Ong & Ong Pte Ltd *v* Fairview Developments Pte Ltd
[2015] SGCA 5

Case Number	: Civil Appeal No 163 of 2013
Decision Date	: 23 January 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Mohan Pillay and Ang Wee Jian (MPillay) for the appellant; Hri Kumar Nair SC, Shivani Retnam and Harsharan Kaur (Drew & Napier LLC) and Yap Neng Boo Jimmy (Jimmy Yap & Co) for the respondent.
Parties	: Ong & Ong Pte Ltd — Fairview Developments Pte Ltd

Civil Procedure – Offer to settle

Contract – Formation

[**LawNet Editorial Note**: The decision from which this appeal arose is reported at [2014] 2 SLR 1285.]

23 January 2015 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal brought by the Appellant, Ong & Ong Pte Ltd, against the decision of the High Court judge ("the Judge") in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 ("the GD") where the Judge held that a settlement agreement had come into being when the Respondent accepted the offer to settle ("the OTS") made by the Appellant under O 22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"). The reason being that at the time the Respondent accepted the OTS, it had not lapsed contrary to what the Appellant asserted.

2 The Respondent contends that a valid settlement was reached on the following terms: [note: 1]

(a) The Respondent was to pay to the Appellant the sum of $2,588,666.

(b) The Respondent was to pay to the Appellant the Appellant'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 Respondent's notice of acceptance (*ie*, 24 September 2013).

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

(d) The Appellant was to discontinue its claims against the Respondent within seven days of payment of the sum of $2,588,666, interest and costs.

Facts

3 The facts which gave rise to the action, the OTS and eventually the settlement as found by the Judge, are as follows. The Appellant is an architectural firm which was engaged by the Respondent. The services of the Appellant were subsequently terminated by the Respondent and this led to a dispute resulting in the Appellant instituting, on 20 May 2011, Suit No 369 of 2011 ("the Suit"). The Appellant claimed against the Respondent a total sum of $10,138,128.28 on two grounds: (1) the loss of prospective fees for architectural works not carried out amounting to $5,626,653.31; and (2) fees due to the Appellant in the sum of $4,511,474.97 on the basis of *quantum meruit*, for certain architectural services already performed.

4 The Respondent responded with a counterclaim for $23,410,000, being losses and damages it suffered on account of the Appellant's delay in furnishing the Respondent with a letter of release after the Appellant's services were terminated by the Respondent. The alleged losses suffered by the Respondent were due to the increase in development charges which the Respondent needed to pay to the authorities in respect of the land proposed to be developed caused by the delay on the part of the Appellant in issuing the letter of release.

5 On 28 July 2011, some two months after the institution of the Suit, the Appellant's solicitors, M/s MPillay ("MPillay") served on the Respondent's then solicitors, M/s Kelvin Chia Partnership, an OTS to settle the claim and the counterclaim in the Suit in the following terms:

> The [Appellant] offers to *fully and finally settle all of the [Appellant's] claims, all of the [Respondent's] counterclaims and all matters arising in this Suit on the following term*s:
>
> 1. The [Respondent] is to pay to the [Appellant] the sum of S$2,588,666;
>
> 2. If this Offer to Settle is accepted by the [Respondent] 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 [Respondent'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 [Respondent] after 11 August 2011:
>
> a) The [Respondent] is to pay to the [Appellant] the [Appellant'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 [Respondent] notice of acceptance (if any);
>
> b) The [Respondent] is to pay to the [Appellant] 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 [Appellant] is to discontinue its claims against the [Respondent], and the [Respondent] is to discontinue its counterclaim against the [Appellant], within 7 days of payment of the sums payable pursuant to this Offer to Settle*.

[emphasis added]

6 On 7 February 2012, pursuant to an application by the Appellant, the court ordered that the trial of the Suit be bifurcated. The trial on liability was heard in October 2012. On 26 March 2013, the Judge granted interlocutory judgment allowing the Appellant's claim for the fees for architectural works already performed, but not for the loss of prospective fees for works not yet performed and at the same time dismissing the Respondent's counterclaim ("the Interlocutory Judgment"). The Judge ordered that damages due to the Appellant be assessed by the Registrar.

7 On 22 April 2013, a few days before the deadline for appealing the Interlocutory Judgment, the Respondent's solicitors, M/s Jimmy Yap & Co wrote to MPillay, asking whether the Appellant was "prepared to accept the outcome of the matter without taking the matter further to the Court of Appeal", and that if the Appellant was amenable to that, the Respondent "will also accept the outcome and not proceed with the Appeal". It further stated that "[i]n other words, both parties will not Appeal against the decision of the learned trial judge". [note: 2]

8 MPillay replied a day later, on 23 April 2013, stating simply that, "[i]f [the Respondent's] proposal is made with the intention of avoiding further time and costs, please be reminded that [the Appellant's OTS] remains open for acceptance". [note: 3] The Respondent did not accept the OTS. Instead, on 25 April 2013, both parties appealed against the Interlocutory Judgment in relation to the Appellant's claims against the Respondent. [note: 4] However, the Respondent did not appeal against the Judge's dismissal of its counterclaim.

9 A hearing on costs was subsequently fixed to be heard before the Judge on 13 May 2013. Prior to that hearing, by a letter dated 10 May 2013, MPillay informed the court that "costs of the trial should be reserved [until] after the assessment of damages by the Registrar, due to the existence of an Offer to Settle". [note: 5] At the hearing on 13 May 2013, the notes of the Registrar recorded Mr Mohan Pillay from MPillay to have said that: [note: 6]

There was an OTS, which will depend on assessment. Suggest to defer order for costs until after assessment of damages.

10 On 24 September 2013, the Court of Appeal heard the cross appeals. The Appellant's appeal was allowed and the Respondent's appeal dismissed. Later, on the same day, the Respondent sent a document entitled "Notice of Acceptance of Plaintiff's Offer to Settle" ("the NOA") purporting to accept the OTS. The NOA read as follows:

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

1. The [Respondent] is to pay to the [Appellant] the sum of S$2,588,666.

2. The [Respondent] is to pay to the [Appellant] the [Appellant'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 [Respondent] is to pay to the [Appellant] interest at 1.5% per annum, for the period from 20 May 2011 up to the date of payment.

