IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA(I) 9

Court of Appeal / Civil Appeal No 6 of 2023

Between

(1) CVV
(2) CVU
(3) CVX
(4) CVQ
(5) CVW
(6) CVZ
(7) CVR
(8) CVY
(9) CVT
(10) CVS
(11) CWA

… *Appellants*

And

CWB

… *Respondent*

In the matter of Originating Application No 2 of 2022

Between

(1) CVQ
(2) CVR
(3) CVS
(4) CVT
(5) CVU
(6) CVV
(7) CVW
(8) CVX
(9) CVY
(10) CVZ

(11) CWA

… *Claimants*

And

CWB

… *Defendant*

In the matter of Originating Application No 4 of 2022 (Summons No 4149 of 2022)

Between

CXS

… *Claimant*

And

(1) CXT
(2) CXU
(3) CXV
(4) CXW
(5) CXX
(6) CXY
(7) CXZ
(8) CYA
(9) CYB
(10) CYC
(11) CYD

… *Defendants*

JUDGMENT

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

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CVV and others
v
CWB

[2023] SGCA(I) 9

Court of Appeal — Civil Appeal No 6 of 2023
Judith Prakash JCA, Steven Chong JCA and Robert French IJ
11 October 2023

1 December 2023 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 Arbitration has emerged as a popular and attractive mode for the resolution of complex commercial disputes. One of the key virtues of arbitration is in the finality of the arbitral award. However, it appears that the benefit of finality is only appreciated by the winning party because dissatisfied parties are increasingly seeking the court's assistance and intervention to set aside arbitral awards. This is so notwithstanding that curial intervention is only warranted on the limited grounds exhaustively prescribed under the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA").

2 One of the prescribed grounds is where a breach of the rules of natural justice has occurred in connection with the making of the award. From a brief survey of Singapore cases, a significant majority of such applications have been

unsuccessful because those challenges were found in substance to have engaged the merits of the award. When a dissatisfied party relies on an alleged breach of the rules of natural justice, it is crucial to bear in mind that the typical grounds on which a litigant may challenge a judgment are quite different and distinct from those which apply in the context of an arbitral award. The failure to properly appreciate this vital distinction is usually the reason why the challenge is ultimately unsuccessful.

3 This appeal arose from a decision of a judge of the Singapore International Commercial Court (the "Judge") refusing to set aside an arbitral award for, *inter alia*, a breach of the rules of natural justice. Like many such similar applications, we find that the alleged breach of natural justice in the present appeal is in essence a challenge based on the merits of the award. For better or for worse, parties in an arbitration must accept the consequences of their choice of the arbitral tribunal as regards the *merits* of the award, irrespective of the degree of their dissatisfaction with the outcome in the award.

The material facts

The parties

4 We have largely adopted the same redacted names as those used in the judgment below. The fourth appellant, CVQ, is a fund management company incorporated in Singapore. It is the fund manager of two Singapore-incorporated funds, "Fund 1" and "Fund 2".

5 Fund 1 and Fund 2 each have various subsidiaries that are incorporated in Ruritania. Fund 2's subsidiary is the seventh appellant, CVR (the "Fund 2 Subsidiary"), while the remaining appellants are subsidiaries of Fund 1 (collectively, the "Fund 1 Subsidiaries").

6 The respondent, CWB, was incorporated in Ruritania sometime in 2015 and is an advisory firm with a focus on real estate investments.

7 As we explain further below, the present dispute arose out of CVQ's engagement of CWB as an asset advisor for Fund 1 and Fund 2. More specifically, CWB claimed that CVQ had failed to pay fees that were due to it for its services as an asset advisor, and that dispute was subsequently referred to arbitration.

Background to the dispute

8 In or around December 2015, CWB approached CVQ with an opportunity to acquire a portfolio of real estate assets (the "Fund 1 Portfolio"). On 24 March 2016, CVQ incorporated Fund 1 to raise capital from investors to acquire the Fund 1 Portfolio. On 25 August 2016, Fund 1 issued a private placement memorandum (the "Fund 1 PPM") to potential investors. Shortly thereafter, Fund 1 acquired the Fund 1 Portfolio through the Fund 1 Subsidiaries.

9 Subsequently, CVQ entered into the following agreements:

(a) On 5 September 2016, CVQ and CWB entered into an advisory agreement ("AA1"), under which CVQ engaged CWB as its asset advisor in relation to the Fund 1 Portfolio. In return, CVQ was to pay CWB an advisory fee, which comprised 50% of the management fee and 50% of the performance fee that CVQ would receive from Fund 1 in its capacity as fund manager. The two components of CWB's advisory fee are respectively referred to as the "Management Fee" and the "Performance Fee".

(b) On 1 March 2018, CVQ, CWB and the Fund 1 Subsidiaries entered into an addendum, by which the parties agreed that the advisory fee under AA1 could be paid by the Fund 1 Subsidiaries directly to CWB.

10 Separately, in February 2018, CWB approached CVQ with another investment opportunity to acquire a real estate asset. CVQ proceeded to acquire this real estate asset through Fund 2. On 31 August 2018, CVQ, CWB and the Fund 2 Subsidiary entered into another advisory agreement ("AA2"), under which CWB was engaged as the asset advisor for Fund 2. Similar to the arrangement under AA1, CVQ was to pay CWB an advisory fee comprising a Management Fee and a Performance Fee, meaning that CVQ would pay CWB 50% of the management fee and 50% of the performance fee that it received from Fund 2 in its capacity as fund manager.

