CCM Industrial Pte Ltd v Uniquetech Pte Ltd
[2008] SGHC 216

Case Number : DA 13/2008

Decision Date : 21 November 2008

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : Leong Yung Chang (Veritas Law Corporation) for the appellant; Uthayasurian s/o Sidambaram (Surian & Partners) for the respondent

Parties : CCM Industrial Pte Ltd — Uniquetech Pte Ltd

Civil Procedure – Costs – Principles – Whether appellant's conduct warranted imposition of indemnity costs

Civil Procedure – Rules of court – Scope of O 22A r 9(3) Rules of Court (Cap 322, R 5, 2006 Rev Ed) – Whether O 22A r 12 applicable if O 22A r 9 inapplicable – Relationship between O 22A and O 59 – Applicability of O 22A r 9(5) – Order 22A rr 9, 12 and O 59 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

21 November 2008

Chan Sek Keong CJ:

1 This was an appeal by the appellant, CCM Industrial Pte Ltd, against the decision of the district judge ("the Judge") in District Court Suit No 1614 of 2007 ("DC Suit 1614/2007") in awarding costs on an indemnity basis to the respondent, Uniquetech Pte Ltd, from the date of an offer to settle made by the respondent.

2 After hearing arguments of counsel for the parties, I affirmed the decision of the Judge and dismissed the appeal. I now give my reasons.

3 I begin with the salient facts. In April 2007, the appellant informed the respondent that it was terminating a tenancy agreement between them due to the latter's failure to pay the appellant rent amounting to $64,134.00. The respondent replied that the appellant owed it $62,728.48 and that it was seeking to set off this amount against the arrears of rent. The appellant rejected the respondent's claim to a set-off and insisted on full payment of the arrears of rent.

4 On 17 May 2007, the appellant commenced DC Suit 1614/2007 to recover the sum of $64,134.00. On 18 June 2007, the respondent filed a defence of set-off and counterclaimed the sum of $62,115.68. At the same time, the respondent made an offer to settle ("the OTS") as follows:

> The Defendants [the respondent] offer to settle the proceedings on the following terms:-
>
> 1. The Defendants do pay the Plaintiffs [the appellant] the sum of $2,018.32, as full and final settlement in respect of the Plaintiffs' claim.
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> 2. Each party bear their own costs.
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> 3. The offer may be terminated or withdrawn at any time by the Defendants giving the Plaintiffs and/or their Solicitors written notice of withdrawal by telefax.

4. The offer will automatically be withdrawn by any subsequent offer to settle sent by telefax to the Plaintiffs and/or their Solicitors.

5 The sum of $2,018.32 is the difference between the appellant's claim and the respondent's counterclaim. The appellant did not accept the OTS and persisted with its claim. Affidavits of evidence-in-chief were exchanged on 22 November 2007, and a pre-trial conference ("PTC") was held on 19 December 2007, at which the appellant also rejected the respondent's proposal to proceed to mediation at the Court Dispute Resolution Centre.

6 Two months later at a confirmatory PTC held on 13 February 2008, the appellant indicated that it would not contest the respondent's counterclaim and contended that the OTS was ambiguous as it did not advert to the counterclaim. The appellant informed the court that the parties would attempt to settle the matter amicably before the hearing scheduled for 20 February 2008.

7 That same day after the PTC, the appellant faxed a letter to the respondent and indicated its intention to settle its claim upon the respondent paying the sum of $2,018.32 in "full and final settlement of [its] claim and [the respondent's] counterclaim" and that "each party is to bear [its] own costs". This offer was substantially the same as the OTS except for the additional reference to the counterclaim.

8 The respondent replied one and half hours later that it was "only prepared to settle" the claim and counterclaim on the condition that the appellant pay $4,000.00 "towards [its] costs plus disbursements, to be agreed or taxed", and that the appellant file a notice of discontinuance in respect of its claim.

The hearing before the Judge

9 Eventually, on 20 February 2008, the parties appeared before the Judge to record a consent judgment in favour of the appellant against the respondent 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, with costs to be decided by the court. The Judge decided that the appellant should pay indemnity costs to the respondent from the date of the OTS after hearing counsel for the parties.

