IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 4

Originating Summons No 5 of 2021

Between

(1) CJM
(2) CJN
(3) CJO
(4) CJP
(5) CJQ
(6) CJR
(7) CJS

… *Plaintiffs*

And

(1) CJT

… *Defendant*

JUDGMENT

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

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CJM and others
v
CJT

[2021] SGHC(I) 4

Singapore International Commercial Court — Originating Summons No 5 of 2021
Anselmo Reyes IJ
21 April, 7 June 2021

15 June 2021 Judgment reserved.

Anselmo Reyes IJ:

Introduction

1 The plaintiffs are shareholders of a company (the "Company"). By their Originating Summons, the plaintiffs seek recourse against two paragraphs of a final award (the "Award") in a Singapore International Arbitration Centre ("SIAC") arbitration. Recourse is sought pursuant to Articles 34(2)(a)(ii), 34(2)(a)(iii) and 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, and s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed). The plaintiffs contend that, by the two paragraphs, the Award wrongly dismissed their claim for an Earn-Out Payment. The Award found in the plaintiffs' favour on the question of anticipatory breach. But the Award dismissed the plaintiffs' claim for an Earn-Out Payment due to what the Award said was the failure to show that the breach had caused actual loss. The

plaintiffs say that the dismissal was unwarranted because it was premised on a case that the plaintiffs had not been running and on which the plaintiffs had therefore not been given a reasonable opportunity to argue. Following the three-month time limit for applying to set aside the Award, the plaintiffs issued a further Summons, this time to amend their Originating Summons in order to challenge two more paragraphs of the Award. The plaintiffs say that if they are right in their substantive critique of the Award, then logically the two extra paragraphs should also be set aside.

Background

2 In July 2016 the defendant entered into an agreement (the "Agreement") to purchase the plaintiffs' shares in the Company. The defendant thereby acquired 60% of the Company. The Agreement provided for the defendant to purchase the remaining 40% of the Company in five parcels (each consisting of 8% of the Company's shares) between 2017 and 2021. A fixed sum was payable for each parcel. But the consideration for the final parcel included an additional component known as the "Earn-Out Payment". The Earn-Out Payment was to be based on the Company's actual EBITDA in financial year ("FY") 2021. In essence, the higher the Company's EBITDA in FY 2021, the higher the Earn-Out Payment. Conversely, if the Company had a negative EBITDA in FY 2021, there would be no Earn-Out Payment.

3 In November 2017 (that is, well before FY 2021) the plaintiffs commenced the SIAC arbitration for anticipatory breach of the Agreement, alleging (among others) that the defendant had breached its good faith obligation by running down the value of the Company's business and thereby diminishing its EBITDA for FY 2021 and destroying the Earn-Out Payment. The plaintiffs claimed damages for loss of the Earn-Out Payment. The

plaintiffs' primary case was that damages were to be quantified on the basis of EBITDA for FY 2021 as projected in a Business Plan 2015 ("BP 2015"). The plaintiffs' expert evidence, for example, assessed damages for loss of the Earn-Out Payment by reference to BP 2015. More specifically, the plaintiffs submitted that BP 2015 contained the parties' agreed expectations of the Company's business and reasonably projected the potential future earnings of the Company during the Earn-Out Period. BP 2015 was said by the plaintiffs to be "intricately linked" with the Agreement and the Earn-Out Payment, such that "in the Ordinary Course of Business, Parties expected the Business to operate, grow and perform … to the levels, at the very least, as agreed in [BP 2015]". The plaintiffs assert that, at no point in the arbitration, did they put forward a case of their loss of Earn-Out Payment being due to the actual failure by the Company to tender for specific projects.

4 Contrary to the plaintiffs' position on BP 2015, the Tribunal unanimously concluded in the Award that the defendant had not been involved in the formulation of BP 2015 and so the Agreement had not been predicated on BP 2015. The Tribunal stated that it was "unnecessary to make any conclusive remarks as to whether or not the targets set out in [BP 2015] were reasonable or achievable" with the consequence that BP 2015 was "at most only one element among many others to be considered by [the Tribunal] for purposes of damages … nothing less, nothing more". The plaintiffs have not sought to set aside this finding.

