IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 81

Originating Summons No 976 of 2019

Between

CKR Contract Services Pte Ltd

… *Plaintiff*

And

Asplenium Land Pte Ltd

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Appeal under Arbitration Act]

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CKR Contract Services Pte Ltd
v
Asplenium Land Pte Ltd

[2020] SGHC 81

High Court — Originating Summons No 976 of 2019
Ang Cheng Hock J
25 November 2019, 3 February 2020

27 April 2020 Judgment reserved.

Ang Cheng Hock J:

1 By this Originating Summons ("OS"), the plaintiff ("CKR") seeks leave under s 49(3)(*b*) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA") to appeal on a number of questions of law that are said to arise out of an arbitral award dated 3 July 2019. That award was issued in an arbitration involving CKR as claimant and the defendant ("Asplenium") as respondent.

Background

2 A brief chronology of the relevant facts is as follows.

3 On 15 January 2013, CKR and Asplenium entered into a contract ("the Contract") concerning the development of the "Seletar Park Residence", a

condominium project at Seletar Road ("the Project").[1] Asplenium had engaged CKR as the main contractor to carry out building and construction works for the Project. Two points bear note in relation to the Contract:

(a) First, the Contract incorporated the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) 9th Edition (Reprint August 2011) (the "SIA Conditions") and the Supplemental Articles and Conditions of Contract.[2]

(b) Second, pursuant to the Contract, a performance bond was procured by CKR in favour of Asplenium in the sum of S$8,806,383.80.[3]

4 On 24 October 2014, for reasons which are not directly relevant to the present judgment, Asplenium terminated CKR's employment under the Contract. A replacement contract tender exercise was held and a new contractor was appointed to complete the Project.

5 On 4 November 2014, consequent to the termination of the Contract, Asplenium made a call on the performance bond for the full sum. While the call amount was subsequently reduced by Asplenium to around S$7.7 million, Asplenium made a second call on the performance bond for the remaining balance of around S$1.1 million on 17 December 2015.

6 On 10 November 2014, CKR commenced arbitration against Asplenium pursuant to the parties' arbitration agreement in clause 37 of the SIA Conditions.

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1 Affidavit of Lee Sien Liang Joseph dated 28 August 2019 ("LSLJ") at [4].

2 LSLJ at [5], p 533.

3 LSLJ at [8], p 532.

The arbitration clause provided that any dispute between the parties arising out of the Contract was to be "referred to the arbitration and final decision of a person to be agreed by the parties".[4] CKR proposed the appointment of Mr Chow Kok Fong as the sole arbitrator, and Asplenium agreed.[5] Mr Chow (hereafter referred to as the "arbitrator" or the "tribunal") was accordingly appointed as the sole arbitrator.

7 On the application of CKR, the arbitration proceedings were bifurcated into two phases – a liability phase and a quantum phase. The liability phase of the arbitration ran from 10 November 2014 to 14 February 2018, and two awards were issued on this regard. The first of these two awards, Partial Award 1, was dated 11 October 2017. It set out the tribunal's findings on liability. In essence, the arbitrator found that the Contract had been validly terminated by Asplenium.[6] The second award, Partial Award 2, was dated 14 February 2018, pursuant to which Asplenium was awarded costs for the liability phase in the sum of S$4,162,000.[7]

8 The arbitration then proceeded to the quantum phase. The hearing took place from 20 August to 30 August 2018. The tribunal issued Partial Award 3 on 9 April 2019. Corrections to Partial Award 3 followed on 26 April 2019 and 15 May 2019. In Partial Award 3, the tribunal found that CKR was liable to Asplenium for sums due and liquidated damages arising from Asplenium's valid termination of the Contract. However, in view of the amount already

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4 LSLJ at p 547.

5 First affidavit of William Nursalim alias William Liem dated 25 September 2019 ("WL1") at [11].

6 LSLJ at [14].

7 LSLJ at [15].

received by Asplenium pursuant to its call on the performance bond, the tribunal found that the net balance owing from Asplenium to CKR was S$6,405,536.34 (the "Award Sum"). This net balance reflected that Asplenium had been "over-paid" pursuant to the call on the performance bond, and the over-payment was therefore had to be repaid to CKR.[8]

9 Partial Award 4 was issued on 3 July 2019 to deal with costs related to the quantum phase (the "Quantum Costs Award"). The tribunal's reasoning in the Quantum Costs Award was largely premised on the fact that Asplenium had issued a Calderbank letter on 6 August 2018 before the hearing of the quantum phase (the "Calderbank Offer") which went unaccepted, and the fact that CKR had not achieved a more favourable outcome than what was offered in the Calderbank Offer.[9]

10 Calderbank letters have their genesis in the English Court of Appeal decision of *Calderbank v Calderbank* [1976] Fam 93 (CA). The crux of the decision, for present purposes, is that where a party receives a written offer to settle proceedings for a particular sum but refuses the offer, contests proceedings, and obtains a judgment for *less than* that particular sum, an adverse costs order may be made against him. The later English decision of *Cutts v Head* [1984] Ch 290 accepted from 302 to 312 that where a party had made a written offer to settle "without prejudice save as to costs", that offer could be validly considered by the Court in determining the final costs order. A useful summary of these developments is set out by Lee Seiu Kin J in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285 from [32] to [35], but

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8 WL1 at [23].

9 LSLJ at [23].

it suffices to note for present purposes that the Calderbank letter is an accepted part of Singapore law: *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 at [54] to [55].

11 Under the terms of the Calderbank Offer, Asplenium had offered to pay CKR S$9.5 million in full and final settlement of "any and all claims, counterclaims, disputes, controversies and/or costs arising out of or in connection with the [Project], including, but not limited to the arbitration proceedings between [CKR and Asplenium]".[10]

12 In their submissions to the arbitrator, the reference to "any and all claims, counterclaims … and/or costs" was contested between CKR and Asplenium. CKR contended that the Calderbank Offer related to:[11]

(a) the arbitration;

(b) HC/S 1274/2015, a claim in, *inter alia*, conspiracy commenced by CKR against Asplenium and eight other parties ("Suit 1274") whilst the arbitration was ongoing;

(c) CA 179/2017, an appeal by CKR against a decision of the High Court in an interlocutory order made in relation to non-disclosure of privileged documents in favour of Asplenium and three other parties ("CA 179") in the course of HC/S 37/2015, which was a claim in negligence against the quantity surveyor and quantity surveying firms

10 LSLJ at [25].

11 LSLJ at [30], [43], and [45].

that priced the replacement tender referred to at [4] above ("Suit 37"); and

(d) HC/S 349/2018, a claim in deceit against the architects working on the Project ("Suit 349").