4. The [Appellant] to discontinue its claims against the [Respondent] within 7 days of payment of the aforesaid sum of $2,588,666, interest and costs.

The main difference between the NOA and the OTS is that the NOA did not mention that the Respondent was to discontinue its counterclaim against the Appellant. Of course, at that point in time there was no longer a counterclaim for the Respondent to discontinue since it was dismissed by the Judge and the time for appeal against that dismissal had lapsed on 26 April 2013.

11 On 25 September 2013, MPillay replied to the NOA stating 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 Respondent's] purported acceptance", the OTS was "no longer capable of being accepted". [note: 7]

12 Thereafter, on 4 October 2013, the Respondent instituted the present proceedings seeking a declaration from the court that its acceptance of the OTS was valid.

13 The Court of Appeal eventually released its grounds of decision for the appeal on 20 January 2014 in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 ("*Ong & Ong (CA)*").

The O 22A offer to settle regime

14 It is apposite at this juncture to briefly describe the essential elements of the offer to settle regime provided for under O 22A of the Rules of Court.

15 The regime under O 22A is not unique to Singapore. Similar regimes are also found in other common law jurisdictions such as British Columbia, Ontario, New South Wales and Victoria. The GD (at [23]–[51]) helpfully traced the origin of O 22A and also provided a comparative analysis of the regimes in those jurisdictions which we do not propose to rehash here at length.

16 The purpose of O 22A, which this court in *The "Endurance 1"* [1998] 3 SLR(R) 970 at [41] cited with approval from the Ontario Court of Appeal decision in *Data General (Canada) Ltd v Molnar Systems Group Inc* (1991) 85 DLR (4th) 392, 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 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.

17 This statement of the Ontario Court of Appeal was made, like the present case, in the context where the plaintiff was the offeror and the defendant the offeree. Having regard to the nature of the scheme under O 22A, it should not really matter where the roles are reversed. The reason why the offeree would need to give careful consideration to the offer to settle is that there is an attendant risk of having to pay indemnity costs if a reasonable offer is not speedily accepted. This is what the New South Wales Court of Appeal in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 meant when it held that legislating cost consequences was to facilitate the proper compromise of litigation by equal measures of "carrot" and "stick". The "carrot" being the promise of indemnity costs to the offeror in the event the offeree does not accept a reasonable offer. The "stick" being the threat to the offeree of having to pay indemnity costs in such a situation.

18 The policy behind the O 22A regime was reiterated by this court in *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 at [38] in these terms:

> 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. …

19 The essential components of the O 22A regime and its operation may be briefly stated as follows:

(a) An offer to settle, which can emanate from either the plaintiff or the defendant, must be in Form 33 – see O 22A r 1.

(b) An offer to settle cannot be made after the court has disposed of the matter in respect of which it is made – see O 22A r 2.

(c) An offer to settle can only be withdrawn in one of two ways:

(i) If the offeror sets a time limit for acceptance, it shall be deemed to have been withdrawn upon the expiry of the time limit but, until the expiry of this time limit, withdrawal of the offer can only validly made with the leave of court – see O 22A rr 3(2) and (4).

(ii) If the offer to settle does not specify a time limit for acceptance, it can be withdrawn with at least one day's prior notice in Form 34 given at any time after the expiry of 14 days from the date on which the offer was served – see O 22A r 3(2).

(d) The offeree can accept an offer to settle by serving a notice of acceptance of offer in Form 35 on the offeror unless either one of the following two circumstances has come about: (1) the offer is withdrawn; or (2) the *court has disposed of the matter in respect of which the offer was made* – see O 22A rr 6(1) and (2).

(e) Where an offer to settle is accepted, the Court *may* incorporate any of its terms into a judgment – see O 22A r 6(3). Once there is valid acceptance, the offer to settle is not enforceable as of right, and the court retains a discretion in deciding whether to enter judgment on the terms of the offer to settle – see O 22A r 8.

(f) The cost consequences which result from an offer to settle made under O 22A depend on whether the offeror is the plaintiff or the defendant. In the situation where the offeror is the plaintiff (as in the present appeal), O 22A r 9(1) provides for three preconditions before the cost consequences will come into play:

(i) First, the offer to settle must not have been withdrawn or the time limit for acceptance must not have expired before the disposal of the claim in respect of which the offer to settle is made.

(ii) Secondly, the defendant must not have accepted the offer.

(iii) Thirdly, the plaintiff must have obtained judgment not less favourable than the terms of the offer to settle.

Where these three preconditions are satisfied, the plaintiff is entitled to costs on a standard basis up to the date the offer to settle was served and costs on an indemnity basis from that date, unless the court orders otherwise.

Parties' arguments below

20 Before the Judge, the Respondent advanced three main lines of argument to contend that at the time it served the NOA, the OTS was still very much on the table. First, the matter in respect of which the OTS was made related to settling the Suit which included both issues of liability and damages. Since the Suit was bifurcated, up to the time when the NOA was served, only the issue of liability was disposed of, and the question as to the damages payable by the Respondent to the Appellant still remained to be assessed. Therefore, the matter in respect of which the OTS was made was not fully disposed of, and the OTS remained open for acceptance. Although the OTS contained a term requiring the Respondent to discontinue its counterclaim against the Appellant and the NOA did not contain such a reference, this was a wholly immaterial consideration. The need for the Respondent to discontinue its counterclaim had been overtaken by events, and should not operate as a bar to accepting the OTS. More importantly, the Respondent underscored the fact that the Appellant had, in its solicitors' letter of 23 April 2013, maintained that the OTS remained open for acceptance even after the counterclaim was dismissed in the Interlocutory Judgment (see [8] above).

