Case Note

RECENT DEVELOPMENTS IN THE OFFER TO SETTLE REGIME IN SINGAPORE

Accepting an Offer to Settle before Damages are Assessed and the *Contra Proferentem* Rule

Ong & Ong Pte Ltd v Fairview Developments Pte Ltd **[2014] 2 SLR 1285**

Under O 22A r 3(5) of Singapore's Rules of Court (Cap 322, R 5, 2014 Rev Ed), 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". But can an offeree accept an offer to settle even after the merits of the case have been adjudicated and appealed upon, on the basis that damages have yet to be assessed? Should it be able to? A recent Singapore High Court decision on this issue is analysed in this case note.

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I. Introduction

1 It is widely accepted that the *raison d'être* of settlement is to terminate litigation as soon as possible so as to save costs and time for the litigants and the courts.

2 But what happens when a party makes an offer to settle ("OTS") without specifying a time for acceptance and fails to withdraw it even after the case has gone to trial and on appeal – can the other party, in anticipation that the damages to be assessed will probably far exceed the amount that would have been payable under the OTS, choose to accept the OTS?

3 This was, in essence, the central and unprecedented question that confronted the Singapore High Court in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd*.[1] The court held that even though there appeared to be a lacuna in the relevant procedural rules, in the light of the purpose upon which the OTS regime was founded and the fact that the offeror's offer had some ambiguity, the offeree could validly accept the OTS even though the appeal had been heard. In reaching its decision, the court also made important observations on the applicability of the *contra proferentem* rule when drafting and interpreting offers to settle.[2]

II. Context

4 It may be helpful at this point to briefly establish the background to the OTS regime. In Singapore, O 22A of the Rules of Court[3] ("ROC"), which was introduced in the 1990s, sets out fairly exhaustively the rules for its OTS regime. This regime, which effectively replaced the antiquated and inflexible payment into court regime under the contiguous O 22 of the ROC as well as the use of *Calderbank*[4] offers under the common law,[5] was designed to "spur the parties to bring

1 [2014] 2 SLR 1285. To be clear, there have been other local decisions that addressed the question of when an offer to settle is considered withdrawn (see, *eg*, *Tanner Sheridan Wayne v NRG Engineering Pte Ltd* [2014] 1 SLR 475), but not the question on when the offer can no longer be accepted. See also Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 70; *Singapore Civil Procedure* vol 1 (G P Selvam ed) (Sweet & Maxwell, 2013) at p 426.

2 As will be seen, this case note may also be of interest to jurisdictions that have identical offer to settlement regimes as well as jurisdictions that are moving away from traditional settlement regimes that Singapore's offer to settle regime had sought to replace. More broadly speaking, it should also be noted that in the last few years, Singapore has witnessed a discernible push towards greater settlement of disputes, principally through mediation. For instance, between 2005 and 2013, mediation figures have jumped fourfold to almost 200 cases a year at the Singapore Mediation Centre – a good number of cases having been referred to it by the courts. Further, in 2013 the Chief Justice advocated for an international mediation centre to be set up in Singapore, and in 2014, the Ministry of Law announced that there will be a new Mediation Act to strengthen and support the framework for international mediation. The Singapore International Commercial Court is also expected to be launched some time in 2014 or 2015, though its exact jurisdiction and powers have yet to be determined.

3 Cap 322, R 5, 2014 Rev Ed. It should be noted that this case was interpreting the previous edition of the Rules of Court, but changes made to the latest edition of the Rules would have had no bearing on this case. It should also be noted that the Rules apply to civil proceedings in both the State Courts and Supreme Court of Singapore.

