Vita Life Sciences Limited and Another v Arthur Andersen and Another [2008] SGHC 85

Case Number : Suit 454/2005, SUM 720/2008

Decision Date : 09 June 2008

Tribunal/Court : High Court

Coram : Chi Qiyuan Douglas AR

Counsel Name(s) : Muthu Kumaran (Bernard & Rada Law Corporation) for the plaintiffs; Rethnam Chandra Mohan and Ng Jin (Rajah & Tann LLP) for the first defendants

Parties : Vita Life Sciences Limited; Vita Health Laboratories Pte Ltd — Arthur Andersen; Ernst & Young

Civil Procedure

9 June 2008 Judgment reserved.

AR Chi Qiyuan Douglas:

Introduction

1 The present application comes at the end of a protracted dispute between the parties which began almost three years ago with the issuance of the plaintiffs' writ of summons in June 2005. The dispute has been successfully resolved as the parties have managed to reach a settlement without the need to go to trial. Unfortunately, there remains some further disagreement between the parties on the issue of costs arising out of an Offer to Settle ("OTS") which was made by the first defendant, and which was accepted by the plaintiffs. Before outlining the issues that arise for determination, I first proceed to lay out the background facts.

Background facts

2 The plaintiffs' claim against the defendants was based on an alleged breach of contract and/or negligence on the part of the first defendant in connection with its audits of various financial statements of the second plaintiff and the latter's parent company. The plaintiffs did not proceed with the action as against the second defendant, and so the first defendant, Messrs Arthur Andersen, was the sole defendant in these proceedings (for convenience, hereinafter referred to as "the defendant"). The defendant is the applicant in the present application, while the plaintiffs are the respondents.

3 At a pre-trial conference ("PTC") on 19 October 2007, the parties took directions on, *inter alia*, the timelines for the filing and exchange of affidavits of evidence-in-chief ("AEICs"). The court also directed that the action be set down by 24 December 2007, and fixed trial dates for 21 January 2008 to 1 February 2008.

4 On 31 October 2007, the defendant served on the plaintiffs an OTS made pursuant to O 22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") in the following terms:

> [The defendant] offer (*sic*) to settle the above proceedings on the following terms:
>
> [The defendant] pay to [the plaintiffs] the sum of S$450,000 in full and final settlement of [the

plaintiffs'] claim herein and costs, up to and including the date of the offer herein, on the appropriate basis to be taxed, if not agreed.

The OTS was dated 31 October 2007, and as we shall see later, was accepted by the plaintiffs on 10 January 2008. For convenience, I will refer to this OTS in the judgment as "the defendant's OTS".

5 In the meanwhile, the parties proceeded to exchange their AEICs. While it appeared that the plaintiffs had some difficulty in complying with the original timelines given by the court, the parties eventually exchanged their AEICs on 19 December 2007, and the taking of objections to the contents of the AEICs was completed by 2 January 2008. There was, however, some delay in the setting down for trial and although the set down date had already been extended to 8 January 2008, the matter still had not been set down by 9 January 2008. In any event, on 9 January 2008, the Registry of the Supreme Court ("the Registry") wrote to the parties informing them to attend before the court for a PTC on 11 January 2008. I should also mention that it was also on 9 January 2008 that the plaintiffs served an OTS of their own ("the plaintiffs' OTS") on the defendant. However, since the plaintiffs' OTS did not form the basis of the settlement between the parties, it is unnecessary for me to set out its terms in the judgment.

6 On 10 January 2008, the defendant served on the plaintiffs a notice of its intention to withdraw the defendant's OTS pursuant to O 22A r 3 of the Rules. On the same day, however, within the notice period for the withdrawal of the defendant's OTS, the plaintiffs accepted the defendant's OTS. It bears mention that no question arose as to whether or not the defendant's OTS was capable of being accepted by the plaintiffs on 10 January 2008; rightly so, given the requirement in O 22A r 3(2) of the Rules of providing at least one day's prior notice of the intention to withdraw the offer. In other words, both parties were agreed that there was a valid acceptance of the defendant's OTS on 10 January 2008. Accordingly, before the parties were due to attend before the court on 11 January 2008 for the PTC, they had reached an out-of-court settlement.

7 On 11 January 2008, the parties duly attended before the registrar having conduct of the PTC ("the PTC Registrar"). The parties' solicitors informed the PTC Registrar that the parties had settled, and then went on to provide the court with the terms of the settlement, which were the terms set out in the defendant's OTS. The PTC Registrar then recorded that "By consent, judgment [was] so entered".

8 Through a series of correspondence that followed between the parties' solicitors, a clear disagreement over the issue of costs and the applicability of O 22A r 9(2) of the Rules to the defendant's OTS arose. I will refer to the relevant correspondence later in the judgment. For present purposes, it suffices to note that the defendant took the position that O 22A r 9(2) of the Rules applied such that it was entitled to costs from "the date 14 days after the date of the service of the offer assessed up to the date that the notice of acceptance was served". Unsurprisingly, the plaintiffs took the opposite view: the issue of costs had already been provided for in the defendant's OTS and accordingly, O 22A r 9(2) of the Rules had no application whatsoever.

9 In addition, the plaintiffs' solicitors' had also drawn up a draft Order of Court ("the Draft Order") for the defendant's solicitors' endorsement. Yet again, there was a large dispute between the respective solicitors over the terms of the Draft Order to be approved. This was another issue, albeit clearly related to the issue of costs, which was being continuously hammered about by both sets of solicitors in the correspondence I have referred to in the paragraph above, and details of which I will provide in the relevant portion of my judgment. For now, it suffices to note that an Order of Court dated 11 January 2008 (which was in the same terms as the Draft Order) was extracted by the plaintiffs' solicitors on 14 February 2008 ("the Extracted Order") despite the lack of agreement on the

part of the defendant's solicitors.

10 On 18 February 2008, the defendant's solicitors took out the present application which prayed for, *inter alia*, the following orders:

(a) the Extracted Order be set aside and/or revoked and/or expunged;

(b) directions be given, if necessary, for parties to see the PTC Registrar to settle the terms of the Extracted Order; and

(c) the plaintiffs pay the defendant costs of the proceedings from the date 14 days after the date of service of the defendant's OTS (*ie*, 14 November 2007) to the date when the defendant's OTS was accepted by the plaintiffs (*ie*, 10 January 2008).

