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

[2024] SGHC 300

Originating Application No 844 of 2024

Between

DKT

… *Applicant*

And

DKU

… *Respondent*

GROUNDS OF DECISION

[Arbitration — Award — Recourse against award — Setting aside — Breach of natural justice]

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v
DKU

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Kristy Tan JC:

Introduction

1 In HC/OA 844/2024 ("OA 844"), [DKT] ("T") applied for an arbitral award (the "Award") made in favour of [DKU] ("U") to be set aside under s 48(1)(*a*)(vii) of the Arbitration Act 2001 (2020 Rev Ed) (the "Act"), *ie*, on the basis that the arbitral tribunal (the "Tribunal") breached the rules of natural justice in making the Award. U was the claimant, and T was the respondent, in the underlying arbitration (the "Arbitration"). After considering the parties' evidence and submissions in OA 844, I dismissed the application.

Facts

2 T was, at the material time, in the business of property and facilities management.[1] U engaged T under a "2012 Term Contract" and a "2014 Term Contract" (together, the "Term Contracts") to provide maintenance services, minor works and repairs within and in the immediate vicinity of U's buildings.[2] Among other works, the Term Contracts required T to carry out inspections of buildings and to repair any cracks found on the walls or ceilings of the buildings.[3] The Term Contracts each contained a Schedule of Rates (the "SOR") which specified the method for performing crack repairs.[4]

The Arbitration

3 In 2018, pursuant to the arbitration agreements in the Term Contracts, U commenced two sets of arbitral proceedings against T, which were consolidated into the Arbitration.[5] The Tribunal, comprised of a sole arbitrator, was duly appointed.

4 In the Arbitration, U claimed against T for breaches of the Term Contracts, namely, that certain crack repair works which U had paid for (the "crack repair works") were not completed and/or performed in accordance with the requirements of the Term Contracts.[6] U sought damages to be assessed

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1 1st Affidavit of [YKN] filed on T's behalf on 23 August 2024 ("T's 1st Affidavit") at p 92: Award at [12].

2 T's 1st Affidavit at p 92: Award at [13]; Affidavit of [PYP] filed on U's behalf on 23 September 2024 ("U's Affidavit") at para 11.

3 U's Affidavit at para 12.

4 T's 1st Affidavit at pp 234 and 777.

5 T's 1st Affidavit at pp 96–98: Award at [21]–[26].

6 U's Affidavit at para 13.

by the Tribunal, "including recovery of the sum … paid to [T] by [U]" for the crack repair works.[7]

5 In the main, T's pleaded defence was that it had satisfactorily performed the crack repair works, and as such, had not breached the Term Contracts.[8] T also pleaded that U had acquiesced to the manner in which the crack repair works were carried out; had agreed to a variation of the Term Contracts by accepting works not completed according to the SOR specifications; and was estopped from requiring or had waived any requirement for compliance with the SOR specifications.[9]

6 The list of issues to be determined in the Arbitration, as settled by the Tribunal, thus included the following issues:[10]

> (a) [T's] liability for breach of contract:
>
> (i) **Breach of Contract:** Whether the alleged crack repair works which [T] claimed and has been paid for were completed and/or carried out in accordance with the Term Contracts.
>
> (ii) **Defences:**
>
> (A) **Acquiescence:** Whether there was any acquiescence on [U's] part to [T's] non-compliance (if any) with the specifications set out in the [SORs].
>
> (B) **Waiver:** Whether [U] has waived any requirement for the alleged crack repair works to comply with and/or be completed in accordance with the specifications set out in the [SORs].

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7 T's 1st Affidavit at pp 108–109: Award at [92]–[93].

8 T's 1st Affidavit at pp 1173–1233: Statement of Defence (Amendment No 2) dated 13 May 2022 ("Defence") at sections 1–11.

9 T's 1st Affidavit at pp 1234–1237: Defence at section 12.

10 T's 1st Affidavit at pp 109–110: Award at [94].

> (C) **Variation:** Whether [U] agreed to a variation of the Term Contracts by allegedly accepting works which did not strictly comply with or are not completed in accordance with the specifications set out in [the SORs].
>
> (D) **Estoppel:** Whether [U] is estopped from requiring the alleged crack repair works to comply with and/or be completed in accordance with the specifications set out in [the SORs].
>
> (b) If [T] is found liable for breach of contract, is [U] entitled to … the return of all payments made to [T] for the alleged crack repair works under the Term Contracts.
>
> …
>
> [emphasis in original]

7 U called an expert witness in the field of concrete repair ("Mr K") to opine on, among other things, whether the crack repair works had been carried out as claimed by T and in accordance with the crack repair method specified in the SORs. In Mr K's report dated 17 June 2022 (the "K Main Report"), he explained the investigative steps that were taken:[11]

> 9. At the visit to each of the 256 [buildings], various cracks and allegedly repaired areas marked up in [T's] photographs and drawings in [T's claim forms ("Claim Forms A")] were checked; scraped and cored to identify the following:-
>
> 9.1 Any **surface preparation** prior to the repair works as per the SOR [s]pecifications.
>
> 9.2 Any **V-shaped groove cut** done prior to the repair with non-shrink cementitious mortar, as per the SOR [s]pecifications.
>
> 9.3 Any **residue of non-shrink cementitious grouting, non-shrink cementitious mortar, epoxy resin or polyurethane** injection material inside the cracks as per the SOR [s]pecifications

[11] T's 1st Affidavit at pp 2258: K Main Report at paras 9–10.

> by taking core samples of 20mm over the crack lines (if observed).
>
> 10. The steps taken at each [building] are as follows:-
>
> 10.1 Look at the drawings and photographs in [T's] Claim Form A, to identify the areas to be checked (i.e. areas where [T] claimed to have completed crack repair works);
>
> 10.2 Partial removal of some of the unknown cementitious material;
>
> 10.3 Check for surface preparation;
>
> 10.4 Check for cracks;
>
> 10.5 Obtain sample coring based on the areas as identified at [10.1];
>
> 10.6 Where core samples are intact, check inside cored holes using the crack microscope for residue of non-shrink cementitious grouting, non-shrink cementitious mortar, epoxy resin or polyurethane resin;
>
> 10.7 Check for V-shaped groove cut with infill in order to ascertain if non-shrink cementitious mortar was applied;
>
> 10.8 For reinforced concrete, additional check for presence of steel rebars will be conducted using the rebar locator prior to coring (to prevent damage caused to the steel bars);
>
> 10.9 Cored sample are labelled for records and available for inspection;
>
> 10.10 Reinstate core holes.
>
> [emphasis in original]

8 Mr K concluded that:

(a) In all the buildings inspected, there was no surface preparation underneath the purported repaired strip. Without surface preparation, regardless of the crack repair method, there would be insufficient surface

adhesion of any repair material applied. Accordingly, any alleged crack repair works would be of no value or benefit to U.[12]

(b) In about 80% of the buildings, when the repaired strips were scraped off, no cracks were observed. Thus, any purported repairs were unnecessary.[13]

(c) There were no signs of injection holes, surface ports or V-shaped groove cuts, which would normally be expected with the repair methods claimed to have been employed.[14]

(d) Many of the core samples fell apart at the crack line. If the crack was repaired, the non-shrink cementitious grout, epoxy resin or polyurethane resin would have held the structure together. However, no such materials were detected in any of the core samples.[15]

9 At the evidential hearing, T's counsel asked Mr K to point out on photographs annexed to certain of T's Claim Forms A the locations from which core samples had been taken. Mr K explained that he would not be able to tell just by looking at those photographs; he would have to refer to "subsequent photographs and the diary" to draw the "link", and further, the core sample locations could be identified by a physical inspection at the building.[16] Mr K

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12 T's 1st Affidavit at p 2259: K Main Report at para 11.1.

