IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 259

Originating Summons No 730 of 2018

Between

Ng Tze Chew Diana

… *Applicant*

And

Aikco Construction Pte Ltd

… *Respondent*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Appeal under Arbitration Act] — [Date of award] — [Application to appeal out of time]

[Arbitration] — [Award] — [Recourse against award] — [Appeal under Arbitration Act] — [Extension of time]

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v
Aikco Construction Pte Ltd

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High Court — Originating Summons No 730 of 2018
Ang Cheng Hock J
30 January, 18 February 2019; 24 May 2019

5 November 2019 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 This is an application under the Arbitration Act (Cap 10, 2002 Rev Ed) (the "Act") by a party to an arbitration for leave to appeal to the High Court on questions of law arising out of an arbitral award. What is immediately noticeable about the application is the fact that it was filed in Court almost ten months after the date of the arbitral award, which is well beyond the statutory time limit of 28 days from the date of the award. This raises questions as to whether the court should grant an extension of time for the application to be made, and what principles the court should apply in such circumstances.

Background facts

The construction contract

2 The applicant is an owner of a property situated at Jalan Sedap in Singapore ("the property").[1] By a contract which incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (7th Edition, 2005) ("the SIA Conditions"),[2] the applicant hired the respondent as the main contractor for the construction of a two-storey semi-detached house on the property ("the contract").[3]

3 The construction of the house did not go smoothly, and the completion certificate for the project was only issued on 8 March 2011[4] when the contractually stipulated completion date was 25 June 2010.[5] Under the completion certificate, it was stated that the date of actual completion was 19 January 2011, and that the maintenance period would end a year later on 19 January 2012.[6] After the completion certificate was issued, the applicant alleged that there were numerous defects in the completed works that required rectification. Hence, up to 30 May 2012, after the maintenance period had expired,[7] the respondent continued to carry out rectification works at the

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1 Ng Tze Chiew Diana's first affidavit for HC/OS 1010/2018, dated 17 August 2018 ("NTC1") p 2 para 5.

2 NTC1 p 714, clause 3.3 and pp 719 – 772.

3 NTC1 pp 713 – 718.

4 Michael Sng's first affidavit for HC/OS 1010/2018 ("MS1"), p 71.

5 NTC1 para 9 and p 714, clause 4.1; MS1 para 9.

6 MS1 p 71.

7 MS1 p 71.

property from time to time.[8]

Arbitration proceedings

4 In October 2012, the applicant commenced arbitration proceedings against the respondent in respect of the delay in completion and defects in the works.[9] In response, the respondent counterclaimed for S$135,676.58, this being the outstanding sum which it was allegedly owed by the applicant for works carried out.[10] The respondent further counterclaimed an additional S$54,304 for additional labour costs.[11]

5 A sole arbitrator was appointed for the matter.[12] Having considered the parties' respective claims, he awarded as follows:

(a) In respect of the applicant's claims:

(i) S$156.25[13] of the S$89,215.26[14] claimed for the alleged discrepancies between the as-built condition of the house and the construction drawings issued by the architect;

(ii) S$42,979.06[15] of the S$374,305.24[16] claimed for the

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8 NTC1 para 12.

9 NTC1 para 13; MS1 para 11.

10 MS1 p 6, para 12 and p 207, para 26.

11 MS1 p 81, para 11.1 – 11.2.

12 NTC1 p 52.

13 NTC1 p 707.

14 MS1 para 11.1 (wrongly stated as $89,2*45*.26) and p 81, para 10.5.

15 NTC1 pp 707 – 708.

16 MS1 para 11.2 and p 81, para 10.4.

alleged costs of rectifying various defects in the works;

(iii) Nothing[17] of the S$522,000[18] and S$1,200,000[19] claimed for the loss of rental and loss in value of the property respectively; and

(iv) Nothing[20] of the S$58,500[21] claimed for liquidated damages.

(b) In respect of the respondent's counterclaim for outstanding works and additional labour costs, the arbitrator allowed the sum of S$98,797.34 in the respondent's favour.[22]

6 As a result of the arbitrator's decision, a net sum of S$59,558.37 was due from the applicant to the respondent.[23]

Summary of arbitrator's findings

7 The arbitrator's award ran 674 pages in length, and his key findings are detailed in my judgment to Originating Summons Nos 1010 of 2018 and 1108 of 2018 ("OS 1010/2018"), where the applicant is seeking to set aside the arbitral award, and to resist enforcement of the same. In this judgment, I will endeavour to set out the gist of the arbitrator's reasons for his award. This is

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17 NTC1 pp 572 – 573, paras 804 – 806; pp 594 – 595, paras 845 – 846.

18 MS1 pp 80 and 111, at para 36.1.

19 MS1 para 11.4 and p 111 at para 36.2.

20 NTC1 pp 562 – 563, paras 778 – 779.

21 MS1 para 11.5 and p 80.

22 NTC1 pp 708 – 709, para 1055.

23 NTC1 p 709.

relevant as the questions of law which the applicant raises in support of her leave to appeal will have to be examined against the arbitrator's reasons to determine if the various requirements for granting leave to appeal are met.

8 First, in relation to the alleged discrepancies between the as-built condition of the house and the construction drawings issued by the architect, the arbitrator noted that the architect had confirmed during cross-examination that the alleged discrepancies (or deviations) had been authorised by him, save for one item.[24] The arbitrator also concluded that the architect had presented himself as a credible witness, who acted in a non-partisan manner during the hearings before him.[25] Since clause 12(1) of the SIA Conditions permits the architect to sanction all variations previously carried out by the contractor, the arbitrator found that the alleged discrepancies were in fact variations that had been sanctioned by the architect. Accordingly, save for the one item of work which had not been sanctioned by the architect, for which the arbitrator awarded the applicant S$156.25, the arbitrator found that the respondent was not liable for the other alleged discrepancies between the respondent's completed works and the works specified in the contract.[26]

9 Second, in relation to the claim for defective works, the architect considered the various defects claimed by the applicant, as well as the evidence of the parties' quantum experts, in determining the appropriate sum to award for each item that he found to be a defect. On the whole, the arbitrator was more inclined towards the evidence of the respondent's quantum expert, Mr Stanley

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24 NTC1 p 601, para 856.

25 NTC1 pp 599 – 600, para 852.

26 NTC1 pp 602 – 603, paras 858 – 861.

Wong, than that of the applicant's quantum expert, Mr Amos Teo ("Mr Teo").[27] This was because he found Mr Teo's evidence to be less reliable. Just as an example, Mr Teo had provided a separate amount for scaffolding for a single item of hairline crack, even though scaffolding was already provided for under the section of "Preliminaries". According to the arbitrator, this separate provision for scaffolding was not logical, unless Mr Teo was suggesting that for "ten such areas of defects, the [applicant] is going to appoint ten different contractors … and each individual contractor must install its own scaffold" to make good the defects.[28]

10 As for the claim for loss of rental, the arbitrator found that the applicant had not submitted any concrete or substantiated evidence to show proof that there was any intention to rent out the property. In this regard, the arbitrator considered that the evidence showed that the applicant's intention at all times was to sell, rather than rent, the property. In any case, there was no proof that her inability to rent out the property was due to the alleged defects. Furthermore, the loss of rental was too remote a loss, as it was not within the reasonable contemplation of parties at the time of the signing of the contract that there would be a claim for loss of rental in the event that there were defects.[29]

11 Turning to the claim for loss in value of the property, the arbitrator concluded that there was insufficient evidence to show that the property could

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27 NTC1 pp 639 – 682.

28 NTC1 pp 633 – 635, paras 904 – 905.

29 NTC1 pp 570 – 572, paras 800 – 804.

not be sold at the applicant's expected price of S$7m due to the alleged defects.[30] The S$7m valuation was based on a text message from a bank officer to the applicant's real estate agent.[31] However, the arbitrator rejected this text message as hearsay evidence, given that the bank officer that sent the message was not called to give evidence as to how she arrived at the figure of S$7m.[32] The arbitrator further rejected the evidence of the applicant's expert on property valuation, Mr Goh Tiam Lock ("Mr Goh"). While Mr Goh's evidence supported the valuation of S$7m, the arbitrator found that Mr Goh's valuation appeared to have been arbitrary and significantly higher than the other transactions concluded around the same time in the vicinity of the property, as shown by the records of property transactions maintained by the Urban Redevelopment Authority.[33] Apart from being unable to prove that the price of the property was S$7m,[34] the arbitrator also found that the applicant had not proven that the defects were the cause of the property's loss in value (if any). This was because there had been two offers from prospective buyers for the property. Although these two offers were lower than the applicant's expected price of S$7m, the applicant failed to show that the alleged defects were the cause of the lower prices offered by the prospective buyers. Thus, it could very well have been that the applicant's inability to sell the property at S$7m was caused by the fact that the expected price of S$7m was simply unrealistic, and not because of the alleged defects.[35] As such, the arbitrator found that the

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30 NTC1 p 595, para 846.

31 NTC1 p 925.

32 NTC1 p 581, para 821.

33 NTC1 pp 591 – 592, paras 841 – 842.

34 NTC1 p 594, para 845.

35 NTC1 pp 592 – 593, para 843.

applicant did not adduce sufficient evidence to support her contention that the loss in value of the property was due to the alleged defects.[36]

12 In relation to the claim for liquidated damages, the arbitrator considered that, pursuant to clause 24(2) of the SIA Conditions, a claim of liquidated damages must be founded on a valid delay certificate. In this respect, clause 24(2) provides that "[u]pon receipt of a [d]elay [c]ertificate the [applicant] shall be entitled to recover from the [respondent] liquidated damages".[37] The architect had issued two delay certificates, with the second purporting to supersede the first. The architect himself admitted that the first delay certificate was flawed as it did not state the information required under clause 24(1) of the SIA Conditions. Hence, he issued a second delay certificate on 26 October 2015. However, this second delay certificate was also invalid as clause 31(6) of the SIA Conditions makes clear that an architect cannot correct or amend or supersede a previous delay certificate issued by him.[38] As both delay certificates issued by the architect were invalid, the applicant's claim for liquidated damages failed.[39]

13 Finally, in relation to the respondent's counterclaim, the arbitrator awarded the sum of S$98,797.34 to the respondent in respect of works that remained unpaid for. This sum in main consisted of sums which had been reflected in the architect's Statement of Final Account, as well as other variation works.[40] However, the respondent's claim for additional labour costs was

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36 NTC1 pp 594 – 595, paras 845 – 846.

