

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 1

Civil Appeal No 1 of 2020

Between

(1) BZW
(2) BZX

... Appellants

And

BZV

... Respondent

In the matter of Originating Summons No 488 of 2019

Between

BZV

... Plaintiff

And

(1) BZW
(2) BZX

... Defendants

FOUNDATIONS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside]
[Arbitration — Award — Remission]

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BZW and another

v

BZV

[2022] SGCA 1

Court of Appeal — Civil Appeal No 1 of 2020
Sundares Menon CJ, Judith Prakash JCA and Steven Chong JCA
13 September 2021

12 January 2022

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal arises out of a ship-building dispute that culminated in a Singapore-seated arbitration conducted under the aegis of the Singapore International Arbitration Centre (“SIAC”). The respondent in the present appeal had entered into a contract with the appellants, two associated companies, for the latter to construct and deliver a vessel to the respondent. Disputes arose over delays in construction as well as the quality of the generators in the vessel eventually delivered. In the arbitration, the respondent pursued two claims against the appellants, namely: (a) a claim for liquidated damages arising from the delay in delivery (“the Delay Claim”); and (b) a claim in damages for the installation of contractually inadequate generators (“the Rating Claim”). The appellants filed a counterclaim seeking extra payment for extra work. In its

arbitral award, a tribunal of three arbitrators (“the Tribunal”) dismissed the respondent’s claims and also the appellants’ counterclaim.

2 The respondent then applied to the High Court to set aside the award on the basis of s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the Act”) and Art 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) (read with s 3(1) of the Act). Apart from contesting the grounds of the application, the appellants argued before the High Court that the application had been filed out of time under Art 34(3) of the Model Law and that, in any event, the Judge ought to suspend the setting aside proceedings and remit the award to the Tribunal pursuant to Art 34(4) of the Model Law. Holding that the setting aside application had not been filed out of time, the Judge considered the merits of the application and, thereafter, allowed it on the basis of s 24(b) of the Act. He, however, declined to remit the award to the Tribunal.

3 The reasons for the Judge’s decision can be found in *BZV v BZW and another* [2021] SGHC 60 (the “Judgment”). On 13 September 2021, we heard and dismissed the appellants’ appeal against the Judgment, and we now provide our grounds of decision. For ease of reading it should be noted that, unless otherwise expressly stated, references in these grounds to Articles are to Articles of the Model Law; references to sections are to sections of the Act; and references to Orders and Rules are to the provisions of the Rules of Court (2014 Rev Ed) (“the Rules”).

Facts***Background***

4 On 29 November 2012, the appellants entered into a ship-building contract with the respondent (“the Contract”). Under the Contract, the appellants undertook to, in accordance with the standards of the American Bureau of Shipping (“ABS”), construct and deliver a vessel with the specifications contained in the Contract to the respondent by 31 May 2014. The parties subsequently varied the Contract several times.

5 The appellants failed to deliver the vessel by 31 May 2014. At the end of 2014, while the vessel was still under construction, the respondent entered into discussions with a third party (“the Buyer”) to on-sell the vessel. The Buyer met the respondent (along with the appellants), in December 2014 and January 2015, to agree on changes to the existing technical requirements to be met by the vessel for the purpose of meeting the Buyer’s unique demands.

6 On or around 22 December 2014, the ABS conducted tests on the vessel. The appellants regarded these tests as “Acceptance Tests” under the Contract and, under Art 7.3.1 of the Contract, notified the respondent of completion. As the respondent did not reject the vessel within 48 hours thereafter, the appellants were of the view that, pursuant to Art 7.3.4 of the Contract, the vessel was deemed to be accepted. Thus, the appellants’ position was that these tests established that they were ready to deliver the vessel in December 2014. In the arbitration, the respondent denied that the ABS tests were “Acceptance Tests” under Art 7 of the Contract or that the vessel was ready for delivery in December 2014.

7 On 2 February 2015, the parties entered into a variation agreement called the second supplemental agreement (“SA2”), which amended the Contract to incorporate the Buyer’s requirements. The relevant aspects of SA2 are set out below:

(a) Article 8 of SA2 extended the delivery date of the vessel from 31 May 2014 to 30 April 2015 and further established 30 June 2015 as the cancelling date.

(b) Article 12 of SA2 provided that, after the cancelling date, the respondent was entitled either to: (i) reject the vessel and terminate the Contract; or (ii) accept delivery of the vessel and claim liquidated damages, at a rate of US\$50,000 *per* day, capped at US\$5m.

(c) Article 15 of SA2 varied Art 9.3.1 of the Contract such that, if the appellants failed to deliver the vessel by the new delivery date of 30 April 2015 because of its efforts to remedy non-conformities raised by the Buyer or ModuSpec (the Buyer’s inspection agency) before 15 April 2015, such delay would be “Permissible Delay”. Only if the appellants gave notice of Permissible Delay would the respondent be obliged to extend the delivery date and the cancelling date for the same period of time, subject to a long-stop date of 15 July 2015.

(d) SA2 incorporated Annex I, which set out the Buyer’s technical requirements. Two subdivisions within Annex I were relevant: (i) Annex I-1, which was the technical agreement for the vessel (“SA2 Technical Agreement”); and (ii) Annex I-12, which was a document signed by the respondent and the appellants recording the main points

agreed between the respondent and the Buyer in the meetings mentioned at [5] above (“SA2 Minutes of Negotiations”).

8 On 16 February 2015, after the signing of SA2, the respondent entered into an agreement with the Buyer for the sale of the vessel to the Buyer. On or around 23 April 2015, the Buyer informed the respondent that the generators installed in the vessel did not conform to the Buyer’s specifications for protection against the ingress of water because they were rated IP23 rather than the contractually specified IP44 rating. When the respondent informed the appellants of this issue on 30 April 2015, the appellants responded that it would take 11 months to upgrade the generators to the IP44 rating.

9 The appellants were unable to deliver the vessel by the new delivery date of 30 April 2015 or the cancelling date of 30 June 2015. On or around 1 July 2015, the respondent put the appellants on notice in writing that the appellants had failed: (a) to deliver the vessel in accordance with Art 8 of SA2; and (b) to give notice of “Permissible Delay” under Art 15 of SA2. However, the respondent did not exercise its right under Art 12 of SA2 to terminate the Contract.

10 On 2 July 2015 and 1 September 2015, respectively, the ABS issued interim class certificates attesting that the vessel complied with ABS standards. These certificates were of an “interim” nature because the respondent had yet to provide information about “Owner Furnished Equipment” (*ie*, drilling equipment) (“OFE”). Between 3 July 2015 and 17 July 2015, ModuSpec inspected the vessel and raised a list of non-conforming features for the appellants to remedy. The appellants then set out to remedy these defects.

11 On 12 September 2015, the parties entered into a fourth supplemental agreement (“SA4”) which, by Art 3, extended the new delivery date to no later than 23 September 2015. Article 4 of SA4 fixed the technical acceptance of the vessel on 12 September 2015. However, SA4 did not provide for any new cancelling date, a notable omission as the cancelling date was the start date for the calculation of liquidated damages under Art 12 of SA2 (see [7(b)] above).

