IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(I) 25

Originating Application No 9 of 2025 (Summons No 777 of 2025)

In the matter of Section 19 and 20 of the International Arbitration Act 1994

And

In the matter of Order 48, Rule 6 of the Rules of Court 2021

And

In the matter of Article 35 of the UNCITRAL Model Law on International Commercial Arbitration

And

In the matter of an arbitration between GNC Holdings, LLC, ONI Global Pte Ltd and LAC Global (Singapore) Pte Ltd

Between

GNC Holdings, LLC

… *Claimant*

And

(1) ONI Global Pte Ltd
(2) LAC Global (Singapore) Pte. Ltd.

… *Defendants*

JUDGMENT

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

TABLE OF CONTENTS

INTRODUCTION AND BACKGROUND 1

THE FINAL AWARD 7

GROUND 4: THE COMPLAINT AS TO THE ORDER FOR SPECIFIC PERFORMANCE IN PARAGRAPH 752(3) IN THE FINAL AWARD 21

GROUND 3: THE COMPLAINT AS TO THE TRIBUNAL'S APPROACH TO POST-TERMINATION DAMAGES 39

GROUNDS 1 AND 2: THE COMPLAINTS BASED ON THE SPOLIATION OF DOCUMENTS AND EVIDENCE 52

GROUND 1: PUBLIC POLICY (S 31(4)(B) OF THE IAA) – THE SPOLIATION APPLICATION 54

GROUND 2: NATURAL JUSTICE (S 31(2)(C) OF THE IAA) – THE ALLEGED FAILURE TO ADDRESS A "CRITICAL ARGUMENT" 58

ORDERS 64

Version No 1: 21 Oct 2025 (11:29 hrs)

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GNC Holdings LLC
v
ONI Global Pte Ltd and another

[2025] SGHC(I) 25

Singapore International Commercial Court — Originating Application No 9 of 2025 (Summons No 777 of 2025)
Chua Lee Ming J, Simon Thorley IJ, James Allsop IJ
21 July 2025

21 October 2025 Judgment reserved.

James Allsop IJ (delivering the judgment of the court):

Introduction and Background

1 Before the Court is an application by the Defendants, ONI Global Pte Ltd and LAC Global (Singapore) Pte Ltd (collectively the "Franchisees" and severally the "Franchisee" and the "Related Company"), to set aside an order made by the Court in favour of the Claimant (the "Franchisor") for the enforcement of a Final Award ("FA") made on 14 August 2024 by a three-member arbitral panel ("Tribunal") in Pittsburgh, Pennsylvania. As part of the narrative that explains the presence of two defendants, it is to be noted that the Franchisee was the direct contracting party with the Franchisor under the relevant agreements. The Related Company was an associated company of the Franchisee which came to operate the franchised stores in Singapore, initially and not until the litigation, without disclosure to, or knowledge of, the

Franchisor. When the arbitration began the Related Company agreed to be bound by the arbitration as if it were a party to the relevant agreements. For the purpose of this judgment it is only necessary to distinguish between them to understand the narrative of events.

2 The FA resolved disputes between the Franchisor and Franchisee concerning the conduct and termination of their franchise relationship embedded in a number of relevant agreements. In the FA the Tribunal dismissed claims made by the Franchisees that the Franchisor had materially breached and repudiated the relevant contractual relationship. Relevantly, the Tribunal allowed the Franchisor's claims for specific performance by way of assignment of the Franchisees' Singapore retail outlets enforcing post-termination covenants and awarded significant damages for breach of contract together with interest.

3 The Franchisee and its associated companies and the Franchisor had, for a considerable number of years before 2022, enjoyed an harmonious and, it would appear, mutually satisfactory franchise relationship concerned with the sale to the public in Singapore of health products and dietary supplements. Through its associated companies in other parts of Asia, relevantly the Philippines, Malaysia and Taiwan, the Franchisee had franchise relationships with the Franchisor in connection with the same business in those countries.

4 The Franchisor is and was a company incorporated in Delaware and carries and carried on the above business in many countries around the world, usually, though not exclusively, through franchise relationships.

5 In about 2020, the Franchisor experienced financial difficulties leading it to seek protection under Chapter 11 of the United States Bankruptcy Code 11

Version No 1: 21 Oct 2025 (11:29 hrs)

USC (US) (1978). It emerged from such protection under new ownership. It appears that from about this time or soon afterwards the relationship between the Franchisee and Franchisor in relation to the businesses in Asia deteriorated, with a breakdown of trust and co-operation and mutual allegations of breach of contract. This deterioration led to arbitrations concerning the Malaysian and Taiwanese relationships. Before May 2022 in the awards resulting from these arbitrations the Franchisee enjoyed a measure of success in the acceptance of its complaints as to the Franchisor's repudiatory breaches of contract under the relevant agreements governing the Malaysian and Taiwanese relationships. The essence of the complaints of the Franchisee was that the Franchisor was behaving in a harsh fashion in breach of good faith as part of a plan to retake the businesses that had been built up by the work of the Franchisee and its associated companies.

6 One aspect of these consolidated arbitrations that is to be noted was the behaviour of at least one senior officer of the Franchisor, a Mr Wong, concerned with the destruction and concealment of documents relevant to the resolution of the disputes.

7 Leading up to May 2022, the Franchisee was of the view that the Franchisor was behaving in a manner that amounted to breach or breaches of the contractual arrangements underlying the Singapore franchise. Specifically, its officers, in particular Ms Poa, considered that the Franchisor's conduct in a number of respects in connection with pricing, delivery of goods and other matters within the Franchisor's discretion that could affect the Franchisee amounted to sufficiently serious breaches of contract as to be repudiatory in character and justifying termination by the Franchisee.

Version No 1: 21 Oct 2025 (11:29 hrs)

8 The senior officers of the Franchisee believed that the Franchisor wished to remove it from the franchise and felt that trust had broken down. The conduct of the Franchisor and the perception of an absence of trust by the Franchisee led to the Franchisee making commercial and legal decisions that led to the Singapore arbitration and the FA. Put shortly, from about September 2021 the Franchisee together with the Related Company began to prepare for the rebranding of its 54 Singapore retail outlets with new marks and brands of their own to replace those of the Franchisor. Any such rebranding of the stores without good legal reason or the consent of the Franchisor was a breach of the relevant agreements which included post-termination covenants requiring the Franchisee to assign all its franchised outlets to the Franchisor upon termination of the franchise relationship. The Franchisee considered that such were the character and seriousness of the breaches by the Franchisor, it would be released by operation of law from the post-termination covenants.

9 On or about 20 May 2022, the Franchisor purported to terminate the Singapore franchise arrangements, asserting breaches by the Franchisor amounting, it was said, to repudiatory conduct by the Franchisor. These alleged breaches and this repudiation were said to justify the Franchisee's conduct and to be the legal basis to discharge the Franchisee from its post-termination obligations in particular those as to assignment.

10 Some days later, the Franchisor commenced an arbitration alleging repudiatory breach by the Franchisee. Some days after that, the Franchisee commenced an arbitration alleging the Franchisor's breaches and repudiatory conduct and seeking declarations as to its entitlement to maintain the 54 Singapore stores free of post-termination obligations.

Version No 1: 21 Oct 2025 (11:29 hrs)

11 Pursuant to the relevant agreement the Tribunal was constituted under the auspices of the International Centre for Dispute Resolution under the American Arbitration Association. The dispute was governed by the law of Pennsylvania, which included an obligation of good faith and fair dealing.

12 The two arbitrations were heard together and effectively consolidated. As is perhaps already evident the structure of the overall dispute in the arbitration and as reflected in the interlocking pleadings, supported in memorial fashion by evidence, hinged upon the validity of the Franchisee's position that it was contractually entitled to act as it did in terminating the relationship and the relevant agreements by reason of the (asserted) serious and repudiatory breaches of contract that were said to have been committed by the Franchisor. If the Franchisee were correct the Franchisor may have lost the benefit of the post-termination obligations, in particular the right to an assignment of the Singapore stores. On the other hand, if (as found by the Tribunal) the Franchisor was not in breach, there was no contractual or other warrant for the Franchisee's abandonment of the relationship and (on this hypothesis) it had wrongly abandoned its obligations under the agreements including its post-contractual obligations to assign all leases of the 54 Singapore stores.

13 That latter circumstance and conclusion was the position in which the Franchisees found themselves. The Tribunal rejected the Franchisees' case that the Franchisor had been in material breach or had repudiated of the relevant contracts. It found that the Franchisor was entitled to an order for, or in the nature of, specific performance of the post-termination covenants, relevantly cl 13.4 of the Franchise Agreement between the Franchisor and the Franchisee, by the assignment of the Singapore stores and was also entitled to very substantial damages.

Version No 1: 21 Oct 2025 (11:29 hrs)

14 The Franchisor sought enforcement of the FA in Singapore under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). By orders made on 4 March 2025 the court granted permission to enforce *ex parte*. By summons filed on 24 March 2025 the Franchisees sought to set aside the enforcement order on grounds under ss 31(2)(*c*), 31(2)(*d*) and 31(4)(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"). The grounds as set out in paras 1 to 4 of the application ("Ground 1" to "Ground 4" respectively) are as follows:

> 1. The Applicant destroyed and/or concealed evidence and in doing so committed a fraud on the Tribunal and/or the Respondents which substantially impacted the Award, by reason of which the Award should be refused enforcement … on the basis that the Award is *contrary to the public policy* of Singapore;
>
> 2. The Tribunal failed to apply its mind to a critical argument made by the Respondents in relation to the adverse inferences to be drawn against the Applicant, by reason of which the Award should be refused enforcement … on the basis that the Tribunal committed *breaches of natural justice* and/or the Respondents were unable to present their case;
>
> 3. The Tribunal allowed the Applicant's new and unpleaded damages claim, by reason of which the Award should be refused enforcement … on the basis that the Tribunal's award of damages was *outside the scope of the parties' submission to arbitration* and/or … on the basis that the Tribunal committed *breaches of natural justice* and/or the Respondents were unable to present their case; and
>
> 4. The Tribunal granted new and unpleaded specific performance reliefs, by reason of which the Award should be refused enforcement … on the basis that the Tribunal's award of specific performance was *outside the scope of the parties' submission to arbitration* and/or … on the basis that the Tribunal committed *breaches of natural justice* and/or the Respondents were unable to present their case.
>
> [emphasis added]

15 For the following reasons, and with one qualification relevant to Ground 4, the application of the Franchisees should be dismissed, and orders should be

Version No 1: 21 Oct 2025 (11:29 hrs)

made varying the order of the Court made *ex parte* enforcing the FA. The qualification is that certain parts of the order providing for specific performance of the obligation in cl 13.4 should not be recognised or enforced.

16 We will deal with the grounds of resistance to enforcement in the order in which they were presented in argument by the Franchisees.

The Final Award

17 Before addressing the grounds of the application and the arguments put forward in support of them, for at least two reasons, it is appropriate to outline the relevant sections of the FA. First, it is salutary to appreciate the comprehensive and careful detail with which the Tribunal attended to the references before it and to the evidence and arguments involved. Secondly, some detailed background is necessary to appreciate some of the arguments put forward before the Court and which are dealt with in due course.

18 In FA Part III at [23]–[44] the Tribunal set out the factual background. Central to this was a brief description of the Franchisee's central proposition that after taking over the Franchisor's business in the bankruptcy process, the new owners "embarked on [a] scheme to destroy the Parties' relationships and misappropriate [the Franchisee's] businesses in its markets" (FA at [31]), quoting the Franchisee's pleadings. This was to be done, it was alleged, by, amongst other means, the Franchisor selling directly into franchised territories by e-commerce from its own and other e-commerce platforms.

19 The Franchisor's Executive Vice Chairman, Mr Wong, was said by the Franchisee to be instrumental in effecting this strategy. He wanted, it was said, to take back markets in Singapore, Malaysia, Taiwan and the Philippines from the Franchisee.

Version No 1: 21 Oct 2025 (11:29 hrs)

20 The Tribunal summarised the Franchisor's case that it did not seek to destroy the relationship with the Franchisee or misappropriate its business, but that it did seek to conduct the relationship more aggressively to grow the Franchisor's business. At [34] of the FA the Tribunal expressed four important summary findings (substantiated later in the body of the reasoning) as follows:

> (i) in late 2020 (and perhaps later), Mr. Wong may well have envisioned replacing [the Franchisee's] entities in all of their markets, but was certainly focused on replacing them in Malaysia and Taiwan;
>
> (ii) [the Franchisor], based on Mr Wong's pressure, terminated [the Franchisee's] affiliates' contracts in Malaysia and Taiwan in early 2021, before their natural expiration; but
>
> (iii) [the Franchisor] at all times largely complied with its contractual obligations to [the Franchisee] in Singapore; and
>
> (iv) [the Franchisor] did not have any immediate plans to terminate [the Franchisor's] contracts in Singapore when, in May 2022, [the Franchisee] unilaterally terminated them.