Issues

11 There were two main issues that arose in the present application:

(a) Whether O 22A r 9(2) of the Rules applied to the defendant's OTS ("the OTS issue"); and

(b) Whether the Extracted Order should be set aside and/or revoked and/or expunged ("the Extracted Order issue").

12 Before dealing with these issues *in seriatim*, it will be helpful to detail the way in which I dealt with some preliminary issues that emerged at the hearing itself. First, a concern of mine was to ensure that the minute sheet of the PTC Registrar ("the Court minute sheet") properly recorded and reflected the proceedings as they transpired during the PTC on 11 January 2008. In particular, I wanted to dispose of any issue as to whether what was recorded on the Court minute sheet was not what was informed to the PTC Registrar and/or intended by the parties at that relevant time. To my mind, if there were any slight doubt (held by either party) as to the accuracy of the Court minute sheet, the proper course would be for the parties to see the PTC Registrar to clarify those doubts. Ultimately, my concerns proved to be unfounded as the parties confirmed before me that the Court minute sheet properly recorded what was told to her by counsel during that PTC. This effectively disposed of the prayer in the defendant's application for directions to be given for the parties to see the PTC Registrar to settle the terms of the Extracted Order. Since there was no doubt that the Court minute sheet was an accurate reflection of the proceedings before the court, there was no necessity for the parties to go back to the PTC Registrar to seek clarification.

13 Secondly, I wanted to find out whether the fact that the settlement was reached by means of an accepted OTS under the Rules was mentioned to the PTC Registrar. To this question, counsel could not give me a conclusive answer one way or the other: both counsel endeavoured to check their respective attendance notes for a record of the same but were unable to confirm either way. Be that as it may, the parties did however confirm that the information provided to the PTC Registrar was premised on the plaintiffs' acceptance of the defendant's OTS and not on some other agreement or fresh settlement entered into by the parties. I should state briefly why this was of some concern to me. In my view, if the parties had appeared before the PTC Registrar merely to record a consent judgment *per se*, even though the terms of that consent judgment might have been identical to that of an accepted OTS, that would have taken the matter beyond the realms of the OTS regime under O 22A of the Rules and the parties would have to stand and fall by the terms of the freely agreed consent judgment (save for the existence of any grounds upon which an agreement can be set aside: see below at [62])).

14 I should state that I am of the view that this remains one *possible* way of dealing with the matter before me, notwithstanding the inconclusive inquiries into whether or not an OTS was mentioned to the PTC Registrar. This is because I find it both reasonable and logical to hold that since the parties have decided to enter a "by consent judgment", neither party should be allowed to interfere with such a judgment so entered where the only basis for doing so is that the judgment has turned out to be a bad decision for one side, or has an effect that is unintended by one party. In this connection, I urge counsel to be extra mindful of the implications of entering a consent judgment before embarking on such a step in any proceedings.

15 Nonetheless, having said that, there are a number of factors which persuaded me not to deal with the matter in this manner. First, the plaintiffs' counsel conceded that the manifest intention of the parties when the terms of the settlement were informed to the PTC Registrar was to give effect to the defendant's OTS. I do note, however, that counsel for the plaintiffs did qualify this by maintaining his position that the parties had elected to have the terms of the defendant's OTS recorded as a consent judgment *per se*. Indeed, counsel for the plaintiffs had, as one of his strands of argument, placed much emphasis on the *effect* of a consent judgment which, according to him, was exhaustive of the rights of the parties. However, the plaintiffs did not vigorously pursue this line of argument, preferring instead to focus on the substantive merits of the issue of whether O 22A r 9(2) of the Rules applied to the defendant's OTS. This is the second reason why I elected not to summarily decide the matter in this manner. Finally, and perhaps most crucially, it seems to me that it would be overly technical to rule in this way since such a decision would clearly favour form over substance in a situation which does not call for such an approach – where there is no evidence before me that the parties had intended for the consent judgment (and its attendant terms) to be entered *independently* of the defendant's OTS and be treated as a stand-alone agreement between the parties.

16 While noting that the Extracted Order issue (and in a related vein, the issue of the consent judgment as discussed above) could effectively determine the outcome of this matter quite apart from the OTS issue, I have decided to address the latter in priority to the former for the simple reason that the OTS issue is clearly the issue that is at the heart of the dispute between the parties. It is also on this issue that there appears to be a lack of local jurisprudence.

Whether O 22A r 9(2) of the Rules applied

17 I therefore turn first to the OTS issue, *viz*, whether O 22A r 9(2) of the Rules applied to the defendant's OTS. Order 22A r 9(2) of the Rules provides as follows:

> **Costs (O. 22A, r. 9)**
>
> 9. …
>
> (2) Where an accepted offer to settle does not provide for costs –
>
> (a) where the offer was made by the plaintiff, he will be entitled to his costs assessed to the date that the notice of acceptance was served;
>
> (b) where the offer was made by the defendant, the plaintiff will be entitled to his costs assessed to the date he was served with the offer, and the defendant will be entitled to his costs from the date 14 days after the date of the service of the offer assessed up to the date that the notice of acceptance was served.

Since the OTS in question, *viz*, the defendant's OTS, was made by the defendant, we are solely concerned with limb (*b*), assuming of course that O 22A r 9(2) of the Rules applies in the first place. For this, we have to look at the operative words "[w]here an accepted offer to settle does not provide for costs". Thus, the issue in the present case is quite simply whether the defendant's OTS constitutes an OTS *that does not provide for costs*.

The defendant's position

18 The crux of the defendant's argument was that O 22A r 9(2) of the Rules applied to the defendant's OTS. Although the defendant acknowledged that there was a dearth of local authority on what constituted an OTS that did not provide for costs, the defendant submitted that cases from the courts of Ontario, Canada were instructive. This was because Ontario had a similar procedure and OTS regime, which was contained in r 49 of Ontario's Rules of Civil Procedure (RRO 1990, Reg 194) ("the Ontario Rules"), to that found in Singapore under O 22A of the Rules. The defendant relied on the Singapore Court of Appeal case of *The Endurance I* [1999] 1 SLR 661 (at [39]), for the proposition that r 49 of the Ontario Rules was in *pari materia* with O 22A of the Rules. In particular, the defendant highlighted r 49.07(05) of the Ontario Rules which states:

> 49.07 (5) Costs –
>
> Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,
>
> (a) where the offer was made by the defendant, to his or her costs assessed to the date the plaintiff was served with the offer; or
>
> (b) where the offer was made by the plaintiff, to his or her costs assessed to the date that the notice of acceptance was served.

and pointed out that this rule was in *pari materia* with O 22A r 9(2) of the Rules.