12 On 22 September 2015, the appellants delivered the vessel to the respondent, who accepted the vessel and made full payment as stipulated under the Contract. That same day, the respondent delivered the vessel to the Buyer. Notwithstanding the delivery and acceptance of the vessel, the respondent asserted the Delay Claim and the Rating Claim against the appellants and sought liquidated damages for the first and damages for breach of contract for the second. Although a separate claim was brought in the arbitration concerning the IP rating of the vessel’s cranes, this stood or fell with the Rating Claim (see [90] of the Judgment).

Claims in the arbitration

The Delay Claim

13 With regard to the Delay Claim, the respondent argued that Art 12 of SA2 entitled the respondent to liquidated damages from the cancelling date to the actual date on which the appellants delivered the vessel. Since Art 8 of SA2 fixed the cancelling date as 30 June 2015 and the appellants only delivered the vessel on 22 September 2015, the respondent claimed to be entitled to liquidated damages for the intervening 84 days, which totalled US\$4.2m. It was later accepted, however, that as Art 4 of SA4 provided that the calculation of liquidated damages could only extend until 11 September 2015, the

respondent's entitlement at most was to US\$3.65m for 73 days of delay between 30 June 2015 and 11 September 2015.

14 As the Judge noted at [96] of the Judgment, in the arbitration the appellants pleaded seven alternative defences to the Delay Claim:

(a) First, the appellants delivered the vessel before the delivery date of 23 September 2015 in Art 3 of SA4 and there was therefore no breach of contract.

(b) Second, the appellants invoked the Permissible Delay provision which entitled them to an extension of time for delivery.

(c) Third, the appellants relied on the "prevention principle" to the effect that the time for the appellants to perform their contractual obligation to deliver the vessel was set at large (and then subject only to a broader requirement of a "reasonable period of time") by the respondent's own acts of prevention, which included: (i) the respondent's delay in registration caused by its failure to provide the appellants information concerning the OFE; (ii) the respondent's delay in securing the class certificate from the ABS; and (iii) the delay of the respondent's inspector ModuSpec in inspecting the vessel.

(d) Fourth, the starting date for calculating the appellants' liability to pay liquidated damages shifted from the cancelling date of 30 June 2015 to the date on which SA4 terminated the appellants' liability to pay liquidated damages (*ie*, after 11 September 2015).

- (e) Fifth, the appellants' liability to pay liquidated damages had lapsed because Art 4 of SA4 provided that "calculation of liquidated damages ... shall cease on 11 September 2015".
- (f) Sixth, Art 12 of SA2 was a penalty clause.
- (g) Seventh, the respondent had waived any right to claim liquidated damages by making full payment on delivery of the vessel.

The Rating Claim

15 In relation to the Rating Claim, the respondent contended that cl 15.2 of the SA2 Technical Agreement read with Art 3 of SA2 obligated the appellants to equip the vessel with generators rated IP44. Given that the appellants delivered the vessel installed with generators only rated IP23, the appellants were in breach of contract.

16 The appellants' defences to the Rating Claim were:

- (a) First, the Contract only required the generators installed in the vessel to meet the ABS requirements and did not specify a particular rating for generators.
- (b) Second, the respondent was estopped from asserting that the appellants were under an obligation to upgrade the vessel's generators from IP23 to IP44. This was because the appellants had informed the respondent in December 2014 that: (a) the generators installed were rated IP23; (b) it was not practical to upgrade the said generators to the IP44 rating; and (c) the generators rated IP23 were fit for purpose. Furthermore, the respondent had expressly asked the appellants not to

raise this issue with the Buyer so as not to jeopardise the negotiations to on-sell the vessel to the Buyer. As the appellants complied with the respondent's own request, they argued that the respondent was estopped from asserting the Rating Claim.

(c) Third, the SA2 Minutes of Negotiations, which were signed by the parties, superseded any specific obligations in the SA2 Technical Agreement and permitted the appellants to deliver the vessel with generators rated IP23.

The counterclaim

17 The appellants counterclaimed, among other things, for additional works to the vessel that the respondent had required the appellants to carry out. The appellants sought approximately US\$2.5m for the additional works. In the main, the respondent's defence to the counterclaim was that the appellants had failed to comply with the conditions precedent for payment in respect of additional works, as stipulated in the Contract.

The arbitration

18 On 9 October 2015, the respondent commenced arbitration proceedings against the appellants. The Tribunal, comprising Dr Colin Ong QC (presiding), Mr David Bateson and Mr Goh Kok Leong ("Mr Goh"), was constituted in January 2016. In May 2017, the evidential hearing took place over nine days. On 25 October 2018, the Tribunal issued the award ("the Award"), which dismissed both the respondent's claims and the appellants' counterclaims.

The Award

19 In summarising the Tribunal’s decision in the Award, the Judge observed that “[i]t is ... impossible on the face of the award to distinguish between those findings which form part of the tribunal’s chain of reasoning on the [D]elay [C]laim and those which form part of its chain of reasoning on the [Rating Claim]”: at [109] of the Judgment. Accordingly, he found it necessary to “extract the tribunal’s findings from the first eight subsections of Section G running from [199] to [261] of the award ... and then attempt with generosity to arrange those findings into a coherent chain of reasoning”: at [110] of the Judgment. Having reviewed the Award, we agreed with the Judge’s characterisation of the same and considered his approach to have been *apropos* and even charitable. As the Judge noted at [111]–[123] of the Judgment, the Tribunal “rested its decision to dismiss both the plaintiff’s [Delay] and [Rating] claims on the following eleven findings”:

- (a) The vessel was not ready for delivery by the appellants on the dates on which ModuSpec inspected the vessel in July 2015: at paras 208–209 of the Award.
- (b) The appellants were responsible for helping the respondent deal with technical aspects of the Buyer’s tender in December 2014 and January 2015: at para 216 of the Award.
- (c) The respondent’s own representative, one Mr Tan, provided supporting documents in December 2014 showing that generators rated IP23 were fit for purpose: at paras 220–222 of the Award.
- (d) The Buyer required the vessel’s generators to be rated IP44. The respondent’s additional payment of US\$10.46m under SA2 was very

possibly in part to pay the appellants to upgrade the generators to IP44, but this was academic given the “[respondent’s] own witness evidence that [the] IP23 rating was fit for purpose”: at para 223 of the Award.

(e) The tests which the ABS conducted on the vessel in December 2014 were “Acceptance Tests” within the meaning of Art 7 of the Contract and these tests had been successful, with ABS signing off on the test report subject to certain defects which the appellants were required to remedy: at paras 227–228 of the Award.

(f) The appellants were not in breach of the Contract by delivering the vessel with generators rated IP23 because the respondent itself had confirmed that generators rated IP23 were fit for purpose: at para 234 of the Award.

