Ram Das V N P *v* SIA Engineering Co Ltd
[2015] SGHC 74

Case Number : District Court Appeal No 32 of 2014

Decision Date : 19 March 2015

Tribunal/Court : High Court

Coram : Hoo Sheau Peng

Counsel Name(s) : Perumal Athitham (Yeo Perumal Mohideen Law Corporation) for the appellant; Kanapathi Pillai Nirumalan (Global Law Alliance LLC) for the respondent.

Parties : Ram Das V N P — SIA Engineering Co Ltd

Civil Procedure – Offer to settle

19 March 2015 Judgment reserved.

Hoo Sheau Peng:

1 This is an appeal from the decision of the District Judge in *Ram Das V N P v SIA Engineering Company Ltd* [2014] SGDC 258 ("the Judgment") which I heard on 12 January 2015. The appeal deals, *inter alia*, with the issue of whether an offer to settle on liability only is a valid and effective offer under O 22A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), and capable of attracting the costs consequences thereunder. It also concerns the issue of whether the cost consequences of an unaccepted offer to settle made by a party prior to trial extends to the work done in respect of the appeal stage as well, when the judgment on appeal was not more favourable to the counterparty than the terms of the offer. As a number of interesting and practically important questions of law in relation to the offer to settle regime were raised, I reserved my judgment for consideration. I now give my judgment.

Background to the appeal

2 The plaintiff-appellant is Ram Das V N P ("the Appellant"), an employee of the defendant-respondent, SIA Engineering Company Ltd ("the Respondent"). The Appellant sustained an injury at work on 1 August 2008 while he was supervising the cleaning of an aircraft. He sued the Respondent. The trial was a bifurcated action, with the issue of liability being heard first. After the first day of trial on liability, the Respondent offered on 4 July 2011 to settle the proceedings under O 22A of the ROC as follows:

> The Defendants [*ie*, the Respondent] offer to settle these proceedings under Order 22A on the issue of liability with the Defendants paying the Plaintiff [*ie*, the Appellant] 50% of the damages to be assessed by the Registrar, with costs and disbursements reserved to the Registrar assessing the damages.
>
> ["the OTS"]

3 The Appellant did not accept the offer. On 12 July 2011, the Appellant made a similar offer to settle on liability to the Respondent. The offer to settle made by the Appellant stated as follows:

> The Plaintiff [*ie*, the Appellant] offers to settle this proceeding on the Issue of Liability in that the

Defendants [*ie*, the Respondent] do pay the Plaintiff 80% of the damages to be agreed or assessed, and interest, costs and disbursements reserved to the Registrar.

4 At first instance, the District Judge dismissed the entirety of the Appellant's claim (see *Ram Das V N P v SIA Engineering Company Ltd* [2012] SGDC 8). On appeal to the High Court in respect of District Court Appeal 41 of 2011 ("DCA 41/2011"), Choo Han Teck J made the following orders:

1. The appeal be allowed to the extent that the decision of the learned District Judge Tan May Tee below dismissing the Plaintiff's claim with costs be varied with the Plaintiff and Defendants each found to be 50% liable for the injury, loss and damage sustained by the Plaintiff.

2. The matter be referred to the learned District Judge Tan May Tee for damages to be assessed.

3. Costs of the appeal and the Court below to be to the Plaintiff to be taxed if not agreed.

…

5 The matter was then sent back to the District Judge for the assessment of damages. After the first day of hearing on the assessment of damages, the issue of quantum was settled between the parties with the Appellant accepting the Respondent's *Calderbank* offer of a sum of $35,000 for damages inclusive of interest, with costs and disbursements to be agreed or taxed. The terms of settlement were recorded before the District Judge on 15 January 2014. However, the issue of the effect of the OTS on costs of the trial and appeal on the issue of liability remained outstanding.

6 In the interests of clarity and for ease of reference, the proceedings between the parties may be sub-divided into four distinct stages for the allocation of costs. They are:

(a) from the date of the issue of the writ of summons to the date when the OTS was served on 4 July 2011 ("stage 1");

(b) from the date of service of the OTS on 4 July 2011 to the date when the Appellant's claim was dismissed with costs by the District Judge on 28 November 2011 ("stage 2");

(c) the work done in respect of DCA 41/2011 (*ie*, from the date that the appeal was filed to the date of the High Court's decision on liability) ("stage 3"); and

(d) the work done for the assessment of damages (*ie*, after the date of the High Court's decision on liability up to the date when the Appellant accepted the Respondent's *Calderbank* offer on 9 January 2014) ("stage 4").

7 It was not disputed that the Appellant was entitled to costs for stages 1 and 4 of the proceedings. It was only the costs in respect of stages 2 and 3 that were in dispute. The Respondent relied on O 22A r 9(3) of the ROC to argue that it should be entitled to indemnity costs for stages 2 and 3. Order 22A r 9(3) 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.

8 As the Appellant succeeded only to the extent of 50% in his appeal on the issue of liability, the Respondent argued that the judgment obtained by the Appellant was not more favourable than the OTS and that the Respondent should therefore be entitled to indemnity costs. The Appellant however pointed to the costs order made by the High Court (see [4] above) and argued that the issue of costs in respect of stages 2 and 3 had already been determined then.

9 Parties were instructed to clarify the matter with Choo J, who directed that the effect of the costs order made on the appeal as well as the effect of the Respondent's OTS be determined by the District Judge.