19 In a nutshell, the defendant's case was that where an OTS was silent or ambiguous as to the question of costs, O 22A r 9(2) of the Rules ought to apply. To this end, the defendant advanced three arguments. First, the defendant relied on the Canadian case of *Tearle v Smith* [2005] OJ No 4594 as authority for this proposition. At [8] of Henderson J's judgment, the learned judge stated as follows:

> The purpose of Rule 49.07(5) is to provide for a resolution of the costs issue where an offer is silent or ambiguous with respect to costs.

20 Secondly, the defendant relied on the (also) Canadian case of *Bickmore v Bickmore* (1996) OTC LEXIS 4191 ("*Bickmore*"). In that case, the husband who was the defendant in those proceedings had made an offer to settle to the wife who was the plaintiff. Under the terms of the offer, the wife was to pay the husband's costs on a solicitor and client basis "from the date of [the] offer to the date of acceptance" (*id*, [7]). There was no mention in the offer of any other costs. The wife claimed that she was entitled to costs up to the date of the offer on the basis of r 49.07(5) of the Ontario Rules (*supra*, [18]). The Ontario court allowed the wife's claim and held that as the offer was silent as to the disposition of costs prior to the time the wife's solicitor was served with the offer, r 49.07(5) of the Ontario Rules applied. The court was also of the opinion that the wife was entitled to consider r 49.07(5) of the Ontario Rules and accept the offer by the husband "on the justifiable assumption [that] she would be entitled to party and party costs as stated in the rule" (*id*, [20]). Relying on

Bickmore, the defendant contended that where there was a partial provision of costs (for a certain segment of the proceedings) in an OTS, the OTS was to be treated as being "silent" with respect to costs for the time periods not covered by the OTS. In such circumstances, the defendant submitted that O 22A r 9(2) of the Rules would apply. In the present case, the defendant's OTS was silent and/or made no provision as to the disposition of costs after the date of the offer. Accordingly, the defendant submitted that O 22A r 9(2)(*b*) of the Rules would apply and the defendant was therefore entitled to its costs from the date 14 days after the date of the service of the offer assessed up to the date that the notice of acceptance was served.

21 Third, the defendant also submitted that O 22A r 9(2)(*b*) of the Rules should apply in the present case as a matter of public policy and in line with the objectives of O 22A of the Rules. The defendant stated that the objective of O 22A of the Rules was to facilitate settlement between disputing parties in an efficient and costs-saving manner: see *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 4 SLR 593, 602 and the Canadian case of *Data General (Canada) v Molnar Systems Group* (1991) 85 DLR (4th) 392, 398. The defendant contended that the plaintiffs had only opted to accept the defendant's OTS approximately ten days before the commencement of trial, notwithstanding that the OTS had been served on the plaintiffs more than two months before. As such, the defendant submitted that both as a matter of rule and policy, the plaintiffs should be ordered to pay the defendant's costs which could otherwise have been avoided if the plaintiffs had accepted the defendant's OTS earlier.

The plaintiffs' position

22 The plaintiffs, on the other hand, adopted the view that O 22A r 9(2) of the Rules had no application in the present case. They contended that the plain and ordinary meaning of the expression "does not provide for costs" was that the OTS contained no provision whatsoever on costs; the OTS had to be wholly silent on costs before O 22A r 9(2) of the Rules could apply. It was *only* in such a situation where the default positions on costs as provided for in O 22A rr 9(2)(*a*) and 9(2)(*b*) of the Rules respectively would kick-in and apply in respect of that OTS.

23 In this connection, the plaintiffs relied on the observations of Woo Bih Li J in *SBS Transit Ltd (formerly known as Singapore Bus Service Ltd) v Teo Chye Seng Douglas* [2005] SGHC 15 ("the *SBS Transit* case") as support for their case. In that case, the learned judge made the following *obiter* remarks on O 22A r 9(2) of the Rules (at [31]):

> I also add that quite often, offers to settle omit to mention a counterclaim. I encourage every person who is drafting such an offer to go through the pleadings carefully to ensure that the offer clearly specifies all claims, including counterclaims, that are meant to be included… Issues of interest and costs should also be stated clearly in the offer to settle although O 22A r 9(2) of [the Rules] does make provision for the situation where an offer to settle does not provide for costs.

The plaintiffs contended that Woo J took extra precaution in paraphrasing the situations in which O 22A r 9(2) of the Rules applied. The plaintiffs submitted that it was significant that Woo J chose to use the same words as set out in O 22A r 9(2) of the Rules, *viz*, "where an offer to settle does not provide for costs", and did not state, for example, that O 22A r 9(2) of the Rules would apply "in so far as the offer to settle does not provide for costs *of the entire action*" (emphasis added) – which in essence was the interpretation the defendant was urging the court to adopt.

24 Similarly, the plaintiffs also cited *dicta* from the Ontario Court of Appeal case of *Rooney (Litigation Guardian of) v Graham* (2001) Carswell Ont 887, 198 DLR (4th) 1 (*sub nom Rooney v*

Graham) 144 OAC 240, 53 OR (3d) 685 ("*Rooney*"), where Laskin JA (Rosenberg JA concurring) made the following observations concerning r 49.07(5) of the Ontario Rules, at [43]:

> By stating what happens when an offer contains no provision for costs, rule 49.07(5) implicitly affirms that a Rule 49 offer can contain a provision for costs.

The plaintiffs submitted that the *dicta*, much like the observations of Woo J in the *SBS Transit* case (*supra*, [23]), also supported their contention that O 22A r 9(2) of the Rules only applied when the OTS contained *no provision for costs*.

25 The plaintiffs also sought to distinguish the cases cited by the defendant – in particular, the case of *Bickmore* (*supra*, [20]). First, the plaintiffs submitted that in relation to the case of *Tearle v Smith* (*supra*, [19]), the Ontario court in that case found that there *was* a provision on costs such that r 49.07(5) of the Ontario Rules did not apply. Therefore, the observation made by the Ontario court on the situation where an OTS was silent or ambiguous as to the question of costs was strictly *obiter*. Further, the plaintiffs submitted that the defendant's position was that the defendant's OTS was *silent* on the issue of costs after the date of the offer; the proposition in *Tearle v Smith* with regard to the position where an OTS was *ambiguous* therefore did not assist the defendant's case.

