IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 50

Civil Appeal No 51 of 2020

Between

Republic of India

… *Appellant*

And

Vedanta Resources plc

… *Respondent*

In the matter of Originating Summons No 980 of 2018

Between

Republic of India

… *Plaintiff*

And

Vedanta Resources plc

… *Defendant*

GROUNDS OF DECISION

[Abuse of Process] — [Collateral purpose]
[Arbitration] — [Confidentiality] — [Documents]
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v
Vedanta Resources plc

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Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
8 April 2021

12 May 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 In the proceedings below, the High Court Judge ("the Judge") identified one of the key issues before him as whether a party in an arbitration who puts a question of law to a tribunal in an investment treaty arbitration and receives an answer which it does not like, can put the same question before a Singapore court (as the seat court) by way of an application for declaratory relief? In his grounds of decision in *Republic of India v Vedanta Resources plc* [2020] SGHC 208 ("the GD") at [100]–[101], the Judge answered the question in the affirmative and consequently found that the application was not an abuse of process. Nonetheless, he decided against exercising his discretion to grant the declaratory relief sought by the appellant.

2 While the Judge was correct in identifying the above issue, in our view, it was in truth the only relevant issue before the court and we arrived at the opposite conclusion, answering the same question in the negative. In short, this determination was dispositive of the appeal as the appellant did not manage to get past the starting gate. There was thus no necessity for us to examine the other issues which the Judge examined below. Although we agreed with the Judge on his ultimate decision in not granting the declaratory relief, we decided it not as a matter of discretion but rather because we found the application to be an abuse of process on several levels. First, although described as an application for declaratory relief, it was in substance a backdoor appeal against the tribunal's decision. Second, in its effort to conceal the true nature of the application, the appellant claimed that the purpose of the application was to use our decision (if decided in its favour) "as a persuasive tool to ask the [tribunal] to reconsider its orders". In essence, the appellant was seeking an advisory opinion from this court in order to "persuade" the tribunal to revisit its decision. As we will explain below, this was an illegitimate basis on which to invoke the jurisdiction of the court. Third, this also meant that the application was a blatant violation of the principle of minimal curial intervention.

3 In dismissing the appeal on 8 April 2021 with brief grounds, we stated that we would issue our detailed grounds in due course. These are our grounds.

The facts

The parties and the arbitrations

4 The appellant is the Republic of India and the respondent is Vedanta Resources plc, a company incorporated in the United Kingdom. The appellant and the respondent are parties to a Singapore-seated investment treaty

arbitration commenced by the respondent against the appellant ("the Vedanta Arbitration").

5 Another investment treaty arbitration that was relevant to the present appeal was an arbitration seated in the Netherlands commenced on 22 September 2015 by members of the Cairn Group against the appellant ("the Cairn Arbitration").

6 The Vedanta Arbitration and the Cairn Arbitration are separate but related arbitrations arising from a set of tax assessment orders issued by the appellant in 2015. Both the Vedanta Arbitration and the Cairn Arbitration were brought under the Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (14 March 1994), (entered into force on 6 January 1995) ("the India-UK BIT"). They were administered by the Permanent Court of Arbitration and conducted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ("the UNCITRAL Rules").

7 Given the potential overlap between the Cairn Arbitration and the Vedanta Arbitration, the appellant was concerned about the risk of inconsistent findings by the two tribunals. Thus, the appellant sought to implement a regime to permit cross-disclosure of documents between the two arbitrations.

The cross-disclosure regime in VPO 3

8 In the Vedanta Arbitration, the appellant initially proposed that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("the UNCITRAL Transparency Rules") be applied. When the respondent was not agreeable to this proposal, the appellant filed an application to the tribunal

in the Vedanta Arbitration ("the Vedanta Tribunal") requesting, in effect, that the Vedanta Tribunal implement the UNCITRAL Transparency Rules. Both parties then made full submissions on this issue to the Vedanta Tribunal.

9 Having considered the parties' submissions, the Vedanta Tribunal rendered its decision on the appropriate cross-disclosure regime in Procedural Order No 3 dated 9 May 2018 ("VPO 3"). In developing this cross-disclosure regime, the Vedanta Tribunal considered three sources of law: (a) the UNCITRAL Rules; (b) the India-UK BIT and public international law; and (c) the law of the seat, *ie*, Singapore law. In relation to the first two sources of law, the Vedanta Tribunal concluded that there was no general obligation of confidentiality under the UNCITRAL Rules and the India-UK BIT, although "there [was] a recognised public interest in investment treaty arbitrations and … an interest in allowing greater transparency of such proceedings".

