Prometheus Marine Pte Ltd
v
King, Ann Rita and another appeal

[2017] SGCA 61

Court of Appeal — Civil Appeal Nos 181 and 182 of 2016; Summons Nos 45 and 46 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA
4 September 2017

Arbitration – Challenge against arbitrator – Bias
Arbitration – Recourse against award – Setting aside
Legal profession – Duties – Court

24 October 2017

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 These appeals arose out of two applications made by Prometheus Marine Pte Ltd ("the Appellant") to set aside the arbitration award dated 5 April 2016 ("the Award") issued in ARB No 24 of 2013 ("the Arbitration"), which was administered by the Singapore International Arbitration Centre ("SIAC"). The Judicial Commissioner ("the Judge") who heard the applications took the view that there were no grounds to set aside the Award and dismissed both applications. Having considered the oral and written arguments of the parties, we agreed with the learned Judge's decision and dismissed the appeals. We

delivered our oral grounds at the hearing, but having regard to the importance of the issues raised and the unsatisfactory manner in which the appeals were conducted, we now set out the fuller grounds for our decision.

The appeals and applications before us

2 The grounds for the Judge's decision can be found in *Prometheus Marine Pte Ltd v Ann Rita King* [2017] SGHC 36 ("the GD"). Civil Appeal No 181 of 2016 ("CA 181/2016") and Civil Appeal No 182 of 2016 ("CA 182/2016") (collectively "the Appeals") essentially sought the same relief, namely, the setting aside of the Award. The only distinction between the two appeals was that CA 181/2016 was filed in respect of the Judge's decision dismissing the Appellant's application to set aside the Award under the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA") while CA 182/2016 was filed in respect of the Judge's decision dismissing the corresponding application brought under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). The Appellant had proceeded in this way because it took the position that the *lex arbitri* or the law governing the Arbitration was unknown. There were also two applications, Court of Appeal Summons Nos 45 and 46 of 2017 ("the CA Summonses"), made by the Appellant, which sought to set aside the Judge's decision on the ground of apparent bias against the Appellant.

The facts

3 The Appellant is a company incorporated in Singapore, which is primarily involved in the marine engineering and yacht brokerage business. It is also involved in the business of yacht charter, yacht support and management and marina development.

4 The respondent in the Appeals, Mrs Ann Rita King ("the Respondent"), is a British national who is the managing director of a company based in Singapore with regional interests.

5 The Respondent contracted to purchase a yacht, a Clipper Cardova 60 (Hull #5) ("the Yacht"), later named the *Santé*, from the Appellant pursuant to a signed sale and purchase agreement entitled "Order Contract" dated 21 February 2011 ("the Contract"). The Contract was governed by Singapore law and had a dispute resolution clause referring disputes to arbitration at the SIAC in accordance with its Domestic Arbitration Rules.

6 The Yacht was manufactured by Clipper Motor Yachts International Ltd ("Clipper"), a company incorporated in Belize, and its parts were assembled by Ningbo FuHua Shipbuilding Industry Co Ltd ("the Shipyard"), a company incorporated in China. The Yacht was due to be delivered to the Respondent in June 2012. On 10 June 2012, while being loaded onto a barge at the Shipyard for shipment to Singapore, the Yacht was dropped. This caused extensive damage to the Yacht.

7 The Respondent hired a maritime surveyor, Mr Donald Richard Lamble ("Lamble"), to survey the Yacht. Lamble produced a report that identified a preliminary list of 19 items of damage ("the Lamble Report"). The parties reached an oral agreement that the Appellant would repair the Yacht at its own cost and to Lamble's satisfaction ("the Repair Contract"). The Appellant then carried out repairs to the Yacht that purportedly remedied the damage enumerated in the Lamble Report.

8 On 25 July 2012, the Yacht was delivered to the Respondent purportedly repaired. Lamble inspected the Yacht again and prepared another report

enumerating 120 defects ("the Lamble Defects List"). Dissatisfied with the repairs done by the Appellant, the Respondent brought the Yacht to Phuket, Thailand on 24 August 2012 for further assessment and repairs at her own cost. At the request of the Respondent, Siam Surveyors International surveyed the Yacht on 7 and 8 September 2012 and prepared a comprehensive inspection report of the Yacht ("the Siam Surveyors Report"). The Siam Surveyors Report identified an additional 109 defects and concluded that the Yacht:

(a) did not meet (a) the requisite *Conformité Européenne* ("CE") standards for sailing and docking in Europe;

(b) did not meet the requisite International Organization for Standardization ("ISO") standard;

(c) was not CE Category A compliant; and

(d) was not fully in conformity with the Recreational Craft Directive ("RCD") 94/25/EC as amended by 2003/44/EC.

Further work and repairs were carried out on the Yacht in Phuket, at the Respondent's expense, to address the defects enumerated in the Lamble Defects List and the Siam Surveyors Report.

9 The Respondent commenced proceedings against the Appellant by way of a Notice of Arbitration dated 23 January 2013 seeking a full refund of the purchase price of the Yacht as well as damages and/or the cost of repairs. The sole arbitrator ("the Arbitrator") was appointed by consent.

The pleadings

10 The Respondent claimed that the parties had agreed on, among others, the following:

Term	**Description**
The Specifications Term	It was an express term of the Contract that the Yacht would conform to the description stated at para 19(a) to (i) of the Statement of Claim.
The New Vessel Term	It was an express term of the Contract that the Yacht would be a new vessel
The Residence Term	The parties orally agreed that the Yacht would be made suitable as a high quality place of residence
The European Compliance Term	The parties orally agreed that the Yacht would be suitable for sailing in Europe and docking at ports in Europe
The Marine Standards Term	The parties orally agreed that the Yacht would (i) meet the requisite ISO Standard; (ii) be CE Category A compliant; and (iii) fully conform with RCD 94/25/EC as amended by 2003/44/EC.
The Correspondence with Description Term	The Yacht would correspond with the description of the vessel in the Contract, as implied by s 13 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SGA")
The Satisfactory Quality Term	The Yacht would be of satisfactory quality, as implied by s 14 of the SGA
The Fit for Purpose Term	The Yacht would be fit for its intended purposes, as implied by s 14 of the SGA

11 The Respondent pleaded that the Residence Term, the European Compliance Term and the Marine Standards Term ("the Oral Terms") were agreed on in the course of discussions between the parties around mid-2010. The Respondent pleaded that the Appellant had breached all the above express and/or implied terms of the Contract (except for the Specifications Term, the breach of which was not expressly pleaded, though as noted below at [59]-[60] this was not material). The Respondent also claimed that the Appellant had made false representations regarding the Oral Terms, thereby inducing the Respondent to enter into the Contract. The Respondent sought damages arising

from the Appellant's breaches of the Contract and the Appellant's misrepresentations.

