IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 258

Originating Summons No 752 of 2016

In the matter of Section 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Originating Summons No 185 of 2016

And

In the matter of an application by **TOBY THOMAS LANDAU**, Queen's Counsel of England

Toby Thomas Landau

… *Applicant*

JUDGMENT

[Legal Profession] — [Admission] — [Ad hoc]

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Introduction

1 This is an application to admit Mr Toby Thomas Landau QC ("the Applicant") under s 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") to represent China Machine New Energy Corporation ("CMNC"), a company incorporated under the laws of the People's Republic of China, in Originating Summons No 185 of 2016 ("OS 185"). OS 185 is CMNC's application to set aside an arbitral award dated 25 November 2015 ("the Award"). The Award was made in favour of Jaguar Energy Guatemala LLC, a corporation incorporated under the laws of Delaware in the United States of America, and AEI Guatemala Jaguar Ltd, a corporation existing under the laws of the Cayman Islands (collectively referred to as "Jaguar"). The Attorney-General supported the Applicant's application for admission while Jaguar and the Law Society of Singapore opposed it.

2 In OS 185, CMNC seeks to set aside the Award on any or all of the following grounds:[1]

(a) That a breach of the rules of natural justice occurred in connection with the making of the Award by which the rights of CMNC have been prejudiced, pursuant to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Article 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law").

(b) That the arbitral procedure in the arbitration was not in accordance with the agreement of the parties, pursuant to Article 34(2)(*a*)(iv) of the Model Law.

(c) That the Award is in conflict with the public policy of Singapore, pursuant to Article 34(2)(*b*)(ii) of the Model Law.

(d) That the making of the Award was induced by fraud or corruption, pursuant to s 24(*a*) of the IAA.

3 In support of this application, CMNC has relied on several atypical arguments it will raise in OS 185. One of those arguments, for example, is that Jaguar took steps to hinder its preparation for the arbitration by engaging in "guerrilla tactics", and that the tribunal issued unfair procedural orders and interventions in the course of the arbitration, as a result of which it was unable to present its case. This, CMNC argues, constituted a breach of its right to be heard under s 24(*b*) of the IAA or Article 34(2)(*a*)(ii) of the Model Law.

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[1] Originating Summons 185 of 2016, filed 26 February 2016

4 In my recent decision in *Re Wordsworth, Samuel Sherratt QC* [2016] 5 SLR 179 ("*Re Wordsworth*"), I admitted Mr Wordsworth QC to argue an application to set aside an investor-state arbitration award where the issues were observed (at [3]) to be "predominantly governed by principles of public international law". I added at [22] that if the only issue in that application involved a "fairly straightforward" due process challenge, "Mr Wordsworth's application would not pass muster".

5 The principal ground relied on by CMNC in OS 185 is that a breach of the rules of natural justice occurred. Would such a due process challenge "pass muster"? Inquiring whether the rules have been breached is necessarily a fact-sensitive exercise. The facts giving rise to such challenges may be fairly straightforward in some cases and more complex in others. But however complex the facts may be, the principles for setting aside an award for breach of natural justice are reasonably well-settled. Further, the inquiry will ultimately be based on the events as they have unfolded in the arbitration. That is largely, if not entirely, assisted by reviewing the record of the arbitration.

6 In addition to the due process challenge, CMNC has also raised what in its views are novel arguments, including the issue of whether there is a duty implied in the arbitration agreement to arbitrate in good faith. CMNC asserts that such a duty should be implied, a breach of which would justify setting aside the Award on the ground that the arbitral procedure was not in accordance with the agreement of the parties.

7 It is not uncommon to raise novel legal arguments in the course of court proceedings. But novelty *per se* should not be confused with complexity. Usually, there must be a factual substratum to support any argument, however novel or complex it may be. In view of the fact that this is an admission

application and not the underlying application in OS 185, this judgment will examine the appropriate level of scrutiny that a court should undertake of the "novel" issues in deciding whether it is reasonable, having regard to all the circumstances, to admit an applicant under s 15 of the LPA.

Background

8 The underlying dispute concerned a Lump-Sum, Turnkey Engineering, Procurement, and Construction Contract ("EPC Contract"), dated 29 March 2008. Under the EPC Contract, CMNC was to construct a power generation plant in Guatemala for Jaguar for the approximate sum of US$450m. The sum was to be paid progressively to CMNC by way of milestone payments.[2]

9 On 13 November 2009, CMNC and Jaguar amended the EPC Contract to allow Jaguar to issue debit notes to CMNC in place of the milestone payments which would fall due under the EPC Contract. On the same day, CMNC and Jaguar entered into a deferred payment security agreement ("DPSA"). This provided that the debit notes would be secured by Jaguar granting CMNC security interests over its collateral assets.[3] Under the DPSA, Jaguar had an obligation to provide evidence of the security interests and to perfect them. Jaguar began issuing debit notes on 15 November 2010 and eventually issued a total of 61 debit notes amounting to approximately US$129m.[4]

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2 Affidavit of Tan Beng Hwee Paul, dated 27 July 2016, at paras 10–12

3 Affidavit of Tan Beng Hwee Paul at paras 14–15

4 1st Affidavit of Wang Juan filed in OS 185 (Applicant's Bundle of Documents, Tab 6) at paras 42 and 43

10 The EPC Contract and the DPSA are both governed by New York law and provide for disputes to be resolved by arbitration according to the 1988 Rules of Arbitration of the International Chamber of Commerce ("the ICC Rules").[5] The seat of arbitration is stated to be Singapore.

11 I will briefly set out the parties' legal dispute over the EPC Contract and DPSA as well as their conflicting accounts of the procedural history of the arbitration.