(g) The respondent had not responded to the appellants’ complaint that the respondent withheld vessel registration information and OFE information, all of which prevented the appellants from obtaining a class certificate. Thus, it was the respondent’s own fault for failing to cooperate with the appellants to obtain the class certificate: at para 238 of the Award.

(h) The respondent wrongfully prevented the appellants from obtaining a class certificate: at para 240 of the Award.

(i) It was not necessary to resolve the factual dispute as to whether the appellants knew that the Buyer required generators that were rated IP44 because the Tribunal had already found as a fact that generators rated IP23 were fit for the respondent’s purpose. As such, it was not material that: (i) the respondent failed to adduce expert evidence that

generators rated IP44 were different from those rated IP23; (ii) the appellants understood that they had to upgrade the generators; and (iii) it was common ground that the appellants delivered vessels with generators only rated IP23: at paras 245–246 of the Award.

(j) It was not unusual for a vessel to be delivered even if it had minor defects because the vessel would be under warranty and such defects could be rectified during the warranty period: at para 250 of the Award.

(k) The respondent failed to prove that any defect in the vessel was so serious that it rendered the vessel obsolete: at para 255 of the Award. The respondent's interests were protected by the appellants' contractual obligation to remedy any defective workmanship during the warranty period.

20 Although the Tribunal by a majority dismissed the Rating Claim, Mr Goh issued a brief dissenting opinion on this claim. Mr Goh would have held that the appellants were obligated to deliver the vessel with generators rated IP44 because this was consistent with the commercial purpose of SA2. Nevertheless, he agreed with the majority's decision on the dismissal of the respondent's Delay Claim and the dismissal of the appellants' counterclaim.

21 In dismissing the appellants' counterclaim, the Tribunal held that: (a) the appellants had indeed delayed in delivering the vessel under the Contract (at para 282 of the Award); (b) SA4 did not extend either the delivery date or the cancelling date (at para 295 of the Award); and (c) the appellants were not entitled to rely on the Permissible Delay clause because they had failed to comply with the contractual conditions precedent for invoking that provision (at paras 301–303 of the Award). As the Judge noted (Judgment at [126]), the

respondent argued that these findings were irreconcilable with the Tribunal's decision to dismiss the Delay Claim.

Subsequent procedural matters

22 On 27 November 2018, the respondent submitted a request for correction of the Award. The Tribunal responded by issuing a decision and addendum dated 16 January 2019 ("the Decision"). Relevant to the present appeal was the respondent's specific request regarding para 220 of the Award, which stated that "[the respondent's Mr Tan] provided supporting documents to show that IP23 was fit for purpose". As the respondent pointed out in its request for correction, Mr Tan was not the respondent's representative but, in fact, the appellants' representative. In the Decision, the Tribunal accordingly reworded para 220 of the Award to state: "[t]he Tribunal has noted that [the appellants' Mr Tan] provided supporting documents to show that IP23 was fit for purpose". On 15 February 2019, the respondent made a further request under Art 33(1)(b) of the Model Law for an interpretation of the Award, but this request was rejected on 9 April 2019 on the ground that it had been made out of time.

23 On 15 April 2019, the respondent filed an originating summons ("OS 488") in the High Court seeking to set aside the Award save for that part in which the Tribunal dismissed the appellants' counterclaim. The respondent did not, however, file a supporting affidavit at the same time as it filed the application. The supporting affidavit was only filed on 30 April 2019 (the "30 April Affidavit"). OS 488 and the 30 April Affidavit were both served on the appellants on 24 May 2019.

Arguments and the decision below

24 Three main issues arose in the respondent's setting aside application before the Judge: (a) first, whether a valid setting aside "application" had been filed under the Model Law and the Rules; (b) second, whether there was any basis to set aside the Award under s 24(b) of the Act and/or Art 34(2)(a)(iii) of the Model Law; and (c) third, whether the Award should be remitted to the Tribunal under Art 34(4) in order to eliminate the grounds for setting aside.

25 The appellants (who were the defendants below) raised a preliminary objection that the respondent's setting aside application was filed outside the three-month time limit stipulated under Art 34(3) of the Model Law owing to the delay in filing the supporting affidavit. On the basis that the three-month period commenced on 16 January 2019 (the date of the Decision) and accordingly expired on 16 April 2019, and since the supporting affidavit was only filed on 30 April 2019, the appellants contended that the "application" was incomplete for the purposes of Art 34(3). On the other hand, the respondent contended that the three-month period in the Model Law and the Rules could run from the date on which a tribunal disposed of a request under Art 33 of the Model Law. Given that the Tribunal disposed of the respondent's request on 9 April 2019, the three-month period expired on 9 July 2019. And, even if the three-month period commenced on 16 January 2019 and did not restart on 9 April 2019, the respondent submitted in the alternative that a valid "application" to set aside the Award had been made when it filed the originating summons alone under O 69A r 2(1)(d) of the Rules on 15 April 2019.

26 The Judge held that there was nothing in Art 34(3) or O 69A r 2(4) which rendered the setting aside application out of time or which prevented the

respondent from relying on the grounds set out in the supporting affidavit: at [24]–[47] of the Judgment. The Judge stated that the “application” to set aside an award is “made” within the meaning of Art 34(3) when the originating summons itself is filed pursuant to O 69A r 2(1)(d), not when both the originating summons and the affidavit are filed: at [28] of the Judgment.

27 As to the substantive grounds of the setting aside application, the parties’ dispute centred on s 24(b) of the Act. In this regard, the respondent (who was the plaintiff below) claimed that there had been breaches of natural justice with regard to both the Delay Claim and the Rating Claim. The appellants naturally disputed this, and we elaborate on the key aspects of the arguments below:

(a) In relation to the Delay Claim, the respondent alleged six breaches of natural justice, but the two most important breaches cited were that: (i) there was no nexus between the chain of reasoning which the Tribunal adopted and the cases which the parties had advanced; and (ii) the Tribunal failed to direct its mind to the merits. In response, the appellants contended that the Tribunal’s chain of reasoning did have a nexus to the prevention principle. It was clear, therefore, that the Tribunal did apply its mind to the merits. Significantly, the appellants did not suggest that the Tribunal’s chain of reasoning had any nexus to any of the other defences.

(b) In respect of the Rating Claim, the respondent cited five breaches of natural justice but, as the Judge noted, the important breach was the absence of any nexus between the Tribunal’s chain of reasoning and the parties’ cases on this head of claim (see Judgment at [153]). The respondent submitted that the Tribunal dismissed the Rating Claim on the basis of three findings, none of which had any nexus to either party’s

case. The appellants in response argued that, first, in finding that supplying IP23 generators did not constitute a breach, the majority had to be taken to have accepted the appellants' defence that the Contract (even as varied by SA2) did not oblige the appellants to deliver the vessel with generators rated IP44. Second, the appellants contended that, in finding that the appellants were led to believe that the IP23 generators were fit for purpose, the majority had to be taken to have considered and accepted the appellants' defence that the respondent was estopped from insisting that the appellants were obliged to upgrade the vessel's generators from IP23 to IP44. There was, as such, a nexus between the Award and the appellants' pleaded defences.