5 By a majority, the Tribunal found in the plaintiffs' favour that the defendant had breached its obligation under the Agreement to grow the Company's business in good faith. However, by a different majority (the "Damages Majority"), the Tribunal held that the plaintiffs had failed to discharge the burden of proof in relation to the causation and quantification of

actual loss. The Damages Majority was of the view that, under the governing law of the Agreement, the plaintiffs needed to establish that (a) there were specific tender opportunities that fell within the scope of the Company's qualifications, (b) the Company had reasonable prospects of being awarded contracts in respect of those tender opportunities, and (c) the profit margins resulting from those contracts would generate positive EBITDA for the Company in FY 2021 and enable the plaintiffs to receive an Earn-Out Payment. The Damages Majority held instead that the plaintiffs (a) had failed to substantiate the existence of particular projects for which the Company would have been eligible to tender, (b) had not shown that the Company possessed the qualifications (whether singly or jointly with others) to bid for such projects as might have been available, and (c) had not shown that the Company's failure to pursue any such tender opportunities resulted in a negative EBITDA which destroyed the prospects of an Earn-Out Payment. The Damages Majority concluded that the plaintiffs had failed to show that the defendant's anticipatory breach had occasioned loss of the Earn-Out Payment. The Tribunal thus dismissed the plaintiffs' claim for the same. It is this outcome that the plaintiffs seek to set aside by their application.

Discussion

Did the Damages Majority dismiss the plaintiffs' case on a basis not before it?

6 I will assume, in the plaintiffs' favour, that they are correct that all four paragraphs against which recourse is sought are logically connected with each other. Given that premise, in this section I will examine the validity of the substantive grounds upon which it is claimed that the four paragraphs should fall.

Plaintiffs' case

7 The plaintiffs observe that, in reaching its conclusion, the Damages Majority focused on certain documents (identified as exhibits C-384 to C-395 (collectively, the "exhibits")) tendered by the plaintiffs after the evidentiary hearing. In gist, the plaintiffs submit that the Damages Majority found that the exhibits were insufficient to establish (a) the Company's eligibility to tender for specific projects, (b) the prices at which the Company could have tendered for such projects, (c) the likely profit margins from such projects, and (d) the likelihood that such projects would have contributed positively to the Company's EBITDA in FY 2021. For this reason, the Damages Majority was of the opinion that the plaintiffs had failed to establish causation between the defendant's anticipatory breach and loss of Earn-Out Payment.

8 The plaintiffs submit that the Damages Majority's conclusion was "wholly misplaced", because in reasoning as it did the Damages Majority was deciding an issue that was not before the Tribunal. The plaintiffs say that their case in respect of the Earn-Out Payment was not premised on actual loss consequent upon the Company's failure to secure any particular tender projects among those identified in the exhibits. The plaintiffs claim to have tendered the exhibits for the limited purpose of rebutting fresh materials in the defendant's expert evidence which suggested that the Company's business had no market or growth potential domestically or internationally. The plaintiffs say that, as they had not put forward the exhibits for the purpose of establishing actual loss of EBITDA due to the failure to take up specific tender opportunities or projects, it is hardly remarkable that they did not provide particulars or evidence substantiating a link between the tender opportunities mentioned in the exhibits (especially C-395) and the loss of Earn-Out Payment.

9 The plaintiffs bolster their argument by reference to the chronology underlying the tender of the exhibits. The day before the evidentiary hearing, the defendant's damages expert filed presentation slides introducing fresh materials. The Tribunal allowed in the fresh materials. But it directed that the plaintiffs could file documents "to rebut the new factual references" in the fresh materials. It was purely in response to this direction that the plaintiffs claim to have submitted the exhibits. They did this to show, in rebuttal of the fresh materials, that as a matter of generality there were market opportunities available to grow the Company's business at home and abroad. They did not adduce the exhibits to establish a failure by the defendant to tender for specific projects during the Earn-Out Period. The plaintiffs stress that, in actuality, the Tribunal's direction enabling them to file additional documents explicitly restricted the purpose of anything filed to the rebuttal of the fresh materials. The plaintiffs point out that, since they had only tendered the exhibits after the evidentiary hearing, they were unable to file witness statements to provide factual or expert evidence on the exhibits or cross-examine the defendant's witnesses on the same.

