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

[2024] SGHC 125

Originating Application No 1203 of 2023

Between

Palm Grove Beach Hotels Pvt. Ltd.

… *Claimant*

And

(1) Hilton Worldwide Manage Limited
(2) Hilton Hotels Management India Private Limited

… *Defendants*

JUDGMENT

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

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Palm Grove Beach Hotels Pvt Ltd
v
Hilton Worldwide Manage Ltd and another

[2024] SGHC 125

General Division of the High Court — Originating Application No 1203 of 2023
S Mohan J
15 March 2024

10 May 2024 Judgment reserved.

S Mohan J:

1 HC/OA 1203/2023 ("OA 1203") is an application brought by the claimant, Palm Grove Beach Hotels Pvt. Ltd. ("Palm Grove"), against the defendants, Hilton Worldwide Manage Limited ("Hilton Worldwide") and Hilton Hotels Management India Private Limited ("Hilton India").

2 In OA 1203, Palm Grove seeks to set aside two partial arbitral awards (or parts thereof) rendered by a Singapore-seated arbitral tribunal. The arbitral proceedings between the claimant and the defendants concerned various disputes that arose out of the defendants' management and operation of a luxury hotel in India, namely the Conrad Pune (the "Hotel").

3 Having carefully considered the affidavit evidence filed by the parties (which included the arbitral record) and their written and oral submissions, I dismiss OA 1203. These are my reasons.

The facts

4 Palm Grove is a company incorporated in India that owns a number of luxury hotels across the country.[1]

5 It appears that at some point "[p]rior to 2011", Palm Grove began constructing a hotel on a plot of land it owned in Pune, India. Palm Grove aspired for the hotel to be a "5-star luxury hotel, intended to be the finest luxury hotel in Pune and its neighbouring areas".[2]

6 The defendants were eventually engaged to manage and operate the Hotel then under construction as part of the Conrad brand.[3] The Hotel opened for business on 10 March 2016 as the Conrad Pune.[4]

7 Hilton Worldwide (incorporated in the United Kingdom) and Hilton India (incorporated in India) belong to the well-known Hilton group of companies, which carries on its business in the hospitality industry, and this includes managing and operating hotels globally.[5] In this judgment, I will refer to both defendants jointly as "Hilton".

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1 Raheja Sandeep Gopal's affidavit dated 8 December 2023 ("RSG") at [5].

2 RSG at [40].

3 RSG at [43].

4 RSG at [75].

5 RSG at [7]–[8].

The agreements

8 Palm Grove's relationship with Hilton is governed by a suite of contractual instruments, the first of which is the Indian Development Services Agreement dated 5 December 2013 (the "IDSA").[6] In essence, Palm Grove undertook by this agreement to "adhere to Conrad's Brand Standards in its construction of the Hotel (including the fitting-out, equipping and furnishing of the Hotel) befitting the status of the said luxury brand";[7] Hilton, for its part, would provide "design directions and review services for the construction, furnishing, equipping, fitting out and decoration of the Hotel to ensure compliance with the Conrad Brand Standards".[8]

9 This was accompanied by various other agreements and addenda (collectively, the "Hotel Agreements"):

(a) The Management Agreement dated 5 December 2013 (the "Management Agreement").[9]

(b) The Management Agreement was supplemented by:

(i) The Working Capital Addendum dated 5 December 2013 (the "Working Capital Addendum");[10]

(ii) The Owner's Room Nights Addendum dated 5 December 2013;[11]

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6 RSG at pp 5911–5996.

7 RSG at [42].

8 RSG at [44].

9 RSG at pp 5997–6121.

10 RSG at pp 6239–6243.

11 RSG at pp 6244–6248.

(iii) The Owner's Office Addendum dated 5 December 2013;[12]

(iv) The Civil and Criminal Proceedings Addendum dated 5 December 2013;[13] and

(v) The Amendment Agreement Relating to the Management Agreement dated 22 October 2020 (the "Amendment Agreement").[14]

(c) The Indian Business Systems Services Agreement dated 5 December 2013 (the "BSSA").[15]

(d) The International Marketing Services Agreement dated 5 December 2013 (the "IMSA").[16]

(e) The License Agreement dated 5 December 2013 (the "Licence Agreement").[17]

10 There is also the Hilton Information Technology Systems Agreement dated 17 December 2015 between Palm Grove and Hilton Systems (which is an affiliate of Hilton).[18]

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12 RSG at pp 6249–6254.

13 RSG at pp 6255–6259.

14 RSG at pp 6271–6280.

15 RSG at pp 6122–6155.

16 RSG at pp 6156–6200.

17 RSG at pp 6201–6238.

18 RSG at pp 6372–6406.

The relevant contractual provisions

11 To set the context for what follows, it will be helpful to explain a few salient aspects of the parties' contractual arrangements.

Hilton's duties in relation to the management and operation of the Hotel

12 Broadly speaking, the Management Agreement is the centrepiece of the parties' overall agreement as to how the Hotel should be managed and operated by Hilton. Relevant for present purposes, and of central importance to the arbitral proceedings between the parties, are the following parts of cl 3.1, which articulates the standards and requirements that Hilton must adhere to as Manager of the Hotel:[19]

> 3.1.1 Owner appoints Manager and Manager hereby accepts such appointment, to exclusively manage and operate the Hotel, upon the terms and conditions set out in this Agreement.
>
> 3.1.2 In accordance with the terms of this Agreement, Manager shall have the sole and exclusive right and obligation, with full control and discretion to manage and operate the Hotel in accordance with the Budget and solely as a hotel under the Brand Standards and for all activities in connection therewith which are customary and usual to such an operation. *Insofar as feasible and in its opinion advisable, Manager shall manage and conduct such operations in accordance with local character and traditions.* So that Manager can manage and operate the Hotel at all times throughout the period between the commencement of the Pre-Opening Activities through to the expiry of earlier termination of this Agreement under the Brand Standards, Owner shall act in a manner that shall permit the maintenance and operation of the Hotel in accordance with the Brand Standards and do such things as are required of Owner pursuant to this Agreement, within the time limits specified in this Agreement or, where no such time limit is specified, in

[19] RSG at pp 6008–6009.

> a timely manner or, where applicable, refrain from acting in a manner inconsistent with its obligations under this Agreement.
>
> 3.1.3 For the purposes of managing and operating the Hotel, Manager shall fulfil all its obligations under this Agreement and the International Agreements *using the skill, effort, care and expertise reasonably expected of a prudent international hotel operator* and *with the intention of optimising the Gross Operating Profit of the Hotel (balancing short, medium and long term goals and objectives)* whilst *having regard to, and not compromising, all other relevant considerations*, including the standards of operation, quality and condition of the Hotel, compliance with Brands Standards, the goodwill and reputation of the Hotel and/or the Marks and/or Manager and its Affiliates, compliance with Laws, requirements and recommendations of regulatory and other like bodies or of insurers, industry practice, ethical standards and the balance of risk versus certainty.
>
> [emphasis added]

The preparation and approval of the Hotel's annual budgets

13 Clause 3.1.2 states, *inter alia*, that Hilton "shall have the sole and exclusive right and obligation, with full control and discretion to manage and operate the Hotel *in accordance with the Budget*" [emphasis added]. To appreciate the reference to "the Budget", one must look to cl 7.4 of the Management Agreement.[20] As will become apparent shortly, the Hotel's annual budgets have been the hotbed of the parties' disputes to date.

14 A hotel, as with any other business, depends for its success on proper budgeting. Clauses 7.4.1A to 7.4.1C set out Hilton's obligation to deliver proposed budgets to Palm Grove within specified timelines. Clauses 7.4.1A and

[20] RSG at pp 6030–6037.

7.4.1B concern the Hotel's pre-opening budgets and are irrelevant to the present discussion.

15 Clause 7.4.1C reads:

> 7.4.1C Thereafter, on or before 30 November of each Calendar Year of the Operating Term (following the Calendar Year in which the Opening Date occurs), Manager shall deliver to Owner, for its approval, the proposed Budget for the forthcoming Fiscal Year.

16 Clauses 7.4.2 to 7.4.3 contemplate a consultative process of sorts between Hilton and Palm Grove following delivery of the proposed budget by Hilton. Subject to certain exceptions, Palm Grove is entitled to raise objections to the proposed budget. In the event such objections are raised, cl 7.4.4 requires the parties to "diligently attempt to reach agreement", failing which their dispute will be resolved by an "Expert" (which I will refer to in this judgment as a "Budget Expert"):

> 7.4.2 Without derogating from the rights and responsibilities of Manager under this Agreement, Owner shall be entitled to consult with Manager, through Owner's authorised representatives, with respect to any part of the proposed Budget and Manager shall participate in such consultation process by responding to Owner. Manager shall also within thirty (30) Calendar Days after receipt by Manager of a request from Owner, Manager will make its area director or other appropriate representative available for such consultation and will treat seriously all comments by Owner.
>
> 7.4.3 If Owner wishes to object to all of or any part of the proposed Budget then Owner shall, within thirty (30) Calendar Days of the date of submission to Owner of the proposed Budget or, if later, within thirty (30) Calendar Days after consulting with Manager in accordance with clause 7.4.2, specify in writing to Manager its objections and stating the reasons for such objections. If Owner fails to give written notice of its objections within the thirty (30) Calendar Day period as aforesaid the proposed Budget shall be deemed to be approved by

> Owner. Owner shall not be entitled to object to any part of the proposed Budget which relates to expenditure required:
>
> …
>
> 7.4.4 In the event of written notice of objection being given by Owner, within the thirty (30) Calendar Days period set forth in clause 7.4.3, Owner and Manager shall thereafter diligently attempt to reach agreement on the categories to which Owner has objected, provided that if Owner and Manager have failed to resolve any disputed issues, within a further fourteen (14) Calendar Days from the date of Owner's written notice of objection, the same shall be determined, on application by either Owner or Manager, by an Expert selected and appointed in accordance with the provisions set forth in clause 18.1. …

17 The appointment of Budget Experts is governed by cl 18.1 of the Management Agreement.[21] In essence, cl 18.1 sets out certain qualifying criteria for appointment as a Budget Expert and provides that the appointment will be made by an arbitral tribunal in the event the parties are unable to make an appointment by consensus.

The provision of working capital by Palm Grove

18 A budget is, of course, nothing without actual funds to back it. Clause 7.2.1 of the Management Agreement therefore sets out Palm Grove's obligation to provide Hilton with:[22]

> … working capital to ensure the uninterrupted and efficient operation of the Hotel, the timely payment of all current liabilities of the Hotel and the timely performance by Manager of all of its obligations in accordance with the terms of this Agreement.

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21 RSG at pp 6067–6069.

22 RSG at pp 6029–6030.

19 This obligation is supplemented by the Working Capital Addendum, cl 2 of which requires Hilton to provide Palm Grove with forecasts of the Hotel's working capital requirements "which shall be based on the approved Operating Budget":[23]

> 2. Manager shall provide to the Owner monthly, a cash flow forecast of projected working capital requirements for the ensuing forty five (45) Calendar Days which shall be based on the approved Operating Budget. Manager shall retain such amounts for a Calendar Month.

20 The Working Capital Addendum, however, also sets out a mechanism for Hilton to request additional funds as and when those funds are necessary, irrespective of the approved budget in place:[24]

> 4. Notwithstanding clauses 3 and 4 above, if Manager determines at any time during the Operating Term, the available funds in the Operating Account are insufficient or reasonably anticipated to be insufficient to allow for the uninterrupted and efficient operation of the Hotel, Manager shall notify Owner of the anticipated or actual amount of the shortfall ("Working Capital Funds Request") and Owner shall deposit into the Operating Account the amount requested by Manager within fifteen (15) Calendar Days after the delivery of the written request.
>
> 5. Manager will meet, review and discuss with Owner reasons for the Working Capital Funds Request including any deviations from the Budget and any deviations from the Budget anticipated to occur during the remainder of the Fiscal Year.

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23 RSG at p 6240.

24 RSG at pp 6240–6241.

21 As with the preparation of the Hotel's budgets, any dispute between the parties over the disbursement of working capital is to be resolved by an "Expert" appointed in accordance with cl 18.1 of the Management Agreement:[25]

> 7. If there is any disagreement between Owner and Manager in respect of any of the matters specified in clauses 1 to 6 above, the same shall be determined, on application of either Owner or Manager, by an Expert selected and appointed in accordance with the provisions set forth in clause 18.1.of [*sic*] the Management Agreement.

The Performance Tests

22 Finally, I turn to the contractual means by which Hilton's performance as the Hotel's manager is assessed. As I detail later in this judgment, Hilton's performance (or underperformance, according to Palm Grove) was a key bone of contention between the parties in the arbitral proceedings.

23 The relevant provisions are found under cl 7.6 of the Management Agreement (which reads "Performance Test").[26] The provisions are lengthy and I will not reproduce them here in full. It is sufficient for present purposes to rely on the following summary in the affidavit of one of Palm Grove's directors, Mr Raheja Sandeep Gopal ("Mr Raheja"), filed in support of OA 1203:[27]

> [B]y Clause 7.6.1 of the Management Agreement, Hilton is subject to a Performance Test starting from the 4th [Calendar Year ("CY")] from the Hotel's opening, pegged at 85% of the budgeted GOP. If in any 2 consecutive full CY during the Performance Period (i.e., the period commencing from the 4th CY from the Opening Date), the GOP in each Relevant CY is less than 85% of the budgeted GOP as set forth in the annual Budget, Palm Grove is entitled to terminate the Management

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25 RSG at p 6241.

26 RSG at pp 6039–6041.

27 RSG at [48].

> Agreement with 30 days' notice unless Hilton pay the shortfall between the actual GOP and 85% of the budgeted GOP.

24 The "budgeted GOP" (or "budgeted Gross Operating Profit") referred to in the foregoing summary is – as its nomenclature suggests – a forecast of the Hotel's gross operating profit for the financial year. It is prepared as part of the Hotel's annual operating budget. In simple terms, therefore, Hilton is expected to rake in at least 85% of the budgeted GOP every year. If it fails to do so for two consecutive financial years, then Palm Grove is entitled to terminate the Management Agreement unless Hilton pays to Palm Grove the shortfall (known as the "Cure Sum"). In the circumstances of the case, the Performance Period commenced from 2020.[28]

Events subsequent to the opening of the Hotel

25 According to Palm Grove, it had concerns about the Hotel's performance from as early as 2016 (in which year the Hotel opened for business)[29] and this gave rise to disputes between the parties. Mr Raheja's supporting affidavit offers an extensive account of Palm Grove's concerns and the facts said to justify them. It is unnecessary to set them out here in full. I will return to the details at the appropriate junctures in this judgment.