21 In Part IIIB, the Tribunal briefly described the disputes between the Franchisor and the Franchisee concerning the Malaysian and Taiwanese franchises: the cancellation by the Franchisor in January 2021 of the Franchisee's affiliate's e-commerce right in Malaysia and Taiwan; the cancellation by the Franchisor in March 2021 of the Franchisee's Taiwan affiliate's distribution agreement; and later in March 2021 the cancellation by the Franchisor of all agreements with the Franchisee's affiliates for Malaysia and Taiwan. Arbitrations were commenced about these matters. One aspect of the escalating dispute over these jurisdictions was the rebranding of Franchisor stores in Malaysia and Taiwan as Franchisee stores. Emergency relief was sought in an arbitration by the Franchisor to restrain this conduct. *Quia timet* relief was granted, but not a mandatory order to reverse rebranding that had been affected. This left some Franchisee affiliated stores branded as Franchisor stores and others branded as Franchisee stores. It was to avoid this kind of

Version No 1: 21 Oct 2025 (11:29 hrs)

situation in Singapore, that in 2021, the Franchisees began, without informing the Franchisor, to prepare the rebranding of all 54 stores in Singapore in advance of anticipated future difficulties or action. By May 2022, the Franchisees were ready to rebrand all Singapore stores overnight.

22 On or about 20 May 2022, the Franchisees unilaterally terminated the agreements relating to the Singapore franchise and, overnight, effected the rebranding of all Singapore stores.

23 In FA Part IV at [45]–[162], the Tribunal set out the history of the proceedings which does not need to be recorded.

24 In FA Part V at [163]–[196] the Tribunal dealt with the application by the Franchisee to dismiss the Franchisor's claims and the defences to its claims on the basis that the Franchisor, in particular through Mr Wong, had engaged in spoliation being the concealment and destruction of documents on disclosure which were relevant to and might be evidence in the arbitration. This was an allegation that had been made by the Franchisee throughout the life of the arbitration that had culminated in an application in November 2023 that sought the dismissal of the Franchisor's claims and the drawing of adverse inferences against the Franchisor in its defences to the Franchisee's claims of repudiatory breach of contract by the Franchisor.

25 The Tribunal began its determination of the issues on the spoliation application by saying that it "takes this entire issue seriously": FA at [165]. The Tribunal began by summarising the very serious findings that it made against Mr Wong, saying (at [165] of the FA) that some of Mr Wong's evidence on the issue was "evasive, unhelpful and not credible".

Version No 1: 21 Oct 2025 (11:29 hrs)

26 The allegations against Mr Wong and a Ms Mullen were described at [167] of the FA. The evidence revealed deletions of text messages and missing documents. The Franchisees pointed to the evidence in support of what it said was the deliberate destruction of evidence as to the Franchisor's strategy and acts directed to destroying the franchise relationship and amounting to its pleaded breaches of contract and repudiation. One of the Franchisees' complaints in the application was that the conduct of destruction meant that it would "never know what other damning deleted messages were sent during this period that would relate to Mr Wong's 'bigger strategic goal' and plans for Singapore".

27 The Tribunal made some very serious findings about Mr Wong's evidence: in cross examination he evaded questions and offered excuses "that [did] not bear scrutiny". The Tribunal was "troubled" by Mr Wong's testimony and discounted it to the point of giving it no weight, unless corroborated by objective evidence: FA at [174]. The Tribunal also found him to have been uncooperative and at times untruthful: FA at [179].

28 After setting out the relevant legal standard by reference to which to assess the application (FA at [176]–[178]) in a manner not the subject of criticism, the Tribunal found important critical elements of the application had been made out. The Tribunal accepted that the Franchisee had proven that evidence within the Franchisor's control was suppressed or withheld. The Tribunal accepted that some of the documents destroyed were relevant to the Franchisor's intentions towards the Franchisee in 2020 and 2021 (though their materiality was said to be overstated by the Franchisee). The Tribunal also found that it was reasonably foreseeable that the documents could be relevant to, and so discoverable in, litigation in all relevant markets in Asia: FA at [180]. All this was found to be wilful: FA at [182].

Version No 1: 21 Oct 2025 (11:29 hrs)

29 The Tribunal turned to the prejudice to the Franchisee and the relief warranted by the conduct at [182]–[186] of the FA. The Tribunal did not consider the evidence of more than limited relevance to the dispute regarding Singapore, except that there was discussion of a plan with a colleague that looked beyond the Franchisee's removal from Malaysia. The critical reasoning of the Tribunal in refusing the Franchisee the relief it sought is contained in FA at [183]–[185] which should be set out in full:

> 183. The difficulty for the Tribunal is that it is left largely to speculate about what additional texts might have been deleted or when they might have been deleted. The Tribunal is, however, helped by what the existing evidentiary record establishes because, it concludes, an adverse inference cannot be adopted that contradicts established facts. (*See* Tr. Day 15:4703-04). Thus, for example, the Tribunal is unable to find that additional deletions dealt with issues regarding specific efforts by [the Franchisor] to locate, and perform due diligence on, a replacement franchisee for Singapore. This is because, despite substantial documentation of Mr. Wong's (and [the Franchisor's]) efforts to terminate the Malaysia and Taiwan agreements and perform due diligence on replacement franchisees, there is no evidence of actual conduct by [the Franchisor] to terminate – or even to prepare to terminate – the Singapore Agreements. The Tribunal is unwilling to extend its conclusions about Mr. Wong's apparently destructive misbehaviour to the rest of the [Franchisor's] organisation and, therefore, the absence of any documents evidencing an effort to perform due diligence on a Singapore replacement prior to May 20, 2022, is powerful proof that [the Franchisor] was not preparing to terminate the Singapore Agreements as of then.
>
> 184. It would be relevant – although not sufficient to prove [the Franchisee's] case – if Mr. Wong's plans in late 2020 envisioned terminating the Singapore Agreements at some time after he had replaced [the Franchisee's] affiliate in the Malaysia market. That fact, moreover, would be consistent with other evidence in this arbitration (*see, e.g.*, Exs. T-152, T-164). The Tribunal finds that an appropriate remedy in this case is to draw precisely that adverse inference against [the Franchisor]. The Tribunal has also kept Mr. Wong's mistreatment of the evidence under his control in mind when weighing other factual questions where there is a lacunae or ambiguity in the evidence. Finally, the Tribunal has determined that Mr. Wong was not a reliable witness and has declined to rely upon his testimony

Version No 1: 21 Oct 2025 (11:29 hrs)

> except insofar as his testimony is fully corroborated elsewhere in the record or was against [the Franchisor's] interest.
>
> 185. The Tribunal declines to take the more draconian step, requested by [the Franchisee], of dismissing [the Franchisor's] claims. That step would work an injustice because the Tribunal does not find that there is sufficient basis to conclude that the destroyed evidence would have altered the outcome of this Final Award. Nor is this a public proceeding where such a measure could have a general deterrent effect.

30 In FA Part VI at [221]–[429] the Tribunal dealt with the Franchisee's counterclaims that the Franchisor was, as at May 2022, in repudiatory breach of its obligations of the Singapore agreements thereby justifying the Franchisee's termination of the agreements and discharging it from future obligations under the relevant agreements. In this section the Tribunal examined and relevantly rejected the whole of the Franchisee's case that sought to justify its actions in May 2022: that it was forced to terminate the agreements because of the Franchisor's material breaches and repudiatory conduct in the making of the Franchisee's business unviable.

31 At [223]–[256] of the FA over eight pages the Tribunal dealt comprehensively with the first asserted breach of the Franchisee's right to e-commerce exclusivity. The Tribunal expressed the Franchisor's obligations by reference to the Pennsylvania Uniform Commercial Code. By that standard, the Tribunal accepted that the Franchisor had, in 2020, breached the Franchisee's exclusivity, but such breaches were neither material nor repudiatory, did not result in any damage to the Franchisee and did not justify the Franchisee's termination.

32 At [257]–[286] of the FA over almost nine pages the Tribunal examined and rejected the claim that the Franchisor had wrongfully disallowed 15 products of the Related Company to be sold in the franchised stores. The agreements unequivocally permitted this kind of decision by the Franchisor; and

Version No 1: 21 Oct 2025 (11:29 hrs)

the Tribunal found that the Franchisor had acted in good faith in its disallowance of the products.

33 At [287]–[329] of the FA over almost eleven pages, the Tribunal examined and rejected the claim that the price increases imposed by the Franchisor in March 2022 were a breach of contract, much less a material breach.

34 At [330]–[346] of the FA over five pages the Tribunal examined and rejected the complaint that the Franchisor failed to deliver ordered products in a timely fashion.

35 At [347]–[358] of the FA over two pages the Tribunal considered and rejected the claim that the issue of a Notice of Default by the Franchisor early in May 2022 was a mere pretext and was thereby a breach of contract.

36 At [359]–[376] of the FA over four pages the Tribunal considered and rejected the complaint by the Franchisees that the Franchisor had breached its implied duty of good faith and fair dealing. After discussing the case law in Pennsylvania and recognising that there was a degree of uncertainty in the Pennsylvania authorities, the Tribunal concluded that the conduct of the Franchisor was reasonable conduct in accordance with the agreements. The Tribunal accepted that there was a poor relationship between the principals of the Franchisor and the Franchisee, however importantly at this point, the Tribunal linked these findings to the alleged spoliation saying at [374] of the FA:

> … even if this Tribunal were to draw an adverse inference from Mr. [W's] missing text messages that he was scheming to end [the Franchisor's] relationship with [the Franchisee] in Singapore, that would not be enough. None of that would be enough to breach the implied duty of good faith and fair dealing

Version No 1: 21 Oct 2025 (11:29 hrs)

> because [the Franchisor] has failed to prove action by [the Franchisor] to implement any such intent in Singapore.

37 This lack of *action* as opposed to *intent* is also important to the dismissal of Ground 1 of the present application concerning any withheld evidence and spoliation, to which we will come.

38 At [375] of the FA the Tribunal said the following in rejecting the Franchisee's claims:

> … whatever Mr. Wong's wishes may have been, the Tribunal finds that [the Franchisees] have failed to prove that those wishes manifested in behaviour by [the Franchisor] that would breach the implied duty of good faith and fair dealing, even if such duty existed under Pennsylvania law beyond the narrow context of terminations in the franchisor-franchisee relationship [as discussed earlier].

39 At [377]–[386] of the FA over two pages the Tribunal considered and rejected the allegation of anticipatory repudiation. The Tribunal applied the high standard required by Pennsylvania law requiring an absolute and unequivocal refusal to perform or a distinct or positive statement of an inability to do so.

40 The Tribunal found at [385] of the FA that:

> [The Franchisor] not only failed to evince an absolute and unequivocal intent not to perform the Agreements, but the Tribunal cannot find that [the Franchisor] even had any secret intent not to perform them. As explained below … the absence of any alternative plan to operate [the Franchisor's] business in Singapore is compelling evidence to this Tribunal that [the Franchisor] intended, at least as of May 2022, to continue working with [the Franchisee].

41 At [387]–[429] of the FA over 15 pages the Tribunal considered and rejected the Franchisees' case that the Franchisor's conduct and cumulative financial effects of the alleged breaches combined with Mr Wong's intent rendered its business unviable and amounted to constructive termination. The

Version No 1: 21 Oct 2025 (11:29 hrs)

summary conclusion of the Tribunal in this respect at [390] of the FA was as follows:

> … the Tribunal finds that [the Franchisor] did not commit a constructive termination. Rather, [the Franchisees] committed a well-planned wrongful termination of the Agreements in an attempt to evade the Agreements' post-termination covenants and continue operating their business in Singapore without the constraints imposed by the Singapore Agreements.

42 The Tribunal applied Pennsylvania law in requiring, in order to conclude that there had been a constructive termination of the franchise, the Franchisee to prove that the Franchisor has acted or failed to act in a way that rendered the franchise economically non-viable and otherwise forced the Franchisee to terminate the relationship and that the conduct that led to the unviability was conduct that was arbitrary, in bad faith and commercially unreasonable. The Tribunal refused to find that the franchise was unviable and reiterated that, with the exception of some non-material breaches, the Franchisor was not in breach and had not acted arbitrarily, in bad faith or commercially unreasonably. Rather, the Tribunal found at [404] of the FA:

> … [The Franchisor] was not, in fact, acting to squeeze [the Franchisees'] profits and to terminate it – constructively or formally – without cause. Rather, the Tribunal finds that sometime after [the Franchisor's] termination of [the Franchisee's] Franchise Agreements in Malaysia and Taiwan, and possibly about the time that [the Franchisor] disallowed the fifteen [Related Company]-branded products on July 29 2021, [the Franchisee] made the decision to end its relationship with [the Franchisor] in all markets, including Singapore, and to continue operating as a competing [Related Company]-branded supplements business, at a time most convenient to [the Franchisee].

