IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 26

Court of Appeal / Civil Appeal No 45 of 2022

Between

Owner of the vessel
"NAVIGATOR ARIES"

… *Appellant*

And

Owner of the vessel
"LEO PERDANA"

… *Respondent*

In the matter of Admiralty in Rem No 170 of 2016

Admiralty Action in rem against:

the vessel "LEO PERDANA"

Between

Owner of the vessel
"NAVIGATOR ARIES"

… *Plaintiff*

And

Owner of the vessel
"LEO PERDANA"

… *Defendant*

In the matter of Admiralty in Rem No 204 of 2016

Admiralty Action in rem against:

the vessel "NAVIGATOR ARIES"

Between

Owner of the vessel
"LEO PERDANA"

… *Plaintiff*

And

Owner of the vessel
"NAVIGATOR ARIES"

… *Defendant*

JUDGMENT

[Civil Procedure — Costs]

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The "Navigator Aries"

[2023] SGCA 26

Court of Appeal — Civil Appeal No 45 of 2022
Judith Prakash JCA, Steven Chong JCA and Belinda Ang Saw Ean JCA
21 July 2023

21 September 2023 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 All court actions and applications have costs consequences. Typically, costs awards are not complex and would generally follow the event. However, in cases where the outcome is split between the parties, some adjustments may be made to reflect the parties' relative success.

2 Costs orders assume a more challenging dimension where there is a valid offer to settle or a Calderbank offer. In the case before us, both were present. One party made an offer to settle before the trial while the other party made a Calderbank offer prior to the appeal being heard.

3 This decision will explain how each of these two competing offers would impact on the eventual costs orders. In particular, we will examine whether a Calderbank offer which is "as favourable" as the judgment obtained should be treated any differently from an offer which proves to be "more

favourable". This question arises in relation to the second of the three sets of costs that this judgment addresses:

(a) the costs of the consolidated action below, HC/ADM 170/2016 (which was consolidated with HC/ADM 204/2016) ("the trial");

(b) the costs of the appeal therefrom, CA/CA 45/2022 ("CA 45" or "the appeal"); and

(c) the costs of the appellant's application to transfer the appeal from the Appellate Division ("AD") to the Court of Appeal ("CA"), CA/OA 13/2022 ("OA 13" or "the transfer application").

Procedural history

4 The background facts for this dispute are set out in *The "Navigator Aries"* [2023] SGCA 20 at [8]–[38] (the "Judgment").

5 In brief, on 28 June 2015, a collision occurred in the Surabaya Strait between the appellant's vessel, the *Navigator Aries* (the "*NA*"), and the respondent's vessel, the *Leo Perdana* (the "*LP*").

6 On 18 August 2016 and 9 September 2016, the appellant and the respondent commenced their respective admiralty actions in the High Court for the apportionment of liability for the collision. The actions were consolidated on 11 November 2016.

7 On 16 May 2018, the respondent served an offer to settle on the appellant. It proposed apportioning liability at 60:40 in the respondent's favour, and for the costs of the trial to follow a similar apportionment.

8 On 13 September 2021, the High Court judge (the "Judge") delivered an oral judgment and apportioned liability at 70:30 in the respondent's favour. This meant that the respondent obtained a judgment that was more favourable than its offer to settle. The offer to settle had not been withdrawn at that point.

9 On 28 September 2021, the Judge made costs orders based on an apportionment similar to the apportionment of liability. These orders were extracted as HC/ORC 5829/2021 ("ORC 5829"):

> It is ordered that:
>
> 1. The Plaintiffs [*ie*, the appellant in the appeal] shall pay to the Defendants [*ie*, the respondent in the appeal] costs to be taxed, if not agreed, as follows:
>
> > (a) The Plaintiffs shall pay 70% of the Defendants' costs of the action in Admiralty in Rem No 204 of 2016 ("ADM 204") on the standard basis from the date of the issue of the writ in ADM 204 on 9 September 2016 to the date when these actions were consolidated on 11 November 2016;
> >
> > (b) The Plaintiffs shall pay 70% of the Defendants' costs of the Consolidated Action on the standard basis from 12 November 2016 to the date of the service of the Defendants' Offer to Settle on the Plaintiffs on 16 May 2018; and
> >
> > (c) The Plaintiffs shall pay 70% of the Defendants' costs of the Consolidated Action on the indemnity basis from 17 May 2018 until the date when [the trial judgment] was delivered in the Consolidated Action on 13 September 2021.
>
> 2. The Defendants shall pay to the Plaintiffs costs to be taxed, if not agreed, as follows:
>
> > (a) The Defendants shall pay 30% of the Plaintiffs' costs of the action in Admiralty in Rem No 170 of 2016 ("ADM 170") on the standard basis from the date of the issue of the writ in ADM 170 on 18 August 2016 to the date when these actions were consolidated on 11 November 2016; and

