IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 120

Suit No 148 of 2022

Between

(1) Peck Wee Boon Patrick
(2) Ding Siew Peng Angel

… *Plaintiffs*

And

(1) Lim Poh Goon
(2) Lim Poh Quee
(3) Haixia Crystal Construction Pte Ltd
(4) Haixia Crystal Development Pte Ltd

… *Defendants*

EX TEMPORE JUDGMENT

[Civil Procedure — Costs]
[Civil Procedure — Offer to settle – Basis of costs – O 22A r 9(3) Rules of Court (2014 Rev Ed)]

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Tan Siong Thye SJ:

Introduction

1 In *Peck Wee Boon Patrick and another v Lim Poh Goon and others* [2024] SGHC 44 ("*Peck Wee Boon*"), I dismissed the plaintiffs' claims in HC/S 148/2022 (the "Suit") against the second defendant, Lim Poh Quee, and the fourth defendant, Haixia Crystal Development Pte Ltd (collectively, "the defendants"). Accordingly, I ordered that costs were to be agreed or taxed. At that point in time, the Court was not informed that there was an offer to settle ("OTS") made by the defendants.

2 Subsequent to the release of my judgment, the defendants' counsel wrote in to inform the Court that the defendants had given an OTS to the plaintiffs before the commencement of the trial, and the OTS was not accepted by the plaintiffs. They now seek to clarify whether the costs awarded to the defendants

are on the standard basis or the indemnity basis. As there was no agreement between the plaintiffs and the defendants on this issue, I shall set out my decision and reasons on the issue of costs to the defendants.

Background

3 In the interests of brevity, I shall not reproduce the facts of the underlying dispute, which have been comprehensively set out in *Peck Wee Boon*.

4 On 15 February 2024, I issued my judgment in *Peck Wee Boon*. On the same day, the defendants' counsel wrote in to inform the Court that they had served on the plaintiffs an OTS dated 21 March 2023 pursuant to O 22A of the Rules of Court (2014 Rev Ed) ("Rules of Court"). The material terms of the OTS are as follows:[1]

> 1. The Plaintiffs and the 2nd and 4th Defendants shall agree to resolve this Suit on a "drop-hands" basis. There will be no order to costs between the Plaintiffs, and the 2nd and 4th Defendants.
>
> 2. The 2nd and 4th Defendants shall consent to the Plaintiffs' withdrawal of the claims against them, with no order as to costs.
>
> 3. The Plaintiffs shall discontinue their claims against the 2nd and 4th Defendants in entirety by filing a Notice of Discontinuance, within seven (7) days of the Plaintiffs' acceptance of this Offer.
>
> …
>
> 5. Paragraphs 1 to 4 of this Offer to Settle shall remain open for acceptance for a period of fourteen (14) days from the date it is served on the Plaintiffs' solicitors.
>
> 6. If the offer in paragraphs 1 to 4 of this Offer to Settle is not accepted in its entirety within the aforesaid fourteen (14) days,

[1] 2nd and 4th Defendants' Written Submissions on Costs dated 25 March 2024 ("Ds' Subs") at pp 15–16.

> it shall remain open for acceptance thereafter save that the following shall apply:-
>
> > "*Upon the acceptance of this Offer to Settle, the Plaintiffs shall pay to the 2nd and 4th Defendants legal costs on an indemnity basis calculated from the 15th day after the date of service of this Offer to Settle to the date when this Offer to Settle is accepted by the Plaintiffs.*"
>
> [emphasis in original]

I note that the OTS had been served on 21 March 2023,[2] before the initial deadline for the filing and exchange of the affidavits of evidence-in-chief ("AEICs") of the Suit.

5 The defendants further averred that the OTS was not withdrawn and/or accepted by the plaintiffs prior to the delivery of the judgment. Therefore, in light of the dismissal of the plaintiffs' claims, the defendants were entitled to costs on the standard basis up to the date of the OTS and thereafter on an indemnity basis.

6 On 4 March 2024, the plaintiffs' counsel put on record that they disagree that the defendants are entitled to costs on an indemnity basis from the date of the OTS.

7 In view of the disagreement between the parties, I urged them to resolve the issue of costs amicably, failing which, I directed the parties to file written submissions on the issues pertaining to costs.

8 On 18 March 2024, the plaintiffs filed their notice of appeal against my decision to dismiss their claims against the defendants.