28 The Judge found that there had been breaches of natural justice "causally connected to the making of the [A]ward" (at [206]–[210] of the Judgment) and that these breaches had prejudiced the respondent because the Tribunal could have found in favour of the respondent had it applied its mind to the issues (at [211]–[213] of the Judgment).

29 In relation to the Delay Claim, the Judge held that, in dismissing this claim, the Tribunal's chain of reasoning had no nexus to any of the appellants' defences: at [149] of the Judgment. Apart from the prevention principle, there was no indication anywhere in the Award that the Tribunal adopted as part of its reasoning any aspects of the appellants' six other defences. The Award did not mention the appellants' two defences on waiver or penalty clause: at [136] of the Judgment. Moreover, the Tribunal's findings in dismissing the counterclaim would have logically defeated the four other defences, since: (a) a finding in the counterclaim that the appellants were in breach of the Contract for late delivery entailed a rejection of the defence of no breach;

(b) a finding in the counterclaim that the appellants failed to invoke the Permissible Delay provision necessarily meant a rejection of the defence that there had been an extension of time; and (c) a finding that SA4 did not extend the delivery date or the cancelling date amounted to a rejection of the remaining two defences that the cancelling date had somehow been altered by contract. Citing *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 (“*JVL Agro Industries*”) at [149], the Judge noted at [52(j)] of the Judgment that “[t]o comply with the fair hearing rule, the tribunal’s chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties’ arguments”.

30 The Judge noted (and the appellants tacitly conceded) that the only defence to the Delay Claim that could have had a nexus to the Tribunal’s chain of reasoning was the prevention principle. The Judge held, however, that in adopting this defence in its reasoning, the Tribunal failed to determine or apply its mind to an essential issue of *causation* that arose from the parties’ arguments: at [149] of the Judgment. The prevention principle provides that where an employer delays a contractor and there is no mechanism for an extension of time, the contractor is only required to complete that obligation within a reasonable period of time. To determine whether such a defence applied required the consideration of three questions: (a) whether an act of prevention had been committed; (b) if so, whether there was a mechanism in the contract for the appellants to claim an extension of time; and (c) if not, whether the act of prevention caused the appellants’ failure to deliver the vessel by 30 April 2015. The first question had been answered in the affirmative by the Tribunal, and although the Tribunal did not consider the second question, the respondent did not rely on this failure to allege a breach of natural justice: at [141]–[142] of the Judgment. On the third question of whether the act of prevention *caused*

the appellants' delay in delivery, the appellants argued on the basis of paras 236–237 of the Award that the Tribunal did apply its mind to the point on causation.

31 The Judge, however, found that these paragraphs did not show that the Tribunal applied its mind to the point on causation, stating that “nowhere in these paragraphs does the tribunal apply its mind to whether [the respondent’s] acts of prevention *caused* the vessel to be ready for delivery only after the [d]elivery [d]ate and the [c]ancelling [d]ate had passed” [emphasis in original]: at [145] of the Judgment. There was, as such, no indication that the Tribunal had applied its mind to the causation point. As the Judge noted at [52(f)] of the Judgment, and relying on *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (“*TMM Division*”) at [72] and [74], “[a] breach of the fair hearing rule can arise from the tribunal’s failure to apply its mind to the essential issues arising from the parties’ arguments”.

32 In relation to the respondent’s Rating Claim, the Judge held that the majority did not rely on a chain of reasoning with a nexus to any of the appellants’ three defences (at [205] of the Judgment):

(a) First, with regard to the appellants’ defence that they were not in breach of the Contract by delivering the vessel with IP23 generators, the majority found, at [223] of the Award, that the Buyer required the generators to be rated IP44 and, at [246] of the Award, that as a result of meetings with the Buyer, the parties “understood that the [vessel’s] generators had to be upgraded from IP 23 to IP 44”. As this entailed that the appellants understood they were obliged to upgrade the generators

to IP44, it necessarily meant that the Tribunal had “rejected the first defence”: at [159] of the Judgment.

(b) Second, the Tribunal’s reasoning had no nexus to the defence that the respondent was precluded by estoppel from insisting that the appellants comply with any obligation to deliver the vessel with IP44 rather than IP23 generators. Crucially, the Tribunal’s original chain of reasoning rested on Mr Tan’s e-mail in December 2014 disclosing that the IP23 generators were “fit for purpose”. However, the Tribunal had wrongly regarded Mr Tan to be a representative of the respondent (when he was in fact the appellants’ representative) and thus erroneously concluded that the respondent made a representation to the appellants that the IP23 generators were adequate. Indeed, Mr Goh noted this error in his dissenting opinion. Only following the respondent’s request for correction did the Tribunal issue the Decision correcting this error to state that Mr Tan had mentioned that IP23 generators were fit for purpose. This correction meant that there was nothing in the Award amounting to “a finding that the [respondent] made any representation of any sort to the [appellants]”. Further, it also meant that there was no evidential support for the assertions at paras 221, 223, 234 and 246 of the Award that the respondent had stated that IP23 would be fit for purpose. Although the Tribunal attempted to clarify for the first time, in the Decision, that references to the respondent’s “own witness evidence” were references to another witness’s cross-examination in which he denied saying that the IP23 rating was “insufficient”, the Judge found that this had nothing to do with a representation of a promissory nature (at [196] of the Judgment). In any event, the Tribunal failed to apply its mind to whether the evidence showed that IP23 generators would be fit

for the Buyer's purpose (which the appellants claimed the respondent led them to believe) and not merely the respondent's purpose: at [197]–[198] of the Judgment.

(c) Third, as to whether the general obligation in the SA2 Minutes of Negotiations superseded the specific obligation in the SA2 Technical Agreement, the majority did not, in the Award, refer to the SA2 Minutes of Negotiations at all: at [200] of the Judgment.

33 Additionally, the appellants sought to argue that the majority's finding at para 228 of the Award that the vessel passed an Acceptance Test precluded the respondent from pursuing the Rating Claim. The Judge, however, held that the Tribunal's finding had no nexus to the conclusion the appellants claimed it entailed. This was because the Acceptance Test was "conducted pursuant to the provisions of the Contract" and the Rating Claim only arose thereafter under the SA2 Technical Agreement: at [202] of the Judgment.

34 The Judge also considered two other elements needed to establish a breach of natural justice. First, in considering in what way the breach was connected to the making of the Award, the Judge held that there were "only two possibilities as to the chain of reasoning by which the tribunal arrived at its decision to dismiss" the two claims (at [208] of the Judgment): either it adopted one of the pleaded defences or it did not. If the Tribunal dismissed the Delay Claim for a reason other than the prevention principle and dismissed the Rating Claim for a reason other than the estoppel defence, then the causal connection was "manifest": at [209] of the Judgment. If the Tribunal dismissed the Delay Claim because it adopted the appellants' prevention principle and dismissed the Rating Claim because it adopted the appellants' estoppel defence, then the

Tribunal failed to apply its mind to an essential issue arising from the parties' arguments: "the causation issue on the prevention principle and the existence of a representation on the estoppel defence" (at [210] of the Judgment).