10 In relation to Singapore law, the Vedanta Tribunal cited the High Court's decision in *AAY and others v AAZ* [2011] 1 SLR 1093 ("*AAY*") and found that an implied obligation of confidentiality applied in every arbitration governed by Singapore procedural law, subject to several exceptions. One such exception was where the public interest or the interests of justice required disclosure. Applying this exception, the Vedanta Tribunal developed a "new independent exception … specifically to cover investment treaty arbitrations". In the Vedanta Tribunal's view, such an exception could be applied together with its inherent power under Art 15.1 of the UNCITRAL Rules to "design a confidentiality regime customized for the particular circumstances of the case". This resulted in the pronouncement of the following cross-disclosure regime:

> 129.4 The Parties are at **liberty to apply** (supported by brief reasons) for the disclosure of any specific, identified document to the *Cairn* Arbitration, after having first consulted the other Party with a view to reaching a mutual agreement on such

> disclosure and/or any redactions. If a Party makes frivolous, unnecessary, and/or excessive requests for cross-disclosures or if the other Party unreasonably or unjustifiably withholds its consent to a request for cross-disclosure, the Tribunal will take such conduct into account in the allocation of costs, at the appropriate stage of the arbitration. [emphasis in original]

The parties' conduct following VPO 3

11 Following the issuance of VPO 3, the appellant applied on two occasions to the Vedanta Tribunal for cross-disclosure of certain documents from the Vedanta Arbitration into the Cairn Arbitration.

12 First, on 14 May 2018, the appellant applied to disclose the following documents: (a) a decision issued by the Vedanta Tribunal on 27 December 2017 regarding the appellant's jurisdictional objections ("the Partial Award"); (b) memorials and related materials, with accompanying evidence; and (c) the transcripts of the hearings held in the Vedanta Arbitration relating to the Partial Award. On 21 June 2018, the Vedanta Tribunal issued Procedural Order No 6 ("VPO 6") allowing only the disclosure of the Partial Award.

13 Second, on 26 August 2018, the appellant made another application to disclose a portion of the transcript in the Vedanta Arbitration which recorded the parties' submissions on jurisdiction. This was rejected by the Vedanta Tribunal on 11 September 2018 in Procedural Order No 7 ("VPO 7").

The application for declaratory relief

14 On 10 August 2018, after the Vedanta Tribunal had issued VPO 6 and while waiting for the Vedanta Tribunal to issue VPO 7, the appellant filed HC/OS 980/2018 ("OS 980") in the High Court, seeking the following declarations:

> 1. A declaration that documents disclosed or generated in [the Vedanta Arbitration] are not confidential or private;
>
> 2. A declaration that disclosure of documents disclosed or generated in the Vedanta Arbitration, including the documents set out in the Schedule herein, by the [appellant] in [the Cairn Arbitration] would not be in breach of any obligation of confidentiality or privacy;
>
> …

The decision below

15 In his decision below, the Judge first rejected the respondent's preliminary objection that the application amounted to an abuse of process and a collateral attack on VPO 3, VPO 6 and VPO 7 (collectively, "the VPOs"). The Judge reasoned as follows (see the GD at [100]–[101]).

(a) Although the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") as set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") applied to the Vedanta Arbitration (see the GD at [69]), Art 5 of the Model Law did not preclude the grant of the declaration sought. This was because the declarations did not engage a matter governed by the Model Law and did not amount to inviting the court to intervene in the arbitration. This was especially since the appellant had given the court an undertaking that if the declarations were granted, it would not unilaterally bypass the Vedanta Tribunal to make cross-disclosure of the relevant documents but instead it would rely on the declarations to request the Vedanta Tribunal to reconsider and revise the VPOs ("the Undertaking") (see the GD at [79]).

(b) Furthermore, as the VPOs were procedural in nature, they did not create any issue estoppel. The fact that the relief sought by the

appellant restated a question of law which the Vedanta Tribunal had answered in VPO 3 did not make the application in and of itself an abuse of process or an impermissible collateral attack.

16 However, the Judge declined to exercise his discretion to grant the declarations and therefore dismissed OS 980. The Judge found that although the question of law raised in the application was arguably novel (see the GD at [115]) and there was a real controversy between the parties (see the GD at [126]), the declaratory relief sought was not justified by the circumstances of the case. This was for three reasons.

(a) It was well within the powers of the Vedanta Tribunal to decide and possibly develop the issue of confidentiality under Singapore's common law of arbitration (see the GD at [161]).

(b) Given that Singapore's common law was only one of three sources of law considered by the Vedanta Tribunal in formulating its cross-disclosure regime, the declarations would not be a persuasive tool on which the Vedanta Tribunal could be invited to reconsider or revise VPO 3 (see the GD at [171]–[172]).

(c) The principle of minimal curial intervention militated against the grant of the declarations. The appellant had placed the scope of the general obligation of confidentiality under Singapore's *lex arbitri* squarely before the Vedanta Tribunal and both parties had made submissions and addressed the Vedanta Tribunal on this question. The Vedanta Tribunal then considered the question and rejected the appellant's submission (see the GD at [175]).

The parties' submissions on appeal

17 On appeal, the appellant submitted that in declining to exercise his discretion to grant the declarations, the Judge erred in three respects. First, the Judge erred in concluding that it was within the power of the Vedanta Tribunal to develop Singapore's *lex arbitri*. As the *lex arbitri* was an external framework of rules imposed by the arbitral seat on a tribunal, the authoritative pronouncement of the *lex arbitri* must come from the court. Second, the Judge erred in finding that the declarations would not be persuasive tools for inviting the Vedanta Tribunal to reconsider VPO 3. Third, the Judge erred in concluding that the principle of minimal curial intervention militated against the grant of the declarations sought. The appellant further submitted that should the court be inclined to exercise its discretion to grant the declaratory relief, it should declare that there is no general obligation of confidentiality under Singapore's *lex arbitri* for investment treaty arbitrations.

