IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 271

Originating Summons Nos 1401 of 2019 and 874 of 2020

Between

(1) BTN
(2) BTO

… *Plaintiffs*

And

(1) BTP
(2) BTQ

… *Defendants*

Originating Summons No 1274 of 2020 (Summons No 471 of 2021)

Between

(1) CKR
(2) CKS

… *Plaintiffs*

And

(1) CKT
(2) CKU

… *Defendants*

Originating Summons 1275 of 2020 (Summons No 472 of 2021)

Between

(1) CKV
(2) CKW

… *Plaintiffs*

And

(1) CKX
(2) CKY

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Award] — [Recourse against award] — [Whether new grounds may be raised in subsequent affidavits in support of a setting-aside application]

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General Division of the High Court — Originating Summons Nos 1401 of 2019, 874 of 2020, 1274 of 2020 (Summons No 471 of 2021) and 1275 of 2020 (Summons No 472 of 2021)
S Mohan J
16, 17 June 2021

30 November 2021 Judgment reserved.

S Mohan J:

Introduction

1 When parties agree to arbitrate their disputes, they also agree to bind themselves to, and accept, the arbitral tribunal's decision on the underlying dispute – that includes accepting the outcome even if the losing party feels that the outcome is extremely harsh and the tribunal made a wrong decision. As succinctly expressed by the Court of Appeal in an oft-quoted passage from *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") (at [37]):

> A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many benefits of party autonomy, so too *must they accept the consequences of the choices they have made*. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come

> to regret, or offer them a second chance to canvass the merits of their respective cases …
>
> [emphasis added]

2 It is only in exceptional circumstances that arbitrants can successfully seek recourse through curial intervention, and it is axiomatic that there is no right of appeal to the courts against the decision of the tribunal on the merits. The courts must therefore be wary of creative arguments, limited perhaps only by the ingenuity of counsel, being deployed by an aggrieved party which, in substance, amount to no more than a *de novo* appeal on the merits of the dispute.

3 The parties before me are no strangers to the court. They have already engaged in one round of litigation before the High Court and the Court of Appeal as part of the plaintiffs' attempts to set aside a first partial award rendered by an arbitral tribunal constituted to hear the parties' disputes. The present series of applications brought by the plaintiffs represents the second battle in court between the parties in the wake of a number of further awards rendered by the same tribunal. I begin by recounting both the procedural history leading up to the applications that were heard by me and the factual background to the dispute between the parties.

Procedural history

4 The substantive dispute between the parties concerns the defendants' entitlement to certain payments defined as "Earn Out Consideration" (the "Earn Outs") in a share and purchase agreement (the "SPA") entered into by the parties.[1] A three-member tribunal (the "Tribunal") comprising Professor Lucy Reed as chairperson, Professor Robert Merkin QC and Professor Benjamin

[1] AB Vol VI at pp 3015 to 3016.

Hughes was constituted to resolve the dispute. After hearing the parties, the Tribunal issued a partial award on certain legal issues on 30 April 2018 (the "First Partial Award"). On 1 June 2018, the plaintiffs filed HC/OS 683/2018 ("OS 683"), seeking to set aside the First Partial Award on a multitude of grounds. On 16 September 2019, in *BTN and another v BTP and another* [2020] 5 SLR 1250 (the "Judgment"), Belinda Ang Saw Ean J (as she then was) dismissed the plaintiffs' application entirely. The plaintiffs appealed. On 23 October 2020, the Court of Appeal, in *BTN and another v BTP and another* [2021] 1 SLR 276 (the "Appeal Judgment"), affirmed the Judgment and dismissed the appeal.

5 While OS 683 was being heard, the arbitration proceedings continued. After the Judgment was rendered but before the Appeal Judgment was delivered, the Tribunal released a second partial award on 11 October 2019 (the "Second Partial Award"), a final award on 9 June 2020 (the "Final Award") and an additional award on 3 July 2020 (the "Additional Award") in favour of the defendants. In this judgment, these three awards will be collectively referred to as the "Awards".

6 HC/OS 1401/2019 ("OS 1401") is the plaintiffs' application to set aside the Second Partial Award while HC/OS 874/2020 ("OS 874") is the plaintiffs' application to set aside the Final Award (insofar as it pertains to the Tribunal's decisions on costs and interest) and the Additional Award. The plaintiffs contend that the Tribunal rendered the Second Partial Award (a) *infra petita* (*ie,* failing to decide a material issue that was within the scope of submission), (b) in breach of natural justice and/or (c) contrary to public policy. In essence, the plaintiffs' dissatisfaction with the Awards is founded on two main grounds. The first is that the Tribunal did not allow the plaintiffs, on the basis that it had not been pleaded, to raise a defence that the defendants had breached their

confidentiality obligations under the SPA and therefore did not satisfy certain conditions precedent set out within the SPA in order for the defendants to be entitled to the Earn Outs. I shall term this ground the "Confidentiality Pleading Issue". The second ground is premised on a complaint by the plaintiffs that as a result of various egregious errors, the Tribunal wrongly decided that, by reason of the operation of the doctrine of issue estoppel, the plaintiffs were precluded from raising as part of the plaintiffs' counterclaim various factual allegations accusing the defendants of misconduct in several respects. I shall term this ground the "Counterclaim Preclusion Issue".

7 The Final Award and Additional Award were awards rendered consequential to the Second Partial Award. As such, OS 874, which is the plaintiffs' application to set aside the Final Award and Additional Award, is entirely parasitic to the challenge to the Second Partial Award in OS 1401. It is common ground between the parties that no additional grounds are relied upon by the plaintiffs in OS 874. Thus, the outcome of OS 874 is wholly dependent upon the outcome of OS 1401 which is the main battleground between the parties.[2]

8 On 15 December 2020, the defendants in OS 1401 and OS 874 applied *ex parte* in HC/OS 1274/2020 ("OS 1274") for leave to enforce the Second Partial Award, and in HC/OS 1275/2020 ("OS 1275") for leave to enforce the Final Award and Additional Award as orders or judgments of the court. Leave was granted by Assistant Registrar Eunice Chan Swee En on 4 January 2021, who delivered written grounds of decision on 26 April 2021 in *CKR and another v CKT and another* [2021] SGHCR 4 (collectively, the "Leave Orders"). On 29 January 2021, the plaintiffs in OS 1401 and OS 874 filed HC/SUM 471/2021

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[2] Transcript (16 June 2021) at p 13 (lines 5 to 19).

("SUM 471") and HC/SUM 472/2021 ("SUM 472") respectively to set aside the Leave Orders. The parties have been assigned different redacted names in OS 1274 and OS 1275. For the sake of consistency and to avoid confusion, I shall, throughout this judgment, adopt the redacted names of the parties given in OS 1401 and OS 874. All references in this judgment to the plaintiffs and defendants are to be understood accordingly.

9 As applications of this nature are fact sensitive, in the next section, I set out in some detail the factual background to the matter. I am in this regard greatly assisted by the fact that a substantial part of the factual backdrop to this case has already been recounted in the Judgment (at [5]–[30]) and Appeal Judgment (at [5]–[33]).

Factual background

10 The defendants, BTP and BTQ, are individuals. They were the owners of a group of companies (the "Group") of which the second plaintiff, BTO, is the principal holding company. BTO is an online travel agency incorporated in Malaysia. On 26 September 2012, the defendants, along with two other owners of the Group entered into the SPA with the first plaintiff, BTN. BTN is a publicly listed company incorporated in Mauritius. Pursuant to the SPA, BTN acquired 100% ownership and control of the Group at both the shareholder and board level.

11 The consideration to be paid to the defendants for the acquisition comprised two elements: a "Guaranteed Minimum Consideration" of US$25m and the Earn Outs. The Earn Outs element depended on, among others, the financial performance of the Group in the financial years 2013, 2014 and 2015,

calibrated based on different levels of "Earn Out Targets" for each financial year as specified in the SPA, up to a maximum amount of US$35m.

12 The SPA also stipulated that the defendants had to be employed by BTO. The employment of the defendants was governed by the respective "Promoter Employment Agreements" (the "PEAs"), unsigned versions of which were annexed to the SPA. Pursuant to the PEAs signed in November 2012, BTP, the first defendant, was employed as the Chief Executive Officer and BTQ, the second defendant, as the Chief Technical Officer. The PEAs were signed by the respective defendants as employees, by BTO as the employer and by BTN as the confirming party; the PEAs were governed by Malaysian law.

13 The SPA and PEAs contained materially identical provisions with regard to the defendants' "With Cause" and "Without Cause" termination. Clause 15.1.2 in both PEAs, governing Without Cause termination, stated:

> If [BTO] terminates the Employment without cause (that is at will for reasons other than as specified in Clause 14.2 below [*sic*]) … the Employee shall, only be entitled to receive (1) Remuneration which has accrued but has not been paid up to the date of termination … (2) severance pay … and (3) such payments as may be expressly specified as payable upon 'Without Cause' termination under Clause 12.9.[2] of the [SPA].

14 The effect of cl 12.9.2 of the SPA (referred to in cl 15.1.2 of the PEAs set out above) read with cl 12.10.1(a) of the SPA was that:

> (a) if the dismissals of the defendants were *Without* Cause, they would (subject to compliance with certain conditions precedent) be entitled to a maximum of US$35m in Earn Outs; and
>
> (b) if the dismissals of the defendants were *With* Cause, then they would not be entitled to *any* Earn Outs.

15 Upon completion of the sale of the Group, the defendants ceased to be directors of BTO. In their place, three senior executives of BTN were appointed as directors, a Mr [K] being one of the three. Mr [K] was the Group Chief Financial Officer and a director of BTN. He was also a director of BTO at all material times.

16 On 8 January 2014, BTO issued termination letters to the defendants, dismissing them from their posts "pursuant to Clause 15.2.1 of the [PEAs] and Clause 12.9.1 of the [SPA]" (the "Termination Letters"), citing various grounds of With Cause termination.

The Malaysian Industrial Court proceedings

17 The defendants took the view that they had been wrongfully dismissed and decided to take action against BTO by invoking certain remedies that Malaysian law makes available to disgruntled employees. On 13 February 2014, the defendants made representations to the Director General of Industrial Relations, Malaysia (the "Director General"), pursuant to the procedure prescribed under s 20 of the Industrial Relations Act 1967 (No 177 of 1967) (M'sia) ("IRA"). Where a workman considers that he has been dismissed without just cause or excuse by his employer, the procedure under s 20 of the IRA allows the workman to make representations to the Director General, who may in turn notify the Malaysian Minister for Industrial Relations. Under s 20(3) of the IRA, the Minister may, if he thinks fit, refer the representations to the Malaysian Industrial Court ("MIC") for an award.

18 The Director General then sent letters dated 7 March 2014 to BTO (at its registered address in Malaysia) and the defendants, requesting them to attend a conciliation meeting. An e-mail was sent on the same day to BTO's manager,

one Mr [C], and two other BTO employees, inviting them to the conciliation meeting. According to the plaintiffs, Mr [C] was then the only employee at BTO's office in Malaysia. All its other employees were based in, and operated out of, Thailand and India. Correspondence to BTO was sent to its registered address and collected from this address by Mr [C]. He was responsible for keeping BTO's senior management apprised of this correspondence as well as keeping them aware of all developments in Malaysia.

19 The conciliation meeting was attended by the defendants, and by Mr [C] and Mr [K] as representatives of BTO. While Mr [K] was representing BTO at that meeting, he still occupied his position on the BTN board. No settlement was reached at the conciliation meeting, and the cases were referred to the MIC on 8 August 2014 (collectively, "the MIC Proceedings"). The defendants and BTO were copied in on the referral letters. From October 2014 to January 2015, the MIC fixed and then adjourned the hearings of the cases before it multiple times due to the non-attendance of BTO. In the process, numerous notices of the MIC Proceedings and various related documents were sent to BTO via registered post to its registered office. In the end, the hearings in respect of the defendants' cases proceeded, in BTO's absence, in March and May 2015.

20 Following the hearings, two Awards were issued by the MIC against BTO on 6 April 2015 and 29 July 2015 respectively in favour of the defendants (collectively, the "MIC Awards"). The MIC found that the defendants' dismissals had been "without just cause or excuse" under s 20 of the IRA, and accordingly awarded them compensatory remedies based on their monthly salaries. The reasoning in the MIC Awards was essentially that the burden of proof was on BTO to justify the defendants' dismissals based on the allegations in the Termination Letters. Given that BTO elected not to appear, the evidence of the defendants on the wrongfulness of their dismissals remained unrebutted

and their dismissals were accordingly held to be unjustified and without just cause or excuse.

21 Subsequent to the MIC Awards, repeated letters from the defendants to BTO demanding payment of the compensation awarded were ignored. On 19 November 2015, the defendants commenced non-compliance proceedings under the IRA against BTO. Both sets of non-compliance proceedings were fixed for a mention hearing on 30 December 2015. Notice of the same was sent to BTO but BTO did not attend either mention hearing. The hearing of the non-compliance applications was fixed on 17 February 2016 and notice of the same was also served on BTO.

22 According to BTO, it was only on 16 February 2016, a day before the non-compliance hearing, that Mr [C] notified the relevant BTO senior personnel, for the first time, of the hearing notices. Up till then, although he had collected the same from BTO's registered office, Mr [C] had kept all the correspondence away from BTN's senior management. On 17 February 2016, BTO appeared at the hearing through its counsel. BTO does not dispute that all the various notices mentioned above were validly served on it at BTO's registered address in Malaysia.

23 By two further awards dated 1 March 2016, the MIC ordered BTO to pay the defendants the sums ordered under the MIC Awards within 30 days. The MIC also stated that at the 17 February 2016 hearing, BTO's counsel had initially requested an adjournment of the hearing. After hearing the defendants' grounds for objecting to the adjournment, namely, that the time to file any judicial review applications against the MIC Awards had long lapsed, BTO's counsel agreed that there was no point in having the adjournment and conceded that any adjournment would further delay proceedings.

24 On 21 April 2016, BTO wrote to the President of the MIC (copying the defendants' solicitors) to inform the MIC that BTO had complied with the MIC Awards and effected full payment as required. BTO also conveyed its apologies for its absence at the MIC Proceedings and explained that "the fact of the said proceedings have [*sic*] been inexplicably withheld from [BTO], [which was] an internal/domestic issue which [BTO was] currently addressing".

The arbitration proceedings

25 On 31 May 2016, the defendants' solicitors wrote to the plaintiffs demanding payment of sums alleged by the defendants to be due to them as Earn Outs, totalling US$35m. No payment was made by the plaintiffs. On 12 July 2016, the defendants commenced arbitration proceedings against the plaintiffs under the SPA, claiming that they were dismissed Without Cause and were therefore entitled to receive Earn Outs in the sum of US$35m. The Tribunal was constituted to conduct the arbitration.

26 In the arbitration proceedings, the plaintiffs took the position that the dismissals were With Cause and put forward various bases in support of this. Apart from defending the claim, the plaintiffs also filed a counterclaim against the defendants. The defendants responded that issues dealing with cause of termination were *res judicata* by virtue of the MIC Awards ("the *Res Judicata* Issue") and that as a matter of construction of the SPA and the PEAs, a determination under the PEAs by the MIC that the dismissals of the defendants were Without Cause was binding for the purposes of the SPA ("the Construction Issue").