26 The plaintiffs further urged me to note several points relating to *Bickmore* (*supra*, [20]) which they said clearly distinguished *Bickmore* from the present case. First, the husband (the offeror) had conceded that the court could make an order on costs (notwithstanding the acceptance of the OTS by the wife) and had asked the court to exercise its discretion under s 131 of the Courts of Justice Act, RSO 1990 (c 43) ("the CJA") and not award costs to either party, in which case he would forgo his entitlement to costs as stipulated under the terms of the accepted OTS. The plaintiffs submitted that the court in *Bickmore* was therefore exercising its discretion in relation to the award of costs, and was not adjudicating on the operation of r 49.07(5) of the Ontario Rules although the court had made reference to that rule. The eventual award of costs was therefore based on the court's general discretion to do so, and any reference to r 49.07(5) of the Ontario Rules was merely *dicta* and a factor that the court might have considered when exercising its discretion. In contrast, the defendant in the present case was contending, as a matter of interpretation of O 22A r 9(2) of the Rules, that it was *entitled* to costs.

27 Secondly, the court in *Bickmore* (*supra*, [20]) actually heard the parties on the outstanding matters (*i.e.* the divorce – which the husband eventually did not oppose – and costs) which had *not* been settled as a result of the acceptance of the husband's OTS. At [2] of the judgment of Kurisko J, the learned judge stated as follows:

> All outstanding matters except costs and the divorce (which the husband no longer opposes) have been settled as a result of acceptance of an offer to settle made by the husband. The divorce has been heard by me and granted.

The judge then proceeded to discuss the sole remaining issue of costs. The plaintiffs submitted that this distinguished *Bickmore* from the present case as the court in *Bickmore* had actually heard the matter (*i.e.* the divorce) and could therefore make an order with respect to the proceedings before it. According to the plaintiffs, this tied in neatly with their submission that the court was making its own order on costs in the exercise of its discretion, and not making a determination on whether r 49.07(5) of the Ontario Rules applied. The plaintiffs therefore submitted that the observations made by the court in *Bickmore* were again *obiter*.

28 Finally, the plaintiffs pointed to a passage of the court's judgment in *Bickmore* (*supra*, [20]),

where the court stated as follows (at [20]):

> In accepting the offer the wife was entitled to consider this rule [*i.e.* r 49.07(5) of the Ontario Rules] and accept the offer on the justifiable assumption she would be entitled to party and party costs as stated in the rule.

The plaintiffs argued that the above passage also indicated that the court was not engaged in the process of determining whether r 49.07(5) of the Ontario Rules applied. This was because if the court was determining such a question, there would be no issue of a "justifiable assumption" on the part of the wife – in such a situation, r 49.07(5) of the Ontario Rules either applied or it did not.

29 The plaintiffs further contended that if O 22A r 9(2)(*b*) of the Rules applied, then it had to apply in its entirety. However, if that were true, it would mean that the rule would override any expression provisions on costs in the relevant OTS, and lead to absurd results. The plaintiffs suggested, as a hypothetical example, the case of an accepted OTS made by a defendant which provided, *inter alia*, that the plaintiff was only to be paid his costs up to the stage of the close of pleadings, and crucially, there were no other terms in the OTS which dealt with costs ("the hypothetical OTS"). According to the defendant, that would constitute a temporal limitation in respect of the costs payable, and in which case the OTS was to be treated as being "silent" with respect to costs for the time periods not covered by the express provision on costs in the OTS. According to the defendant's interpretation of O 22A r 9(2) of the Rules, it would mean that O 22A r 9(2)(*b*) of the Rules applied to the hypothetical OTS. That would lead to either one of two consequences. First, if O 22A r 9(2)(*b*) of the Rules was applied in its entirety to the hypothetical OTS, it would mean that the hypothetical plaintiff would be entitled to *all* the costs up to the date of service of the hypothetical OTS regardless of when this was *vis-à-vis* the close of pleadings. Clearly, according to the plaintiffs, that would have the (unintended) effect of overriding the express provision on costs in the hypothetical OTS. Secondly, if O 22A r 9(2)(*b*) of the Rules was *only* to be applied insofar as it was not inconsistent with the hypothetical OTS, then that would require a "slicing and dicing" of the Rules which surely could not be the case. Such an approach would also invariably cause considerable uncertainty as to when, and to what extent, O 22A r 9(2) of the Rules applied in any given situation.

My analysis

Meaning of O 22A r 9(2) of the Rules

30 It is a fundamental principle of statutory interpretation (as laid down by Lord Tindal CJ in *The Sussex Peerage* (1844) 11 Cl. & F 85 at 143) that:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

Likewise, in F A R Bennion, *Statutory Interpretation* (Butterworths, 4th Ed, 2002), the learned author observes (at p 471):

> The plain meaning rule was expressed by Lord Reid [in *Pinner v Everett* [1969] 1 WLR 1266 at 1273] as follows –
>
> > In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be

supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.

The propositions cited above are trite law and our courts have consistently reiterated this fundamental principle: see for example, *PP v Low Kok Heng* [2007] 4 SLR 183 ("*Low Kok Heng*") at [30]; *Ng Chin Siau v How Kim Chuan* [2007] 4 SLR 809 ("*Ng Chin Siau*") at [35].

31 However, I note that any discourse on the construction of statutes in Singapore must take place against the backdrop of s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act"). An extensive and comprehensive discussion of this provision has already been undertaken in *Low Kok Heng* at [39] to [57]. I can do no better than to make reference to the relevant portions of that discussion where appropriate. Section 9A of the Interpretation Act provides:

> **9A.**—(1) In the interpretation of a provision of a written law, *an interpretation that would promote the purpose or object underlying the written law* (whether that purpose or object is expressly stated in the written law or not) *shall be preferred to an interpretation that would not promote that purpose or object*.
>
> [emphasis added]

32 A useful summary of the legal effect of s 9A of the Interpretation Act can be found in *Low Kok Heng* (at [57]):

> [Section] 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions... The purposive approach takes precedence over all other common law principles of interpretation.

It is therefore plain that a purposive approach is to be adopted in the construction of O 22A r 9(2) of the Rules; and the purposive approach will take precedence over a literal interpretation.