12 The Respondent further pleaded that the parties had entered into the Repair Contract (see [6] above) sometime in or around late June 2012, and that too had been breached because the Appellant failed to repair the Yacht to the satisfaction of Lamble, and also failed to conduct sea trials to the satisfaction of Lamble prior to the delivery of the Yacht. The Respondent therefore also sought damages arising from the breach of the Repair Contract.

13 The Appellant contended that it was a "distributor/broker for yachts built by Clipper and other builders" in its Statement of Defence. Paragraph 11 of the Respondent's Statement of Claim, in which it was pleaded that "[the Appellant] is the vendor of the *Santé*", was admitted by the Appellant in its Statement of Defence. It should be noted that the Appellant did not plead in its Statement of Defence that it was acting as an agent of Clipper or that the proper party to the Arbitration was Clipper. The Appellant denied all of the Respondent's claims, and explicitly stated that it was "[reserving] its rights to rely on the Contract for its full terms and effect".

14 The parties also agreed on a Statement of Issues, which was reproduced in full by the Arbitrator in the Award (at [89]), and served as the framework around which the Arbitrator organized his findings.

The Award

15 At the outset, the Arbitrator identified the SIAC Rules and Singapore law as the applicable rules and law governing the arbitration, pursuant to cll 12 and 14 of the Contract (at [11] of the Award). He did not state the applicable statute under Singapore law for the Arbitration, that is to say, whether it was the

IAA or the AA. The effect of this omission became an issue in the applications before the Judge and in these appeals.

16 The Arbitrator noted that the Appellant did not specifically plead that it was only Clipper's agent and not the seller under the Contract, and that this point was not identified in the Statement of Issues (at [90] of the Award). Nevertheless, the Arbitrator first considered the Appellant's claim that it was not the seller of the Yacht under the Contract, because he recognized that this was a "threshold issue" which had an impact on his jurisdiction (at [90] of the Award). The Arbitrator held that the Appellant was not acting as an agent of Clipper. He arrived at this conclusion after having considered a number of matters including the testimonies of witnesses, the letter from Clipper's solicitors taking the position that Clipper was not a party to the Contract, the Appellant's Response to the Notice of Arbitration and the position the Appellant took in its Statement of Defence (at [92]-[104] of the Award).

17 The Arbitrator then considered the merits and found that only the Specifications Term and the New Vessel Term had been breached. The Arbitrator found that the Specifications Term had been breached to the extent that the Appellant failed to repair the damage or rectify the defects on the Yacht so as to bring it to conformity with the specifications in the Contract (at [184] of the Award). As a consequence of this breach by the Appellant, the Arbitrator awarded the Respondent damages representing the cost of the repairs that were necessary to render the Yacht compliant with the Specifications Term (at [198]-[203] of the Award).

18 In relation to the New Vessel Term, the Arbitrator agreed with Lamble that for yachts or pleasure craft built to the specific requirements of the purchaser, because of the customised character of such vessels, it tended to be

the case that the purchaser would value the vessel being unblemished, unspoilt and unsullied. This was a distinct requirement from the vessel being unused. Even an unused vessel that had the blemish of an incident would have lost some degree of its "newness" and its value would accordingly be affected (at [130] of the Award). The Arbitrator took the view that "fairness and justice dictate[d] that the [Yacht] after [the incident] could no longer be considered a 'new build' yacht for the purposes of complying with the Contract", and therefore the Respondent was in breach of the New Vessel Term (at [131]-[132] of the Award). The Arbitrator therefore awarded the damages representing the Yacht's diminution in value due to the fact that the Yacht had been damaged and repaired and was, in that sense, not new (at [204]-[207] of the Award).

19 The other terms that the Respondent claimed had been breached were not found by the Arbitrator to be terms of the Contract for various reasons. The Arbitrator did not express a view as to whether the Oral Terms had in fact been agreed between the parties, but held that they could not form terms of the Contract in any event because cll 2 and 3 of the Contract prevented the application or inclusion of any terms not contained in the Contract unless these had been agreed in writing (at [109]-[112] of the Award). In relation to the Correspondence with Description Term, the Arbitrator observed (at [116] of the Award) that:

> …the Correspondence with Description [Term] need not be implied into the Contract. The Parties had by setting out the terms and conditions in the Contract and by agreeing to such specifications required by [the Respondent] and agreed to by the [Appellant], made them "express" terms. It is superfluous to further argue that they are implied.

20 The Arbitrator also observed in relation to the Satisfactory Quality Term and Fit for Purpose Term that that these terms, which the Respondent sought to have implied by law under the SGA, had been validly excluded by cl 10(f) of

the Contract, which excluded all warranties except for those stated in cl 10. The Arbitrator considered that such exclusions by the operation of cl 10(f) of the Contract were permitted by s 55(1) of the SGA, which states that:

> Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act (Cap. 396) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

21 The Arbitrator was also satisfied that this conclusion was unaffected by the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") because the Contract came within s 26(3)(*b*) read with s 26(4)(*a*) of the Act. Section 26 of the UCTA states that:

> **International supply contracts**
>
> 26. —(1) *The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3).*
>
> (2) The terms of such a contract are not subject to any requirement of reasonableness under section 3 or 4.
>
> (3) Subject to subsection (4), that description of contract is one whose characteristics are the following:
>
> (a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and
>
> (b) it is made by parties whose places of business (or, if they have none, *habitual residences*) *are in the territories of different States.*
>
> (4) A contract falls within subsection (3) only if either —
>
> (a) *the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another*;
>
> (b) the acts constituting the offer and acceptance have been done in the territories of different States; or
>
> (c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

[emphasis added]

22 The Arbitrator concluded that the Contract came within s 26(3)(*b*) read with s 26(4)(*a*) of the UCTA because the Respondent did not maintain habitual residence in Singapore, and the performance of the Contract involved the Yacht being conveyed from the territory of one state, namely, China, to the territory of another, namely, Singapore. The effect of this was that the Contract was an international supply contract for the purposes of UCTA, such that the limits imposed by UCTA on the extent to which liability could be excluded or restricted in contracts in general did not apply (at [117]-[125] of the Award).

23 However, despite finding that the Oral Terms were not part of the Contract, such that it was not a term of the Contract that the Yacht had to be CE Category A compliant, the Arbitrator noted that it was not disputed that under the "Options" sheet attached to the Contract, the Respondent had opted to obtain "CE Certification" for the Yacht and paid US$6,500 for this purpose. The Arbitrator therefore found that the Yacht ought to have a CE certification (at [141] of the Award). Given that the Yacht had a name plate on board that identified her as "CE Category B", it would appear that the Yacht had been so certified (at [142] of the Award). The Arbitrator accepted the evidence of the Respondent's expert that the Yacht was not in fact CE Category B compliant, and therefore found the Appellant in breach of "its contractual obligation for the [Yacht] to meet the CE Category B standard" (at [144] of the Award). This was a breach of the Specifications Term (at [196] of the Award), in respect of which the Arbitrator awarded the Respondent damages representing the cost of obtaining CE Category B certification for the Yacht (at [208] of the Award).