27 In a procedural order issued on 13 March 2017, the Tribunal set out the timetable for the arbitration, which included timelines for the filing of pleadings

and the production of documents. It also fixed the hearing dates of the arbitration to take place from 6 December 2017 to 8 December 2017. In early November 2017, certain events occurred as a result of which the defendants applied for an adjournment of the hearing. On 27 November 2017, the Tribunal informed the parties that it was inclined to adjourn the hearing on evidentiary or factual issues but was willing to proceed with a hearing on legal issues alone if the parties were agreeable. The evidentiary hearing was formally adjourned on 28 November 2017. Thereafter, parties were able to agree on the legal issues to be determined, and on 29 November 2017, the Tribunal issued Procedural Order No 5 setting out the agreed list of legal issues as follows:

> **A. What, if anything, is the effect of the judgments of the [MIC]?**
>
> 1. What are the issues before the Tribunal in this arbitration that are said to be the subject of *res judicata*?
>
> 2. What did the [MIC] decide?
>
> 3. What law governs the question of *res judicata*?
>
> 4. Are the findings of the [MIC] binding on the Tribunal?
>
> Question A.4 will include: (a) the question of ***whether the decisions of the [MIC] are binding as a matter of contract on a proper interpretation of the SPA and PEAs*** [*ie,* the Construction Issue], in addition to the ***questions of res judicata under the general law*** [*ie,* the *Res Judicata* Issue]; and (b) ***determination of all issues necessary to resolve*** whether the findings of the [MIC] are binding on both [plaintiffs], including (i) all questions of Mauritian law (if that is the applicable law) and (ii) ***whether any preclusive effect extends to [BTN]*** as well as [BTO] (whether by way of privity, the doctrine of co-interested parties or otherwise).
>
> **B. Issues relating to the interpretation of Clause 12.9.1(viii) of the SPA**
>
> 1. Can [BTN and BTO] rely on clause 12.9.1(viii) in circumstances where no "Audited Accounts" (as defined in the SPA) had been prepared and/or adopted at the time of the dismissal?

> 2. Is strict compliance with the definition of "Audited Accounts" (as defined by the SPA) essential for a valid dismissal under clause 12.9.1(viii) of the SPA?
>
> [emphasis added in bold italics]

28 The Tribunal further explained that the hearing was meant to "hear discrete issues on points of law insofar that they could be entirely divorced from factual matters", and it had become apparent that "there were potentially determinative points of law capable of resolution in this way, that the parties were aware of those points of law and were fully prepared to argue them".

29 The Tribunal duly conducted the hearing on legal issues on 6 and 7 December 2017. Queen's Counsel appeared at the hearing for both parties. They made submissions in two rounds and in response to questions from the Tribunal. Further, expert evidence on Mauritian law was presented and each party's expert was cross-examined by counsel. At the close of the hearing, all counsel agreed that there should be no post-hearing memorials.

The First Partial Award

30 In the First Partial Award, the Tribunal dealt with the Construction Issue and the *Res Judicata* Issue. On the Construction Issue, the Tribunal considered the characteristics of the SPA and the PEAs and concluded that "the PEAs and the SPA … [were] closely interconnected parts of the same transaction". The Tribunal further decided that termination Without Cause under the PEAs meant the same thing as termination Without Cause under the SPA, and *vice versa*. On the *Res Judicata* Issue, the Tribunal held that both the plaintiffs were prevented from arguing that the defendants were terminated With Cause under the SPA and PEAs by the doctrine of issue estoppel under Singapore law, as the question of whether this had occurred was essentially the same as the issue that the MIC had already determined.

The first setting aside application and its appeal

31 The effect of the First Partial Award was that the plaintiffs would not be able to adduce evidence in the arbitration proceedings to make out their assertion that the defendants were terminated With Cause and therefore, among others, were not entitled to the Earn Outs. In OS 683, the plaintiffs sought the following:

> (a) a declaration, pursuant to s 10(3)(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), that the Tribunal had jurisdiction to determine whether the defendants were terminated Without Cause for the purposes of the SPA;
>
> (b) in the alternative, a setting aside of the First Partial Award with respect to both the plaintiffs pursuant to:
>
> > (i) s 24(*b*) of the IAA, Art 34(2)(*a*)(ii), Art 34(2)(*a*)(iii) and/or Art 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), on the basis that the Tribunal made findings on disputed facts despite the parties' agreement to reserve the resolution of disputed facts to subsequent hearings; and/or
> >
> > (ii) s 24(*b*) of the IAA and/or Art 34(2)(*a*)(ii) of the Model Law, on the basis that the Tribunal:
> >
> > > (A) decided on an issue that was not pleaded or argued, by drawing a purported distinction between "subject matter identity" and "issue identity" in its decision on issue estoppel;

(B) failed to consider an argument submitted by the plaintiffs against giving the MIC Awards *res judicata* effect under Singapore law; and/or

(iii) s 24(*b*) of the IAA, Art 34(2)(*a*)(ii), and/or Art 34(2)(*a*)(iii) of the Model Law, on the basis that the Tribunal failed to decide on the merits of the substantive dispute between the parties because it regarded itself bound by the MIC's determinations; and/or

(iv) Art 34(2)(*b*)(ii) of the Model Law, on the basis that the First Partial Award was in conflict with the public policy of Singapore;

(c) in the further alternative, a setting aside of the First Partial Award with respect to BTN only.

32 On 16 September 2019, Ang J delivered the Judgment and dismissed the plaintiffs' application entirely. In brief, the learned Judge held that the First Partial Award was not a ruling on jurisdiction, because neither the Construction Issue nor the *Res Judicata* Issue was a jurisdictional issue (Judgment at [45], [52], [78] and [79]). The learned Judge also held that there was no breach of natural justice, nor did the Tribunal breach the parties' agreed arbitral procedure or exceed its jurisdiction (Judgment at [92]–[99]). All that occurred was that there was a disagreement between the parties as to the ambit of the requirement of identity of subject matter, and the Tribunal had preferred the defendants' position on issue estoppel (Judgment at [101]–[102]). The Tribunal was tasked with determining whether the findings of the MIC were contractually binding and had *res judicata* effect, and the Tribunal decided the very matters submitted to it, namely, the Construction Issue and the *Res Judicata* Issue (Judgment at

[108]). Ang J further held that the First Partial Award was not contrary to the public policy of Singapore, as the plaintiffs were not prevented from having their case heard and there was no wrongdoing on the part of the defendants in commencing proceedings in the MIC (Judgment at [116] and [117]). The argument that the First Partial Award should be set aside with respect to BTN was also rejected (Judgment at [119]).

33 On 20 September 2019, the plaintiffs sought leave, pursuant to s 10(4) of the IAA, to appeal against Ang J's finding that the Tribunal's rulings on the Construction Issue and the *Res Judicata* Issue were not jurisdictional decisions. On 9 January 2019, the learned Judge refused leave to appeal. On 26 September 2019, the plaintiffs appealed against the rest of the Judgment.

34 In the appeal, the plaintiffs submitted that Ang J erred in dismissing their application to set aside the First Partial Award. Before the Court of Appeal, the plaintiffs advanced the same arguments that had been canvassed before the High Court, namely: that there had been a breach of natural justice which had prejudiced them; that it would be contrary to public policy to enforce the First Partial Award, because it deprived the plaintiffs of the right to put forward their defence to the defendants' claim and to make their own claim against the defendants; and that the Tribunal failed to decide matters contemplated by and/or falling within the submission to arbitration. On 23 October 2020, the Court of Appeal, in the Appeal Judgment, dismissed the plaintiffs' appeal.

The Second Partial Award, Final Award and Additional Award

35 As I indicated at [5] above, the arbitration was ongoing even while OS 683 was being heard. In July 2018, the Tribunal conducted a procedural hearing to decide (a) whether to stay the proceedings pending the outcome of OS 683,

(b) the scope of the remaining issues to be determined after the First Partial Award and (c) the defendants' application to bifurcate the remaining claim issues and the counterclaim issues. Parties filed their respective position papers, *inter alia*, identifying the issues remaining for determination on the claim and counterclaim. Following the procedural hearing on 31 July 2018, the Tribunal issued Procedural Order No 7 dated 24 August 2018 ("PO No 7") and ordered the following:[3]

> (1) The [plaintiffs'] application to stay these proceedings pending the outcome of the proceedings of the Singapore High Court in OS 683 is denied;
>
> (2) An evidentiary hearing on the remaining issues in the [defendants'] claim, agreed by the parties and identified in paragraph 76 above, is scheduled for 5 December 2018 (with 7 December held in reserve);
>
> (3) A hearing, for oral argument on the question of whether and, if so, to what extent any of the Respondents' counterclaim allegations are precluded by issue estoppel under the reasoning of the [First Partial Award], is scheduled for 6 December 2018 (with 7 December held in reserve);
>
> (4) As a necessary consequence of the decision in sub-paragraph (3) above, the [defendants'] application of bifurcation of the remaining Claim Issues from the merits of the counterclaim is granted.

36 On 3 December 2018, two days before the start of the second oral hearing, a pre-hearing telephone conference was conducted. In their written submissions, the plaintiffs' defence to the defendants' claim to the Earn Outs under the SPA was that the defendants had not duly complied with their obligations under the SPA. At the pre-hearing conference, the plaintiffs stated that they would abandon this defence save for the pleaded allegation that the defendants had breached their confidentiality obligations by disclosing confidential information to one Mr [X], a third-party consultant whom the

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[3] AB Vol II at pp 517 and 518 (paras 21 to 25).

defendants had engaged to advise them on BTO's business and operations.[4] As such, one of the conditions precedent in cl 12.6(ii) of the SPA was not satisfied. The defendants objected to this defence being advanced on the basis that this allegation or defence was not pleaded and was a new allegation.

37 Parties agreed that the Confidentiality Pleading Issue would be addressed as a preliminary matter at the start of the hearing on 5 December 2018. The oral hearing was duly conducted on 5 and 6 December 2018. After hearing parties' submissions on the Confidentiality Pleading Issue on the first day, the Tribunal stood the hearing down, conferred and then proceeded to dismiss the Confidentiality Pleading Issue. Consequently, the Tribunal disallowed the plaintiffs from pursuing this defence at the oral hearing. The Tribunal then proceeded to continue hearing the parties' cases on the remaining issues for the claim and the counterclaim. On 23 September 2019, the Tribunal formally closed the record for this phase of the proceedings. It also alerted parties that it intended to issue the Second Partial Award and thereafter the Final Award, including the Tribunal's decision on costs. The Tribunal also indicated that it intended to consult with the parties concerning the remaining issues for submission and the scope of the Final Award.[5]

38 On 11 October 2019, the Tribunal issued the Second Partial Award. The Tribunal decided that the defendants had satisfied the conditions precedent in cll 12.6(i) and (ii) of the SPA. It concluded that the requirement for an Earn Out Compliance Certificate in cl 12.7 of the SPA was not relevant to a termination of employment Without Cause. Thus, the defendants were entitled to the Earn

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4 AB Vol II at p 521 (para 41).

5 AB Vol II at p 522 (para 51).

Outs under the SPA, including the Earn Outs in respect of the 2013 financial year.

39 As regards the Counterclaim Preclusion Issue and the plaintiffs' counterclaim in the arbitration, the defendants contended that the plaintiffs were precluded from arguing that the defendants were terminated With Cause under the SPA and the PEAs or from raising the counterclaim allegations because of the operation of issue estoppel. The Tribunal agreed with the defendants on this. It found that save for a single allegation of misconduct concerning a payment gateway known as Euroline (the "Euroline Counterclaim") which predated the SPA, *all* of the other allegations relied upon by the plaintiffs in support of their counterclaim against the defendants were, as a result of the MIC Awards, precluded by the doctrine of issue estoppel applied under Singapore law. The Tribunal also found that there were no special circumstances in the case that would warrant a departure from the application of the doctrine of issue estoppel.

40 In its dispositive orders, the Tribunal ordered the plaintiffs to pay the defendants a sum of US$30,796,624, which was the sum of US$35 million claimed by the defendants for the Earn Outs less a sum of US$4,203,376, representing the value of the Euroline Counterclaim which the Tribunal held in reserve pending the substantive determination of the Euroline Counterclaim.

41 Following the Second Partial Award, the Tribunal heard arguments on the Euroline Counterclaim and the question of costs on 21 and 22 January 2020. The Tribunal then issued the Final Award on 9 June 2020, in which it dismissed the Euroline Counterclaim. Essentially, the Tribunal found that while the plaintiffs were not time-barred from bringing the Euroline Counterclaim, the Tribunal did not have jurisdiction over the Euroline Counterclaim as it was not

pleaded. The defendants were awarded the sum of US$3,736,407.97 for legal costs.

42 On 3 July 2020, the Tribunal issued the Additional Award granting the defendants' application for an award in its favour and payment of the sum of US$4,203,376 that had been held in reserve pursuant to the Second Partial Award.

43 As I mentioned at [6]–[7] above, OS 1401 (filed on 8 November 2019) seeks to challenge the Second Partial Award while OS 874 (filed on 9 September 2020) is aimed at the Final Award and Additional Award.

The parties' cases

44 Mr Alvin Yeo SC, counsel for the plaintiffs, submits that the Awards should be set aside pursuant to s 24(*b*) of the IAA or Art 34(2)(*a*)(ii), (iii) and/or (*b*)(ii) of the Model Law. The Leave Orders should also be set aside under s 19 of the IAA read with Art 36(1)(*a*)(ii), (iii) and/or (*b*)(ii) of the Model Law.[6] In essence, the two central grounds of the plaintiffs' applications are that the Tribunal had erred with respect to the Confidentiality Pleading Issue and the Counterclaim Preclusion Issue (see [6] above). If the court sets aside the Second Partial Award, the Final Award and Additional Award should also be set aside because they are premised on the Tribunal's findings in the Second Partial Award.[7]

45 On the Confidentiality Pleading Issue, the plaintiffs argue that the Tribunal had improperly abdicated its duty to decide on whether the allegations

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6 PWS at para 38.

7 PWS at paras 224 to 226.

in relation to the Confidentiality Pleading Issue afforded the plaintiffs a defence to the defendants' claim for the Earn Outs. This was an issue contemplated by and falling within the scope of submission to the arbitration. Mr Yeo argues that it has always been the plaintiffs' position that unauthorised disclosure of confidential information to Mr [X] amounted to a breach of the defendants' confidentiality obligations and this had been raised in the context of the conditions precedent to the SPA. Thus, the plaintiffs have squarely pleaded the case that the conditions precedent relating to the confidentiality obligations were not satisfied. In substance, the plaintiffs submit that the Tribunal erred in considering this a "new point". They also say that the defendants had the opportunity to and did deal with this point in their pleadings, arguments and witness statements. Thus, the Tribunal incorrectly concluded that the factual evidence in the record about Mr [X] and the confidential information was "one-sided" in the plaintiffs' favour and the defendants did not respond to or offer witness testimony on the allegations made in the Confidentiality Pleading Issue. Since this is an improper narrowing of the Tribunal's jurisdiction, this issue is subject to a *de novo* review by the court. The Tribunal's error renders the Second Partial Award *infra petita* and liable to be set aside on this basis.[8]

46 Alternatively, the Tribunal's dismissal of the Confidentiality Pleading Issue was in breach of natural justice. First, the plaintiffs were deprived of their right to have a full opportunity to present their case on whether the defendants failed to satisfy the conditions precedent for the Earn Outs because they had breached their confidentiality obligations. Second, the clear and virtually inescapable inference (*per AKN* at [46]) to be drawn from the Tribunal's erroneous conclusion that the factual evidence was one-sided in the plaintiffs'

8 PWS at paras 124 to 161.

favour was that the Tribunal simply failed to consider the parties' arguments, evidence and submissions. This was because the defendants had in fact put forward arguments, evidence and submissions addressing the alleged disclosure of confidential information to Mr [X]. Third, the fair hearing rule was breached because the plaintiffs were not even given a full and proper opportunity to be heard on the issue as to whether the defendants satisfied the conditions precedent in cl 12.6(ii) of the SPA as a result of their disclosure of confidential and commercially sensitive information to Mr [X]. This substantially prejudiced the plaintiffs as the Confidentiality Pleading Issue was, effectively, the only remaining defence that the plaintiffs had to the defendants' claim.[9]

47 As for the Counterclaim Preclusion Issue, Mr Yeo submits that the Tribunal, by a series of egregious errors, improperly abdicated its jurisdiction in respect of the plaintiffs' counterclaim against the defendants, resulting in a wrongful negative jurisdictional decision which rendered the Second Partial Award *infra petita*. Mr Yeo relies on several strings in his bow in order to make good this argument.

