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

[2022] SGHC 17

Originating Summons No 433 of 2021

Between

CLX

… *Plaintiff*

And

(1) CLY
(2) CLZ

… *Defendants*

Originating Summons No 212 of 2021 (Summons No 2174 of 2021)

Between

CLY

… *Plaintiff*

And

CLX

… *Defendant*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside]
[Arbitration — Award — Recourse against award — Award induced or affected by fraud]
[Abuse of Process — Inconsistent positions — Principle of approbation and reprobation]

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CLX v
CLY and another and another matter

[2022] SGHC 17

General Division of the High Court — Originating Summons Nos 433 of 2021 and 212 of 2021 (Summons No 2174 of 2021)
S Mohan J
17, 24 September 2021

25 January 2022 Judgment reserved.

S Mohan J:

Introduction

1 In arbitration proceedings, parties are expected to put forward their case fully and exhaustively before the arbitral tribunal at first instance so that the dispute submitted to the tribunal for determination and all issues encompassed within it can be conclusively and comprehensively resolved. Where a party fails to do so, the court may not allow an applicant a "second bite of the cherry", in a setting-aside application, to introduce an issue or argument material to the merits of the underlying dispute which was not but which could and should have been raised during the arbitration proceedings. In such circumstances, the court may dismiss such a belatedly raised objection as an abuse of the setting aside process (*BAZ v BBA and others and other matters* [2020] 5 SLR 266 ("*BAZ*") at [64]–[65]). I have occasion to consider if the present case is one such instance, in circumstances where the applicant contends that an arbitral award

unfavourable to it was, *inter alia*, induced or affected by fraud on the part of its counterparty.

2 In HC/OS 433/2021 ("OS 433"), CLX is the plaintiff and CLY and CLZ are the defendants. OS 433 is CLX's application to partially set aside a final award dated 18 November 2020 (the "Final Award") rendered by a sole arbitrator (the "Arbitrator") and a Decision and Memorandum of Corrections dated 8 February 2021 rendered by the Arbitrator under r 33 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Edition, 1 August 2016) ("SIAC Rules") (the "Rule 33 Decision"). The Final Award and Rule 33 Decision will hereinafter be collectively referred to as the "Corrected Final Award".

3 CLX seeks to set aside the following dispositive terms of the Corrected Final Award pursuant to s 48(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) (the "AA"):

(a) An award in favour of CLY against CLX for:

(i) the sum of $2,110,025.99 together with simple interest at a rate of 5.33% from 22 December 2015 until full and final payment;

(ii) the sum of $82,191.18 (*ie*, 70% of CLY's share of the costs of the arbitration);

(iii) the sum of $1,433,975.92 (*ie*, 70% of CLY's legal fees);

(iv) the sum of $318,832.64 (*ie*, 70% of CLY's expenses and disbursements); and

(v) simple interest at a rate of 5.33% on each of the sums referred to in (ii), (iii), and (iv) above from the date of the Corrected Final Award until full and final payment.

(b) An order that CLX removes the overhead cranes designed, supplied and installed by it (the "Overhead Cranes") from CLY's premises within six months from the date CLY allows CLX access to the site (or within such time as may be agreed between them) and to bear the costs of such removal.

CLX does not seek to set aside the Arbitrator's decision that it is entitled to the sum of $67,230 from CLY.

4 HC/SUM 2174/2021 ("SUM 2174") is filed by CLX (as defendant) in HC/OS 212/2021 ("OS 212"). SUM 2174 is CLX's application to set aside HC/ORC 1361/2021 (the "Leave Order") made in OS 212, granting CLY leave to enforce the Corrected Final Award against CLX as a judgment of the court.

5 For convenience, I will hereinafter, unless otherwise stated, refer to CLX as the "plaintiff", CLY as the "first defendant", CLZ as the "second defendant" and to CLY and CLZ collectively as the "defendants".

6 The plaintiff relies on three grounds to set aside the Corrected Final Award. Firstly, the Corrected Final Award is induced or affected by fraud because the first defendant dishonestly concealed and/or gave false evidence to the Arbitrator regarding the alleged actual condition of the Overhead Cranes, which was the subject of the parties' dispute. This is the main ground relied upon by the plaintiff. Secondly, there is a breach of natural justice in the making of the Corrected Final Award because the plaintiff was deprived of the

opportunity to make arguments regarding the alleged actual condition of the Overhead Cranes, and specifically, to resist the claim by the first defendant for rescission of the underlying contract and/or mount significant defences to the claim for rescission. Thirdly, the Corrected Final Award is contrary to public policy because it was rendered on the basis of an egregious error of fact that the Overhead Cranes had not been damaged. As is quite common, the plaintiff relies on these same grounds to also set aside the Leave Order.

Factual background

7 The parties are all companies incorporated in Singapore. The plaintiff is in the business of designing, manufacturing and repairing of lifting and hoisting machinery. The first defendant is in the business of land transportation of containers and general cargoes. It is also the owner of a multi-level warehouse and container depot in Singapore (the "Development"). The second defendant is in the business of general construction and design and build construction work. The first defendant appointed the second defendant as the main contractor for the Development.[1] On 10 December 2012, the plaintiff and the first defendant entered into a contract where the plaintiff was appointed as a nominated sub-contractor for the design, supply, installation, testing and commissioning of the Overhead Cranes for the Development (the "Contract").[2] The original contract price was $6,468,000 excluding Goods and Services Tax ("GST"). Following a number of agreed changes during the course of the works, the revised contract price was $7,386,596 excluding GST.[3] Pursuant to a term in the Contract, the plaintiff entered into a sub-contract with the second

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1 Agreed Bundle of Cause Papers ("ABCP") Vol I at p 57; CLY's first affidavit dated 2 June 2021 ("LJ1") at p 159 (para 5).

2 LJ1 at paras 9 to 10.

3 ABCP Vol I at p 116 (Final Award para 3.6).

defendant dated 22 February 2013 (the "Sub-contract"). Hereinafter, both the Contract and Sub-contract will, unless the context indicates otherwise, simply be referred to as the "Contract".

8 Subsequently, disputes arose between the parties regarding whether the Overhead Cranes supplied by the plaintiff were defective. On 22 December 2015, the second defendant assigned its rights and obligations under the sub-Contract to the first defendant by way of a deed of assignment.[4] On the same day, the first defendant issued a written notice of termination to the plaintiff on grounds that there were numerous breaches of and/or non-compliance with the terms of the Contract by the plaintiff,[5] and thereafter, proceeded to terminate the Contract with immediate effect. The first defendant (as assignee) also treated the plaintiff's conduct as a repudiation of the Contract and accepted the repudiation. The first defendant claimed that the Overhead Cranes were of unsatisfactory quality under the Contract and/or the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SOGA") and it was entitled to reject them. The first defendant sought, among others, a rescission of the Contract and a refund of the sums it had paid to the plaintiff and/or damages for breach of the Contract.

9 The first defendant commenced arbitration proceedings against the plaintiff on 5 December 2016 (the "Arbitration"). The Arbitration was a domestic arbitration conducted under the auspices of the Singapore International Arbitration Centre ("SIAC"). On 16 February 2017, on the application of the plaintiff, the second defendant was joined as a party to the Arbitration by the SIAC Court of Arbitration. On 8 May 2017, Mr Christopher

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4 Defendant's Written Submissions dated 10 September 2021 ("DWS") at para 8; LJ1 at p 73 (para 11).

5 LJ1 at paras 12 to 14.

Lau SC was appointed by the SIAC as the sole Arbitrator.[6] The Arbitration ran its course and the oral hearing was conducted over the course of ten days from 16 July 2018 to 27 July 2018. Written closing submissions were submitted in September and November 2018, covering 23 issues for determination.[7]

10 The Arbitrator subsequently wrote to both parties on 18 June 2020 to indicate that his draft award had been sent to the SIAC for scrutiny, and sought clarification on whether the parties sought any orders in relation to the Overhead Cranes kept in storage within the first defendant's premises. He noted that the parties' submissions did not address this issue. Relevantly, in the first defendant's Statement of Claim (Amendment No. 1) filed in the Arbitration, it had sought, among others, the costs associated with the disposal of the defective cranes and parts and sale of scrap metal, in an amount to be quantified.[8]

11 In response to the Arbitrator's message, the first defendant sought an order for the removal of the Overhead Cranes and for the costs to be borne by the plaintiff. The plaintiff gave no substantive response, opting to leave the issue to the Arbitrator's determination.[9]

12 On 18 November 2020, the Arbitrator rendered his Final Award. In essence, he found in favour of the defendants on the issues of breach by the plaintiff of the SOGA, the first defendant's right to terminate the Contract and to treat the plaintiff's breach of the Contract as repudiatory. The Arbitrator also upheld the first defendant's rejection of the Overhead Cranes and its claim for

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6 ABCP Vol I at p 60.

7 ABCP Vol I at pp 91 and 138 to 139.

8 ABCP Vol I at pp 806 to 807.

9 ABCP Vol I at pp 102 to 103.

rescission of the Contract.[10] The Arbitrator ordered the plaintiff to, *inter alia*, refund the purchase price of the Overhead Cranes to the first defendant and pay for various associated costs and expenses incurred by the first defendant. After taking into account, by way of set-off, various amounts that were awarded by the Arbitrator to the plaintiff, the Arbitrator awarded a net sum of $2,117,515.99 (excluding interest) in the first defendant's favour. The Arbitrator also ordered that the plaintiff remove the Overhead Cranes from the first defendant's premises within four weeks of the date of the Final Award and to bear the costs of such removal (the "Removal Order").[11]

13 Following the release of the Final Award, the plaintiff conducted a physical inspection of the Overhead Cranes at the first defendant's premises (the "Site Visit") on 4 December 2020, almost exactly four years after the Arbitration had commenced. During the Site Visit, the plaintiff's representatives took several photographs of the Overhead Cranes. According to the plaintiff, it was only during the Site Visit that it discovered for the first time that the Overhead Cranes had not just been dismantled as previously asserted by the plaintiff but had been damaged and/or destroyed, with several key parts missing and/or cannibalised by the first defendant.[12] This assertion forms the bedrock of the plaintiff's fraud complaint.

14 On 18 December 2020, the plaintiff submitted an application to the Registrar of the SIAC under r 33 of the SIAC Rules for, *inter alia*, the Final Award to be corrected and/or interpreted and/or for an additional award to be

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10 ABCP Vol I at pp 590 to 591 (Summary of Findings on Issues 11 to 14).

11 ABCP Vol I at pp 587 to 589, 617 to 619.

12 Plaintiff's Skeletal Submissions dated 10 September 2021 ("PWS1") at para 5(f).

issued (the "Rule 33 Application").[13] In essence, the plaintiff requested that the Arbitrator correct double-counting errors, provide further directions in relation to the alleged damage to the Overhead Cranes and extend the timeframe for the plaintiff to comply with the Removal Order. There were a total of five requests made by the plaintiff in its Rule 33 Application. Only one (categorised by the Arbitrator as "Request 4") is relevant to the applications before me.

15 Given its centrality to the plaintiff's applications, in the following paragraphs, I set out in some detail (a) the plaintiff's Request 4 in relation to the Removal Order; and (b) the Arbitrator's decision on that request. The plaintiff submitted that upon inspection of the Overhead Cranes during the Site Visit, it realised for the first time that instead of dismantling and properly taking down the Overhead Cranes, the first defendant had "severed the steel structural components into pieces". As a result, the Overhead Cranes had been damaged and/or destroyed. Any residual value in the dismantled components had been destroyed and the remaining structural parts would only amount to scrap metal. In addition, various components of the Overhead Cranes had gone missing and "may have been cannibalised by the [first defendant] for its own use". These include (amongst others) the main control panels, various motors, cables, drag chains, power cables and cable festoon systems of the Overhead Cranes.[14]

16 The plaintiff claimed that these matters were unknown to it until the Site Visit. According to the plaintiff, the Site Visit was the first opportunity it had to properly inspect the "dismantled crane system".[15] Thus, the plaintiff and the Arbitrator were not in a position to take into account the destruction of the

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13 CLX's first affidavit dated 5 May 2021 ("BTSA1") at para 8.