26 In compromise of certain of the parties' disputes, a Settlement and Amendment Agreement was entered into on 13 March 2019 (the "Settlement Agreement").[30]

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28 RSG at [16(d)].

29 Claimant's Written Submissions dated 8 March 2024 ("CWS") at [28]; RSG at [83].

30 RSG at pp 6260–6270.

27 It nevertheless appears that Palm Grove's concerns persisted even after the Settlement Agreement had been concluded. Disputes erupted again in 2021, when both parties made cross-allegations of contractual breaches.[31]

28 On 1 June 2021, the Hotel's General Manager (the "GM") suspended the Hotel's operations.[32] The circumstances leading to this decision – and more specifically, the question of whether Hilton or Palm Grove was responsible for it – was disputed in the arbitral proceedings and in this application. I will return to this at [168] below. For present purposes, however, it suffices to note that on 18 June 2021, Hilton obtained a mandatory order from the High Court of Bombay ordering the Hotel to resume operations.[33]

The arbitral proceedings

29 It appears that eight references to arbitration have emerged from the parties' fractious dealings to date:

(a) SIAC ARB122/22/RHM ("ARB 122");

(b) SIAC ARB234/21/JZH ("ARB 234");

(c) SIAC ARB235/21/JZH ("ARB 235");

(d) SIAC ARB236/21/JZH ("ARB 236");

(e) SIAC ARB237/21/JZH ("ARB 237");

(f) SIAC ARB240/21/JZH ("ARB 240");

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31 RSG at [104]–[106].

32 RSG at [114].

33 RSG at [115].

(g) SIAC ARB044/23/BRP ("ARB 044"); and

(h) SIAC ARB343/23/BRP ("ARB 343").

30 As I mentioned at [2] above, the arbitrations were seated in Singapore. All eight references were administered by the Singapore International Arbitration Centre (the "SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016) (the "SIAC Rules 2016"). They were all presided over by the same tribunal comprising Ms Juliet Blanch (as the Presiding Arbitrator), Mr Stuart Isaacs KC, and Mr Roderick Cordara KC, SC (the "Tribunal").

ARB 122 and the 1st Partial Award

31 ARB 122, which was commenced by Palm Grove on 10 May 2022, relates to the parties' dispute over the selection and appointment of a Budget Expert to resolve the parties' dispute over the Hotel's budget for Calendar Year ("CY") 2022. I will refer to the proceedings in respect of ARB 122 as the "First Tranche Arbitration".

32 ARB 122 was determined by a Partial Award dated 26 September 2022 (the "1st Partial Award"),[34] in which it was decided by the Tribunal that Crowe Horwath HTL ("Horwath") should be appointed as the Budget Expert. The 1st Partial Award is not the subject of OA 1203, although it forms the backdrop to certain arguments that were made before me in relation to the 3rd Partial Award (which I will come to shortly).

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[34] RSG at pp 433-499 ("1st Partial Award").

ARB 234 and the 2nd Partial Award

33 On 2 August 2021, Hilton commenced ARB 234, ARB 235, ARB 236, ARB 237, and ARB 240 by way of a single Notice of Arbitration.[35] All five references were eventually consolidated,[36] and I will refer to the proceedings in respect of these references as the "Second Tranche Arbitration".

34 These references were concerned with the parties' cross-claims for breaches of the Hotel Agreements. Hilton claimed that Palm Grove had breached the Hotel Agreements by:

(a) failing to pay fees which were payable and due to Hilton's affiliates thereunder (the "Affiliate Fees Claim");

(b) failing to inject working capital into the Hotel (the "Working Capital Claim");

(c) wrongfully suspending the Hotel's operations from 1 June 2021 to 18 June 2021 (the "Suspension Claim"); and

(d) interfering with the operation and management of the Hotel (the "Interference Claim").

35 The precise contours of Palm Grove's counterclaims and defences to Hilton's claims are the focus of OA 1203, and so I will examine the matter in detail throughout this judgment.

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35 RSG at p 193, para 35.

36 RSG at p 193, para 38.

36 By a Partial Award dated 3 July 2023 (the "2nd Partial Award"),[37] the Tribunal *inter alia*:

(a) allowed Hilton's Affiliate Fees Claim, Working Capital Claim, and Suspension Claim;

(b) dismissed Hilton's Interference Claim; and

(c) dismissed Palm Grove's counterclaim.

37 On 30 August 2023, parts of the 2nd Partial Award were corrected by the "Memorandum of Correction to the Second Partial Award dated 3 July".[38] Nothing turns on these corrections.

ARB 044, ARB 343, and the 3rd Partial Award

38 On 11 February 2023, Palm Grove filed its Notice of Arbitration in respect of ARB 044 (which was deemed to have been commenced on 15 February 2023).[39] By this reference, Palm Grove sought the appointment of Horwarth as the Budget Expert who would "determine the Budget for the Hotel for the calendar year 2023".[40]

39 On 11 April 2023, Hilton filed its Notice of Arbitration in respect of ARB 343 (which was deemed to have been commenced on 12 April 2023).[41] By this reference, Hilton sought to set aside Horwarth's expert determination

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37 RSG at pp 167–361 ("2nd Partial Award").

38 RSG at pp 362–368.

39 RSG at p 382, para 24.

40 RSG at p 1046, para 39(b).

41 RSG at p 383, para 32.

regarding the Hotel's budget for CY 2022 (which determination was made pursuant to Horwarth's appointment under the 1st Partial Award; see [31]–[32] above) on grounds that it was "replete with manifest errors".[42]

40 ARB 044 and ARB 343 were eventually consolidated on 24 March 2023.[43] This consolidated arbitration, which I will refer to as the "Third Tranche Arbitration", proceeded on a "documents-only" basis.[44]

41 By a Partial Award dated 26 October 2023 (the "3rd Partial Award"),[45] the Tribunal:

(a) dismissed Hilton's claims in ARB 343; and

(b) as regards ARB 044, appointed Prognosis Global Consulting ("Prognosis") as the Budget Expert to determine the Hotel's budget for CY 2023.

Palm Grove's setting-aside application

42 As I mentioned at the outset, OA 1203 is Palm Grove's application to set aside the 2nd Partial Award and 3rd Partial Award (or parts thereof).

43 As regards the 2nd Partial Award, Palm Grove seeks to set aside the Tribunal's decision to:

(a) dismiss Palm Grove's counterclaim;

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42 RSG at p 391, para 90.

43 RSG at p 383, para 28.

44 CWS at [45].

45 RSG at pp 369–431 ("3rd Partial Award").

(b) allow Hilton's Affiliate Fees Claim;

(c) allow Hilton's Working Capital Claim; and

(d) allow Hilton's Suspension Claim.

44 Palm Grove also seeks to set aside any orders on interest and costs that were made in consequence of those decisions, but that is of course contingent on Palm Grove first succeeding on any of the aforementioned points.

45 As regards the 3rd Partial Award, Palm Grove seeks to set aside the Tribunal's decision to appoint Prognosis as the Budget Expert who will determine the parties' dispute over the Hotel's budget for CY 2023. As for the Tribunal's decision in ARB 343 (*ie*, to dismiss Hilton's challenge against Horwarth's expert determination on the Hotel's budget for CY 2022), that part of the 3rd Partial Award is not the subject of any challenge before me.

46 Based on the summary above, there are thus five broad issues that fall for my determination, which I will now address in turn.

Issue (a): Palm Grove's counterclaim

47 It is Palm Grove's case that in the Second Tranche Arbitration, its counterclaim against Hilton for breach of cll 3.1.2 and 3.1.3 was advanced on two *distinct* bases.

48 The first relates to Hilton's alleged "failure to prepare, for Palm Grove's approval, appropriate Budgets for 2020, 2021 and 2022 … in accordance with

the contractual standards prescribed by [cll 3.1.2 and 3.1.3]".[46] I will refer to this as the "Preparation Issue".

49 The second relates to Hilton's alleged "failure to manage and operate the Hotel"[47] in accordance with the same provisions or, put another way, Hilton's alleged "underperformance in relation to the *operation* of the Hotel".[48] I will refer to this as the "Underperformance Issue".

50 In oral submissions, counsel for Palm Grove, Mr Thio Shen Yi SC, drew a "process-performance" distinction and explained that the Preparation Issue was concerned with the *process* of setting the Hotel's annual operating budgets, whereas the Underperformance Issue was concerned with the Hotel's actual performance and, by extension, Hilton's *performance* as the Hotel's manager.

51 Palm Grove takes issue with how the Tribunal addressed – or rather, allegedly failed to address – both aspects of its counterclaim.

The Preparation Issue

52 In essence, Palm Grove's complaint in relation to the Preparation Issue is that the Tribunal entirely overlooked it in the 2nd Partial Award. According to Palm Grove, this is evidenced by how the Tribunal:

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46 RSG at [199].

47 RSG at [213].

48 CWS at [61].

(a) "inexplicably found that Palm Grove had not made any submissions that Hilton were in breach of such obligation" despite the parties' submissions and evidence on the matter;[49] and

(b) erroneously characterised Palm Grove's case to be that the budget comprised a guarantee as to the Hotel's financial performance (and hence Palm Grove's returns on its investment) despite that argument never having been made by Palm Grove.[50]

53 Palm Grove submits that in overlooking the Preparation Issue altogether, the Tribunal (a) failed to apply its mind to an essential issue in breach of natural justice;[51] and relatedly (b) failed to resolve an issue that was submitted for the Tribunal's determination, such that the 2nd Partial Award is, to that extent, *infra petita*.[52]

54 Hilton's riposte is simple: the Budgeting Issue was never properly pleaded in the Second Tranche Arbitration or advanced in the manner Palm Grove contends it was.[53] If Hilton is correct, then Palm Grove's arguments on the Preparation Issue collapses entirely.

The applicable principles

55 It has become common practice for parties challenging an arbitral award on grounds that it is *infra petita* to also challenge it pursuant to s 24(*b*) of the

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49 RSG at [167] and [209(b)].

50 RSG at [209(a)].

51 CWS at [72].

52 CWS at [73].

53 Defendants' Written Submissions dated 8 March 2024 ("DWS") at [14]–[15].

International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") on the basis that the tribunal acted in breach of natural justice in completely failing to consider and decide on a material issue submitted for its determination.

56 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation*"), the Court of Appeal observed that an award is liable to set aside pursuant to Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") in circumstances where the tribunal "[failed] to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute" (at [33]). Inherent to this formulation is the principle that a tribunal's failure to consider an issue is not *ipso facto* grounds for setting an award aside; the issue must be of "such importance that, if [it] had been dealt with, the whole balance of the award would have been altered and its effect would have been different": *CRW Joint Operation* at [32], citing Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 10.40.

57 The same considerations are engaged where an award is challenged on the basis that the tribunal acted in breach of natural justice by having failed to address its mind to a particular issue. As a starting point, it is settled law that where an award is sought to be set aside on grounds of a breach of natural justice, the applicant must show (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: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29].

58 A pillar of natural justice is the right to a fair hearing, and one dimension of this right is the tribunal's duty to consider the essential issues submitted for its determination. The substance of this duty was explained by the Court of Appeal in *BZW and another v BZV* [2022] 1 SLR 1080 ("*BZW*") (at [60(a)]):

> [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 … 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 … 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 … 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 … *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 …*
>
> [emphasis added]

59 Situating these principles within the four-stage inquiry set out in *Soh Beng Tee* (see [57] above), it is again apparent that an award will not be set aside pursuant to s 24(*b*) IAA for the sole reason that the tribunal failed to consider an issue raised for its determination. The setting-aside applicant must further demonstrate that the failure was "connected to the making of the award" in such a way as to prejudice its rights.

60 A tribunal cannot, of course, be faulted for failing to consider an issue if the issue was never properly submitted for its consideration to begin with. That is the pith of Hilton's case in these proceedings as regards the Preparation Issue.

61 In *CDM and another v CDP* [2021] 2 SLR 235 ("*CDM*"), the Court of Appeal explained (at [18]) that "[t]he question of what matters were within the scope of the parties' submission to arbitration [is] answerable by reference to five sources", namely:

(a) the parties' pleadings;

(b) the agreed list of issues;

(c) the opening statements;

(d) evidence adduced in the arbitration; and

(e) the closing statements.

62 As I observed in *BTN and another v BTP and another and other matters* [2022] 4 SLR 683 ("*BTN*") (at [80]):

> … ***a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration***. The purpose of adopting a broad interpretation of the relevant documents (for example, the pleadings) is to ***avoid an inflexible and rigid analysis of the issues raised in the arbitration***, so that issues which *arise from* or are *natural consequences* of the *pleaded issues* are not excluded
>
> [emphasis in italics in original; emphasis added in bold italics]

63 This statement of principle was articulated to make the point that an issue is not unpleaded if only because it was not clearly and explicitly stated in the relevant documents (including, in particular, the pleadings). However, the court's practical approach to delineating the substance of a dispute also cuts in the opposite direction. An issue is *not* properly pleaded (and therefore put into issue) simply because the relevant documents may contain a statement (or statements) that, when read in isolation, could lead the reader to believe that the

issue was in dispute. Instead, the relevant documents must be read as a whole, alongside each other, and within their proper context so that the court can appreciate if the issue had indeed been truly put forward for the Tribunal's determination.

64 I made much the same observation in *BTN* (at [87]) when I noted that the court's task is to read pleadings "in context and as a whole in order to understand the nub of the claim or defence advanced". Were it otherwise, it would be all too easy for an aggrieved party to cobble together a case after the event with the benefit of hindsight and then contend that the award is *infra petita* or was made in breach of natural justice. It follows that in considering the five sources identified in *CDM*, it is essential not to lose sight of how a party, *in fact and in substance*, presented and argued its case before the tribunal as that would in turn inform how *the tribunal* was likely to have understood the party's case. It is only when an essential issue is adequately put forward that a tribunal then comes under a duty to consider and dispose of it.