35 As for the other factor being how the breaches had prejudiced the plaintiff's rights, the Judge, relying on *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54], noted that "[a] breach of natural justice causes a party to suffer actual or real prejudice if complying with the rules of natural justice *could reasonably have* (not *would have*) made a difference to the outcome" [emphasis in original]. Had the Tribunal applied its mind to the parties' cases, it could have found in favour of the respondent on both claims: at [211]–[213] of the Judgment.

36 For completeness, both the respondent and the appellants relied on the same arguments and grounds as those canvassed in respect of s 24(b) of the Act to make similar arguments as to whether the Tribunal had dealt with matters beyond the scope of the parties' submission to arbitration under Art 34(2)(a)(iii) of the Model Law. Given the Judge's disposal of the matter on the basis of s 24(b) of the Act, he did not find it necessary to analyse the application under Art 34(2)(a)(iii) separately (at [215] of the Judgment).

37 On the issue of remission, the Judge refused to exercise his discretion to remit the Award to the Tribunal because: (a) the Tribunal's breaches were "fundamental and woven deeply into the analytical exercise which the tribunal undertook" (at [222] of the Judgment); and (b) the purpose of remission was "not to give the tribunal a further opportunity to formulate *ex post facto* rationalisations for its original decision" (at [223] of the Judgment). In this case,

the Tribunal's prior conduct meant that remission would not afford the respondent "a genuine opportunity to persuade the tribunal to arrive at a different result" (at [224] of the Judgment). Accordingly, on 2 December 2019, the Judge set aside that part of the Award dismissing the respondent's claims in the arbitration.

Issues to be determined

38 Three main issues arose for our determination:

- (a) First, did the respondent file its application to set aside the Award within the three-month time limit?
- (b) Second, did the Tribunal breach rules of natural justice in the way it dealt with the Delay Claim and the Rating Claim?
- (c) Third, if the first and second questions are answered in the affirmative, was the Judge correct in refusing to remit the Award to the Tribunal?

Issue 1: Was the application filed within time?

39 As the appellants put it, the nub of this issue was whether OS 488 filed by the respondent on 15 April 2019 was "[a]n application for setting aside" within the meaning of that term in Art 34(3) of the Model Law. This article states:

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

In this connection, it is also relevant to the appellants' argument that under Art 34(2)(a), an arbitral award may be set aside only if the party making the application "*furnishes proof*" [emphasis added] of one of the matters set out in Art 34(2)(a).

40 There was some quibbling below about when the three-month period for filing a setting aside application started in this case. By the time of this appeal, however, it was accepted that, as the Judge had held, the application had to be filed by 16 April 2019. The 30 April Affidavit which contained an account of all the facts on which the appellants relied was, however, filed only after the 16 April deadline.

41 As we stated above, the Judge rejected the appellants' contention that the application was filed out of time. He found that the filing of OS 488 within time was sufficient to defeat the time bar. The later filing of the 30 April Affidavit was irrelevant for this purpose. He gave four reasons for this holding. First, Art 34(3) of the Model Law left it to domestic law to define what amounted to an "application": at [29]–[30] of the Judgment. Second, an originating process carried special significance as a document of a "public character" as opposed to an affidavit, which was said to be of a "private character": at [31]–[32] of the Judgment. Third, O 69A r 2(1)(d) of the Rules (providing that "[e]very application ... to set aside an award ... must be made by originating summons") and O 69A r 2(4) (providing that "[a]n application under paragraph (1)(d) may not be made more than 3 months after the later of the following dates: ...") equated an "application" to set aside an award with the originating summons: at [36]–[37] of the Judgment. Fourth, drafting convention indicated that the Rules would make it an express requirement if

both the originating summons and the supporting affidavit had to be filed contemporaneously: at [38]–[40] of the Judgment.

42 Before us, the appellants reiterated their principal argument on the time-bar point. They further submitted that the Judge “failed to grapple properly” with their submissions and therefore was led into error. He did not interpret Art 34(3), the governing legislation, but focussed on the Rules which were subsidiary legislation. The Judge had concluded that an application was “made” within Art 34(3) when an originating summons alone was filed. This, the appellants said, missed the point of the appellants’ argument which was that an application under Art 34(3) would only be made when, whatever document(s) were filed, such document(s) stated the ground on which the applicant relied (*ie*, the factual matters, proof of which would entitle the party to the relief claimed). In the appellants’ submission, the form of the documents was irrelevant for the purpose of satisfying Art 34(3); it was their content that mattered. The appellants submitted that their position was supported by (a) case authority (see *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 at [10] (“*ABC Co*”); (b) the *travaux préparatoires* – which are permissible references for the purpose of interpreting the Model Law (see s 4(1)(b) of the Act; and (c) common sense – the natural purpose of a short time limit is to compel a rapid formulation of the challenge to arbitral awards.

43 When we questioned the appellants at the hearing, it became clear that they considered that in this case it was the 30 April Affidavit filed after the expiry of the three-month period that contained the grounds of the application. In their view, OS 488 itself had no such content. We pointed out to their counsel, Mr Kenny Yap, that the first part of OS 488 reads as follows:

Let all parties concerned attend for the hearing on [sic] an application by the Plaintiff(s) that

1. The Honourable Court set aside that part of the award dated 25th of October 2018, as corrected by the “Decision and Addendum on Claimant’s Request for Correction” dated 16 January 2019, (the “Award”) dismissing the Plaintiff’s claims for liquidated damages and damages on the following grounds:-

a. the Award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, pursuant to s 3(1) of the International Arbitration Act (Cap. 143A, 2002 Rev. Ed.) read with Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration; and/or

b. that a breach of the rules of natural justice occurred in connection with the making of the Award by which the rights of the Plaintiff has been prejudiced, pursuant to s 24(b) of the International Arbitration Act (Cap. 143A, 2002 Rev. Ed.).

44 We suggested to Mr Yap that the paragraphs numbered 1(a) and 1(b) in OS 488 qualified as the grounds of the application. Mr Yap resisted that suggestion. Instead, the contention the appellants were advocating for was that the requirement for grounds was only satisfied by the detailed account of what had happened during the arbitration and the criticisms of the Award as contained in the 30 April Affidavit. In his submission, simply stating in OS 488 which sub-articles of Art 34(2) and which section of the Act the respondent was relying on to justify the setting aside application could not qualify as grounds. We pointed out to him the parallel between an endorsement of claim on a writ of summons identifying the cause of action sued on (which might state for example that “the plaintiff’s claim is for damages arising out of the breach of a contract dated ... by the defendant”) and the summary description of the statutory provisions relied on in OS 488. Both would be sufficient in themselves to ensure the originating processes they were contained in were regular

documents identifying the basis of the claim put forward. A common example of a situation in which a generally indorsed writ is frequently filed to prevent the onset of limitation is the Admiralty action and typically the details of the claim therein are the bare minimum of an assertion of breach of contract or tort in respect of a specified contract of carriage of goods.