4 This was named after the English case of *Calderbank v Calderbank* [1976] Fam 93.

5 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [24]–[39] and [51]. See also Chen Siyuan & Eunice Chua, *International Encyclopaedia of Laws: Civil Procedure (Singapore)* (Wolters Kluwer Law & Business, 2014) at pp 319–320.

litigation to an expeditious end without judgment, and thus to save costs and judicious time"[6] by introducing greater clarity and flexibility in the ways in which parties could arrange for settlement of claims.[7]

5 The OTS regime, generally considered a useful innovation in civil justice in various common law jurisdictions,[8] finds its genesis in Canadian provincial and Australian state legislation, though some of those laws have since changed in whole or in part.[9] Suffice to say the principal way in which the OTS regime induces and promotes settlement of claims is that a party who rejects a reasonable offer from the other party will, upon being awarded judgment less favourable than the terms of the OTS, be penalised with certain adverse costs orders, while the other party will correspondingly be rewarded with such costs.[10]

6 But as with any regime that enhances party autonomy with a view to facilitating non-judicial means of dispute resolution, there can be certain gaps in the rules that require judicial intervention and clarification.

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6 *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 at [37]. See also *The Endurance 1* [1998] 3 SLR(R) 970 at [41]:

> The impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early (that is, when the offer is served) and careful consideration of the merits of the case. [emphasis by Court of Appeal omitted]

7 Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at pp 63–69. However, under O 22A r 9(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), the court retains residuary discretion as regards the extent of costs payable. This is but part of its broader power as expressed in O 59 r 2(1). Order 22A r 12 also states that:

> Without prejudice to Rules 9 and 10, the Court, in exercising its discretion with respect to costs, may take into account any offer to settle, the date the offer was made, the terms of the offer and the extent to which the plaintiff's judgment is more favourable than the terms of the offer to settle.

8 Goh Yihan & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 SAcLJ 176 at 214; Pablo Cortés, "A Comparative Review of Offers to Settle – Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?" (2013) 32(1) CJQ 42 at 42–43.

9 *Singapore Civil Procedure Volume 1* (G P Selvam ed) (Sweet & Maxwell, 2013) at p 421.

10 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [48]. The main benefits of the offer to settle regime as compared to the payment into court regime are that: first, it is not limited to monetary claims; secondly, it is available to defendants and defendants to counterclaims as well; thirdly, it permits the plaintiff to take the initiative in the settlement process; fourthly, the party making the offer does not need to have the money ready immediately; fifthly, money need not be paid into court; and finally, the party making the offer has greater freedom in formulating the offer.

7 As will be seen in this case, at issue was the appropriate construction to be given to a supposedly unclear OTS (there was no expiry date for acceptance) combined with a not unusual scenario (the proceedings had been bifurcated into separate hearings for liability and damages); yet this seemingly innocuous combination yielded an uncertain implication in this particular context, for O 22A r 3(5) of the ROC only states that an OTS that is not withdrawn may be accepted at any time before the court disposes of the matter in respect of which the OTS was made, but nothing else in O 22A or the ROC defines what constitutes a matter as having been disposed of or states how else an OTS can no longer be accepted by the offeree.

III. Facts

8 Turning then to the facts of the case, the plaintiff, an architectural firm, had sued the defendant, a property developer, for $10.1m in May 2011. The claim was for fees and loss of prospective fees for a project. The defendant counterclaimed for $23.4m for loss suffered as a result of the plaintiff's delay in providing a letter of release after the defendant had terminated the plaintiff's services.

9 In July 2011, the plaintiff made an OTS for $2.6m in full and final settlement of the claim and the counterclaim; the OTS also spelt out different costs and interest consequences depending on whether the offer was accepted before or after 14 days from the date of the offer.[11]

11 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [6]. For convenience, the letter in full states:

> The Plaintiff offers to fully and finally settle all of the Plaintiff's claims, all of the Defendant's counterclaims and all matters arising in this Suit on the following terms:
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> (1) The Defendant is to pay to the Plaintiff the sum of S$2,588,666;
>
> (2) If this Offer to Settle is accepted by the Defendant no later than 14 days from today, *ie* by 11 August 2011:
>
> (a) Parties will bear their own legal costs from the date of commencement of these proceedings on 20 May 2011 to the date of
>
> (b) The Settlement Sum shall be inclusive of interest accrued from the date of
>
> (3) If this Offer to Settle is accepted by the Defendant after 11 August 2011:
>
> (a) The Defendant is to pay to the Plaintiff the Plaintiff's costs:
>
> (i) on a standard basis, from the date of commencement of these proceedings on 20 May 2011 to 11 August 2011,
>
> (ii) on an indemnity basis, from 12 August 2011 up to the date of the Defendant's notice of acceptance (if any);
>
> (b) The Defendant is to pay to the Plaintiff interest at 1.5% *per* annum, for the period from 20 May 2011 up to the date of payment;

(*cont'd on the next page*)

The defendant did not respond, and no other OTS was ever made by either party (nor was the plaintiff's OTS amended in any way).

10 The dispute eventually went to trial, and in March 2013, the trial judge allowed part of the plaintiff's claim and dismissed the defendant's counterclaim, with damages to be assessed in a separate hearing as previously ordered and accepted by the parties.[12] The plaintiff confirmed to the defendant that the July 2011 OTS nonetheless remained open for acceptance.[13]

11 In April 2013, a few days before the expiry of the period to file a notice of appeal, the defendant wrote to the plaintiff to ask if they were "prepared to accept the outcome of the matter without taking the matter further to the Court of Appeal".[14] The plaintiff did not respond, but both parties proceeded to appeal against the decision regarding the extent of the defendant's liability (the defendant, however, did not appeal against the counterclaim).

12 The Court of Appeal – the apex court in Singapore – allowed the plaintiff's appeal on 24 September 2013, and later that same day, the defendant informed the plaintiff that the July 2011 OTS would be accepted via a notice of acceptance ("NOA").[15] The plaintiff, however, replied that the OTS was no longer open for acceptance as the court had already ruled on the dispute, notwithstanding the fact that damages had yet to be assessed in the separate hearing.[16] The defendant then applied to the High Court for a declaration that the acceptance of the OTS was valid.

IV. Decision of the court

13 The plaintiff mounted three arguments as to why the declaration sought by the defendant should not be granted: first, the defendant's NOA did not mirror the terms in the plaintiff's OTS as the OTS contained terms pertaining to the settlement of the counterclaim and

(4) Costs to be paid pursuant to this Offer to Settle, to be taxed if not agreed; and

(5) The Plaintiff is to discontinue its claims against the Defendant, and the Defendant is to discontinue its counterclaim against the Plaintiff, within 7 days of payment of the sums payable pursuant to this Offer to Settle.

12 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [7].

13 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [12]. It should be noted that O 22A r 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) states that an offer to settle may, with one day's notice, be withdrawn at any time 14 days from the date of service of the offer on the party.

14 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [8].

15 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [9].

16 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [9].

discontinuance of the counterclaim, but the NOA did not; secondly, the full set of terms in the OTS was no longer capable of being accepted as both the claim and counterclaim had been disposed of by the court, notwithstanding the bifurcation of the proceedings into the determination of liability and assessment of damages phases; and thirdly, the defendant's conduct was contrary to the spirit of the OTS regime as the acceptance was served very late in the proceedings (two years after the OTS had been made).[17]

14 The defendant, on the other hand, essentially argued that at the time the NOA was made, the court had not yet disposed of the matter in respect of which the OTS was made, as only the issue of liability had been disposed of; the issue of damages, which remained to be assessed at that point, had not.[18] In other words, its acceptance of the OTS was in accordance with O 22A r 3(5) of the ROC.