65 Having reviewed the arbitral record with these principles in mind, I agree with Hilton's position that the Preparation Issue was *not* a matter that had been adequately put forward for the Tribunal's determination.

Palm Grove's Response to the Notice of Arbitration

66 I begin with Palm Grove's Response to the Notice of Arbitration dated 17 August 2021 (the "RNOA").[54] As a starting point, it is striking that at para 11 of the RNOA, Palm Grove took the position that:[55]

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54 RSG at pp 532–561.

55 RSG at p 546.

> 11. The Claimants' repeated and continuous breach of their obligations under the Management Agreement and have failed and neglected to:
>
> (a) use their *skill, effort, care and expertise of a prudent international hotel operator* to optimize the Gross Operating Profit and bringing the Hotel to its lowest rank amongst its CompSet; and
>
> (b) have also *failed to provide an approved Budget* for the Calendar Year 2020 and 2021. Under *clause 7.2.1* of the Management Agreement, the obligation of the Respondent of providing sufficient Working Capital is a reciprocal obligation, to the Claimants' obligation of its timely performance of all of its obligations under the Management Agreement, which includes provision of the Budget.
>
> [emphasis added]

67 There are two points of note in this paragraph. First, there was a clear allegation that Hilton failed to apply the "skill, effort, care and expertise of a prudent international hotel operator" (the "Prudent Hotel Operator Standard") in optimising the Hotel's GOP and causing the Hotel to rank poorly. There was no allegation that Hilton fell short of that standard in *preparing the Hotel's proposed budgets*.

68 Second, the Hotel's budget was referred to in para 11(b) of the RNOA, but there was no accompanying mention of any failure to meet the Prudent Hotel Operator Standard. More crucially, it only alleged a failure to *provide an approved budget*, which is altogether different from an allegation that Hilton defaulted in *preparing* the *proposed* budgets. The same allegation was repeated at para 41(a) of the RNOA, although this time Palm Grove went further in identifying the precise contractual provision that it was relying on:[56]

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[56] RSG at p 558.

> … the Claimants have failed to provide an approved Budget for the year 2021 as per clause 7.4.1C of the Management Agreement; …

There was likewise no mention of cll 3.1.2 and 3.1.3, or the Prudent Hotel Operator Standard.

69 I refer also to para 30 of the RNOA, in which Palm Grove summarised Hilton's alleged breaches of the Management Agreement:[57]

> 30. In summary, the Claimants are in material breach of the Management Agreement inasmuch as:
>
> i. The Claimants have not managed and operated the Hotel solely as a hotel under the Brand Standards **(Clause 3.1.2);**
>
> ii. The Claimants have not used the skill, effort, care and expertise reasonably expected of a prudent international operator. **(Clause 3.1.3).**
>
> iii. The Claimants have irreparably damaged the goodwill and reputation of the Hotel by compromising and undermining the price positioning of the Hotel in relation to its status as a truly luxury product. **(Clause 3.1.3.);**
>
> iv. The Claimants have not managed and conducted the operations of the Hotel in accordance with local character and traditions. **(Clause 3.1.2)** and have underperformed and not operated the Hotel in accordance with the requirements relating to Setting and Operating in Accordance with the Budget. **(Clause 7.4).**
>
> [emphasis in bold in original]

As far as the Hotel's budgeting is concerned, there was only the allegation at para 30(iv) that Hilton failed to "[operate] the Hotel in accordance with the requirements relating to Setting and Operating in Accordance with the Budget

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[57] RSG at p 554.

[*ie*, pursuant to cl 7.4]". This statement is ambiguous but reading it charitably, it was at best an allegation that Hilton breached cl 7.4, which provision says nothing about *how* Hilton had to *prepare* its proposed budgets.

70 Overall, I am not persuaded that there was anything in the RNOA that took issue with the way in which Hilton prepared the proposed budgets, much less to contend that Hilton did so in a way that discloses a breach of cll 3.1.2 and 3.1.3.

The parties' list of issues

71 In the Second Tranche Arbitration, the parties were unable to produce an agreed list of issues and therefore tendered two separate lists of issues to the Tribunal.

72 Relevant for present purposes is Palm Grove's list of issues, which was set out in full in the 2nd Partial Award:[58]

> Respondent's List of Issues:
>
> > *"**Claims***
> >
> > *1. Whether the Claimants have managed and operated the Hotel in accordance with the terms of the Management Agreement?*
> >
> > *2. Whether the Claimants operated the Hotel within the parameters of the approved Budget?*
> >
> > *3. Whether the Claimants prove that the Respondent has interfered with the management of the Hotel?*
> >
> > *4. Whether the Claimants prove that the instruction to not invite business for the Hotel was invalid?*
> >
> > *5. Whether the Claimants have proved a claim for damages suffered on account of such instruction?*

[58] 2nd Partial Award at para 100.

6. *Whether the Claimant's demand for a sum of Rs. 1.75 crores per month for working capital was justified?*

7. *Whether the Claimants are entitled to:*

   a. *Fees / charges under the Management Agreement and the International Agreements as set out at Paragraph 132 I of the Statement of Claim;*

   b. *An amount of INR 1,14,86,000, which is the working capital injected by the Claimants to continue the operation of the Hotel pursuant to the Bombay High Court order dated 18 June 2021 as set out at paragraph 132(d) of the Statement of Claim;*

   c. *Damages;*

   d. *Pendente lite and future interest;*

   e. *Costs.*

Counter Claims

8. *Whether the Claimants are liable to pay to the Respondent:*

   a. *Damages of INR 124.19 crores or such other amount as determined by the Tribunal for causing loss of business and profit to the Respondent;*

   b. *Damages of INR 139.20 crores or such other amount as determined by the Tribunal on account of the harm caused to the goodwill and reputation of the Hotel;*

   c. *Pendente lite and future interest on all sums due to the Respondent;*

   d. *Costs.*

…

73 As a starting point, Hilton says[59] – and Palm Grove does not appear to seriously dispute[60] – that the Preparation Issue was not *explicitly* raised in Palm Grove's list. Palm Grove's answer is that:[61]

> [T]he issues were framed very broadly and encompassed Palm Grove's Counterclaim for Hilton's preparation of the Hotel's Budgets – Hilton's Issue (7) and Palm Grove's Issue (1) relating to the Counterclaim were identical: "*Whether [Hilton] have managed and operated the Hotel in accordance with the terms of the Management Agreement*".

74 Although it is correct that the absence of the Preparation Issue in the parties' list of issues cannot be determinative of the matter, it is also equally true that Palm Grove's failure to expressly list that issue is a factor that can be placed onto the scales in deciding if the issue was properly pleaded. If Palm Grove intended – as it now says it did – to rely on Hilton's alleged failure to prepare appropriate budgets as a *distinct and independent* basis for its counterclaim against Hilton (so that it would be an "essential issue" in and of itself), questions immediately arise as to why that issue was so conspicuously absent in Palm Grove's list.

Palm Grove's pleadings

75 I turn now to Palm Grove's pleadings in the Second Tranche Arbitration.

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59 DWS at [24].

60 CWS at [70].

61 CWS at [70(a)].

(1) Palm Grove's Statement of Defence

76 I was referred to parts of Palm Grove's Statement of Defence ("SOD")[62] which, according to Palm Grove, raised the Preparation Issue. Those parts were substantially duplicated in Palm Grove's Counterclaim (the "Counterclaim")[63] and the same arguments were made in that connection. For this reason, I will focus on Palm Grove's Counterclaim and the arguments made in connection with it.

(2) Palm Grove's Counterclaim

77 Looking to the Counterclaim, Palm Grove says that the Preparation Issue was clearly raised at para 35:[64]

> 35. Briefly, the Claimants under performance under the Management Agreement is demonstrated by the fact that:
>
> a. in the year 2019 (third full year), the Claimants only achieved 84% of the approved Budget of INR 149 crore [INR One Billion and 49 Million];
>
> b. then in the year 2020 (fourth full year), the Claimants shockingly, lowered the Budget to INR 139 crore[INR One Billion Thirty Nine Million];
>
> c. for the year 2021, the Claimants provided a meager Budget of INR 55 crore [INR Five Hundred and Fifty million] without any explanation; and
>
> …

78 With respect, I entirely disagree with Palm Grove. In my judgment, Palm Grove was plainly asserting that Hilton's *underperformance* was

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62 RSG at pp 636–731.

63 RSG at pp 732–778.

64 RSG at pp 745–746, para 35.

evidenced by the "meagre" proposed budgets, which is a very different proposition from Hilton having breached the Management Agreement in *preparing* those budgets. The gravamen of Palm Grove's complaint was targeted at Hilton's alleged *failure to perform*.

79 Palm Grove went on to plead at para 37 of its Counterclaim that:[65]

> … the Claimants have repeatedly and continuously breached their obligations under the Management Agreement and have failed and neglected to use their skill, effort, care and expertise of a prudent international hotel operator to optimize the Gross Operating Profit and have failed to *provide* an approved Budget for the calendar year 2020 and 2021. …
>
> [emphasis added in italics and underline]

On this, I repeat my observations at [67]–[68] above. On a plain reading of this paragraph, Palm Grove was only alleging that Hilton (a) fell short of the Prudent Hotel Operator Standard *in optimising the Hotel's GOP*; and (b) failed to *provide approved budgets*. The sting of Palm Grove's complaint in relation to the latter was that Hilton had provided "lowballed" budgets which in turn led (or would have led) to the Hotel's sub-optimal GOP. Again, there was no allegation that Hilton fell short of the Prudent Hotel Operator Standard in *preparing the proposed budgets*.

80 Section IV of the Counterclaim sets out Palm Grove's "Grounds for Counter-claim", and the discussion proceeds under two headings. The first reads:[66]

> **A. THE NON – PERFORMANCE OF THE CLAIMANTS PRIOR RECIPROCAL OBLIGATIONS UNDER THE**

---

65 RSG at pp 753–754, para 37.

66 RSG at p 754.

MANAGEMENT AGREEMENT – OPERATING AS PER THE APPROVED BUDGET

The second reads:[67]

B. FAILURE ON THE PART OF THE CLAIMANTS TO: [1] OPERATE THE HOTEL AS A "PRUDENT INTERNATIONAL OPERATOR"; [2] "OPTIMIZE THE GROSS OPERATING PROFIT"; [3] THE CONTINUOUS UNDERMINING THE HOTEL BY THE CLAIMANTS; [4] DAMAGING THE POSITING AND REPUTATION OF HOTEL; AND [5] REFUSAL TO BENCHMARK THE HOTEL AGAINST OTHER COMPARABLE HOTELS

81 Section IV.A (as the heading suggests) was concerned with Hilton's obligation to operate the Hotel "per the approved budget". The discussion opened with the forthright assertion that:[68]

> a. The Claimants have continuously failed and neglected to perform their fundamental and prior reciprocal financial obligation *inter alia* under ***Clauses 7.4.1C, 7.4.2 and 7.4.4 and 7.5.4 of the Management Agreement read with Clause 2 of the Working Capital Addendum***, which required the Claimants to ***provide an approved Budget*** to the Respondent. …
>
> [emphasis added in bold]

Again, there was only an allegation of Hilton's failure to provide an approved budget. That allegation cross-referred to various contractual provisions, but cll 3.1.2 and 3.1.3 were not among them.

82 Palm Grove's case took on a different complexion at para IV.A(c), where it was asserted that:[69]

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67 RSG at p 760.

68 RSG at p 754, para IV.A(a).

69 RSG at p 755, para IV.A(c).

> … In the year 2020, the Claimants proposed a Budget, which the Respondent held to be prepared and presented with the clear motive and intention *to disguise the Claimants absolute failure in managing and operating the Hotel and in breach of Clause 3.1.3.*, thereby, such Budget was a fraudulent budget …
>
> [emphasis added]

Here, Palm Grove pleaded to how Hilton's proposed budget for CY 2020 had been fraudulently prepared and presented *to conceal a breach (or breaches) of cl 3.1.3*. Again, this allegation is very different – and I add, far more serious – than the allegation that Hilton's breach of cl 3.1.3 consisted in the preparation of the proposed budget for CY 2020.

83 The part of the arbitral record that comes the closest to raising the Preparation Issue can be found at para IV.A(g) of Palm Grove's Counterclaim, the relevant parts of which read:[70]

> … It was evident from the above that the Claimants had intentionally and deliberately proposed fraudulent and deliberately undermined Budgets … *which not only in itself is a breach of the Management Agreement, but also of a 'Manager' that has failed to fulfill its covenants and obligations under clause 3.1.3 of the Management Agreement to use the skill, effort care and expertise reasonably expected from an international hotel operator while maximizing the GOP of the Hotel.*
>
> [emphasis added]

84 Here, I accept that if one were to consider the foregoing extract *in isolation*, it may be construed as an allegation that Hilton breached its duty to apply the "skill, effort, care and expertise of a prudent international hotel operator" in preparing the proposed budgets.

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70 RSG at pp 757–758, para IV.A(g).

85 However, I explained at [62]–[64] above that it has never been the court's approach to read parts of the arbitral record in isolation. Thus, while the foregoing extract may support the position that Palm Grove now takes, it is hardly determinative of the matter.

86 I move on to section IV.B of the Counterclaim, which focused on Hilton's alleged breaches of cll 3.1.2 and 3.1.3. Nowhere in section IV.B was it asserted that Hilton breached those provisions by acts referrable to the preparation of the proposed budgets. In its written submissions in OA 1203, Palm Grove was only able to point to para IV.B(d),[71] which is a near *verbatim* repeat of para 35 of its Counterclaim (see [77] above):

> The Claimants since the commencement and operation of the Hotel in 2016, have continuously under-performed. The mandate for The Hotel to be number 1 in the market was also an objective set by the Petitioners themselves as they themselves admitted that the Hotel deserved to be the highest price in Pune (higher than the JW Marriott) as per the Power Point Presentation made to the Respondent by the Petitioners in May 2015. This is inter alia demonstrated by the fact that: [a] in the year 2019, the Claimants only achieved only 84% of the approved Budget; [b] then in the year 2020, the Claimants shockingly, lowered the Budget to INR 139 Crore- [INR One Hundred and Thirty Nine crores] [INR One Billion and Thirty Nine Million] clearly to mislead and deprive the Respondent of inter alia maximizing the Gross Operating Profit of the Hotel and easily pass the Performance Test which kicked in the fourth full year of operation; [c] the Claimants gave a meager Budget of INR 55 Crore [INR Fifty Five Crores] [INR Five Hundred and Fifty Million] for the year 2021 without any explanation and without benchmarking the same to comparable hotels as it was obligated to; and [d] when the Hotel was operational from September 2020 to March 2021 in these months too, the Claimants under-performed in comparison to the only other luxury hotel i.e. The Ritz Carlton, and JW Marriott Pune (rebranded from a regular Marriott and now being classified as a luxury hotel), both of which hotels had a significantly higher turnover per available room than that of the Hotel.