24 In the light of the Arbitrator's finding that the Oral Terms did not form part of the Contract, the Arbitrator found that the question of whether false

representations had been made in relation to the Oral Terms, or whether there was reliance and detriment suffered by the Respondent as a result of those representations did not arise for determination (at [194] of the Award). He made "no finding of misrepresentation on the part of [the Appellant]" (at [195] of the Award), which in effect meant that the Respondent's misrepresentation claim failed.

25 In relation to the Repair Contract, the Arbitrator took the view that there was no necessity to consider whether the Repair Contract had separately been entered into because the Appellant was obliged in any event to deliver a vessel that complied with the specifications and terms and conditions in the Contract (at [149] of the Award). He nevertheless went on to hold that there was no separate Repair Contract that had been concluded between the parties (at [150] of the Award). In any event, it also appeared to us that any such Repair Contract, even if it had been entered into orally, might have been excluded by the operation of cll 2 and 3 of the Contract: see [19] above.

26 As the Respondent succeeded in her principal claims for relief, the Arbitrator made an award in her favour in respect of her legal costs and expenses and the costs of the arbitration.

The decision below

27 The Appellant filed two summonses, High Court Summons No 429 of 2016 and High Court Summons No 430 of 2016 ("OS 429" and "OS 430" respectively and "the High Court Summonses" collectively) seeking to set aside the Award. OS 429 was filed under s 48(1) of the AA while OS 430 was filed under s 24 of the IAA. The Appellant did so because it took the position that the Award was "flawed by reason of the Arbitrator's failure to determine whether

the AA or the IAA applied", and that it was therefore not possible to determine the statute under which it should bring an application to set aside the Award.

28 The Appellant sought to set aside the Award on the following bases:

(a) The Appellant was Clipper's agent and was therefore not the seller under the Contract and not the proper party to the arbitration agreement in the Contract;

(b) The Arbitrator exceeded his jurisdiction by:

(i) reformulating and/or re-characterising the Respondent's claim regarding the Correspondence with Description Term;

(ii) awarding damages for the diminution in the Yacht's value;

(iii) awarding damages for the Appellant's failure to ensure the Yacht's compliance with CE Category B; and

(iv) awarding damages for the Appellant's failure to repair hidden or latent defects.

(c) The Arbitrator breached the rules of natural justice by:

(i) failing to consider the evidence and the Appellant's submissions that it was merely Clipper's agent and its submissions regarding the Respondent's "true motives" in commencing the action;

(ii) failing to afford the Appellant the opportunity to address the Arbitrator on the Respondent's loss and damage claim "as reformulated and/or re-characterised by the Arbitrator"; and

(iii) failing to afford the Appellant an opportunity to address the Arbitrator on the appropriate computation of maintenance costs for the Yacht.

(d) The Award was "contrary to public policy and/or in conflict with the public policy of Singapore" because the Arbitrator had failed to determine the *lex arbitri* and the Appellant listed 18 findings, both factual and legal, which it claimed to be erroneous and/or contradictory; and

(e) The Arbitrator was apparently biased.

29 The Appellant sought to make a new submission well after filing its written submissions, without leave or any forewarning, that there had been fraud or corruption in the making of the Award. This was not supported by any averment in any affidavit. The Appellant subsequently withdrew this submission, after the Judge directed the Appellant to set out the evidential basis for its allegation of fraud or corruption in an affidavit and after the Judge drew the attention of the Appellant's counsel, Mr Arvind Naaidu, ("Mr Naaidu") to the relevant case authorities on the high threshold to be met for proof of fraud or corruption (at [31] of the GD). The Judge's actions in this regard formed a separate ground in the Appeals before us.

30 The Judge dismissed the High Court Summonses in their entirety with costs, essentially for the following reasons:

(a) The Appellant was the correct party to the Arbitration because it was indeed the seller under the Contract.

(b) The Arbitrator acted within his jurisdiction, because the Respondent's Statement of Claim "clearly framed as one of the issues the non-conformity of the Yacht with the contractual descriptions and specifications" (at [60] of the GD). This was so even though she had not specifically pleaded breach of the Specifications Term but rather had pleaded the breach of the Correspondence with Description Term at para 52 of her Statement of Claim (at [63] of the GD). Nonetheless, the Statement of Issues, which was agreed between the parties, made it clear that the Arbitrator was to determine whether the terms of the Contract included the Specifications Term and the Correspondence with Description Term, and whether those terms had been breached (at [65] of the GD).

(c) The court would not lightly set aside the Award for breach of the rules of natural justice; a challenge on this ground had to meet a high threshold (at [86] of the GD) and the Appellant had failed to meet this threshold. There was no obligation on an arbitrator to expressly address each and every argument put forth by the parties, and even issues in dispute could be implicitly resolved (at [88] of the GD). The Arbitrator had "fully considered the submissions that were made" as he "methodically cited, considered and gave his conclusion on each of the issues in the Statement of Issues", and in fact found in favour of the Appellant on some of the issues (at [90] of the GD).

(d) The Appellant's allegation of the Arbitrator's failure to determine the applicable legislation was misconceived, because the seat of arbitration invariably determines the *lex arbitri*, and the Arbitrator effectively determined the *lex arbitri* by determining that the seat was Singapore. It was evident that the case before the Arbitrator was an

international arbitration, because the Arbitrator had found that the Respondent did not maintain a habitual place of residence in Singapore. In any event, whether the AA or the IAA was applicable did not have a material bearing on the outcome of the High Court Summonses because the grounds that were relied on to set aside the Award were mirrored in both statutes (at [104]-105] of the GD).

(e) The Appellant was essentially alleging bias on the basis of the Arbitrator's rejection of the Appellant's submissions "and nothing more", and this was an "astonishing submission", given that there was a "complete absence of any evidence of the Arbitrator's partiality" (at [113]-[114] of the GD).

Grounds for appeal

31 The Appellant advanced the following grounds of appeal against the Judge's decision not to set aside the Award:

(a) The Judge was apparently biased against the Appellant (this was also repeated as part of the CA Summonses);

(b) The Judge erred in finding that the Arbitrator's failure to determine the *lex arbitri* was not contrary to public policy;

(c) The Judge erred in finding that there was no evidence that making of Award was induced by fraud on the Respondent's part or non-pecuniary corruption on the Arbitrator's part;

(d) The Judge erred in finding that the Arbitrator had neither acted in excess of jurisdiction nor in breach of natural justice when he held that the Appellant was liable for breaches of the Contract; and

(e) The Judge erred in finding that the Appellant was the seller under the Contract (and was hence a party to the arbitration agreement contained there), instead of Clipper, and therefore also erred in finding that the Arbitrator had the requisite jurisdiction to hear the dispute.

