**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2017] SGHCR 09**

HC/OS 430 of 2017
HC/SUM 2109 of 2017

Between

Tommy Choo Mark Go & Partners

… *Plaintiff / Respondent*

And

Kuntjoro Wibawa
(alias Wong Kin Tjong)

… *Defendant / Applicant*

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# JUDGMENT

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[Civil Procedure – Striking Out]

# Tommy Choo Mark Go & Partners
# v
# Kuntjoro Wibawa (alias Wong Kin Tjong)

**[2017] SGHCR 09**

High Court — Originating Summons No 430 of 2017 (Summons No 2109 of 2017)
Justin Yeo AR
12 June 2017

12 June 2017

**Justin Yeo AR:**

1 This is an application by the defendant, Kuntjoro Wibawa @ Wong Kin Tjong ("the Defendant"), under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), to strike out the Originating Summons 430 of 2017 ("OS 430") filed by the plaintiff, Tommy Choo Mark Go ("the Plaintiff"), on the basis that the High Court does not have the jurisdiction to hear and determine OS 430.[1]

## Background facts

2 OS 430 is related to three matters that have been fixed for hearing by the Court of Appeal in late July 2017, namely Civil Appeal Nos 226, 231 and 232

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[1] Defendant's Written Submissions (HC/SUM 2019/2017) at para 33.

of 2015 (respectively, "CA 226", "CA 231" and "CA 232"; collectively referred to as "the Appeals").

(a) CA 226 is the Plaintiff's appeal to the Court of Appeal against the order of the High Court in *Tommy Choo, Mark Go & Partners v Kuntjoro Wibawa and other matters* [2015] SGHC 239 ("*Tommy Choo*"), insofar as the High Court did not to allow costs to be paid by the Defendant to the Plaintiff. The Defendant is the respondent in CA 226.

(b) CA 231 and CA 232 are cross-appeals by the parties to the Court of Appeal against the decision of the High Court in *Tommy Choo*, relating to the applications for review of taxation orders. The Plaintiff is the appellant in CA 232 and the respondent in CA 231, while the Defendant is the appellant in CA 231 and the respondent in CA 232.

3 On 17 April 2017, the Plaintiff filed OS 430 in the High Court, seeking *inter alia* the following:

(a) a declaration that an "offer to settle document" relating to the Appeals, made by the Defendant on 8 March 2017 pursuant to O 22A r 1 of the Rules of Court, is valid;

(b) a declaration that an "acceptance document" relating to the Appeals, made by the Plaintiff on 9 March 2017 pursuant to O 22A r 6 of the Rules of Court, is valid;

(c) a declaration that the parties have entered into a compromise as identified by the terms listed in the "offer to settle" and "acceptance" documents;

(d) a declaration that the Appeals are fully and finally settled, and that the Defendant is to pay the Plaintiff an amount of $106,000; and

(e) an order that the parties are to file respective notices of discontinuance in the Appeals within 14 days of the order in OS 430.

4 OS 430 is fixed to be heard by the High Court on 28 June 2017.

5 On 8 May 2017, the Defendant filed an application in CA 226, *ie* Court of Appeal Summons No 53 of 2017 ("SUM 53"), seeking a declaration that the Plaintiff's acceptance of the offer to settle for CA 226 was valid. SUM 53 did not relate to the offers to settle in CA 231 and CA 232.

6 On the same day, the Defendant filed the present application to strike out OS 430, together with a draft supporting affidavit (as the Defendant was unable have his affidavit commissioned while away from Singapore). The Defendant's supporting affidavit was formally filed on 11 May 2017. A reply affidavit was filed on behalf of the Plaintiff on 22 May 2017, and the Defendant filed a final response affidavit on 5 June 2017. The application was fixed to be heard on 12 June 2017.

**The present application**

7 When filing the present application, the Defendant did not specify the precise grounds for seeking to strike out OS 430. It transpired at the hearing that

the Defendant was proceeding only on two grounds under O 18 r 19 of the Rules of Court, namely:

(a) O 18 r 19(1)(*b*) of the Rules of Court, on the basis that OS 430 is "legally unsustainable", in that it is "clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks" (citing *The Bunga Melati 5* [2012] 4 SLR 546).

