VV and Another v VW
[2008] SGHC 11

Case Number : OS 2160/2006

Decision Date : 24 January 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Philip Jeyaretnam SC (Rodyk & Davidson LLP), Naresh Mahtani and Elizabeth Xue (Alban Tay Mahtani & de Silva LLP) for the plaintiffs; Davinder Singh SC, Tan Siu Lin and Ankur Gupta (Drew & Napier LLC) for the defendant

Parties : VV; B — VW

Arbitration – Costs – Application to set aside costs award – Whether arbitrator breaching rules of natural justice in deciding costs on scale on which no evidence was given

Arbitration – Costs – Application to set aside costs award – Whether arbitrator having jurisdiction to award costs in respect of counterclaims put forth as set-off defences when arbitrator had declined to assert jurisdiction over them as counterclaims

Arbitration – Costs – Application to set aside costs award – Whether costs award in conflict with public policy in that it offended against principle of proportionality

24 January 2008 Judgment reserved.

Judith Prakash J

1 This is an application by the plaintiffs to set aside an award made in an international arbitration governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"). The plaintiffs were the claimants in the arbitration and the defendant was the respondent and had also put forward a counterclaim. Three awards were issued in the proceedings. The first was the main award which was made on 11 April 2006 ("the Main Award") and dealt with the substantive issues in dispute, the second was a corrective award made on 11 May 2006 and the third was the award on costs made on 23 April 2006 ("the Costs Award"). This application concerns the Costs Award and, as far as I am aware, it is the first time in Singapore that any party to an international arbitration has tried to set aside an award on costs under the Act.

2 By the Costs Award, the defendant was awarded a total sum of $2,805,498.52 as legal costs and expenses for the arbitration. The plaintiffs consider that award to be completely out of proportion to the amount of time spent in the arbitration proceedings, the issues that were submitted for the decision of the Arbitrator and the amount involved. The arbitration took approximately nine months from the appointment of the Arbitrator to the issue of the Main Award and the amount claimed by the plaintiffs in the arbitration was just under $1m.

Background

3 The course of events leading to the Costs Award is as follows. The plaintiffs are an unincorporated joint venture comprising an Australian company and a South-east Asian firm. The defendant is an Asian government. The dispute that was the subject of the arbitration arose from a contract made between the parties in December 1996 ("the Contract") by which the defendant engaged the plaintiffs to plan, design and provide work supervision services for an infrastructure

project in the defendant's country. The Contract provided for disputes under the Contract to be referred to arbitration and prescribed two alternative modes for choosing the sole arbitrator and further provided that, if both those methods failed, "the dispute shall be referred to arbitration as prescribed by the Arbitration Act in force in Singapore".

4 A dispute arose between the parties over the plaintiffs' claim for payment under cl 17.1(c) of one of the contractual documents, the Conditions of Engagement ("the Conditions") and on 10 March 2005, the plaintiffs issued to the defendant a notice of arbitration. By this notice, the plaintiffs referred to arbitration:

(a) the question as to what was the amount due and payable to the defendant under cl 17 of the Conditions in connection with a 15-month period during which work under the Contract had been suspended; and

(b) the question as to whether the plaintiffs were entitled to terminate the Contract (or alternatively, terminate their appointment under the Contract) as a result of the defendant's failure to comply with its obligations under cl 17 of the Conditions.

The plaintiffs stressed that in paras 9 and 10 of the notice for arbitration, they had stated specifically that the request for arbitration related only to the two questions set out in the notice and that they expressly reserved all their rights in respect of all other claims and issues. According to an affidavit filed by one DD on behalf of the plaintiffs, the plaintiffs had deliberately opted to pursue their claim under cl 17 in a limited reference in a "limited arbitration" as they had been claiming that sum since July 1999 and desired a quick and relatively inexpensive way to recover it. The amount claimed by the plaintiffs as a disruption charge payable under cl 17 was approximately $927,000.

5 The parties were unable to agree on an arbitrator. The plaintiffs therefore asked the Singapore International Arbitration Centre ("SIAC") to appoint an arbitrator. On 30 June 2005, the Deputy Chairman of the SIAC appointed Mr Alan J Thambiayah as the sole arbitrator in the arbitration. Subsequently, the parties confirmed in writing that the procedural law governing the arbitration was Singapore law and that the Act would apply to the arbitration.

6 On 5 July 2005, the defendant appointed M/s Drew & Napier to represent it in the arbitration. The first preliminary meeting before the Arbitrator to deal with procedural issues was held on 7 July 2005. In accordance with the timetable established at that meeting, the plaintiffs filed their statement of case on 22 July 2005 and the defendant filed its defence and counterclaim on 19 August 2005. Another preliminary meeting was held on 21 September 2005 which directed witness statements to be exchanged by 15 December 2005. The hearing was scheduled to commence on 13 February 2006.

7 In the meantime, there was considerable correspondence between the parties. The plaintiffs objected to the defendant's introduction of extensive counterclaims in the arbitration and maintained that the Arbitrator had no jurisdiction to hear these counterclaims. They were concerned that an arbitration which they thought could be decided mainly by reference to, and construction of, documents was being turned, by the defendant, into a much broader case that would involve extensive factual and expert witness evidence relating to the defendant's counterclaims. Accordingly, on 24 October 2005, the plaintiffs filed a "Jurisdictional Objections Application". The parties then exchanged submissions. After hearing the application on 21 November 2005, the Arbitrator decided that at that stage of the proceedings, with hardly any evidential material relating to the defendant's cross-claims available to him, he was not in a position to decide whether he had or lacked jurisdiction over the cross-claims. He held that he could only decide this question after completing the

substantive hearing the following year. In the letter of 5 December 2005 in which he conveyed this decision, the Arbitrator also stated:

> I am of the view that a determination of the question whether an equitable set-off has been established does go to jurisdiction. In other words, whether the [defendant] succeeds in this arbitration on the cross-claims pleaded depends ultimately on whether I find, on the facts, that these amount to permissible set-offs … If, on the other hand, I find that the [defendant] cannot avail itself of the cross-claims as a set-off, then, whether [or] not such cross-claims are meritorious, the Tribunal constituted for this arbitration does not have jurisdiction in respect of the cross-claims.