43 In support of this conclusion the Tribunal made 14 critical groups of factual findings at [405] of the FA about the conduct in Malaysia, Taiwan and Singapore. The Tribunal summarised these at [406] of the FA as follows:

Version No 1: 21 Oct 2025 (11:29 hrs)

> … the foregoing evidence may establish a wrongful termination of [the Franchisee's] Malaysian franchise agreements, and establishes Mr. Wong's long-term objective – at least during late 2020 and early 2021, that perhaps even in 2022 – to terminate [the Franchisee's] Singapore Agreements and take back the Singapore market. But the evidence does not prove that [the Franchisor] had yet made any decision to terminate (constructively or directly) the Singapore Agreements when, on May 20, 2022, [the Franchisee] pre-emptively terminated those Agreements. The Tribunal cannot find, based on all the evidence before it (including the evidence summarized above), that [the Franchisor] had a plan in place to terminate, or would have terminated, the Singapore Agreements when [the Franchisee] terminated on May 20, 2022.

44 In dealing with Mr Wong, the Tribunal said at [408] of the FA:

> Even with the adverse inferences that the Tribunal draws from Mr. Wong's treatment of his text messages (*see* ¶184 above), it cannot conclude that [the Franchisor] had a replacement franchisee that it was actively vetting and/or had ready in the wings because there is a complete absence of any corroborating corporate records or knowledge by Ms. Mullen or any other [Franchisor] witness. Although the evidence has given the Tribunal substantial reservations about Mr. Wong's candour …, the Tribunal has no basis to find that all of [the Franchisor's] personnel and legal department acted corruptly to destroy and/or conceal such documents if they had existed. Without evidence that any such documents exist, it is implausible that [the Franchisor] would have made any decision to terminate [the Franchisee] (constructively or directly) in Singapore without any replacement lined up to take its place.

45 Further summarising at [410] of the FA the Tribunal said:

> [The Franchisor's] termination of [the Franchisee's] affiliates' distribution and franchise agreements for Malaysia and Taiwan in March 2021 was, the Tribunal finds, a watershed moment for [the Franchisee] group. [Referring to a Franchisee document] ("[The Franchisor's] bad faith termination in Malaysia and Taiwan fundamentally destroyed the trust between [the Franchisor] and [the Franchisee], and this had a significant bearing on the parties' relationship in Singapore and the Philippines as well.") The Tribunal finds that [the Franchisee's] commercial decision to terminate the Singapore Agreements occurred in the aftermath of that watershed moment although [the Franchisee] did not decide when it would

Version No 1: 21 Oct 2025 (11:29 hrs)

> trigger that termination until late April 2022 when most of its preparations had been completed.

46 The decision of the Franchisee to break entirely with the Franchisor was made in 2021, not later than September: FA at [414]. From this point the Franchisee began, it was found, preparing the rebranding.

47 At FA Part VII at [431]–[573] over 27 pages the Tribunal examined and allowed most of the Franchisor's contractual claims of breach by reason of: the Franchisee's transfer of the business to the Related Company; the undertaking of acts prior to termination with the intent to divert business from the Franchisee after the termination; the failure to meet minimum purchase requirements; the failure to discontinue the sale of 15 disallowed products; the failure to suspend sales due to packaging concerns; the failure to provide a business plan; the Franchisee's termination which in the circumstances was a repudiation of the relevant agreements; and the breaches of the post-termination obligations after the Franchisees gave notice of termination.

48 The pre-termination breaches by the Franchisee (with the exception of the failure to meet some purchase requirements) did not sound in damages or at least substantial damages. On the other hand, the repudiation of the Agreement and the breaches of post-termination covenants sounded in substantial damages.

49 The remedial consequences of the repudiation and breaches by the Franchisee to the extent not already dealt with were dealt with by the Tribunal at FA Part IX at [607]–[728] over 26 pages. The relief discussed and dealt with concerned an injunction in the nature of specific performance of cl 13.4 and damages to remedy various financial losses even after the stores are transferred to it.

Version No 1: 21 Oct 2025 (11:29 hrs)

50 As to the injunctive relief, the Franchisor had asserted its desire to recover all 54 stores. The Tribunal made an order in the nature of specific performance with the effect that the Franchisees assign to the Franchisor all stores that could be assigned. This did not necessarily mean all 54 stores. In cross-examination Mr Wong said that the Franchisor would have to assess which of the stores it wished to take. The Tribunal found this important stating at [648] of the FA:

> In exercising its equitable discretion, the Tribunal considers Mr. [W's] statements to be important. In particular, the Tribunal finds that upon careful consideration of all the circumstances and equities it would be inequitable to return stores to [the Franchisor] that [the Franchisor] will not reopen with an offer of employment to all of its store-level and non-executive, [Franchisees'] employees as of the date of this Final Award.

51 The terms of the order are said by the Franchisees to go beyond what was legitimate from the pleadings and the submission to arbitration.

52 The Franchisor's damages were analysed and awarded by the Tribunal for two periods: up to 1 January 2025, being the date on which the Franchisor branded stores would have been handed back if it called for them back pursuant to the ordinary termination of the relevant agreements, and the period thereafter.

53 As to the first period, the Franchisor contended that it would have received profits on the Franchisee's minimum purchase obligations and royalties from sales from 20 May 2022 to 31 December 2024. It would, it said, have received the stores back on 1 January 2025 without disruption of its market position. Experts gave evidence that the disruption in branding after 20 May 2022 had damaged the brand with an impact on sales after the stores were returned on the hypothesis that they were.

Version No 1: 21 Oct 2025 (11:29 hrs)

54 As to damages in the first period there were relevant heads of damages alleged and awarded to which it is unnecessary to refer.

55 As to damages after 1 January 2025, at [698] and [699] of the FA the Tribunal set out what it said was the Franchisor's damages claim:

> 698. [The Franchisor] contends that if [the Franchisee] had not wrongfully terminated the Agreements, at their expiration on December 31, 2024, it would have either (i) renewed the Agreements with [the Franchisee], (ii) taken over the Singapore stores and operated them itself, or (iii) taken over the Singapore stores and transferred them to a new franchisee. [The Franchisor] contends that because the stores would have continued without interruption as [Franchisor] stores, there would have been no loss of good-will or loss of sales. In this 'but for' world, it would have suffered no loss after December 31, 2024.
>
> 699. However, [the Franchisor] continues, [the Franchisee's] termination on May 20, 2022, has caused disruption and loss of goodwill because [the Franchisees] rebranded the [Franchisor] stores as [Franchisee] stores and have refused to turn them over without an order from this Tribunal. Not knowing when this Tribunal would issue this final award, [the Franchisor] contends that if [the Franchisees] are ordered to turn over the store leases and [the Franchisor] or a new franchisee is able to reopen the stores as [Franchisor] stores on December 31, 2024, that 31-month disruption would have a substantial impact on [the Franchisor's] profits after December 31, 2024. In particular, [the Franchisor's] experts project that by being out of the market for 31 months, [the Franchisor] would re-enter the market on January 1, 2025, with a 41.8% loss in market share. [The Franchisor's] experts further project that this market share would recover at a rate of 6.5% per year, requiring eleven years to recover fully from [the Franchisee's] rebranding of the stores in May 2022.

56 At [700] of the FA the Tribunal recorded the Franchisee's challenge to this claim for damages that the Franchisor had changed its case after the hearing in its Post-Hearing Brief because it had (during the hearing) "based its damages claim entirely on its expert's opinion that [the Franchisor] would not recover the store leases and would never re-enter the Singapore market, thereby losing all of the profits that it would have otherwise earned, never claiming until the

Version No 1: 21 Oct 2025 (11:29 hrs)

Post-Hearing Brief any damages if it were to recover the store leases". This proposition was the basis of an application to strike out this way of putting forward the damages claim by the Franchisor after the hearing in the post-hearing submissions.

57 At [701] of the FA the Tribunal rejected this application to strike out the new quantum case in the following terms:

> … While [the Franchisor's] expert, in both his reports and his testimony, did calculate the Franchisor's losses on the assumption that [the Franchisor] would never return to the Singapore market if it did not recover the store leases … he also calculated the losses that would result if [the Franchisor] recovered the store leases and did return to the market at the end of 2024 … It is the latter calculations that [the Franchisor] has ultimately relied upon in its Post-Hearing Brief and its closing arguments. Because the Tribunal has, in fact, ordered the return of the store leases to [the Franchisor], the Tribunal has no need to decide whether the Franchisor's expert's seemingly primary argument – assuming that [the Franchisor] would never re-enter the Singapore market if it did not obtain the store leases – was reasonable. But equally, because [the Franchisor's] expert did present from the outset the alternative damages calculation that has been pursued in closing submissions – and is the subject of the remainder of this damages discussion – [the Franchisee's] Application on this issue must fail.

58 The correctness of this analysis is the subject of Grounds 3 and 4 of this application.

59 At [702]–[707] of the FA the Tribunal referred in detail to the expert evidence of Mr Brophy and Ms Feygenson called by the Franchisor and Mr Searby called by the Franchisees. At [708] of the FA the Tribunal accepted Ms Feygenson's estimates of reduction in overall market share per year of market absence by the Franchisor (between 20 May 2022 and 1 January 2025) and a recovery rate per year following the Franchisor's re-entry into the market as the basis for the damage to the brand of the Franchisor.

Version No 1: 21 Oct 2025 (11:29 hrs)

60 At [721] and [722] of the FA the Tribunal preferred the likelihood that the Franchisor would enter the Singapore market with a new franchisee rather than entering it directly itself. This led to a much lower sum in damages than if it had accepted the evidence that the Franchisor would have run Singapore by corporate stores. It is unnecessary to traverse all the discussions of the expert reports and all the findings. It suffices to say that the Tribunal found that but for the breach there would have been a new franchisee from 1 January 2025. On this hypothesis the Tribunal found a figure of US$52,243,745 as the net present value from cashflow from 1 January 2025 to 31 December 2034 from a new franchisee assuming that the Franchisee had not breached its contract and had performed the agreements through to 31 December 2024 and then assigned the stores to the Franchisor which operated them thereafter with a new franchisee. From this figure the Tribunal deducted the net present value of the cashflow from the actual scenario from 1 January 2025 to 31 December 2034 of a new franchisee operating in the actual market that had been damaged by the wrongful conduct of the Franchisor from 20 May 2022, of US$33,320,733 leading to the damages sum of US$18,923,012.

61 We now turn to the grounds of complaint.

Ground 4: The complaint as to the order for specific performance in paragraph 752(3) in the Final Award

62 The claim for specific performance was made in para 121 and in para (b) of its conclusory claims for relief in the Franchisor's Statement of Claim. Paragraph 121 stated as follows:

> 121. [The Franchisor] further demands relief in the form of:
>
> (i) a declaration that [the Franchisee's] post-termination obligations in the Singapore Agreements are valid and enforceable;

Version No 1: 21 Oct 2025 (11:29 hrs)

> (ii) an order requiring [the Franchisee] to specifically perform its post-termination obligations, including assignment of the Singapore Leases to [the Franchisor] and transmittal of all customer lists to [the Franchisor]; and
>
> (iii) an injunction prohibiting [the Franchisee] from engaging in any conduct prohibited in the Post-Termination Covenant Against Competition until January 1, 2026 – *i.e.* 1-year after the natural expiration of the Singapore Agreements on December 31, 2024.

63 Paragraph (b) of the conclusory claims for relief requested that the Tribunal:

> (b) Declare that the Post-Termination Covenants are valid and enforceable against [the Franchisee], and order [the Franchisee] to strictly comply with all post-termination covenants, as follows:
>
> > (i) Order [the Franchisee] to assign the Singapore Leases to [the Franchisor];
> >
> > (ii) Order [the Franchisee] to transfer all copies of its customer lists to [the Franchisor]; and
> >
> > (iii) Enjoin [the Franchisee] from competing with [the Franchisor] in Singapore until January 1, 2026.

64 It is appropriate to note that in para (f) of the conclusionary claims for relief the Franchisor sought "such other relief as the Tribunal deems necessary, fair and just".