Parties' Arguments

10 Before the District Judge, as well as before this Court, the Appellant argued that the Court of Appeal case of *The "Endurance 1"* [1998] 3 SLR(R) 970 ("*The Endurance 1*") had settled the issue of the validity of an offer to settle that dealt only with liability. The relevant paragraphs of the judgment are set out here as follows:

> 46 In our considered view, also, it is axiomatic to the proper application of O 22A that the offer to settle should be a serious and a genuine offer and not just to entail the payment of costs on an indemnity basis. This is particularly so where the claim is for an unliquidated sum to be ascertained. ***In our view an offer to settle for a percentage of an unliquidated sum to be ascertained, as the claims in this case for damages to be assessed, cannot by any means be said to be a serious and a genuine offer to settle.*** It runs counter to the principle behind O 22A … . *An assessment of damages, even where liability is a matter of course, can give rise to numerous complexities and result in protracted hearings and expense*. ***It must follow that to offer to settle at a percentage of the unliquidated sum to be ascertained or of damages to be assessed cannot be a serious and a genuine offer to settle but is made to take an unfair advantage of r 9 of O 22A.***
>
> 47 What, in our view, is required is for the plaintiff to make his own estimate of what the unliquidated sum ought to be or his own assessment of what the damages ought to be and to offer that sum as being a fair and reasonable sum which the defendant ought to pay in settlement of his claim. It is then for the defendant to carefully consider the merits and demerits of the plaintiff's claim and accept or reject the offer bearing in mind that should the offer be rejected and the plaintiff succeeds in obtaining judgment for a sum not less favourable than the offer he stands to pay costs on an indemnity basis. …
>
> 48 The mechanics under O 22A is not unlike the mechanics under O 22. Under O 22 the defendant makes an estimate in monetary terms of what he thinks is a fair and reasonable settlement of the plaintiff's claim which he then pays into court. *Likewise, under O 22A the plaintiff makes an estimate in monetary terms of what he thinks is a fair and reasonable sum the defendant ought to pay to settle his claim and offers to accept that sum in settlement of his claim – the offer to settle*.
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> [emphasis added in italics and bold italics]

Thus, in the Appellant's submission, *The Endurance 1* stood for the proposition that an offer to settle that did not prescribe a "dollar and cents" value could not be a serious and genuine offer to settle and thus could not be a valid offer under O 22A.

11 The Appellant also argued that the OTS could not affect the costs of the appeal as the Respondent would not have allowed the Appellant to accept the OTS after the dismissal of the claim at first instance or before the hearing of the appeal. The Appellant cited para 22A/1/2 of *Singapore Civil Procedure 2015* (GP Selvam gen ed) (Sweet & Maxwell, 2015) ("*Singapore Civil Procedure 2015*") in support of his argument. Paragraph 22A/1/2 states:

> Order 22A does not apply to appeals although there are no cases which held that an offer system with costs consequences and incentives should not be applicable at the appeal level: see *Meadowfield Ventures v. Kennedy* (1990) 75 O.R. (2d) 760, which followed *Niagara v. Laflamme* (1987) 58 O.R. (2d) 773. In *Niagara*, the Court of Appeal of Ontario held that the better view is that the right to make an offer at any time before the court disposes of the matter means before the pronouncement of judgment by a court of first instance and, r.2 of O.22A would not extend beyond this.
>
> The Court of Appeal for Ontario in *Douglas Hamilton v. Robert Mark* (1993) Ont CA Lexis 238 held that while the court recognised that the Canadian equivalent of O.22A (r.49) had no application to offers to settle in appeals, the existence of an offer to settle may, in appropriate circumstances, be considered by the court in exercising its discretion on costs.

12 The Respondent submitted that the *ratio decidendi* of *The Endurance 1* was not that an offer to settle that dealt with liability only could not be a valid offer, but in the circumstances of that case, where the action was not bifurcated, an offer to settle that dealt only with liability could not be said to be a serious and genuine attempt at resolving the dispute. Further, the Respondent argued that the OTS would also extend to the costs of appeal as O 22A r 1 was not limited to "trials" but extended to "proceedings" generally.

Decision below

13 The District Judge found that the OTS was valid and effective, and granted the Respondent costs on an indemnity basis from the date of the OTS to the date of the High Court's decision on liability.

14 The District Judge held that O 22A did not preclude parties from making offers to settle in respect of liability only. In analysing *The Endurance 1*, the District Judge held at [25] of the Judgment that:

> … *The Endurance 1* does not stand for the proposition that all offers to settle must stipulate a monetary sum in order to be regarded as serious or genuine, or that an offer made in terms of a percentage of an unliquidated sum is invalid in all cases for the purposes of O. 22A r. 9. …

15 Instead, the learned District Judge was of the view that *The Endurance 1* stood for the proposition that in order to attract the cost consequences contemplated in O 22A, an offer to settle must be serious and genuine and should not be made merely as a "tactical ploy" to benefit from indemnity costs. In the present case, the District Judge found that the Respondent's OTS was a serious and genuine one and was therefore valid.

16 The District Judge also held that O 22A r 1 did not prevent the offer to settle regime from

applying to appeals (at [41] of the Judgment). As the Respondent's OTS did not include an expiry date and was never withdrawn, it remained open for the Appellant to accept even up to the appeal hearing before the High Court since the issue of liability remained alive between the parties until the appeal judgment was delivered (at [43] of the Judgment).

17 As the Appellant had obtained a judgment on appeal which was not more favourable than the terms of the Respondent's OTS, and as there was no reason to depart from the *prima facie* position in O 22A r 9(3), the District Judge granted the Respondent costs on an indemnity basis from the date of the OTS to the date of the High Court's decision on liability.

Issues before this Court

18 The main issue before this Court is whether, in the light of the Respondent's OTS, the Appellant should be made, by virtue of O 22A r 9(3) of the ROC, to pay indemnity costs to the Respondent for stages 2 and 3 of the proceedings, that is, from the date that the OTS was served up to the date of the High Court's decision on liability.

19 In order for this issue to be answered, four sub-issues should be considered, namely:

(a) whether the Respondent's OTS on liability is valid and effective under O 22A;

(b) if so, whether the elements under O 22A r 9(3) are satisfied such that the Respondent was entitled to be paid costs on an indemnity basis by the Appellant;

(c) whether the cost consequences in Or 22A r 9(3) applies to the work done in DCA 41/2011; and

(d) whether the Court should exercise its discretion under O 22A rr 9(3) and 12 not to order indemnity costs (if the Court finds that O 22A r 9(3) applies) or under O 22A r 9(5) to order indemnity costs against the Appellant (should the Court find that O 22A r 9(3) is inapplicable).