15 The court agreed with the defendant and held that the OTS had not expired on 24 September 2013 (the date of the NOA), and accordingly, the OTS was validly accepted by the defendant on that date.[19] Prefatorily, it noted that acceptances of offers to settle must be done without any amendment and condition, and courts would look at the substance of the offer and acceptance rather than the strict form when deciding whether the offer and acceptance is valid.[20]

16 The court then traced the origins of the OTS regime, highlighting first the limitations of the payment into court regime under O 22 of the ROC and, subsequently, the use of *Calderbank* offers under the common law.[21] Turning to the OTS regime *per se*, the court noted that reforms to the OTS regimes in Canada and Australia over the years:[22]

> … had a common purpose of encouraging settlement … the imposition of certain cost consequences effectively encouraged settlement by providing parties with a tangible incentive to offer to settle and to treat offers seriously.

17 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [16]–[22].
18 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [11]–[14].
19 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [57].
20 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [16]–[18]. The court cited and accepted the propositions in *Fuyawa Enterprise Pte Ltd v Lim Han Tee trading as Wifu Marketing* [1996] SGHC 300 and *Re Desanto et al v Cretzman et al* (1986) CanLII 2663.
21 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [24]–[39].
22 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [48].

It further observed that the OTS regime is meant to save even more legal costs and judicial time than the payment into court regime and the *Calderbank* offer.[23]

17 But the first specific reason for the court's holding was that there was unequal pressure on the parties. Specifically:[24]

> … the plaintiff could be entitled to costs on an indemnity basis from [the date of the offer] … had the defendant not accepted the OTS, it would still be liable for indemnity costs for the proceedings to follow, which would be the assessment of damages. The plaintiff, on the other hand, had no such pressure. It had, at a very early stage, been prepared to accept the sum in the OTS.

18 The second reason was that the plaintiff "was in full control of the situation. It was open to the plaintiff (but not the defendant) to withdraw the OTS at any time subject to giving one day's notice".[25]

19 The third reason was that as the terms of the OTS were the plaintiff's, it was "open to the plaintiff to limit the period of validity or phrase it in any fashion but it did not do so".[26]

20 The fourth reason was that:[27]

> … the court should come down in favour of clear drafting in terms of unambiguous offers and expiry dates. These factors are entirely within the control of the offeror … Any ambiguity will be interpreted *contra proferentem*. To hold otherwise … would be to arm the plaintiff with a double edged sword against the defendant.

21 The final reason was that while "the OTS in this case had spurred parties to further litigate on the offer itself … favouring clear and certain terms in an offer to settle can only accord with the policy of encouraging settlement".[28]

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23 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [49].

24 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [52]. Order 22A r 9(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) states:

> Where an offer to settle made by a plaintiff –
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> (*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
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> (*b*) is not accepted by the defendant, and the plaintiff obtains a judgment not less favourable than the terms of the offer to settle,
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> the plaintiff is entitled to costs on the standard basis to the date an offer to settle was served and costs on the indemnity basis from that date, unless the Court orders otherwise.

25 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [52].

26 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [52].

27 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [54].

28 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [55].

22 As regards the contention that the defendant's conduct was contrary to the OTS regime, the court refuted this by saying that:[29]

> … [i]f a party chose to accept near the conclusion of the suit it is because that party has deemed it to be in its best interest to do so … the defendant in this case had elected to pay indemnity costs up to the date of acceptance even when the possibility was still there that he may only incur standard costs should the final award be less favourable than the offer.

V. Evaluation of the decision

23 It is rather surprising that the court never directly addressed the question that was common and central to both the plaintiff and the defendant: that is, whether the court was considered to have disposed of the matter in respect of which the OTS was made within the meaning of O 22A r 3(5) of the ROC, when at the material time only the issue of liability had been determined but not the amount of damages. Given that bifurcations of the hearing on liability and damages have been described as "readily" having been granted in the Singapore courts, this would have been an important question.[30] Just as surprising is the fact that greater recourse could have been had to two of the four pieces of legislation that had inspired O 22A of the ROC – these pieces of legislation having been briefly referred to by the court itself in its judgment when it was tracing the origins of O 22A.[31]

24 Specifically, the language of "dispos[ing]" of the claim is also used in r 49.04(4) of the Ontario Rules of Civil Procedure,[32] while r 26.03(4) of the Victoria Supreme Court (General Civil Procedure Rules)[33] similarly permits an offer of compromise to be accepted before "verdict or judgment in respect of the claim to which the offer relates".