21 The second line of argument of the Respondent related to the application of the *contra proferentem* rule in contract law. The Respondent's point was that, at the very least, the OTS was ambiguous as to whether the dismissal of the counterclaim would mean that the OTS was no longer capable of being accepted. Any ambiguity in the construction of the OTS should be construed against the offeror (*viz*, the Appellant in this case) *per* the *contra proferentem* rule.

22 The third line of argument of the Respondent was that if it did not accept the OTS, and the Appellant was eventually awarded damages higher than $2,588,666, the Appellant could rely on the non-acceptance of the OTS and ask for indemnity costs and this would place the Respondent in an invidious position. There was nothing in the OTS to suggest that the OTS would lapse after the court had decided on liability. There was still the question of assessment of damages. Until damages are assessed, there was no way one could say whether the amount that would be awarded by the court would be higher or lower than the amount stated in the OTS and as a consequence, it is still uncertain whether the offeree should bear costs on an indemnity basis. The whole object of the O 22A regime is to use costs as the incentive to encourage responsible conduct. Determination of liability alone would not dispose of the claims which constituted the subject of the OTS. That would

only dispose of part of the dispute. Moreover, it was the Appellant who applied for the action to be bifurcated.

23 The Appellant's response was that the OTS was made in respect of the entire Suit, *ie*, both the claims and the counterclaim. Therefore, even though the quantum of the claims was not yet decided, because the counterclaim was dismissed, this meant that the OTS could no longer relate to all the matters in respect of which it was made. In addition, the Appellant made another argument which ran tangentially to that point. It argued that an offeree's acceptance must mirror the terms of the OTS. Since the NOA did not include a term stating that the Respondent would discontinue the counterclaim, this meant that such an acceptance was not valid. Moreover, as a matter of fact, the Respondent could not have done so because the counterclaim had been dismissed by the Judge and the dismissal was made final when the Respondent did not file an appeal within time.

24 We should add that the parties had also made arguments based on policy considerations implicit in the O 22A regime. The Respondent's point was that an OTS made in a bifurcated action in respect of a matter (or claim) was not resolved by the issue of a judgment on liability alone and it would remain open for acceptance until damages had been assessed. Otherwise the rationale for the OTS regime would be seriously undermined as it would mean that the offeror would not be able to obtain indemnity costs in a bifurcated proceeding as, upon liability being determined, the OTS would lapse.

25 The Appellant's contention on policy was a different one. It said that the Respondent's conduct in only accepting the OTS so late in the day – *ie*, after a two week trial, judgment, and the hearing and disposal by the Court of Appeal of the subsequent appeal, and more than two years after the OTS had been made – was contrary to the spirit of the OTS regime which was to encourage the early disposition of disputes such that valuable time and resources could be saved. In this case, even though the OTS was made early in the proceedings (before the close of pleadings) the late acceptance by the Appellant undermined the very purpose of the OTS regime.

Decision below

26 On the main issue, the Judge noted that the wording of the OTS stated that the settlement was in relation to "all of the plaintiff's claims, all of the defendant's counterclaims and all matters arising in this Suit". The question that arose was whether the fact that the Respondent's counterclaim had been finally determined meant that the OTS was no longer open for acceptance. The Judge's decision was that although the wording of the OTS could be interpreted in this way "this position, even if it is tenable, is not explicit". He then gave reasons why he preferred an interpretation of the OTS which favoured the offeree-Respondent.

27 First, there were unequal pressures on the parties. Since the Appellant was the offeror, it was the Respondent who was faced with substantial indemnity costs if it did not accept the OTS. The Appellant on the other hand had really no such pressures, and was in a position where it could possibly recover a large amount of its legal costs.

28 Secondly, the Appellant, as the offeror, was in full control of the situation, in the sense that he could have withdrawn the OTS at any time. The Appellant could also have fashioned the terms of the OTS with a time limit for acceptance, but it did not do so.

29 Thirdly, the ambiguity surrounding the terms of the OTS put the Respondent in a difficult situation which was unfair to the latter. At the time when the counterclaim was finally determined, it was not clear whether the OTS was open to acceptance or not. The Respondent would be taking a chance as to whether the OTS was valid, with the risk that it would be subject to cost consequences

if the OTS was held to remain valid and it did not accept the OTS. The court should therefore come down in favour of clear drafting, since any ambiguity in an offer to settle would be oppressive to the offeree. It follows that any ambiguity should be interpreted *contra proferentem*, and so the OTS must be taken to remain open for acceptance.

The parties' cases before us

Appellant's case

30 Before this court, the Appellant essentially reiterated its arguments made at first instance. To address the Judge's finding on the *contra proferentem* rule, the Appellant makes the following contentions:

(a) the *contra proferentem* rule does not apply because there was no ambiguity in the OTS and, in any event, it would be unduly onerous on the Appellant to list down every single possible scenario in which the offer would lapse;

(b) there were no unequal pressures on parties in respect of cost consequences because the Respondent could always have made its own offer to settle; and

(c) in any event, such cost consequences should not be conflated with the interpretation of the terms of the OTS.

31 In addition, the Appellant also makes two further submissions not raised in the court below. The first is that the dismissal of the counterclaim was a fundamental change in circumstances which caused the OTS to lapse. This is a principle of contract law derived from the cases of *Financings Ltd v Stimson* [1962] 1 WLR 1184 ("*Financings v Stimson*") and *Dysart Timbers Ltd v Nielsen* [2009] 3 NZLR 160 ("*Dysart Timbers*"); common law contractual principles can be applied to the OTS regime insofar as they are not inconsistent with the express provisions in O 22A: see *Chia Kim Huay (litigation representative of the estate of Chua Chye Hee, deceased) v Saw Shu Mawa Min Min and another* [2012] 4 SLR 1096 at [1]–[2] ("*Chia Kim Huay*").

32 Second, submitting in the alternative, the Appellant contends that there is an implied term that the OTS would lapse at the point when either the claim or the counterclaim has been fully and finally disposed of.