13 T's 1st Affidavit at p 2259: K Main Report at para 11.2.

14 T's 1st Affidavit at pp 2259–2260: K Main Report at paras 11.3–11.4.

15 T's 1st Affidavit at p 2260: K Main Report at para 11.5.

16 T's 1st Affidavit at pp 4454 and 4456: Transcript of the Arbitration hearing on 18 July 2022 ("Day 5 Transcript") at pp 12:4–17 and 14:18–25; 2nd Affidavit of [YKN] filed on T's behalf on 23 August 2024 at pp 1291 and 2150: 1st Witness Statement of [SBN] dated 11 February 2022 at pp 1287 and 2146; T's 1st Affidavit at para 119.

added that "the core [was] the final bit of proof" among the "many steps" in his investigation.[17] Mr K also admitted that "in at least five [buildings] we [*ie*, Mr K's team] took cores in the wrong place".[18]

10 Following the evidential hearing, the parties exchanged written closing submissions on 17 February 2023 (the "Closing Submissions") and reply closing submissions on 28 April 2023 (the "Reply Submissions").[19]

11 On the same day that the parties exchanged their Reply Submissions, *ie*, on 28 April 2023, the Appellate Division of the High Court issued the decision of *Liu Shu Ming and another v Koh Chew Chee and another matter* [2023] 1 SLR 1477 ("*Liu*"), stating at [217]:

> … a plaintiff does not have an unfettered option to claim reliance damages and neither is there a wide discretion for a court to grant reliance damages. Such a relief is usually available if it is impossible, or at least extremely difficult, for a plaintiff to prove his expectation damages in the usual way or if his contract was not for profit. …

12 In T's Reply Submissions, T acknowledged that U had elected in U's written opening statement and Closing Submissions to recover reliance (as opposed to expectation) loss in the form of "wasted expenditure" on U's payments to T for the crack repair works.[20] However, T raised a new point, relying on *Liu*, that U was not entitled to make such an election. T argued that U could not claim reliance damages as U had "never once pleaded, or led evidence to show" that U "suffered any loss of profits due to the alleged

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17 T's 1st Affidavit at p 4457: Day 5 Transcript at p 15:6–10.

18 T's 1st Affidavit at p 4467: Day 5 Transcript at p 25:16–20.

19 T's 1st Affidavit at pp 105–106: Award at [77]–[78].

20 T's 1st Affidavit at pp 6592, 6594 and 6713: T's Reply Submissions at paras 131, 139 and 549.

breaches by [T]" or that it was impossible, or at least extremely difficult, for U to prove expectation damages.[21] T further asserted that "neither the 2012 Term Contract nor the 2014 Term Contract [were] not for profit contracts".[22]

13 On 16 May 2023, U sought leave from the Tribunal to respond to T's reliance on *Liu*.[23] T objected to this request.[24] On 18 May 2023, the Tribunal granted U leave to file reply submissions addressing *Liu*.[25]

14 On 6 June 2023, U filed its submissions in reply to T's Reply Submissions ("U's Supplementary Submissions"). U highlighted that, based on *Liu* at [217], reliance damages were available: (a) where it was impossible, or at least extremely difficult, for a plaintiff to prove his expectation damages in the usual way; or (b) if the contract was not for profit (the "*Liu* Requirements").[26] U submitted that its case fell within both categories.[27] First, the Term Contracts were not entered into for U's profit and did not result in any profit made by U: U entered into the Term Contracts for, *inter alia*, T to carry out *ad hoc* and specialised crack repair works where needed; the Term Contracts were akin to services agreements and there was no "profit" to be earned by U.[28] Second, it was impossible, or at least extremely difficult, for U to prove expectation damages in the usual way: T did not provide crack repair works in

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21 T's 1st Affidavit at pp 6591–6594: T's Reply Submissions at paras 130–137.

22 T's 1st Affidavit at p 6594: T's Reply Submissions at para 138.

23 U's Affidavit at p 190.

24 U's Affidavit at pp 208–209.

25 U's Affidavit at pp 214–216.

26 T's 1st Affidavit at pp 6881–6882: U's Supplementary Submissions at para 23.

27 T's 1st Affidavit at p 6882: U's Supplementary Submissions at para 24.

28 T's 1st Affidavit at pp 6882 and 6884–6885: U's Supplementary Submissions at paras 25 and 30–36.

accordance with the Term Contracts and U was unable to say what "profits" would have been earned if T had done so.[29]

15 On 12 June 2023, T sought leave from the Tribunal to respond to U's Supplementary Submissions to address, *inter alia*, the "novel point[s]" raised by U that the Term Contracts were "not for profit" contracts and that it was very difficult, if not impossible, for U to prove expectation losses, "which [were] never part of [U's] case in this Arbitration (which [T] was not put on notice at all material times) [*sic*]".[30] U deferred to the Tribunal on T's request but pointed out that it was "self-explanatory" why U was not able to consider the principles raised in *Liu* prior to the decision being issued, and relied on in T's Reply Submissions, on 28 April 2023.[31] On 13 June 2023, the Tribunal granted T leave to respond to U's Supplementary Submissions.[32]

16 On 3 July 2023, T filed its submissions in reply to U's Supplementary Submissions ("T's Supplementary Submissions"). T argued that there was no pleading by or evidence from U that the Term Contracts were "not for profit" or that expectation damages were impossible or difficult to prove.[33]

The Award

17 On 30 May 2024, the Tribunal issued the Award.

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29 T's 1st Affidavit at pp 6888 and 6889: U's Supplementary Submissions at paras 42 and 44.

30 U's Affidavit at pp 242–244.

31 U's Affidavit at p 246.

32 U's Affidavit at p 259.

33 T's 1st Affidavit at pp 6927 and 6939: T's Supplementary Submissions at paras 139–144 and 187–192.

18 The Tribunal found that T had breached the Term Contracts.[34] In respect of Mr K's evidence, the Tribunal found, *inter alia*, that the K Main Report was comprehensive. Mr K's tests involved a visual inspection of the buildings for signs that the alleged crack repair works had in fact been carried out. The visual inspection was "further reinforced by core sampling". The conclusions from the tests were reasonable and logical.[35]

19 In respect of T's defences of acquiescence, waiver, estoppel and variation ("T's Defences"), the Tribunal found that they were "not dealt with in [T's] closing submissions" and the Tribunal "need not deal with them". However, the Tribunal would have dismissed T's Defences in any event because there was "no evidence" to consider if they were made out.[36]

20 The Tribunal reasoned that U was entitled to reliance damages because:

(a) This was an appropriate case to allow U to proceed with its claim for damages to be assessed on the reliance measure even though the *Liu* Requirements had not been pleaded in U's Statement of Claim. *Liu* was "a watershed decision". Prior to *Liu*, U was entitled to run its case on the basis that it had an unfettered right to elect between seeking damages on either an expectation or a reliance basis. It was wholly fortuitous that *Liu* was issued midway between the hearing of the Arbitration and the issuance of the Award. It was only fair that U be allowed to put into issue whether it had satisfied the requirements for claiming damages on a reliance basis under "the newly formulated [*Liu*] test". U had not sought to introduce any new evidence in respect of its choice to seek

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34 T's 1st Affidavit at pp 110–148: Award at [95]–[296].