10 The plaintiffs note that the Tribunal rejected the admission of an exhibit C-396 on the basis that the plaintiffs had "failed to establish why these [C-396] documents are material". Exhibit C-396 consisted of over 20,000 pages of tender documents for the 51 sample projects which were identified in exhibit C-395 and for which (according to the plaintiffs) the Company could have tendered. The plaintiffs argue that Exhibit C-396 would at least have been evidence of the tender exercises identified in C-395 having taken place. Given the terms of the documents in C-396, it would have been possible from C-396 to identify the qualifications for the tender exercises in C-395 and assess whether the Company met or could meet those qualifications. Thus, it was contradictory (the plaintiffs suggest) for the Tribunal on the one hand to reject

exhibit C-396 and on the other hand for the Damages Majority to say that there was insufficient evidence in the exhibits to establish that the Company could have tendered for the projects listed in C-395. However, for the purposes of these proceedings and given the limited basis upon which the plaintiffs say the exhibits were adduced, the plaintiffs make no complaint about this allegedly contradictory approach.

11 The plaintiffs say that, in their closing submissions before the Tribunal, they only relied on the exhibits to establish that "[t]he general market development and the current outlook for the FY 2021 exceed the projections underlying the BP 2015 and there [was] an abundance of orders available for the Company to pursue". From this it would follow that "[t]he domestic ... market had performed and is expected to perform better than anticipated by [BP 2015]". This would mean that the quantum of the alleged lost Earn-Out Payment could safely be based on the hypothetical projection of the Company's EBITDA in BP 2015. It formed no part of the plaintiffs' closing submissions at the arbitration that the Company's failure to tender for any specific projects identified in the exhibits led to an actual loss in EBITDA.

12 In those circumstances, the plaintiffs submit that the Tribunal acted in excess of the parties' submission to arbitration by rejecting the plaintiffs' claim for an Earn-Out Payment on the basis of a lack of evidence to substantiate a failure to tender for specific projects and the actual running down of EBITDA in consequence of that failure. The basis of the Damages Majority's reasoning (according to the plaintiffs) simply did not arise from the pleadings or what transpired at the arbitration. Although an unpleaded issue can sometimes arise in the course of an arbitration and can legitimately be considered by an arbitral tribunal, such issue must be made known to all of the parties. The plaintiffs assert that, to the contrary, they were taken by surprise that the Damages

Majority should seek in the Award to quantify damages in the way that it did. According to the plaintiffs, it also follows that, by dealing with a case that had not been run, the Tribunal failed to afford a reasonable opportunity for the plaintiffs to be heard on the same. It would then be contrary to Singapore public policy to allow the impugned four paragraphs to stand when due process had not been observed.

Analysis of the plaintiffs' case

13 I am unable to accept the plaintiffs' contentions.

14 First, the causation and quantification of any actual loss of Earn-Out Payment were squarely before the Tribunal. There can therefore be no question that it had jurisdiction to decide on such an issue.

15 In Schedule 2 of their Statement of Claim, the plaintiffs pleaded:

> 4.34 As Earn-out Payments are always based and structured on the company's potential future earnings, [BP 2015] also reflects and records the reasonable and agreed expectations of the Parties from the Business, by way of projecting potential future earnings of the Company, during the Earn-out period. [BP 2015] is therefore intricately linked with the terms of the [Agreement], particularly those relating to Earn-Out Payment.
>
> 4.35 Within the legal framework of economic damages, [BP 2015] provides visibility on the "But For" situation regarding the future consolidated EBIDTA [*sic*] of the Company. Thus, in the Ordinary Course of Business, Parties expected the Business to operate, grow and perform … to the levels, at the very least, as agreed in [BP 2015].
>
> 4.36 But for the Breaches and actions of the Respondent, the targets of its projecting potential future earnings of the Company, as set out in [BP 2015], were reasonable and achievable ….

