Ng Chin Siau and Others v How Kim Chuan
[2007] SGHC 31

Case Number : OS 749/2006, SUM 4825/2006

Decision Date : 06 March 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

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

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

Arbitration – Award – Recourse against award – Appeal under Arbitration Act – Whether leave to appeal against High Court decision on appeal against findings of arbitrator should be granted on ground that question of law of general importance or "special reasons" existing – Applicable principles – Section 49(11) Arbitration Act (Cap 10, 2002 Rev Ed)

6 March 2007 Judgment reserved.

Judith Prakash J

1 I have before me a summons filed by the defendant, How Kim Chuan ("Mr How") seeking leave to appeal to the Court of Appeal against the decision that I delivered on 11 October 2006 in these proceedings. Then, I had allowed the plaintiffs' appeal against the award given by the arbitrator in the arbitration proceedings known as ARB059/DA15/04 which were proceedings between Mr How and the plaintiffs ("the partners") as his erstwhile partners in a dental clinic. In order to understand the issues that arise in the summons it is necessary to go into the history of the matter.

The partnerships and the dispute

2 Prior to 11 May 2002, Mr How and the partners (in different combinations) were practising in partnership in 5 dental practices located in various parts of Singapore and also in a business that ran a dental laboratory. As a result of a dispute, on 11 May 2002, Mr How issued a notice of retirement from the various partnerships. The partnership agreements provided for certain moneys to be paid to a retiring partner and the parties had negotiations on the amounts payable to Mr How. Eventually the partners paid a total sum of $65,555.29 to Mr How which they calculated as being the amount due to him. Mr How disagreed and claimed that the amount due was considerably larger. Subsequently, the parties agreed to refer all disputes and differences arising under the partnership agreements to arbitration.

3 On 12 October 2004, Mr How issued a notice of arbitration. On or about 14 February 2005, the Singapore International Arbitration Centre appointed Mr Lim Joo Toon ("the arbitrator") as the sole arbitrator in respect of the arbitration proceedings between Mr How and the plaintiffs.

4 Mr How's claim in the arbitration proceedings was set out in his amended statement of case. There, he averred that at all material times he had been a partner of a dental practice known by the name and style of Q & M Dental Surgery. This name was used by a chain of dental clinics but each

clinic belonged to different partners who all practiced under the name and style of Q & M Dental Surgery. In para 6 of the statement, Mr How stated that he was a partner of 5 Q & M Dental Surgery clinics, those located at Jurong East, Hougang, Yishun, Khatib and Tiong Bahru, which were established on varying dates between March 2000 and March 2002, as well as of the Megadent Dental Laboratory. In para 7, Mr How said that he had executed a partnership agreement on 22 May 2000 in respect of the Hougang practice. He then went on to recount the circumstances of his retirement from the several practices. In para 11, he set out the payments that had been made to him by the various partnerships upon his retirement. He gave the breakdown as follows:

a)	Jurong East	$5,348.99
b)	Hougang	$32,535.00
c)	Yishun and Khatib	$14,480.06
d)	Tiong Bahru	$7,234.72
e)	Megadent Dental Laboratory	$5,956.52

Mr How pleaded in para 13 that he was dissatisfied with the above payments because they were insufficient, inequitable and did not represent the fair market value due to him. In para 14, Mr How said that he was entitled by the partnership agreements that he had signed or in law or in equity to:

a) a return of his capital contributions in the various partnerships; and

b) a share of profits and goodwill in accordance with his percentage share in these various partnerships.

5 Paragraphs 15 to 18 of the statement of case are important and I therefore quote them in full:

"15. The Claimant's [Mr How's] entitlement as set out in para14 above ought to be calculated and determined on a Fair Market Value Basis.

PARTICULARS

(a) The method of calculation to obtain a Fair Market Value ought to be the Income Capitalisation Method.

(b) The Income Capitalisation Method requires the Partners to determine the average earning of the Partnerships and multiply the same by the price-earning ratio.

16. The Claimant had appointed C. C. Koh & Co, a Certified Public Accountant, to calculate and determine the Fair Market Value.

17. A report was prepared by C. C. Koh & Co for the Arbitration to which the Claimant will provide and exchange the same with the Partners upon directions to be given by the Arbitrator.

18. The Claimant now claims:-

(a) For directions that all necessary Accounts and Inquiries to be taken and made, if required:

(b) For an award of payment of such sum as may be found due to the Claimant;

…"

6 In their amended respondents' defence filed on 11 April 2005, the partners refuted various allegations made by Mr How and gave their version of the partnership agreements. They alleged that Mr How's claims had not been properly particularised and that they were ready, willing and able to pay any and all sums that were rightfully due to Mr How. In para 18, they denied paras 14 and 15 of the amended statement of case and said that the amount due to Mr How should be computed as set out in their particulars. They averred that the income capitalisation method was not proper or appropriate for the valuation of a professional partnership, such as the dental partnerships in this case , and should not be used. Even if that method was to be used, then the income or earnings considered should be the income or earnings of the partnerships after Mr How had left. Then, the plaintiffs gave particulars of their computation. In relation to the Hougang partnership, the following particulars were given:

"(e) For the Hougang Partnership, it is averred that, in accordance with the partnership agreement dated 22 May 2000, the Claimant is entitled to be paid such sum as found to be due under cl 10.3 of the said Agreement. The Claimant has refused to appoint a valuer jointly with the remaining partners and has also refused to appoint his own independent valuer and to exchange reports. In the premises, it is averred that the Claimant is entitled to be paid such sums as in terms of share of profit, capital and goodwill, taking into account the loss of goodwill consequent on the Claimant's retirement and taking into account solicitation of the Hougang Partnership's patients by the Claimant, as found just and fair by this Honourable Tribunal."

