

Offer to settle remains valid for acceptance

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The Singapore Court of Appeal has clarified that an Offer to Settle remains valid for acceptance as long as there is an outstanding matter within the scope of the Offer to Settle. This is regardless if any other matters addressed by the Offer to Settle have been resolved.

Facts

This was decided by the Court of Appeal in the recent case of *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2015] SGCA 5.

Ong & Ong, an architectural firm, was engaged by property developer, Fairview Developments. Ong & Ong's services were terminated.

Ong & Ong brought a claim against Fairview for the loss of prospective fees for work not carried out ("Prospective Fees") and for payment of fees for work already carried out ("Incurred Fees"). The Prospective Fees and Incurred Fees claimed were about S\$5.6m and S\$4.5m respectively.

Fairview brought a counterclaim against Ong & Ong for increased development charges payable by Fairview on account of delay by Ong & Ong ("Delay Loss"). The Delay Loss counterclaimed was about S\$23.4m.

Two months after the suit was commenced, Ong & Ong served an Offer to Settle ("OTS") to settle both the claim and the counterclaim by the payment of about S\$2.6m by Fairview to Ong & Ong. It also provided, among other things, that both the claim and counterclaim were to be discontinued after payment.

Ong & Ong successfully applied to have the question of liability determined first. After a trial, the Court granted interlocutory judgment in favour of Ong & Ong for the Incurred Fees. The Court dismissed both the claim for Prospective Fees and the counterclaim for Delay Loss.

Ong & Ong appealed against the dismissal of the claim for Prospective Fees. Fairview appealed against the judgment for Incurred Fees; no appeal was brought in respect of the Delay Loss.

The Court of Appeal heard the cross-appeals and allowed Ong & Ong's appeal but dismissed Fairview's appeal. In other words, Ong & Ong was entitled to both Prospective Fees and Incurred Fees.

The same day, Fairview accepted the OTS to settle the claim by paying Ong & Ong S\$2.6m and provided, among other things, that the claim be discontinued after payment. Reference to the counterclaim was conspicuously absent.

A dispute arose between Ong & Ong and Fairview whether the OTS (which dealt with both the claim and counterclaim) could be validly accepted by Fairview when the counterclaim had been disposed of.

Decision

The Court of Appeal decided that the OTS did not lapse and was validly accepted by Fairview.

The Court of Appeal considered that the words of Order 22A of the Rules of Court which sets out the OTS regime were crucial to determine whether an OTS had lapsed. The Court of Appeal held that as it is provided that an OTS "may be accepted at any time before the Court disposes of the matter in respect of which it is made", this meant 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, even if some matters had been disposed of.

The Court of Appeal reasoned that the purpose of the regime is to encourage the settlement of disputes by agreement between parties to save costs and judicial time. Therefore, the court should be slow to find that an OTS has lapsed, especially when the OTS can still fulfil the purpose of bringing the litigation to an end without the court having to give judgment.

The Court of Appeal also did not think that the circumstances had been fundamentally changed such that the OTS was no longer binding because Ong & Ong knew that the counterclaim had been dismissed and could have withdrawn the OTS if it was a fundamental basis to the OTS. Finally, the Court of Appeal did not consider Fairview's acceptance of the OTS after the dismissal of its appeal to be exploitative or unfair. Accordingly, the Court of Appeal did not exercise its discretion to refuse enforcement of the OTS.

Comment

Parties who make an OTS to resolve multiple claims and/or counterclaims should take care to review the terms of the OTS when there is a partial resolution of the dispute. For example, where a contractor mounts numerous variation claims against a developer and some of these claims are resolved by agreement, the OTS which was issued when all claims were disputed may be validly accepted by the contractor despite the resolution of some of these claims.

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