65 These claims embodied a case to enforce the obligations in cl 13.4 of the relevant Franchise Agreement, which was relevantly in the following terms:

> 13.4 <u>Surrender of Possession, Assignment, Renovation</u>. [The Franchisee] shall, at [the Franchisor's] option and within 3 days after [the Franchisor] gives notice to [the Franchisee], assign to [the Franchisor] any interest which [the Franchisee] has in any lease or sublease for the premises of any of the Franchised [Franchisor's] outlets …

Version No 1: 21 Oct 2025 (11:29 hrs)

66 The terms of Order 3 in the Dispositive Award in the FA, being relevantly para 752, were as follows:

> 3. With regard to the former 54 [Franchisor] store leases in Singapore, the Tribunal orders:
>
> a. within ten business days of the date of this Final Award, Respondents shall provide to [the Franchisor] a true and complete copy of the lease, sublease, and all other agreements and understandings governing the landlord-tenant relationship for each of the 54 former [Franchisor] franchise store locations that [the Franchisees] possess as of the date of this Final Award;
>
> b. within fifteen business days of the date that [the Franchisor] receives all of the documents identified in subparagraph a, above, [the Franchisor] shall (i) notify Respondents in writing of each store location that it will reopen as a [Franchisor] store within twelve months of receiving lawful possession and (ii) for each such store, provide the following written representation and warranty to [the Franchisees], signed by a person with authority to bind [the Franchisor]:
>
> > "[The Franchisor] hereby represents and warrants to [the Franchisees] that within twelve months of receiving lawful possession (i) it shall operate the store located at [INSERT STORE ADDRESS] (the "Store"), which is currently operated as an [Franchisee]-branded store, as a [Franchisor]-branded store for a period of no less than twelve months from the time it opens for retail business as a [Franchisor]-branded store; and (ii) it shall offer employment to all store-level and non-executive employees who are employed at that Store by [the Franchisees] on terms substantially similar to those on which those employees are employed as of the date of this Final Award, such employment to take effect from the time [the Franchisor] takes lawful possession of the Store and to continue for a period of no less than twelve months from the time it opens for retail business as a [Franchisor]-branded store."
>
> c. for each store that is identified in accordance with subparagraph b, above, [the Franchisees] shall assign to [the Franchisor] all of their rights and

Version No 1: 21 Oct 2025 (11:29 hrs)

interests in those premises (including all leases, subleases, and other agreements and understandings governing the landlord-tenant relationship) within ten business days of receiving [the Franchisor's] written representation and warranty or, if landlord consent is required, within five business days of receiving landlord consent;

d. for each store that [the Franchisees] identify pursuant to subparagraph c, above, as requiring landlord consent, Respondents shall notify [the Franchisors] of the store location and the identity of the landlord within ten business days of receiving from [the Franchisor] the notification, representation and warranty provided pursuant to subparagraph b above. Further, Respondents shall (i) make all reasonable efforts to secure landlord consent as promptly as possible, (ii) fully inform [the Franchisor] on a twice-weekly basis of all efforts that they are taking to secure that consent, and (iii) comply with all reasonable requests by [the Franchisor] to secure that consent (or obtain landlord confirmation that no consent is required), including by introducing [the Franchisor] to the landlord and permitting [the Franchisor] to participate in and/or conduct on its own the efforts with the landlord;

e. for any of the 54 former [Franchisor] franchise store locations that is not identified by [the Franchisor] under subparagraph b, above, Respondents may, but shall not be required to, assign to [the Franchisor] all of their interests in the leases, subleases, and other agreement and understandings governing the landlord-tenant relationship in those premises, and [the Franchisor] shall be required to accept any such assignment, provided that (i) Respondents make that election within fifteen business days from the expiration of the fifteen business day period in subparagraph b, above and (ii) unless otherwise expressly agreed by [the Franchisor] in writing, the transfer is not effective prior to the date that Respondents have effected the transfer of all other store locations pursuant to subparagraph c, above. For the avoidance of doubt, [the Franchisor] is not required to provide the representation and warranty contained in subparagraph b, above, with respect to any store for which the lease is assigned by [the

Version No 1: 21 Oct 2025 (11:29 hrs)

> Franchisees] to [the Franchisor] pursuant to this subparagraph e;
>
> f. if [the Franchisor] fails to comply with the representation and warranty in subparagraph b, above, with respect to any one or more store locations, [the Franchisees] shall be entitled to pursue whatever claims and seek whatever remedies are available to them for breach of that representation and warranty;
>
> g. [The Franchisees] are enjoined from taking any actions from the date of this Final Award that would impede, interfere with, or obstruct in any way the full implementation of the provisions of this paragraph 752.3.

67 The essential submissions of the Franchisees are that the detail and content of Order 3 were orders incapable of being made because they were beyond the scope of the submission to arbitration for the purposes of s 31(2)(*d*) of the IAA and made in breach of the Tribunal's obligation to afford the Franchisees natural justice resulting in the Franchisees being deprived of the opportunity to present their case about the orders for the purposes of s 31(2)(*c*) of the IAA.

68 For the reasons that follow, with two exceptions, both submissions should be rejected.

69 As to the scope of the submission, the Franchisees submitted that the parameters and confines of the pleading were that the Tribunal could either order specific performance of the obligation to assign the leases (essentially in those bare terms) or not. It was not within the Tribunal's authority to make an order of the kind in Order 3 because it was outside the scope of that which had been submitted to arbitration and it embodied orders not asked for and not debated at the hearing thereby denying the Franchisees natural justice.

Version No 1: 21 Oct 2025 (11:29 hrs)

70 In order to place into context the terms of Order 3 and to deal with the arguments of the parties it is necessary to refer to other parts of the pleadings and the submissions, and to some of the evidence.

71 It is important to distinguish between whether the order was within the scope of the submission to arbitration and whether the order was made in breach of natural justice. What follows in the description of the various materials is relevant to both. However, the question of submission to arbitration will be dealt with as an anterior point to the question of natural justice. The conclusion that the order was made within the scope of submission to arbitration does not answer the question as to whether the order was made in breach of the principles of natural justice.

72 The Franchisor sought not only damages, but also enforcement of the post-termination covenants obliging the Franchisees to assign all their stores in Singapore to the Franchisor. It is to be noted that the covenant in cl 13.4 was an executory obligation found within an otherwise executed and completed commercial agreement. It is unnecessary to dwell on this distinction for the purposes of considering whether damages were an adequate remedy to the Franchisor. No complaint is made by the Franchisees before this Court that specific performance should not have been awarded because of the adequacy of damages.

73 There was also no dispute over the basal proposition that the Tribunal was exercising the power of an Equity Court to award, or that it was within the Tribunal's equitable authority to award, or not as the case may be, equitable relief.

Version No 1: 21 Oct 2025 (11:29 hrs)

74 It is also worthy of recognition that though in a contract executed and at an end, the relevant obligations were executory for the assignment of property (leases). The order sought was by way of specific performance: the orders granted were by way of mandatory injunction to effectuate that claim. Thus, the orders were, properly speaking, in the nature of specific performance. As will be seen below this recognition is of some importance in that there was a contest as to whether relief should be granted in equity because of the hardship to the Franchisees, the impossibility of some performance, and the unjust or inappropriate affectation of the position of third parties, being existing employees of the Franchisees, and to a lesser extent landlords of the Franchisees.

75 It is also to be noted that the debate at the hearing before the Tribunal was, to a significant degree, binary in character: whether or not orders in the nature of specific performance should be made assigning all the leases in Singapore, or not. The importance of the question of assignment of the leases cannot be exaggerated for the Franchisees. An order enforcing assignment of all the shops in Singapore would destroy, it was said, an existing business and require those interested in the Franchisees to begin their business again in new stores, if that were possible. That of course was the very purpose of the clause: to protect the Franchisor's established business and reputation in Singapore that had been operated for many years by the Franchisee. The different way of viewing whose business it was inheres in the franchise relationship to which both parties acceded. The importance of the issue to both sides explains why little or no emphasis might have been placed in argument about working around and balancing the matters that had been put forward as the basis to deny the remedy at all, to make any order to effect the assignment more or less workable, practical or just, if it were to be ordered.

Version No 1: 21 Oct 2025 (11:29 hrs)

76 The fact that the Tribunal was faced with a debate that was essentially binary (orders to effect assignment of leases or not) could not of itself circumscribe any proper attempt to fashion the orders if they were to be made to provide for practical, just and workable effectuation of the obligations involved avoiding or ameliorating hardship, especially to third parties.

77 It will be necessary at this point to return to the pleadings and conduct of the arbitration. In doing so, it is important to bear in mind, as the Franchisor rightly submitted, that the complaints as to the legitimacy of Order 3 in the form made are on two doctrinally distinct bases: whether the order was beyond the scope of the submission to arbitration, and whether natural justice was afforded to the Franchisees. Failure to keep in mind the distinct foundation of each is apt to lead to confusion. That is not to say, however, that an examination of the conduct of the arbitration is not centrally relevant to both. The scope of the arbitration is seen in the pleadings that were the subject of evidence and debate and otherwise how the parties conducted the reference. Whether natural justice was afforded will likely depend on how the Tribunal approached and dealt with the pleadings, evidence and arguments of the parties and whether important matters were not dealt with or material questions were decided without notice to the parties or a party when fairness required engagement with the parties or party.

78 Both the questions of scope of the submission and the question of whether natural justice was afforded are unlikely to be answered by resort to strict rule-based analysis or fine dissection of pleadings. The Court of Appeal emphasised this (in the context of natural justice) in *CZT v CZU* [2024] 2 SLR 216 at [33]–[40] in its explanation and use of the important judgment of the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"). Likewise in *Prometheus Marine Pte*

Version No 1: 21 Oct 2025 (11:29 hrs)

Ltd v King, Ann Rita [2018] 1 SLR 1 at [58] the Court of Appeal described the practical approach to identifying the substance of the dispute in the scope of the submission to the Tribunal for resolution and determination. To similar effect is the judgment of S Mohan J in *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] 5 SLR 706 at [48] and [56] where his Honour rightly considered that the framing of specific defined *a priori* tests as to the relevant connection between the Tribunal's findings and the framing of the issues was unwise. Commonsense and relational phrases such as "close nexus", "intertwined with" and "genesis" accurately captured the essence of the matter.

79 The Franchisor rightly emphasised that once the scope of the submission is identified error within that scope is generally within the remit of the Tribunal to decide. Its decision within the submission is a matter of merits. Such can be accepted at that level of generality. One qualification to it must, however, recognise the context of the task in which the Court is engaged. The Court is being asked to recognise and enforce the award: that is enforce the Dispositive Award (that is [752] of the FA) as a judgment or as orders of the Court. To the extent that orders in a particular form may suffer from some vice, there may be scope for the Court to enforce the award in a manner to accord with legal principle applying to court orders, without trenching upon the authority of the Tribunal to reach its decision without curial supervision of any error within the merits. This question arises in respect of some of the specific detail of Order 3 and the consequence of there having been, to a small extent, a failure to afford natural justice by the deprivation of the opportunity to the Franchisees (and indeed Franchisor) to make submissions on some specific detail of Order 3.

80 To return to the pleadings and the conduct of the arbitration, the Franchisees' response to the claim for orders for the assignment of the leases was to set up competing equities. In its Response to the Franchisor's Application

Version No 1: 21 Oct 2025 (11:29 hrs)

for Interim Measures the Franchisees set up the hardship of the destruction of their business, and the affectation of third parties, in particular the retrenchment of over 300 employees.[1] In its Statement of Defense and Counterclaims in the arbitration these matters were repeated.[2] The Franchisor engaged with these propositions by responding in its Reply and Defence to Counterclaim that these consequences were of the Franchisees' own making.[3] The Franchisees repeated their position in their Rejoinder and Reply on Counterclaim and also submitted that damages would be an adequate remedy.[4] At this point, the Franchisor filed a Rejoinder to the Reply on Counterclaim in which it reiterated that the only way to remedy the conduct of the Franchisees and fairly restore the Franchisor's business was to transfer the leases.[5] However, the Franchisor offered to employ current non-executive employees of the Franchisees if it were to run the stores. This involved and was directed to dealing with the third-party hardship of employees. This introduced into the pleadings an aspect of the balancing of the equities between the parties and third parties in how any order was to be framed.

81 It may be noted that the Franchisees themselves had an equivalent pleading to the conclusionary para (f) in the claim by the Franchisor in its (the Franchisees') Counterclaim: "… such additional or other relief as may be just".[6]

82 Other aspects of the conduct of the arbitration explain some of the terms of Order 3. The Franchisees said that some of the leases prohibited assignment

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1 Agreed Core Bundle of Documents ("ACB") at p 41, at para 179.

2 ACB at p 123, para 369.

3 ACB at pp 181–182, para 58 (Franchisor's Reply in Further Support of its Statement of Claim and Statement of Defence to Franchisee's Counterclaims).

4 ACB at pp 226–228, para 334.

5 ACB at p 302, para 159.

6 ACB at p 124, para 393(j).

Version No 1: 21 Oct 2025 (11:29 hrs)

and hence were impossible to assign. Some required consent before assignment. This threw up the need to deal with such circumstances in any order, if such matters were not to be a basis for refusing to make the order.

83 There was evidence before the Tribunal that the Franchisor may not want to receive and use all 54 stores. This threw up the question, if cl 13.4 were to be enforced, how the choice of store or lease was to be dealt with.

84 Thus, the pleadings and the evidence threw up for consideration the questions whether: first, the Franchisees had disclosed hardship on them or effects on third parties and a degree of impossibility in performance sufficient to persuade the Tribunal to deny an order for or in the nature of specific performance; and, secondly, if no to that question and if an order to assign the leases would be made, how should the order be fashioned in balancing the equities to take account of the considerations originally raised as grounds for denial of the order, in ameliorating and making the order more just. These matters plainly all fell within the broad scope of the task of the Tribunal administering equity and granting equitable relief.

85 We reject the proposition that what was before the Tribunal was, and was only, the binary question as to whether a short order framed in terms of para 121 of the Statement of Claim or conclusionary claim for relief (b) should be made.