18 On the other hand, the respondent submitted that the Judge was correct in declining to exercise his discretion to grant the declarations. The declarations were unlikely to be persuasive or serve any practical purpose, and were declarations on a theoretical or hypothetical question. Furthermore, the grant of the declarations would contravene the principle of minimal curial intervention, despite the appellant's Undertaking. The appellant was effectively attempting to relitigate questions already decided by the Vedanta Tribunal, which amounted to an abuse of process. In this regard, we note that the respondent's argument in relation to abuse of process was not raised before us as a preliminary objection, as in the proceedings below, but as a factor to be considered by the court in the exercise of its discretion whether to grant the declaratory relief. Finally, the respondent submitted that, in any case, a general duty of confidentiality should apply to all Singapore-seated arbitrations.

Our decision

No legitimate basis to invoke the court's jurisdiction

19 Initially, it appeared to us that the appellant's challenge to the VPOs was premised on the Vedanta Tribunal having acted in excess of its power or jurisdiction in developing the *lex arbitri*. At the hearing before us, however, counsel for the appellant, Mr Cavinder Bull SC, suggested otherwise, relying on s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") instead to justify the application in OS 980. Regardless, we came to the conclusion that neither argument afforded the appellant any ground to stand on. In other words, the appellant had no legitimate basis to invoke the jurisdiction of the court for the declaratory relief.

Excess of power or jurisdiction

20 We turn first to the argument that the Vedanta Tribunal acted in excess of its power or jurisdiction in purporting to develop the *lex arbitri*. This was a *recurring theme* in the appellant's submissions, both in the proceedings below and on appeal. Indeed, the Judge had understood the appellant as having taken the position that the Vedanta Tribunal "exceeded its jurisdiction when deciding VPO 3 by taking it upon itself to develop and extend the common law of Singapore" (see the GD at [75]). On appeal, despite claiming that it was not arguing that the Vedanta Tribunal had exceeded its power, the appellant made repeated references to how, because the *lex arbitri* was an external framework of rules imposed by the arbitral seat on a tribunal, the Vedanta Tribunal had no "power to develop the *lex arbitri*". The appellant further submitted that "it was not open to the Vedanta Tribunal to consider if the *lex arbitri* ought to be changed because it was ill-suited to investment treaty arbitrations". By this submission, the appellant appeared to suggest that in developing the exception

that it did for investment treaty arbitrations (see [10] above), the Vedanta Tribunal had overstepped the limits of its power. The appellant's comparison of the Vedanta Tribunal's decision to decisions concerning a tribunal's jurisdiction further reinforced this impression.

21 However, we could not see how the court's intervention could possibly be justified by the mere fact that the Vedanta Tribunal's decision pertained to the *lex arbitri*. If the appellant's argument was accepted, that would suggest that a tribunal's decision could be reviewed simply because it adopted a mistaken view of the *lex arbitri*. That cannot be correct. It is well established that an error of law made by the tribunal is "final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under" the IAA and/or the Model Law (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57]). As the respondent submitted, even if the Vedanta Tribunal had erred in finding that a general duty of confidentiality applied to Singapore-seated investment treaty arbitrations, this was an error of law and such an error was insufficient to justify curial intervention. The fact that the alleged mistake by the Vedanta Tribunal pertained to the *lex arbitri* made no difference. This was evident from the appellant's own example of jurisdictional questions. Even if a tribunal makes a mistake in determining its jurisdiction, which is governed by the *lex arbitri*, that does not provide a party with a self-standing right to ask the court to intervene. The party must still bring itself within one of the permitted avenues of curial intervention under the Model Law and/or the IAA.

22 In this regard, the appellant submitted that none of the parties had asked the Vedanta Tribunal to develop the *lex arbitri*. In our view, this was a disingenuous argument. As we have observed above at [8], VPO 3 was issued pursuant to the appellant's application. Both parties made full submissions

before the Vedanta Tribunal on this issue, including submissions on whether there was an implied obligation of confidentiality under Singapore law. The appellant submitted that there was no general obligation of confidentiality for investment treaty arbitrations under Singapore law, while the respondent predictably submitted to the contrary. Both parties, including the appellant, thus knew that the Vedanta Tribunal would have to decide on the questions of whether a Singapore-seated investment treaty arbitration was subject to the same confidentiality obligations as a private commercial arbitration, the extent of any such obligation, and whether it was absolute or subject to exceptions. The appellant's case reflected its position that if the Vedanta Tribunal had decided in its favour, that would have been perfectly proper but if the Vedanta Tribunal decided in any other way against it, the Vedanta Tribunal would somehow have exceeded its jurisdiction. This cannot be correct. A tribunal in deciding any dispute is not limited to the parties' submissions. In other words, the tribunal's choice is not binary. The tribunal is entitled to decide what it regards as the correct legal position based on its understanding and interpretation of the law, as long as the issue was before the tribunal and the parties were afforded the opportunity to address the tribunal on that issue. We agreed with the respondent's submission that this is the case even where the *lex arbitri* is involved.

