Ng Chin Siau and Others v How Kim Chuan
[2007] SGCA 46

Case Number : OS 749/2006, SUM 1083/2007

Decision Date : 27 September 2007

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : N Sreenivasan and Collin Choo (Straits Law Practice LLC) for the respondents; Lok Vi Ming SC, Kirindeep Singh and Mark Seah (Rodyk & Davidson LLP) for the applicant

Parties : Ng Chin Siau; Yap Kin Wai; Chong Kai Chuan; Chong Ling Sharon; Ng Jet Wei; Wong Dai Chong; Loh Meow Song; Kuan Chee Keong; Oh Chin Hong; Ng Cheng Huat; Tan Soon Kiat; Francis Lee; Ang Hwee Quan Susan; Seah Yang Howe; Leong Hon Chiew — How Kim Chuan

Arbitration – Award – Recourse against award – Appeal under Arbitration Act – High Court refusing leave for appeal to Court of Appeal – Whether Court of Appeal could grant leave to appeal – Section 52(3) Arbitration Act (Cap 10, 2002 Rev Ed)

Arbitration – Award – Recourse against award – Residual jurisdiction of Court of Appeal – When residual jurisdiction could be invoked – How residual jurisdiction should be applied

Words and Phrases – "Appeal" – Section 49 Arbitration Act (Cap 10, 2002 Rev Ed)

27 September 2007

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 This was an application for leave to appeal to the Court of Appeal against a decision of the High Court setting aside a domestic arbitration award. At the conclusion of the hearing, we dismissed the application. These are our reasons for so ruling. In these grounds of decision, we examine the procedural pre-requisites for appeals on questions of law to the court in relation to domestic arbitration awards and, in particular, we clarify the very limited circumstances in which appeals pursuant to s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") may be pursued further to the Court of Appeal.

Background and procedural history

2 The applicant/defendant, Dr How Kim Chuan ("Dr How"), and the respondents/plaintiffs were partners (in different combinations) in a number of dental practices and a business that ran a dental laboratory. A dispute arose between the parties which led to Dr How issuing a notice of retirement from the various partnerships. Subsequently, further differences and disputes arose and the parties agreed to refer these matters to an arbitrator.

3 The arbitrator issued his written award in the arbitration proceedings on 15 March 2006 ("the Award"). Dissatisfied with the decision in relation to one of the partnerships, the Hougang partnership, the plaintiffs filed an originating summons on 11 April 2006, seeking leave to appeal on two questions of law which they considered had arisen out of the Award. The judge granted them leave to appeal on only one of the questions they had raised.

4 The same judge later allowed the appeal after having decided the question raised in favour of the plaintiffs. She varied the Award and ordered that the plaintiffs pay the defendant only the sum of $54,017.47 for the Hougang partnership, in substitution of the sum of $213,333.74 that the arbitrator had originally assessed as being due. The judge then remitted the question of costs to the arbitrator for re-determination. For ease of reference, this decision of the judge will be referred to hereinafter as "the Decision".

5 The defendant subsequently filed Summons No 4825 of 2006 on 18 October 2006 seeking leave to appeal against the Decision to the Court of Appeal. Having regard to s 49(11) of the Act (which provides that the court may give leave to appeal to the Court of Appeal against a decision on an appeal from an arbitration award only if the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal) the summons set out a list of questions of law which counsel for the defendant considered met the necessary requirements. The summons was again heard by the same judge on 2 November 2006.

6 In her judgment dated 6 March 2007 ("the 6 March decision"), the judge concluded that there was "no question of law of general importance to be brought before the Court of Appeal nor any special reason to allow the questions framed on behalf of [Dr How] to go forward on appeal" (see *Ng Chin Siau v How Kim Chuan* [2007] 2 SLR 789 ("*Ng Chin Siau*") at [52]). Accordingly, the application was dismissed. Dissatisfied, the defendant then filed this application and requested that it be heard by the Court of Appeal.

7 Just prior to the hearing we invited counsel to make submissions on the following preliminary issues:

(a) whether an application may be made directly to the Court of Appeal for leave to appeal against a decision of the High Court on an appeal (against an arbitration award) under s 49(11) of the Act; and

(b) in any event, whether the present application could have been brought despite the fact that the High Court had already refused such leave to appeal.

8 It appeared to us that there was some confusion amongst counsel as to the proper basis for this application and the appropriate forum before which this application ought to be heard. We noted that the plaintiffs' solicitors, M/s Straits Law Practice LLC ("SLP") had written to the defendant's solicitors, M/s Rodyk & Davidson LLP ("Rodyk"), on 27 March 2007 expressing, *inter alia*, their view that the applicable sections for an appeal from the High Court to the Court of Appeal would be ss 49(10) and 49(11) instead of s 49(7) of the Act as earlier indicated by Rodyk. SLP suggested that since leave to appeal had already been refused by the learned judge, the present summons ought to be fixed before the Court of Appeal (and not another High Court judge). Rodyk then wrote to the Registry on 5 April 2007 requesting that the summons be fixed for hearing before the Court of Appeal, stating that they had "no objections if the matter is refixed for hearing before the Court of Appeal".

9 Thus, it appears to us that counsel themselves had initially *agreed* between themselves that the Court of Appeal had jurisdiction to hear such an application. We shall return to the implications of this "understanding" when we address the issue of costs. For now, we turn to consider the respective positions of the parties, as re-defined by their final submissions on the jurisdictional conundrum we had identified for counsel: see [7] above.

The defendant's position

1 0 Mr Lok Vi Ming SC ("Mr Lok"), who appeared for the defendant, confirmed that the defendant's initial application to the judge was made pursuant to s 49(11) of the Act. He clarified before us that, for the purposes of this application, he was relying solely on s 49(7) of the Act as the basis for the application to this court. This was because leave to appeal had been refused by the judge in the first instance. Mr Lok contended that s 49(7) of the Act provided a "further avenue of appeal to the defendant". Section 49(7) of the Act reads as follows:

> The leave of the Court shall be required for any appeal from a decision of the Court under this section to grant or refuse leave to appeal.

Mr Lok declared that this was his position from the outset, *viz*, that the application could be made under s 49(7) of the Act (to the High Court) for leave to appeal against the 6 March decision denying him leave to appeal. It was only after the plaintiffs' solicitors had expressed their misgivings about this and suggested that the application should instead be made pursuant to ss 49(10) and 49(11) of the Act, to the Court of Appeal, that they "reached a consensus" to have the matter fixed before us.

11 Mr Lok further submitted that a "decision of the Court under this section to grant or refuse leave" would include the 6 March decision wherein the learned judge refused to grant the defendant leave to appeal against the Decision. According to Mr Lok, what it all boiled down to was this – that s 49(7) of the Act applied equally to two types of applications:

> (a) the first was an application for leave to appeal against the decision of the court granting or refusing *leave to appeal against an arbitration award* – what he labelled as a "first-tier application"; and
>
> (b) the second was an application for leave to appeal against the decision of the court granting or refusing *leave to appeal against the decision of the Court on an appeal from an arbitration* – a "second-tier application".

Purely for the sake of convenience, we shall also adopt this terminology. The application made to this court was therefore a second-tier application.

12 At the heart of the defendant's argument is an arid literal reading of s 49(7) of the Act. In this regard, Mr Lok invited the court to accept that it was a fundamental precept of statutory interpretation that the intended meaning of a statutory provision must be taken to punctiliously correspond with the literal meaning. Accordingly, Mr Lok argued that the literal meaning of the words "decision of the Court under this section" would mean *any* decision made pursuant to *any* subsection of s 49 of the Act, thereby encompassing the 6 March decision.

13 In the course of the hearing, Mr Lok developed this argument further. This was clearly because he had by then realised that there remained one further major obstacle he had to surmount (even assuming that his literal interpretation of s 49(7) of the Act was accepted by the court) in order to bring this application before the Court of Appeal. Mr Lok recognised and fully accepted that the "Court" referred to in s 49(7) of the Act, and indeed wherever else employed in the Act, was defined in s 2(1) of the Act to mean the *High Court* only. Therefore, even on the literal interpretation urged upon us, Mr Lok's application should be made before the High Court and not the Court of Appeal.

14 In order to overcome this seemingly insurmountable difficulty, Mr Lok then boldly turned to s 52 of the Act as a crutch. So far as it is material, s 52 of the Act reads:

Application for leave of Court, etc.

52.—(1) An application for the leave of the Court to appeal or an application referred to in section 21(10), 36(6) or 49(3)(*b*) or (7) shall be made in such manner as may be prescribed in the Rules of Court.