Respondent's case

33 In response to the *contra proferentem* point, the Respondent agrees that the OTS was made in respect of the entire Suit. Still, regardless of whether the counterclaim was withdrawn or dismissed, the Respondent argues the following:

(a) the Respondent would be put in an unfair situation if it were not allowed to accept the OTS, since it could be subject to adverse cost consequences under O 22A r 9 if it did not do so;

(b) the Appellant chose not to withdraw the OTS because it did not want to lose the potential cost benefits afforded by the OTS, and cannot now have its cake and eat it;

(c) the court should not reward poor drafting and the Appellant should not be allowed to place the risk on the Respondent; and

(d) consequently, the *contra proferentem* rule should apply.

34 The Respondent's answer to the Appellant's reliance on the doctrine of fundamental change of circumstances is that it lends no assistance to the Appellant's case. The Respondent submits that the dismissal of the counterclaim did not constitute a change in circumstances that was fundamental.

35 The Respondent avers that there could also not have been an implied term that the OTS would lapse once the counterclaim was no longer a live issue because: (1) the Appellant could have limited the time for acceptance which it did not do; (2) the Appellant maintained that the OTS remained open for acceptance after the Interlocutory Judgment (see [8] above); and (3) there were still matters in respect of which the OTS was made that were not yet disposed of and so the OTS could not have lapsed.

36 The Respondent further submits that estoppel applies because the Appellant had, after the Interlocutory Judgment, continued to represent to the Respondent that the OTS was open for acceptance.

The issues before this court

37 Before setting out the issues before us, we pause to make an observation regarding how the facts of the present case gave rise to the difficulties in this appeal.

38 Under O 22A r 1, an offer to settle may be made in respect of any one or more of the claims pursued in the action. Unless the offer to settle lapses due to the expiry of the specified period for acceptance or is withdrawn in accordance with r 3(2), the offer to settle may be accepted at any time before the court disposes of the matter in respect of which the offer to settle is made. In a normal case where there is only one claim in the action, then upon the court finally deciding on that claim, the offer to settle would have lapsed and would no longer be available for acceptance by the offeree. The present case is not the typical case for three reasons.

39 First, the OTS was made in consideration of settling all the claims in the Suit as well as the counterclaim of the Respondent. Second, the Suit was bifurcated. Third, the Appellant's claims in the Suit were eventually granted by this court for both services already rendered as well as for those yet to be rendered although the damages due to the Appellant were still to be assessed (hereafter referred to as the "CA Liability Decision"). The Respondent did not appeal against the High Court decision to dismiss its counterclaim.

40 It is undoubtedly the case that the OTS made by the Appellant was a global offer by the Appellant to settle the claims of the Appellant as well as the counterclaim of the Respondent. There are two possible approaches to viewing the present problem. The first is to say that so long as the court has disposed of *any* part of the matter in respect of which an offer to settle was made, the offer is no longer open for acceptance. The second is to hold that so long as there is an outstanding matter not disposed of which is within the scope of an offer to settle, the offer to settle remains open for acceptance. In our opinion, the answer depends on the interpretation of the rules in O 22A, in particular O 22A r 3(5) (see [54] below).

41 As will be shown later at [44] to [53], the various arguments of the parties which are founded on general contractual principles, while relevant to this appeal, are not pertinent to the determination of whether an offer to settle has been validly accepted; they are only pertinent to the question of whether the accepted offer to settle should be enforced. In our view, the parties have erroneously assumed that those general contractual principles apply to determine whether an offer to settle has been validly accepted. The fact that the application brought by the Respondent was for a declaration

that the OTS was validly accepted on the terms stated in the NOA (see above at [2]) showed the manner in which the parties viewed the problem and thus shaped the way they presented their arguments to us. At this juncture, we ought to mention that even where there is a valid acceptance of the OTS it does not follow that that concludes everything. There are still O 22A rr 6 and 8 to be considered as these rules give the court the discretion to incorporate the terms of an accepted offer to settle into a judgment which in turn could be enforceable. What further complicates this matter is that the rules do not lay down the considerations which the court should take into account in determining whether an accepted offer to settle should be incorporated into a judgment. Under O 22A r 8(1)(*b*), the court could disregard an accepted offer to settle and order the case to proceed on a determination of the merits (see rule quoted at [63] below).

42 There are therefore the following issues to be addressed in this appeal:

(a) First, did the OTS lapse following the CA Liability Decision which allowed the Appellant's appeal.

(b) Second, if the OTS did not lapse, did the NOA constitute a valid acceptance of the OTS.

(c) Third, if there was a valid acceptance of the OTS, is there any reason why the court should not incorporate the terms of the accepted OTS as a judgment.

Did the OTS lapse following the CA Liability Decision?

43 To answer the first issue whether the OTS had lapsed because of the CA Liability Decision (although the damages due in respect of the Appellant's claims had yet to be assessed), we must first decide whether this issue is one which ought to be resolved with the aid of contractual principles.

Should contractual principles of offer and acceptance apply generally to the offer to settle regime under O 22A?

44 The High Court decisions of *Chia Kim Huay* and *S & E Tech Pte Ltd v Western Electric Pacific Pte Ltd and another* [2006] 2 SLR(R) 7 appear to answer the question in the affirmative unless a particular contractual principle was expressly excluded by O 22A. We pause to observe that in both these decisions, the courts did not sufficiently explore why an application of contractual principles should be the default position, and why such principles should only be displaced where expressly stipulated for in the rules.

45 In this regard, two sets of provisions in O 22A are especially significant. The first is O 22A r 3 which provides:

> **3.**—(1) *An offer to settle shall be open for acceptance for a period of not less than 14 days after it is served.* If an offer to settle is made less than 14 days before the hearing of the matter, it shall remain open for a period of not less than 14 days unless in the meanwhile the matter is disposed of.
>
> (2) Subject to paragraph (1), *an offer to settle* which is expressed to be limited as to the time within which it is open for acceptance *shall not be withdrawn within that time without the leave of the Court.* An offer to settle which does not specify a time for acceptance 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 of the intention to withdraw the offer is given*.

(3) The notice of withdrawal of the offer shall be in Form 34.

(4) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires.

(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]

46 The second is O 22A r 6(2) which provides that, "[w]here a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the Court has disposed of the matter in respect of which it was made".