11 Both AA1 and AA2 provided that the governing law of the respective agreements was Singapore law, and that disputes were to be resolved by arbitration in Singapore, as follows:

> 25.1 This Agreement shall be construed in accordance with the laws of Singapore.
>
> 25.2 Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force which rules are deemed to be incorporated by reference into this Clause. A Party may require any other dispute between the same parties concerning any other agreement relating to the advisory services which is also expressed to be subject to arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre to be resolved in the same arbitration as the dispute concerning this Agreement, provided that the Tribunal considers it reasonable to accede to that requirement in the circumstances. The Tribunal shall consist of one (1) arbitrator

> to be appointed by the Singapore Arbitration Centre. All arbitration proceedings shall be in the English language. The decision of the arbitrator shall be final and binding on all the Parties. The seat of arbitration shall be Singapore.

12 By October 2018, there was growing distrust and tension between the parties. On 19 March 2019, CWB issued a demand to two of the Fund 1 Subsidiaries for payment of advisory fees that were outstanding under AA1. On the same day, CWB served CVQ with a notice of termination of AA2. CVQ accepted CWB's notice of termination of AA2 on 27 March 2019. The effective date of termination of AA2 was 20 June 2019.

13 As for AA1, CVQ served notice of termination of AA1 to CWB on 22 March 2019 and in turn the Fund 1 Subsidiaries served notice of termination of AA1 to CWB on 5 April 2019. The effective date of termination of AA1 was 23 June 2019.

14 On 12 March 2020, CVQ, along with the Fund 1 Subsidiaries and the Fund 2 Subsidiary (collectively, the "Claimants"), commenced arbitration proceedings with the Singapore International Arbitration Centre against CWB for various alleged breaches of AA1 and AA2 (the "Arbitration"). In response, CWB brought counterclaims seeking, among other things, payment of outstanding advisory fees comprising (a) the Management Fee and Performance Fee under AA1; and (b) the Management Fee under AA2.

15 The Claimants disputed that they were liable to pay any outstanding fees under AA1 and AA2. In relation to AA1, the Claimants' position was that those fees were only due when Fund 1 reached the end of its life, and that had not occurred. In the alternative, the Claimants took issue with the quantum of fees that CWB claimed were owed to it and how those amounts should be computed. Notably, while the Claimants raised various objections to the calculations

adduced by CWB, the Claimants themselves did not provide their own calculations of the amounts owed to CWB.

The arbitral tribunal's decision

16 On 20 June 2022, the arbitral tribunal (the "Tribunal") issued its final award (the "Award"). A memorandum of corrections to the Award was subsequently issued on 19 July 2022. In the Award, the Tribunal dismissed all the Claimants' claims and allowed CWB's counterclaims. Briefly, the Tribunal found that CWB had not breached its obligations under AA1 and AA2 and was entitled to payment of its outstanding advisory fees. In determining the amounts due to CWB under AA1, the Tribunal adopted the calculations that were adduced by CWB at the evidentiary hearing through its Head of Finance ("Mr B"). Consequently, the Tribunal ordered CVQ to pay CWB the following sums (Award at para 495):

Description	**Amount payable to CWB**
Management Fee under AA1 for 1 January 2019 to 23 June 2019 (being the effective date of termination for AA1, see [13] above) (the "Pre-Termination Management Fee")	US$313,734
Management Fee under AA1 for 23 June 2019 to the end of the life of Fund 1 (the "Post-Termination Management Fee")	US$1,193,674
Performance Fee under AA1	US$1.01m

17 Further, the Tribunal found that CWB was entitled to be paid the Management Fee under AA2, in the sum of US$97,424.32 plus interest.

Summary of proceedings below

18 On 20 July 2022, the Claimants filed HC/OA 366/2022 in the General Division of the High Court of Singapore, to set aside the Award. HC/OA 366/2022 was subsequently transferred to the Singapore International Commercial Court and renamed SIC/OA 2/2022 ("SIC 2").

19 In SIC 2, the Claimants contended that the Award should be set aside in its entirety under s 24(*b*) of the IAA as it was issued in breach of the rules of natural justice. In particular, the Claimants' arguments were that:

(a) The Tribunal breached the rule against bias.

(b) The Tribunal breached the fair hearing rule in finding that CWB was entitled to the Performance Fee under AA1, because:

(i) The Tribunal adopted a chain of reasoning that the parties had no reasonable notice it would adopt. CWB had admitted in its opening statement for the Arbitration that the Performance Fee could *not* be quantified on the available evidence and that the hearing should be bifurcated on that basis. Nevertheless, the Tribunal proceeded to make a finding on the quantum of the Performance Fee.

(ii) The Tribunal did not apply its mind to the Claimants' submissions that the Performance Fee was not due as Fund 1 had not come to the end of its life, or to the Claimants' objections to the quantification of the Performance Fee.

(c) The Tribunal breached the fair hearing rule in finding that CWB was entitled to the Pre-Termination Management Fee and the Post-Termination Management Fee under AA1. The Tribunal wholly adopted

the calculations of Mr B without any regard to the Claimants' objections.

(d) The Tribunal acted irrationally and capriciously, as evidenced by the fact that the Tribunal used contradictory dates as the end of the life of Fund 1 at different points in the Award.