My decision

Whether the Respondent's OTS on liability only is valid and effective under O 22A

20 In order for the cost consequences under O 22A r 9 to apply, the offer to settle must be validly made under O 22A. In this regard, the Singapore courts have set out certain guidelines that must be satisfied before the cost consequences under O 22A r 9 arises.

21 First, the offer must be validly made under O 22A r 1. Order 22A r 1 provides that "[a] party to any proceedings may serve on any other party an offer to settle *any one or more of the claims in the proceedings* on the terms specified in the offer to settle". Order 22A r 1 also provides that the offer to settle must be in Form 33 of the ROC.

22 Additionally, an offer to settle should also be clear and precise (*Denis Matthew Harte v Tan Hun Hoe and Gleneagles Hospital Ltd* [2001] SGHC 19). In the present case, the terms of the OTS were simple. Indeed, the Appellant had made a counter-offer on similar terms (see [3] above). Both parties understood the Respondent's OTS to be a settlement on the issue of liability, with liability to be apportioned in the percentages as offered by either party, and have argued on this basis in this appeal.

23 It has also been consistently held by our courts that the offer to settle must be a serious and

genuine offer, and should contain an element that would induce or facilitate settlement (see *Singapore Airlines Ltd and another v Fujitsu Microelectronics (Malaysia) Sdn Bhd and others* [2001] 1 SLR(R) 38 at [10]–[11]). In order for an offer to be a serious and genuine one, it should also contain reasonable terms (see *Wyno Marine Pte Ltd (in liquidation) v Lim Teck Cheng and Others* [1998] SGHC 340 at [9]). What would constitute a serious and genuine offer to settle must depend on the circumstances and issues of the case (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 ("*Man B&W Diesel*") at [10]).

24 On the basis of the Court of Appeal's decision in *The Endurance 1*, the Appellant contended that an offer made as to liability only can never be considered a serious and genuine offer to settle, and therefore, offers to settle made as to liability only can *never* have the effect contemplated under O 22A r 9 of the ROC. However, the Respondent submitted that the Court of Appeal in *The Endurance 1* only held that an offer to settle had to be serious and genuine in order to attract the cost consequences under O 22A r 9, and *in the particular circumstances of that case*, the offer to settle made as to liability only could not be considered a serious and genuine offer to settle ("the narrow interpretation"). The narrow interpretation was preferred by the District Judge below.

25 In support of its argument, the Respondent also cited *Lu Bang Song v Teambuild Construction Pte Ltd and Another and Another Appeal* [2009] SGHC 49 and *Xu Ren Li v Nakano Singapore (Pte) Ltd* [2011] SGDC 159 for the proposition that an offer to settle on liability alone is apt to attract the cost consequences under O 22A r 9. The facts in both cases were similar, and involved a claim by an employee against an employer for damages for personal injuries sustained in the course of employment. In *Lu Bang Song*, the High Court, in allowing the employer's appeal, found the employee wholly liable for his injuries. In *Xu Ren Li*, the District Court at first instance dismissed the employee's claim, and similarly found the employee fully liable for his injuries. In both cases, the court awarded costs on an indemnity basis in view of an offer to settle made by the defendant prior to a trial on liability. However, in each of the cases, the court did not spell out what the terms of the offers to settle were. Furthermore, the court in either case did not specifically address its mind to the issue of whether an offer to settle on liability only could be valid. Therefore, I am unable to rely on these decisions for the above proposition.

26 That being said, I agree with the narrow interpretation and find that that *The Endurance 1* stands for the proposition that in order for offers to settle to attract the cost consequences under O 22A r 9, the offer should be a serious and genuine one, and that in a trial on both liability and assessment of damages, an offer to settle a claim for an unliquidated sum at a percentage is not a serious and genuine one. However, *The Endurance 1* does not stand for the proposition that an offer on liability only can *never* be said to be a serious and genuine offer to settle. On the facts of this particular case, I find that the Respondent's OTS could be said to be serious and genuine, and is valid under O 22A. I set out my reasons below.

The purpose of O 22A

27 As mandated by s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act"), the court is required to take a purposive interpretation of written laws. Order 1 r 3 of the ROC provides that the Interpretation Act shall apply in relation to the ROC as well. The narrow interpretation of *The Endurance 1* should be preferred because this approach accords with the purpose of the O 22A offer to settle regime. The purpose of O 22A was highlighted in *The Endurance 1*, where the Court of Appeal, citing the Ontario Court of Appeal in *Data General (Canada) Ltd v Molnar Systems Group Inc* (1991) 85 DLR (4th) 392 ("*Data General*"), found that the rationale of the O 22A regime was to "encourage the termination of litigation by agreement of the parties – more speedily and less expensively than by judgment of the court at the end of trial" (at [44]). Similarly, Chao Hick Tin JA in

Singapore Airlines Ltd v Tan Shwu Leng [2001] 3 SLR(R) 439 set out the rationale behind O 22A as such (at [38]):

> The scheme of things under O 22A is verily to encourage the plaintiffs to be realistic in their assessment of what they are entitled to and on the part of the defendants, to make reasonable offers, on pain of having to bear the costs on the indemnity basis if they should persist in their exaggerated claims or maintain their unreasonable position (in respect of an offer from the plaintiff). The order seeks to promote responsible conduct on the part of both parties. It discourages obstinacy. …

28 As noted by Lee Seiu Kin J in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 ("*Ong & Ong (HC)*"), various statutory procedures in relation of offers to settle existed in a number of Canadian and Australian states at the time O 22A was included in the Rules of the Supreme Court and in the Rules of the Subordinate Courts in Singapore. This included the jurisdictions of British Columbia, Ontario, New South Wales and Victoria, and the regime in these jurisdictions formed the background against which O 22A was included in Singapore's civil procedure rules. In summarising the purpose behind the offer to settle regimes in these jurisdictions, Lee J stated (at [48]):

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

29 It is therefore clear from the above authorities that the purpose of O 22A is to promote the expeditious resolution of cases. Where trials are bifurcated into issues of liability and damages, it would accord with the purpose of the offer to settle regime to allow parties to settle on the basis of liability only, with damages to be later assessed. As pointed out by the District Judge at [36] of the Judgment, the nature of the facts and evidence required for a trial on liability are very different from a hearing on the assessment of damages. In the present case, had the Appellant accepted the Respondent's offer to settle on liability, the next four days of trial and subsequent appeal on the issue of liability need not have been proceeded with, which would have resulted in substantial time and costs savings for parties, counsel and the courts.