16 I read the expression "But For" in paragraph 4.35 as referring to "but for causation". At the oral hearing, plaintiffs' counsel accepted that must be so. In

other words, "but for" the defendant's breach the Company's business could be expected "to operate, grow and perform" in a way that would "at the very least" meet the levels projected in BP 2015 (including the EBITDA for FY 2021 projected there). One asks: "'At the very least' by reference to what?" Implicit in the latter phrase is the suggestion that EBITDA as projected in BP 2015 should be regarded as a conservative estimate of what EBITDA could have been in FY 2021 "but for" the defendant's failure to act in good faith. It is apparent then from their pleading that the plaintiffs recognised that it would not be enough to establish their Earn-Out Payment claim merely by pointing to EBITDA as projected in BP 2015. The plaintiffs would also need to show causation, that is, but for the defendant's breach, the Company would probably have enjoyed healthy profits, such that the Tribunal could confidently regard the EBITDA projections in BP 2015 as evidencing the lower bound of the Company's putative EBITDA in FY 2021. Thus, even if the Tribunal (as it did) rejected BP 2015 as an indicator of EBITDA in FY 2021, it would be open in principle for the plaintiffs (if so minded) to advance their Earn-Out Payment claim based on evidence of what the Company's EBITDA would likely have been in FY 2021 if the defendant had caused the Company to tender for and undertake specific projects.

17 This understanding of the plaintiffs' pleading is borne out by the Issues List that the parties submitted to the Tribunal. Issue No 4 as framed by the plaintiffs read: "If damages are payable, is the Earn-out Payment flowing from the EBITDA targets set in [BP 2015] the correct measure of damages payable to [the plaintiffs] or are they entitled to damages in some other amount?" The plaintiffs say that, when asking whether they were "entitled to damages in some other amount", they were only referring to an alternative case based on what has been called the defendant's Business Plan 2016 ("BP 2016"). However, that this was the sole alternative case that the plaintiffs were pursuing would not have

been evident to the Tribunal. For instance, under the general heading "The Measure of Damages" in their closing submissions, the plaintiffs' principal proposition in paragraph 4.32 was that "[BP 2015] is the appropriate basis for estimating damages". Underneath that proposition, the plaintiffs gave the following particulars relating to BP 2016:

> - [BP 2016] matches the trajectory of growth foreseen by [BP 2015] albeit commencing after the earn-out period. Thus, [BP 2016] is only [BP 2015], but holds back the full and true potential of the Company until after the earn-out period is over and is thereafter pursued.
> - All Business Plans of the Company have largely similar EBITDA targets over 5 year periods. Business Plan 2013 largely resembles [BP 2015] delayed by two years. [BP 2015] largely resembles [BP 2016] delayed by 5 years.
> - Parties therefore believed the Company's growth is capable of being consistent with [BP 2015] provided ample working capital was available.
> - If [the defendant] had performed its obligations under the [Agreement] including in particular its fiduciary obligations, the Company would have achieved the EBITDA and therefore the Earn-out Payment predicted by [BP 2015].

18 Reading those particulars, the Tribunal would have formed the impression that BP 2016 (albeit with its projections advanced by some 5 years) was being used to support the plaintiffs' argument on BP 2015 and not as an alternative to the plaintiffs' case on BP 2015. Accordingly, while it would have been plain to the Tribunal that the plaintiffs were advancing a case on loss based on BP 2015, Issue No 4 as drafted would have suggested that they were also seeking damages on some other basis, leaving it to the Tribunal to decide on the totality of evidence whether there was an alternative way of assessing such damages.