20 The Claimants contended that they were prejudiced by the above, as but for the Tribunal's alleged breaches of the rules of natural justice, they could reasonably have been successful in their claims and in resisting CWB's counterclaims.

21 Separately, on 18 October 2022, CWB filed HC/OA 694/2022 in the General Division of the High Court of Singapore, for permission to enforce the Award. HC/OA 694/2022 was subsequently transferred to the Singapore International Commercial Court and renamed SIC/OA 4/2022. Permission was granted by an assistant registrar on 31 October 2022. On 16 November 2022, the Claimants filed HC/SUM 4149/2022 ("SUM 4149") to set aside the order granting permission, or alternatively, for an order prohibiting CWB from taking any enforcement steps until the determination of SIC 2. The Claimants sought these orders on the basis that their application in SIC 2 would otherwise be rendered nugatory, even if successful.

The decision below

22 On 26 April 2023, the Judge issued his judgment (the "Judgment") dismissing SIC 2 and SUM 4149. The Judge's reasons may be summarised as follows:

(a) The Claimants' criticisms of the Award did not support any allegation of bias: Judgment at [30].

(b) In finding that CWB was entitled to the Performance Fee under AA1, the Tribunal did not adopt a chain of reasoning which the parties had no reasonable notice it would adopt. CWB had tendered written submissions on the quantification of the Performance Fee, which the Claimants had the opportunity to respond to. There was thus no breach of the fair hearing rule: Judgment at [39]–[40].

(c) While the Tribunal did not expressly address the Claimants' submissions on the Performance Fee in the Award, it was relatively clear from other parts of the Award that the Tribunal had applied its mind to the same and therefore did not breach the fair hearing rule: Judgment at [43]–[45] and [48].

(d) It was open to the Tribunal to wholly adopt Mr B's calculations of the Pre-Termination Management Fee and Post-Termination Management Fee, as Mr B's evidence was unchallenged: Judgment at [51] and [53].

(e) The apparent inconsistency in the dates that the Tribunal used as the end of the life of Fund 1 did not necessarily mean that the Tribunal had not applied its mind or had breached the fair hearing rule: Judgment at [61].

23 Accordingly, the Judge concluded that the setting-aside application in SIC 2 must be dismissed, and that the Claimants' application in SUM 4149 should likewise be dismissed: Judgment at [62].

24 On 23 May 2023, the Claimants filed the present appeal against the Judge's decision. On 31 August 2023, following written submissions on costs tendered by the parties, the Judge rendered his decision on costs.

The parties' cases

25 In this appeal, the crux of the Claimants' case is that the Tribunal breached the fair hearing rule by failing to apply its mind and/or to give reasons for its decision on essential issues in the Award. The Claimants' submissions largely mirror those made before the Judge below. The Claimants contend that the Tribunal's failure to apply its mind manifested in four aspects of its decision:

(a) First, the Tribunal failed to consider whether various conditions for payment of the Performance Fee to CWB had been satisfied. At the hearing before us, counsel for the Claimants, Mr N Sreenivasan SC ("Mr Sreenivasan"), emphasised that the Performance Fee represented a 50% share of the performance fee that CVQ collected from Fund 1 in its capacity as fund manager. Thus, under the terms of AA1, the Performance Fee was only payable to CWB once CVQ had received payment from Fund 1. Mr Sreenivasan referred to this as a "pay when paid" arrangement. The Tribunal failed to consider that CVQ had not received payment from Fund 1, and the Performance Fee therefore could not be due and payable to CWB.

(b) Second, the Tribunal omitted to make any finding on whether the life of Fund 1 had come to an end, or alternatively, used inconsistent dates as the end of the life of Fund 1.

(c) Third, the Tribunal accepted Mr B's calculations of the quantum of the Performance Fee, the Pre-Termination Management Fee and the

Post-Termination Management Fee, without considering the Claimants' objections to the same.

(d) Fourth, the Tribunal failed to consider whether CWB's claims were awarded as a debt or as an award for damages.

26 Next, the Claimants contend that the arbitral procedure was not carried out in accordance with the parties' agreement and that the Award should be set aside on this basis. The Claimants rely on the same reasons set out above, and this ground therefore stands or falls with the first ground. The Claimants assert that this ground is not a new argument on appeal, but contend that even if it is, they are entitled to raise a new argument on appeal.

27 Lastly, the Claimants submit that they had no reasonable notice that the Tribunal would make a decision on the quantum of the Performance Fee, in breach of the fair hearing rule. For the avoidance of doubt, for the purposes of this appeal the Claimants are not pursuing the allegation that the Tribunal was biased.

28 CWB resists the appeal on the basis that the Tribunal did not breach the fair hearing rule or its duty to give reasons for its decision. In any event, the Claimants have not shown that they suffered prejudice from the alleged breaches of natural justice, which would warrant the setting aside of the Award.

The applicable law

29 The law on setting aside an arbitral award for a breach of the rules of natural justice is relatively well-settled. As set out by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29], 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.