10 The relevant provision on costs in the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") relied upon by the parties is O 22A r 9, which provides as follows:

9.—(1) Where an offer to settle made by a plaintiff —

(*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 defendant, and the plaintiff obtains a judgment not less favourable than the terms of the offer to settle,

the plaintiff is entitled to costs on the standard basis to the date an offer to settle was served and costs on the indemnity basis from that date, unless the Court orders otherwise.

(2) Where an accepted offer to settle does not provide for costs —

(*a*) where the offer was made by the plaintiff, he will be entitled to his costs assessed to the date that the notice of acceptance was served;

(*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.

(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.

(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.

(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.

11 The appellant's submission was that the proper order of costs should be that each party pay its own costs for the following reasons:

(a) It was fair and equitable that each party pay its own costs as both parties had some measure of success.

(b) The OTS should be disregarded as it was ambiguous in that it referred only to the claim and not the counterclaim (citing *SBS Transit Ltd v Teo Chye Seng Douglas* [2005] SGHC 15).

(c) The judgment obtained was more favourable than the OTS by $8.96 (which represented the interest on the judgment sum computed at the rate of 5.33% per annum from the date of filing of the writ and the making of the OTS) as judgment interest in respect of the period before the service of the OTS had to be taken into consideration (see O 22A r 9(4)).

(d) The OTS was withdrawn on 13 February 2008 when the respondent counter-proposed that the appellant pay costs either at $4,000 or to be taxed.

12 The respondent's submission was that it should be awarded indemnity costs from the date of the OTS for the following reasons:

(a) The OTS was clear and unequivocal, and there was no reason for the appellant not to

accept it.

(b) The judgment sum was not more favourable than the OTS as the judgment interest was only $8.96, *ie*, it could be considered *de minimis*.

(c) The OTS was not withdrawn as the parties were only working out the costs issue. The fact remained that the appellant had obtained a consent judgment for the same amount in the OTS.

(d) The respondent had, by way of the OTS, made a genuine and serious attempt to settle the dispute and to save costs and judicial time, whereas the appellant had adopted an uncompromising stand throughout the proceedings, including refusing mediation and even an agreed bundle of documents.

13 The Judge made the following findings:

(a) The OTS was not ambiguous: it clearly referred to the proceedings, *ie*, both the claim and the counterclaim, and not merely the claim. The appellant could not have been confused as, even before the writ was issued, the respondent had already made an offer to set off the counterclaim against the claim.

(b) The respondent's counter-offer on costs had the automatic effect of withdrawing the OTS as provided in para 4 of the OTS.

(c) The judgment sum was more favourable than the OTS even though the amount in excess was only $8.96 (see *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 4 SLR 593 ("*Singapore Airlines Ltd*") at [4]).

14 On these findings, the Judge held that the OTS did not satisfy the requirements of O 22A r 9(3)(*b*). Nevertheless, he held that the OTS was relevant in the determination of the issue of costs because of O 22A r 12 of the ROC, which provides as follows:

> Without prejudice to Rules 9 and 10, the Court, in exercising its discretion with respect to costs, may take into account any offer to settle, the date the offer was made, the terms of the offer and the extent to which the plaintiff's judgment is more favourable than the terms of the offer to settle.

For this proposition, the Judge referred to the following passages at [36] and [38] of the judgment of the Court of Appeal in *Singapore Airlines Ltd* as follows:

> It will be seen that r 12 tempers the rigours of r 9 and gives the court a wide discretion to do justice as between the parties even in a case where the offer is less than the sum awarded in the judgment.
>
> …
>
> 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.

15 Applying the test of what is just and fair, the Judge found that the conduct of the appellant was unreasonable (see *Harte Denis Matthew v Tan Hun Hoe* [2001] SGHC 19 at [35]) and that it had wasted resources, time and costs. The appellant was aware that the respondent had made a counterclaim even before it commenced proceedings. Yet it made the counter-offer only one week before the trial, and after a delay of more than eight months. The Judge was of the view (at [46] of his grounds of decision ("the GD")) that to order each party to pay its own costs "would have unduly favoured a lackadaisical and irresponsible litigant, and subvert the very spirit behind O.22A, which '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 the trial': *The "Endurance 1"* [1999] 1 SLR 661 at [42]".