48 The first egregious error is the Tribunal's finding that, by virtue of the very wide wording of the Termination Letters, there was identity of subject matter between the MIC Awards (which reached conclusions on the effect of the unproven allegations in the Termination Letters) and all of the allegations of misconduct (save for the Euroline Counterclaim allegation) levelled by the plaintiffs against the defendants in their counterclaim. Second, in finding that BTO was presumed to be aware of the MIC Proceedings, the Tribunal based its reasoning entirely on its earlier "gratuitous" finding in the First Partial Award

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9 PWS at paras 162 to 179; Transcript (16 June 2021) at pp 36 (lines 10 to 20), 43 (lines 16 to 27) and 44 (lines 1 to 2).

(which was only intended to be a decision on points of law and not findings of fact) that BTO had been validly served. The Tribunal completely failed to address and decide the issue of whether the plaintiffs were in fact aware of the MIC Proceedings; this error is compounded by the Tribunal infecting *BTN* with *BTO's* presumed knowledge even though BTN was not a party to or privy to the MIC Proceedings. This in turn leads to a further egregious error in the Tribunal ultimately finding that "there are no special circumstances justifying a departure from the doctrine of issue estoppel" and that the doctrine of issue estoppel applies to the "factual allegations upon which [the plaintiffs] rely for their counterclaim allegations". Thus, the plaintiffs were prevented from arguing, in their counterclaim, that the defendants were terminated With Cause under the SPA and the PEAs. The plaintiffs argue that the findings in the First Partial Award were made in the context of whether issue estoppel should apply to default judgments. The Tribunal should not have ignored the arguments, evidence and submissions set out that BTO and its senior management were in fact not aware of the MIC Proceedings. There is no evidence to show that BTO was in fact aware of the MIC Proceedings at the material time[10] and the plaintiffs contend that the unchallenged evidence of Mr [K], which the Tribunal completely failed to consider, was that both plaintiffs were not in fact aware of the MIC Proceedings.

49 Alternatively, Mr Yeo contends that the Tribunal acted in breach of natural justice in finding that BTO was aware of the MIC Proceedings. The Tribunal did not bring its mind to bear on an important aspect of the dispute by failing to even consider the arguments, evidence and submissions on the plaintiffs' counterclaim. The plaintiffs suffered real and actual prejudice as a

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10 PWS at paras 180 to 213.

result of the Tribunal's breach of natural justice because if not for the breach, there could have been a material difference to the result in that the counterclaim, if allowed, would have reduced the damages awarded to the defendants. The Tribunal wrongly conflated what it had to decide in the Second Partial Award with what it had decided in the First Partial Award. It even extended the effect of its finding on BTO's knowledge of the MIC Proceedings to BTN when it is not disputed that BTN was not even a party to the MIC Proceedings. Additionally, the plaintiffs argue that the Awards are against Singapore's public policy. The Awards, Mr Yeo submits, shock the conscience because the Tribunal made its decision without at all considering that the plaintiffs were not in fact aware of the MIC Proceedings.[11]

50 As an aside, the first prayer in OS 1401 seeks a declaration that pursuant to s 10(3)(*b*) of the IAA, the Tribunal has jurisdiction to determine whether the defendants committed the misconduct and/or breaches of contract alleged by the plaintiffs as part of their counterclaims in the arbitration. Even though the plaintiffs did not advance any arguments on this prayer in their written or oral submissions, Mr Yeo indicated that he did not have instructions to withdraw that prayer of the application.[12] In any case, that prayer is a non-starter insofar as it relies or is grounded on s 10(3)(*b*) of the IAA. This is because even if the Awards (and the Second Partial Award in particular) contained jurisdictional rulings or decisions, the Awards *also* dealt entirely with the substantive merits of the underlying dispute between the parties. As Judith Prakash J (as she then was) held in *AQZ v ARA* [2015] 2 SLR 972 (*"AQZ"*) at [65]–[70], s 10(3) of the IAA *does not* apply to an award that deals with the merits of the dispute, however marginally. *AQZ* was subsequently endorsed by Kannan Ramesh J in

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11 Transcript (17 June 2021) at pp 108 (lines 8 to 13) and 109 (lines 2 to 6).

12 Transcript (16 June 2021) at pp 11 (lines 16 to 27) and 12 (lines 1 to 22).

Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and others [2019] 3 SLR 12 ("*Kingdom of Lesotho*") (at [68]–[70]). Given that the Awards clearly engaged the merits of the dispute, s 10(3) of the IAA is plainly inapplicable. In the circumstances, Mr Yeo quite rightly focused his arguments on setting aside the Awards under s 24 of the IAA and/or Art 34(2) of the Model Law.

51 The defendants, represented by Mr Chew Kei-jin, submit that there is no basis to set aside the Awards. On the Confidentiality Pleading Issue, Mr Chew submits that the Tribunal's dismissal of the Confidentiality Pleading Issue cannot be said to be *infra petita* because the issue had not been pleaded and therefore was not referred to the Tribunal for determination. The plaintiffs' pleadings did not contain any allegation that the defendants had breached cl 11.1.2(c) of the SPA, compliance with which was a condition precedent under cl 12.6 of the SPA. Without an express pleading link or an express reference by the plaintiffs to the alleged averments in the Confidentiality Pleading Issue, the matter or issue cannot be said to have been referred to the Tribunal.[13]

52 The defendants also argue that there is no breach of natural justice because the Tribunal plainly understood and considered all of the plaintiffs' arguments. It heard detailed oral submissions from the parties on 5 December 2018 on the Confidentiality Pleading Issue. The Tribunal had set a careful timetable to ensure that all remaining issues on the claim were identified and fully prepared in advance of the hearing. Yet, the plaintiffs sought to raise a new issue just days before the oral hearing. The procedural conduct of the Tribunal cannot be faulted, and the decision was plainly open to the Tribunal having regard to fairness to both parties and the efficient and expedient resolution of the case.

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13 DWS at paras 199 to 204.

53 Further, the Tribunal's dismissal of the Confidentiality Pleading Issue would not have made a difference to the outcome of the arbitration. This is because it is clear on the basis of the Tribunal's determination in the First Partial Award that the plaintiffs were precluded by issue estoppel from alleging that the defendants committed breaches of their obligations under the SPA. While this was decided in the context of the Counterclaim Preclusion Issue, the same reasoning would apply to the Confidentiality Pleading Issue even if that had been allowed. Therefore, there was no real or actual prejudice suffered by the plaintiffs.[14]

54 As for the Counterclaim Preclusion Issue, the defendants submit that the Tribunal cannot be said to have acted *infra petita* when it had expressly considered and determined the issue on its merits. The Tribunal understood and considered the fact that BTO claimed that it was not in fact aware of the MIC Proceedings. However, the Tribunal still found it sufficient that BTO had been validly served with the various notices, letters and other court process pertaining to the MIC Proceedings. The plaintiffs' alleged "procedural" challenge is nothing more than a brazen attempt at a re-hearing and to circumvent the Appeal Judgment. Further, since the Tribunal considered that in circumstances where BTO had been validly served, *res judicata* could apply and no special circumstances exception was engaged even if there had been internal communication failings, there is no possible breach of due process or natural justice. Therefore, there is also no causative link between the Tribunal's determination and the alleged prejudice to the plaintiffs. In short, the Tribunal's decision would have been the same.[15]

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14 DWS at paras 214 to 216.

15 DWS at paras 177 to 187.

Issues

55 Based on the parties' submissions, the main issues that arise for my consideration are as follows:

(a) whether the Tribunal's dismissal of the Confidentiality Pleading Issue renders the Second Partial Award (and therefore, the Awards) *infra petita* and/or made in breach of natural justice such that they should be set aside; and

(b) whether the Tribunal's decision on the Counterclaim Preclusion Issue renders the Second Partial Award (and therefore, the Awards) *infra petita* and/or made in breach of natural justice and/or contrary to public policy such that they should be set aside.

First Issue: The Confidentiality Pleading Issue

Whether the plaintiffs are precluded from raising the Confidentiality Pleading Issue

56 As a preliminary issue, the defendants argue that the plaintiffs should not be permitted to raise the Confidentiality Pleading Issue before me. They say that it is a new ground that was only raised in Mr [K]'s second affidavit filed on 5 January 2021, which was more than a year after OS 1401 was filed. At the time of filing OS 1401, the only grounds stated in Mr [K]'s first affidavit filed on 8 November 2019 in support of the plaintiffs' *infra petita* and breach of natural justice arguments were in relation to (a) the plaintiffs' main defence (*ie*, that the defendants had been terminated With Cause) and (b) the plaintiffs' counterclaim in the arbitration proceedings. These grounds had nothing to do with the Confidentiality Pleading Issue. It was only *after* the Appeal Judgment

was released that the Confidentiality Pleading Issue was belatedly introduced as a new ground in Mr [K]'s second affidavit.[16]

57 Mr Chew argues that the three-month time limit for setting aside applications to be brought under Art 34(3) of the Model Law is intended to support the principle of finality of arbitral awards. Under O 69A r 2(4A) of the Rules of Court (2014 Rev Ed) ("ROC"), the affidavit in support of an originating summons to set aside an award must, amongst other things, state the grounds in support of the application, set out any evidence relied on by the plaintiff, and be served with the originating summons. After a setting-aside application is filed, the defendant should be able to expect that the grounds of challenge as set out in the supporting affidavit accompanying the originating summons amounts to the totality of the plaintiff's challenge. There cannot be a back-door attempt to introduce new facts and evidence to supplement the grounds in support of the setting-aside application through a later affidavit.[17]

58 In response, the plaintiffs argue that they are not precluded from raising the Confidentiality Pleading Issue for the following reasons. First, while O 69A r 2(4A) of the ROC refers to "affidavit" in the singular, "words in the singular include the plural and words in the plural include the singular" pursuant to O 1 r 3 of the ROC read with s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed). Since Mr [K]'s second affidavit was filed in support of OS 1401 pursuant to the court's directions, the plaintiffs may rely on the contents of the affidavit. Second, the defendants have not suffered any prejudice since they have had ample opportunity to respond to the Confidentiality Pleading Issue and have in

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16 DWS at paras 188 to 191; AB Vol I at pp 86 to 88 (paras 54 to 59) and 132 to 147 (paras 34 to 64).

17 DWS at paras 193 to 198.

fact done so in BTP's affidavits. Third, the plaintiffs rely on the High Court decision in *BZV v BZW and another* [2021] SGHC 60 ("*BZV*") (at [28]) which held that an application to set aside an award is made within the meaning of Art 34(3) of the Model Law when an originating summons alone is filed under O 69A r 2(1)(*d*) of the ROC, and not when both an originating summons and an affidavit in support of the originating summons which complies with O 69 A r 2(4A) are filed. The plaintiffs contend that *BZV* supports their position that the grounds in support of the application in Mr [K]'s second affidavit cannot be disregarded simply because it was filed after the three-month time limit.[18]

Analysis and decision

59 Order 69A r 2 of the ROC provides that:

> **2.**—(1) Every application to a Judge —
>
> > (*a*) to decide on the challenge of an arbitrator under Article 13(3) of the Model Law;
> >
> > (*b*) to decide on the termination of the mandate of an arbitrator under Article 14(1) of the Model Law;
> >
> > (*c*) to appeal against the ruling of the arbitral tribunal under section 10 of the Act or Article 16(3) of the Model Law; or
> >
> > (*d*) to set aside an award under section 24 of the Act or Article 34(2) of the Model Law,
>
> must be made by originating summons.
>
> …
>
> (3) An application under paragraph (1)(*a*), (*b*) or (*c*) shall be made within 30 days from the date of receipt by the applicant (who shall be referred to the originating summons and hereafter

[18] PWS at paras 115 to 123.

> in this Order as the plaintiff) of the arbitral tribunal's decision or ruling.
>
> (4) An application under paragraph (1)(*d*) may not be made more than 3 months after the later of the following dates:
>
> (*a*) the date on which the plaintiff received the award;
>
> (*b*) if a request is made under Article 33 of the Model Law, the date on which that request is disposed of by the arbitral tribunal.
>
> (4A) The affidavit in support must —
>
> (*a*) state the grounds in support of the application;
>
> (*b*) have exhibited to it a copy of the arbitration agreement or any record of the content of the arbitration agreement, the award and any other document relied on by the plaintiff;
>
> (*c*) set out any evidence relied on by the plaintiff; and
>
> (*d*) be served with the originating summons.
>
> …
>
> (4C) Within 14 days after being served with the originating summons, the defendant, if he wishes to oppose the application must file an affidavit stating the grounds on which he opposes the application.

60 While O 69A r 2(4) of the ROC stipulates a time limit of 3 months for an application to be made to set aside an award by the filing of an originating summons, there is no stipulated time limit on when the originating summons must be served on the defendant. As such, O 6 r 4(1)(*b*) read with O 7 r 5 of the ROC would apply such that the plaintiff must serve an originating summons filed under O 69A r 2(4) of the ROC on the defendant within six months after the originating summons issues (or within 12 months if the defendant is to be served out of jurisdiction) (*BZV* at [19]).

61 As regards the affidavit in support, there is no stipulated guidance as to whether and when the affidavit in support must be *filed*. As noted by Vinodh Coomaraswamy J in *BZV* (at [17]), it is a practical reality that every originating summons must inevitably and will invariably be supported by an affidavit for evidential support. If nothing else, the affidavit is necessary simply to put the award itself in evidence. It is also provided in O 69A r 2(4A)(*d*) of the ROC that the affidavit in support "must be served with the originating summons". In this regard, I accept the plaintiffs' contention that the word "affidavit" may be construed as including the plural form. In some cases, more than one affidavit may be required in support of an application made under O 69A r 2(1) of the ROC. However, this only brings the plaintiffs so far.

62 In my judgment, the affidavit(s) in support *served with* the originating summons must reasonably contain all the facts, evidence and grounds relied upon in support of an application under O 69A r 2(1)(*d*) of the ROC to set aside an award. This coheres with the procedure set out in O 69A r 2(4C) of the ROC in which the defendant must, if he wishes to oppose the application, file an affidavit stating the grounds on which he *opposes* the application 14 days after being served with the originating summons. When the defendant is served with the originating summons (and any affidavit or affidavits in support which are required to be served *with* the originating summons), the originating summons *and* the affidavit(s) in support are meant, *compendiously*, to inform the defendant of the specific grounds on which the arbitral award is being challenged. The facts and circumstances and the grounds relied upon to challenge the award should therefore be detailed with sufficient particularity in the affidavit or affidavits that are served on the defendant with the originating summons. Having been served with that compendious "package" comprising the application, and the supporting grounds and evidence for the application, the

defendant will then know the case being mounted and will put forth its defence or opposition to the application by way of an affidavit or affidavits in reply filed in accordance with O 69A r 2(4C) of the ROC.