33 However, before considering what the effect of a purposive approach to the construction of O 22A r 9(2) of the Rules entails, it will be helpful to begin with a discussion of the plain meaning of O 22A r 9(2) of the Rules. In my judgment, the natural and ordinary meaning of the expression "does not provide for costs" is simply that there is no provision whatsoever on costs. The defendant had sought to read into the said expression various words or phrases that would have the effect of qualifying O 22A r 9(2) of the Rules to read, for instance, as "does not provide for costs *fully*" or "does not provide for the costs of *the whole proceedings*". In essence, the defendant contended that that would be the effect of a purposive approach to the construction of O 22A r 9(2) of the Rules. In support of its case, the defendant relied on the cases in Ontario, Canada as shedding light on the purposive meaning of O 22A r 9(2) of the Rules. It is for this reason that counsel for the defendant began his oral submissions by telling me that he was essentially relying on only two cases – *Tearle v Smith* (*supra*, [19]) and *Bickmore* (*supra*, [20]) – to make out the defendant's entire case. I now turn to consider whether the cases that the defendant relies on lend any assistance to our interpretation of O 22A r 9(2) of the Rules.

Cases

Tearle v Smith

34 In *Tearle v Smith* (*supra*, [19]), the settlement in that case arose as a consequence of a written OTS by the defendant, the material paragraph of which read as follows (*id*, [2]):

> The Defendant offers to settle costs of this action in the sum of $8,025 inclusive of GST. The Defendant will also pay for the Plaintiff's reasonable disbursements in an amount to be agreed to or as assessed.

An issue to be decided in that case was the amount of disbursements requested by the plaintiff. The defendant took the position that the amount of disbursements should be reduced because some of the disbursements were incurred after the date of the offer and should therefore not be allowed. In support of his position, the defendant relied on r 49.07(5)(*a*) of the Ontario Rules (*supra*, [16]). However, the court held (at [7]) that "… this Rule [*i.e.* r 49.07(5) of the Ontario Rules] does not apply because the offer in this case provides for the disposition of costs". The court then proceeded to make the observation (at [8]) that,

> The purpose of Rule 49.07(5) is to provide for a resolution of the costs issue where an offer is silent or ambiguous with respect to costs. In this case the offer clearly sets out the mechanism for determining costs. Specifically, the disbursements are to be agreed to or assessed. I find that the parties have entered into an agreement with respect to the resolution of the costs issue, and both sides are now bound to the terms of that agreement.

35 In my view, the case of *Tearle v Smith* (*supra*, [19]) cannot and does not assist the defendant since the OTS in that case provided for the disposition of costs, and accordingly, r 49.07(5) of the Ontario Rules did not apply. If anything, *Tearle v Smith* should support the plaintiffs' case because it reiterates the general view that where parties have entered into an agreement with respect to the resolution of costs, they should be bound to the terms of that agreement, and nothing more. This must be so.

Bickmore

36 I have already stated at some length above (*supra*, [26] – [28]) the plaintiffs' arguments which seek to distinguish *Bickmore* (*supra*, [20]) from the present case. While I do not agree entirely with the plaintiffs' submissions, I am of the view that *Bickmore* can and should be distinguished from the present case.

37 First, I find it significant that the husband (the offeror) had *conceded* that the court could make an order on costs (notwithstanding the acceptance of the OTS by the wife) and had submitted that the court *should* exercise its discretion under s 131 of the CJA, and not award costs to either party, in which case he would forgo his entitlement to costs as agreed upon under the terms of the accepted OTS. Ultimately, the court declined to exercise its discretion in this manner given that s 131 of the CJA stated that such discretion was "subject to the rules of the court"; the court also determined that the husband had failed to establish the factors necessary for the court to "disregard this discretion" (*Bickmore* (*supra*, [20]) at [17]). With respect, I find it difficult to view this case as representing anything other than the court exercising its discretion on the issue of costs. Whether that was an exercise of the court's underlying discretion or the discretion under s 131 of the CJA seems unclear to me. What is clear to me, however, was the concern of the Ontario court to ensure that the wife in *Bickmore* was not unfairly prejudiced – as evident from the following passage in the judgment, (*id*, [21]):

> It would be unfair to deprive the wife of such costs by the summary exercise of judicial discretion based on the principle, submitted by counsel for the husband, that the usual disposition of costs in matrimonial matters is to require each party to pay their own costs.

38 In my view, the fact that in *Bickmore* (*supra*, [20]), the parties had submitted to the court

that it should exercise its discretion in relation to costs and the fact that the court had in turn expressed concerns of fairness in coming to its decision, clearly distinguished that case from the present. Although the defendant did submit that as a matter of policy (whatever the defendant might have intended it to mean in the present circumstances) the plaintiffs should be ordered to pay the defendant's costs which could otherwise have been avoided if the plaintiffs had accepted the defendant's OTS earlier, the defendant made this argument in the context of its submissions that O 22A r 9(2)(*b*) of the Rules should apply in the present case. This was quite different from asking the court to exercise its power to determine the issue of costs under O 22A r 9(5) of the Rules, which reads as follows:

> (5) Without prejudice to paragraphs (1), (2) and (3), where an offer to settle has been made, and notwithstanding anything in the offer to settle, the Court shall have full power to determine by whom and to what extent any costs are to be paid, and the Court may make such a determination upon the application of a party or of its own motion.

39 At this juncture, I should point out that it was unfortunate that neither party referred to O 22A r 9(5) of the Rules. In particular, I would have thought that if the defendant wanted the court to exercise its underlying discretion and take into account all the circumstances of the case and make an assessment of costs on the basis of those facts (quite apart from O 22A r 9(2) of the Rules), it would have surely been to the defendant's benefit to draw the court's attention to this provision. It would have been reasonable to expect the defendant to rely on O 22A r 9(5) of the Rules to persuade me that notwithstanding the issue of the applicability of O 22A r 9(2) of the Rules, I nonetheless had the power to determine by whom and to what extent any costs are to be paid. For the sake of completeness, I should state that in any event, if the defendant had invited the court to do so and rested its case on what it has termed "public policy", I would have declined to exercise my discretion in the defendant's favour. I shall have more to say on this later (see [41] below).