14 ABCP Vol I at p 663.

15 ABCP Vol I at p 663.

Overhead Cranes and the resulting depreciation in their value in the plaintiff's earlier evidence and submissions in the Arbitration, and thus, this issue was not dealt with by the Arbitrator in the Final Award.

17 In the main, the plaintiff was dissatisfied that, unbeknownst to itself and the Arbitrator, the Overhead Cranes had allegedly been destroyed in the course of being dismantled/uninstalled by the first defendant following the termination of the Contract. According to the plaintiff, this was contrary to the first defendant's constant representations throughout the Arbitration that the Overhead Cranes had merely been dismantled and stored at the first defendant's premises pending the outcome of the Arbitration, which in turn led to the natural inference that the "parts remained capable of reassembly (in which case their resale value would have been considerable)".[16] The plaintiff contended that as a result of the alleged destruction of the Overhead Cranes, their resale value would have deteriorated by about 50% of the original value. The plaintiff argued that the issue necessitated further consideration and an order from the Arbitrator, by way of an interpretation of the Final Award and/or additional award.[17] The plaintiff's request for relief in the Rule 33 Application was stated as follows:[18]

> 22 In particular, the [plaintiff] takes the view that it is entitled to, and hereby requests, that the [Arbitrator] issue an order, by way of and interpretation of the [Final Award] and/or a further Award, that the [first defendant] be liable for the depreciation in the value of the [Overhead Cranes] resulting from the damage and destruction caused by the [first defendant], and value of the components that have gone missing and believed to have been cannibalised by the [first defendant] for their own use. …

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16 ABCP Vol I at p 664.

17 ABCP Vol I at pp 662 to 665.

18 ABCP Vol I at pp 674 to 675.

> 23 The [plaintiff] requires time and further access to the [Overhead Cranes] in order to complete its inspection and provide a full itemisation of the destroyed and/or missing parts and seeks an order that the [plaintiff] be granted such access forthwith, and additional directions in respect of the conduct of proceedings in relation to the further order being sought, including if necessary directions for further evidence and submissions.
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> …
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> 34 In the premises, the [plaintiff] reiterates its stance that further time and access be granted to the [plaintiff] to provide a full itemisation of the destroyed and missing parts, and additional directions in respect of the conduct of proceedings in relation to the further order being sought, including if necessary directions for further evidence and submissions.
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> [emphasis in original omitted]

18 In response, the first defendant submitted, *inter alia*, that the plaintiff's request cannot appropriately be dealt with under r 33 of the SIAC Rules since the conditions for its invocation were not satisfied. The plaintiff's claim was a new claim and was not part of the Arbitrator's mandate. To bring matters to a logical close, the first defendant suggested that the Removal Order be clarified as an order for removal on an "as is where is" basis. Alternatively, it submitted that the plaintiff was estopped from raising any arguments relating to the alleged damage to the Overhead Cranes, whether in the Arbitration or in separate proceedings, because of the doctrine of extended *res judicata* or abuse of process.[19]

19 After considering the submissions from the parties on the Rule 33 Application, the Arbitrator issued the Rule 33 Decision on 8 February 2021. The Arbitrator rejected the plaintiff's request for an interpretation of the Final Award and/or an additional award on account of the alleged damage to the

[19] ABCP Vol I at pp 666 to 670.

Overhead Cranes. The Arbitrator noted that he was *functus officio* after the release of the Final Award save in the limited circumstances set out in r 33 of the SIAC Rules. The Arbitrator found that r 33.3 (which dealt with the making of an additional award) only applied in respect of claims presented in the arbitration but not dealt with in the award. As it was not in dispute that the plaintiff had not, prior to the release of the Final Award, raised the matters relating to the alleged damage to/cannibalisation of the Overhead Cranes and consequent diminution in value in the course of the Arbitration, r 33.3 of the SIAC Rules did not provide a basis for the Arbitrator to determine those matters. Accordingly, he was not in a position to issue the directions sought by the plaintiff.[20]

20 The Arbitrator also rejected the *first defendant's* suggested clarification of the Final Award that the Removal Order should be on an "as is where is" basis. The Arbitrator was of the view that while the first defendant framed its suggestion as such, it was in fact requesting the Arbitrator to make the clarificatory order. The Arbitrator found that there was no basis to grant this request as it would not be within his powers to do so under r 33 of the SIAC Rules. The Arbitrator concluded that r 33.1 did not apply as the first defendant's request did not involve any "error in computation, any clerical or typographical error or any error of a similar nature". Further, in the Final Award, the first defendant's request for the plaintiff to "remove *and dispose*" of the Overhead Cranes had been expressly rejected by the Arbitrator. Thus, it could not be said that the Arbitrator had not dealt with the first defendant's request, and therefore r 33.3 did not apply. As for an interpretation of the Final Award, the Arbitrator considered that the first defendant was unable to identify the relevant parts of

[20] ABCP Vol I at p 674.

the Final Award which were unclear, ambiguous or vague and as such, there was nothing in the Final Award to be interpreted such as to make r 33.4 applicable.[21]

21 What I have set out at [19] and [20] above encapsulates the *ratio decidendi* of the Arbitrator's decision on the Rule 33 Application in so far as the Removal Order and Request 4 are concerned. However, the Arbitrator went on, in *obiter dicta*, to state that even if he had the power to consider the first defendant's request to clarify the Removal Order as being on an "as is where is" basis, he would have dismissed it.

22 From the correspondence exchanged between the parties, the Arbitrator observed that the plaintiff had made clear from the inception that the first defendant was under no circumstances to tamper with the Overhead Cranes as they constituted evidence relevant to the Arbitration. Since the first defendant's case was that it was entitled to reject the Overhead Cranes, the Arbitrator considered that the first defendant "cannot on one hand claim that [it was] rejecting the [Overhead Cranes] (thereby disclaiming any right of ownership in respect of the same), and freely cannibali[s]e the [parts of the Overhead Cranes] on the other".[22] The Arbitrator also noted that the first defendant had represented during the Arbitration that it had "refrained from tampering" with the Overhead Cranes after communications with the plaintiff and that this was irreconcilable with the position it took in the Rule 33 Application that it was entitled to do as it saw fit in respect of the Overhead Cranes. At no point in time prior to the release of the Final Award did the first defendant indicate that the dismantling of the Overhead Cranes could have resulted in destruction of the same to any

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21 ABCP Vol I at pp 676 to 677.

22 ABCP Vol I at p 679.

extent or that the components of the Overhead Cranes had been removed. If the first defendant had so indicated, this would then have been a matter for determination in the Final Award. As it stood, there was no basis for the first defendant's request that the Removal Order be clarified as one on an "as is where is" basis.[23]

23 The Arbitrator also observed that there was no indication that the plaintiff "should have been aware that the dismantling of the [Overhead Cranes] could have resulted in their destruction".[24] There was nothing in the correspondence exchanged between the parties that indicated that the dismantling could have resulted in some destruction of the Overhead Cranes. The relief sought by the first defendant, *ie*, that it had a right to reject the Overhead Cranes and claim the return of the purchase price, also meant that, if granted, the first defendant would need to return the Overhead Cranes to the plaintiff. Accordingly, the relief sought by the first defendant would not have put the plaintiff on notice that not all components of the Overhead Crane System that it had supplied would be returned. Finally, in light of his rejection of the first defendants' request, the Arbitrator did not consider it necessary to address its arguments on the application of the doctrine of extended *res judicata* or abuse of process.[25]

24 The Arbitrator eventually made one correction to the Final Award to correct a double-counting error which resulted in the principal net sum awarded being reduced to $2,110,025.99. The Arbitrator also extended the time for the plaintiff to remove the Overhead Cranes to six months from the date when the

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23 ABCP Vol I at pp 678 to 682.

24 ABCP Vol I at p 684.

25 ABCP Vol I at pp 684 to 694.

plaintiff is allowed access to the first defendant's premises (or within such time as agreed by the parties).[26]

25 Just over a month after the Rule 33 Decision was rendered, the first defendant commenced OS 212 on 10 March 2021 and obtained the Leave Order.

The parties' cases

26 As stated above (at [6]), the plaintiff's case is founded on three grounds. Firstly, it submits that the Corrected Final Award is induced or affected by fraud and should be set aside pursuant to s 48(1)(*a*)(vi) of the AA. It contends that the first defendant dishonestly concealed from the Arbitrator the fact that the Overhead Cranes had, sometime before or during the Arbitration, been dismembered and/or destroyed, with several key parts missing and/or cannibalised by the first defendant for its own use. This was only discovered by the plaintiff during the Site Visit.

27 The first defendant also falsely represented to the Arbitrator that the Overhead Cranes had merely been "dismantled" pending the outcome of the Arbitration, in line with the rescission relief that it was seeking in the Arbitration (*ie*, the return of the purchase price and for the Overhead Cranes to be returned to the plaintiff following rescission of the Contract).[27] As a result of the false representations and from the documents and information disclosed by the first defendant during the Arbitration, there was no "trigger" or reason for the plaintiff to "set a train of inquiry in motion at the arbitration" or to apply to

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26 ABCP Vol I at pp 714 to 717.

27 PWS1 at paras 16 to 21.

inspect or seek further orders during the course of the Arbitration to preserve the "dismantled" Overhead Cranes.[28]

28 Further, there is a causative link between the first defendant's deliberate concealment and false representations, and the decision of the Arbitrator. Since the first defendant sought the relief of rescission in the Arbitration, the Arbitrator would not have upheld the rejection of the Overhead Cranes and/or awarded the first defendant the purchase price since these were premised on the Overhead Cranes having merely been dismantled and therefore, being returned to the plaintiff without any damage and/or parts missing.[29]

29 Secondly, the plaintiff submits that the Corrected Final Award is contrary to public policy. There is a substantial overlap between the public policy ground raised by the plaintiff and the fraud ground since the public policy objection encompasses corruption, bribery and fraud. The plaintiff contends that in view of the deliberate concealment of material facts regarding the state of the Overhead Cranes from the Arbitrator, there was an egregious error of fact in the making of the Corrected Final Award.[30]

30 Thirdly, the plaintiff submits that the first defendant's fraudulent conduct deprived it of a reasonable and/or fair opportunity to defend against the first defendant's claim. It was precluded from arguing during the Arbitration that:[31]

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28 Plaintiff's Supplementary Skeletal Submissions dated 15 September 2021 ("PWS2") at para 4.

29 PWS1 at paras 30 to 35.

30 PWS1 at paras 39 to 41.

31 PWS1 at para 44.

(a) The Arbitrator ought to refuse the relief sought by the first defendant (*ie*, the return of the purchase price and for the Overhead Cranes to be returned to the plaintiff) on the grounds that the Overhead Cranes had already been destroyed and/or cannibalised whilst in the first defendant's possession.

(b) Alternatively, even if the Arbitrator was minded to uphold the rejection and order the return of the purchase price, he should make appropriate deductions therefrom, given that the first defendant was unable to return the Overhead Cranes to the plaintiff completely.

(c) The amounts awarded to first defendant for consequential costs should be reduced accordingly.

31 If the court finds that there are outstanding matters which the Arbitrator has the power to determine, the plaintiff submits that the court may suspend the proceedings herein for a period of time and allow the Arbitrator to resume the Arbitration and/or take any action as may eliminate the grounds for setting aside of the Corrected Final Award, pursuant to s 48(3) of the AA.[32]

32 In response, the defendants submit that there is no basis to set aside the Corrected Final Award. As regards the ground of fraud, the defendants contend that the plaintiff has not provided any cogent evidence to show that the first defendant had deliberately concealed the condition of the dismantled Overhead Cranes. The first defendant had put forward evidence in the Arbitration showing the condition of the Overhead Cranes both prior to and after dismantling.[33] The

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32 PWS1 at para 46.