30 One of the two pillars of natural justice is that the parties must be given adequate notice and opportunity to be heard. Sub-branches of this principle are that each party must be given a fair hearing and a fair opportunity to present its case: *Soh Beng Tee* at [43]. In *BZW and another v BZV* [2022] 1 SLR 1080 at [60], this court described two types of breaches of the fair hearing rule, which are relevant to the present case:

> (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* ([31] *supra*) 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* ([29] *supra*) 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)]).
>
> [emphasis in original]

31 The Claimants take the position that another aspect of fairness in proceedings is the need for the tribunal to give reasons for its decision. The Claimants rely on *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") for this proposition. In that case, the High Court Judge observed that an arbitral tribunal is generally bound to give reasons for its decision, and suggested that a failure to give reasons would be a breach of Art 31(2) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") that would render an award liable to being set aside (at [97] and [99]). Article 31(2) of the Model Law (as adopted in the First Schedule to the IAA) provides as follows:

> Article 31. Form and contents of award
>
> …
>
> (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.

32 It appears that the case law on the duty of an arbitral tribunal to give reasons is sparse and we take the opportunity to make two observations about

this area of the law. First, while Art 31(2) of the Model Law indeed places the arbitral tribunal under a general duty to give reasons, we caution that it is not settled in the case law whether a tribunal's failure to give *adequate* reasons is *itself* a reason to set aside an award. The High Court Judge in *TMM Division* did not decide conclusively either way (at [97]), and it may be observed that a failure to give *adequate* reasons has not been expressly recognised in the case law as a breach of the rules of natural justice, nor is it expressly named as a ground for setting aside under s 24 of the IAA or Art 34 of the Model Law. Indeed, on the facts of *TMM Division* itself, the award was not set aside for a failure to give reasons. Counsel for the Claimants, Mr Sreenivasan, also acknowledged at the hearing before us that there has been no case in Singapore where an arbitral award was set aside for a tribunal's failure to give reasons.

33 Second, it is also not entirely settled what the *content* of a tribunal's duty to give reasons is. In *TMM Division*, the Judge considered that the standards set out in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 ("*Thong Ah Fat*") were "assistive indicia" to arbitrators in determining the scope of their duty to give reasons (*TMM Division* at [103]). Respectfully, we disagree with this observation. As counsel for CWB, Mr Jason Chan SC, correctly highlighted at the hearing before us, *Thong Ah Fat* set out the standards applicable to *judges* in court cases, and different considerations are at play in a court case as opposed to an arbitration. For instance, in court cases, there is a need for open justice and to set out the court's reasons in detail, because a review by the appellate court would involve a re-examination of the merits. As the court in *Thong Ah Fat* observed, the judicial duty to give reasons "ensures that the appellate court has the proper material to understand, and do justice to, the decisions taken at first instance", and is founded on the principle that "justice must not only be done but it must be seen to be done" (at [22] and [24]). By contrast, arbitration proceedings are confidential in nature and not subject to a review of the merits

at the setting-aside or enforcement stage. It follows that the scope of a tribunal's duty to give reasons would differ from that of a judge's, and it is therefore inappropriate to apply standards applicable to judges in the context of arbitration proceedings.

34 The views we have just expressed are consistent with the observations of the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 ("*Westport Insurance*"). In that case, the issue was whether the tribunal had failed to give *adequate* reasons for the award, such that there was a manifest error of law that would warrant the granting of leave to appeal against the award. The majority rejected the notion that an arbitrator is required to give reasons to a "judicial standard", instead preferring the view that what is required of the tribunal "will depend upon the nature of the dispute and the particular circumstances of the case" (at [53]). Similarly, Kiefel J observed that there was nothing in the equivalent provision to Art 31(2) of the Model Law which suggested that a tribunal had to give reasons to a judicial standard (at [169]). We mention for completeness that the High Court Judge in *TMM Division* had also referred to *Westport Insurance* (at [102]), but nevertheless reached the conclusion that the standards of reasoning applicable to judges may also apply to arbitrators. For the reasons we have explained, we respectfully disagree with the observations in *TMM Division* that that should be the case.

35 In our observations above, we have outlined two relatively unsettled issues of law, namely whether a tribunal's failure to give reasons is a ground for setting aside an award, and if so, what the scope of the tribunal's duty to give reasons is. Be that as it may, we do not consider it necessary to pronounce on these issues for present purposes. This is because the Claimants' case for setting aside the Award is ultimately premised on a breach of the rules of natural justice, rather than the Tribunal's alleged failure to give reasons. Specifically, the

Claimants contend that the Tribunal's alleged failure to give reasons "gives rise to the inference that the Tribunal had 'ignored, forgotten, or overlooked'" their submissions, in breach of the fair hearing rule. In other words, the Claimants rely on the Tribunal's failure to give reasons as *demonstrative* of the fact that the Tribunal must have failed to apply its mind. The Claimants' case must therefore be evaluated from the perspective of whether, on the totality of the evidence, it is indeed the case that the Tribunal had failed to apply its mind in breach of the fair hearing rule. In that regard, we agree with the observations of the Judge in *TMM Division* at [98] that the inadequate provision of reasons and explanations is, without more, a mere error of law and an allegation of the same is therefore incapable of sustaining a challenge against an award. Where a failure to give reasons is relied on to assert that a tribunal *failed to apply its mind*, the tribunal's omission to give reasons must logically be so grave or so glaring as to point to the inescapable inference that the tribunal did not even attempt to comprehend the essential issues in the arbitration.