16 The Judge also referred to the exceptions, under O 59 r 3(2), to the general rule that costs follow the event. In this respect, he held at [48] of the GD that:

> One such exception is where a party has conducted his case 'unreasonably or improperly' – for instance, 'by omitting to do any thing the doing of which would have been calculated to save costs'. In such circumstances, the court may order that the party bear his own costs so occasioned and to pay the costs so occasioned to the other party: O.59, r.7(1) & (2)(a). Thus, a party who unreasonably fails to resolve issues when he has the opportunity to do so may be penalized in costs: *Chan Choy Ling v Chua Che Teck* [1995] 3 SLR 667 at [23].

17 For those reasons, and applying the exceptions, the Judge decided that the respondent should be awarded indemnity costs from the date of the OTS.

The Appeal

18 Before me, counsel for both parties proceeded on the basis that the Judge had applied O 22A r 12 to determine the costs issue against the appellant. In my view, it was not clear that this was correct. The Judge had said nothing in the GD that r 12 was applicable to the case, but only observed that the OTS was relevant for costs determination because of O 22A and r 12 and, in support of his view, cited what the Court of Appeal had said in relation to r 12 specifically and O 22A generally in *Singapore Airlines Ltd* ([13] *supra*). That does not necessarily mean that the Judge was applying O 22A r 12 in the hearing before him.

19 Nevertheless, proceeding on the basis as understood by counsel, the appellant's case before me was that the Judge was wrong to apply O 22A r 12 as a sword and to use it to invoke O 22A r 9 to impose indemnity costs against the appellant, when r 9 did not apply to the facts of the case. The appellant's case raised two questions:

(a) whether the Judge had erred in his application of O 22A r 12; and

(b) if he did not, whether there were special circumstances warranting an order for indemnity costs.

20 In the larger context of offers to settle, this appeal also raises issues concerning the scope of r 9 and its relationship to r 12 and also the relationship between O 22A and O 59 of the ROC. Before I give my views on these questions and issues, it is necessary to examine the terms of r 9, and, in particular, r 9(3)(*b*) in relation to offers to settle made by defendants, which was the case here.

Scope of Order 22A rule 9(3)

21 Order 22A r 9(3) is clear enough. It provides that if the defendant's offer to settle is not withdrawn and has not expired before the disposal of the claim in respect of which the offer is made, *and* the offer 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*. Built into the specific directions on costs in r 9(3) is the power of the court to order otherwise. Order 22A r 9(1), which applies to offers to settle made by plaintiffs, also vests the same power in the court.

22 However, in the present case, there was no occasion for the Judge to decide under r 9(3)(*b*) because he had decided that the OTS did not satisfy its requirements. He had found on the facts that (a) the OTS had been withdrawn; (b) the appellant had not accepted the OTS; and (c) the judgment sum (under the consent judgment) was more favourable than the OTS.

23 Since r 9(3)(*b*) did not apply to the facts of the case, the ordinary principles of costs under O 59 would have applied to the case to determine which party had to pay what kind of costs to the other party with respect to the claim and counterclaim, unless there was some other rule that was applicable. As I have mentioned earlier, it is not clear whether the Judge had held that O 22A r 12 was applicable. Nevertheless, applying the spirit of r 12 and the Court of Appeal's statement in *Singapore Airlines Ltd* ([13] *supra*) on the purpose of O 22A, the Judge awarded the respondent indemnity costs from the date of the OTS even though the judgment sum was more favourable than the OTS (in this case, by $8.96). Proceeding on the basis (as agreed by the parties) that the Judge did apply r 12, the question was whether he was correct in law to do so on the facts of the case.

Is Order 22A rule 12 applicable, if Order 22A rule 9 is not applicable?

24 The Judge, having referred to the statement of the Court of Appeal in *Singapore Airlines Ltd* (at [36]) that "r 12 tempers the rigours of r 9" and (at [38]) that "[t]he 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", held that the appellant's unreasonable conduct in the proceedings justified an order that it pay indemnity costs. Counsel for the appellant contended that the Judge was wrong as he had applied O 22A r 9(3)(*b*) in his determination on costs when the OTS and the circumstances surrounding it rendered r 9(3)(*b*) inapplicable to the case. In other words, r 12 could not be used to temper the rigours of a non-applicable rule as there was nothing to temper. It was argued that, in effect, the Judge had used r 12 to invoke r 9(3)(*b*) when he had already found r 9(3)(*b*) to be inapplicable.

