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

[2023] SGHC 275

Originating Application No 642 of 2022

Between

CYE

… *Claimant*

And

CYF

… *Defendant*

JUDGMENT

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

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CYE
v
CYF

[2023] SGHC 275

General Division of the High Court — Originating Application No 642 of 2022
S Mohan J
2 March, 12–13 April 2023, 29 September 2023

29 September 2023 Judgment reserved.

S Mohan J:

1 HC/OA 642/2022 ("OA 642") is the claimant's application, made pursuant to s 48 of the Arbitration Act 2001 (2020 Rev Ed) (the "AA"), to set aside a Final Award (the "Award") rendered by a sole arbitrator (the "Arbitrator") under the auspices of the Singapore International Arbitration Centre (the "SIAC").

2 For the reasons I shall elaborate upon, I dismiss the claimant's application.

3 On 18 April 2023, I ordered that the details pertaining to, *inter alia*, the parties be anonymised in any judgment published in this matter. Accordingly, the parties' identities, individuals' names, dates and certain details relating to the transaction concerned have been anonymised or redacted in this judgment.

Facts

The parties

4 The claimant is a company incorporated under the laws of Singapore, engaged in the business of energy trading and the wholesale distribution of petroleum and petroleum products.[1]

5 The defendant is also a company incorporated under the laws of Singapore, engaged in the business of commercial storage of petroleum and petroleum products.[2]

6 Sometime in or around [M0 Y0 – month and year redacted], Co A, a company related to the defendant, collapsed as a result of significant trading and financial liabilities. Co A was owned and controlled by X, Y and Z (the "Controllers").[3] The defendant is wholly owned by another company, which was indirectly owned by the Controllers.[4]

7 Y was the Chief Executive Officer ("CEO") of the defendant. After his resignation as CEO, he remained a director of the defendant. Y was also a director of Co A.[5] X was a director of the defendant until his resignation in [M0 Y0]. X was also the managing director of Co A.[6]

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1 Affidavit of the claimant dated 11 October 2022 ("Claimant's 1st Affidavit") at para 8.

2 Claimant's 1st Affidavit at para 9.

3 Claimant's 1st Affidavit at para 11.

4 Claimant's 1st Affidavit at para 12.

5 Claimant's 1st Affidavit at para 13.

6 Claimant's 1st Affidavit at para 14.

Background to the dispute

8 In the month preceding [M0 Y0], the claimant and the defendant entered into an agreement dated [D0 – date redacted] (but executed the following day), pursuant to which the defendant agreed to provide the claimant with storage and terminal facilities and services at its terminal (the "Terminal") for Gasoil 10 PPM S (the "Product") with a total working capacity of [redacted] cubic meters ("cbm") (the "Storage Agreement").[7] The parties subsequently entered into an addendum to increase the working capacity to [redacted] cbm (the "Addendum").[8]

9 On the same date [D0], the claimant entered into a contract with Co A, under which Co A agreed to sell the claimant [redacted] barrels of the Product plus/minus 5% at operational tolerance in one lot via a transfer at the Terminal during the period [D0+2] to [D0+4] (the "1st Sale Contract"). Payment was to be made by letter of credit. Pursuant to the contract, title and risk would pass from Co A to the claimant at [time redacted] on the transfer date.[9]

10 As of that date (*ie,* [D0]), a total quantity of [redacted] metric tons ("mt") (or approximately [redacted] barrels) of Product was present in tanks Alpha, Bravo and Charlie. The tanks allocated to the claimant under the Storage Agreement were tanks Delta, Bravo, Charlie and Echo with a total capacity of [redacted] cbm. Following the conclusion of the Addendum, tank Foxtrot was

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7 Claimant's 1st Affidavit at paras 4 and 15.