86 The submission to arbitration involved the task in Equity to frame a just order in the nature of specific performance. This task not only permitted, but required, the Tribunal to consider all the circumstances and, in the way of equitable judicial technique, to "[look] to every connected circumstance that ought to influence its determination upon the real justice of the case": *Jenyns v*

Version No 1: 21 Oct 2025 (11:29 hrs)

Public Curator (Qld) (1953) 90 CLR 113 at 119 (*per* Dixon CJ, McTiernan J and Kitto J).

87 This process of balancing the equities and fashioning an order that was just in all the circumstances must of course be undertaken within the confines of the legal or equitable right being enforced or protected. Here, the right was a legal right, found in cl 13.4, to have the leases assigned. That set the subject matter for the terms of the order.

88 The rejection of the argument that the Tribunal was limited to a yes or no answer and the reasons therefor to the question whether specific performance of cl 13.4 should be ordered leaves to be decided whether the particular complaints as to the terms and content of Order 3 otherwise take the order or parts of it outside an enforcement of cl 13.4 and outside what was submitted for consideration and decision. For this to be dealt with requires a discussion of each of the paragraphs of the order and the order as a whole.

89 Before turning to this task, it is appropriate to say something of the obligation of good faith under the law of Pennsylvania. Reference was made to the discussion of this obligation at [359]–[376] of the FA. The particular discussion of the obligation at [369]–[372] of the FA makes it safe to say that whatever may be the limits of the obligation in contracts generally and franchise agreements in particular, in Pennsylvania those limits include, when not in conflict with the express words of the contract, the obligation not to undermine the bargain and, as the converse, the obligation to take such steps as are reasonable in the circumstances to support the bargain. In 1869 in the United States Supreme Court, Clifford J speaking for the Court (in discussing the question in the then prevailing concept of federal common law) in *Railroad Company v Howard* 74 US 392 (1868) at 413 said:

Version No 1: 21 Oct 2025 (11:29 hrs)

> Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn around and disavow their acts and defeat the just expectations which their own conduct has superinduced.

90 Likewise, it can be said that the Tribunal here was of the view that the obligation in cl 13.4 could be made to work justly and fairly and in particular it could be made to work by the engagement of reasonable conduct by the Franchisees to make their obligation to assign the leases work practically. Just as Cardozo J in *Wood v Lucy*, *Lady Duff-Gordon* 222 NY 88 (1917) at 91 found a duty to take steps to support the bargain to be "instinct with an obligation", though imperfectly expressed, here the Tribunal considered (correctly) that instinct within cl 13.4 was the obligation to take such steps as were reasonable to support and effect the obligation to assign.

91 Such statements of good faith to support the bargain within the Pennsylvania cases to which the Tribunal referred and such cases as *Railroad Company v Howard* and *Wood v Lucy* are reflective of a principle well known to the common law generally: see *Stirling v Maitland* (1864) 5 B & S 840 at 852; 122 ER 1043 at 1047 (*per* Cockburn CJ); *Mackay v Dick* (1881) 6 App Cas 251 at 263 (*per* Lord Blackburn); *Butt v M'Donald* (1896) 7 QLJ 68 at 70–71 (*per* Griffith CJ as Chief Justice of Queensland); and more recently in Singapore, *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [48]–[50] (*per* V K Rajah J (as he then was)) each of which is to the same substantive effect: that where parties have agreed that something shall be done that cannot be done effectively without both parties concurring or acting to bring it about, each impliedly agrees to do all that is reasonably necessary on his part to carry out the thing. It is in this context and

Version No 1: 21 Oct 2025 (11:29 hrs)

against this background that Order 3 must be examined to assess whether the various parts of it fall within the scope of the submission to arbitration.

92 Turning to Order 3, para (a) is simply a provision that requires the Franchisees to supply the terms of the leases to the Franchisor. It is an act reasonably necessary to support and give effect to the primary obligation in cl 13.4. It is plainly within the scope of the submission.

93 Paragraph (b) is a provision which underpins the representation made by the Franchisor to avoid hardship to third-party employees and to avoid the hardship of termination payments by the Franchisees. It is part of the balancing of equities and making the order in equity just. It is plainly within the scope of the submission.

94 Paragraph (c) reflects the fundamental obligation to assign the leases, though limited to the stores wanted by the Franchisor, within timeframes depending upon whether the landlord's consent is required. It falls squarely within the scope of the submission.

95 Paragraph (d) deals with landlord consent. It is built on the requirement of the Franchisees to exercise reasonable steps to effectuate its primary obligation to assign cl 13.4. The obligation identified in sub-para (i) to make all reasonable efforts to secure consent promptly takes one no further than the implied obligation to take reasonable steps in good faith to support and not undermine the bargain. The obligations in sub-paras (ii) and (iii) are specific manifestations of that general obligation in (i). Reference will be made when dealing with natural justice as to whether the Franchisees should reasonably have been heard on these particular terms, but the obligations are within the whole of (d) and fall within the scope of the submission to arbitration as the just

Version No 1: 21 Oct 2025 (11:29 hrs)

working out in the Tribunal's view in a practical way of the primary obligation in cl 13.4.

96 Paragraph (e) seeks to accommodate the reality of the situation made clear in the evidence that the Franchisor may not want all the store sites. It provides, in balancing the equities, for the Franchisees to be able to retain some stores, but also that if the Franchisees wish they may assign them (though without any security of employment for the employees). Again, though not directly addressed to the obligation of the Franchisees to assign it seeks to balance the equities by providing the Franchisees with a right not to retain some stores when most are being assigned. It is reasonably connected with the just working out of the equitable order and within the scope of the submission to arbitration.

97 Paragraph (f) is a provision that seeks to underpin the representation by the Franchisor and the obligation upon the Franchisor in para (b) that was designed to protect former employees. It is plainly closely connected with para (b) and thus within the scope of the submission to arbitration. It falls, however, within the group of provisions in para (d), that is together with sub-paras (ii) and (iii) that will be addressed again under natural justice.

98 Paragraph (g) is intimately bound up with protecting the orders and is within the scope of the submissions.

99 As the above shows, all of Order 3 is part of or connected to the enforcement of cl 13.4 whether directly or in fashioning an appropriate order in equity which justly resolves the competing considerations put forward by the partes during the arbitration, even though those matters may have been put forward as reasons not to make the orders at all. Nothing made it wrongful or

Version No 1: 21 Oct 2025 (11:29 hrs)

outside the scope of the Tribunal's authority to fashion a just regime to enforce the primary obligation by reference to considerations put forward by one of the parties as reasons not to enforce the obligation.

100 What has been said above forms the necessary context of the complaint based on an asserted denial of natural justice.

101 The relevant principles governing the affording of natural justice were not relevantly in dispute. There are numerous cases exhibiting the application of the principles to the particular facts and circumstances of a situation, such as the scope of reasons or orders in the context of the pleadings and how the case was fought, the failure to address issues or submissions, and the apprehension of a fixed attitude or closed mind on matters in dispute. The subject is not apt for precise rules and definitions built on abstractions, too often sought to be drawn, as rules, from the contextual application of principle to particular facts. The Court of Appeal has made it clear in the important judgment in *Soh Beng Tee* in 2007 and in *CZT v CZU* last year in 2024 that the principles are built on fairness. But fairness is a multi-dimensional concept controlled by principle. How the principal propositions such as: that the parties have a general right to be heard effectively on all issues (*Soh Beng Tee* at [65(a)]); that an arbitrator is not bound slavishly to adopt the positions of the parties in resolving the dispute (*Soh Beng Tee* at [55(g)] and *CZT v CZU* at [85] adopting *Soh Beng Tee* at [65(e)]); that an arbitrator is not obliged to disclose what he or she is minded to decide (*Soh Beng Tee* at [55(h)]); and that a party should be taken to appreciate the need to address matters that arise squarely from the material in the pleadings and evidence (*CZT v CZU* at [104]–[105]), play out in any particular context depends ultimately upon an assessment of what is fair in all the circumstances.

Version No 1: 21 Oct 2025 (11:29 hrs)

102 Here, the Tribunal heard the parties fully on the questions of whether to order specific performance of cl 13.4. It was its task to decide whether to do so. It decided to do so. Once the Tribunal had come to this view it was not only open to it, but the Tribunal was bound to consider the most efficacious and just way to adjust the parties' and third parties' rights and obligations. As revealed by the Procedural Order after the hearing and before the Post-Hearing Briefs, the Tribunal sought no assistance by way of submissions on the subject. That is understandable as the primary battle upon which consideration and decision were required was whether to order specific performance of the obligation to assign the leases, or not. No doubt the Tribunal could have sought the views of the parties. However, in respect of such parts of the order as could not be gainsaid to be reflective of an proper enforcement of cl 13.4 in a way that was practical and just bearing in mind the legal context of the Franchisees being obliged to undertake reasonable steps to effectuate and support the primary obligation, there could be no practical injustice to either party in not having heard the parties' views. A breach of the principles of natural justice is not established in circumstances when there is or can be no real practical injustice. The terms of paras (a), (b), (c), (d) other than (ii) and (iii), (e) and (g) fall into that category for the reasons already given.

103 Sub-paragraphs (ii) and (iii) in para (d) and sub-para (f) fall into a different category. As to the former, (ii) and (iii) in (d), these are specific obligations drawn from the general obligation in (i). There might be something to be said in submission as to why these matters should better be left at the level of generality of (i) to be worked out by application to the facts as they might fall out at the time. An *a priori* view of the Tribunal as to what would always be reasonable and obligatory might well be open to debate. In respect of these parts of para (d) the Franchisees were deprived of a real opportunity to make a (small) difference to the orders. Also, whilst (i) is a restatement of obligation as to

Version No 1: 21 Oct 2025 (11:29 hrs)

reasonable efforts to support and not undermine cl 13.4, (ii) and (iii) as specific obligations may give rise to unnecessary debates as to whether (i) would be offended by what has taken place or not taken place in relation to (ii) and (iii). A court will generally limit continuing supervision of its orders to what is absolutely essential and (ii) and (iii) if enforced may lead (as orders of the court) to unnecessary debate and unnecessary supervision of acts which, though not in conformance with (ii) and (iii), did not fall foul of (i).

104 In these circumstances, (ii) and (iii) should not be enforced as having been made without the opportunity of the Franchisees to put submissions and being of a character apt to lead to unnecessary debate and supervision given the place of (d)(i) in the order.

105 As to para (f), the Franchisees complain that they will or may be exposed to the possibility of complaint from former employees if they do not take some action. The Franchisor submitted that this was turning the order on its head when it arose from the Tribunal attempting to solve (without denying the order for specific performance) the problem raised by the Franchisees of the harm to former employees. With respect, that proposition by the Franchisor is not a fair response. If the Franchisees had been aware of the possibility of this order they could have legitimately put the submission that it may in fact prejudice them. That may or may not have been accepted by the Tribunal, but it would not be fanciful that it might have been accepted. For these reasons para (f) should not be enforced as having been obtained without the opportunity for submission by the Franchisees to make some (albeit small) adjustment to the orders.

106 The Franchisees submitted that Order 3 was an integral whole and if parts of it were not to be enforced, it should all fall as unenforceable. This should be rejected. The interconnection is not complete or rigid. Not enforcing

Version No 1: 21 Oct 2025 (11:29 hrs)

paras (d)(ii) and (iii) would not change the meaning or effect of the remaining order or any part of it, including para (d). Not enforcing (f) may possibly lead to a textual and practical weakening of para (b). However, our unwillingness to enforce para (f) because of the Franchisees' lack of opportunity to address it cannot change or limit any rights that may exist otherwise from the representation made in para (b). The other parts of the order deal with cl 13.4 or adjusting the equities in a manner which is practical and just.

107 Thus, Ground 4 of the application should be allowed in part. Order 3 should be enforced, but without the parts of para (d) being sub-paras (ii) and (iii) and without para (f).

Ground 3: The complaint as to the Tribunal's approach to post-termination damages

108 The Franchisees' complaints as to damages concern the approach of the Tribunal to damages from 1 January 2025 until 31 December 2034. As with the complaints about the specific performance order, they are put both by reference to the approach taken by the Tribunal being outside the scope of the submission to arbitration and as embodying a denial of natural justice.

109 For the reasons that follow both complaints should be rejected.

110 The Franchisees claim that in its Post-Hearing Brief the Franchisor changed entirely its damages claim to raise a new claim that was not pleaded and that lay outside the submission to arbitration. They also claim that having been denied disclosure by the Tribunal in a contested disclosure application on the basis that the documents sought were irrelevant, the unpleaded amendment found in the Post-Hearing Brief squarely raised the relevance of the documents

Version No 1: 21 Oct 2025 (11:29 hrs)

earlier refused and the Franchisees were left, after the hearing, to deal with the new case without relevant documents. Thus, they were significantly prejudiced.