(b) O 18 r 19(1)(*d*) of the Rules of Court, on the basis that the bringing of OS 430 is an abuse of the process of the court, in that it creates proceedings that are "manifestly groundless or without foundation or which serve no useful purpose" (citing *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582).

8 At the hearing, both sets of counsel informed me that they had been directed to file any appeal against my decision by 16 June 2017, *ie* within four days from the hearing of the application. This was to ensure that the timelines concerning the hearing of OS 430 (and potentially, the Appeals) would not be affected. Counsel for the Defendant also emphasised that depending on the outcome of this application, she would need time to take instructions on whether or not an appeal should be filed. As such, I rendered this decision on the same day the application was heard, based on the arguments and authorities submitted to me.

**Issues and parties' arguments**

9 Counsel for the Defendant raised one preliminary issue and one main issue at the hearing.

***Preliminary issue: Whether O 22A of the Rules of Court applies to appeals***

10 The preliminary issue was whether the offer to settle regime in O 22A of the Rules of Court ("the O 22A regime") is applicable to appeals. Counsel for the Defendant explained that she had addressed this point in view of the suggestion in *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) ("*Singapore Civil Procedure 2017*") at paragraph 22A/1/2, that the Order 22A regime may not apply to appeals. The learned authors of *Singapore Civil Procedure 2017* had relied on several Canadian case authorities for this proposition.

11 Counsel for the Defendant submitted that on closer review of the Canadian case authorities, as well as the differences between the O 22A regime and the regime in Canada, "[w]hile it may be the case that the costs consequences of Order 22[A] Rule 9 may not apply to appeals, it does not mean that the offer to settle regime cannot apply to appeals".[2] Put another way, "an offer to settle regime does apply at the appellate level. It is only that costs consequences will remain at the discretion of the Honourable Court".[3] Counsel for the Defendant submitted that this position would also be in line with the policy of the O 22A regime – to "spur the parties to bring litigation to an expeditious end without judgment, and thus to save costs and judicial time" (citing *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 43 at [37]).

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2 Defendant's Written Submissions (HC/SUM 2019/2017) at para 27.

3 Defendant's Written Submissions (HC/SUM 2019/2017) at para 32.

12 At the hearing, counsel for the Plaintiff clarified that he was not taking issue with the applicability of the O 22A regime to appeals, and confirmed that the hearing should proceed directly to the main issue, to which I now turn.

***Main issue: Whether the High Court has jurisdiction to hear OS 430***

13 The main issue was whether the High Court has the necessary jurisdiction to hear and determine OS 430, given that OS 430 concerns offers to settle relating to the Appeals.[4]

14 This appeared to be a novel issue, and neither counsel could locate case authorities that were directly on point. They chose instead to proceed largely on arguments from first principles.

15 Counsel for the Defendant relied on the same arguments to establish that OS 430 should be struck out under both O 18 r 19(1)(*b*) and (*d*) of the Rules of Court.[5] Her arguments may be summarised as follows:

> (a) First, the discretion involved in enforcing the offers to settle under the O 22A regime is exercisable only by the Court of Appeal because the offers to settle in question relate to matters that are on appeal. To elaborate, it is established under the law that even if an offer to settle has been validly accepted by the offeree, it would not automatically be enforced by the court – the court retains a discretion on whether to enforce the offer to settle (*Ong & Ong Pte Ltd v Fairview*

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4 Defendant's Written Submissions (HC/SUM 2019/2017) at para 33.

5 Defendant's Written Submissions (HC/SUM 2019/2017) at para 53.

*Developments Pte Ltd* [2015] 2 SLR 470 ("*Ong & Ong*") at [19(e)]). This is because in enforcing an accepted offer to settle, regard should be had "not only to ordinary contractual principles but also to general principles of fairness and justice" (*Ong & Ong* at [69]). In this regard, since the Appeals are already before the Court of Appeal, *only* the Court of Appeal can enter a judgment on the terms of the offers to settle.[6] The High Court is *not* "competent to exercise this discretion",[7] and "any order made by the High Court seeks to usurp the jurisdiction and powers of the Court of Appeal";[8] the High Court "cannot give judgment and tell the Court of Appeal what to do".[9]

(b) Second, in view of s 29A(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), the Court of Appeal has "all the authority and jurisdiction" of the High Court. Therefore, the Court of Appeal can hear the matters sought to be canvassed in OS 430.