23 It was therefore artificial to suggest that the Vedanta Tribunal had not been *asked* to develop the *lex arbitri*. In reality, no party would ask a tribunal, or any adjudicator for that matter, to develop the law in the abstract. The Vedanta Tribunal had been presented with a *real* dispute between the parties regarding the appropriate cross-disclosure regime and it resolved the dispute with reference to the applicable principles and laws, interpreting and developing

the same where necessary. This was part of the tribunal's adjudicatory function, which the Judge explained at [134(a)] and [142] of the GD as follows:

> 134 I first consider the role of an adjudicator in resolving a substantive dispute between the parties in the common law tradition. I use the general term 'adjudicator' deliberately. In my view, an adjudicator fulfils either or both of two roles:
>
> (a) One role is to adjudicate and determine the dispute before him on the merits. This is necessarily a composite task. It entails finding the facts, ascertaining the law, developing the law if necessary and applying the law as ascertained or developed to the facts as found to resolve the parties' dispute. I call this the 'Adjudicatory Role'.
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> …
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> …
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> 142 A tribunal cannot fulfil its Adjudicatory Role without the power to apply legal principles to the facts at hand. Where a tribunal must apply a common law, and is faced with an ambiguity or a lacuna in that law, it is entirely within a tribunal's power to ascertain that principle, develop it in fullness of the common law tradition and to apply it to the facts as found. It is absurd to suggest that, every time a tribunal is faced with a gap in a common law which it must apply, it must throw its hands up in defeat and terminate its legal analysis. This approach does not reflect the reality of the common law. It also does not reflect the demands on arbitration as a dispute-resolution procedure.

24 Even taking the appellant's case at its highest, there was no question of the Vedanta Tribunal purportedly "developing" the *lex arbitri*. The Vedanta Tribunal's decision in the VPOs was binding only on the immediate parties to the Vedanta Arbitration, namely, the appellant and the respondent. The VPOs did not bear and did not purport to bear any precedential value on other investment treaty arbitrations. In this regard, we agree with the Judge's reasoning at [134(b)] and [139] of the GD:

> 134 …
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> …
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> (b) Another role is to contribute to a coherent *corpus* of common law by generating judgments recording the adjudicator's legal reasoning which are then published and form the basis for other decisions, either as binding or persuasive authority. I call this the 'Precedential Role'.
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> …
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> 139 A tribunal in an arbitration has no Precedential Role. A tribunal operates outside the doctrine of *stare decisis*. It is not bound as a matter of law by the Court of Appeal. And there are no courts which its decisions bind as a matter of law. There is no formal system by which tribunals' awards, redacted or otherwise, are published and disseminated. In international commercial arbitrations especially, a tribunal has no Precedential Role for the obvious reason that disputes generally are confidential …

25 Furthermore, it appeared that the appellant's primary complaint was in relation to VPO 3, specifically, that VPO 3 was wrong in impermissibly developing the *lex arbitri*. Indeed, the appellant indicated that it ultimately intended to use the declarations to invite the Vedanta Tribunal to reconsider its decision in VPO 3. However, as the respondent highlighted, after VPO 3 was issued, not only did the appellant fail to raise any complaint that VPO 3 had been decided in excess of the Vedanta Tribunal's jurisdiction or power, the appellant in fact *relied* on VPO 3 and applied for two cross-disclosure orders but failed on one altogether while the other was partially allowed. We note that the Judge had made similar observations at [128] and [129] of the GD, although the Judge viewed these circumstances in a different light:

> 128 I note that this argument has more than an impression of the afterthought to it. First, it is the [appellant] who put this very question to the Vedanta [T]ribunal when it made its initial application for a cross-disclosure regime to be put in place. When it did so, it did not suggest to the tribunal that it was under any disability in answering the question in the fullness of the common law tradition. It is surprising that the [appellant]

> would choose to ask a question of the Vedanta [T]ribunal which the [appellant] believed the tribunal was under a disability in answering. It is even more surprising that the [appellant], if it believed that, would not have explained to the Vedanta [T]ribunal at that time the nature of the disability.
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> 129 Furthermore, if the [appellant] was then of the view that the Vedanta [T]ribunal was disabled from answering this question in the fullness of the common law tradition, I would have expected the [appellant] to ask the Vedanta [T]ribunal to hold the Vedanta Arbitration in abeyance while it sought a declaration on this very question from the court. That the [appellant] did not do so suggests that the motive behind the application before me is an attempt to have a second bite of the cherry. None of this, of course, is intended as criticism.

26 We agreed with the Judge that the appellant's conduct amounted to an attempt to have a *second bite* of the cherry, although we took a different view of the legitimacy of such conduct. In our judgment, having relied on VPO 3 to seek disclosure under VPO 6 and VPO 7, it simply did not lie in the appellant's mouth to allege that the Vedanta Tribunal had acted in excess of its jurisdiction or overstepped the limits of its power. Besides, it bears repeating that the Vedanta Tribunal's decision in VPO 3 was made pursuant to the *appellant's* own application, in relation to which the appellant did not raise any complaint whatsoever at the time of its issuance. For these reasons, it was plainly unsustainable to suggest that the Vedanta Tribunal had acted in excess of its jurisdiction or power when it issued the VPOs.