30 Furthermore, it should be noted that there is nothing in O 22A that requires the offer to settle the entirety of the proceedings. In fact, O 22A r 1 expressly states that the offer to settle can be made on "any one or more of the *claims* in the proceedings" [emphasis added]. The term "claim" is not defined in the ROC. However, it has been interpreted by the court in *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 in the context of s 209 of the Penal Code (Cap 224, 1985 Rev Ed). In that case, V K Rajah JA, as he then was, with whom Andrew Phang JA agreed, held that the word "claim" is an etymological chameleon that takes its colour and definition from the context in which it is used (at [61]). In coming to that conclusion, Rajah JA considered the definition in *Black's Law Dictionary* (Bryan A Garner chief ed) (West, 9th Ed, 2009) and *P Ramanatha Aiyar's The Law Lexicon* (Justice Y V Chandrachud and V R Manohar gen eds) (Wadhwa and Company, 2nd Ed, 1997) ("*The Law Lexicon*"). In particular, the authors of *The Law Lexicon* noted that the word "claim" is "of very extensive signification, embracing every species of legal demand" (at p 329). In the same case, Choo J held that a "claim" in a court of justice should be understood as "any demand or assertion of right made before any court and requiring the sanction of that court" (at [153]).

31 The word "claim" takes its definition from the context in which it is found. Again, as mandated

by s 9A(1) of the Interpretation Act, the interpretation of the word "claim" that promotes its purpose and object in the context of O 22A should be preferred. It is my view that, taking a purposive approach to O 22A r 1, the word "claim" should be interpreted to include any question of liability and/or damages and/or other relief (*eg*, injunction) which a court may be required to determine. Such an interpretation would promote the purpose and policy behind O 22A.

The position in other jurisdictions

32 An examination of the various jurisdictions that have a procedure similar to O 22A shows that in those jurisdictions, offers to settle on liability only are also recognised as attracting the cost consequences in the relevant rules. As stated above at [28], as the procedures in these jurisdictions were precursors of Singapore's O 22A offer to settle regime, the authorities interpreting these procedures would be persuasive in Singapore as well.

33 One such authority is *Mahoney v Curwood Transport Ltd [1998] NJ No 311 ("Mahoney")*, a decision of the Newfoundland Supreme Court, which was cited by the Respondent and relied on by the District Judge in her Judgment. The offer to settle regime in Newfoundland, Canada, may be found at r 20A of the Newfoundland Rules of the Supreme Court, 1986, c 42, Sched D ("Newfoundland Rules"), a provision similar to O 22A of the ROC. The provisions relevant in *Mahoney* are set out here:

> **Where Available**
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> **20A.01.** A party may serve upon an adverse party an offer to settle … any claim between them in the proceeding and, where there is more than one claim between them, to settle one or more of them, on the terms therein specified.
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> ...
>
> **Effect of Failure to Accept**
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> **20A.08.** (2) Unless ordered otherwise, when an offer to settle was made by a defendant at least seven days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to commencement of the trial or hearing, and where the plaintiff obtains a judgment no more favourable than the terms of the offer to settle, the plaintiff shall be entitled only to party and party costs plus taxed disbursements to the date of service of the offer to settle, and the defendant shall be entitled to taxed disbursements plus, from the date of service of the offer, costs on a party and party or some other greater basis as the judge deems appropriate.
>
> …

34 In *Mahoney*, the offer to settle was worded as follows: "TAKE NOTICE that Defendants offers [*sic*] to accept 50% liability in settlement of the liability trial in these proceedings." Like the present case, the trial in *Mahoney* was a bifurcated one. The court, in recognising the validity of the offer for the purposes of r 20A, held that r 20A of the Newfoundland Rules was not limited to judgments for money. Furthermore, given that the purpose of r 20A was to encourage parties to settle their disputes without going to court, the availability of the rule should not be unduly restricted. Orsborn J then continued (at [24]–[27]):

> 24 The availability of rule 20A should not be unnecessarily restricted. Neither the wording of the rule, nor the policy reasons which support its existence, require that its application be limited to

money claims.

25 Here, the parties clearly separated, for the purposes of litigation, the issues of liability and quantum. The issue proceeding to trial was limited to liability; the fact that the parties may not have had any meaningful discussions on quantum does not mean that a settlement on liability could not have been effected.

26 It is for parties to assess their positions on the issue(s) in dispute – here liability – and consider the expense of litigating that issue and the possible outcomes. An offer by one party to settle the liability issue is an offer which, if accepted, would avoid the necessity for trial on that issue.

27 Rule 20A is not limited to judgments for money. The offer by [the defendant] to settle the liability issue was an offer to settle a claim in the proceeding. Indeed it was an offer to settle the only claim then scheduled for trial.

This reasoning is apposite and applicable to the present case.

