

Singapore Court of Appeal Clarifies The “Offer To Settle” Regime

Introduction

1. The decision of the Singapore Court of Appeal in Ong & Ong Pte Ltd v Fairview Developments Pte Ltd [2015] SGCA 05 provides important clarification on the “Offer to Settle” regime under O 22A of the Rules of Court:
 - (1) So long as there is an outstanding matter not disposed of which is within the scope of an offer to settle, the offer to settle remains open for acceptance; and
 - (2) The fact that an offer to settle has been validly accepted by the offeree does not mean that the Court would automatically enforce it. The Court has a discretion.

The Issues before the Court of Appeal

2. The Respondent had engaged the services of the Appellant, an architectural firm. The Respondent terminated the services of the Appellant, and the Appellant commenced legal proceedings against the Respondent for (a) the loss of prospective fees for architectural work not carried out and (b) fees due to the Appellant for services already performed.
3. The Respondent filed a counterclaim against the Appellant for losses and damages.
4. Some two months after the commencement of legal proceedings, the Appellant made an offer to settle (“OTS”) to settle the Appellant’s claims and the Respondent’s counterclaim.
5. The trial was bifurcated, and the Appellant obtained interlocutory judgment for their claim for services already performed. The Respondent failed in their counterclaim at the trial.
6. The Respondent purported to accept the Appellant’s OTS immediately after the Appellant had succeeded in their appeal for their further claim for loss of prospective fees (with

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For any queries relating to this article, please contact the following persons:

Christopher Tan
Partner – Litigation and Dispute Resolution
DID: 6557 4618
christophertan@leenlee.com.sg

Authors:

Christopher Tan
(with thanks to Denise Gan)

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damages to be assessed at a later stage).

7. The main issues before the Court of Appeal were:
 - (1) Whether the OTS lapsed when the Appellant succeeded on their appeal for their claim for loss of prospective fees;
 - (2) If the OTS did not lapse, did the Respondent validly accept the OTS; and
 - (3) If there was a valid acceptance of the OTS, is there any reason why the Court should not incorporate the terms of the accepted OTS as a judgment.

The Decision and Reasoning of the Court of Appeal

8. The Court of Appeal ultimately decided that the OTS had not lapsed and was validly accepted by the Respondent. The Court also found no reason to refuse enforcement of the accepted OTS.
9. The Court analysed the essential elements of the OTS regime under O 22A of the Rules of Court, and emphasized that the policy underlying the regime :

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

10. In considering the first issue, whether the OTS had lapsed, the Court pointed out that contractual principles governing offer and acceptance are not to be applied to the O 22A regime. The rules in O 22A clearly modified some of the most basic principles governing the formation of a contract. Instead, the rules encapsulate a unique arrangement which departs significantly from the manner in which a contract comes into being under normal contractual principles.

11. The Court made reference to the statutory OTS regime in England, as well as English cases, and concluded that the OTS regime in O 22A must be interpreted according to its own terms and not according to contractual principles.
12. The interpretation of the “at any time before the Court disposes of the matter” in O 22A r 3 was at the heart of the first issue. The Court preferred the interpretation that so long as there is an outstanding matter not disposed of which is within the scope of the OTS, the OTS remains open for acceptance. The OTS on the facts therefore did not lapse.
13. The Court also decided the second issue in the Respondent’s favour – the OTS had been properly accepted, although the acceptance did not mention the Respondent’s counterclaim. By that time the Respondent accepted the OTS, the counterclaim was already dismissed, and dead.

The Court’s Discretion

14. In considering the third issue of whether to enforce the accepted OTS, the Court examined case law from Ontario and New South Wales, the Court stated that in exercising the discretion (whether to enforce), the Court would have regard to ordinary contractual principles, but also to principles of fairness and justice.
15. The main points for consideration in relation to the Court’s discretion were:
 - (a) Was there a sufficient change of circumstances after the OTS was made so that the Appellant should have been given an opportunity to withdraw or modify his offer without being held to it?
 - (b) Did the Respondent engage in any unfair conduct or exploit the Appellant's mistake?
 - (c) Would the enforcement of the OTS cause any injustice such that the courts ought not to give effect to it?
16. In considering the question of the change of circumstances, the Court was of the view that there was room for the application

of the doctrine of fundamental change, namely a fundamental change in circumstances occurring between the time the offer was made and the time the offer was purportedly accepted, would cause an offer to lapse.

17. In the present case however, the Court was of the view that there was no fundamental change in circumstances. The Appellant had known that the counterclaim was dismissed at the trial, and the time for an appeal against the dismissal of the counterclaim had lapsed. But the Appellant did not take any steps to withdraw the OTS. This silence (inaction) on the part of the Appellant meant that the Appellant did not regard the dismissal of the counterclaim as fundamental to the OTS.
18. The Court also found (on the facts) that the Respondent did not engage in any unfair conduct. It was material that under the O 22A regime, the Appellant could not have immediately withdrawn the OTS the moment their appeal (for loss of prospective fees) succeeded. The Appellant was required to give one day's notice before they could withdraw the OTS, during which time, the Respondent could have accepted the OTS. The Respondent's acceptance of the OTS immediately after the Appellant's appeal succeeded could therefore not have been regarded as exploitative or unfair.
19. The Court finally also decided that permitting enforcement of the accepted OTS would not be unjust, on the facts of the case.