7 I have singled out the particulars relating to the Hougang partnership because it was the arbitrator's award in relation to that partnership that resulted in the appeal to the High Court. It is also relevant at this stage to set out cl 10.3 of the Hougang partnership agreement ("cl 10.3"). This provides:

"10. Termination of Partnership Agreement

…

10.3 Upon the termination of the Partnership or the bankruptcy or death of a Partner a final settlement of accounts shall be made as follow *(sic)*:

(i) the share of such outgoing bankrupt or deceased Partner ('the Outgoing Partner') in the goodwill and future net profits of the practice shall vest without payment in the continuing or surviving Partner and the outgoing bankrupt or deceased Partner shall not be entitled to share in the future profits of the practice;

(ii) the surviving or continuing Partner shall prepare or cause to be prepare *(sic)* a final account in writing showing the net profits of the Partnership after taking into account all liabilities as at the date of termination of the Agreement and shall account and pay to the outgoing bankrupt or deceased Partner his share of the net profits forthwith; and

(iii) the continuing or surviving Partner shall purchase the share of the outgoing bankrupt or

deceased Partner in the capital and goodwill of the Partnership at a price to be mutually agreed, failing which, to be determined by a valuation made by a valuer to be agreed or (if the Partners cannot agree upon a valuer) by the average valuation made by two independent valuers to be appointed by each Partner."

8 The arbitration was heard in November 2005. The arbitrator issued his written award ("the award") on 15 March 2006. In respect of the Hougang partnership, the arbitrator noted that two main issues arose for his consideration:

a) whether cl 10.3 applied to Mr How who had served a notice of retirement and if so, how that clause was to be interpreted; and

b) how the goodwill of the Hougang partnership was to be valued.

The arbitrator then noted that Mr How's stand was that cl 10.3 was not applicable to him as he had issued a notice of retirement and as such was not an "outgoing bankrupt or deceased partner". The arbitrator rejected this contention as he found that cl 10.3 applied to two situations, first, upon the termination of partnership and second, upon the bankruptcy or death of the partner. In this case, when Mr How served his notice of retirement the partnership was terminated and the provisions of cl 10.3 came to play. He also noted that after Mr How had served his notice of retirement, he had appointed two valuers on two separate occasions, namely TK Low & Company and Ewe, Loke & Partners, to give their valuations. The arbitrator considered that this conduct by Mr How was intended to invoke the provisions of cl 10.3(iii) whereby if the price of the outgoing shares could not be mutually agreed by the partners, it was to be determined by the average valuation of two independent valuers appointed by each side.

9 The arbitrator then went on to consider three expert reports. Two experts, one Mr Teh Kwang Hwee ("Mr Teh") of M/s Tan & Teh and one Mr Chan gave evidence on behalf of the partners, and one expert, Mr Koh of TK Low & Company gave evidence on behalf of Mr How. Mr Koh had valued the fair market value of the Hougang partnership at $1,053,780 which meant that as Mr How had a 45% share in that partnership, the value of his share was $474,201. The arbitrator, however, rejected Mr Koh's report. He analysed it in some detail and found that it contained several errors and that Mr Koh had made flawed assumptions and ignored actual revenue figures in favour of annualised revenue. He had also used the "multiple of revenue method" which the arbitrator accepted was too simplistic a method and was not appropriate in valuing a dental practice as the nature of the patient-dentist relationship negated this method. Additionally, Mr Koh had ignored the fact that the personal goodwill of Mr How had left the practice with his departure and the valuation did not make any distinction between personal/professional goodwill and enterprise/business goodwill. The arbitrator also rejected Mr Chan's report (Mr Chan had valued the goodwill as zero) for reasons that I need not go into.

10 On the other hand, the arbitrator, having also considered Mr Teh's report in detail had no adverse comments on it. He noted that Mr Teh had concluded that the goodwill that was payable to Mr How was $54,017.47. This figure was arrived that on the basis of goodwill for the whole practice was $176,010 and that although Mr How's share of the profits was 45% which would have given him a share in the goodwill equal to $79,204.50, this amount had to be discounted by 31.8% since the profits of the Hougang partnership had declined by that percentage after Mr How left it. The arbitrator accepted Mr Teh's expert evidence.

11 The arbitrator went on to hold that cl 10.3(iii) applied to the dispute before him. The effect of this clause he said was that the value of the goodwill was determined by averaging the values of two

independent valuers. On the partners' side, it was the valuation of goodwill in Mr Teh's report that he accepted. Then, he went on to say (in para 55 of the award):

> "The problem is to determine which of the valuers' reports to use for the Claimant's side as the Claimant has three (3) valuation reports. I have earlier referred to two (2) accountants, namely, TK Low & Company ("TK") and Ewe, Loke & Partners ("Ewe"), appointed by the Claimant. These two (2) reports have been admitted in evidence in cross-examination of the Claimant as C2 and R3 respectively. TK's report is dated 28 February 2003 and the goodwill is valued at S$305,751.62. Ewe's report is dated 26 September 2003 and the goodwill is valued at S$376,650.00. Ewe's report was the report which the Claimant intended to use in a series of solicitors' correspondence from 16 January 2004 to 9 February 2004 (2AB 718-725). Although the process was initiated to effect the exchange of the valuation reports, it broke down as the parties could not agree on whether the exchange of the valuation reports was to be on a "without prejudice" basis. For these reasons, I therefore find that Ewe's report is the relevant report for the Claimant for the purpose of Clause 10.3(iii). I do not accept the report by Koh as the report by Koh did not value goodwill due to an outgoing partner. What Koh did was to give a valuation of an ongoing business. The purported valuation of Koh was thus on a completely different basis than what was contracted for by the parties under Clause 10.3 of the Hougang agreement. I therefore conclude that under the terms of the Hougang agreement, the valuation of the goodwill in the Hougang partnership is derived by the average of Teh's valuation of S$54,017.47 and Ewe's valuation of S$376,650.00. This produces a figure of S$215,333.74. Accordingly, I find the sum of S$215,333.74 to be the valuation of the goodwill in respect of the Hougang partnership under the Hougang agreement.

12 The partners were dissatisfied with that decision. In April 2006, they filed the originating summons herein whereby they asked for leave to appeal on two questions of law which they considered had arisen out of the award. I heard that application on 7 August 2006 together with a separate application filed on behalf of Mr How whereby he asked for leave to appeal on other questions of law. I dismissed Mr How's application. As far as the partners' application was concerned, I gave them leave to appeal on one of the questions they had put forward.

The appeal before me

13 The question of law in respect of which I had given the partners leave to appeal was as follows:

> Whether, in the light of the undisputed facts and the facts found by the learned Arbitrator, the following findings were in error:-
>
> (i) That the valuation method in Clause 10.3(iii) of the partnership agreement dated 22nd May 2000 in relation to the Hougang partnership was applicable and applying the said valuation method when both the [partners] and [Mr How] had pleaded that that method was not/no longer applicable,
>
> (ii) That the valuation report of Ewe, Loke & Partners ("Ewe") was to be used even though [Mr How] himself had not entered the said report into evidence nor relied on the report in the arbitration, the [partners] had not admitted the truth of the contents of the report and when the maker was not called,
>
> (iii) That the average valuation of the valuation reports of Ewe and that of the [partners'] expert be taken in order to determine the value of [Mr How's] share,

when it was never pleaded by [Mr How] that an average valuation should be taken.