19 This view on the Tribunal's part would have been reinforced by other parts of the plaintiffs' closing submissions. For instance, paragraph 4.17 of the document in the section entitled "The Breach" stated:

> **[The plaintiffs] identified more than 50 sample tenders since April 2018 for which [the Company] had the technical qualification and could have bid but [the defendant] didn't bid**
>
> - Although it is practically impossible to reconstruct all tenders and to list the tender details omitted by the Company over years and months, a sample of 50 EPC and [other] tenders published by [certain] companies since April 2018 could be established (C-395).
> - Moreover, for almost all these tenders [the Company] would have the technical capabilities and would have been eligible to bid. From the information available it becomes clear that for almost all of these opportunities (i) a tender fee and (ii) an EMD would have been required by [the Company]. However, none of these randomly sampled tenders match the six tenders for which [the Company] had paid a tender fee since July 2016 (C-394). Crucially, not a single bid was submitted even for these six tenders.
> - Further, the Company qualified for another 12 projects in the FY 2018-2019 identified by [the plaintiffs], and placed on record at C-340 … which the Company evidently did not pursue.
> - Conclusively, this sample of tenders underlines that [the Company] was only approaching an insignificant portion of the market opportunities available in India since its takeover by [the defendant].

Paragraph 4.34 of the same document referred to "an abundance of orders available for the Company to pursue" and there being "2,849 project opportunities for the Company", citing C-386, C-387 and C-388 as evidence thereof. In paragraph 4.39, the plaintiffs submitted by way of conclusion on "The Measure of Damages" that, under the Agreement's governing law, "[o]nce causation for the fact of damages is established, proof of the amount, may be an estimate, uncertain or inexact".

20 It will be noticed that, contrary to what the plaintiffs now maintain, the exhibits were being deployed in their closing submissions not just to show that the domestic and international markets for the Company's business were generally favourable, but also that the Company failed to take up the tender opportunities identified in the exhibits (such as C-386, C-387, C-388, C-394 and C-395). The Tribunal will have been alive to this and, in the context of Issue No 4, would have naturally assumed that the plaintiffs were putting forward an alternative case that the Company under the defendant's management failed to pursue the opportunities identified in the exhibits and so caused detriment to the Company's EBITDA.

21 In the Award, the Tribunal rejected the plaintiffs' contention that BP 2015 was a comprehensive plan embodying the parties' agreement and understanding of the Company's business. The Tribunal did not find anything to suggest that BP 2015 reflected the agreed potential future earnings of the Company or was linked with the Agreement. As far as the Tribunal was concerned, there was "not ... a shred of evidence" that the defendant ever accepted BP 2015 or that BP 2015 was prepared by the Company. The Tribunal instead held that the Agreement was the full contract between the parties and did not allow the importation of BP 2015 into the Earn-Out Payment under the Agreement. According to the Tribunal, at no point did the parties agree that BP 2015 was to be the basis of which the Earn-Out Payment was to be calculated. On the contrary, the Tribunal thought that the evidence indicated that, as far as the evidence was concerned, the defendant viewed the underlying assumptions in BP 2015 as unrealistic.

22 In those circumstances, where the Tribunal was not persuaded that BP 2015 was compelling evidence of a minimum level of EBITDA in FY 2021, the Damages Majority was entitled, in light of the plaintiffs' pleading, the framing

of Issue No 4, and the plaintiffs' closing submissions, to consider whether the exhibits constituted evidence of what EBITDA was likely to be in FY 2021. Otherwise, if (as is presently being asserted) the plaintiffs' case was solely based on BP 2015 as a measure of likely EBITDA in FY 2021, the plaintiffs would have failed outright on their Earn-Out Payment claim. BP 2015 being no more than an inconclusive piece of evidence of what EBITDA might be in FY 2021, it is obvious that in the Tribunal's mind BP 2015 could not by itself serve the "but for" function advocated by the plaintiffs.

23 Second, as a result of what transpired during the evidentiary hearing, the plaintiffs should have appreciated that the exhibits were bound to be considered in connection with the issue of causation and quantification of actual loss.