12 According to CMNC, Jaguar refused to perfect certain security interests in October or November 2013, as required by the DPSA. CMNC made a formal demand in October 2013 for Jaguar to fully evidence and perfect the security interests within 30 days or, in the alternative, pay all the milestone payments which had accrued under the EPC Contract.[6] Jaguar did not comply with this demand. CMNC therefore declared an event of default under the DPSA and, pursuant to a letter dated 28 November 2013, took possession of the securities granted to it, including Jaguar's rights under the EPC Contract and the power generation plant.[7]

13 CMNC says Jaguar purported to terminate the EPC Contract on 14 December 2013[8] even though it had no right to do so given that CMNC had taken over its rights under the EPC Contract.[9]

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5 Affidavit of Tan Beng Hwee Paul at para 16

6 1st Affidavit of Wang Juan at para 293

7 Affidavit of Tan Beng Hwee Paul at para 20; 1st Affidavit of Wang Juan at para 294

8 1st Affidavit of Wang Juan at para 63

9 1st Affidavit of Wang Juan at para 64

14 CMNC alleges, further, that (a) beginning in October 2013, Jaguar employed security guards at the project site to prevent CMNC employees from removing documents and equipment; and (b) in December 2013, Jaguar evicted CMNC employees from the living quarters on the project site and prevented any re-entry with the threat of violence. [10] These acts show that Jaguar had started impeding CMNC's preparation for the arbitration even before Jaguar formally commenced the arbitration on 28 January 2014.[11] Jaguar then continued to employ guerrilla tactics to impede CMNC's preparation of its case throughout the procedural history of the arbitration.[12] These guerrilla tactics included, for example, Jaguar's procuring the detention of CMNC's Chinese employees in Guatemala on the basis that they were illegal immigrants, which affected CMNC's ability to prepare its witness statements, and Jaguar's theft of CMNC's hard disks containing important project documents from the employees' living quarters.

15 According to Jaguar, throughout the first half of 2013, CMNC was consistently behind schedule on the project.[13] By 11 October 2013, it decided to put CMNC on notice that it was not fulfilling its obligations under the EPC Contract.[14] Jaguar issued a number of notices of default to CMNC.[15] On 14 December 2013, Jaguar notified CMNC that the EPC Contract and the DPSA were terminated.[16]

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10 1st Affidavit of Wang Juan at paras 65–66

11 1st Affidavit of Wang Juan at para 103

12 1st Affidavit of Wang Juan at para 118 – 141

13 1st Affidavit of Maureen J Ryan filed in OS 185 (Respondent's Bundle of Documents, Tab 2) at paras 27–29

14 1st Affidavit of Maureen J Ryan at para 31; 1st Affidavit of Wang Juan at para 58

15 1st Affidavit of Maureen J Ryan at para 35

16 1st Affidavit of Wang Juan at para 63

16 Jaguar alleges that the so-called "guerrilla tactics" CMNC accuses it of were simply steps to ensure the completion of the project; they did not and were not intended to affect the arbitration.[17] Jaguar alleges that it did not forcefully take over the project site on 15 December 2013, and that it was in fact CMNC which refused to accept termination of the EPC Contract, threatened Jaguar with violence, and took steps to hinder Jaguar's completion of the project.[18] Jaguar alleges that CMNC engaged in procedural gamesmanship by repeatedly changing its legal and expert teams and repeatedly asking for extensions of time from the arbitral tribunal to meet procedural deadlines, in some cases even after those deadlines had passed.[19]

The arbitration

17 Jaguar commenced arbitration on or about 28 January 2014. This was pursuant to the ICC Rules.[20]

18 Jaguar sought a declaration that it had validly terminated the EPC Contract and damages comprising, among other things, liquidated damages resulting from delays caused by CMNC. It also sought a declaration that the DPSA was terminated, the security interests thereunder were extinguished, and the outstanding debit notes were cancelled.[21]

19 CMNC sought, among other things, declarations that Jaguar's failure to evidence and perfect the security interests constituted a material breach of

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17 1st Affidavit of Maureen J Ryan at para 15 and 83

18 1st Affidavit of Maureen J Ryan at paras 15–16

19 1st Affidavit of Maureen J Ryan at paras 13–14

20 1st Affidavit of Wang Juan at para 68

21 Arbitral Award (Applicant's Bundle of Documents, Tab WJ-1) at para 666

the DPSA, that Jaguar's purported termination of the EPC Contract and the DPSA was invalid and without legal basis, and that CMNC was entitled to extensions of time for the scheduled taking-over dates and additional payments as the tribunal thought appropriate.[22]

20 A three-member arbitral tribunal was constituted. The arbitration hearings took place on various dates between April 2014 and July 2015 in London, Singapore, Toronto, Hong Kong, and Dublin.[23]

21 In the Award rendered on 25 November 2015, the tribunal found in favour of Jaguar. The tribunal held that the DPSA was terminated, that the security interests were extinguished, and that the outstanding debit notes were cancelled. It also held that Jaguar had validly terminated the EPC Contract and awarded it US$129,389,417 in damages for CMNC's breaches of contract, as well as interest and costs.[24] The tribunal substantially rejected all of CMNC's claims for relief.

22 CMNC now seeks, in OS 185, to set aside the Award on the grounds listed at [2] above.

The present application

23 The law governing the *ad hoc* admission of foreign counsel under s 15 of the LPA has been discussed on many occasions. The most authoritative exposition is the Court of Appeal's in *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [51]–[65].

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22 Arbitral Award at para 667

23 1st Affidavit of Wang Juan at para 73

24 Arbitral Award at para 1632

24 In any application for *ad hoc* admission, the court must first be satisfied that the applicant (a) is a Queen's Counsel or holds an appointment of equivalent distinction in any jurisdiction; (b) does not ordinarily reside in Singapore or Malaysia but has come or intends to come to Singapore for the purpose of appearing in the case; and (c) has special qualifications or experience for the purpose of the case (see ss 15(1)(*a*)–(*c*) of the LPA). These requirements are mandatory. If they are not met, the application must be dismissed.