It can be seen from the above that the Arbitrator's view was that he had no jurisdiction to consider the defendant's cross-claims as independent claims or causes of action but that he might, depending on the facts, have jurisdiction to consider the defendant's cross-claims as permissible set-offs and defences to the plaintiffs' claim. Accordingly, by this time, the Arbitrator had held that he had no jurisdiction to award the defendant payment of any money as any cross-claim established by the defendant would only go to diminish or extinguish the amount to be awarded to the plaintiffs if they were successful in their claim.

8 By its defence and counterclaim, the defendant had raised two main defences and a host of counterclaims:

(a) the defendant's first defence was that the plaintiffs were not contractually entitled to the payment of a disruption charge under the Contract;

(b) the second defence was that even if this disruption charge was payable, the defendant had a defence of equitable set-off arising from losses caused by the plaintiffs' various breaches of the Contract (counterclaims) which operated to extinguish the plaintiffs' claim;

(c) the defendant also advanced the counterclaims as independent counterclaims to claim damages against the plaintiffs.

The total value of the defendant's counterclaims amounted to the equivalent of $20m. There were ten counterclaims in all and the amounts of these ranged from $12,500 to about $6.1m. Six of these counterclaims exceeded the plaintiffs' claim.

9 The hearing of the arbitration took place as scheduled. The defendant led evidence on its counterclaims and adduced the opinions of experts as part of this evidence. Despite the Arbitrator having made known his views on 5 December 2005, it continued to submit in the proceedings that an award could be made on the counterclaims as independent claims. Ultimately, the Arbitrator decided in the defendant's favour that the plaintiffs were not entitled to a disruption charge pursuant to cl 17 of the Conditions. He therefore dismissed the plaintiffs' claim. The Arbitrator also considered the jurisdictional points again and repeated his ruling that he had no jurisdiction over the counterclaims as counterclaims and that the only dispute in respect of which he had jurisdiction to hear and determine was the plaintiffs' claim. He concluded that the defendant's counterclaims did not fall to be determined in the arbitration because, first, insofar as they constituted substantive defences of equitable set-off, it was unnecessary to consider them since the plaintiffs' claim had been dismissed, and second, insofar as they were independent claims, no jurisdiction had been conferred on him to decide them.

The proceedings on costs

10 From the time of the Arbitrator's decision not to make a ruling on jurisdiction until after the substantive hearing, the plaintiffs were concerned about the costs that would be involved in that hearing arising from the presentation of the counterclaims. When they opened their case therefore, the plaintiffs stated that they reserved their rights on costs and, at the end of the hearing, they requested that costs be determined at a subsequent hearing held after the substantive award was issued. In the Main Award, the Arbitrator thus directed that there should be an inquiry as to which party should bear the costs incurred with reference to the arbitration.

11 There were written submissions from the parties on the question of costs as well as an oral hearing on 21 July 2006. The plaintiffs considered that they were entitled to substantial costs to compensate them in part for the costs incurred in defending the counterclaims on which the Arbitrator had ruled he had no jurisdiction. The plaintiffs claimed 70% of their costs based on an apportionment of time spent as between the claim and the counterclaims. The plaintiffs submitted a bill of costs for taxation in which they claimed a total of $1,120,669.75 as legal fees, $367,566.27 and CHF 299 as disbursements and $39,908.99 as witnesses' expenditures.

12 In its costs' submissions, the defendant claimed its full costs on the basis that costs follow the event and it was entitled to pursue a defence of equitable set-off. The defendant argued that its counterclaims were not improper or unreasonable and that the facts establishing its defences of equitable set-offs and counterclaims were one and the same. The defendant quantified its costs as follows: $2,566,705.84 as legal costs, $335,437.50 as legal costs for interlocutory applications and $540,498.52 as disbursements. A large part of the disbursements was made up of the fees of two expert witnesses adduced by the defendant in support of its counterclaims. As for the legal fees, these came in two parts. First, there were the fees charged by the defendant's senior counsel totalling $825,000, which comprised a brief fee of $350,000 and a daily refresher of $25,000. The remaining $1,741,705.84 comprised the legal charges of the team of lawyers assisting the senior counsel.

13 The Arbitrator's decision was that the principle that costs should follow the event should apply. The defendant, as the successful party, was granted its costs of the arbitration, including the costs of its counterclaims. In reaching this conclusion, the Arbitrator decided (at para 12 of the Costs Award) that although the defendant's counterclaims had not been determined in the arbitration, insofar as the counterclaims had been relied upon to make out a substantive defence of equitable set-off, they had not been unreasonably raised as there was "some merit" to them as equitable set-offs. As for the defendant's argument that the counterclaims could also be determined as independent counterclaims (because the Arbitrator's jurisdiction had been enlarged by agreement, and even if it had not), the Arbitrator decided (at para 10 of the Costs Award) that although the defendant had failed on these two points, these were but arguments which did not require any evidence additional to that relied on for the defendant's permissible substantive defence.

14 Accordingly, the Arbitrator found (at para 15 of the Costs Award) that the defendant's unsuccessful arguments did not cause a significant increase in the length of the proceedings or substantially add to the costs of the arbitration and that the defendant was entitled to its costs of the same. Given however, that the defendant had failed on the two points, the Arbitrator decided (at para 21 of the Costs Award) that a discount should be factored into the legal costs that the plaintiffs had to pay the defendant. The Arbitrator also gave a discount to reflect the fact that in his view it was not reasonable for the defendant's solicitors to:

(a) charge for overtime or all overtime at double the normal hourly rates; or

(b) for the days spent by the defendant's lawyers out of Singapore, to allocate only five hours

a day to be charged at normal hourly rates with the remaining working hours per day considered as overtime.

The Arbitrator decided that "*doing the best I can in all the circumstances* … a fair estimate of what would constitute reasonable fees for the [defendant's] senior counsel is $725,000" (emphasis added). As far as the rest of the legal team was concerned, he considered that a fair estimate of reasonable fees for them was $1.5m. He accordingly awarded a total of $2.25m to the defendant as its legal fees. He also allowed the defendant its full disbursements and a sum of $40,000 for the costs hearing itself.

The application

15 As the plaintiffs are well aware, the grounds available under the Act to set aside an arbitration award are extremely limited. The court does not exercise any appellate function and therefore an award cannot be overturned even if it is based on errors of law or fact. Under the Act, however, an award may be set aside, if, *inter alia*, it is in conflict with the public policy of Singapore or a breach of the rules of natural justice occurred in connection with its making.