…

(3) For the purposes of this section —

(*a*) an application for leave of the Court may be heard and determined by a Judge in Chambers; and

(*b*) the Court of Appeal shall have the like powers and jurisdiction on the hearing of such applications as the High Court or any Judge in Chambers has on the hearing of such applications.

Mr Lok submitted that pursuant to s 52(3) of the Act, the Court of Appeal had the like powers and jurisdiction as the High Court. This meant that once an application was made to the High Court under s 49(7) of the Act, the Court of Appeal could thereafter hear that application; this was the case here, according to Mr Lok, because his initial application was made pursuant to s 49(7) of the Act, and had been made to the High Court (albeit before an assistant registrar) on 15 March 2007.

The plaintiffs' position

15 The plaintiffs' position was straightforward. After receiving our invitation to make further submissions on the jurisdictional issue, SLP made a *volte-face*. It contended that no application for leave could be made to the Court of Appeal and, in any event, the decision of the High Court refusing leave to appeal was final.

16 Counsel for the plaintiffs, Mr N Sreenivasan ("Mr Sreenivasan"), relied on an English Court of Appeal decision that he submitted was on all fours in relation to the jurisdictional issue we had to determine. In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388 ("*Henry Boot*"), the English Court of Appeal, after construing s 69(8) of the English Arbitration Act 1996 (c 23) ("the English Act"), concluded that it could not entertain an appeal unless the High Court gave leave, and furthermore could not review or otherwise reconsider the High Court's refusal to give leave. Mr Sreenivasan also drew the court's attention to the immediate predecessor of the current s 49(11) of the Act, *ie*, s 28(7) of the since repealed Arbitration Act (Cap 10, 1985 Rev Ed) ("the repealed Act"), which provided as follows:

No appeal shall lie to the Court of Appeal from a decision of the court on an appeal under this section unless the court *or the Court of Appeal* —

(*a*) gives leave; and

(*b*) considers the question of law to which the decision relates either as one of general public importance or as one which for some other special reason should be considered by the Court of Appeal.

[emphasis added]

Mr Sreenivasan submitted that the repealed provision made express reference to the Court of Appeal having the power to grant leave. This has, however, been deliberately omitted in the current s 49 of the Act, thereby leading to the irresistible inference that the restrictive English position on appeals had been consciously adopted. He also helpfully pointed out that in the Law Reform and Revision Division, Attorney-General's Chambers, *The Review of Arbitration Laws – Final Report* (LRRD No 3/2001, March 2001) ("LRRD 3/2001"), a comparative table (Table of Derivations) at Annex B (pp 91–95) showed cl 49 of the Arbitration Bill 2001 (now enacted as s 49 of the Act) to be a modified derivative of s 69 of the English Act.

17 At the hearing, after being apprised of Mr Lok's reliance on s 49(7) of the Act read with s 52 of the Act as the basis of his application, Mr Sreenivasan submitted that a literal interpretation of s 49(7) of the Act was not plausible. This was because it could potentially result in an endless string of leave applications under s 49(7) of the Act. Moreover, a literal interpretation would run counter to the general scheme of s 49 of the Act, which he pointed out is captioned "Appeal against award". By this, Mr Sreenivasan was alluding to the numerous references to the term "appeal under this section" which are to be found throughout s 49 of the Act. He argued that such a reference, which occurred for example in subll ss 49(3), 49(4) and 49(6) of the Act amongst others, was made specifically in relation to an appeal against an arbitration award. This was clearly different from an appeal against a decision of the High Court. In short, s 49(7) of the Act did not apply to the present situation; it only applied to first-tier applications, *ie*, decisions in relation to leave to appeal against an arbitration award.

18 Turning to s 52 of the Act, Mr Sreenivasan's position was that s 52(3)(*b*) of the Act only applied to situations where there had been no determination by the court on the merits of any particular case. What was contemplated in such situations was that first, an application for leave to appeal against an arbitration award (under s 49(3)(*b*) of the Act) was turned down; this was followed by an application for leave to appeal against such refusal under s 49(7) of the Act which was also unsuccessful. In such a scenario, Mr Sreenivasan submitted that s 52(3)(*b*) of the Act would apply, giving the Court of Appeal jurisdiction to hear an application for leave to appeal. The fundamental rationale underpinning such an interpretation was that there would have been, as it were, "no bite of the cherry" as yet. Ultimately, once the court had heard the merits of an appeal against an arbitration award, s 49(7) of the Act was irrelevant; s 52 of the Act also did not offer any assistance in this regard.

Our decision

19 We begin by considering briefly why an application under s 49(11) of the Act for leave to appeal against a decision of the High Court in relation to an appeal on a question of law against an arbitration award cannot be brought to the Court of Appeal. That this was an application under s 49(11) of the Act (as opposed to s 49(7) of the Act) was the position posited by both parties prior to our request for further submissions on this issue. Although this was ultimately abandoned by both the parties, we nevertheless think it is necessary to restate why an application under that provision does not lie to the Court of Appeal. We will then address the respective positions adopted by the parties in relation to an application under s 49(7) of the Act.

Application under section 49(11) of the Act

20 The starting point of our analysis is the plain meaning of s 49(11) of the Act. When read with s 2(1) of the Act, which expressly states that the term "Court" when employed in the Act means the High Court, this plainly stipulates that leave to appeal to the Court of Appeal against a decision on an appeal from an arbitration award, after satisfying either of the two requirements set out in s 49(11) of

the Act (*viz*, that the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal) must be obtained from the *High Court*.

21 A comparison with the provisions of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") governing appeals to the Court of Appeal in, *inter alia*, interlocutory matters is apposite. Section 34(2) of the SCJA reads:

> **Matters that are non-appealable or appealable only with leave**
>
> **34.**—(1) …
>
> (2) Except with the *leave of the Court of Appeal or a Judge*, no appeal shall be brought to the Court of Appeal in any of the following cases:
>
> …
>
> [emphasis added]

The corresponding provision in the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is O 56 r 3(1) which reads:

> **Leave to appeal against order or judgment of Judge (O. 56, r. 3)**
>
> **3.**—(1) A party applying for leave under section 34 of the Supreme Court of Judicature Act (Chapter 322) to appeal against an order made, or a judgment given, by a Judge must file his application —
>
> (*a*) to the Judge within 7 days of the order or judgment; and
>
> (*b*) *in the event leave is refused by the Judge, to the Court of Appeal* within 7 days of the refusal.
>
> [emphasis added]

It is clear beyond peradventure that leave to appeal under the SCJA operates under a wholly different scheme from that under the Act. First, the statutory architecture of the two schemes was drawn up differently. Whereas s 34(2) of the SCJA expressly provides that leave to appeal may be obtained from the *Court of Appeal or a Judge*, s 49(11) of the Act merely stipulates that "[t]he Court may give leave to appeal" and it is common ground that the "Court" here refers only to the High Court.

22 The Rules also reflect this difference in that O 56 r 3(1) of the Rules specifically recognises and provides for the situation where leave to appeal is refused by the High Court whereupon an application for leave to appeal may be filed to the Court of Appeal. The corresponding provision in the Rules, in relation to arbitration proceedings under the Act, *ie*, O 69 r 8 of the Rules, only states that "[a]n application under the Act for leave to appeal against a decision of the Court to the Court of Appeal must be made to the Court within 7 days of the decision of the Court". Yet again, "Court" here is defined to mean the High Court: see O 1 r 4(2) of the Rules. These differences are plainly material and are not statutory slips between the cup and the lip as we shall now see.