63 While it may be common practice for a plaintiff to file further reply affidavits after the defendant has filed its affidavit in opposition to the application, this does not mean that the plaintiff should be permitted to advance *new grounds* in *subsequent* affidavits by introducing new facts and circumstances that could and should have been raised at first instance. That does not sit well with the procedure contemplated in O 69A r 2 of the ROC, and does violence to the clear language in O 69A r 2(4A)(*d*) requiring any supporting affidavit *to be served* ***with*** *the originating summons*. Similarly, even in cases where there is a related appeal pending, a plaintiff ought not to be permitted to hedge its bets by drafting the initial affidavit in support in vague terms and then introducing new grounds in subsequent reply affidavits. Not only would that amount to springing a surprise on the defendant, but such conduct would also contribute to greater inefficiency by prolonging the proceedings, and possibly also encourage abuse of process. In such a scenario, a plaintiff/applicant should be forewarned that the court may well preclude it from raising such new grounds belatedly.

64 As for *BZV*, I disagree with the plaintiffs that the case supports their position. In *BZV*, the court was dealing with whether the application for the setting-aside of the arbitral award was made within time. The learned judge held that an application to set aside an award is made within the meaning of Art 34(3) of the Model Law when an originating summons alone is filed under O 69A r 2(1)(*d*) of the ROC. The issue that I am considering was not before the court in *BZV*. Nor is there any issue before me on whether the application in OS 1401 was made within time. *BZV* itself did not involve a fact scenario where the

plaintiff had attempted to bring up new facts and grounds in subsequent affidavits to supplement the grounds initially advanced in the setting-aside application. Therefore, *BZV* is distinguishable and does not afford any assistance to the plaintiffs.

65 Having considered the competing arguments, I find that the Confidentiality Pleading Issue is *not* a new issue or ground raised by the plaintiffs only in Mr [K]'s second affidavit. I set out below the relevant paragraphs of Mr [K]'s first affidavit:

> 56. It is my understanding that in the Second Partial Award, the Tribunal, on the basis of its findings in the First Partial Award that the [MIC] awards have preclusive effect and it thus did not have any competence *to determine [the plaintiffs'] main defence*, i.e. that [BTP] and [BTQ] had been terminated "*With Cause*" …, allowed [the defendants'] claim *without considering or deciding that defence*.
>
> 57. I have been advised by the Plaintiffs' solicitors and verily believe that portions of the Second Partial Award which deal with [BTP] and [BTQ]'s claim are *infra petita* because, in allowing their claim, the Tribunal failed to deal with disputes contemplated by and falling within the terms of the submission to the arbitration and/or failed to decide matters within the scope of the submission to arbitration. Further and/or in the alternative, in allowing [the defendants'] claims *without considering or deciding [the plaintiffs'] main defence, the Tribunal breached the rules of natural justice* by failing to give the [plaintiffs] a reasonable opportunity to be heard and/or to present their case.
>
> [emphasis added]

66 While I accept that these averments are somewhat bare, Mr [K] repeatedly raised his contention that the plaintiffs' *main defence* was not considered or decided by the Tribunal. The *main defence*, in substance, was that the defendants are not entitled to the Earn Outs, whether it was because the defendants were terminated With Cause or because the defendants had not

complied with the conditions precedent necessary to be entitled to the Earn Outs. At the pre-hearing conference before the Tribunal on 3 December 2018, the plaintiffs made it clear that they were dropping all allegations of non-compliance with the conditions precedent save for the defendants' breach of confidentiality[19] (see [36] above) – thus, in the proceedings culminating in the Second Partial Award, that was the *main defence* of the plaintiffs. In dismissing the Confidentiality Pleading Issue, the result was that the Tribunal did not allow the plaintiffs to raise its *main defence*. The Tribunal thus did not consider that defence on its merits, and this forms the basis for the plaintiffs' argument that the Awards should be set aside because they are *infra petita* or rendered in breach of natural justice. I find that the averments of Mr [K] in his first affidavit are, in substance, the same as the Confidentiality Pleading Issue or at the least, broad enough to cover it. It is therefore not a new ground raised belatedly. However, I consider Mr [K]'s first affidavit to be sorely lacking in detail. Notwithstanding that the Tribunal's decision on the Confidentiality Pleading Issue was known to the plaintiffs when OS 1401 was filed, the supporting affidavit did not condescend to specific detail, particularising the alleged breach of natural justice or that the Tribunal's decision was *infra petita*. It was only in Mr [K]'s second affidavit filed more than a year later where the details were fleshed out. The brevity of the averments reproduced at [65] above stand in stark contrast to the comprehensiveness with which the issue was traversed in Mr [K]'s second affidavit.

67 In any event, I accept the plaintiffs' submissions that no prejudice has been occasioned since the defendants were given the opportunity and were able to respond, by way of subsequent reply affidavits, to the Confidentiality

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19 AB Vol II at p 521 (para 41).

Pleading Issue raised in Mr [K]'s second affidavit. Further, as this issue was fully dealt with in the evidence and the parties' written and oral submissions, I deal with it on its merits. However, for future cases, I would caution parties that it falls upon the plaintiff to fully traverse, in the *primary affidavit or affidavits* supporting the application and *served with the originating summons*, all the facts, circumstances and grounds relied upon by the plaintiff for its setting-aside application. This is so that the defendant will know the exact case it is to meet in opposition to the application.

68 Having dealt with the preliminary issue, I turn now to the merits of this ground of objection.

Whether the dismissal of the Confidentiality Pleading Issue was infra petita

69 The procedural background pertaining to the Confidentiality Pleading Issue has been detailed at [36] above and I do not propose to repeat it here.

70 The Tribunal explained its decision to dismiss the Confidentiality Pleading Issue in the following terms:

> **From the transcript of the hearing on 5 December 2018:**
>
> CHAIRPERSON: We'll go back on the record. The tribunal has deliberated over the break and are unanimously of the view that we cannot allow the application of the [plaintiffs] to proceed with their effectively amended claim here. The reasons are that we consider that this is a ***new issue that's pleaded belatedly without adequate justifications***. The tribunal has given both sides several opportunities to identify specifically what are the remaining claims, affirmative claims and defences to those claims in this arbitration. We did so, before and during and after the July 2018 hearing. Having said that, we appreciate [the counsel for the plaintiffs'] presentation this morning. We appreciate that *there's factual evidence in the record about [Mr [X]] and confidential information; that evidence is for one side only at this point.* But ***we see no pleading link of that evidence to the SPA 11.1.2(c) and no pleading link onward***

> ***to 12.6(ii)***. *Without those links, that would be why the [defendants] haven't responded to that claim or given testimony on that claim. Nor is there any evidence, of course, from [Mr [X]] in the record.* On balance then, the tribunal members all feel this is more than a technical pleading failure at this stage many, many months into this case, and it would be unfair to the [defendants] to allow it to be pleaded now. Indeed, for the record, the fact that we have to make a procedural direction like this at this stage of this case speaks for itself. *So, we propose to proceed today with the parties' cases on the remaining claims without the [Confidentiality Pleading Issue]*. We thank both sides for, we think, succinct and clear submissions this morning.
>
> **In the Second Partial Award:**
>
> 61. In the Tribunal's view, in bringing the [Confidentiality Pleading Issue], [the plaintiffs] were effectively seeking to ***amend their position and belatedly raise a new issue without adequate justification***. The procedural history reflects that both sides were given numerous opportunities to identify the specific remaining claims - both affirmative claims and defences to those claims - before, during and after the July 2018 hearing. The factual evidence in the record concerning the [defendants'] alleged transfer of confidential information to [Mr [X]] was, by the time of the December 2018 hearing, one-sided in [the plaintiffs'] favour. ***[The plaintiffs] had made no pleading link of that evidence to Clause 11.1.2(c) of the SPA and no pleading link onward to Clause 12.6(ii).*** The absence of those links would explain why the [defendants] had not responded to, or offered witness testimony on, the allegations underlying the [Confidentiality Pleading Issue]. Further, there was no evidence from [Mr [X]] himself in the record.
>
> 62. On balance, the Tribunal considered this situation to be more than a technical pleading failure by [the plaintiffs] at such a late stage of the proceedings, and hence that it would be unfair to [the defendants] to admit this new allegation in defence.
>
> [emphasis added in italics and bold italics]

71 As can be seen, the central thrust of the Tribunal's reasoning was premised on its view that the Confidentiality Pleading Issue was a new issue that was "pleaded belatedly" without adequate justification. It considered that the plaintiffs did not make pleading links between the allegations of breaches of

confidentiality involving information passed by the defendants to Mr [X] to cl 11.1.2(c) and onward to cl 12.6(ii) of the SPA. This, according to the Tribunal, explained why the defendants had not responded to, or offered witness testimony on, the allegations underlying the Confidentiality Pleading Issue. The Tribunal also noted that the evidence in the record concerning the alleged transfer of confidential information to Mr [X] was one-sided in the plaintiffs' favour. Thus, the Tribunal decided that it would be unfair to the defendants to allow the plaintiffs to admit this new allegation at that stage.

72 First, I do not agree with Mr Chew's characterisation of the Tribunal's decision on the Confidentiality Pleading Issue as a mere exercise of the Tribunal's procedural discretion. Instead, I accept Mr Yeo's argument that the Tribunal's decision *in substance* amounted to a determination of its jurisdiction. The Court of Appeal, in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 (at [33]), has stated that the role of pleadings filed in an arbitration is to provide a convenient way to *define the jurisdiction* of the tribunal by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. I note that the parties did not address this issue strictly as a question of jurisdiction and the Tribunal did not explicitly state that its decision on the Confidentiality Pleading Issue was a jurisdiction ruling or a determination of its own jurisdiction. Nonetheless, it is in my view undeniable that a decision by a tribunal on whether an issue has been pleaded is, *in substance and effect*, a decision that impinges upon the parties' scope of submission to the tribunal. It is therefore, a decision on the tribunal's *jurisdiction* to hear and determine that issue, as opposed to one on the merits of the underlying dispute. In this instance, the Tribunal was in effect making a finding as to whether this particular issue had been submitted to its jurisdiction for determination.

73 Thus, whether the matters pertaining to the Confidentiality Pleading Issue were pleaded and within the scope of submission are issues that may be reviewed *de novo* by this court. As stated by the Court of Appeal in *AKN* (at [112]), the courts should not, in general, engage with the merits of the underlying dispute when dealing with applications to set aside arbitral awards. However, an exception arises when the courts are confronted with arguments relating to the jurisdiction of the tribunal. In such a case, the court can undertake a *de novo* hearing. Additionally, while the court will in such an event consider as persuasive what the tribunal has said, the court is not bound to accept the tribunal's findings on the matter (*Kingdom of Lesotho* at [87]).

74 In order to determine "what matters were within the scope of submission to the arbitral tribunal" for the purposes of a setting-aside application under Art 34(2)(*a*)(iii) of the Model Law, a court may have regard to various sources from the arbitration record as may be appropriate to the case before it – namely, the parties' pleadings, any agreed list of issues, opening statements, evidence adduced and closing submissions (*CDM and another v CDP* [2021] SGCA 45 at [17]–[19]). However, as recently explained by the Court of Appeal in *CAJ and another v CAI and another appeal* [2021] SGCA 102 (*"CAJ*") (at [50]), these five sources are *not* to be treated as discrete or independent sources which found an arbitral tribunal's jurisdiction. In other words, it is not enough, for the purposes of determining the ambit of the tribunal's jurisdiction, to simply consider whether the issue in question had been raised in *any one* of those five sources. Instead, it remains an important consideration whether the relevant issue had been adequately *pleaded* before the tribunal.

Analysis and decision

75 On a *de novo* review and after carefully considering the pleadings, arguments and evidence adduced before the Tribunal at the material time, I conclude that the Confidentiality Pleading Issue was ***not*** a new issue that was unpleaded or otherwise raised belatedly. Hence, it ought to have been allowed by the Tribunal and considered on its merits. Let me elaborate.

76 I first analyse the plaintiffs' pleadings. In its Statement of Defence and Counterclaim ("SDC"), in a section titled "*Key Features of the SPA*", the plaintiffs stated that the "Earn Outs were further contingent on express conditions precedent under cl 12.6 of the SPA, pursuant to which the Parties agreed that Earn Outs would be forfeited in the event of … breach, default or delay in the performance of the *relevant Promoter Covenants*" [emphasis added]. In a footnote directly after the words "relevant Promoter Covenants", the plaintiffs make reference to "Clause 12.6(ii), which prescribes Promoter Covenants set out in Clause 9 (*ie*, Lock-In of [BTN] Shares) and/or *Clause 11.1.2 (ie*, *Non-Compete and Non solicitation)*".[20] Clause 11.1.2(c) is a sub-provision of Clause 11.1.2 and deals with the material obligation that the defendants undertake not to use or allow to be used "any information of a secret or confidential nature relating to the affairs of [the Group]". Just from this pleading, I consider that the plaintiffs did already plead that the Earn Outs were subject to the conditions precedent in cl 12.6(ii) of the SPA and would not be satisfied if there is a breach of cl 11.1.2 of the SPA (which naturally *includes* cl 11.1.2(c)).

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20 AB Vol IV at p 1692; AB Vol III at pp 983 and 986 (paras 63 and 73).

77 The plaintiffs also expressly pleaded, in a section of the SDC titled "*In Any Event, None of the Conditions Precedent to Earn Outs under the SPA Were Satisfied*", that none of the conditions precedent to the Earn Outs under the SPA were satisfied, including cl 11.1.2 (*ie*, Non-Compete and Non Solicitation).[21] The plaintiffs contended that to establish their entitlement to the Earn Outs, the defendants were required to positively establish that "they did not breach any of the relevant Promoter Covenants".[22] Critically, the plaintiffs said that the defendants "failed to discharge their burden of proof of establishing compliance with all of these conditions precedent under the terms of the SPA".[23] As seen above, this included the confidentiality obligations in cl 11.1.2(c) of the SPA. In the same pleading, albeit in the context of outlining the defendants' employment duties under the supervision and direction of the board, the plaintiffs had in an earlier paragraph made the allegation that the defendants had "despite … their confidentiality obligations, … unilaterally disclosed internal correspondence regarding [BTO]'s financials to [Mr [X]] that they had earlier sent to the Board".[24] The footnote to this sentence admittedly referenced cl 11 of the *PEA* (as opposed to clause 12.6(ii) of the *SPA*). Nonetheless, I accept Mr Yeo's submission that in essence, the confidentiality obligations under both the SPA and the PEA were the same and both agreements were cross-linked.[25] There was, in my view, a connection or link made in the SDC between the allegations concerning the defendants' breach of confidentiality and a breach of cl 11.1.2(c) of the SPA. The link may have been less than direct and somewhat convoluted but it was nonetheless made.

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21 AB Vol III at p 1078 (para 458(b)).