16 The plaintiffs mount their attack on the Costs Award on the following main grounds:

(a) The Costs Award is in conflict with the public policy of Singapore in that it awards the defendant a quantum of costs that is wholly disproportionate to the amount at stake in the arbitration *ie* it offends against the principle of proportionality. The breach of the proportionality principle is not justified by the fact that the defendant incurred costs in raising counterclaims because the arbitrator never in fact held in the Main Award that he had jurisdiction over these counterclaims.

(b) The arbitrator had no jurisdiction to award costs to the defendant in respect of counterclaims made by the defendant over which the arbitrator in the Main Award had already declined to assert jurisdiction.

(c) The arbitrator acted in breach of natural justice when he awarded costs on a scale based on an alleged international arbitration practice on which no evidence was given.

The public policy ground

17 Any party to an international arbitration who seeks to set aside the award made in that arbitration on the ground that the same is in breach of the public policy of Singapore has a difficult task. As the Court of Appeal explained at para 59 of its judgment in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 ("the *Asuransi* case") the concept of public policy of the State under the Act encompasses a narrow scope. Chan Sek Keong CJ went on to state:

> In our view, [public policy] should only operate in instances where the upholding of an arbitral award would "shock the conscience" … or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", … or where it violates the forum's most basic notion of morality and justice.

It is also important to note that assertions of breach of public policy cannot be vague and generalised. As the High Court stated in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262, a party seeking to challenge an award on this ground must identify the public policy which the award allegedly breaches and then must show which part of the award conflicts with

that public policy.

18 For the purpose of this judgment, I must be guided by the pronouncements of the Court of Appeal in the *Asuransi* case. The plaintiffs cited formulations of public policy from courts in the Philippines and Zimbabwe which were slightly different from those endorsed in the *Asuransi* case. It would not only confuse the issue but would also be inappropriate for me to apply such formulations. Where there is direct authority from our Court of Appeal as to the relevant tests, such authority must be followed and it would not be right for me to try and put a gloss on the principles expressed by the Court of Appeal by reference to the pronouncements of judges in other jurisdictions.

19 The plaintiffs contended that the principle of procedural proportionality was a cornerstone of the Singapore justice system and thereby, part of the public policy of Singapore. Further, the Costs Award in the sum of $2,805,498.52 for the defendant's legal costs and expenses was so out of proportion to the amount in dispute that it shocked the conscience, or would be wholly offensive to the ordinary reasonable and fully informed member of the public or alternatively it violated Singapore's most basic notion of morality and justice.

20 The first sub-issue that I must address therefore is whether there is a principle of proportionality in relation to costs and, if so, what it covers. In the view of the plaintiffs, this principle mandates that in the assessment of the legal costs to be paid by one party to another, the adjudicator must ensure that the amount of costs awarded is proportionate to the amount involved in the proceedings in which the costs are being assessed and to the other circumstances of the case. The defendant, on the other hand, doubted the existence of the principle and also argued that even if it existed, it was not applicable in international arbitrations and an international arbitrator would not be obliged to have regard to it.

21 The plaintiffs cited a number of authorities to support their argument but were not able to find Singapore case authority or Singapore legislation that directly reflected their stand. The closest they came to local authority on the point was a paper entitled *Proportionality – Cost-Effective Justice* which was delivered by District Judge James Leong at the 22nd AIJA International Conference. There Mr Leong stated that it was in the area of procedural justice that the doctrine of proportionality manifested itself most strongly in the Singapore civil justice system. He also said that although proportionality was not expressly stated as an overriding objective of the Rules of the Supreme Court, it was in his view clear that the principle of proportionality "underlines the civil justice process and civil justice system in Singapore". This was because first, amendments to the Rules of Court governing costs indicated an intention to keep the costs of litigation in Singapore at a reasonable amount commensurate with the value and nature of the subject matter; second, judicial pronouncements discouraged litigants from unreasonably conducting proceedings to obtain undue advantage and to escalate costs; and third, there was a strong culture of judicial case management in Singapore. I think it is worth noting that Mr Leong defined proportionality as a principle of justice "requiring a reasonable relationship between the objective that is to be achieved and the means by which this was to be done". Mr Leong's paper was mainly concerned with demonstrating the various methods that Singapore has adopted to try to manage the costs of dispute resolution.

22 The plaintiffs also sought to rely on the case of *Re Econ Corp Ltd (In provisional liquidation)* [2004] 2 SLR 264 ("the *Econ Corp* case"). Although that case related to the fees charged by the provisional liquidator of the company concerned, the plaintiffs considered that the observations of VK Rajah J (as he then was) were applicable in the present case. They noted that the judge had not only asserted that judicial control over the fees of a professional liquidator was in the interest of the public but had also stressed that in determining the appropriate fee level, the court would want to know the value contributed to the matter by the insolvency practitioner concerned. VK Rajah J indicated (at

para 60) that the basis ultimately applied "must be characterised by fairness and reasonableness" and had also observed (at para 74) that there was "a very strong public interest element dictating that costs in Singapore be competitive and reasonable at all times". The plaintiffs laid emphasis on the judge's statement that "proportionality and the rendering of value are integral to professionalism" (at para 75) though I should point out that that statement related to the way in which professionals should charge for their services rather than to the basis on which a court or arbitrator should determine the quantum of legal fees when tasked to do so. In my view, the *Econ Corp* case only has a marginal relevance to the issue currently before me.

23 The plaintiffs noted that the proportionality principle had been adopted in other common law jurisdictions. That may be so but the main example given by the plaintiffs, *ie* their reference to the Civil Procedure Rules 1998 (Rules 44.3, 44.4 and 44.5) of England and Wales ("the CPR"), showed that in that jurisdiction specific regulations had been passed to incorporate the concept of proportionality in the assessment of costs. It is worth noting that the position in England prior to the introduction of the CPR was very similar to the procedural regime that still applies in Singapore. The CPR introduced the requirement that assessment of litigation costs on the standard basis would allow such costs "which are proportionate to the matters in issue" or "were reasonably incurred or reasonable and proportionate in amount". The CPR also emphasises that in deciding whether costs are proportionate or not the court has to have regard to "all the circumstances" and there is no specification in the CPR that the amount of the dispute is the only or prevailing circumstance to be considered. In the case of *Home Office v Lownds* [2002] 1 WLR 2450 ("the *Lownds* case") which considered these provisions in the CPR, Lord Woolf CJ held that the requirement of proportionality applied to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order had been made. He advised too that the court must attach appropriate significance to the requirement of proportionality when assessing the amount of costs.