35 The court in *Mahoney* followed an earlier case of *Hunger Project v Council on Mind Abuse (C.O.M.A) Inc et al* (1995) 121 DLR (4th) 734 ("*Hunger Project*"), where the Ontario Court (General Division) considered whether the cost consequences could apply to an offer to settle which contemplated the plaintiff discontinuing the suit in return for a written retraction and an apology. Macdonald J answered the question in the affirmative, and stated (at 742):

> The present offer system increases the settlement incentives, in order to enhance the prospects of the parties resolving litigation. It is firstly a comprehensive system, available to plaintiffs and defendants. Secondly, it is linked to the substantial incentive of solicitor and client costs. Thirdly, the present rules dispense with the necessity of tender or payment into court as an ingredient of the offer, thereby simplifying the process. *Fourthly, at no point do the present rules state or imply that only monetary offers are contemplated by the rules. While that reflects the fact that non-monetary remedies abound, the significant point is that there is no constraint in the present rules upon the* ***types of offers*** *which may be advanced.* Specifically, there is nothing which states or implies that offers must be for redress which the court may award, in order for costs consequences to arise. Rule 49.10's requirements of a favourable comparison between the offer and the judgment do not imply that only offers limited to legal rights and remedies are within the rules, in my opinion. Favourability requires only comparability, not equivalence and not correspondence. …
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> [emphasis added in italics and bold italics]

36 The opinion expressed by the court in *Hunger Project* above accord with the position taken by the Singapore courts in relation to the issue of favourability (as discussed at [44]–[45] below). Given the similarity of the Newfoundland and Ontario offer to settle regimes to the rules in Singapore, and the fact that they formed the background against which Singapore's O 22A was enacted, these cases form persuasive authorities as to how O 22A should be interpreted. *Mahoney* has also been cited and followed in a number of recent Canadian cases (see *eg*, *Mercer v Gollop [2000] NJ No 98 at*[13] , *Webster v BCR Construction [2012] OJ No 6672 at*[15] *).*

37 The Respondent also bolstered its argument with the case of *Coombes v Road and Traffic Authority & Ors (No 2)* [2007] NSWCA 70 ("*Coombes*") from New South Wales where the court held that an offer to settle in respect of liability only is valid. In *Coombes*, the Court of Appeal of New

South Wales considered whether an offer made only on the issue of liability is capable of acceptance and held that it was. The court in *Coombes* also referred to the decision of *Thomas William Vale v Timothy David Eggins (No 2)* [2007] NSWCA 12 ("*Vale*") where no objection was expressed in relation to an offer made as to liability only.

38 There is however an important point of distinction between New South Wales and Singapore's offer to settle regime. This is the presence of the definition of "claim for relief", which includes "a claim for the determination of any question or matter which may be determined by the Court", in both the New South Wales Supreme Court Act (Act No 52 of 1970) (NSW) and Civil Procedure Act 2005 (NSW), under which the New South Wales Supreme Court Rules 1970 (NSW) ("NSW Supreme Court Rules") and the New South Wales Uniform Civil Procedure Code (Reg No 418 of 2005) (NSW) ("Uniform Civil Procedure Code 2005") were enacted respectively.

39 Both *Coombes* and *Vale* were decided on the basis of the provisions in the Uniform Civil Procedure Rules 2005, which replaced the provisions relating to offers to settle that were originally found in Pts 22 and 52 of the NSW Supreme Court Rules. Part 22 of the NSW Supreme Court Rules dealt with the rules governing the making of offers, while Pt 52 set out the cost ramifications. Part 22 r 2 provided that "[i]n any proceedings the plaintiff or the defendant may make to the other an offer to compromise *any claim in the proceedings* on the terms specified in the notice of the offer" [emphasis added]. This is similar to O 22A r 1.

40 The court in *Coombes* relied on the case of *Whitehouse Properties Pty Ltd v Bond Brewing (NSW) Ltd* (1992) 28 NSWLR 17 ("*Whitehouse Properties*"), which was decided under the NSW Supreme Court Rules. In *Whitehouse Properties*, the claim was one for possession, damages, mesne profits, interests and costs. The plaintiff made an offer to settle in respect of compensation for loss of possession only. The defendant argued on appeal that the offer did not comply with Pt 22 as the offer was made in satisfaction of any claim by the defendant for compensation, but the defendant had made no such claim. Handley JA relied on the definition of "claim for relief" stated above to hold that the defendant's pleaded defence of equitable estoppel for the plaintiff not to seek possession without compensation for loss amounted to a "claim". He also held that an offer to settle would validly attract the cost consequences under Pt 22, even if the offer did not relate to all the claims for relief made in the proceedings.

41 There is no similar definition of "claim" or "claim for relief" in Singapore's ROC. However, as discussed at [30]–[31] above, I am of the view that a purposive interpretation of O 22A r 1 requires that the word "claim" be defined broadly. A wider definition of the term "claim" will also bring the O 22A regime in line with the relevant jurisdictions in Canada and Australia.

Availability of O 22A to non-monetary claims

42 The fact that the offer to settle regime under O 22A of the ROC has been held to be available for non-monetary claims is an additional reason for holding that offers to settle under O 22A may be made in respect of liability only.

43 It is clear that offers to settle do not apply only to monetary claims (see *eg*, *Mopi Pte Ltd v Central Mercantile Corporation (S) Ltd* [2001] SGHC 328 where the offer to settle dealt only with the use of a trade mark and had no monetary value). Indeed, one reason why the O 22A regime was introduced was to provide an alternative to the payment into court procedure under O 22, which was only available for monetary claims (see *Singapore Civil Procedure 2015* at para 22A/0/2).

44 That an offer to settle should not be restricted only to monetary values can also be seen in the

context of the test of favourability. In this regard, the Appellant had relied on *Tan Shwu Leng v Singapore Airlines Limited and another* [2001] SGHC 51 at [96] for the proposition that the test for favourability must be in dollars and cents, and argued that it followed from that that an offer to settle must have a monetary value to be valid under O 22A r 9. This is mistaken.

45 Although favourability is normally determined on the basis of a dollar amount in the offer compared to that awarded in the judgment, this does not always have to be the case. As observed by Kan Ting Chui J, as he then was, in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd (judgment on costs* [2004] 1 SLR(R) 134 at [21], favourability should not be restricted only to monetary terms. Kan J gave the example of a licence – if the defendant had been sued for a three year licence, and the plaintiff rejected an offer of a two year licence, judgment for a one year licence in favour of the plaintiff would be, in Kan J's judgment, a less favourable judgment than the offer. Similarly, in *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 ("*CCM Industrial*"), Chan Sek Keong CJ, as he then was, held that favourability must be determined in the context in which it was used. Thus, in an offer to settle that contained many terms, the monetary sum offered is only one factor to be taken into account in determining whether the plaintiff's judgment is more favourable than the offer to settle (at [40]).