33 DWS at paras 63 to 64.

plaintiff produced no record of the condition of the Overhead Cranes prior to the termination of the Contract.[34]

33 In any event, the plaintiff failed to identify how the Corrected Final Award would have been affected by the evidence of the condition of the Overhead Cranes. The plaintiff had not pleaded the defence of impossibility of rescission and/or further orders which may be necessary and appropriate to "adjust for any change to the property or benefits derived from the contract and its rescission".[35] In essence, there were defences or reliefs available to the plaintiff. It is also likely that substantial rescission was possible given that any diminution in value from allegedly missing parts could have been anticipated by the plaintiff and accounted for by depreciation, even if the Overhead Cranes could not be restored to their original state.[36] In addition, the Arbitrator was aware of the very same facts that the plaintiff relies upon in OS 433 and had raised these matters in its Rule 33 Application. Yet, in the Rule 33 Decision, the Arbitrator did not disturb his finding on the damages awarded to the first defendant or any part of the dispositive terms.[37]

34 Further, even if there was deliberate non-disclosure, the first defendant had good reasons because the condition of the Overhead Cranes was "legally immaterial" in light of the pleaded positions taken by the parties in the Arbitration. Firstly, the plaintiff did not plead any diminution or depreciation in value which was a defence readily available to it in the light of the first defendant's claim for rescission under the SOGA. Secondly, there was good

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34 DWS at para 66.

35 DWS at para 84.

36 DWS at para 92.

37 DWS at para 93.

reason to believe that the specific condition of the Overhead Cranes at every juncture during the dispute was not "legally material" to the claims made in the Arbitration.[38] For one, there is no duty of care or legal duty to preserve the goods that are the subject of a rescission claim.[39] In addition, the first defendant was under no obligation to disclose the condition of the Overhead Cranes as it was not material to the positions taken by the first defendant in the Arbitration. Thus, there was no deliberate concealment aimed at deceiving the Arbitrator.[40]

35 The plaintiff also did not satisfy the due diligence requirement in adducing new evidence. The alleged new information or evidence raised by it was available prior to the conclusion of the Arbitration, and such information could have been obtained had the plaintiff exercised reasonable diligence. There were multiple instances prior to the issuance of the Final Award in which the plaintiff had ample opportunity to obtain the relevant information or take the necessary positions required to account for any depreciation or diminution in value of the Overhead Cranes if the first defendant was successful in the claim for rescission.[41] Even if not every allegation of destruction and/or missing components was specifically evident, the evidence presented during the Arbitration should have been sufficient to put the plaintiff on notice of the case it should plead in order to safeguard its own position.[42] There were measures that the plaintiff could have taken, including requesting for disclosure of documents, inspecting the dismantled Overhead Cranes or cross-examining the

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38 DWS at para 96.

39 DWS at paras 99 and 105.

40 DWS at para 106.

41 DWS at paras 109 to 110.

42 DWS at para 111.

first defendant's witnesses on this issue, but the plaintiff failed to avail itself of these remedies which were available to it during the Arbitration.[43]

36 As regards the natural justice ground, the defendants contend that the plaintiff was not deprived of a chance at proper representation. Not only was the Arbitration extensive and detailed, the Rule 33 Application afforded the plaintiff every avenue to present its case to the Arbitrator. The plaintiff is in effect arguing that it was deprived of an opportunity to present a *different defence and/or counterclaim.* In the circumstances, the fair hearing rule has not been breached.[44]

37 As regards the public policy ground, the plaintiff has not referred to any particular principle of public policy which the Corrected Final Award is allegedly contrary to.[45] If the plaintiff is unsuccessful in establishing fraud, their public policy ground would be a non-starter.[46] Further, the plaintiff also failed to demonstrate a sufficient degree of connection between the alleged fraud and the Corrected Final Award.[47] Therefore, the public policy ground should be similarly dismissed.

38 Finally, the defendants submit that OS 433 should also be dismissed by reason of the doctrine of approbation and reprobation, as the plaintiff has already taken tangible steps to reap the benefits of the Corrected Final Award and should not be allowed to take an inconsistent position by applying to set it

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43 DWS at paras 79, 106 to 107.

44 DWS at paras 129 to 134.

45 DWS at para 147.

46 DWS at para 148.

47 DWS at para 151.

aside.[48] The plaintiff had committed to "reconfigure the dismembered" Overhead Cranes for sale to a "Third Party at an attractive discount" on or around 23 March 2021.[49] The contract entered into by the plaintiff with the third party (the "Third Party Contract") demonstrates that the plaintiff sought to enjoy the fruits of the Corrected Final Award (*ie*, by removing the dismantled Overhead Cranes and reconfiguring the same for sale to a third party). OS 433 is grossly inconsistent with its course of conduct in entering into the Third Party Contract. Thus, having secured an actual benefit from the Corrected Final Award in the remains of the Overhead Cranes and going on record in enforcement proceedings relating to the seizure and sale of the Overhead Cranes to affirm their election to treat the Overhead Cranes as their property, the plaintiff should be barred from applying in OS 433 to set aside the same Corrected Final Award giving it the rights to the Overhead Cranes and which it seeks to sell under the Third Party Contract.[50]

Issues

39 Based on the parties' submissions, the main issues that arise for my consideration are as follows:

(a) whether the doctrine of approbation and reprobation precludes the plaintiff from setting aside the Corrected Final Award;

(b) whether the Corrected Final Award is induced or affected by fraud;

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48 DWS at para 153.

49 DWS at para 163.

50 DWS at paras 162 to 172.

(c) whether there is a breach of natural justice in the making of the Corrected Final Award; and

(d) whether the Corrected Final Award is contrary to public policy.

First issue: whether the doctrine of approbation and reprobation precludes the plaintiff from setting-aside the Corrected Final Award

40 I first address the logically anterior question of whether the doctrine of approbation and reprobation precludes the plaintiff from seeking to set aside the Corrected Final Award. For the following reasons, I answer this question in the negative.

41 The Court of Appeal, in *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") (at [102]) set out the law on approbation and reprobation as follows:

> 102 The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates (*Evans v Bartlam* [1937] AC 473 *per* Lord Russell of Killowen at 483). The doctrine of approbation and reprobation has also been referred to as a principle of equity that a person 'who accepts a benefit under an instrument must adopt it in its entirety giving full effect to its provisions and, if necessary, renouncing any other rights which are inconsistent with it' (Piers Feltham, Daniel Hochberg & Tom Leech, *Spencer Bower: Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) ('*Estoppel by Representation*') at para XIII.1.10). We endorse Belinda Ang Saw Ean J's description of the doctrine in *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, Intervener)* [2006] 1 SLR(R) 358 ('*Treasure Valley*') at [31]:
>
> > The doctrine of approbation and reprobation precludes a person who has *exercised a right* from *exercising another right which is alternative to and inconsistent with the right he has exercised*. It entails, for instance, that a person 'having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit': see *Evans v Bartlam* [1937] AC 473 at 483 and *Halsbury's Laws of Australia* vol 12 (Butterworths, 1995) at para 190-35 where the doctrine

> of approbation and reprobation is conveniently summarised as follows:
>
> > A person may not 'approbate and reprobate', meaning that a person, *having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile* once he or she has taken some benefit from the chosen course.

42 The doctrine does not necessarily require the electing party to make a conscious choice between alternative rights and remedies (as required in the common law doctrine of election) but a party's election which gives rise to a prior position must still be reasonably clear to be effective (*Aries Telecoms (M) Bhd v ViewQwest Pte Ltd* [2018] 1 SLR 108 at [5]). The Court of Appeal in *BWG* (at [118]–[119]) also accepted that the doctrine of approbation and reprobation extends to inconsistent positions taken against different parties in different proceedings:

> 118 Based on our survey of the above authorities, it is clear that the operation of the doctrine of approbation and reprobation does extend to inconsistent positions asserted against different parties in different proceedings, as long as the party has received an actual benefit as a result of an earlier inconsistent position. This is illustrated by cases such as *Express Newspapers* and *First National Bank*, where the doctrine was applied because the parties who sought to advance inconsistent positions had already secured actual benefits from their prior positions.
>
> 119 In the present case, and as noted above, there is an apparent inconsistency in the respondent's position in pursuing proceedings against Sit to judgment on the one hand, and its illegality defence here on the other. In our view, the judgment which the respondent has obtained against Sit in bankruptcy proceedings is a 'benefit'. Cases show that the 'benefit' that triggers the doctrine of approbation and reprobation is constituted by a judgment (*Evans v Bartlam* [1937] AC 473 at 483; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, at [252] and [257]) or an arbitral award (*Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348 at [47]; *European Grain and Shipping Ltd v Johnston* [1982] 3 All ER 989) rendered to the successful party, without further specifying that the resulting judgment debt has to be satisfied

> in order for the requisite benefit to be conferred. This was equally the case in *Twinsectra* where the judgment obtained against the director was considered to be a benefit notwithstanding its non-satisfaction (*Twinsectra* at [21]). Notably, as held in *R Durtnell & Sons Limited v Kaduna Limited* [2003] EWHC 517 (TCC) at [47], the requisite 'benefit' is made out by 'an entitlement to payment'.

43 The defendants argue that the doctrine of approbation and reprobation bars the plaintiff from proceeding with OS 433 because it has accepted an actual benefit, or has at least elected to, under the Corrected Final Award in the form of the entitlement to take back possession of the Overhead Cranes. Through its conduct of entering into the Third Party Contract, it elected to treat the Overhead Cranes as its property. It is thus inconsistent for the plaintiff to now seek to set aside the Corrected Final Award which grants it the right to the Overhead Cranes.[51]

44 The plaintiff argues that the doctrine of approbation and reprobation does not apply for the following reasons. Firstly, the Third Party Contract does not specifically identify the Overhead Cranes.[52] Secondly, it cannot be said that it had unequivocally communicated that it intended to abide by the Corrected Final Award simply by reason of entering into the Third Party Contract. It was merely seeking to protect its business interests while concurrently exploring its legal options *vis-à-vis* the Corrected Final Award.[53] Thirdly, an entitlement to take possession of a property pursuant to a judgment is not a benefit.[54] Fourthly, the plaintiff has not till date taken possession of the Overhead Cranes.[55] Finally,

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51 DWS at paras 162 to 172.

52 Notes of Arguments (17 September 2021) ("NOA") at p 17 (lines 28 to 29).

53 PWS2 at paras 32 to 35.

54 PWS2 at para 38.

55 PWS2 at para 39.

in seeking an extension of time to apply to set aside the Leave Order, the plaintiff made it clear that it was still considering whether to exercise its right to apply to set aside the Corrected Final Award and reserved its rights.[56]

Analysis and decision

45 I find that while certain aspects of the plaintiff's conduct could be criticised as inconsistent, the *totality* of the circumstances does not support the conclusion that the plaintiff's conduct clearly demonstrated that it had approbated by entering into the Third Party Contract and reprobated in seeking to set aside the Corrected Final Award in OS 433.

46 I note that even if, as the plaintiff contends, the Third Party Contract does not specifically identify the Overhead Cranes, the affidavit evidence of the plaintiff's director clearly establishes that the plaintiff intended to reconfigure the Overhead Cranes for sale to the third party at a discount; it is not suggested by the plaintiff in its evidence that it was intending to sell a *different* crane system to the third party that did not comprise any part of the Overhead Cranes. Even when it discovered the alleged damage to the Overhead Cranes, the plaintiff considered it still possible to utilise some parts of the Overhead Cranes with new materials to fulfil its obligations under the Third Party Contract.[57] The plaintiff's conduct of concluding the Third Party Contract on 23 March 2021 could therefore be described as being inconsistent with its filing of OS 433 and seeking to set aside the Final Corrected Award in its entirety, *if* viewed in isolation.

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56 PWS2 at para 36.

57 CLX's third affidavit dated 16 June 2021 ("BTSA3") at paras 51 to 53.

47 However, I agree with Mr Edmund Kronenburg, counsel for the plaintiff, that the facts *in their totality* do not show a clear or unequivocal communication by the plaintiff of its intention to take the benefit of the Overhead Cranes pursuant to the Final Corrected Award and rest its case. On the contrary, its overall conduct is relevant and should be considered. For example, the plaintiff's Rule 33 Application seeking further orders and clarifications from the Arbitrator including orders related to the allegedly damaged Overhead Cranes demonstrates otherwise. In applying for an extension of time to set aside the Leave Order and explicitly reserving its position as regards the setting-aside application, the plaintiff was making clear that it may seek to set aside the Corrected Final Award. The fact that the plaintiff entered into the Third Party Contract does not, in and of itself, evince a clear or unequivocal intent as regards its legal position. It is understandable that the plaintiff would be exploring its options on the *assumption* that the Corrected Final Award would not be set aside. It is also plausible that the plaintiff may subsequently renegotiate the Third Party Contract or fulfil its contractual obligations using other materials or parts if it did not obtain the Overhead Cranes from the defendants. I would not consider the plaintiff's overall conduct to mean that the plaintiff has taken a benefit from the Corrected Final Award from which it cannot later resile.