32 The Appellant's grounds for challenging the Judge's decision and for seeking to set aside the Award formed the issues for determination before us. These issues were largely identical to those that were put before the Judge, except that:

(a) the Appellant narrowed the scope of its arguments relating to the excess of jurisdiction and the breach of natural justice point from those listed at [28(b)]-[28(c)] above to three main points:

(i) the Arbitrator's decision was irrational;

(ii) the Arbitrator reformulated Respondent's claim from a breach of the Correspondence with Description Term (which was pleaded) to a breach of the Specifications Term (which was not pleaded), and also "folded" the Satisfactory Quality Term, Fit for Purpose Term and the Marine Standards Term into the Specifications Term, thereby exceeding his jurisdiction; and

(iii) the Arbitrator breached the rules of natural justice because he applied a 15% discount to the damages payable by the Appellant as repair costs, on the basis that this represented ordinary maintenance costs, without giving parties the opportunity to make submissions on the point.

(b) the argument regarding fraud and non-pecuniary corruption of the Arbitrator had never been canvassed before the Judge because the Appellant in the end withdrew these arguments (see [29] above); and

(c) the allegation that the Judge himself was apparently biased was new.

Our decision

The CA Summonses

33 We dealt first with the CA Summonses. Mr Naaidu filed the CA Summonses *after* he had filed the Appeals. In our judgment, for reasons we shall shortly set out, Mr Naaidu, in substance, was attempting by the CA Summonses to invoke the original jurisdiction of the Court of Appeal even as he was seeking essentially the same relief in CA 181/2016 and CA 182/2016. Furthermore, we noted that this was the second occasion on which Mr Naaidu had done much the same thing save that on the previous occasion, he had purported to invoke the original jurisdiction of the Court of Appeal after having sought from and been refused by the High Court leave to file an appeal to the Court of Appeal. That involved a matter that was related to the present proceedings. Instead of then seeking leave to appeal from the Court of Appeal, Mr Naaidu applied directly to us, seeking the very injunction he had sought from and been refused by the High Court, and in respect of which, as we have noted, the High Court also refused leave to appeal. Moreover, on that occasion, the learned assistant registrar had taken the time to try to educate Mr Naaidu on why his proposed course of action was wrong but Mr Naaidu insisted on having his summons listed before the Court of Appeal. When that matter came before us, we took Mr Naaidu to task and eventually dismissed the application and awarded indemnity costs to be borne by Mr Naaidu personally. We were therefore disappointed to

see Mr Naaidu persisting in a similar course again, when he insisted on maintaining the CA Summonses before us even though essentially the same relief was being sought in the Appeals.

34 We invited Mr Naaidu at the outset of the hearing in the present matter to reconsider his position in the light of what had transpired in the earlier matter. Mr Naaidu declined to do so. Indeed, he boldly suggested that he was maintaining the CA Summonses in an effort to *save* costs. We found this impossible to accept given that the CA Summonses were filed in April 2017, after the Appeals had been filed in December 2016. We were unable to see how the filing of an additional, wholly unnecessary and ill-conceived set of summonses could possibly be seen as an attempt to save costs.

35 Before us, Mr Naaidu attempted to contend that the position he was taking in these proceedings was distinct from the position that he had taken in the earlier set of proceedings. In particular, he contended that the CA Summonses invoked not our original jurisdiction, but our appellate jurisdiction. He maintained that this was so because if his client succeeded in the CA Summonses to set aside the Judge's decision on the basis of apparent bias, there would have been no need for the Appeals to be heard. We found this argument to be wholly misconceived. Pursuant to s 29A(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), the Court of Appeal has the jurisdiction and powers of the court below if such jurisdiction and powers were to be exercised "for the purposes of and incidental to" the hearing and determination of any appeal. The CA Summonses were certainly not incidental to the hearing of the Appeals, if as Mr Naaidu argued, the Appellant's success in the CA Summonses would render the Appeals otiose. Mr Naaidu was, in essence, asking us to reverse the Judge's decision without going through the appellate process. This was *in substance* an attempt to invoke the original

jurisdiction of the Court of Appeal because Mr Naaidu wanted us to make a finding that the decision of the Judge was infected by apparent bias and on that basis alone set it aside without dealing with the substance of the Appeals. Indeed, it was on this misconceived view of the case that he thought he would be saving costs by bringing the CA Summonses. But this is a jurisdiction that we do not have: see *Au Wai Pang v Attorney-General and another matter* [2014] 3 SLR 357 (at [30]) where we held that none of the provisions in the SCJA conferred original jurisdiction on the Court of Appeal. We therefore dismissed the CA Summonses as an abuse of the process of the court.

36 We turn to the Appeals. A number of grounds were advanced and we dealt with them in turn.

Apparent bias

37 First, Mr Naaidu advanced the argument that the Judge's decision should be set aside on the basis of apparent bias. That argument had been mounted on several prongs and we considered each of them in turn. The first prong that Mr Naaidu relied on was the fact that the Judge had used strong language in dealing with the Appellant's arguments. Mr Naaidu put it this way at para 3.1.1 of the Appellant's skeletal arguments (references omitted):

> Throughout the proceedings in OS 429 and OS 430, the learned Judge assumed a combative and hostile attitude towards the Appellant which is manifested in the learned Judge's use of intemperate and injudicious language in the GD. The intemperate choice of words and phrases included "litany", "clearly unmeritorious", "distinct impression", "trawled for every conceivable argument it could find", "fashion an all-out assault to impugn the Award", "ditching in the process any regard for their sustainability", "particularly apt illustration", "scattergun", "indiscriminate" and "appeared willing to cast aspersions" and "without any regard to whether there was any substance to underscore them", "audacity", "betrayed" and "astonishing".

38 As to this, we made a few observations. First, a judge is entitled to express his or her honest impressions of the case presented by counsel. In our judgment, the Judge's choice of words in the GD spoke volumes about the appalling state of the arguments that had been advanced on behalf of the Appellant and was not a reflection of any impropriety on the part of the Judge. To put it simply, he was entitled to call a spade a spade and after having heard the Appeals, we were of the view that that was just what he had done.

