IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 12

Court of Appeal / Civil Appeal No 48 of 2024 (Summons No 2 of 2025)

Between

Vietnam Oil and Gas Group

… *Applicant*

And

Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport)

… *Respondent*

JUDGMENT

[Arbitration — Award — Recourse against award — Remission]
[Civil Procedure — Appeals — Adducing fresh evidence on appeal — Party seeking to adduce notes taken by solicitors of hearings below to challenge trial judge's notes of evidence — Whether further evidence relevant to appeal]
[Civil Procedure — Appeals — Judge's notes of hearing forming official record of hearing — Party alleging error in official record of hearing — Proper procedure for raising challenge to or seeking correction of official record of hearing]

TABLE OF CONTENTS

Vietnam Oil and Gas Group
v
Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport)

[2025] SGCA 12

Court of Appeal — Civil Appeal No 48 of 2024 (Summons No 2 of 2025)
Steven Chong JCA
7 February 2025

17 March 2025 Judgment reserved.

Steven Chong JCA:

Introduction

1 The context of this application is rather peculiar, but it raises an issue of civil procedure that is of considerable practical importance. In essence, the applicant's principal complaint is that the judge below recorded, in his notes of the hearing, a submission by the respondent's counsel that the applicant alleges was never made. Is the applicant entitled to raise the issue and, if so, how should this be done?

2 An important piece of context is that the applicant has not placed the allegation of error and the evidence supporting its contention before the judge. Instead, what the applicant has done is to file an appeal against the judge's decision to this court and seek leave via this application to adduce further evidence in the form of the notes taken by its solicitors of the hearings before

the judge, with a view to challenging the veracity of the judge's notes in the appeal. The question of principle that therefore arises is whether this course of action is the correct, or at least a permissible, approach.

Background facts

3 The applicant, Vietnam Oil and Gas Group, applied to the General Division of the High Court in HC/OA 346/2024 ("OA 346") seeking to set aside an arbitral award on various grounds including breach of natural justice. OA 346 was heard together with HC/SUM 988/2024 ("SUM 988"), which was also an application by the applicant, albeit to set aside an earlier order granting leave to the respondent, Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport), to enforce the award.

4 There were three hearings for OA 346 and SUM 988 before a Judge of the General Division of the High Court (the "Judge"). The first hearing on 19 July 2024 was the substantive hearing of the application where the Judge heard oral arguments from the parties. At the end of the first hearing, the Judge reserved judgment. Shortly after, the Judge handed down his decision at the second hearing on 23 July 2024. The Judge delivered a brief oral judgment in which he explained that he agreed with the applicant that there were grounds to set aside the award, but he was not inclined to set aside the award and would instead make an order remitting the matter to the arbitral tribunal. The third hearing on 31 July 2024 addressed a residual disagreement between the parties on the terms of the order to reflect the Judge's decision. Subsequently, on 24 September 2024, the Judge handed down his written grounds of decision: see *Vietnam Oil and Gas Group v Joint Stock Company (Power Machines – ZTL, LMZ, Electrosila Energomachexport) and another matter* [2024] SGHC 244 (the "GD").

5 Both parties have filed cross-appeals against the Judge's decision which are pending before this court. In CA/CA 48/2024 ("CA 48"), the applicant appeals against the Judge's decision to make an order for remission in lieu of setting aside the award. In CA/CA 49/2024 ("CA 49"), the respondent appeals against the Judge's finding that the applicant had established grounds for setting aside the award. As the present application only concerns the applicant's appeal in CA 48, I will say no more about CA 49 save to state that the respondent has confirmed in its Appellant's Case for CA 49 that, if it is unsuccessful in its appeal, it agrees with the Judge's decision to make an order for remission.