25 If the mandatory requirements are satisfied, the court then decides whether to exercise its discretion to admit the applicant, having regard to the four matters set out in paragraph 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012). These are: (a) the nature of the factual and legal issues involved in the case; (b) the necessity for the services of a foreign senior counsel; (c) the availability of any local Senior Counsel or other advocate and solicitor with appropriate experience; and (d) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case ("Notification matters").

Issues in OS 185

26 There are two overarching considerations of the *ad hoc* admissions regime: identifying the issues in contention in the underlying application, and assessing whether there is a need for foreign counsel's assistance with reference to those issues, "need" for this purpose encompassing that of the litigant and the court (see *Re Wordsworth* at [39]).

27 I propose to start by describing in some detail the issues to be argued in OS 185. There are a number of them but, for this application, counsel for the

Applicant, Mr Paul Tan, chose to focus only on four.[25] During the hearing before me it became clear to me that whether or not these four issues were novel and complex was the key point of departure between the opposing parties in this application. I shall describe them with reference to the grounds of challenge of the Award and the facts giving rise to the challenges.

28 The first issue is whether a party's obstructive conduct before and during an arbitration can constitute an infringement of the other party's right to be heard, giving rise to a ground to set aside an award under Article 34(2)*(a)*(ii) of the Model Law. CMNC alleges that Jaguar took steps to hinder its preparation for the arbitration by, among other things, employing guerrilla tactics.[26] For example, it is said that Jaguar denied CMNC access to documents stored on the project site and bribed Guatemalan officials to detain CMNC staff who had knowledge of the case just before submissions were due in the arbitration.

29 The second issue, linked to the first, is whether such obstructive conduct *also* amounts to an infringement of an implied duty in the arbitration agreement to arbitrate in good faith and, if so, whether a breach of this implied duty would justify setting aside the Award on the ground that "the arbitral procedure was not in accordance with the agreement of the parties" (see Article 34(2)(*a*)(iv) of the Model Law).

30 The third issue is whether the tribunal's alleged hostility towards CMNC, as manifested in unfair procedural orders and interventions in the course of its giving evidence, meant that CMNC was "unable to present [its]

[25] Notes of Evidence (9 September 2016) at p 1, lines 38–39; Applicant's Submissions at paras 35(a), (b), (c), and (e).

[26] Affidavit of Tan Beng Hwee Paul at para 24

case" (see Article 34(2)(*a*)(ii)) of the Model Law). CMNC's primary complaint is over the tribunal's use of an Attorney's Eyes Only ("AEO") order, a procedural order for safeguarding confidential information. CMNC takes issue with the tribunal allowing Jaguar's application to subject the disclosure of commercially-sensitive documents to an AEO order.[27] The tribunal also allowed Jaguar to unilaterally designate further documents as AEO, which meant that only CMNC's external counsel and expert witnesses could view them. Had CMNC wanted its employees to have access to those documents, CMNC would have had to first apply to the tribunal for disclosure on a document-by-document basis.[28] Jaguar eventually designated more than 18,000 documents as AEO.[29] Although CMNC's external counsel and expert witnesses had access to these documents, CMNC asserts that its ability to prepare its case was nonetheless affected. CMNC's external counsel and expert witnesses did not possess sufficient knowledge of the project to properly evaluate the documents; only those employees of CMNC who had been involved in the project did.[30] CMNC alleges that the tribunal turned a deaf ear to its repeated requests for the AEO order to be lifted. However, the AEO order was granted with liberty to CMNC to apply for its witnesses to view the documents though no such application was ever made by CMNC.[31] Furthermore, CMNC did apply to the tribunal to lift the AEO order but decided to withdraw the application on the basis that it was in discussion with Jaguar to resolve the AEO issue. In any event, the AEO order was eventually

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27 Affidavit of Wang Juan at paras 145–146

28 Affidavit of Wang Juan at para 152

29 Affidavit of Wang Juan at para 153

30 Affidavit of Wang Juan at para 159

31 Notes of Evidence (9 September 2016) at p3, lines 15–17

lifted by consent on 18 March 2015, about four months before the main evidential hearing took place in Dublin in July 2015.

31 The fourth issue is whether enforcing the Award would be contrary to the public policy of Singapore within the meaning of Article 34(2)(*b*)(ii) of the Model Law. CMNC alleges that the Award is in conflict with public policy because it was obtained by Jaguar through guerrilla tactics both prior to and throughout the arbitration.[32] CMNC also alleges that the Award was contrary to public policy because of corruption. Jaguar originally had a claim for "post-termination public relations costs" amounting to US$2,526,071 but withdrew the claim after it emerged during the main evidential hearing that a representative of Jaguar, one Ernesto Cordova, had bribed high-ranking officials in Guatemala to obtain assistance in relation to Jaguar's dispute with CMNC and the completion of the project.[33] The allegations against Cordova affected Jaguar's claims because it appeared that Jaguar had paid those bribes to Guatemalan officials through a woman called Karen Cancinos, who had allegedly a fictitious public relations consultancy contract with Jaguar, and whose fees were part of the "public relations costs" claim which Jaguar withdrew.[34] CMNC hence suggests that part of Jaguar's claim for the costs of completion was attributable to the bribes Jaguar had paid.[35] CMNC further alleges that the tribunal had a duty, which it failed to discharge, to investigate the impact of the corruption allegations on Jaguar's claims, in particular, the claim for costs to complete.[36] An ancillary issue which hence arises is whether an arbitral tribunal has such a duty in the first place.

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32 Affidavit of Wang Juan at para 262

33 Affidavit of Wang Juan at para 268

34 Affidavit of Wang Juan at paras 269–270

35 Affidavit of Wang Juan at para 271

Mandatory requirements

32 It is undisputed that the Applicant satisfies the formal requirements in s 15(1)(*a*) and (1)(*b*) of the LPA. He was appointed Queen's Counsel in 2008.[37] He resides in the United Kingdom and intends to come to Singapore to represent CMNC in OS 185.