14 On the hearing of the appeal, Mr Sreenivasan, counsel for the partners, referred to the evidence that in respect of the claim relating to the Hougang partnership, the partners had appointed Mr Teh as their accountant in accordance with cl 10.3 and Mr How had appointed and discharged two firms of accountants namely, TK Low & Company and Ewe, Loke & Partners ("Ewe"). Mr How had thereafter, however, placed no reliance at all on the reports given by these firms. These reports were not disclosed in discovery, were not relied upon in the pleadings, were not relied upon by Mr How in his evidence in chief and were not tendered as evidence by Mr How. It was the partners' counsel who had raised them when, in the course of cross-examination, Mr How had asserted that to determine the goodwill of the partnership, it was not enough for a report to be produced but that the merits of that report had to be looked into.

15 At the hearing of the arbitration, Mr How had relied on the report produced by his third accountant, Mr Koh. Mr Koh was called to testify as Mr How's expert during the arbitration. He had issued valuation reports for all six partnerships and these six reports were disclosed in discovery in the arbitration. Mr Sreenivasan contended that throughout the arbitration, Mr How had relied only upon the Koh report which he stated represented the true value of the goodwill. During the arbitration, Mr How did not put forward the proposition that the goodwill amount should be the average of the figures in the Teh report and the Koh report. Nor did he argue that the goodwill amount should be the average of the figures in the Teh report and the Ewe report.

16 Mr Sreenivasan submitted that for the purpose of the arbitration proceedings, both parties had taken the position that cl 10.3 was not applicable, albeit for different reasons. Mr How's position was that contained in para 15 of his statement of case (see [5] above). Further, the basis of Mr Koh's valuation was not in accordance with cl 10.3 as he had valued the Hougang partnership as an ongoing business and it was not possible to determine the goodwill component from the overall valuation in his report. On the other hand, cl 10.3(iii) provided that the goodwill of the Hougang partnership should be separately valued. Finally, in his closing submissions, Mr How had taken the position that cl 10.3 did not cater for the situation of a partner who had retired.

17 The position taken by the partners was that cl 10.3 was no longer applicable to them and Mr How because Mr How had refused to appoint a joint valuer as required by the clause and secondly, had refused to exchange valuation reports except on a without prejudice basis. While Mr Koh's report was eventually disclosed, this was done during the process of discovery pursuant to directions made by the arbitrator and, therefore, Mr Sreenivasan submitted that it could not be considered as the equivalent of the "exchange" required by cl 10.3(iii).

18 Mr Sreenivasan submitted that the arbitrator had erred in law by finding first, that cl 10.3 was applicable and second, by using the Ewe report for the purpose of applying the formula in cl 10.3(iii), as these findings were based on facts that were not pleaded. He cited several authorities including *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793 and *Yap Chwee Kim v American Home Assurance Co* [2001] 2 SLR 421 for the proposition that a court was not allowed to make a finding or give a decision based on facts that have not been pleaded and submitted that these authorities also applied to an arbitration conducted under the SIAC Domestic Arbitration Rules ("the Rules") as the rules had a similar approach to case statements as the rules of court had to pleadings. It was, thus, important that neither party had pleaded that cl 10.3(iii) was applicable to the facts before the arbitrator. The arbitrator should not therefore have taken it on himself to decide on the issue of whether that clause was applicable and then to apply it.

19 Mr Sreenivasan also submitted that with the rejection of the reports given by Mr Koh and

Mr Chan, the only evidence in respect of the goodwill of the Hougang partnership that was actually in evidence before the tribunal was Mr Teh's report. Mr How had wanted an "all or nothing" case by instructing Mr Koh to value all the partnerships on a basis that was different from what had been contracted for. Given the rejection of Mr Koh's report, the arbitrator erred in law by awarding the sum of $215,333.74 as the average of the valuations of the goodwill by Ewe and Mr Teh, instead of awarding the sum of $54,017.17 as the goodwill as valued by Mr Teh.

20 Further submissions were made on why it had been an error by the arbitrator to rely on Ewe's report. Basically, this was because Mr How himself had never relied on Ewe's report either before or during the arbitration proceedings. In fact, Mr How had terminated Ewe's services as he thought that Mr Ewe had attended a meeting with the partners behind his back. Mr Ewe was not called as a witness by Mr How and the report did not form part of the agreed bundle of documents in the arbitration. Mr How did not disclose Ewe's report during discovery. It was only after it had been established during cross-examination that Mr How did not consider that cl 10.3(iii) was applicable, that Mr How was asked to produce a copy of the Ewe report. Mr Sreenivasan submitted that the Ewe report had not, thereby, been admitted into evidence.

21 Mr Sreenivasan relied on the following exchanges during cross-examination of Mr How to establish that Mr How had not relied on the Ewe report and that he considered that the merits of any such valuation would have to be examined before it could be accepted and that the amount payable to him could not be determined by the mere arithmetical exercise of taking an average. The passages from the cross-examination read:

Q: The remaining partners ask you to exchange valuation report in accordance with 10.3(iii)?

A : Yes.

Q : You did not want to do so until it is in without prejudice basis?

A : Yes, because I had bad experience to do that. We were originally going to exchange valuation report at my former accountant's office, Mr Ewe sometime September 2002. Prior to our exchange, Dr Ng and his wife had a prior meeting with my former accountant and I was not happy about this. As a result, I did not want to exchange with them. Subsequently I changed my accountant. I also engaged Mr Phua as my lawyer and Mr Phua advised me that we will exchange on a without prejudice basis.

Q : What do you understand "without prejudice basis"?

A : Partners are not supposed to disclose the information in CA, but if agreed, partners are bound by it.

Q : You do not take the average of the report automatically?

A : If the whole report has any merit and assuming that both valuation reports are of equal merit, then there is no problem with it. However, there is too much variation between the two valuation reports, then I think it will be proper to look at the basis and merit of the reports.

Q : Will it be correct to say that it is your position that we should not be looking at the valuation report, but look at the merits?

A : Yes, I think so.