6 In CA 48, the applicant contends, in the main, that the Judge did not have the jurisdiction to make an order for remission as neither of the parties had made a request for such an order. At the heart of the applicant's argument is its understanding that the language of Art 34(4) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which has the force of law in Singapore pursuant to s 3(1) read with the First Schedule of the International Arbitration Act 1994 (2020 Rev Ed), contains a requirement for a request for remission to be made by one of the parties:

> (4) The court, when asked to set aside an award, may, where appropriate *and so requested by a party,* suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. [emphasis added]

7 In its Appellant's Case for CA 48, the applicant has advanced two permutations of its submission that there had been no request for remission by the parties. First, the applicant makes the broad argument that, as a matter of law, any request for remission must be formally made by way of an application in the form of a summons supported by an affidavit. Neither party made such

an application. Second, the applicant submits that, in any event, no request for remission was made by the respondent at the first hearing on 19 July 2024.

8 In the alternative, the applicant submits that even if there had been a request for remission, the Judge erred in making such an order for various reasons: (a) the Judge wrongly reversed the burden of proof by proceeding on the basis that it was for the applicant to show why remission was not appropriate rather than for the respondent to show why remission should be ordered; (b) there was a breach of natural justice in the making of the order as the applicant did not have an adequate opportunity to address the issue of remission; and (c) the Judge did not give any reasons for exercising his discretion to make an order for remission.

The present application

9 In this application, the applicant seeks leave to adduce two pieces of further evidence in the form of the notes taken by members of its team of solicitors of the 19 July 2024 and 23 July 2024 hearings. These are, respectively, the notes of Ms Natalie Poh Yuxuan ("Ms Poh") and the notes of Mr Nguyen Trung Nam ("Mr Nguyen").

10 The applicant intends to rely on Ms Poh's and Mr Nguyen's notes to establish that neither party had made a request for remission for the purpose of Art 34(4) of the Model Law. More specifically, the applicant has taken issue with the Judge having recorded, in his notes of the 19 July 2024 hearing, that the respondent's counsel had made the following submission:

> If Court takes view that there was breach, submit that should remit to Tribunal.

According to the applicant, no such submission was in fact made, and the respondent did not make any request for remission at the 19 July 2024 hearing.

The parties' arguments

The applicant's arguments

11 As a starting point, the applicant submits that it is not required to satisfy the conditions set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") to obtain leave to adduce Ms Poh's and Mr Nguyen's notes as their notes relate to a matter that emerged only *after* the Judge's decision. As the parties were only able to see what the Judge had recorded in his notes of the 19 July 2024 and 23 July 2024 hearings after the Judge gave his decision at the latter hearing, it would not have been possible for the applicant to have adduced Ms Poh's and Mr Nguyen's notes before the Judge gave his decision.

12 In this regard, the applicant submits that Ms Poh's and Mr Nguyen's notes should be admitted because (a) they are material to the applicant's case in CA 48 that there was no request for remission by either party; and (b) they are reliable as they are contemporaneous notes taken by Ms Poh and Mr Nguyen during the hearings. Finally, the applicant submits that it is not guilty of any unreasonable delay in raising the matter as it first became aware of the alleged error in the Judge's notes when the GD was released on 24 September 2024.

The respondent's arguments

13 The respondent objects to the application. The respondent submits that the *Ladd v Marshall* test is applicable as Ms Poh's and Mr Nguyen's notes relate to matters occurring *before* the Judge handed down his decision, and the applicant has failed to satisfy this test.

14 The respondent emphasises that, as there are no audio recordings of the hearings, the Judge's notes are the "official record" of the hearings pursuant to O 15 r 11(7) of the Rules of Court 2021 ("ROC 2021"). In these circumstances, the correct thing for the applicant to do should have been to raise its contention of error in the Judge's notes to the Judge, along with any evidence in support of this contention, at the earliest possible opportunity. However, the applicant has not done so to date, despite more than six months having elapsed since the Judge gave his decision at the 23 July 2024 hearing. This translates to a failure to act with reasonable diligence and, in turn, a failure to satisfy the condition of "non-availability" under the *Ladd v Marshall* test.