37 NTC1 p 747 clause 24(2).

38 NTC1 p 757.

39 NTC1 pp 562 – 563, paras 778 – 780.

40 NTC1 pp 683 – 709.

rejected entirely, as the additional labourers had been deployed on the respondent's own accord, without the architect's instruction.[41]

14 Having considered both the applicant's claims and the respondent's counterclaims, the arbitrator concluded that since more was due from the applicant to the respondent than *vice versa*, the applicant was to pay the net amount of S$59,558.37 to the respondent.[42]

Release of the arbitrator's award

15 Having summarised the arbitrator's award, I proceed to set out the chronology of events that led to the release of the arbitrator's award. The chronology is important to my decision as to whether an extension of time is required for the applicant to appeal against the arbitrator's award, and whether such extension of time ought to be granted.

16 On 22 March 2017, the respondent's counsel wrote to the arbitrator that the respondent was facing financial difficulties.[43] Pursuant to the respondent counsel's letter, there was a conference with the arbitrator on 27 March 2017. During the conference, Mr Michael Sng, the managing director of the respondent, confirmed that the respondent was in financial trouble, and that he would arrange to pay the outstanding bill owed to the arbitrator progressively.[44] Subsequently, in a letter dated 24 April 2017, the respondent informed the

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41 NTC1 p 701, paras 1040 – 1041.

42 NTC1 p 709 para 1057.

43 Ng Tze Chew Diana's second affidavit for OS 730/2018 ("NTCB") p 12, para 2.

44 NTCB p 15, para 2.3(b).

arbitrator that it would try to sell the respondent's office premises to pay the outstanding sums owed to the arbitrator.[45]

17 Later, on 18 July 2017, the arbitrator wrote to the parties to inform them that the award would be ready for collection from 25 July 2017. He went on to state that the award would be released upon payment of the outstanding balance of his fees and expenses, amounting to the aggregate sum of S$57,929.17.[46] The applicant's and the respondent's shares of what was outstanding at that time were S$9,027.09 and S$48,902.08 respectively.[47]

18 The award by the arbitrator was dated 25 July 2017,[48] but parties did not collect the award on that date.

19 After multiple reminders that the award was ready for collection, the applicant wrote to the arbitrator on 29 August 2017 to propose that the arbitrator release the award to her if she paid her outstanding share of S$9,027.09.[49] Not unexpectedly, given that Article 16.1 of the Singapore Institute of Architects Arbitration Rules (2nd Ed, 2009) ("SIA Rules") provides that parties are "jointly and severally liable to the Arbitrator for payment of all such fees and expenses until they have been paid in full",[50] the arbitrator did not agree to this proposal, and he instead wrote to the respondent, requesting that the respondent

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45 Michael Sng's second affidavit for OS 730/2018 ("MSB") p 3, para 9; p 13, para 3 and p 18.

46 Ng Tze Chew Diana's first affidavit for OS 730/2018 ("NTCA") p762 – 764.

47 Michael Sng's first affidavit for OS 730/2018 ("MSA") p 10, para 18 and p 11, para 20; NTCB p 2, paras 5 – 6.

48 NTC1 p 52.

49 MSB p 13, para 2.4; p 17, para 2.4

50 Respondent's Bundle of Authorities for OS 1010/2018, Tab 12.

pay its outstanding share of S$48,902.09 before he released the award.[51]

20 Thereafter, on 14 September 2017, at a conference with the arbitrator, the applicant's counsel was informed that the respondent was still trying to sell its office premises to raise funds to pay the arbitrator's fees and expenses. In light of the situation, the applicant's counsel indicated that he would speak to the applicant, for the applicant to consider if she was willing to pay the balance of the arbitrator's fees and expenses.[52] However, despite multiple reminders and letters that were sent by the arbitrator thereafter, no payment was made by either party.[53]

21 Finally, after almost ten months, on 17 May 2018, the arbitrator released the award to the parties even though he had not been paid his outstanding fees and expenses.[54]

22 The respondent subsequently made payment of its share of the outstanding fees and expenses to the arbitrator on about 18 June 2018.[55] According to the respondent, it had completed the sale of premises on 10 May 2018 and had thus raised the money to be able to make payment.[56]

23 Up to the time the parties appeared before me, the applicant, on the other

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51 MSB p 13, para 2.4.

52 MSB pp 13 – 14.

53 MSB pp 14 – 22.

54 NTCA pp 765 – 766.

55 NTCB pp 22 – 23.

56 MSB p 4, paras 10 – 11.

hand, has not paid her outstanding share of $9,027.11 to the arbitrator.[57]

Commencement of proceedings for leave to appeal against arbitrator's award

24 The applicant commenced these present proceedings on 14 June 2018, seeking leave to appeal against certain questions of law arising from the award.[58] This was 28 days after she had received the award on 17 May 2018.

25 The right to appeal against an award is subject to the restrictions under s 50 of the Act (read with s 49(4) of the Act). More specifically, s 50(3) of the Act provides that an application or appeal must be brought within 28 days of the date of the award:

> 49 … (4) The right to appeal under this section shall be subject to the restrictions in section 50.
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> …
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> 50 … (3) Any application or appeal shall be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

26 Given the statutory requirement for an appeal to be brought within 28 days of the date of the award, one would have expected the applicant to be seeking in her first prayer in the originating summons relief in the form of an extension of time for her to file this application. However, that was not done. The prayers in the originating summons proceed as if there is no question at all of the applicant being out of time. It is only after seeking leave to appeal against all the questions of law set out in prayer (1) of the originating summons that the

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57 MSA p 14, para 28.

58 Originating Summons 730 of 2018.

applicant seeks in prayer (2) as follows:[59]

> If necessary, the time limited for filing this application be extended to 28 days after the release, on 17 May 2018, of the Award dated 25 July 2017.

27 In my view, this is not the proper way for the applicant to approach the matter. The applicant should have been more upfront in dealing with the issue of her tardiness. Whether an extension of time ought to be granted for the applicant to make the application under s 49(3) of the Act for leave to appeal against the award is a *threshold question* that needs to be decided. If the court does not grant an extension of time to the applicant, the application under s 49(3) of the Act will fail *in limine*.

Whether an extension of time needs to be sought before the application for leave to appeal may be made

28 The applicant argues that there is no need for her to apply for an extension of time before she can apply for leave to appeal against the award. Even though s 50(3) of the Act provides for an application to be made within 28 days of the date of the award, the words "date of the award" should actually be read to mean the "date when the parties received the award". This means that time only ran after 17 May 2018, the date the parties received the award.[60] The applicant argues that this is a purposive interpretation of the words in s 50(3) of the Act because the parties can only decide if the arbitrator made a mistake, and hence whether they wish to appeal against questions of law arising from the award, after they received the award and reviewed the grounds on

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59 Originating Summons 730 of 2018.

60 Applicant's Written Submissions to OS 730/2018 ("AWS") p 14, paras 22 – 23.

which the arbitrator had come to his decision.[61]

29 This submission is wholly without merit. In *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510 ("*Hong Huat*"), the Court of Appeal considered a similar argument with respect to an earlier version of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the 1985 Act"). Under the 1985 Act, O 69 r 4(2) of the Rules of Court (Cap 322, R5, 1997 Rev Ed) ("ROC") provided that in respect of an appeal against an arbitral award made pursuant to s 28(2) of the 1985 Act, the notice had to be served and the appeal entered within 21 days after the award was made and published to the parties. An issue before the court in *Hong Huat* was thus what "after the award has been made and published to the parties", as set out in O 69 r 4(2) of the ROC, meant. As observed, since *Brooke v Mitchell* (1840) 9 LJ Ex 269, "it has been accepted that an award is made and published when the arbitrator gives notice to the parties that the award is ready for collection" ("the notice rule") (*Hong Huat* at [22]). This notwithstanding, it was argued that "made and published" occurred only when the parties had notice of the actual contents of the award, and not when the arbitrator gave notice to the parties that the award was ready for collection (*Hong Huat* at [22]). This argument was firmly rejected by the Court of Appeal, which held at [25]:

> The appellants further argued that delay cannot be an adequate reason for adopting the notice rule. They said that *unless the parties have actual knowledge of the contents of the award, they would not be in a position to challenge the award*. Furthermore, the notice rule would be too rigid as it would not be able to take into account different circumstances, such as, the parties were away when the notice was given or a party might be incapacitated at the time. In our opinion, the *notice rule is to be preferred as it ensures prompt action and does not depend on the will of the parties*. To hold otherwise would be inconsistent

[61] AWS p 15, para 27.

> with the *legislative policy underlying the reference to arbitration, namely, the expeditious resolution of arbitrated disputes and the need for finality*. In a case where extenuating circumstances exist, the parties are at liberty to apply for an extension of time. Obviously, whether extension should be granted in a particular case would have to depend on how meritorious the grounds are. [emphasis added]

30 In *Hong Huat*, there were two reasons for preferring the interpretation that time is to run from the moment parties are notified that the award is ready for collection, rather than when parties have notice of the actual contents of the award. First, this ensures prompt action, and does not depend on the will of the parties. Second, this accords better with the legislative policy underlying the reference to arbitration, which is the expeditious resolution of disputes that are subject to arbitration and the need for finality.