22 Mr Sreenivasan considered that the above exchange showed clearly that:

a) Mr How did not intend to use the Ewe report for the purpose of the exchange procedure, whether on a without prejudice basis or otherwise. He therefore changed his accountant.

b) Mr How did not intend to exchange reports to get an average: the valuation would be subject to agreement.

c) Mr How agreed that when there was a wide variation between the valuation figures given by different experts, the basis and merits of the reports had to be considered.

23 Finally, Mr Sreenivasan submitted that it might have appeared to the arbitrator that the $54,017.47 value for goodwill for the Hougang practice was unfair to Mr How especially since the partners had offered Mr How a sum of about $175,000. The arbitrator, however, had not considered that:

a) Neither party had pleaded that the average of two valuations was to be taken in general, or, specifically that the average of the Teh and Ewe valuations was to be taken. This was also not prayed for as a relief by either side.

b) Mr How could have obtained the valuations based on the contractual formulation and he would have been paid the average upon exchange. He chose to use an entirely different, non-contractual basis, which was accepted by the arbitrator to be without merit. Since the basis of his claim was shown to be unfounded, there was no avenue for the type of approach taken by the arbitrator which was to resort to a formulation that both parties had rejected.

24 Mr Leslie Phua who appeared for Mr How on the appeal submitted that the Ewe report had been admitted in evidence on the application of the partners' solicitors and it was admitted as Exhibit R3 (for the partners) at the arbitration. Once it was admitted, it formed part of the evidence. Since the partners had wanted the Ewe report to be admitted, they could not complain that the arbitrator had used that valuation. The arbitrator had accepted that cl 10.3(iii) had to be applied and thereafter he had the discretion to decide which valuation report was the fair and equitable valuation report to be used on behalf of Mr How in order to give effect to cl 10.3(iii) ie so that the averaging exercise could be undertaken. The arbitrator had not erred in deciding that the Ewe report was to be used since he had based this decision on the fact that, originally, Mr How had intended to use this report for the purposes of exchange.

25 Mr Phua also submitted that the arbitrator had provided a fair and equitable award having considered all the evidence before him. Mr How's stand at the arbitration had been that he would rely on the Hougang partnership agreement or on law or on equity. Para 14 of Mr How's amended statement of claim had paraphrased the essential elements of cl 10.3. It was trite law that facts, not evidence, had to be pleaded and Mr How's pleadings had given the partners notice of the case they would have to meet and that he would be relying on the Hougang partnership agreement. Nowhere in his pleadings had Mr How said positively that cl 10.3 was not applicable. In fact during cross-examination when he was asked which portion of the Hougang partnership agreement he was relying on to say that he was entitled to fair market value, Mr How's response was that he was relying on cl 10.3(iii). It was also submitted that in para 13 of the closing submissions put forward on behalf of Mr How, it had been stated that if cl 10.3 was applicable to him, then the partners had to purchase his share in the partnership at a price that was determined by the fair market value. Since the arbitrator had determined that the Hougang partnership agreement was valid, it was for him to decide how to give effect to cl 10.3. The arbitrator had not erred in reaching the decision he had.

26 As I have stated above, I allowed the appeal by the partners. I accepted Mr Sreenivasan's submissions on the question of law that had been raised. I took the view that in an arbitration governed by rules of procedure that provided for each party to set out its case in a statement of case in the same way as parties to litigation set out their cases in their pleadings, the arbitrator would be bound to decide the case in accordance with the parties' pleadings. He would not be entitled to go beyond the pleadings and decide on points on which the parties had not given evidence and had not made submissions. If an arbitrator considers that the parties have not framed their cases correctly and that certain points need to be addressed then he must indicate his concerns to the parties and allow them to make such amendments to their pleadings and to adduce such additional evidence as may be necessary to deal with those concerns. He is not entitled to make a decision on points that have not been addressed by the parties. The necessity of abiding by this rule is important in litigation but it is essential in arbitration proceedings where the right of appeal is severely restricted.

27 I did not agree that it was an error for the arbitrator to hold that cl 10.3 in general applied to the parties. Application of the clause meant holding that the continuing partners had an obligation to buy over the share of the outgoing partner in the goodwill of the partnership. However, having found that that clause would generally apply to the situation of a partner who, like Mr How, had served notice of retirement, it was incorrect to go on to determine the value of Mr How's share in the goodwill by using the formula set out in the clause. It was obviously wrong for the arbitrator to hold that the exchange and averaging procedure applied when the parties (in particular Mr How) had failed to carry out any such exchange and when they plainly no longer wished to abide by such procedure. Further, it was clear from the pleadings and the submissions made on behalf of Mr How that he did not wish to invoke the exchange and averaging procedure as *the contractual method* of determining the value of the goodwill of the Hougang partnership. He put forward Mr Koh's report and he wanted Mr Koh's valuation to be accepted. He rejected the exchange procedure as being inapplicable in situations where the two valuations given varied widely. In those cases he considered that it was not possible to follow a mechanistic approach to obtain the price of the goodwill. Instead, the merits of the two reports had to be examined. The partners had accepted that stand in the sense that they did not allege either that the exchange procedure was applicable, being content to argue for the acceptance of their own expert reports and the rejection of Mr Koh's.

28 That was how the arbitration was run, with both parties putting forward their respective reports and their respective experts for cross-examination and scrutiny. The arbitrator was very detailed in his examination of the expert evidence. He considered it with care and on a very rational and reasoned basis. He had good reasons for rejecting Mr Koh's report and for accepting Mr Teh's report. Having gone through that exercise however, he failed to take the obvious next step which was to adopt Mr Teh's valuation as the only credible valuation before him and make his award on that basis. Instead, he considered he was still bound to apply the averaging procedure and therefore looked around for a report to use for Mr How and picked on Mr Ewe's report.

29 With respect, I considered that in doing so, the arbitrator fell into error. Whilst the Ewe report had been produced in the course of the hearing, it had only been adduced for a limited purpose. It had not been adduced as evidence of the value of the goodwill by Mr How. Indeed, Mr How who, as the claimant, had had the onus of proving that the value of his share in the goodwill was greater than the amount paid to him by the partners, did not call the maker of the Ewe report as a witness to substantiate his report. No detailed examination of the Ewe report was carried out. Neither party submitted on its reliability and the accuracy of the methods used by Ewe to arrive at the conclusions in the report. The arbitrator was wrong in law to rely on an expert report that had not been adduced by the claimant or by the respondent for the purpose of deciding the substantive issues before him but had only been produced in the proceedings for the purpose of cross-examination when the

partners sought to show that Mr How had shopped around for valuers who would compute a value that was to his liking.