47 These two sets of rules clearly show that contractual principles governing offer and acceptance are not to be applied to the O 22A regime. Under general contractual principles, an offer may be withdrawn before it is accepted. This liberty is seriously curtailed under the regime. The offeror does not have the liberty to withdraw an offer within the time limited for acceptance (where one is specified) without the leave of court. Where no time limit has been specified, the offer to settle cannot be withdrawn within 14 days of being made and, thereafter, the offer may only be withdrawn after at least one day's prior notice is given to the offeree. Furthermore, under general law, an offer lapses once it is rejected, and will not be available for acceptance by the offeree. Yet O 22A r 6(2) provides that, after rejection, the offer still remains on the table and may be accepted by the offeree so long as the offer to settle has not been withdrawn and the court has not disposed of the matter in respect of which the offer to settle was made. These rules clearly modify some of the most basic principles governing the formation of a contract. What these rules encapsulate is a *sui generis* arrangement which departs significantly from the manner in which a contract comes into being under normal contractual principles. The O 22A regime is a regime which seeks to promote certainty and encourage settlement of the action between the parties so that they will not face the uncertain costs consequences that litigation entails.

48 Authorities from other common law countries which have a regime similar to O 22A have also so held – see the Ontario case of *McDougall v McDougall* [1992] OJ No 295; the New South Wales case of *Mohamed v Farah* [2004] NSWSC 482 ("*Mohamed v Farah*"); and the English cases of *Flynn v Scougall* [2004] EWCA Civ 873 and *Gibbon v Manchester City Council* [2010] EWCA Civ 726 ("*Gibbon*").

49 A discussion of the statutory offer to settle regime in England may be helpful. The regime in England is found in Part 36 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) as amended in 2006. The current position was stated by Moore-Bick LJ in *Gibbon* in these terms at [6]:

> Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In

my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.

50 This case was the culmination of a number of earlier cases which had begun to deprecate the contractual approach. In *Sampla and others v Rushmoor Borough Council and another* [2008] EWHC 2616 (TCC), Coulson J rejected an argument from contract law principles that a Part 36 offer that has been rejected was thenceforth not open for acceptance and held (at [33]) that while parts of Part 36 might operate in a way analogous to contract law that was not the same as stating that there was a direct analogy between contract law and Part 36:

> Fourthly, given that Part 36 comprises the only settlement mechanism under the CPR it would, I think, be unwise to conclude that the absence of the payment in mechanism meant that the entire regime was now entirely analogous to contract. Pre-CPR, a claimant might write to a defendant to say that the sum paid into court was inadequate, and that he would not be accepting it, but then, some weeks or months later, the claimant might change his mind and decide to take the money in court. There was no question in those circumstances of the claimant's original stance, on its own, preventing him from accepting or seeking permission to accept the money in court. It would, I think, be an odd result if the new CPR Part 36 proved to be less flexible than the position before 1999.

51 Coulson J therefore declined "to find a principle of law, analogous to contract law, that would prevent the offeree from ever being allowed to accept an offer that he had initially rejected" (at [36]).

52 Likewise in *Orton v Collins and others* [2007] 1 WLR 2953, Peter Prescott QC ("Judge Prescott") sitting as a deputy High Court judge had to decide the issue of whether a Part 36 offer that was accepted could later be impugned because it dealt with real property but did not comply with the formality requirements for contracts dealing with real property set out in the Law of Property (Miscellaneous Provisions) Act 1989. Judge Prescott agreed that no contract had been created due to the failure to adhere to the formality requirements but held that the settlement could nevertheless be enforced (at 2965–6):

> In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences.
>
> As to those consequences, I interpret Part 36 in the light of the overriding objective (CPR r 1): the object is to deal with cases justly which includes saving expense, proportionality, expedition, fairness and saving court time. I therefore hold that it need not be a contract that is being enforced and that the regime of Part 36, while it may well give rise to a contract under the general law touching offer and acceptance, does not depend upon contract law, except in the special case mentioned in CPR r 36.15(6). Infringement of human rights there is none. Nobody is forcing a party to make or accept a Part 36 offer. The obligation that arises is not primarily contractual. It is sui generis. It is part of the court's inherent jurisdiction, now regulated and clarified in Part 36, "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner." The administration of justice includes addressing the settlement of disputes.

53 It is clear that the authorities from these other jurisdictions also support the view that an offer to settle under a regime like O 22A must be interpreted according to its own terms and not according to contractual principles. Having said that, it does not follow that contractual principles have no place at all under O 22A. This will be considered under the third issue.

The interpretation of O 22A r 3

54 As mentioned above (at [40]–[41]), we are of the view that an interpretation of O 22A r 3 is crucial to determining whether the OTS has lapsed. The issue is whether the phrase, "may be accepted at any time before the Court disposes of the matter in respect of which it is made" in O 22A r 3(5) should be interpreted to mean: (1) that so long as the court has disposed of *any* part of the matter in respect of which an offer to settle is made, the offer to settle is no longer open for acceptance; or (2) that so long as there is an outstanding matter not disposed of which is within the scope of the offer to settle, the offer to settle remains open for acceptance.

55 Our view is that the second interpretation is the correct one. The starting point in considering this matter must be the purpose of the offer to settle regime under O 22A. As we have explained earlier, the purpose of the regime is to encourage the settlement of disputes by agreement between parties. This will save costs and judicial time. Therefore, where an offer to settle is made and not withdrawn or expired, the court should be slow to find that such an offer has lapsed. This is especially so where the offer to settle can still fulfil the purpose of spurring parties to bring litigation to an expeditious end without the court having to give judgment on the dispute.

56 Therefore, so long as the offer to settle contains matters which are not disposed of, the court should support the interpretation that such an offer remains open for acceptance. Any unfairness to the offeror is mitigated in two ways. The first is that the offeror can withdraw the offer in accordance with the procedure stated in O 22A. The second is that if the offeree accepts the offer before the offeror can properly withdraw the offer, it does not follow that the offer to settle will be binding on the offeror. The court will determine whether it is fair and just in the circumstances for the offer to settle to be enforced against the offeror. It is here that contractual principles will be helpful.