Section 18 of the SCJA and Art 5 of the Model Law

27 As mentioned above, the appellant subsequently disavowed the argument that the Vedanta Tribunal had acted in excess of its power or jurisdiction. Instead, the appellant submitted that the application in OS 980 had its basis in s 18 of the SCJA, read with para 14 of the First Schedule to the SCJA, as well as Art 5 of the Model Law. The substance of the appellant's argument was as follows. Art 5 of the Model Law provided that "[i]n matters

governed by this Law, no court shall intervene except where so provided in this Law". However, neither the IAA nor the Model Law made any provision for confidentiality. Instead, the implied obligation of confidentiality set out in *AAY* applied as a substantive rule of the common law. Accordingly, confidentiality was not a matter "governed by this Law" within the meaning of Art 5 of the Model Law. It followed that it was for the court to pronounce on the question of whether the confidentiality obligation set out in *AAY* extended to investment treaty arbitrations. In particular, the court could issue a declaratory judgment pursuant to its powers under s 18 of the SCJA read with para 14 of the First Schedule to the SCJA, the latter of which conferred on the court the "[p]ower to grant all reliefs and remedies at law and in equity".

28 In the proceedings below, the Judge appeared to have agreed with the appellant, when he held that the declarations sought were not on a matter governed by the Model Law. The Judge observed that while the issuance of the VPOs had been made pursuant to the Vedanta Tribunal's "broad procedural power" and that "Art 19(2) of the Model Law place[d] those very procedural powers squarely within the domain of the [Vedanta Tribunal]", this was pitched at too "high a level of generality" (see the GD at [81]). Instead, the Judge preferred the narrower view that the declarations sought concerned "the question of confidentiality under substantive Singapore law", which was "not a matter governed either by the IAA or by the Model Law within the meaning of Art 5" (see the GD at [82]).

29 In our judgment, it was incorrect to frame the issue as whether confidentiality was governed by the Model Law. This overlooked the broader *purpose* of the question of confidentiality and the context in which it was being considered. Here, confidentiality was not relevant as a discrete and standalone issue nor was it being considered in the abstract. Rather, it was an integral and

anterior question which served to guide the determination of the extent to which the Vedanta Tribunal should order the cross-disclosure of documents. On this view, the issue in VPO 3 was a *procedural* one – it concerned disclosure and/or discovery of the documents disclosed or generated in the Vedanta Arbitration – and it is trite that an arbitrator is "master of his own procedure" (see *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 at [41]; the GD at [37]). The fact that the obligation of confidentiality applied as a substantive rule of the common law (see *AAY* at [55]) did not take it outside the scope of the arbitral procedure and place it within the purview of the court.

30 The Judge also seemed to hold that Art 5 did not preclude the grant of the declarations because such a grant did not amount to *intervening* in the Vedanta Arbitration. At [91] of the GD, the Judge opined that the appellant was "merely asking the court to decide a question of Singapore's substantive law on arbitration as any litigant could, on the ordinary principles which apply to the exercise of the court's declaratory jurisdiction". He then went on at [92] of the GD to hold that since it was open to the appellant to go back to the Vedanta Tribunal to ask it to reconsider its decision in the VPOs, there was no reason the appellant could not come to the court to get the law correct so that it would have "an additional line of argument" with which to approach the Vedanta Tribunal. The Judge concluded that in light of the Undertaking given by the appellant, "[t]he final decision … [was] ultimately the Vedanta [T]ribunal's to make".

31 In our view, this was not the correct approach. It assumed that it was legitimate to obtain guidance from a court in relation to a general or abstract question of law, which it is not. As observed in Lord Woolf & Jeremy Woolf *The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 4-59, "[t]he absence of a dispute based on concrete facts is critical" and "is the missing element which makes a case hypothetical". Similarly, we observed

recently in *Tan Ng Kuang Nicky (the duly appointed joint and several liquidator of Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation)) and others v Metax Eco Solutions Pte Ltd* [2021] SGCA 16 at [85] that:

> … [T]he long established legal position is that a court in Singapore will not answer hypothetical questions or opine on an academic point merely because a party to the proceedings would like the court to set down the law on the point. …

32 The approach taken below further assumed that although it was impermissible to get guidance from the court on an abstract question of law, such conduct could be legitimised by tying the question to the facts. However, it was clear that the appellant could not do so in this case because that would entail examining the identical question which had been decided by the Vedanta Tribunal, thereby making the application an impermissible attempt to relitigate an issue that had already been determined by the Vedanta Tribunal. As pointed out by the respondent, the declarations in OS 980 were essentially reformulations of the appellant's various requests to the Vedanta Tribunal for cross-disclosure, which the Vedanta Tribunal had rejected. This dovetails with our discussion at [38] below that the present application was in truth a backdoor appeal against the VPOs.

33 Finally, the approach taken below assumed that the appellant's conduct could alternatively be legitimised by providing an undertaking not to do anything other than to bring the answer back to the Vedanta Tribunal for its consideration. Although the Judge had initially expressed concern that the declarations sought would enable the appellant to circumvent the VPOs without consequence, he eventually accepted that this concern was satisfactorily addressed by the appellant's Undertaking (see the GD at [79] and [93]). But, in our view, this very Undertaking was precisely what made the application an abuse of process. First, it revealed that tying the question to the facts was a sham

to disguise the true intention of the appellant in order to secure the court's ruling on an abstract question of law so that it could use that ruling to ask the Vedanta Tribunal to reconsider the VPOs. Second, and even more troubling, it left the court in the untenable situation of giving its view to the Vedanta Tribunal in the hope that the Vedanta Tribunal would give it some consideration, with the distinct possibility that the Vedanta Tribunal might decide to *ignore* the court's view altogether.