23 In 2002, the Law Reform and Revision Division ("LRRD") of the Attorney General's Chambers undertook a study of the existing Rules of Court to ascertain if there were any amendments that were

required to align the Rules of Court with the Act: see *Report on Review of Rules of Court Relating to Arbitration* (LRRD No 2/2002, 23 January 2002) ("LRRD 2/2002"). LRRD 2/2002 was considered by the Working Party on Rules of Court chaired by L P Thean JA. The LRRD's *Review on Rules of Court Relating to Arbitration* (*Supplementary Report*) (LRRD No 6/2002, 7 May 2002) ("LRRD 6/2002") sets out reasons for the main differences between the Rules that were approved and the draft rules drawn up ('the draft Rules"). It is helpful to refer to LRRD 6/2002 for assistance in identifying and explaining the material changes from the draft Rules to the approved rules in relation to applications for leave to appeal under the Act. We set out the relevant portions in full, at paras 2.11–2.12:

> **Leave to appeal to Court of Appeal**
> **(Original Report para 3.18)**
>
> 2.11 The draft Rules provided that an application for leave to appeal to the Court of Appeal against a decision of the High Court must be made within 7 days of the decision of the High Court. In the event that leave is refused by the High Court, the application for leave to appeal to the Court of Appeal must be made to the Court of Appeal within 7 days of the refusal.
>
> 2.12 *To ensure that the Rules are not ultra vires the Act*, the Working Party recommended that the relevant provision in the draft Rules be redrafted. *As the relevant sections in the Act provide that leave of the High Court, and not the Court of Appeal, must be obtained in respect of applications to appeal against the decision of the High Court*, [it was] recommended that the Rules provide that an application for leave to appeal to the Court of Appeal against a decision of the High court must be made *to the High Court* within 7 days of the decision of the High Court.
>
> [emphasis added]

It also bears mention that O 69 r 8 of the draft Rules was in fact modelled upon O 56 r 3 of the Rules.

24 It is clear from the above report that the Working Party had also considered the appeal scheme in the Act: leave of the High Court, and not the Court of Appeal had to be obtained in such situations. More significantly, the amendments expressly removed the provision that allowed for an application for leave to appeal to be made to the Court of Appeal upon refusal of leave by the High Court. This was plainly a deliberate decision to ensure that the Rules were not *ultra vires* the Act. This background reinforced our view that the difference in wording between O 69 r 8 and O 56 r 3 of the Rules was deliberate and not merely stylistic or inadvertent.

The English position

25 If any doubts on the appeal scheme linger, a brief survey of the position in England will surely put these to rest. The corresponding provision in the English Act ([16] *supra*) is to be found at s 69(8):

> The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
>
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Section 105(1) of the English Act similarly defines "the court" to be the High Court or a county court (subject to certain other provisions which are not relevant for present purposes). *Halsbury's Laws of*

England vol 2(3) (Butterworths LexisNexis, 4th Ed Reissue, 2003) at para 75, fn 20, observes:

> The effect of the Arbitration Act 1996 s 69(8) is that an appeal from a decision of a county court or the High Court made under s 69 will ***only lie to the Court of Appeal with the permission of those lower courts, and it is not open to the Court of Appeal to conduct a review of the lower court's refusal to grant permission***: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [[2001] QB 388] … [emphasis added in bold italics]

The passage states unequivocally that the Court of Appeal is not permitted to conduct a review of the lower court's refusal to grant leave to appeal. Similarly, the learned authors of *Russell on Arbitration* (Sweet & Maxwell 22nd Ed, 2003) state, at para 8-073;

> If the court that decides the appeal does not consider that the matter should be referred to the Court of Appeal for the reasons stated in the Act permission will not be given. *There can be no appeal to the Court of Appeal, either on the substantive issues or on the court's decision to refuse to give permission to appeal*. [emphasis added]

In *Henry Boot* ([16] *supra*), Waller LJ, delivering the unanimous decision of the court, unequivocally declared, at 392:

> In my view it would be difficult to find words clearer than the words of this particular subsection for the proposition that leave of the High Court (or the county court) was needed before any appeal could be brought in the Court of Appeal. Furthermore, if one has regard to its statutory predecessor, the position becomes clearer still. …
>
> It would furthermore seem to me absurd to contemplate a review process in the Court of Appeal in relation to the giving of that leave, otherwise the objective sought to be attained is defeated.

26 We have similarly appraised the statutory predecessor of s 49(11) of the Act – s 28(7) of the repealed Act: see [16] above. Mr Sreenivasan has correctly submitted that the deliberate omission in s 49(11) of the Act of any reference to the Court of Appeal having the power to grant leave (which was present in s 28(7) of the repealed Act), inexorably points to the fact that the English position has been consciously adopted in Singapore.

27 In our view, an application under s 49(11) of the Act for leave to appeal against a decision of the High Court on an appeal against an arbitration award cannot and should not be brought before the Court of Appeal. This conclusion is not reached by any strained interpretation of the statutory provisions; rather, the answer is the same in our view, whether the issue is approached on the basis of a plain reading of s 49(11) of the Act, a comparison with s 34 of the SCJA and the corresponding Rules or a consideration of the immediate statutory predecessor of s 49(11) of the Act. That is the position in relation to an application under s 49(11) of the Act. Is the result any different if an application purports to be brought under s 49(7) of the Act?

Application under section 49(7) of the Act

28 The defendant confirmed in the course of the hearing that the basis of his present application was founded solely on s 49(7) of the Act. We now turn to consider this. As we earlier noted, the defendant had already unsuccessfully sought leave from the High Court to appeal to the Court of Appeal under s 49(11) of the Act. Can the defendant now seek leave to appeal against that decision under s 49(7) of the Act? That is the crux of the matter.

Scheme of section 49 of the Act

29 We begin our analysis by considering the taxonomy of s 49 of the Act, and examining the prescribed modalities. In particular, we need to differentiate the two tiers of applications identified by Mr Lok. In the general scheme of appeals against arbitration awards brought before the courts pursuant to s 49 of the Act, the High Court is first asked to decide whether or not to grant leave to permit such an appeal. If the High Court so decides that leave should be granted, it will then proceed to hear the merits of the appeal. The High Court when hearing such an appeal has a limited role and carefully-defined powers – these are found in ss 49(8) and 49(9) of the Act. Any decision on the merits is deemed pursuant to s 49(10) of the Act to be a judgment of the High Court. A party dissatisfied with such a decision has a further right to seek leave to appeal against that decision – but such leave will only be granted in the very restrictive circumstances prescribed in s 49(11) of the Act.

30 We have broadly described the general scheme prescribed by s 49 of the Act. It is crucial that any counsel who seeks to rely on s 49 of the Act carefully appraise the ambit of the provision. A failure to properly appreciate its ambit could result in adverse cost consequences (and not just for their clients).

31 Returning to our analysis of s 49 of the Act, we note that every subsection in s 49 of the Act leading up to sub-s (10), save for sub-s (2) (which is not relevant for present purposes), adverts to an "appeal". This term "appeal" first appears in s 49(1) of the Act – it is used in the context of an appeal to the High Court on a question of law arising out of an arbitration award. The subsections that follow, for example, sub-ss (3), (4), (5) and (6) of s 49 of the Act, also make reference to an "appeal". It is clear that these subsections are referring to the same appeal, *ie*, an appeal to the High Court from an arbitration award. These sections plainly cannot refer to a different appeal – an appeal to the Court of Appeal from a decision of the High Court. In fairness, neither counsel suggested this to be the case. Leaving aside sub-s (7) of s 49 of the Act for the moment, we further note that sub-ss (8) and (9) of s 49 of the Act are also relevant only in the context of an appeal against an arbitration award, setting out the powers of the High Court when hearing such an appeal.

32 Only when we consider sub-s (10) of s 49 of the Act are we introduced to another term, "[t]he decision of the Court"; however, it must be noted that this decision referred to in sub-s (10) is also in respect of an appeal from an arbitration award. Only at the conclusion of s 49 of the Act is there a reference to a *different* kind of appeal. In sub-s (11) of s 49 of the Act, an appeal to the Court of Appeal from a decision of the High Court is spelt out for the very first time in s 49 of the Act. It is pertinent to also note that the Court of Appeal is *only* referred to in this subsection alone *qua* appellate court.

Scope of section 49(7) of the Act

33 Returning to sub-s (7) of s 49 of the Act, we have first to consider the words "decision … to grant or refuse leave to appeal". This is because Mr Lok argues that the decision of the judge refusing the defendant leave to appeal to the Court of Appeal (*ie*, the 6 March decision) is embraced by these words. The question to be answered is this, what decision does s 49(7) of the Act contemplate? Is it leave to appeal against an arbitration award? Or is it leave to appeal against a decision of the High Court?

34 As highlighted above (at [12]), Mr Lok contends that the court should adopt a literal reading of sub-s (7) of s 49 of the Act. A literal reading of sub-s (7) would encompass a decision refusing leave to appeal *against a decision of the High Court* within its ambit. This is because sub-s (7) merely

ends with the words "leave to appeal" but does not define precisely what decision from which leave to appeal is being sought.