30 In the originating summons asking for leave to appeal, the partners had asked for an order, if the appeal was successful, that in so far as the award given by the arbitrator related to the payment of the sum of $215,333.74 by the partners to Mr How in respect of the Hougang partnership, the award be varied to the extent that the partners should be ordered to pay the sum of $54,017.47. When I allowed the appeal, I accordingly varied the award and ordered that instead of paying Mr How $215,333.74 for the Hougang partnership, the partners should pay him the sum of $54,017.47. The originating summons had also asked for an order that the costs order made by the arbitrator be set aside and Mr How be ordered to pay party-and-party costs of the arbitration to the partners. Whilst I did set aside the original costs order, I did not make any order in its place as to the way in which costs of the arbitration should be borne. Instead, I remitted this question to the arbitrator for his determination having regard to the decision that I had made in relation to the valuation of the Hougang partnership.

Leave to appeal to the court of appeal-the present application

31 After my decision was made, Mr How changed solicitors. On 18 October 2006, his new solicitors filed the summons that is presently before me asking for leave to appeal against my decision to the Court of Appeal. Having regard to s 49(11) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"), which provides that the court may give leave to appeal to the Court of Appeal against a decision on an appeal from an arbitration award only if the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal, the summons set out a list of the questions of law which Mr How's counsel considered met the necessary requirements.

32 Before I go on to consider the questions of law sought to be posed, I must deal with the law on the issue of appeals to the Court of Appeal. The primary principles are set out in ss 49(10) and (11) of the Act. These read:

> (10) The decision of the Court on an appeal under this section shall be treated as a judgment of the Court for the purposes of an appeal to the Court of Appeal.
>
> (11) The Court may give leave to appeal against the decision of the Court in subsection (10) only if the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal.

Thus, for a prospective appellant to succeed in his application for leave, he must show either that his proposed question of law is a question of general importance or is a question which should be considered by the Court of Appeal for some special reason. What do these requirements entail? As far as the first one is concerned, a good definition of a "question of law… of general importance" was given by Lai Kew Chai J in *Anthony s/o Savarimiuthu v Soh Chuan Tin* [1989] SLR 607 where he stated that the question should be one of general principle upon which further argument and a decision of a higher tribunal would be to public advantage. It is also salutary to bear in mind the Court of Appeal's observation in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR 494 that a question of law is a finding of law that the parties dispute and that requires the guidance of the court to resolve.

33 I was, however, not cited any judicial guidance on what a "special reason" for bringing forward a question of law before the Court of Appeal might be. Mr Lok's submission was that where the court

deciding the appeal from the arbitrator had made a *prima facie* error of law in coming to its decision that would be a special reason for bringing the matter before higher authority. Mr Sreenivasan did not disagree. In fact, he impliedly agreed since his submission was that whilst Mr How actually had to surmount two hurdles, the tests in both cases converged. The second hurdle that Mr Sreenivasan referred to was that arising pursuant to the provisions of s 34(2) of the Supreme Court of Judicature Act (Cap. 322, 1999 Rev Ed) ("SCJA") because the amount involved in the appeal before me was less than $250,000 and, therefore, leave to appeal under that section was also required. Whilst there is no statutory guidance as to the conditions to be satisfied under the SCJA before an application for leave can succeed, s 34(2) has been given frequent judicial consideration and it has been held that for leave to be granted, the prospective appellant must at least:

> (a) demonstrate a *prima facie* case of error of law that has a bearing on the decision of the trial court;
>
> (b) show that there is a question of law decided for the first time or a question of law of importance upon which a decision of a higher tribunal would be to the public advantage;
>
> (c) show a question of law on which there is a conflict of judicial authority and on which a pronouncement from a higher court in the judicial hierarchy is desirable.
>
> (as per Tay Yong Kwang JC in *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716).

It would immediately be noted that the first condition is the presence of a *prima facie* error of law affecting the decision and that the other two conditions are in effect the requirement that the question of law to be decided should be of general importance. Thus, the convergence of which Mr Sreenivasan spoke.

34 The policy behind the enactment of s 49 of the Act is that curial intervention in the arbitral process is to be minimised. That is why there is no appeal as of right against the arbitrator's decision or against the decision of the High Court on such an appeal. That is also why the first pre-condition specified in s 49(11) is that the legal point at issue should be of general importance rather than something that is only relevant to the parties or a very limited situation. Thus, in relation to the second pre-condition it would negate the purpose of such restriction if one were to give a wide reading to the words "special reason". If any error of law on the part of the court hearing the appeal from the arbitrator were allowed to found an appeal to the Court of Appeal, then such appeals would practically be as of right. Whilst it may not seem right for the legal system to allow mistakes of law to stand uncorrected, in view of the policy considerations underlying the present legislation it is my judgment that in relation to errors of law, if at all they are to found a basis for appeal, only the correction of egregious errors of law should qualify as "special reason" to allow leave to appeal. This analysis is I think supported by the legal principles that apply to the grant of leave to appeal against the arbitrator's decision itself. These are set out in s49(5) of the Act which provides *inter alia* that based on the findings of fact in the award it must be shown that the decision of the arbitral tribunal was obviously wrong or the question is one of general public importance and the decision of the tribunal is open to serious doubt. The threshold for leave to appeal to the Court of Appeal cannot be lower than that. On the other hand, I am cognisant that the legislature did not in s49(11) see fit to specify that an error of law of any kind would provide ground for appeal to the Court of Appeal as it could so easily have done in the same way as it did in the preceding s49(5) and therefore "special reason" may not have been intended to include errors of law. As this point was not argued in full before me, I express no concluded opinion. For the purpose of this application I am content to assume that it would be a special reason justifying leave to appeal if the question of law which is to be

brought before the Court of Appeal is a question on which the judge's decision has been obviously wrong. I think that the formulation "obviously wrong" imposes a higher burden on the prospective appellant than the formulation "*prima facie* error of law" does, though perhaps others might consider the difference a fine one.