24 The Tribunal had signalled its concerns over the lack of specificity in the plaintiffs' case on causation and quantum of loss, during the cross-examination of the plaintiffs' sole factual witness on the first day of the evidentiary hearing:

THE CHAIRMAN:	I'm asking you[,] you have a finding of the Tribunal saying that you were right, these opportunities could have been secured and we want to give you damages. Then we have to identify which business opportunity was missed, what was the profit --
A.	Yes, sir.
THE CHAIRMAN:	Imagine you won on everything. But what, how much, which project? It cannot be a general finding. That doesn't give you any money.
A.	Yes, sir.
THE CHAIRMAN:	So this is your opportunity. Which one?
A.	Sir, if I have to give some specific examples in my discussion, sir, some of

our key customers and the potential customers for which we have given the list in the annual report of [C]. The utilities, it is mentioned in that that how much they were expanding each --

ARBITRATOR 1: Which utilities?

A. Sir, all utilities are mentioned.

ARBITRATOR 1: Name them.

A. Yes, sir. [Names 5 entities]

…

ARBITRATOR 1: Then?

A. … Then our customer -- we had a private customer … which we had brought as a new customer and he gave us repeat orders … But what I got to know that now they have gone to another supplier because we did not pursue them like we used to pursue them earlier. So these kind of examples I can give --

THE CHAIRMAN: But you understand that6 [*sic*] you are feeding us at a late stage of an arbitration many generalities.

A. Yes, sir.

ARBITRATOR 1: Have you mentioned it in your affidavit?

A. No, these not in my affidavit.

THE CHAIRMAN: It is very general.

ARBITRATOR 1: Specific projects.

A. Specific projects, sir, I have not mentioned but I believe that in the --

THE CHAIRMAN: Was there a tender, for example?

A. There were actually many tenders and we did not -- because nothing was pursued so we did not list those tenders in this. There were many, many tenders by all these utilities which we did not even bid.

ARBITRATOR 2: Were you tendering against other companies?

A. Sir, we were not tendering at all.

ARBITRATOR 2: Against other companies?

A. Yes, sir.

ARBITRATOR 2: And some other company won the tender?

A. Sir, somebody won. One of them won and --

ARBITRATOR 2: So why is that anything other than the ordinary course of business?

A. Sorry, sir, I didn't understand, sir. I'm sorry.

ARBITRATOR 2: You win some, you lose some...

A. Sir, we didn't win it all.

ARBITRATOR 2: No. So maybe you weren't tendering very well.

A. No, sir, we didn't tender at all. We didn't even file a bid. We didn't even buy the bid tender. We did not pursue them at all because it was limited to three projects per year.

ARBITRATOR 2: I don't understand.

Q: ... you are talking about tenders of utilities, right?

A. Yes.

Q. There are tender documents published with qualification requirements, right?

A. Yes.

Q. Why have you not put all those tenders on record to show what opportunities could have been done? First point. We'll go step-by-step.

A. Well, we have not put in -- I don't know what to answer for that.

Q. Because you know that there are no such projects which we haven't done

which you were qualified for and haven't tried. That's why you haven't --

A. That is not correct because there are certain evidences on record. For example, we won a [certain] tender from [M] for [five products] when we were in majority and if we were not qualified, we would not win that one.

Q. It depends what range of [products] they are. Qualified to tender for [certain type of product] yet --

A. With all due respect, now you are being general. If you ask me if you present a specific document which we don't qualify, I can answer.

Q. … it is your obligation to prove your damages. It is for you to first put -- please listen -- you to put forward first the specific projects which you say we could have won and that with a price which would give us a margin because without the margin you wouldn't get your EBITDA, right?

A. Yes, of course. You have to have the gross margin.

Q. If we bid and secure the contract at a loss, it's not going to give you an EBITDA, right?

A. Of course. If the project is at loss, there will be no EBITDA.

Q. So are you aware of what -- have you done an analysis, have you placed an analysis on record as to what the minimum price that [the Company] can pay for X category of [products] without which you won't get a profit? Have you put anything like that on record? Yes or no?

A. No, I think I wish to elaborate this.

Q. First answer yes or --

A. No, I wish to elaborate this.

Q. First you answer yes or no --

A. Can I elaborate, sir.

Q. First answer yes or no.

THE CHAIRMAN: Answer but I derive from your previous answers that you have none identified specifically, correct?