24 In Australia, the idea of proportionality in costs seems to be gaining ground. Chief Justice Spiegelman of the Supreme Court of New South Wales, in an address entitled "Access to Justice and Access to Lawyers" delivered in 2007 to the 35th Australian Legal Convention, took the view that the "cost of dispute resolution must in some manner be proportionate to what is in dispute". Then, in *Seven Network Limited v News Limited* [2007] FCA 1062, Justice Sackville of the Federal Court of Australia estimated the legal expenses to be nearly A$200m and noted that the maximum amount at stake in the litigation was not likely to be very much more than that amount. He considered that expenditure of A$200m on a single case was extraordinarily wasteful and bordering on the scandalous and found it "difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake (measured in financial terms)".

25 No case authorities were cited which dealt directly with the concept of proportionality in relation to arbitration costs. The plaintiffs took heart from the fact that the 3rd Edition of the SIAC Rules expressly provides for the capping of the "costs of arbitration" by applying a rate that is predicated on the amount involved in the dispute. They argued that this recognised the principle of proportionality in relation to costs as applicable in international arbitrations in Singapore. As the defendant was quick to emphasize however, the "costs of the arbitration" was defined by those rules to refer to the tribunal's fees and expenses, the SIAC's fees and expenses and the costs of expert advice required by the tribunal. This capping measure could therefore equally well be seen as a measure aimed at making the SIAC attractive for international arbitrations. The legal fees incurred by the parties are not covered by the SIAC Rules and there is no provision for such fees to be capped or to be proportionate to the amount in dispute.

26 On the other hand, *Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs*

of the Arbitration of *The Practice Guide* ("the Arbitration Practice Guide") issued by the Chartered Institute of Arbitrators provides at section 5.2.6:

> There is no doubt that an arbitrator is entitled to take into account whether the receiving party's costs were "proportionate" and many arbitrators have always done this. A difficulty is created by the fact that Section 65(3) [of the English Arbitration Act 1996] refers only to reasonableness. It is thought that an arbitrator could not be criticised if he regarded proportionality as an aspect of reasonableness. The safest course however is for the arbitrator to specify the "basis" on which he has acted in determining costs by reference to a formula which includes a reference to proportionality.

The above passage is not completely helpful to the plaintiffs as it appears to indicate that applying the principle of proportionality is an option rather than a requirement in assessing the legal costs of a party to an arbitration. There is another passage in the same guide (s 1.6) which explains that the CPR does not apply to arbitration proceedings and that there is no requirement that arbitrators must act "judicially" in the sense that they must follow the same principles that a court would in making costs orders.

27 The defendant considered it absurd that a costs award which is more than what a losing party believes is fair would "shock the conscience" or be "clearly injurious to the public good" or violate a Singaporean's "most basic notion of morality and justice". If so, it argued, every review of taxation in court would engage issues of public policy. Therefore, it contended even taking the plaintiffs' case at its highest, there would be simply no issue, let alone breach, of public policy. Additionally, the Arbitrator was not bound to have regard to the principle of proportionality.

28 The authorities cited by the plaintiffs do show that in relation to civil litigation, the courts, recognising their pivotal role in the provision of justice to the public, are concerned that access to justice shall not be obstructed or nullified by excessive costs orders. This concern is reflected not only in the way that the courts approach the making and taxation of costs orders but, among other measures, also in the differing jurisdictions of the various judicial bodies that operate in Singapore so that individuals with smaller claims can pursue them in the Magistrate's or District Court rather than the High Court and thereby incur a lower level of expense. As part of civil litigation in the courts and to enable the courts to maintain their control over legal costs, all costs can be taxed whether as between party and party or as between solicitor and client. The taxation process in the courts is governed by the Rules of Court (2004 Rev Ed). At present, the costs provisions of the Rules of Court do not make any reference to proportionality. As shown in the paper delivered by Mr Leong, the principle of proportionality has been reflected in a more general way and not directly in the assessment of party and party costs. Whilst that principle may influence a taxing officer when he is considering whether the conduct of litigation has been reasonable, there is nothing in Singapore law, unlike the position in England, which compels the taxing officer to give regard to the principle. In the future, however, in view of increasing judicial recognition of the value of the principle in relation to the control of costs, it would not be a surprise if there were changes to the Rules of Court to incorporate it specifically. Overall, therefore, while there is a general public policy implemented by the courts to keep some control over the costs of litigation, the principle of proportionality is not formally entrenched in relation to taxation of costs in court.

29 The courts will however, move to provide redress whenever it is clear that excessive costs have been claimed. If this application arose out of a dispute heard in court and appeared before me as a review of taxation proceedings, it is likely that I would have opened it up to determine whether it was reasonable for one party to have to pay such a high quantum in costs. While the courts recognise that senior counsel with particular expertise are able to command certain fee levels, there

is within any common law system an inherent bench marking process which would be able to assess what the reasonable and appropriate figure would be in the circumstances within the general prevailing legal market. This does not necessarily relate to what a particular counsel might charge his client (and what the client might be content to pay for the expertise). Indeed every counsel of standing should be able to ask his client to pay his market price. In the court system, however, a client would pay this price knowing that, even if successful, he may not thereafter be able to recover all amounts so paid from his opponent.

30 The situation in arbitration proceedings is, however, somewhat different. From the authorities cited to me it is clear that in international arbitrations the entitlement of the successful party to costs and the way in which such costs should be assessed are hotly debated issues. For example, concerns have been expressed about the differing levels of costs incurred depending on which jurisdiction the counsel employed come from as rates, naturally, vary substantially from country to country. Despite the concerns, except in very limited circumstances, the merit of the arbitral process as opposed to civil litigation is that the parties have many liberties in the process of adjudication of their dispute, the principal one being the choice of who determines the dispute for them. Essentially this means that the parties choose a person they trust to adjudicate their dispute fairly and must then stand or fall by that choice. Where institutional arbitration has been chosen by the parties the appointment is sometimes made not by the parties themselves but by a named institution; and such institution conducts various phases of the arbitration and may even become involved in some instances (the SIAC is an example) in the taxation of costs. Where an institution administers an arbitration, it must scrupulously supervise and keep track of how an arbitrator performs. Reputable institutions do perform this function well. There are situations, however, where the institution serves only as a default appointing authority. In these cases, the institution has no control over the conduct of the arbitration (and is not intended by the parties to have such control). I sometimes wonder whether or not in cases like this where the parties have no other recourse, not even the publication of an award or a discussion of how the arbitration was handled due to confidentiality, the courts should in very restricted and specific circumstances exercise a supervisory role to prevent or curb excesses. That, however, is not something I can do under the present regime. Legislative intervention would be required to change it.

