On 8 June 2017, the respondent filed summons no 2628 of 2017 to strike out the appellant's claim under O 18 r 19 on the ground that the statement of claim disclosed no reasonable cause of action against the respondent. In a supporting affidavit, the director of the respondent averred that it had been engaged for a very limited scope of work at the Development, which was the supply and installation of metal roofing, gutter and flashing at five locations, and that none of the defects identified by the appellant were in respect of these works.[2]

[1] Statement of Claim at [13]

12 On 17 July 2017, the respondent's application for striking out was granted without any objection by the appellant, and the AR ordered the costs of the application to be fixed at $1,200 to be paid by the appellant to the respondent. As for the costs of the action, both counsel requested that costs be taxed. The AR then ordered the appellant to pay the respondent costs of the action which are to be taxed, if not agreed by the parties.

13 Subsequently, parties were unable to agree on costs and the respondent proceeded to file a bill of costs for taxation before another AR. In this bill, the respondent asked for taxation on an indemnity basis. The appellant objected, noting that the striking out order did not stipulate for costs to be taxed on an indemnity basis. The taxation hearing was adjourned for parties to clarify the basis of the taxation with the AR who heard the striking-out application.

14 On 24 October 2017, parties appeared before the AR to submit on the basis for taxation. After hearing arguments, the AR made the following cost orders which form the subject matter of the present appeal:

> (a) That the costs of the action be taxed on a standard basis from the date of the service of the writ of summons (*ie*, 22 April 2016) to the date of service of the OTS (27 June 2016) and paid by the appellant to the respondent.
>
> (b) Costs of the action to be taxed on an indemnity basis from the date of the service of the OTS, and paid by the appellant to the respondent.

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[2] Affidavit of Tan Soh Huan at [6] – [7]

(c) Costs of the further arguments to be fixed at $2,500 (all-in) and paid by the appellant to the respondent.

The parties' cases

The appellant's case

15 The appellant's arguments before the AR at the 24 October 2017 hearing and in this present appeal before me can be summarised as follows.

16 First, that the AR was *functus officio* and should not have made the cost order forming the subject matter of the present appeal on 24 October 2017, given that she had already made a costs order after granting the striking-out application on 17 July 2017, which order was extracted by the respondent on 20 July 2017. As such, she had no jurisdiction to hear further arguments as she did on 24 October 2017, and no jurisdiction to make further cost orders.[3]

17 Second, the respondent was not entitled to costs on an indemnity basis as the appellant never accepted the OTS.[4]

18 Third, the respondent was not entitled to costs on an indemnity basis as the striking-out of the appellant's claim did not constitute a 'judgment' within the meaning of O 22A r 9(3)(b) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed)("the ROC").[5]

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[3] Appellant's written submissions on the *functus* point ("Appellant's first written submissions) at [12] – [14]

[4] Appellant's written submissions on the OTS point ("Appellant's second written submissions) at [2] – [4]

[5] Appellant's second written submissions at [5] – [7]

19 Fourth, the cost implications in O 22A r 9(3)(b) of the ROC could not be triggered in the present case where the OTS was not a serious and genuine offer to settle.[6]

20 Fifth, the OTS was defective for not complying with O 22A r 10 of the ROC, which pertained to an OTS where there were allegations of joint and several liability between the defendants.[7]

21 Lastly, the court should in any case exercise its discretion not to order indemnity costs against the appellant given the appellant's efforts to settle its claim and the respondent's unreasonable refusal to do the same.[8]

The respondent's case

22 The respondent argued that the AR was not *functus officio* on the issue of costs as the striking-out order did not state the basis of taxation, and also since the OTS was not brought to the AR's attention at the first hearing on 17 July 2017.[9]

23 Second, it is clear from *Merchant Industries (S) Pte Ltd v X-Media Communications Pte Ltd* [2001] SGHC 338 that a dismissal of a claim is treated the same way as a judgment for the purposes of O 22A r 9(3) of the ROC, and that such dismissal is clearly not more favourable than the terms of the OTS.[10]

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[6] Appellant's second written submissions at [8] – [12]

[7] Appellant's second written submissions at [13] – [17]