13 On the other hand, Asplenium contended that the Calderbank Offer related only to items [12(a)] to [12(c)] above. Asplenium argued that Suit 349 was not included within the ambit of the Calderbank Offer because Asplenium was not party to Suit 349 at all.[12]

14 In the Quantum Costs Award, the tribunal accepted that the Calderbank Offer related only to items [12(a)] to [12(c)] above. Observing that the Calderbank Offer sum of S$9.5 million was approximately S$3.1 million more than the Award Sum of around S$6.4 million, the tribunal determined that "this excess of $3.1 million suggests irresistibly that [CKR] would have been better off in accepting the Offer Sum".[13] The tribunal therefore found that CKR was entitled to costs of S$950,758.27, representing the proportion of costs for the quantum phase incurred up to 13 August 2018 (the last day for acceptance of the Calderbank Offer), but that Asplenium was entitled to S$826,540.88, representing the proportion of costs from 14 August 2018 (after the expiry of the Calderbank Offer) to the close of arbitration proceedings.[14] The tribunal concluded the Quantum Costs Award by finding that the net costs of S$124,217.39 were payable to CKR.[15]

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12 WL1 at [35] to [40].

13 LSLJ at p 1843.

14 LSLJ at p 1849.

15 LSLJ at [22].

15 The Quantum Costs Award forms the subject matter for the present application.

16 I pause at this point to note the fairly extensive and protracted nature of the arbitration. Spanning a period of around five years, the bifurcated arbitration involved four Partial Awards, many days of hearing, and multiple rounds of submissions before the arbitrator. Apart from this present application, there also have been three earlier applications to the Court for leave to appeal against questions of law arising from the tribunal's awards. The complexity of the matter undoubtedly engendered considerable costs on both sides. CKR's failure to even *respond* to the Calderbank Offer perhaps regrettably extinguished an opportunity to resolve the dispute before costs continued to escalate.

The law on granting leave under the Arbitration Act to appeal questions of law

17 Section 49 of the AA governs appeals against an arbitral award. Section 49(1) of the AA provides that a party to arbitral proceedings may appeal to the Court "on a question of law arising out of an award made in the proceedings".

18 The requirements before leave to appeal will be granted are rather uncontroversial and have been summarised by this Court in *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2019] SGHC 259 at [59] as follows:

> 59 In summary, the court must be satisfied that the following conditions are met before leave to appeal will be granted:
>
> (a) the appeal must be on a question of law (s 49(1) of the Act);
>
> (b) the determination of that question will substantially affect the rights of one or more of the parties to the arbitration (s 49(5)(*a*) of the Act);

> (c) the question was one which the arbitrator was asked to determine (s 49(5)(*b*) of the Act);
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> (d) on the basis of the findings of fact in the award, the decision of the arbitrator on the question is obviously wrong, *or* the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt (s 49(5)(*c*) of the Act); and
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> (e) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question (s 49(5)(*d*) of the Act).
>
> [Emphasis in original]

19 The party seeking leave to appeal has to satisfy each one of these five requirements in order to obtain leave. These requirements go towards the court's jurisdiction to grant leave. The stringent nature of the conditions before leave to appeal against an arbitral award is granted is explicable on the basis of the underlying policy of the AA. As was observed by the High Court in *Holland Leedon Pte Ltd (in liquidation) v Metalform Asia Pte Ltd* [2011] 2 SLR 1086 at [3]:

> The underlying policy of the AA is to promote *finality of the arbitration process and awards*. The AA recognises party autonomy as parties have decided to resolve their disputes by arbitration and not court actions. Section 49 of the AA provides an *exceptional* recourse to the courts on questions of law *only* where the rigorous statutorily prescribed conditions have been met.
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> [Emphasis added]

20 It is in this context that the observations by the High Court in *Ng Chin Siau and others v How Kim Chuan* [2007] 2 SLR(R) 789 at [34] that "(t)he policy behind the enactment of s 49 of the Act is that curial intervention in the arbitral process is to be minimised" should be understood. Further, when examining the arbitral award, I accept that the Court should read the tribunal's reasons in a "reasonable and commercial way" and should not approach an award with a "meticulous legal eye endeavouring to pick holes, inconsistencies

and faults in [the] award": *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd* [2015] EWHC 3405 (Comm) at [2], in relation to an appeal from an arbitration award under s 69 of the Arbitration Act 1996 (c 23) (UK) ("English Arbitration Act 1996"). Section 69 of the English Arbitration Act 1996 is *in pari materia* with s 49 of the AA.

21 In the OS, the questions of law on which CKR seeks leave to appeal are as follows:

(a) Where a party to whom an offer is made fails to achieve more by rejecting the offer, whether the arbitral tribunal will have to order the offeree to bear all costs incurred after the date stated in the offer for acceptance, or whether the arbitral tribunal has discretion in the matter ("Question 1");

(b) Where a Calderbank offer offers to settle other matters and/or proceedings that are not before the arbitral tribunal, whether the arbitral tribunal has the jurisdiction to assess the monetary value of such other matters and/or proceedings, and if so, whether and in what circumstances the arbitral tribunal should do so ("Question 2(a)");

(c) Where a Calderbank offer offers to settle a non-monetary claim that remains pending before another Court or tribunal, whether and in what circumstances it is possible for the arbitral tribunal to assess the favourability of the Calderbank offer ("Question 2(b)");

(d) Whether in assessing the monetary value of the proceedings, the arbitral tribunal ought to evaluate the merits of the parties' case before the Court ("Question 2(c)");

(e) Whether an arbitral tribunal has the jurisdiction to determine the impact of its findings on a Court proceeding ("Question 2(d)"); and

(f) Whether on a true and proper construction of an identified clause in the Contract, the provisions relating to interest therein apply where a dispute relating to Asplenium's call, demand and receipt of payment on the performance bond furnished by CKR is referred to Court for determination and not to arbitration ("Question 3").

22 On 25 November 2019, when this OS was first heard in Court, CKR indicated that it would not be proceeding with its application for leave to appeal on Question 3. As such, Question 3 will not be addressed in this judgment.

23 From my review of the questions as set out in the OS, they can be divided into three general categories, as follows:

(a) Category I: Question pertaining to whether the tribunal has the *discretion* to order costs should a party who rejects a Calderbank offer fail to achieve a better outcome in arbitration. This category will address Question 1.

(b) Category II: Questions pertaining to whether and when the tribunal has *"jurisdiction"* to consider proceedings not before it, or to consider the impact of its own findings on those proceedings. This category will address Questions 2(a), 2(c) and 2(d).

(c) Category III: Question pertaining to whether and when a tribunal can consider the favourability of a Calderbank offer where the offer seeks to settle non-monetary claims *pending* before the Court or another tribunal. This category will specifically address Question 2(b).

I address these categories of questions in turn.

Category I

Question 1

24 Question 1 as framed by CKR queries whether the tribunal *necessarily has to* penalise a party in costs if that party has rejected a Calderbank offer and later failed to obtain a better outcome in the arbitral proceedings.

25 CKR argues that this question arises as a question of law because in the Quantum Costs Award, the tribunal "appears to have proceeded on the incorrect legal basis that it had *no choice* but to order CKR to bear all costs" [emphasis in original] incurred after the expiry of the Calderbank Offer if the Calderbank Offer was better than what was ultimately achieved in the arbitration.[16] CKR further argues that this question of law arises because of two misquoted excerpts in Asplenium's written submissions to the arbitrator from *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) and *Halsbury's Laws of Singapore* vol 1(2) (Lexis Nexis, 2017 Reissue) ("*Halsbury's Laws of Singapore*").[17] It is uncontested that the misquoted excerpts in Asplenium's written submissions suggest, erroneously, that the tribunal *must* impose adverse consequences if a party fails to achieve a better result after rejecting the offer.