35 In our judgment, this argument cannot stand up to serious scrutiny. If Mr Lok is right, by parity of reasoning, applying a literal interpretation to the word "appeal" wherever it appears in s 49 of the Act, the conditions governing such "appeal", for example in sub-ss (4), (5) and (6) of s 49 of the Act, will likewise have to apply to an appeal against a decision of the High Court. This will be the unintended but unavoidable consequence of a wholly literal interpretation of s 49 of the Act. This cannot be right. It is trite that even a literal approach to statutory interpretation such as the "plain meaning rule" (as laid down by Lord Tindal CJ in *The Sussex Peerage* (1844) 11 Cl & Fin 85; 8 ER 1034) mandates that the courts give the words of the statute their ordinary meaning *in the context in which they appear*. As rightly pointed out in *Maxwell on the Interpretation of Statutes* (P St J Langan ed) (N M Tripathi Private Ltd, 12th Ed, 1969) ("*Maxwell*") at p 58, "[i]ndividual words are not considered in isolation, but may have their meaning determined by other words in the section in which they occur". Our courts have also similarly stated that the rule "prescribes that the statutory provision [is to] be interpreted in its entirety, without undue focus on an isolated word or phrase": see *PP v Low Kok Heng* [2007] SGHC 123 ("*Low Kok Heng*") at [30]. Likewise, in F A R Bennion, *Statutory Interpretation* (Butterworths, 4th Ed, 2002), the learned author observes at p 471:

> The plain meaning rule was expressed by Lord Reid [in *Pinner v Everett* [1969] 1 WLR 1266 at 1273] as follows –
>
> > In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase *in its context in the statute*. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.
>
> [emphasis added]

Therefore, even if Mr Lok is right that a literal approach should be adopted when interpreting s 49 of the Act, in our judgment, Mr Lok has not correctly *applied* such a precept. He has failed to take into account the context of the statute when expounding the word "appeal" in its natural and ordinary sense. Once the context of s 49 of the Act is taken into account, the term "appeal" must refer only to an appeal against an arbitration award.

36 Furthermore, any discourse on the construction of statutes in Singapore must take place against the backdrop of s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act"). We note that an extensive and comprehensive discussion of this provision has recently been undertaken in *Low Kok Heng* at [39] to [57]. There is no necessity for us to add to that discussion; we merely wish to highlight a few salient points that are relevant to the present case. Section 9A of the Interpretation Act provides:

> **9A.**—(1) In the interpretation of a provision of a written law, *an interpretation that would promote the purpose or object underlying the written law* (whether that purpose or object is expressly stated in the written law or not) *shall be preferred to an interpretation that would not promote that purpose or object*.
>
> (2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the

meaning of the provision, consideration may be given to that material —

(a) to *confirm* that the meaning of the provision is the ordinary meaning conveyed by the text of the provision *taking into account its context in the written law and the purpose or object underlying the written law*; or

(*b*) to ascertain the meaning of the provision when —

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

...

[emphasis added]

37 As the court in *Low Kok Heng* summarised, at [57]:

[Section] 9A of the Interpretation Act mandates that a purposive approach be adopted in the construction of all statutory provisions, and allows extrinsic material to be referred to, even where, on a plain reading, the words of a statute are clear and unambiguous. The purposive approach takes precedence over all other common law principles of interpretation.

It is plain that a purposive approach is to be adopted in the construction of s 49 of the Act; and the purposive approach will take precedence over a literal interpretation. Section 9A(2) of the Interpretation Act also allows us to make reference to, and draw assistance from, the reports of the LRRD (see [23] above and [49] and [52] below), as well as various other extrinsic material "capable of assisting in the ascertainment of the meaning of the provision".

38 It is common ground that the Act incorporates various provisions from the English Act and both Acts are largely based on the UNICTRAL Model Law on International Commercial Arbitration ("the Model Law"), which forms the basis of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"): see the second reading of the Arbitration Bill (Bill 37 of 2001) on 5 October 2001 (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2214. The legislative background to the English Act is therefore of some relevance in our understanding of the taxonomy of the Act. In this regard, we note also the observations made by the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, where Lord Steyn expounded on the "ethos" of the English Act, at [18]:

Lord Wilberforce played a large role in securing the enactment of the Arbitration Bill. During the second reading of the Bill in the House of Lords he explained ***the essence of the new philosophy*** enshrined in it: Hansard (HL Debates), 18 January 1996, col 778. He said:

"I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. *I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see* ***arbitration, as far as possible****, and subject to statutory guidelines no doubt,* ***regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law*** *– yes, its substantive law.* …

…

… [The Bill] has given to the court ***only*** those ***essential powers*** which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, ***in the direction of correcting very fundamental errors***." (My emphasis.)

Characteristically, Lord Wilberforce did not express his understanding of the new Arbitration Bill in absolute terms. But the general tendency of his observations, and what Parliament was being asked to sanction, is clear. It reflects the ethos of the 1996 Act.

[emphasis added in bold italics]

Law-makers in Singapore have articulated similar sentiments emphasising the *limited* role of the courts in relation to arbitration proceedings: see LRRD 3/2001 ([16] *supra*) at para 2.38 quoted at [52] below.

39 As pointed out by a leading English commentator, D Rhidian Thomas in *The Law and Practice Relating to Appeals from Arbitration Awards* (Lloyd's of London Press Ltd, 1994), in relation to the English Arbitration Act 1979 (c 42) ("the 1979 Act") at para 10.3.2.1:

The policy of the legislation is unambiguous. Whereas appeals from arbitration to the High Court under the 1979 Act will be rare, on-appeals from the High Court to the Court of Appeal will be still rarer. Kerr L.J. [in *The Derby* [1985] 2 Lloyd's Rep 325 at 327] has summarised the policy of the legislation in the following terms:

Since the 1979 Act has come into force and its effect has been laid down in a number of decisions, in particular [*The Nema*], only a few decisions by arbitrators have reached the Court of Appeal. *This is in accordance with the policy of the Act to discourage appeals from arbitrators on issues of law and only to allow them to proceed beyond the court of first instance in exceptional circumstances.*

[emphasis added]

In a similar vein, in *The Antaios* [1981] 2 Lloyd's Rep 284, Robert Goff J (as he then was) said, at 300:

It seems to me that the whole scheme of the Act is basically that on the questions of law which fall within the Act the intention is that primarily there should be one appeal, and one appeal only, and that is to [the High] Court.

Although the latter observations were made in the context of the 1979 Act, in our view, they apply with equal if not greater force to the (current) English Act. It is therefore plain from the foregoing that the general ethos or philosophy underpinning the English Act is that the courts will adopt a non-interventionist stance in relation to arbitration matters; it is only in the case of the "very fundamental errors" that have been statutorily identified that the court will be willing to intervene. We are of the view that the policy objectives articulated in respect of the English Act are equally applicable to our domestic arbitration legislation. One need not look any further than the provisions of the Act itself to find support for this view. For instance, s 47 of the Act expressly provides that the court does not have jurisdiction to "confirm, vary, set aside or remit an [arbitration] award … *except where so provided in* [*the*] *Act*" [emphasis added]. Further, it is plain that an application or appeal under s 49 of the Act may not be brought unless the applicant or appellant (as the case may be) has first

exhausted any available alternative remedies provided for in the arbitral process and under s 43 of the Act: see s 50(2) of the Act. All these provisions unerringly point to the same conclusion: it is only in very limited circumstances that the court will be willing and able to intervene.

40 In applying a purposive approach in interpreting the Act, the objective should be to promote the desirability of finality and limited curial intervention in arbitration proceedings. The availability of an onward appeal has been severely attenuated. In this regard, we must firmly reject Mr Lok's submission that it is appropriate to apply a wholly arid literal interpretation to s 49(7) of the Act. Other common law principles of interpretation come into play *only* when their application coincides with the purpose underlying the written law in question. It must be noted, nevertheless, that it is more often than not that a literal reading of a statutory provision is in fact likely to coincide with a purposive reading of that provision. To be sure, a successfully drafted piece of legislation is one which clearly brings out the purpose underlying the provision by its express literal words: see D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 4th Ed, 1996) at para 2.5, p 31. Indeed, the present case is one good example which conduces towards such a finding: on both a (correctly applied) literal reading of s 49 of the Act and a purposive approach to that section, we come to the same conclusion – the term "appeal" used in s 49 of the Act can *only* refer to an appeal from an arbitration award.

41 To be fair, Mr Lok did not attempt to argue that the whole of s 49 of the Act should be read "literally". He must have recognised the absurdity of adopting such an interpretative technique given the consequences. He trained his fire on persuading the court that s 49(7) of the Act should be read in isolation in this manner. He contended that if the legislative intent was to prevent any further application for leave under s 49(7) of the Act once the court had already refused leave to appeal to the Court of Appeal, this would have been expressly stated in the Act. Since s 49(7) was silent on this, it did not foreclose such an application being made.