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[71] RSG at p 761, para IV.B(d).

It follows that for the reasons given at [78] above, I do not think that there is anything in para IV.B(d) that assists Palm Grove.

87 Finally, I note that Palm Grove sought the following reliefs in the Counterclaim:[72]

> …
>
> a. a declaration to the effect that the Claimants have breached several provisions of the Management Agreement;
>
> b. a declaration to the effect that the Claimants have operated the Hotel in violation of the terms of the Management Agreement;
>
> c. a declaration to the effect that the Claimants have caused a huge loss of business and profit to the Hotel and the Respondent;
>
> d. a declaration to the effect that the Claimants have caused immense damages to the business of the Hotel and have damaged the goodwill and reputation of the Hotel and the Respondent;
>
> e. a direction that the Claimants pay the Respondent, the damages suffered by the Respondent due to the loss of profit and loss of business to the Respondent and the Hotel, in an amount to be quantified at a later stage;
>
> f. a direction that the Claimants pay the Respondent damages suffered by the Respondent due to the irreparable harm caused by the Claimants to the goodwill and reputation of the Hotel and the Respondent, in an amount to be quantified at a later stage;
>
> g. interest on the amounts stated at clause (e) and (f) above from the date of the Award till the date of payment;
>
> h. a direction to the Claimants to pay costs to the Respondent, including legal costs, to the respondent for initiating these proceedings;

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72 RSG at pp 777–778, para 46.

> i. any other relief that the Tribunal may deem fit in the interest of justice.

These prayers – like Palm Grove's list of issues – were couched in broad terms, particularly Palm Grove's prayers for declaratory relief in sub-paras (a) to (d). None of them clearly or specifically respond to Hilton's alleged failure to prepare the Hotel's proposed budgets in accordance with the Prudent Hotel Operator Standard.

(3) Palm Grove's Rejoinder

88 I move on to Palm Grove's "Rejoinder to the Reply to the Statement of Defence" (the "Rejoinder").[73] Palm Grove has not sought to rely on the Rejoinder; Hilton, on the other hand, referred me to parts of the Rejoinder which, it says, shows that the Preparation Issue was inadequately pleaded.

89 There are two points of note in the Rejoinder. The first relates to section II.D of the Rejoinder,[74] which sets out Palm Grove's responses to "[Hilton's] contentions in relation to the Budget to be provided by [Palm Grove] under the Management Agreement". At para II.D(xiii), Palm Grove particularised those acts concerning the Hotel's budget that, in its view, amounted to material defaults of the Management Agreement:[75]

> xiii. In any event, and without prejudice to the above, as required under the Management Agreement the Claimants have failed and materially defaulted in: [a] providing an approved Budget for the years 2020 and 2021; [b] referring the unapproved proposed Budget for the year 2021 for determination by an Expert; [c] having due regard to the performance of the Hotel and other

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73 RSG at pp 831–911.

74 RSG at p 850.

75 RSG at p 857, para II.D(xiii).

> comparable hotels; [d] failing to make its Area Director or other appropriate representative available for consultation; [e] taking into consideration and treat seriously the Respondents comments suggestions and advise, which had been based on real facts and data.

90 It is striking that in particularising Hilton's budget-related acts said to constitute breaches of the Management Agreement, there was no suggestion whatsoever that Hilton failed to exercise the "skill, effort, care and expertise of a prudent international hotel operator" in preparing any of its proposed budgets.

91 The second point relates to section II.E, which sets out Palm Grove's responses to "[Hilton's] contention that it complied with all requirements under the Management Agreement with respect to operation of the Hotel".[76] At para II.E(iii), Palm Grove particularised the acts said to disclose Hilton's failure to meet the Prudent Hotel Operator Standard:[77]

> iii. … the Respondent states that the lack of prudence and use of skill, effort, care and expertise reasonably expected of an international prudent operator on the part of the Claimants is evident through the following facts:
>
> (a) Failure to market the Hotel at a much higher price point than its inferior CompSet and continuously benchmarking it with this CompSet.
>
> (b) Providing unnecessary free 'add ons' like office transfers to many corporate accounts thereby reducing the ADR and Revenue yields of the Hotel.
>
> (c) Closing RFPs at rates lower than CompSet leading to a lower ADR and RevPar rank from the GDS platform.

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76 RSG at p 861.

77 RSG at p 862, para II.E(iii).

> (d) Failure to get their Above Property Team/NSO to perform and deliver revenue to the Hotel through a deeper penetration of its source markets with the objective of acquiring business from new avenues and accounts.
>
> (e) Failure to recognize the only comparable luxury hotel like The Ritz Carlton as a competitor to the Hotel and refusing to include it in its Primary CompSet while letting inferior and lower category hotels to continue in its CompSet in order to present a better picture of its performance in relation to managing and operating the Hotel.
>
> (f) Failure to take the best Hotel in the best location of the market to a leadership position and acquire the number one rank.
>
> (g) Allowing the Hotel to fall to the lowest rank amongst its inferior CompSet.
>
> (h) Use of an Obsolete Revenue Management System which is inflexible and restrictive in comparison to even standalone hotels who use more dynamic systems with full flexibility to change prices and promotions at will and react and respond to CompSet initiatives immediately.
>
> (i) Under utilizing the Banquet capacity available at the Hotel.
>
> (j) Failing to perform as per approved Budgets.

92 There was again no mention at all in this list of Hilton's alleged defaults in preparing its proposed budgets. Item (j) alleged a "[failure] to *perform* as per *approved* Budgets", but that is quite evidently a different matter.

93 Leaving aside the Rejoinder's silence on how Hilton's proposed budgets were prepared, I am mindful that the Rejoinder was filed in response to Hilton's

Reply (to Palm Grove's SOD). Palm Grove itself points out[78] that in Hilton's Reply, it was averred that:[79]

> … [Hilton has], regardless of [Palm Grove's] lapses, continued to: (i) submit the Budget in a timely manner, as required by the Management Agreement; (ii) repeatedly reminded [Palm Grove] to review the Budget; and *(iii) formulated successive budgets for the Hotel as a prudent and experienced manager, while navigating the unprecedented challenges posed by the ongoing Covid-19 pandemic*.
>
> [emphasis added]

Palm Grove says that this averment was intended as a response to the Preparation Issue (which Hilton understood Palm Grove to be raising).

94 I do not accept this submission. The averment, read in context, was only made in support of Hilton's position that it had always complied with cl 7.4 in delivering its proposed budgets to Palm Grove – a position that was, in turn, taken to meet Palm Grove's *defence* to Hilton's *Working Capital Claim* (which I discuss at [154]–[167] below).

95 More crucially, it seems to me that if (a) the Preparation Issue *was* raised in Palm Grove's SOD or Counterclaim, and (b) Hilton's averment that it "formulated successive budgets for the Hotel as a prudent and experienced manager" was a response to the Preparation Issue; then it stands to reason that (c) Palm Grove would have met that averment head on (in its Rejoinder) by explaining why and how Hilton fell short of the Prudent Hotel Operator Standard in *preparing* its proposed budgets. As it were, however, Palm Grove said nothing on the matter in its Rejoinder.

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78 CWS at [63(b)].

79 RSG at p 791, para 28.

The pre-hearing submissions and post-hearing briefs

96 Looking now to the parties' submissions in the Second Tranche Arbitration, Palm Grove says that the Preparation Issue was explicitly raised in its pre-hearing submissions.[80] Here, I was referred to para 56:[81]

> **I. THE CLAIMANT FAILED TO OPERATE AND MANAGE THE HOTEL IN ACCORDANCE WITH THE MANAGEMENT AGREEMENT**
>
> 56. There are two bases under which the Claimants have failed to comply with their obligations under the Management Agreement:
>
> (1) The Management Agreement requires the Claimants to operate and manage the Hotel subject to and in accordance with the terms of the agreement, including, as set out in Clause 3.1.2 and Clause 3.1.3 with "*the skill, effort, care and expertise reasonably expected of a prudent international hotel operator, with the intention of optimizing the Gross Operating Profit of the Hotel*". This obligation must be accorded a meaning which gives effect to the commercial wisdom and the reasoning with which the parties entered into a contractual relationship.
>
> The submissions on this basis are dealt with from paragraph 90 to 96 below.
>
> (2) The Management Agreement also, in terms of Clause 7.4, requires the Claimants to prepare a Budget for operation of the Hotel, which forecasts, amongst others, the Gross Operating Profit that the Hotel would aim to achieve in a particular financial year. ***The preparation of the Budget under Clause 7.4 is an independent obligation which must be undertaken in accordance with Clause 3.1.2 and Clause 3.1.3. This obligation, if appropriately performed, is key to assessing the Claimants' performance under the Management Agreement.***
>
> The submissions on this basis are dealt with from paragraph 102 to 107 below.

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80 RSG at pp 2545–2586.

81 RSG at pp 2561–2562, para 56.

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

97 In this paragraph, Palm Grove again bifurcated its claim against Hilton for breach of the Management Agreement. The first part – *ie*, para 56(1) – was directed at Hilton's alleged breaches of cll 3.1.2 and 3.1.3. In this connection, there was no mention of the Hotel's budget (whether proposed or approved); nor was the allegation made in paras 90–96, to which para 56(1) cross-referred.

98 The second part was directed at Hilton's alleged breaches of cl 7.4. It is only in this regard that the preparation of Hilton's proposed budgets was mentioned.

99 The bifurcation was, however, muddied by the assertion that "[t]he preparation of the Budget under Clause 7.4 is an *independent* obligation which must be undertaken *in accordance with Clause 3.1.2 and Clause 3.1.3*." It is not immediately clear to me what Palm Grove intended to convey by this statement. I nevertheless accept that reading para 56 as a whole, one might infer that Palm Grove was alleging that Hilton had breached the Management Agreement in failing to comply with the "independent obligation [of preparing its proposed budgets] … in accordance with Clause 3.1.2 and Clause 3.1.3". This notwithstanding, there was nothing in paras 102–107 of Palm Grove's pre-hearing submissions (to which para 56(2) cross-referred) that referenced the Preparation Issue.

100 As for Palm Grove's post-hearing briefs,[82] Palm Grove drew my attention to the following parts of the document:[83]

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82 RSG at pp 4765–4849.

83 CWS at [68]; RSG at pp 4780–4786.

B. THE MANAGEMENT AGREEMENT SETS OUT CONTRACTUAL STANDARDS FOR PERFORMANCE

…

37. Incredibly, the Claimants dispute this fundamental premise and primarily run a six-pronged contractual case:

…

(4) The Claimants further delink the responsibility to propose a Budget under Clause 7.4.1C of the Management Agreement from the overall standard of care it must maintain as a "*prudent international hotel operator*" intending to "*optimize the Gross Operating Profit*" under Clause 3.1.3 of the Management Agreement. In its oral opening submissions, the Claimants stated "*in my submission, equally it doesn't follow, a fortiori, that because there is a failure to make some sort of estimate which itself is a breach of 3.1.3. They are tested separately and independently*."

…

38. Effectively, the Claimants set out a contractual case designed to never be in breach for the underperformance of the Conrad Pune. The combined effect of the Claimants' case is that:

(1) Until the commencement of the Performance period, which would contractually begin four years after the Hotel's operation but has been indefinitely postponed due to the outbreak of Covid-19, the Claimants could run the Conrad Pune to the ground, without any consequence.

(2) The Budget, which mechanism governs the financial performance of the Conrad Pune, could be prepared by the Claimants without adhering to the contractual standard of care and without the intent of optimizing Gross Operating Profit, and would not be able to be faulted by the Respondent on this basis.

39. The Claimants' interpretation, while convenient for its case, does not find support in the Management Agreement. The express terms, as supported by the evidence on record, make it clear that:

(1) The Claimants' right to manage and operate the Conrad Pune is not unfettered.

(2) The Claimants' obligation to set a Budget must be based on objective parameters and entitles the Respondent to raise contractually permissible objections.

> …
>
> **The Respondent has raised contractually permissible objections to the Budget**
>
> …
>
> 46. As set out above, the Claimants was required to act as a prudent international operator intending to optimize the GOP at all times during the term of the Management Agreement, including when preparing the Budget. Importantly, the express terms of the contract do not support the Claimants' case that this obligation is suspended at the time of proposing a Budget.
>
> …
>
> 49. Factually, the Respondent's rejection of the Claimants' proposed Budgets for 2020, 2021 and 2022 are preceded by the consistent non-achievement of the Budget by the Claimants since opening of the Conrad Pune, and a consistent failure to benchmark itself against its competitors.
>
> …
>
> 51. Once the contractual Performance Period commenced, although the operation of the Performance Test was pushed, there was a stark and deliberate lowering of the Budgetary proposals. These could not have been considered reasonable or contractually acceptable, given that the Claimants proposed demonstrably low Budgets with the clear intention to evade the failure of the Performance Test and with no regard to their obligation to optimize. …
>
> [emphasis in original]

101 In my judgment, there is nothing in the foregoing extract that takes Palm Grove's case any further. Palm Grove indeed submitted that Hilton was attempting to "delink the responsibility to propose a Budget … from the overall standard of care it must maintain" under cl 3.1.3.[84] Palm Grove also pointed out that on Hilton's case, the Budget "could be prepared by [Hilton] without adhering to the contractual standard of care and without the intent of optimizing

[84] RSG at p 4781, para 37(4).