48 As I have found that the plaintiff's conduct is not sufficiently unequivocal to constitute approbation and reprobation, it is strictly unnecessary for me to go any further. However, given that the parties had made arguments on whether the plaintiff had taken an actual benefit for the purposes of the application of the doctrine,[58] I make some brief observations.

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[58] PWS2 at para 38; DWS at para 171.

49 In *R Durtnell & Sons Limited v Kaduna Limited* [2003] EWHC 517 (TCC) ("*Durtnell*") (at [47]), HHJ Richard Seymour QC stated as follows:

> 47 … In simple terms, a party to an adjudication cannot pick and choose which parts of a decision upon a dispute he will accept and which not. The decision upon a particular dispute must either be accepted in whole or not at all, assuming that the latter option is otherwise available. I accept that for the doctrine to apply it is necessary for a party, with knowledge that it is open to him to object to the decision, to take the benefit of part of it. However, I do not accept that what constitutes a 'benefit' for this purpose depends simply upon whether the party whose receipt of a 'benefit' is in question has obtained net cash sum or an entitlement to a payment. *It is, in my judgment, a 'benefit' to a party, for the purposes of the doctrine, that his liability to another party in respect of any particular matter is crystallised on an interim basis at a particular amount*, even though that is an amount which he is called upon to pay. Thus a party who contends that his obligation towards another party is limited to payment of a particular sum by reason of the decision of an adjudicator has both claimed and derived a 'benefit' from that decision. It is probably also correct, as Mr. Bowdery submitted, that a party who is, in consequence of the decision of an adjudicator, *entitled to take possession of a building and does so, has claimed and derived a 'benefit' from the decision.* [emphasis added]

50 Counsel for the defendants, Mr Christopher Chuah, argues that based on the passage from *Durtnell* quoted above, the actual receipt of monetary sums pursuant to an award is not a necessary prerequisite and that the scope of derived benefits in the doctrine of approbation and reprobation is to be construed broadly and can extend beyond monetary benefits.[59] Mr Chuah further submits that the entitlement to "take possession of a building" mentioned in *Durtnell* is analogous to the Removal Order in the present case. The plaintiff has thus secured an actual benefit from its entitlement in the Corrected Final Award to the Overhead Cranes.[60]

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59 DWS at para 159.

60 DWS at para 171.

51 Mr Kronenburg relies on the later English decision of *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC) ("*AMEC*") which doubted the correctness of *Durtnell*. Mr Kronenburg also contends that since the plaintiff has not in fact been able to take possession of the Overhead Cranes, it cannot be said that the plaintiff has secured any actual benefit that would attract the application of the doctrine.[61] In *AMEC* (at [96]), Coulson J commented on the reasoning in *Durtnell* as follows:

> 96 But secondly, if this point had been critical, I would have needed to have been persuaded that, with great respect, Judge Seymour's *analysis of benefit*, a vital ingredient of this argument was correct …
>
> 97 Taken *to its logical conclusion, a benefit so defined could mean that a party who has lost an adjudication, and has dutifully followed every aspect of the decision against him when preparing his next withholding notice, would still be deriving a benefit from the decision.* ***That seems, on the face of it, to be a surprising conclusion. No authority is identified by Judge Seymour in support of his definition****. Thus, whilst I can see that a* ***losing party who seeks to rely positively on some aspect of a decision on which he has been successful****, whilst continuing to challenge the decision as a whole, might be attempting to gain a benefit,* ***I find it difficult to reach the same conclusion when the losing party has simply applied, to his detriment, the findings of the adjudicator on which he has been unsuccessful****.*
>
> [emphasis added in italics and bold italics]

52 In my view, *Durtnell* (at [47]) is correct in so far as it holds that an order or judgment in a party's favour can *per se* amount to a "benefit" – that proposition has been accepted in our courts. In *BWG* (at [119]), the Court of Appeal noted that the "benefit" that triggers the doctrine of approbation and reprobation is constituted by a judgment or an arbitral award rendered to the successful party and there is no need for the resulting judgment debt to be satisfied in order for the requisite benefit to be conferred. *BWG* in fact referred

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61 PWS2 at paras 38 to 39.

to *Durtnell* for the proposition that the requisite benefit is made out by an "entitlement to payment". The same point was recently noted in *Goldbell Engineering Ltd v Etiqa Insurance Pte Ltd (Range Construction Pte Ltd, third party) and another matter* [2022] SGHC 1 (at [79]). The inquiry as to whether a party had taken "a benefit" would ultimately depend on the facts and circumstances of each case. In this regard, I am also prepared to accept that a judgment or award for *non-monetary* benefits can in some cases also constitute a "benefit" under the doctrine. Contrary to Mr Kronenburg's submission, I do not read Coulson J's comments above in *AMEC* as doubting Seymour J's analysis in *Durtnell* (at [47]) in its entirety. Instead, Coulson J was in some doubt as to whether *a liability* that is adjudged against a *losing* party could amount to a "benefit" to that party. I am inclined to agree that it may be stretching the scope of the concept of a "benefit" too far to extend it as including a judgment or award against the losing party.

53 As regards the example mentioned in *Durtnell* of "a party who is, in consequence of the decision of an adjudicator, *entitled to take possession of a building* ***and does so***, has claimed and derived a 'benefit' from the decision" [emphasis added in italics and bold italics], I make three points. Firstly, the issue of taking possession of a building *did not* arise on the facts of *Durtnell*. Seymour J merely made a tentative observation that counsel's submission was "probably correct". The context in which the submission was made by counsel in *Durtnell* is not clear from the case report. Secondly, that sentence in *Durtnell* cannot be read to stand for the proposition that an entitlement to a chattel "in consequence of a decision" of an adjudicator or tribunal, even if the entitlement arises *implicitly*, can or will always be considered a "benefit" for the purposes of the doctrine of approbation and reprobation. The context behind what "in consequence of a decision" means is also unclear from *Durtnell*. Without the

benefit of argument on these points, I decline to come to any definitive conclusion on them. I would however observe that from the language used by Seymour J and extrapolating it to an example of a chattel, it would appear that the title to or right to possession of the chattel would need to have been an issue before the adjudicator or tribunal, or at the least formed part of the relief requested *by the party* alleged to have taken the "benefit" of the decision. Thirdly, the example cited seems in any event to contemplate the *actual* taking of possession of the property in question as being necessary before the approbating party could be said to have claimed and derived a "benefit".

54 In the present case, I reject the defendants' argument that the plaintiff has taken an actual benefit for two reasons. Firstly, the Corrected Final Award did not explicitly make any finding that the title to the Overhead Cranes vests or re-vests in the plaintiff. The title to or right to possession of the Overhead Cranes was not in issue before the Arbitrator. Nor was it the subject of any relief sought by the plaintiff. Instead, the Arbitrator only ordered that the plaintiff remove the Overhead Cranes from the first defendant's premises at its cost within four weeks of the date of the Final Award (see [12] above), and subsequently extended the deadline to six months in the Rule 33 Decision. The Removal Order is only a *consequence* of the remedy of rescission sought by the *successful first defendant*, which the Arbitrator allowed. It would not, in my judgment, be fair or reasonable to consider the vesting (or re-vesting) of title to the Overhead Cranes with the plaintiff *as the losing party*, in circumstances where that occurred merely as an *implied consequence* of the Contract being rescinded, as constituting an "actual benefit" for the purposes of the doctrine. That would be extending the concept of "actual benefit" too far, at least in the context of the case before me. Secondly, the plaintiff has not in fact taken possession of the Overhead Cranes. Therefore, even on the basis of the example

referred to in *Durtnell*, it cannot be said that the plaintiff has taken the benefit of the Corrected Final Award.

55 In sum, I hold that the doctrine of approbation and reprobation does not apply on the facts of this case to bar the plaintiff from seeking to set aside the Final Corrected Award in OS 433 or the Leave Order. Accordingly, I turn now to address the substantive merits of the plaintiff's challenge against the Corrected Final Award.

Second issue: whether the Corrected Final Award is induced or affected by fraud

56 Under s 48(1)(*a*)(vi) of the AA, an award rendered in a domestic arbitration may be set aside by the court if the "making of the award was induced or affected by fraud or corruption". For international arbitrations, an identical ground may be found in s 24(*a*) of the International Arbitration Act 1994 (2020 Rev Ed).

57 It is well-established that the threshold for establishing fraud, which is rooted in dishonesty, is a high one. In *BNX v BOE* [2018] 2 SLR 215 ("*BNX*") (at [82]), the Court of Appeal was at pains to re-emphasise that dishonesty is the cornerstone for fraud and that "inadvertent errors in the evidence, the drawing of wrong inferences, conjectures, lack of corroborative evidence or even false evidence … short of actual and deliberate fraud would not be sufficient to discharge the burden of proof".

58 In the recent decision of *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 3 SLR 725 ("*Bloomberry*") (at [99]), Belinda Ang Saw Ean J (as she then was) noted that where fraud is alleged, "strong and cogent evidence" has to be adduced and the

court will not infer a finding of fraud. In short, a convincing case of fraud must be shown (*BVU v BVX* [2019] SGHC 69 ("*BVU*") at [46]).

59 The law concerning perjury and concealment of evidence (including concealing documents or information) in an arbitration was also helpfully and clearly summarised by Ang J in *Bloomberry* (at [103]–[109]). The key principles are as follows:

(a) Perjury and the deliberate suppression or withholding of documents in an arbitration can in a proper case amount to obtaining an award by fraud.

(b) Where the fraud alleged is perjury, the applicant must prove that:

(i) false evidence is given which is intended to cause any person in that proceeding to form an erroneous opinion that touches any point material to the result of such proceeding;

(ii) the new evidence demonstrating fraud could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings; and

(iii) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party.

(c) Where the fraud alleged is concealment or non-disclosure of material information or documents, the applicant must prove that:

(i) there is deliberate (as opposed to innocent or negligent) concealment aimed at deceiving the arbitral tribunal or the other party/parties to the arbitration;

(ii) there is a causative link between the deliberate concealment and the decision in favour of the concealing party (*ie*, the concealment must have substantially impacted the making of the award). The document(s) (or information) concealed must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant; and

(iii) there must not have been a good reason for the non-disclosure.

(d) Where new evidence is being introduced to demonstrate fraud, the applicant would have to demonstrate why it was not available or could not have been obtained with reasonable diligence at the time of the arbitration.

(e) The three common core elements to such procedural fraud (*ie*, perjury and concealment of documents/information) include: (a) dishonesty or bad faith; (b) the materiality of the new evidence to the decision of the tribunal; and (c) the non-availability of the evidence during the earlier proceeding. Further, while proving fraud, dishonest or unconscionable conduct is essential, it is not sufficient.

60 Turning back to the case at hand, the lynchpin of the plaintiff's case is that the first defendant had either dishonestly concealed from the Arbitrator or falsely misrepresented to the Arbitrator the actual condition of the Overhead Cranes.[62] The plaintiff submits that the first defendant must have known of the condition of the Overhead Cranes since they were dismantled by the first defendant's contractor following the termination of the Contract, and remained

[62] PWS1 at para 16.

in the first defendant's possession and care throughout the Arbitration. It was dishonest for the first defendant to conceal that the Overhead Cranes had not just been dismantled but had been dismembered/destroyed and with parts either missing or cannibalised.[63] The first defendant also falsely represented to the Arbitrator and the plaintiff that the Overhead Cranes had merely been dismantled and had not been tampered with pending the outcome of the Arbitration.[64] The plaintiff relies on photographs taken during the Site Visit in support of its contention that there is serious damage to and/or cannibalisation of the Overhead Cranes.[65] Since the first defendant had not stated on affidavit that it honestly believed that the Overhead Cranes were properly dismantled and not tampered with as it consistently represented to the Arbitrator and the plaintiff during the Arbitration, the court should draw the inference of fraud from the first defendant's silence.[66]

61 The defendants submit that the plaintiff has not shown cogent evidence that there was actual or intentional cannibalisation or destruction of the Overhead Cranes by the first defendant or any deliberate concealment by the first defendant regarding the condition of the Overhead Cranes from the Arbitrator, or that there were no good reasons.[67] On the contrary, there were multiple instances where the first defendant had itself put forth evidence showing the condition of the Overhead Cranes.[68] Not only has the plaintiff not produced any record of the original condition of the Overhead Cranes, it has not

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63 PWS1 at para 16.