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[2] Ds' Subs at p 12.

The parties' arguments

9 The defendants submit that they are entitled to costs on the standard basis up to the date of the OTS, *ie*, 21 March 2023, and thereafter on an indemnity basis.[3] The OTS was not withdrawn and/or accepted by the plaintiffs prior to the delivery of my judgment. The defendants argue that the terms of the OTS were more favourable to the plaintiffs than the final decision of the Court.[4] The OTS was a sincere and genuine offer which sought to settle the matter without recourse to judicial determination.[5]

10 On the contrary, the plaintiffs aver that there is no basis for the defendants to seek costs on an indemnity basis from the date the OTS was served.[6] They argue that O 22A r 9(3) of the Rules of Court would not apply as the requirement that the OTS was not withdrawn and had not expired before the disposal of the claims is not satisfied.[7] In any event, the OTS was not a genuine and serious offer and was made merely to seek a tactical advantage by securing indemnity costs, rather than sincerely seeking to settle the matter without recourse to judicial determination.[8]

11 The plaintiffs accept that costs follow the event and that the defendants are entitled to costs of the Suit to be paid by the plaintiffs.[9] They submit that this should be fixed at $103,000 (excluding disbursements, to be agreed or taxed),

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3 Ds' Subs at paras 18–19.

4 Ds' Subs at paras 7, 18(c).

5 Ds' Subs at para 18(d).

6 Plaintiffs' Submissions on Costs dated 25 March 2024 ("Ps' Subs") at paras 6–7.

7 Ps' Subs at para 6(2).

8 Ps' Subs at para 6(4).

9 Ps' Subs at para 5.

taking guidance from Appendix G of the Supreme Court Practice Directions 2014, which encloses the "Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore".[10]

The applicable law

12 Order 22A r 9(3) of the Rules of Court is the main provision applicable in the present case and it states:

> 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.

13 Where the plaintiff does not accept an offer to settle, the general rule on costs under O 22A r 9(3) of the Rules of Court will apply if two conditions are satisfied: (a) the offer to settle was not withdrawn and had not expired before the disposal of the claim (the "Validity Requirement"); and (b) the judgment is not more favourable than the terms of the offer to settle (the "Favourability Requirement"): see *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 1043 ("*NTUC Foodfare*") at [15].

Issues to be determined

14 Since the plaintiffs did not accept the OTS, there are three issues to be determined:

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[10] Ps' Subs at para 8.

(a) whether the Validity Requirement is fulfilled;

(b) whether the Favourability Requirement is fulfilled; and

(c) whether the OTS was a genuine and serious offer.

Whether the Validity Requirement is fulfilled

15 I shall first consider whether the Validity Requirement was satisfied, *ie*, the OTS was not withdrawn and had not expired before the disposal of the claims. It is undisputed that the defendants had not withdrawn the OTS.

16 It is settled law that for the purposes of O 22A r 9(3)(a) of the Rules of Court, "the disposal of the claim" refers to the final disposal of the claim on appeal if an appeal is filed: *NTUC Foodfare* at [17], citing *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 3 SLR(R) 267 ("*Man B&W Diesel*") at [20] and *Ram Das V N P v SIA Engineering Co Ltd* [2015] 3 SLR 267 at [73]. For the purposes of ascertaining costs at the end of trial (as opposed to determining costs at the end of an appeal), the offer to settle must continue to be valid up to the issuance of the judgment of the first instance court. For the trial court, it is essential that a plaintiff must have had the opportunity to accept a defendant's offer to settle the suit before the delivery of the judgment of the first instance court. Applying this to the present case, the OTS must continue to be valid *up to the date of my judgment, ie*, 15 February 2024. The central issue is thus whether the OTS was valid when I issued my judgment in dismissing the plaintiffs' case.

17 In order to determine whether the OTS had expired before I issued my judgment, I turn to the terms of the OTS itself. It is evident that the OTS does

not specify a time for acceptance (see above at [4]). Order 22A r 3(5) of the Rules of Court provides for this scenario and it states:

> 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]

The phrase "dispos[al] of the matter" in O 22A r 3(5) of the Rules of Court must be interpreted consistently with the similar phrase in O 22A r 9(3)(a) of the Rules of Court. This phrase refers to the final disposal of the claim on appeal where there is an appeal: *NTUC Foodfare* at [17]. In a case where costs are to be determined after trial and where an offer to settle does not specify a time for acceptance, the offer to settle may be accepted at any time before the issuance of the judgment of the first instance court. In the present case, the OTS does not specify a time for acceptance. Thus, the OTS may be accepted at any time by the plaintiffs before the issuance of my judgment on 15 February 2024. Therefore, I find that the Validity Requirement is satisfied.