26 In seeking to satisfy the s 49(5) AA conditions, CKR argues as follows:

(a) this question was one the tribunal was asked to determine, and did in fact determine;

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16 Plaintiff's Written Submissions ("PWS") at [71].

17 PWS at [72] to [80].

(b) the question substantially affected the parties' rights given that CKR was unable to recover approximately S$700,000 in costs from 14 August 2019 onwards, *and* had to pay Asplenium's costs for that time period in the sum of S$826,540.88, which meant that CKR was out of pocket for a total sum of approximately S$1.5 million;[18]

(c) it was proper to grant leave to appeal the question given the strength of the challenge, the amount of money involved, and the limited delay which would be involved in having the appeal heard in Court.

27 I turn first to the issue of whether the tribunal proceeded on an erroneous understanding of the law. While Asplenium's erroneous quotations from the two academic works were no doubt wholly unhelpful to the tribunal, I am not convinced that the tribunal "proceeded on the incorrect legal basis"[19] that it had no discretion whatsoever in imposing adverse cost consequences against CKR.

28 First, and most directly, the tribunal made clear at [36] of the Quantum Costs Award that

> … The principles are well settled and not in dispute here … If Party A's offer was rejected by Party B then, if the tribunal's decision turns out to be as favourable or more favourable to Party A than the terms of the offer made by Party A, the result is that Party B is to be penalized in costs. In such a situation a tribunal *may, in an appropriate situation,* award to Party A costs on an indemnity basis or a higher proportion of costs.
>
> [Emphasis added]

As is evident from the portion of the quote in italics above, the tribunal was clear that it did in fact have a discretion, which could be exercised "in an

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18 PWS at [93].

19 PWS at [71].

appropriate situation", to determine whether or not to impose cost consequences on the party which had rejected a Calderbank offer.[20]

29 I am unable to accept CKR's arguments about [36] of the Quantum Costs Award. CKR argues that:

(a) The phrase "Party B is to be penalized in costs" is imperative and thus *necessarily* shows that the arbitrator believed he had no discretion; and

(b) The last sentence quoted above ("In such a situation … a higher proportion of costs") can only mean that the tribunal believed it could penalise Party B in *either* indemnity costs or a higher proportion of costs, and its discretion was "limited solely to these two alternatives".[21]

30 Neither of these arguments is persuasive. The reading of the phrase referred to in [29(a)] above is strained and taken out of context. CKR's interpretation is wholly inconsistent with the quote in italics above at [28], which appears at the very next line. Reading the entire paragraph as a whole, it appears far more likely to me that the tribunal was simply suggesting that the *typical* outcome that would arise if a party rejected a Calderbank Offer but failed to achieve a better result is that the party would suffer costs consequences.

31 Further, CKR's attempt to reconcile the inconsistency referred to at [29(b)] is also, to my mind, rather implausible. There is nothing to suggest that the tribunal believed that its discretion was limited solely to *either* awarding

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20 LSLJ at p 1840.

21 PWS at [85].

costs on an indemnity basis or awarding a higher proportion of costs. Crucially, adopting the interpretation CKR advances would require me to insert the word "either" into the last sentence of the quote such that it read:

> "In such a situation a tribunal may, in an appropriate situation, *either* award to Party A costs on an indemnity basis or a higher proportion of costs."
>
> [Emphasis added]

Absent the term "either", CKR's binary reading that the tribunal believed that it could either order indemnity costs or a higher proportion of costs is not one that is borne out by a plain reading of that sentence.

32 I see no reason why the word "either" should be "read in" given the absence of any clear indication to suggest that this is what the tribunal intended to convey. Even if that word were inserted to suggest a binary choice between imposing indemnity costs or a higher proportion of costs, that does not explain the reference to "an appropriate situation" given that the latter phrase suggests that there may be *inappropriate* situations where *neither* awarding costs on an indemnity basis nor at a higher proportion is warranted. I am thus of the view that [36] of the Quantum Costs Award, read in its totality, makes clear that the tribunal was well aware of the discretion it had. I am unconvinced by CKR's attempts to suggest that the discretion the tribunal was referring to was constrained only to the appropriate *type* of sanction.

33 The second reason I cannot accept CKR's argument that the tribunal was misled is because the area of law on cost consequences following an unaccepted Calderbank offer is fairly trite and I would expect the arbitrator to have been aware of the relevant principles. In fact, this explains the tribunal's clear statement that the principles are "well settled" and "not in dispute" at [36] of the Quantum Costs Award. This is also consistent with the arbitrator's express

recognition in that same paragraph of the discretion he possessed.[22] In my judgment, there is no basis to find that the arbitrator believed that he had lacked discretion to decide whether to make an award of costs that was adverse to CKR.

34 Third, Asplenium's misquoting of academic works (see [25] above) must be seen in context of the passages in the submissions where the erroneous quotes appeared. In particular, the section of Asplenium's written submissions on costs did not present the erroneous quotation from *Halsbury's Laws of Singapore* as suggesting that the arbitrator had no discretion in ordering adverse costs. Quite the contrary, Asplenium's written submissions before the arbitrator read as follows:[23]

> [32] This is also the position in Singapore, as noted by the learned authors of *Halsbury's Laws of Singapore: Arbitration vol 1(2)* (LexisNexis, 2017 Reissue), … who stated at [20.109] *that the tribunal has the power to consider* a 'without prejudice' offer to settle and order the receiving party (who had rejected that offer) to 'bear all costs incurred'…
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> [Original emphasis omitted; emphasis added]

Thus, when seen in context of Asplenium's written submissions on costs, the effect of the erroneous references to the academic works referred to at [25] above should not be overstated. The overall tenor of Asplenium's submissions, misquoted authorities notwithstanding, shows that Asplenium was not advancing the proposition that the arbitrator had no discretion in awarding costs that are adverse to CKR.[24]

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22 LSLJ at p 1840.

23 LSLJ at p 1624.

24 LSLJ at p 1624. See also Asplenium's Costs Submissions in the Arbitration at [32].

35 For these reasons, I find that the arbitrator was not in fact misled on the law in relation to adverse costs consequences following from an unaccepted Calderbank offer. However, leaving all that aside, the crucial question is whether a "question of law" within the meaning of s 49(1) of the AA arises from the award. In *Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd* [2011] 3 SLR 476 ("*Healthcare Supply Chain*"), the High Court, despite finding that the majority arbitrators had erroneously applied the law on parol evidence, held at [8] that:

> In so far as [the applicant's] application was based on what it considered to be a misreading of the contract as a result of applying [the law on parol evidence erroneously], that was not an error of law but an error *in the application of the law*, which was *not* subject to appeal under s 49 [of the AA].
>
> [Emphasis added]

36 On the present facts, it was accepted by both parties and the arbitrator that the law in relation to costs following an unaccepted Calderbank offer is fairly well established. No novel points of law or particular nuances of argument in relation to the law arose in the submissions on this point. The Court of Appeal's decision in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*") is instructive in this regard. At [19] of *Northern Elevator*, the Court of Appeal held that a question of law within the meaning of the AA referred to a finding of law which the parties have disputed and that requires the guidance of the court to resolve. In this case, I do not find that the parties had disputed the relevant law in relation to the tribunal's discretion to make adverse costs orders following a Calderbank offer. What was in dispute was *whether* and *how* the tribunal should exercise the said discretion. Accordingly, no question of law arises even taking CKR's case at its highest on this Question 1, and it is only an error in the *application* of the law which is disclosed.