31 When the 1985 Act was subsequently amended, the earlier phrase of "made and published to the parties" in O 69 r 4(2) of the ROC was replaced by "date of the award". The Attorney-General's Chambers, *Review of Arbitration Laws [Report]* LRRD No 3, 2001 ("the AGC Report")[62] explains that this change was a considered one. As stated at paragraph 2.39.2 of the AGC Report, it was considered that the phrase "made and published to the parties" could be argued "to mean that for so long that a party has not received the award, time might not run for the purposes of an appeal". Hence, at paragraph 2.39.3 of the AGC Report, it was proposed that the "date of the award" should be inserted into what is s 50(3) of the Act today, replacing the phrase "made and published to the parties". This, it was explained, "provides a certain and incontrovertible date for reckoning of time set for appeal. To compensate for any time loss (*sic*) in the making and collection of the award, the time limit for appealing against

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62 Applicant's Bundle of Authorities at Tab 23.

an award is increased from the present 21 days to 28 days after the date of the award." Hence, I find that the "date of the award" refers literally to the date which the arbitrator has dated the award. This will usually be when the arbitrator notifies the parties that the award is ready for collection. Of course, in a case where the arbitrator has dated the award well before he informs the parties that the award is ready for collection, and as a consequence thereof, parties have too little time to consider the award and file the application for leave to appeal, that would be the kind of situation where the court may grant an extension of time for parties to file their application.

32 The words "date of the award" found in s 50(3) of the Act may be contrasted with s 48(2) of the Act, which relates to applications to set aside an arbitrator's award. Section 48(2) of the Act provides that "[a]n application for setting aside an award may not be made after the expiry of [three] months from the date on which the party making the application had *received the award*…" [emphasis added]. Both parties' counsel were in agreement that this meant actual receipt of the award. If I were to adopt such an interpretation as correct, then had it truly been the intention that time under s 50(3) of the Act was to run from the time parties *collected* or *received* the award, the provision could have been drafted to follow the wording in s 48(2) of the Act. Yet, s 50(3) of the Act refers solely to the "date of the award", without any additional words to indicate that this is in relation to the date on which the parties *receive* the award.

33 As such, it is clear to me that the application under s 49(3) of the Act is out of time. The last date by which the application could have been made was 28 days after 25 July 2017, which is the date that the parties had been notified that the award would be ready for collection and which is also in fact the date

which the award is dated.[63] Given this, it is incumbent on the applicant to satisfy the Court that an extension of time ought to be granted to make her application under s 49(3) of the Act. It is only if this threshold issue can be overcome in favour of the applicant that the court will then proceed to hear the application under s 49(3) of the Act proper.

The principles applicable for the grant of an extension of time for an application under s 49(3) of the Act

34 The parties are in agreement as to the principles that govern the question of whether an extension of time should be granted to the applicant to file an application for leave to appeal under s 49(3) of the Act. As set out in *Pearson Judith Rosemary v Chen Chien Wen Edwin* [1991] 2 SLR(R) 260, which has been followed in the cases of *Hong Huat* (at [12]) and *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 ("*Tay Eng Chuan*") (at [26]), a case which post-dates the amendments to the Act, the factors to be considered in deciding whether an extension of time ought to be granted are:

(a) the length of the delay;

(b) the reasons for the delay;

(c) the prospects of success if time for appealing was extended; and

(d) the degree of prejudice suffered by the respondent, if any, should an extension of time be granted.

35 With the aforementioned principles in mind, I proceed to consider whether an extension of time ought to be granted to the applicant in this case.

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63 NTC1 p 52.

Length of delay

36 Turning to the first factor of the length of delay, I accept the respondent's submission that the length of delay must be judged against the yardstick of the 28 days provided for under s 50(3) of the Act.[64] Given that the award is dated 25 July 2017, the last day for the applicant to have filed her application for leave to appeal against the award was 22 August 2017. The application was only filed on 14 June 2018, which is nine months and 23 days late. By any measure, such a delay of over nine and a half months is very substantial. In fact, in *Progen Engineering Pte Ltd v Winter Engineering (S) Pte Ltd* [2006] SGHC 224 ("*Progen*") at [16], V K Rajah J (as he then was) had described a delay of 49 days past the statutory time limit as not marginal but very substantial. Similarly, in *Squibb Group Limited v Pole 2 Pole Scaffolding Limited* [2017] EWHC 2394 (TCC) ("*Squibb*") at [34], a delay of 84 days was described as a "substantial delay".

37 No precedent, whether local, English or otherwise, has been submitted to show that the court has granted an extension of time in a case where the delay is as lengthy as in the present case. As summarised by the respondent, the following cases concerned applications for an extension of time to appeal against an arbitrator's award, involving varying periods of delay following the expiry of the statutory time limit:[65]

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64 Respondent's Further Skeletal Submissions (Issue on Extension of Time) (18 Feb 2019) para 5.

65 Respondent's Further Skeletal Submissions (Issue on Extension of Time) (18 Feb 2019) para 7.

(a) *Terna Bahrain Holding Company WLL v Ali Marzook Ali bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm) at [65]: delay of almost 17 weeks;

(b) *Ian Rollitt (trading as CD Consult) v Christopher Leonard Ballard* [2017] EWHC 1500 (TCC) ("*Rollitt*") at [21]: delay of 88 days;

(c) *S v A and B* [2016] EWHC 846 (Comm) ("*S v A and B*") at [31]: delay of 74 days;

(d) *Squibb* at [20]: delay of 84 days;

(e) *Tay Eng Chuan* at [27]: delay of 14 days;

(f) *Progen* at [7]: delay of 49 days; and

(g) *Hong Huat* at [34]: delay of about three months.

38 Of the seven cases above, an extension of time was only granted in *Hong Huat*. This was due to the fact that the parties in that case had, prior to bringing an application for leave to appeal against the award, been in discussions on a possible settlement, notwithstanding that the award was ready for collection. Further, the respondents did not deny that their solicitors had informed the appellants' solicitors that the time for bringing an application for leave could be extended by agreement. In the court's view, it would thus be reasonable to infer that there was an understanding that time would not begin to run for the purpose of filing an application for leave to appeal while parties were in the midst of discussions. In addition to the adequate reasons provided for the delay, the court further considered that there was a question of law that could substantially affect the appellant's rights, and that no prejudice would be caused to the respondent if the application was granted since interest would continue to run on the sums

outstanding under the award. In the circumstances, an extension of time to apply for leave to appeal was granted.

39 Hence, given the substantial delay of over nine and a half months in this case, it is important to consider the three other factors, in particular the reasons for the delay, to determine whether the applicant can sufficiently justify the grant of an extension of time. In this regard, I note that the applicant did not make any specific submission on the length of the delay. There is no attempt to downplay the length of the delay in this case. It is thus to the reasons for the delay which I now turn.

Reasons for the delay

40 The applicant focuses much of her submissions on the reasons for why the delay is excusable. She argues that the delay was attributable to the respondent's conduct in not making payment of its share of the outstanding arbitrator's fees and expenses in the amount of S$48,902.08,[66] and that this caused the applicant to only receive the award much later on 17 May 2018.[67] Given the respondent's professed financial difficulties in the first half of 2017, the applicant submits that it would not be reasonable to expect her to have paid the entire amount of S$57,929.17 owed to the arbitrator in order to secure the release of the award. This is because she would then not have been able to recover payment of such fees and expenses from the respondent in the event the award was substantially in her favour.[68] This was especially as the respondent's share of the outstanding arbitrator's fees and expenses was substantial (at

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66 AWS para 38.

67 AWS para 43.

68 AWS para 40.

S$48,902.08), as compared, for example, to the "very modest" £4,052.88 that remained outstanding in the case of *Rollitt* (at [6] and [26]).[69] Finally, the applicant deposed on oath that she was unable to afford the respondent's share of the outstanding fees as she was no longer employed, and that she had been unable to sell the property owing to the respondent's allegedly defective works.[70]

41 To support her reasons for not footing the respondent's share of the outstanding fees, the applicant relies on the decision of *Tay Eng Chuan*. There, the applicant had been notified that the tribunal's award would be ready for collection upon full payment of the costs of arbitration on 23 December 2008. On 26 December 2008, the applicant paid his share of the arbitration fees, but the respondent only paid its share on 13 January 2009. The applicant was then notified on 15 January 2009 that the award could be collected, and he thus collected the award on the same day. On 3 February 2009, the applicant applied to appeal against the award. This was 14 days after the applicant's time for filing an application for leave to appeal had expired. The applicant made much of the fact that he had only five days between the date of collection of the award and the last day for filing an application for leave to appeal, since he only collected the award on 15 January 2009. It was also alleged that such delay was occasioned by the respondent's, rather than the applicant's, tardiness in making payment of its share of the costs. Judith Prakash J (as she then was) ("Prakash J") rejected this argument, and observed at [35] of her judgment that:

> There would have been no prejudice to the applicant in paying the respondent's share of costs as well since he would have known that the respondent was a solvent company which would

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69 AWS para 41.

70 AWS para 42.

> be able to reimburse him without difficulty. There was no evidence of any financial difficulty on the part of the applicant that would have prevented him from taking this course. Therefore the applicant's own conduct had to an extent contributed to the truncation of the available period in which to file an application under s 49.

42 In other words, given that the respondent was a solvent company, the applicant in *Tay Eng Chuan* ought to have paid the respondent's share of the costs first, and seek reimbursement from the respondent thereafter. This would have allowed the applicant more time to consider whether to file an application to appeal against the arbitrator's award.

43 In our case, the applicant submits that there was uncontroverted evidence that the respondent was in dire financial circumstances. Hence, unlike the applicant in *Tay Eng Chuan*, it would have been potentially prejudicial to her had she paid the respondent's portion of the arbitrator's fees.[71] She might not have been able to recover such fees from the respondent if there was a costs order in her favour in the award.

44 I am unable to accept this submission. This is a case where the applicant made a deliberate decision not to make the necessary payment to the arbitrator in order to secure the release of the award. In my view, the onus is on both parties to the arbitration to make the full payment due to the arbitrator so that they can obtain a copy of the award. As Article 16.1 of the SIA Rules (set out at [19] above) makes clear, both parties are jointly and severally liable to the arbitrator for his fees and expenses. So, if the respondent was unable to make payment of its outstanding share of the fees and expenses, whether for reasons of insolvency or otherwise, the applicant would be obliged to make such

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[71] AWS para 40.

payment.