Special qualifications and experience

33 As for s 15(1)(*c*) of the LPA, counsel for Jaguar, Mr Daniel Chia, indicated in the course of the hearing his willingness to accept, in contrast to the position in his written submissions, that the Applicant does possess special qualifications and experience for the purpose of the case.[38] Only the Law Society maintained that he does not.[39] Its grounds of objection were as follows:

(a) Regarding the first and third issues, the court's task is to determine if the specific facts alleged by CMNC amounted to a breach of natural justice. There was no evidence that the Applicant possessed any special qualifications or experience which could not be found among local counsel.[40]

(b) As regards the second issue, the Applicant does not have special qualifications and experience because the previous occasion on which he dealt with the implied duty of good faith was when he sat as

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36 Affidavit of Wang Juan at para 278

37 Affidavit of Toby Thomas Landau QC at p 21

38 Notes of Evidence (9 September 2016) at p 5, line 3

39 Notes of Evidence (9 September 2016) at p 5, lines 7–9

40 Law Society's Submissions at para 30

an arbitrator in an investor-state arbitration. The present case, on the other hand, arose from an international commercial arbitration.[41]

(c) Finally, as regards the fourth issue, the Law Society submitted that the IAA is a piece of local legislation. Local jurisprudence would be most relevant when deciding whether the Award conflicts with the public policy of Singapore. The Applicant "cannot reasonably be argued to possess the relevant qualifications and experience for this".[42]

34 I am not persuaded by these submissions. The Law Society's first argument seems to imply that local counsel would be no less well-placed to argue OS 185. That is a point which goes to the second and third Notification matters (*ie*, the necessity of foreign counsel and the availability of local counsel) which I will separately examine below.

35 Its second argument is hardly an objection. It appears to be an implicit admission that the Applicant does have special expertise, since it shows that the Applicant has in practice confronted the issue of the duty of good faith before albeit in a different capacity and under a different arbitration regime.

36 Its third argument is not persuasive either. The concept of "public policy" under the IAA does not refer to the political stance that Singapore takes against corruption. As the Court of Appeal held in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59], "public policy" for the purpose of setting aside an award refers to fundamental principles of law and justice. Corruption, bribery, or fraud would offend such fundamental principles, which would be common to most jurisdictions

41 Law Society's Submissions at para 36

42 Law Society's Submissions at para 42

adopting the Model Law. Therefore, the court hearing OS 185 is not strictly concerned with local legislation "that has no analogue elsewhere" such that it would be ordinarily difficult to show that foreign counsel has special qualifications or experience for the purpose of the case (see *Re Beloff* at [56]). It follows that the challenge to an arbitral award based on public policy is not, as the Law Society appears to suggest, a local-centric one. Granted, the concept of "public policy" under the IAA cannot be interpreted without reference to local jurisprudence on this point. But the Law Society's submission that the Applicant "cannot reasonably be argued to possess the relevant qualifications and experience" simply because local jurisprudence is involved would imply that no foreign counsel could ever have such qualifications or experience so long as local jurisprudence is involved. That would be to take an unduly restrictive approach to the admissions regime.

37 Apart from that, there is consensus that the Applicant possesses wide-ranging experience in arbitration and certainly has the requisite expertise to address the four issues identified by Mr Tan. I have no doubt that, for the purpose of s 15(1)(*c*), the Applicant does possess special qualifications and experience that will allow him "to expertly discharge [his] duties to the client and to the court 'for the purpose' of the case for which *ad hoc* admission is sought" (see *Re Andrews Geraldine Mary QC* [2013] 1 SLR 872 ("*Re Andrews*") at [39]). I turn to consider, with reference to the Notification matters, whether I should exercise my discretion to admit him to represent CMNC in OS 185.

Notification Matters

Nature of factual and legal issues in this case

38 The first Notification Matter is "directed at a qualitative evaluation of the character of the issues in the case", which would call for an assessment of "whether the issues are complex or difficult, or novel, or of significant precedential value" (see *Re Beloff* at [61]). Based on the previous cases on admission applications, it seems to me that there are a number of general principles which can guide this qualitative evaluation.

39 It is useful to ask how likely it is that the stated issues will actually arise for determination. Allegedly novel or complex points of law may not need to be dealt with if, for example, the other party does not intend to pursue them (see *Re Caplan Jonathan Michael QC* [2013] 3 SLR 66 ("*Re Caplan*") at [63]–[64]), or if the court can say with the benefit of clear legal authority that they will not arise on the facts of the case (see *Re Rogers, Heather QC* [2015] 4 SLR 1064 ("*Re Rogers*") at [54]).

40 Having identified the factual and legal issues that will arise, the court should give some thought as to how they are likely to be argued. It may also direct its mind towards the "procedural or evidential complexities which will or are likely to arise in the course of the underlying case" and which will influence the resolution of the issues (see *Re Andrews* at [47]). Such an inquiry will vary depending on the nature of the application for which admission is sought.

41 Where disputes of fact are concerned, it is important to look at the nature of the supporting evidence. If the evidence is documentary, one may ask whether it is "so convoluted or esoteric as to be beyond the comprehension

of competent local counsel" (*Re Caplan* at [61]). If the evidence is largely oral, the credibility of witnesses will be significant and the trial experience of foreign counsel may be more pertinent to the overall question of "need" (see *Re Andrews* at [73]). This would be relevant if the applicant is being sought to be admitted for the trial of the action or where cross-examination is ordered. This consideration does not arise here.

42 As regards questions of law, the court should sieve out those which are already well-settled (see *Re Beloff* at [80]; *Re Rogers* at [53]). Such questions are unlikely to give rise to any unusual complexity or difficulty. On the other hand, legal propositions which have to be extracted from a long line of possibly conflicting authorities may justifiably be regarded as more complex (see *Re Fordham, Michael QC* [2015] 1 SLR 272 at [77]). In this regard, it may be relevant to consider the breadth and depth of research that will have to be undertaken to address any legal issue (see *Re Lord Goldsmith Peter Henry QC* [2013] 4 SLR 921 ("*Re Lord Goldsmith*") at [52]).