46 Following from the reasoning in the above authorities, there is no reason to restrict the validity of offers to settle to require a monetary value, even if the claim is for an unliquidated sum, when the action is bifurcated. Rather, what is important is that the offer to settle is a serious and genuine one, which must be a question of fact in every case.

47 At this point, the Court of Appeal's objection to an offer to settle on liability only in *The Endurance 1* should be addressed. M Karthigesu JA, in holding that an offer to settle for a percentage of an unliquidated sum could not be said to be a serious and genuine offer to settle, stated that such an offer would run counter to the principle behind O 22A as the "assessment of damages, even where liability is a matter of course, can give rise to numerous complexities and result in protracted hearings and expense" (at [46]). This passage appears to suggest that because the assessment of damages would take up considerable time and costs, an offer to settle which requires parties to still incur this time and expense cannot be said to be a serious and genuine offer to settle. However, this passage should be read in the context in which it was decided. It is to the facts of *The Endurance 1* that I now turn.

The Endurance 1

48 The claim in *The Endurance 1* was made by the charterers of a vessel against the owners for breach of a time charterparty, or the wrongful withdrawal of the vessel in the alternative, as well as for the wrongful conversion of two water-makers placed by the charterers on board the vessel for use. The owners counterclaimed for unpaid charter-hire and for damages for the wrongful arrest of the vessel. The vessel was chartered by the charterers at a rate of US$2,000 per day for a period of one year commencing from the date of delivery of the vessel. The charterers then subchartered the vessel for a charter-hire of US$2,800 per day. On 17 March 1994, the vessel was delivered by the owners directly to the subcharterers. The charterers paid the owners the charter-hire for the first month amounting to US$60,000 in advance of delivery.

49 Under the charter and subcharter, the vessel was intended to be used to supply fuel oil to fishing vessels. However, the equipment was not in good repair, and from the date of delivery on 17 March 1994, the main engine and cargo pump broke down frequently. About a month later, on 8 April 1994, the subcharterer expressed the intention to terminate the subcharter on account of the unseaworthiness of the vessel, and withheld payment which accrued from that date. Around a week

later, on 15 and 18 April 1994, the owners wrote to the charterers demanding payment and threatened to withdraw the vessel if payment was not made. On 25 April 1994, the owners purportedly withdrew the vessel from the charterers. The two water-makers aboard the vessel which had been purchased by the charterers for the subcharterers were not returned to the charterers after the owners withdrew the vessel.

50 The trial judge rendered her decision on 12 May 1998. Before this decision, in June 1997, the charterers made two offers to settle to the owners. The first, dated 16 June 1997, required the owners to admit liability and proceed to an assessment of damages with the owners to pay the charterers 80% of the damages as assessed, and was open until 1 July 1997. The second, dated 19 June 1997, was that the owners would discontinue their counterclaim and pay the charterers the costs of the counterclaim.

51 The trial judge found that the vessel was not seaworthy at the time of delivery. However, as the charterers had not elected to terminate the charterparty on this basis, the charterers' main claim for breach of the charterparty on the ground of unseaworthiness failed. The charterer's alternative claim for wrongful withdrawal of the vessel succeeded and the trial judge awarded the charterers damages based on loss of profits. The trial judge also awarded the charterers the replacement costs of the two water-makers as damages for their wrongful conversion. The owners' counterclaim was dismissed. In view of the two offers to settle made by the charterers, the trial judge also awarded the charterers indemnity costs in respect of their claim as well as the owners' counterclaim.

52 The owners appealed against the award of damages and costs, but not the dismissal of their counterclaim. The Court of Appeal agreed with the trial judge's finding on liability, but disagreed with the trial judge's assessment of damages as well as the award of indemnity costs. In relation to O 22A, the Court of Appeal found that the offers made by the charterers were not serious and genuine offers, and were made only to take unfair advantage of O 22A r 9. In so holding, the Court of Appeal also stated at [46] that:

> … an offer to settle for a percentage of an unliquidated sum to be ascertained, as the claims in this case for damages to be assessed, cannot by any means be said to be a serious and genuine offer to settle. …

The question in this appeal is whether this statement by the Court of Appeal rules out all and any offers to settle on liability only from being serious and genuine offers to settle.

53 The District Judge, after analysing *The Endurance 1*, concluded that the case did not stand for the proposition that all offers to settle must stipulate a monetary sum in order to be regarded as serious and genuine, or that all offers made in terms of a percentage of an unliquidated sum would be invalid for the purposes of O 22A r 9 (at [25] of the Judgment). The District Judge was of the view that the Court of Appeal regarded the two specific offers to settle which did not specify any monetary sums "as offers which could not have merited proper consideration by the defendant" (at [24] of the Judgment). I agree. When the terms of both offers are examined, neither seemed to be a serious and genuine offer that would induce or facilitate settlement.

54 The first offer required the owners to *admit liability*, with the charterers offering to accept 80% of the damages as assessed. In relation to liability, there was no element of compromise. In relation to damages, the District Judge stated that the charterers' claims were "easily quantifiable" (see [24] of the Judgment). To the extent that the District Judge meant that the charterers could have "easily" quantified their claims in the sense of attributing a figure to their offer rather than to leave the owners in a conundrum, I agree. However, if the District Judge meant that the *process* of assessment

of damages was an easy task for the court in *The Endurance 1*, this was not so clear to me. Indeed, the assessment of damages in *The Endurance 1* turned out not to be such a straightforward process. On the facts, the Court of Appeal disagreed with the trial judge's award of damages for breach of the charterparty, and in relation to the award of damages for wrongful conversion, sent the case back for damages to be reassessed. The Court of Appeal's primary objection in *The Endurance 1* to an offer to settle on liability alone was the fact that an assessment of damages could give rise to numerous complexities and result in protracted hearings (at [46]).