[8] Appellant's second written submissions at [18]

[9] Respondent's written submissions at [10] – [15]

[10] Respondent's written submissions at [17] – [19]

24 Third, the OTS was a genuine and serious offer, as accepting it would have given the appellant the benefit of recovering costs on a standard basis from the respondent up to the date of the service of the OTS.[11]

25 Fourth, the OTS was not defective for breach of O 22A r 10 of the ROC, since no claim for joint or joint and several liability was pleaded. Although there was a reference in the statement of claim to a deed of indemnity and warranty wherein the second defendant and the respondent agreed to jointly and severally warrant certain works and to indemnify the first defendant in relation to the same, there was no allegation of breach of this deed.[12]

26 Lastly, the existence of the concurrent negotiations was irrelevant for present purposes, and could not justify a departure from the *prima facie* cost implications in O 22A r 9 of the ROC.[13]

The AR's decision

27 In making the cost order stated above at [14], the AR made the following findings. Whilst the court is usually *functus officio* upon the order being perfected, the present case had several distinguishing factors, notably that the basis of costs was not argued as the OTS issue was not raised at the 17 July 2017 hearing. Further, the correspondence between the parties prior to the 17 July 2017 suggest that there was an understanding for costs to be dealt with by agreement or at a taxation, and as such it would be unfair to deprive the respondent of the chance to raise the issue of the OTS at a later juncture.

[11] Respondent's written submissions at [24]

[12] Respondent's written submissions at [27]

[13] Respondent's written submissions at [32]

28 As for the validity of the OTS itself, the AR was of the view that where a claim was struck out even before it reached trial, this was clearly an even less favourable result to the appellant than if the case had been dismissed after trial. The OTS was also a genuine and serious offer, in that accepting it would have given the appellant the benefit of obtaining costs. Whilst this was a benefit inherent in all offers to settle, in the context of this case such a benefit sufficed. The AR also found that O 22A r 10 of the ROC was not breached, since the tortious claims were phrased in a language that suggested they were separate claims, and it was not otherwise evident from the face of the pleadings that the claims against the defendants were joint and several. Lastly, as the discretion to alter the cost consequences of O 22A r 9 of the ROC was a narrow one such as to preserve the utility of the OTS regime, the existence of concurrent negotiations was not sufficient reason to exercise that discretion.

My decision

Was the AR functus officio?

29 It was not disputed that as a matter of general principle and policy, a court is *functus officio* and can no longer hear further arguments on an issue after a court order has been perfected. Hence, the key issue that remained for determination was whether the specific circumstances of the case were such that this general position could be departed from. In particular, the respondent argued that it was under the impression, due to a letter sent by the appellant on 14 July 2017 ("the 14 July letter"), that neither party would raise the issue of costs of the main action at the 17 July 2017 hearing.

30 The 14 July letter formed part of a series of correspondence between the parties as to whether discontinuance of the appellant's claim against the respondent would amount to an acceptance of the OTS. After re-iterating its position in this letter that the appellant would not be accepting the OTS but would instead not contest the striking-out application, the appellant went on to say as follows:

> We note that you have listed out the various summons for which your client will be claiming costs, which in our view is best left to be dealt with later by way of agreement or at taxation. Matters relating to the costs of the action that your client wishes to claim should be dealt with separately whether by way of agreement between the parties or by way of taxation if there is no agreement. At the Summons we propose that the parties can take directions from the Court on the timelines relating to the determining [*sic*] the costs of the action

31 I accepted that as the respondent was the party seeking to rely on the OTS to ask the court to depart from the standard basis of taxation, the prudent thing for the respondent to do would have been to bring the OTS to the AR's attention at the 17 July 2017 hearing. That said, I did not think it was unreasonable for the respondent not to have done so, as it was entitled to rely on the appellant's representations in the paragraph of the 14 July letter cited above. Read objectively, the appellant had proposed that they should attempt to arrive at a settlement on the costs of the main action and that this be done after the 17 July 2017 hearing. As the parties subsequently failed to reach an agreement on the issue of costs, this meant that the AR could then hear further submissions on costs. In these circumstances, the respondent was entitled to direct the court's attention to the OTS at this subsequent hearing. It does not behove the appellant to make the representations it did in the 14 July letter and subsequently argue that the respondent should not have acted as it did.