22 AB Vol III at p 1079 (para 459(b)).

23 AB Vol III at p 1079 (para 461).

24 AB Vol III at pp 1006 to 1007 (para 154).

25 Transcript (17 June 2021) pp 130 (lines 10 to 28) and 131 (lines 1 to 15).

78 Additionally, in its Reply to Defence to Counterclaim, the plaintiffs reiterated that the payment of the Earn Outs remained contingent on the defendants' compliance with the conditions precedent in cl 12.6 of the SPA. It stated the following:[26]

> 72. Finally, it should be reiterated that even if [the defendants] were permitted to avoid the consequences of their breaches in an attempt to trigger Clause 12.9.2, they would not automatically be entitled to the Earn Outs as they allege. *As has been explained, the payment of Earn Outs remains contingent on [the defendants]' compliance with the requirements of Clauses 12.6 and 12.7 of the SPA.* Specifically, clause 12.6 requires inter alia that "*the Promoters shall have duly complied with their obligations*" — a clear reference to *the entirety* of their management duties, *including* their "*material obligation*" to manage the business under the terms of the SPA. [The defendants] feign ignorance of these requirements, and perhaps understandably so — faced with their track record of patent mismanagement, it would be impossible to receive Earn Outs, regardless of how they may be claimed.
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> 73. In any event, *the* ***question of such compliance should not even arise. As has been conclusively established, and as will be reiterated in Part III, [the defendants] repeatedly breached their obligations under the SPA****,* causing [BTO] to suffer considerable financial losses, operational problems and a damaged reputation. [The defendants]' breaches and pervasive mismanagement not only make a mockery of their claim to have been terminated "Without Cause", but affirmatively support the [plaintiffs'] counterclaim for damages, as detailed in this submission.
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> [emphasis added in italics and bold italics]

I understand the plaintiffs' statement that "the question of such compliance should not even arise" to be an assertion that due to the defendants' alleged repeated breaches of their obligations under the SPA, there could be no question that the defendants had not complied with the conditions precedent in cl 12.6.

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[26] AB Vol III at pp 1239 to 1240 (paras 72 to 73).

79 The plaintiffs go on to particularise the defendants' non-compliance with the conditions precedent in cl 12.6 of the SPA with reference to Part III of the Reply to Defence to Counterclaim. I note that "Part III" was given the broad title of "Claimants breached their obligations" and the third sub-section of Part III was the "concealment of material information from the [BTO] Board and refusal to comply with its directions".[27] Under this sub-section, the plaintiffs detailed the defendants' covert involvement of Mr [X]. They alleged that the defendants had "provided him with confidential and sensitive information about [BTO] business and regularly forwarded exchanges that they had with the [BTO] Board, so that Mr [X] could advise them on the positions to take against the Board".[28] The plaintiffs also repeated this allegation of the defendants' wrongful sharing of confidential information to Mr [X] three more times in the Reply to Defence to Counterclaim.[29] They then concluded that the defendants' "covert engagement of Mr [X] illustrates … a clear breach of the SPA and their PEAs".[30] In its request for relief, the plaintiffs also requested the Tribunal to issue a final award on the merits "declaring that the Claimants are in breach of their obligations under the SPA".[31]

80 As explained by the Court of Appeal in *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [58], a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration. The purpose of adopting a broad interpretation of the relevant documents (for example, the pleadings) is to avoid an inflexible and rigid

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27 AB Vol III at pp 1241 to 1242.

28 AB Vol III at p 1344 (para 462(c)).

29 AB Vol III at pp 1346 (para 471), 1348 (para 479) and 1350 (para 488).

30 AB Vol III at p 1351 (para 494).

31 AB Vol III at p 1385 (para 624(b)).

analysis of the issues raised in the arbitration, so that issues which *arise from* or are *natural consequences* of the *pleaded issues* are not excluded (*CAJ* at [44]). Considering all of the plaintiffs' pleadings holistically and in the round, the plaintiffs did, in my judgment, sufficiently plead and, *in substance*, place in the arena the issues of (i) whether the defendants breached their confidentiality obligations under cl 11.1.2(c) of the SPA and (ii) whether the conditions precedent in cl 12.6 of the SPA had been satisfied.

81 It is also reasonably clear that the defendants were cognisant of this allegation and responded accordingly. In the defendants' Statement of Reply and Defence to Counterclaim, they relied on the fact that "Mr [X] had signed a confidentiality undertaking".[32] In the Second Witness Statement of BTP, he stated that Mr [X]'s "engagement was on formal terms including a confidentiality undertaking for his role as our consultant".[33] In turn, the plaintiffs responded to this by way of a witness statement from Mr [K] which stated that "[f]rom a confidentiality perspective, the [BTO] Board simply could not verify whether there were adequate safeguards in place because it was not aware of the issue and had not even seen the [non-disclosure agreement] that [BTP] claimed to have been signed by [Mr [X]]".[34] This again showed that, in substance, the issue of the defendants' breach of their confidentiality obligations surrounding Mr [X] was in play as between the parties.

82 Following the plaintiffs' Reply to Defence to Counterclaim (see [78] above), the defendants requested permission to serve further witness statements and exhibits in answer to it. The Tribunal noted the substantial overlap between

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32 AB Vol III at p 1136 (para 111(b)).

33 AB Vol III at p 1458 (para 63).

34 AB Vol III at p 1491 (para 109).

the plaintiffs' arguments and evidence supporting the plaintiffs' defence and counterclaim but nonetheless, allowed the defendants to serve new witness statements and exhibits specifically to reply to the new arguments in the plaintiffs' Reply to Defence to Counterclaim.[35] The defendants were thus given the opportunity to respond to the allegations raised by the plaintiffs, which *included* the allegations of breaches of confidentiality. In this regard, I agree with the plaintiffs that it was the *defendants' choice* not to put forward evidence from Mr [X].[36] Indeed, the relevance of any evidence from Mr [X] is questionable given that the issue of whether there was a breach of confidentiality obligations *by the defendants* was something only within the knowledge of the defendants. Nevertheless, the point remains that the defendants were afforded the opportunity to tender further witness statements, which could have included Mr [X] if the defendants so wished. They did, however, put forward further evidence from BTQ in BTQ's Third Witness Statement in which he stated that:[37]

> … I also wish to reiterate [Mr [X]]'s engagement included a formal confidentiality undertaking, and in any event, I understand that we were entitled under the SPA to disclose information to professionals with confidentiality obligation. I therefore strongly deny the [plaintiffs'] allegation that there were any breaches on our part.

The extract above demonstrates that the defendants not only knew of the allegations levelled by the plaintiffs that they had breached confidentiality obligations, they responded to it directly and denied it.

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35 AB Vol V at pp 2689 to 2690.

36 PWS at para 141.

37 AB Vol III at p 1526 (para 56).

83 This is also confirmed by the defendants' Submissions on Counterclaim Issues in which they stated that "the gist of [the plaintiffs]' complaint was known to them and made in Part III of the SDCC, which alleges that confidential information was provided to Mr [X]". They further argued that "[i]n any event, no loss is (or could sensibly be said) to have flowed from this. Moreover, this could have been relied upon as misconduct in the [MIC] proceedings and is thus now precluded by the [First Partial Award]".[38] Thus, it is reasonably clear that the defendants cannot be said to be taken by surprise by these allegations. It does not lie in the defendants' mouths to claim that that while they were aware of the allegations that they breached their confidentiality obligations, they were surprised that this had the implication of not satisfying the conditions precedent in cl 12.6(ii) of the SPA given that this was based on the express wording of the SPA.

84 Finally, it is important to note that after the release of the First Partial Award, the Tribunal directed parties to submit on the issues that remained to be resolved. The defendants themselves acknowledged that one of the issues that remained to be determined in relation to their claim was as follows – "Are the Conditions Precedent in Clause 12.6(i) (in summary, no breach of Material Warranties) *and Clause 12.6(ii) (in summary, compliance with Lock-In and Non-Compete/Non-Solicitation)* of the SPA satisfied?" [emphasis added].[39] The Tribunal noted that the plaintiffs' position was not dissimilar to the defendants' and was expressed in the following terms – "Have the Claimants established compliance with the conditions precedent in Clause 12.6 of the SPA, which is governed by Mauritian law?".[40] Therefore, whether the conditions precedent to

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38 AB Vol VI at p 2888 (para 15(d)).

39 AB Vol V at p 2719 (Procedural Order No 7, para 40(a)).

40 AB Vol V at p 2719 (Procedural Order No 7, para 41(a)).

cl 12.6 of the SPA had been satisfied by the defendants was clearly in issue before the Tribunal.

85 For the abovementioned reasons, and on the basis of a *de novo* review which the court is empowered to undertake, I have come to a different conclusion to that of the Tribunal on the Confidentiality Pleading Issue. I find that the Confidentiality Pleading Issue was *not* a new unpleaded issue or an issue that was only pleaded belatedly. The allegations forming the substance of the Confidentiality Pleading Issue were, in my view, pleaded, albeit in a weak and somewhat convoluted form. I note the concession made by the plaintiffs' counsel during the arbitration[41] that the plaintiffs had not expressly identified the confidentiality obligations as being related or linked to a breach of the promoter covenants in cl 12.6(ii) of the SPA. However, whether the defendants had breached their confidentiality obligations in cl 11.1.2(c) of the SPA was put in issue. Whether the conditions precedent in cl 12.6 of the SPA (including cl 12.6(ii)) were satisfied was also put in issue. The plaintiffs had particularised the breaches of confidentiality obligations extensively in its Reply to Defence to Counterclaim. While this was in the context of the plaintiffs' counterclaim, as explained above, the gravamen of the allegation pertaining to breach of confidentiality was reasonably linked to the defendants' compliance with the conditions precedent in cl 12.6 of the SPA and the defendants' entitlement to the Earn Outs (see [78]–[79] above). The defendants responded to the factual allegations of confidentiality and cannot be said to be taken by surprise.

86 I note Mr Chew's arguments that (a) the plaintiffs' pleadings did not contain any allegation that the defendants had breached cl 11.1.2(c) of the SPA, compliance with which was a condition precedent under cl 12.6 of the SPA, and

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41 AB Vol IV at p 1696 (lines 1 to 8).

(b) without an express pleading link or an express reference to the allegation in the Confidentiality Pleading Issue by the plaintiffs, the matter cannot be said to have been referred to the Tribunal. I disagree.

87 First, while there is no doubt that this issue could and ought to have been pleaded better or more clearly by the plaintiffs, a practical (as opposed to a technical) view ought to be taken by the court in ascertaining if an issue has in substance been submitted to a tribunal for its determination (see above at [80]). Second, the issue has to be considered by reading the plaintiffs' pleadings in context and as a whole in order to understand the nub of the claim or defence advanced. Pertinently, in *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") (at [150]), Coomaraswamy J noted that "an issue raised in a party's pleadings remains in play throughout the arbitration unless [it] is expressly withdrawn, *no matter how weakly the party may actually advance it*" [emphasis added].

88 To put this another way, let us assume that the Tribunal allowed the Confidentiality Pleading Issue, and went on to eventually rule that there was a breach of confidentiality by the defendants within the meaning of cl 11.1.2(c) of the SPA and that the conditions precedent in cl 12.6 of the SPA were not satisfied. Would the Tribunal in those circumstances have *exceeded* its mandate and thereby rendered an award containing decisions which were *ultra petita*? The answer must surely be "No". To the contrary, all those allegations were, in substance, in issue before the Tribunal and therefore would, in my judgment, be within the scope of submission.

89 I draw further guidance from *JVL Agro* (at [159]) where Coomaraswamy J also said:

> In summary, therefore, a tribunal denies a party a reasonable opportunity to present its responsive case if it follows a chain of reasoning which has no nexus to the case advanced by the parties, unless the parties have been put on notice in some other way that they are expected to address that chain. Thus, without attempting to be prescriptive, a particular chain of reasoning will be open to a tribunal in any one of the following circumstances: (i) if it arises from the party's express pleadings; (ii) if it *is raised by reasonable implication by a party's pleadings*; (iii) if it does not feature in a party's pleadings but is *in some other way brought to the opposing party's actual notice*; or (iv) if the links in the chain flow reasonably from the arguments actually advanced by either party or are related to those arguments.
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> [emphasis added]

While these views were expressed in the context of an application to set aside an award made on the ground of a party not being given a reasonable opportunity to present its case, I consider those views to be useful and equally apposite in determining the degree of specificity required in, for example, a pleading before an issue is considered as having been put before a tribunal. The same analysis can, in my judgment, be usefully applied to determine the scope of the submission to the tribunal's jurisdiction when the court is faced with an application to set aside an award on the basis that the award was made *infra petita*.

90 In the circumstances, I am satisfied that the Confidentiality Pleading Issue was pleaded and put in issue before the Tribunal, at the very least by reasonable implication, based on a holistic reading of the pleadings and the framing of the relevant issue by the parties. It was thus brought to the defendants' notice and was in play in the arbitration. In my judgment, the Tribunal ought therefore to have heard and decided the Confidentiality Pleading Issue on its merits. In not doing so, the Tribunal, in my view, fell foul of the *infra petita* rule.

91 However, that is not the end of the matter. It is still necessary to go on to consider whether any actual or real prejudice was occasioned thereby, and I turn now to address that very issue.

Whether the dismissal of the Confidentiality Pleading Issue resulted in any actual or real prejudice

92 In *CRW Joint Operation v PT Perushaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (at [31]–[32]), the Court of Appeal set out the applicable law pertaining to setting-aside an award on the ground of *infra petita*, as follows:

> 31 It is useful, at this juncture, to set out some of the legal principles underlying the application of Art 34(2)(a)(iii) of the Model Law. First, Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it ***or failed to decide matters that had been submitted to it. In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it*** (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606–2607 and 2798–2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation*") at p 117).
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> 32 Second, it must be noted that a failure by an arbitral tribunal to deal with *every* issue referred to it will *not* ordinarily render its arbitral award liable to be set aside. *The crucial question* ***in every case*** *is whether there has been real or actual prejudice to either (or both) of the parties to the dispute.* In this regard, the following passage in *Redfern and Hunter* ([27] *supra* at para 10.40) ***correctly summarises*** the position:
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> > *The significance of the issues that were not dealt with has to be considered* ***in relation to the award as a whole.*** For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different.

> [emphasis in original in italics; emphasis added in bold italics]

It is clear from the Court of Appeal's pronouncements above that it is not the case that every failure to deal with every issue referred to a tribunal affords grounds for setting aside an award. The critical inquiry is whether there has been real or actual prejudice to either (or both) parties and this inquiry must be conducted by considering the award *as a whole*.