> (b) The Defendants shall pay 30% of the Plaintiffs' costs of the Consolidated Action on the standard basis from 12 November 2016 until the date when [the trial judgment] was delivered in the Consolidated Action on 13 September 2021.
>
> 3. The Defendants shall not in any event be entitled to any costs of and incidental to the following matters:
>
> (a) The defence of inevitable accident; and
>
> (b) The Defendants' submissions and authorities in relation to the "Basis Rule" in respect of expert evidence in the Defendants' Reply Submissions dated 22 June 2020.

10 In ORC 5829, the Judge gave effect to O 22A r 9(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC (2014 Rev Ed)"), which was the applicable version of the rules at the time, concerning an offer to settle made by a defendant:

> **Costs (O. 22A, r. 9)**
>
> **9.—** …
>
> (3) Where an offer to settle made by a defendant —
>
> (*a*) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and
>
> (*b*) is not accepted by the plaintiff, and the plaintiff obtains judgment not more favourable than the terms of the offer to settle,
>
> the plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise.

11 At paragraph 3 of ORC 5829, the Judge also accepted the appellant's submission that the respondent should not be entitled to costs on two issues (the "Excluded Issues"). To provide context:

(a) This first issue is the respondent's pleaded defence of inevitable accident. In its costs submissions below, the appellant had submitted that such an argument was superfluous, because the respondent was already mounting a primary case that the *NA* was solely to blame for the collision. In any case, the respondent could not avail itself of this defence. The parties did not dispute that the defence of inevitable accident requires the accident to have taken place without any negligence on the defendant's part. The Judge accordingly rejected the defence on its merits, having found that the *LP*'s excessive speed contributed to the bow cushion effect (and, in turn, the collision).

(b) The second issue relates to an evidential objection raised in the respondent's reply submissions below. The objection was that the appellant's navigation expert had no factual basis with respect to certain matters (such as the existence of the anchored crane barge) on which to render an opinion premised on those matters. In its costs submissions below, the appellant submitted that this objection was unfounded, as objective evidence of these facts had clearly been adduced over the course of the trial.

12 Returning to the case's procedural history, on 12 October 2021, the appellant filed its appeal against the whole of the Judge's decision, including his decision on costs, *vide* AD/CA 109/2021.

13 On 10 August 2022, the appellant served a Calderbank offer (*ie*, a letter without prejudice save as to costs) on the respondent. It proposed to settle the issue of liability through a 50:50 apportionment, and to settle the costs of the trial and the appeal.

14 On 28 September 2022, the appellant applied to transfer the appeal from the AD to the CA, *vide* OA 13.

15 On 4 November 2022, OA 13 was granted, as the appeal raised a point of law of public importance and its results would have considerable significance to the shipping industry. The costs of OA 13 were also ordered to be costs in the appeal.

16 On 29 March 2023, the respondent withdrew its offer to settle.

17 On 3 April 2023, CA 45 was heard. The appellant's Calderbank offer had not been accepted by this point in time. On 13 April 2023, it was revoked.

18 On 7 July 2023, CA 45 was decided. Liability was apportioned at 50:50. The appellant thus obtained a better result in the appeal than the trial, as its share

of liability was reduced from 70% to 50%. It also obtained a judgment not less favourable than its Calderbank offer, since both were for a 50:50 apportionment.

19 In summary, the following figures for the apportionment of liability were proposed or decided (as applicable) in these proceedings:

Stage	**Appellant's % liability**	**Respondent's % liability**
The respondent's offer to settle	60	40
Decision at the trial	70	30
The appellant's Calderbank offer	50	50
Decision on appeal	50	50

The parties' positions on costs

20 Three sets of costs fall to be decided:

(a) the costs of the trial;

(b) the costs of the appeal; and

(c) the costs of the transfer application.