42 This argument may be easily disposed of. It is a rule of statutory interpretation that it is presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect: see *Maxwell* ([35] *supra*) at p 159. In *Gelberg v Miller* [1961] 1 WLR 459, the House of Lords considered s 1(4) of the English Administration of Justice Act 1960 (c 65) which provided that "[f]or the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the court below". The House of Lords concluded that that section did not authorise it to exercise the power of the Divisional Court or the Court of Appeal (Criminal Division) to certify that a point of law of general public importance was involved in its decision in a criminal cause or matter. This case was noted in *Henry Boot* ([16] *supra*) along with other House of Lords authorities, and persuaded the English Court of Appeal in *Henry Boot* to find that when a court was construing a statutory provision relating to appeals it was *illegitimate to start* from the point of view that litigants had such rights. In particular, the Court of Appeal in arriving at its conclusion in *Henry Boot* derived considerable guidance from the judgment of Lord Halsbury LC in *Lane v Esdaile* [1891] AC 210. This was a case where the House of Lords had to consider whether an appeal lay to the House of Lords after a refusal by the Court of Appeal to grant "special leave" under a rule of the court (Rules of the Supreme Court 1881, O 58 r 15, cited in *Henry Boot* at 392) that stipulated:

> No appeal to the Court of Appeal from any interlocutory order … shall, except by special leave of the Court of Appeal, be brought after the expiration of 21 days …

A substantial portion of Lord Halsbury LC's judgment in *Lane v Esdaile* (at 211–212) was quoted in *Henry Boot* and we now set out the relevant portions as we too find them instructive:

> An appeal is not to be presumed but must be given. I do not mean to say that it must be given by express words, but it must be given in some form or other in which it can be said that it is affirmatively given and not presumed. In the particular case now before your Lordships the appeal is certainly not given in express words. The words used are "leave of the Court"…
>
> [W]hen I look not only at the language used, but at the substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal – that there should not be an appeal unless some particular body pointed out by the statute … should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really ought to give it a reasonable construction.
>
> [emphasis added]

In short, there is simply no presumption of law that litigants have a right of appeal. The express provision granting a dissatisfied litigant in the High Court (in relation to an appeal from an arbitration award) a right of appeal to the Court of Appeal is s 49(11) of the Act. Even then it is available only in extremely limited statutorily-prescribed circumstances. Any alternative or further right of appeal cannot be implied into the Act; express language is required to allow s 49(7) to be interpreted as having this effect.

43 Taking the argument further and taking Mr Lok's case at its highest by focusing solely on s 49(7) of the Act, and assuming *arguendo* that Mr Lok is right in his interpretation of s 49(7), we still arrive at the inevitable conclusion that the outcome is untenable. A simple hypothetical based on the same facts but in the *converse*, employing Mr Lok's analysis, will illustrate the point. An astute reader will find that this will bear some resemblance to the reasoning of Lord Halsbury LC in the latter portions of the passage quoted at [42] above.

44 Assume that the judge had granted the defendant leave to appeal because there was, in her view, a question of law of general importance. This would result in a substantive appeal wending its way to the Court of Appeal. In the meantime, the plaintiffs being dissatisfied with the judge's decision ("the s 49(11) decision"), can and do apply under s 49(7) of the Act (according to Mr Lok's reasoning) to another High Court judge ("Justice X") for leave to appeal against the s 49(11) decision. If we assume that Justice X also grants leave to appeal, this would result in a second appeal being

placed before the Court of Appeal – but this time for the Court of Appeal to decide whether the s 49(11) decision was correct, *ie*, whether leave to appeal should have been given in the first place. Thus, the Court of Appeal would be pressed to first decide the latter appeal, *ie*, whether leave to appeal should be granted, before it can decide, and only if the answer to this is affirmative, the merits of such an appeal.

45 In our view, this could not have been what Parliament had even faintly contemplated. It would entail a situation whereby although the Court of Appeal is already seised of jurisdiction to hear the former appeal (*ie*, substantive appeal), it would have to, as it were, "stay" the proceedings for it to decide the question of whether it actually had the jurisdiction or not. Further, the effect of Mr Lok's analysis is that the Court of Appeal will have to actually decide whether leave to appeal from a decision of the High Court should be granted. However, Mr Lok paradoxically states in his written submissions (at para 48) that "no application for leave to appeal [from a decision of the High Court] could be made to the Court of Appeal under the new Act" and, again, at para 54 that:

> At the very most, the purpose of the amendments [to the repealed Act] appeared to be to channel all applications for leave to appeal before the High Court. This means that a 2nd tier application would be heard by another High Court Judge instead of the Court of Appeal.

It appears to us that Mr Lok has failed to consider the next step in his suggested scheme: eventually, the Court of Appeal might have to hear an application for leave to appeal under s 49(11) of the Act, as demonstrated by the result in the scenario posited above. This would be contrary to the intention of s 49(11) of the Act, and we hasten to add that it would also be incongruous with our conclusion reached in [27] above.

46 We find some tangential support for our conclusions in the view which was taken by the English Court of Appeal in the case of *Kay v Briggs* (1889) 22 QBD 343 in relation to s 45 of the English Supreme Court of Judicature Act 1873 (c 66). That section governed appeals to a divisional court from an inferior court, and provided that:

> … The determination of such Appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard.

In that case, the divisional court had refused leave to appeal and the aggrieved party thereupon attempted in the Court of Appeal to review the determination of the divisional court in that respect. The Court of Appeal took the view that it was unable to entertain the question and could not review the decision of the divisional court. Lord Esher MR said, at 344:

> If this Court [meaning the Court of Appeal] could overrule the discretion given by that section to Divisional Courts the practical effect would be to allow an appeal here in every case, because the facts of each case would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of s. 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts.

Similarly, in the present case, if the Court of Appeal can routinely overrule the discretion given to the High Court pursuant to s 49(11) of the Act, the practical effect would be to allow an appeal to the Court of Appeal in every case because the facts of each case would be brought before us in order to enable us to decide whether or not we ought to overrule the discretion exercised by the High Court. As Lord Herschell astutely noted in *Lane v Esdaile* ([42] *supra*) at 214, "the matter was intrusted, and intended to be intrusted, to their discretion". In our judgment, the discretion whether to grant leave

to appeal to the Court of Appeal must be, and can only be, exercised by the High Court; see however [68] below. This arrangement ensures that speed and finality in the arbitral process continue to prevail while preserving a limited scope for curial intervention.

Section 52 of the Act

47 How does s 52 of the Act clarify this, if at all? In view of the conclusion we have reached above, *viz* that s 49(7) of the Act does not apply to a decision of the High Court made pursuant to s 49(11) of the Act, the defendant cannot seek to rely on s 49(7). Accordingly, s 52 of the Act is also irrelevant. Nevertheless, since both counsel spent some time addressing the point, we will also examine the intent and purport of s 52 of the Act.

48 In our view, the legislative purpose of s 52 is merely to spell out the jurisdiction and the powers that the Court of Appeal possesses when the High Court grants leave to appeal pursuant to s 49(7) of the Act. As we have explained above, this is only in relation to first-tier applications. In such a situation, the Court of Appeal will consider whether the High Court's decision to grant or refuse leave to appeal against an arbitration award is correct. The result is that the Court of Appeal will have to decide whether to grant or refuse leave to appeal *against an arbitration award*. In doing so, s 52(3)(*b*) of the Act confirms that the Court of Appeal has the same jurisdiction and all the powers as the High Court if and when the High Court decides such a matter.

49 It is also helpful to examine the legislative background to s 52 of the Act. In LRRD 3/2001 ([16] *supra*) at para 2.41, cl 52 of the Arbitration Bill 2001 which (with minor amendments) is substantially similar to the present s 52 of the Act, is stated to be enacted "[t]o ensure a consistent procedure and practice in relation to applications for leave to appeal". It thus appears that this provision was introduced into the Act more for the purposes of streamlining the procedural requirements in relation to applications for leave to appeal than as a provision intended to confer jurisdiction upon the courts. Interestingly, s 52(1) of the Act stipulates that the applications for leave to appeal *shall* be made in such manner as may be prescribed in the Rules. As a further observation, we also note that this provision has not been modelled on any other comparative legislation.