(c) Third, OS 430 seeks to impose *in personam* obligations on the parties (*eg*, the obligation to file a notice of discontinuance in the Appeals). If a party should, in a hypothetical scenario, refuse to obey the order of the High Court in OS 430, the Appeals will remain on the record, and the Court of Appeal will proceed to hear the Appeals. This is so, notwithstanding that the High Court has declared that the Appeals

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6 Defendant's Written Submissions (HC/SUM 2019/2017) at para 48.

7 Defendant's Written Submissions (HC/SUM 2019/2017) at para 48.

8 Defendant's Written Submissions (HC/SUM 2019/2017) at para 49.

9 Defendant's Oral Submissions on 12 June 2017.

are fully and finally settled, and ordered that the parties are to file notices of discontinuance in the Appeals.

16 Counsel for the Plaintiff argued that the matters raised in OS 430 were validly brought before the High Court at first instance, for the following reasons:

(a) First, the High Court has original jurisdiction, as specified in s 3(*a*) of the SCJA, and thus matters ought to commence in the High Court.[10] In contrast, the Court of Appeal only has appellate jurisdiction, as specified in s 3(*b*) of the SCJA. Under s 29A(3) of the SCJA, the Court of Appeal has jurisdiction to hear and determine matters "incidental" to an "appeal to the Court of Appeal" or to the "amendment, execution and enforcement of any judgment or order made on such appeal". However, OS 430 does not fall within the categories of matters covered by s 29A(3) of the SCJA.

(b) Second, and related to the first point, the issues for determination in the Appeals (see [2] above) are not the same as the issues to be determined in OS 430 (which relate to whether the parties have reached a compromise under the O 22A regime). The issues in OS 430 are therefore not incidental to the appeals, but rather, are more properly regarded as properly brought in a free-standing first instance application.[11] Furthermore, as the issues raised in OS 430 concern facts

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10 Plaintiff's Written Submissions (HC/SUM 2019/2017) at para 47.

11 Plaintiff's Written Submissions (HC/SUM 2019/2017) at para 51.

that are not on appeal to the Court of Appeal, it is inappropriate to ask the Court of Appeal to be "a fact finder at first instance".[12]

(c) Third, s 35 of the SCJA provides that where an application may be made to either the High Court or to the Court of Appeal, the matter shall at the first instance be brought before the High Court. Therefore, even if the Court of Appeal has jurisdiction to enforce the offers to settle, the application to enforce these offers is rightly commenced in the High Court.

(d) Fourth, the reference to "court" in O 22A of the Rules of Court does not specify that offers to settle with regard to matters in the Court of Appeal may only be heard by the Court of Appeal. In this regard, the definition of "court" within the Rules of Court expressly includes mention of the "High Court" (see O 1 r 4(2) of the Rules of Court). The reference to "judge" in O 22A r 8 of the Rules of Court also includes reference to a Judge of the High Court (see s 2 of the SCJA and O 1 r 4(1) of the Rules of Court).

(e) Fifth, it is improper for the Defendant to suggest that there are parallel proceedings by virtue of the filing of SUM 53 – this is a manipulation of the court process to support the Defendant's application to strike out OS 430.[13]

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12 Plaintiff's Oral Submissions on 12 June 2017; and Plaintiff's Written Submissions (HC/SUM 2019/2017) at paras 53–54.

13 Plaintiff's Written Submissions (HC/SUM 2019/2017) at para 58.

(f) Sixth, as a practical consideration, it is "oppressive" for the Plaintiff to be forced to proceed by way of taking out summonses in the Court of Appeal, rather than to have a determination from the High Court in relation to the offers to settle in OS 430.[14] This is in view of the higher costs involved in proceeding before the Court of Appeal.

**Decision**

17 From the outset, two prefatory points should be noted.

(a) First, the present decision relates to the striking out of an originating summons in the High Court. The threshold to be met by an applicant to succeed on a striking out application is high. It is only in plain and obvious cases that recourse should be had to a summary striking out under O 18 r 19 of the Rules of Court: see *Singapore Civil Procedure 2017* at paragraph 18/19/6. The Defendant, being the applicant, has the burden of satisfying this court that the requisite threshold has been met.