45 We were not able to accept the appellants' contentions that the application had not been filed in time. As the Judge stated at [29] of the Judgment, what amounts to an "application" within the meaning of Art 34(3) is a matter outside the scope of the Model Law. The drafters of the Model Law left the nature of an application to be governed by the procedural law of each Model Law jurisdiction. They did not specify the form of the application, much less what its content should be; thus, the appellants' contention has no legs. This position is universally accepted. In the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* at p 136, para 9, it is stated that in relation to the admissibility of actions to set aside an award:

... there is no guidance in the Model Law on matters such as the required form of applications, their content or the admissible evidence. These issues are regulated in the domestic procedural or arbitration law. Applications which do not comply with such domestic legislation will usually be rejected. ...

46 In Singapore, O 69A of the Rules entitled "International Arbitration Act" was adopted to prescribe how applications to the court under the Act and the Model Law were to be made. It is our domestic law governing such applications and it was not correct for the appellants to criticise the Judge for focussing on the Rules instead of on the Model Law. The Model Law provided by Art 34(3) the broad parameters of the setting aside application and these were intended to be filled in by our domestic law-makers in whatever way they chose. The choices made in Singapore are shown in O 69A of the Rules as amended

from time to time. It should be unnecessary to observe that not only do domestic law-makers bring the implementing subsidiary legislation into force, but they can also change it from time to time to suit local practice.

47 In this regard, O 69A r 2 requires a setting aside application under s 24 of the Act or Art 34(2) of the Model Law to be made by an originating summons within three months from the date of receipt by the applicant of the award or the corrected award. There is nothing in r 2 that requires an affidavit to be filed at the same time as the originating summons, albeit r 2(4A)(d) provides that the affidavit must be served with the originating summons. By other sub-rules it is provided that the affidavit must “state the grounds in support of the application” (r 2(4A)(a)) and “set out any evidence relied on by the plaintiff” (r 2(4A)(c)). The Rules therefore make it clear that as far as the grounds are concerned, they must appear in the affidavit. This of course does not preclude grounds from being stated in the originating summons as well if this is a requirement of Art 34(3).

48 The three matters that the appellants relied on in support of their contention actually do not do so. First, while the case of *ABC Co* held that it is a requirement under Art 34(3), as the same is to be properly interpreted, that the application must state the grounds, it did not define “grounds” as referring to all the evidence that was going to be put forward in support of the application. Instead, and to the contrary intent, at [16] of *ABC Co* the court stated that the “grounds” in Art 34(2) and s 24 constituted causes of action. As noted at [44] above, a brief statement as to the cause of action relied on is sufficient for the purposes of an endorsement of claim on a writ. Similarly, a brief statement of the sub-articles of Art 34(2) and s 24 of the Act which are relied on to justify the setting aside application is all that an applicant needs to state in the

originating summons as grounds. Paragraphs 1(a) and 1(b) of OS 488 amply meet that requirement in our view. We observe that O 69A r 2(4A) also contains a distinction between “grounds” and the “evidence relied on” by the applicant as separate sub-paras detail these requirements. The extended definition of “grounds” as put forward by the appellants cannot be accepted.

49 Secondly, the appellants have not been able to point to any specific requirement in the *travaux préparatoires* that “the grounds” in the extended sense given to it by the appellants should be filed within the three-month period. The *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (Report of the Secretary-General)*, UN GAOR Commission on International Trade Law, 18th Sess, UN Doc A/CN.9/264 (1985) which the appellants quoted, while emphasising that the listing of the various grounds on which an award may be set aside as set out in Art 34(2) is exhaustive (see p 72, para 5), did not mention anything about how or where the grounds had to be expressed in the setting aside application.

50 As for the appellants’ third reason, that it accords with common sense for the grounds to be in the application because the natural purpose of a short time limit is to compel a rapid formulation of the challenge to arbitral awards, that reason equally supports the view that it is sufficient to state which ground is being relied on in the originating summons and leave the detailed evidence to the affidavit. In any case, the Rules do support the rapid formulation of the challenge to arbitral awards because not only does the originating summons have to be filed within three months, but that originating summons cannot be served on the defendant unless it is accompanied by an affidavit which complies

with the requirements of O 69A r 2(4A), and this means that the affidavit will have to be filed fairly close to the time of the filing of the originating summons.

51 We thus found no merit in the appellants' preliminary time bar point.

Issue 2: Was there a breach of natural justice by the Tribunal?

52 We agreed with the Judge's reasoning and decision that the Tribunal was in breach of natural justice in the way that it dealt with the Delay Claim and the Rating Claim. The appellants put lengthy arguments before us to try and establish their position that the Judge went wrong in several respects. We did not find these arguments persuasive.

53 The appellants asserted that the Judge pored over thousands of pages of facts and submissions in order to come up with a detailed summary of the background facts and the parties' arguments. This was wrong, they said, because the court will set aside an award only if the breach of natural justice is "demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions": *TMM Division* at [125]. An application to set aside an award is not a pretext for the losing party to appeal on the merits. The Judge nevertheless went on to examine the merits of the respondent's claim and identified alleged errors of fact that the Tribunal had made. A Tribunal is only required to determine all essential issues and it is not obliged to determine every argument or submission raised in connection with an issue (*TMM Division* at [73]), and "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made" (see *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60]). The Judge, the appellants said, erred in extending

the foregoing principles into a requirement that the Tribunal's chain of reasoning had to have sufficient nexus to the parties' arguments.

54 We were unable to accept this contention. While generally speaking an assertion of a breach of the fair hearing rule does not require the degree of study of the Award and the record that the Judge undertook in this case, the allegations here that the impugned portions of the Award had no nexus to the case as actually presented to the Tribunal, required the exercise that the Judge undertook. If it takes time to make sense of an award to ascertain whether an important point was overlooked or addressed at all or whether the tribunal decided on a point that the parties did not have the opportunity to address, then the judge will have to look at the award, the pleadings, the submissions and any other documents that may throw light on what happened in the arbitral proceedings and what cases the parties were running. Then the judge will have to analyse the award in some depth in order to decide whether the allegations made by the party seeking to impugn the award on the basis of breach of natural justice have substance.

55 The appellants' second argument was that the enquiry as to whether a tribunal's chain of reasoning is sufficiently connected with the essential issues is not concerned with whether a tribunal's reasoning is cogent or correct. A tribunal may have misunderstood the facts or law; its reasoning may also be unclear – but none of this causes a breach of the fair hearing rule. There is only a breach if a tribunal decides an issue on the basis of reasoning which it was unfair for the tribunal to adopt because the parties had no reasonable opportunity to address it.

56 To the extent that the second argument propounds the well-known principle that a setting aside application is not an appeal and therefore, the court will not interfere even if it considers that, in reaching its decision, the tribunal has made mistakes of facts or law or both, we of course accept it. But that is not what is in issue in this case. The appellants' argument went far beyond that principle and it was, in fact, quite shocking that the appellants supported the right of a tribunal to be manifestly incoherent in making its decision. The fair hearing principle requires that a tribunal pays attention to what is put before it and gives its reasoned decision on the arguments and evidence presented. If its decision is manifestly incoherent, this requirement would not be met. A manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and, in our view, that would mean that parties have not been accorded a fair hearing.