Application to the facts

57 Reverting to the facts of the present case, as there was no attempt made by the Appellant to withdraw the OTS, the only question that remains is whether the OTS had lapsed or ceased to exist on account of the fact that the Respondent's counterclaim had been disposed of by the decision of the High Court and there was no follow up appeal by the Respondent against that dismissal. Clearly, the counterclaim was no longer a live issue between the parties thereafter.

58 To be clear, we pause to highlight that it is not the Appellant's case that because the Suit was bifurcated and the issue of liability has been determined, the matter in respect of which the OTS was made has been disposed of.

59 Based on a plain reading of the OTS (see above at [5]), it is clear that the OTS was not made in respect of the counterclaim alone. There were no separate offers for each of the claims constituting the package. It was a global offer covering both the claims of the Appellant as well as the counterclaim of the Respondent. The fact that one of the elements of the package had been disposed of can hardly mean that the entire package has been disposed of. On the above interpretation of O 22A r 3, this means that there are still outstanding matters not disposed of which are within the scope of the OTS.

60 In addition, following the non-appeal by the Respondent against the dismissal of the counterclaim – and if that was a matter that affected the Appellant's OTS – it would have been open to the Appellant to withdraw the offer and make a fresh OTS. The Appellant did not do that. Indeed, as pointed out at [8] above, the Appellant reminded the Respondent, who suggested that parties do not appeal against the decision of the High Court, that the OTS was on the table for the Respondent to act on.

61 As a result, we hold that the fact that the counterclaim of the Respondent had been resolved did not mean that the OTS had lapsed. The regime under O 22A is very specific and the OTS could only lapse in accordance with the rules governing the regime, and the rules are such that the OTS remained open for acceptance since there were still matters under the OTS that had yet to be disposed of.

Was there a valid acceptance?

62 Turning to the second issue, the point raised by the Appellant is that the Respondent's NOA did not repeat the exact terms of the OTS when it failed to mention the counterclaim of the Respondent. Here, we agree with the Judge that, on the facts of this case, the Respondent was amply justified in not repeating the counterclaim in the NOA because that claim was no longer an issue between the parties. The counterclaim was already dead. It was dismissed and *res judicata* applies. This is an instance where it is correct to look at substance over form.

Should the OTS be enforced?

63 We now move to the third issue. In this regard O 22A r 8(1) is directly relevant. It reads:

> **8.—**(1) Where a party to an accepted offer to settle fails to comply with any of the terms of the accepted offer, the other party may —
>
> (*a*) make an application to a judge for judgment in the terms of the accepted offer, and the judge ***may*** grant judgment accordingly; or
>
> (*b*) continue the proceeding as if there had been no accepted offer to settle.
>
> [emphasis added in bold italics]

It will be seen from r 8(1)(*a*) that the fact that an offer to settle has been validly accepted by the offeree does not mean that it would be automatically enforced by the court. The court has a discretion.

64 However, r 8(1) does not lay down the considerations which the court should or could take into account in determining how the discretion is to be exercised. We will begin by first looking at how some of the other jurisdictions which confer a similar discretion on their courts deal with the issue.

65 In Ontario, as in Singapore, the court "*may* incorporate any of its terms into a judgment" [emphasis added] (see r 49.07(6) of the Rules of Civil Procedure (O Reg 575/07) ("Rules of Civil Procedure (Ont)")). In *Dofasco Inc v National Steel Car Limited* [2012] OJ No 5388, Goldstein J held that the discretion should be exercised on the basis that a settlement in the nature of an offer to settle should be regarded *as a form of contract* and be governed as such. In that case, there were two matters between the same parties known as "Action 440" and "Action 526". Subsequently, Action 526 was consolidated to be heard together with Action 440. The offeror then made an offer to settle

in terms that appeared to refer to Action 526, even though there was no Action 526 extant by that time because it had been subsumed into Action 440. Goldstein J found that the offeror had intended to settle the whole matter, including the issues in Action 440. However, the offeree thought the offer referred only to Action 526 and accepted the offer. On the offeror's application to enforce the purported settlement, Goldstein J held at [24]–[25] that the parties were not *ad idem* on what was being settled and declined to enforce the settlement.

66 Similarly in *Blackwell v Dixon* [2009] OJ No 2968 ("*Blackwell v Dixon*"), the court found that because the parties were mistaken about the settlement it would not be enforced. There, the defendants submitted an offer to settle which did not list a total amount of money but individual sums for each claim. There was a typographical error and a mathematical error that resulted in the sums adding up to $400,000. The defendants' counsel had instructions to settle only for $390,000 and had intended his offer to be for only this sum. There were telephone discussions in which it was clear that the plaintiffs' counsel believed the quantum of the offer was $400,000 and that the defendants' counsel believed the quantum was $390,000 and in fact made clear that if the offer added up to more than $390,000, it was a mistake and outside his authority to offer. The plaintiffs accepted the defendants' offer for $400,000 and sought to enforce it. Code J held at [20] and [22] that the lawyers should have avoided sharp practice "when it comes to exploiting an opponent and colleague's known mistake in an offer of settlement"; the plaintiffs' counsel had "erred in seeking to enforce a settlement, knowing that it was based on a mistake and knowing that it exceeded [the defendants'] counsel's instructions".