35 T's 1st Affidavit at pp 123–125: Award at [152]–[160].

36 T's 1st Affidavit at pp 147–148: Award at [291]–[295].

damages on a reliance basis. T had full opportunity to respond to U's case in this regard.[37]

(b) It would have been extremely difficult for U to prove expectation damages in this case. The usual measure of damages where works were not carried out was the cost of repair. However, it would be an overly onerous task for U to obtain quotes from third-party contractors for each of the 252 buildings, which would require different assessments.[38]

(c) The Term Contracts were "not for profit" contracts. The Tribunal did not accept T's argument that the Term Contracts were entered into to reduce U's maintenance costs, which would "consequently increase the profit earned by [U], as reduced maintenance costs would result in lower expenditure incurred". The Tribunal found that U entered into the Term Contracts as U required cracks in its buildings to be repaired. The Term Contracts did not result in U deriving profit from them directly.[39]

21 The Tribunal found that only six buildings had cracks that required repair by T, and as such, the Tribunal awarded U damages in the sum of moneys U had paid to T for the other 246 instances of alleged crack repair works.[40]

The parties' cases

T's case

22 T alleged three instances of breach of natural justice by the Tribunal.

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37 T's 1st Affidavit at pp 149–150: Award at [309]–[316].

38 T's 1st Affidavit at p 152: Award at [327]–[330].

39 T's 1st Affidavit at pp 153–154: Award at [340]–[346].

40 T's 1st Affidavit at pp 156–157 and 159: Award at [361]–[366] and [381].

23 First, T submitted that the Tribunal disregarded T's Defences. T alleged that T's Defences and evidence in support thereof were raised in T's Closing Submissions and T's Reply Submissions. The Tribunal mistakenly assumed that T's Defences were withdrawn, and as such, "did not bother looking for the evidence or submissions and assumed there were none".[41]

24 Second, T submitted that the issues of whether the Term Contracts were "not for profit" and/or whether it would have been extremely difficult for U to prove expectation damages were "not … in play as at all material times [they were] not pleaded". Further, the Tribunal made factual findings that (a) the Term Contracts were "not for profit" because U did not derive any "direct profit" from them and (b) it was overly onerous for U to obtain quotes for repairs from third-party contractors for 252 buildings, without giving T the opportunity to address the substance of those findings.[42]

25 Third, T submitted that the Tribunal failed to apply its mind to T's defence that, because (a) Mr K admitted that core samples were taken in the wrong place in at least five buildings and (b) Mr K was unable to point out where core samples were taken in photographs shown to him at the evidentiary hearing, Mr K had basically admitted that he was unable to correctly identify the locations within the buildings for checking whether and/or how crack repair works were carried out by T, and U thus could not prove that the crack repair works were not done in all 252 buildings. The Tribunal also allegedly "created" a "rebuttal case" that "[T] never knew it had to meet": T "had to rebut a concession that [Mr K] had inspected at least 5 [buildings] wrongly, by

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41 T's written submissions in OA 844 dated 24 October 2024 ("TWS") at paras 9–34.

42 TWS at paras 35–89.

identifying *the 5 or more [buildings]* that were wrongly inspected, failing which all [buildings] are deemed properly inspected" [emphasis in original].[43]

U's case

26 U submitted that OA 844 was a backdoor appeal against the Award.[44]

27 In respect of the first ground, U submitted that T did not develop or make any substantive submissions on T's Defences in T's written or oral opening statements or Closing Submissions. T only made a perfunctory attempt to revive its "alternative position" on T's Defences in T's Reply Submissions, *after* U pointed out that T had abandoned them. Even so, T's Reply Submissions were bereft of any explanation on how each legal element of the various doctrines underpinning T's Defences was established. Accordingly, T's Defences were no longer essential issues that were adequately put forward by T, with the consequence that the Tribunal did not have to deal with them. In any event, the Tribunal went on to consider T's Defences but rejected them for lack of evidence.[45]

28 In respect of the second ground, U submitted that T had put into play the issues of whether the Term Contracts were "not for profit" and/or whether it would have been extremely difficult for U to prove expectation damages, by way of T's new arguments based on the *Liu* Requirements in T's Reply Submissions. T therefore had reasonable notice that it had to meet the case on the *Liu* Requirements notwithstanding that U did not plead them. The Tribunal also gave T the opportunity to respond to U's Supplementary Submissions. T

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43 TWS at paras 90–139.

44 U's written submissions in OA 844 dated 24 October 2024 ("UWS") at para 3.

45 UWS at paras 20–39.

did not ask to adduce new evidence or recall witnesses; instead, T made a deliberate strategic choice to argue that there was no evidence proving that U met either of the *Liu* Requirements. T's tactical decision did not work out as the Tribunal rejected T's argument; this, however, was not a breach of the fair hearing rule. Further, even if (which was denied), there was a lack of evidential basis for the Tribunal's findings of fact, this was not a ground for setting aside the Award. Further yet, as the *Liu* Requirements were disjunctive, as long as the Tribunal's findings on either requirement were untainted by a breach of natural justice, the Tribunal could still reach the same conclusion that U was entitled to claim reliance damages and T would fail to establish actual or real prejudice.[46]

29 In respect of the third ground, U submitted that the Tribunal had considered and dismissed T's arguments that Mr K did not identify the correct locations of the alleged crack repair works. Among other things, T had mischaracterised Mr K's evidence as constituting an admission that he could not demonstrate that he inspected the correct locations, whereas his evidence was that he could not identify the locations based *solely* on certain photographs. Given the Tribunal's acceptance of the K Main Report as sufficient proof that T breached the Term Contracts, the Tribunal had implicitly dismissed this allegation of Mr K's admission; natural justice did not require an arbitral tribunal to give a response to all submissions. The Tribunal had also considered T's other argument that Mr K admitted that he took wrong core samples for at least five buildings. The Tribunal found that, even without the core sampling, the other findings in the K Main Report were sufficient to make out a *prima facie* case that T breached the Term Contracts. The evidential burden thus

46 UWS at paras 40–66.

shifted to T to rebut Mr K's evidence but T failed to do so. T's real grievance was that the Tribunal disagreed with T; that was not a breach of natural justice.[47]

Issues for determination

30 An applicant seeking to set aside an arbitral award on the ground of breach of natural justice must establish (a) the rule of natural justice which was breached; (b) how it was breached; (c) how the breach was connected with the making of the arbitral award; and (d) how the breach prejudiced the applicant's rights: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29].

31 The issues for determination in OA 844 were whether T satisfied the above test in respect of its three alleged grounds of breach of natural justice, *viz*, in relation to T's Defences ("Ground 1"); U's claim for reliance damages ("Ground 2"); and Mr K's expert evidence ("Ground 3").

Decision on Ground 1

32 The Tribunal set out its findings on T's Defences in the Award at [291]–[295]:

> 291. [T] had initially raised the defences of acquiescence, waiver, estoppel and variation in its Defence. These defences, however, were not dealt with in its closing submissions. In the circumstances, I need not deal with them.
>
> 292. For the record, however, I would state that in any event, even if [T] had proceeded with these defences, I would have likewise dismissed them.
>
> 293. The common thread between these defences is [T's] allegation that deviation from the [SORs] must have

47 UWS at paras 67–92.

> been carried out on [U's] instructions and with its full knowledge. To support this, [T] submitted that:
>
> (a) The works were carried out openly and the equipment were visibly present;
>
> (b) [U's] technician was there to supervise the works;
>
> (c) [U] was entitled to inspect the works at any time; and
>
> (d) It would be obvious if the visible defects are not repaired at all.
>
> 294. It is [T's] case that the deviation from the [SORs] must have happened as a result of [U's] instructions, and with its full knowledge. This remains a bare assertion which [T] did not adduce a shred of evidence to substantiate.
>
> 295. Consequently, I am left with no evidence before me to consider if the defences were … made out.