25 In my view, this argument has logic to support it. If r 12 is intended to temper the rigours of r 9, then logically it does not apply where r 9 is not applicable. The Court of Appeal's statement in *Singapore Airlines Ltd* that r 12 tempers the rigours of r 9 was made in the context of a situation *where the offered sum in the offer to settle was less than the sum awarded in the judgment.* In that case, the plaintiff had claimed damages against the defendants who made an offer to settle (at $350,000) about three years after the writ was issued. The plaintiff rejected the offer to settle because she wanted higher damages. The defendants admitted liability and, in assessing damages, the assistant registrar assessed damages in a sum that was lower than the offer to settle, and ordered costs in accordance with r 9(3)(*b*). The plaintiff appealed successfully on the quantum of damages and the result was that the judgment sum became slightly more than the offer to settle. However, the Judge was of the view that because the plaintiff's refusal to accept the offer to settle was unreasonable (she had demanded exorbitant damages at about $1m and had delayed accepting

the offer to settle for more than six months) she should be awarded only nominal costs of $1,000. She appealed to the Court of Appeal which dismissed her appeal.

26 Accordingly, in *Singapore Airlines Ltd*, r 12 did not apply to the facts in that case and it was inappropriate for the court to use r 12 to reduce the costs of the plaintiff. The court should have used r 9(5) as will be explained later (see [44] and [45] below). As the judgment sum in the present case is more than the sum offered in the OTS, the Court of Appeal's statement is not applicable to the present case, and cannot be used as a basis to order indemnity costs against the appellant.

27 In my view, the reason why r 12 cannot apply to the present case is that r 12 is not an empowering rule. Rule 12 cannot be used as a free-standing rule to impose costs because it does not vest any power in the court to order costs in relation to offers to settle. Rule 12 provides that, *in exercising its discretion* with respect to costs, the court may take into account the matters mentioned therein, *viz*: (a) any offer to settle; (b) the date of the offer; (c) the terms of the offer; and (d) the extent to which the plaintiff's judgment is more favourable than the terms of the offer to settle. Rule 12 merely provides the guidelines for the exercise of the court's discretion. It is not an empowering rule. The empowering rules are found somewhere else. They are found in rr 9(1)(*b*) and 9(3)(*b*) and also r 9(5). These are the only rules empowering the court to award costs in relation to offers to settle. It therefore follows that if r 9(3)(*b*) does not apply to an offer to settle, then r 12 cannot be applied to r 9(3)(*b*) in order to temper its rigours. However, where r 9 applies to an offer to settle and the court is desirous of deciding otherwise (contrary to the prescribed costs), then r 12 sets out the matters the court may take into account for that purpose.

28 Order 22A r 12 begins with the words "Without prejudice to Rules 9 and 10, the Court, *in exercising its discretion* with respect to costs, may" [emphasis added]. The expression "without prejudice" in a statutory provision ordinarily means that what follows in that provision (here, the factors to be taken into account) is not to impair the force of the existing provisions and is therefore not to override or repeal them (see *Public Prosecutor v Viran* [1947] 1 MLJ 62 at 64 *per* Spenser-Wilkinson J). Accordingly, with reference to r 12, the expression means that r 12 may not be applied in any way that would diminish or impair the operation of r 9 (with the consequences prescribed by r 9 itself). Rule 12 assumes a case where r 9(3)(*b*) is applicable, and given that that rule allows the court to decide otherwise than in accordance with the prescribed costs, no such impairment will occur.

29 In my view, r 12 cannot be construed as a free-standing empowering provision to enable the court to order costs at its discretion in order to do justice. If that were the intention of the Rules Committee, it would have expressly stated that the court "shall have full power to determine by whom and to what extent any costs are to be paid" (see *eg*, the formulation in O 22A r 9(5) which was inserted in 1999 and which gives an overriding discretion to the court to order costs in cases involving offers to settle).

30 Accordingly, if the Judge did apply r 12 to order indemnity costs against the appellant, his decision was wrong in law. However, I think he was doubtful about the application of r 12 as ultimately he appeared to have relied on O 59 to order indemnity costs against the appellant.

31 As r 12 has no application to the OTS in the present case, it is not necessary for me to deal with the argument that it cannot be used as a sword. I will now consider the application of O 59 to the facts of the present case.