Costs of the trial

21 The parties both submit that the costs of the trial should be apportioned at 50:50, on a standard basis, in light of our decision to apportion liability at 50:50.

22 The respondent acknowledges that its pre-trial offer to settle (at [7] above) is no longer relevant to determining costs. The appellant has obtained a more favourable judgment on appeal than what was offered – the judgment is

for the respondent to bear 50% liability, whereas the offer was only for 40%. In any case, the offer was withdrawn on 29 March 2023.

23 The respondent has not challenged the Judge's decision on the Excluded Issues (see [9] and [11] above).

Costs of the appeal

24 In respect of the appeal, the appellant submits that it is entitled to costs. It advances three alternative positions as to their quantification:

(a) Its primary position is for costs to be assessed, if not agreed. The standard basis should apply from the date the appeal was filed to the date its Calderbank offer was served. This is the period of 12 October 2021 to 10 August 2022. The indemnity basis should apply from a day after the Calderbank offer was served to the date the appeal was heard. This is 11 August 2022 to 3 April 2023.

(b) In the alternative, should we be minded not to order an assessment, the appellant asks that costs be fixed. It proposes a quantum of $100,000 (inclusive of disbursements), which includes a measure of indemnity.

(c) In the further alternative, should we be minded only to award costs on the standard basis, it proposes the figure of $75,000 (inclusive of disbursements).

25 In justifying its primary position, the appellant submits that the Calderbank offer should be taken into account, since the judgment on appeal is not less favourable than the offer. The respondent's failure to accept the offer

was unreasonable: it was a genuine offer, its terms were reasonable, and there was ample time for its acceptance. Giving weight to the Calderbank offer would further the court's policy of encouraging settlement and saving judicial time and costs.

26 As for its alternative positions, the appellant again relies on the Calderbank offer to justify the measure of indemnity contained in its proposed figure of $100,000. In addition, as to the nature of the case, it had features not normally found in collisions at sea, such as the presence of a dredged channel and recommended navigation track, and a need to examine the relationship between a vessel's underkeel clearance with her speed, bow cushion effect, and passage planning. These features also raised legal issues not governed by well-established principles, such as the application of Rule 9(*a*) of the International Regulations for Preventing Collisions at Sea 1972 (the "COLREGS") to a channel that lacks clear boundaries but has a recommended track. The appellant submits that its proposed figures would fairly and reasonably account for the nature of these issues as well as the evidence adduced, having regard to the applicable range for appeals against a judgment obtained following a trial (*ie*, $30,000 to $150,000) in Appendix G of the Supreme Court Practice Directions. The figures are also reasonable given the appellant's solicitors' time costs of $131,480 and the disbursements of $5,726.

27 The respondent's position is that each party should bear its own costs of the appeal, in a departure from the general rule that costs should follow the event. This is because the appellant failed to establish several of its key arguments, such as its argument that the *LP*'s failure to go past the western edge of the dredged channel breached Rule 9(*a*) of the COLREGS (see Judgment at [137]–[155]), and its argument that the lack of proper passage planning was a

breach of Rule 2(*a*) of the COLREGS (see Judgment at [156]–[160]). The respondent also notes, without elaboration, that the appeal raises a point of public importance and is of considerable significance to the shipping industry.

Costs of the transfer application

28 For the transfer application, the appellant seeks $10,872.80 as the successful party, comprising $10,000 in costs and $872.80 in disbursements. This is slightly below the median of the applicable Appendix G range for applications determined by the CA without an oral hearing (*ie*, $6,000 to $20,000). This sum is warranted because the appeal raised a number of difficult issues (see [26] above) and the appellant's submissions on the transfer had to go into some detail to explain the facts and issues that gave rise to the appeal.

29 The respondent submits that each party should bear its own costs for the transfer application, for the same reasons outlined at [27] above. It also highlights that the appellant incurred costs unnecessarily by taking out the application, since the CA was already considering a transfer on its own motion. The respondent sought to save costs by consenting to the appellant's application.

Our decision

Costs of the trial

30 In *The "Osprey"* [1967] 1 Lloyd's Rep 76 at 94–95, Justice Brandon identified three possible approaches to awarding costs in a collision action:

(a) making cross orders in the same proportions as the proportions of liability;

(b) ordering the less successful party to pay a portion of the taxed costs of the more successful party; and

(c) ordering the less successful party to pay a certain sum by way of contribution to the costs of the more successful party.

