

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 56

Civil Appeal No 207 of 2017

Between

NTUC Foodfare Co-operative
Ltd

... Appellant

And

- (1) SIA Engineering Company
Limited
- (2) Yap Tee Chuan

... Respondents

JUDGMENT

[Civil Procedure] — [Offer to settle]

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NTUC Foodfare Co-operative Ltd
v
SIA Engineering Co Ltd and another

[2018] SGCA 56

Court of Appeal — Civil Appeal No 207 of 2017
Sundares Menon CJ, Steven Chong JA and Quentin Loh J
2 August 2018

5 September 2018

Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

1 On 19 July 2018, we allowed this appeal in part and directed the parties to file written submissions on the appropriate orders on costs for the trial and the appeal, unless they came to an agreement on costs: see *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] SGCA 41 (the “Judgment”) at [85]. The parties were unable to come to an agreement, and have now filed their submissions on costs.

2 The parties’ submissions raise the issue of whether, where a defendant makes an offer to settle (“OTS”) that is inclusive of costs or proposes that there be no order as to costs, the court should account for costs incurred by the plaintiff (up to the date of the OTS) in deciding whether the judgment is not more favourable than the OTS under O 22A r 9(3)(b) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the Rules of Court”). This issue has not been considered by this court before. The costs consequences in this appeal are

further obfuscated by a *Calderbank* offer which was made by the plaintiff following the trial, apparently in the mistaken belief that the OTS had lapsed. We now issue this judgment to address the aforementioned issue, and to give our decision on the appropriate costs orders.

Facts

3 On 7 December 2015, the appellant (“NTUC Foodfare”) commenced the suit from which this appeal arises.

4 On 12 May 2017, 11 days before the trial began, the respondents served an OTS (“the OTS”) on NTUC Foodfare, which states:¹

The Defendants offer to settle this proceeding on the following terms:

1. The Defendants shall pay to the Plaintiff the sum of S\$225,000.00 (the “Settlement Sum”).
2. The Plaintiff shall file a Notice of Discontinuance with *no order as to costs* within 7 days of the receipt of the Settlement Sum by the Plaintiff.
3. This settlement is in full and final settlement of all or any claims whatsoever arising out of or in connection with this action ...

[emphasis added]

5 By the OTS, the respondents offered to pay NTUC Foodfare S\$225,000 (the “Settlement Sum”) in settlement of its claims. Importantly, the OTS did not provide for NTUC Foodfare to receive a separate sum for the costs it incurred prior to 12 May 2017. NTUC Foodfare was to receive the Settlement Sum only. Significantly, the OTS also did not specify a date on which it would expire.

¹ Appellant’s submissions on costs at Appendix A.

6 NTUC Foodfare submits, and the respondents do not deny, that all of the affidavits of evidence-in-chief (“AEICs”) for the trial were filed by 12 May 2017.² We are also satisfied that much of the preparatory work for the trial, which was set down for seven days, would have been completed by this stage. Following the trial, the claim was dismissed in its entirety.

7 NTUC Foodfare did not accept the OTS at any time. However, on 16 April 2018, after the trial, but before the hearing of this appeal, NTUC Foodfare wrote a letter to the respondents stating that it was prepared to accept a total sum of S\$176,176.85 (all in) in settlement of the dispute (the “*Calderbank Offer*”).³ The respondents did not accept the *Calderbank Offer*.

8 On 19 July 2018, we delivered the Judgment, holding at [84] that the respondents were liable to NTUC Foodfare in the sum of S\$176,176.85 and interest at 5.33% per annum on the said sum from the date of the writ to the date of the Judgment (“the Judgment Sum”).

The parties’ submissions

9 The respondents submit that the OTS was open for acceptance until the disposal of the appeal. Furthermore, the judgment was less favourable to NTUC Foodfare than the terms of the OTS because the sum awarded – accounting for interest from the date of the writ of summons (7 December 2015) to the date of the OTS (12 May 2017), pursuant to O 22A r 9(4) of the Rules of Court – was less than the Settlement Sum.⁴ The respondents submit that O 22A r 9(3) of the Rules of Court therefore applies, and the court should apply the rule thereunder

² Appellant’s submissions at para 23d.