Relationship between Order 22A and Order 59

32 At [48] of the GD, the Judge also referred to O 59 rr 7(1) and 7(2) in deciding to order

indemnity costs against the appellant. However, it is also not clear whether the Judge actually relied on O 59 rr 7(1) and 7(2) to give him a separate and distinct power to order the appellant to pay indemnity costs or merely to reinforce his reliance on O 22A r 12. As O 59 gives the court unfettered power to deal with costs (see O 59 r 2), the Judge would have been justified in relying on O 59 rr 7(1) and 7(2) to order indemnity costs against the appellant in an appropriate case. But it has to be said that indemnity costs are an exception and have to be exceptionally justified.

33 Order 59 rr 7(1) and 7(2) provide as follows:

> **7.**—(1) Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.
>
> (2) Without prejudice to the generality of paragraph (1), the Court shall for the purpose of that paragraph have regard in particular to the following matters:
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> (*a*) the omission to do any thing the doing of which would have been calculated to save costs;
>
> (*b*) the doing of any thing calculated to occasion, or in a manner or at a time calculated to occasion unnecessary costs; and
>
> (*c*) any unnecessary delay in the proceedings.

34 Order 22A was introduced to deal specifically with costs in connection with offers to settle. Applying established principles of statutory construction, where a case falls within that order, it should be dealt with according to the terms of that order. In the present case, O 22A r 9 had no application (and the other rules were not relevant) to the OTS. Therefore, the case has to be dealt with under some other rule. It has been noted in *Singapore Court Practice 2006* (LexisNexis, 2006) (Jeffrey Pinsler gen ed) at p 581 that:

> If the plaintiff obtains a judgment which is more favourable than the terms of the offer, the costs consequences under the offer to settle process do not apply. In this event, costs are governed by general principles. (See O 59.)

I agree with this statement as O 59 applies to every case on costs in the absence of any other specific rule. Order 59 thus applies to the present case. But whether indemnity costs should be ordered under O 59 raises a very different issue. However, for reasons given below, I find it unnecessary to decide whether it was proper for the Judge to have relied on O 59 in the present case (assuming that he did).

Were there circumstances warranting an order for indemnity costs?

35 This brings me to the second issue in this appeal, which is whether there were any circumstances to justify the Judge's order of costs. This issue has two aspects. The first concerns the facts and the second involves the exercise of discretion. On the first aspect, the Judge has found on the facts that the respondent had acted reasonably and expeditiously in trying to settle the claim, whereas the appellant had acted unreasonably and had adopted an uncompromising stance throughout the proceedings in: (a) refusing to accept the respondent's counterclaim; (b) rebuffing

the respondent's request for mediation; and (c) rejecting the OTS for eight months on the unmeritorious ground that it was ambiguous, before making a conditional offer just one week before the date of the trial of the action to accept it, with each party bearing its own costs. The respondent rejected this offer of the appellant by making a counter-offer on costs. The Judge held that this counter-offer had the effect of withdrawing the OTS under para 4 of the OTS. By this stage, it was already clear that the appellant's actions had led to wastage of resources, time and costs. The appellant's conduct of the litigation subverted the rationale and spirit behind O 22A.

36 In my view, there was sufficient evidence for the Judge to make the findings he did, and there was no reason for me to disturb them.

37 With respect to the second aspect of the second issue, *ie*, the exercise of discretion, here again, unless the appellant could show that the Judge had exercised his discretion contrary to law, there was no basis to disturb his decision on costs. In this respect, too, I could find no basis to disagree with the Judge's exercise of discretion on costs.

Was the appellant's judgment sum more favourable than the OTS?

38 Another issue of fact which I would like to consider here is whether the judgment sum was more favourable than the OTS, although my conclusion is tentative and does not affect my reasoning on the main issue of law. The Judge found (at [31] of the GD) that the judgment sum, together with interest of $8.96, was more favourable than the OTS by $8.96, citing the Court of Appeal's statement in *Singapore Airlines Ltd* ([13] *supra* at [30]) that "once it was shown that the offer was less than the judgment sum *no matter how slightly*, O 22A r 9(3) did not apply" [emphasis added]. The respondent's first argument on this issue was that the interest amount was *de minimis* and should not be considered when calculating the judgment sum, a point I am disposed to agree with.