31 I have said what I said in the proceeding paragraphs because I have concluded that it is not part of the public policy of Singapore to ensure that the costs incurred by parties to private litigation outside the court system *eg* arbitration whether the same is domestic or international, are assessed on the basis of any particular principle including the proportionality principle. That is not to say that arbitrators should not follow established legal principles when assessing costs payable by one party to another but simply that there are no public policy implications connected with that procedure. There is no public interest involved in the legal costs of parties to one-off and private litigation. Such litigation sets no precedents and binds no one apart from the immediate parties. The immediate parties are parties to the arbitration because they had a pre-existing contractual relationship by which they had decided (probably, though not always, with the benefit of legal advice) that disputes arising under the contract were to be settled in this way outside the judicial system. There is no issue of such parties having been fortuitously involved in litigation as is often the case in court where claims arise not only out of contract but also out of tort and non-commercial relationships. The concern that has been expressed by judges and others as to keeping the costs of litigation in proportion to the circumstances of the case has been a concern that related to court litigation and the general rubric of "access to justice". From a policy perspective, this concern does not extend to private arbitrators despite personal misgivings at the quantum of any costs award in such litigation. I do not think that the amount of costs awarded by an arbitrator to a successful party in an arbitration proceeding could ever be considered to be injurious to the public good or shocking to the conscience no matter how unreasonable such an award may prove to be upon examination. The courts adhere to

the policy of party autonomy embodied in the Act and reflected by the limited grounds on which they may interfere in the arbitral process. The prevailing public policy being that substantive arbitral awards are inviolable notwithstanding mistakes of fact or law, it would be odd for the courts to be able to justify interfering with the quantum of costs awarded by an arbitrator by invoking public policy.

32 It follows from what I have said above that in my judgment the plaintiffs have no basis to challenge the Costs Award on public policy grounds. This decision is not dependent on whether the principle of proportionality is a part of Singapore procedural law or not or the content of that principle or the issue of whether the Costs Award offends the principle. As the matter may go up on appeal, however, it may be helpful for me to express my views on the subsidiary points.

33 I am persuaded by the authorities that the proportionality principle is not limited to a relationship between the amount involved in the dispute and the amount of costs awarded. What is truly meant by this principle is that when legal costs have to be assessed, all circumstances of the legal proceedings concerned have to be looked into, not only the amount of the dispute though that is an important factor, especially when assessing whether the amount of work done was reasonable, but also everything else that occurred. In this connection, as I have noted above, Rule 44.5 of the CPR makes it clear that whether an English court is considering "reasonableness" (when it assesses costs on an indemnity basis) or both "proportionality" and "reasonableness" (when it assesses costs on a standard basis), all relevant factors have to be taken into account. This rule reads:

> **Factors to be taken into account in deciding the amount of costs**
>
> **(1)** The court is to have regard to all the circumstances in deciding whether costs were –
>
> (a) if it is assessing costs on the standard basis –
>
> (i) proportionately and reasonably incurred; or
>
> (ii) were proportionate and reasonable in amount, or
>
> (b) if it is assessing costs on the indemnity basis –
>
> (i) unreasonably incurred; or
>
> (ii) unreasonable in amount.
>
> …
>
> **(3)** The court must also have regard to –
>
> (a) the conduct of all the parties, including in particular –
>
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done.

Lord Woolf CJ said that the policy behind these rules was that litigation should be conducted in a proportionate manner, where possible at a proportionate cost. In assessing proportion, he said, at para 31 of his judgment, that what was required was a two-stage approach. He explained:

> There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.

34 The above citation sets out the general approach advocated by Lord Woolf CJ. He also had advice to give regarding the questions of principle as to whether (a) the costs awarded to a successful litigant may or should be reduced if they are disproportionate to the amount claimed in the action and (b) whether such costs may or should be reduced if they are disproportionate to the amount recovered in the action; taking into account other relevant considerations. On these issues, Lord Woolf said at para 39 of his judgment:

> … [W]here a claimant recovers significantly less than he has claimed, the following approach should be followed. Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Thus (i) the proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim; (ii) the proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover, should his claim succeed. This is likely to be the amount that the claimant has claimed, for a defendant will normally be entitled to take a claim at its face value.
>
> 40 The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption.

35 If the principle of proportionality as embodied in the CPR and further elaborated by Lord Woolf were to be part of the public policy of Singapore applicable to arbitrations, then I consider that, quite

apart from challenging the rates the defendant's lawyers charged their clients, the plaintiffs would have a very good argument that the amount awarded to the defendant by the Arbitrator in the Costs Award was disproportionate. This is because, applying the test set out above, the defendant in putting forward its full counterclaims, was in fact putting forward an exaggerated claim and, in my view, should have been allowed only the costs necessary to pursue its reasonable claim that was sufficient to meet the plaintiffs' claim. It was not necessary, in my view, for the defendant to pursue all ten counterclaims when a combination of two or three would have been more than sufficient to extinguish the quantum of the plaintiffs' claim if the same had succeeded.

36 The defendant asserted that the amount at stake in the arbitration was far more than the sum of $927,000 claimed by the plaintiffs because of the presence of the defendant's counterclaims. As the plaintiffs argued, however, that assertion was not strictly correct. On 5 December 2005, the Arbitrator had made a negative ruling on jurisdiction to the effect that he had no power to consider the cross-claims raised by the defendant except insofar as they amounted to equitable set-offs. In short, he had no power to award to the defendant payment of any money. The Arbitrator's jurisdiction over the counterclaims therefore was limited to the extent that they amounted to equitable set-offs. Thus, the moment they exceeded the amount of any award to the plaintiffs, they ceased to be claimable. This meant that the amount at stake was never more than approximately $927,000. The net payment ordered by the Arbitrator, if any, could only vary between $0 and $927,000 and only in favour of the plaintiffs.