39 Mr Naaidu referred to para 3.1.2 of the Appellant's skeletal arguments and argued that even before the hearing, the Judge had formed impressions about the case. We found this a wholly untenable point. Because the Judge was not only entitled but obliged to have made the effort to read the papers and come prepared, it was inevitable in that process that provisional views and provisional conclusions might have been formed. This is not at all incompatible with the judicial function. As has often been noted in our courts and elsewhere, an open mind does not mean an empty mind (see, for instance, *Re Singh Kalpanath* [1992] 1 SLR(R) 595 at [69], *Dean v Colvin*, 585 F.App'x 904 (7th Cir, 2014) at 905 and *R (on the application of Royal Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts and another* [2011] All ER (D) 44 (Nov) at [16]). Indeed, in such circumstances, it is entirely in keeping with the judicial function to put such provisional views or concerns to counsel for them to be addressed. It is apposite here to recall what was said by the High Court in a slightly different context in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [114]:

> …in the modern era of complex and often document-intensive litigation, it is not uncommon for judges to take an active part in case management or to intervene as often as they feel they need to in order to understand the issues and the evidence. …[C]ounsel are often assisted by the court revealing its concerns, its provisional views and its reservations so that the parties have every opportunity to seek to correct or modify them

> or to persuade the court to come to a different view. In my view, giving counsel the opportunity to peek within the judicial mind considering the case can be a great advantage to counsel and the parties.

40 In this light, the argument that the Judge might have formed some initial impressions about the case that were adverse to the Appellant said nothing about the propriety of the Judge's conduct. On the contrary, it would have been a reflection on the case advanced by Mr Naaidu and it was then entirely appropriate for the Judge to put any concerns across to Mr Naaidu. To the extent these could not be addressed, that would simply mean that Mr Naaidu's arguments lacked merit.

41 Mr Naaidu also catalogued a series of what he referred to as "misfindings" of fact and law by the Judge. For instance, he argued that the Judge made a wrong finding that the Appellant's witness, Mark Campion's former designation in Clipper was CEO and director of Clipper, when Mark Campion was never a director of Clipper. Mr Naaidu also argued that the Judge wrongly found that the Appellant made the repairs to the Yacht when it was carried out by Clipper and/or the Shipyard. We found it surprising that Mr Naaidu thought it appropriate to mount such arguments because taken at their highest and even assuming that what the Appellant said was all true, none of it was shown to be material. These purported "misfindings" were in fact nothing more than a guise for the Appellant to attempt to mount an attack against the Judge's conclusions. In any event, it also did not follow that because a judge erred in his findings of law or fact, he was biased against a party.

42 Mr Naaidu next contended that the Judge had allegedly taken positions that were improperly disadvantageous to the Appellant on two points in particular. Because these touch on other parts of the Appellant's case in the Appeals, we shall deal with these in the subsequent sections, in which we will

also explain why the Judge's approach to and decision on these two points was unimpeachable and disclosed no apparent bias.

43 Finally, the Appellant contended that the Judge had descended into the arena but we were satisfied that there was no merit in this whatsoever. We were satisfied in the circumstances that the Appellant's argument, insofar as it rested on the allegation of apparent bias on the part of the Judge, was wholly without merit.

Lex arbitri

44 We return to the point that we alluded to at [42] above. Mr Naaidu first took issue with the fact that the Judge had sought his assistance by asking that he take a position on and clarify to the court which of the IAA or the AA governed this arbitration. In our judgment, the Judge was entitled to seek Mr Naaidu's position on this. Mr Naaidu maintained that it was not appropriate for him to identify the applicable statute; rather, he contended that because the Arbitrator did not determine which of the IAA or the AA governed this arbitration, he had effectively "delocalised" the Arbitration and an award rendered pursuant to a delocalised arbitration should not be enforced in Singapore as it would be contrary to public policy. Mr Naaidu seemed to think that it was a point of great forensic importance to his case to maintain a state of confusion as to the governing law of the Arbitration.

45 In our judgment, Mr Naaidu had misunderstood the law. A delocalised arbitration is one that is detached from the control of the law of the seat of the arbitration; the arbitral tribunal is therefore removed from the supervisory authority of local courts. The learned authors of Blackaby, Partasides, Redfern, et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) observe (at p 180) that the delocalisation theory is based on:

> the idea […] that instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control: that of the place of enforcement. In this way, the whole world (or most of it) would be available for international arbitrations, and international arbitration itself would be 'supranational', 'a-national', 'transnational', 'delocalised', or even 'expatriate'

46 In this regard, Singapore law, unlike say French law (see, for instance, the French Supreme Court's decision in *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnugotia Est Epices* [2007] Rev Arb 507 (at 514) enforcing an arbitral award set aside by the English High Court, which was perceived as a judicial manifestation of the delocalisation theory), does not support the notion that arbitral proceedings or arbitral awards can stand free from control of the national legal system of the seat of the arbitration. In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 (at [75]), we recognized that "it is generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat", but we also expressed serious doubt (at [76]) that this general position extended to "the recognition and enforcement of an award which *has been set aside* in the seat by the court of a foreign jurisdiction" (emphasis in original), contrary to the view which appeared to have gained favour under French law. Our reservations stemmed from the fact that "the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply *no award to enforce*" (emphasis in original), and so it would make little sense as a matter of practice if setting aside an award was only of significance at the seat of the arbitration (at [77]). At least at this time, this remains the position regarding delocalisation in Singapore.

47 However, whether the Arbitration was delocalised was never the issue in this case. Mr Naaidu accepted that the Arbitration was seated in Singapore and therefore, he also accepted, that it was governed either by the IAA or the AA. It was not a case where he was arguing that *neither* the IAA nor the AA ought to apply. Indeed, the fact that he sought relief under *both* statutes meant that even he accepted that at least one of them governed the Arbitration. In the circumstances, this was a Singapore arbitration, not a delocalised arbitration. The only issue was whether it was governed by the IAA or the AA. This was not a case of the Arbitration being governed by some other transnational system of law or by no domestic law. In the premises, the real question was which law applied to govern this arbitration; specifically, was it the IAA or the AA? This was what the Judge asked Mr Naaidu to assist him with, in an effort to come to grips with the real point of the case and Mr Naaidu declined to answer. This was also what we asked Mr Naaidu to assist with in the course of his oral arguments and again he declined to take a position. The point, in the final analysis, had no substance despite Mr Naaidu's arduous efforts to the contrary because this was never a case about a delocalised arbitration at all, as Mr Naaidu tried to suggest; rather, if at all there was an issue, it was a simple one of determining which of the two Singapore statutes applied to govern this arbitration.

48 On the facts, while the Arbitrator did not explicitly state that the IAA was the applicable statute to the present proceedings, by virtue of his finding that the Respondent was *not* resident in Singapore (at [123] of the Award), it was probably *implicit* that the IAA was the applicable statute. Section 5(2)(*a*) read with s 5(3)(*b*) of the IAA pointed to the conclusion that the IAA was the law applicable to the Arbitration when one of the parties, at the time of concluding the arbitration agreement, had her habitual residence outside of Singapore.