33 T's case was that the Tribunal breached the fair hearing rule by disregarding T's Defences and T's submissions on the evidence supporting T's Defences, owing to a mistaken assumption that T's Defences were "withdrawn", "dropped" or "abandoned" by T.[48] I disagreed with T's argument on several fronts.

34 First, in my view, the Tribunal did *not* treat T's Defences as having been withdrawn, dropped or abandoned. The starting point was the Award at [291], in which the Tribunal stated that T's Defences "were not dealt with in its closing submissions" and that "[i]n the circumstances, [the Tribunal] need not deal with them". Despite U referring in U's Reply Submissions to "[T's] abandonment of [T's Defences]",[49] the Tribunal did *not* adopt the terminology of "abandonment" (or refer to "withdrawal") of T's Defences. The Tribunal merely stated that T's Defences were "not dealt with in [T's] closing submissions". Having perused

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48 TWS at paras 14, 23, 28 and 29.

49 T's 1st Affidavit at p 6466: U's Reply Submissions at paras 285 and 287.

the record of the Arbitration proceedings, I accepted U's submission in OA 844 that T's Closing Submissions and Reply Submissions were bereft of any explanation of how the legal elements of the various doctrines underpinning T's Defences were established based on the evidence.[50] Further, the evidence cited by T in its Closing Submissions and Reply Submissions was raised in the context of T's primary argument that it had not breached the Term Contracts to begin with, and not in the context of and/or in support of T's Defences.[51] For example, while T had alleged that any signs of poor workmanship on its part would have been "picked up" by U's inspections[52] and there was "no complaint" from U for years,[53] this allegation was made to advance T's "logic" that the absence of complaints meant that the crack repair works were not defective.[54] In these circumstances, a fair reading of the Award at [291] pointed to the Tribunal expressing the view that, because T had not meaningfully dealt with T's Defences in its Closing Submissions and Reply Submissions, T's Defences could be dismissed without the Tribunal having to substantively address them.

35 The Tribunal's statement in the Award at [292] that "in any event, even if [T] had proceeded with these defences, I would likewise have dismissed them" did not detract from this view. The reference to "if [T] had proceeded with [T's Defences]" should be understood, in harmony with the Award at [291], to mean *if T had dealt with T's Defences*; and not in contradistinction to T having abandoned or withdrawn T's Defences. Reading the Award this way

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50 UWS at paras 23 and 25–28.

51 UWS at para 30; T's 1st Affidavit at pp 115–116: Award at [117]–[118].

52 T's 1st Affidavit at p 5147: T's Closing Submissions at paras 51–55; T's 1st Affidavit at p 43: para 50 Table, S/No 43, third column.

53 T's 1st Affidavit at pp 5136–5138: T's Closing Submissions at paras 30–38; T's 1st Affidavit at p 42: para 50 Table, S/No 42, third column.

54 See, *eg*, T's 1st Affidavit at p 5136: T's Closing Submissions at paras 30–32 and 34.

accorded with the legal principle that an arbitral award should be read generously, without "carry[ing] out a hypercritical or excessively syntactical analysis of what the arbitrator has written", and "expecting, as is usually the case, that there will be no substantial fault that can be found with it": *BLC and others v BLB and another* [2014] 4 SLR 79 at [86]; see also *Soh Beng Tee* at [65(f)].

36 T's reliance on *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") was accordingly misplaced.[55] The facts in *Front Row* were unique in that there was no real dispute that the arbitrator had failed to consider certain representations pleaded by a party (in its misrepresentation claim) because of his mistaken belief that they had been abandoned: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [45]. In contrast, in the present case, U's position was not that the Tribunal considered T's Defences to have been abandoned or withdrawn, but rather, that the Tribunal found that "because [T] did not pursue [T's] Defences in its closing submissions, the Tribunal would reject such arguments" which "remained unsubstantiated".[56] I reached a similar view on the nature of the Tribunal's finding in the Award at [291].

37 Second, the Tribunal's decision in the Award at [291], thus properly understood, did not amount to the Tribunal "disregarding" T's Defences or to a breach of the fair hearing rule. Where a party fails to substantively address in its closing submissions how the legal elements of its pleaded defence (or claim, as the case may be) are established by the evidence, it is reasonable for an arbitral tribunal to form the view that the defence (or claim) has not been

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55 TWS at paras 17–20.

56 UWS at para 29.

meaningfully dealt with in that party's closing submissions, and that consequently, it is unnecessary for the arbitral tribunal to substantively address the defence (or claim) before dismissing it. Indeed, this is the logical consequence of such a failure since it is not for an arbitral tribunal to divine a party's case on that party's behalf, or to set up strawman arguments which that party could have made for the sake of rejecting them.

38 Third, the Tribunal *did* go on to succinctly explain why, in any event, T's Defences warranted dismissal on an evidential review. The Tribunal reasoned in the Award at [293] that the "common thread" between T's Defences was T's allegation that deviation from the SORs must have been carried out on U's instructions and with U's full knowledge, citing T's main submissions in this regard; held in the Award at [294] that T's allegation to this effect was "a bare assertion which [T] did not adduce a shred of evidence to substantiate"; and concluded in the Award at [295] that the Tribunal was "left with no evidence … to consider if the defences were … made out". On a fair reading of the Award at [293]–[295], the Tribunal was expressing the view that T's Defences lacked evidential support.

39 T argued that the Tribunal's use of the phrases "did not adduce a shred of evidence" and "no evidence" (see the Award at [294] and [295]) "point[ed] to the *existence* of evidence, not *quality* of the evidence" [emphasis in original], citing *AYW v AYX* [2016] 1 SLR 1183 ("*AYW*") at [109]–[110] and *DHZ v DHY and another matter* [2024] SGHC 236 ("*DHZ*") at [43]; this supposedly showed that the Tribunal "assum[ed] [T] withdrew the defences" and "did not bother looking for the evidence or submissions and assumed there were none".[57] I did not accept this argument.

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[57] TWS at paras 31–32.

(a) One, I did not think that *AYW* and *DHZ* stood for the proposition claimed by T. In *AYW*, in the context of an application to strike out the plaintiff's claim, (i) the defendant's counsel submitted that there was not a single shred of evidence to support a causal link between an alleged act and the claimed damage (at [109]) and (ii) the court understood this submission to mean that there was a complete absence of evidence supporting the claim (at [110]). In *DHZ*, the court noted that (i) the claimant had submitted in the underlying arbitration that there was not one shred of documentary evidence in support of one of the respondent's counterclaims (at [43]) and (ii) the arbitrator had dismissed that counterclaim on the ground that there was insufficient evidence to support it (at [45]). Neither case pronounced on the interpretation of the phrase "not a shred of evidence" (or "no evidence") as a term of art. The furthest that could be said was that both cases referred to the court or the arbitral tribunal's *understanding of a party's use of that phrase* in the *specific circumstances of those cases*. This did not assist T in the present case concerning how the Award, issued in a wholly different context, should be understood.

(b) Two, I found that T's argument was verily a quibble over semantics. The case of *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 ("*Fisher*") was instructive. There, the plaintiff submitted that the arbitrator did not consider the evidence of the plaintiff's expert witness on the structural integrity of the swimming pool as seen from, *inter alia*, the statement in the arbitral award that "[t]here were no evidence produced during the hearing to support that the structural integrity of the swimming pool was a problem [*sic*]" [emphasis in original omitted] (at [46]–[47]). The court declined to draw this inference from the "less than tight language" used in the arbitral

> award, holding that it seemed more likely and fairer to the arbitrator to conclude that he had considered the evidence but had rejected it on the basis that it was not satisfactory (at [48]). T's counsel argued that the arbitrator in *Fisher* was a professional architect (at [52]), in contrast to the Tribunal in the present case which comprised a senior counsel from whom "tight language" was expected. I placed no weight on this purported distinction. The simple point was that the Tribunal should not be taken, by the expressions used in the Award at [294]–[295], to have disregarded or failed to consider T's evidence in the Arbitration. The likelier and fairer understanding of the Award at [294]–[295] was that the Tribunal thought that the evidence adduced by T was not germane and/or was insufficient to establish T's Defences. T might disagree with the Tribunal's view, but that was not a ground for setting aside the Award.