111 Once again, it is necessary to examine the pleadings and other documents in the case to deal with the arguments. Before doing so, it is necessary to elaborate a little upon the points sought to be made by the Franchisees. They contend that up to and during the hearing the Franchisor only sought damages for the future, after 1 January 2025, on the basis of the lost earnings of the Singapore stores being run by the Franchisees. That is, to use the lexicon of the case, it sought damages on the "but for the breach" hypothesis. This, it was contended, was in the alternative to their case for specific performance. So, the Franchisees contend the case was always in the alternative: for specific performance of cl 13.4 *or* if not granted, what the Franchisor lost with the Franchisees running the stores as they had. In this context, the Franchisees point to the disclosure ruling where the Tribunal found that the Franchisees' call for documents relating to the Franchisor's plans to operate the Singapore stores (either itself or through another franchisee in the future) was irrelevant to the case for damages run by the Franchisor at the time. The changes in the Post-Hearing Brief were, the Franchisees contend, the introduction of a new case for damages, not in the alternative to specific performance, but in addition to it, based on the Franchisor operating the Singapore stores itself or through another franchisee once the order for specific performance was granted.

112 An examination of the pleadings, the attached evidence in memorial style, other evidence and documents support the conclusion that claims for both specific performance and damages (not just specific performance *or* damages) were made within the arbitration, as found by the Tribunal.

Version No 1: 21 Oct 2025 (11:29 hrs)

113 The request for arbitration made clear that the Franchisor required strict enforcement of the post-termination covenants.[7] This was, as the document made clear, a call for the assignment of all the leases[8] and a request for full damages to remedy harm including "lost revenue, lost profits, loss of commercial opportunities, and loss of goodwill and consumer confidence".[9]

114 Thus, the arbitration began with a demand for specific performance and damages put forward as co-ordinate or concurrent, not alternative, relief. The memorial style Statement of Claim with expert evidence attached was then filed. Paragraphs 120 and 121 in the Statement of Claim are read differently by the parties.[10] There is no express statement that damages for the future are claimed only in the alternative to the claim for specific performance. The paragraphs state:

> [120] As a direct and proximate cause of [the Franchisee's] aforementioned breaches, [the Franchisor] is entitled to monetary damages for actual damages (including amounts unpaid by [the Franchisee]), lost profits, profits unjustly retained by [the Franchisee], damage to [the Franchisor's] Brand and associated goodwill, harm [the Franchisor's] Business in Singapore, liquidated damages, consequential damages, attorney's fees, costs. [The Franchisor] demands damages in an amount to be determined by the Tribunal, but believed to be in excess of USD$104,000,000.00. In support of its claim for monetary damages, [the Franchisor] will rely on the opinions of its retained expert, Christopher Brophy, as reflected in the Brophy Report, together with amendments, supplements, additions, or alterations made thereto as a result of further factual development in this dispute.
>
> [121] [The Franchisor] further demands relief in the form of: (i) a declaration that [the Franchisee's] post-termination obligations in the Singapore Agreements are valid and enforceable; (ii) an order requiring [the Franchisee] to

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7 Case Management Bundle ("CMB") at p 8787, para 180.

8 CMB at p 8787, paras 184 onwards.

9 CMB at p 8786, para 179.

10 ACB at pp 76 and 77, paras 120 and 121.

Version No 1: 21 Oct 2025 (11:29 hrs)

> specifically perform its post-termination obligations, including assignment of the Singapore Leases to [the Franchisor] and transmittal of all customer lists to [the Franchisor]; and (iii) an injunction prohibiting [the Franchisee] from engaging in any conduct prohibited in the Post-Termination Covenant Against Competition until January 1, 2026 …

115 The reference to USD$104,000,000 could, however, be taken as a reference to one scenario of the first expert report of Mr Brophy dated 17 March 2023 as the sum reached on the assumption of the Franchisees continuing: see the table at para 33 of Mr Brophy's first report identifying USD$104,543,813 read with the hypothesis at para 35A.[11] It is, however, to be noted that the same table had greater sums from the operation of the stores by the Franchisor or a new franchisee. This is reflected by the assumptions at paras 35B and 35C of Mr Brophy's first report with the Franchisor or its new franchisee operating stores, implicitly assigned by the Franchisees.

116 The conclusionary claim for relief in the Statement of Claim claimed both damages and specific performance, not in the alternative.[12]

117 Returning to Mr Brophy's first report, Mr Brophy attached a report of Ms Feygenson which dealt with the impact of the Franchisees' rebranding the stores after May 2022 and the Franchisor's likely loss of market share up to 1 January 2025 and the likelihood of regaining that market share thereafter if the Franchisor or another franchisee ran the stores. That regaining of market share would occur at a rate slower than the rate that market share had been lost by having been out of the market and the Franchisees having actively competed from 20 May 2022 until the orders.

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11 ACB at p 88, paras 33 and 35.

12 ACB at pp 84 and 85.

Version No 1: 21 Oct 2025 (11:29 hrs)

118 Thus, the possibility of the Franchisor going into business in the Singapore market after 1 January 2025 was expressly addressed in Mr Brophy's first report.

119 The Franchisor accepts that this was not Mr Brophy's primary case. The primary case was that the Franchisor would not return to Singapore without the existing store network (thus assuming no specific performance). Thus, the loss (in one sense the "actual" loss) was what also could be described as the "but for" element of calculating the loss: the value to the Franchisor of the stores being run properly by the Franchisees without breach as they had in years past. The alternative cases (based on an assumption of specific performance being granted) can be seen in para 42 of Mr Brophy's first report.[13] These pages were supported by detailed schedules including material and information from Ms Feygenson's work.[14]

120 The difference between the primary and the alternative cases was an assumption about enforcement of cl 13.4. The primary damages case put during the hearing was in the alternative to specific performance being granted, that is on the assumption that it was not granted. It was the sum that would have been received had the breaches not occurred. The absence of an order to assign the leases was the foundation for the view of Mr Brophy that the Franchisor directly or through another franchisee would not take up the Singapore market again starting from scratch with no existing network. The alternative cases were on the foundation that specific performance was ordered.

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13 ACB at pp 90–93.

14 ACB at pp 95 and 96.

Version No 1: 21 Oct 2025 (11:29 hrs)

121 The summary table in Mr Brophy's first report is clear. If the Franchisor operated the stores, USD$61,227,949 would be the difference between its running of the business in an unimpacted market and in an impacted market; and if a new franchisee operated the stores, USD$25,325,329 would be the difference between a new franchisee running the business in an unimpacted market and in an impacted market.[15]

122 The Franchisees contend that even though these hypothesised actual scenarios were within the evidence they were not propounded, being "buried" in the evidence.

123 In its Statement of Defense and Counterclaims at para 343, the Franchisee criticised the evidence of Mr Brophy saying:[16]

> … in simply asserting that the but-for profits as damages without comparing them to the actual scenario, Mr Brophy implicitly assumes that, in the actual scenario, [the Franchisor] would never have re-entered the Singapore market (and that [the Franchisor] is not currently in the Singapore market through various online platforms). Mr Brophy's assumption that [the Franchisor] would never have re-entered the Singapore market is absurd – and is contrary to what Mr Brophy *assumes elsewhere*. Moreover, it ignores [the Franchisor's] duty to mitigate its damages … [emphasis added]

124 The reference to where Mr Brophy "assumes elsewhere" in his report was to those parts of the report which concerned the Franchisor operating in the Singapore market itself or by a new franchisee. Thus, the Franchisee in its Statement of Defense and Counterclaims engaged with this part of Mr Brophy's first report, albeit it is said on the basis of the topic of mitigation.

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15 ACB at p 98.

16 ACB at p 120.

Version No 1: 21 Oct 2025 (11:29 hrs)

125 The expert evidence of the Franchisee also engaged with these alternative ways of putting damages if the stores were recovered.[17]

126 The Franchisee's pleading in its Rejoinder and Reply on Counterclaims also took up the matter.[18] From footnote 753 of the Rejoinder and Reply on Counterclaims, it would appear that the Franchisee's expert chose not to engage directly with Mr Brophy's alternative cases. Rather, the expert began to direct attention to the topic of an "omnichannel strategy", which was dealt with in the expert's report and was attached to this pleading. The matter is dealt with under the heading "Mr Brophy's alternative scenario: return of the stores".[19]

127 The point was taken up again by the Franchisor in its Rejoinder to the Franchisee's Counterclaims where at para 9 the following was stated:[20]

> The only meaningful way to remedy this situation is to enter a final order requiring [the Franchisee] to transfer the leases to [the Franchisor] and compensate [the Franchisor] sufficiently to rebrand the stores and retake its market share in Singapore. This is the only relief that will truly restore the *status quo* and rectify [the Franchisee's] egregious breaches of the Singapore Agreements.

128 The question was also alive at the hearing. Mr Brophy was questioned (in particular by the Tribunal) without any objection, about the effect of delayed re-entry into the market and his alternative damage calculations. At no point during these exchanges between Mr Brophy and in particular the Tribunal about damages based on the Franchisor's re-entry into the market was there any

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17 ACB at pp 136–138, paras 4.62–4.68 and p 140, para 4.75.

18 ACB at p 231.

19 ACB at pp 293–294.

20 ACB at p 301.

Version No 1: 21 Oct 2025 (11:29 hrs)

objection by counsel for the Franchisees. Nor was there any request to further cross-examine Mr Brophy or Ms Feygenson.

129 The Post-Hearing Brief of the Franchisor contained submissions in similar form to that which had been put in earlier reports in Schedule 43C of Mr Brophy's first report that had been before the Tribunal at the hearing.[21]

130 It can be accepted that these submissions put to the centre of the arbitration damages in addition to specific performance that had previously been in Mr Brophy's report, but only as alternative claims.

131 At this point it is necessary to say something of the document request and the order of the Tribunal refusing production. This had taken place before the hearing. The Redfern Schedule, or Stern Schedule, can be found at pages 166 and 167 of the ACB. The Franchisor recognised that Mr Brophy's alternative damages claim was relevant to the request. The competing contentions before this Court were as follows. The Franchisees argued that the document request called for documents that would have been central to the damages case brought forward in the Post-Hearing Brief whereas the Franchisor contended that the request was overly broad and unlikely to be particularly helpful being a call for material only up to 12 May 2023. Whoever be correct, the thrust of the Franchisees' submissions as to the Post-Hearing Brief is that the running of an unpleaded case made the failure of the Tribunal to order disclosure deeply unfair (albeit after the event) in all the circumstances that occurred.

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[21] ACB at p 454, para 209 *cf.* ACB at pp 94–98.

Version No 1: 21 Oct 2025 (11:29 hrs)

132 It is also important to appreciate the nature of the application brought by the Franchisees upon the Post-Hearing Brief being filed. No application was made to re-open the hearing to revive the disclosure application, nor for further cross-examination of Mr Brophy or Ms Feygenson once documents were produced, nor to lead further evidence once further documents were produced. Rather, the Franchisees made an application to strike out the case now being advanced, arguing it was unpleaded and in effect beyond the scope of the original case.

133 The above outline demonstrates that the submission to arbitration reflected in the request for arbitration, the pleadings and the evidence always contained a claim for damages co-ordinate or concurrent with, rather than merely as an alternative to, specific performance. What is plain is that various damages alternatives were put up by both sides. Mr Brophy's three alternatives were initially led by one based on the Franchisor not re-entering the market (either itself or by another franchisee) on the hypothesis that specific performance was not granted. But alternative cases were articulated based on the Franchisor or a new franchisee entering the market, on the hypothesis that specific performance was granted. This was plain to be read in the pleadings and in the reports of Mr Brophy and Ms Feygenson. It was not directly engaged with by the Franchisees' expert who focused on another mode or structure of running the business: the "omnichannel" strategy of the Franchisor. There was some treatment of the alternative damages cases at the hearing, in particular by the Tribunal questioning Mr Brophy. No objection was taken to this at the hearing by the Franchisees. It was no doubt the interest of the Tribunal shown during the hearing in the alternative cases that spurred the decision to bring them forward in the Post-Hearing Brief, rather than principally relying upon the earlier primary case of the Franchisees continuing as the measure of the loss.

Version No 1: 21 Oct 2025 (11:29 hrs)

134 Whether or not the Tribunal was correct to deny the documents sought at the disclosure hearing, in particular in the context of the content of Mr Brophy's report and Ms Feygenson's evidence could be debated if it were relevant. What is clear, however, is that when the Post-Hearing Brief was filed the Franchisees made none of the applications described above at [132]. Crucially, no claim was made that the Franchisees were now being treated unfairly, because the very documents sought and refused in the disclosure application, in part by reason of their supposed irrelevance, were now centrally relevant to what was said to be a new case.

135 The scope of submission argument was that a new and unpleaded case was being run. That submission should be rejected. The alternative cases put in Mr Brophy's first report were encompassed within the Statement of Claim as understood by reference to the request for arbitration and in the context of the evidence filed with it in memorial style, in particular that of Mr Brophy. It is not an answer to say that the alternative cases were "buried" and not expressed: *COD v COE* [2023] 4 SLR 708 at [47]–[52] (per Philip Jeyaretnam J).

136 That the claim put in this fashion was being elevated from an alternative claim to a primary claim can be accepted. But it was not new or unpleaded or hidden or buried. The Franchisees' expert chose not to engage with it, whether for good reason or bad. If it was not engaged with because of a paucity of documents, that was not put forward as a source of injustice when the Post-Hearing Brief was filed.