37 The distinction between an error in the application of the law (which does *not* confer a right of appeal under the AA) and a question of law (which does confer a right of appeal under the AA) reflects longstanding authority. In *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 ("*Ahong Construction*"), GP Selvam JC, as he then was, defined a question of law at [7] as "a point of law in controversy which has to be resolved after opposing views and arguments have been considered". The Judicial Commissioner in *Ahong Construction* went on to state at [7] that

> If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court.

38 Applying the principles set out in *Ahong Construction* and *Northern Elevator* to the present facts, I am not satisfied that there was a "point of law in controversy" in relation to the law on the tribunal's power to make adverse costs awards following an unaccepted Calderbank offer. I accept that the law on the discretion of a tribunal to award adverse costs following an unaccepted Calderbank offer is well established and not controversial. At the very highest, CKR can only show that there was an error in the application of the law and not a question of law. Accordingly, no appeal lies on this point.

39 I am unconvinced by CKR's reference to *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455 ("*Lim Chin San*") at [43] to advance the proposition that "whether or not the question of law is settled is irrelevant".[25]

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25 PWS at [89].

40 First, CKR's proposition flies in the face of the principles set out in *Northern Elevator* ([36] *supra*). At the risk of repetition, *Northern Elevator* at [19] expressly states that a question of law "must necessarily be a finding of law which the parties dispute". If the law is settled and not disputed by the parties, then *Northern Elevator* makes clear it is not an appealable question of law.

41 Second, CKR's reliance on [43] of *Lim Chin San* somewhat misses the point. At that passage in the judgment, Judith Prakash J, as she then was, was dealing with the issue of whether *Northern Elevator* obliges the Court to limit the meaning of a "question of law" to the precise issues which were pleaded before an arbitrator. The thrust of [43] of *Lim Chin San* thus concerns whether an issue not having been expressly pleaded would *ipso facto* preclude it being a question of law within the meaning of s 49(1) of the AA, and *not* whether a question of law needs to be unsettled to fall within that statutory provision. Accordingly, CKR's argument that *Lim Chin San* stands for the proposition that "whether or not the question of law is settled is irrelevant" is a misconceived one.

42 I pause here to note that both *Ahong Construction* ([37] *supra*) and *Northern Elevator* concerned the application of the old s 28 of the 1985 Arbitration Act (Cap 10, 1985 Rev Ed) ("Arbitration Act 1985") and not the application of the present AA. However, this does not appear to pose any difficulties.

43 First, the Court of Appeal in *Northern Elevator* did indicate that it was dealing in that case with the old s 28 of the Arbitration Act 1985, but did not suggest that the applicable principles would be different from those which applied to the present AA. This was despite the present AA having already been enacted at the time *Northern Elevator* was decided.

44 Further, the framing of the requirement of a question of law arising out of an award made in the proceedings is entirely similar in both the old and present Arbitration Acts. There is nothing to suggest that the meaning of the *same* words used in the old and present Arbitration Acts is different.

45 Finally, in more recent cases like *Healthcare Supply Chain* ([35] *supra*), the reasoning in *Ahong Construction* and *Northern Elevator* ([36] *supra*) distinguishing an error in the application of the law and a question of law continues to be applied, even in the context of s 49 of the AA. I am therefore of the view that *Ahong Construction* and *Northern Elevator* continue to be relevant and applicable in the context of s 49 of the AA.

46 For the above reasons, I find that Question 1 is not a question of law within the meaning of s 49(1) of the AA.

47 Having established that Question 1 is not a question of law arising out of an award made in the arbitral proceedings within the definition of s 49(1) of the AA, this would in itself suffice to dispose of the application for leave to appeal in relation to Question 1. However, two further points can be made.

48 First, I am not satisfied that the determination of Question 1 will substantially affect the rights of one or more of the parties. CKR argues that, if one were to answer Question 1 correctly, that is, the tribunal had the discretion whether or not to award adverse costs, that would result in a difference of around S$1.5 million in its favour.[26] This is a rather fanciful argument because it assumes that:

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[26] PWS at [93].

(a) the tribunal did not believe that it had any discretion in making an adverse award on costs against CKR in the first place; and

(b) if the tribunal believed it had such a discretion, it would have declined to make any adverse award on costs against CKR.

49 Neither of these assumptions is well-founded. As I have already explained, the tribunal does not appear to have believed that it lacked discretion to award costs against CKR: [27] to [34] above. Further, while CKR drew the Court's attention to a number of factors which might have militated against the awarding of costs adverse to it arising from the Calderbank Offer, I am not persuaded that those factors would have caused the tribunal to have come to a different view of the Calderbank Offer. This is because of the substantial differential between the Calderbank Offer of S$9.5 million, and the Award Sum in favour of CKR of around S$6.4 million, coupled with the arbitrator's finding that Suit 1274 and CA 179 would not overturn that differential even if they were both decided in CKR's favour. To my mind, therefore, I am not at all satisfied that determining Question 1 would substantially affect the rights of the parties.

50 Second, I am not satisfied that Question 1 is a question which the arbitral tribunal was asked to determine. This, of course, is closely connected to my analysis above (see [35] to [46]) as to whether this is a question of law. I disagree with CKR that the tribunal "did determine at some length, this issue".[27] A reading of [38] to [46] of the Quantum Costs Award shows that the tribunal was explaining its reasoning for determining that the Calderbank Offer was more favourable than the outcome CKR had ultimately achieved in the

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27 PWS at [92].

arbitration. That part of the Quantum Costs Award does not address the question of whether or not the tribunal had the *discretion* to order adverse costs, as CKR claims.

51 Tellingly, CKR's reply submissions on costs before the tribunal ("CRS") at [52] expressly referred to Asplenium's submissions on costs at [31]–[32].[28] As it were, [32] of Asplenium's submissions on costs squarely indicated that the tribunal "has the power to consider a 'without prejudice' offer to settle…".[29] The upshot of this is simply that there does not appear to have been a dispute between the parties on this point which necessitated a legal determination by the arbitral tribunal. Asplenium's *own* submissions accepted that the tribunal merely had the *power* to consider the offer, and did not argue that the tribunal was *obliged* to impose costs consequences because of the offer. There therefore does not appear to have been a controversy between parties on this point. Accordingly, I am not satisfied that Question 1 is a question which the tribunal was asked to determine.

52 For the reasons above, I find the requirements in s 49 of the AA are not met in relation to Question 1.

Category II

53 The second category of questions framed by CKR pertains to the tribunal's alleged overreaches of "jurisdiction". I will take each of the three sub-questions identified in this category in turn.

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28 LSLJ at p 1808.

29 LSLJ at p 1624.

Question 2(a)

54 Question 2(a) specifically queries whether an arbitral tribunal has the "jurisdiction" to assess the monetary value of matters to be settled in a Calderbank offer but which are not before the arbitral tribunal.