31 Justice Brandon recognised that each approach has its tradeoffs. The first approach requires two sets of costs to be taxed (if taxation proves necessary). It may also operate unfairly in that a plaintiff's costs tend to be greater than a defendant's, all else being equal. Unfairness may arise with the second and third approaches when the costs of either side are not known, particularly at a stage of the case when only liability is being decided.

32 Having regard to the limitations inherent in each approach, we are satisfied that the Judge's adoption of the first approach was a legitimate exercise of his discretion as to costs. We thus maintain the form of the cross orders made by the Judge, save for adjustments to the percentages and bases of assessment in light of our decision on liability.

33 We agree with both parties that each party should bear 50% of the other party's costs, mirroring how liability has been apportioned. We also agree with the respondent that its offer to settle is no longer relevant, especially as the appellant has obtained a judgment on appeal that is more favourable than that offer. Accordingly, there shall be an order to the following effect:

> It is ordered that:
>
> 1. The Plaintiff shall pay to the Defendant costs to be taxed, if not agreed, as follows:
>
> (a) the Plaintiff shall pay 50% of the Defendant's costs of the action in Admiralty in Rem No 204 of 2016 ("ADM 204") on the standard basis from the date of the

> issue of the writ in ADM 204 on 9 September 2016 to the date when the actions were consolidated on 11 November 2016; and
>
> (b) the Plaintiff shall pay 50% of the Defendant's costs of the consolidated action on the standard basis from 12 November 2016 to the date when judgment was delivered in the consolidated action on 13 September 2021.
>
> 2. The Defendant shall pay to the Plaintiff costs to be taxed, if not agreed, as follows:
>
> (a) the Defendant shall pay 50% of the Plaintiff's costs of the action in Admiralty in Rem No 170 of 2016 ("ADM 170") on the standard basis from the date of the issue of the writ in ADM 170 on 18 August 2016 to the date when the actions were consolidated on 11 November 2016; and
>
> (b) the Defendant shall pay 50% of the Plaintiff's costs of the consolidated action on the standard basis from 12 November 2016 to the date when judgment was delivered in the consolidated action on 13 September 2021.
>
> 3. The Defendant shall not in any event be entitled to any costs of and incidental to the following matters:
>
> (a) the defence of inevitable accident; and
>
> (b) the Defendant's submissions and authorities in relation to the "Basis Rule" in respect of expert evidence in the Defendant's Reply Submissions dated 22 June 2020.

Costs of the appeal

34 As for the costs of the appeal, the appellant is entitled to costs. Costs should be fixed and not assessed. The CA is well-placed to determine the quantum of costs, as these relate to the written and oral submissions for the appeal which were squarely before the CA. The appellant has not explained why an assessment would be necessary or beneficial in the circumstances.

35 As for the quantum of costs, as the appellant submits, it is relevant to consider the respondent's failure to accept its Calderbank offer. This is so even though the judgment is not *more* favourable to the appellant than its offer, only *as* favourable.

36 A Calderbank letter offers to settle a dispute without prejudice save as to costs. Such letters are useful tools for encouraging settlement and have been recognised as being complementary to the offer to settle regime under the Rules of Court: *SBS Transit Ltd (formerly known as Singapore Bus Services Limited) v Koh Swee Ann* [2004] 3 SLR(R) 365 ("*SBS Transit*") at [24].

37 In the present case, both the judgment on appeal and the offer were for a 50:50 apportionment of liability. While there are some differences as to costs, particularly that the costs of the Excluded Issues (see [9] and [11] above) would not have been excluded under the offer but remain so in this judgment (see [33] above), there is no evidence that these differences would have been quantitatively significant. In other words, as far as the evidence goes, the appellant did not receive a more favourable judgment than the offer, only one as favourable as the offer.

38 Some cases may be read to suggest that a Calderbank offer should only be shown to the court and taken into consideration if the judgment obtained is *more* favourable for the offeror (or less favourable for the offeree) than the offer made: see *SBS Transit* at [24]; *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 ("*Ong & Ong*") at [34]; and *Zhang Jinwei v Tradsurance Agency Pte Ltd and another* [2022] SGMC 58 ("*Zhang Jinwei*") at [1]. This excludes cases where the judgment is only as favourable as the offer.