137 The debate that took place as to the claim put forward in the Post-Hearing Brief tended to confuse some relevant considerations. Was it a new case? Clearly not in the sense that Mr Brophy had already dealt in some detail with damages on the assumption that the Franchisor re-entered the market,

Version No 1: 21 Oct 2025 (11:29 hrs)

either directly or through a new Franchisee. Was it a change in direction of the case? Most certainly. It moved away from Mr Brophy's primary or preferred case which was based on the assumption that the Franchisees did not (or were not required to) transfer the stores to the Franchisor. In such circumstances, Mr Brophy thought it absurd that the Franchisor would attempt to re-enter the market, given that it would need to find new stores from scratch to challenge an incumbent with an established market of 54 stores. It was a change in direction in that sense. It proceeded on a different assumption (that there would be the assignment of stores) compared to the previously preferred case of the Franchisor not re-entering the market.

138 The Franchisees, advised by highly experienced lawyers, took the course of seeking to strike out the claim for damages propounded in the Post-Hearing Brief as outside the pleadings. This was in effect an application that an amendment was necessary. An amendment was not necessary. The case fell within the pleadings and the existing framework of the evidence filed in memorial style. Further time was given by the Tribunal to the Franchisees to deal with the matter.

139 Senior Counsel before this Court submitted that it was deeply unfair that the Tribunal dealt with the new or alternative claim of Mr Brophy without providing the disclosure that had previously been rejected. That proposition was never put to the Tribunal.

140 We accept that, as was submitted by the Franchisees, this was not a case of a point being waived if not taken (such as in the circumstances of possible apprehended bias). However, the failure to raise this complaint contradicts any proposition that the Tribunal somehow dealt with the Franchisees unfairly and denied them an opportunity to put their case. The disclosure application was

Version No 1: 21 Oct 2025 (11:29 hrs)

rejected at a time when the primary case of the Franchisor being pressed assumed that the Franchisor would not re-enter the market. Rightly or wrongly a widely expressed request for documents which may well have been relevant to Mr Brophy's alternative cases, but not his primary case, was rejected. The Post-Hearing Brief for the Franchisor then put forward an alternative claim that had been in Mr Brophy's first report, based on the Franchisor re-entering the market. If it was unfair to permit this alternative claim in the light of the earlier refusal of disclosure, no such complaint was ever made to the Tribunal. It certainly was not put as the foundation of the argument to strike out the claim.

141 It was a matter for the Franchisees to seek to reopen the hearing, to renew the application for disclosure, to apply to lead further evidence, or to apply to resume cross-examination if the refusal of the disclosure application was now unfairly prejudicing the Franchisees. None of this was done. An application to strike out an unpleaded case was (rightly) rejected on the basis that it was in fact pleaded. The application was not based upon what is now said to be the significant unfairness in allowing this case forward in circumstances where the application for documents had been denied.

142 The strike out application failed. That was a procedural decision (albeit an important one) of the Tribunal whose members were by this point of time both immersed in and clearly focused on the issues in the light of the totality of the evidence after a two-week hearing. Whilst there was a suggestion before this Court that it was said to the Tribunal that some unfairness would occur in particular because of the view taken in disclosure, no application was made (other than the strike out application) to remedy, or that was based on, any such unfairness.

Version No 1: 21 Oct 2025 (11:29 hrs)

143 The following question can be put: Have the Franchisees been denied natural justice and treated unfairly in the following circumstances? First, the Tribunal wrongly, on this hypothesis, denied the Franchisees disclosure of documents relevant at the time to their case on mitigation and relevant to an alternative or secondary case of the Franchisor, but irrelevant to the primary case of the Franchisor then being put (which had as an underlying assumption that the Franchisor would not have the stores transferred to it and would not re-enter the market). Secondly, the Tribunal refused to strike out the Franchisor's case for damages now put as its primary case in the Post-Hearing Brief which previously had been the pleaded alternative case for damages on a different assumption (*ie*, that the Franchisor would have the stores transferred to it and would re-enter the market). Thirdly, the Tribunal did not revisit the earlier made disclosure ruling in circumstances where it was not asked to do so, nor to reopen the hearing, nor to allow further cross-examination, nor to admit further evidence.

144 The answer to this question is no. This Court does not sit on appeal from either procedural decision of the Tribunal to deny a disclosure or to deny the strike out. The case for unfairness arises from the Tribunal's rejection of the strike out application based on the (correct) view that the case put in the Post-Hearing Brief was within the pleadings, in circumstances where the documents as to the Franchisor's intentions in Singapore had not been disclosed to the Franchisees. These documents, though not relevant to the Franchisor's primary case, could now be relevant to what had become its new primary case, through the elevation in importance of the existing alternative case.

145 But such unfairness and such unfair consequences said to exist was never sought to be remedied by any application (other than the strike out brought on the incorrect basis that the case was entirely new) to reopen the hearing, to

Version No 1: 21 Oct 2025 (11:29 hrs)

compel the Franchisor to produce the documents previously requested and refused, to adduce any necessary fresh evidence or to conduct any further cross-examination.

146 In these circumstances, even if one assumes that the Tribunal erred in denying the disclosure application, the claim for damages as propounded in the Post-Hearing Brief was not outside the scope of the submission to arbitration and the Franchisees cannot be heard to say that they were denied procedural fairness.

147 In all these circumstances Ground 3 should be rejected.

Grounds 1 and 2: The complaints based on the spoliation of documents and evidence

148 There are two bases for this ground of the Franchisees' application to resist enforcement of the FA. The first is public policy under s 31(4)(*b*) of the IAA under Ground 1. The second is natural justice under s 31(2)(*c*) of the IAA under Ground 2.

149 The Tribunal's consideration of this matter has been discussed above. It should be stated at the outset that the Tribunal found substantial matters in favour of the Franchisees in finding at least the following:

(a) Information within the Franchisor's control was removed from documents produced which discussed topics relevant to the arbitration: FA at [179].

(b) Some of the missing communications had relevance to the Franchisor's intentions regarding the Franchisee in 2020 and 2021,

Version No 1: 21 Oct 2025 (11:29 hrs)

though the Tribunal doubted the materiality of such: FA at [179] and footnote 9 thereto.

(c) Some of the missing communications were removed after a "litigation hold" notice was issued for the arbitration concerning Malaysia and Taiwan: FA at [179] and [170(a)].

(d) Mr Wong, a senior officer of the Franchisor, was uncooperative and untruthful in his evidence: FA at [179].

(e) It was likely that Mr Wong deleted further relevant texts beyond those known about (see FA at [170] as to which texts specifically) that have not been found copied into another document: FA at [179].

(f) It was foreseeable that the deleted material would be relevant to the Singapore arbitration: FA at [180].

(g) It appeared that Mr Wong was seeking to conceal harmful information relating to the Franchisor's treatment of the Franchisees' entities in all markets to gain an unjust litigation advantage: FA at [180].

(h) Mr Wong's plans in late 2020 envisioned terminating the Singapore agreements at some time in the future after he had replaced the Franchisees' affiliates in Malaysia: FA at [184].

150 The Tribunal also took Mr Wong's mistreatment of the evidence and inferentially his conduct into account in "weighing other factual questions where there is a lacunae [*sic*] or ambiguity in the evidence": FA at [184]. Not surprisingly, the Tribunal declined to rely upon any evidence of Mr Wong unless it was fully corroborated in the record or was against the Franchisor's interest: FA at [184].

Version No 1: 21 Oct 2025 (11:29 hrs)

151 Critically, the Tribunal declined to remedy these matters by dismissing the Franchisor's claims, stating in the FA at [185]:

> That step would work an injustice because the Tribunal does not find that there is sufficient basis to conclude that the destroyed evidence would have altered the outcome of this Final Award. Nor is this a public proceeding where such a measure could have a general deterrent effect.

152 The first ground put forward by the Franchisees focuses upon the Tribunal's refusal to conclude that the conduct would have materially affected the outcome as just stated; and the second ground focuses on the failure to deal with what was said to be "a critical argument" put by the Franchisees as to adverse inferences to be drawn against the Franchisor.

153 These are put as separate arguments, the public policy argument not depending for success upon the natural justice argument.

Ground 1: Public policy (s 31(4)(b) of the IAA) – the spoliation application

154 The difficulty for the Franchisees in this ground is that the Tribunal, intimately cognisant of the facts and materials in the arbitration heard, carefully considered and decided the matter. It weighed the evidence and submissions and made very serious findings against the Franchisor and its Senior Executive, Mr Wong. The findings were on matters within the remit of the Tribunal as part of the dispute or controversy between the parties.

155 It cannot be gainsaid that an award materially brought about by fraud whether within the process or not (so-called "intrinsic" or "extrinsic" fraud) is within the public policy exception in s 31(4)(*b*), making the question one for the Court in the application for recognition and enforcement. That said, courts have taken a cautious approach, requiring deliberate falsity with regard to matters (generally facts) that were material to the Tribunal's decision. Also, as an aspect

Version No 1: 21 Oct 2025 (11:29 hrs)

of such caution, when the Tribunal has fully dealt with the question of the alleged wrongful conduct and has decided upon the appropriate extent of the remedial consequences of that finding as part of the rendering of the final award, the greatest caution possible should be shown by the Court in reagitating and relitigating such a question. The potential for re-litigation of the merits of an award based on asserted false evidence, defective disclosure and the like (as here) would undermine or risk undermining the very foundations of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

156 Thus, as Mr Born states in *International Commercial Arbitration* (Kluwer Law International, 2021, 3rd Ed) at §25.04[J][4]:

> … courts from virtually all jurisdictions have demanded … showings of fraud … and that could not have been discovered or corrected during the arbitral process.

157 Likewise in connection with recognition proceedings, Mr Born *op cit* states at §26.05[C][11]:

> In general … a tribunal's consideration and rejection of a claim of fraud or similar misconduct during the arbitral proceedings will preclude relitigating the matter …

158 In *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 4 All ER 570 Colman J said the following (at 680):

> Where a party to a foreign New York Convention arbitration award alleges at the enforcement stage that it has been obtained by perjured evidence that party will not normally be permitted to adduce in the English courts additional evidence to make good that allegation unless it is established that: (i) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and (ii) the evidence was not available or reasonably obtainable either (a) at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it

Version No 1: 21 Oct 2025 (11:29 hrs)

> in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available.

159 Similarly, the Second Circuit in *Europcar Italia, S.P.A. v Maiellano Tours* 156 F.3d 310 (2nd Cir. 1998) observed at 315 that if the issue of forgery was not raised to the arbitrators, it was forfeited; and if the issue was raised to the arbitrators, the party could not seek to relitigate the matter before the court.

160 There is no reason not to adhere to this clear international consensus and to reject Ground 1. There is no basis (apart from Ground 2 which will be considered separately) to consider that the Tribunal's consideration of these serious questions was flawed or not open to it. The application was decided with all the advantages of advanced preparation and with the advantage of the Tribunal being fully cognisant of all relevant facts and evidence as they fell out at the hearing. This is particularly relevant to the necessity to gauge as far as could be done the proven material effect of any fraud or misconduct as to disclosure and evidence.

161 Already set out are findings made by the Tribunal in the early part of the FA as to the spoliation application. Later in the FA in dealing with unclean hands as a discretionary defence or consideration to the awarding of specific performance, the Tribunal stated at [639], [642] and [643] the following:

> 639. … There is no evidence that Mr. Wong destroyed any evidence once this arbitration could have been reasonably anticipated or was afoot. Rather, Mr. Wong appears to have destroyed evidence in connection with a different arbitration – the M/T arbitration – that would have been pertinent to – but far from material to or dispositive of – the issues in this arbitration. While this Tribunal may infer that Mr. Wong's destruction of evidence was not limited to that which has been proven by [the Franchisee], this Tribunal cannot infer in light of substantial evidence that does exist, that Mr. Wong destroyed documents that would have been material to the central issues in this arbitration. …

Version No 1: 21 Oct 2025 (11:29 hrs)

> …
>
> 642. … the Tribunal has concluded that the unjustified destruction of documents justifies an adverse inference that Mr. Wong's plans in late 2020 (and perhaps even in 2022) envisioned terminating the Singapore Agreements at some time in the future after he had replaced [the Franchisee] in the Malaysia market. The Tribunal has also concluded that Mr. Wong's testimony is generally unreliable, and has not relied upon it in this arbitration unless corroborated by other, reliable evidence.
>
> 643. The Tribunal is unwilling, however, to exercise its wide range of discretion to deny [the Franchisor] equitable relief to which it is otherwise plainly entitled. This Tribunal has found that by the second half of 2021, [the Franchisee] was deliberately engaged in a scheme to materially breach the Agreements by transferring the store leases and all of its operations under the Agreements to [the Related Company], and to prepare for re-branding the stores as [the Related Company's] stores despite [the Franchisor's] unambiguous contractual rights to, *inter alia*, continuation of those stores as [the Franchisor's] stores following any termination.