35 The questions of law put forward by Mr Lok are the following:

1. Whether in the light of the Plaintiffs' and the Defendants' pleadings in the Arbitration, and the facts and undisputed facts found by the Arbitrator, the Arbitrator erred in:

a. holding that the valuation method in Clause 10.3(iii) of the partnership agreement dated 22 May 2000 in relation to the Hougang Partnership (hereinafter, "the Hougang Partnership Agreement") was applicable:

b. entering the valuation report of Ewe, Loke & Partners ("Ewe") into evidence upon the application of the Plaintiffs and relying on the same even though the Defendant himself had not entered the said report into evidence nor relied on the report in the arbitration; and

c. holding that the average valuation reports of Ewe and that of the Plaintiffs' expert be taken in order to determine the value of the Defendant's share and goodwill.

2. Whether in the light of the Plaintiffs' and the Defendants' pleadings in the Arbitration, and the facts and undisputed facts found by the Arbitrator, the learned Judge erred in ordering that:

a. Insofar as the Arbitration Award relates to the payment of the sum of $215,333.74 by the Plaintiffs to the Defendant in respect of the Hougang partnership, the Arbitration Award be varied to the extent that the Plaintiffs should be ordered to pay the sum of $54,017.47 to the Defendant; and

b. The Arbitration Award in respect of costs be set aside and the matter be remitted to the Arbitration for his further consideration as to the appropriate orders in the light of the Order made herein in the appeal.

3. Whether the effect of the decision of the learned Judge in (2) above would be contrary to the intention of the parties and the learned Judge erred in so deciding.

4. Whether the decision of the learned Judge amounts to a rewriting or re-crafting of the Partnership Agreement and whether the learned Judge erred in doing so as the decision of the learned Judge will mean that the valuation of the shares would be based solely on the expert report of the Plaintiffs while the Partnership Agreement expressly provides that the valuation shall be an average of the Plaintiffs' and Defendant's expert reports.

5. Whether the decision of the learned Judge diminishes the principle of contractual certainty and the learned Judge erred in so deciding.

6. Whether in light of the widespread usage of clauses similar to Clause 10.3, the decision of the learned Judge would diminish the certainty of such clauses and the learned Judge erred in so deciding.

7. Whether the learned Judge's decision is contrary to the commercial intention of the parties and diminishes the commercial certainty of contracts and the learned Judge erred in so deciding.

8. Whether the learned Judge erred in deciding to rely on the expert report of only one party to the dispute to determine the value of an asset where the valuation is disputed by the other party and the appointment of the expert is not with the consent of that other party.

9. Whether the learned Judge erred in rejecting the Ewe report without affording Ewe an opportunity to explain or to defend his report and/or be cross-examined.

10. Whether, the learned Judge erred in not appointing a valuer or not referring the matter back to the arbitrator or not affording the Defendant an opportunity to obtain another valuation report, but instead ordered that the valuation be based only on the report of the Plaintiff's expert.

11. Whether the learned Judge's rejection of Ewe's report without affording Ewe the opportunity to explain or to defend his report and/or be cross-examined, is contrary to the principles of natural justice.

12. Whether the learned Judge's decision to reject one expert report, leaving a contested valuation to be decided by the expert report of only one party to the dispute, is contrary to the principles of natural justice and the learned Judge erred in so deciding.

36 On the first ground for leave, Mr Lok did not address each of the questions individually in his submissions. Instead, he made general submissions on the points which he said were raised by the questions. First, he submitted that Singapore is a commercial centre in which certainty in the law, especially with respect to partnership, to commercial law and shareholders' disputes, is extremely important. Cl 10.3, he said, was an "exit" clause that determined how the shares of an outgoing member of a partnership were to be determined. Whilst he accepted that cl 10.3 was not a one-off clause and therefore its interpretation would not usually be a matter of general importance, he said that in the local context such exit clauses were commonplace in partnership and other agreements and therefore how such clauses are to be interpreted would be of much interest to the commercial world and a decision of the Court of Appeal in this regard would significantly clarify the legal position.

37 Mr Lok further submitted that my decision, that the arbitrator should have used the Teh report alone for the purpose of valuing the goodwill of the Hougang partnership, would leave the law in a state of uncertainty. Parties had contracted to rely on two reports. If the court could, in the absence of parties' agreement, look at the merits of the reports and exclude one and rely only on the remaining report (a report that was commissioned and made for one of the contesting parties), parties would have no certainty as to whether their valuation reports which were allowed by their agreement would be upheld. The Court of Appeal should have the opportunity to decide whether this uncertainty should be left unaddressed. Further, the proposed questions of law crafted concerned how shares were valued in the contested valuation when no independent valuer had been appointed and this question must undoubtedly be of general importance.

38 Mr Lok emphasised that his questions of law dealt with the issues of whether the court's decision had been contrary to the intention of the parties; whether it had amounted to a rewriting of the partnership agreement and whether the decision had diminished the principle of contractual certainty. He submitted that the doctrine of giving effect to commercial intention should be heeded even though one party had produced an incomplete report. Where you had a contractual term stating that you were to take the average of two reports, then the role of the arbitrator was to take the two reports and find the average of those two unless there was fraud. If the arbitrator found that the expert had given undue weight to a factor, then he could not rewrite the report but only reject it. He would then have to tell the party to get another report done in the right way and that party could be

penalised in costs. Mr Lok agreed that if the court was wrong in holding that the arbitrator should not have used Ewe's report, it was difficult to say that a generally important question of law arose from that mistake. He argued however, that if the court was wrong in holding that Ewe's report plus Teh's report could be replaced by Teh's report alone, the question that would arise would be whether that decision represented a departure from the contractual bargain between the two parties ie that each be allowed to tender one report and an average be taken. The contract did not provide for an alternative mechanism if one report was rejected. It was a general commercial contract and therefore the court's decision would have an impact on other cases.

39 Mr Lok also contended that in both court and arbitration proceedings, parties may decide not to rely on certain documents or reports and may decline to disclose the same. Upon an application to the court or the arbitrator, disclosure of such documents may be ordered and the documents will then be admitted into evidence. It would appear from the court's decision in this case that such documents could not be relied on despite having been admitted into evidence. In his submission, the Court of Appeal ought to be given an opportunity to clarify whether that was the correct position. If the point was left unaddressed, it would cause considerable uncertainty because cases involving disclosure of documents under such circumstances are not unusual.