34 For the above reasons, we concluded that there was absolutely no legitimate legal basis to invoke the jurisdiction of the seat court to ask for the declaratory relief. Absent a challenge against an *arbitral award* based on the grounds provided for in the IAA and/or the Model Law (for example, a claim that the tribunal acted in excess of jurisdiction, in breach of natural justice or contrary to public policy), the appellant had no basis to seek the declaratory relief with respect to the VPOs and s 18 of the SCJA did not provide the answer. To put it another way, there was no proper cause or matter that could be supported by OS 980.

The true purpose of the application

35 The true purpose of the application was exposed by the terms of OS 980 as well as the appellant's Undertaking coupled with its submission that its purpose was to use the court's decision as a "persuasive tool" to invite the Vedanta Tribunal to reconsider VPO 3. Upon closer scrutiny, it became apparent to us that the application was either a backdoor appeal against the VPOs, or an attempt to seek an advisory opinion from the court in order to put pressure on the Vedanta Tribunal. In our view, both purposes were equally improper.

Backdoor appeal

36 First, notwithstanding that it had been framed as an application for declaratory relief, it was clear from the nature of the relief *as framed in OS 980* that the application in OS 980 was essentially a backdoor appeal.

(a) By its first prayer, the appellant sought a declaration that the documents disclosed or generated in the Vedanta Arbitration were not confidential or private. This was directed towards obtaining a ruling from the court that under Singapore law, there was no general obligation of confidentiality in investment treaty arbitrations.

(b) By its second prayer, the appellant sought a declaration that the disclosure of documents disclosed or generated in the Vedanta Arbitration would not be in breach of any obligation of confidentiality or privacy. This would follow from the first prayer being granted or, if the first prayer were not granted, would be by way of an exception to the general obligation of confidentiality. The Judge made much the same observations at [4] of the GD.

37 Having regard to the above relief, it was apparent that the appellant was in substance seeking to appeal against the decision of the Vedanta Tribunal in the VPOs.

(a) The ruling on Singapore law sought by the appellant in its first prayer was contrary to the Vedanta Tribunal's express finding in VPO 3 that "in every arbitration governed by Singapore procedural law there is an implied obligation of confidentiality", including investment treaty arbitrations. By asking the court to find that no such obligation of

confidentiality existed under Singapore law, the appellant was essentially asking the court to overrule the Vedanta Tribunal.

(b) The appellant's second prayer was also contrary to the Vedanta Tribunal's decisions in VPO 6 and VPO 7. In fact, as the respondent submitted, the appellant's second prayer made reference to the very same documents that the Vedanta Tribunal had refused permission to disclose in VPO 6 and VPO 7. Likewise, the Judge observed at [27] of the GD that the schedule referred to in the second prayer of OS 980 listed the Partial Award and fourteen other documents which fell within the two rejected categories of documents in VPO 6. The schedule also referred to the transcript excerpt which the Vedanta Tribunal had refused permission to disclose in VPO 7. It was thus evident that the second prayer, if granted, would directly contradict VPO 6 and VPO 7.

38 In light of the above, the appellant's submission that the issue before the Vedanta Tribunal was different from the issue before the court was plainly wrong. Looking at the substance of the appellant's application, we agreed with the respondent that the first and second prayers of OS 980 had already been decided by the Vedanta Tribunal in the VPOs. The declarations sought by the appellant targeted both the question of law underpinning the Vedanta Tribunal's decision in VPO 3, as well as the Vedanta Tribunal's decision on the facts in VPO 6 and VPO 7. If granted, they would effectively overrule the Vedanta Tribunal's decisions in the VPOs. Therefore, based on the declarations as crafted in OS 980, it was simply untenable to suggest that OS 980 was not a backdoor appeal against the VPOs. This was improper because, as the respondent submitted and as the appellant rightly acknowledged at the hearing before us, the appellant had no such right of appeal.

Advisory opinion to put pressure on the Vedanta Tribunal

39 In the course of the proceedings below, the appellant offered its Undertaking to the court that it would not bypass the Vedanta Tribunal but instead would only ask the Vedanta Tribunal to reconsider its decision in the VPOs. As a starting point, this was not the pleaded relief. In fact, it contradicted the appellant's first prayer which, as we observed at [37] above, effectively sought a ruling that the Vedanta Tribunal was wrong in concluding that the general obligation of confidentiality extended to investment treaty arbitrations. It was thus clear that the Undertaking was an attempt by the appellant to distance itself from the characterisation of OS 980 as a backdoor appeal and to reframe its application in order that the grant of the declarations would be more palatable. Indeed, the Undertaking had been given precisely to assuage the Judge's concern that the granting of the declarations would enable the appellant to ignore the VPOs and bypass the Vedanta Tribunal with impunity (see the GD at [78]–[79]). As the respondent submitted, the offer of the Undertaking was the clearest indication that the granting of the declarations would amount to unwarranted judicial interference in the arbitral process. Otherwise, there would have been no need for the appellant to offer any such undertaking.

40 Furthermore, even if the Undertaking was accepted by this court, it nevertheless revealed that the appellant's purpose was to put *pressure* on the Vedanta Tribunal to reconsider its decision in the VPOs. In this regard, we agreed with the respondent's submission that the declarations on their face amounted to final declarations by the court as to the appellant's rights in relation to the documents disclosed or generated in the Vedanta Tribunal. Given the targeted nature of the declarations sought, the Vedanta Tribunal would be hard pressed to disregard them.