39 Such a suggestion would be incorrect. If a judgment is as favourable for the offeror as the offer, then the offeree has not obtained anything by coming to court that it could not have obtained, without incurring further costs, through accepting the offer (to use the language adopted in *Zhang Jinwei* at [41], citing *Butcher v Wolfe and Wolfe* [1999] 1 FLR 334 at 346). Yet this same outcome has been obtained at the expense of judicial time and cost. As a matter of principle, a court ought to be able to give due consideration to such Calderbank offers.

40 This view is consistent with how the offer to settle regime has been structured under O 22A r 9 of the ROC (2014 Rev Ed), which centres on whether the judgment is "not less favourable" or "not more favourable" than the offer made:

> **Costs (O. 22A, r. 9)**
>
> **9.—** …
>
> 9.—(1) Where an offer to settle made by a plaintiff —
>
> (*a*) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and
>
> (*b*) is not accepted by the defendant, and the plaintiff obtains a judgment *not less favourable than* the terms of the offer to settle,
>
> 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.
>
> …
>
> (3) Where an offer to settle made by a defendant —
>
> (*a*) is not withdrawn and has not expired before the disposal of the claim in respect of which the offer to settle is made; and

> (*b*) is not accepted by the plaintiff, and the plaintiff obtains judgment *not more favourable than* the terms of the offer to settle,
>
> the plaintiff is entitled to costs on the standard basis to the date the offer was served and the defendant is entitled to costs on the indemnity basis from that date, unless the Court orders otherwise.
>
> [emphasis added]

41 In reaching this conclusion, we are also fortified by the eponymous decision of *Calderbank v Calderbank* [1976] Fam 93 ("*Calderbank*"). In *Calderbank*, Cairns LJ had to consider how litigants might be able to conduct negotiations without prejudice as to the merits of a matter, while reserving the possibility of referring to those negotiations should the question of costs come before the court. In his analysis, Cairns LJ referred to existing procedural mechanisms designed to protect a party desirous of making a compromise other than a payment into court. In describing the practice concerning maritime collisions, he specifically referred both to judgments that are (from the offeror's perspective) "more favourable" than the offer and judgments that are "as favourable" as the offer (*Calderbank* at 105–106):

> There are various other types of proceedings well known to the court where protection has been able to be afforded to a party who wants to make a compromise of that kind and where payment in is not an appropriate method. One is in proceedings before the Lands Tribunal where the amount of compensation is in issue and where the method that is adopted is that of a sealed offer which is not made without prejudice but which remains concealed from the tribunal until the decision on the substantive issue has been made and the offer is then opened when the discussion as to costs takes place. *Another example is in the Admiralty Division where there is commonly a dispute between the owners of two vessels that have been in collision as to the apportionment of blame between them. It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted no reference is made to that offer in the course of the hearing until it comes to costs, and then* ***if the court's apportionment is as favourable***

> ***to the party who made the offer as what was offered, or more favourable to him****, then costs will be awarded on the same basis as if there had been a payment in.* [emphasis added in italics and bold italics]

42 As for the weight to be ascribed to the appellant's Calderbank offer, it is settled law that the court is not bound to award costs in any particular manner in the face of such an offer, and may treat the offer as one factor to be considered in exercising its wide discretion as to costs: *Ong & Ong* at [35]; *SBS Transit* at [24]. Some factors relevant to determining the offer's weight may include: (a) the offer's terms; (b) the reasonableness of the offeree's refusal to accept the offer; (c) the timing of the making of the offer; and (d) the nature and timeliness of the offeree's reaction to the offer: *Ong & Ong* at [36]–[37]; *Zhang Jinwei* at [24]–[27].

43 For the following reasons, we attach moderate weight to the respondent's failure to accept the Calderbank offer in this case.

44 In the appellant's favour, it is significant that the respondent has not provided any reason for not responding to the offer. There is no indication that reasons were given contemporaneously. Nor have any reasons been given now; the respondent's skeletal arguments of 6 March 2023 and costs submissions of 21 July 2023 are both noticeably silent on the Calderbank offer and its significance.

45 There has been no suggestion that the offer's terms are unreasonable. On the contrary, whereas the appellant's position at first instance was that the respondent ought to bear 80% of the liability, the offer moderated this down substantially to 50%. This suggests that the appellant realistically reassessed the strength of its case, after the Judge found that it ought to bear 70% of the blame.