Gross Operating Profit".[85] This culminated in the assertion that Hilton was "required to act as a prudent international operator intending to optimize the GOP at all times … including when preparing the Budget".[86]

102 However, nothing was said beyond these bare assertions. There was (again) no clear assertion that Hilton had acted in breach of cll 3.1.2 and 3.1.3 in preparing its proposed budgets, and still less were there any submissions on *why* or *how* that was the case. There was also no explanation of – or reference to any evidence on – how a "prudent international hotel operator" would have set about *preparing* the proposed budgets. Palm Grove was cognisant of Hilton's argument that there was no clarity as to what the Prudent Hotel Operator Standard required, but was only able to limply respond as follows:[87]

> Apart from asserting ambiguity as to the standard of performance of these obligations, the Claimants have neither proffered alternate standards, nor have they cross-examined the Respondents' witnesses, who were personally involved in the drafting and negotiating the contracts, on the standard of performance expected of the parties. They have also not disputed the Respondent's position that the contract must be interpreted in a manner that gives effect to commercial wisdom.

103 The overall impression one gets of Palm Grove's case, having read its post-hearing brief, is *not* that Hilton had fallen short of the Prudent Hotel Operator Standard in *preparing* the proposed budgets. Rather, it is that:

(a) Hilton's *underperformance* could be measured against the Prudent Hotel Operator Standard (contrary to Hilton's position that the

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85 RSG at p 4781, para 38(2).

86 RSG at p 4785, para 46.

87 RSG at p 4783, para 43.

Performance Test was the sole mechanism for assessing its performance); and

(b) Hilton was attempting to conceal its failure to meet that standard *by proposing unreasonable (or "lowballed") budgets*.

104 I am fortified in this view by the following parts of Palm Grove's post-hearing briefs:[88]

> 50. … the Claimants failed to manage and operate the Hotel as the best (and in fact, only) luxury hotel in the market, as becomes evident from a combined reading of the Budgets, the data reflected in the STR and Demand 360 Industry Rankings/Reports and the Respondent's consistent concerns regarding the Claimants failure to manage and operate the Hotel prudently.
>
> 51. Once the contractual Performance Period commenced, although the operation of the Performance Test was pushed, there was a stark and deliberate lowering of the Budgetary proposals. These could not have been considered reasonable or contractually acceptable, given that the Claimants proposed demonstrably low Budgets with the clear intention to evade the failure of the Performance Test and with no regard to their obligation to optimize. …

The evidence led in the Second Tranche Arbitration

105 Finally, I turn to consider the evidence that was led in the Second Tranche Arbitration. In this regard, Palm Grove referred me to the following part of the witness statement of Mr Bhagwan Advani (who is Palm Grove's Chief Executive Officer):[89]

> In the year 2020, Hilton proposed a Budget, which Palm Grove held to be prepared and presented with the clear motive and

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88 RSG at pp 4786–4787, paras 50–51.

89 RSG at p 2293, para 31.

> intention of Hilton *to disguise its absolute failure in managing and operating the Hotel and in breach of Clause 3.1.2 and Clause 3.1.3 of the Management Agreement*, thereby, such budget was a fraudulent budget …
>
> [emphasis added]

106 Far from advancing Palm Grove's case, this evidence by Mr Advani underscores the point I expressed at [103] above, *ie*, that Palm Grove was not looking to Hilton's preparation of the proposed budgets as a failing in and of itself or even as an aspect of its underperformance, but rather as the means by which Hilton attempted to conceal its underperformance and/or engineer a situation in which Hilton could not be held liable for underperforming when assessed against the Performance Test. The substance of Palm Grove's case had always been directed at the Hotel's (and Hilton's) alleged underperformance.

107 Palm Grove also points out that in the Second Tranche Arbitration:

(a) Mr Ranjan Malakar (who testified as Hilton's Regional Director of Operations, India) was cross-examined on "the preparation of the 2020 Budget … and the reasonableness of Palm Grove's objections to the 2020 budget";[90] and

(b) Mr Advani was likewise cross-examined on Palm Grove's objections to Hilton's proposed Budgets.[91]

108 In reviewing the transcripts of Mr Malakar and Mr Advani's evidence, I was unable to identify anything that supports Palm Grove's present case. I was referred to certain portions of Mr Malakar's testimony, but those portions only

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90 RSG at [206(d)]; CWS at [67(a)].

91 RSG at [206(e)]; CWS at [67(b)].

show that he was cross-examined on why a lower budget was proposed for CY 2020, and whether he considered Palm Grove's responses to have "[fallen] within the umbrella of what would be reasonable objections".[92] Nothing emerged from Mr Malakar's testimony to indicate that Palm Grove was disputing Hilton's compliance with cll 3.1.2 and 3.1.2 in *preparing* the proposed budgets.

109 The same may be said of Mr Advani's evidence. In the parts of the transcript to which I was referred, Mr Advani was only questioned on the basis for Palm Grove's objections to Hilton's proposed budget for CY 2020. His evidence was that Palm Grove objected because Hilton offered no explanation for the lower figure it proposed:[93]

> Q: You said that the document does not provide any explanation or reasons for the figure it contains in relation to proposed 2020 budgets of INR 139 crore?
>
> A: Yes.
>
> Q: Which, incidentally, was not approved and was pending resolution. Your position was that you -- did you need some explanation as to what was happening to the hotel business?
>
> A: Till February, Hilton did not even for once state force majeure. You may say that you can see outside, like, you made in the opening suspicion -- submission, sorry, but that's not the case. This is a business proposition. They must explain -- I mean, their number, how did they achieve that number in -- could they have achieved more, could they have achieved less? Have they compared it to competition? Have they compared it to CompSet? Of course we needed these explanations. We deserve, it is part of the agreement, that they must compare their performance against competitor performers and that's exactly the second point I'm

92 RSG at p 3854; Transcript of proceedings on 2 August 2022 at p 27, lns 12–15.

93 RSG at p 4071; Transcript of proceedings on 2 August 2022 at p 101, ln 23 to p 102, ln 24.

> making, which Hilton refuses to do. It never compares its performance with the CompSet or sets a goal against the CompSet. It tends to avoid accountability.

110 The crux of Mr Advani's evidence was that Palm Grove had no visibility whatsoever into how Hilton devised the proposed budget for CY 2020. That Mr Advani's evidence was that Palm Grove objected to the proposed budget because it *did not know* how the proposed budget was devised suggests, in my view, that Palm Grove was in no position to allege that Hilton fell short of the Prudent Hotel Operator Standard in undertaking that exercise.

The Preparation Issue was not adequately pleaded

111 Although I have spent some time examining the relevant parts of the arbitral record in detail, I return to the point I made at [62]–[64] above, which is that the relevant documents must be considered alongside each other and with an eye for the substance – and not form – of the parties' cases. Having done so, it is clear to me that the Preparation Issue was not adequately pleaded or put into issue by Palm Grove in the Second Tranche Arbitration.

112 I have noted two points in the relevant documents that may reasonably be construed as raising the Preparation Issue (see [83] and [99] above). Neither of them was entirely forthright. Their significance was vastly diminished by all the other assertions and arguments that pulled in different – and sometimes contrary – directions.

113 More importantly – and I reiterate – the touchstone is not whether the allegation was made in form, but whether the issue was *in substance* adequately and clearly put forward for the Tribunal's consideration. To cross this bar, it is simply not enough for Palm Grove to now string together disparate assertions

that stray far and wide across the entire gamut of documents in the arbitral record. In my judgment, the Preparation Issue was simply not an issue that emerged clearly and consistently in the Second Tranche Arbitration.

114 For these reasons, there is in my view no question of the Tribunal having failed to consider the Preparation Issue in breach of natural justice, nor of the Tribunal having rendered an award that was *infra petita* inasmuch as it allegedly failed to address the Preparation Issue. In my judgment, neither objection is made out and I therefore dismiss Palm Grove's application to set aside the 2nd Partial Award on those grounds.

The Underperformance Issue

115 Moving on to the Underperformance Issue, Palm Grove's position is that it had put forward three "main, independent grounds" in support of its case on the Underperformance Issue in the Second Tranche Arbitration:[94]

(a) the Hotel's underperformance based on key performance indicators provided in accepted industry reports (the "Industry Reports");

(b) Hilton's underperformance in four specific areas (the "Four Areas"), namely the:

(i) use of an obsolete revenue management system ("RMS");

(ii) establishment of a productive national sales office ("NSO");

94 RSG at [213]; CWS at [77].

(iii) creation of brand awareness; and

(iv) under-pricing the Hotel;

(c) Hilton's admission of liability in entering into the Settlement Agreement.

116 At this juncture, I say a few words to contextualise Palm Grove's reliance on the Industry Reports. The Industry Reports adduced by Palm Grove in the Second Tranche Arbitration broadly comprised two sets of reports, one generated by Smith Travel Research ("STR")[95] and the other by Hotelligence Demand360 ("Demand360").[96] STR and Demand360 are both providers of hospitality market intelligence. The Industry Reports benchmarked the Hotel's performance against the performance of competing hotels forming the Hotel's competitive set (or "CompSet") along various parameters – the CompSet included hotels such as the JW Marriott Pune, Westin Pune, and Hyatt Regency Pune. The parameters in the Industry Reports included *inter alia* occupancy; average daily rate (or "ADR"); revenue per available room (or "RevPAR"); and total revenue per available room (or "TRevPAR"). It was Palm Grove's case in the Second Tranche Arbitration that Hilton's underperformance was evidenced by how poorly the Hotel performed on those metrics *vis-à-vis* its CompSet in the Industry Reports.

117 In summary, the Tribunal rejected the three "independent grounds" summarised at [115] above and dismissed Palm Grove's counterclaim on the basis that:

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95 RSG at pp 6413–6415.

96 RSG at pp 6641 and 7710.

(a) the Industry Reports were of no assistance in determining whether Hilton breached cll 3.1.2 and 3.1.3;[97]

(b) Hilton's failure to adopt Palm Grove's proposals in respect of the Four Areas was "insufficient to evidence a breach by [Hilton] of their operation and management obligations";[98]

(c) the Settlement Agreement was irrelevant to the question of whether Hilton breached cll 3.1.2 and 3.1.3;[99] and

(d) ultimately:[100]

> No expert evidence was adduced as to the steps a prudent international hotel operator would have taken, balancing short, medium and long term objectives, to operate the Hotel and explaining how the Claimants' actions failed to meet this standard … and in the absence of such evidence, the Tribunal is unable to assess whether or not the Claimants breached their obligations.

118 Palm Grove says that there are two grounds upon which this Court should set aside the Tribunal's decision to dismiss its counterclaim. The essence of the first is that it was not open to the Tribunal to dismiss the counterclaim on evidential grounds in the way it did. The second is directed specifically at the Tribunal's finding that the Settlement Agreement was irrelevant to the inquiry.

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97 2nd Partial Award at para 583.

98 2nd Partial Award at para 584.

99 2nd Partial Award at para 582.

100 2nd Partial Award at para 583.

The Tribunal did not err in dismissing Palm Grove's counterclaim on evidential grounds

119 Palm Grove submits that it was not open to the Tribunal to dismiss the counterclaim on evidential grounds and that the Tribunal's decision and reasoning were surprising and unforeseeable because:

(a) it was contrary to the parties' "common and agreed position" on how the Underperformance Issue should be determined;[101] and

(b) the Tribunal should at any rate have invited the parties to adduce the necessary expert evidence, insofar as it considered that such evidence was relevant or necessary.[102]

120 I now address each of these arguments in turn.

(1) There was no "common and agreed position" on how the Underperformance Issue should have been determined

121 According to Palm Grove, it was the parties' "common and agreed position" that:[103]

(a) whether Hilton underperformed was a matter that would be determined based on the Industry Reports; and

(b) Hilton was obliged to comply with Palm Grove's stipulations in respect of the Four Areas, the implication being that a failure to do so

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101 CWS at [78].

102 CWS [93].

103 CWS at [78].

was *ipso facto* an act of underperformance in breach of cll 3.1.2 and 3.1.3.

122 Palm Grove says that it was for this reason that no expert evidence was adduced on whether Hilton performed in accordance with cll 3.1.2 and 3.1.3; it was the Tribunal's duty to determine that question on the parties' agreed premises. On that footing, Palm Grove argues that there *was* sufficient factual evidence – albeit factual evidence given by persons with ample industry experience – for the Tribunal to determine the question one way or the other.[104] In failing to do so, the Tribunal "effectively abdicated its duty to consider [the] issue" and introduced a "new difference" that was outside the scope of the parties' submission to arbitration.[105]

123 Counsel for Hilton, Mr Kelvin Poon SC, submits that there was *no* "common and agreed position" as contended by Palm Grove.[106] On the contrary, it was Hilton's constant refrain throughout the Second Tranche Arbitration that Palm Grove had failed to demonstrate what the standard of a "prudent international hotel operator" required.[107] Hilton further submits that it actively disputed the probative value of the Industry Reports and its obligation to comply with Palm Grove's recommendations in respect of the Four Areas.[108] These matters plainly give the lie to Palm Grove's assertion that there was a "common and agreed position" on how the Tribunal should have determined the Underperformance Issue.

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104 CWS at [79].

105 RSG at [244]; CWS at [92].

106 DWS at [53].

107 DWS at [53]–[54].

108 DWS at [57].

124 I agree with Hilton. Palm Grove was unable to point to anything that evinces the putative "common and agreed position". As regards the Industry Reports, all that Palm Grove was able to muster were:

(a) thin references to the arbitral record which (it says) demonstrate that Hilton relied on the Industry Reports or, at the very least, "did not dispute the use of accepted industry reports in determining the issue of Hilton's underperformance";[109] and

(b) the witnesses' "extensive evidence on the issue whether the Hotel underperformed based on the same accepted industry reports", which (according to Palm Grove) proves that the parties proceeded on the basis that the Industry Reports were conclusive.[110]

125 There is no merit to these submissions. Insofar as Hilton engaged with the Industry Reports, it is clear that Hilton did so only to (a) dispute their relevance; or (b) show that their contents did not support Palm Grove's allegations of underperformance in any event. To cite but one example, it was averred in Hilton's Reply to Palm Grove's SOD that:[111]

> 66. As set out above, *the only requirement under the Agreements with respect to the Claimants' performance i.e., the Performance Test, pertains to achieving a GOP of 85% or more of the budgeted GOP for the year, during the Performance Period.* Therefore, the Respondents' allegations of under-performance are pre-mature, irrelevant and do not entitle the Respondent to damages under the Agreements.
>
> 67. *The Respondent has, in order to mislead the Tribunal, once again picked and chosen favorable data from*

[109] CWS at [80(d)] and [82].