15 The respondent also submits that (a) the applicant has not shown how Ms Poh's and Mr Nguyen's notes are relevant to the appeal (although there is no elaboration on this); and (b) in any event, Ms Poh's and Mr Nguyen's notes cannot be taken to be credible as they are self-serving, incomplete and contain various inaccuracies.

My decision

The applicable legal framework

16 I begin with the parties' disagreement as to the legal framework which governs this application. It is well-established that there are two parallel regimes for adducing fresh evidence in an appeal before this court under ss 59(4) and 59(5) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA"). Which regime is applicable depends on whether the further evidence relates to matters occurring before or after the date of the decision appealed against (see *COD v COE* [2023] SGCA 29 ("*COD*") at [37]–[38]):

(a) If the further evidence *does not* relate to matters occurring *after* the date of the decision appealed against, s 59(4) of the SCJA applies, and the applicant must show "special grounds" warranting the admission of the further evidence by satisfying the three *Ladd v Marshall* conditions:

(i) the evidence could not have been obtained with reasonable diligence for use in the lower court (the "non-availability" condition);

(ii) the evidence would probably have an important influence on the result of the case, although it need not be decisive (the "materiality" condition); and

(iii) the evidence must be apparently credible, although it need not be incontrovertible (the "reliability" condition).

(b) If the evidence relates to matters occurring *after* the date of the decision appealed against, s 59(5) of the SCJA applies, and the further evidence need not satisfy the requirement of "special grounds". In such a case, the court will instead apply the modified *Ladd v Marshall* test set out by this court in *BNX v BOE and another appeal* [2018] 2 SLR 215 (at [97]–[99]):

(i) first, the court must ascertain what the relevant matters are of which evidence is sought to be given, and ensure that these are matters that occurred after the trial or hearing below;

(ii) second, the court must satisfy itself that the evidence of these matters is at least potentially material to the issues in the appeal; and

(iii) third, the court must satisfy itself that the material at least appears to be credible.

17 In my judgment, it is the latter regime, rather than the former, which applies to the further evidence in this case, at least as a matter of substance. Taking a step back for a moment, it is important to bear in mind that the court is not bound to apply the *Ladd v Marshall* conditions mechanistically, as it retains an overriding discretion to act as the interests of justice require. The overarching principle is that fresh evidence may be admitted, notwithstanding non-compliance with the *Ladd v Marshall* conditions, if "it would affront common sense or a sense of justice to refuse leave to adduce fresh evidence": *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [37]–[38].

18 Approaching things from this wider perspective, it becomes apparent that the non-availability condition of the ordinary *Ladd v Marshall* test cannot meaningfully apply to Ms Poh's and Mr Nguyen's notes for the simple reason that, like the Judge's notes, they came into existence only *after* the respective hearings. Logically, they could not therefore have been adduced at the same hearings which Ms Poh and Mr Nguyen were recording, nor could the parties have discovered any alleged error(s) in the Judge's notes until after the hearing. Since Mr Nguyen's notes are the notes of the very hearing where the Judge handed down his decision, they are not evidence that could have been adduced prior to the Judge's decision. The modified *Ladd v Marshall* test must thus apply.

19 Turning to Ms Poh's notes, arguably, it could have been theoretically possible for the applicant to obtain a copy of the Judge's notes of the 19 July

2024 hearing, detect any alleged error(s) therein, and adduce Ms Poh's notes of the same for the purpose of comparison, either before or at the 23 July 2024 hearing itself. However, there would be no reason or occasion for any party, including the applicant, to apply for the Judge's notes prior to the delivery of the Judge's decision. It would thus be unrealistic to expect the applicant or any party to have done so prior to the decision.

20 Given the above, the success of the present application, to my mind, turns on the applicant's ability to satisfy the *Ladd v Marshall* conditions of materiality and reliability in relation to Ms Poh's and Mr Nguyen's notes.