18 I shall further discuss whether the OTS subsists in the period after the issuance of my judgment and before the appeal is heard. Although this issue is not relevant for my consideration, as I have already concluded that the OTS was valid when I dismissed the plaintiffs' case, it will give some clarity to the scope of the validity of the OTS. In this regard, I note that the OTS requires the plaintiffs to "discontinue their claims against the 2nd and 4th Defendants in entirety by filing a Notice of Discontinuance, within seven (7) days of the Plaintiffs' acceptance of [the OTS]". This means that the Suit had to be discontinued if the plaintiffs chose to accept the OTS after I had issued my judgment dismissing the plaintiffs' Suit. In this scenario, the plaintiffs could not discontinue the Suit as I had dismissed it. The plaintiffs could only discontinue their appeal, which is not a term of the OTS. Hence, the OTS, which contains a

term requiring the discontinuance of the action, could not be validly accepted by the plaintiffs *after* I had dismissed the Suit.

19 The Court of Appeal in *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 ("*Michael Vaz Lorrain*") encountered this same situation. There, the offer to settle provided that the appellant was to pay a sum of money to the respondent within 14 days of acceptance of the offer, and the respondent was to "file its Notice of Discontinuance of Claim" within three working days of the receipt of that sum of money. The appellant had purportedly accepted the offer *after* the High Court judge had decided the case in favour of the respondent and awarded damages to it, and *after* the appellant had filed his appeal against the damages and costs assessed by the judge. In determining whether the offer could be accepted, the Court of Appeal at [36] remarked:

> In sum, an action can only be discontinued *before* judgment and we reach this conclusion for reasons of principle and coherence. ***Since the OTS in question required discontinuance of a concluded action that is no longer legally possible, the OTS is impotent and incapable of valid acceptance***. It should be construed as being capable of acceptance only before judgment was obtained. … [emphasis in italics in original; emphasis in bold italics added]

20 In *Michael Vaz Lorrain*, the Court of Appeal addressed its previous decision in *NTUC Foodfare*. In *NTUC Foodfare*, the offer to settle also contained a term that required the action to be discontinued, yet the Court of Appeal had concluded that the offer remained open for acceptance until the disposal of the appeal, *ie*, after the High Court had issued its judgment on the merits of the case and awarded damages accordingly: *NTUC Foodfare* at [17]. The Court of Appeal in *Michael Vaz Lorrain* at [27] observed that in *NTUC Foodfare,* it did not squarely address the preliminary issue – whether an offer to settle which contains a term that requires the action to be discontinued could be validly accepted after the issuance of the judgment of the first instance court.

Additionally, the question of whether there could be compliance with the requirement of discontinuance after judgment was not an issue before the court: *Michael Vaz Lorrain* at [35].

Whether the Favourability Requirement is fulfilled

21 I shall now address whether the Favourability Requirement was satisfied, *ie*, whether the judgment obtained in *Peck Wee Boon* is not more favourable than the terms of the OTS. The OTS was a "drop-hands" offer, which is essentially a zero-dollar offer as the defendants would not be making any payment to the plaintiffs for the discontinuance of the Suit against the defendants. However, the judgment was a complete dismissal of the plaintiffs' claims.

22 The decision in *Management Corporation Strata Title Plan No 3563 v Wintree Investment Pte Ltd and others (Greatearth Corp Pte Ltd, third party)* [2018] 5 SLR 412 ("*MCST No 3563*") involved a similar situation. There, the offer to settle "involved essentially a zero-dollar offer or what is sometimes known as a "drop hands" offer": *MCST No 3563* at [36]. The respondent's application for striking out was granted without any objection by the appellant, effectively amounting to a dismissal of the appellant's claims. The question was whether, in light of these facts, the test of favourability was satisfied. Lee Seiu Kin J (as he then was) held at [38]:

> In any case, any potential problems with comparing the favourability of an outcome with a zero-dollar offer were largely diminished by the fact that the provision in O 22A r 9 of the ROC refers to an outcome "not more favourable" rather than "less favourable" than the terms of the OTS. *Hence, it is clear that an outcome in which a plaintiff does not obtain any award is not more favourable than the terms of a zero-dollar offer.* In the present case where the claim was struck out at the pre-trial stage, it was even more obvious that such an outcome was not more favourable than the terms of the OTS. This is especially

> so since accepting the OTS would have entitled the appellant to some costs… [emphasis added]

23 By analogy, the complete dismissal of the plaintiffs' claims is not more favourable than the "drop-hands" offer in the OTS. Accordingly, I find that the Favourability Requirement has been satisfied.