57 The appellants' first and second arguments were general ones. They also put forward lengthy submissions dealing specifically with the Award. In this regard they repeated at length the justifications for upholding the Award that they put before the Judge.

58 We found it impossible to accept the arguments of the appellants. As a preliminary observation, the Judge was restrained and generous in his summary of the Award. The Award spans 78 pages. Pages 1 to 41 are a summary of the facts and parties' cases. Section G, which is from pages 41 to 75, comprises the entirety of the analysis. The analysis of evidence also appears thin. While the Tribunal did make factual findings, these findings were often mere assertions rather than the apparent result of examining documentary evidence and considering the credibility of witnesses. Crucially, what makes the Award difficult to understand is also the fact that the Tribunal did very little, if

anything, to connect the proverbial dots. As the Judge noted at [109] of the Judgment, it is “impossible on the face of the award to distinguish between those findings which form part of the tribunal’s chain of reasoning on the [Delay Claim] and those which form part of its chain of reasoning on the [Rating Claim]” and “it is exceedingly difficult to map those findings to the essential issues arising from the parties’ cases on both claims”.

59 In setting aside the Award on grounds of breach of natural justice pursuant to s 24(b) of the Act, the Judge held that the respondent had established the four elements set out in *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18] (“*John Holland*”) to wit:

- (a) First, the specific rule of natural justice that was breached.
- (b) Second, how it was breached.
- (c) Third, how the breach was connected to the making of the Award.
- (d) Fourth, how the breach prejudiced the respondent’s rights.

60 We agreed with the Judge that all four elements were present in this case. First, the specific rule of natural justice that was breached was identified, correctly, as the fair hearing rule. Two types of breaches of the fair hearing rule were relevant to this arbitration:

- (a) One, a breach of the fair hearing rule can arise from a tribunal’s *failure to apply its mind* to the essential issues arising from the parties’ arguments. The court accords the tribunal “fair latitude” to determine what is and is not an essential issue (*TMM Division* at [72] and [74]).

That a tribunal's decision is inexplicable is but one factor which goes towards establishing that the tribunal failed to apply its mind to the essential issues arising from the parties' arguments (*TMM Division* at [89]). Thus, if a fair reading of the award shows that the tribunal did apply its mind to the essential issues but "fail[ed] to comprehend the submissions or comprehended them erroneously, and thereby c[a]me to a decision which may fall to be characterised as inexplicable", that will be simply an error of fact or law and the award will not be set aside (*TMM Division* at [90]–[91]; *BLC and others v BLB and another* [2014] 4 SLR 79 at [100]). Moreover, the fact that an award fails to address one of the parties' arguments expressly does not, without more, mean that the tribunal failed to apply its mind to that argument: there may be a valid alternative explanation for the failure (*ASG v ASH* [2016] 5 SLR 54 at [92]). An award will therefore not be set aside on the ground that the tribunal failed to apply its mind to an essential issue arising from the parties' arguments unless such failure is a clear and virtually inescapable inference from the award (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [46]).

(b) Two, a breach of the fair hearing rule can also arise from the *chain of reasoning* which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments (*JVL Agro Industries* at [149]). A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but

arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (*JVL Agro Industries* at [150], [152], [154] and [156]). To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65(d)]).

61 Secondly, we agreed with the Judge as to how the fair hearing rule was breached. The breach arose because the Tribunal failed to apply its mind to the essential issues in respect of the Delay Claim and it also adopted, with regard to the Rating Claim, a chain of reasoning that had no nexus with the parties' submissions:

(a) One, in relation to the Delay Claim, the Tribunal failed to apply its mind to the essential issues arising from the parties' arguments. The appellants' case in OS 488 was that the only relevant defence with a nexus to the Tribunal's chain of reasoning in the Award was the prevention principle (Judgment at [135]). Whether the prevention principle applied as a defence in this context turned on three questions that the Tribunal ought to have posed to itself: (i) did the respondent commit an act of prevention; (ii) was there a mechanism in the Contract for the appellants to claim an extension of time arising from the act of prevention; and (iii) did the act of prevention cause the delay. As to the second question, the Tribunal expressly stated at para 261 of the Award

that it “[did] not need to deal with the issue of extension of time”. On the third issue of causation, the Tribunal did not apply its mind to the causation point at all in the Award. These were essential issues and the Tribunal simply failed to apply its mind to them.

(b) Two, in relation to the Rating Claim, the Tribunal adopted a chain of reasoning that had no nexus with the parties’ submissions. In this regard, the appellants had mustered two defences in the arbitration: (i) that the respondent was estopped from insisting that the appellants comply with the requirement that generators be rated IP44; and (ii) that they were not in breach of contract in supplying generators rated IP23 rather than IP44. In relation to estoppel, the appellants’ submission in the arbitration was that the respondent led the appellants to believe that both the respondent and the Buyer would accept the IP23 generators in lieu of the IP44 generators. The Tribunal’s only relevant factual finding in this regard was at para 220 of the Award, which held that the appellants’ representative Mr Tan had provided documents showing that IP23 generators were fit for purpose. This finding was made after the Tribunal had corrected its original error in the same para of the Award where it had mistaken Mr Tan as being the respondent’s representative. However, once the Tribunal amended para 220 of the Award to simply rely on the appellants’ own assessment that the IP23 generators were fit for purpose, the element of representation on the part of the promisor needed for the estoppel defence could not be established. The inescapable inference that has to be drawn from the Tribunal’s amendment of para 220 of the Award in the way that it did is that the Tribunal failed to apply its mind to the essential issue arising from the parties’ arguments, that of the existence of representation in the estoppel

defence. Second, in relation to breach of contract, the majority at para 223 of the Award found that the Buyer had required the vessel's generators to be rated IP44 and that negotiations leading to SA2 resulted in the agreement to pay the appellants a modification fee; the upgrade of the vessel's generators from IP23 to IP44 was a reasonable explanation why the appellants agreed to incorporate this fee in s 15.2 of the SA2 Technical Agreement. At para 246 of the Award, the Tribunal found that the pleadings and evidence pointed to the conclusion that the parties understood that the vessel's generators had to be upgraded from IP23 to IP44. As the Judge held at [159] of the Judgment, this could only mean that the Tribunal was rejecting the appellants' defence that they were not in breach of contract in delivering the vessel with IP23-rated generators. However, what was confusing is that the Tribunal stated at para 234 that "there was no breach by the [appellants] in supplying generators of IP23 rating" because "the [respondent] itself had also confirmed that IP23 was fit for purpose". But it was never the appellants' case in the arbitration that they were not in breach of the Contract because the respondent had confirmed that IP23 was fit for purpose. Finally, we observe that even if the generators were fit for purpose, such a finding would simply have no nexus whatsoever to the issue before the Tribunal as to whether the installation of generators with IP23 rating was in breach of a *contractual* obligation to deliver generators with IP44 rating.