32 As such, I found in the circumstances that the AR was not *functus officio* and rightly held that she had jurisdiction to rule on the issue of costs.

Is a striking-out order no less favourable than the terms of the OTS?

33 In arguing for costs on an indemnity basis, the respondent relied on O 22A r 9(3) of the ROC, which provides as follows:

> (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.

34 The appellant submitted that an order to strike-out a claim is not a 'judgment' at all and certainly not a judgment obtained by the plaintiff. Therefore, the cost implications of O 22A r 9(3) of the ROC could not be triggered. I accept that, on a superficial reading of the provision, O 22A r9(3) only contemplates the situation where a plaintiff obtains a judgment in its favour, and there is no explicit reference to the situation where a plaintiff has its case dismissed. But if that reading were correct, there would be a serious lacuna in the OTS regime as it does not provide for the situation where the plaintiff's case is dismissed. However, there is greater justification for imposition of indemnity costs against the plaintiff in that situation, where the plaintiff recovers nothing, as opposed to the situation where it recovers less than what the defendant has offered. The superficial reading therefore suffers from a

deficit of logic. A similar sentiment was expressed by the court in *Merchant Industries (S) Pte Ltd v X-Media Communications Pte Ltd* [2001] SGHC 338. The defendant in that case had served an offer under O 22A of the ROC to settle the suit for a certain sum. However, the plaintiff's claim was eventually dismissed by the court. On the question of costs, the court held that there was greater justification for the same costs consequences to follow. The learned judge said at [149] that:

> *A fortiori,* where the Plaintiff does not succeed in his claim at all, the same costs consequences should follow. This was not disputed by the Plaintiffs. I therefore dismissed the Plaintiff's claim and ordered the Plaintiffs to pay the Defendants costs on the standard basis up to the date of the service of the offer to settle and costs on the indemnity basis thereafter, with such costs to be agreed or taxed.

35 The OTS regime was instituted to encourage early resolution of actions in court. It was designed to provide a party with an opportunity to promote resolution of the suit at the earliest possible stage by making an offer to the other parties, whether in the form of a sum that the former is prepared to pay or accept, or some other action by one or all parties. The costs provision in O 22A of the ROC has the effect of forcing an offeree to carefully evaluate its case under the peril of a large award in costs against it. A superficial interpretation of O 22A r 9(3) of the ROC, by leaving out the more deserving case where a plaintiff has its case dismissed, is therefore inconsistent with the objective of the OTS regime. In my view, the words "obtains judgment not more favourable than the terms of the offer to settle" in O 22A r 9(3)(*b*) of the ROC refer not only to a judgment obtained by the plaintiff against the defendant but includes the situation where the plaintiff's claim is dismissed.

36 The issue remained however that before an unsuccessful plaintiff is made to pay costs on an indemnity basis, it must be determined whether the outcome obtained by the plaintiff was indeed one that was not more favourable than the terms of the OTS. This issue of 'favourability' is made somewhat trickier in circumstances such as these, where the OTS involved essentially a zero-dollar offer or what is sometimes known as a "drop hands" offer.

37 Whereas the test of favourability usually rests on the dollar value of what has been awarded (*Tan Shwu Leng v Singapore Airlines Limited and Another* [2001] SGHC 51 at [96]), favourability should also be interpreted in context and may depend on the terms of the particular offer (*CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20).

38 In any case, any potential problems with comparing the favourability of an outcome with a zero-dollar offer were largely diminished by the fact that the provision in O 22A r 9 of the ROC refers to an outcome "not more favourable" rather than "less favourable" than the terms of the OTS. Hence, it is clear that an outcome in which a plaintiff does not obtain any award is not more favourable than the terms of a zero-dollar offer. In the present case where the claim was struck-out at the pre-trial stage, it was even more obvious that such an outcome was not more favourable than the terms of the OTS. This is especially so since accepting the OTS would have entitled the appellant to some costs, which point I shall turn to shortly.

Was the OTS genuine and serious?