[110] CWS at [81].

[111] RSG at p 803, paras 66–67.

> *different reports which would support its case.* At some points it refers to one parameter under the STR Report and some times to another parameter under the Demand 360 Report. STR compares the performance of the Hotel with its agreed CompSet, i.e. JW Marriott, Westin, Hyatt Regency and Taj Blue Diamond. Admittedly, Demand 360 has a different CompSet as Taj is replaced by Sheraton. *Therefore, the results of both these reports cannot be clubbed together as the Respondent has attempted to do.*
>
> [emphasis added]

126 Turning now to the first of the Four Areas, Palm Grove's position is that Hilton, in disputing the allegation that the RMS in use was "obsolete and inflexible", impliedly conceded that "Hilton was not supposed to use a system that was obsolete and inflexible".[112]

127 This submission involves a leap of logic that I am unable to make. It is plain to me that a party, when faced with an allegation that it failed to do *A* in breach of its duties, disputes that allegation by saying that it *did* in fact do *A*, that response cannot, without more, be interpreted as a concession that it was under an obligation to do *A*.

128 On the point regarding the establishment of a productive NSO, Palm Grove submits that:[113]

> Hilton's defence to this claim was: *first*, Hilton were (allegedly) not obliged to establish an NSO under the Management Agreement; Hilton *also* argued that in any case they did establish and maintain a productive NSO (referred to as the Above Property Sales Team which was akin to an NSO). The parties' dispute was factual – did Hilton establish a productive NSO.
>
> [emphasis in original]

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112 CWS at [87].

113 CWS at [89].

Again, the conclusion that the dispute was a merely factual one involves a *non sequitur* that is made all the more puzzling by the fact that Palm Grove itself acknowledged Hilton's position that it was "not obliged to establish an NSO under the Management Agreement".

129 Palm Grove also referred me to the evidence and the parties' arguments on whether Hilton failed to establish a productive NSO. This led to the submission that:[114]

> If indeed there was no common and undisputed position on Hilton's performance to be assessed in this respect … *it is difficult to see why parties would have adduced such extensive factual evidence submissions and arguments on this point.*
>
> [emphasis added]

There is again no merit to this submission. The reason the parties – and Hilton specifically – led that evidence is plain to see. Hilton would obviously have been concerned to mount an airtight defence to Palm Grove's counterclaim, and this naturally involved mounting defences that rested on premises Hilton did not accept.

130 The points relating to Hilton's alleged under-pricing of the Hotel and failure to create brand awareness were not taken up in Palm Grove's written submissions, but they were canvassed in Mr Raheja's supporting affidavit. There is, however, no material difference between the thrust of Mr Raheja's evidence and the submissions made before me, which is that Hilton impliedly conceded its obligation to create brand awareness and to price the Hotel appropriately because it engaged with Palm Grove on factual questions of

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114 CWS at [90].

whether it had failed to do either. For the reasons I have just given, I am not persuaded by this line of reasoning.

131 Overall, there is no evidence pointing to the "common and agreed position" framed by Palm Grove.

(2) The Tribunal addressed its mind to the parties' evidence and arguments before concluding that there was insufficient evidence

132 Closely tied to its arguments on the putative "common and agreed position" is Palm Grove's position that the Tribunal failed to apply its mind to the merits of the parties' evidence and submissions on Hilton's alleged underperformance before concluding that the counterclaim had to fail for want of evidence.[115] In Mr Raheja's supporting affidavit, there was the somewhat startling assertion that the Tribunal had "formed a pre-judgment that expert evidence was necessary" and hence summarily dismissed Palm Grove's counterclaim when that evidence was not produced.[116]

133 I reject these arguments. The Tribunal plainly acknowledged Palm Grove's (and Hilton's) arguments on the Industry Reports and the Four Areas and then summarised Palm Grove's case as follows:[117]

> The nature of the Respondent's case is that because the Hotel performed poorly in the industry rankings, that is evidence that the Claimants breached Clause 3.1.3, inter alia by failing to maximise GOP. The Respondent further identifies four specific areas in which, it asserts, the Claimants failed to use the skill, effort, care and expertise of a prudent international hotel operator, namely: a failure to create brand awareness; the failure to operate a NSO from the time the Hotel opened and

115 CWS [93].

116 RSG at [171].

117 2nd Partial Award at para 579.

> once the NSO was established, the failure to operate it successfully in a manner which optimised GOP; the underpricing of rooms; and the obsolete RMS used. The Respondent further refers to the Settlement Agreement as an admission by the Claimants that they had underperformed.

134 The Tribunal then reasoned that although the Industry Reports "give some context as to the performance of the Hotel against that of its CompSet in terms of certain data points (for example ADR and occupancy)",[118] they otherwise "do not cover the actions of the hotel operator per se but instead solely compare the way in which a particular hotel performs at a specific point in time".[119] The Tribunal hence concluded that the Industry Reports shed no light on what the Prudent Hotel Operator Standard under cll 3.1.2 and 3.1.3 requires.[120]

135 On the Four Areas, the Tribunal noted Palm Grove's "evident frustration that [Hilton] did not appear to be willing to listen to [its] concerns"[121] but, having construed the Management Agreement, ultimately took the view that:

(a) Hilton was "not contractually obliged to adhere to [Palm Grove's] ideas or suggestions";[122] and

(b) without the further expert evidence on what the Prudent Hotel Operator Standard required of Hilton, "[Hilton's] failure to adopt [Palm

118 2nd Partial Award at para 583.

119 2nd Partial Award at para 583.

120 2nd Partial Award at para 583.

121 2nd Partial Award at para 584.

122 2nd Partial Award at para 584.

> Grove's] proposals [was] insufficient to evidence a breach by [Hilton] of their operation and management obligations."[123]

136 In my judgment, the argument that the Tribunal *failed* to consider the evidence and arguments on both the Industry Reports and the Four Areas is plainly unsustainable in light of the Tribunal's analysis in the 2nd Partial Award.

(3) The Tribunal was not obliged to call for expert evidence

137 Palm Grove goes on to submit that even if the Tribunal was entitled to have regard to expert evidence in determining the Underperformance Issue, the parties should have been invited to adduce the necessary expert evidence before the Tribunal reached its decision. Palm Grove says that the Tribunal had the power do so under the SIAC Rules 2016 (which applied by virtue of the relevant arbitration agreements) and the IBA Rules on the Taking of Evidence in International Commercial Arbitration 2020 (the "IBA Rules of Evidence") (which was adopted pursuant to the Procedural Order No. 1).[124] It is said that in failing to call for that evidence, the parties were "deprived of the opportunity to present their case on this question".[125]

138 I disagree. The burden was on Palm Grove to adduce evidence sufficient to make out its counterclaim against Hilton. In this case, expert evidence *was* required but ultimately not adduced. Palm Grove says it omitted to do so because it was under the impression that the Tribunal would have determined

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123 2nd Partial Award at para 584.

124 RSG at [240].

125 RSG at [240].

the counterclaim without the aid of expert evidence in line with the parties' "common and agreed position".[126]

139 That, in my judgment, was a false impression that Palm Grove cast unto itself, and perhaps only now with the benefit of hindsight. Palm Grove took the view (or so it claims) that there was a "common and agreed" position on how the Tribunal should approach the counterclaim when there was absolutely no objective basis for forming that view. There was virtually *no* common ground between the parties in that respect, and it must have been clear to Palm Grove that the question of what the Prudent Hotel Operator Standard required – and whether Hilton fell short of it – remained at large. Palm Grove should have known from the outset that it would require expert evidence to discharge its burden of making out the counterclaim. Palm Grove took a strategic decision to run its case in the way it did and without the aid of expert evidence. That decision having evidently backfired, Palm Grove cannot now run to the court and cry foul about how it was "deprived" of the opportunity to present that expert evidence.

140 I should state for completeness that although it may have been open to the Tribunal to call for expert evidence on the Underperformance Issue, it is also clear to me that nothing in the SIAC Rules 2016 or the IBA Rules of Evidence *obliged* the Tribunal to do so. If the Tribunal did in fact extend such an invitation, that would have been an act of indulgence to which Palm Grove now effectively claims an entitlement.

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126 CWS at [79].

141 For these reasons, I find that there was no breach of natural justice on the part of the Tribunal in determining the Underperformance Issue without inviting the parties to adduce expert evidence on the matter for its consideration.

The Tribunal did not err in concluding that the Settlement Agreement was irrelevant

142 In the Second Tranche Arbitration, it was Palm Grove's case that the Settlement Agreement disclosed concessions by Hilton that it had breached cll 3.1.2 and 3.1.3. In this connection, Palm Grove invited the Tribunal to draw an adverse inference from "Hilton's unexplained failure to call Mr Ahluwalia, Hilton's representative who negotiated and executed the Settlement Agreement on their behalf". The Tribunal declined to do so, and Palm Grove now says that the Tribunal failed to consider the arguments and evidence on why the Tribunal should have concluded the other way.[127]

143 I have no hesitation in rejecting this argument. The Tribunal again acknowledged Palm Grove's general reliance on the Settlement Agreement, as well as the specific argument that an adverse inference should be drawn from Hilton's failure to call Mr Ahluwalia. The Tribunal then concluded that there was simply no basis for Palm Grove to rely on the Settlement Agreement because:[128]

> … by the express terms of the Settlement Agreement, the Parties have agreed that the Settlement Agreement does not constitute an admission of liability from either Party. Clause 3.4 states as follows: "[…] *This Agreement* […] *does not constitute an admission of liability by any Party in any manner whatsoever.*"
>
> [emphasis in original]

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127 CWS at [104].

128 2nd Partial Award at para 581.

It is not suggested by Palm Grove that the Tribunal can be faulted for making this finding. On that premise, whether an adverse inference ought to be drawn from Hilton's failure to call Mr Ahluwalia became moot.

144 It is thus obvious to me that the Tribunal considered Palm Grove's arguments on why an adverse inference should be drawn from Hilton's failure to call Mr Ahluwalia and rejected it – if not expressly, then impliedly at the least.

145 In any case, even if I were to assume that the Tribunal did fail to consider Palm Grove's invitation to draw an adverse inference, no prejudice could have resulted to Palm Grove from any such failure. Given the Tribunal's findings on cl 3.4 of the Settlement Agreement (see [143] above), the eventual outcome would, in my view, have been the same.

Conclusion

146 For these reasons, Palm Grove has failed to establish any of its grounds for impeaching the Tribunal's decision to dismiss its counterclaim on the Underperformance Issue. I accordingly dismiss Palm Grove's application to set aside the 2nd Partial Award on those grounds.

Issue (b): The Affiliate Fees Claim

147 I turn now to the Affiliate Fees Claim. In brief, this was a claim by Hilton for outstanding fees (the "Affiliate Fees") in the sum of US$66,973.00 under the License Agreement, the IMSA, and the BSSA (see [9] above).[129] In support of this claim, Hilton tendered a document setting out its breakdown of the

[129] 2nd Partial Award at paras 310–311.

Affiliate Fees. That document was marked "Exhibit C-090" in the Second Tranche Arbitration, and I reproduce it here in full:[130]

EXHIBIT C-090

CLAIMANTS OUTSTANDING AFFILIATE FEES

Hiton Outstanding	Upto to March 2020	April 2020 to December 2020	January 2021- June 2021	July 21 – Dec 21	January 2022-May 2022	June 2022	Total
Affiliates Affiliates	Value in USD	Value in USD	Value in USD		Value in USD	Value in USD	Value in USD
Total o/s Till Date in USD	50,510	4,587	5,705	2,800	2,689	674	66,973

148 In the present application, Palm Grove says that the Tribunal entirely overlooked a key defence to the Affiliate Fees Claim, *ie*, that:[131]

> [Those] Fees were not contractually due and payable under any of the Hotel Agreements (whether to Hilton or their Affiliates). In particular, … Hilton [failed] to identify the contractual basis (*i.e.*, any provisions in the Hotel Agreements) pursuant to which the Affiliate Fees were payable.

149 In its written submissions, Palm Grove acknowledged that the Tribunal "noted from its reading of [various contractual terms] that these contemplated that Palm Grove would be liable for fees paid to Hilton's Affiliates". The real issue, according to Palm Grove, is that the Tribunal:[132]

> [D]id not go on to consider if these contractual provisions *were* the bases for Hilton's Affiliate Fees claim (and *ergo* Palm Grove's defence) because the Tribunal explicitly thought (mistakenly) … that **Palm Grove did not contest** "*the validity of the sums detailed in Exhibit C-090*" and its defence was "*limited to asserting that the fees were waived by the Settlement Agreement*

130 RSG at p 4354.

131 CWS at [107].

132 CWS at [111].

> *and that there is no contractual entitlement in the absence of invoices being provided*".
>
> [emphasis in original]

150 I cannot accept that argument. It is plain on the face of the 2nd Partial Award that the Tribunal was aware of the defence and gave it due consideration:

(a) The Tribunal noted Palm Grove's argument that "there [was] no contractual basis for Affiliate Fees under the Management Agreement"[133] and summarised the arguments made in that connection.[134]

(b) The Tribunal then framed the key question as follows:[135]

> The question for the Tribunal to determine is therefore whether the Affiliate Fees claimed by the Claimants are sums which accrued after 31 December 2018 and are due under any of the Hotel Agreements. If the answer is yes then the Respondent is liable for such sums, if the answer is no, then the Respondent has no liability.

(c) The Tribunal went on to list nine provisions across the various contracts[136] which, in its view, made it clear that:

(i) The parties "understood that services would be provided by [Hilton's] Affiliates";[137] and

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133 2nd Partial Award at para 318.

134 2nd Partial Award at para 319.

135 2nd Partial Award at para 322.

136 2nd Partial Award at para 324.

137 2nd Partial Award at para 324.

(ii) At the time the Hotel Agreements were concluded, "it was understood by the Parties that [Palm Grove] would be liable for fees paid to [Hilton's] Affiliates".[138]

Plainly, the Tribunal took the view that there were contractual provisions that supplied the basis for the Affiliate Fees claimed for by Hilton.