162 At this point it is important to recall the fundamental distinction drawn by the Tribunal to which we have already referred, between any *plans* of the Franchisor and Mr Wong and any s*teps that might have been taken* to put such into effect. The spoliation application was directed to uncovering or illuminating Mr Wong's and the Franchisor's plans for Singapore and what they had done in furtherance of such. The Tribunal had made it plain that a breach of good faith, a repudiation of the agreement and otherwise any breach was more than mere intention for future action but necessarily needed to involve action being taken to effect such intention. This distinction can be seen to pervade the Tribunal's conclusion of the lack of likely materiality of any documents further illuminating Mr Wong's plans.

163 The findings of the Tribunal set out above and otherwise in the FA at [183] and the absence of proof of the nature of any further documents concealed by Mr Wong (see *CYE v CYF* [2023] SGHC 275 at [138(c)] and [150]) would

Version No 1: 21 Oct 2025 (11:29 hrs)

place a heavy burden on this Court of relitigating a spoliation application fully and carefully decided by the Tribunal whose members had intimate and detailed knowledge of, and familiarity with, the evidence after a full hearing. This Court should not approach this allegation of alleged fraud in such a manner. It would be an approach undermining the New York Convention and the Model Law.

Ground 2: Natural justice (s 31(2)(c) of the IAA) – the alleged failure to address a "critical argument"

164 The "critical argument" identified by the Franchisees in support of Ground 2 was that the Franchisor's plan to "take back" Singapore was not limited to replacing the Franchisee with another franchisee, but also potentially involved taking over the Franchisee's 54 stores to run them by itself. In support of this phrasing of the matter, reference was made to the opening statements on the first day of the arbitral hearing.

165 The first, and fatal, difficulty for the Franchisees is that they did not in fact ask for this adverse inference.

166 The Franchisee's Rejoinder and Reply on Counterclaims sought six adverse inferences from the documents that the Franchisor failed to produce and from the spoliation as follows:

(a) That "Mr Wong's missing text messages and emails would fully detail his illicit and bad faith 'plan' to 'take back… Singapore' from [the Franchisee]."[22]

(b) That "Mr Wong's missing text messages and emails would detail his discussions with potential new partners in Singapore (including Ms

[22] ACB at p 215, para 70.

Version No 1: 21 Oct 2025 (11:29 hrs)

Lau…), revealing further Mr Wong's strategic goal of taking back Singapore and the fact that he was lining up a potential partner to replace [the Franchisee] (just as Mr Wong did in Malaysia and Taiwan)."[23]

(c) That missing documents showing the Franchisor's forecasted and actual lead times for its products ordered by its other customer would establish that the said customer did not suffer delays to the extent that the Franchisee did.[24].

(d) That unproduced contracts between the Franchisor and its other customer would establish that the Franchisor did not impose upon the said customer geographical restrictions as to where it could sell the Franchisor's products.[25].

(e) That the Franchisor's unproduced documents with respect to price increases, if any, imposed by the Franchisor on its other customers, would establish that no price increases were in fact passed down to the said customers.[26]

(f) That "[the Franchisor's] unproduced (non-privileged) documents with respect to its reasons for and the timing of issuing the Notice of Default on 6 May 2022 would establish that [the Franchisor] issued the Notice of Default pretextually, in order to default [the Franchisor] and terminate the Singapore Agreements, and pursuant to Mr Wong's instruction to Ms Mullen … to 'take back … Singapore'".[27]

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23 ACB at p 217, para 71.

24 ACB at p 218, para 72.

25 ACB at p 219, para 73.

26 ACB at p 220, para 74.

27 ACB at p 221, para 75.

Version No 1: 21 Oct 2025 (11:29 hrs)

167 In support of the inference sought in (b) above it was also submitted that "[the Franchisee] has indisputably produced *prima facie* evidence of Mr Wong's plan to take back Singapore and replace [the Franchisee] with a new partner".[28]

168 In the opening statements on the first day of the hearing before the Tribunal, counsel for the Franchisees said:[29]

> [The Franchisor] is not going to do this [*ie*, take over the 54 stores] itself. It never did it before … It is not going to take over the 54 stores.

169 The slides in the opening submissions did not contain any call for the inference that the Franchisor would take over the stores directly.[30]

170 The adverse inferences sought in the spoliation application in the event that the Franchisor's claims were not dismissed did not seek this inference.

171 There was a statement by counsel for the Franchisees in closing on 13 February 2024 in answer to a question from the Tribunal which is relied upon by the Franchisees. The Chairperson of the Tribunal asked the following:[31]

> In that one, it strikes me as fairly reckless to push somebody into ending the franchise without having somebody else in the wings, at least. Like in Taiwan, you had Ting Hsin in the wings, conceptually. In Malaysia, you had Caring in the wings, conceptually. But I – please, tell me where I'm wrong, but I don't see anything in the record where there is anybody in the wings.

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28 ACB at p 218, para 71(d).

29 Transcript of Arbitration (Day 1) at p 264, lines 21–24.

30 ACB at p 312; CMB at p 5988.

31 CMB at p 6813.

Version No 1: 21 Oct 2025 (11:29 hrs)

172 Counsel for the Franchisees replied:[32]

> So, first of all there is Rachel Lau, who is well and truly in the wings. We don't know what exactly the wings entailed because he deleted all the messages that describe that. But yes, you do have someone in the wings within the person of Rachel Lau.
>
> Second, and this is very important, recall what Mr Wong specifically said a week before the May 6, 2022 notice of default. He said, I want you to take back Singapore and have an office there. Recall also that [the Franchisor] here seeks [the Franchisee's] 54 stores. They may have -- I can't tell you what their exact backup plan was, probably because I [*sic* Mr Wong] deleted all the messages that describes it.

173 In the hearing before this Court, Senior Counsel for the Franchisees, in answer to the proposition that the Tribunal was never asked to draw the inference that they were going to take back the stores themselves as opposed to handing them over to a new franchisee, referred to references in paras 139, 140, 147 and 148 of the Franchisees' submissions before this Court.

174 The first reference to para 139 was to Mr Wong's message to Ms Mullen that he wanted to "take back Singapore" and "have an office there". This was not, however, pleaded or referred to as an argument in the spoliation application. Rather, as para 139 itself stated, this was in the section of the Statement of Defense and Counterclaims asserting breach of the obligation of good faith.

175 The second reference to para 140 referred to the evidence of Mr Tillet, the Franchisor's market manager for Singapore until June 2021, who had a telephone conversation with Mr Wong. Mr Tillet said in his witness statement:[33]

> 25 … Mr Wong told me that he wanted [the Franchisor] itself to take over [the Franchisee's] markets. …
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> …

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32 CMB at pp 6813–6814.

33 ACB at pp 128–129, paras 25, 28 and 31.

Version No 1: 21 Oct 2025 (11:29 hrs)

> 28 … rather than having [the Franchisor's] stores that are run by a franchisee with exclusive rights, Mr Wong wanted [the Franchisor's] products to be sold by as many non-exclusive retailers and e-commerce merchants in as many locations as possible. …
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> …
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> 31 … Mr Wong wanted to "replace [the Malaysian Franchisee] and [the Taiwanese Franchisee] with Caring Pharmacy and Ting Hsin". …
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> …
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> 33 Mr Wong's plan [was to] to take over [the Franchisor's] business in Singapore. …

176 However, in address to the Tribunal, counsel for the Franchisees submitted that the Franchisor's "take back plan" was to replace the Franchisees with other franchisees.[34] In particular, he said:

> I would also note, as we think about this, in response to your question, having just gone through this exercise twice in Malaysia and Taiwan and essentially held the hand of the new partner, Caring on the one hand, Ting Hsin on the other, to walk them through the due diligence process, to show them how to take over the stores, [the Franchisor] would have known very well how to do exactly the same thing in Singapore. This was the plan it had already put into place. It sort of walked through how you do it. And it therefore knew, as it turned out to be the case in Taiwan, that it could do this very fast.

177 Thus, counsel was addressing the question of the likelihood of the Franchisor using the same methodology as used in Malaysia and Taiwan, *ie*, using a new franchisee.

178 The third reference to para 147 can be set to one side. It was a reference to the Franchisees' expert saying that the Franchisor would never enter the market in Singapore itself. That, however, was in the context of rebutting Mr Brophy's evidence which was given on the assumption of no lease assignments.

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34 ACB at p 515, line 17 to p 516, line 5.

Version No 1: 21 Oct 2025 (11:29 hrs)

179 The fourth reference to para 148 is also of no materiality as it simply explains some expert evidence on behalf of the Franchisees.

180 Thus, none of those references demonstrates that a critical argument was put that there should be an adverse inference drawn – namely that Mr Wong's plans to "take back Singapore" involved the Franchisor directly undertaking the operation of the stores.

181 All the above shows that the Franchisor taking over in Singapore by running its own stores was not put by the Franchisees in a way that required separate attention. The possibility that the Franchisor might take over in Singapore directly did not have to be directly addressed by the Tribunal. It had not been put forward as an argument critically different or distinct from the taking over of Singapore by a new franchisee. The Tribunal dealt with the application thoroughly. It found upon an examination of all the material that spoliation had occurred. There is no basis to consider that any further advertence to the Franchisor taking the stores over directly as opposed to by a new franchisee would have made the slightest difference to the outcome of either the spoliation application or the claim that the Franchisor repudiated the agreement rather than the Franchisees. The above examination of what was submitted allows one to conclude that no breach of natural justice has occurred.

182 In *DKT v DKU* [2025] 1 SLR 806, the Court of Appeal set out the relevant framework for natural justice challenges of an "*infra petita*" variety: that not all material issues raised were considered by the tribunal. Four conditions must be satisfied. First, the issue must have been properly before the Tribunal. Here, the so-called critical argument was barely made out as a separate issue from the plan generally to "take back Singapore". Secondly, the point must have been essential to the dispute. Nor is this made out, in particular given the

Version No 1: 21 Oct 2025 (11:29 hrs)

statements of counsel for the Franchisees to which reference has been made. Thirdly, the Tribunal must have completely failed to consider the point. The award must not be parsed and analysed with minute particularity but read generously. The overlooking must be clear and inescapable. This is not made out. The relevant texts and their contents and the questions of the taking over of the Southeast Asian, including Singaporean businesses, were considered carefully in examining the spoliation conduct and in assessing the whole of the evidence as to the Franchisor's conduct in the face of the Franchisees' allegations of repudiation: see for instance FA at [167]–[186] and [405]–[408]. It is far from clear that the Tribunal did not consider the texts and all relevant evidence and submissions in assessing what the Franchisor and Mr Wong did and said leading up to May 2022. Fourthly, there must have been prejudice. Given the findings of the Tribunal in the light of the serious findings against Mr Wong, there has been no prejudice demonstrated.

183 Further, ultimately the findings of the Tribunal were contrary to any case of a plan to take the Singapore stores back for itself to run. The Tribunal found that the Franchisor would not have made a plan to terminate the Franchisees without arranging a replacement franchisee and would not have altered its long-standing strategy of operating through franchisees.[35] These findings are contrary to a plan to take the Singapore stores back and run them corporately which can be taken to be dealt with by being implicitly rejected.

184 The natural justice claim fails.

Orders

185 The orders of the court are as follows:

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[35] FA at [183], [406], [407] and [721]; CMB at pp 569, 621, 622 and 683.

Version No 1: 21 Oct 2025 (11:29 hrs)

(a) The application by the Defendants in SIC/OA 9/2025 that HC/ORC 1222/2025 be set aside is allowed in part as set out in (b) and (c) below, but is otherwise dismissed.

(b) HC/ORC 1222/2025 be varied such that the parts of the orders of the Tribunal in Order 3(d)(ii) and Order 3(d)(iii) in para 752 of the Final Award and Order 3(f) in para 752 of the Final Award not be enforced.

(c) The orders of the Tribunal otherwise set out in para 752 of the Final Award be enforced.

(d) Within 14 days the Claimant (the Franchisor) prepare a schedule of costs separating out costs and disbursements incurred before and after transfer to this Court, together with short submissions as to the suggested quantum to be awarded both pre-transfer and post-transfer.

(e) Within 14 days thereafter the Defendants (the Franchisees) may, if they wish, file short written submissions on the quantum of costs.

Version No 1: 21 Oct 2025 (11:29 hrs)

(f) Within two days thereafter both sides should indicate to the Court whether they are agreeable for costs to be decided on the papers without a hearing and if so whether they are agreeable for the question of costs to be dealt with by order of a single Judge of the *Coram*.

Chua Lee Ming
Judge of the High Court

Simon Thorley
International Judge

James Allsop
International Judge

Toby Landau KC (Duxton Hill Chambers) (instructed), Rachel Low (Rachel Low LLC) (instructed), Adrian Aw, Ian Choi and Tessa Lim (Resource Law LLC) for the claimant;
Davinder Singh SC, David Fong and Ng Shu Wen (Davinder Singh Chambers LLC) for the defendants.

Version No 1: 21 Oct 2025 (11:29 hrs)