45 In response, the applicant asserts in her affidavit that she could not pay the full sum of S$57,929.17 which remained outstanding to the arbitrator. This was because she had stopped working in 2009, and thus had no income. To compound matters, she had spent a significant sum paying the respondent to re-build the property, which she has been unable to rent or sell due to the alleged defects. Furthermore, she has incurred significant legal fees, both in pursuing the arbitration proceedings against the respondent, and in acrimonious matrimonial proceedings in Hong Kong against her husband, which has been ongoing since 2013.[72]

46 I find that this explanation does not hold water because it is contradicted by the evidence. In this regard, the property, which she owns, is a substantial asset in Singapore, unencumbered by any security interests as far as I can tell.[73] It is also undisputed that the applicant had refused to accept two offers of S$6.18m and S$6.3m for the property because she was of the view that her property was worth S$7m.[74] The applicant also confirmed during the arbitration proceedings in 13 July 2016 that she was not in a hurry to sell the property as she did not have "a loan, pressing payments to make or … cash flow problems".[75] This ability to hold out for a higher offer, coupled with the fact that the arbitrator had found that there was insufficient evidence to support the applicant's assertion that she had taken efforts to rent out the property,[76]

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72 NTCB paras 8 – 19.

73 MSA pp 108 – 110.

74 NTC1 p 583, para 826.

75 MSA p 114, lines 2 – 5.

76 NTC1 p 570 para 801 – p 572 para 804.

suggests that the applicant's bare assertions about her financial struggles were grossly exaggerated. Indeed, when the respondent explained to the arbitrator that it was in financial difficulties and thus could not pay its share of the arbitrator's fees and expenses, the applicant did not raise any similar problems of her own, and in fact offered to pay her share of S$9,027.11 to receive the award.[77] Till date, the applicant has not paid her share of the arbitrator's fees and expenses, suggesting that the respondent's previous impecuniosity had nothing to do with the applicant's non-payment of the arbitrator's fees and expenses.

47 In the circumstances, I find that the applicant did not have a good reason to refuse to pay the arbitrator's fees and expenses to secure the award once she had been notified that it was ready for collection. Such refusal to pay the arbitrator's fees and expenses has not been accepted by the courts as a proper excuse justifying the grant of an extension of time to apply for leave to appeal.

48 In *Progen*, the arbitrator had releaseed his award subject to the payment of his fees by the parties. The plaintiff, which filed its notice of appeal some 49 days after the statutory limited date to appeal against the award, asserted that the delay was not attributable to them, but rather the arbitrator's insistence that the release of the award was contingent on his fees being paid. The Court found that such an excuse was "entirely unconvincing" (*Progen* at [13]), and rejected the application for an extension of time to file an appeal against the award.

49 As Hobhouse J explained in *International Petroleum Refining & Supply Sdad Ltd v Elpis Finance S.A.* [1993] 2 Lloyd's Rep 408 ("*The Faith*") at 411:

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[77] MSB p 13, para 2.4; p 17, para 2.4

> It is not open to a party to argue … that they were waiting for the other party to take up the award; that they did not know that there was any point they wanted to raise on the award. They have to take that decision for themselves. The position is, in a sense, a stark one: a party who wishes to reserve his right to take the matter to the Court either by way of appeal … must ensure that the award is taken up in time to enable the application to be made.

50 Hence, the onus is on the parties, who are usually jointly and severally liable for the fees of the arbitrator, to ensure that the terms of release of the award are promptly complied with, so that parties have sufficient time to file an appeal (if necessary) within the statutory time limit under s 50(3) of the Act. If parties fail to act promptly, in the absence of good reason for justifying their non-payment of the arbitrator's outstanding fees or otherwise, it would be simply insufficient, in seeking an extension of time, to assert that the delay was caused by the other party's non-payment of the arbitrator's fees.

51 Thus, in *S v A and B*, the court rejected the seller's argument, in seeking an extension of time, that the buyers had delayed in the payment of their share of the tribunal's fees. The judge, referring to the above passage in *The Faith*, held that this "carries little, if any weight" (*S v A and B* at [37]). Similarly, in *Rollitt*, the claimant sought to attribute blame for the delay in filing the application to appeal on the defendant's refusal to pay any of the arbitrator's fees, causing the arbitrator to delay the release of the award pending full payment of the outstanding fees. The judge considered that the arbitrator's terms and conditions of appointment expressly stated that the parties would be jointly and severally liable for his fees and expenses, and that payment would be required for the release of the award. Thus, it did not lie in the claimant's mouth to rely on the defendant's refusal to pay as a reason for the delay (*Rollitt* at [32]).

52 Similarly here, given that the parties were jointly and severally liable for the arbitrator's fees, the applicant cannot rely on the respondent's non-payment of the arbitrator's fees to justify her delay in filing the application to appeal against the arbitrator's award. This is especially as I have found that the applicant did not provide any other good reason for not paying the arbitrator's outstanding fees. Her allegation of her inability to pay the respondent's share of the fees is but a belated assertion that is contradicted by evidence.

53 In my judgment, the applicant made a calculated call not to make the necessary payment to secure the release of the award. In such circumstances, given that she must know that the time for her to make an application for leave to appeal would run from the date of the award which she knew to be ready for collection on 25 July 2017, I find that the applicant made a considered decision to take the risk that she might be out of time in any application for leave to appeal against the award.

54 As such, I find that the applicant has not provided valid reasons for the delay in her application.

The chances of the appeal succeeding

55 The third factor to be considered relates to the chances of the applicant's appeal succeeding. In relation to this factor, the court in *Lee Hsien Loong v Singapore Democratic Party* [2008] 1 SLR(R) 757 observed at [19]–[20] that this limb does not require the court to go into a full-scale examination of the merits of the appeal, and serves simply to weed out hopeless appeals, in which case an extension of time ought not to be granted, even if the delay was very short:

> … In our view, it is significant that of the four factors, the emphasis, in the first instance at least, is invariably on the first two, *viz*, the length of delay and the reasons for the delay. This is not surprising because the third factor (*viz*, the chances of the appeal succeeding if time for appealing were extended), whilst of equal importance relative to the other three factors, is set at a *very low threshold* in fairness to the applicant – namely, ***whether the appeal is "hopeless"*** … Indeed, as this court put it in *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 3 SLR(R) 355 … (at [43]):
>
> > As to the question of merits, it is *not* for the court at this stage to *go into a full-scale examination* of the issues involved. *Neither is it necessary for the applicant to show that he will succeed in the appeal.* The threshold is lower: the test is, is the appeal hopeless? … Unless one can say that there are no prospects of the applicant succeeding on the appeal, this is a factor which ought to be considered to be neutral rather than against him.
>
> 20 This third factor nevertheless becomes of signal importance where the appeal is a truly hopeless one. In such a situation, notwithstanding even a very short delay, an extension of time will generally not be granted by the court simply because to do so would be an exercise in futility, resulting in a waste of time as well as resources for all concerned.…
>
> [emphasis added]

Requirements for leave to appeal

56 Before I turn to consider whether the applicant's intended appeal is hopeless or bound to fail, the requirements for leave under s 49 of the Act must be emphasised. This is because, even if an extension of time is granted, the applicant must then persuade the Court to grant leave to appeal against the award. The grant of leave to appeal is a necessary precursor to the applicant's appeal succeeding, and it is fruitless to consider whether the substantive appeal will be hopeless without first considering whether the application for leave to appeal is hopeless in the first place. As Prakash J phrased the question in *Tay Eng Chuan* at [41]:

> Taking the issue in the context of arbitration proceedings what I had to consider was not whether the appeal itself would be hopeless but *whether the application for leave to appeal could be said to be "hopeless".* [emphasis added]

57 In this regard, it is noted that the Court of Appeal observed in *Hong Huat* at [39] that "[i]t seems to us clear that in relation to the question of 'prospect of success' that must be in relation to the success of the appeal and not just the success of obtaining an extension of time to file an application for leave. Otherwise, it would make no sense. The object of the extension of time is not to obtain leave *per se* but to appeal." This may be taken to mean that the court need only to consider the prospects of success of an eventual appeal against the award, rather than the prospects of the applicant obtaining leave to appeal against the award. However, a closer reading of the decision in *Hong Huat* shows that this is not the approach which the court adopted. Section 28(4) of the 1985 Act, which was under consideration in *Hong Huat*, required first that a question of law was raised, and second that the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration before leave of court could be granted to appeal against an award. Before granting the extension of time sought in that case, the court considered both of the above conditions (*Hong Huat* at [39]–[52]), showing that the consideration of all requirements which are relevant for obtaining leave to appeal is necessary at this stage. In determining whether an extension of time ought to be granted, it is insufficient to simply conclude that the substantive appeal itself is not hopeless, since this necessarily presumes that the application for leave to appeal is not hopeless, when such may not be the case at all.

58 Therefore, in considering the third factor of the applicant's prospects of success, I adopt Prakash J's formulation in *Tay Eng Chuan* at [41], and consider whether the application for leave to appeal could be said to be hopeless.

59 In summary, the court must be satisfied that the following conditions are met before leave to appeal will be granted:

(a) the appeal must be on a question of law (s 49(1) of the Act);

(b) the determination of that question will substantially affect the rights of one or more of the parties to the arbitration (s 49(5)(*a*) of the Act);

(c) the question was one which the arbitrator was asked to determine (s 49(5)(*b*) of the Act);

(d) on the basis of the findings of fact in the award, the decision of the arbitrator on the question is obviously wrong, *or* the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt (s 49(5)(*c*) of the Act); and

(e) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question (s 49(5)(*d*) of the Act).

60 Let me say a little about these requirements in s 49 of the Act.

(1) Question of law

61 A question of law is distinct from an error of law, and relates specifically to a "point of law in controversy". It does not extend to errors in the *application* of the law. As the Court of Appeal explained in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*") at [18]–[19]:

> …. in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208 … G P Selvam JC (as he then was) stated at [7]:
>
> > … A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. … [emphasis added]
>
> 19 To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

62 The Court of Appeal in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("*Ng Eng Ghee*") re-emphasised that *Northern Elevator* represents the approach towards questions of law in arbitration cases (*Ng Eng Ghee* at [96]–[99]).