³ Appellant’s submissions on costs at Appendix B.

⁴ Respondents’ submissions on costs at paras 5–6.

by awarding costs to NTUC Foodfare on a standard basis from 7 December 2015 (the date of the writ of summons) to 12 May 2017 (the date of the OTS), and costs to the respondents on an indemnity basis from 12 May 2017 onwards.⁵ In the alternative, the respondents seek costs on a standard basis, emphasising that NTUC Foodfare only partially succeeded in its claim and much time at the trial and on appeal was spent on aspects of the claim which NTUC Foodfare failed to prove.⁶

10 NTUC Foodfare submits that O 22A r 9(3) of the Rules of Court does not apply because its preconditions have not been satisfied.

(a) First, the OTS was not open for acceptance after the trial ended.⁷

(b) Second, the terms of the OTS were less favourable than the judgment once costs and disbursements incurred by NTUC Foodfare up to the date of the OTS are accounted for.⁸

11 NTUC Foodfare submits that the appropriate costs order for the trial and the appeal is costs to NTUC Foodfare, to be taxed if not agreed. Further, NTUC Foodfare submits that it is entitled to indemnity costs from 16 April 2018, the date of the *Calderbank* Offer, on the basis that the global sum proposed therein was more favourable to the respondents than the outcome of this appeal.⁹

⁵ Respondents' submissions on costs at para 1a.

⁶ Respondents' submissions on costs at para 21a.

⁷ NTUC Foodfare's submissions on costs at para 27.

⁸ NTUC Foodfare's submissions on costs at paras 17–25.

⁹ NTUC Foodfare's submissions on costs at paras 26–27.

The issues

12 The following issues arise for our determination:

- (a) First, does O 22A r 9(3) of the Rules of Court apply?
- (b) Second, what are the appropriate orders on costs?

13 We now address these issues in turn.

Analysis

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

14 Order 22A r 9(3) of the Rules of Court states:

(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.

[emphasis added in italics]

15 NTUC Foodfare did not accept the OTS. Hence, the general rule on costs under O 22A r 9(3) would apply if two conditions are satisfied:

- (a) the OTS was not withdrawn and had not expired before the disposal of the claim (the “Validity Requirement”); and

- (b) the judgment is not more favourable than the terms of the OTS (the “Favourability Requirement”).

The Validity Requirement

16 It is not in dispute that the respondents did not withdraw the OTS at any time. However, NTUC Foodfare claims that the OTS expired upon the conclusion of the trial. We disagree. Here, the OTS did not specify a time for acceptance. Order 22A r 3(5), which provides for this scenario, states:

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

17 Under O 22A r 3(5), the OTS remained open for acceptance “at any time before the Court *dispose[d] of the matter* in respect of which it [was] made” [emphasis added]. It is settled law that for the purposes of O 22A r 9(3)(a), “the disposal of the claim” refers to the final disposal of the claim on appeal if an appeal is filed: see *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 3 SLR(R) 267 at [20] and *Ram Das V N P v SIA Engineering Co Ltd* [2015] 3 SLR 267 at [73]. In our judgment, the phrase “dispos[al] of the matter” in O 22A r 3(5) must be interpreted consistently with O 22A r 9(3)(a) to refer to the final disposal of the claim on appeal where there is an appeal. We therefore conclude that under O 22A r 3(5), the OTS remained open for acceptance until 19 July 2018, when we issued the Judgment which finally disposed of the claim. Hence, the Validity Requirement is satisfied.

The Favourability Requirement

18 As noted above, we held in the Judgment that the respondents are liable for the sum of S\$176,176.85 and interest at 5.33% per annum on the said sum from the date of the writ to the date of the Judgment.