Whether Ms Poh's and Mr Nguyen's notes are material to the appeal

21 However, in my judgment, the insurmountable difficulty which the applicant faces lies in satisfying the materiality condition, as for one reason or another, Ms Poh's and Mr Nguyen's notes are immaterial to the appeal in CA 48.

Mr Nguyen's notes are not material to the appeal

22 I can summarily dispose of the application in relation to Mr Nguyen's notes of the 23 July 2024 hearing. They are immaterial for the simple reason that the applicant has not taken any issue with the Judge's notes of the same hearing. The only error that the applicant has alleged lies in the Judge's notes of the 19 July 2024 hearing, and there is no suggestion of any inconsistency between what is recorded in the Judge's notes of the 23 July 2024 hearing and Mr Nguyen's notes of the same. Given this, Mr Nguyen's notes add nothing to the appeal in CA 48. I dismiss the application in relation to Mr Nguyen's notes on this basis alone.

Ms Poh's notes are not material to the appeal

23 Turning to Ms Poh's notes of the 19 July 2024 hearing, the position has a more complex dimension given that the applicant *does* intend to rely on them to mount an allegation of error in the Judge's notes of the 19 July 2024 hearing. However, my conclusion is the same – Ms Poh's notes are immaterial to the appeal. This is for two reasons.

(1) The alleged error in the Judge's notes has no bearing on the appeal

24 I deal first with the more straightforward reason. Assuming *arguendo* that it is open to the applicant to allege an error in the Judge's notes in the appeal before this court in CA 48, Ms Poh's notes would still be irrelevant because the error that the applicant has alleged, even if made out, would have no bearing on the appeal.

25 In the first place, the primary argument that the applicant advances in the appeal is that a request for remission must be made by way of an application in the form of a summons and supporting affidavit (see [7] above). The underlying premise of this submission is that what transpired at the hearing is irrelevant because it was not open, as a matter of law, to the respondent to have made an effective oral request for remission at the 19 July 2024 hearing. Given that the applicant essentially invites this court to disregard the 19 July 2024 hearing for the purposes of locating a request for remission, Ms Poh's notes would be irrelevant to this argument.

26 Although the applicant's alternative case is that no oral request for remission was in any event made by the respondent at the 19 July 2024 hearing,

Ms Poh's notes remain immaterial because the alleged error in the Judge's notes which the applicant has taken issue with is inconsequential.

27 To recapitulate, the applicant contends that the Judge was wrong in recording a submission by the respondent's counsel along the lines of "[i]f court takes view that there was breach, submit should remit to Tribunal" (see [10] above). The crux of this submission is that, if the Judge disagreed with the respondent's primary case that no ground for setting aside the award was established, the respondent's position was that the matter should be remitted to the tribunal. Even if the Judge had made a mistake in recording this submission, the Judge recorded a submission of identical substance by the respondent's counsel at a different point during the hearing. It follows that whether or not the respondent's counsel did say what the applicant claims he did not is of no moment in the appeal.

28 Specifically, at the end of his oral submissions, the respondent's counsel stated that it was "[w]ithin [the] Court's power to remit if [the] Court disagrees with [the respondent's] submission on [the] 1st Issue" as there was "[n]o reason why [the] Tribunal cannot deal with the issue". The applicant does not dispute that this submission was in fact made or that the Judge similarly erred in recording this. Indeed, it is not open for the applicant to do so, since (a) Mr Nguyen concedes in his supporting affidavit for this application that "[the respondent's] counsel said that [the respondent] would leave it to [the Judge] to decide"; and (b) more importantly, this submission by the respondent's counsel is recorded, in even greater detail than the Judge's notes, in Ms Poh's notes:

> Ct: On issue of remission?
>
> EK: Remission won't make a practical difference because of Dzung's view. *But within YH's power to remit if he disagrees with my submissions made.* But this tribunal

> was careful in reasoning. I don't think [the applicant's counsel] is saying anything about individuals. *Would require higher degree of real bias to be shown before his argument that tribunal is incapable of dealing with the issue would wash.*
>
> So (i) should not set aside (ii) *can remit* (iii) does not need to deal with it because tribunal already dealt with the bigger point.