151 Palm Grove says the Tribunal mistakenly thought that it had not contested the validity of the Affiliate Fees detailed in Exhibit C-090. This was a reference to para 325 of the 2nd Partial Award, where the Tribunal noted that:

> … *[Palm Grove] has not contested the validity of the sums detailed in Exhibit C-090,* its defence being limited to asserting that the fees were waived by the Settlement Agreement and that there is no contractual entitlement in the absence of invoices being provided. …
>
> [emphasis added]

152 It appears from Palm Grove's written submissions that it understood the Tribunal's reference to "validity" to mean the presence (or absence) of a contractual basis for those fees. This, in my view, is a misinterpretation of the 2nd Partial Award. When the Tribunal spoke of the validity of the sums detailed in Exhibit C-090, the Tribunal was referring to the accuracy and truth of the information set out therein – at the very least, that is a plausible and reasonable reading of the 2nd Partial Award. If the Tribunal in fact intended to use the word "validity" in the sense understood by Palm Grove, the Tribunal could have summarily allowed the Affiliate Fees Claim on the basis that Palm Grove had conceded its contractual liability to pay those fees – but that was not what the Tribunal did.

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138 2nd Partial Award at para 325.

153 For these reasons, there is no basis for me to conclude that the Tribunal failed to consider Palm Grove's defence to Hilton's Affiliate Fees Claim. I therefore dismiss Palm Grove's application to set aside the 2nd Partial Award on that basis.

Issue (c): The Working Capital Claim

154 The thrust of Hilton's Working Capital Claim was helpfully summarised by the Tribunal as follows:[139]

> The Claimants seek an order requiring the Respondent to pay INR 11,486,000 in respect of the working capital injected by the Claimants pursuant to the offer made by the Claimants during the Bombay High Court proceedings to infuse the necessary working capital to keep the Hotel running, provided that the Respondent withdrew its instructions to the General Manager to suspend the Hotel operations. This offer, the Claimants say, was made strictly without prejudice to the Claimants' right to recover it in the present arbitration. The Claimants further claim interest as stipulated in Schedule 1 to the Management Agreement.

155 In these proceedings, Palm Grove says that the Tribunal's decision to allow the Working Capital Claim should be set aside because it failed to consider two defences that Palm Grove contends were raised in the Second Tranche Arbitration.

The Tribunal considered the Force Majeure Defence

156 The first defence that Palm Grove says it mounted was that:[140]

> [P]ursuant to the correct construction of the Management Agreement, if Hilton were entitled to call a Force Majeure Event to excuse their non-performance of important financial

139 2nd Partial Award at para 331.

140 CWS at [117].

> obligations (such as evading the Performance Test and their obligation to provide reasonable Budgets), then Palm Grove must equally be entitled not to perform its financial obligation under the Management Agreement such as provide working capital to the Hotel.
>
> [emphasis in original omitted]

I will refer to this as the "Force Majeure Defence".

157 On this, Palm Grove submits that:[141]

> the Tribunal recognized that this was one of Palm Grove's key defences to the Working Capital Claim – it referred to this defence but *only* in its summary of Palm Grove's case on the Suspension Claim. Plainly, when it came to its consideration of the Working Capital Claim, this key issue had escaped it. The Tribunal awarded the Working Capital Claim without any reference (**much less analysis**) to Palm Grove's defence based on the reciprocal application of the Force Majeure provision; in fact, this defence was not even referred to in the Tribunal's summary of the parties' cases on the Working Capital Claim.
>
> [emphasis in original]

158 Hilton, on the other hand, says that contrary to Palm Grove's arguments, the Tribunal plainly considered and dismissed the Force Majeure Defence *vis-à-vis* the Working Capital Claim (in addition to the Suspension Claim).

159 I note at the outset that in the 2nd Partial Award, the Tribunal expressly acknowledged that Palm Grove was raising the Force Majeure Defence against the Working Capital Claim:[142]

> The Respondent says that pursuant to the correct construction of the Management Agreement, if the Claimants were entitled to call a Force Majeure Event to excuse their contractual non-performance, such as evading the Performance Test under Clause 7.6 of the Management Agreement and their obligation

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141 CWS at [122].

142 2nd Partial Award at para 389.

> to provide a reasonable Budget for 2020, 2021 and 2022, then the Respondent must equally be entitled not to perform its financial obligation under the Management Agreement *such that the Claimants cannot be permitted to enforce the Respondent's obligations to provide working capital to the Hotel.*
>
> [emphasis added]

160 I accept Palm Grove's submission that the Force Majeure Defence did not feature explicitly in the discussion that followed in the 2nd Partial Award on the Working Capital Claim. However, Palm Grove also fairly acknowledges that the Force Majeure Defence *was* considered in the Tribunal's discussion on the *Suspension Claim*.[143] In that regard, the Tribunal reached the view that no right to suspend the Hotel's operations could have enured to Palm Grove even if Hilton had declared a *force majeure* because cl 17 of the Management Agreement only provides for the exercise of such a right *by Hilton*.[144] Importantly, the Tribunal went on to say that cl 17 "does not state that if one Party calls a Force Majeure Event, *all obligations of the Parties* become suspended" [emphasis added].

161 It is therefore clear to me that the Tribunal did have in mind the argument that cl 17 contains an element of reciprocity or bilateralism and, having construed cl 17 for itself, the Tribunal rejected that argument. For that reason, I am unable to draw the "clear and virtually inescapable inference" that the Tribunal failed to consider the Force Majeure Defence *vis-à-vis* Hilton's Working Capital Claim: *BZW* at [60]. I would be prepared to go so far as to say that based on its analysis and interpretation of cl 17 in relation to the Suspension

143 CWS at [122].

144 2nd Partial Award at para 399.

Claim, the Tribunal implicitly rejected Palm Grove's Force Majeure Defence with regard to the Working Capital Claim.

162 I add for completeness that even if the Tribunal failed to consider the Force Majeure Defence in relation to the Working Capital Claim, that would not suffice as grounds for setting aside the Tribunal's decision to allow it. It is incumbent on Palm Grove to demonstrate how it was prejudiced by the breach: *Soh Beng Tee* at [29]. Palm Grove submits that it was prejudiced because a proper consideration of the Force Majeure Defence "could have led to a rejection of the Working Capital Claim".[145] I do not regard that as a sustainable position to take in light of the Tribunal's finding that one party's invocation of cl 17 could *not* have the effect of suspending the other party's obligations under the Management Agreement (see [160] above). Palm Grove would not have achieved any better result even if the Tribunal expressly addressed the Force Majeure Defence as part of its analysis on the Working Capital Claim; put another way, Palm Grove's argument that the outcome could reasonably have been different is a fanciful one. This conclusion is also fatal to this head of Palm Grove's application.

The Tribunal considered the Wrongful Request Defence

163 The second defence to the Working Capital Claim that Palm Grove says it raised in the Second Tranche Arbitration – and which the Tribunal allegedly overlooked – was the argument that Hilton's request for working capital was wrongful because:[146]

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145 CWS at [124].

146 CWS at [123].

> [A] Working Capital request was to be accompanied by a cash flow statement as per Clause 4 of the Working Capital Addendum. The absence of a Budget did not relieve Hilton from providing a 'cash flow forecast' (Clause 2 of Working Capital Addendum) outlining the anticipated revenue and expenses of the Hotel for the next 3 months when working capital of 'INR 17.5 million per month' was demanded by them on 12 May 2021.

I will refer to this as the "Wrongful Request Defence".

164 Palm Grove again fairly accepts[147] that the Tribunal expressly acknowledged the Wrongful Request Defence in the 2nd Partial Award:[148]

> Clause 2 details the Claimants' obligation to provide the Respondent with monthly cashflow forecasts of projected working capital requirements based on the approved Budget. The Respondent argues that the Claimants did not do this as there was no approved Budget and thus, the Respondent says, the procedure in Clauses 4 and 5 cannot be followed.

165 The Tribunal immediately went on to consider and reject the defence. In brief, the Tribunal reasoned that if Palm Grove's argument were to be accepted, it would effectively mean that Hilton's right to working capital "could be defeated by the fact a Budget has not been approved, whether or not as a result of [Palm Grove's] refusal to agree a Budget";[149] if that was what the parties intended for, clear words to that effect should have been used in the Management Agreement or Working Capital Addendum and there were none:[150]

> The Tribunal does not accept this. *It cannot be the case that the Claimants' right to seek an infusion of additional capital could be defeated by the fact a Budget has not been approved, whether or not as a result of the Respondent's refusal to agree a Budget.*

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147 CWS at [122]

148 2nd Partial Award at para 351.

149 2nd Partial Award at para 352.

150 2nd Partial Award at paras 352 and 354–355.

> In addition, *there is no express provision in the Working Capital Addendum that a Working Capital Request can only be made if there is an approved Budget*. Indeed Clause 4 commences with the words "Notwithstanding Clauses 3 and 4 above…" which suggests that the procedure for seeking a further infusion of Working Capital is not dependent upon the proper performance of Clause 2. *Had the Parties intended that a Working Capital Request could only be made if there was an approved Budget, this would have been made express in Clause 4*.
>
> …
>
> The Claimants say that the 12 May Letter comprised the Working Capital Request. This communication did not contain any explanation as to how the Claimants calculated the sum required to be injected, the explanation being limited to the effects of the COVID-19 Pandemic and the fact that steps were being taken by the Claimants to reduce the impact of the pandemic. The Claimants then state as follows: "Given that travel is at a virtual standstill in India, current and forecasted revenue of the Hotel is insufficient to meet Hotel Operating Expenses" before requiring the stated injection of working capital to be provided "urgently".
>
> The Tribunal accepts that Clause 4 does not mandate that the request should provide any detail of the underlying calculations justifying the quantum sought. The Tribunal therefore does not find that the absence of detail made the Working Capital Funds Request invalid. …
>
> [emphasis added]

166 In the premises, I find it impossible to say that the Tribunal *failed* to consider the Wrongful Request Defence when even a cursory reading of the 2nd Partial Award will show that the Tribunal did precisely *the opposite*.

167 To sum up, I am not persuaded that the Tribunal, in breach of natural justice, failed to apply its mind to the Force Majeure Defence or the Wrongful Request Defence. Accordingly, I dismiss Palm Grove's application to set aside the 2nd Partial Award insofar as it relates to the Working Capital Claim.

Issue (d): The Suspension Claim

168 I turn now to the Tribunal's decision to allow Hilton's Suspension Claim in the Second Tranche Arbitration, which decision Palm Grove challenges on two grounds.

169 First, Palm Grove says that the Tribunal failed to consider its argument that liability for the suspension of the Hotel could not be attributed to Palm Grove because it "[did] not have the authority to instruct the General Manager of the Hotel to do so".[151] According to Palm Grove, it had no such authority because the GM "is appointed by Hilton and reports to Hilton", who was the only party who "could have authorised the General Manager to suspend the Hotel's operations".[152] I will refer to this as the "Agency Defence".

170 Second – and relatedly – Palm Grove asserts that the Tribunal inexplicably thought that its defence on the issue as to who was responsible for the Hotel's suspension was limited to the contention that it was Hilton that first threatened suspension and that Palm Grove merely accepted Hilton's offer.[153] This, Palm Grove says, discloses a breach of natural justice that prejudiced Palm Grove "as it formed the basis of the Tribunal's decision that it was Palm Grove that is liable for the suspension of the Hotel's operations and this amounted to a breach of the Management Agreement".[154]

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151 CWS at [126].

152 CWS at [126].

153 RSG at [289]; CWS at [131].

154 RSG at [290].

171 Hilton disputes this limb of Palm Grove's setting-aside application on the basis that the arguments set out above at [169] are not even arguments that Palm Grove advanced in the Second Tranche Arbitration. In this regard, Hilton points to the following:[155]

(a) The assertion in Palm Grove's RNOA that:[156]

> … in view of [Hilton's] continuous reluctance and express inability to perform its obligations, by citing Force Majeure Event, culminating in [Hilton's] own communication, dated May 12, 2021 in which it expressed no option but to close down the operations of the Hotel, *[Palm Grove] accepted this suggestion and issued directions to the General Manager to continue to cease operations owing to existing Force Majeure Event.*
>
> [emphasis added]

(b) The assertion in Palm Grove's SOD that:[157]

> The Respondent under the above circumstances, and the fact that there is admittedly a Force Majeure Event in play, had no choice but to suspend the operations of the Hotel.

(c) The assertion in Palm Grove's pre-hearing submissions that "[t]he decision to not accept further bookings was taken by the General Manager 'as advised by Mr. Advani'".[158]

(d) Mr Advani's evidence in the arbitration, specifically:

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155 DWS at [88].

156 RSG at p 558, para 40.

157 RSG at p 675, para 39(f).

158 RSG at p 2581, para 116(3).

(i) His admission on cross-examination that he spoke to the GM and "told him to shut the hotel";[159]

(ii) His testimony that:[160]

> [Palm Grove's] position was we'll accept Hilton's suggestion and open the hotel – shut the hotel and open it only once they submitted an unconditional budget and when the force majeure event as per them was over.

172 Hilton says that having regard to the arbitral record as a whole, Palm Grove clearly conceded that it was responsible for the suspension of the Hotel's operations without also adequately raising the Agency Defence.

173 Palm Grove rejects this and submits that "[t]he crux of [its] defence [was] that the General Manager of the Hotel was not *obligated* to follow Palm Grove's directions" [emphasis in original].[161] However, Palm Grove was only able to point to two parts of the arbitral record to make good this assertion:

(a) The argument in Palm Grove's pre-hearing submissions that:[162]

> In terms of the Management Agreement, the Respondent could not, in any case, compel the Hotel to shut down. That is because:
>
> (1) The General Manager was under no contractual obligation to agree to actions proposed by the Respondent. Instead, as set out under Clause 7.5.5 of the Management Agreement, the General Manager would have to make a decision on a "*commercially reasonable*" basis.

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159 RSG at p 4092; Transcript of proceedings on 4 August 2022 at p 186, ln 24 to p 187, ln 3.

160 RSG at p 4092; Transcript of proceedings on 4 August 2022 at p 185, lns 8–12.

161 CWS at [130].

162 RSG at p 2581, para 117.

> (2) The Respondent was also not in control of the reservation system of the Hotel.
>
> [emphasis in original]

(b) Mr Advani's evidence in his Reply Witness Statement that:[163]

> … The General Manager considered Palm Grove's email and took the decision not to accept further bookings under the given situation. Further, it was shocking that Hilton itself sent an email stating that it would shut down the Hotel while it was operating the Hotel without an approved Budget as required under the Management Agreement.