19 Order 22A r 9(4) of the Rules of Court provides that in deciding whether the judgment is more favourable than the terms of an OTS, the court should only consider interest awarded in respect of *the period before service of the OTS*. Interest at 5.33% per annum on the sum of S\$176,176.85 from 7 December 2015 until 11 May 2017 (before the OTS was served on 12 May 2017) amounts to S\$13,429.31. Adding this sum to S\$176,176.85 yields the sum of S\$189,606.16.

20 The respondents submit that the Favourability Requirement is satisfied because S\$189,606.16 is less than the Settlement Sum of S\$225,000. On the other hand, NTUC Foodfare contends that the Favourability Requirement has not been satisfied because once costs and disbursements are taken into account, the terms of the OTS are less favourable than the judgment. Thus, the narrow point which we have to decide is whether we should take into account the costs and disbursements that NTUC Foodfare incurred up to the date of the service of the OTS in assessing the relative favourability of the OTS and the judgment.

(1) The test of favourability

21 In *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20, Chan Sek Keong CJ made the following pertinent remarks at [40] on the test of favourability under O 22A r 9(3)(b):

... 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.*** [emphasis added in italics and bold italics]

22 In this passage, Chan CJ emphasised that all of the terms of the OTS are critical in determining whether the Favourability Requirement is satisfied and that even in a claim for damages, the settlement sum stated in the OTS would not be the only relevant factor. We agree with and endorse these propositions.

23 In our judgment, where a defendant makes an OTS proposing to pay the plaintiff a sum of money in settlement of the dispute, one factor that is relevant to the Favourability Requirement is whether the OTS makes separate provision for the plaintiff to be paid its costs (up to the date of the OTS). If the OTS does not do so, the court should account for the costs incurred by the plaintiff up to the date of the OTS in determining if the Favourability Requirement is satisfied.

24 Such an approach was taken by the High Court in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd (judgment on costs)* [2004] 1 SLR(R) 134 (“*LK Ang*”). In that case, the defendant had filed an OTS proposing to pay the plaintiff S\$30,000 inclusive of costs to settle their dispute. The plaintiff did not accept the OTS. It then obtained judgment in the sum of S\$15,424.84 (inclusive of interest). Kan Ting Chiu J held at [14] that it was necessary to account for the plaintiff’s costs up to the date of service of the OTS when examining the Favourability Requirement. It was unclear whether the Favourability

Requirement was made out on the evidence before the court. Kan J therefore ordered at [22] that the plaintiff tax its costs on the standard basis up to the date of the OTS, and that the general rule under O 22A r 9(3) would apply if the sum of the plaintiff's costs and the judgment sum was less than S\$30,000.

25 In our judgment, the broad approach taken in *LK Ang* is consistent with the scheme and operation of O 22A r 9(3) for the following reasons.

(a) Order 22A r 9(3) sets out a general rule that the defendant should be awarded costs on an indemnity basis from the date on which the OTS was served if the conditions of O 22A rr 9(3)(a) and 9(3)(b) are satisfied. The rule is based on the notion that where those conditions are fulfilled, the plaintiff should have chosen one option (accepting the OTS) over another option (proceeding to judgment), *on the date that the OTS was served*. That is why O 22A r 9(3) provides for the defendant to be awarded costs on an indemnity basis from that date.

(b) Order 22A r 9(3)(b) requires the court to compare the judgment and the terms of the OTS. This comparison is to be made *as of the date of the OTS*. Hence, O 22A r 9(4) provides that the court should only consider interest awarded in respect of the period *before* the OTS was served in deciding whether the Favourability Requirement is satisfied (see [19] above).