40 I therefore found that Ground 1 did not engage any breach of natural justice and provided no basis for setting aside the Award.

Decision on Ground 2

41 T's case was that the Tribunal breached the fair hearing rule by denying T a reasonable opportunity to present its case on the following two matters decided by the Tribunal: (a) that the Term Contracts were "not for profit"; and (b) that it was overly onerous for U to obtain quotes for repairs from third-party contractors for 252 buildings.[58] There were three main strands of argument in T's case on Ground 2, which I address in turn.

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[58] TWS at paras 2.2 and 35–89.

42 T's first main argument was that it had no opportunity to address whether U met the *Liu* Requirements for claiming reliance damages because U did not plead its case on the requirements. I did not accept this argument.

43 From the outset of the Arbitration, U pleaded in its Statement of Claim a claim for damages that included the recovery of all payments made to T for the crack repair works (see [4] above).[59] In U's written and oral opening statements and Closing Submissions, U elaborated that it was electing for damages to be assessed on the reliance measure and sought the recovery of these payments as reliance damages.[60] At that time, there was no indication that T did not understand U's case or disagreed that U was entitled to elect for damages to be assessed on the reliance instead of expectation measure.[61] On 28 April 2023, *Liu* was issued and the parties exchanged their Reply Submissions. In T's Reply Submissions, T raised a new point to the effect that U could not claim reliance damages because U had not pleaded or proven that the *Liu* Requirements were satisfied (see [12] above). In U's Supplementary Submissions, U submitted that the Term Contracts were "not for profit" given their nature, and that it was impossible, or at least extremely difficult, for U to prove expectation damages in the usual way (see [14] above). It was abundantly clear that U rested its case on the *Liu* Requirements based on these submissions and was prepared not to adduce further evidence on these matters. In response, T countered in T's Supplementary Submissions that there was no pleading by or evidence from U that the Term Contracts were "not for profit" or that expectation damages were impossible or difficult to prove (see [16] above). In my judgment, three effects followed from the foregoing procedural history of the Arbitration proceedings.

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59 U's Affidavit at para 54.

60 U's Affidavit at paras 57–58 and 60.

61 U's Affidavit at paras 56 and 59.

44 One, by dint of the position T took in its Reply Submissions, T put the following issues into play: whether U was entitled to claim reliance damages, which in turn depended on whether at least one of the *Liu* Requirements was met.

45 Two, these issues fell within the scope of the parties' submission to arbitration without any need that they be specifically pleaded.

(a) The Tribunal stated in the Award at [314] that *Liu* was "a watershed decision". In other words, the *Liu* Requirements represented a change in the law arising in the course of the Arbitration. This change affected U's right to *the existing pleaded remedy* of recovery of payments for the crack repair works; accordingly, the issues arising from whether the *Liu* Requirements were met fell within the scope of the parties' submission to arbitration, and further, being issues known to all the parties (after being raised in T's Reply Submissions) were part of the dispute in the Arbitration and did not need to be specifically pleaded: see *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [47] and [48].

(b) After T introduced the *Liu* Requirements and argued that they were not met, the Tribunal allowed U to address T's arguments and allowed T to further respond to U. The parties made full use of their opportunity to respond to each other's positions. In these circumstances, it was unduly formalistic for T to insist that U had to plead U's case on the *Liu* Requirements. As the Court of Appeal explained in *CKH v CKG and another matter* [2022] 2 SLR 1 ("*CKH*"), matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded; whether a matter falls or has

> become within the scope of the agreed reference depends ultimately upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the arbitral tribunal (at [16]). In my view, the present case was one where the conduct of the parties had "widen[ed] the scope of the issues falling for determination in a way which deprive[d] a pleading objection of any force" (see *CKH* at [17], citing *CBX and another v CBZ and others* [2022] 1 SLR 47 at [48]).

46 Three, the position taken by U on the issues was clearly stated in its Supplementary Submissions and did not rely on advancing any further evidence. T knew the case on the *Liu* Requirements, advanced by U, which T had to meet.

47 Cumulatively, these three effects meant T could not reasonably say that, by reason of U not pleading its case on the *Liu* Requirements, T had no notice of U's case or did not have a reasonable opportunity to respond to U's case.

48 T's second main argument was that it had no opportunity to address the Tribunal's finding of fact that the Term Contracts were "not for profit". I did not accept this argument.

49 The Tribunal's reasoning in the Award at [339]–[340] and [342]–[346] was relevant:

> 339. [T], however, disagrees with [U] that the Term Contracts were "*not for profit*".
>
> 340. In this regard, [T] argued that the Term Contracts were entered into with a view to reduce maintenance costs that would be incurred by [U], and that this would consequently increase the profit earned by [U], as reduced maintenance costs would result in lower expenditure incurred.

> …
>
> 342. I agree with [U] that the Term Contracts were "*not for profit*".
>
> 343. I find that the Term Contracts clearly did not result in [U] deriving any profit from them directly. [U] had entered into these contracts as it had required the cracks in the respective [buildings] to be repaired, "*for various reasons including those related to appearance, performance and maintenance costs*".
>
> 344. It follows that I do not accept [T's] submissions that the Term Contracts were contracts for profit, even though it would reduce maintenance costs that would be incurred by [U], which in turn would have resulted in [U] earning increased profits.
>
> 345. As alluded to earlier, what I should be concerned with when assessing whether the Term Contracts were "*not for profit*", is whether [U] had derived any direct profit from them.
>
> 346. I am satisfied that [U] has established that no such direct profits were made. In the circumstances, I find that the Term Contracts are "*not for profit*" contracts.
>
> [emphasis in original; footnote in original omitted]

50 Jumping on the reference to "direct" profit in the Award, T alleged a lack of notice that it had to address the Tribunal on "direct profits" versus "indirect profits".[62] This objection was without merit. I accepted U's counsel's submission that the Tribunal was, in the Award at [343]–[346], expressing rejection of T's argument, recapitulated in the Award at [340], that the Term Contracts would allegedly result in reduced maintenance costs that would in turn allegedly result in increased future profits for U. The reference to "direct" profit in the Award at [343] and [345]–[346] was simply a way of distinguishing the relevant inquiry (*viz*, whether the Term Contracts were "not for profit") from the extended view that T had purported to take of when a contract would be

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62 TWS at paras 74–76.

considered to have been entered into for profit. Contrary to T's contrived objection that it had no opportunity to address the Tribunal on "direct profits" versus "indirect profits", the Tribunal was in fact dealing with (and rejecting) an argument raised by T. The Tribunal was entitled to reject T's argument, and this did not entail a breach of the fair hearing rule.

51 T also submitted that the Tribunal could not reach the finding that the Term Contracts were "not for profit" because U's witnesses had not testified to this fact and T did not have the opportunity to adduce further evidence on the point.[63] I disagreed with this submission.