67 In *Mohamed v Farah*, a case from New South Wales, there was a dispute in relation to amounts due under a probate to a will. The plaintiff claimed $163,838 as his share of the estate. The defendant as executrix of the estate claimed that the plaintiff had taken the sum of $107,666 from the deceased which sum he had failed to account for or explain. The plaintiff made an offer to settle under Part 22 of the Supreme Court Rules 1970 (NSW) for the sum of $90,000 plus costs. The defendant's solicitor wrote to clarify that this was a settlement for the claim of $163,838 and the plaintiff's solicitor agreed, whereupon the offer was accepted. When the settlement came to be enforced it emerged that the plaintiff's solicitor had confused the two amounts and in actual fact the offer was meant to compromise only the claim in relation to the smaller sum. Barrett J held that there was valid acceptance within the rules and accepted also that under the common law of mistake the plaintiff would not be entitled to resile from the compromise because the defendant's solicitors had not acted in any unfair way to take advantage of a mistake which they knew or should have known. However Barrett J declined to enforce the compromise, saying at [66]–[67] that:

> In these circumstances, the things that must be proved in order to have a contract set aside for unilateral mistake in accordance with *Taylor v Johnson* (above) have not been proved. Equity will not intervene, according to general principles, to grant relief to the mistaken party.
>
> I am, however, satisfied that this is a case in which the court cannot allow the compromise to stand. The plaintiff has invoked the jurisdiction of the court in an attempt to vindicate a right he considers himself to have against the defendant. The defendant, for her part, has entered an appearance and the parties, through their legal representatives, have embarked upon the ordinary steps directed towards obtaining adjudication by the court. The offer of compromise was made and accepted in the course of those events but is affected by unilateral mistake. Had the plaintiff and his solicitors realised that the offer to accept in full settlement a sum of $90,000 plus costs related to a claim of $163,838 rather than a claim of $107,666, the offer would not have been made. *Enforcement of that compromise in this case would not represent a just result of the kind the court is bound to impose in determining every dispute it is called upon to adjudicate.* As the New Zealand Court of Appeal said in *Waitemata City Council v MacKenzie*

(above), procedures designed to further the ends of justice cannot be allowed to become instruments of injustice or oppression. I am of the opinion that it would be unjust to enforce the apparent compromise rather than allowing the controversy to proceed towards trial as if the offer had not been made and accepted.

[emphasis added]

68 In coming to this view, Barrett J applied the principle laid down in *Lewis v Combell Constructions Pty Ltd* (1989) 18 NSWLR 528 where the plaintiff's solicitor made an oral offer of compromise for the sum of $227,000 but mistakenly inserted the sum of $127,000. It was accepted that the defendant's solicitors were likewise aware that the correct sum was $227,000. In the result, Finlay J ordered that judgment not be entered in terms of the offer of compromise and said (at 537–538) that:

In the present case judgment has not been entered. The defendant's acceptance of the offer of compromise is, in my view, an agreement to a compromise of litigation which is subject to the procedures of this Court. Such procedures, including the possibility that the Court may consider it unjust to enforce the settlement, or that it is in the interests of justice that the matter proceed to trial.

…

What I perceive to be the relevant principle in the category of cases into which this matter falls is that in an appropriate case, especially before judgment is made, the overriding interests of justice and the Court's concern over its own procedure may mean that the Court will not enforce a contract. Of course contracts made during the Court's process to settle, if they are bona fide and not affected by any error, will normally be enforced. But I repeat my previous observation that whenever parties agree to a compromise of litigation, they do so subject to the procedures of the Court which include the possibility that the Court may consider it unjust to enforce the terms of settlement or that it is in the interests of justice that the matter proceed to trial. In my view the overriding principle with which the Court is here concerned is the interests of justice in all the circumstances.

69 These cases show that the courts in those jurisdictions with regimes similar to our O 22A have held that in determining whether they should exercise their discretion to enforce an accepted offer to settle, regard should be had not only to ordinary contractual principles but also to general principles of fairness and justice. It is our view, as we have earlier indicated at [41] above, that these same considerations should apply when our courts exercise that discretion.

70 Reverting to the facts of the present case and the arguments raised by the parties, the points for consideration may be grouped under the following heads:

(a) Was there a sufficient change of circumstances after the OTS was made so that the Appellant should have been given an opportunity to withdraw or modify his offer without being held to it?

(b) Did the Respondent engage in any unfair conduct or exploit the Appellant's mistake?

(c) Would the enforcement of the OTS cause any injustice such that the courts ought not to give effect to it?

The question of change of circumstances

The question of change of circumstances

71 The Appellant relies on the cases of *Financings v Stimson* and *Dysart Timbers* to contend that because of a very significant change of circumstances, it should not be held bound to the OTS. In *Dysart Timbers*, the New Zealand Supreme Court held that a fundamental change in circumstances occurring between the time the offer was made and the time the offer was purportedly accepted would cause an offer to lapse. In that case, Dysart Timbers brought proceedings against the Nielsens to enforce a guarantee and successfully obtained judgment. The Nielsens applied for leave to appeal to the Supreme Court, and thereafter made a contractual offer to settle on the basis that they would pay a sum of money to Dysart Timbers lower than the judgment sum but withdraw the leave application. Dysart Timbers purported to accept the offer, but in the meantime, the Supreme Court granted the leave application. The Nielsens then disputed that the offer was still open for acceptance. The Supreme Court eventually held that a fundamental change in circumstances could cause an offer to lapse, but the granting of the leave application in this case was not a fundamental enough change.

72 We note that the High Court in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* [2010] 3 SLR 956 ("*Norwest Holdings*") considered (in *obiter*) that the approach taken in both *Financings v Stimson* and *Dysart Timbers* should not be followed (at [67] and [70]):

> 67 In my judgment, the usual objective approach to offer and acceptance, or the doctrine of common mistake, is more than adequate to provide a principled approach to changes in circumstances occurring after an offer was made and before the offer is purported to be accepted. If the change of circumstances is known to the parties, it becomes part of the context in which they deal with each other, and the question then is whether the offeror's original intention to make an offer had, on an objective view, changed in light of the change of circumstances. If, as here, the change is unknown to the parties, then the doctrine of common mistake should apply, subject to its other requirements being met. …
>
> …
>
> 70 … It also seemed to me, for the reasons given above, that adopting an overly expansive approach to the lapse of offers would have the effect of undermining the objective approach to offer and acceptance, as well as the doctrine of common mistake. For these reasons, I would have declined to follow both *Financings* and *Dysart Timbers*, had it been necessary for me to decide the point. …

The Court of Appeal in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 dismissed the appeal, but declined to express an opinion on the views of the High Court.