37 The defendant continued to argue that it was entitled to payment of the cross-claims if they were equitable set-offs and "over-topped" the amount awarded to the plaintiffs but, as the plaintiffs submitted, this was a hopeless argument in view of the Arbitrator's prior ruling on jurisdiction and duly failed. The Arbitrator, rather kindly, described this as "a valiant but ultimately unsuccessful effort" in paragraph 10 of his Costs Award. In view of the Arbitrator's prior ruling on 5 December 2005, however, it cannot be said that the defendant held a reasonable belief that it might recover more than the maximum possible set-off amount of $927,000. Applying the test in the *Lownds* case, the total amount of the defendant's counterclaims would be irrelevant in assessing what would be deemed to be reasonable and proportionate costs.

38 Quite apart from comparing the amount of costs awarded with the amount of the claim, it would be obvious that if the defendant had chosen to put forward only two or three of its counterclaims as equitable defences to the plaintiffs' claim, the amount of work involved and the amount of disbursements incurred could have been reduced substantially thus resulting in a substantial reduction as well in the legal costs incurred by the defendant. Thus, from this point of view as well, the Costs Award was a disproportionate one.

The jurisdictional ground

39 The second ground put forward by the plaintiffs was that the Arbitrator had no jurisdiction to award costs to the defendant in respect of counterclaims raised by the defendant and over which at no point did he take jurisdiction whether as equitable set-offs or otherwise. They stated that this conclusion can be tested in the following way. The scope of an arbitration clause may sometimes be unclear, for example, whether it extends to non-contractual causes of action. If a party invokes arbitration for such a non-contractual cause of action, and the arbitrator does not accept jurisdiction over that cause of action, the party can never recover the costs of its unsuccessful attempt no matter how reasonably it acted in bringing forward this cause of action.

40 The plaintiffs reiterated that they had objected to the Arbitrator's jurisdiction to hear the counterclaims. This issue was finally determined in the Main Award when the Arbitrator held that,

(a) his jurisdiction had not been enlarged by agreement and (b) he had no jurisdiction over the pleaded and argued counterclaims as independent counterclaims. The Arbitrator did not hold in the Main Award that the counterclaims qualified as defences of equitable set-offs and that consequently he had jurisdiction over them on this basis. The plaintiffs argued that therefore the Arbitrator became *functus officio* in relation to these issues prior to making the Costs Award. Pursuant to s 19B of the Act, the Main Award as "final and binding" on the parties and under sub-s 19B(2), the Arbitrator did not have the jurisdiction nor power to "vary, amend, correct, review, add to or revoke" his finding in the Main Award.

41 Notwithstanding this, the Arbitrator held in para 12 of the Costs Award that "prima facie at least, there was some merit to the [defendant's] set-off defence". The plaintiffs submitted that this statement was totally inconsistent with para 51 of the Main Award in which he had stated that the defendant's counterclaims did not fall to be determined in the arbitration because, first insofar as they constituted substantive defences of equitable set-off, it was unnecessary to do so and, second, insofar as they were independent claims, no jurisdiction had been conferred on him to decide them.

42 The plaintiffs asserted that the statement in para 12 of the Costs Award relating to the *prima facie* merit of the set-off defence could not change the position that the Arbitrator did not at any time assert jurisdiction over the counterclaims. During the arbitration hearing, he had simply carried on hearing evidence and arguments concerning the counterclaims and then when it came to the crunch of deciding on his jurisdiction, he had come to the conclusion expressed in para 51 of the Main Award.

43 The defendant's response to the above submission was as follows. First, the Arbitrator did hold in the Main Award that he had jurisdiction over the counterclaims insofar as they qualified as defences of set-off. At para 44, he stated that he had jurisdiction to hear any allegation made by the defendant against the plaintiffs provided it raised a legal or equitable defence to the claim and at para 45, he noted that if the counterclaims were pure defences to the claims, then the merits of both the claims and the counterclaims would have to be determined within the arbitration. Finally, at para 49, he observed that he could hear and determine the counterclaims insofar as they qualified as defences by way of equitable set-off to reduce the plaintiffs' claim. The Arbitrator did not take the next step of determining whether the counterclaims actually qualified as defences because insofar as this question had to be answered for the purposes of deciding liability, there was no need for him to do so as the plaintiffs' claim had failed.

44 The question was whether the Arbitrator should have made such a determination on the cross-claims for the purpose of deciding costs. The defendant submitted that there was no need for him to do so because the plaintiffs had asked that the question of costs be determined at a separate hearing. As the Arbitrator noted in his supplemental award:

> The plaintiffs have asked that costs be determined at a subsequent hearing and the [defendant has] not objected. The question of which party should bear the costs of these proceedings …, the basis of assessment of costs and the quantum of costs will have to be determined at a subsequent hearing.

This request was made by the plaintiffs on 20 March 2006 at the end of the hearing. In the light of the plaintiffs' request, the Arbitrator adjourned the question of costs to be heard separately and stated in his Main Award that it was final save as to costs. During the costs inquiry, the plaintiffs themselves (said the defendant) asked the Arbitrator to make a finding on whether the counterclaims qualified as equitable defences and made assertions to the effect that the counterclaims were "unmeritorious as defences", "inherently unworthy as equitable set-offs" and "had no merit" such that they could not be said to have been properly or reasonably raised. In these circumstances, the

defendant submitted, there was no basis for the assertion that the Arbitrator was not entitled to determine the question of the standing of the counterclaims at the costs inquiry. The question was placed before the Arbitrator by both parties and therefore was well within his jurisdiction.

45 Whilst, initially, the plaintiffs' arguments appeared attractive, I have concluded on further consideration that they should be rejected. Once the plaintiffs had submitted their claim to arbitration the defendant was entitled to raise all defences that it possessed to the same including any claims that could be set-off against any award made in the plaintiffs' favour. The Arbitrator's jurisdiction to determine the plaintiffs' claim obviously included a jurisdiction to hear and determine the defendants' defence and that would mean he also had jurisdiction to hear the set-off claims. It was incorrect for the plaintiffs to argue that the Arbitrator did not take jurisdiction over the counterclaims simply because he did not make any finding on their merits. The merit or lack of merit of the counterclaims insofar as they constituted set offs and the issue whether it was reasonable for the defendant to raise all of them could only go towards influencing the nature and quantum of the costs order. The manner in which those points were determined could not in itself confer jurisdiction on the Arbitrator to make a costs order or deprive him of the jurisdiction he already had to make orders on how the costs of the arbitration should be apportioned. Just to make my position clear, I repeat that the Arbitrator had jurisdiction over the whole of the claim and the whole of the defence and the fact that in the circumstances due to the failure of the claim it was not necessary for the Arbitrator to consider the merits of the set-off defences cannot deprive the Arbitrator of that jurisdiction which included the power to decide on how the costs of the arbitration should be borne.