55 CKR argues that this is a question of law which "concerns the issue of whether the Tribunal had jurisdiction to make the findings he did", and that it is "clearly" a question of law susceptible to appeal.[30]

56 In seeking to satisfy the s 49(5) AA conditions, CKR further argues that its position before the tribunal was that:

(a) the tribunal did not have "jurisdiction" to assess the monetary value of other matters not submitted to arbitration, and

(b) that the tribunal lacked the evidential basis to form a view of the monetary value of such matters.

Accordingly, CKR argues that the issue was one which the tribunal was asked to determine.

57 As a preliminary point, I find CKR's use of the term "jurisdiction" somewhat difficult to understand. There is no suggestion that the tribunal's observations in the arbitral award would fetter the jurisdiction of a judge in other legal proceedings. There is also little to suggest that "jurisdiction" is required before a tribunal can make comments or certain observations about other legal proceedings. No authority is cited for that proposition. If the argument is that

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[30] PWS at [104].

a tribunal has exceeded its remit, then the appropriate remedy is the setting aside of the award. As such, I find that the language of "jurisdiction" is neither apposite nor useful on the facts of this case.

58 Leaving aside that preliminary point, I am not convinced that Question 2(a) is a question of law the tribunal was asked to determine. On the contrary, the question of whether the arbitrator had the "jurisdiction" to or could assess the monetary value of matters not before him does not appear to have been a point in controversy between the parties during the arbitration.

59 In its submissions for the present application, CKR claims that "[CKR's] position below was that the Tribunal did not have jurisdiction to assess the monetary value of other matters … since they were not submitted to arbitration".[31] According to CKR, it was only as a secondary point that it had argued before the tribunal that there was insufficient evidential basis to form a view of the monetary value of such matters. However, having perused CKR's written submissions before the arbitrator, I am not at all satisfied that this depiction of CKR's position in the arbitration is entirely accurate.

60 The heading under which this point is discussed in CKR's CRS in the arbitration is expressly titled "The Respondent's Calderbank offer is uncertain".[32] No reference is made to an argument that the tribunal is precluded as a matter of "jurisdiction" from considering the offer. Instead, the argument made by CKR in its CRS focused on the *evidential* difficulty of determining

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31 PWS at [105].

32 See LSLJ at p 1808.

what was offered in the Calderbank Offer and the value of what was being offered.

61 At [51] of CKR's CRS, the underlined portion on which CKR *itself* decided to place emphasis reads that "it is impossible for the Tribunal to determine, at this juncture, whether the [Calderbank Offer] is more favourable than the outcome of the quantum phase. *For this reason*, the [Calderbank Offer] should be *given no weight*…" [Emphasis in original in underline, emphasis added in italics].[33] Nothing is raised about "jurisdiction", and the key reason highlighted by CKR is the *evidential* uncertainty in coming to a view on whether the Calderbank Offer is more favourable than the Award Sum. Further, the reference to "weight" makes clear that this is not an issue of "jurisdiction" which would preclude even *consideration* of the monetary value of matters not before the tribunal. Instead, it is an evidential matter that affects the *weight* to be placed on the possible outcomes of the proceedings not before the tribunal.

62 At [55] of CKR's CRS, the fact that the crux of CKR's argument is on evidential weight and not "jurisdiction" is underscored. CKR relied explicitly on the fact that "(n)either Suit 1274 nor CA 179 are [*sic*] concluded, and their outcomes are *not known*" [Emphasis added].[34] The emphasis here is once again on whether there is evidence of what the outcomes of Suit 1274 and CA 179 might be. Nothing is said by CKR in terms of "jurisdiction".

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33 LSLJ at p 1808.

34 LSLJ at p 1809.

63 It is only subsequently at [56] and [61] of CKR's CRS that "jurisdiction" is referenced. But, neither reference to "jurisdiction" in these paragraphs assists CKR:

(a) At [56], CKR argues that "both Suit 1274 and CA 179 involve claims concerning parties other than [CKR] and [Asplenium], whom the Tribunal has no jurisdiction over". It is immediately clear that this reference to "jurisdiction" has *no connection* with the tribunal having the "jurisdiction to assess the monetary value of such other matters and/or proceedings". Rather, it merely makes the fairly obvious point that the tribunal's determinations do not, in and of themselves, bind persons who are not parties to the arbitration.

(b) Similarly, at [61], CKR makes the once again fairly trite point that "the Tribunal has no jurisdiction to hear and decide the claims in Suit 1274". This is entirely unsurprising – it is the Court and not the tribunal which has *jurisdiction* to "hear and decide" the claims in Suit 1274. Nothing that the tribunal says or determines in relation to Suit 1274 will *ipso facto* be binding on the Court which hears the Suit. Pertinently, for present purposes, however, there is nothing in the relevant portion of CKR's CRS which deals with whether or not the tribunal has the "jurisdiction" to *assess the monetary value* of matters and proceedings not before it.

64 After these two references to "jurisdiction" in CKR's CRS, neither of which assist CKR's present case, CKR continued to focus on the evidentiary issues rather than the alleged difficulty as to "jurisdiction". At [64] of CKR's CRS, it argued that "the Tribunal's observations [concerning Suit 1274 in

Partial Award 1] were made without the benefit of full evidence…".[35] Thus, CKR continued to argue in its CRS that the focus was on what *evidence* had been placed before the tribunal, as opposed to whether the tribunal had any "jurisdiction" to consider Suit 1274.

65 At [70] of CKR's CRS, in discussing the case of *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 864, CKR expressly relies on the fact that "the outcomes of both proceedings referred to in the Calderbank offer were known by the time costs fell to be decided"[36] [Emphasis in original] to distinguish it from the instant situation. The focus is thus once again on the evidence and whether that evidence is available, not on issues of "jurisdiction".

66 Overall, CKR does not appear to have addressed the broad issue of "jurisdiction" over Suit 1274 and CA 179 before the tribunal, much less the specific issue of whether the tribunal could conceivably "assess" the "monetary value" of those legal proceedings. I am therefore not satisfied that the issue framed in Question 2(a) is a matter the tribunal was asked to determine.

67 Accordingly, this requirement in s 49(5)(*b*) of the AA is not met, and there is no basis for me to grant leave to appeal Question 2(a).

Question 2(c)

68 Question 2(c) is a question about whether, in assessing the monetary value of the various proceedings, an arbitral tribunal ought to evaluate the merits of the parties' cases in other proceedings before the Court. This refers

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35 LSLJ at p 1811.

36 LSLJ at p 1813.

specifically, it appears, to Suit 1274 and CA 179. Question 2(c), like Question 2(a), appears aimed at exploring the ability of a tribunal to draw conclusions and make findings about such legal proceedings.

69 CKR argues that Question 2(c) concerns the correct approach in law for a tribunal to take when assessing the monetary value of legal proceedings in Court and that it is therefore a question of law.[37] CKR further argues that Question 2(c) is an issue the tribunal was asked to determine because, at [44] of the Quantum Costs Award, the tribunal held that it was not required to inquire into the merits or the evidence relating to Suit 1274 and CA 179.[38] On CKR's proposed resolution of Question 2(c), the arbitral tribunal ought to evaluate the merits of the parties' cases in assessing the monetary value of the proceedings not before it.