174 In my judgment, the Agency Defence was not adequately pleaded and argued in the Arbitration. There is no clear assertion by Palm Grove that *only* Hilton – and *not* Palm Grove – had the authority to instruct the GM to suspend the Hotel's operations. The material that I have quoted above (at [171] and [173]) shows that Palm Grove in fact argued that although it directed the GM to suspend operations, it only did so in light of Hilton's communications. That is, however, a very different thing from saying that Palm Grove never had the authority to give such instructions, so that the GM should never have complied with them to begin with.

175 In that context, it is therefore unsurprising that the Tribunal should have directed its mind to the question of who procured the suspension – which Palm Grove effectively conceded it did – without further enquiring into whether Palm Grove could escape liability on grounds that only Hilton had the authority to give such instructions. Insofar as Palm Grove now seeks to argue that the Tribunal failed to address its mind to the Agency Defence, I reject that

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163 RSG at p 2365, para 29.

submission because the Agency Defence was *never* put forward in the Second Tranche Arbitration.

176 This conclusion also renders unsustainable Palm Grove's further argument that its defence against the Suspension Claim was misconstrued and given inadequate treatment by the Tribunal in breach of natural justice.

177 For these reasons, the objections raised by Palm Grove as against the Tribunal's decision on the Suspension Claim are without merit and I reject them accordingly. Thus, and for all of the foregoing reasons, Palm Grove's attempt to set aside the 2nd Partial Award (whether in whole or in part) also fails.

Issue (e): The appointment of Prognosis

178 I move on to consider Palm Grove's application in relation to the 3rd Partial Award.

179 As I mentioned at [17] above, the procedure for appointing a Budget Expert is set out under cl 18.1 of the Management Agreement. In the 3rd Partial Award (and following its analysis in the 1st Partial Award), the Tribunal construed cl 18.1 and took the view that by two of its sub-provisions, there were three distinct prerequisites that a candidate must meet in order to be considered for appointment as a Budget Expert:[164]

(a) Cl 18.1.1.2 requires that the candidate be "independent of the Parties" (the "Independence Requirement");

[164] 3rd Partial Award at para 178.

(b) Cl 18.1.1.2 also requires that the candidate must not have been "engaged directly or indirectly as a consultant or advisor (except as an arbitrator or an expert) for at least twenty four calendar months prior to the date of appointment" (the "24 Months Requirement"); and

(c) Cl 18.1.3 conjunctively requires the candidate to be a "qualified professional", have "expertise in the matter in dispute", and have a "national or international reputation as an expert in the hotel industry" (the "Expertise Requirement").

180 In ARB 044, Palm Grove sought the appointment of Horwarth as the Budget Expert who would determine the Hotel's budget for CY 2023. Hilton opposed that and nominated HVS Anarock ("Anarock") and Prognosis as their candidates.

181 Cross-arguments were advanced by both sides as to why the other side's candidate(s) failed to satisfy the three requirements under cl 18.1. It suffices to note for present purposes that the Tribunal determined that *all three* candidates fulfilled those requirements, and then proceeded to appoint Prognosis as the Budget Expert.

The Tribunal did not depart from the chain of reasoning it adopted in the 1st Partial Award

182 The central plank of Palm Grove's challenge to the 3rd Partial Award is the assertion that the Tribunal "inexplicably disregarded and departed" from the reasoning it adopted in the 1st Partial Award.[165] Specifically, Palm Grove says that:

[165] RSG at [37].

(a) In the 1st Partial Award, the Tribunal found that Maharajan & Aibara Advisers LLP ("M&AA") (who were one of Hilton's two nominees) failed to satisfy the Independence Requirement because its marketing materials listed two Hilton hotels as M&AA's "Asset Management" clients.[166] In a departure from this, the Tribunal (by the 3rd Partial Award) concluded – anomalously, it is said – that "the fact that Hilton is listed on Prognosis website as a client does not mean Prognosis lacks the necessary independence".[167]

(b) In the 1st Partial Award, the Tribunal likewise found that Hotelivate (who was Hilton's other nominee in the First Tranche Arbitration) failed to satisfy the Independence Requirement because several of its team members had prior working and/or personal relationships with members of Hilton and/or persons in HVS India (which was a consultancy firm that Hilton had then recently engaged).[168] However, in the 3rd Partial Award, the Tribunal did not consider certain "asserted relationships" between Prognosis' members and members of Hilton as "sufficient to render Prognosis in breach of the Independence Requirement".[169]

183 Palm Grove submits that in light of the foregoing and the fact that the Tribunal failed to justify the departures in the 3rd Partial Award, "the irresistible

166 1st Partial Award at para 211.

167 3rd Partial Award at para 239.

168 1st Partial Award at paras 190–198.

169 3rd Partial Award at para 233.

inference is that the Tribunal did not apply its mind to its own reasoning in the [1st Partial Award] in deciding in the [3rd Partial Award]".[170]

184 I reject Palm Grove's submission. As a starting point, it is not even clear to me that the Tribunal adopted inconsistent lines of reasoning in the manner asserted by Palm Grove or at all.

185 On [182(a)] above, the Tribunal concluded in the 1st Partial Award that M&AA was not independent because the relevant marketing materials listing Hilton as one of M&AA's clients were undated. It was thus unclear to the Tribunal if Hilton was *still* a client of M&AA at the time ARB 122 was heard. Coupled with the fact that Hilton made no submissions on M&AA's independence despite having been given the opportunity to do so, the Tribunal concluded that Hilton had failed to discharge its burden of demonstrating that M&AA satisfied the Independence Requirement.[171]

186 The circumstances in ARB 343 were entirely different. Hilton was able to demonstrate to the Tribunal's satisfaction that it had no working relationship with Prognosis in the preceding 24 months.[172] Allegations were made as to the existence of personal and professional relationships between Hilton's and Prognosis' officers but importantly, evidence was led to persuade the Tribunal that those relationships were not of such a nature as to undermine Prognosis' independence.[173] It is thus clear to me that the Tribunal reached different findings on M&AA's and Prognosis' independence in the 1st and 3rd Partial

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170 CWS at [147].

171 1st Partial Award at paras 144–146.

172 3rd Partial Award at para 239.

173 3rd Partial Award at paras 233–238.

Awards respectively not because of any departure or inconsistency in logic or reasoning, but because the evidence led and facts found in both cases warranted different outcomes.

187 The same may be said of the comparison drawn by Palm Grove at [182(b)] above. In both cases, the Tribunal had regard to the existence and substance of the relationships said to undermine Hotelivate's and Prognosis' independence. The relationships were significant enough (in the Tribunal's mind) to achieve that effect in Hotelivate's case,[174] but the same could not be said in Prognosis' case.[175] Again, it bears mentioning that the task before the Tribunal was to appoint the Budget Expert for CY 2023 based on the evidence and arguments laid before it in ARB 044. There was no question of the Tribunal simply rubber-stamping any particular candidate based on what it previously said or found in the 1st Partial Award. It was obliged to consider the evidence put before it by the parties without any preconceived notions either way.

188 More generally, the 3rd Partial Award contains extensive references to the Tribunal's conclusions and reasoning in the 1st Partial Award. To cite but one example, the Tribunal made the following observations in assessing Anarock's independence:[176]

> Finally, the Tribunal turns to its finding in the First Partial Award that Hotelivate did not meet the necessary requirements of independence on the basis of the relationship of the individuals at Hotelivate (all of whom had worked at HVS before founding Hotelivate) and the Claimants since 2018. The Tribunal notes that the members of the then HVS team all left to work at Hotelivate when it was founded and do not work at

174 1st Partial Award at paras 194–198.

175 3rd Partial Award at para 238.

176 3rd Partial Award at para 228.

> HVS Anarock. Accordingly, the Tribunal's finding in the First Partial Award with regard to Hotelivate is irrelevant to its considerations of the independence of HVS Anarock.

On the whole, it is clear to me that the Tribunal strived for analytical consistency between the 1st and 3rd Partial Award.

189 In my judgment, Palm Grove's arguments amount to nothing more than a disguised attempt at reopening not only the merits of the Tribunal's decision in the 3rd Partial Award, but also the factual findings that underpinned it. It goes without saying that these arguments must fail.

190 For these reasons, I reject the submission that the 3rd Partial Award is defective because the Tribunal failed to consider or follow the reasoning it adopted in the 1st Partial Award. I do not accept the factual premise of that submission: in my view, there are no inconsistencies in the reasoning adopted between both awards, and there is every indication that the Tribunal endeavoured to ensure that was the case.

191 These conclusions also make it unnecessary for me to deal with Palm Grove's further submission, *ie*, that it was deprived of the opportunity to present its case by the Tribunal's failure to invite further submissions before deciding ARB 044 on new (and allegedly inconsistent) principles.

The Tribunal did not exceed the scope of its jurisdiction in reaching its decision to appoint Prognosis

192 For context, the Tribunal took the view that although all three candidates in ARB 044 met the requirements set out in cl 18.1 of the Management Agreement, a candidate other than Horwarth should be appointed bearing in mind that (a) Horwarth's reappointment would bring with it the risk of further

disputes, given the parties' history; and (b) there were advantages to be had in appointing a new Budget Expert:[177]

> … the Tribunal is troubled by the similarity in circumstances between the Respondent's [Palm Grove's] refusal to agree to the reappointment of JLL because of the Respondent's allegations of breach and misconduct and the present situation where the Claimants [Hilton] object to Horwath's reappointment, again due to allegations of misconduct. The Tribunal is also concerned that the Claimants' objections to Horwath's appointment, albeit not accepted by the Tribunal, give rise to the potential for further disputes concerning Horwath's role as Expert which are best avoided if possible. In addition, mindful of the overall purpose of the expert-led budgetary exercise namely to promote the successful operation of the Hotel, it appears desirable to have another, independent expert perspective on the budgetary process, to follow on from that of Howarth. Therefore, the Tribunal considers that, of the candidates which meet the criteria for appointment as Budget Expert under the Management Agreement, in the exercise of the Tribunal's discretion to appoint the Budget Expert from amongst the suitably qualified candidates, it is appropriate that a candidate other than Horwath should be appointed.

193 Palm Grove says that "in concluding that it [was] inappropriate for Horwath to be appointed", the Tribunal "went beyond the scope of the parties' submissions in taking into account speculative matters which had not been advanced before it".[178] Palm Grove also argues that the Tribunal failed to invite further submissions from the parties before reaching that decision, and so Palm Grove was deprived of the opportunity to present its case.[179]

194 In my judgment, there is absolutely no merit to these submissions. Palm Grove is, in my view, simply nitpicking at the 3rd Partial Award. The entire purpose of cl 18.1 and ARB 044 was to facilitate the appointment of a Budget

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177 3rd Partial Award at para 247.

178 RSG at [36] and [307].

179 RSG at [308].

Expert by an arbitral tribunal. The essential issue before the Tribunal, therefore, was *which* of the three nominees should be appointed – all of whom, as the Tribunal found, were past the gate under cl 18.1. The Tribunal was plainly entitled to have regard to all the circumstances of the case and the overall dispute and to then draw such inferences as it considered necessary to determine that question, whether raised by parties in argument or not.

195 Insofar as Palm Grove now argues that the Tribunal's inferences were speculative, that is not a point that this court can sit in appeal over. In any case, I am of the view that the Tribunal's reasoning was cogent, sensible, and supported by the facts before it, bearing in mind that this was the same Tribunal that issued the 1st and 2nd Partial Awards and had front row seats to the parties' fractious working relationship. It was obviously true that there were prior disputes over the appointment of Horwarth and its subsequent expert determinations. One might thus fairly and reasonably contemplate the prospect of such disputes repeating themselves in a contractual relationship envisaged to run until at least 31 December 2035;[180] the Tribunal would have known that better than anyone else. It is also obviously true that the purpose of the budgetary exercise (*ie*, "to promote the successful operation of the Hotel") would benefit from the perspectives of a new Budget Expert. These matters, in my view, furnish ample grounds for the conclusion that the Tribunal ultimately reached, which was that a candidate other than Horwarth should be preferred.

196 I also reject Palm Grove's contention that it was deprived of the opportunity to present its case by the Tribunal's failure to invite further

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[180] RSG at p 6087: "Expiration Date: 31 December of the twentieth (20th) full Calendar Year following the commencement of the Operating Term in accordance with clause 2.1".

submissions before it selected between the three candidates on "speculative" grounds. The parties had every opportunity to submit on why their respective nominee(s) should be appointed. Palm Grove must have – or at any rate, should have – contemplated or anticipated the possibility that the Tribunal would have to select between candidates that meet all three requirements under cl 18.1, as opposed to assuming that only Horwarth would emerge unscathed. As it were, Palm Grove deemed it sufficient to challenge Anarock's and Prognosis' nominations on grounds that neither ticked off those boxes (although in fairness, Hilton took much the same approach). On the other hand, there were – as I explained at [195] above – ample grounds for the Tribunal to conclude that a candidate other than Horwarth should be appointed. Those grounds emerged from the objective facts and circumstances before the Tribunal and were not plucked out of thin air. On that basis, I am of the view that the essential issues were adequately ventilated, and that the Tribunal was in a position to determine ARB 044 in the way that it did. There was accordingly no breach of natural justice.

197 To conclude the analysis on this issue, I am not persuaded that there is any basis to set aside the Tribunal's decision in ARB 044 to appoint Prognosis as the Budget Expert who would determine the Hotel's budget for CY 2023. Accordingly, Palm Grove's application to set aside the 3rd Partial Award is dismissed.

Conclusion

198 As Palm Grove has failed to persuade me on any of the grounds raised in its application, I dismiss OA 1203 in its entirety.

199 I shall hear the parties separately on costs.

S Mohan
Judge of the High Court

Thio Shen Yi SC (TSMP Law Corporation) (instructed), Nakul Dewan SA (instructed), Lin Weiqi Wendy, Goh Wei Wei and Foo Hsien Weng (WongPartnership LLP) for the claimant;
Poon Kin Mun Kelvin SC, David Isidore Tan Huang Loong, Chrystal Lee Tze En and Ku Chern Ying Vanessa (Rajah & Tann Singapore LLP) for the first and second defendants.