[emphasis added]

29 The account in Ms Poh's notes is particularly illuminating because it captures the *context* in which the respondent's counsel made this submission: it was a response to a *direct* question by the Judge on the respondent's position on remission. It is therefore incontrovertible that the respondent's counsel did say at some point during the 19 July 2024 hearing – whether in this undisputed submission or the other submission which the applicant takes issue with – that the respondent was amenable to an order for remission if the Judge thought fit to make such an order. As a result, the applicant's appeal in CA 48 does not turn on what the respondent's counsel said (or did not say) at the 19 July 2024 hearing, but whether the position adopted by the respondent's counsel – *ie*, that the respondent would leave the issue of remission up to the Judge – constitutes, as a matter of law, a request for remission under Art 34(4) of the Model Law. Ms Poh's notes are irrelevant to this question.

(2) The applicant is not even entitled to raise the alleged error in the Judge's notes in the appeal

30 Although the immateriality of the alleged error that the applicant has raised in the Judge's notes of the 19 July 2024 hearing suffices to dispose of the application *vis-à-vis* Ms Poh's notes, I consider that there is an even more fundamental problem in the applicant's position, which is that it is not even entitled to *raise* the alleged error in the Judge's notes as an issue in the appeal

before this court in CA 48. For this reason, Ms Poh's notes, which are adduced for the purpose of supporting the applicant's case on such error, are not material to the appeal.

31 In sum, the approach that the applicant has taken in this case – *ie*, to appeal to this court and challenge the Judge's notes in the first instance before this court – is improper. In my view, an appellate court should generally not entertain a challenge to the official record of the hearing below unless the issue has been ventilated before the court or judge below. Let me explain.

(A) THE JUDGE'S NOTES ARE THE OFFICIAL RECORD OF THE HEARINGS

32 I begin by sketching the legal context. The starting point is O 15 r 11(5) of the ROC 2021, which provides that "[t]he Court must maintain an official record of every hearing". An official record of a hearing may take one of two forms:

> (a) In a case where an audio recording system approved by the Registrar is used, the audio recording would be the official record of the hearing: O 15 r 11(6) of the ROC 2021.
>
> (b) In a case where an audio recording system is not used, the Court's notes of the proceedings, recorded in any manner that the Court may determine, would be the official record of the hearing: O 15 r 11(7) of the ROC 2021.

33 An audio recording will be made by default in every open court trial in an action begun by originating claim, and may be made by the court in any other hearing in the General Division of the High Court: see para 14(1) of the Supreme Court Practice Directions 2021 ("SCPD 2021"). The parties may

request for the court to make an audio recording by filing the requisite form through the Electronic Filing Service at least seven working days before the scheduled hearing: see para 14(5A) of the SCPD 2021.

34 In this case, the parties did not make any request under para 14(5A) of the SCPD 2021 for an audio recording to be made of the 19 July 2024 hearing (or, for that matter, *any* of the three hearings on 19 July 2024, 23 July 2024 and 31 July 2024). Furthermore, since the proceedings below were held in camera, as most arbitration-related matters tend to be, no audio recording was made as a default measure under para 14(1) of the SCPD 2021. In these premises, the official record of the 19 July 2024, 23 July 2024 and 31 July 2024 hearings are the Judge's notes of each of these hearings.

35 A party may apply for a certified transcript of the official record of a hearing upon payment of the relevant fees: O 15 r 11(8) of the ROC 2021. Since the certified transcript represents the "official record", in a case where the official record is the court's notes of the hearing, a party would only be able to obtain a certified transcript of the notes of the presiding judge or *coram*. This explains why in this case, when the applicant filed a request to the Registry for a transcript of the 19 July 2014 hearing (as well as the 23 July 2024 and 31 July 2024 hearings), its request was rejected, and it was instead directed to file for a certified transcript of the Judge's notes.