70 I am unable to agree with CKR that there is a valid basis to grant leave to appeal in relation to Question 2(c). I do not see how determination of this question would have a substantial effect on the rights of the parties. Even if Question 2(c) is resolved in the way CKR seeks and the tribunal has to examine the merits of the parties' cases in Suit 1274 and CA 179, I am not satisfied that this would change the tribunal's determination of whether the Calderbank Offer was more favourable than the Award Sum. In my view, the tribunal's exercise of its discretion to award costs would be unaffected.

71 In determining whether or not the Calderbank Offer was more favourable than the Award Sum, the tribunal had already proceeded on the *best*

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37 PWS at [164].

38 LSLJ at p 1843.

case scenario for CKR and assumed that it would succeed in both Suit 1274 and CA 179. Even with this assumption, the tribunal nonetheless found that the excess of S$3.1 million between the Calderbank Offer and the Award Sum suggested "irresistibly" that CKR "would have been better off in accepting the Offer Sum".[39] The tribunal had thus taken CKR's case at its highest in deciding whether the Calderbank Offer was more favourable than the Award Sum. Given this, I am not persuaded that the determination of Question 2(c) in CKR's favour could have altered that decision in any way.

72 In reaching its decision, the tribunal had relied on certain key findings of fact. In this regard, I accept that:

(a) the tribunal found that CA 179 was not a monetary claim;

(b) the tribunal found that Suit 1274 was materially linked to the arbitration, and that the claim by CKR against Asplenium in Suit 1274 would be disposed of by reason of the outcome of the arbitration. The tribunal thus appeared to be of the view that CKR would not have been awarded any damages against Asplenium even if it succeeded in Suit 1274; and

(c) the tribunal went on to make a further finding that, *even if* CKR was successful in both CA 179 and Suit 1274, the S$3.1 million difference between the Calderbank Offer and the eventual Award Sum would *still* be greater than any recovery it might obtain in those legal proceedings.

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[39] See LSLJ at p 1843.

73 That the abovementioned observations are findings of fact was made clear by CKR's own stance in the course of its oral arguments before me. When it was highlighted by the Court that Asplenium's case was that the tribunal had made findings of fact which were not open to challenge, CKR's response was not to deny that they were findings of fact, but only to challenge the "jurisdiction" of the tribunal to make the said findings of fact. CKR also did not deny, in its written submissions before me, that the findings referred to above were findings of fact made by the tribunal.

74 It is accepted by both parties that findings of fact by an arbitral tribunal are not open to challenge. In *Progen Engineering Pte Ltd v Chua Aik Kia (trading as Uni Sanitary Electrical Construction)* [2006] 4 SLR(R) 419 ("*Progen Engineering*"), Belinda Ang J stated at [16] that:

> … the arbitrator's findings of fact are *conclusive*: it is irrelevant whether the court considers those findings of fact to be right or wrong … the court must decide any question of law arising from an award on the basis of an *unqualified acceptance* of the findings of fact of the arbitrator…
>
> [Emphasis added]

75 The Court in *Progen Engineering* went on to state at [29] that:

> … the court will not interfere in the arbitrator's findings of fact arrived at after an assessment and evaluation of the evidence. Admissibility of evidence, weight of the evidence and the inferences from it are essentially matters for the arbitrator. … The alleged question of law was an attempt to circumvent the rule that the arbitrator's findings of fact are conclusive.

76 On the present facts, CKR's argument that the Calderbank Offer should be given no weight because of evidential inadequacies is an argument which goes to the weight of the evidence and the inferences which may be drawn from it. *Progen Engineering* at [29] makes clear that the "weight of the evidence and the inferences from it" are matters for the arbitrator, and it is not open to CKR

to seek to circumvent the arbitrator's findings of fact by framing the challenge as one raising a question of law. CKR's attempt to raise a question of law by putting forward the question of whether the tribunal had the "jurisdiction" to make certain findings of fact appears to me to be a backdoor challenge of the type identified at [29] of *Progen Engineering*.

77 Seeing as the findings of fact at [72(a)] to [72(c)] are to be taken as conclusive, there does not appear to be anything which might alter the favourable weight given to the Calderbank Offer, even if Question 2(c) were determined in the way CKR seeks. In my judgment, given the tribunal's findings that, even if CKR succeeded in the two legal proceedings then pending before the Court, it would not have made a difference because of the gulf between the Award Sum and the Calderbank Offer, there is little point in deciding the question of whether the tribunal should have analysed the strength of the respective parties' cases in the legal proceedings. Accordingly, I am unable to accept that the determination of the question will substantially affect the rights of one or more of the parties.

78 I pause here to address CKR's arguments in relation to how Suit 1274 and CA 179 could have altered the favourability of the Calderbank Offer. CKR's arguments are twofold. First, CKR argues that the relief sought in Suit 1274 for conspiracy is wide enough to encompass the legal costs in the arbitration, which would not have been necessary but for the conspiracy. CKR further argues that these legal costs exceed S$11 million, which sum may be awarded to CKR if it succeeds in Suit 1274, and which would suffice to overcome the S$3.1 million difference between the Calderbank Offer and the Award Sum. Second, in relation to CA 179, CKR contends that the documents disclosed on a successful appeal may have impacted Suit 37, which was not even considered by the tribunal in its assessment of the Calderbank Offer.

79 CKR's arguments in relation to Suit 1274 may be fairly quickly dealt with:

(a) First, CKR made no mention in its submissions before the tribunal which mentioned that the sum of S$11 million in legal costs would be sought as damages in Suit 1274. This head of loss appears to have been an altogether new development which was raised only *after* the arbitration.[40]

(b) Second, there is considerable doubt as to whether seeking the sum of S$11 million in damages is viable, especially since Asplenium seeking to recover the *entire* cost of the arbitration has the practical effect of undoing *all* of the tribunal's awards as to costs made in the Arbitration. This would reverse the approximately S$4 million of costs awarded against CKR in Partial Award 2. Also, more fundamentally, I fail to comprehend how CKR can recover its legal costs in connection with the arbitration in Suit 1274 when that arbitration concerned the validity of Asplenium's termination of the Contract, and tribunal had concluded that the termination was valid.

(c) Third, and most decisively, the sum of S$11 million in legal costs which are alleged to have been recoverable in Suit 1274 goes towards a question of fact which is not open to challenge. Specifically, the question of whether S$11 million would have been recoverable in legal costs goes towards the question of whether or not the Calderbank Offer exceeded the best-case-scenario valuation of CKR's claims against Asplenium. As outlined at [72(c)] above, this question of fact was

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40 See Plaintiff's Amended Statement of Claim (No. 1) in Suit 1274.

determined by the tribunal, and I accept the tribunal's finding as conclusive.

80 CKR's arguments in relation to CA 179 are also unpersuasive and may be swiftly disposed of:

(a) First, CKR's appeal in CA 179 has already been dismissed (see [97] to [101] below) and the appeal can therefore have *no effect whatsoever* on whether or not the Award Sum is more favourable than the Calderbank Offer.

(b) Second, even if one ignores the fact that CKR's appeal in CA 179 has been unsuccessful, the success or failure of that appeal goes once again to the question of whether the Calderbank Offer exceeded the best-case-scenario valuation of CKR's claims against Asplenium. As stated above, this is a question of fact which the Court will not interfere with.