43 Besides looking at how the arguments are likely to be presented, it is also relevant to consider how the court hearing the case is likely to resolve the factual and legal issues. To illustrate this point, in the context of applications to set aside an arbitral award, there is a difference between setting aside an award on jurisdiction, which involves a *de novo* standard of review and thus a greater possibility of factual and legal complexity (see *Re Wordsworth* at [44]), and an application to set aside for breach of natural justice, for example, for which the scope of curial intervention is far more limited (see [54] below).

44 However, in considering how the issues are likely to play out, the court should be wary of delving too deeply into the merits of the case given that it is not hearing the underlying case for which admission is sought. Yet it cannot

completely ignore either party's prospects of success. The Court of Appeal in *Re Beloff* described the tension in this way (at [79]):

> In forming an assessment of the complexity of the legal issues in a case the question arises as to the extent to which the court should consider the substantive merits of the case. Certainly not too much, for at the preliminary stage of applying to admit foreign senior counsel the parties' arguments may not yet be fully formed; yet, not too little, for if the substantive merits are unarguably in one party's favour then it cannot be said that the issues are complex.

45 I am mindful of these competing considerations because Jaguar alleged that two of CMNC's arguments to set aside the Award – based on the implied duty of good faith and the tribunal's alleged duty to investigate corruption – were neither novel nor complex but were simply without legal basis.[43]

46 I think the focus of the inquiry should not be whether the issues raised in the substantive application are arguable. Even in *Re Beloff*, where the Court noted that the parties had put forward "fairly developed contentions" in support of their positions in the underlying case, the Court went no further than to note that on one of the issues, the arguments raised by the party resisting the admission of foreign counsel "seemed persuasive" though acknowledging that this might have stemmed from the absence of any riposte from the other side (at [79]). It would not be appropriate for the admission application to develop into a lengthy preliminary contest in advance of the actual case for which admission is sought. That said, the strength of the support for either party's case, to the extent that it can be demonstrated, would be something to be borne in mind, not in deciding who has the better case, but as factors which may impact on the court's assessment of the novelty or complexity of the issues. It would suffice to identify the legal issues, the

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[43] Respondent's Submissions at paras 82 and 93

"fairly developed contentions" which will be advanced at the substantive hearing and the authorities which will be relied upon in support of the contentions. If it is shown convincingly that some of the contentions are plainly unarguable or far-fetched, then, as noted in *Re Beloff*, it cannot be said that they will be complex. In such a case, it will hardly be appropriate or necessary to admit foreign counsel to argue those points.

47 In this case, although Jaguar did suggest that a number of CMNC's arguments in OS 185 might be "devoid of any legal or precedential basis"[44], they have not quite explained why there is no legal basis beyond pointing to the lack of judicial authority. They did, however, put forward a number of local authorities showing that the arguments raised by CMNC may not be novel, or at least may be resolved by applying settled principles. I will consider them in due course.

48 The salient point in my view is this: the court should not analyse the legal issues in a vacuum. It is important to relate those issues to the facts and evidence which will be relied upon so as to appreciate the shape the legal arguments will eventually take in the substantive hearing. For present purposes, one thing is clear. The facts and evidence presented by the parties in the arbitration can no longer change and have been entirely chronicled in the record of the arbitration.

49 With these considerations in mind, I turn to the issues in OS 185.

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[44] Respondent's Submissions at para 112

The first issue – obstructive conduct

50 I start with the first issue on obstructive conduct. Mr Tan submits that: (a) whether obstructive conduct can constitute a breach of the other party's right to be heard is a novel issue;[45] (b) whether a tribunal's failure to restrain such conduct can be a ground for setting aside an award is a point on which there is comparatively little discussion of in the literature;[46] and (c) the court's decision on this point will also be of precedential value because it will set normative standards of conduct for arbitrating parties whether in Singapore or elsewhere.[47] The Attorney-General was in broad agreement.[48]

51 Jaguar submits that the court will first have to undertake a comprehensive review of the record of the arbitration to determine if the allegations about Jaguar's obstructive conduct are made out. Only then can it consider whether, at law, that conduct justifies setting aside the Award as a consequence of CMNC's right to be heard being affected. Determining that would not be a legally complex inquiry.[49]

52 In my judgment, whether Jaguar's obstructive conduct would justify setting aside the Award for breach of natural justice is not so complex or novel a point as to lean in favour of admission. There was general agreement that the legal principles on setting aside an award for breach of natural justice have been considered on many occasions by our courts.[50] Here, it is the tribunal's

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45 Applicant's Submissions at para 75

46 Applicant's Submissions at para 75

47 Applicant's Submissions at para 77

48 Attorney-General's Submissions at para 51

49 Respondent's Submissions at paras 67–69

50 Applicant's Submissions at para 20; Respondent's Submissions at para 70; Law

alleged failure to recognise or rein in Jaguar's obstructive conduct – its guerrilla tactics – which is said to be a breach of CMNC's right to be heard.[51] The conduct of the tribunal being challenged may not specifically have been the subject of any previous setting-aside application but the crucial inquiry remains the same, *ie*, whether there was any causal connection between the tribunal's alleged failure to respond to such obstructive conduct and the ability of CMNC to present its case. The court will necessarily examine the objections, if any, which were raised by CMNC in relation to such obstructive conduct during the arbitration and the consequential directions and orders, if any, made by the tribunal.

53 It is increasingly the case that a variety of procedural decisions made by tribunals are challenged for being in breach of their duty to give each party a fair hearing. As I previously observed, this reflects parties' attempts to expand the boundaries of natural justice as a ground for setting aside an award (see *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [3]). However, our courts have resolved such novel challenges by applying the settled legal principles on when an arbitral award should be set aside for breach of natural justice. There is no suggestion that the court hearing OS 185 cannot do likewise.