52 U essentially took the position in U's Supplementary Submissions that the fact of the Term Contracts being "not for profit" could be inferred from the purpose of the Term Contracts being for T to carry out *ad hoc* and specialised crack repair works where needed.[64] U was entitled to rest its case on this assertion and run the risk that the Tribunal would find that U had not done enough (evidentially or argumentatively) to establish that the Term Contracts were "not for profit". In response, T took the tactical position of arguing that there was no pleading by or evidence from U that the Term Contracts were "not for profit" (see [16] above). T chose not to adduce any further evidence on this point, request for witnesses to be recalled, or ask for any earlier evidence to be reconsidered and re-assessed in light of *Liu*.[65] The Tribunal preferred U's position over T's, finding in the Award at [343] that the Term Contracts were "not for profit" because U had entered into them as U had required the cracks

63 TWS at paras 87–88.

64 T's 1st Affidavit at p 6884: U's Supplementary Submissions at para 30.

65 U's Affidavit at para 65(b).

in U's buildings to be repaired. I make two points on the foregoing positions taken by the parties and the conclusion reached by the Tribunal.

53 One, in my view, the Tribunal's finding that the Term Contracts were "not for profit" was an inference of fact that the Tribunal was entitled to draw from the evident nature and purpose of the Term Contracts. If I were wrong on this count in that the Tribunal reached this finding on no or insufficient evidential basis, this was nevertheless not a ground for setting aside the Award. The "no evidence rule" (*ie*, that an arbitral award which contains findings of fact made with no evidential basis at all is liable to be set aside for breach of natural justice) has not been adopted as part of Singapore law as to do so would run contrary to the policy of minimal curial intervention in arbitral proceedings: *CEF and another v CEH* [2022] 2 SLR 918 ("*CEF*") at [101]–[102].

54 Two, T could not now allege that it did not have the opportunity to adduce further evidence on whether the Term Contracts were "not for profit", when it had made a deliberate tactical decision to rest its case on objections of lack of pleading and proof by U. T's reliance on *Phoenixfin Pte Ltd and others v Convexity Ltd* [2022] 2 SLR 23 ("*Phoenixfin*") in this regard was misplaced.[66] In that case, the arbitral tribunal unilaterally re-introduced an issue (the "Penalty Issue") over the respondent's objections, after earlier rejecting an application by the first appellant to amend its pleadings to include the Penalty Issue and after the evidentiary hearing had concluded. In those circumstances, the Court of Appeal held that the arbitral tribunal was not entitled to bring up the Penalty Issue and the respondent did not have a fair opportunity to address it (at [53]). The Court of Appeal emphasised that since the respondent was not amenable to the inclusion of the Penalty Issue, the burden was on the appellants to properly

66 TWS at paras 82–86.

bring it into the arbitration and to adduce evidence to establish their case; if the issue had been properly pleaded, it would then be the respondent's prerogative to adduce whatever evidence it deemed relevant to meet the pleaded case (at [62]). The arbitral tribunal could not make a finding on the Penalty Issue which was a question of mixed fact and law, when the issue was unpleaded and no evidence had been led by the appellants on it; the respondent did not have an opportunity to adequately respond to the appellants' case, since the case had never been established (at [64]). The facts of *Phoenixfin* were entirely distinguishable from the present case, where it was T which put into play the issues of whether the *Liu* Requirements were met. I have explained at [43] and [45] above why these issues were properly brought into the Arbitration without any need for U to plead them. That being so, and once U's factual position on these issues was made known in U's Supplementary Submissions, it was for T to adduce whatever evidence it deemed relevant to meet U's case. T had a reasonable opportunity to do so but chose not to.

55 T's third main argument was that it had no opportunity to address the Tribunal's finding of fact that it was overly onerous for U to obtain quotes for repairs from third-party contractors for 252 buildings.

56 U submitted in the Arbitration that it was impossible, or at least extremely difficult, for U to prove expectation damages in the usual way because (a) the contractual subject matter was "non-existent" in that it concerned crack repair works and materials which T was obliged to provide in accordance with the Terms Contracts but did not;[67] (b) consequently, U was unable to say what "profits" would have been earned if T had performed the crack repair works in accordance with the Term Contracts (and in fact took the

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67 T's 1st Affidavit at p 6888: U's Supplementary Submissions at para 42.

position that the Term Contracts were "not for profit");[68] and (c) U could not prove the market value of the contractual subject matter and deduct the contract price therefrom to prove damages.[69]

57 T countered that (a) U had not pleaded or proven that it was very difficult, if not impossible, for U to prove expectation damages;[70] (b) the usual measure of damages for defects was the cost of repair, and it was not the case that U could not "find replacement contractors to quote for the repairs" or "prove how much it will cost for the replacement contractors to repair the cracks properly";[71] and (c) U's argument on the non-existence of the contractual subject matter was misconceived and did not answer why U could not "go out to the market and find out how much it will cost [U] to carry out the repairs as per the SOR" [emphasis in original omitted].[72]

58 The Tribunal found in the Award at [321]–[330] as follows:

> 321. [U] submits that like the non-existent oil tanker in *McRae*, the contractual subject matter here concerned crack repair works and materials which [T] was required to provide in accordance with the Term Contracts but had failed to do so.
>
> 322. [U] also submits that like the plaintiff in *Anglia Television*, [U] is unable to say what "*profits*" would have been earned if [T] had performed the crack repair works in accordance with the Term Contracts.
>
> 323. [T], however, disagrees that it is impossible, or at least extremely difficult for [U] to prove expectation damages in the "*usual way*" on the facts of this case.

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68 T's 1st Affidavit at p 6888: U's Supplementary Submissions at para 42.

69 T's 1st Affidavit at p 6889: U's Supplementary Submissions at para 44.

70 T's 1st Affidavit at p 6939: T's Supplementary Submissions at paras 187–192.

71 T's 1st Affidavit at pp 6940–6941: T's Supplementary Submissions at paras 195–199.

72 T's 1st Affidavit at pp 6941–6944: T's Supplementary Submissions at paras 200–211.

> 324. Further, [T] submits that the "*usual measure*" of damages for "*defects*" is the cost of repair. The cost of repair can simply be established from quotes received from third-party replacement contractors when tenders are called for subsequent rectification works to be carried out.
>
> 325. [T] further seeks to distinguish the case of *McRae* from the facts of the present case, on the basis that the subject matter of the contract in *McRae* was a non-existent oil tanker of unknown specifications. There is obviously no market for such a tanker.
>
> 326. This is unlike the repair works under the Term Contracts, which clearly specified (in the [SORs]) what type of repair is to be carried out by [T], and what the repair cost is.
>
> 327. I accept [T's] submission that the usual measure of damages where works had not been carried out would be the cost of repair.
>
> 328. I find however, that the present case is not one of those "*usual cases*" pointed out by [T].
>
> 329. In this regard, I find that obtaining quotes from third-party contractors for each of the 252 [buildings], which would require different assessments, is an overly onerous task to place on [U], in view of the large number of [buildings] involved.
>
> 330. I find therefore, that it would have been extremely difficult for [U] to prove expectation damages in this case.
>
> [emphasis in original; footnote in original omitted]

59 The Tribunal evidently accepted T's submission that the usual measure of damages where works had not been carried out would be the cost of repair (see the Award at [327]). However, in the Award at [329], the Tribunal took the view that it would be an overly onerous task for U to obtain quotes from contractors for the cost of repairs given that (a) 252 buildings were involved and (b) the repairs for each building would have to be separately assessed. Inherent in this finding was the Tribunal's acceptance of the premise in T's submissions that the way for U to prove the cost of repair was to "find replacement

contractors to quote for the repairs" and "prove how much it will cost for the replacement contractors to repair the cracks properly" (see [57] above). On this premise, however, the Tribunal took into account the undisputed fact that 252 buildings were involved, and came to the view that obtaining quotes for the different repairs required for each of the 252 buildings was overly onerous. In other words, the Tribunal disagreed with the implicit assertion in T's submissions that it was not difficult to obtain quotes from contractors in order to ascertain the cost of repairs. The Tribunal thus concluded in the Award at [330] that it would have been extremely difficult for U to prove expectation damages.