93 What constitutes real or actual prejudice has been explained by the Court of Appeal in a number of cases, and I would highlight three. In *CRW* itself (at [37]–[38]), the court noted that:

> 37 To set aside an arbitral award under s 24(*b*) of the IAA, the court has to be satisfied, first, that the arbitral tribunal breached a rule of natural justice in making the arbitral award. Second, and more importantly, the court must then be satisfied that the breach of natural justice caused *actual or real prejudice* to the party challenging the award. In other words, the breach of the rules of natural justice ***must have actually altered the final outcome of the arbitral proceedings in some meaningful way before curial intervention is warranted. Where the same result could or would ultimately have ensued even if the arbitrator had acted properly, there would be no basis for setting aside the arbitral award in question*** (see *Soh Beng Tee* at [29] and [82]–[91]).
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> 38 ***As in the preceding section vis-à-vis challenging the Final Award based on Art 34(2)(a)(iii) of the Model Law*** (see [34] above), ***the pertinent questions where challenging the Final Award*** based on s 24(*b*) of the IAA is concerned *are*: (a) whether the Majority Members breached any rule of natural justice in making the Final Award without opening up, reviewing and revising the Adjudicator's decision; and, (b) ***if they did commit such a breach, whether the breach caused actual or real prejudice to PGN.***
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> [emphasis in original in italics; emphasis added in bold italics]

94 In *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125, the Court of Appeal held (at [54]):

> 54 … To say that the court must be satisfied that a different result would definitely ensue before prejudice could be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue without the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not be seriously said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator …
>
> [emphasis in original]

95 Finally, in its recent judgment in *BRS v BRQ and another and another appeal* [2021] 1 SLR 390 ("*BRS*") (at [95]–[96]), and in the context of an application to set aside an award based on a complaint of breach of natural justice, the Court of Appeal applied the test of real or actual prejudice to the facts of the case as follows:

> 95 Furthermore, even if such an omission to consider the Relining Method evidence constituted a breach of natural justice, no real prejudice resulted. As the Tribunal explained at [256] of the Award:
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> > [t]he issue under examination does not relate to the need for safety measures. The question under examination is whether [the Buyer], having entered into the SPA subject to a requirement that wet commissioning should be achieved by executing the project with reference to the existing design at a particular price, can add additional safety features which were not in contemplation when the SPA was entered and indemnity was granted, even if such additional features were subsequently found to be necessary. ***Even if relining was necessary, [the***

> ***Seller's] Cost Overrun indemnity will not cover the cost of relining or the interest and establishment expenditure incurred by [the SPV] during the extended period required for completion by reason of the relining of the penstock.*** To put it differently, [the Buyer], having decided to acquire the project through share purchase route with a condition that [the Seller] should ensure completion of the [P]roject according to the then existing parameters/ specifications/designs, cannot subsequently say that for safety purposes it would have other features and [the Buyer] should pay for the time spent for installing the additional features or the cost of the additional features. [emphasis added in bold italics]
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> 96 **Hence, *even if* the Tribunal had found, on the basis of the B Report and other evidence which it omitted to expressly mention, that the Relining Method was necessary, this would not have changed the outcome.** This is because, in the Tribunal's view (whether rightly or wrongly), such relining amounted to a departure from the "existing parameters/specifications/designs" that the parties had contracted upon, and on which basis the indemnities were granted by the Seller. Hence, even if the departure was *necessary* (as posited in the B Report), the Seller would not be liable for delays that flowed from such a departure.
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> [emphasis in original in italics; emphasis added in bold]

It is worth noting that in *BRS*, the court examined the findings of the tribunal closely in considering whether there would be a reasonable difference to the outcome of the arbitration if not for the alleged breach of natural justice.

96 Drawing together the principles that may be distilled from the trilogy of cases referred to above, on the issue of actual or real prejudice (whether due to a tribunal's failure to decide an issue that was before it or due to a breach of natural justice), the essential question the court must ask itself is this – if not for the tribunal's alleged failure or breach, would there have been any *reasonable difference* made to the arbitral tribunal's deliberations and the final outcome of the arbitration proceedings? Where there could have been *no* reasonable difference or "the same result could or would ultimately have ensued" (*CRW* at

[37]), there would be no justification for curial intervention as it would, in those circumstances, simply be a waste of time and costs for both the parties and the tribunal.

97 Mr Yeo argues that there was substantial prejudice to the plaintiffs because they were not even given a proper opportunity to be heard on this issue on the merits despite it being put squarely before the Tribunal; the prejudice was clear as this was the only remaining defensive case that the plaintiffs had to oppose the claim by the defendants for the Earn Outs.[42] If the Tribunal had considered the arguments, evidence and submissions on whether the Confidentiality Pleading Issue should have been allowed on its merits, the Tribunal could (and would) have reasonably found that the defendants did not satisfy the conditions precedent under cl 12.6(ii) of the SPA and were not entitled to the Earn Outs.[43]

98 In contrast, the defendants argued in the course of the arbitration that these allegations (*ie*, the substantive allegations underpinning the Confidentiality Pleading Issue) would also have been precluded by the Tribunal's findings on issue estoppel in the First Partial Award (see [39] above). Thus, no prejudice was suffered by the plaintiffs by the Tribunal not allowing the Confidentiality Pleading Issue to be advanced.

Analysis and decision

99 While I have found that the Tribunal failed to decide the Confidentiality Pleading Issue even though it was an issue before it, I am *not* persuaded that a

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42 AB Vol II at p 521 (para 41).

43 PWS at paras 169 to 179.

setting-aside of the Awards would be appropriate in the circumstances. In my judgment, no actual or real prejudice has been suffered by the plaintiffs.

100 On the facts of this case, I find that even if the Tribunal *had* allowed the Confidentiality Pleading Issue and considered it on the merits, it *would not* have altered the balance of the award. In other words, I agree with the defendants that there could or would have been *no* reasonable difference to the Tribunal's decision or the outcome of the arbitration. This is because, in my judgment, the Tribunal's findings in relation to issue estoppel on *the Counterclaim Preclusion Issue* would, logically, *also* apply to bar the plaintiffs' *defence* based on the allegations of breach of confidentiality, given the broad and overlapping nature of the plaintiffs' allegations pertaining to breach of confidentiality. In addressing the Counterclaim Preclusion Issue, the plaintiffs were given the opportunity to present their case, adduce the necessary evidence and make all the necessary arguments on the application of issue estoppel to the facts of this case as a result of the MIC Awards, including the application of issue estoppel to any alleged breaches of confidentiality by the defendants relating to Mr [X] – the very same allegations that formed the basis of the Confidentiality Pleading Issue. Thus, even if the Tribunal did consider the Confidentiality Pleading Issue on its merits, that defence in all likelihood would still have been dismissed because of the application of issue estoppel arising from the MIC Awards and the Tribunal's decision in the First Partial Award. I elaborate below.

101 In the Second Partial Award, the Tribunal considered the scope of the findings made by the MIC in relation to the allegations raised in the counterclaim. It concluded that the Termination Letters alleged acts and omissions of gross misconduct and gross negligence, acts of wilful damage or wilful omission resulting in material loss or damage to the Group and that the defendants had behaved in a manner that is materially detrimental to the

interests of the Group. It also noted that "[t]hese allegations of misconduct are painted with an extremely broad brush, and the factual determinations of the Malaysian Industrial Court that these allegations were not proven must be accepted as correspondingly broad, encompassing a very wide range of possible misconduct".[44] It also went on to consider 17 "purportedly new examples of misconduct" alleged by the plaintiffs for the purposes of the counterclaim.[45] What is material for present purposes is one particular example that "[the defendants] defied the [BTO] Board's instructions that no further information or data about [the Group] should be disclosed to [Mr [X]]". As regards this allegation, the Tribunal rejected the plaintiffs' argument that they were not aware, at the time the employment of the defendants was terminated, of their breaches of confidentiality. It referred to a "critical exchange" of emails on 19 February 2013 and in particular, quoted an email sent that day by BTN's Mr [J] to Mr [K] where Mr [J] complained that:[46]

> [BTP] has gone ahead, hired a guy ***and also shared [BTO] data with him*** despite me repeatedly telling him that one of you has to meet him and approve his appointment. *He went ahead and also got a [BTO] NDA signed with him without worrying about checking with our legal team.* This is a gross violation in my opinion and we should take this incident seriously.
>
> [emphasis added in bold italics]

102 It found that the plaintiffs "were in fact aware of the [defendants'] alleged breaches of the SPA *relating to* Mr [X]'s recruitment, hire and ongoing dealings with [the defendants]" [emphasis added].[47] Accordingly, the Tribunal held that this allegation also fell squarely within the scope of the very broad

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44 AB Vol II at p 561 (para 155).

45 AB Vol II at pp 567 to 568 (para 172).

46 AB Vol II at p 571 (para 181).

47 AB Vol II at p 572 (para 183).

allegations in the Termination Letters and had been determined by the MIC. Therefore, they were precluded by issue estoppel.[48]

103 In the light of the Tribunal's analysis and decision on issue estoppel as summarised above, I agree with the defendants that there is no actual or real prejudice suffered by the plaintiffs. I disagree with the plaintiff's submission that in deciding the Counterclaim Preclusion Issue, the Tribunal dealt with the allegations against the defendants relating to Mr [X] *only* in the context of the latter's "use or employment" by the defendants and not in the context of the defendants breaching their confidentiality obligations under the SPA by divulging confidential information to Mr [X].[49] It is reasonably clear from the Tribunal's analysis and reasoning that the Tribunal did not address the issue within such a narrow compass as argued by the plaintiffs but did address the breach of confidentiality aspect *as well*. For example, the references by the Tribunal at [181] and [184] of the Second Partial Award to the email from Mr [J] (see [101] above) where specific reference was made to the defendants "sharing [BTO] data" with Mr [X] as well as the Tribunal's references to the plaintiffs being aware of the alleged breaches by the defendants of the SPA "*relating to* Mr [X]'s recruitment, hire *and ongoing dealings* with [the defendants]"[50] and "*relating to* Mr [X] at the time of the Termination Letters"[51] demonstrate quite clearly that the Tribunal was not limiting its analysis and decision only to matters relating to the "use or employment" of Mr [X] as contended by the plaintiffs.

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48 AB Vol II at p 573 (para 185).

49 PWS at paras 174 to 178.

50 AB Vol II at p 572 (para 183).

51 AB Vol II at p 572 (para 185).

104 Mr Yeo also submitted that the defendants' argument that the Confidentiality Pleading Issue would have been barred in any event by issue estoppel on the Counterclaim Preclusion Issue was a red herring. This is because neither party suggested, during the arguments before the Tribunal, that the Confidentiality Pleading Issue was a futile application because it would have been precluded by issue estoppel in any case.[52]

105 I disagree with this argument for the simple reason that the Tribunal had *not yet* heard the Counterclaim Preclusion Issue when it heard arguments on and disallowed the Confidentiality Pleading Issue. The Tribunal would not have been able to disallow the Confidentiality Pleading Issue on the basis that it would have been barred in any case under the Counterclaim Preclusion Issue because that would mean, in substance, the Tribunal having to *prejudge* the outcome of the Counterclaim Preclusion Issue on which it had not yet heard or considered the evidence or arguments. Thus, the fact that neither party raised any argument on the futility of the Confidentiality Pleading Issue is not of any significance. It was, in my view, understandable given the order in which the issues were argued before the Tribunal during the oral hearing in December 2018.

106 In the circumstances and having considered the Second Partial Award and the Tribunal's decision *as a whole*, including its analysis and decision on the Counterclaim Preclusion Issue (which I consider in greater detail below), there *would not*, in my judgment, have been any meaningful difference to the ultimate result or outcome of the arbitration even if the Tribunal had dealt with the Confidentiality Pleading Issue on its merits. This is because issue estoppel would, based on the Tribunal's reasoning and decision on the Counterclaim

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52 Transcript (16 June 2021) at pp 146 (lines 25 to 27) and 147 (lines 1 to 9).

Preclusion Issue, have also barred the allegations made in the Confidentiality Pleading Issue in any event. In the premises, this ground of objection raised by the plaintiffs fails.

Whether the dismissal of the Confidentiality Pleading Issue resulted in a breach of natural justice

107 I start by briefly summarising some well-established principles. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (at [29]), the Court of Appeal held that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

108 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, the Court of Appeal described the overarching enquiry as follows (at [98]):

> In our judgment in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case …

As mentioned at [96] above, the test for demonstrating actual or real prejudice is the same, whether the ground relied upon is *infra petita* or breach of natural justice.

109 In this case, it is strictly unnecessary for me to address the plaintiffs' arguments on breach of natural justice in any detail as they are, first, closely intertwined with their *infra petita* arguments. Second and more importantly, since I have found that there is no actual or real prejudice to the plaintiffs arising from the Tribunal's failure to deal with the Confidentiality Pleading Issue (ie, the *infra petita* objection), that lack of prejudice is equally fatal to the success of the plaintiffs' breach of natural justice objection.

110 Thus, even if I were to *assume* that there was a breach of natural justice in terms of the fair hearing rule by reason of the Tribunal failing to decide the Confidentiality Pleading Issue on its merits, given the lack of any actual or real prejudice caused by any such assumed breach, the test laid out in *Soh Beng Tee* (at [105] above) is still not made out by the plaintiffs. Therefore, this ground of objection also fails accordingly.

111 To sum up my conclusions on the first issue, the plaintiffs are not precluded from raising the Confidentiality Pleading Issue even though it was only properly fleshed out in Mr [K]'s reply affidavit. On the substantive objection, I find, on the basis of a *de novo* review, that the Tribunal's dismissal of the Confidentiality Pleading Issue was *infra petita* as it was a defence that was pleaded. Nevertheless, the failure by the Tribunal to decide that issue on its merits did not result in any actual or real prejudice to the plaintiffs given the Tribunal's decision on the Counterclaim Preclusion Issue. As for the complaint of a breach of natural justice, even assuming that there was any such breach, this ground also fails due to the lack of any actual or real prejudice.

Second Issue: The Counterclaim Preclusion Issue

Whether the Tribunal's decision on the Counterclaim Preclusion Issue was infra petita

112 I turn now to the Counterclaim Preclusion Issue. The plaintiffs argue that the Tribunal's decision on the Counterclaim Preclusion Issue was a "wrong negative jurisdictional ruling". As summarised above at [45], their case is that the Tribunal improperly abdicated its jurisdiction in respect of the plaintiffs' counterclaim against the defendants by (a) ignoring the arguments, evidence and submissions before it on the application of issue estoppel, and (b) in making a factual finding that BTO was presumed to be aware of the MIC Proceedings based on its gratuitous factual finding in the First Partial Award (even though the First Partial Award was supposedly limited to points of law) that BTO had been validly served in Malaysia.[53] The plaintiffs take issue with various errors, described by their counsel as egregious, that were committed by the Tribunal and which resulted in it finding that (a) there was subject matter identity between the counterclaim allegations and the factual findings in the MIC Awards and (b) that there were no special circumstances.

113 As regards the Tribunal's decision on subject matter identity, Mr Yeo raised three criticisms.[54] The first was the Tribunal's finding that based on the very broad allegations in the Termination Letters, they covered every possible instance of misconduct on the defendants' part, even those not known to the plaintiffs at the time of the Termination Letters and were therefore caught by the MIC Awards.[55] The second criticism, related to the first, is that the Tribunal

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53 PWS at paras 180 to 187.

54 Transcript (16 June 2021) at pp 59 to 66.

55 Transcript (16 June 2021) at pp 64 (lines 5 to 27) and 65 (lines 1 to 6).

completely failed to deal with the allegation in the SDC that there had been *further* breaches by the defendants of their confidentiality obligations in relation to divulging information to Mr [X] which had only come to light after the arbitration had been commenced in the course of discovery.[56] Instead, the Tribunal referred to the exchange of emails on 19 February 2013 to conclude that the plaintiffs were aware of the defendants' breaches of their confidentiality obligations when the Termination Letters were sent, the effect of which was that the decision even included breaches not known to the plaintiffs at the time those letters were sent to the defendants. The third criticism was in relation to the Tribunal's finding that by not turning up at the MIC Proceedings, the plaintiffs had raised but then conceded the allegations made in the Termination Letters.[57]

114 The Tribunal's decision on the lack of special circumstances is what Mr Yeo describes as the Tribunal's most egregious error. Mr Yeo submits that the Tribunal completely disregarded the plaintiffs' evidence and arguments that the plaintiffs were not in fact aware of the MIC Proceedings. This is demonstrated by the fact the Tribunal went down the path of finding that BTO was *presumed* to be aware instead of whether they were *in fact* aware of the MIC Proceedings.[58] Mr Yeo also submitted that, before making any findings on the point, the Tribunal ought to have examined Mr [K] on his witness statement or "given Mr [K] an opportunity to explain his position" where Mr [K] had stated that the plaintiffs were not aware of the MIC Proceedings.[59]

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56 Transcript (16 June 2021) at p 67 (lines 5 to 13); AB Vol IV at pp 1935 (lines 8 to 18), 2080 (lines 24 to 25) to 2081 (lines 1 to 2).