(c) Third, and in any event, CA 179 pertained to and arose out of Suit 37, which was CKR's claim in negligence against the quantity surveyor and the quantity surveying firms that priced the replacement tender (see [12(c)] above). Asplenium was not even party to Suit 37, and I therefore fail to see how the determination of CA 179 in the context of Suit 37 would have substantially affected the rights of the present parties *vis-à-vis* each other.

81 I am also not satisfied that Question 2(c) is an issue the tribunal was asked to determine. CKR refers me to [44] of the Quantum Costs Award, where the tribunal "held that it was not required to inquire into the merits or the evidence relating to Suit 1274 and CA 179, but was only required to assume

that CKR succeeded in both actions".[41] CKR then argues that this "holding" was made "following [CKR's] submission that the Tribunal could not assess the value of Suit 1274 and CA 179 at the material time".[42] Thus, according to CKR, Question 2(c) was an issue the tribunal was asked to determine.

82 Having reviewed the Quantum Costs Award and CKR's submissions on costs before the tribunal, I am unable to agree. All the tribunal did in relation to the value of Suit 1274 and CA 179 was to indicate that a detailed evaluation of the merits of the parties' cases in those actions was not needed because, even if one was to assume that CKR would succeed completely in those legal proceedings, that would still not suffice to render the Calderbank Offer less favourable than the Award Sum. The tribunal's point was that a favourable outcome for CKR in both Suit 1274 and CA 179 would not overcome the S$3.1 million difference between the Calderbank Offer and the Award Sum. There was no determination by the tribunal on whether and when a tribunal *ought to* evaluate the merits of parties' cases in separate legal proceedings. It was thought by the arbitrator to be simply unnecessary for the purposes of his analysis.

83 Quite apart from that, CKR's submission that it had argued before the tribunal that "the Tribunal could not assess the value of Suit 1274 and CA 179 at the material time" (see [81] above) is also not entirely accurate. From my review, the thrust of CKR's arguments at [50] to [74] of its CRS was that the tribunal did not have sufficient evidence or material before it to assess the value of Suit 1274 and CA 179. This is a question of evidential sufficiency, not

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41 PWS at [165].

42 PWS at [165].

whether the tribunal had the *power* to conduct such an assessment. Properly understood, therefore, CKR's argument before the tribunal was that there was insufficient evidence to allow the tribunal to evaluate the merits of the parties' cases in Suit 1274 and CA 179. CKR did not argue before the tribunal that it ought not to evaluate the merits of the parties' cases *as a question of law or as a matter of principle*.

84 The tribunal, having assessed the evidence before it, disagreed with CKR's arguments. The tribunal found that the evidence was sufficient for it to at least consider CKR's best case scenario. I am therefore of the view that Question 2(c) seeks to contrive a question of law from what was in effect a disagreement between the parties on evidential sufficiency and the weight to be given to the evidence. Those areas of disagreement clearly concerned questions of fact. As already mentioned, the findings of fact by the tribunal have to be given unqualified acceptance in the proceedings before me (see [74] to [76] above).

85 In summary, I find that CKR's arguments in relation to Question 2(c) before the tribunal centred on questions of fact, not law. Question 2(c) is framed as a question of law, but does not reflect what was really in contention before the tribunal. I therefore do not find that Question 2(c) is a question that the tribunal was asked to determine.

86 Accordingly, I find that the requirements in s 49(5) of the AA are not met in relation to Question 2(c).

Question 2(d)

87 Question 2(d) is concerned about whether an arbitral tribunal has the "jurisdiction" to determine the impact of its findings on a court proceeding.

88 It will be quite apparent that there is considerable similarity between Question 2(d) and Question 2(a). Both relate to the "jurisdiction" of an arbitral tribunal, with Question 2(a) focused on the "jurisdiction" of the tribunal to assess the monetary value of proceedings not before it, and Question 2(d) focused on the "jurisdiction" of the tribunal to assess the impact of its findings on proceedings not before it. In fact, the two questions are regarded as so similar that CKR's written submissions accept that "(t)he arguments for this question overlap largely with the arguments for the first part of Question 2(a)" and further that "(t)he requirements of the Act are satisfied in respect of this question for the same reasons as they are satisfied in Question 2(a)".[43]

89 Given the similarity, I am of the view that the difficulties identified above in relation to Question 2(a) also apply to render Question 2(d) one that does not satisfy the s 49 AA requirements.

90 First, Question 2(d) does not appear to have been a question that the tribunal was asked to determine. The paucity of references to "jurisdiction" before the tribunal notwithstanding, the complete absence of references to "jurisdiction" to "determine the impact of its findings on a court proceeding" in CKR's submission to the tribunal is telling (see above from [58] to [66]).

91 Next, I am of the view that the determination of Question 2(d) would not have a substantial effect on the rights of parties. The tribunal's finding of fact is that the Calderbank Offer would far exceed the Award Sum, and he had proceeded on the assumption that CKR would succeed in both Suit 1274 and the appeal in CA 179. As such, regardless of whether or not the tribunal has

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43 PWS at [176].

"jurisdiction" to determine the impact of its findings on court proceedings, that is, whether the tribunal *could* decide that CKR's claim against Asplenium in Suit 1274 would be disposed of because of the outcome of the arbitration, CKR would *not* have succeeded in persuading the tribunal that it should not be visited with an adverse costs award. Put another way, Question 2(d) is both a hypothetical and an academic question.

92 A further point I would emphasise is that I am once again perplexed by CKR's reference to "jurisdiction", and in particular "jurisdiction to determine the impact of (the tribunal's) findings on a Court proceeding". No authority is cited for the proposition that a tribunal specifically requires "jurisdiction" to comment on how its findings might affect any pending court proceedings, nor was any explanation provided as to how a tribunal would be making a "determination" in any manner binding on legal proceedings in Court. To my mind, this confusion is caused by CKR's loose usage of the term "jurisdiction" in its attempt to contrive a question of law that may be appealed.

93 The Court will be vigilant in guarding against attempts to frame a challenge to the tribunal's findings of fact as a question of law. I am of the view that Question 2(d) is such an attempt. It is not a question that the tribunal was asked to determine, nor would it have any impact on the rights of the parties. I am not satisfied that the s 49 AA requirements are met, and do not grant leave to appeal in relation to Question 2(d).

Category III

Question 2(b)

94 The final category of questions raised by CKR concerns whether the tribunal can consider the favourability of a Calderbank offer where the offer

seeks to settle a non-monetary claim that remains pending before another court or tribunal.

95 Given the specific reference in Question 2(b) to a "non-monetary claim that remains pending before another Court or tribunal", it appears that CKR is referring specifically to CA 179. It is common ground that Suit 1274 is a monetary claim.

96 CKR submits that Question 2(b) is a question of law that substantially affects the rights of parties and for which it is just and proper to grant leave to appeal for the same reasons as Question 2(a). CKR further submits that the issue is one the tribunal was asked to determine because the issue of whether a non-monetary claim ought to impact a tribunal's assessment of the favourability of a Calderbank offer was placed "squarely" before the tribunal by reason of Asplenium's submission to the arbitrator that "[n]o monetary sum is involved in respect of CA 179".[44]

97 I am unable to agree with CKR that leave should be granted to appeal Question 2(b). First, I am not convinced that determination of Question 2(b) would have a substantial impact on the rights of the parties. Second, I am not satisfied that the tribunal was asked to determine Question 2(b). I elaborate below.