(B) THE PROCEDURE FOR RAISING CHALLENGES TO THE OFFICIAL RECORD OF A HEARING

36 If the judge's notes are the official record of the hearing, what is the proper procedure for raising a challenge to, or seeking a correction of, the official record?

37 This question has in fact been addressed by this court on a prior occasion in the rather obscure case of *Chan Kok Kiang v Tan Swan Cheng and another* [1968–1970] SLR(R) 707 ("*Chan Kok Kiang*"). The appellant there made an application to amend the record of appeal to add contemporaneous notes that his counsel had taken at the trial to the notes of evidence, as the notes of evidence did not reflect the trial judge having stated a particular legal proposition which was recorded in the contemporaneous notes of the appellant's counsel. By the time the application was made, neither the respondent's trial counsel nor the trial judge could remember what exactly had been said at the hearing. In these circumstances, this court dismissed the application (at [6]–[7]):

> 6 It was submitted to us by counsel for the appellant that this court should accede to his motion as the only contemporaneous note of what the trial judge said was the one made by the defendant's counsel at the trial and its accuracy was not denied by the trial judge and by counsel who appeared for the plaintiffs at the trial. We dismissed the motion. It is not the practice of the courts in Singapore to have a verbatim shorthand note taken of the entire proceedings in court. *If it is intended that any note taken by counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate court, it is desirable that the trial judge and counsel for the other party or parties should be supplied at the earliest possible opportunity with a copy of the note so made for correction or acceptance or otherwise. If the trial judge and counsel for all parties agree to the original or a corrected version then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence.* Where no version can be so agreed, then in any application for leave to include the note made or taken by counsel at the trial, the affidavit in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement.
>
> 7 In the present case, having regard to the fact that the application was made at a very late stage in the proceedings and the fact that the trial judge and counsel for the plaintiffs at the trial were unable to say whether or not the note made by [the appellant's counsel] was an accurate verbatim note of what

> the trial judge had said at the trial, we thought it right that the application should be dismissed.
>
> [emphasis added]

38 The short point made by this court in *Chan Kok Kiang* was that any party who believes the official record of the hearing to be inaccurate or incomplete must raise the matter at the earliest possible opportunity to the other party (or parties) and the trial judge, and it should do so by providing the evidence that supports its contention of error. This would facilitate the ability of the other party and the trial judge to take a position on the veracity of the challenge and respond accordingly.

39 Although this court stated that the issue should be raised "at the earliest possible opportunity", I do not think that the intention was to use "earliest possible opportunity" as a deadline or *de facto* time bar in the sense that any challenge raised *after* the "earliest possible opportunity" would not be entertained and dismissed *in limine*. Instead, it seems to me that what this court had in mind was that the issue should be raised "at the earliest possible opportunity" so that it may be addressed by the parties and the judge while their recollections of the hearing remain relatively cogent and intact. Put in a different way, the point is not that a party must raise the challenge at the earliest possible opportunity, failing which it will be estopped or be taken to have waived the point, but that a party who delays in raising the issue does so *at its own peril* because it runs the risk that, by the time the issue is raised, the other party and the judge would no longer be able to recollect what had transpired at the hearing such that they would be unable to take a position on the issue. Indeed, this was the case on the facts of *Chan Kok Kiang* itself and led to this court dismissing the application.