39 The appellant relied on the case of *The "Endurance 1"* [1998] 3 SLR(R) 970 ("*The Endurance"*) to argue that an offer must be serious and genuine

before it will attract the cost consequences of O 22A r 9 of the ROC, and further that such an offer should contain an element that would induce or facilitate settlement (*Singapore Airlines Ltd and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2001] 1 SLR(R) 38). It is clear that what constitutes a serious and genuine OTS must depend on the circumstances of the case (*Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers* [2004] 3 SLR(R) 267*)*("*Man B&W Diesel"*), and that the key question to ask is whether the offeror is effectively expecting the other party to capitulate (*Man B&W Diesel* at [14], *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [69]).

40 In this regard, it is worth noting that the court in *The Endurance* recognised (at [45]) that the general rule that an OTS should contain an element of compromise does not apply to a case where there is no defence of any substance to a liquidated claim. The reason for this, as explained by Morden ACJO in *Data General (Canada) Ltd v Molnar Systems Group Inc* (1991) 85 DLR (4th) 392 and endorsed by the Court of Appeal in *Man B&W Diesel*, is that where it is clear that a plaintiff will succeed in obtaining judgment, it should not have to forgo part of its claim in order to avail itself of a rule that aims to discourage a defendant from delaying the judicial process. This reasoning could be applied analogously to a case such as the present where it was clear to both parties that the plaintiff had no case, and where it would not be fair to require the defendant to compromise by offering an arbitrary sum just to avail itself of the rule that seeks to bring the matter to an expeditious resolution.

41 Where a party offers what is in the circumstances an unreasonably low sum or even nominal sum, the Court should certainly be alive to the possibility

that the offeror is merely seeking to gain a tactical advantage by securing indemnity costs, rather than sincerely seeking to settle the matter without recourse to judicial determination.

42 That said, and in view of the authorities cited above, it is not necessarily the case that a nominal or even zero-dollar offer can never be genuine and serious. In particular, the cost implications of accepting an OTS could suffice in some cases as an inducement to settle. In the present case, the OTS was silent as to the issue of costs, and as such the provisions in O 22A r 9(2)(*b*) of the ROC would have been triggered had the appellant accepted the OTS. Order22A r 9(2)(*b*) provides as follows:

> (2) Where an accepted offer to settle does not provide for costs —
>
> …
>
> (*b*) where the offer was made by the defendant, the plaintiff will be entitled to his costs assessed to the date he was served with the offer, and the defendant will be entitled to his costs from the date 14 days after the date of the service of the offer assessed up to the date that the notice of acceptance was served.

43 Hence if the appellant had accepted the OTS in this case, it would have been entitled to costs up to 27 June 2016. Faced with the OTS, the sensible thing for the appellant to do would have been to conduct an expeditious evaluation of its claim against the respondent to see if there was good basis to continue, or whether it should accept the OTS with recovery of standard costs against the respondent. By choosing to continue with its claim which it subsequently effectively abandoned, the appellant had involved the respondent in unnecessary costs until the time the claim was struck out. I was of the view that the circumstances in this case were such that the cost benefits sufficed to induce

settlement and to render the OTS a genuine and serious one. Indeed, the respondent's offer was not only genuine and serious, but one might even say generous, as the respondent was offering essentially to pay some costs to the appellant even though the appellant had no case against the respondent.

Was the OTS in breach of O 22A r 10 of the ROC?

44 O 22A r 10 of the ROC provides as follows:

> Where there are 2 or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the cost consequences prescribed by Rule 9 do not apply to an offer to settle unless —
>
> …
>
> (*b*) in the case of an offer made to the plaintiff —
>
> (i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer; or
>
> (ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole of the offer.

45 Whether or not O 22A r 10 of the ROC is triggered by reason of a defendant's joint liability is an issue to be determined based on the pleadings, rather than any subsequent findings of fact, since it is for that defendant to determine on the face of the pleadings whether r 10 needs to be complied with in the making of an OTS (*Denis Matthew Harte v Tan Hun Hoe and Another* [2001] SGHC 19)("*Denis Matthew Harte*"). In other words, O 22A r 10 is

founded upon whether the defendants have been alleged to be jointly or jointly and severally liable and not whether they have been proven to be so (*Denis Matthew Harte* at [25]).