64 PWS1 at paras 16, 23 to 25; PWS2 at para 11.

65 PWS2 at para 8.

66 PWS2 at para 11.

67 DWS at para 63.

68 DWS at para 64.

accounted for the incident on 7 December 2015 which caused some damage, the poor original condition of the Overhead Cranes which included multiple damaged parts and the removal of two spreaders prior to the first defendant's dismantling of the Overhead Cranes.[69] The plaintiff's case is supported purely by a selection of photographs taken during the inspection at the Site Visit.[70]

62 In my judgment, the plaintiff has failed to produce the necessary strong and cogent evidence to persuade me that there is a convincing case of the Corrected Final Award being induced or affected by fraud.

63 To place matters in the proper context, I first outline the first defendant's representations to the Arbitrator and the Arbitrator's view of the plaintiff's allegations as stated in the Rule 33 Decision – I have alluded to these earlier at [15]–[23].

64 In an email dated 23 June 2020 to the Arbitrator, the first defendant stated that it "had refrained from tampering with the defective [Overhead Cranes] as a result of the [plaintiff's] letter dated 19 January 2016, wherein the [plaintiff] warned the [first defendant] not to dispose of the components, as it would constitute tampering with the evidence".[71] From the first defendant's expert reports, it also represented to the Arbitrator that the Overhead Cranes had been dismantled and stored in parts. They were stored in an open yard and were exposed to the elements at all times.[72]

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69 DWS at para 66.

70 DWS at para 69.

71 ABCP Vol I at p 679 (para 4.11).

72 ABCP Vol I at p 681 (para 4.11).

65 As set out above at [21]–[23], the Arbitrator noted in the Rule 33 Decision that at no point in time prior to the release of the Final Award did the first defendant indicate that "the dismantling of the [Overhead Cranes] could have resulted in destruction of the same to an extent which had yet to be identified" and/or the "components of the [Overhead Cranes] may have been removed".[73] The Arbitrator felt that there was no reason for the plaintiff to be aware of or suspect that the dismantling could have resulted in some destruction and/or the components of the Overhead Cranes may have been removed.[74] He observed that it did not follow from the fact that the Overhead Cranes had been dismantled and stored in parts that the plaintiff should have been aware that the dismantling of the Overhead Cranes could have resulted in some destruction.[75] Since the first defendant sought the relief of rescission, it would have to return the Overhead Cranes to the plaintiff. This relief would not have put the plaintiff on notice that not all components of the Overhead Cranes would be returned. The Arbitrator's concluding comment was that:[76]

> … To conclude otherwise would mean, by analogy, that the purchaser of a car – having successfully established its right to reject the car on the basis of defects – could, on receiving the refund of the sums paid for the car, return the car to the seller without some components which had been with the car when it was supplied, for instance the car's engine and wheels.

66 I make a few observations regarding the Rule 33 Decision, as the plaintiff relies on it heavily as evidence that there was deliberate concealment by the first defendant and that the Arbitrator was unaware of the actual condition of the Overhead Cranes. Firstly, it should be noted that a close reading of the

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73 ABCP Vol I at p 680 (para 4.11).

74 ABCP Vol I at p 694 (para 4.11).

75 ABCP Vol I at p 682 (para 4.11).

76 ABCP Vol I at p 694 (para 4.11).

Rule 33 Decision shows that the Arbitrator *did not* make any factual findings that there *was in fact* damage or destruction to the Overhead Cranes or any cannibalisation of parts of the Overhead Cranes by the first defendant. The Arbitrator's comments were premised on the *assumption* that there was indeed damage to or destruction of the Overhead Cranes and there were missing/cannibalised parts *as alleged* by the plaintiff. As summarised above at [18]–[23], the Arbitrator's comments were in response to the *first defendant's* suggestion (which the Arbitrator found in fact amounted to a request) that the Arbitrator clarify the Removal Order in the Final Award to require the plaintiff to remove the crane parts on an "as is where is" basis, and various arguments that the first defendant raised in support of that suggestion. The Arbitrator found that the first defendant had not shown that its request fell within *any* of the provisions of r 33 of the SIAC Rules. Accordingly, r 33 was not engaged and the Arbitrator had no power to make the order requested. While Mr Kronenburg argued that the Rule 33 Decision provides a clear indication that the Arbitrator himself was unaware of the actual condition of the Overhead Cranes,[77] I disagree that the Rule 33 Decision can be construed as making any findings or reaching any conclusions on (a) the alleged actual condition of the Overhead Cranes or (b) the knowledge of the first defendant or the Arbitrator as regards the alleged actual condition of the Overhead Cranes.

67 Secondly, the Arbitrator was *functus officio* following the release of the Final Award save for the limited circumstances set out in r 33 of the SIAC Rules. The Arbitrator explicitly reasoned that since the plaintiff had not raised the allegations of damage to and/or cannibalisation of the Overhead Cranes prior to the release of the Award, he was not in a position to determine the matters raised

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[77] PWS1 at para 22; NOA at p 3 (lines 8 to 30).

or make any direction that the first defendant should be liable for the depreciation in the value of the Overhead Cranes resulting from the alleged damage and cannibalisation of parts by the first defendant.[78] He therefore had no power to determine whether the Removal Order by the plaintiff should be on an "as is where is" basis as per the first defendant's request. Again, there was no finding or acceptance by the Arbitrator that there had in fact been destruction of the Overhead Cranes or missing/cannibalised parts.

68 Thirdly, the Arbitrator's *dicta* in rejecting the first defendant's request even on the assumption that he had the power to consider it is not binding on the parties (see above at [21]–[23]). Nor am I bound to follow the Arbitrator's views or observations on this issue. The Arbitrator considered that there would have been no basis for the first defendant's request since it was premised on an incorrect assumption that the plaintiff "should have been aware of, or at least suspected that (1) the dismantling could have resulted in some destruction and/or (2) the components of the [Overhead Cranes] may have been removed".[79] For reasons which I explain below, I take a different view on this.

69 Finally, while I agree with the Arbitrator that in seeking the relief of rescission, the first defendant was not entitled to destroy and/or cannibalise parts of the Overhead Cranes, the determination of whether the first defendant had in fact done so and how the reliefs ought to have been calibrated is a matter which could have been and therefore ought to have been put before the Arbitrator by the plaintiff, as I explain in greater detail below. It is thus inappropriate for this court, in a setting-aside application, to embark on a fact-finding mission to determine the veracity of this potential course of action. I therefore say no more

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78 ABCP Vol I at pp 673 to 674 (paras 4.6 to 4.7).

79 ABCP Vol I at p 694.

on its merits but will come back to this point later in a different context. Suffice to say, the Arbitrator found it unnecessary, in the Rule 33 Decision, to deal specifically with the first defendant's submissions on the extended doctrine of *res judicata*/abuse of process.[80]

70 The plaintiff relies heavily on the Rule 33 Decision as evidence that the Arbitrator was not aware of any damage/destruction to the Overhead Cranes or of any cannibalised or missing parts.[81] I have rejected this argument at [66] above, but even if I accept that the Arbitrator was unaware, this only brings the plaintiff's case so far. To make out its case on the Corrected Final Award being induced or affected by fraud, the plaintiff must meet the requirements set out in *Bloomberry* (above at [59]) and prove that the first defendant has deliberately concealed material information from the Arbitrator or given false evidence to mislead the Arbitrator. I am not persuaded that the plaintiff has done so.

71 Having failed to meet the fundamental overarching requirement of adducing strong and cogent evidence of fraud, that would be sufficient for the plaintiff's applications to be dismissed. Nevertheless, I turn to consider in greater detail the three core elements of procedural fraud: (a) dishonesty or bad faith; (b) the causal link between the new evidence and the decision of the tribunal; and (c) the non-availability of the evidence during the arbitration.

Whether there was dishonesty or bad faith on the part of the first defendant

72 I find that the plaintiff has not established a convincing case of dishonesty or bad faith on the part of the first defendant.

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80 ABCP Vol I at p 694 (Rule 33 Decision para 4.12).

81 PWS1 at para 22; NOA at p 5 (lines 19 to 26).

73 The authorities make it clear that, in cases of procedural fraud, dishonesty or bad faith must be shown. Negligence or error in judgment in, for example, failing to discover a crucial document would not be sufficient to justify a setting aside of the award. For that purpose, the non-disclosure must have been deliberate and aimed at deceiving the arbitrator (*Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*") at [30(d)]). A similar *mens rea* would also apply in the case of concealment of information.

Analysis and decision

74 As a preliminary point, it is not necessary for me to decide precisely what damage, if any, was caused to the Overhead Cranes in the process of their dismantling and/or thereafter, or which parts, if any, went missing or were cannibalised as alleged. The plaintiff claims that the photographs taken during the Site Visit "clearly show significant damage to the [Overhead Cranes], including, but not limited to, damage to the crane girders, runways, cable trays, screw jack motors, flipped motors, flipper frames, twist lock motors, long travel motors and wheels, spreaders, spreader junction box, spreader control cables, operator cabins and consoles, operator cabin motors and trolley gear wheels, hoist crab travelling motor, hoist motors, hoist junction panel, thruster brakes and inverters".[82] It relies on photographs adduced by the first defendant of the Overhead Cranes prior to dismantling and the photographs taken by its representatives at the Site Visit.[83] The defendants on the other hand do not assert that there is no damage or that all parts of the Overhead Cranes remain.[84] They

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82 BTSA3 at para 8.

83 PWS2 at para 6.

84 DWS at paras 70 to 71.

only point out that the dismantled Overhead Cranes were kept in an open yard and exposed to the elements and there was damage to the Overhead Cranes when it was first delivered to them.[85]

75 Even though I find that the evidence produced by the plaintiff to make good its contention that there was damage/destruction to the Overhead Cranes and/or missing parts is sketchy, I proceed on *the assumption* that there was damage to the Overhead Cranes and some parts went missing. *Even then*, there is, in my judgment, no evidence that the damage was intentionally caused by the first defendant or that any missing parts were cannibalised by the first defendant. While the plaintiff submits that it does not need to prove that the first defendant "specifically and intentionally" destroyed or cannibalised the Overhead Cranes,[86] it remains, in my view, an important part of the context. It also remains the plaintiff's burden to demonstrate with cogent evidence that the first defendant has in fact damaged the Overhead Cranes or cannibalised parts for its own use. Had the evidence shown that the first defendant intentionally destroyed or cannibalised the Overhead Cranes or parts thereof, this would have provided strong support for the allegation that there was a *deliberate* misrepresentation to the Arbitrator (or plaintiff) and/or a *deliberate* concealment from the Arbitrator (or plaintiff) of the actual condition of the Overhead Cranes, in contrast to the first defendant's assertion that the Overhead Cranes had merely been dismantled and stored at the first defendant's premises pending the outcome of the Arbitration.

76 On the contrary, in the present circumstances, it is entirely possible that the damage and/or missing parts asserted by the plaintiff had existed from the

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85 LJ1 at para 59; DWS at paras 66 and 70.

86 PWS1 at para 28.

beginning when the first defendant took possession of the Overhead Cranes. It is also entirely possible that the damage could have been caused by the third party engaged by the first defendant to dismantle the Overhead Cranes, or that parts went missing during the dismantling process, or subsequently when the dismantled Overhead Cranes were shifted to a different location.[87] If the first defendant had been negligent or careless in preventing harm through the dismantling, storage and/or relocation process or simply did not take proper note of any lost parts, this would still *not* be sufficient to show *deliberate* concealment or the *intention* to give false evidence. It is from this perspective that I find that the evidential basis underlying the plaintiff's allegations of fraud is weak and sketchy rather than strong and cogent. It is close to impossible, simply from a comparison of the photographs taken during the Site Visit with a selection of photographs taken by the first defendant after the dismantling process, to say with any degree of confidence that there has been deliberate damage, destruction or cannibalisation of the Overhead Cranes, or to what extent. This weakness in the objective evidence is, in my judgment, fatal to the plaintiff's fraud objection.