60 In my view, what the Tribunal did in the Award at [329]–[330] was to adopt a chain of reasoning which flowed reasonably from T's own arguments and the known facts (*ie*, that the repairs of 252 buildings were involved). There was no breach of the fair hearing rule because the Tribunal's chain of reasoning had sufficient nexus to T's arguments and T had reasonable notice that the Tribunal could adopt it: see *BZW and another v BZV* [2022] 1 SLR 1080 at [60(b)]. While I was prepared to accept that there did not appear to be evidence before the Tribunal of what obtaining quotes from contractors for 252 buildings entailed (and the corresponding difficulty of such an endeavour), to the extent that the Tribunal reached its finding in the Award at [329] on no or insufficient evidential basis, this was not a ground for setting aside the Award as the "no evidence rule" did not apply: *CEF* at [102].

61 In sum, T did not establish any breach of the fair hearing rule in respect of its three main arguments under Ground 2. Further, I accepted U's submission that even if T succeeded in proving a breach of natural justice in the making of the Tribunal's findings on either (but not both) of the *Liu* Requirements, T

would not suffer any real or actual prejudice.[73] Under the fourth limb of the test in *Soh Beng Tee* (see [30] above), the court must consider whether, as a result of the breach of natural justice, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations; the applicant must show that the material *could* reasonably have made a difference: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]. In the present case, as seen from the Award at [350], the Tribunal found that the *Liu* Requirements were disjunctive. In other words, the Tribunal would have found that U was entitled to claim reliance damages so long as *either* of the *Liu* Requirements was satisfied. Thus, as long as the Tribunal's findings on *one* of the *Liu* Requirements were untainted by any breach of natural justice, the Tribunal would in all likelihood still have reached the same conclusion that U was entitled to claim reliance damages, even if his findings on the *other* requirement were impugned.

62 I therefore found that Ground 2 provided no basis for setting aside the Award.

Decision on Ground 3

63 T's case appeared to be that the Tribunal breached the fair hearing rule in two respects: (a) by failing to apply its mind to T's defences in relation to certain of Mr K's evidence; and (b) by "the creation of a 'rebuttal' case … that [T] never knew it had to meet" in relation to certain of Mr K's evidence.[74] I address each aspect of T's case in turn.

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73 UWS at paras 64–66.

74 TWS at paras 2.3 and 90.

64 T's first main argument appeared to be that the Tribunal failed to apply its mind to T's defence that, because (a) Mr K admitted that core samples were taken in the wrong place in at least five buildings and (b) Mr K was unable to point out where core samples were taken in photographs shown to him at the evidentiary hearing, Mr K had basically admitted that he was unable to correctly identify the locations within the buildings for checking whether and/or how crack repair works were carried out by T, and U thus could not prove that the crack repair works were not done in all 252 buildings.[75] There were several difficulties with this argument.

65 First, I accepted U's submission that T mischaracterised Mr K's evidence when T alleged that Mr K had admitted that he could not demonstrate that he inspected the correct locations.[76] Mr K's evidence was not that he could not identify *at all* the locations from which core samples had been taken, but rather, that he could not point out the locations on the photographs annexed to certain of T's Claim Forms A (to which T's counsel had referred him in cross-examination) without making further reference to other photographs and his diary; he indicated that he would also be able to point out the locations at the physical buildings (see [9] above). It was in that context that Mr K said that he could not identify the core sample locations "sitting in [the] chair" in the Arbitration.[77]

66 Second and more fundamentally, the Tribunal had implicitly considered and rejected these "defences" raised by T. I reiterate that an arbitral award should be read generously such that only meaningful breaches of the rules of

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75 TWS at paras 91–100, 106–113 and 121–132.

76 UWS at paras 79–81; *cf*, *eg*, TWS at para 122.

77 T's 1st Affidavit at pp 4454 and 4456: Day 5 Transcript at pp 12:4–17 and 14:18–25.

natural justice that have actually caused prejudice are remedied: *Soh Beng Tee* at [65(f)]. An inference should not be drawn that an arbitral tribunal failed to consider an important issue unless such inference was "clear and virtually inescapable": *AKN* at [46]. An issue need not be addressed expressly in an arbitral award; it may be implicitly resolved without navigating through all the arguments and evidence on the issue: *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [77]. In my judgment, the following three sets of findings made by the Tribunal, especially when taken in the round, bore out that the Tribunal had implicitly disagreed with T's submission that Mr K's tests were (barring wrong locations in five buildings) not shown to have been conducted in correct locations.

67 One, in the Award at [152], the Tribunal reproduced the ten-step method of testing set out in para 10 of the K Main Report (see [7] above). The first step involved looking at the drawings and photographs in T's Claim Forms A to identify the areas to be checked, *ie*, the areas where T claimed to have completed crack repair works. The Tribunal summarised the tests (which involved visual inspections "reinforced by core sampling") and Mr K's findings in the Award at [153]–[159], before concluding in the Award at [160] that: "I find that the [K Main Report] is comprehensive and Mr [K's] testing methodology and conclusions are reasonable and logical". Implicit in the Tribunal's acceptance of Mr K's findings as reasonable and logical must be an acceptance that Mr K had in the main inspected the correct locations.

68 Two, the Tribunal expressly rejected a suggestion by T that Mr K might have mixed up the works done at the buildings by other contractors with the crack repair works done by T, holding in the Award at [274] that:

> 274. … the fact that there were other subcontractors working on site is immaterial. It has no bearing whatsoever on

> Mr [K's] methodology used in identifying [T's] works. Mr [K] testified that he had used the diagrams and photographs in [T's] Claims Form A [*sic*], to identify the location of [T's] alleged completed works. The said diagrams and photographs are akin to "as-built" drawings, submitted by [T] to inform [U] what and where the alleged crack repair works had been completed, so that payment can be made.

In expressly endorsing Mr K's method of identifying the locations to be inspected, the Tribunal implicitly rejected T's argument that Mr K's tests were not shown to have been conducted in correct locations.

69 Three, in respect of Mr K's admission that core samples were taken from the wrong locations in at least five buildings, the Tribunal decided that this would only affect the reliability of the core sampling and not the other tests performed by Mr K, again implicitly rejecting T's argument that Mr K's tests were not shown to have been conducted in correct locations. The Tribunal held in the Award at [210]–[215] and [269]–[273] that:

> 210. The fact that Mr [K] may have taken cores from the wrong places would not affect [T's] ability to rebut [U's] case. It only affects the credibility of the [K Main Report]. It is thus relevant when an assessment on the weight of the evidence presented in the [K Main Report] is being carried out.
>
> 211. What I have to consider is whether a *prima facie* case had been established by [U], taking into account the facts.
>
> 212. It is important to note that [U's] case is that Mr [K's] evidence and conclusion is not premised solely on core sampling.
>
> 213. As explained by Mr [K], "*the core sampling is merely "the final bit of proof"*". To this end, I am satisfied that the [K Main Report] contains sufficient findings to make out a *prima facie* case against [T]. Examples of these findings are as follows:
>
> (a) There were no cracks observed underneath many strips of the "unknown surface material".

(b) There were no signs of injection holes or surface ports even after the partial removal of the "*unknown surface material*".

(c) There were also no V-shaped groove cuts found "*at all*".

(d) There were no signs of surface preparation as "*the old paint [was] still present*"[.]

214. In line with the *Britestone* framework …, the evidential burden would now shift to [T] to adduce evidence in rebuttal to Mr [K's] testimony, and the [K Main Report].

215. Having considered the evidence and the Parties' contentions in totality, I find that no satisfactory evidence to rebut [U's] case has been produced by [T].