40 In relation to his point that my decision on the appeal had involved rewriting the contract between the parties, Mr Lok cited several authorities which restated the well known principle that the courts are not allowed to rewrite contracts between parties. Instead, the role of the court was to uphold agreements even though the result may appear capricious or unreasonable, and not withstanding that it may be suspected that the parties intended something different. In fact, even if the court were to imply a term, it could only do so where such term was so obvious that it went without saying. In this case, cl 10.3(iii) was found by the arbitrator to be binding. For the partners to argue that Mr How had elected not to follow it was neither correct nor to the point. Since that clause was applicable, then it had to be followed. It had provided for fairness between the parties in the matter of the value of the goodwill and this was done by ensuring that the value used came either from a mutually acceptable valuer or, if there was no such person, from the average of the valuations. The court in relying on the Ewe report alone had acted contrary to cl 10.3(iii) and re-written the contract. This decision was also contrary to the legal dictum expressed in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 that it is inappropriate for a court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination.

41 Mr Sreenivasan disputed that any question of law of general importance arose from the appeal such as to require determination by the Court of Appeal. He made the following points. First, the point of law upon which the appeal was determined arose from the specific pleadings in the arbitration. The factual matrix was unique to the case as it involved the pleadings in the case and the admissions made by Mr How when he was being cross-examined. An appeal from an arbitration award is not a platform to recast the case which was heard and determined by the arbitrator.

42 Mr How could not, Mr Sreenivasan submitted, seek on appeal remedies which he did not seek in the arbitration or in the appeal before the High Court. He could not set the clock back and change the nature of his case or go back on his assertions in the court below. Constant reference was made to the fact that the application of cl 10.3(iii) had been before the arbitrator. Mr Sreenivasan emphasised that in the arbitration *both parties* had taken the position that the merits of the various reports had to be evaluated and that the exchange mechanism in cl 10.3(iii) did not apply. The arbitrator could not and should not have taken a position contrary to the pleaded position and the submissions of both parties. Although the Ewe report was admitted, its contents were not proved by calling the maker. Its admission only showed that there was such a report which was not exchanged

and which Mr How objected to because he was suspicious of Mr Ewe.

43 The partners did not agree that the decision had the effect of rewriting the partnership agreement. Mr How was entitled to be paid his share of capital, profit and goodwill. The exchange mechanism having broken down, a determination had to be made and was made. The arbitrator had found that Teh's computation was in accordance with the Hougang partnership agreement and that it was the only valuation that had been carried out in accordance with that agreement. In ordering that payment should be made on the basis of Teh's report, the court had not acted contrary to the intent of the parties. The court had set aside a finding made on an unpleaded basis and had then accepted the arbitrator's finding that the Teh report complied with the agreement. The award made by the court was not based on any findings as to value made by the court. It was based entirely on the arbitrator's findings.

44 Mr Sreenivasan submitted that there was no question of general importance in the case. The entire fact situation was specific and arose from the conduct of Mr How in that when it suited his purpose, he stated that the merits of the valuation report should be looked at and when the merits went against him, he decided that it was a breach of natural justice that he was not allowed to shop around for another report. The question of law decided on the appeal which basically was whether relief could be given on an unpleaded case was not one that was to be decided for the first time or was unclear. The authorities submitted by both parties at the hearing had shown that the principles of law were clear and fixed. The decision did not rest on an interpretation of cl 10.3 and therefore could have no impact on the interpretation of similar clauses in other agreements. I accept this submission. I was not interpreting cl 10.3 when I decided the appeal. My decision arose out of unique circumstances which cannot be exactly replicated. No issue of general importance arose in that only well-established and non controversial principles were applied.

45 I turn now to consider the specific questions of law that Mr Lok put forward. Question 1 is actually the question of law considered in the appeal before me. It deals with whether the arbitrator had made a mistake in holding that the valuation method in cl 10.3 was applicable, in relying on the Ewe report even though Mr How himself had not entered it into evidence or relied on it in arbitration, and in applying the averaging procedure to the Ewe and Teh reports. In my judgment, this question is not a question of general importance. The way it is framed itself shows that the question relates to the specific arbitration involved in the appeal before me and the specific decisions made by the arbitrator. I gave leave to the partners to appeal on this question because I considered that in relation to the way the arbitration was conducted and the pleadings, the arbitrator's findings in relation to the application of the exchange procedure were obviously wrong. In relation to an appeal from my decision to the Court of Appeal in so far as the question of law is whether parties are entitled to expect their cases to be decided on the basis of their pleadings, that is a settled legal principle and needs no further legal discussion. I would add that it would be peculiar for me to now hold that my finding that the arbitrator was obviously wrong was itself obviously wrong.

46 Question 2 is whether I erred in varying the arbitration award by ordering that the partners should pay Mr How $54,017.47 instead of the 'averaged' amount awarded by arbitrator and by setting aside the costs order. Questions 3 and 4 are related to Question 2 as they are whether my aforesaid decision was contrary to the intention of the parties and whether it amounted to a rewriting of the partnership agreement. When the 3 questions are considered together, it can be seen that they too are specific to the facts of the case and the way in which the arbitration was pleaded and conducted. In giving the decision, I took the view that I was not rewriting the partnership agreement because the parties themselves had not pleaded that they wanted the agreement to be specifically enforced. In fact, both appeared to have agreed that in the way that circumstances had developed the averaging procedure no longer applied and therefore the individual reports had to be looked at to

determine the value of the goodwill. Clause 10.3(iii) set out a method of valuation but did not go on to provide what would happen if the parties failed to exchange their respective reports for the purpose of undertaking the averaging exercise. In the light of that vacuum, the parties were entitled to put forward their respective valuations to the arbitrator for determination as to which was the correct valuation and the arbitrator duly and carefully carried out this task and came to the conclusion that the Teh report was the only valid one. It was his finding that I applied when I ordered payment of $54,017.47. It should also be noted that that was a relief that was specifically requested in the application for leave to appeal against the award. No argument was made at that time that I should remit the case to the arbitrator for him to reconsider the Ewe report after Mr Ewe had been cross-examined or to enable him to consider any further valuation report that Mr How could produce. In any case, even if my decision did encompass a possible re-crafting of the partnership agreement, that was not a disputed question of law. Mr Lok cited many cases setting out and discussing this principle. It is so well established that no further authority on it is required.