55 Given these complexities, it would have been difficult for the owners, looking at the first offer on its face, to understand whether there was a compromise, and exactly what settlement it would be accepting. The first offer was therefore not a serious and genuine offer. In any event, I also note that the first offer did not appear to comply with O 22A r 9(1)(*a*) as it would have expired on 1 July 1997, months before the disposal of the claim.

56 With respect to the second offer, it was even clearer why it did not amount to a serious and genuine offer. It required the owners to discontinue their counterclaim and pay the charterers' costs in that respect. There was no element of compromise on the charterers' part. It thus could not be said to be a serious or genuine offer to settle.

57 Additionally, and perhaps more importantly, I would also highlight the following aspect of the present case which distinguishes it from *The Endurance 1*. Unlike *The Endurance 1*, the action in this case was bifurcated into separate trials for liability and assessment of damages. The Respondent's OTS was issued on 4 July 2011, in between the first and second tranches of the trial on liability. When the Respondent's OTS was issued, it was clear that the issues of liability and damages would be heard in separate trials. Hence, unlike the situation in *The Endurance 1*, at the time the Respondent made its OTS, there were separate and distinct proceedings (being the trial on liability and the appeal thereupon (if any)) which were capable of being settled entirely.

58 On the other hand, the action in *The Endurance 1* was not bifurcated into separate trials for liability and assessment of damages. Hence, the offers to settle, which dealt only with liability and still required damages to be assessed for both claims for breach of charterparty and wrongful conversion, if accepted, would have only have disposed of *a part of the trial* in which a substantial portion would be taken up by the assessment of damages. In such a situation, it would be incongruous to allow such offers which dealt only with liability to be seen to be serious and genuine.

59 Furthermore, in the present case, what I am concerned with in this appeal are the appropriate costs orders for stages 2 and 3 of the proceedings. As a result of the bifurcation, stages 2 and 3 of the proceedings were concerned solely with the issue of liability. If the OTS was accepted, stages 2 and 3 of the present proceedings would have been rendered unnecessary. Indeed, if the Appellant had accepted the Respondent's OTS, as discussed at [29], he would have been in the same, if not better, position than he is in presently. This accords with the policy and purpose of cost consequences under the offer to settle regime, which is to promote the extra-judicial settlement of disputes by the imposition of cost penalties (see above at [27]–[29]).

60 It should also be noted at this juncture that if there had not been a subsequent offer to settle on the issue of quantum, it might have been possible for the Appellant to argue that the cost consequences of the Respondent's OTS should not have extended to the trial on damages and subsequent appeal (if any), as the subject-matter of the OTS did not extend to the issue of damages. As the parties did not bring this point up, and given that it was not in issue, I make no decision on it.

Conclusion

Conclusion

61 Given that the rationale of O 22A is to facilitate the speedy and efficient resolution of disputes by the imposition of costs benefits and penalties, it would not promote the system of incentives underlying O 22A if it is to be read restrictively. I therefore find, taking a purposive approach, that in the appropriate circumstances, offers to settle made on liability only are capable of attracting the cost consequences under O 22A. On the facts of this case, as the hearing was bifurcated into separate proceedings dealing with liability and damages respectively, the Respondent's OTS is capable of attracting the cost consequences under O 22A.

Whether the pre-conditions under O 22A r 9 are satisfied

62 The next issue to consider is whether the pre-conditions under O 22A r 9(3) are satisfied in the present case. As stated recently by the Court of Appeal in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] SGCA 5 ("*Ong & Ong (CA)*") at [19(f)], there are pre-conditions in O 22A which must be satisfied before the cost consequences will come into play. Where the offeror is the defendant, O 22A r 9(3) provides for these three pre-conditions:

(a) the offer 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 is made;

(b) the plaintiff must not have accepted the offer; and

(c) the plaintiff must have obtained judgment not more favourable than the terms of the offer.

63 It is not in dispute that the first two pre-conditions above were satisfied. On the last pre-condition, the Appellant argued that because O 22A r 9(4)(*a*) provides that the interest awarded in respect of the period before the service of the offer to settle is to be considered by the court in determining whether the judgment obtained by the plaintiff is more favourable, this goes towards showing that the court is obliged to consider the "dollar value" of what has been awarded. Since the Respondent's OTS was made in percentage terms, the Appellant's argument was that no comparison can be made.

64 In my judgment, it is clear that the Appellant has obtained a judgment, whether on appeal or at first instance, which was not more favourable than the terms of the OTS. The Appellant's objections have been addressed above and no more need be said on it.

Whether the cost consequences in O 22A r 9(3) applies to the work done in relation to DCA 41/2011

65 The third issue in these proceedings is whether the cost consequences of O 22A r 9(3) applies to the work done in DCA 41/2011, the appeal by the Appellant on the issue of liability.

66 The Appellant cited para 22A/1/2 of *Singapore Civil Procedure 2015* and the case of *Niagara Structural Steel (St. Catherines) Ltd v WD Laflamme Ltd [1987] OJ No 2239 ("Niagara")* to argue that O 22A does not apply to appeals. This commentary and case however, deals with the issue of whether an offer to settle may be made pending an appeal. With respect to the learned counsel, this is not the issue in the present case.

67 What is in issue in this appeal is not whether parties may *make* an OTS in respect of an appeal, but whether the cost consequences under O 22A r 9(3) apply in the situation where (i) the defendant has made an offer before judgment at first instance, (ii) the plaintiff did not accept the offer, (iii)

judgment was rendered in the defendant's favour, (iv) the plaintiff appealed and obtained a judgment on appeal not more favourable than the defendant's initial offer. This requires an analysis of O 22A r 9(3).

68 The District Judge at [42]–[43] of the Judgment held that as the issue of liability was only finally disposed of when the appeal was heard in the High Court, the OTS made when the trial on liability was pending remained valid and capable of acceptance until the appeal was full dealt with. Also, since the Respondent's OTS did not specify an expiry date, it remained open for the Appellant to accept even up to the hearing before the High Court.