77 I note the plaintiff's argument that the defendants have not denied, in their affidavits in response, that there was damage or destruction to the Overhead Cranes and missing parts; nor have they adduced any positive evidence of their own to show the actual condition of the Overhead Cranes.[88] In my view, this argument places the cart before the horse. The legal burden of proving fraud lies on the plaintiff as the applicant and its evidential burden is to adduce strong and cogent evidence of the fraudulent conduct complained of. As I have said above at [75], the plaintiff's evidence on the actual condition of the

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87 LJ1 at para 59(d).

88 NOA at pp 3 (lines 14 to 18) and 19 (lines 12 to 15).

dismantled Overhead Cranes is sketchy at best. It cannot be that the plaintiff can then simply rely on the alleged silence of the defendants to then contend that it has thereby discharged its burden to prove fraud – in effect, the plaintiff asks the court *to infer* fraud from the alleged silence. It is clear that the court will not infer fraud (see [58] above), and it would, in my view, be dangerous for the court to make a finding of fraud simply on account of a party's alleged silence. In any case, I also note that the defendants, in their reply affidavit, *do make* the specific assertion that the plaintiff has not established that there was any cannibalisation or destruction specifically and intentionally by the first defendant;[89] the defendants also assert that there was no ill intent or malice when they undertook the dismantling of the Overhead Cranes as it was undertaken by a third party crane contractor and denies any deliberate dismemberment, destruction and/or cannibalisation of the Overhead Cranes or their parts.[90]

78 In addition, the defendants contend that even if the plaintiff is able to demonstrate deliberate concealment (which the defendants deny), there was no causative link to the outcome of the Arbitration.[91] In essence therefore, the defendants are disputing the plaintiff's case that there has been any form of nefarious or reprehensible conduct by the defendants. It is thus not strictly correct for the plaintiff to say that there has been *no* denial by the defendants that the Overhead Cranes had been cut up, destroyed and with parts missing or cannibalised.

79 I also find that the plaintiff has not established that the first defendant deliberately concealed information regarding the condition of the Overhead

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89 LJ1 at para 63.

90 LJ1 at para 90.

91 LJ1 at para 92.

Cranes from the Arbitrator or gave false evidence in the Arbitration with the intention to mislead the Arbitrator. The plaintiff's argument that the first defendant's conduct amounts to fraud simply because the first defendant must have known the true state of affairs regarding the Overhead Cranes and did not disclose any information regarding the condition of the Overhead Cranes to the Arbitrator requires somewhat of a quantum leap. In my judgment, the mere fact that the first defendant must or ought to have known about the condition of the Overhead Cranes because the Overhead Cranes were dismantled by its contractor and remained in its possession and care throughout the Arbitration is insufficient to demonstrate fraud. As stated in *BNX* (at [82]), *dishonesty* is the cornerstone of fraud. There is no indication of dishonesty or bad faith in the way that the first defendant had conducted itself during the Arbitration.

80 I accept the defendants' argument that the first defendant's behaviour could not be described as a party seeking to mislead the Arbitrator by giving false evidence or concealing material information from him. The first defendant had consistently put forth evidence regarding the Overhead Cranes when it considered it appropriate to do so. In various witness statements adduced by the first defendant in the Arbitration, the backdrop to the dismantling of Overhead Cranes and its condition prior to, during and after dismantling was provided. The first defendant also provided photographs of the Overhead Cranes throughout the course of the Arbitration and an invoice in support of its claim for the costs of dismantling by a third-party contractor which referred to the cutting of crane girders if the length was more than 12m.[92] The very fact of some girders requiring cutting would indicate the possibility of some damage occurring in the process. Further, I also note that, in their

[92] ABCP Vol I at pp 680 to 694.

Statement of Claim (Amendment No. 1) filed in the Arbitration, one of the pleaded claims made by the first defendant was for the "[C]osts associated with *the disposal* of the defective crane parts; *sale of scrap metal*" for an amount "to be quantified" [emphasis added]. The reference to sale of "scrap metal" should have given some forewarning to the plaintiff that the dismantled Overhead Cranes, whether in whole or in part, were intended to be disposed of by the defendants as scrap metal. That pleading would have given some indication that the state of the Overhead Cranes might be more than just "dismantled" if, by that, the plaintiff thought or had the impression that the Overhead Cranes as a system were still intact and could simply be re-assembled or re-used at another location, in the event the rescission claim succeeded. I shall return to this point later when I consider the issue of whether the alleged new evidence would have been available to the plaintiff with reasonable diligence. Overall, and for the reasons above, I find that the first defendant's behaviour does not evince any dishonest intention to conceal facts or information from the Arbitrator regarding the Overhead Cranes.

81 It is also material that, in response to the Arbitrator's email dated 18 June 2020 seeking clarification from parties on whether the removal of the Overhead Cranes ought to be dealt with in the Final Award (see [10] above),[93] the first defendant specifically requested that the Arbitrator order the removal of the Overhead Cranes.[94] I accept that this objectively shows that the first defendant was not actively trying to divert the Arbitrator's attention away from the Overhead Cranes. This is especially so in the light of s 36 of the SOGA, which provides that:

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93 ABCP Vol I at p 102.

94 ABCP Vol I at p 585.

> **Buyer not bound to return rejected goods**
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> 36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

I accept the defendants' argument that the effect of s 36 of the SOGA is that it was open to the first defendant to not have requested that the Overhead Cranes be returned to the plaintiff or for an order that they be removed by the plaintiff – it was sufficient for the first defendant to intimate that it rejected the Overhead Cranes and to seek rescission of the Contract. This would have been a more strategic position to adopt had the first defendant intended to conceal the alleged actual condition of the Overhead Cranes from the Arbitrator and the plaintiff.

82 In any event, I also agree that there was good reason for the first defendant not to have disclosed anything regarding the alleged actual state of the Overhead Cranes to the Arbitrator. It is not disputed that the plaintiff had not, at any stage in the Arbitration, pleaded or otherwise asserted either a defence and/or counterclaim of a diminution in the value of the Overhead Cranes resulting from the first defendant's dismantlement of the Overhead Cranes or any alleged removal of components of the system.[95] While the plaintiff did have the opportunity to inspect the Overhead Cranes throughout the course of the four-year long Arbitration (and even before the Arbitration commenced), it did not so. The plaintiff also did not cross-examine the first defendant's witnesses during the oral hearing regarding the condition of the Overhead Cranes or in relation to any assertion of diminution in value.[96] In other words, the *condition (and therefore associated value)* of the Overhead Cranes cannot be said to have been put into issue in the Arbitration by the plaintiff. I

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95 ABCP Vol I at p 673 (para 4.4).

96 DWS at para 67.

will shortly address the submission by the plaintiff that there was no "trigger" or anything that would have caused it to suspect that the Overhead Cranes had, as it alleged, been destroyed or cannibalised, so as to put it on notice to inspect or otherwise assess the actual condition of the Overhead Cranes at any time during the course of the Arbitration. However, based on the state of play in the Arbitration *including* the responsive case that the plaintiff decided to run in the Arbitration, there was, in my judgment, no obligation on the first defendant to disclose the "true" condition of the Overhead Cranes, even if they had been damaged during or after the dismantling process or there were missing parts as a result of the dismantling or relocation of the Overhead Cranes.

83 It was, in my view, justifiable for the first defendant to take the position that the actual alleged condition of the Overhead Cranes was not *legally material* to the pleaded positions taken by *the plaintiff and first defendant* in the Arbitration. The Arbitrator himself took the view that this claim (*ie*, for depreciation in value on account of damage to or destruction of the Overhead Cranes alleged to have been caused by the first defendant and the value of components alleged to have gone missing) was *not* a claim presented by the plaintiff in the Arbitration; in substance, that conclusion meant that this issue was *not* within the scope of the parties' submission to arbitration.[97] This, in my view, at least suggests an explanation that is not implausible or fanciful as to why the first defendant did not make any alleged damaged/destruction of the Overhead Cranes or any alleged missing/cannibalised items known to the Arbitrator. It also provides, in my view, further support for my conclusion that the necessary strong or cogent evidence of dishonesty or bad faith on the part of the first defendant has not been established by the plaintiff to the standard

[97] ABCP Vol I at p 674 (para 4.7).

expected by the law. As this fundamental requirement of dishonesty or bad faith has also not been met by the plaintiff, it is, in my judgment, equally fatal to the fraud objection raised by the plaintiff.

Whether there is a causative link between the new evidence and the Arbitrator's decision

84 Since I have concluded that the plaintiff has failed to prove dishonesty or bad faith on the part of the defendants or an overall convincing case of fraud, it is strictly unnecessary for me to go on to address the other two requirements. Nevertheless, assuming that I am wrong on the first core element and there was dishonesty on the defendants' part, that in itself is still insufficient. The plaintiff must go on to also show that the "reprehensible conduct or fraud had caused it substantial injustice in that the same procured or substantially impacted the making of the award" (*Swiss Singapore* at [29]; *Bloomberry* at [106(b)]).

85 I also find that the requirement of a causative link between the new evidence and the Arbitrator's decision is not satisfied. The "new evidence" adduced and relied upon by the plaintiff in the applications before me are the photographs of the Overhead Cranes taken at the Site Visit after the Final Award was issued.

86 Mr Kronenburg submits that there is a causative link between the new evidence and the Arbitrator's decision. Relying on the Rule 33 Decision, he argues that if the Arbitrator had been aware of the condition of the Overhead Cranes, in all likelihood, he would not have upheld the first defendant's rejection of the Overhead Cranes and/or allowed the claim for rescission of the Contract and/or awarded the first defendant the return of the purchase price of the Overhead Cranes since these remedies awarded were all premised on the Overhead Cranes being returned to the plaintiff without any parts missing and/or

destroyed.[98] In such circumstances, the first defendant's remedies would only be confined to an award of damages for a breach of warranty but not rescission of the Contract. The Arbitrator's decision to order the plaintiff to pay 70% of the first defendant's costs of the Arbitration, legal fees and expenses would also be consequently altered.[99] Substantial rescission was not possible given the serious damage to the Overhead Cranes which altered the character of the property. In any case, even if substantial rescission was possible, the court (or tribunal) will do what is "practically just" and adjust for any change to the property or benefits derived to put the owner in "as good a position as before".[100] Since the plaintiff was unaware of the serious damage to the Overhead Cranes, it was illogical for the first defendant to allege that the plaintiff ought to have pleaded "impossibility" of rescission and/or sought further orders necessary to adjust for changes to the property.[101]

87 On the other hand, Mr Chuah submits that there is no causative link because the plaintiff had not pleaded "impossibility" of rescission and/or any further orders which may be necessary to "adjust for any change to the property or benefits derived from the contract and its rescission". These were possible defences or reliefs available to it when faced with a claim for rescission of the Contract which it could and ought to have raised.[102] Additionally, the principle of substantial rescission was applicable, and the onus lay on the representor to "assert and prove" its compensation for any depreciation of the goods to be returned as a result of rescission. Where the property in question retained its

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98 PWS1 at paras 30 to 31; PWS2 at para 15.