25 Parenthetically, though it did not serve as inspiration for the OTS regime in Singapore, Pt 36 of the English Civil Procedure Rules[34] may benefit from the answer to the above question as well, given that it defines the "relevant period", in the absence of any specified time, to mean "the period up to end of the trial or such other period as the court has determined".[35] Thus, in a situation where an order of bifurcation of

29 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [56].
30 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [64].
31 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [40].
32 Courts of Justice Act (RRO 1990, Rg 194).
33 SR No 148/2005.
34 For a modern account of Pt 36 of the English Civil Procedure Rules, see Stuart Sime, "Offers to Settle: Incentive, Coercion, Clarity" (2013) 32(2) CJQ 182.
35 There are, as yet, no known English cases that have considered the precise meaning of this phrase.

proceedings has been made, the issue may arise as to whether the "trial" referred to in r 36.3(1)(c)(ii) refers to a trial on liability or quantum, or both.

26 Returning to the case at hand, although the court did not directly address the aforementioned question, in concluding that the OTS was validly accepted on the facts of the case, the court must have taken the view that the matter in respect of which the OTS was made had not been disposed of by virtue of interlocutory judgment with damages to be assessed being obtained. Otherwise, the OTS could no longer have been found to be open for acceptance.

27 However, in view of the underlying rationale of the OTS as elucidated by the court – that of encouraging settlement by using costs consequences to incentivise parties to accept a reasonable offer, and to save costs and time for all parties concerned – the court could have taken a purposive interpretation[36] of the phrase to require complete disposal of a matter, including a final determination on the amount of damages, on the basis that before complete disposal in this matter it still remained possible to reap the benefits of settlement.

28 Moreover, if the court's ruling is correct, it must mean that it was even theoretically possible for the defendant to have waited for the hearing of the assessment of damages to be over to accept the OTS (assuming the OTS was not withdrawn by the plaintiff by then), since the decision on the assessment of damages could have been appealed against as well,[37] *ie*, the matter would still not have been fully disposed of for the purposes of O 22A r 3(5) of the ROC.

29 But instead of engaging in a fuller exercise of statutory interpretation as it was statutorily mandated to, the court preferred to resolve the dispute mainly by construing the terms of the offer, based on a general application of the *contra proferentem* rule under contract law.[38] Yet it could, and should, have tested the limits of the proposition it was making.

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36 In Singapore, a purposive interpretation of legislation is mandated to prevail over any other form of statutory interpretation: s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed). The need for a purposive interpretation of civil procedure legislation in Singapore was recently reinforced by the Court of Appeal: see Chen Siyuan & Eunice Chua, "The Right to Appeal against a Decision Made on an Interlocutory Application: The Immediate Aftermaths of the 2010 Amendments" (2013) 25(2) SAcLJ 424 at 435–439.

37 See s 34 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

38 There is, of course, precedent for recourse to general contract law where O 22A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) is silent, such as *S&E Tech Pte Ltd v Western Electric Pacific Ltd* [2006] 2 SLR(R) 7 and *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096.

30 For instance, as mentioned, would accepting the OTS even after an appeal against the assessment of damages was made have been possible, and if so, be in line with the principles and purposes of the OTS regime? What is the reason that the offeree can and should be permitted to wait till the latest stage possible in the proceedings to accept the offer, notwithstanding the fact that the offeror was at liberty to withdraw the offer? Would the same reasoning apply if an offeree-defendant with deep pockets chooses to draw out proceedings in the hope of a financially- or time-constrained offeror-plaintiff succumbing to the costs of litigation and giving up before the final disposal of the matter, despite a very reasonable offer being placed on the table by the offeror-plaintiff? By focusing, albeit not exclusively, on party autonomy and general contractual principles, the court may have failed to consider the said implications of its ruling.