This element of compromise reflects a genuine and reasonable attempt to settle by the appellant: see, in the context of offers to settle, *Resorts World at Sentosa Pte Ltd v Goel Adesh Kumar and another appeal* [2018] 2 SLR 1070 at [20]–[22]; *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 3 SLR(R) 267 at [8].

46 There has also been no suggestion that the timeframe for accepting the offer was unreasonably short, such that the respondent lacked a fair opportunity to properly consider and deal with the offer. The offer was made even before the appellant filed its case in CA 45. It remained open for acceptance for over a week after the appeal was heard.

47 If the respondent had genuine difficulties with the offer's terms or window for acceptance, one would have expected evidence of the respondent having raised those concerns with the appellant contemporaneously. In *Zhang Jinwei*, the offeree submitted that various concerns with the Calderbank offer prevented him from accepting it, such as a lack of clarity over how the proposed figure was arrived at. The magistrate held, at [33], that while these could have been legitimate reasons for not accepting the offer, the "fundamental difficulty" was that they were "raised belatedly, long after the action had commenced, and seemingly only after the [offeror] sought an order for the [offeree] to bear the costs of the action". In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] SGHC 81 at [111], Ang Cheng Hock J commented that if the Calderbank offer's precise ambit was uncertain, the offeree in that case ought to have sought clarification. Unlike *Zhang Jinwei*, the present case does not even feature a belated explanation from the respondent on why it did not respond to the offer.

48 For these reasons, the Calderbank offer should be given due weight. However, this must be balanced against two countervailing considerations. First, we appreciate that predicting how a court might apportion liability for a collision is not a straightforward exercise even for the most seasoned of litigators. Apportionment is fundamentally based on a "broad, commonsensical and qualitative assessment" of the circumstances: Judgment at [55]. Furthermore, the court is not confronted with a binary choice, but may entertain a range of possible percentages, and this inherently complicates the prediction exercise. A second, related consideration is that the appellant did not obtain a considerably more favourable judgment, only one as favourable as its offer. This colours the assessment, at least in this case, of *how* reasonable the offer's terms were.

49 Therefore, considered holistically, the Calderbank offer ought to be given moderate weight.

50 Leaving the Calderbank offer aside, we consider a more significant factor to be the nature of CA 45. It was an evidentially voluminous and technically demanding case. The length of the Judgment and the range of issues canvassed is most telling in this regard. Detailed consideration had to be given to a host of technical evidence concerning navigation practice in narrow channels, the nature and effect of hydrodynamic phenomena, and various dimensions of each vessel's speed, course and steerage.

51 Finally, the respondent has urged us to consider the appellant's failure to establish all the points that it raised. In the circumstances, this is a neutral factor. In any litigation, particularly complex litigation, it is to be expected that the winning party will likely fail on one or more issues: *HLB Kidsons (a firm) v*

Lloyds Underwriters [2008] 3 Costs LR 427 at [11]. Under our Rules of Court, something more is required to warrant a discount on costs, for example, that the unsuccessful points unnecessarily increased the amount of time taken, the costs or the complexity of the proceedings: see O 59 r 6A of the ROC (2014 Rev Ed) and O 21 r 4(4)(*a*) of Rules of Court 2021. There is no suggestion that this was the case in CA 45. None of the appellant's arguments was rejected for being plainly wrong; each point was decided in the Judgment only following a considered assessment of both parties' submissions on the law and evidence. There is therefore no basis for reducing the quantum of costs, much less a case for each party to bear its own costs of the appeal.

52 More fundamentally, the appellant's case was never that the respondent should bear full liability, only 50% thereof. Some of the points that it failed on had also been mounted as alternative submissions. Evidently, the appellant was cognisant that it might not succeed on all the points it raised. Crucially, it did not *need* to succeed on all points to obtain the 50:50 apportionment it sought.

53 Before we set out our decision on the appropriate quantum of costs of the appeal, we turn to consider the costs of the transfer application, which were ordered to be costs in the appeal.

Costs of the transfer application

54 The appellant is entitled to the costs of the transfer application. We disagree with the respondent's submission that the appellant ought to bear its own costs on the basis that the application was: (a) unnecessary, in that the court was already considering a transfer on its own motion; and (b) uncontested, in that the respondent did not eventually object to the application.