99 PWS1 at paras 33 to 35.

100 PWS2 at paras 12 to 14.

101 PWS2 at para 16.

102 DWS at paras 81 to 84.

substantial identity, rescission may still be ordered "even though it has deteriorated or depreciated or cannot be restored to its original state". The substantial identity of the Overhead Cranes was retained and rescission was therefore possible. This is supported by the plaintiff's own conduct in entering into the Third Party Contract. Therefore, it does not follow that a claim for rescission would necessarily fail, even if the value of the subject property had decreased substantially or had been changed or altered.[103] The Arbitrator noted that the allegations relating to the alleged actual condition of the dismantled Overhead Cranes had not been referred to him during the Arbitration. He therefore rejected the plaintiff's request for further directions to deal with the residual value of the Overhead Cranes.[104]

88 The defendants also submitted that their alternative claims for damages for breach of contract pursuant to their termination of the Contract and/or acceptance of the plaintiff's repudiation of the Contract would also have entitled them to compensatory damages by way of return of the purchase price. In support, Mr Chuah relied on the decision of G P Selvam J in *Management Corporation Strata Title Plan No 1166 v Chubb Singapore Pte Ltd* [1999] 2 SLR(R) 1035 which was cited to the Arbitrator. Mr Chuah pointed out that the plaintiff is not challenging the Arbitrator's conclusions that the first defendant was, as a result of the plaintiff's breach, entitled to terminate the Contract and was also entitled to accept the plaintiff's repudiatory breach of the Contract. Thus, even if the remedy of rescission was not allowed, there would be no difference to the eventual outcome as the damages for breach of the Contract would still have been awarded on the same basis.

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103 DWS at paras 85 to 92.

104 DWS at paras 93 to 95.

Analysis and decision

89 In my judgment, the condition of the Overhead Cranes cannot be said to be *decisive* in that it would have prompted the Arbitrator to have swung the other way and ruled in favour of the plaintiff. Therefore, there is, in my view, no substantial injustice to the plaintiff. Even assuming that the Arbitrator was not aware of the condition of the Overhead Cranes, that would not have substantially impacted the making of the Corrected Final Award. Let me explain.

90 Firstly, I acknowledge that there may be some merit to the plaintiff's argument that, on the assumption that (a) the actual condition of the Overhead Cranes is as alleged by the plaintiff; (b) it had been put in issue before the Arbitrator; and (c) the Arbitrator was aware that the Overhead Cranes were damaged and/or had been cannibalised by the first defendant, the Arbitrator may have made a *different* decision. However, even then, I disagree that it would necessarily be one *in favour of the plaintiff* instead of the first defendant. The Arbitrator could, for example, have awarded the first defendant damages for breach of warranty *in lieu* of rescission, but even so the damages awarded could still have been by way of repayment of the purchase price paid by the first defendant under the Contract instead of, for example, replacement cost. Even if the Arbitrator took the view that substantial rescission was possible, he could have made an adjustment to account for the alleged damage to the Overhead Cranes or missing parts. The Arbitrator seemed to be of the view that the remedy of rescission was predicated on the return of the Overhead Cranes when he stated in the Rule 33 Decision that:[105]

> iii further, the essence of the relief sought by the [first defendant], namely a right to reject the [Overhead Cranes] and

[105] ABCP Vol I at p 694 (para 4.11).

> a claim for the return of the sums paid to the [plaintiff] for these was that, if granted, the [first defendant] would, in turn, need to return to the [plaintiff] what the [first defendant] received from the [plaintiff], namely the [Overhead Cranes] …

91 Nonetheless, despite my observations above, I am not persuaded that evidence of the alleged actual condition of the Overhead Cranes would have necessarily resulted in the Arbitrator coming to a decision in favour of the plaintiff instead of the first defendant.

92 More importantly, in my judgment, the fatal flaw in the plaintiff's case is that this issue *was not put before the Arbitrator*, and the plaintiff could and ought to have done so. As I have explained above at [82], the plaintiff did not, in the Arbitration, assert a depreciation or diminution in the value of the Overhead Cranes resulting from the first defendant's dismantlement of the Overhead Cranes or any alleged removal of components from the system.[106] In other words, the plaintiff was *content* to run its case in the Arbitration on the basis that there was no diminution to or depreciation in the value of the Overhead Cranes (aside from normal wear and tear), however unfounded that belief may be.

93 As such, even if the first defendant had disclosed information in the Arbitration that there was damage to the Overhead Cranes or missing parts, the plaintiff would have had to amend its defence and counterclaim to put this in issue before the Arbitrator. The Arbitrator would then have had the opportunity to determine, as a fact, whether there was damage to and/or cannibalisation of the Overhead Cranes by the first defendant. The Arbitrator could then consider the appropriate relief taking into account the doctrine of substantial rescission. However, given the Arbitrator's recognition that the issue was not put before

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106 ABCP Vol I at p 673 (para 4.4).

him, any new evidence relating to the condition of the Overhead Cranes cannot be said to have "substantially impacted" the making of the Corrected Final Award. Whilst this analysis may, at first blush, seem somewhat circular given that the plaintiff argues that it did not raise this issue in the Arbitration *because* of the fraud on the part of the first defendant, it is closely linked to the next issue which I consider – whether the alleged new evidence could have been obtained with reasonable diligence during the course of the Arbitration. Related to this issue are the wider questions of whether the plaintiff could or ought to have raised this issue in the Arbitration and if so, whether it should be permitted to raise it now in a setting aside context.

Whether the new evidence could have been obtained with reasonable diligence at the time of the arbitration

94 Where new evidence is being introduced to demonstrate fraud, the applicant would have to demonstrate why it was not available or could not have been obtained with reasonable diligence at the time of the arbitration (*Bloomberry* at [107]). As noted by Ang J in *Bloomberry* (at [221]), the current position in Singapore appears to lean in favour of the requirement being applied in an unattenuated manner despite the allegation of fraud. Ang J also noted (at [222]) that the position in England, at least in the context of an application to set aside a judgment obtained by fraud, may be that there is no requirement that evidence of the fraud could not have been obtained in the earlier proceedings by exercise of reasonable diligence (see the UK Supreme Court decision in *Takhar v Gracefield Developments Ltd and others* [2020] AC 450 ("*Takhar*") (at [46])). Nonetheless, this requirement stands in so far as Singapore law is concerned. That said, it was noted in *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869 (at [41]), again in the context of applying to set aside a court judgment obtained by fraud, that the

requirement "ought not to be imposed rigidly such as to cause injustice in a situation where the fresh evidence uncovers fraud on the other party".

95 Bearing the above principles in mind, and whether applying the requirement in an unattenuated manner or not, I find that the plaintiff has failed to show that the information or evidence relating to the condition of the Overhead Cranes could not have been obtained with reasonable diligence, and consequently, that the arguments and claim it sought to make under Request 4 in the Rule 33 Application could not have been made by it in the Arbitration.

96 Mr Kronenburg submits that the exercise of reasonable diligence requires a "trigger", drawing an analogy with how a party requires a "trigger" before it seeks specific disclosure of a particular document from the opposing party. Further, there is a legitimate expectation that the first defendant would be taking care of its own property during the course of the Arbitration and there would be no reason for the plaintiff to suspect that the first defendant would sabotage its own claim for rescission. Since what a party ought to have done is tempered by reasonableness and there was no indication for the plaintiff to suspect that the first defendant would damage the Overhead Cranes, this evidence cannot be considered to have been available with the exercise of reasonable diligence.[107]

97 The defendants argue that the information pertaining to the condition of the Overhead Cranes was available prior to the conclusion of the Arbitration and could have been obtained had the plaintiff exercised reasonable diligence. Prior to the commencement of the Arbitration, the plaintiff had the opportunity to prescribe a method of dismantling and removal of the Overhead Cranes but

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107 NOA at p 20 (lines 4 to 28).

chose not to do so despite being better placed to do so as a crane specialist. The plaintiff was also aware that the first defendant would engage a third party to dismantle the Overhead Cranes and the invoices for the dismantling costs were produced in evidence and suggested that the Overhead Cranes were to be dismantled "for scrap". The Statement of Claim claimed the costs of disposal of the crane parts and sale of "scrap metal". In addition, during the Arbitration, the plaintiff also had the right to make a disclosure request under r 19.2 of the SIAC Rules or a request to inspect the Overhead Cranes under r 27(d) of the SIAC Rules to inform its case on whether it was necessary to plead a defence or counterclaim for potential depreciation. Alternatively, it could have requested for an order to preserve or sell the Overhead Cranes but did not do so. Finally, the plaintiff had an opportunity to raise issues relating to the condition of the Overhead Cranes when the first defendant adduced photographic evidence showing the condition of the Overhead Cranes in the open yard. The evidence presented in the Arbitration should have been sufficient to put the plaintiff on notice of the case it should plead in order to safeguard its own position.[108] Finally, the cases do not say that a "trigger" is required in order for the innocent party to act with reasonable diligence.

Analysis and decision

98 I agree with the defendants that evidence regarding the condition of the Overhead Cranes could have been obtained with reasonable diligence at the time of the Arbitration *and* the issue of depreciation or diminution in value could and should have been raised by the plaintiff in the Arbitration. At the heart of it, the decision on whether to advance a defence to bar a claim for rescission, or a counterclaim for potential depreciation due to the condition of the Overhead

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[108] DWS at paras 109 to 111.

Cranes lies with the plaintiff. The plaintiff cannot shirk from its duty to evaluate its own legal position and take the necessary measures to determine if there was a need to advance such a case, even if in the alternative. It is not commercially sensible or plausible for the plaintiff to simply equate the first defendant's response that the Overhead Cranes would be dismantled and stored in parts and/or not tampered with to a confirmation by the first defendant that there was *no deterioration* in the condition or diminution in the value of the Overhead Cranes throughout the period that it was within the first defendant's custody or that there was no damage. As with any claim, it is for the plaintiff to seek the relevant evidence before deciding whether it should pursue that claim. The same goes for a counterclaim or a defence to a remedy. If the plaintiff was even the least bit concerned with the preservation of the value of the Overhead Cranes, it was up to the plaintiff to evaluate whether it was necessary to advance the required pleadings to safeguard its position, bearing in mind the pleaded claims and reliefs advanced by the first defendant in the Arbitration. This ought to be done by taking the appropriate measures to evaluate the evidential basis for those claims.

99 During the Arbitration, the plaintiff knew that the first defendant sought the remedy of rescission. It would have been aware of the original value of the Overhead Cranes (as the seller under the Contract). It was aware that the first defendant was going to dismantle the Overhead Cranes using a third party. As early as 19 January 2016, the plaintiff (through its solicitors at the time) had requested permission from the first defendant to enter the first defendant's premises to take photographs and video recordings of the Overhead Cranes *prior* to their dismantling – clearly, the importance of obtaining and securing contemporaneous evidence on the condition of the Overhead Cranes was not lost on the plaintiff. It would have been aware that it would take time for the

Arbitration to run its course; as it turned out, the Arbitration took some four years to conclude. During that entire time, the Overhead Cranes were stored at the first defendant's premises *as evidence*. Again, as early as January 2016, the plaintiff had expressly cautioned the first defendant that it was not to tamper with the Overhead Cranes as "the same constitutes evidence in the impending arbitration proceedings".[109] It was also aware that the first defendant had pleaded a claim for disposal costs of the crane parts and/or sale of scrap metal.

100 Taking all of the above into account, it is not outside the realm of reasonable contemplation that the dismantling process, relocation and extended period of storage over time may cause damage to and/or depreciation of the Overhead Cranes, or at the least that the first defendant might advance an argument that the Overhead Cranes were in such a state or had depreciated to a state that they were worth no more than scrap value. Similarly, the prospect of parts going missing from the Overhead Cranes, which was a complex system comprising many components, was also within reasonable contemplation. In my judgment, the plaintiff ought to have made use of the various avenues that were available to seek and obtain information and evidence regarding the condition of the Overhead Cranes, either during or after the dismantling process and during the course of the Arbitration. Its failure to do so is, in my view, inexplicable.

101 To this end, there is force in the defendants' submission that there were several opportunities open to the plaintiff to seek further information or evidence regarding the condition of the Overhead Cranes. The evidence as to whether there was damage to or destruction of the Overhead Cranes as alleged and/or missing or cannibalised parts was plainly available for the plaintiff to

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109 ABCP Vol I at p 678 (para 4.11).

discover. As mentioned at [97] above, there were procedural avenues available to the plaintiff under the SIAC Rules; indeed, Mr Kronenburg does not contend otherwise. The fact that the plaintiff did not think to inquire or investigate further because it *assumed* that there would be no change (apart from wear and tear) to the condition of the Overhead Cranes (on the basis of the first defendant's confirmation that it would not tamper with the evidence), amounts in my judgment, to a failure to act with reasonable diligence.