69 On the face of O 22A r 9(3), if the elements therein are satisfied, then "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]. Although the wording of O 22A r 9(3) does not deal specifically with appeals, a plain reading of the rule would suggest that if the plaintiff has obtained a less favourable judgment at first instance, the cost consequences as entailed in O 22A r 9(3) would apply to *any subsequent proceedings*, inclusive of the appeal.

70 This position is supported by the practice of the Singapore courts. In *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd (No 2)* [2004] SGCA 28 ("*Compaq Computer Asia*"), the plaintiff-respondent had succeeded in their claim against the defendant-appellant in the High Court, but this decision was overturned on appeal. The defendant-appellant had made an offer to settle before the trial. As the plaintiff-respondent did not obtain a more favourable judgment on appeal, the Court of Appeal held that the defendant-appellant was entitled to indemnity costs from the date of their offer to settle pursuant to O 22A r 9 of the ROC. In making this holding, Chao JA stated at [2] that "[t]he validity of the OTS was not restricted as to any period of time. It was never withdrawn and was still on the table as at the date of our judgment".

71 The Court of Appeal in *Compaq Computer Asia* followed its earlier decision in *Man B&W Diesel*. In *Man B&W Diesel*, Chao JA stated that the term "disposal of the claim" in O 22A r 9(3) "must refer to the final disposal of the claim where there is an appeal" (at [20]). The non-accepting party would be penalised with indemnity costs for the appeal stage as well since he was able at all times to accept the offer, but refused to do so.

72 In the recent case of *Ong & Ong (CA)*, the Court of Appeal interpreted the term "disposal of the matter" to mean 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 (at [54]–[55]). Given that the offer in that case was made for both the claims of the appellant and the counterclaim of the respondent, the fact that the counterclaim was no longer a live issue did not mean that the entire matter was disposed of (at [57]–[61]). In this regard, it was implicit in the judgment that the counterclaim had only been "disposed of" when the time limit for its appeal had expired. This is also in line with the approach of the Court of Appeal in *Compaq Computer Asia* and *Man B&W Diesel*.

73 The reasoning in the above cases in interpreting the phrase "disposal of the claim" to mean final disposal on appeal, implies that an offer to settle made by a defendant would still be open for acceptance even after judgment at first instance has been rendered. The decision in *Ong & Ong (CA)* also appears to suggest that even if no appeal is filed, a party may still accept an offer to settle so long as the time limit for appealing has not expired. As stated by the Court of Appeal in *Ong & Ong (CA)*, any prejudice to the offeror may be mitigated in two ways (at [56]):

> … 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. …

74 In the present case, the issue is not complicated, as at both first instance and on appeal, the Appellant did not obtain a judgment more favourable than the terms of the Respondent's OTS. It appears therefore to be a straightforward case in which O 22A r 9(3) could apply.

75 Lastly, the Appellant also cited some cases from New South Wales to argue that indemnity costs should not be awarded against him in respect of the appeal. These included the cases of *Coombes*, *Vale*, and *Moore v Woodforth (No 2)* [2003] NSWCA 46 ("*Moore*"). As the Respondent correctly submitted, these cases cited dealt with the peculiar legislative framework of civil procedure in New South Wales, where the rules of the District Court and Supreme Court of New South Wales were found in separate pieces of legislation. Hence, while the New South Wales Court of Appeal could take into account a pre-trial offer of compromise made under the New South Wales District Court Rules when exercising its discretion as to cost, the appellate court was not bound to apply those rules in relation to the costs of the appeal (see *Moore* at [13]–[14]; *South Sydney Council v Morris (No 3)* [2001] NSWCA 200 at [10]–[11]). In Singapore, this issue does not arise as the ROC applies to both High Court and District Court proceedings. These judgments thus do not have general application in Singapore's context.

In any event, whether the Court should exercise its discretion to order indemnity costs

76 The court's discretion in the face of an offer to settle arises in two circumstances. In the first instance, if O 22A rr 9(1), 9(2) or 9(3) are applicable, the court may yet decline to award indemnity costs against the non-accepting party if it is of the view that it is just to do so. In the second instance, even if O 22A rr 9(1), 9(2) or 9(3) are inapplicable, such as the case where the pre-conditions in these sections are not satisfied, the court may still consider the effect of the offer to settle on costs under O 22A r 9(5). In both instances, the court may consider the factors under O 22A r 12 in deciding how to exercise its discretion (see *CCM International*).

77 On the facts, I have found that O 22A r 9(3) is applicable. I now consider whether I should exercise my discretion to not award indemnity costs against the Appellant under the same.

78 The award of indemnity costs against the Appellant under O 22A r 9(3) is discretionary. However, in the interests of consistency and the expectation of the parties, it has been held that a departure from O 22A r 9(3) should only be made when the circumstances justify it and when the interest of justice requires it (see *Alagamalai s/o Veerasamy v Chan Liau Chuan* [1994] SGHC 267 and *Niagara*).

79 The Appellant argued that his damages would be whittled away if he is ordered to pay costs on an indemnity basis. Further, the Appellant highlighted that he was successful on appeal. The Appellant also relied on the fact that the Respondent refused to go for Court Dispute Resolution ("CDR") in the State Courts. In response, the Respondent pointed out that in making the offer to settle on liability, the Respondent precisely sought to avoid the situation where the Appellant's damages would be whittled away by costs. The Respondent also objected to the Appellant's reliance on the failure of the Respondent to attend CDR as the Appellant had only brought up this issue on appeal.

80 The District Judge found that the Respondent's OTS was a serious, genuine and reasonable

offer. There did not seem to be anything exceptional in the present case to justify a departure from the *prima facie* position under O 22A r 9(3). I agree. There was also no evidence before me pertaining to the issue of CDR; the Appellant submitted on the basis of bare assertions. I therefore do not rely on this.

Conclusion

81 In the circumstances, I find in favour of the Respondent on all four issues, and dismiss the appeal. I will hear parties on the costs of this appeal.