40 The second reason why *Bickmore* (*supra*, [20]) can be distinguished from the present case actually lies in the reasoning of the court in *Bickmore* itself (at [20]):

> In accepting the offer the wife was entitled to consider this rule [*i.e.* r 49.07(5)] and accept the offer on the justifiable assumption she would be entitled to party and party costs as stated in the rule.

I have already made reference to paragraph [20] of *Bickmore* in my discussion of the plaintiffs' submissions above (at [28]). However, I found this paragraph significant for a different reason. It will be helpful to remind ourselves that the wife in *Bickmore* was the plaintiff in those proceedings, and the party which was claiming its entitlement to costs under r 49.07(5) of the Ontario Rules. She was also the person who received the OTS, *i.e* the offeree. In contrast, in the present case, O 22A r 9(2)(*b*) of the Rules is slightly different from r 49.07(5) of the Ontario Rules in that the former provides for *two* sets of costs – one for the plaintiff and the other for the defendant – while differentiating these costs by reference to certain significant dates. This means that the defendant is also entitled to certain costs under O 22A r 9(2)(*b*) of the Rules. The significance of this in the present case is that the defendant which is the party claiming its entitlement to costs under O 22A r 9(2)(*b*) of the Rules *is the party who made the offer*, *i.e.* the offeror.

41 Therefore, just as much as the court in *Bickmore* (*supra*, [20]) was of the view that the wife was entitled to accept the offer on the justifiable assumption that she would be entitled to costs as provided for under the relevant rule, in my judgment, the plaintiffs were entitled to accept the defendant's OTS on the justifiable assumption that the only costs that were in issue were the costs up to and including the date of the defendant's OTS which they would be entitled to. In my view, the

plaintiffs could not reasonably be expected to have anticipated that they would have to pay costs for the period 14 days after the date of service of the defendant's OTS until the date they accepted the OTS, when they decided to accept the defendant's OTS. I am fortified in my conclusion by the fact that the defendant was the party who made the offer – in my view, it is eminently reasonable to expect the *offeror* to bear the burden of ensuring that all the terms of the settlement which it intended to propose were clearly stated in its offer. The offeror should not be allowed to turn around and imply various terms into its offer after it had been accepted. For the sake of completeness, I should explain that this is also the main reason why, as I have mentioned above (at [39]), I would have elected not to exercise my discretion in favour of the defendant in any event. In my view, there are strong policy reasons in favour of maintaining a high degree of predictability and certainty in the OTS regime; allowing offerors to be able to imply terms *ex post facto* into an accepted OTS would patently defeat this objective.

42 In my judgment, it is therefore abundantly clear that the cases of *Tearle v Smith* (*supra*, [19]) and *Bickmore* (*supra*, [20]) do not assist the defendant's interpretation of O 22A r 9(2) of the Rules since both cases are easily distinguishable. But what about the defendant's argument that its interpretation of O22A r 9(2) of the Rules would promote the objective behind O 22A of the Rules?

43 At the outset, I should state that I agree wholly with the defendant's submissions on the rationale behind O 22A of the Rules – that the OTS regime under O 22A of the Rules is to "encourage parties to make reasonable offers to settle and to facilitate the early settlement of litigation" (see *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) at p 423). However, at the risk of stating the obvious, I am mindful that the settlement of litigation that is encouraged through O 22A of the Rules is nonetheless a settlement *between the parties*. Therefore, while O 22A of the Rules exists to *facilitate* such settlements, it is ultimately up to the parties to reach a consensus on the terms of their agreement. As Prof Jeffrey Pinsler SC in *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (Lexis Nexis, 2006) pertinently observes (at p 571), "[t]he flexibility of the 'offer to settle' lies in giving a party the complete freedom to formulate the offer to suit the circumstances of the case".

44 In my view, the object of O 22A of the Rules would be best served by promoting autonomy and flexibility for parties who elect to use the OTS regime under O 22A of the Rules. In this regard, I think that the provisions in O 22A r 9(2) of the Rules should only apply in the clearly defined situation stipulated for in that rule, *viz*, where an accepted OTS contains no provision as to costs; the position on costs as provided for in O 22A r 9(2) of the Rules should exist only as a *default* position, which applies *only* when parties have failed to reach any agreement on costs (as evidenced by the lack of any provision for costs in the accepted OTS). In my view, this proposition is consistent with the general scheme of O 22A r 9 of the Rules which governs the element of *costs* generally in relation to an OTS. Order 22A rr 9(1) and 9(3) of the Rules provide for how costs are to be determined and paid in specifically defined situations. However, it is to be noted that ultimately, the court has a discretion to determine the question of costs: see O 22A r 9(5) of the Rules, which is to be read together with O 22A rr 9(1) and 9(3) of the Rules (which are qualified by the words "unless the court orders otherwise" at the end of each paragraph). In short, O 22A r 9 of the Rules provides "default" positions on the cost consequences which will apply unless the court determines that the interests of justice require otherwise. In my judgment, O 22A r 9(2) of the Rules is *only* meant to fill in the gaps on the issue of costs *where there is a gap in the first place*.

45 Therefore, I am of the view that giving O 22A r 9(2) of the Rules its literal meaning will give effect to a purposive interpretation of O 22A r 9(2) of the Rules. In applying a purposive approach in interpreting O 22A of the Rules, the objective should be to promote the desirability of encouraging parties to settle by allowing parties to have freedom and flexibility in drafting their offers to settle. Order 22A r 9(2) of the Rules should thus be given its natural and ordinary meaning as this would have

the effect of specifically delimiting the situation in which that rule will apply. This will then allow parties to have complete freedom in formulating the terms of their settlement in respect of costs.

46 In this connection, I note that the common law principles of interpretation come into play *only* when their application coincides with the purpose underlying the statutory provision in question: see *Ng Chin Siau* at [40]. In this regard, the observations of the court in *Ng Chin Siau* (at [40]) are apposite:

> Other common law principles of interpretation come into play *only* when their application coincides with the purpose underlying the written law in question. It must be noted, nevertheless, that it is more often than not that a literal reading of a statutory provision is in fact likely to coincide with a purposive reading of that provision. To be sure, a successfully drafted piece of legislation is one which clearly brings out the purpose underlying the provision by its express literal words: see D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 4th Ed, 1996) at para 2.5, p 31.

In my view, the present case is one good example of a "successfully drafted piece of legislation": the same conclusion is reached when a literal *or* purposive reading of O 22A r 9(2) of the Rules is taken – O 22A r 9(2) of the Rules only applies where an OTS makes no provision *whatsoever* on costs.