31 In an Ontario Superior Court of Justice decision, *Grass v Women's College Hospital*,[39] some of these implications were considered by the court in deciding the issue of costs. This case involved a situation where there was a first trial in 1998, judgment rendered in 1999, a new trial ordered by the Court of Appeal in 2001, and leave to appeal to the Supreme Court of Canada dismissed with costs in 2002. The second trial was held in 2003. Both the first and second trials focused on liability as the parties had settled damages at Canadian $1.3m before the first trial. An OTS had been made by the plaintiffs in 1998 for the sum of $1m before the first trial; in other words, it was prepared to accept $300,000 less than the agreed upon damages.

32 The plaintiffs argued that their OTS was still open for acceptance as it was resurrected and continued in force after the Court of Appeal overturned the first trial. The court disagreed, stating that such an interpretation would be inconsistent with the plain reading and purpose of r 49.04(4) of the Ontario Rules of Civil Procedure and that, further, such an interpretation had "the potential to cause mischief, particularly when further proceedings have added to the cost of the litigation".[40] This case, however, was not brought to the attention of the Singapore court although the considerations of the court, including the risk of abuse and the escalation of costs, would have been pertinent.

33 Notably, the OTS provisions in the other two pieces of legislation that Singapore's OTS regime was based on (and also referred

39 (2004) CanLII 19636. The only other known Ontario decisions that have interpreted the meaning of disposal of the claim are *Boozari v Wallace* (2007) CanLII 12698 and *Gardiner v Mulder* (2007) CanLII 15473, but they are not relevant to the discussion at hand. The analogue in Australian (Victorian) jurisprudence is *Parish v Wu (No 2)* [2010] VSC 64, but it too is not relevant to the discussion at hand.

40 *Grass v Women's College Hospital* (2004) CanLII 19636 at [21].

to by the court) have undergone significant change since enactment such that they will not encounter the issue identified above.

34 The OTS provisions in the New South Wales Supreme Court Rules[41] have been replaced with Division 4 of the Uniform Civil Procedure Rules, which requires the OTS to "specify the period of time within which the offer is open for acceptance" pursuant to r 20.26(2)(f) and stipulates conditions for the closing date for acceptance of an offer under r 20.26(5).

35 The OTS provisions in the British Columbia Supreme Court Civil Rules[42] are structured even more liberally, without specifying any conditions for the making of or acceptance of an OTS. Instead, the court is given a broad discretion as to costs not by reference to the ultimate judgment of the court being more or less favourable than the OTS, but whether when the offer was open for acceptance, it would have been reasonable to accept it. Rule 9(1)(2) does specify, however, that the fact that:

> … an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined.

36 It can be said that r 9(1)(2) of the British Columbia Supreme Court Civil Rules implicitly suggests that an offer to settle may be open for acceptance as long as some issue in the proceeding, other than costs, remains outstanding. However, this reading is not consistent with the overall structure of the OTS provisions in the legislation, which is based on multi-factoral considerations, such as: "whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date"; "the relationship between the terms of settlement offered and the final judgment of the court"; and "the relative financial circumstances of the parties".[43]

37 In addition, similar provisions as to non-disclosure until determination of all issues as to liability and relief also exist in the OTS regimes of Ontario, New South Wales, Victoria and England, the purpose of which is to ensure that the trial court is not influenced in any way by the OTS.[44]

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41 Supreme Court Act 1970 No 52, Supreme Court Rules, Pt 22 r 2.