(b) Second, the issue of whether an application traversing grounds similar to those in OS 430 can properly be brought in the Court of Appeal is *not* before me. As such, it is not necessary for me to come to a decision on whether the Court of Appeal has the jurisdiction to deal with the enforcement of offers to settle at first instance, and whether the issues relating to the enforcement of the offers to settle are "incidental" (or otherwise) for the purposes of s 29A of the SCJA. The issue before

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[14] Plaintiff's Oral Submissions on 12 June 2017.

me is, instead, whether the High Court has the necessary jurisdiction to hear and determine OS 430 (see [13] above).

18 Keeping in mind the threshold for striking out OS 430 (see [17(a)] above), I am not convinced that OS 430 should be struck out under O 18 r 19(1)(*b*) and (*d*) of the Rules of Court.

19 With regard to the legal basis for jurisdiction, the High Court has original jurisdiction to hear OS 430. In addition to s 3 of the SCJA, which was cited by counsel for the Plaintiff (see [16(a)] above), s 16 of the SCJA provides that the High Court has jurisdiction to hear and try any action where, *inter alia*, the defendant is served with an originating process in the manner prescribed by the Rules of Court. Counsel for the Defendant confirmed that the Defendant had been validly served with OS 430. As such, *prima facie*, the High Court has original jurisdiction to hear OS 430.

20 No reasons were cited to me as to how the High Court subsequently came to be deprived of jurisdiction that had otherwise been validly founded pursuant to s 16 of the SCJA. In this regard, counsel for the Defendant did not provide any relevant legal authority or basis for her position that orders made by the High Court in OS 430 would "usurp the jurisdiction and powers of the Court of Appeal" (see [15(a)] above).

(a) First, *Ong &* Ong, as cited by counsel for the Defendant (see [15(a)] above), relates to considerations which the court should take into account when exercising its discretion to enforce an offer to settle (*Ong & Ong* at [64]–[69]). The case does not address the issue of *which court* ought to hear an application for a declaration that an offer to settle is

valid, or to enforce an offer to settle. *Ong & Ong* therefore does not aid the Defendant's argument that *only* the Court of Appeal may enforce the offers to settle in question.

(b) Second, any orders made by the High Court in OS 430 would stand as orders of the High Court (*contra* Court of Appeal) at first instance. Even if the High Court were to grant all the prayers sought in OS 430, this would result in a first instance High Court judgment making the declarations sought and ordering that the parties discontinue the Appeals (see [3] above). The judgment remains appealable to the Court of Appeal – there is no usurpation of the Court of Appeal's appellate jurisdiction in this regard. For completeness, I recognise that there may be some overlap between OS 430 and SUM 53 (see [5] above). However, no reasons were provided to justify allowing the Defendant to rely on the filing of SUM 53 (which was *subsequent* to the filing of OS 430) to argue that OS 430 is legally unsustainable or an abuse of process. In any event, counsel for the Defendant did not pursue this argument before me.

(c) Third, the arguments by counsel for the Defendant concerning the imposition of *in personam* obligations and the hypothetical situation in which a party may choose to disobey the order of the High Court (see [15(c)] above), do not assist the Defendant's case. If the Defendant is dissatisfied with the High Court's decision in OS 430 and wishes to proceed on the Appeals, he would presumably have to file an appeal against the High Court's decision in OS 430, and may also take out an application to stay the High Court's orders. It is perplexing that the Defendant should even attempt to rely on the possibility of non-

compliance with the High Court's orders in OS 430, to argue that the matters therein should therefore be heard directly by the Court of Appeal. For the avoidance of doubt, it is not open to a party to simply disobey an order of the High Court – such disobedience is on pain of liability for contempt of court. In any event, should the hypothetical situation materialise, it remains open to the other party to take out applications to, *inter alia*, compel the disobeying party to act in accordance with the High Court's orders.

**Conclusion**

21 For the foregoing reasons, this application is dismissed. I will hear parties on costs.

Justin Yeo
Assistant Registrar

Mr Anil Balchandani (I.R.B. Law LLP) for the Plaintiff;
Ms Christine Chuah (Optimus Chambers LLC) for the Defendant.