50 In our view, s 52(3)(*b*) of the Act merely confirms that the Court of Appeal has a complementary jurisdiction to that of the High Court if and when it is properly seised of a matter. Ultimately, the High Court is meant to fulfil the role of an exclusive gate-keeper for arbitration matters in relation to the appeals procedure prescribed by the Act. Therefore, it is *only* when the High Court decides that leave under s 49(7) of the Act is to be granted, that the Court of Appeal thereafter has the jurisdiction to hear the matter. Before elaborating on this point, we note in passing the previous state of the law under the repealed Act. Under that Act, leave of Court was not required for an appeal to the Court of Appeal against the High Court's decision on an application for leave to appeal from an arbitration award: see *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609 at [16]; and *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2003] 4 SLR 492 ("*Northern Elevator*") at [12]. However, the Court of Appeal in *Northern Elevator* went on to observe that this procedural point was of "limited effect due to the changes effected to arbitration law by [the Act]" because "[s]ection 49(7) [of the Act] ... is a new provision that specifies that the leave of the court shall be required for any appeal from a decision of the court under this section [s 49] to grant or refuse leave to appeal" (at [11]).

51 Returning to our discussion on the current state of the law, we find ourselves unable to fully agree with Mr Sreenivasan's argument that s 52(3)(*b*) of the Act only applied to situations where there had been no determination by the High Court on the merits of any particular case. While Mr Sreenivasan is correct to say that where there *has* been a determination by the court on the

merits of a case, s 52(3)(*b*) does not apply (as is the case with s 49(7) of the Act), we are of the view that the converse does not necessarily follow. In our judgment, Mr Sreenivasan's concession is too generous: it is not in *all* cases where there is no determination on the merits that s 52(3)(*b*) must apply. In a situation where the High Court refuses to grant leave to appeal pursuant to s 49(7) of the Act against an initial decision refusing leave to appeal against an arbitration award, even if there has been no determination on the merits in this type of situation, we are of the view that s 52(3)(*b*) will have no role to play. The Court of Appeal simply does not have the jurisdiction to hear such an application. Our views on s 52(3)(*b*) are reinforced when we consider later the position in England (see [58] below).

52 In our judgment, this interpretation is consistent with the general policy that underpins the spine of the Act that is the desirability of finality, and limited curial intervention, in the arbitral process. The judge correctly observed in *Ng Chin Siau* ([6] *supra*) at [34]:

> The policy behind the enactment of s 49 of the Act is that curial intervention in the arbitral process is to be minimised. That is why there is no appeal as of right against the arbitrator's decision or against the decision of the High Court on such an appeal. That is also why the first pre-condition specified in s 49(11) is that the legal point at issue should be of general importance rather than something that is only relevant to the parties or a very limited situation.

We agree entirely with these observations. There is no gainsaying the rationale behind such a policy: parties having chosen to arbitrate should usually be bound by the finding of the tribunal and not that of the court; so whether the court would reach a similar conclusion would not be relevant and if the court were to come to a different view, the substitution of the court's view for that of the tribunal might actually subvert the agreement of the parties. Indeed, this was recognised and articulated by the Review of Arbitration Act Committee formed by the Attorney-General in 1997 to review the arbitration legislation in Singapore (see also the commentary in *Singapore Arbitration Handbook* (LexisNexis, 2003) at p 68). It is instructive to refer to the committee's report, LRRD 3/2001 ([16] *supra*), at para 2.38:

> 2.38 *Appeal against awards (Clause 49)*
>
> 2.38.1 We considered the desirability of abolishing the right of appeal to the Court on substantial issues in the arbitration. … This proposition was accepted by the Law Reform Sub-Committee on Review of Arbitration Law when they recommended the adoption of [the] Model Law and the enactment of the International Arbitration Act. In relation to domestic arbitration, the Sub-Committee suggested that *'the courts should be more closely involved … (both in order to protect weaker parties and for the purpose of being involved in the evolution of decisions that concern domestic law and practice)'*. We find much wisdom in this view and accept that an absolute abolition of the right of appeal may not be desirable in arbitrations under the domestic regime. Retaining a limited degree of review by the court is consistent with the parties' desire to have the matter decided in accordance with the law as properly understood and as applied in Singapore. The right of appeal against awards on questions of law is thus retained in this Bill.
>
> [emphasis in original]

53 Clearly, the objective of retaining a *limited* degree of review by the court in so far as domestic arbitrations are concerned was consciously and deliberately adopted. This is to be contrasted with the position under the IAA: Except where the High Court has found grounds under s 34 of the IAA or Art 24 of the Model Law to set aside an award, there is *no right of appeal*. To be sure, Mr Lok accepted the general policy objectives behind the Act. However, he contended that

these policy objectives only applied in relation to arbitration matters coming before the courts *for the first time*; once an arbitration matter was properly before the court, these policy considerations did not apply to any further appeal thereon. We find ourselves unable to agree with Mr Lok's submission. In our view, the policy concerns permeate the entire process of curial intervention apropos arbitration proceedings; and continue to remain relevant in every pending application before the court.

54 The case of *Henry Boot* ([16] *supra*) is again instructive: Waller LJ, in considering s 69(8) of the English Act, noted at 396:

> I also reject [counsel for the plaintiff's] submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible … Limitation on the rights of appeal is consistent with that philosophy: see the observations of Sir John Donaldson MR in [*Aden Refinery Co Ltd v Ugland Management Co Ltd*] [1987] QB 650, 655. As Lord Nicholls of Birkenhead emphasised in *Inco Europe Ltd v First Choice Distribution* [2001] 1 WLR 586, 590C, many sections of the 1996 Act provide for applications to the court and some of them restrict appeals from decisions of the court. The Act thus adopts the same philosophy and the construction I have placed on section 69 is consistent with its context.

The English position

55 We have already briefly considered the English position at [25]–[26] above. Mr Lok had accepted that the English position is clear that an application for leave to appeal against the decision of the court on an appeal from an arbitration award must be heard by the High Court judge who heard the appeal against the award. In other words, Mr Lok accepts that whenever leave is required, it is to be made to the court which gave the decision. On the present facts, this was indeed what was done by Mr Lok – he had taken out such an application for leave which was turned down. Thus, it is strictly speaking unnecessary to conduct a further review of the English position in relation to s 69(8) of the English Act, save to note that *Henry Boot* has also been applied in recent cases such as *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd* [2007] 1 Lloyd's Rep 142 ("*CGU*"); and *Cantrell v Wright & Fuller Ltd* (2003) 91 Con LR 97.

56 We would however like to make some observations on another English case, *North Range Shipping Ltd v Seatrans Shipping Corpn* [2002] 1 WLR 2397 ("*North Range*"), and the more recent case of *CGU*. *North Range* involved an application to the Court of Appeal for permission to appeal against a High Court judge's (David Steel J's) refusal to grant leave for an appeal from the decision of the arbitrators to the High Court, *ie*, a first-tier application. Prior to this, the applicant had applied to Steel J for permission to appeal to the Court of Appeal pursuant to s 69(6) of the English Act (which is *in pari materia* with s 49(7) of the Act) from the judge's refusal to grant leave. Steel J refused to grant permission without giving any reasons. It is to be noted, however, that he gave reasons for his initial refusal to grant leave to appeal to the High Court. The significance of this point will become clearer shortly. The Court of Appeal granted the application for permission to appeal but dismissed the appeal.

57 It is noted from the outset that this case involves a different situation from the present. In *North Range*, there was no decision on the merits at any stage of the court proceedings. This alone is sufficient to distinguish the case and it is therefore of no assistance to the defendant. However, it will also be apparent that the case does have some bearing in relation to another issue, an issue that we have expressed our opinion on at [51] above. To reiterate, this concerns the situation where the High Court refuses leave to appeal from an arbitration award and further refuses leave to appeal to the Court of Appeal from such decision. We have already expressed our view that in such a situation,

the aggrieved party's odyssey comes to an end – he cannot bring any further application before the Court of Appeal. The decision in *North Range* allowing permission to appeal therefore seems, at first blush, to be at odds with our view. It is in this context that we consider it helpful to deal with that case. Having said that, it bears mention that this case is also helpful for a number of other reasons which we now explain.