A. Actually, what I believe that what sir is asking I am answering to the best of my knowledge in general. But there are certain testimonies which will happen in the next couple of days, including from experts, and possibly they will be able answer this more specifically than I am at this moment.

THE CHAIRMAN: You are a factual witness.

A. Yes, sir.

THE CHAIRMAN: You are saying that certain business opportunities existed and were profitable that were not pursued.

A. Yes, sir.

THE CHAIRMAN: For that, we need to have specific examples of business opportunities to see whether they were profitable and why they were not pursued, who should have identified them, why you did not yourself identify them.

A. Yes, sir.

THE CHAIRMAN: You need to go really to specifics. Do you have anything to add now?

A. Sir, all these customers that I mentioned, there were numerous tenders, which I believe we have not put all tenders on record, but this question has come up so we'll have a couple of days.

ARBITRATOR 2: You do understand this as well, do you --

A. Yes, sir --

ARBITRATOR 2: Just listen to me. You do understand this, do you: experts give evidence on

the basis of the facts that are given to them --

A. Yes, sir.

ARBITRATOR 2: -- on which they base their expert opinion.

A. Of course, sir.

ARBITRATOR 2: If they are not given the facts, then it is difficult for them to express an expert opinion.

A. Yes, sir.

ARBITRATOR 2: If they are -- if we are not given the facts, it is very difficult for us to understand the basis upon which the experts are expressing their opinion.

A. Yes, sir.

ARBITRATOR 2: You have not so far given us the facts, as the presiding arbitrator has pointed out.

A. Yes, sir. These are specific tenders I am not able to specify right now.

ARBITRATOR 2: But you understand the difficulty that causes us?

A. Yes, sir. I'm understanding your point, sir.

THE CHAIRMAN: Basically, for facts we have the documents and we have factual witnesses.

A. Yes, sir.

THE CHAIRMAN: The documents -- we have the documents we have, we all have, on this point and factual witness you are the only one. Hence us putting to you and giving you an opportunity to set out those business opportunities because you make an allegation, right, and it's a serious allegation and you are asking money for that allegation.

A. Yes, sir.

THE CHAIRMAN:	So then you have to substantiate that, and this is the opportunity you have in addition to the documentary evidence that you have already put.
A.	Yes, sir.

25 Given the above extended discussion, it would have been clear to all that the Tribunal was going out of its way to articulate difficulties with the state of the plaintiffs' factual evidence on loss of the Earn-Out Payment. The Tribunal was plainly inviting the plaintiffs to make good the deficiencies in their factual evidence on loss as soon as possible. As a result, it is hard to see how the plaintiffs can now maintain that they were not afforded a reasonable opportunity to deal with the grounds on which the Damages Majority ultimately dismissed their Earn-Out Payment claim.

26 From what the Tribunal indicated on Day 1 of the evidentiary hearing, the plaintiffs would have known that they faced a glaring gap in their factual evidence and, without more, the Tribunal was unlikely to be with them on causation of actual loss in connection with the Earn-Out Payment. That the plaintiffs realised their predicament may be inferred from the fact that, as pointed out above at [19]–[20], in their closing submissions they actually deployed the exhibits in support of a case that the Company failed to take up specific tender opportunities identified in the exhibits. This seems to have been done despite the fact that the Tribunal's order permitting the plaintiffs to adduce the exhibits had been expressly limited to the introduction of factual evidence for the purpose of rebutting the fresh materials put in by the defendant's damages expert. The plaintiffs are effectively complaining here that, rather than chastising the plaintiffs for deploying the exhibits for an unauthorised purpose, the Damages Majority took the plaintiffs' closing submissions at face value and considered whether, BP 2015 having been rejected as compelling evidence of EBITDA in FY 2021, there was anything in the exhibits that could redeem the

plaintiffs' case and establish the likely level of actual EBITDA in FY 2021. Ironically, the Damages Majority is now being criticised by the plaintiffs for going the extra mile and checking whether the exhibits might be of help in establishing the plaintiffs' case on causation and quantification of loss.