36 Finally, it is pertinent to note that a party seeking to rely on a breach of the rules of natural justice to set aside an award must demonstrate that it has been prejudiced by the alleged breach: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

37 As noted above, the Claimants also seek to set aside the Award on the ground that the arbitral procedure was not in accordance with the parties' agreement. That ground is provided for in Art 34(2)(*a*)(iv) of the Model Law, which states as follows:

> Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> …

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (*a*) the party making the application furnishes proof that:
>
> …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; …

38 Having set out the applicable law, we turn to assess the merits of the Claimants' arguments.

Whether the Tribunal failed to apply its mind in breach of the fair hearing rule

39 As noted at [25] above, the Claimants contend that the Tribunal's failure to apply its mind manifested in four aspects of its decision. We take each of these arguments in turn.

The Tribunal's alleged failure to consider whether the Performance Fee was due and payable

40 In the Arbitration, the Claimants' position was that the Performance Fee was not due to CWB as various conditions for its payment had not been met. First, Fund 1 had not yet reached the end of its life. Under the terms of AA1, CVQ had the right to defer payment of the Performance Fee to the end of the life of Fund 1, and the Claimants asserted that CVQ had duly exercised this right. The relevant provision of AA1 states as follows:

> [CVQ] may also defer the fees to be paid to [CWB] to the end of life of the Fund. If [CWB] is paid any monies by way of fees or reimbursement of expenses of [CWB] directly by the Portfolio Companies, then the amount so paid shall be deduced [*sic*] from the fees payable to [CWB].

41 Second, the Claimants highlighted that the Performance Fee was only payable to CWB upon CVQ receiving payment of its performance fee from Fund 1, and Fund 1 achieving a target rate of return of 8%. AA1 provided that CWB's Performance Fee would be 50% of the performance fee that CVQ received from Fund 1, and that it would be payable within 30 business days of CVQ receiving the same from Fund 1 (*ie*, the "pay when paid" arrangement):

> Advisory Fees
>
> After paying for expenses of the RPM Operations Team … the surplus will be distributed as follows:
>
> 50% of the Fund Management Fee; and
>
> 50% of the Performance Fee,
>
> will be paid to [CWB], with the balance being retained by [CVQ].
>
> The share of fees belonging to [CWB] shall be payable within 30 Business Days of [CVQ] receiving the above mentioned fees from [Fund 1].

42 Further, the "performance fee" that CVQ was to receive from Fund 1 was defined in the Fund 1 PPM as follows:

CARRIED INTEREST ('PERFORMANCE FEE')	For the Total Capital Contributions invested by [Fund 1] from time to time which has a target rate of return of no less than 8% (Eight Percent) internal rate of return per annum ('Threshold Return' or 'Hurdle Rate'), the 10% (Ten Percent) of the return to [CVQ] pursuant to the Management Agreement.

43 The Claimants contended that the above provision meant that CVQ would only receive a performance fee from Fund 1 if Fund 1 achieved a target rate of return of 8% at the end of its life. Accordingly, CWB would likewise receive its Performance Fee only if this threshold rate of return was met. In that

event, the exact quantum of the Performance Fee would be calculated by an independent third-party fund administrator. However, given that Fund 1 had not reached the end of its life, CVQ had not received any payment from Fund 1 and a computation of the Performance Fee was not available.

44 In this appeal and in the proceedings before the Judge below, the Claimants submit that the Tribunal did not address their points individually in the Award, and that the Tribunal therefore failed to apply its mind to those points. In particular, as noted at [25(a)] above, the Claimants emphasise in this appeal that the Tribunal did not consider that CVQ was only obliged to "pay when paid", and thus cannot be liable for the Performance Fee as it has not received payment from Fund 1.

45 We disagree with the Claimants' submissions. In our judgment, even if the Tribunal did not refer to the Claimants' arguments *in seriatim*, it is plain on the face of the Award that the Tribunal did apply its mind to the essential issues raised by the Claimants' case and therefore did not breach the fair hearing rule.

46 The Tribunal *expressly* addressed the issue of when and whether the life of Fund 1 had come to an end. At paras 481 to 486 of the Award, the Tribunal considered the Claimants' argument that they were entitled to defer payment of the Performance Fee until the end of the life of Fund 1. Crucially, at para 486, the Tribunal concluded that the wording of AA1 "plainly read gave [CVQ] the unconditional right to defer payment … *until the end of life of Fund I on 2 September 2020 and no longer*" [emphasis added]. The Tribunal therefore accepted the Claimants' submission that they were only supposed to pay the Performance Fee at the end of the life of Fund 1. The Tribunal's finding at para 486 of the Award, however, was that the life of Fund 1 *had ended* on 2 September 2020.

47 Next, the Tribunal also addressed the conditions for the Performance Fee to become payable. At para 462 of the Award, the Tribunal observed that under the Fund 1 PPM, the performance fee payable by Fund 1 to CVQ was calculated "based on a 10% return to [CVQ] after Fund I achieves a target rate of return of no less than 8%" and was "payable to [CVQ] when the Fund I Portfolio is sold". Further, at para 463 of the Award, the Tribunal observed that CVQ had to pay CWB 50% of the performance fee it received from Fund 1 (*ie*, the Performance Fee) "within 30 business days of receiving the same from Fund I".

48 As for whether these conditions had been met, the Tribunal expressly referred to Mr B's evidence that the Fund 1 Portfolio had been sold (at para 478 of the Award). While the Tribunal did not expressly discuss whether the 8% rate of return had been achieved or whether CVQ had received payment from Fund 1, we are satisfied that the Tribunal *did* find that these conditions were met when it accepted Mr B's calculations of the Performance Fee as the "most cogent evidence of the loss available" (Award at para 503). Mr B's calculations were that an 8% rate of return *would* be achieved by the sale of the Fund 1 Portfolio, and that on that basis, CVQ would receive a performance fee of US$2.02m from Fund 1. The Performance Fee payable to CWB was 50% of that sum, *ie*, US$1.01m.