…

269. Mr [S] [*ie*, T's witness] had alleged that there is a real possibility that Mr [K] had inspected and taken core samples from the wrong areas in the respective [buildings].

270. On this, he had noted the following:

(a) 6 out of the 22 core samples listed in [Mr K's] 2018 Preliminary Expert Report had not been correlated to the relevant areas where work was done and claimed for in the specified [buildings].

…

271. On the first point above, it has been established at the hearing that of the said 6 core samples, only 1 core taken from the [building] located at [a stated address] had been correlated by Mr K.

272. Even if this allegation did in fact cast doubt on the reliability of the core samples, [U] had explained (see paragraphs 213 – 214 above) that Mr [K's] evidence is not premised solely on core sampling. Core sampling was merely "*the final bit of proof*". In this regard, the [K Main Report] had set out several other findings which in any event, would support [U's] case. In other words, the core sampling was not a crucial piece of evidence.

273. Having carefully considered all the evidence before me, and on the basis that the core sampling is rejected, I find on a balance of probabilities, that [U] had established that [T] had breached the Term Contracts.

[emphasis in original; footnotes in original omitted]

70 Any alleged error in the Tribunal's reasoning in any of the above findings would be an attack on the merits of the Award, and not a basis for setting aside the Award. As the Court of Appeal explained in *AKN*, there is a distinction between an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and the arbitral tribunal's failure to even consider that argument; only the latter amounts to a breach of natural justice while the former is an error of law and not a breach of natural justice (at [47]).

71 T's second main argument was that the Tribunal allegedly "created" a "rebuttal case" that "[T] never knew it had to meet", in that T "had to rebut a concession that [Mr K] had inspected at least 5 [buildings] wrongly, by identifying *the 5 or more [buildings]* that were wrongly inspected, failing which all [buildings] are deemed properly inspected" [emphasis in original].[78] In my view, T appeared to have misunderstood the Tribunal's findings.

72 One, nothing in the Award suggested that the Tribunal required T to identify the "wrongly inspected" buildings. Indeed, it appeared from the Award at [270(a)] and [271] (see [69] above) that the parties *knew* the buildings from which core samples had been taken from the wrong locations. The Tribunal simply did not conclude that the taking of core samples from the wrong locations in five buildings compromised the rest of the tests done by Mr K.

73 Two, in so far as the Tribunal's findings concerned T's failure to discharge its evidential burden, these were made in the context of the Tribunal having accepted that the K Main Report established a *prima facie* case by U that

[78] TWS at paras 101–105, 114 and 137.

T had breached the Term Contracts such that the evidential burden shifted to T to show why this was not so: see the Award at [211]–[214] (see [69] above). The Tribunal considered T's expert's evidence in concluding that T had not satisfactorily discharged its evidential burden of rebutting U's *prima facie* case: see the Award at [215]–[247]. This had nothing to do with T having to identify the "wrongly inspected" buildings.

74 I therefore found that Ground 3 did not engage any breach of natural justice and provided no basis for setting aside the Award.

Remittal

75 For completeness, T argued that this was not an appropriate case for the matter to be remitted to the Tribunal if a breach of natural justice was found,[79] whereas U submitted that the court would be entitled to do so.[80] This issue ultimately did not arise for determination given my decision rejecting T's allegations of breach of natural justice.

Conclusion

76 In conclusion, I dismissed OA 844.

Costs order

77 The parties were unable to agree on an order for costs, and duly filed their written costs submissions.

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79 TWS at paras 141–146.

80 UWS at para 93.

78 The parties were *ad idem* that costs should be ordered in favour of U as the successful party in OA 844.[81]

79 U sought costs on an indemnity basis pursuant to the following contractual provisions in the Term Contracts (the "Indemnity Clauses"):[82]

(a) The 2012 Term Contract:

> [T] shall be liable for and shall indemnify [U] against all … costs (including legal costs on a solicitor-client indemnity basis), … arising (whether directly or indirectly or consequentially) from any breach of any of the provisions in [the 2012 Term Contract] …[83]

(b) The 2014 Term Contract:

> [T] shall be liable for and fully indemnify and save harmless [U] from and against any and all … costs (including legal costs on a solicitor-client indemnity basis), … which [U] may suffer, incur, sustain or be subject to (whether directly or indirectly or consequentially) arising out of, in connection with or in relation to … any breach by [T] of any of the provisions in [the 2014 Term Contract] …[84]

U submitted that the principles set out in O 21 r 22(3) of the Rules of Court 2021 for assessing costs on an indemnity basis would apply.[85]

80 T accepted that the Indemnity Clauses applied to U's entitlement to legal costs for the Arbitration where U's cause of action was based on a breach of

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81 T's costs submissions in OA 844 dated 25 November 2024 ("TCS") at para 27; U's costs submissions in OA 844 dated 25 November 2024 ("UCS") at para 3.

82 UWS at para 95; UCS at para 6.

83 T's 1st Affidavit at p 438: cl 24.1.1 of the General Conditions of Contract for Engineering (Term Contracts) (Updated 24 May 2012).

84 T's 1st Affidavit at p 974: cl 24.1.1 of the General Conditions of Contract for Engineering (Term Contracts) (Revised 1 February 2014).

85 UCS at para 5.

contract.[86] However, T disputed that the Indemnity Clauses applied to U's costs in OA 844 as T's setting aside application "[did] not arise from breach of any contractual provision or duty" and "[was] a (quasi public law) or public law action arising under the [Act]", which the Indemnity Clauses did not cover.[87]

81 Where there is a contractual agreement between parties on costs, the court will tend to exercise its discretion to award costs in a manner that upholds the parties' contractual bargain unless it would be manifestly unjust to do so: *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 ("*Telemedia*") at [29]; *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd and other suits* [2020] SGHC 204 at [198].

82 In the present case, I found that the scope of the Indemnity Clauses extended to the costs incurred by U in OA 844: such costs (a) arose "indirectly" from (see [79(a)] above) and/or (b) were incurred by U "in connection with or in relation to" (see [79(b)] above) T's breaches of the Term Contracts, given that such costs were incurred to defend against T's application to set aside the Award made in the Arbitration concerning T's said contractual breaches. Having regard to the parties' contractual bargain in the Indemnity Clauses, I exercised my discretion to award costs to U on an indemnity basis (see *Telemedia* at [53], [55], [99(a)] and [101]). Nothing suggested that it would be manifestly unjust to award costs on this basis.

83 Turning to the quantum of costs to be awarded, I was mindful that Appendix G (Guidelines for Party-and-Party Costs Awards in the Supreme

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86 TCS at para 18.

87 TCS at paras 18–22.

Court of Singapore) to the Supreme Court Practice Directions 2021 stipulated a daily tariff of $13,000–$40,000 for originating applications relating to arbitration. I considered the following factors to be relevant: (a) there was a one-day hearing of OA 844; (b) while OA 844 was not especially complex, the arbitral record that had to be traversed was nevertheless substantial; (c) further, I accepted U's submission that the presentation of T's case was dense and not easy to follow, calling for more work on the part of U's legal team than might otherwise have been necessary;[88] and (d) in my view, it was reasonable for U to have engaged a senior counsel for legal representation given the value and nature of the dispute. Having regard to these factors and to the award of costs on an indemnity basis, I fixed costs in the amount of $55,000 all-in to be paid by T to U in OA 844.

Kristy Tan
Judicial Commissioner

Tan Tian Luh, Tan Xian Ying and Yap Xuan Wei (Chancery Law Corporation) for the applicant;
Abraham Vergis *SC*, Zhuo Jiaxiang and Ngo Wei Shing (Providence Law Asia LLC) for the respondent.

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88 UCS at paras 17–18.