Breach of natural justice

46 In paras 20 and 21 of the Costs Award, the Arbitrator stated:

> 20. The [plaintiffs] also produced Singapore High Court authorities on taxation of costs in domestic court cases and submitted that these were precedents that served as a guideline for me in the exercise of ascertaining the quantum of costs payable. *It seems to me that reliance on domestic court taxation 'precedents' quite simply ignores the reality of the practice relating to assessment of costs obtaining in Singapore, in international commercial arbitrations.*
>
> Furthermore, this approach is clearly not consonant with the basis on which the [plaintiffs] themselves seek payment of their legal costs. As noted above, the [plaintiffs] ask for payment of <u>all</u> their legal costs incurred in connection with the [defendant's] counterclaims. I have to assume that the ground on which such a claim for full payment of costs has been made is that the [plaintiffs'] lawyers' fees, as charged, are reasonable because the [plaintiffs], as reasonable litigants, considered such fees to be reasonable.
>
> 21. The [plaintiffs] also took objection to the [defendant's] engagement of Senior Counsel and to the brief fee and daily refresher charged by Senior Counsel. These objections are misplaced. The dispute or the subject of this arbitration was of such a nature and complexity that the engagement of highly competent and experienced counsel (such as [the plaintiffs'] counsel) or Senior Counsel was merited. *In my view, the fees charged by [the defendant's] counsel are in line with those charged by eminent leading counsel instructed to represent litigants in international commercial arbitrations in Singapore and other recognised international arbitration venues.*
>
> 22. As for the fees charged by the other lawyers in the [defendant's] legal team I think a discount is warranted for the reasons adverted to in paragraph 21 above and also because, in my view, it is not reasonable either:

a) to charge for overtime or all overtime at double the normal hourly rates or

b) for the days spent by the [defendant's] lawyers out of Singapore, to allocate only 5 hours per day to be charged at normal hourly rates with the remaining working hours per day considered as overtime.

Again, doing the best I can in the circumstances, I think a fair estimate of what constitutes reasonable fees for the rest of the [defendant's] legal team is S$1,500,000.00. I FIND accordingly.

(emphasis added)

47 The plaintiffs took issue with the Arbitrator's acceptance of the defendant's senior counsel's brief fee and daily refresher rates. They alleged that, at the hearing, the defendant had not provided any evidence of what leading counsel might charge. Noting that the rate claimed by the defendant's senior counsel was $25,000 per day, the plaintiffs calculated that this worked out to $2,500 per hour on the basis of a ten-hour day and contrasted that figure with Justice VK Rajah's observation in the *Econ Corp* case (at para 56) that the rate of $1,000 per hour for an insolvency practitioner seemed excessive when measured against what the courts allowed in 2004 for counsel in taxation proceedings.

48 The plaintiffs' submission was essentially that the Arbitrator's expression of and reliance on a matter of fact – to fees charged by leading counsel in international commercial arbitrations – without any evidence of those fees being provided, nor any opportunity given to the plaintiffs to test that evidence, was in clear breach of the rules of natural justice.

49 During the taxation submissions, the plaintiffs said, they had referred to precedents in Singapore concerning the quantum of costs and assisted the Arbitrator with a breakdown and analysis of the proportion of documentation, time and costs incurred in the arbitration by the counterclaim and jurisdictional arguments relating to the counterclaims (about 70% of the costs were incurred on account of the counterclaims). In contrast, the defendant did not offer any alternative analysis, breakdown, formula or precedents on reasonable costs. The plaintiffs thought it was questionable on what basis the Arbitrator granted his own minor "discount" against the fees of the defendant's legal team when there was no alternative evidence or formula proferred by the defendant or the Arbitrator to contradict the plaintiffs' assessment that 70% of the costs incurred in the case arose in connection with the counterclaims. The Arbitrator did not refer to the evidence put forward by the plaintiffs, but dismissed as irrelevant the authorities on costs submitted and came to his own conclusion on fees charged in international commercial arbitrations.

50 The plaintiffs further argued that if the Arbitrator had noted the evidence tendered by them of taxed fees in Singapore, brought into the scale evidence of higher fees in arbitration cases, and then made a judgment based on that evidence, he could not be criticised. But simply to accept $2,500 per hour (on the basis of a ten-hour day) without any evidence of this height ever having been scaled before, purportedly on his own view of what other leading counsel charged, and in doing so to dismiss the Singapore precedents on taxation submitted by the plaintiffs as irrelevant, was a breach of natural justice. In this instance, the rule of natural justice that was breached was the obligation to give the parties the opportunity to deal with arguments or matters that had not been advanced by either party. The plaintiffs cited in support the case of *Gbangbola v Smith & Sheriff Ltd* [1998] 3 All ER 730 which concerned an award on costs. In that case, the arbitrator referred to two matters in his decision on costs that had not been advanced by either party. When the decision was challenged, the judge held that the arbitrator had irregularly exercised his discretion on costs and the award was

set aside.

51 The plaintiffs also relied on the following observations of Lord Denning MR in the case of *Annie Fox v PG Wellfair Limited* (1981) 2 Lloyd's Reports 514 at 552:

> I cannot think it right that the defendants should be in a better position by failing to turn up. Nor is it right that the arbitrator should do for the defendants what they could and should have done for themselves. His function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given … and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge – or at any rate he should not use it – so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves. For then he would be discharging the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts – without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong … I am afraid that the arbitrator fell into error here.

The plaintiffs asserted that in this case, the Arbitrator had used his own special knowledge without forwarding the plaintiffs the opportunity to lead evidence in response to his proposition. There was no evidence before him as to the level of such fees. The only evidence was that presented by the plaintiffs in relation to the rates charged and the practice in Singaporean court cases. The Arbitrator, however, dismissed this evidence on the ground that it ignored the reality of the practice relating to assessment of costs in international commercial arbitrations. The Arbitrator had also told the plaintiffs that he had experience of higher fees usually being charged and awarded in international arbitration cases. He mentioned fees of US$800 an hour and US$1,000 an hour being charged in such arbitrations.