49 It is important to understand that the backdrop to Mr B's calculations was that the Claimants had repeatedly refused to disclose documents which would have facilitated the calculation of the quantum of CWB's Performance Fee, or to provide any calculations of their own. In a letter to the Claimants dated 29 July 2021, CWB's solicitors had stated that based on publicly available information, they understood that the Fund 1 Portfolio had been sold, and accordingly asked the Claimants to disclose "all documents evidencing the total

amount of Performance Fee received or to be received by [CVQ]". In their letter of response dated 5 August 2021, the Claimants stated their position that the life of Fund 1 had not come to an end, and that accordingly the entitlement to the Performance Fee had not crystallised. In addition, the Claimants asserted that the statement of account prepared by the third-party fund administrator would be "the only document relevant and material to establish the quantum of Performance Fee payable". However, no such statement of account had been provided by the third-party fund administrator.

50 It was in this context that Mr B observed in his second witness statement dated 6 October 2021 that CWB was "unable to quantify its 50% share of the Performance Fees given the Claimants' inadequate disclosures to date", and that his calculations were therefore a "best estimate" of the Performance Fee payable to CWB. Likewise, in CWB's closing submissions for the arbitration, its position was that "[g]iven the lack of information from the Claimants necessary to fully and properly quantify these amounts, [Mr B's calculations] remain [CWB's] best estimates of these claims in the absence of any challenge to this evidence, and any alternative quantifications being proffered by the Claimants".

51 In the Award, the Tribunal expressly accepted CWB's submission that Mr B's calculations were the best estimates of its claims. The Tribunal explained its decision to adopt Mr B's calculations at footnote 133 of the Award, in the following terms:

> The Tribunal adopts this quantification and accepts [CWB's] assertion at paragraph 124 of [CWB's] Closing Submissions: 'We respectfully submit that the quantification of these amounts as presented in [Mr B's] evidence was not challenged either in the Claimants' Opening Submissions, or at the Hearing. Given the lack of information from the Claimants necessary to fully and properly quantify these amounts, these remain [CWB's] best estimates of these claims in the absence of any challenge to this evidence, and any alternative

> quantifications being proffered by the Claimants, we respectfully ask that the Tribunal adopt the quantification proposed by [CWB]'.

52 The Tribunal emphasised that the Claimants had essentially placed themselves in a "heads we win, tails you lose" position by claiming on the one hand that CWB had not produced sufficient evidence of the quantification of the Performance Fee, while simultaneously disclaiming knowledge of the correct quantum of the Performance Fee and relegating this responsibility to the third-party fund administrator (Award at para 502). It was for this reason that the Tribunal accepted Mr B's calculations as the "most cogent evidence of the loss available" (Award at para 503).

53 In other words, it appears to us that because of the Claimants' repeated refusals to disclose documents pertaining to the correct computation of the Performance Fee, the Tribunal was prepared to assume in CWB's favour that the conditions for payment of the Performance Fee had been satisfied, such that US$2.02m *had been paid* to CVQ, and CWB was consequently entitled to US$1.01m as its share of the Performance Fee. Whether the Tribunal was correct to do so is a question on the merits and is not subject to review by this court. The key point here is that once the context to the Tribunal's reasoning is properly appreciated, it is clear that the Tribunal *did* apply its mind to the question of whether the conditions for payment of the Performance Fee had been satisfied. The Tribunal's conclusion was that such conditions had been met. There is therefore no basis for saying that the Tribunal breached the fair hearing rule.

The date of the end of the life of Fund 1

54 Next, the Claimants contend that the Tribunal failed to apply its mind as two different dates were used as the end of the life of Fund 1 in the Award. On

one hand, the Tribunal accepted Mr B's calculations which used 23 June 2021 as the end of the life of Fund 1 in determining the quantum of the Post-Termination Management Fee (Award at para 473). On the other hand, the Tribunal also found that the life of Fund 1 ended on 2 September 2020, and accordingly ordered interest on CWB's claims to run from that date (Award at paras 486 and 495). This argument was advanced by the Claimants in their written submissions for this appeal. At the hearing before us, however, Mr Sreenivasan appeared to also suggest that the Tribunal had omitted to make a finding on whether the life at Fund 1 had come to an end *at all*.

55 We start with the latter contention raised by Mr Sreenivasan. In respect of that argument, it is plain from [46] above that the Tribunal did find that the life of Fund 1 had come to an end on 2 September 2020. There is therefore no basis for Mr Sreenivasan's assertion.

56 As for the contention that the Tribunal used inconsistent dates as the end of the life of Fund 1, we disagree that this shows the Tribunal failed to apply its mind. In our judgment, the Tribunal's acceptance of Mr B's calculations, notwithstanding the fact that his calculations used a different date as the end of the life of Fund 1, is readily explicable by the fact that Mr B's calculations were the *only* calculations adduced before the Tribunal. As explained at [49]–[52] above, the Claimants did not put forth any alternative calculations of their own in the Arbitration, and it was for this reason that the Tribunal found Mr B's calculations to be the "best estimates" of CWB's claims. In other words, despite the Tribunal's finding that the life of Fund 1 had ended on 2 September 2020, there were simply no calculations before it that used that date, and the Tribunal decided to adopt Mr B's calculations in those circumstances. The Tribunal's decision is therefore readily explicable on the facts and does not show that it

made inconsistent findings as to the date of the end of the life of Fund 1, or that it otherwise failed to apply its mind to the issues at hand.