39 My view is as follows. In *Singapore Airlines Ltd*, the Court of Appeal was considering the case of a judgment sum which did not involve the payment of interest. In the present case, it was the agreed interest that made the judgment sum more favourable than the OTS by $8.96 (because under r 9(4)(*a*), the interest awarded in respect of the period before the service of the offer to settle may be taken into account). In the context of the appellant's conduct, the excess was truly *de minimis* because, if the appellant had accepted the respondent's offer of a set-off, the action would not have been commenced in the first place. Nevertheless, I am bound by the Court of Appeal's statement if it is applicable to the present case.

40 The second argument on this issue is that the relevant words in O 22A r 9(3)(*b*) are whether "the plaintiff obtains judgment not more favourable than the terms of the offer to settle". 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 *Singapore Airlines Ltd*, 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 *Singapore Airlines Ltd* 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.

41 In this connection, the duration of the offer should be taken into account. Here, the OTS was open to acceptance until it was withdrawn or until the judgment date. Either date was longer than

eight months after the date of the OTS. If the appellant had accepted the OTS within a reasonable time after the date of the OTS (say not more than 14 days) he would have had the use of the money, and the interest, income or other benefit that would have accrued from its use should be taken into account in determining whether the sum offered would have been more favourable than the judgment sum. In *Singapore Airlines Ltd*, the Court of Appeal adverted to this factor where it said (at [6]):

> The offer made by the defendants was $350,000. Taking into account the interest which this sum would have earned from the date of the offer up to the date of the assessment by the assistant registrar, it would become $351,809.82. As this sum was still less than the total sum of $352,279.33 awarded, [the judge] also altered the decision below on costs. The defendants were ordered to pay the [the plaintiff's] costs up to the date of the offer. As for the costs incurred after the offer, [the judge] fixed them at $1,000 payable by the defendants to [the plaintiff]. As for the costs of the appeal before the High Court, [the judge] also fixed it at $5,000, payable by the defendants to [the plaintiff].

42 This passage recognises that the interest or benefit that would have accrued to the plaintiff in accepting an offer to settle at an early date is a consideration to be taken into account in determining whether the plaintiff's judgment is more favourable than the offer to settle. The Court of Appeal's later statement at [30] (see [38] above) with respect to only the principal of the judgment sum should be read in the light of its earlier statement at [6] (see [41] above).

43 On this basis, the judgment obtained by the appellant was not more favourable than the terms of the OTS and hence, under O 22A r 9(3)(*b*), the respondent would have been entitled to costs on an indemnity basis from the date of the OTS.

Applicability of Order 22A rule 9(5)

44 I should discuss one further rule which the parties have not cited to the Judge or to me nor was it referred to by the Court of Appeal in *Singapore Airlines Ltd.* Order 22A was amended in 1999 by the insertion of r 9(5) to give the court an overriding discretion to deal with costs in offers to settle. It also addressed the lacuna in the ROC which did not provide for situations where the offer to settle fell outside the ambit of the requirements in rr 9(1) and 9(3). Although r 9(5) is expressed to be "without prejudice to paragraphs (1), (2) and (3)" (just like r 12 is expressed to be without prejudice to rr 9 and 10), but otherwise, unlike r 12, it provides that 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. These are empowering words not found in r 12.

4 5 In the present case, the Judge did not rely on r 9(5) in ordering indemnity costs against the appellant. But, in my view, r 9(5) is applicable to the present case, whether or not r 9(3)(*b*) applies. The reason is that r 9(5) vests the court with full power to determine by whom and to what extent any costs are to be paid, so long as it is exercised without prejudice to rr 9(1), 9(2) and 9(3). Following from my observations (see [28] and [29] above), if r 9(3)(*b*) has no application to the present case, any decision by the court under r 9(5) would not have diminished or impaired r 9(3). The introduction of r 9(5) has made it unnecessary for the court to rely on O 59 to determine costs in relation to offers to settle.

46 As the Judge had the power to order indemnity costs against the appellant under O 22A r 9(5), the issue here is ultimately one concerning the proper exercise of the court's discretion. Were there any circumstances that justified the Judge in ordering indemnity costs against the appellant? Given

the circumstances in the present case, it is difficult to disagree with the Judge's conclusion that the appellant was wholly unreasonable in not accepting the OTS expeditiously (which would have entailed a loss of interest of probably not more than $10) and dragging the litigation on for another eight months.

47 For the reasons set out above, the appeal was dismissed with costs.