41 At the same time, the application in OS 980 was also an attempt to obtain an *advisory* opinion from the court. It was akin to a case stated procedure, whereby after a tribunal has taken a certain view on a point of law, a party can take that view to the court, invite the court to assess the correctness of that view, and if the court concludes that the view is wrong, the party can then go back and ask the tribunal to reconsider its initial position. However, no such process exists under Singapore law. The appellant's application was tantamount to an invitation to the court to act as an *amicus* to the Vedanta Tribunal with an acknowledgement that the Vedanta Tribunal may or may not be "persuaded" to reconsider its decision in VPO 3. This, the court does not do.

42 The appellant had sought to rely on two decisions of this court to bolster its case. The first was *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*"), where this court had observed at [143] that:

> … Where the circumstances of a case are such that a declaration will be of value to the parties or to the public, the court may proceed to hear the case and grant declaratory relief even though the facts on which the action is based are theoretical. …

43 However, *Tan Eng Hong* was clearly distinguishable from the present case. *Tan Eng Hong* concerned a question of public constitutional law, specifically, a constitutional challenge against s 377A of the Penal Code (Cap 224, 2008 Rev Ed). As the respondent submitted, *Tan Eng Hong* involved a very different declaration from those sought in the present case. Furthermore, despite this court's observations regarding the court's discretion to grant declaratory relief on a theoretical question, this court ultimately found that there was in fact a real controversy as the appellant had been arrested, investigated, detained and charged under s 377A, and there was a real and credible threat of prosecution under s 377A (see *Tan Eng Hong* at [186]). In this case, however,

there was no real controversy to speak of. Any controversy had already been determined by the Vedanta Tribunal and the court's ruling could not determine any purported controversy in light of the appellant's Undertaking. Thus, the principles set out in *Tan Eng Hong* at [143] had no application here.

44 The second case relied upon by the appellant was *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*"). In *Sun Travels*, the respondent had succeeded against the appellant in a Singapore-seated commercial arbitration. When the appellant resisted enforcement proceedings in the Maldivian courts, the respondent then sought the assistance of the Singapore court to, among other things, issue a declaration that the arbitral awards were final, valid and binding on the parties and that the appellant's conduct in bringing certain claims before the Maldivian court was in breach of the arbitration agreement. This court upheld the High Court's decision to grant the declarations sought, finding that the court's power to grant declaratory relief extended to proceedings in the context of arbitration, unless such power was circumscribed by the Model Law or the IAA (see *Sun Travels* at [133]–[135]). This court further observed that the declarations sought would be a "persuasive tool in the proceedings in the Maldives" (see *Sun Travels* at [137]).

45 However, *Sun Travels* was likewise distinguishable from the present case. In *Sun Travels*, unlike the present case, the application for declaratory relief had nothing to do with the conduct of the arbitration. Indeed, the arbitration had concluded and the declarations sought were directed towards the enforcement proceedings before the Maldivian courts. The declarations were thus intended to *assist* the arbitral process by seeking to ensure that the parties acted in accordance with the arbitral award. There was no concern of intervention or interference with the arbitration. Nor was there any question that

the Singapore court, as the seat court, had the jurisdiction to issue the declarations sought. In contrast, the declarations sought by the appellant in the present case directly pertained to the conduct of the arbitration, specifically, the cross-disclosure regime instituted by the Vedanta Tribunal. In addition, as we have observed above, the application in OS 980 was effectively a backdoor appeal against the VPOs and an attempt to relitigate questions the Vedanta Tribunal had already considered and determined. Given the stark differences between *Sun Travels* and the present case, we found that *Sun Travels* did not offer any assistance whatsoever to the appellant.

46 For the above reasons, it was apparent that what had initially started out as a backdoor appeal had gradually morphed into an attempt to seek an advisory opinion from the court in order to pressure the Vedanta Tribunal to reconsider its decision in the VPOs. Either way, both were manifestly improper.

Violation of the principle of minimal curial intervention

47 Given the discussion above, it was evident that the application was also a blatant violation of the principle of minimal curial intervention. The principle of minimal curial intervention is an essential feature of Singapore's *lex arbitri*, and is enshrined in Art 5 of the Model Law. It "dictates that courts should not without good reason interfere with the arbitral process", and should act with a view to "respecting and preserving the autonomy of the arbitral process" (see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [59]). As this court stated in *BLC and others v BLB and another* [2014] 4 SLR 79 at [51] (which the Judge cited at [174] of the GD), it is "axiomatic that there will be minimal curial intervention in arbitral proceedings".

48 In this case, regardless of whether the appellant's application in OS 980 was characterised as a backdoor appeal or an attempt to obtain an abstract ruling to put pressure on the Vedanta Tribunal, the granting of the declarations by the court would infringe the principle of minimal curial intervention. As the respondent submitted, the Vedanta Tribunal had already directed its mind to and decided on the appellant's applications for cross-disclosure, in the exercise of its broad powers to determine the appropriate arbitral procedure. Since the Vedanta Tribunal was the master of its own procedure (see [29] above), it would be inappropriate for the court to intervene in its decision. Moreover, for the court to entertain applications such as the present would mean that whenever a party is dissatisfied with a tribunal's decision on a procedural matter which the party claims is not covered by existing case law, it can invite the court to rule on the procedural matter in order for such a ruling to be used as a tool to persuade the tribunal to reconsider its decision. This is a violation of the principle of minimal curial intervention at the highest level.