(c) In our judgment, since O 22A r 9(3) is based on the notion that the plaintiff should have chosen one option (accepting the OTS) over another option (proceeding to judgment), the comparison under O 22A r 9(3)(b) must be between like and like. Hence, the starting point is to examine the terms of the OTS. The analysis will depend on the terms:

(i) Where the OTS states a monetary sum, but is either silent on interest and costs, or states that the settlement sum is inclusive of interest and costs, or states that each party shall bear its own costs, it should be interpreted as an “all-in” offer inclusive of interest and costs. For the comparison to be between like and like, since the settlement sum is inclusive of interest and costs, the court should compare the judgment sum *together with interest and costs up to the date of the OTS* with the settlement sum. In *LK Ang*, Kan J indicated at [22] that the appropriate measure of the plaintiff’s costs was the plaintiff’s (party-and-party) costs, assessed on a standard basis, up to the date of the OTS. We agree that this is the appropriate measure, albeit we add the following. Where the judgment sum does not exceed the District Court limit or the Magistrate’s Court limit, the costs should generally be assessed on the applicable State Courts scale, unless there was sufficient reason for bringing the action in the High Court or (one of) the defendant(s) objected to the transfer of the action to a State Court: see ss 39(1) and 39(4) of the State Courts Act (Cap 321, 2007 Rev Ed) and O 59 r 27(5) of the Rules of Court.

(ii) On the other hand, where the OTS provides for the plaintiff to receive a fixed sum *plus* interest and costs, it would typically suffice for the court to compare the judgment sum (without accounting for interest and costs) with the fixed sum in the OTS to determine whether the Favourability Requirement is satisfied.

26 We acknowledge that we did not expressly articulate the approach laid down above in other OTS cases which have come before this court. However, in those cases, the costs incurred by the plaintiff up to the date of the OTS were immaterial to the issue of whether the Favourability Requirement was satisfied:

(a) In *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439, the plaintiff obtained judgment in the sum of S\$352,279.33 (including interest). The defendants had offered to settle the dispute for S\$350,000. Even without accounting for the plaintiff's costs up to the date of the OTS, the judgment sum of S\$352,279.33 already exceeded the settlement sum of S\$350,000. The Favourability Requirement was clearly not satisfied and hence the necessity to examine the costs incurred up to the date of the service of the OTS simply did not arise.

(b) The converse situation arose in *Clarke Beryl Claire (personal representative of the estate of Eugene Francis Clarke, deceased) and others v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136. There, the defendant was held to have been entitled to limit its liability to each plaintiff to US\$75,000. The defendant had offered to settle the claims for S\$332,000 each. The Court of Appeal held at [64] that the plaintiffs had failed to obtain a judgment that was more favourable than the OTS, without considering the costs incurred by the plaintiffs. In our view, however, given the gulf between the sums of US\$75,000 and S\$332,000, the Favourability Requirement was clearly satisfied even if the plaintiffs' costs (to the date of the OTS) had been accounted for.

27 By contrast, in this case, the costs incurred by NTUC Foodfare are material to the question of whether the Favourability Requirement is satisfied.

(2) Application of the law

28 The OTS states a Settlement Sum of S\$225,000 with no further provision for interest or costs. The judgment sum, accounting for interest up to the date of the OTS, amounts to S\$189,606.16 (see [19] above).

29 The difference between the OTS and S\$189,606.16 is S\$35,393.84. For the following reasons, we are satisfied that NTUC Foodfare's costs up to 12 May 2017, assessed on a standard basis, would have exceeded this sum:

(a) In terms of disbursements, NTUC Foodfare's disbursements up to 12 May 2017 amounted to S\$27,640.41 or S\$33,140.41 (depending on whether a later refund of hearing fees is accounted for).¹⁰

(b) In terms of costs, even if we accept that the correct sum for disbursements is the lower sum of S\$27,640.41, we are satisfied that costs would have far exceeded S\$7,753.43 (the difference between S\$35,393.84 and S\$27,640.41), given that the OTS was served after all of the AEICs had been filed and much of the preparatory work for the trial was completed (see [6] above). This would have been the case regardless of whether the costs were assessed on the High Court scale or on the District Court scale (the Judgment Sum here was less than S\$250,000, which is the District Court limit).

30 Therefore, once NTUC Foodfare's costs up to the date of the OTS are accounted for, the OTS was less favourable than the judgment. We therefore conclude that the Favourability Requirement is not satisfied. It follows that the rule on costs under O 22A r 9(3) of the Rules of Court is not engaged.