40 The same point was made more recently in the decision of the General Division of the High Court in *North Star (S) Capital Pte Ltd v Megatrucare Pte Ltd and another* [2021] SGHC 110. In that case, a dispute over the accuracy of the official transcript of a witness's evidence was only raised by the second defendant in its reply submissions some three months after the witness had taken the stand. Dedar Singh Gill J dismissed the application, and commented that the delay in raising the dispute had deprived the court (and the parties) of the option of recalling the witness (at [120]–[122]):

> 120 In light of the principles in *Chan Kok Kiang*, the second defendant should have scrutinised the Official Transcript and given the court and opposing counsel written notice of his intention to challenge the Official Transcript at the earliest possible opportunity ("Written Notice"). The Written Notice should have stated his belief that the Official Transcript was wrong and the basis for this belief, so as to enable the court to reach a decision on how to progress the matter. If the plaintiff's agreement to amend the record was not forthcoming, parties should have, once again, written in to the court, which may then have taken the option of re-calling Professor Kua.
>
> 121 In this case, the second defendant's failure to provide the court or opposing counsel with a Written Notice and prematurely contacting Professor Kua prior to receiving the court's directions on this issue removed the option of recalling Professor Kua as a witness. What is also inexplicable is how the second defendant was prepared to mount the present challenge before even obtaining the audio recording of the proceedings; the audio recording was only requested by the plaintiff on 30 January 2021.
>
> 122 Having reviewed the audio transcript of the trial proceedings, and considering the Challenged Portions of Professor Kua's testimony in their context, I am unable to verify the accuracy of the second defendant's proposed alterations and dismiss his challenge to the Official Transcript.

41 In my judgment, the approach laid down by this court in *Chan Kok Kiang* more than five decades ago remains equally apposite in the present day.

To summarise, if a party intends to raise a challenge to the official record of a hearing, the steps that should be taken are as follows:

(a) The challenge (along with any supporting evidence) should be raised at the earliest possible opportunity to the opposing party and the judge. The other party should be invited to take a position on the challenge and, if possible, an agreement should be reached between the parties as to whether the challenge is or is not well-founded.

(b) Once the parties have taken their positions on the challenge, the judge should decide whether he or she agrees or disagrees with the challenge. If the judge agrees with the challenge and is minded to, he or she may amend the official record accordingly.

42 In my view, if the above procedure is not followed, and a party instead chooses, as the applicant has done in this case, to short-circuit the process by mounting a challenge against the official record before an appellate court as the first port of call, the appellate court should generally refuse to entertain such a challenge. This is not because of some arid procedure but for at least two fundamental justifications:

(a) First, as a matter of competence, the judge presiding over the hearing below would obviously be better placed than the appellate court to resolve a conflict as to what was or was not said at the hearing before him or her. Unlike the judge and the parties, the appellate court is a stranger to what may have transpired at the hearing below.

(b) Second, where the official record of the hearing is the judge's notes, a challenge to the official record may potentially carry with it the

connotation of an allegation of breach of natural justice against the judge. Given the potential seriousness of the matter, it is right as a matter of fairness that the judge should be given the opportunity to address the issue before it is ventilated before the appellate court.

(C) THE APPLICANT HAS NOT RAISED THE ALLEGED ERROR TO THE JUDGE

43 In this case, the applicant has neither raised the alleged error in the Judge's notes of the 19 July 2024 hearing to the Judge, nor offered any reason as to why this has not been done. For the reasons I have stated above, this court should not entertain the applicant's challenge to the Judge's notes in the appeal in CA 48. Since it is not open to the applicant to take this point, Ms Poh's notes are rendered immaterial to the appeal.

44 Although it is not necessary for the disposal of this application, having reviewed the record of the proceedings below, I feel compelled to observe that the applicant's delay in raising the issue of the alleged error in the Judge's notes – leaving aside that this court is not the correct forum for doing so – has been nothing short of inordinate. While the applicant has argued that it is not guilty of any unreasonable delay as it only became alive to the issue when the GD was issued on 24 September 2024, this assertion is plainly unsupported by the objective evidence before this court.