54 The dispute will thus focus on whether the tribunal's response, or lack thereof, to Jaguar's misconduct warrants setting aside the Award. This can be determined by examining the procedural history of the arbitration which has been set out in affidavits filed by CMNC and Jaguar in OS 185. I do not think such a review would be particularly difficult, complex, or beyond the range of

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Society's Submissions at para 50

[51] Applicant's Submissions at para 78

local counsel's competence. The review is essentially objective in nature and one will have to bear in mind the limited scope for curial intervention where breaches of natural justice are alleged given the high threshold that must be crossed before a court will set aside an award. It is not a court's task "to rake through the award and the record fastidiously with the view to finding fault with the arbitral process" (see *BLB and another v BLC and others* [2013] 4 SLR 1169 at [35]). Any alleged breaches of natural justice must be "demonstrably clear on the face of the record" (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [125]). This means that the factual substratum of such a challenge would be within a reasonably narrow compass. In this connection, it is material to note Mr Chia's submission that CMNC did bring the guerrilla tactics to the attention of the tribunal for the purpose of seeking extensions of time. It is not disputed that the tribunal did grant the extensions (though some might have been shorter than what CMNC requested).[52] Hence, the tribunal would have considered CMNC's complaint as regards the guerrilla tactics.

Second issue – implied duty of good faith

55 Mr Tan submits that a Singapore court has yet to consider the issue of whether there is a duty to arbitrate in good faith. The available commentary on this duty is confined to examining its operation within the arbitral process and does not address how this duty can give rise to grounds for setting aside an arbitral award.[53] The Attorney-General agrees there has been no local judicial determination on this implied duty to arbitrate in good faith, which makes it a novel and complex issue.[54]

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52 Notes of Evidence (9 September 2016) at p 3, lines 10–12

53 Applicant's Submissions at paras 80–81

56 In response, Jaguar submits, as it did with the first issue, that the court must first be satisfied that the acts giving rise to the breach of the implied duty to arbitrate in good faith did occur – the implied duty would not be a live issue otherwise. Even if it were, Jaguar submits that there is simply no legal basis for setting aside an arbitral award based on a breach of such an implied duty.[55] The Law Society submits that implying a duty to arbitrate in good faith is a matter of interpreting an arbitration agreement. This is a matter our courts routinely engage with.[56]

57 It seems to me that the question of an implied duty to arbitrate in good faith only assumes relevance in OS 185 if: (a) such a duty is shown to exist; (b) Jaguar breached the duty; and (c) such a breach translates into a ground to set aside the Award.

58 Whether the duty exists does not appear to me to be an entirely novel question. I was referred to an article showing that the duty has been recognised in awards and cases from around the world (see "Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process", The Paris Journal of International Arbitration (2010), Vol 3, p 737). For example, one arbitral tribunal held that it was a breach of the duty of good faith to obtain evidence illegally (in that case, by wiretapping) and, in response, issued an order ordering the guilty party not to intercept communications. There are also a number of judicial decisions to the effect that a party who has not acted in good faith – *eg*, by being guilty of undue delay – will be estopped from challenging the jurisdiction of the arbitral tribunal. Such a duty can arguably

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54 Attorney-General's submissions at paras 50(a) and 51

55 Respondent's Submissions at paras 82–83

56 Law Society's Submissions at para 54

be seen as inherent in an arbitration agreement, or implied by the governing law of the arbitration agreement or the law of the seat of the arbitration. Mr Tan has not explained why it would be necessary to admit the Applicant to make the case for recognising a duty on any of these grounds. In particular, so far as the duty is a contractual one, I agree with the Law Society that the concept of a contractual duty of good faith is not unfamiliar to our courts.

59 Whether Jaguar breached the duty, if such a duty exists, is a factual inquiry. There is no reason why local counsel cannot undertake such a task. Any novelty at best lies in developing the link between one party's breach of its duty of good faith and the failure of the tribunal to conduct the arbitration in accordance with the agreement of the parties, which would be a ground to set aside the Award under Article 34(2)(*a*)(iv) of the Model Law. According to Mr Tan, this point has yet to be decided by any court. If that is correct, then the Applicant or suitable local counsel would both be starting from the same base, *ie*, arguing from first principles. I fail to see why local counsel would not be able to argue this issue competently. The argument seems to imply that arguing novel issues or ground breaking points of law is outside the competence of local counsel. However, as Jaguar rightly observed, a number of novel principles of law in setting-aside applications have been argued by local counsel.[57]

60 I should add that the breach of an alleged duty to arbitrate in good faith is *solely* premised on the same guerrilla tactics which are relied on in support of the alleged breach of natural justice. If those underlying facts are found in OS 185 to constitute a breach of natural justice, then there is hardly any utility in deciding whether it would separately justify setting aside the Award under

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[57] Respondent's Submissions at para 38

Article 34(2)(*a*)(iv) of the Model Law. By the same token, if the facts do not amount to a breach of natural justice, then I have reservations about whether those same facts would justify setting aside the Award under Article 34(2)(*a*)(iv) of the Model Law. The short point I wish to make here is simply this: ultimately, whether there is a duty to arbitrate in good faith may be a moot point on the facts of this case given the dual purpose of the guerrilla tactics allegation. However, I do not wish to pre-judge this issue. It is CMNC's prerogative to argue this issue in OS 185. For now, I will only say that I am not convinced that the alleged novelty is beyond the competence of local counsel.

Third issue – use of AEO orders

61 I do not regard the third issue – whether the tribunal's use of AEO orders impinged on CMNC's right to be heard – as sufficiently novel or complex to lean in favour of admitting the Applicant to argue the point.