63 In considering any question of law, the findings of fact of the arbitrator must be accepted in an unqualified manner (*Progen Engineering Pte Ltd v Chua Aik Kia (trading as Uni Sanitary Electrical Construction)* ("*Chua Aik Kia*") [2006] 4 SLR(R) 419 at [16]):

> … This means that the arbitrator's findings of facts are conclusive; it is irrelevant whether the court considers those findings of fact to be right or wrong. The upshot of this is that on an application for leave to appeal, the court must decide any question of law arising from an award on the basis of an *unqualified acceptance* of the findings of fact of the arbitrator… [emphasis added]

64 Thus, Belinda Ang J explained, "[a]dmissibility of evidence, weight of

the evidence and the inferences from it are essentially matters for the arbitrator … Even inconsistency in the arbitrator's findings of fact is not a valid ground for an attack on an award as it is no more than an error of law or fact or of both": *Chua Aik Kia* at [29].

(2) Determination of that question substantially affecting parties' rights

65 Turning to the second requirement for leave to be granted to appeal, it must be shown that the determination of the question of law will substantially affect the rights of one or more of the parties. As explained in *Northern Elevator* at [32] (citing *Pioneer Shipping Pte Ltd v BTP Tioxide Ltd* [1980] QB 547 ("*The Nema*") at 564, with approval), "the phrase 'substantially affect the rights' meant that the point of law must be a 'point of practical importance – not an academic point – nor a minor point'." The "question of substantiality is largely a matter of discretion, and such issues are best discussed if they are necessary, and clearly defined" (*Northern Elevator* at [32]).

66 By way of illustration, in *Tay Eng Chuan* at [51], Prakash J considered that while two questions of law could be raised in the case, this would not substantially affect the applicant's rights, given that he had already been awarded S$754,500 in the award, and stood to gain only an additional S$17,000 were the questions of law to be decided in his favour.

(3) A question which the arbitrator was asked to determine

67 As to the scope of the question which the arbitrator was asked to determine, it was accepted in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455 ("*Lim Chin San*") at [42]–[43] that this is not limited to the pleaded issues before the arbitrator, and that it also includes a question of law that "arises out of a finding which was a necessary step along

the path of the arbitrator's ultimate conclusion on the pleaded issue" (*Lim Chin San* at [42]).

(4) Decision of the arbitrator on the question is obviously wrong; or the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt

68 The fourth requirement has two disjunctive limbs, and the applicable disjunctive limb depends on whether the question of law raised is a "one-off" point, or a point of "general public importance". As explained by Quentin Loh J in *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681 ("*Engineering Construction*") at [49]:

> It is settled law that the principles set out in [*The Nema*] prescribe:
>
> > (a) where the question of law involved is a ***"one-off"*** point, leave to appeal should not be given unless it is apparent to the court upon a mere perusal of the reasoned award itself, without the benefit of argument, that the arbitrator was ***obviously wrong***; and
> >
> > (b) where the question of law is not a ***"one-off" point***, leave to appeal should not be given unless the court considers that a ***strong prima facie case*** has been made out that the arbitrator is wrong.
>
> [emphasis added in bold italics]

69 The court in *Engineering Construction* recognised at [49]–[51] that *The Nema* principles above applied to the old s 28 of the 1985 Act. The present day s 49(5)(*c*) of the Act is slightly less restrictive, and provides as such:

> (c) on the basis of the findings of fact in the award –
>
> > (i) the decision of the arbitral tribunal on the question is obviously wrong; or
> >
> > (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt;

Section 49(5)(*c*)(ii) is *in pari materia* with s 69(3)(*c*)(ii) of the Arbitration Act 1996 (c 23) (UK) ("the English Arbitration Act 1996"). In *CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co* [2003] 1WLR 1015 ("*The Northern Pioneer*"), Lord Phillips MR observed that *The Nema* principles have been superseded by the broader provisions in s 69(3)(*c*)(ii) of the English Arbitration Act 1996, such that where a question of general public importance is raised, the door has been opened "a little more widely to the granting of permission to appeal than the crack that was left open" in *The Nema* (*The Northern Pioneer* at [11] and [61]).

70 Hence, where a question of general public importance is raised, the threshold, as set out in s 49(5)(*c*)(ii) of the Act, is simply that the decision of the arbitral tribunal is "at least open to serious doubt". If the question is, however, not one of general public importance, for instance, because the question raised is only a "one-off" point, the threshold remains that it must be shown that the arbitral tribunal was "obviously wrong": s 49(5)(*c*)(i) of the Act; see also *Northern Elevator* at [23] and *Engineering Construction* at [45], [52] and [53].

(5) Just and proper for the court to determine the question, despite parties' agreement to arbitrate

71 Finally, even if the other conditions above are met, leave to appeal against an award will only be granted if the court is satisfied that "despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question" of law posed (s 49(5)(*d*) of the Act). This means that it may be insufficient to show that the other requirements for leave to appeal have been satisfied, without going further to show that judicial intervention is warranted on the facts of the particular case. For example, the court might refuse leave to appeal if it can be shown "that the

parties wished speed and finality to prevail even if the tribunal decided a question of law in a way which was obviously wrong, or at least open to serious doubt" (*Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2012] 1 SLR 917 ("*Prestige Marine*") at [68], citing Michael Mustill and Stewart Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 2001) at pp 357–358). In this respect, if parties have agreed to a clause stipulating that the arbitral award shall be final and binding, this will indicate that the parties did not contemplate becoming involved in litigation over the arbitral award, such that the court should lean towards giving effect to the stated intention of the parties for such finality: *Prestige Marine* at [69]–[70], citing *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] NZCA 131 at [54].

72 With these principles in mind, I move now to consider, in a broad fashion, the applicant's various questions of law for which she seeks leave to appeal. From my review of the 13 questions set out in prayer one of the originating summons, which are numbered prayer 1(a) to 1(m), these questions can be divided into three general categories. The first deals with the applicant's claim in the arbitration for damages for delay, the second deals with the applicant's claim for loss of rental from the property, and the third deals with the applicant's claim for the loss in value of the property.

73 I will consider these three categories of questions in turn.

Delay and liquidated damages

(1) The first question

74 The first question raised by the applicant is as follows: whether the arbitrator erred in law when he decided that, just because there was no valid

delay certificate, the applicant was not entitled to recover from the respondent liquidated damages or any general damages as a result of its delay in completing the works.[78]

75 As a preliminary point, I must point out that, at the hearing, counsel for the applicant confirmed with me that there is no suggestion that the arbitrator had reached a wrong decision in law on the invalidity of the second delay certificate issued by the architect, which had been relied on as the basis for the claim for liquidated damages.[79] In short, there is no challenge to the arbitrator's interpretation of clause 31(6) of the SIA Conditions, which resulted in this conclusion as to the ineffectiveness of the second delay certificate.[80] In any event, any such argument would have required an amendment to the originating summons in terms of the questions posed, and the applicant's counsel informed me that there was no intention to make any such amendment.[81]

76 On this first question posed by the applicant, I have some difficulty with the applicant's submission that it is a question of law, rather than an allegation that the arbitrator had committed an error of law. In other words, I find that the allegation is that the arbitrator erred when he decided that the applicant was not entitled to liquidated damages or general damages for delay just because the delay certificates were not valid. This alleged error would have followed from an erroneous application of the law, and does not in fact raise a question of law, especially since the applicant's counsel confirmed that the arbitrator's

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78 Originating Summons 730 of 2018, prayer 1(a).

79 MS1 para 11.5 and p 80.

80 NTC1 p 563 para 779.

81 Minute Sheet (30 January 2019) p 3 and Minute Sheet (18 February 2019) p 3.

interpretation of clause 31(6) of the SIA Conditions is not being disputed. As explained in *Northern Elevator* at [18]–[19], an error in the application of law does not entitle an aggrieved party to appeal; a question of law, which means a point of law in controversy, must be raised. The same point was made in *Chua Aik Kia* at [29].

77 But, be that as it may, even if I were to accept that this is a question of law, this was not a question that the parties had presented to the arbitrator for his determination. The arbitrator's remit is defined by the pleadings in the arbitration and the parties' submissions to him. As I have explained in my judgment issued in OS 1010/2018, the applicant's claim in the arbitration in respect of delay was for liquidated damages of S$58,500 only. There was no alternative claim for general damages, nor for any lower sum of liquidated damages in the applicant's statement of case for the arbitration, or in her opening and closing submissions in the arbitration proceedings.[82]

78 How the applicant arrived at the sum of S$58,500 requires explanation. The contractual completion date was 25 June 2010.[83] However, works were not completed by that date, and the architect later issued a first delay certificate on 4 January 2011, certifying that the works were in delay as of 23 November 2010.[84] This implied that an extension of time had been given to the respondent to complete the contractual works up to 22 November 2010. Much later, on 26 October 2015, the architect issued a second delay certificate, purporting to

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82 MS1 p 107, Respondent's Core Bundle of Documents ("DCBD") at pp 5 and 12, para 19, NTC2 pp 20 – 21, at para 10 and pp 85 – 87, at paras 170 – 176.

83 NTC1 para 9 and p 714, clause 4.1; Michael Sng Boh Kwang's first affidavit ("MS1") para 9.

84 NTC1 p 773.

supersede the first delay certificate. In the second delay certificate, the extension of time granted to the respondent was far shorter, such that the last day for the respondent to complete the works was stipulated to be 8 July 2010.[85] As such, under this second delay certificate, the respondent was in delay from 9 July 2010 to the date of the actual completion, 19 January 2011, this being a period of slightly over six months.[86]

79 Relying on the second delay certificate, the applicant claimed S$58,500 in liquidated damages for the respondent's delay in completing the works. This S$58,500 had been calculated on the basis of the contractually stipulated rate of S$300 per day of delay for the period from 9 July 2010 to 19 January 2011 (195 days).[87] There was no alternative reliance by the applicant on the first delay certificate, under which she would only have been entitled to S$17,400 (S$300 x 58 days, being the period from 23 November 2010 to 19 January 2011) in liquidated damages. There was also no alternative plea for general damages. There were also no submissions made that the arbitrator should have awarded liquidated damages notwithstanding any finding that the second delay certificate was found to be invalid.[88]

80 Despite the applicant's attempts to argue to the contrary, she had not disputed in the arbitration the interpretation of clause 24(2) of the SIA Conditions, which provides that the grant of liquidated damages is subject to the

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85 MS1 para 16; NTC1 p 774.