45 It is indisputable that the applicant became aware at the 23 July 2024 hearing itself that the Judge was under the impression that the respondent had made a request for remission at the 19 July 2024 hearing. Indeed, after the Judge read his oral judgment in which he stated, *inter alia*, that "[he] agree[d] with [the respondent] that this [was] an appropriate case to remit to the Tribunal", the applicant's counsel, Dr Colin Ong KC ("Dr Ong"), immediately raised the

objection that there had been no request by the parties for remission as required under Art 34(4) of the Model Law. The Judge responded to this by stating that he had understood the respondent as having made a request for remission as part of its alternative case (*ie*, in the event that the Judge held that there were grounds for setting aside the award). The respondent's counsel, Mr Edmund Kronenburg ("Mr Kronenburg"), duly confirmed that this had indeed been the respondent's position. This exchange was recorded in black and white in the Judge's notes of the 23 July 2024 hearing, as well as in Mr Nguyen's notes as follows:

> DCO: … point out that under Article 34(4) of the Model Law, in order to remit it requires one party to make that application. We objected to it. [The respondent] said they left it to court.
>
> Ct: I understood [the respondent's] submissions to be that if I find a breach, then I think it should be remitted, so I take that as an application by them.
>
> EK: Yes.

46 Given this, I do not see how the applicant can suggest that it was only put on notice as to the alleged error in the Judge's notes of the 19 July 2024 hearing when the GD was subsequently released just over two months later. It was already the applicant's position at the 23 July 2024 hearing that no request for remission had been made at the 19 July 2024 hearing, as Dr Ong indicated to the Judge, and the applicant was informed by both the Judge and the respondent (through Mr Kronenburg) that they had a different recollection of the 19 July 2024 hearing. In these circumstances, one would have expected the applicant to have taken steps to procure a copy of the Judge's notes of the 19 July 2024 hearing and compare them against Ms Poh's notes. Indeed, the applicant did file a request immediately after the 23 July 2024 hearing for certified transcripts of the Judge's notes for both the 19 July 2024 and 23 July 2024 hearings (as did the respondent). While the exact time when the applicant's

request was fulfilled is not known to me, it can be reasonably inferred from the fact that the respondent was able to enclose the certified transcripts of both the 19 July 2024 and 23 July 2024 hearings in a letter to the tribunal on 23 July 2024 itself – which the applicant and its solicitors were copied in – that the applicant had the Judge's notes of the 19 July 2024 hearing by the close of 23 July 2024.

47 In my view, the earliest possibly opportunity when the applicant could, and should, have raised the alleged error to the Judge was either 23 July 2024 itself or, at the very latest, shortly after that. But for reasons that are only known to the applicant, it did not do so and has not done so to date. Instead, the first time that the applicant formally raised the alleged error was when it filed the present application to this court on 30 December 2024, by which time more than five months had elapsed since the delivery of the decision. By any measure, this delay of over five months is not only inordinate but quite simply inexplicable. This is especially so given that the applicant continues to be represented by Dr Ong – who had himself raised the objection of a lack of a request for remission to the Judge at the 23 July 2024 hearing itself.

Conclusion

48 For the foregoing reasons, I dismiss this application. Leaving aside the applicant's failure to follow the proper procedure for challenging the Judge's notes of the 19 July 2024 hearing, it should in any event have been obvious to the applicant and its counsel that (a) the alleged error in the Judge's notes is inconsequential (and Ms Poh's notes are thus immaterial to the appeal); and (b) Mr Nguyen's notes could serve no purpose in the appeal.

49 Finally, the parties have advanced essentially identical positions on costs as they have both sought costs of around $10,000 plus disbursements if they are successful in this application. Accordingly, I fix the costs of the application in the sum of $12,000 (all-in), payable by the applicant to the respondent.

Steven Chong
Justice of the Court of Appeal

Colin Ong Yee Cheng KC, Koh Choon Guan Daniel and Wong Hui Yi Genevieve (Eldan Law LLP) for the applicant;
Edmund Jerome Kronenburg, Stephanie Sim Wei Min and Chan Yu Jie (Braddell Brothers LLP) for the respondent.