62 The AEO order is a procedural order rooted in US jurisprudence. The Applicant therefore suggests that the court will have to consider how the evidential practice in one jurisdiction (the US) can impinge on another party's expectations of due process.[58] In addition, Mr Tan submits that, given the suppressive effect of AEO orders, a determination on this issue will require a careful examination of first principles and a comparative understanding of due process in arbitration.[59]

63 I disagree with Mr Tan and accept Jaguar's submissions on this point. The form of an AEO order may be relatively unfamiliar but the idea of a

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[58] Applicant's Submissions at para 84

[59] Applicant's Submissions at para 86

tribunal managing the discovery of confidential documents is not. Whether it is a breach of the rules of natural justice for a tribunal to allow one party not to produce documents to the other side in discovery on the ground of confidentiality was considered in the case of *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871. The imposition of the AEO order is one of a number of procedural orders imposed by the tribunal that CMNC challenges. Another order was the tribunal's decision to exclude an expert report.[60] These orders regulating the taking of evidence are part of a tribunal's case management powers. It is not uncommon to challenge the exercise of such powers as being a breach of the rules of natural justice. In *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, for example, it was alleged that the arbitral tribunal had breached the rules of natural justice in ordering the plaintiff to file a report within a short time, and by excluding an expert report it sought to admit.

64 Therefore, I do not think this is a novel point of sufficient complexity beyond the competence of local counsel.

Fourth issue – duty to investigate corruption

65 CMNC claims that the tribunal had a duty to investigate the corruption allegations especially in the face of Jaguar's remarkably high claim for costs to complete and the manner in which Jaguar withdrew its claim for the post-termination public relation fees.[61] CMNC says that the tribunal should have investigated the allegation of corruption by, for example, recalling

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60 Affidavit of Tan Beng Hwee Paul at para 35

61 Affidavit of Wang Juan at para 282

Mr Cordova.[62] Its failure to do so renders enforcement of the Award contrary to public policy.

66 I do not think the existence of the duty to investigate corruption is an exceptionally novel point. It has been accepted as a general principle in our jurisprudence that an arbitral tribunal has the duty and mandate to investigate matters raised which, if proven, would render the award unenforceable for being contrary to public policy (see *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*")). The Court of Appeal noted at [72] that:

> … public policy is a question of law which an arbitrator must take cognisance of if he becomes aware of it in the course of hearing the evidence presented during arbitral proceedings.

The Court endorsed the following passage from Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at vol 1, p 835:

> Where the parties' contract raises issues of illegality, violations of public policy or mandatory law, or performance of administrative functions, then the tribunal's mandate must necessarily include consideration of those issues insofar as they would affect its decision or the enforceability of its award.

67 The question is whether the statement of principle above is broad enough to cover allegations of corruption. I do not think the argument that it does will be very difficult to make. I note that CMNC has filed an expert opinion in OS 185 from a leading arbitrator, Professor Gabrielle Kaufmann-Kohler, whose view is that the arbitrator's duty to raise and inquire into issues of corruption is "well established among courts, tribunals and scholars".[63]

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62 Notes of Evidence at p 2, line 29 to p 3, line 2

63 Affidavit of Gabrielle Kaufmann-Kohler filed in OS 185 (Applicant's Bundle of Documents, Tab 8) at GK-1, para 53

Since CMNC's own expert has acknowledged that the duty to investigate corruption is "well established", CMNC's local counsel should be able to develop the argument with reference to the relevant authorities identified by CMNC's expert.

68 The more difficult question will be *how* a tribunal is expected to investigate allegations of corruption. That is what CMNC seems to imply the tribunal should have done. It is not clear how a tribunal would discharge such a role. Professor Kaufmann-Kohler suggests that in aid of their investigation, arbitrators may request additional evidence or explanations from parties, draw adverse inferences, or reverse the burden of proof if there is sufficient evidence supporting the corruption allegation.[64] However, at no time after having brought the corruption allegations to the tribunal's attention did CMNC ask the tribunal to recall any witness or seek any additional order from the tribunal in relation to the corruption allegations. There is no suggestion by CMNC that had the tribunal inquired further into these allegations, it would have uncovered evidence to show that the Award was indeed tainted by fraud and/or corruption. If so, I have difficulty with Mr Tan's submission that the tribunal ought, on its own motion, to have investigated further. In a limited sense, I can agree that the argument is "novel" in that it has never been attempted before. But it does not follow that it is complex beyond the competence of local counsel.

69 In the final analysis, I am not sure that the question of a tribunal's investigative powers will occupy centre stage in OS 185. The dispositive issue is whether the Award should be set aside for being in conflict with Singapore's public policy. That appears to turn on the factual question of

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[64] Affidavit of Gabrielle Kaufmann-Kohler at GK-1, para 41

whether Jaguar's claims were indeed tainted by bribery or corruption. It is important to bear in mind that the tribunal did address its mind to this issue. It found that: (a) the allegations of corruption had not been established in any court; (b) no *evidence* was submitted to the tribunal that would enable it to make any judgment or conclusion that could have any bearing on the matters in issue; and (c) Jaguar had "quite properly" withdrawn a claim for the public relations costs which might have been affected by corruption.[65] The tribunal did find that there was no reason to doubt that the payments were not illegal. This, as Jaguar submits, is essentially a finding of fact by the tribunal.[66] Accordingly, there is no question of the tribunal failing in its duty to *consider* the allegations of corruption. It is clear that if a tribunal finds *as a fact* that a contract is not illegal, a court cannot substitute its own factual findings in place of that (*AJU v AJT* [2011] 4 SLR 739 ("*AJU*") at [65]); the court does not have the power to examine the facts of the case afresh (*AJU* at [71]). In that sense, as I said with the natural justice issue (at [54] above), the scope for curial intervention is limited, as is the extent of submissions that can be made. On the whole, I am not convinced that there is a need for foreign counsel to argue this issue.

70 That leaves one further argument on the factual complexity of OS 185 to address. Mr Tan submitted that the 30,000 pages of affidavits that have been filed thus far in OS 185 is testament to the factual complexity of the case. The record of the arbitration itself runs to well over 250,000 pages.[67] But it is not unusual, in modern litigation, for documentary evidence to run into tens of thousands of pages. That the evidence in OS 185 is voluminous is therefore

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65 Award at para 1859

66 Respondent's Submissions at para 88

67 Applicant's Submissions at paras 101–102

not a factor in favour of admission. To hold otherwise might suggest that local counsel do not have the requisite competence to handle a document-intensive case. That would be quite unfair to the local Bar. Besides, the task of the parties and the court in reviewing the voluminous documentary evidence in the context of a setting aside application is quite different from the task of a trier of fact. It is even less demanding as compared to an appeal given the very limited grounds for curial intervention. Findings of facts have already been made by the tribunal. The court's task is instead restricted to reviewing the documents insofar as they are relevant to the limited grounds for setting aside the Award.