62 Third, the Judge correctly held that the breaches of natural justice were connected to the making of the Award. As the Judge pointed out at [208]–[210] of the Judgment, there were only two possibilities as to the chain of reasoning by which the Tribunal arrived at its decision to dismiss the Delay Claim and the

Rating Claim: either the Tribunal dismissed the claims because it adopted the appellants' prevention principle and estoppel defences or the Tribunal dismissed the claims for reasons other than those defences. If the Tribunal dismissed the claims because it adopted the appellants' defences, then the connection between the breaches of natural justice and the Award was clear: as shown above, the Tribunal did not apply its mind to causation as regards the prevention principle or to representation as regards the estoppel defence. If the Tribunal dismissed the claims for reasons other than those defences, then the connection between the breach of the fair hearing rule and the Tribunal's dismissal of both claims was arguably even more clear, because nothing remained in the Award that supported the dismissal of the respondent's claims.

63 We agreed with the Judge that the breaches prejudiced the respondent's rights. A breach of natural justice causes a party to suffer actual or real prejudice if complying with the rules of natural justice *could reasonably have* made a difference to the outcome of the arbitration (see *L W Infrastructure* at [54]). In this case, if the Tribunal had applied its mind to the parties' cases and essential issues, it *could* have found in favour of the respondent on both the Delay Claim and the Rating Claim. It is not necessary for us to hold that giving proper consideration *would* have caused the Tribunal to find in the respondent's favour on both claims. The prejudice arising from the failure to consider the submissions which arguably could have succeeded is sufficient.

Issue 3: Should the matter have been remitted to the Tribunal?

64 The appellants argued that the court should exercise its powers under Art 34(4) to suspend the hearing of the application and remit the Award to the

Tribunal and so give the Tribunal an opportunity to take steps to eliminate the grounds for setting aside. Their reasons were:

- (a) First, the Tribunal remained available for the Award to be remitted back to.
- (b) Second, the Tribunal was well placed to eliminate the grounds for setting aside the Award. Now, if remitted, there was no reason to suspect or believe that the Tribunal would not reconsider its ultimate decision.
- (c) Third, it would be more efficient for the same Tribunal to be given an opportunity to explain its decision and remedy any breach of natural justice than for the Award to be set aside. The Tribunal heard evidence and argument on a number of complex issues. It would be inefficient for the issues to be heard afresh before a new tribunal (which would occasion a very substantial delay, and significant additional cost and expense).

65 Like the Judge, we considered that this was a case where it was inappropriate to remit the Award to the Tribunal. It appears that the drafters of Art 34(4) intended that in determining whether to “remit”, the court should consider whether: (a) the tribunal’s error is remediable; and (b) whether, by its error, the tribunal’s mandate no longer continues. The intention was to save an award from being set aside if the defect was curable. The *travaux préparatoires* state:

...

“Remission” to arbitral tribunal, paragraph (4)

13. Paragraph (4) envisages a procedure which is similar to the “remission” known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.

14. Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, *whose continuing mandate is thereby confirmed*, to take appropriate measures for eliminating a certain *remediable defect* which constitutes a ground for setting aside under paragraph (2). Only if such “remission” turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36(2), would the Court resume the setting aside proceedings and set aside the award.

...

[emphasis added]

66 In Singapore, the following observations on Art 34(4) have been made:

(a) There is no power to remit an award after it has been set aside: *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 (“*AKN (2016)*”) at [34]. As noted at para 14.094 of *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon Editor-in-Chief; Denis Brock gen ed) (Sweet & Maxwell, 1st Ed, 2014), “setting aside an award and remitting an award are mutually exclusive”. This is because if an award is set aside, a tribunal is *functus officio*.

(b) The principle of limited curial intervention militates against the exercise of the Art 34(4) power rather than in favour of it (see *AKN (2016)* at [25]–[34]).

(c) The court should consider whether the breach is in respect of a single isolated or stand-alone point. The Court of Appeal in *Soh Beng Tee* at [92] held that, “had there been a breach of Fairmount’s right to be heard, the appropriate remedy would have been to remit the matter to the Arbitrator for him to receive further evidence on the Disputed Issue. This is because setting aside the whole Award would have forced the parties to re-arbitrate the entire case when the Disputed Issue was only one among several other severable issues that the Arbitrator had decided”.

(d) The court also takes into account whether the arbitrators are unfit to continue the hearing. As noted in Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa, 2009) at p 118, “[i]f the court is of the view that the arbitrators are unfit to continue the hearing, the correct approach is the setting aside of the award and the appointment of a fresh tribunal”.

67 In the UK, the following has been observed:

(a) In deciding whether to remit, the court has to consider whether “there is a real risk, judged objectively, that even a competent and respectable arbitral tribunal, whose acts or omissions have been held to amount to serious irregularity causing substantial injustice may subconsciously be tempted to achieve the same result as before” (*Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] 159 ConLR 168 (“*Raytheon Systems*”) at [11]).

(b) The test is whether a reasonable person would no longer have confidence in the Tribunal’s ability to come to a fair and balanced

conclusion on the issues if remitted (*Lovell Partnerships (Northern) Limited v A W Construction plc* (1996) 81 BLR 83 (“*Lovell Partnerships*”) at 99H).

68 We were not persuaded to disturb the Judge’s decision on remission. In this case, remission was not appropriate for several reasons. First, the breach by the Tribunal did not involve only a single isolated or stand-alone issue or point. Rather, the Tribunal failed entirely to appreciate the correct questions it had to pose to itself, let alone apply its mind to determining those questions.

69 Secondly, while the appellants contended that there was no reason to believe that the Tribunal would not be able to reconsider its decision, the respondent argued, citing *Raytheon Systems*, that “there [was] a real risk, judged objectively, that even a competent and respectable arbitral tribunal, whose acts or omissions have been held to amount to serious irregularity causing substantial injustice may sub-consciously be tempted to achieve the same result as before”. We agreed with this position. Further, on the facts here a reasonable person would no longer have confidence in the Tribunal’s ability to come to a fair and balanced conclusion on the issues if remitted (using the test in *Lovell Partnerships*). This was a case where it would be invidious and embarrassing for the Tribunal to be required to free itself from all previous ideas and to redetermine the same issues. This point gained force from the majority’s reaction when their error as to Mr Tan’s employer was pointed out. As the Judge noted, the Tribunal in the Decision “sought to deny the obvious effect which that error had had on the majority’s chain of reasoning in the paragraphs which followed”: at [224] of the Judgment. Too, the majority’s earlier disregard of this point which the dissenting arbitrator (Mr Goh) had highlighted is inexplicable and must impact the parties’ confidence in the remission process.

70 Thirdly, a substantial amount of time had elapsed since the Tribunal heard the evidence and submissions. There was no benefit to the parties in terms of time and cost savings since the Tribunal would in any event have to spend considerable time, effort and costs in reviewing the evidence again (*Raytheon Systems* at [11]).

Conclusion

71 For these reasons, we dismissed the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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