49 In any case, even assuming Mr Naaidu was correct that the Arbitrator had failed to determine the issue of the applicable governing statute, it simply did not follow that this would invalidate the Award. The failure to determine the *lex arbitri* was not a valid ground for setting aside an arbitral award whether under the IAA or the AA. Still less was this the case when the question of which of those two statutes governed the arbitration was a question of law that was capable of being resolved in the way we have outlined.

50 In the circumstances, we found that the point taken by Mr Naaidu on behalf of the Appellant had no substance at all; we were also satisfied that the way in which the Judge dealt with Appellant's arguments regarding the *lex arbitri* was not at all inappropriate and did not in any way disclose any apparent bias on his part.

Fraud and non-pecuniary corruption

51 The second point on the basis of which Mr Naaidu took issue with the Judge's disposal of the case pertained to the allegations of fraud and non-pecuniary corruption that the Appellant wished to level against the Arbitrator. These were extremely serious allegations that were raised for the first time, in the further submissions that Mr Naaidu had filed without leave of court a month or more after the initial submissions. Given the gravity of the allegations, the Judge rightly asked Mr Naaidu to frame the arguments carefully and to produce a draft affidavit attesting to the relevant facts before he would consider the points. Mr Naaidu then declined to pursue the points. No affidavit was therefore produced. Despite this, he nonetheless raised this as an issue in the Appeals, contending that the way the Judge had dealt with the matter was suggestive of apparent bias on his part.

52 In our judgment, the Judge was entirely correct to take the cautionary step of asking for a draft affidavit from the Appellant before allowing Mr Naaidu to mount such an argument. As a matter of procedure, in an application to set aside an arbitral award, an affidavit in support setting out the grounds and any evidence relied upon by an applicant is *required*, regardless of whether the application was made pursuant to the IAA or the AA (see O 69 r 5(1) – (2) and O 69A r 2(4A) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC")). This meant that the factual basis for the Appellant's arguments regarding fraud and non-pecuniary corruption had to be contained within the affidavits that were filed in support of the High Court Summonses. The Appellant's approach was therefore procedurally irregular in that it was seeking to add new grounds for setting aside the Award in the further submissions without seeking the court's leave to file an additional affidavit setting out the evidence that it would rely on to make the new arguments. In this regard, the Judge was perfectly justified in not hearing the Appellant if it pursued this line of argument, because the procedural requirements in the ROC had not been complied with.

53 The fact that no affidavit was ever forthcoming suggested that this was a case of fraud being alleged without any basis. That raised altogether more serious concerns including the ethical obligations of Mr Naaidu as an officer of the court in seeking to advance such allegations without a proper basis. While we accepted in *Wee Soon Kim Anthony v Law Society of Singapore* [2002] 1 SLR(R) 954 (at [23]) that there is no general duty on the part of a solicitor to verify the instructions of his client, we also noted that it would be different "if there were compelling reasons or circumstances which required the solicitor to verify what the client had instructed". In the English case of *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associate Newspapers Ltd* [1970] 2 QB 450 (at 456E-F), Lord Denning MR noted the duty of counsel not to put a charge of fraud on the record "unless he has clear and sufficient evidence to

support it". This statement of counsel's duty has been subsequently cited with approval in a number of cases: see, for example, the House of Lords' decision in *Medcalf v Mardell and others* [2003] 1 AC 120 ("*Medcalf v Mardell*") at 151. In our judgment, in a situation such as the present one, where a court is faced with counsel who, amidst a flurry of weak points, asserts that he has ostensibly been instructed to allege fraud against the opposing party at a late stage in the legal proceedings, the court would be entirely entitled to require counsel to verify that there was, at minimum, some factual basis for the allegation. In our judgment, this was the proper context in which to see the Judge's disposal of the issue. The fact that no affidavit was then filed suggests that there was in fact no basis for the allegation.

54 Aside from all of this, we also found it deplorable that the Appellant then endeavoured to keep the point alive both directly and indirectly in the Appeals, without having filed an affidavit as directed by the Judge below and despite Mr Naaidu having informed the Judge below that he would not be pursuing it. We were satisfied that the Judge dealt with Mr Naaidu's further submissions in a manner that was entirely appropriate and there was no basis for the Appellant's allegation of bias in this regard.

55 Despite this, we considered briefly the Appellant's contention that the Award was tainted by fraud. Mr Naaidu submitted that this was so because the Respondent had falsely claimed that she was locally resident, which induced or affected the Arbitrator's making of the Award without identifying the *lex arbitri*. In our judgment, this argument failed not only because of the procedural defects we noted in the preceding paragraphs, but also, because the Arbitrator had in fact ruled against the Respondent on this point and found that she was not habitually resident in Singapore. This was a fact that was acknowledged even in the Appellant's own case at para 117. It was therefore impossible to see

how the Award could be said to have been *induced* by the alleged fraud. Furthermore, as the Respondent pointed out, the threshold for showing fraud is a high one; fraud encompasses "a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or wilful destruction or withholding of evidence": *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SLR 814 at [41]. None of these elements was even remotely satisfied in the present case.

Excess of jurisdiction and breach of natural justice

56 Mr Naaidu next contended that the Arbitrator had acted in excess of jurisdiction in making findings that were clearly irrational and by reformulating the Respondent's case and then finding that the Appellant had breached the Specifications Term, when this was a point that had not specifically been pleaded in the Respondent's Statement of Claim. Mr Naaidu also contended that the Arbitrator breached the rules of natural justice because he applied a 15% discount to the damages payable by the Appellant as repair costs, on the basis that this represented ordinary maintenance costs, without giving parties the opportunity to make submissions on the point. We were satisfied that all of these points were misconceived.

57 First, it is trite that an error of law or an error of fact made by an arbitrator, however irrational, does not afford a ground for setting aside an award. In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 48 ("*AKN*"), we observed (at [37]) that a critical foundational principle in arbitration is that the parties choose their adjudicators; but just as the parties enjoy many of the benefits of party autonomy, they must also accept the consequences of their choices, which is reflected in the policy of minimal curial intervention in arbitral proceedings. We noted (at [38]-[39]) that:

> 38 …the grounds for curial intervention are *narrowly circumscribed, and generally concern process failures* that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, *the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts*. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.
>
> 39 In the light of their limited role in arbitral proceedings, *the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award*, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. […]
>
> [emphases added]

We also reiterated (at [73]) the distinction we drew in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (at [33]) between the erroneous exercise by an arbitral tribunal of an available power vested in it, which would amount to no more than a mere error of law, and the purported exercise by the arbitral tribunal of a power which it did not possess. The former situation was held to be insufficient to set aside an arbitral award.