73 The learned authors of *Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 03.096–03.098, however, have questioned whether the High Court's reasoning in *Norwest Holdings* was entirely appropriate. The view of the authors is that in a situation where the change in circumstances had only become known after the offer was made but before that offer was accepted, it was not possible to take into account the circumstances in construing the offer, nor was it possible for common mistake to apply. Therefore, there seems to be room for the application of the doctrine of fundamental change in circumstances *per Dysart Timbers*.

74 We also note that this doctrine was applied in the context of Part 36 of the English Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) in *Capital Bank plc v Stickland* [2004] EWCA Civ 1677 (see [62]–[65]).

75 However, we do not think that any question as to fundamental change in circumstances arises in the circumstances of the present appeal. In *Dysart Timbers*, it was held by Elias CJ and Blanchard J (at [4]) that:

> … because it was possible for the offeror to specify the events in which the offer would lapse and, normally, to revoke the offer at any time without having to give a reason, in determining what must be taken to be, or amount to, a fundamental change *the Court should give less weight to the occurrence of any event which an offeror must have had in contemplation when making the offer, and about which the offeror chose to be silent. That silence when the offer was made, or when it could have been revoked, may indicate that the offeror did not regard such a matter as fundamental to the continuance of the offer*. [emphasis added]

76 In the present appeal, this reasoning applies *a fortiori*, since the Appellant *knew* that the counterclaim was dismissed and that the time for appeal had lapsed, and yet did not take any steps to withdraw the OTS. The fact remains that the Appellant could have withdrawn the OTS, but it did not do so. Therefore, the silence on the part of the Appellant must be taken to mean that the dismissal of the counterclaim was not fundamental to the OTS.

77 The Appellant submits that a withdrawal of the OTS would undermine its position that the OTS was no longer valid, since that would suggest that it will be conceding that the OTS was still open for acceptance. We do not agree with that submission. That submission is a self-serving argument, and turns the principle as stated in *Dysart Timbers* on its head. In any event, in the light of our views above (see [43]–[61]) that the OTS had not lapsed, the Appellant's argument here is simply without merit. It is clear that the offer has been validly accepted in accordance with the O 22A regime, and at the enforcement stage, the doctrine of fundamental change of circumstances also does not avail itself to the Appellant.

The question of unfair conduct

78 We have (at [66] above) referred to the case of *Blackwell v Dixon*. There, the Ontario court, exercising its discretion under rule 49.09 of the Rules of Civil Procedure (Ont) which is *in pari materia* to our O 22A r 8, declined to enforce the accepted offer of $400,000. Instead, the court entered judgment for the lower amount of $390,000. The court applied the principle that where sharp practice was involved in "exploiting an opponent and colleague's known mistake in an offer of settlement" the settlement reached would not be enforced. There is no equivalent principle established in our case law, but in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 the Court of Appeal declined to enforce contracts for purchase of printers where there was "sharp practice" or "unconscionable conduct" (see [77]).

79 In the present case, while on the face of it, it might be said that the immediate acceptance of the OTS by the Respondent after the Court of Appeal allowed the Appellant's appeal in *Ong & Ong (CA)* might constitute a "snapping up" of sorts, this was a very different situation from *Blackwell v Dixon*. In that case, the plaintiffs' counsel *knew* that the defendants only meant to settle at $390,000 but exploited the error in the offer to settle document to seek enforcement at $400,000. Here, even if the Respondent could be said to have guessed or even known that the Appellant would probably want to withdraw the OTS after its appeal was allowed, there was no exploitation of any error. While it may be said that the Appellant made an "error" by not withdrawing the OTS once the counterclaim was dismissed, there was no evidence that the Appellant had intended to withdraw the OTS. The Appellant would have known that one of the outcomes of the appeal would be that its claims in the Suit could be allowed in full. That was what it was arguing for. So what actually happened could not be said to have been unexpected. In any event, under O 22A, the offeror needs to give one day's

notice before it may serve a notice of withdrawal in Form 34 on the offeree: see also *Tanner Sheridan Wayne v NRG Engineering Pte Ltd* [2014] 1 SLR 475. Therefore, even if the Appellant had wanted to withdraw the offer the moment it knew that it had succeeded in the appeal, the Respondent would still have the one day to accept the OTS because it could not have been withdrawn before then. The Respondent's acceptance of the OTS immediately after the CA Liability Decision could not be regarded as exploitative or unfair.

Whether permitting enforcement of the OTS would be unjust

80 From the positions taken by the parties, it would appear that everyone expects that the assessment of damages for the Appellant's claims to exceed $2,588,666. If not, the Appellant (practically speaking) would not have questioned that the OTS was still on the table along with the positive consequence of being awarded costs on the indemnity basis. Similarly for the Respondent, who obviously thought it would have to pay more if the Appellant's claims were to go for assessment by the Registrar. The Appellant knew that the OTS was still on the table as it reminded the Respondent of it after the Interlocutory Judgment. It had the opportunity to withdraw the OTS after the counterclaim was dismissed and there was no appeal against that dismissal. The Appellant would have known of the consequences if both its claims were allowed on appeal. Yet it did nothing. The Appellant clearly wanted to have its cake and eat it. If it were to withdraw the OTS before this court had decided on the Appellant's appeal, the Appellant would have lost its entitlement to indemnity costs. It has to take the consequences of its own choice. Therefore, we do not think it would be unjust to enforce the accepted OTS.

Conclusion

81 For the reasons above, we hold that there was a valid acceptance of the OTS by the Respondent's NOA. The OTS as so accepted is enforceable. Accordingly, we are of the view that the appeal should be dismissed, with costs to the Respondent to be taxed if not agreed. The usual consequential orders apply.

[note: 1] ACB Vol II at 169-170.

[note: 2] ACB Vol II at p 160.

[note: 3] ACB Vol II at p 161.

[note: 4] ACB Vol II at pp 162-165.

[note: 5] RCB at pp 8-9.

[note: 6] RCB at p 10.

[note: 7] ACB Vol II at p 168.