55 In evaluating this submission, it is pertinent to consider the following developments:

(a) On 13 September 2022, the court sent a letter to both parties indicating that the appeal (which had then been placed before the AD) had been identified for a possible transfer on the court's own motion, as it would raise a point of law of public importance. Parties were directed to indicate by 20 September 2022 if they objected to the transfer, and if so, their reasons for objecting.

(b) On 14 September 2022, the appellant stated that it had no objections.

(c) On 19 September 2022, the respondent objected to the transfer as the appeal did not raise a point of law of public importance. Instead, the appeal's focus was on the causative potency of the conduct of both parties' vessels, and the law on causative potency was not in dispute.

(d) On 28 September 2022, the appellant filed OA 13. It decided to file OA 13 because of the respondent's expressed objection to a transfer, and because the prescribed 14-day period for filing a transfer application was expiring that day.

(e) On 3 October 2022, the Supreme Court Registry convened a case management conference ("CMC") to clarify whether the filing of OA 13 ought to be accepted, given the court's earlier indication to the parties that a transfer on the court's own motion was being explored. The appellant clarified that it wished for the application to be accepted. The respondent was given until 5 October to state its position.

(f) On 5 October 2022, the respondent stated that it would not object to OA 13. On the one hand, it maintained the view that there was no point of law of public importance, and that the appeal's result would not be significant. On the other hand, in the light of the appellant's filing of a transfer application, and in the interest of saving judicial time and costs, the respondent decided not to object to OA 13.

56 In its submissions, the appellant acknowledged that the respondent ultimately did not object to the application. However, it added that the application would not have been necessary if the respondent had not first informed the court on 19 September 2022 that it was objecting to the proposed transfer.

57 In our judgment, the following points justify an award of costs to the appellant for the transfer application.

58 First, the respondent only decided not to contest the transfer after OA 13 was filed. When the transfer was being considered on the court's own motion, it was unequivocally against the transfer. Even after OA 13 was filed, it reiterated its view that a transfer would be inappropriate in principle. As such, the filing of OA 13 was not objectively unnecessary. From the appellant's perspective, the filing of OA 13 was also reasonable at the time of filing. It would have been unclear to the appellant whether the court would have gone ahead to transfer the appeal on its own motion notwithstanding the respondent's objections.

59 Second, the respondent's submission that OA 13 was uncontested is not conclusive. Regardless of whether OA 13 was contested, the statutory

conditions for a transfer under s 29D of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) would have to be satisfied before a transfer could be ordered. The appellant would have had to incur costs anyway in filing substantive submissions on this point, and in addressing the factors that weighed against a transfer which the respondent had previously raised.

60 Third, substantial work was *in fact* done for OA 13. The appellant filed comprehensive submissions. Legal research was undertaken to confirm that various questions of law were indeed novel and unaddressed in the jurisprudence, such as how Rule 9(*a*) of the COLREGS ought to be interpreted and applied in narrow channels with recommended navigation tracks.

Quantum of costs of the appeal and the transfer application

61 We decide to award the appellant a total of $100,000 (inclusive of disbursements) for the costs of the appeal and the transfer application.

62 Under Appendix G of the Supreme Court Practice Directions, the guideline for appeals against a judgment obtained following a trial is $30,000 to $150,000. The range for applications determined by the CA without an oral hearing is $6,000 to $20,000. Given our comments on the Calderbank offer and the nature of the issues and evidence in CA 45 (see [35]–[50] above), we are minded to award costs of the appeal near the middle of the $30,000–$150,000 range. The transfer application likewise engendered substantial work and research into novel points of law, and warrants an award near the middle of the $6,000–$20,000 range. In the circumstances, an award of $100,000 (inclusive of disbursements) is appropriate.

Conclusion

63 In summary:

(a) for the costs of the trial, there shall be an order to the effect of [33] above;

(b) the costs of the appeal and the transfer application are fixed at a total of $100,000 (inclusive of disbursements) to be paid by the respondent to the appellant; and

(c) the usual consequential orders shall apply.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Seah Lee Guan Collin, Jonathan Lim Shi Cao, Choi Yee Hang Ian and Tessa Lim (Resource Law LLC) for the appellant;
Mohamed Goush s/o Marikan (Goush Marikan Law Practice) and Mohd Munir Marican (Marican & Associates) for the respondent.