42 British Columbia Supreme Court Civil Rules (Court Rules Act, BC Rg 168/2009) r 9-1.

43 British Columbia Supreme Court Civil Rules (Court Rules Act, BC Rg 168/2009) rr 9-1(6)(a)–9-1(6)(c).

44 See r 49.06(2) of the Ontario Rules of Civil Procedure (RRO 1990, Rg 194); r 20.30(3)(c) of the New South Wales Uniform Civil Procedure Rules 2005; (*cont'd on the next page*)

38 It is observed that the court's approach in this case seems to be more appropriate to the OTS regime in British Columbia given that the reasons the court gave for its decision essentially boiled down to it being reasonable for the defendant to have accepted the OTS at such a late stage after the determination of liability. This was because the terms of the OTS, which were entirely in the plaintiff's control, permitted this and there was greater pressure on the defendant than the plaintiff because of the costs consequences that would be visited on the defendant given the early stage at which the OTS was made.

39 Although it is submitted that the court's reliance on the factors of control and pressure arising from potential costs consequences is questionable given that these are the very essence of the incentive structure established by the OTS regime, which contemplates one party making an offer to the other at as early a stage as possible in order to reap the maximum benefits from making an OTS, it is recognised that the terms of the OTS regime in the ROC as well as in other jurisdictions referred to earlier are framed broadly enough to give the court the discretion to decide in this manner. This is because there is no fixed form for the OTS to take,[45] which provides maximum flexibility to the parties to craft an offer that is reasonable and suitable to the particular circumstances of the case.

40 Parties should be aware, though, of the stance the Singapore court has taken to construe any ambiguous terms against the party who had made the offer. The factors cited by the court of control, unequal pressure, responsibility for the terms, and the policy of promoting certainty will apply in every case where an OTS is made at an early stage, hence it may be preferable for the offeror to specify an actual date or event for the determination of an OTS rather than leave it open for acceptance indefinitely.

41 It is also noteworthy that although the court's decision will mean that the sum to be paid by the plaintiff to the defendant is pegged to the amount stated in the OTS and that the plaintiff will generally be entitled to costs on an indemnity basis from the date the OTS was made,

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reg 26.05(2) of the Victoria Supreme Court (General Civil Procedure) Rules 2005 (SR No 148/2005); and r 36.13(2) of the English Civil Procedure Rules 1998 (SI 1998 No 3132).

45 See also O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed):

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

For a short discussion on the meaning of "inherent power" in the context of Singapore, see Chen Siyuan, "Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers?" (2013) 17(4) E&P 367.

this is not the end of the matter. On the facts of this case, there is still room for negotiation between the parties as the OTS specifies for costs to be taxed if not agreed. Anecdotally, this appears to be a common term included in many OTS. It would be helpful if an empirical study could be conducted to determine how often parties are able to agree on costs under the OTS regime in Singapore. If parties are unable to agree on costs, the matter will then proceed for taxation and the court will still be able to consider the lateness of the acceptance of the offer in exercising its overriding discretion as to costs.

42 In addition, although the timing of acceptance of the offer is not explicitly stipulated as a factor for the court's consideration under O 22A r 9(5) of the ROC, this provision is not exhaustive. In *Dennis Harte v Dr Tan Hun Hoe*,[46] the Singapore High Court took into account the fact that a revised offer was made on the day following the commencement of the trial in exercising its discretion to award costs. By way of analogy, the timing of acceptance of the offer (as opposed to timing of the offer) can be a factor the court will consider when exercising the discretion to award costs. The courts ought to consider all the circumstances of the case and depart from the usual costs consequences stipulated in the ROC if it would be just to do so.

VI. Conclusion

43 The plaintiff has since appealed against this decision after the trial judge granted leave to appeal as "the matter concerned a novel point of law",[47] and it will be interesting to see if the Court of Appeal upholds the decision or allows the appeal on this particular point, as this is likely to have significant implications for how parties draft offers to settle in future, at least in terms of the explicitness of the expiration date of the offer.[48]

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46 [2000] SGHC 248.

47 *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 at [2].

48 Parliament may, in turn, want to consider amending the legislation if it is of the view that there should be limits imposed on when an offer expires if not stated as a term in the offer.