57 Transcript (16 June 2021) at p 66 (lines 8 to 14).

58 Transcript (16 June 2021) at pp 138 (lines 4 to 17), 140 (lines 1 to 27) and 141 (lines 1 to 17).

59 Transcript (17 June 2018) at pp 118 (lines 5 to 28) to 122 (line 4); PWS at para 219.

115 Mr Chew, on the other hand, argues that the Counterclaim Preclusion Issue was an issue decided based on the substantive merits of the dispute. All of the criticisms levelled against the Tribunal by the plaintiffs with respect to its decision on subject matter identity were really nothing more than criticisms of the decision on its merits. Dealing with each criticism in turn, Mr Chew submitted that based on the very broad allegations in the Termination Letters, the Tribunal reasoned that a similarly broad interpretation would have to be applied to determine if the allegations in the counterclaim were identical to the allegations in the Termination Letters. The Tribunal then proceeded to examine if all the counterclaim allegations raised by the plaintiffs were identical to the issues in the MIC Proceedings and the factual findings made in the MIC Awards.[60] As for the criticism pertaining to the Tribunal's failure to deal with the further breaches of the defendants' confidentiality obligations pertaining to Mr [X], the plaintiffs had never taken the point in the arbitration that that particular allegation (raised in the plaintiffs' submissions on counterclaim issues in the arbitration)[61] fell outside the ambit of the Termination Letters, bearing in mind that following the exchange of emails on 19 February 2013, the defendants' employment was only terminated almost a year later on 8 January 2014.[62] With respect to the criticism that the plaintiffs were found to have raised but then conceded the allegations in the Termination Letters before the MIC, the premise of the plaintiffs' submission was misguided; all the Tribunal did was to hold that the MIC Awards made a finding of fact that the alleged misconduct set out in the Termination Letters did not occur and that the MIC Awards were binding on the plaintiffs.[63]

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60 Transcript (17 June 2021) at p 62 (lines 1 to 27).

61 AB Vol VI at pp 2853–2854 (para 19).

62 Transcript (17 June 2021) at p 68 (lines 19 to 28).

63 Transcript (17 June 2021) at p 69 (lines 19 to 28) and 70 (lines 1 to 23).

116 With regard to the Tribunal's decision on the lack of special circumstances, Mr Chew's response was that the plaintiffs were again simply attempting to revisit the decision on the merits.[64] The argument that they were not in fact aware of the MIC Proceedings was not an argument raised before the Tribunal as constituting a special circumstance, as can be seen from the arguments raised in the plaintiffs' position paper and in their counsel's oral submissions. Thus, there is no basis for the plaintiffs to contend that the Tribunal completely failed to consider the plaintiffs' arguments or evidence on this issue.

117 Furthermore, in general, the Counterclaim Preclusion Issue was not an issue that was raised with the Tribunal as a jurisdictional challenge. Therefore, there is no basis to set aside the Awards and the plaintiffs are merely seeking, in the guise of a jurisdictional challenge, to illegitimately relitigate the merits because they are dissatisfied with the outcome.[65]

Analysis and decision

118 In my view, the plaintiffs' arguments are, in the round, a creative but nonetheless disguised attempt to persuade the court to revisit the merits of the Tribunal's decision on the Counterclaim Preclusion Issue. This is not a matter pertaining to the Tribunal's jurisdiction; nor was the Tribunal's decision on the Counterclaim Preclusion Issue, either in substance or effect, a negative jurisdictional ruling. The Tribunal was fully aware that it had the jurisdiction to determine the counterclaim on the merits; the merits of the counterclaim *included* deciding whether the factual allegations in support of it were precluded by reason of the application of issue estoppel. Hence, the Tribunal's analysis of

64 Transcript (17 June 2021) at p 81 (lines 3 to 11).

65 DWS at paras 123 to 129.

whether the factual allegations made in the plaintiffs' counterclaim were barred by issue estoppel was done in the exercise of that very jurisdiction conferred on it by the parties. In the Appeal Judgment (at [71]), the Court of Appeal made it clear that determinations of *res judicata* issues are decisions on matters of *admissibility and* ***not*** *jurisdiction*. Thus, the Tribunal's decision on issue estoppel was one that touched only on the question of admissibility of those factual allegations. That is a purely substantive issue that the Tribunal was asked to determine on the underlying merits of the counterclaim as opposed to a jurisdictional issue. The Tribunal duly proceeded to hear arguments and decided the very issue that it was asked to determined, and which it clearly indicated it would in PO No 7 where the Tribunal stated as follows:[66]

> 83. However, the Tribunal has also determined to conduct a one-day hearing on the question of whether and, if so, to what extent any of the Respondents' counterclaim allegations are precluded by issue estoppel under the reasoning of the [First Partial Award]. This question incorporates the fundamental question of whether the counter claim prima facie survives the [First Partial Award] [as] a matter of *res judicata.* The Tribunal is open to one further round of written submissions, with the Respondents to file first.

119 This distinction between admissibility and jurisdiction is critical. As stated in the Appeal Judgment (at [72]):

> … there is no basis on which to challenge an award involving an erroneous ruling in respect of an admissibility issue (such as a *res judicata* issue) that would result in the tribunal considering that it is not able to determine the merits of either party's position on that issue …

Therefore, whether the Tribunal was right or wrong in *the application* of issue estoppel to the merits to the plaintiffs' counterclaim (which was the crux of the Counterclaim Preclusion Issue), there is no justification whatsoever for curial

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66 AB Vol V at p 2732 (Procedural Order No 7, para 83).

intervention. I agree with Mr Chew's submission that the plaintiffs' attempted re-characterisation of this issue as a jurisdictional question is misconceived. The plaintiffs are, in effect, recirculating a number of the arguments they raised in their attempts to set aside the *First* Partial Award and which have already been roundly rejected by the High Court and Court of Appeal in the Judgment and the Appeal Judgment respectively. In addition, the plaintiffs' criticisms of the Tribunal summarised above at [113] also amount, in my judgment, to little more than an attempt to repackage various arguments on the merits raised by the plaintiffs unsuccessfully before the Tribunal during the second phase of the arbitration.

120 The plaintiffs also make extensive arguments, as I have summarised above, that the Tribunal based its finding that BTO was presumed to be aware of the MIC Proceedings on its earlier "gratuitous" finding at [126] of the First Partial Award that BTO had been validly served in Malaysia with the MIC papers. Mr Yeo criticises the Tribunal for this as the First Partial Award was only intended to be a decision on points of law and not findings of fact. In addition, the plaintiffs argue that there was no evidence that BTO was in fact aware of the MIC Proceedings, the unchallenged evidence of Mr [K] was that BTO was in fact unaware, yet the Tribunal committed an egregious error in finding that the plaintiffs were presumed to be aware of the MIC Proceedings simply because BTO was validly served with the documents in the MIC Proceedings. This, Mr Yeo argues, demonstrates that the Tribunal members completely failed to consider the plaintiffs' evidence and arguments on this issue and did not bring their minds to bear on it.[67]

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67 PWS at paras 194 to 213.

121 In my judgment, none of these arguments brings the plaintiffs' case any further. First, I note that even though the Tribunal expressed its intention for the First Partial Award to deal with "discrete issues on points of law insofar that they could be entirely divorced from factual matters" (at [28] above), the issues put to the Tribunal under the general issue, "What, if anything, is the effect of the judgments of the [MIC]", *expressly allowed* the Tribunal to determine "all issues necessary to resolve whether the findings of the [MIC] are binding on both [defendants]" (see [27] above).[68] This permitted the Tribunal to make necessary factual findings if it is clear from the record to resolve the question at hand. There is therefore nothing impermissible in the Tribunal making references to its findings in the First Partial Award as part of its reasoning or to aid a conclusion it reached in the Second Partial Award. The Tribunal had, in any event, expressly incorporated the First Partial Award into and made it part of the Second Partial Award (see [126] below). Further and in any case, even if the Tribunal committed an error in relying on its allegedly "gratuitous" findings in the First Partial Award, this would, at its highest, amount only to an error of fact or law, neither of which constitutes grounds for setting aside the Awards.

122 Further, while the plaintiffs argue that the Tribunal completely ignored and/or did not really try to understand the arguments set out (*ie*, that BTO and its senior management were in fact not aware of the MIC Proceedings), in my view, the evidence shows that the Tribunal *did* put its mind to the issue and therefore the plaintiffs' criticism of the Tribunal is unwarranted. In my view, the Tribunal simply did not consider the plaintiffs' contention to be determinative. First, the Tribunal explained at the beginning of the section dealing with the Counterclaim Preclusion Issue that it had structured the

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68 AB Vol II at p 711 (para 116A(4)).

relevant section to "focus on the issues [it] considered fundamental to resolution of [the] issues". It also stated that "for the avoidance of doubt, the Tribunal has carefully considered *all of the submissions* of the Parties with respect to counterclaim preclusion, regardless of whether they are specifically referenced herein" [emphasis added].[69] While I accept that such a statement cannot be taken to be conclusive, it is at least indicative of the Tribunal's state of mind to be mindful of the plaintiffs' various submissions. Indeed, the plaintiffs repeatedly made the point, in their pleadings, M [K]'s witness statement, their position paper, further submissions on the Counterclaim Preclusion Issue and oral submissions (presented during a telephone hearing on 31 July 2018 and at the oral hearing in December 2018) to the effect that the plaintiffs were prevented from knowing or were unaware of the MIC Proceedings (due to the actions of Mr [C]) and were therefore unable to defend themselves.[70]

123 At [199] and [200] of the Second Partial Award, the Tribunal succinctly summarised the law in Singapore on the special circumstances exception and the plaintiffs' basic position. It correctly noted that the plaintiffs were not contending that the MIC Awards contained any egregious errors but rather, premised their case on the grave injustice that would be caused (*ie*, preventing the plaintiffs from raising a fundamental issue concerning their rights). At [199], the Tribunal adopted the language used by the High Court in *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 which was heavily relied upon by both parties in the arbitration and which the Tribunal itself had earlier

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69 AB Vol II at p 549 (para 124).

70 AB Vol III at pp 988 (SDC at paras 85 to 86), 1429 (Witness Statement of Mr [K] at paras 141 to 142); AB Vol VI at pp 2824 (Plaintiffs' Position Paper para 40) and 2854 (Plaintiffs' Submissions on Counterclaim Issues para 22); AB Vol IV at pp 1620 to 1621 (Transcript on 31 July 2018, pp 90 to 91), AB Vol IV at pp 2079 (Transcript on 6 December 2018 at p 164 lines 13 to 15) and 2091 (lines 17 to 19).

referenced at [141] of the Second Partial Award. To demonstrate that the Tribunal clearly understood and appreciated the legal principles applicable, I can do no more than reproduce below [142] and [143] of the Second Partial Award:

> 142. Thus, even if all four elements for issue estoppel are met, a departure from the doctrine might be justified if the [plaintiffs] can demonstrate that the [MIC Awards] contain a "very egregious error", or that the application of issue preclusion would cause a "grave injustice" by preventing the [plaintiffs] from raising "a fundamental issue concerning their rights".
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> 143. The Tribunal now turns to consider whether the [defendants] are able to establish that that [*sic*] all three elements of identity of subject matter are satisfied and, if so, whether the [plaintiffs] are able to establish that a departure from the doctrine of issue estoppel nonetheless is justified.

124 After reiterating that the doctrine of issue estoppel is not absolute and summarising the applicable legal principles on special circumstances at [199], at [201] of the Second Partial Award, the Tribunal then went on to make specific reference to and summarised the plaintiffs' arguments on special circumstances as listed in their position paper. At [202], the Tribunal summarised the defendants' responses to those arguments. It thus beggars belief, in my judgment, to say that, all of the above notwithstanding, the Tribunal was unaware of or completely disregarded the plaintiffs' evidence or arguments that they were in fact unaware of the MIC Proceedings.

125 Second, the Tribunal's reasoning in the Second Partial Award in relation to the special circumstances exception demonstrated that it did understand the plaintiffs' argument that issue estoppel should not apply on account of grave injustice being occasioned because the plaintiffs were unaware of the MIC Proceedings and could not defend themselves. As I have already stated above at [123], when setting out the applicable law, the Tribunal noted that the doctrine

of issue estoppel is not absolute and a departure from the doctrine might be justified if the plaintiffs can "demonstrate that the [MIC] Judgments contain a "very egregious error" or that the application of issue preclusion would cause a "grave injustice" by preventing the [plaintiffs] from raising "a fundamental issue concerning their rights".[71] The Tribunal then listed all of the plaintiffs' arguments as to why there were special circumstances and the defendants' arguments in response.

126 The Tribunal's reasoning as set out below must thus be considered in this light:[72]

> 203 *Having considered the Parties' sharply different positions on this issue, the Tribunal can only conclude that there are no special circumstances justifying a departure from the doctrine of issue estoppel* in this case. First, the Tribunal has already ***rejected [the plaintiffs'] argument that it was prevented from knowing about*** the Malaysian Industrial Court proceedings. In the [First Partial Award], the Tribunal noted that [the plaintiffs] had been *validly served in the Malaysian Industrial Court proceedings on multiple occasions, and that any problem in appearing before the Court resulted from [the plaintiffs'] own internal management failures*, for which [the defendants] cannot be faulted:
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> > 194. In this context, the Tribunal observes that we cannot speculate about what the Malaysian Industrial Court might have decided if [BTO], with or without [BTN], had appeared and defended itself in the proceedings. Such speculation is irrelevant to our analysis of issue estoppel under Singapore law.
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> > 195. The relevant point is that the Malaysian Industrial Court, being informed of the grounds for dismissal under the PEAs, made findings on the merits that [the defendants] had not been terminated for just cause or excuse…
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> 204 Further, the Tribunal is ***not persuaded that [the defendants] had any obligation to inform [the plaintiffs] of***

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71 AB Vol II at pp 555 to 556 (paras 141 to 142).

72 AB Vol II at pp 579 to 580 (paras 203 to 204).

> ***the Malaysian Industrial Court proceedings***. [BTO], ***having been validly served and having participated in the initial mediation, was fairly presumed to be aware of the proceedings***. *It is specious for [the plaintiffs] to suggest that Clause 18.3 of the PEAs imposed any obligation upon [the defendants] to inform [the plaintiffs] of Court communications, as this provision clearly applies to notices between the Parties.*
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> 205 Finally, the Tribunal, while recognising that the authorities do contemplate that, exceptionally, special circumstances may justify a departure from the application of issue estoppel, is not persuaded that any injustice, grave or otherwise, results from the application of the doctrine of issue estoppel to the factual allegations underlying [the plaintiffs'] counterclaim ***in the circumstances before us. [The plaintiffs] may lament that they have been prevented from pursuing their counterclaim in any forum and, as counsel put it at the hearing, "have had no bites of the cherry in terms of the investigation of the merits of the matters on which they are now relying upon as the basis for advancing their counterclaim".*** However, it bears repeating that the same factual allegations upon which [the plaintiffs'] counterclaim rests have already been determined by the Malaysian Industrial Court, and the Tribunal determined in its [First Partial Award] that issue preclusion applies to those findings. It is precisely the purpose of issue preclusion to prevent the re-litigation of the same factual or legal issues between the same parties after those issues have been determined by a court of competent jurisdiction…"
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> [emphasis in original omitted; emphasis added in italics and bold italics]

127 The first observation I would make is that a careful reading of the paragraphs quoted above shows that the Tribunal was engaging each of the arguments that had been advanced by the plaintiffs and which the Tribunal had summarised at [201] of the Second Partial Award.