86 NTC1 p 774.

87 MS1 para 11.5 and p 80; p 99.

88 MS1 p 107, DCBD at pp 5 and 12, para 19, NTC2 pp 20 – 21, at para 10 and pp 85 – 87, at paras 170 – 176.

condition precedent that there is a valid delay certificate.[89] I find it mischievous for the applicant to now argue before me that she had put forward a case in the arbitration that she could nonetheless claim liquidated damages even without a valid delay certificate.[90] This "issue", or purported question of law, was clearly not one which the arbitrator had been asked to decide.

81 I would add that such a submission by the applicant has absolutely no merit anyway since, under the SIA Conditions, the only provision for liquidated damages is clause 24(2), which states that "[u]pon *receipt of a Delay Certificate*" [emphasis added], the applicant shall be entitled to recover from the respondent "liquidated damages calculated at the rate [agreed by the parties] from the date of default certified by the Architect for the period during which the Works shall remain incomplete".[91] That being the case, the claim for damages at the agreed rate of S$300 per day of delay can only be sustained if there is a valid delay certificate. The applicant did not point me to any alternative clauses, whether in the contract or the SIA Conditions, to suggest that liquidated damages could be determined in any other way. As a result, given that the arbitrator had rejected the applicant's claim for liquidated damages on the basis that the delay certificates were both invalid, it cannot be said that the arbitrator was wrong, or that the applicant has shown even a *prima facie* case that he had been mistaken in deciding as he did.

82 Given this, the intended application for leave to appeal against this "question of law" cannot satisfy the conditions set out in ss 49(5)(*b*) and

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89 NTC1 p 747, clause 24.2.

90 AWS paras 79 – 80.

91 NTC1 p 747, clause 24.2.

49(5)(*c*) of the Act and it is bound to fail.

(2) The second question

83 The second question raised by the applicant is this: whether the arbitrator erred in law when he decided that it was not necessary for him to deal with and decide on the following questions or issues which were raised in the arbitration proceedings: (i) whether the respondent was in delay in completing the works; and (ii) whether the respondent was entitled to an extension of time to complete the works.

84 This second "question" suffers from the same difficulties as the first one. It does not raise any question of law, in that the errors raised do not relate to any findings of law that the arbitrator had made, for which the court may consider on appeal.

85 It also proceeds on the fallacious argument that the arbitrator is obliged to decide issues which are not presented to him for decision, or which are not necessary for him to decide. As explained above, on the applicant's claim for delay in the arbitration, she only sought liquidated damages based on the second delay certificate issued by the architect. The architect found that delay certificate to be invalid. He also found that the first delay certificate was flawed, as admitted by the architect. Given these findings, the inevitable conclusion must be that the liquidated damages claim would fail. It was not necessary for the arbitrator to decide whether the respondent was in delay, how long such delay was or whether the respondent was entitled to any extension of time. This was because there was no alternative claim for general damages for delay. An arbitrator only has to decide the essential issues which are necessary for him to decide the dispute and the claims made by the parties (*TMM Division* at [72]–

[73]). As such, the arbitrator did not have to deal with these non-essential issues. It cannot thus be said that the arbitrator had been obviously wrong in deciding not to make any findings on the issues raised under this second question.

86 When pressed at the hearing, counsel for the applicant in fact accepted that this complaint about the arbitrator not having decided the length of delay and extension of time were more relevant to the applicant's application in OS 1010/2018 to set aside the award because the arbitrator had failed to decide the issues that had been presented to him for determination.[92] This reinforces my view that this was not a suitable question for which leave would be granted to the applicant to appeal against.

87 For the above reasons, I find that the intended application to raise the two "questions" in relation to the applicant's claim for delay is a hopeless one.

Loss of rental

(1) The third and fourth questions

88 The third and fourth questions relate to the applicant's claim in the arbitration for loss of rental from the property due to the alleged defects in the works carried out by the respondent.[93] In both questions, the applicant alleges that the arbitrator had erred in law, first in holding that loss of rental could not be claimed during the period when the respondent was making good the defects (the third question), and second in holding that the loss of rental was too remote to be claimed for (the fourth question). As the arbitrator's findings in this regard

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92 Minute Sheet (30 January 2019) p 3.

93 Originating Summons 730 of 2018, prayers 1(c) and 1(d).

were closely intertwined, I will consider both questions together.

89 As summarised above at [10], the arbitrator found that the applicant had not adduced sufficient evidence to show that she intended to rent out the property. Instead, the evidence before him showed that the applicant's intention at all times was to sell, rather than rent the property. In any case, it was not shown that the defects had caused her to be unable to rent out the property. The arbitrator also found that the loss was too remote, as it was not within the reasonable contemplation of parties at the time of the signing of the contract that there would be a claim for loss of rental in the event that there were defects.[94] Put another way, the arbitrator found that the applicant had not discharged her burden of proof to succeed on her claim for the loss of rental. This is a finding of fact by the arbitrator which led to the applicant's claim for loss of rental being dismissed. As explained in *Chua Aik Kia* at [16], the arbitrator's findings of facts are conclusive, and in an application for leave to appeal, the court must decide any question of law on the basis of an unqualified acceptance of the arbitrator's findings of fact. Since the third and fourth questions relate solely to alleged erroneous findings of fact by the arbitrator, it is clear that no questions of law have been raised that fall within the ambit of s 49(1) of the Act.

90 In any event, the resolution of either question is not one what will substantially affect the rights of the parties. Even if it is determined that the applicant *could* claim for loss of rental while the respondent was rectifying the defects *or* that the applicant's loss of rental was a reasonably contemplated head of loss, and the arbitrator had erred in this regard, there is another insuperable

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94 NTC1 pp 570 – 572, paras 800 – 804.

obstacle in the way of the applicant's claim. This is the arbitrator's finding of fact that the applicant had not discharged her evidential burden of proving that she had tried to rent out the property, or that the defects were the cause of her being unable to rent out the property.

91 Given the arbitrator's findings of fact on the issue of causation, I find that the arbitrator's decision on the alleged errors raised in the third and fourth questions ultimately did not alter the result arrived at by the arbitrator in relation to the loss of rental issue. Regardless of his findings in relation to the alleged errors, the applicant's claim for loss of rental would inevitably have failed.

92 For completeness, even assuming that questions of law have been raised, I should add that this is not a case where one could say that the arbitrator's decision on this issue of remoteness was obviously wrong. Further, it cannot be sensibly argued that the question relating to remoteness is one of general importance, given the established principles in this regard.

93 For the above reasons, I find the intended application for leave to appeal against the third and fourth questions, relating to the applicant's claim for loss of rental, to be hopeless and bound to fail.

Loss in value of the property

94 To recapitulate, the applicant's claim for loss in value of the property arises in the following manner. The contract works were completed on 19 January 2011.[95] There was a period that followed where the respondent was carrying out rectification works on the property due to defects. The applicant

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95 MS1 p 71.

claims that she was prevented from selling the property in October 2012, when the property market was rising, because of the defects in the works. Her claim for loss of value was for the amount of S$1.2m. This S$1.2m was the difference between what she alleged was the market value of the property when the market hit its high in April 2013 (S$7m) and the market value of the property in May 2016 (S$5.8m),[96] which was shortly before the first tranche of the arbitration proceedings commenced in July 2016.[97]

95 In his award, the arbitrator found that the applicant had not proven on her evidence presented that the market value of the property was indeed S$7m. The arbitrator also found that the applicant had also not shown that the defects in the works, which he assessed required S$42,979.06 to rectify,[98] had caused her to be unable to sell the property at the price that she wanted.[99]

96 With these findings in mind, let me examine the various questions which the applicant intends to seek leave to appeal against.

(1) The fifth, seventh and eighth questions

97 The fifth question is this: whether the arbitrator was wrong in law in relying on a purported fact that had not been advanced by either party, and finding that it was a "well-known fact which [he believed] the [applicant would] not deny" that apparently leaving defects un-rectified would "undoubtedly" cause the defects to deteriorate "especially under our tropical weather of heat

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96 NTCB pp 162 – 164, paras 225 – 232.

97 NTC1 pp 83 – 85.

98 NTC1 pp 707 – 708.

99 NTC1 p 594, para 845 – p 595, para 846.

built-up (*sic*) and high humidity without proper regular maintenance of the building, and proper and continuous daily ventilation of the premises".[100]

98 This fifth question arises in the following context. In the course of discussing the issue of the mitigation of damages, the arbitrator had noted the undisputed fact that the applicant had chosen to leave the defects in the works un-rectified. The arbitrator, who is an architect by profession, thus observed that it was "well-known" that leaving defects, such as water seepage and external plaster cracks, un-rectified would worsen the damage to the house over time, given Singapore's weather and humidity.[101]

99 The respondent disputes the submission that such a "well-known fact" was not advanced by either party. The respondent argues that its expert, Ms Catherine Loke, had given evidence on this very point.[102] However, leaving that aside, it will be immediately apparent from the way the question has been proposed by the applicant that this is not a question of law in controversy between the parties. Rather, the issue here is whether the arbitrator should have relied on this "well-known fact" in coming to his view that the applicant failed to mitigate her loss. This is a question of whether the arbitrator had conducted the hearing in a procedurally fair manner. The applicant knows very well that this is her true complaint. That is why she has commenced a separate application in OS 1010/2018. There, she alleges that the arbitrator breached natural justice by making a finding based on this "well-known fact" without first

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100 OS 730 of 2018, prayer 1(e).