The Tribunal's acceptance of Mr B's calculations

57 The Claimants allege that the Tribunal failed to consider its objections to Mr B's calculations of the Performance Fee, the Pre-Termination Management Fee and the Post-Termination Management Fee, and instead adopted Mr B's calculations wholesale. We first address the Tribunal's acceptance of Mr B's calculation of the Performance Fee, before turning to his calculations of the Pre-Termination and Post-Termination Management Fee.

The Performance Fee

58 In relation to the Performance Fee, the Claimants contend in their written submissions for this appeal that they objected to Mr B's calculations in (a) their responses to the interrogatories that were served on them by CWB (the "Response to Interrogatories"); and (b) the responsive witness statement of CVQ's Head of Asset Management ("Mr E"). In addition, at the hearing before us, Mr Sreenivasan highlighted that the Tribunal had stated at para 475 of the Award that "the Claimants [did] contest [Mr B's] calculations, *but no earlier in the Proceedings than in Claimants' Response to Respondent's Further Submissions dated 15 April 2022*" [emphasis added]. Mr Sreenivasan submitted that this was incorrect, as Mr B's calculations had been challenged earlier in the proceedings, in the Response to Interrogatories and Mr E's responsive witness statement. Mr B had also been challenged on his calculations in cross-examination, and he had conceded that certain figures used in his calculations were overstated.

59 We disagree that the above shows that the Tribunal failed to apply its mind to the correct quantum of the Performance Fee. Beginning with the Response to Interrogatories, the point remains that the Claimants' responses did not set out *any* alternative calculations of the Performance Fee. The interrogatories served on the Claimants focused on the details of the sale of the Fund 1 Portfolio, such as the date on which the Fund 1 Portfolio was sold, the consideration for which it was sold, and the total amount of capital contributed by all Fund 1 investors. Accordingly, in their Response to Interrogatories, the Claimants disclosed this information, but crucially did *not* set out their own calculations of the Performance Fee that would consequently be due to CWB. In the circumstances, the contents of the Claimants' Response to Interrogatories do not take anything away from the Tribunal's finding that Mr B's calculations were the "most cogent evidence of the loss available", in the absence of alternative calculations from the Claimants (Award at footnote 133 and para 503). The mere fact that the Tribunal did not expressly refer to the Response to Interrogatories, or incorporate the figures disclosed therein into the Award, does not necessarily show that it failed to apply its mind to the correct computation of the Performance Fee.

60 As for Mr E's responsive witness statement, the objections therein were made in response to the initial estimates of the Performance Fee set out in Mr B's first witness statement. In his first witness statement, Mr B had estimated that CWB was entitled to a Performance Fee of around US$700,000 based on an offer that CWB had made sometime in October 2018 to purchase the Fund 1 Portfolio. Subsequently, however, Mr B re-calculated his estimate of the Performance Fee based on certain documents that were disclosed by CVQ in the Arbitration. His calculations were set out in his second witness statement, and it was those calculations that were eventually adopted by the Tribunal. Accordingly, Mr E's objections to the estimates in Mr B's first witness

statement were strictly irrelevant to the Tribunal's decision on the quantum of the Performance Fee. The fact that the objections set out in Mr E's responsive witness statement were not addressed by the Tribunal is therefore not a breach of the fair hearing rule.

61 Finally, as for the fact that Mr B was challenged on his calculations in cross-examination and had made several concessions, the Tribunal expressly noted that this was the case in a separate part of the Award (at paras 478–479). Accordingly, notwithstanding the Tribunal's statement at para 475 of the Award that "the Claimants [did] contest [Mr B's] calculations, but no earlier in the Proceedings than in Claimants' Response to Respondent's Further Submissions dated 15 April 2022", it cannot be definitively said that the Tribunal *overlooked* what had transpired in Mr B's cross-examination.

62 In any event, even if the Tribunal was mistaken in stating that the Claimants had failed to challenge Mr B's calculations until the time of closing submissions, we are satisfied that this is at most an error of fact which would not justify setting aside the award. The present case is unlike the situation in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"). In *Front Row*, the arbitrator was under the erroneous impression that the respondent had ceased to rely on several pleaded points in its counterclaim for misrepresentation, and consequently failed to have regard to the respondent's submissions on the issue. Andrew Ang J found that this was a breach of the rules of natural justice (at [45]). Here, the Tribunal's purported misapprehension that Mr B's calculations were unchallenged until the time of closing submissions does not mean that it failed to have regard to the Claimants' case. As already noted above, the Tribunal *did* expressly reference Mr B's concessions in the Award at paras 478–479. In so far as the Claimants' contention is that the Tribunal failed to give weight or

should have given more weight to Mr B's concessions, this is an alleged error of fact that is insufficient to constitute a breach of natural justice.

The Pre-Termination and Post-Termination Management Fee

63 Turning to Mr B's calculations of the Pre-Termination and Post-Termination Management Fee, the Claimants' case is that the Tribunal failed to address various objections raised in Mr E's responsive witness statement, and its closing submissions dated 28 January 2022 (the "Claimants' Closing Submissions").