58 Furthermore, while pleadings in arbitral proceedings can provide a convenient reference point to determine the scope of an arbitrator's jurisdiction, that jurisdiction is by no means limited by the pleadings because a practical view has to be taken regarding the substance of the dispute being referred to arbitration. In the present case, it was plain to us that the argument mounted by Mr Naaidu regarding the Arbitrator's reformulation of the Respondent's case was unmeritorious and could not possibly amount to an excess of jurisdiction. This was so for two reasons.

59 First, the substance of the breach was the same regardless of whether it was labelled as a breach of the Specifications Term or a breach of the

Correspondence with Description Term. As we noted at [14] above, the parties had agreed on a Statement of Issues. For present purposes, we noted that two of the questions on this list were:

> (1) Whether the following were the terms of the Contract:
>
> a. That a new motor yacht be manufactured in accordance with [the Respondent's] specifications, as pleaded in paragraph 19(a) of the [Statement of Claim];
>
> […]
>
> f. That [the Yacht] would correspond with the description of the vessel in the Contract as pleaded in paragraph 26 of the [Statement of Claim]…

60 Paragraph 19(a) of the Statement of Claim, labelled along with the other descriptions from para 19(b) to 19(i) as "the Specifications Term", stated that it was a term of the Contract that the Appellant would supply to the Respondent "a new motor yacht manufactured in accordance with [the Respondent's] specifications". Paragraph 26 of the Statement of Claim, labelled as "the Correspondence with Description Term" stated that it was a term of the Contract that "[the Yacht] would [correspond] with the description of the vessel in the Contract". Therefore, regardless of how the terms were labelled, in substance, the agreed issue that was submitted for the Arbitrator's resolution was the same, namely, whether the Yacht corresponded to what was specified in the Contract. In these circumstances, we could not see how the Arbitrator could be said in any way to have exceeded his jurisdiction by concluding that the Correspondence with Description Term was superfluous in the light of the existence of the Specifications Term that was essentially identical in content.

61 Second, the Respondent had pleaded the necessary facts to sustain the Arbitrator's finding regarding the breach of the Specifications Term, even though the breach was not explicitly pleaded, and we were satisfied that the

Appellant had not been taken by surprise by the Respondent's failure to plead the breach of this term. The existence of the Specifications Term and its contents were specifically pleaded in the Statement of Claim. The Statement of Claim also made reference to the Lamble Report, the Lamble Defects List and the Siam Surveyors Report, all of which were in evidence in the proceedings. The Arbitrator considered these reports before arriving at his decision that the Specifications Term had been breached. It was therefore not the case that the Appellant had been taken by surprise in terms of the evidence.

62 More importantly, at para 4.2.2 of the Appellant's closing submissions in the Arbitration, the Appellant described the Respondent as having averred that the Appellant had allegedly breached the Specifications Term. The Appellant proceeded to argue at para 4.2.17 of those submissions, on the basis of its interpretation that the Specifications Term formed part of the implied Satisfactory Quality Term (at para 4.2.5), that cl 10(f) of the Contract operated to exclude (among other implied terms) the Satisfactory Quality Term. It was therefore certainly not the case that the Appellant was taken by surprise by the finding of a breach of the Specifications Term since the Appellant did not take the position during the Arbitration that the Specifications Term did not form part of the matters that had to be determined by the Arbitrator. In the circumstances, we could see no prejudice whatsoever to the Appellant arising from the Arbitrator's findings regarding the Specifications Term, because it was identical in content to the Correspondence to Description Term which was pleaded, and further, because the Appellant had in fact taken the opportunity to address the Specifications Term in the Arbitration.

63 Aside from this, we also referred Mr Naaidu in the course of the arguments to our observations in *AKN* which dealt with a ground of appeal concerning a tribunal having allegedly exceeded its jurisdiction by

reformulating a party's claim. In *AKN*, in the notice of arbitration, the appellants prayed for, among other things, "damages". Throughout the arbitration, the parties proceeded on the basis that the appellants' claim was for actual loss of profits. The tribunal eventually concluded that actual loss could not be proven but re-characterised the appellants' claim as one for loss of an opportunity to earn profits and awarded the appellants damages on this basis. The idea of damages in the form of a loss of such an opportunity was raised by the tribunal itself, and only on the last day of the arbitral hearing. The judge held that the tribunal had acted in excess of its jurisdiction in this regard, but we disagreed. We reaffirmed (at [72]) the need to show actual or real prejudice to the aggrieved party before the setting aside could succeed on the ground of excess of jurisdiction, and further held at [74] that the judge had erred in holding that a generic claim for damages by the appellants was not broad enough to include a claim for damages for loss of an opportunity to earn profits. We concluded that a generic claim for damages was nothing more than a particular manner of asserting a right to damages, and was therefore broad enough to encompass a claim for the loss of an opportunity to earn profits. We have already dealt with the absence of any prejudice in this case in the preceding paragraph. Once regard was had to this court's practical approach towards pleadings in arbitral proceedings as shown in *AKN*, where we held that there was no excess of jurisdiction despite the fact that the basis for the appellants' claim for damages had been reformulated by the tribunal, it became evident that Mr Naaidu's argument in this case could not possibly get off the ground, given that the facts supporting the breach of the Specifications Term were pleaded, and the agreed Statement of Issues identified the breach of the Specifications Term as an issue.

64 Finally, the Appellant's argument that there was a breach of natural justice relating to the issue of damages payable as repair costs was directly contradicted by the terms of the Award:

> Repair Costs
>
> […]
>
> 199. *The [Appellant's] expert, Mr Howe*, had in Howe Report-1 expressed that he had "reviewed 759 pages of invoices…including expenses incurred prior to the Incident relating to [the Respondent's] personal expenses, contractual payments, items ordered for the yacht, crew costs ,airfares, various alcoholic spirits and bar stores…" […] While he acknowledges that a number of the claims are justified, others are clearly the "[Respondent's] personal items". *Mr Howe unfortunately did not identify the items that are claimable but ventured on to suggest that the realistic claim is substantially less than 10% of the total amount of the invoice.*
>
> […]
>
> 203. The Tribunal is conscious that of the items of claim relating to the repairs carried out, some are items of repair as well as improvement, or of maintenance work and/or expendables [incurred] in the normal course of running/maintaining the vessel. *The Tribunal accepts Mr Howe's comment that it is not always easy to separate repair works from [the] owner's own work and maintenance*. In the absence of any Party making any submission on this, *the Tribunal will apply a flat 15% as representing the cost the [Respondent], as owner, would still have to pay if the vessel was not under repairs* e.g. daily victuals, fuel, water, electricity, garbage disposal, crew expenses and any other expenses in the nature of maintenance costs. Taking that into account the Tribunal will therefore award repair costs at US$269,701.11.
>
> [emphases added]

65 It was evident from this that the Appellant's evidence in the form of its expert's testimony and reports had been taken into consideration by the Arbitrator in relation to the damages payable for repair costs. It was not the case that no submissions had been made on the point; the Appellant submitted in its closing submissions that it was not liable for the Respondent's claims of loss or damages at all, that the Respondent's claims for damages included general maintenance costs, which ought to be excluded, and also that the testimony of the Appellant's expert regarding the minimal extent and cost of repairs ought to be accepted. What in fact transpired was that Arbitrator did not accept the

Appellant's submissions and the testimony of the Appellant's expert that the appropriate damages was less than 10% of the total amount claimed by the Respondent. In any event, not only did the Arbitrator give the Appellant the opportunity to be heard as to the repair costs (and the appropriate discount for regular maintenance costs), the Arbitrator in fact accepted part of the testimony of the Appellant's expert that regard had to be had to regular maintenance costs. On this basis, he applied a discount of 15% to the Respondent's claim. We were unable to see how this could be the subject of a legitimate complaint by the Appellant.