71 I have therefore come to the view, having regard primarily to the criteria of novelty and complexity, that none of the four legal issues raised by Mr Tan lean in favour of admitting the Applicant. That said, it is important to consider how the four Notification matters relate to or affect one another (*Re Beloff* at [55]). Although the issues are not in my view unduly novel or complex, there may still be a need to admit the Applicant if it is shown that there are few local counsel able to handle these issues. I turn then to consider the second and third Notification matters.

Necessity of foreign counsel and availability of local counsel

72 It has been repeatedly underscored that the current admissions regime is to be viewed through the prism of "need" (see *Re Beloff* at [42], *Re Wordsworth* at [1]). However the question of "need" is necessarily relative: is there a need to admit the Applicant "because of a lack of available and appropriate local counsel" (see *Re Beloff* at [44])?

73 From the court's perspective, there is no significant need for foreign counsel. It should be clear from the preceding paragraphs that there is ample local jurisprudence on applications to set aside arbitral awards. It can reasonably be assumed that the court would be *au fait* with this area of law. Although the court hearing OS 185 would certainly *benefit* from having the Applicant's formidably wide-ranging experience, it does not follow that there is a "*need*" to admit him. Furthermore, setting-aside applications are brought before our courts fairly frequently and local counsel would have the benefit of familiarity with local case law and of having argued similar challenges in the context of the IAA.

74 As for the availability of local counsel, Mr Tan admitted that it would not be beyond the ability of competent local Senior Counsel to address the issues *in isolation*. However, because all these complex issues arose *together* in this case, that had the effect of compounding the complexity of the case and "substantially limiting the pool of local advocates, even in the upper echelons of the local Bar."[68] I have difficulty understanding why local counsel would have the competence to handle *each* of the issues *in isolation* but somehow not be able to handle them *collectively*. Taking this submission to its logical conclusion may give the wrong impression that local counsel do not have the ability to handle cases with multiple complex issues.

75 Furthermore, I note that there is no indication from leading local counsel that such issues, viewed together, were indeed beyond their range of competence. Mr Tan however submits that, given the complexity of the case, the normal practice of consulting local counsel to assess whether they would take on a case is not relevant.[69] I cannot agree with this submission. As noted

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[68] Applicant's Submissions at para 106

in *Re Caplan* at [23], full details of efforts to ascertain the availability of local counsel should be set out. The reason for this requirement is clear. It is essential to establish a lack of available and appropriate local counsel to handle the case. I was prepared in *Re Wordsworth* to dispense with this requirement in *exceptional* cases (at [64]) and in that regard, I found that the issues in that case touched on public international law, which is not an area of law most local lawyers practise in.

76 The present case, however, is not such an exceptional one. Challenges to arbitral awards are brought before our courts fairly frequently. It is incumbent on Mr Tan to provide some detail at least of his efforts to ascertain the availability of local counsel. He did approach one Senior Counsel, Mr Lee Eng Beng SC. However, Mr Lee's reply that the Applicant would be "more well-placed than local counsel"[70] to argue the case is an implicit acknowledgment that the case is within the competence of local counsel, but that the Applicant is *better placed* to argue it. As aptly observed in *Re Lord Goldsmith* at [54], the fact that foreign counsel would do "an even better job" than local counsel "does not really address the question of necessity". Furthermore, I do not think it is satisfactory for Mr Tan to approach just one senior counsel from his own firm and to rely on his response as representative of the views of the local Bar. As a result, I do not have the benefit of the record of efforts by CMNC to engage local counsel and I am not prepared to assume, as I did in *Re Wordsworth*, that the pool of local counsel who can act in OS 185 will inevitably be small (or non-existent) such that there would be limited utility in going through this exercise. Based on the number of such applications argued by local counsel, it appears to me that the contrary is true.

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69 Applicant's submissions at para 111

70 Applicant's Submissions at para 113

I note in passing – and this was a point made by the Law Society as well – that CMNC has retained Rajah & Tann Singapore LLP, a leading local law firm with an established arbitration practice. It has five senior counsel within its ranks, each with an impressive track record in arbitration cases.[71]

Reasonableness

77 Mr Tan placed some weight on the Applicant's previous admission to appear in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372, a case involving complex questions of international arbitration law.[72] I do not think this is an especially significant consideration. This application should be assessed on its own merits with reference to the issues in the underlying application for which the admission is being sought.

78 On the whole, I conclude that this is not an appropriate case to admit the Applicant because the issues in this case are not sufficiently novel or complex *beyond* the competence of local counsel such that there is a need to admit the Applicant to represent CMNC in OS 185.

Conclusion

79 In the circumstances, the application is dismissed with costs fixed at $6,000 inclusive of disbursements. Consistent with the costs order in *Re Rogers* (see [66]–[68]), such costs are to be paid by the "true party" who stood to benefit from this application, *ie*, CMNC and not the Applicant.

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71 Law Society's Submissions at para 60

72 Affidavit of Tan Beng Hwee Paul at para 56

Steven Chong
Judge

Paul Tan, Rachel Low and Alessa Pang (Rajah & Tann Singapore LLP) for the applicant;
Daniel Chia, Ker Yanguang and Kenneth Kong (Morgan Lewis Stamford LLC) for the respondents in OS 185;
Jeyendran Jeyapal and Jeanette Justin (Attorney-General's Chambers) for the Attorney-General;
Christopher Anand Daniel and Harjean Kaur (Advocatus Law LLP) for the Law Society of Singapore.