64 We disagree that this amounts to a breach of the fair hearing rule. With regard to the objections raised in Mr E's responsive witness statement, the crucial point is that none of the objections therein were put to CWB's witnesses, including Mr B. The Tribunal thus accepted that Mr B's calculations were "not challenged in either the Claimants' Opening Submissions, or at the Hearing", and adopted Mr B's calculations on that basis (at footnote 133 of the Award). It is no excuse for the Claimants to say that they did not cross-examine CWB's witnesses on the calculation of the Pre-Termination and Post-Termination Management Fee, because CWB's counsel in the Arbitration had declined to question the Claimants' Mr E on the same. Even if CWB's counsel had chosen not to pursue that line of cross-examination, it remained open to the Claimants to cross-examine Mr B. Having chosen not to do so, the Claimants cannot now claim that there has been a breach of the fair hearing rule by which they are prejudiced.

65 As for the objections raised in the Claimants' Closing Submissions that CWB was expected to mitigate its loss and should have deducted its costs and expenses from the sum claimed, these objections do not change the fact that the Claimants did not put forward any alternative calculations of the Pre-

Termination and Post-Termination Management Fee, which was why the Tribunal ultimately adopted Mr B's calculations. The Claimants' objections therefore do not impinge on the Tribunal's reasoning, and the Tribunal's omission to expressly address the Claimants' objections does not show that it failed to apply its mind.

Whether CWB's claims were awarded as a debt or an award for damages

66 Finally, the Claimants contend that the Tribunal breached the fair hearing rule as it failed to consider whether CWB's claims were awarded as a debt or as an award for damages. It appears to us that this is a new submission advanced by the Claimants on appeal, in response to an observation made by the Judge below that it was "not clear to [him] from the face of the Award whether the [Performance Fee] was awarded as a debt or on the basis of an award for damages for wrongful termination": Judgment at [43]. In our judgment, the short point here is that the Claimants did not make the argument before the Tribunal that it was important to draw a distinction between an award for debt and an award for damages, and if so, why this was the case. Accordingly, the fact that the Tribunal did not address this argument does not show that it failed to apply its mind to the Claimants' case.

67 At the hearing before us, Mr Sreenivasan submitted that the Claimants *did* characterise CWB's claim for the Performance Fee as one for a debt rather than for damages, when they contended in the Arbitration that they were only obliged to "pay when paid". It is not clear to us that that amounted to drawing a distinction between a claim for debt and a claim for damages, but in any event, we have explained at [48]–[53] above that we are satisfied that the Tribunal did address the Claimants' argument that the Performance Fee was not due as CVQ

had not received payment of the same. There is therefore no basis for concluding that the Tribunal breached the fair hearing rule.

Whether the arbitral procedure was not in accordance with the parties' agreement

68 We turn to consider the remaining ground on which the Claimants seek to set aside the Award. As noted at [26] above, the Claimants also contend that the arbitral procedure was not carried out in accordance with the parties' agreement, and they rely on the same arguments made in support of their contention that the Tribunal breached the fair hearing rule. In our judgment, this is clearly a new ground for setting aside the Award that was not pursued before the Judge below, and so there is a question of whether the Claimants should be permitted to raise a new ground on appeal. Nevertheless, we do not find it necessary to comment further on this question, as this ground, which is premised on the *same* arguments made in support of the breach of the fair hearing rule, is wholly unmeritorious given our conclusion above that the Tribunal did not breach the fair hearing rule.

Whether the Claimants had reasonable notice that the Tribunal would make a decision on the quantum of the Performance Fee

69 Lastly, the Claimants contend that they had no reasonable notice that the Tribunal would decide on the quantum of the Performance Fee, and that this was a breach of the fair hearing rule. In our judgment, there is plainly no merit to this point. After the parties had filed their respective closing submissions for the Arbitration, the Tribunal invited the parties on 14 March 2022 to file a further round of closing submissions, addressing any orders that CWB needed to "quantify its share of the Performance Fee with precision". In response, the Claimants filed a further set of closing submissions on 15 April 2022 addressing, among other things, the correct quantification of the Performance

Fee. There is thus no basis for arguing that the Claimants were not given reasonable notice that the Tribunal would decide on the quantum of the Performance Fee, *nor* more importantly, a reasonable opportunity to present their case.

70 To be clear, the Claimants do not allege that they were deprived of an opportunity to adduce more evidence or to pursue certain lines of cross-examination, such that they did not have a reasonable opportunity to present their case. Indeed, at the hearing before us, Mr Sreenivasan accepted that when the Tribunal invited the parties to file further submissions on 14 March 2022, the Claimants did not object to say that they had no notice that the Tribunal would decide on the quantum of the Performance Fee, or that they desired to adduce further evidence. In the circumstances, it cannot be said that the Tribunal adopted a chain of reasoning that the parties had no reasonable notice of, such that a breach of natural justice occurred in connection with the making of the Award.

Conclusion

71 For the reasons set out above, we are satisfied that the Tribunal did not breach the rules of natural justice and that there are no grounds for setting aside the Award. We therefore dismiss the appeal.

72 The Claimants are to pay CWB costs of the appeal fixed at S$100,000, plus disbursements of S$7,650.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Robert French
International Judge

N Sreenivasan SC, Tan Kai Ning Claire and Wah Kai Lin Kelly (K&L Gates Straits Law LLC) for the appellants;
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