46 As the respondent had served the OTS on 27 June 2016, the relevant set of pleadings was the pre-amendment statement of claim filed on 22 April 2016. It was not seriously disputed that the tortious claims as phrased in the statement of claim did not allege joint or several liability on the part of the defendants, as it was stated that "the Plaintiff brings a claim in tort against the 4th to 6th Defendants respectively for negligence".[14] The appellant sought to rely instead on the mention of deeds of indemnity and warranty entered into by the defendants:[15]

> 15. By the Deeds of Indemnity and Warranty made between the 1st Defendant (including its assigns and successors in title), the 2nd Defendant and the 4th to 6th Defendants respectively, the 2nd Defendant and the 4th to 6th Defendants respectively agreed to jointly and severally warrant the respective works executed by the 4th to 6th Defendants (the "Warranted Works") and to jointly and severally indemnify the 1st Defendant (including its assigns and successors in title) in respect of the respective Warranted Works.
>
> …
>
> 16. In this regard, the Plaintiff shall be referring to and relying on the respective Deeds of Indemnity and Warranty entered into between the 1st Defendant (including its assigns and successors in title), the 2nd Defendant and the 4th to 6th Defendants respectively, for its full terms and effect at the trial of this matter and at any interlocutory proceedings in this action.

[14] Statement of Claim at [36]

[15] Statement of Claim at [15] – [16]

47 I did not think that the mere mention of the indemnities entered into and the vague assertions that the appellant shall be "referring to and relying on" them constituted an allegation of joint and several liabilities between the defendants. It was clear that the respondent could not be jointly and severally liable with any of the other defendants except with regard to defects in the works actually undertaken by the respondent. In the absence of any specific allegation as to how particular defects are attributable to the respondent, it was also difficult to see how there can be any allegations of joint and several liability on the part of the respondent. As such, I found that there was no breach of O 22A r 10 of the ROC.

Should the court exercise its discretion to depart from the cost consequences in O 22A r 9 of the ROC?

48 It is clear from O 22A rr 9 and 12 of the ROC that the court has a discretion in making cost orders even where there is an OTS, in order to do justice as between the parties. That being said, given that the OTS regime aims to "spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time" (*Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 at [37]) and does so primarily by stipulating default cost implications where reasonable offers are not accepted, these cost implications contained in O 22A r 9 of the ROC should apply unless there are good reasons for them not to.

49 I did not see any reason in this case to depart from the default cost implications of O 22A r 9 of the ROC. As I explained at [43] above, the OTS was a reasonable one in the circumstances and there were no good reasons for the appellant not to have considered it more seriously.

50 The appellant argued that the court should exercise its discretion to depart from the cost implications in O 22A r 9 of the ROC on the basis that the appellant had undertaken reasonable efforts to settle its claim against the respondent, referring primarily to negotiation attempts and rejected offers made between June 2016 and January 2017.[16] Whereas the reasonableness of a party's actions could certainly be a relevant consideration when the court exercises its discretion as to costs, I did not think that the existence of concurrent or subsequent negotiations sufficed in the circumstances to displace the default cost implications. In the absence of any strong reasons to do so, I saw no impetus to depart from the default position of ordering indemnity costs against the appellant from the date of the OTS.

[16] Appellant's second written submissions at [18]

Conclusion

51 For the reasons above, I dismissed the appellant's appeal against the cost orders of the AR. I ordered for costs of this appeal to be fixed at $3,000 (inclusive of disbursements) to be paid by the appellant to the respondent.

52 It might be prudent at this juncture to end on this cautionary note. Parties involved in civil litigation should always take offers to settle seriously, even where such offers may, at first blush, appear to be unfavourable or even unreasonable. As this case has demonstrated, the cost implications triggered by the existence of an OTS could be significant, particularly where proceedings are drawn out for longer than they should have been.

Lee Seiu Kin
Judge

Ponnampalam Sivakumar and Liao Ruiyi (Bernard & Rada Law Corporation) for the appellant;
Twang Kern Zern (Central Chambers Law Corporation) for the respondent.