47 There is just one other point that I should highlight. The defendant has also conceded in its submissions that if the defendant's OTS had stated "costs of $x" or "costs" *per se*, as opposed to "costs up to the date of the offer", then O 22A r 9(2)(*b*) of the Rules would simply have no application whatsoever. Following this line of argument, I would add that if the defendant's OTS had offered to pay the plaintiffs costs otherwise than in accordance with the first limb of O 22A r 9(2)(*b*) of the Rules, *viz*, costs up to the date of service of the offer, I would be very surprised if the defendant would still have then tried to maintain that it was entitled to costs under O 22A r 9(2)(*b*) of the Rules. In other words, it seems to me that it is merely out of *coincidence* that because the defendant's OTS contained an offer that was *not inconsistent* with the default position under O 22A r 9(2)(*b*) of the Rules, this then afforded the defendant (it would appear) the opportunity to raise the arguments it is presently making. In my view, this was a clear indication that the defendant's position could not hold water.

48 For the reasons given above, I find that the defendant's OTS, which was accepted by the plaintiffs on 10 January 2008, *does* provide for costs. In my judgment, O 22A r 9(2) of the Rules has no application to the present case. Accordingly, I am dismissing the defendant's application for costs of the proceedings from the date 14 days after the date of service of the defendant's OTS to the date when the defendant's OTS was accepted by the plaintiffs.

49 I now turn to consider the Extracted Order issue, *viz*, whether the Extracted Order should be set aside and/or revoked and/or expunged. In particular, I consider whether this issue has any material bearing on the conclusion I have just reached on the OTS issue.

Whether the Extracted Order should be set aside and/or revoked and/or expunged

50 Before I set out the facts leading up to the extraction of the Extracted Order, I pause to make a brief preliminary observation that I have already alluded to above. The main grouse of the defendant was in respect of costs. Of course, the defendant was also clearly unhappy that the plaintiffs had proceeded to extract an Order of Court which made no mention of the defendant's purported entitlement to costs under O 22A r 9(2) of the Rules. The defendant therefore also attacked the plaintiffs' extraction of such an Order. However, I must note that *in substance*, what

the dispute between the parties really boiled down to was still the issue of costs; the plaintiffs' attempts to extract the said Order merely brought this issue to the fore. I think that this is fairly evident from the correspondence between the parties. Thus, even if the plaintiffs had not extracted the said Order, and assuming the defendant still held the view that it was entitled to costs under O 22A r 9(2) of the Rules, the latter would still have had to bring an application for the court's determination of that issue. Viewed from this perspective, one can see why the Extracted Order issue is really not that critical in the larger scheme of things. It is for this reason that I do not propose to spend an unnecessary amount of time dealing with this final issue.

The facts

51 After the parties attended the PTC on 10 January 2008, by way of a letter dated 10 January 2008 (which appears to have been only sent out on 14 January 2008), the plaintiffs' solicitors requested from the defendant a confirmation that they may be released from their stakeholding obligations in respect of the security for costs paid to them by the first plaintiffs. The defendant's solicitors replied by way of a letter dated 14 January 2008 on, *inter alia*, the following terms:

> 3. In respect of the security for costs held by you as stakeholders, we note the provisions of [O 22A r 9(2) of the Rules], pursuant to which our clients are entitled to costs from "*the date 14 days after the date of the service of the offer assessed up to the date that the notice of acceptance was served*."
>
> 4. As such, our clients are not comfortable with the released of the security for costs held by you as stakeholders until the issue of costs is resolved.
>
> [emphasis in original]

On 18 January 2008, the plaintiffs' solicitors wrote back to the defendant's solicitors. By this letter, the plaintiffs' solicitors forwarded the Draft Order (*supra*, [9]) dated 11 January 2008 for the defendant's solicitors' approval, informing the defendant's solicitors that they had inspected the minutes recorded by the PTC Registrar at the PTC on 11 January 2008 and had ascertained that the Draft Order was in accordance with the same. Further, and in any event, the plaintiffs' solicitors also disputed the application of O 22A r 9(2) of the Rules to the defendant's OTS.

52 On 21 January 2008, the defendant's solicitors replied to the plaintiffs' solicitors expressing their view that since the defendant's OTS was an offer made pursuant to O 22A of the Rules, and that O 22A r (4) of the Rules deemed such an offer to be "an offer of compromise made without prejudice save as to costs", there was no necessity for any judgment or order of court to be extracted. The defendant's solicitors also elaborated further on their position with regard to the application of O 22A r 9(2) of the Rules to the defendant's OTS.

53 On 24 January 2008, the plaintiffs' solicitors wrote to the Registry requesting that the Draft Order be extracted. In this letter, the plaintiffs' solicitors stated that

> [the Draft Order] has not been returned to us within the time frame prescribed by [O 42 r 8(2) of the Rules] and as such, [the defendant's solicitors] are deemed to have consented to the terms thereof.

54 It would appear that the plaintiffs' solicitors, in their letter to the Registry, had omitted to make any mention of the defendant's solicitors' letter dated 21 January 2008.

55 Thereafter, the defendant's solicitors wrote various letters to the Registry, as well as the plaintiffs' solicitors, objecting to the extraction of any order of court, and in any event, the Draft Order on, *inter alia*, the following grounds:

(a) The defendant could not be deemed to have consented to the terms of the Draft Order as O 42 r 8 of the Rules did not apply in these circumstances – there was no judgment in favour of any party, and in any event, the defendant's solicitors had written to the plaintiffs' solicitors on 21 January 2008 stating their objections to the extraction of any order of court.

(b) There was no basis for any judgment or order *against* the defendant as the defendant's OTS was a without prejudice offer to settle made pursuant to O 22A of the Rules.

(c) It was not recorded anywhere in the Court minute sheet that "*Judgment be entered against [the defendant]*" as stated in the Draft Order. Instead, the PTC Registrar had merely recorded "judgment so entered" which had to mean that judgment was recorded on the terms of the settlement. As such, the Draft Order was incorrectly worded.

(d) The Draft Order did not provide for the costs implications under O 22A r 9(2) of the Rules.

56 In response to the series of letters from both parties, the Registry replied by way of a letter dated 29 January 2008 to both sets of solicitors, directing them to attend before the Duty Registrar to resolve the issue.