47 Questions 5, 6 and 7 are basically the same question: they are whether my decision diminishes the principle of contractual certainty. At the risk of sounding repetitive, I do not consider that my decision can have such an effect as it was based on the pleaded case and it was the pleaded case that side-stepped the contractual position because both parties took the view that the averaging procedure was no longer applicable. So long as both parties follow the terms of a contract, there would be no uncertainty. In this case, Mr How did not follow cl 10.3(iii) in full. If he had exchanged the Koh report with the partners, then it is highly likely that there would have been no arbitration or, if there had been an arbitration, then his point would have been that the partners should have paid him the average of Mr Koh's value and Mr Teh's value. Taking such a stand would have meant that, if successful, Mr How would have been awarded less than Mr Koh's value of $474,201. That was not Mr How's position in the actual arbitration. He did not want any averaged amount. Instead what he wanted was the full $474,201 as he pleaded that this was the fair market value obtained by Mr Koh when he applied the correct method of valuation which was the income capitalisation method. If parties refuse to follow contractual provisions, they cannot thereafter contend that the court is contributing to contractual uncertainty simply because it resolves the issues actually in dispute notwithstanding that the parties have departed from the contractual framework.

48 Questions 8 to 12 deal with the same subject matter. Basically, they concern the decision to award Mr How the value found by Mr Teh rather than taking one of several alternative courses suggested in the questions. These alternatives were first, to afford Mr Ewe an opportunity to explain or defend his report or be cross-examined, second to appoint a valuer, third, to refer the matter back to the arbitrator and fourth, to afford Mr How the opportunity to obtain another valuation report. It was also suggested that there was a breach of natural justice on my part when I rejected Mr Ewe's report without affording him the opportunity of explaining his report or being cross-examined and or alternatively, that it was a breach of natural justice to reject one expert report and allow a contested valuation to be decided by the report of only one party to the dispute. The argument on breach of natural justice appears to me to be misplaced because Mr How had every opportunity he needed to make arguments on the various reports both before the arbitrator and before me. He did not ask the arbitrator for leave to call Mr Ewe and therefore cannot complain of any breach of natural justice arising from Mr Ewe's non appearance in court. It also cannot have been a breach of natural justice to accept the arbitrator's findings on the merits of the reports before him when such findings were made after hearing evidence and submissions. All that the court did was to implement such findings in the light of the pleadings in the arbitration. It was the arbitrator's task to evaluate the reports. He did so and found that only one was acceptable. An acceptance of that decision can in no way found a complaint of a breach of natural justice.

49 At the hearing of the appeal itself, it was not submitted on behalf of Mr How that the matter

should be remitted back to the arbitrator for his reconsideration. In fact, there would have been very little for the arbitrator to reconsider because all the evidence that the parties had chosen to lead was already before him and he had analysed all the reports. Having done so, he should have implemented his findings instead of casting about for another report so as to do the averaging exercise. Even more, it was not for me to do a valuation exercise and I had to accept the arbitrator's finding as to which report was valid. The arguments that an additional report should be called for and placed either before the court or before the arbitrator or that Mr Ewe should be cross-examined were not put forward either in Mr How's case on the appeal before me or in his submissions at that stage. Even in OS 752/2006 where Mr How was seeking leave to appeal, he did not ask for another report to be submitted. His fall back position there was that there should be an average between Mr Teh's and Mr Koh's report. Mr Lok indicated that if the matter went on appeal, he would ask the Court of Appeal to order that the matter be remitted to the arbitrator for the arbitrator to call for another report from Mr How so that an average could be taken under cl 10.3(iii). That order was not sought from me when I heard the appeal and there cannot have been an error in my failing to make an order that I was not asked for. I find difficulty in seeing how such 'failure' could form the basis of a principle of law of general importance.

50 Turning to the second requirement of "other special reason" Mr Lok submitted that I made a *prima facie* error of law in finding that cl 10.3(iii) was not applicable on the basis that it was not adequately pleaded. Mr How's position was that this clause was adequately pleaded because he had expressly pleaded that he was entitled to be paid the price of the shares, including capital and goodwill (the very words of cl 10.3(iii)) pursuant to the partnership agreement. He had thereby pleaded the essence and elements of cl 10.3(iii). I cannot accept that the pleading was adequate because although Mr How had averred that he was entitled to capital and goodwill he had not invoked the right to the exchange and averaging procedure under cl 10.3(iii) and that was not the relief that he sought. Mr Lok further submitted that in any event the issue as to whether this clause applied was specifically placed before the arbitrator and at the time of the hearing it was clear that the parties had each taken a position with respect to the clause and made submissions on it. Therefore, it was too late for the partners to take a technical procedural objection on appeal after the arbitrator had made his finding based on the submissions before him. I do not accept this argument either. Neither party dealt with the exchange procedure in its pleadings nor in its submissions. Whilst there may have been arguments on the applicability of cl 10.3(iii) to a retiring partner, those arguments did not lead to any submissions as to how the exchange procedure was to be applied in the situation before the arbitrator ie the one in which the procedure had been bypassed and the parties had each put forward their own expert's report as the sole basis of the determination of the value of the goodwill. I do not think that my decision on this point is obviously wrong so as to permit an appeal to the Court of Appeal.

51 Mr Lok further argued that if I had made my decision on the basis that 10.3(iii) was not applicable, I should have remitted that back to the arbitrator to determine the value of the shares in the absence of cl 10.3(iii). His submission was that it was not open to the court to substitute the price of the shares as determined by the arbitrator with the court's own valuation. This is because it was the arbitrator and not the court that was the finder of fact. I have given above the reasons why I made the order that I did. I did not substitute my own valuation for the arbitrator's valuation. I simply accepted the arbitrator's findings as to the validity of the various reports and adopted his holding that of the reports placed before him only the Teh report had valued the goodwill on the correct basis. No findings of fact were made by me. There was no question of remitting the matter back to the arbitrator since he had already evaluated all the evidence put before him and come to a reasoned conclusion on it.

Conclusion

52 Having considered the submissions made on behalf of Mr How, there appears to me to be much force in Mr Sreenivasan's argument that Mr How is trying to eat his cake and still have it. If leave is to be granted on the purported points of law posed by him, it would effectively amount to him being given the opportunity to re-write the partnership agreement, to re-write the pleadings and to re-write most of his case in the arbitration and at the appeal hearing before me. Mr How has raised issues in the present application that were not raised previously and having failed in his earlier cases, he now wishes to start anew and take a different approach. The issues he now takes are inconsistent with his position in the arbitration. There is no question of law of general importance to be brought before the Court of Appeal nor any special reason to allow the questions framed on behalf of Mr How to go forward on appeal. This application must therefore be dismissed with costs.