58 First, we note the observations made in *North Range* in relation to the relief that was being sought in that case. At [10] of the judgment, Tuckey LJ said:

> The applicant's notice of appeal asks this court to give leave to appeal from the arbitrators' award. *This court has no jurisdiction to make such an order* as their counsel Mr Plender conceded. However, his primary submission to us was that we should allow the appeal from the judge's refusal to give leave and remit the application for rehearing by a different commercial judge because David Steel J's reasons were inadequate. [emphasis added]

We raise this point because it reinforces our view of the role and purpose of s 52(3)(*b*) of the Act. There is no comparable provision in the English Act. When Tuckey LJ says that "[t]his court has no jurisdiction to make … an order [granting leave to appeal from an arbitration award]" in relation to the English position, this in our view clearly illustrates a significant difference between that statutory regime and ours. When this Court is invited to decide whether to grant or refuse leave to appeal against an arbitration award (pursuant to the granting of leave by the High Court under s 49(7) of the Act), s 52(3)(*b*) of the Act confirms that this Court of Appeal has the same jurisdiction and powers as the High Court when it determines such a matter. It therefore has the jurisdiction to make an order granting leave to appeal from an arbitration award. That is one such situation s 52(3)(*b*) is intended to embrace. In England, it would appear from the portion of Tuckey LJ's judgment quoted above that the English Court of Appeal has no such powers; instead, it would have to allow the appeal from the judge's refusal to give leave and *remit the application* for rehearing by a different High Court judge.

59 The second reason why *North Range* is helpful is that it categorically reaffirms the position on appeals (as declared in *Henry Boot* ([16] *supra*)) at [11]:

> The first question therefore is whether we have jurisdiction to deal with the case on this basis. *What is clear is that there is no appeal from the judge's refusal to give leave on the merits. This follows from the language of the statute and was confirmed by this court in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*. … [2001] QB 388. [emphasis added]

By following the position in *Henry Boot*, the court in *North Range* confirmed that where the High Court had heard an appeal from an arbitration award *and had ruled on the merits*, any refusal to grant leave to appeal to the Court of Appeal against that decision was final – no appeal would lie against such refusal.

Residual jurisdiction

60 Interestingly, *North Range* also adds another jurisprudential woof to the jurisprudence discussed thus far – the reliance by the applicant in that case on the provisions of the Human Rights Act 1998 (c 42) ("HRA") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and the court's discussion of a "residual jurisdiction" which the Court of Appeal possessed. In *North Range*, the applicant's counsel sought to rely on s 6 of the HRA, which makes it unlawful for a court to act incompatibly with a Convention right, and argued that the court was required to give the applicant a right of appeal to enable it to complain that the process by which the judge reached his decision was unfair and contrary to Art 6 of the ECHR. It must be noted

that this submission did not involve a direct challenge to the correctness of the judge's decision on the merits of the application for leave to appeal.

61 The position prior to *North Range* had been that if the High Court judge refused permission to appeal to the Court of Appeal under s 69(6) of the English Act, the Court of Appeal had no jurisdiction to hear an appeal against such a refusal. This was so determined by the Court of Appeal in *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650 ("*Aden Refinery*"), a decision that predated the HRA. The basis of this decision was that the discretion conferred upon the judge under s 69(6) of the English Act was for him alone. However, the Court of Appeal in *Aden Refinery* also reserved the right to intervene in cases where the judge had failed to act judicially and "in truth never reached 'a decision' at all on the grant or refusal of leave, but had reached his conclusion, not by any intellectual process, but through bias, chance, whimsy, or personal interest" (*per* Mustill LJ (as he then was) at 666). These *dicta* were applied by the Court of Appeal in *North Range* on the basis that "unfairness and misconduct both relate to process" (at [12]), thereby providing a means for the Court of Appeal to consider the question whether reasons had to be given by a judge who refused permission to appeal against his refusal to hear an arbitration claim. The Court of Appeal in *North Range* accepted that it had no power to grant permission to appeal against the judge's decision to refuse to hear an appeal against an arbitration award, but held that there was a *residual jurisdiction* vested in the Court of Appeal to hear an appeal against a refusal to permit an appeal in circumstances in which the judge's decision had allegedly been unfair. Section 69(6) of the English Act was not a bar to an appeal *where the complaint was one of procedural unfairness* by the judge in the lower court.

62 The Court of Appeal in *North Range* held that it had the jurisdiction to consider whether a judge's reasons to refuse permission to appeal were adequate and to set aside his decision if they were not, but it would refuse permission to appeal against the adequacy of a judge's reasons in anything other than the very plainest case. The reasoning of the court at [14] is instructive:

> We accept Mr Plender's submissions on the question of jurisdiction. If, as is accepted, there is a residual jurisdiction in this court to set aside a judge's decision for misconduct then there can be no reason in principle why the same relief should not be available in a case of unfairness. *Each is directed at the integrity of the decision-making process or the decision maker*, which the courts must be vigilant to protect, and *does not directly involve an attack on the decision itself*. [emphasis added]

The result was that the applicant was granted permission to appeal but since the judge had given entirely adequate reasons for his decision, the appeal would be dismissed. As the court observed (at [32]), there are "dangers inherent in an attack on the adequacy of reasons. Only their adequacy is in issue; not whether or not they are correct".

63 We note further that the "exceptional jurisdiction" exercised by the Court of Appeal in *North Range* was again exercised in *BLCT Ltd v J Sainsbury plc* [2004] 2 P & CR 3. The bulk of the arguments in the latter case focused on s 69(5) of the English Act (no requirement of oral hearing for leave to appeal applications) and whether a denial of an oral hearing on the facts of that case contravened Art 6 of the ECHR. The applicant further argued that the restriction contained in s 69(6) of the English Act was itself incompatible with Art 6 of the ECHR. In considering these arguments, the Court of Appeal relied on *North Range* and accepted that it had a residual jurisdiction to grant relief in a case of unfairness, but held that there was none in the circumstances. It is instructive to refer to the relevant passage in Arden LJ's judgment where the learned judge asked herself (at [45]) whether the restriction contained in s 69(6) of the English Act:

> … would apply to the refusal of a judge to recuse himself on the grounds of bias. It would certainly be very odd if the refusal of the judge to give leave against that decision meant that the appellant had no avenue of appeal to the Court of Appeal. *In my judgment, the answer lies not in any incompatibility with the Convention but in the residual jurisdiction articulated in the* North Range *case*. [emphasis added]

As noted by Robert Merkin in *Arbitration Law* (Lloyd's of London Press Ltd, 1991), at para 21.63:

> The outcome of *North Range Shipping* and *Sainsbury* is, therefore that the Court of Appeal has a residual jurisdiction to give permission for an appeal to it in cases where unfairness would otherwise result from the manner in which the trial judge determined the application for permission to appeal against the award.

64 The most recent pronouncement in England (as far as we are aware) on the issue of a residual jurisdiction in this area is the case of *CGU* ([55] *supra*), where the English Court of Appeal confirmed the correctness of the decision in *North Range*: see *CGU* at [66]. *CGU* concerned an application to a judge for permission to appeal against his substantive decision on an appeal from an arbitration award (under s 69(8) of the English Act) which was refused. This was different from *North Range* which concerned a refusal by a judge to grant permission to appeal against an arbitration award (under s 69(6) of the English Act), although the relevant principles governing a challenge to the judge's refusal were regarded as identical: see *CGU* at [65]. In that sense, *CGU* is even more relevant to the present case than *North Range*. What was in issue in *CGU* was whether *North Range* was decided *per incuriam* inasmuch as it held that a residual jurisdiction did exist to remedy a breach of the Art 6 (of the ECHR) requirement of fair process. Rix LJ, in giving the leading judgment of the court, held at [59] that:

> … *North Range* was not decided *per incuriam*, is binding on this court, and is correct in holding that a residual jurisdiction exists for reviewing on appeal the misconduct or unfairness of a first instance judge's determination concerning the grant or refusal of leave to appeal.