128 I agree with the defendants that the Tribunal understood and considered the fact that BTO claimed that it was not in fact aware of the MIC Proceedings. First, the Tribunal specifically noted the plaintiffs' argument that "it was prevented from knowing about the [MIC Proceedings]"; the phrase "prevented from knowing" was itself coined by the plaintiffs in their position paper. It

cannot be seriously contended that even though the Tribunal knew of and understood the plaintiffs' argument that they were prevented from knowing about the MIC Proceedings, the Tribunal somehow did not address its mind at all to and/or did not really try to understand the sharp point of the plaintiffs' contention that they were in fact not aware of the MIC Proceedings. Just as a matter of plain English, if the plaintiffs were indeed "prevented from knowing" about the MIC Proceedings, the logical and obvious inference to be drawn from that argument is that *they did not in fact know* about those proceedings. In my view, that is also how the Tribunal would have understood and did understand the plaintiffs' argument. Given the eminence of the Tribunal members, I find it difficult to accept that the Tribunal missed or completely failed to understand this quite obvious inference, leaving aside the fact that the plaintiffs did also specifically make the point to the Tribunal that they were not aware of the MIC Proceedings (see [122] above).

129 Digressing slightly, I do not accept Mr Yeo's contention that it was somehow incumbent on the Tribunal to question or orally examine Mr [K] on the evidence in his witness statement regarding the plaintiffs being unaware of the MIC Proceedings, before the Tribunal made any finding on the same. Nor do I accept his argument that because the Tribunal failed to question Mr [K] even though he was offered as a witness, it shows that the Tribunal did not even consider Mr [K]'s "unchallenged" evidence that BTO was unaware of the MIC Proceedings. Neither of these arguments has any merit.

130 First, the arbitral process in Singapore is still primarily adversarial. It is therefore for the parties to press a point in the proceedings, if they think it is appropriate or tactically advantageous to do so, including making tactical decisions such as whether to question a witness or not. The latter point is all the more relevant in the present case since parties had agreed, by an email dated 14

November 2018, that "any reliance upon evidence concerning allegations made in support of the counterclaim would be elicited by reference to the documentary evidence, without the need for oral evidence".[73] During the oral hearing, the defendants chose not to cross-examine Mr [K] as the plaintiffs had chosen not to cross-examine the defendants' witnesses (*ie,* BTP and BTQ) on clause 12.6 of the SPA.[74] The Tribunal was therefore perfectly entitled to decide the Counterclaim Preclusion Issue on the basis of the documentary evidence and witness statements as submitted by the parties. Moreover, contrary to Mr Yeo's submission, the Tribunal did not disbelieve Mr [K]'s evidence or consider Mr [K] to have lied. Nor did the Tribunal make any finding to the effect that BTO was in fact aware of the MIC Proceedings.[75]

131 Reverting to the issue I was addressing at [125] above, in my judgment, it is more likely that the Tribunal *accepted*, at face value, the plaintiffs' claim that they were unaware of the MIC Proceedings (because they were "prevented from knowing" about them) *but* did not consider that to be relevant in light of the valid service on BTO of the papers in the MIC proceedings (see [22] above). It is also equally plausible that the Tribunal simply disagreed with the plaintiffs that it made any difference to the existence or otherwise of special circumstances.

132 As such, while the Tribunal may not have laid out their reasoning or dealt with that point specifically or clearly (*ie*, that BTO was not in fact aware of the MIC Proceedings), the reason could simply be because the Tribunal found it sufficient that BTO had been validly served with the notices, letters and other

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73 AB Vol II at p 519 (para 32).

74 AB Vol II at p 531 (para 74).

75 Transcript (17 June 2021) at pp 120 (lines 21 to 28) and 121 (lines 1 to 2).

documents pertaining to the MIC Proceedings; hence its reference back to its findings in the First Partial Award. This also provides, in my view, a plausible explanation for its finding that BTO was "fairly presumed to be aware of the proceedings". In addition, that finding was also the Tribunal's specific response to the plaintiffs' argument that *the defendants* were under a contractual obligation to give *both* plaintiffs *notice* of the MIC Proceedings. This evinces the fact that the Tribunal was fully alive to the plaintiffs' claim not to have been aware of the MIC Proceedings at the material point in time and their argument that the defendants ought to have brought the MIC Proceedings to the plaintiffs' attention; this was simply another facet of the same argument raised by the plaintiffs about them not being aware of the MIC Proceedings. There is thus no basis at all for the court to come to the conclusion or draw any inference that the Tribunal completely failed to address the plaintiffs' arguments on this point or did not even try to understand them.

133 I also draw support for my conclusions above from *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") where Chan Seng Onn J held (at [104]–[105]) in the context of an application to set aside an award on the ground of breach of natural justice:

> 104 Even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety reasons why an arbitral tribunal may elect not to say something. In my view, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122. In this regard, I agree fully with Prakash J's following observation in *SEF* … at [60]:
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> > The fact that the [Adjudicator] did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard

> to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice.
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> 105 There is plainly no requirement for the arbitral tribunal to touch on "each and every point in dispute" in its grounds of decision: *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at [48]. Last but not least, it bears repeating that as guided by *Thong Ah Fat*, decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning.

134 In short, reading the Second Partial Award reasonably, generously, commercially, as a whole and in context, it is not difficult to draw the conclusion that the Tribunal was, in effect, *disagreeing* (even if not expressly, at least implicitly) with the plaintiffs that the fact that they were not in fact aware of the MIC Proceedings was sufficient to amount to special circumstances in this case. In substance, the conclusion of the Tribunal was that *it did not matter* because, in its view, the presumption of awareness via valid service on BTO of the various notices and letters from the MIC and attendance at the conciliation meeting was sufficient to negate the existence of special circumstances, and for the Tribunal to decline to exercise its discretion not to apply issue estoppel. More importantly, the Tribunal's conclusion and decision on the plaintiffs' awareness of the MIC Proceedings was *entirely* concerned with the *merits* of the case, *ie*, whether there existed special circumstances that warranted disapplying issue estoppel to the counterclaim allegations. The correctness of the Tribunal's conclusion, however erroneous or egregious the plaintiffs may think it is, *cannot* be impugned before this court in the guise of arguments based

on the *infra petita* rule. *A fortiori* when the Tribunal was, on the issue of special circumstances in particular, exercising a *discretion* whether or not to disapply issue estoppel based on the facts and circumstances before it.

135 Further, at [205] of the Second Partial Award, the Tribunal specifically noted the plaintiffs' argument that they "have had no bites of the cherry in terms of the investigation of the merits of the matters on which they are now relying upon as the basis for advancing their counterclaim" and footnoted a reference to the hearing transcript where counsel for the plaintiffs had advanced it. The Tribunal clearly understood that the nub of this argument was that the plaintiffs had not had any opportunity to pursue the counterclaim or the counterclaim allegations in any forum (be it before the MIC or the Tribunal); as Mr Yeo put it, the plaintiffs had not had the opportunity to "vex" anyone even once, given that the rationale behind the doctrine of *res judicata* was to prevent successful litigants from being vexed twice. This argument was entirely consistent with the plaintiffs' overarching claim that they were not in fact aware of the MIC Proceedings and did not have a chance to defend themselves. The Tribunal nevertheless determined, on the merits and in the circumstances before it, that issue estoppel applied *notwithstanding* that the effect of its decision would be that the plaintiffs would, effectively, not be able to pursue their counterclaim at all based on the same factual allegations as determined by the MIC. On the facts and arguments presented to it, the Tribunal did not consider there to be any grave injustice sufficient to amount to exceptional circumstances and declined to exercise its discretion in the plaintiffs' favour.

136 While the *consequences* of the Tribunal's decision may seem particularly harsh and unfair to the plaintiffs, the Tribunal's *decision itself* is entirely understandable given its view, as set out in the First Partial Award, that the plaintiffs' situation was a result of its own internal management failures.

137 Having regard to the arbitration record, and reading the Second Partial Award as a whole and in context, and in a reasonable, generous and commercial way, I am more than satisfied that the Tribunal came to its decision on the Counterclaim Preclusion Issue after considering all of the arguments and evidence on the issue; it did not fail to decide an issue that was before it. Nor did it fail to understand the plaintiffs' arguments. I therefore reject the plaintiffs' submission that the Tribunal failed to take into account or understand their arguments, evidence and submissions on the Counterclaim Preclusion Issue. The Tribunal's decision on the Counterclaim Preclusion Issue was, in my judgment, not made *infra petita*.

Whether the Tribunal's decision on the Counterclaim Preclusion Issue breached natural justice or is contrary to public policy

138 Finally, the plaintiffs' arguments on breach of natural justice and public policy are founded largely upon the same arguments canvassed above for their *infra petita* objection.[76] With regard to the public policy ground, Mr Yeo argues that the Second Partial Award is contrary to Singapore's public policy as it shocks the conscience.[77]

Analysis and decision

139 I reject the plaintiffs' arguments as they are without merit. Following the Tribunal's decision to apply the doctrine of issue estoppel to the plaintiffs' counterclaim, it was correct for the Tribunal not to have gone on to consider the merits of the plaintiffs' counterclaim. The counterclaim was inadmissible precisely because the Tribunal found that issue estoppel applied and there were

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76 PWS at para 214.

77 Transcript (17 June 2021) at p 108 (lines 8 to 13).

no special circumstances. I have already found above (at [137]) that the Tribunal did consider the plaintiffs' arguments and evidence on the Counterclaim Preclusion Issue. The plaintiffs were given a reasonable opportunity to be heard on the Counterclaim Preclusion Issue and were not wrongfully precluded from presenting their case. Accordingly, the plaintiffs' objection based on a breach of natural justice, which is predicated on an assumption that the Tribunal did fail to consider or try and understand their arguments, evidence and submissions, falls away in light of my dismissal of the *infra petita* objection.

140 The plaintiffs also contend that the Tribunal "egregiously" extended the effect of the finding on BTO's presumed knowledge of the MIC Proceedings to BTN, when it was not disputed that BTN was not a party to the MIC Proceedings.[78] This argument is, in my view, a non-starter for two reasons. First, in the First Partial Award, the Tribunal had considered the plaintiffs' position on this and rejected it. In dealing with BTN's connection with BTO for the purposes of issue estoppel, it found that while BTN was not a named party to the MIC Proceedings, viewing the circumstances in the round, it considered that BTN's interests in the outcome of the proceedings were sufficiently connected to BTO's interests to place BTN in a position of privity with BTO.[79] Whether right or wrong, that was a decision on the merits and there is no basis for curial intervention. Second, reading the particular sentence at [204] of the Second Partial Award in context, the Tribunal was in fact addressing the plaintiffs' argument (summarised at [201(b)] of the Second Partial Award) that the defendants were, under clause 18.3 of the PEAs, obliged to notify *both plaintiffs* of the MIC Proceedings. Therefore, far from being an egregious error on the part of the Tribunal or demonstrating irrationality or capriciousness on its part,

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78 PWS at paras 34, 205 and 218.

79 AB Vol II at p 735 (para 187).

the Tribunal was, in fact, simply answering a point (described by the Tribunal as "specious") put to it *by the plaintiffs themselves*.

141 When all is said and done, at its core, the plaintiffs are, in my view, simply dissatisfied that all their factual allegations of misconduct against the defendants, which in the plaintiffs' view are borne out on the evidence, will not be heard before any tribunal or forum – and the consequence of that is a hefty award against them in the sum of US$35 million (excluding interest and costs).

142 I share Ang J's sentiment (Judgment at [116]) that "one may harbour some sympathy for the predicament in which the [the plaintiffs] found themselves in", and I empathise to some extent with Mr Yeo's lamentation that the plaintiffs have not been able to "vex anyone even once". However, ultimately, it is the plaintiffs' own internal arrangements and failings which have resulted in this rather unfortunate state of affairs the plaintiffs find themselves in.

143 At the same time, it bears emphasising that the plaintiffs' predicament is *not* the fault of *the Tribunal*. As the Court of Appeal noted (Appeal Judgment at [1]), "[l]itigants affected adversely by the application of the *res judicata* doctrine, a long-established common law doctrine, often consider themselves to have been unfairly deprived of their right to a hearing". While the plaintiffs may feel extremely hard done by at being deprived of the right to any "substantive" hearing, there is, in my judgment, simply no basis to allege any breach of natural justice on the part of the Tribunal. On the Counterclaim Preclusion Issue, the Tribunal did no more than (a) apply the law on issue estoppel, as requested by the parties, to the facts of the case and (b) come to a decision based on the arguments and evidence presented to it. No matter how unhappy the plaintiffs are with the outcome of the arbitration, the hard truth is that the plaintiffs must

swallow the bitter pill and make their peace with the outcome of the arbitration. They cannot seek to impugn the Awards by relitigating the merits of the dispute veiled behind a breach of natural justice complaint. For all of the reasons above, the breach of natural justice objection also fails.

144 Finally, the plaintiffs' public policy objection is also of no merit. For this objection to succeed, the court must be satisfied that upholding the Awards would shock the conscience, be clearly injurious to the public good or violate the forum's most basic notion of morality and justice (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]). Mr Yeo argues that the public policy impugned in this case is that the Awards shock the conscience because the Tribunal made its decision without considering that the plaintiffs were not in fact aware of the MIC Proceedings.[80] It suffices to say that I have no hesitation rejecting this argument in the light of my findings and conclusions above on the *infra petita* and breach of natural justice objections mounted by the plaintiffs.

145 To sum up, I find that the Tribunal's decision on the Counterclaim Preclusion Issue was not rendered *infra petita*. It was not a negative jurisdictional ruling but a decision on the merits as the Tribunal applied the elements of issue estoppel and reached a decision on the admissibility of the factual allegations relating to the plaintiffs' counterclaim. The Tribunal's decision also did not result in any breach of natural justice as it did consider and understand all of the plaintiffs' arguments and evidence on the issue. Nor is the Tribunal's decision on the Counterclaim Preclusion Issue in any way contrary to public policy.

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[80] Transcript (17 June 2021) at pp 108 (lines 8 to 13) and 109 (lines 2 to 6).

Conclusion

146 For all of the reasons that have been set out in this judgment, none of the grounds raised by the plaintiffs to set aside the Awards has succeeded. I therefore dismiss OS 1401 and OS 874 in their entirety. Consequently, I affirm the Leave Orders and also dismiss SUM 471 and SUM 472.

147 I shall hear the parties separately on costs.

S Mohan
Judge of the High Court

Alvin Yeo Khirn Hai SC, Koh Swee Yen, Quek Yi Zhi, Joel (Guo Yizhi) and Kweh Ghee Kian (WongPartnership LLP) for the plaintiffs in HC/OS 1401/2019 and HC/OS 874/2020 and the defendants in HC/OS 1274/2020 and HC/OS 1275/2020;
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