27 At the hearing before me, plaintiffs' counsel submitted that the plaintiffs have been severely prejudiced by the Damages Majority's decision on causation and quantum of loss. The exhibits (plaintiffs' counsel observed) dealt with projects that arose pre-2018 and post-2018. But the arbitration, which was commenced in 2017, only concerned anticipatory breaches by the defendant in the pre-2018 period. The plaintiffs complain that, by its determination, the Damages Majority has precluded them from mounting another claim in the future in respect of the defendant's failure to take up post-2018 tender opportunities and destroying actual EBITDA in FY 2021 as a result. For this reason, the plaintiffs say the impugned paragraphs should be set aside, at least insofar as they concern the Damages Majority's dismissal of the exhibits as evidence of causation and quantum.

28 There is no substance in this submission. Whether the plaintiffs can commence a second arbitration on post-2018 breaches is not a question that is before me. Nothing in this judgment should be taken as bearing on whether a second arbitration along the lines sketched out by plaintiffs' counsel is or is not precluded by *res judicata*, issue estoppel or some other legal doctrine. For the purposes of these recourse proceedings, it suffices to point out that what the Damages Majority held by the four challenged paragraphs of the Award was that the plaintiffs had failed to establish a causative link between the defendant's anticipatory breach on the one hand and an alleged loss of Earn-Out Payment on the other. That, as mentioned above, was an issue before the Tribunal and the Tribunal had expressly warned the plaintiffs of its concerns on the matter. I

am consequently unable to see how the Tribunal's conduct can in any way be characterised as prejudicial.

29 Third, regardless of how the plaintiffs framed their claim for Earn-Out Payment, the defendant's defence was (among other matters) that there was no evidence that any deceleration of the Company's business by the defendant caused actual loss. This was reflected, for instance, in Issue No 13 (as framed by the defendant) of the Issues List for the arbitration:

> Whether [the defendant] has deliberately caused loss in value of Earn Out? If so, is [*sic*] [the plaintiffs] entitled to damages for the loss in the value of Earn-out? If so, to what amount?

In light of that, the Tribunal clearly was entitled to determine on the totality of evidence before it whether the defence of a lack of causation in respect of the alleged loss of Earn-Out Payment had been made out.

30 For those reasons, in dismissing the plaintiffs' Earn-Out Payment claim as it did, the Damages Majority was not exceeding the Tribunal's jurisdiction. It was instead dealing with an issue that was squarely before the Tribunal and upon which the Tribunal had given the plaintiffs ample opportunity to present a case. Contrary to what the plaintiffs now say, it appears that they sought to respond to the concerns raised by the Tribunal during the cross-examination of their factual witness, by deploying the exhibits to establish actual loss of Earn-Out Payment through a failure to take up specific tender opportunities. There is nothing contrary to Singapore public policy in how the Tribunal conducted the arbitration or in how the Damages Majority dealt with the exhibits. There is no ground for setting aside the four paragraphs of the Award which the plaintiffs have impugned.

Should the plaintiffs' original application be amended to include two further paragraphs?

31 It follows from [6]–[30] above that, whether or not the plaintiffs' amendment application is out of time is a moot point. There is no basis for setting aside the two additional paragraphs and the plaintiffs' amendment application should therefore be dismissed.

Conclusion

32 The plaintiffs' Originating Summons to set aside two paragraphs in the Award is dismissed. The plaintiffs' application to amend their Originating Summons to set aside two further paragraphs is likewise dismissed.

33 The defendant having wholly prevailed, it should in principle have its costs of these proceedings. Within 14 days from the date of this Judgment, the defendant is to file written submissions on the quantum of costs being claimed by it. Within 14 days thereafter, the plaintiffs are to reply to those submissions. Within 7 days thereafter, the defendant is to respond to the plaintiffs. I will then assess costs on the basis of the parties' written submissions.

Anselmo Reyes
International Judge

Francis Xavier s/o Subramaniam Xavier Augustine, Chia Xin Ran Alina and Gani Hui Ying Tracy (Rajah & Tann Singapore LLP) for the plaintiffs;
Vergis S Abraham, Asiyah binte Ahmad Arif and Zhuo Jiaxiang (Providence Law Asia LLC) for the defendant.