102 I find support for my conclusion in the approach taken by Ang Cheng Hock JC (as he then was) in *BVU*. Ang JC considered the availability of orders that a party could have requested for within the relevant arbitration rules. In that case, Ang JC considered that the applicant "could have requested for the documents that were the subject of the subpoena during the arbitration if it truly believed that these categories of documents were crucial" (at [73]). The question was why it did not do so. He rejected the applicant's argument that it "had no means of knowing or ascertaining the existence of internal documents in the [other party's] possession" (at [74]).

103 I similarly reject the plaintiff's argument that there must have first been a "trigger" to indicate that there was a possibility that the Overhead Cranes would be in a damaged or cannibalised state before the plaintiff could be expected to advance the relevant pleadings or obtain evidence of the actual condition of the Overhead Cranes post-dismantling. It is no answer to say that the first defendant did not disclose anything of note. As I have found at [82] above, the first defendant was not required to do so given that the issue was not put before the Arbitrator and therefore was legally immaterial. Further, the first defendant was not relying on any information or evidence relating to the condition of the Overhead Cranes to advance its own case.

104 Mr Kronenburg relied on a passage from the judgment in *Takhar* (at [63]) where Lord Sumption reasoned that the basis on which the law unravels judgments obtained by fraud is that "a reasonable person is entitled to assume honesty in those with whom he deals" and is "not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are". Mr Kronenburg argues that similarly, the plaintiff was entitled to take the statements by the first defendant that the Overhead Cranes had been dismantled and not tampered with at face value and had no reason to suspect that it was dishonest in making these assertions. For the reasons below, I disagree that *Takhar* offers any assistance to the plaintiff's case.

105 Firstly, as far as the law currently stands in Singapore, the position adopted in *Takhar* (at [46] and [54]), namely, that for judgments obtained by fraud there is no requirement to show that the fraud could not be uncovered with reasonable diligence in the earlier proceedings, does not appear to have found favour in Singapore, *particularly* in the context of attempts to set aside arbitral awards alleged to have been obtained or that are tainted by fraud – the cases of *Swiss Singapore*, *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871, *BVU* and *Bloomberry* have all accepted and reaffirmed this requirement as part of our law. Lord Sumption's statement above was made, and is to be understood, in the context of the position ultimately taken by the UK Supreme Court in *Takhar* that there was *no* such requirement under English law. Thus, accepting Lord Sumption's statements above as also representing our law would, in my view, be somewhat inconsistent with the present weight of authority in our jurisprudence.

106 However, even if I were to accept Lord Sumption's statements as to the basis on which a court unravels a transaction (including a judgment) obtained by fraud as correct, those statements must be understood in the proper context

of the observations preceding them. In particular, they must be understood in the context of Lord Sumption *also recognising*, in the same paragraph, the principle (based on the extended doctrine of *res judicata*/abuse of process) that the court considers proceedings to challenge a judgment obtained by fraud as abusive where "the point at issue and the evidence deployed in support of it not only could have been raised in earlier proceedings *but should have been*" and that "should" in this formulation "refers to something *which the law would expect a reasonable person to do in his own interests* and in that of the efficient conduct of litigation" [emphasis added].

107 As is evident from the reasons I have given above at [98]–[103], I consider that a reasonable person in the plaintiff's shoes could *and should* have, in the factual matrix of this case, taken the necessary steps to (a) plead the necessary reliefs/defences to the claim for rescission; and (b) inspect and assess the condition of the Overhead Cranes for itself at the material times, in order to protect and advance its own interests in the Arbitration; this would be the case *even if* it was entitled to assume that the first defendant was honest when it stated that the Overhead Cranes had been dismantled and had not been tampered with. Thus, the passage in *Takhar* that the plaintiff drew my attention to, when read and understood in proper context, does not assist the plaintiff or take its case as far as it wishes to. Otherwise, it would be all too easy for an applicant in a setting aside context to contend that it did not take any steps to discover the new evidence because it was entitled to assume that its counterparty would deal with it honestly.

108 In my judgment, it remains the case that the plaintiff has failed to satisfy the requirement that the new evidence could not have been obtained by it with reasonable diligence. It is simply not enough that the plaintiff did nothing because *it did not think* that it was possible that the Overhead Cranes may have

been damaged/destroyed or cannibalised in the course of or after the dismantling process.

109 For the foregoing reasons, the fraud objection is not made out by the plaintiff.

110 I had at [93] above indicated that the question of whether the new evidence was available with the exercise of reasonable diligence is, in this case, also connected to a wider principle which I had referred to at the beginning of this judgment (see [1] above), *ie*, that a party to an arbitration is expected to raise all issues or arguments that it could and should have raised in the course of the arbitral proceedings. In the current context, this is a facet of the extended doctrine of *res judicata*. In *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 (at [58]–[59]), the Court of Appeal stated that:

> 58 … the court may disallow a party to raise certain points in court which it could and should have raised in arbitration (see, *eg*, *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997 at [30]–[46] and *Dallal v Bank Mellat* [1986] QB 441 (in particular at 462–463)).
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> 59 Whether as a function of substantive or procedural law, there is strong support for the view that barring special circumstances, *the 'extended' doctrine of res judicata operates to preclude the reopening of matters that* (a) are covered by an arbitration agreement, (b) are arbitrable, and (c) ***could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded*** (see David Williams, 'The Application of the *Henderson v Henderson* Rule in International Arbitration' (2014) 26 SAcLJ 1036 at para 11; see also *Born* at pp 3745–3746 and 3764 and Filip De Ly & Audrey Sheppard, 'ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration' (2009) 25(1) *Arbitration International* 83 at 85).
>
> [emphasis added in italics and bold italics]

111 Even without applying the extended doctrine of *res judicata* in its strict sense, a court may "in a proper case, dismiss an objection in a setting aside proceeding or an enforcement proceeding on the basis that a party had plainly made a decision not to raise it before the tribunal when it ought to have done so". The court will not allow "an introduction of an issue material to the merits of the dispute not raised during the arbitration in an attempt to set aside the award" (*BAZ* at [64]–[65]).

112 As I have found at [98]–[103] above, a defence or claim for depreciation or diminution in value on account of alleged damage to the Overhead Cranes or allegedly missing/cannibalised parts was available to the plaintiff, as was the evidence in support thereof. These defences or claims *and* the evidence in support thereof could and should have been raised by the plaintiff in the Arbitration; *more so* as they were, in my view, reasonably foreseeable defences or claims to raise in response to the first defendant's claim in the Arbitration for rescission of the Contract. Therefore, if necessary, I would have found this to be a further ground upon which the plaintiff would be precluded from raising these objections before me now in the context of its setting aside applications.

Third issue: whether there is a breach of natural justice in the making of the Corrected Final Award

113 The principles regarding a challenge based on a breach of natural justice are well-established. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (at [29]), the Court of Appeal held that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

114 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695, the Court of Appeal described the overarching enquiry as follows (at [98]):

> In our judgment in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case …

115 Mr Kronenburg submits that as a result of the *first defendant*'s conduct, the plaintiff was precluded from arguing during the Arbitration that the Arbitrator ought not to have ordered the relief of rescission, or if he was minded to do so, to make appropriate deductions therefrom considering the condition of the Overhead Cranes. The plaintiff also did not have the opportunity to argue that the amounts awarded to the first defendant in respect of consequential costs should be correspondingly reduced.[110] In essence, its objection is grounded on the fair hearing rule. The plaintiff, however, accepts that in this case, there is no act or omission on the part of *the Arbitrator* that has resulted in any breach of natural justice, which is typically what an applicant would contend when it raises a breach of natural justice objection (see *Bloomberry* at [226]).[111]

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110 PWS1 at paras 42 to 45.

111 NOA at p 7 (lines 7 to 11).

116 Mr Chuah submits that the plaintiff is effectively arguing that it was prevented from presenting a *different* defence and/or counterclaim from what it actually presented in the Arbitration. The first defendant had been transparent and forthcoming regarding the process of dismantling the Overhead Cranes. The allegations regarding the damaged condition of the Overhead Cranes were also brought before the Arbitrator in the Rule 33 Application.[112] There was accordingly no breach of natural justice.

117 In my judgment, there has been no breach of the fair hearing rule. I agree with the defendants that the nub of the plaintiff's complaint is that it was prevented from presenting to the Arbitrator a different defence or counterclaim based on the Overhead Cranes being allegedly damaged or destroyed and/or having parts missing or cannibalised. In *Bloomberry* (at [226]–[227]), Ang J rejected the applicants' arguments on breach of natural justice on a similar basis. The learned Judge stated that she understood the applicant's case "more appropriately, to be described as one where they were arguably deprived of an opportunity to present a *different case* rather than one where there were unable to present their case *per se*. Therefore, it is difficult to see *how* the *audi alteram partem* rule has been breached." [emphasis added]. I can do no better than to echo that conclusion here.

118 As I stated above (at [107]), it is the plaintiff's duty to seek and adduce evidence regarding the condition of the Overhead Cranes and to take all the relevant points in its pleadings and submissions if there was a basis for it, however slight. Where it has failed to do so, it cannot be permitted, at the setting-aside stage and after the award has gone against it, to attempt to characterise its dissatisfaction with the outcome as a failure of natural justice.

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112 DWS at paras 129 to 134.

In my judgment, ultimately, the plaintiff is in effect seeking to regain ground from its omission to make the relevant inquiries or obtain the necessary evidence during the Arbitration, *and its decision* to run its case in a certain way, on an assumption or belief that there was no damage to or diminution in the value of the dismantled Overhead Cranes. That is impermissible and I reject the plaintiff's breach of natural justice objection accordingly.

Fourth issue: whether the Corrected Final Award is contrary to public policy

119 For this ground to succeed, the court must be satisfied that upholding the Final Corrected Award would shock the conscience, be clearly injurious to the public good or violate the forum's most basic notions of morality and justice (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]). Egregious circumstances such as "corruption, bribery or fraud which would violate the basic notions of morality and justice" would allow recourse to the public policy ground (*BLB and another v BLC and others* [2013] 4 SLR 1169 at [100]).

120 The crux of the plaintiff's public policy arguments overlaps substantially with those advanced in support of its fraud ground. The plaintiff argues that the Corrected Final Award should be set aside as being contrary to public policy because there was an egregious error of fact in the making of the Corrected Final Award caused by the first defendant's alleged false representation to and/or deliberate concealment of material facts from the Arbitrator.[113]

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113 PWS1 at para 41.

121 Mr Chuah argues that the plaintiff has not referred to any particular "principle of public policy to which the award is allegedly contrary". If the plaintiff is unsuccessful in establishing fraud on the part of the first defendant, the public policy ground would be a non-starter as the public policy arguments are "wrapped up" with the fraud arguments.[114]

122 In my judgment, there is no basis for the Corrected Final Award to be set aside on the grounds of it being contrary to public policy. Given that I have rejected the plaintiff's allegations that the first defendant had dishonestly concealed the state of the Overhead Cranes from the Arbitrator or made false representations during the Arbitration (see [79] above), the public policy objection which is grounded on those same allegations also fails. In any event, it could only, at best, be said that the Arbitrator had made the Corrected Final Award without being cognisant that there *could* have been some damage or deterioration to the condition of the Overhead Cranes. This can hardly be described as an "egregious" error of fact that results in the Corrected Final Award being contrary to public policy, thereby warranting it being set aside.

Conclusion

123 For all of the foregoing reasons, I dismiss OS 433 and SUM 2174. In light of my decision, there is no need for me to consider if it would be appropriate in this case to suspend the setting aside applications under s 48(3) of the AA and remit the matter to the Arbitrator.

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114 DWS at paras 147 to 152; NOA at p 17 (line 4).

124 I shall hear the parties separately on costs.

S Mohan
Judge of the High Court

Kronenburg Edmund Jerome, Lim Yanqing Esther Candice, Sim Wei Min Stephanie and Michelle Shona (Braddell Brothers LLP) for the plaintiff in HC/OS 433/2021 and the defendant in HC/OS 212/2021 and HC/SUM 2174/2021;
Chuah Chee Kian Christopher, Lee Hwai Bin, Low Ching Wei Justin and Ho Zhengxuan Cleon (WongPartnership LLP) for the defendants in HC/OS 433/2021 and the plaintiff in HC/OS 212/2021 and HC/SUM 2174/2021.