¹⁰ NTUC Foodfare's submissions on costs at Appendix C.

The appropriate orders on costs

31 In the premises, we are satisfied that costs should follow the event, although a discount should be applied because NTUC Foodfare did not succeed in full. Before turning to the appropriate costs orders, however, we address NTUC Foodfare’s argument that it should be awarded costs on an indemnity basis from the date of the *Calderbank* Offer, on the basis that the terms of the *Calderbank* Offer were more favourable to the respondents than the Judgment Sum.

32 This submission would have been compelling if the costs incurred by NTUC Foodfare after the date of the *Calderbank* Offer were wholly attributable to the respondents’ failure to accept that offer. However, we do not accept this premise. As we have noted, the OTS, which was more favourable to NTUC Foodfare than the *Calderbank* Offer, did not expire upon the conclusion of the trial. It remained open for acceptance by NTUC Foodfare until the disposal of the appeal. Hence, having decided after the trial that it was prepared to accept the sum of S\$176,176.85 in settlement of the dispute, NTUC Foodfare could have simply accepted the OTS. This would have concluded the matter. Yet NTUC Foodfare did not so. It appears that this was because NTUC Foodfare did not realise that the OTS was still open for acceptance. This is consistent with NTUC Foodfare’s costs submissions before us. In this light, the costs incurred by NTUC Foodfare after it served the *Calderbank* Offer did not arise solely because the respondents failed to accept that offer. They are also attributable to NTUC Foodfare’s failure to accept the OTS which remained valid for acceptance. It is therefore inappropriate to award NTUC Foodfare indemnity costs from the date of the *Calderbank* Offer.

33 We now state and explain our orders on costs:

(a) *The costs of the appeal:* According to its Costs Schedule, NTUC Foodfare incurred costs of S\$50,000 for the appeal, with disbursements of S\$7,000 (for a total of S\$57,000).¹¹ On one hand, NTUC Foodfare failed in its claims for certain losses (“the Rebuilding Losses”). On the other hand, most of the time at the appeal hearing was spent on the issue of whether a duty of care arose, on which NTUC Foodfare succeeded. On the whole, we consider it apposite to apply a discount of 25% to a base figure of S\$40,000, yielding a sum of S\$30,000 inclusive of disbursements for the costs of the appeal.

(b) *The costs below:* In relation to the costs below, the respondents submit,¹² and we agree, that much of the time at the trial was spent on factual issues pertaining to the Rebuilding Losses. We therefore consider that it would be appropriate to apply a higher discount of 40%. Hence, NTUC Foodfare should receive 60% of its costs below to be taxed on the District Court scale if not agreed. In arriving at this conclusion, we had regard to our decision in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629. In that case, we awarded S\$50,000 in damages to each plaintiff. We then held at [89], “in accordance with the spirit that a party should not have to incur costs other than what is warranted by the substance or magnitude of the claim”, that each plaintiff would only be entitled to costs on the applicable Subordinate Courts scale. In our judgment, the same reasoning applied here. Since the Judgment Sum was less than the District Court limit of S\$250,000 (but more than the Magistrate’s Court

¹¹ NTUC Foodfare’s Costs Schedule.

¹² Respondents’ submissions at para 21a.

limit of S\$60,000), the applicable scale would be the District Court scale.

Conclusion

34 We thus award NTUC Foodfare costs of the appeal fixed at S\$30,000 inclusive of disbursements, and 60% of its costs below, assessed on a standard basis, to be taxed on the District Court scale if not agreed.

Sundaresh Menon
Chief Justice

Steven Chong
Judge of Appeal

Quentin Loh
Judge

N Sreenivasan SC, Palaniappan Sundararaj, N K Rajarh and Cheong
Wei Yang, Daryl (Straits Law Practice LLC) for the appellant;
Kwek Yiu Wing Kevin, Tan Yiting Gina and Charmaine Elizabeth
Ong Wan Qi (Legal Solutions LLC)) for the respondents.