57 The parties' solicitors then tried to arrange between themselves for a date to attend before the Duty Registrar. The defendant's solicitors proposed for parties to attend before the Duty Registrar to get a special hearing date to resolve the issue relating to the Draft Order and all outstanding issues including: (a) the issue of the defendant's entitlement to costs under O 22A r 9(2) of the Rules; and (b) whether the security for costs held by the plaintiffs' solicitors as stakeholders should be released to the plaintiffs. The defendant's solicitors proposed this because they were of the view that the resolution of the defendant's entitlement to costs under O 22A r 9(2) of the Rules would have a material bearing on the terms to be included in the Draft Order to be extracted and on the issue of the release of the security for costs.

58 The plaintiffs' solicitors adopted a different view of matters: they objected to the defendant's solicitors' proposal to obtain a special hearing date; instead, they maintained their position that they were only to see the Duty Registrar to settle the Draft Order. In essence, the plaintiffs' solicitors did not think that it was necessary for the court to make any determination on any issue other than the settling of the terms of the Draft Order. This was because they did not see any "live" issue that was in dispute and held the position that there was none. As it turned out, parties could not agree on an appointment before the Duty Registrar. As a result, the plaintiffs decided to write to the Registry on 14 February 2008 in the following terms:

3. Parties have not been able to agree on an appointment to meet before the Duty Registrar. We believe that parties have copied the Registry on the correspondences, but in any event we enclose for ease of reference our last letter (dated 6 February 2008) on the appointment before the Duty Registrar, with respect to which we have not received agreement on appointment to meet before the Duty Registrar.

4. As the parties are unable to agree on an appointment to meet before the Duty Registrar to settle the draft Order of Court, please either:

a. approve (with or without amendments) / settle [the Draft Order], based on the minutes of the Court, as we believe the minutes are quite clear;

OR

b. if the minutes are not clear, direct the parties to appear before the Duty Registrar on a specified date & time to settle [the Draft Order].

59 The defendant's solicitors' did try once again to state their objections to the approval of the Draft Order by writing to the Registry on 14 February 2008 immediately after receipt of the plaintiffs' solicitors' letter of even date. However, the Extracted Order was extracted on 14 February 2008.

The parties' submissions

60 Both parties made elaborate submissions on the steps and procedures that are involved in the extraction of an order of court. As I have mentioned above, I do not consider it necessary to examine in any great detail these submissions. Briefly, the plaintiffs relied on O 42 rr 8(1) and 8(2) of the Rules to establish that the defendant could be taken to have consented to the Draft Order and that therefore, the plaintiffs were entitled to proceed to have the Draft Order extracted. The defendant, on the other hand, had two main complaints: first, it argued that it would have been evident from the parties' correspondence that there was a disagreement between the parties as to the terms of the order of court to be extracted. As such, the plaintiffs' solicitors in proceeding to have the Draft Order extracted were in clear contravention of para 64 of the Supreme Court Practice Directions (2007 Ed) and O 42 rr 8(3) and 8(4) of the Rules. Secondly, the Extracted Order was not in accordance with the minutes of the court because the Extracted Order should not read as "[j]udgment be entered against [the defendant]" since the PTC Registrar merely recorded in the Court minute sheet that "judgment [is] so entered". The defendant contended that the order made by the PTC Registrar was merely an order recording the terms of the settlement as agreed between the parties and could not in any way be construed as a judgment that was entered against the defendant.

My analysis

61 I find it unnecessary to express any view on the issue of whether there has been any non-compliance with the Rules. In my view, the paramount issue is really whether there are any grounds to set aside the Extracted Order, which is in form and in substance the manifestation of a consent judgment (assuming for the moment that that is true). I think that there is a subtle difference between the setting aside of a consent judgment and an order of court that represents the consent judgment, and the impugning of the *extraction process* undertaken in relation to that order of court. And even if we remove the assumption that the Extracted Order is a manifestation of a consent judgment, electing instead to treat the proceedings before the PTC Registrar at the PTC on 10 January 2008 as a mere recording of the terms of a settlement between the parties rather than the entering of a consent judgment, in my opinion, setting aside the order of court that results from those proceedings is once again different from attacking the process by which the order of court is obtained.

62 In my judgment, I see no practical purpose in setting aside the Extracted Order since the defendant has accepted that the Court minute sheet is an accurate reflection of the proceedings before the court as well as a proper record of the intentions of the parties at the relevant time. To be sure, the defendant has not contended that the Extracted Order (or for that matter, the consent judgment) should be set aside on grounds of fraud or on any of the grounds upon which an agreement can be set aside. Similarly, the defendant has not alleged any slip in drawing up the Extracted Order

and that there has been an error in expressing the manifest intention of the court. In this regard, I refer to a passage in *Bakery Mart Pte Ltd v Ng Wei Teck* [2005] 1 SLR 28 which I found to be instructive (although acknowledging that the principles stated therein are in relation to the issue of when a consent judgment or order will be set aside), at [11]:

> The general principle is that the court will not interfere to set aside a consent judgment or order after it has been made and perfected otherwise than in a fresh action brought to set aside such a judgment on grounds of fraud or on any of the grounds upon which an agreement can be set aside. The exceptions to the general principle are where there has been a slip in drawing up the judgment or order which has been entered and where there has been an error in expressing the manifest intention of the court: see generally *Ainsworth v Wilding* [1896] 1 Ch 673 approved by the Privy Council in *Kinch v Walcott* [1929] AC 482; *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1993] 1 SLR 89; *Wiltopps (Asia) Ltd v Drew & Napier* [2000] 3 SLR 244.

63 In summary, I can see no good reason to set aside and/or revoke and/or expunge the Extracted Order. If I decide to do so, the plaintiffs' solicitors can and will draw up, and then extract, another order of court on substantially the same terms (which will this time – I suppose – meet the approval of the defendant's solicitors). I do not think that that should be necessary in the present circumstances.

Conclusion

64 In the final analysis, I do not think that the ends of justice would be met if I allowed the defendant to, as it were, "ambush" the plaintiffs in relation to costs after the date of service of the defendant's OTS. In addition, since the real complaint of the defendant was indeed the issue of costs, there was nothing to be gained from taking sides in what I saw to be essentially an unfortunate joust – full of acrimony – between the parties' solicitors in respect of the extraction of the Extracted Order.

65 In the premises, I am dismissing the defendant's application. I will hear the parties on costs.