98 In relation to the submission that the determination of Question 2(b) would substantially affect the rights of the parties, CKR relies on its arguments

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[44] PWS at [146].

in relation to the other questions it has raised. These have already been dealt with above (see [70] to [77] above).

99 More pertinently in relation to Question 2(b), however, is the fact that CA 179, which is the "non-monetary claim" referred to in the question, has already been disposed of since the issuance of the Quantum Costs Award. CA 179 was dismissed in its entirety by the Court of Appeal on 17 September 2019, with costs ordered *against* CKR. This resolution of CA 179 does not in any way operate in CKR's favour if one is to assess the overall favourability of the Calderbank Offer *now*.

100 Given that CA 179 has been dismissed in its entirety, the determination of Question 2(b), which pertains only to CA 179 and not Suit 1274, will have no impact on the rights of parties on the issue of value to be attributed to the Calderbank Offer by the arbitrator. Put another way, Question 2(b) can have no bearing on the tribunal's finding that the Calderbank Offer was more favourable than the Award Sum.

101 CKR attempts to rebut this conclusion by arguing that the dismissal of CA 179 is "irrelevant because at the time that the Tribunal issued the [Quantum Costs] Award, CA 179 had yet to be heard".[45] I find this to be a surprising submission. It does not appear to cohere with the statutory framework. Section 49(5)(*a*) of the AA makes clear that the determination of the question has to substantially affect the rights of one or more of the parties. If it is the case that the Court answering Question 2(b) in the way that CKR seeks in an appeal cannot possibly alter the favourable calculus of the Calderbank Offer given what

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45 PWS at [151].

is known now, it is difficult to understand how the s 49(5)(*a*) AA limb can be satisfied. The Court cannot shut its eyes to the known outcome of CA 179 simply because it had not been decided when the tribunal issued the Quantum Costs Award.

102 A second ground for refusing leave to appeal is that Question 2(b) is not a question that the tribunal was asked to determine. The "non-monetary" nature of CA 179 was not emphasised or even expressly raised by CKR in the submissions to the tribunal. Instead, before the tribunal, CKR chose to focus on the issue of "costs to be awarded" in that appeal, which "may well go against [Asplenium]".[46] Nothing turned on the "non-monetary" nature of CA 179 since, even on CKR's own position in the arbitration, the only issue which was significant enough to be drawn to the arbitrator's attention was the fact that costs might be ordered against Asplenium if the appeal was successful.

103 It may be appropriate to reproduce CKR's CRS on this point:[47]

> 63 As to CA 179, while this is a non-monetary claim, *there remains the issue of costs to be awarded*. These costs may well go against [Asplenium].
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> [Emphasis added]

104 Given that CKR itself pointed to costs of CA 179 as the only worthwhile issue to highlight, I do not see how the tribunal was asked to assess or determine whether any specific "non-monetary" aspect of CA 179 would affect the favourability or otherwise of the Calderbank Offer.

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46 See LSLJ at p 1811.

47 See LSLJ at p 1811.

105 CKR argues that CA 179 could have had monetary consequences in terms of its impact on Suit 1274 and Suit 37. But, as I have already pointed out, this issue was simply not raised before the tribunal. In any event, this argument about the monetary consequences of CA 179 is a different proposition altogether from what is being raised in Question 2(b), which is about the "non-monetary" aspects of CA 179.

106 I pause to note that CKR cites several English authorities in its submissions before me which are to the effect that a party should not be precluded from raising a new point of law in respect of an issue on appeal simply because the precise point was not argued before the arbitrator. These cases include *Petraco (Bermuda) Ltd v Petromed International SA and another* [1988] 1 WLR 896, and *The London Borough of Islington v PGM Building Company Ltd* (Unreported, 19 November 1992), amongst others. I do not propose to deal with these authorities given that Question 2(b) is untenable as a ground of appeal (see [98] to [101] above), but it suffices for me to observe that several of the cases CKR relies on concern the English Arbitration Act 1979 (c 42) (UK) ("English Arbitration Act 1979"). The English Arbitration Act 1979 had no express requirement that the question of law sought to be appealed had to be one which the arbitral tribunal was asked to determine, and it is thus not directly comparable with s 49 of the AA. For completeness, I note that the English Arbitration Act 1979 has since been replaced by the English Arbitration Act 1996, and that s 69(3) of the English Arbitration Act 1996 is *in pari materia* with s 49(5) of the AA.

107 For the reasons I have set out above, I find the requirements in s 49(5) of the AA are not met in relation to Question 2(b).

Conclusion

108 The case law on granting leave to appeal questions of law arising from an arbitral award illustrates that the threshold for the grant of such leave is a high one. As was observed by Judith Prakash J, as she then was, in *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR(R) 270 at [8]:

> The court's ability to supervise the conduct of arbitration proceedings and interfere with the outcome of those proceedings is *limited*. It is well established that the principle of party autonomy is to be given priority and that, even if a judge would have come to a different conclusion from that of the arbitrator, *that is not, in itself, a reason to set aside the award or allow an appeal to be brought against it…*
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> [Emphasis added]

109 The high threshold which must be crossed before the Court will exercise its discretion to grant leave to appeal a question of law arising from an arbitral award is explicable by reference to the *raison d'etre* of arbitration. As observed by the Court of Appeal in *Ng Chin Siau and others v How Kim Chuan* [2007] 4 SLR(R) 809 at [52]:

> [P]arties having *chosen* to arbitrate should usually be bound by the finding of the tribunal and not that of the court … the substitution of the court's view for that of the tribunal might actually subvert the *agreement of the parties*.
>
> [Emphasis added]

110 Beyond the threshold which must be met, s 49 of the AA is clear in setting out the requirements before leave to appeal shall be granted. These requirements are cumulative, and all of them must be satisfied before leave to appeal may be granted. On the instant facts, at least some of the requirements for the grant of leave to appeal the questions framed by CKR have not been met. Accordingly, there is no basis for me to grant leave to appeal.

111 As a final note, let me caution that parties should carefully consider and evaluate offers to settle disputes. They represent an avenue to minimise the costs of litigation, and can save considerable time and resources. It is for this reason that there may be consequences when they are unjustifiably ignored. While my decision does not at all turn on this point, the Calderbank Offer appeared to be a generous one, particularly when one compares it to the eventual Award Sum in the arbitration. If there were uncertainties about the precise ambit of the offer, CKR could have sought to clarify them. No such clarification was sought. This appeal appears to me an attempt to nullify the effects of the unaccepted Calderbank Offer given the eventual outcome of the arbitration, and might have been avoided had the Calderbank Offer been given proper consideration.

112 I will deal with the issue of costs separately.

Ang Cheng Hock
Judge

Lee Sien Liang Joseph, Corinne Taylor, Qabir Singh Sandhu and Yap Pei Yin (LVM Law Chambers LLC) for the plaintiff;
Chuah Chee Kian Christopher, Kua Lay Theng, Chain Xiao Wei Edmund and Rachael Chong Rae-Hua (WongPartnership LLP) for the defendant.