101 NTC1 p 574 para 809.

102 Respondent's Written Submissions (23 January 2019) p 34, para 72.

giving the parties an opportunity to deal with this point.[103] Counsel for the applicant conceded at the hearing, when pressed, that this complaint related more to the question of whether there has been a breach of natural justice, rather than being a true question of law.[104]

100 There is a more fundamental problem faced by the applicant. The question of whether the applicant had mitigated her loss was not the basis on which the arbitrator had dismissed her claim for loss of value. As explained, the arbitrator found that she had not proven her loss because she had not established what the market value of the property was.[105] In an application for leave to appeal, this finding of fact must be accepted without qualifications: *Chua Aik Kia* at [16]. Therefore, the answer to this proposed question, which deals only with the issue of mitigation, will not alter the outcome of the arbitrator's decision to dismiss the applicant's claim for loss of value. The rights of the parties would not be substantially affected. Therefore, apart from not raising any question of law, any application for leave to appeal on the fifth question would be hopeless since any finding in this regard would not substantially affect the award, or her rights. This problem also plagues the seventh and eight questions, which likewise relate to the issue of mitigation.

101 The seventh question is this: whether the arbitrator had erred in law in holding that due to the applicant's failure to mitigate the loss by failing to rectify the defects and allegedly allowing them to deteriorate, the arbitrator could

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103 Applicant's Written Submissions (28 November 2018) p 49 paras 88 – 94, p 54 paras 97 – 98.

104 Minute Sheet (30 January 2019) p 4.

105 NTC1 p 595, para 846.

therefore disregard all the defects claimed for by the applicant.[106]

102 This question posed by the applicant is a most curious one. This is because it is not apparent from the award that the arbitrator had come to such a conclusion. From my review of the award, the arbitrator had considered the various allegations of defects and made findings on each of them. After going through all the alleged defects, the arbitrator allowed some of the claims but disallowed others. The applicant had claimed the sum of approximately S$374,305 as rectification costs of the alleged defects. The arbitrator had allowed the claim in the amount of S$42,979.06.[107] The fact that the applicant had not succeeded in many of her claims for defects does not mean that the arbitrator had "disregarded" her allegations because of his findings on mitigation.

103 Simply put, this is not a question of law. It is quite clearly an attempt to challenge the findings of facts by the arbitrator on what are defects and what are not, and also on the amount of rectification costs required to make good these defects. Given that no question of law is raised, any application for leave to appeal on the seventh question would plainly be a hopeless one.

104 The eighth question raised by the applicant also relates to mitigation. The question is posed as such: whether the arbitrator was wrong in law in holding that the applicant had not taken reasonable action or no action to discharge her duty to mitigate her loss by allowing the defects to deteriorate.[108]

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106 Originating Summons 730 of 2018, prayer 1(g).

107 NTC1 pp 639 – 682.

108 Originating Summons 730 of 2018, prayed 1(h).

105 The applicant argues that the arbitrator had come to the wrong conclusion on whether there had been a failure to mitigate.[109] In my judgment, the arbitrator's findings as to the state of the defects and whether steps were taken to rectify them are findings of fact, which cannot be challenged before me. Both parties had submitted *The "Asia Star"* [2010] 2 SLR 1154 as the applicable authority on the principles of mitigation in their submissions to the arbitrator.[110] It appears to me that there was no quarrel as to legal principles on mitigation. Patently, there is no question of law raised, and this is but a frivolous attempt to mask a challenge to the merits of the arbitrator's award under an application for leave to appeal under s 49(3) of the Act.

106 As such, I find that no questions of law have been raised by way of the fifth, seventh and eighth questions, such that any application for leave to appeal in respect of those "questions" would be hopeless. More fundamentally, any application for leave to appeal on those questions would also be hopeless since any finding in this regard would not substantially affect the applicant's rights.

(2) The sixth question

107 The sixth question raised by the applicant is this: whether the arbitrator erred in law in holding, contrary to the submissions of both parties, and without any evidence whatsoever, that the costs of rectification of the defects would have been minimal in October 2012.[111]

108 In my judgment, it is patently self-evident that this question is not a

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109 AWS at pp 48 – 50, paras 107 – 113.

110 NTC1 p 576, para 812.

111 Originating Summons 730 of 2018, prayer 1(f).

question of law, but a finding of fact by the arbitrator on the evidence. What defects that were present in October 2012 is a question of evidence and the arbitrator's findings in this regard cannot be attacked in an application under s 49 of the Act. Hence, leave to appeal under s 49 of the Act would clearly be refused for this question posed by the applicant. Nonetheless, I must say a bit more about this in relation to a particular submission made by the applicant.

109 Pursuant to leave that I granted, the applicant and respondent were permitted to file further written submissions on various points in contention. In these post-hearing written submissions, the applicant belatedly made the point that there was a building surveyor report from Glenfield Design Consultants ("GDC") that detailed the defects in the works pursuant to inspections that were carried out on 19 and 20 May 2012 ("the GDC report"). It was argued that this was in evidence in the arbitration proceedings and, even though no representative from GDC was called to give evidence, the contents of the report were probative of the fact that there were defects in the works that were evident in 2012. Hence, the criticism was that the arbitrator had failed to take into account such evidence and erred in coming to the view that the costs of the rectification would have been minimal in October 2012.[112]

110 I found this submission to be completely unsupportable. A review of the record of the arbitration proceedings revealed that this issue of the admissibility of the GDC report was a matter that was raised to the arbitrator on more than one occasion. It suffices for me to say that the arbitrator decided that the applicant could not rely on the GDC report if the maker of the report was

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112 Applicant's Reply Submissions (22 March 2019) p 43, para 75; Applicant's 2nd Reply Submissions (22 April 2019) p 12, para 25; Applicant's 3rd Reply Submissions (24 May 2019) p 3, para 4 – p 4 para 6.

not being called to give evidence. In fact, the applicant's counsel made clear representations to the arbitrator that, apart from the photographs in the GDC report, which were incorporated into the report of one Mr Chin Cheong, the applicant was not relying on the GDC report.[113] Given what transpired, I am at a loss on how the applicant can even make the submission that the arbitrator had failed to appreciate the significance of the GDC report on the issue of defects.

(3) The ninth question

111 The ninth question raised by the applicant is this: whether the arbitrator was wrong in law in failing to consider evidence that was available, and instead holding that there was no evidence that the value of the property was between S$6.8m and S$7m between October 2012 and April 2013 when there was clear evidence from the applicant's real estate agent that the value of the property was S$7m around October 2012 and the evidence of the applicant's expert valuer that the value of the property was $S6.8m between October 2012 and November 2013.

112 In his award, the arbitrator assessed the evidence adduced by the applicant on the value of the property. He found the evidence from the applicant's real estate agent to be hearsay. This is because the real estate agent, Mr Hanrik Tan, had concluded that the property was worth S$7m based on a text message from a bank officer friend, and the said bank officer was not called to give evidence.[114] As for the applicant's expert valuer, Mr Goh, the arbitrator analysed his evidence and found it to be arbitrary and unreliable because his

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113 Respondent's 5th Submissions (9 May 2019) p 3 para 2 – p 6 para 13 and Tabs 6 – 7 (especially Tab 7, pp 11 and 14)

114 NTC1 p 581, paras 820 – 821.

valuation of the property was significantly higher than the transacted property prices in the vicinity.[115]

113 These findings by the arbitrator were based on his assessment of the evidence and they are findings of fact. The question posed is not a question of law, by any stretch. Attempts to effectively challenge findings of fact by the arbitrator in the guise of questions of "law" must be resisted. At the risk of repetition, the arbitrator is the master of the facts, and an application for leave to appeal, or an appeal for that matter, is not the appropriate avenue to challenge such findings of fact, which must be accepted in an unqualified manner: *Chua Aik Kia* at [16].

114 Also, this is not a question for which it can be said that the arbitrator had come to an obviously wrong answer, nor is this a question on a matter of public importance. Hence, an application for leave to appeal on this question would not have been allowed in any event.

(4) The tenth question

115 The tenth question is closely related to the last one: whether the arbitrator was wrong in law in failing to consider that the Evidence Act (Cap 97, 1997 Rev Ed) does not apply to the arbitration, and holding that the text message from the bank officer to Mr Hanrik Tan stating that the value of the property was S$7m was inadmissible hearsay evidence. There is a second part to this question, which is the applicant's complaint that the arbitrator had relied on other hearsay evidence, namely the email evidence of another estate agent,

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115 NTC1 pp 591 – 592, paras 841 – 842.

Lawrence Song, dated 4 October 2012, on the same issue.[116]

116 I will reiterate my observation that the arbitrator's findings on the evidence and, in this case, the weight to be given to the text message from the bank officer is something that is well within the arbitrator's remit as the finder of fact. The law does not permit the court to intervene even if there is an error of fact on the record, let alone in this case where the arbitrator had given a clearly correct explanation for not accepting the text message as evidence that he could rely on.

117 I would also add that I am unable to understand the applicant's complaint about the email from Lawrence Song, which stated that that there was an offer of S$6.18 m for the property. The email by Lawrence Song had been raised by the *applicant,* and both parties were content to rely on the contents of this email as representing the truth that there was indeed an offer to purchase the property at this price of S$6.18m.[117] The arbitrator was simply proceeding on the basis of what was undisputed by the parties.

118 In any case, the arbitrator found that "there is insufficient evidence adduced to support the [applicant's] claim … that the [p]roperty could not be sold at the [applicant's] expected sales (*sic*) price of S$7.0 million due purely and/or solely upon the alleged numerous defects."[118] Given the finding on causation, insofar as the applicant's main gripe with the arbitrator in this regard is his rejection of Mr Hanrik Tan's valuation of the property at S$7m, the admission of such evidence would not have substantially affected the rights of

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116 Originating Summons 730 of 2018, prayer 1(j).

117 NTC1 p 579, para 815.

118 NTC1 p 595, para 846.

the parties.