65 Rix LJ, however, went on to analyse the decision in *North Range*, and it was possible in his view to do so "in more than one way" (at [67]). Briefly, the first possible explanation of *North Range* the learned judge suggested was that s 69 of the English Act "could be construed all by itself as dealing only with decisions on the merits, and not with a process undermined by misconduct or unfairness" (at [68]). On that basis, the learned judge was of the view that the *Lane v Esdaile* ([42] *supra*) principle, which was a principle of construction, could be distinguished. The second explanation was that the residual jurisdiction was conferred by virtue of the HRA, *ie*, the source of the jurisdiction could be found in the HRA itself. The third and last possibility, and the one which Rix LJ preferred, was an approach based on a construction of s 69 of the English Act. He held that the proper interpretation of the judgment in *North Range* was that the construction of s 69 of the English Act was modified, in accordance with the obligation on judges imposed by the HRA to construe legislation consistently with the ECHR, "so as to exclude from its possible ambit any challenge which went to misconduct or unfairness in the process, as distinct from the merits of the decision" (at [70]) (also see *Arbitration Law* ([63] *supra*) at para 21.63). The learned judge's reasoning is instructive and merits a careful appraisal, at [71]–[72]:

> In my judgment, it is at least a possible construction that section 69(8) is not purporting to deal with appeals from the first instance judge on the basis of his own misconduct or the unfairness of the process. The whole context of section 69 is an appeal on the merits. … While it is understandable that a challenge to the award based on serious irregularity (affecting the tribunal, the proceedings or the award) should be dealt with expressly by the statute, it is equally

understandable that the statute does not expressly deal with, indeed it may be said does not contemplate, misconduct or unfairness (and all misconduct is a form of unfairness) by the court. The statute may not contemplate such failure in the judicial process, and indeed it is likely to be quite exceptional and rare, but in theory it may occur. If it should occur, what reason is there for thinking that Parliament intended that it should be swept under the carpet by the judge's own power to refuse leave to appeal to the Court of Appeal? The same question arises if the unfairness occurs not in the conduct of the judicial appeal at first instance, but in the process of considering an application for leave to appeal to the Court of Appeal.

The truth of the matter is: there are all sorts of contexts in which, for good reason, Parliament has provided that there should be restrictions on the appeal process, and a limit to appellate jurisdiction. In such situations, for the reasons given in *Lane v Esdaile*, it is natural to conclude that, even in the absence of express language, the statute intended the lower court's discretion as to whether or not to give permission to appeal to a higher court to be exclusive and final. *However, there is no similar rationality, it may be said no good reason at all, for thinking that a court's unfairness is to be left incapable of appellate review*.

[emphasis added]

Accordingly, Rix LJ was of the view that a challenge to the refusal of the judge to grant permission to appeal under s 69(6) (or, as the case might be, s 69(8)) of the English Act could not be brought before the English Court of Appeal on the merits of his ruling but it could be made where the judge's decision was on procedural grounds in truth not a decision at all: in such a case, Rix LJ was of the view that the application to the English Court of Appeal was not under s 69 of the English Act but rather under s 16(1) of the Supreme Court Act 1981 (c 54), which provides for the English Court of Appeal to have jurisdiction "to hear and determine appeals from any judgment or order of the High Court".

66 It must also be noted, however, that Rix LJ in *CGU* was quick to underline that this residual jurisdiction would only be exercised when there was "not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision" (at [79]). In the court's view, perversity in itself – a decision that no reasonable decision-maker could make – was not enough. It had to be something which amounted to unfairness in the process, such as deciding on the basis of a litigant's skin colour (at [85]).

67 We have covered the position in England in some detail. It must be noted that the statutory requirements of the ECHR and the HRA do not feature at all in our jurisdiction in the sense that we do not have similar legislation in Singapore. Therefore, this line of cases and the jurisprudence which it explicates must be carefully read in its proper context. Having said that, however, Rix LJ in *CGU* astutely pointed out that he was not concerned in that case "with the width of judicial review, but with the distinction between a decision on the merits, right or wrong, and the process by which the decision is supposedly taken, adequate or flawed by unfairness" (at [46]). In the learned judge's opinion, the *dictum* of Mustill LJ in *Aden Refinery* ([61] *supra*) demonstrated, *even before the HRA*, the limits of the *Lane v Esdaile* ([42] *supra*) principle, and "the need for a residual jurisdiction to deal with misconduct or unfairness (or even mischance) in the decision making process, if it can be found consistently with the dictates of the relevant statutes" (at [47]).

68 In our judgment, when considering s 49 of the Act, it is plain that Parliament could not have intended any unfair process of the High Court to be absolutely immune from appellate review. In a scenario where an appeal process has been allowed, this court cannot take the view that even the most egregious situation involving a lower court has been shielded from appellate review. While such

situations will be infrequent, they may nevertheless occur. Do we then throw up our hands and avert our gazes from the injustice that may have been occasioned? We do not think that Parliament would condone such a parochial judicial attitude (see also *CGU* at [71]). If there was no "decision", surely this court has the residual discretion to direct another judge to hear the application. As characterised by Mustill LJ in *Aden Refinery* at 662:

> [T]here was no way in which Parliament could have achieved its object [of eliminating delays which might frustrate the primary purpose of the arbitration statute], for however hard the legislature tried to prevent an appeal, there was no form of words which could exclude an overriding discretion to intervene when the circumstances are such that the judge either failed in any true sense to exercise a discretion, or based his exercise on flawed foundations.

Therefore, in our view, the Court of Appeal has a residual jurisdiction to enquire into unfairness in the process of a refusal of leave under s 49(11) of the Act read together with ss 29A(3) and 29A(4) of the SCJA. We agree that there is a distinction to be drawn between a decision on the merits and the process by which that decision is reached. Where the Court of Appeal exercises this residual jurisdiction, it does so *only* to correct the *process* of decision-making of the High Court; it does not purport – indeed, it does not have the jurisdiction – to interfere with the *merits* of a decision of the High Court. However, and this is a point we cannot over-emphasise, since there is not even the slightest hint of any allegation of procedural unfairness by the defendant, the issue of an exercise of the residual jurisdiction does not arise in the present case. The question of what exactly will constitute procedural unfairness such as to be able to invoke the assistance of the court in the exercise of its residual jurisdiction will have to be determined in an appropriate case in the future, if and when it so arises.

69 All that is left for us to do at present is to emphasise the importance of what was also said in *North Range* ([56] *supra*) and *CGU* about the dangers of this residual jurisdiction being misused. Any inclination by counsel in future cases, even an unconscious one, to masquerade an unfavourable decision as one which is not only wrong but arrived at unfairly, should be resolutely resisted unless plainly and amply supported by the facts. A failure to rein in an unwarranted inclination may result in adverse costs consequences. We stress that in the nature of things it is likely to be an exceptionally unusual case where the submission of processoral unfairness is justifiably advanced. The existence of this residual jurisdiction, which is necessary to prevent injustice, cannot itself be turned on its head to become a forensic tool for undermining the process of arbitration and the legislative intent.

Costs

70 In view of our finding that this court does not have the jurisdiction to hear this application, the entire application was flawed *in limine*. In the usual course of events, this should naturally result in costs being awarded to the plaintiffs.

71 However, in describing the procedural history of this application, we have made reference to the fact that the parties had initially *agreed* that this court had the jurisdiction to hear such an application. Indeed, at the end of the hearing of this application when we had to decide the question of costs, Mr Sreenivasan forthrightly acknowledged the role he had played in this befuddled application. When asked what would be a fair costs order, Mr Sreenivasan replied that he was only seeking to receive half of the costs of the entire application. Mr Lok submitted in reply that since the court had only substantively dealt with the jurisdiction point, he urged the court not to award the entire amount of his opponent's costs. He suggested that an order for a quarter of the costs be granted.

72 We agreed with Mr Sreenivasan that an order for the defendant to pay half of the costs of the entire application was appropriate in the circumstances. Both counsel had spent considerable time and effort in preparing for their respective cases on the merits of the application for leave to appeal. This work was completed before we invited counsel to make submissions on the preliminary jurisdictional issues. Even though we did not hear any arguments on the merits of the application proper, we are of the view that since substantial work was done, the defendant having been unsuccessful with this application should be made to bear half of the costs of the entire application with the usual consequential orders to apply.

Conclusion

73 We now summarise our views:

(a) An application under s 49(11) of the Act for leave to appeal against a decision of the High Court on the merits of an appeal against an arbitration award cannot be brought to the Court of Appeal.

(b) Where the High Court has made its decision either to allow or to refuse leave to appeal to the Court of Appeal under s 49(11) of the Act, that decision is final. Section 49(7) of the Act does not have any application in such a scenario.

(c) Section 52(3)(*b*) of the Act confirms that the Court of Appeal has the same jurisdiction and powers as the High Court when hearing an application for leave to appeal *from an arbitration award*. However, this provision *only* applies if the High Court has granted prior leave to appeal pursuant to s 49(7) of the Act in relation to its initial decision either granting or refusing leave to appeal from an arbitration award.

(d) The Court of Appeal has a residual jurisdiction to deal with any unfairness in the decision-making process in the High Court in relation to an appeal from an arbitration award. However, the situations in which this may occur will have to be exceptional.

(e) For the avoidance of doubt, nothing in this decision affects the right of a party to make an application to the High Court under s 48 of the Act to set aside an arbitration award and thereafter the unfettered right of appeal to the Court of Appeal.

74 For these reasons, we dismissed the application.