52 After careful consideration, I have come to the conclusion that the plaintiffs' arguments on this ground cannot stand. The requirement for the rules of natural justice to be observed does not mean that every conclusion that an arbitrator intends to make to be put before the parties. In the recent decision of *Soh Beng Tee & Co v Fairmount Development Pte Ltd* [2007] 3 SLR 86, the Court of Appeal observed that the rules of natural justice cannot be applied mechanically and said at [63] of its judgment:

> …[T]he parties to arbitration or the appointing authority would usually appoint an arbitrator who is himself an expert in the field of law and/or trade that is the subject of dispute. In so doing, they, *inter alia*, intend to rely on his expertise to obtain a sound and expeditious judgment. It would therefore be wrong for the courts to blindly and/or willy-nilly mechanically apply the rules of natural justice so as to require every conclusion that the arbitrator intends to make to be put to or raised with the parties. As helpfully pointed out in Commercial Arbitration, at p 299:
>
> > When the parties appoint an experienced merchant as arbitrator in a quality dispute, they do not expect him to behave as if he were a High Court Judge. Their wish is that he shall use skill and diligence in finding out the facts as quickly and cheaply as possible … [A]n attempt to apply uncritically the rules which have been developed in relation to a High Court action would serve merely to confuse and irritate the commercial community, without improving the quality of arbitral justice.

53 It is also pertinent to note that the assessment of costs is an exercise in estimating what reasonable fees are and it is not a determination of an issue of fact. Therefore, it is not something to

which the rules of evidence apply so as to preclude the adjudicator from having regard to information that he has which has not been adduced in evidence by either party. The observation of Lord Denning MR cited in [51] above is not germane to the assessment of reasonable costs.

54 In the English courts, taxing masters are able to use their own knowledge when assessing costs. The English White Book 2007 states at para 47.14.5, under the heading "The hourly rate", that:

> The costs officer's general knowledge and experience of local conditions and circumstances remains the only firm basis for reliable and consistent assessment.

Also helpful in this regard is the case of *Higgs v Camden & Islington Health Authority* [2003] EWHC 15. There, Fulford J said in relation to counsel's fees in a clinical negligence case:

> 60. I agree with Miss Neenan that, in relation to the issues raised on this appeal it is helpful to consider part of the judgment of Kennedy LJ in Wraith v Sheffield Forgemasters Ltd [1998] 1 WLR 132 at 141-142:
>
> > "If it is contended that a lawyer amounts to an unsuitable or "luxury" choice made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful competent and efficient representation in the type of litigation concerned, in deciding whether such an objection is sustainable in practice, the focus is primarily upon the reasonable interests of the claimant in the litigation so that, in relation to broad categories of costs, such as those generated by the decision to employ a particular status or type of solicitor or counsel, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded claimant, a reasonable choice or decision has been made.
> >
> > If satisfied that the choice [of lawyer] is reasonable, the question of what is a reasonable amount to be allowed imports consideration of the appropriate rate or fee for a solicitor or counsel of the status and type retained."
>
> 61. As the claimants observe, the judge's own knowledge and experience will inform his assessment of whether it is reasonable to employ a particular status of counsel and to determine what he considers to be a reasonable figure in respect of counsel's fees.

55 In another English decision, Evans J had to comment on a solicitor's hourly rates and he said that "[the costs judge's] judicial assessment of the proper figure, based upon his general knowledge and experience, is what the rules require …". See *Johnson v Reed Corrugated Cases Limited* [1992] 1 All ER 169 at 180.

56 From my knowledge and experience, the Singapore position in relation to the assessment of costs, at least in the court system, does not differ from the English one. The taxing of costs done by judicial officers is based on their general knowledge and experience as well as on the precedents cited to them by counsel. The same approach is taken when the taxation of a bill of costs is reviewed by the judge in chambers. It has never been argued that a judge is not entitled to use his general knowledge and experience to influence his assessment of the reasonableness and appropriateness of the costs claimed. As a matter of principle, an arbitrator must be similarly entitled.

57 The defendant met the plaintiffs' argument that if an arbitrator intends to rely on his own expertise and experience, he has to give the parties an opportunity to address it and should not take

them by surprise, by contending that the Arbitrator had done this. Quoting from the transcript of the proceedings, they submitted that at the costs inquiry, the Arbitrator's views and experience were clearly before the parties and the plaintiffs had every opportunity to address the same. Counsel also denied that $25,000 a day translated into $2,500 an hour since, it was submitted, there was no basis for the plaintiffs to assume that he had only spent ten hours a day on the case.

58 In my judgment, there was no breach of natural justice in relation to the assessment of costs. The Arbitrator was not bound by domestic decisions on costs though he could have used them as a guide had he chosen to do so. The Arbitrator did cite authorities relating to assessment of costs in arbitrations (para 19 of the Costs Award) and these appear to indicate that the main test is that of reasonableness based on the time spent and the complexity of the case. The expert witnesses who filed affidavits on costs in these proceedings agreed that the test of reasonableness was the test applicable in assessing costs in an arbitration and that the amount of fees which a party pays its own lawyers is a starting point as to what is reasonable. The plaintiffs' expert took the view that the Arbitrator had not applied the test of reasonableness and had arrived at costs which were unreasonable and disproportionate whereas the defendant's expert considered that the Arbitrator had applied the test of reasonableness and arrived at reasonable costs. Those views are, in essence, irrelevant to the outcome of this application. What is clear is that the plaintiffs' complaint is that the Arbitrator made a mistake in his assessment of costs. I have some sympathy with this view. The Arbitrator having no evidence before him of the number of hours senior counsel for the defendant spent on the case had no way of ascertaining whether on an hourly basis the fee charged was within or even close to his experience of charges of US$1,000 an hour. It cannot, however, help the plaintiffs' case. Any mistake made by the Arbitrator would be a mistake of fact and would have no impact on this application as it is not an appeal and the Costs Award cannot be set aside on that ground. What is relevant to the case is that as the Arbitrator had indicated his views to the parties there cannot be said to have been a breach of natural justice.

59 It follows that this application fails on this ground as well.

Conclusion

60 In the result this application must be dismissed. The plaintiffs shall pay the defendant's costs of the application as taxed, if not agreed.

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