49 Furthermore, it is open to parties in any investment treaty to expressly agree and stipulate that there is no general obligation of confidentiality by incorporating the UNCITRAL Transparency Rules. This is a matter for the parties' agreement. Absent an agreement, as in the present case, there was simply no room for the court to impose those rules on the parties. Not only would such a ruling offend the principle of minimal curial intervention, it would also violate the principle of party autonomy, which is a fundamental tenet of contract law.

50 Finally, we note that as disclosure orders are interlocutory in nature, the appellant was, and continues to be, at liberty to reapply to the Vedanta Tribunal for reconsideration of the VPOs. This was similarly observed by the Judge at [48]–[49] of the GD:

> 48 So where does that leave a procedural order? A procedural order (as opposed to an award) is not final and may be reconsidered and revised by a tribunal *but* cannot be nullified by a court. This is not a contradiction. This is merely an aspect of the tribunal being the exclusive master of its own procedure …
>
> 49 Does this mean that a party may repeatedly ask a tribunal to reconsider and revise its procedural orders? In theory yes. As the cases make clear, until the tribunal issues its final award and becomes *functus officio*, it has the jurisdiction to reconsider and revise earlier procedural orders. And a party does nothing wrong by inviting a tribunal to do so. It is simply invoking another facet of the tribunal's mastery of its own procedure.
>
> [emphasis in original]

51 Therefore, the appellant was and remains entitled to apply to the Vedanta Tribunal to reconsider its procedural orders. What the appellant was precluded from doing was to invite the court to intervene so that it could use the court's decision as a "persuasive tool" before the Vedanta Tribunal. That would be a violation of the principle of minimal curial intervention, as well as a blatant abuse of process, as we explain below.

Abuse of process

52 The above analysis revealed that the application in OS 980 was ultimately an abuse of process. In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649, this court explained the term "abuse of the process of the Court" contained in O 18 r 19(1) of the Rules of Court 1996 (S 71/1996) at [22] as follows:

> The term, 'abuse of the process of the Court' in O 18 r 19(1)(*d*) has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct

> rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose … [I]f an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

53 The concept of abuse of process, albeit in the context of the court's inherent jurisdiction to strike out actions, was further elaborated on by this court in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [32]–[34] as follows:

> 32 Sir Jack Jacob described an abuse of process at 40–41 in the following terms:
>
> > It connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice. It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation. …
>
> 33 Proceedings are frivolous when they are deemed to waste the court's time, and are determined to be incapable of legally sustainable and reasoned argument. Proceedings are vexatious when they are shown to be without foundation and/or where they cannot possibly succeed and/or where an action is brought only for annoyance or to gain some fanciful advantage.
>
> 34 The instances of abuse of process can therefore be systematically classified into four categories, *viz*:
>
> > (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

> (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
>
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[emphasis in original omitted]

54 This was not a case concerning the striking out of an action, either under the Rules of Court (Cap 322, R 5, 2014 Rev Ed) or the court's inherent jurisdiction. Nevertheless, the concept of abuse of process is a broad one and the principles set out above applied similarly in the present case to assist us in determining whether the appeal should be dismissed for being an abuse of process.

55 Applying these principles, we had no hesitation in dismissing the appeal. The application in OS 980, and the present appeal by extension, were an abuse of the process of the court on several levels. In the first place, there was no legitimate basis for the appellant to invoke the court's jurisdiction. The Vedanta Tribunal was entitled to determine the dispute that the *appellant* itself had placed before it, which determination was subsequently *relied upon* by the appellant, albeit it did not result in the appellant's desired outcome. Since the VPOs pertained to a procedural matter, and the appellant was unable to bring itself within any of the avenues of recourse in the IAA and/or the Model Law, there was no legitimate basis for the court to intervene. In short, this was an application without foundation.

56 Furthermore, the application was in substance an attempt to obtain an abstract ruling of law from the court in order to place pressure on the Vedanta Tribunal, as well as a backdoor appeal against the VPOs. This was vexatious

because it amounted to a relitigation of the issues that had been placed before the Vedanta Tribunal. Worse still, it was improper because it would require the court to render an advisory opinion and in doing so, violate the principle of minimal curial intervention. The appellant's attempts to circumvent these various difficulties – tying the declarations to the facts and offering the Undertaking – appeared to be a sham, disguising the true nature and purpose of its application in OS 980.

Conclusion

57 For all of the above reasons, we concluded that the application in OS 980 and the appeal by extension amounted to an abuse of the process of the court and we dismissed the appeal accordingly.

58 We also awarded costs of $120,000 in favour of the respondent, inclusive of disbursements. In this regard, we declined to award indemnity costs given that the Judge had taken the view, albeit erroneously, that there was no abuse of process and the documents sought to be disclosed by the appellant could be relevant for post-award litigation (see the GD at [101] and [125]). Given the Judge's views, it could not be said that it was patently unreasonable for the appellant to have pursued the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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