Whether the OTS was a genuine and serious offer

24 Finally, I shall consider whether the OTS was a genuine and serious offer.

25 Where a party offers what is, in the circumstances, an unreasonably low or even nominal sum, the court should certainly be alive to the possibility that the offeror is merely seeking to gain a tactical advantage by securing indemnity costs, rather than sincerely seeking to settle the matter without recourse to judicial determination: *MCST No 3563* at [41]. However, it is not necessarily the case that a nominal or even zero-dollar offer can never be genuine and serious: *MCST No 3563* at [42].

26 The purpose behind the default rule in O 22 r 9 of the Rules of Court is to encourage the parties in an action to resolve their dispute in an efficient manner. In this regard the Court of Appeal in *Man B&W Diesel* at [8] remarked:

> … This is because *the rationale behind O 22A is to encourage the speedy termination of litigation by agreement of the parties*. The offer to settle should therefore be a serious and genuine offer and not just to entail the payment of costs on an indemnity basis. *It should contain in it an element which would induce or facilitate settlement*: see *Singapore Airlines Ltd v Fujitsu Microelectronics (Malaysia) Sdn Bhd* [2001] 1 SLR(R) 38 ("*SIA v Fujitsu*") at [10] … [emphasis added]

This is why, if the defendant issues an offer to settle and secures an outcome more favourable than the offer, the defendant is entitled to indemnity costs as the acceptance of the offer by the plaintiff would have averted a costly trial.

27 In determining whether an offer to settle is reasonable, serious or genuine, it would suffice that there is a legitimate basis for the offer made and the offer is not illusory. Hence, the offer should not be made just to entail the payment of costs on an indemnity basis and should not be one where the offeror effectively expects the other party to capitulate: see *Resorts World at Sentosa Pte Ltd v Goel Adesh Kumar and another appeal* [2018] 2 SLR 1070 at [22], citing *Man B&W Diesel* at [14].

28 In the present case, the OTS was a genuine and serious offer. The OTS was served more than a year after the plaintiffs had commenced the action against the defendants. Various interlocutory applications had already been taken up and directions for the filing of AEICs of the Suit had been issued. Indeed, the OTS came at a fairly advanced stage of the proceedings. The parties were able to and would have evaluated the strength of their respective cases. As I have found in *Peck Wee Boon*, it is obvious from the evidence and undisputed that the plaintiffs did not invest with the defendants, who were unknown to them at the material time, and the plaintiffs did not hand any money directly to the defendants. Clearly, the plaintiffs had overreached their claims and their chances of success against the defendants were dismal. Given my findings on the serious lack of merit in the plaintiffs' claims, it also cannot be said that there was no legitimate basis for the OTS.

29 Further, the plaintiffs did not produce any evidence to suggest that the OTS was not genuine and serious, and merely put forward bare assertions. Despite this, the defendants were, according to the terms of the OTS, prepared

to forgo all their costs incurred up to that point. I also note that the OTS coincided with the appointment of the plaintiffs' current solicitors. Hence, the OTS provided an opportunity to the fresh solicitors of the plaintiffs to resolve the Suit amicably.

Conclusion

30 In summary, I find that the OTS was a genuine and serious offer by the defendants, and had satisfied the Validity Requirement and the Favourability Requirement. Accordingly, the default rule in O 22A r 9(3) of the Rules of Court applies with regard to the entitlement of costs after the service of the OTS. The defendants are entitled to costs on the standard basis up to the date the OTS was served, *ie*, 21 March 2023, and to costs on the indemnity basis from that date.

Tan Siong Thye
Senior Judge

Foo Maw Shen, Chu Hua Yi and Goh Jia Jie (FC Legal Asia LLC) for the plaintiffs;
Singh Ranjit and Teo Jun Wei Andre (Francis Khoo & Lim) for the second and fourth defendants;
The first and third defendants absent and unrepresented.