(5) The eleventh and thirteenth questions

119 The eleventh and thirteenth questions are closely related to the tenth question, as they also relate to whether the arbitrator ought to have accepted the valuation of the property that had been proffered by the applicant's experts.

120 The eleventh question raised by the applicant is this: whether the arbitrator was wrong in holding that the applicant had adduced no evidence to support her belief that the value of the property was higher than compared to the surrounding properties in the vicinity because it was a newly built property when the arbitrator himself forgot that he had cited the evidence of the applicant's expert valuer, Mr Goh, at [841] of the award to the same effect.[119]

121 The thirteenth question raised by the applicant is this: whether the arbitrator was wrong in law and had no basis to reject the evidence of the applicant's expert valuer, Mr Goh, as being arbitrary, all the more so when the respondent did not adduce any expert evidence to even challenge Mr Goh's valuation of the property.[120]

122 As a preliminary point, I find that the intended application to raise both these questions on appeal to be hopeless from the outset, given that whatever valuation the arbitrator ascribed to the property, that would not substantially affect the rights of the parties. This is because of the arbitrator's finding against the applicant on the issue of causation, as I explained at [118] above.

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119 Originating Summons 730 of 2018 at prayer 1(k).

120 Originating Summons 730 of 2018 at prayer 1(m).

123 Furthermore, both questions appear in substance to be challenging the arbitrator's rejection of Mr Goh's evidence. Again, these are challenges against findings of fact, and do not amount to questions of law. Nonetheless, I will consider the questions briefly.

124 As regards the eleventh question, I have reviewed [841] of the award. I am unable to agree with the applicant that, in that portion of the award, the arbitrator had actually accepted the evidence of Mr Goh. Quite the contrary, the arbitrator appeared to me to be criticising Mr Goh's evidence for being arbitrary and he was explaining why that was the case.[121]

125 This also answers the thirteenth question. Given that the arbitrator provided sound reasons for rejecting Mr Goh's evidence (see [112] above), it did not matter that the respondent did not adduce any expert evidence to challenge Mr Goh's valuation; the onus was on the applicant to produce sufficient evidence to prove her loss. Furthermore, the arbitrator was not bound to accept Mr Goh's evidence simply because the respondent had not called an expert of its own to counter Mr Goh's evidence. As the Court of Appeal explained in *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd* [2013] SGCA 23 at [10], the opinions of experts "will always remain as opinions and do not bind the court concerned." It is thus entirely within the remit of the arbitrator, as the finder of fact, to determine whether Mr Goh's *opinion* on the valuation of the property ought to be accepted as properly reflecting the property's value. On reviewing Mr Goh's opinion, the arbitrator did not think so, and he was well within his rights to reject his evidence.

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[121] NTC1 pp 591 – 592, para 841.

126 Thus, I find that the intended application to appeal on the eleventh and thirteenth questions would also be hopeless.

(6) The twelfth question

127 Finally, the twelfth question raised by the applicant is as follows:whether the arbitrator was wrong in law in holding that, because the applicant's claim for loss in value of the property was based on the defects to the property, this loss was too remote.

128 The arbitrator had considered the decision in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [56] as standing for the proposition that remoteness limits the defendant's liability if the plaintiff's loss was not reasonably foreseeable.[122] On the basis of such an uncontroversial principle, the arbitrator concluded that the applicant's claim for loss in value was not a consequential loss that was reasonably foreseeable by the parties.[123]

129 However, it bears reiteration that this was not the main basis for rejecting the applicant's claim for the loss in value of the property. Instead, and as already mentioned, the arbitrator had rejected the applicant's claim for the loss in value as he found that there was no proper valuation to justify her alleged claim that the property was worth S$7m, and that it had not been proven that the loss in value was caused by the alleged defects.[124] Hence, even if the arbitrator's findings on remoteness in this respect were different, the applicant's claim for

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122 NTC1 p 587, para 831.

123 NTC1 p 588, para 834.

124 NTC1 p 594, para 845.

loss in value would still fail, and her rights would not be substantially affected.

130 Furthermore, given that the arbitrator had applied a well established principle in determining whether the loss of value of the property was too remote a head of loss to be recoverable, I am unable to agree with the applicant that this is question of law for which the court would grant leave to appeal. This is also neither a case where the arbitrator was obviously wrong, nor a case where a question of general public importance is raised.

(7) Conclusion on the prospects of success

131 For the above reasons, I find that all of the questions raised by the applicant in its intended application for leave to appeal are not ones that would move the court to grant leave to appeal. Evaluating the prospects of each of the thirteen questions raised by the applicant, I find the intended application for leave to be quite hopeless and bound to fail.

Prejudice to the respondent

132 In exercising its discretion whether to extend time, the court will also take into account the prejudice that may be suffered by the respondent if the applicant is granted an extension of time to apply for leave to appeal against the award. The respondent argues that the dispute between the parties took a long time before it was fully and finally resolved by the arbitration. Indeed, while the arbitration was commenced in October 2012,[125] the award was only issued in 2017,[126] and released to parties in May 2018.[127] This has contributed to the

125 NTC1 para 13; MS1 para 11.

126 Ng Tze Chiew Diana's first affidavit for HC/OS 730/2018 ("NTC-A") pp 762 – 764.

127 NTC-A pp 765 – 768.

delay in bringing matters finally to a close. There is a net amount of S$59,558.37 due to the respondent based on the award. This is not a large sum.[128] But, up to today, the applicant has not made any payment. While the respondent has obtained an order of court to enforce the award, it has been unable to act on the order to enforce because the applicant has taken an application to set aside the leave granted because she alleges that there have been breaches of natural justice in the making of the award (OS 1010/2018).

133 Whether there will be prejudice will depend on the facts of each case. In *S v A and B*, it was held at [39] that "there is always at least some irremediable prejudice when a commercial party is being kept out of its money". In *Squibb*, recognising the importance of the finality of arbitrated disputes, the court found that the following circumstances constituted prejudice to the respondent (at [28]–[29]):

128 Respondent's Further Skeletal Submissions (Issue on Extension of Time) (18 February 2019) pp 18 – 19, paras 21 – 23.

> 28 … [The respondent] submits that [it] would suffer substantial prejudice if [the applicant] were granted an extension of time to challenge the Award. [The respondent] is a modest company with a turnover of £400,000 approximately in comparison with [the applicant], a company with a turnover of £40 million approximately. [The applicant's] claim in the arbitration was for outstanding invoices in the sum of just over £100,000 … The Award is for the modest sum of £97,620.19…
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> 29 The general principles of the [Arbitration Act 1996 (UK)] … are that parties to arbitration should have autonomy and finality in the determination of their disputes. Those principles are reflected in the *short time limits for any party to raise a challenge to an award.* I am satisfied that *any delay in receiving payment of the sum awarded and any additional expense incurred in enforcing the Award would cause irremediable prejudice* to [the respondent]. That is a very significant factor in this case.
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> [emphasis added]

134 I accept that there will be a degree of prejudice suffered by the respondent if an extension of time is granted to the applicant to apply for leave to appeal. It will protract matters further. It bears noting that that one of the factors which the court is required to take into account in considering whether to grant leave to appeal under s 49 is whether it is just and proper to do so, notwithstanding parties' agreement to fully and finally settle matters by arbitration. This suggests that, when the court has to consider whether to grant an extension of time for a party to apply for leave to appeal, the court must always bear in mind that the parties had agreed to arbitration as the mode of settlement of their disputes. An attempt by the unsuccessful party to challenge the merits of the award must be carefully scrutinised because it delays the successful party's rights to the fruits of its success in the agreed mode of dispute resolution. This would be inconsistent with the legislative policy with regard to arbitration, namely, the expeditious resolution of arbitrated disputes and the need for finality: *Hong Huat* at [25]. In my judgment, the respondent in this case will suffer prejudice that is more than in the usual case because of the

length of delay by the applicant in bringing this application. That is a significant consideration for the court.

Conclusion

135 On a holistic assessment of all the factors relevant to the application to extend time, I find that this is not an appropriate case where time should be extended. All the factors weigh heavily against the applicant, as I have explained above. No good reason has been provided by the applicant for her substantial delay in applying for leave to appeal against the award. Additionally, a careful consideration of the alleged questions of law framed by the applicant shows that most of the questions raised are not "questions of law" or would not substantially affect the rights of the parties even if such questions are answered by the court. The applicant's application for leave to appeal against the award is hopeless and is bound to fail. To allow such a frivolous application would militate against the principle of finality, which is fundamental for the efficient and effective resolution of disputes, a key attraction of arbitration. This is why leave to appeal against an arbitral tribunal's award will not be lightly granted, as seen by the various requirements that must be fulfilled under s 49 of the Act.

136 In an application for leave to appeal against an award under the Act, arguments as to the correctness of the arbitral tribunal's findings must directly relate to the questions of law that are raised. The merits of the award will not be reviewed in its entirety as if it is a rehearing. This is more than a theoretical proposition – it carries very real consequences. Parties must understand that arbitration, with the efficiency and finality it allows, carries with it the potential serious downside that there exists limited recourse against errors in law and fact that are committed by the arbitrator(s) (*Chua Aik Kia* at [29] and [34]). This

must form part of the basket of considerations that parties weigh when deciding which mode of dispute resolution best suits their needs. Having chosen arbitration, it would not be permissible for a dissatisfied litigant to challenge findings of fact and errors in the application of correct legal principles to the facts by masquerading such challenges as appeals against questions of law that arise from the arbitral award.

137 For the foregoing reasons, I decline to grant an extension of time. Even if such an extension of time were granted, given my findings that the prospects of the applicant succeeding in an application for leave to appeal is hopeless, such leave to appeal would also have been denied. Therefore, I dismiss Originating Summons 730 of 2018 in its entirety.

138 I will hear parties separately on the question of costs.

Ang Cheng Hock
Judge

Koh Choon Guan Daniel, Lim Khoon and Ang Minghao (Eldan Law LLP) for the applicant;
Por Hock Sing Michael and Li Jiaxin (Michael Por Law Corporation) for the respondent.