The seller under the Contract

66 There was, in the written arguments, a separate argument on the question of whether the Appellant was the agent of Clipper and therefore not the seller under the Contract, but we were satisfied that this was amply and correctly dealt with by the Judge (see [41]-[55] of the GD). Since we agreed with his analysis, it was unnecessary for us to say more.

67 In the circumstances, we dismissed the Appeals.

Conduct of counsel

68 Before we turned to the question of costs, we made several observations on the conduct of counsel. In our judgment, it would be appropriate to highlight these observations for the guidance of the Bar. In gist, we were troubled by several aspects of the way in which Mr Naaidu conducted these appeals and we highlight three in particular.

69 First, we were dismayed by Mr Naaidu's insistence that he was entitled to maintain the CA Summonses despite all the efforts made by the court to

educate him on this point. It led us to think that Mr Naaidu was not interested in assessing the correctness of his position and was adamant on maintaining his position even after it had been pointed out to him that this was likely to be wrong. We saw this tendency also in his refusal to correctly frame issues or respond directly to questions that the court had put to him. This was wholly unsatisfactory because a counsel's first duty is to the court and part of that duty extends to giving careful consideration to the observations and concerns of the court.

70 Second, we were dismayed by Mr Naaidu's repeated tendency to say that he was maintaining untenable positions on his client's instructions. We reiterated that an advocate and solicitor owes his first duty to the court and if a position, in good conscience, is untenable, the advocate is duty-bound to decline to put it forward. On the other hand, if the advocate considers that the point can fairly be put, it is simply unsatisfactory for him, under questioning from the court, to suggest he is holding on to that position on the instructions of his client. That conveys the unhappy and unacceptable position that the advocate sees himself as the client's unwitting or unthinking mouthpiece.

71 Third, we were deeply concerned by Mr Naaidu's willingness to mount allegations of fraud and corruption against the Arbitrator and allegations of bias against the Arbitrator and the Judge without any basis. As we noted above (at [52]), there has to be an evidentiary basis for arguments in originating summonses relating to the setting aside of arbitral awards, and in our view, given the serious allegations made by the Appellant, Mr Naaidu, as an officer of the court, had a duty to ensure compliance with the procedural requirements. In addition, in the circumstances of this case, as an officer of the court, he also owed the court a duty to consider the evidence and ensure that there was reasonably credible material before mounting his arguments, in particular

serious ones regarding fraud or apparent bias on the part of the Arbitrator and/or the Judge. We have already noted the background to the Judge having asked the Appellant to frame at least one of these arguments on oath and the Appellant having declined to do so. We also noted that these allegations of fraud, corruption and bias took up a significant portion of the Appellant's Case and written submissions, but these were then not pursued robustly in the oral arguments before us. This lent itself to one of two inferences.

72 Perhaps it might have been suggested that Mr Naaidu had thought the better of these arguments; but when we asked him at the outset of the oral arguments whether he was maintaining his position, he said he was. This caused us to be deeply concerned; if Mr Naaidu genuinely thought he had grounds to mount these arguments, then given their gravity, he should have been doing so with robustness and force while clarifying his reasons and grounds for doing so. Instead, we were left with the impression that Mr Naaidu was not seriously pursuing these points but instead had chosen to run his case by throwing as much dirt as possible at whoever was in the line of fire, in the hope that some of it might stick. The comments of Lord Hobhouse in the decision of the House of Lords in *Medcalf v Mardell* (where the court affirmed an order of costs against counsel for making serious allegations of fraud without reasonably credible material) are apt in this regard (at [142]):

> The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. *In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession.* This again reflects the public interest in the proper administration of justice; […] The advocate must respect and uphold the authority of the court. *He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time.* The codes of conduct of the advocate's profession spell out the detailed provisions to be

> derived from the general principles. […] All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.
>
> [emphases added]

73 We considered that Mr Naaidu's actions were irresponsible and an abuse of the privileges of an advocate and solicitor and we were deeply concerned by this.

Conclusion

74 For the above reasons, we dismissed both appeals and the CA Summonses. We awarded to the Respondent costs of $55,000 plus disbursements of $1141.40.

75 As to costs, after giving Mr Naaidu an opportunity to explain his conduct and pursuant to our jurisdiction to make personal costs orders against solicitors under O 59 r 8(1)(*b*) of the ROC, we ordered that the sum of $10,000 was to be borne by Mr Naaidu personally, being the portion of the costs that we apportioned to the filing and prosecution of the CA Summonses. In *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 at [71] and later in *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 220 at [58], this court endorsed the English Court of Appeal's comments in *Ridehalgh v Horsefield and another* [1994] Ch 205 at 231 that in deciding whether to order costs against the solicitor personally, a three-stage test is to be applied: (i) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (ii) If so, did such conduct cause the applicant to incur unnecessary costs? (iii) If so, is it in all the circumstances just to order the legal representative to compensate the other party for the whole or any part of the relevant costs?

76 In our judgment, this test was amply satisfied in the present case because the CA Summonses were wholly ill-conceived applications that should never have been filed, and Mr Naaidu had no reasonable basis for maintaining them. We reiterate the point made in *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR(R) 529 (at [20]) that "a solicitor should not be held to have acted improperly or unreasonably simply because he acted for a client who has a bad case", but it would be different "if a solicitor should give his assistance to proceedings which are an abuse of the process". We considered that the latter had occurred in this case.

77 We also made the usual consequential orders for the payment out of the security.

Sundaresh Menon	Andrew Phang Boon Leong	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Arvind Daas Naaidu (Arvind Law LLC) for the appellant in Civil Appeal Nos 181 and 182 of 2016; and
Murali Rajaram and Tan Kai Ning Claire (Straits Law Practice LLC) for the respondent in Civil Appeal Nos 181 and 182 of 2016.