8 Claimant's 1st Affidavit at para 16.

9 Claimant's 1st Affidavit at paras 17–18; Claimant's Exhibit at Tab 3 of Tab C at pp 245–250 (cll 3, 4, 7, 8 and 12).

added to accommodate the additional [redacted] cbm (tanks Bravo, Charlie, Delta, Echo and Foxtrot are collectively the "Allocated Tanks").[10]

11 A certificate dated [D0+2] on the defendant's letterhead (bearing its watermark) and with the defendant's company stamp affixed with ink (the "1st Certificate") identified Co A as the transferor and the claimant as the transferee of a quantity of [redacted] mt or [redacted] barrels of the Product (the "1st Parcel") at the Terminal and identified the supplying and receiving tanks as tanks Delta, Bravo, Charlie and Echo.[11] It is disputed whether the defendant's company stamp was affixed with "wet ink", a point I come back to later in this judgment.

12 The claimant claimed that the defendant had issued the 1st Certificate on [D0+2] and that, in accordance with cl [redacted] of the 1st Sale Contract, title to the 1st Parcel had passed from Co A to the claimant at [time redacted] on the same date (*ie*, [D0+2]). The defendant denied that it had issued the 1st Certificate.[12] The claimant also received a second certificate sometime later on [D0+13] (the "2nd Certificate") in respect of the 1st Parcel to include tank Foxtrot. The defendant also denied that it had issued the 2nd Certificate.[13]

13 As of [D0+2], there was only a total of [redacted] barrels of the Product stored in the Allocated Tanks.[14]

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10 Claimant's 1st Affidavit at para 20.

11 Claimant's 1st Affidavit at para 21; Claimant's Exhibit at Tab 5 of Tab C at p 254.

12 Claimant's 1st Affidavit at para 21.

13 Claimant's 1st Affidavit at para 31.

14 Claimant's 1st Affidavit at para 22.

14 On [D0+5], a staff member of Co A sent a staff member of the defendant a text message with instructions for a ship ("Ship 1") to load close to a minimum of [redacted] barrels of Product from tank Delta (to "deplete") and the balance from tank Gryphon during the period [D0+6] to [D0+8].[15] On [D0+7] and [D0+8], all of the Product in tank Delta was accordingly loaded on board Ship 1 on Co A's instructions, leaving that tank empty.[16]

15 Pursuant to a contract dated [D0+8] (the "Co A Sale Contract"), the claimant sold to Co A a quantity of [redacted] barrels of the Product plus/minus 5% at operational tolerance on a free on board basis Terminal during the period [D0+9] to [D0+11].[17]

16 On [D0+8], Co A nominated another ship ("Ship 2") as the loading vessel for the Product sold under the Co A Sale Contract, with loading to commence on [D0+9].[18] All the Product in tanks Bravo, Charlie and Echo, amounting to a total quantity of [redacted] barrels (the "Co A Parcel"), was loaded on board Ship 2, leaving those tanks empty.[19]

17 On [D0+12], the claimant entered into a second contract with Co A, under which Co A agreed to sell the claimant [redacted] barrels of the Product plus/minus 5% at operational tolerance in one lot via a transfer at the Terminal during the period [D0+13] to [D0+15] (the "2nd Sale Contract"). Payment was

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15 Claimant's 1st Affidavit at para 23.

16 Claimant's 1st Affidavit at para 26.

17 Claimant's 1st Affidavit at para 25; Claimant's Exhibit at Tab 7 of Tab C at pp 258–272.

18 Claimant's 1st Affidavit at para 27; Claimant's Exhibit at Tab 8 of Tab C at p 276.

19 Claimant's 1st Affidavit at para 29.

to be made by letter of credit. As with the 1st Sale Contract, title and risk would pass from Co A to the claimant at [time redacted] on the transfer date.[20]

18 On [D0+19], the claimant received by hand from a Co A representative a certificate (the "3rd Certificate") printed on the defendant's letterhead on watermarked paper, signed in ink and with the defendant's company stamp affixed in ink.[21] It is also in dispute whether the defendant's company stamp on the 3rd Certificate was affixed with "wet ink", a point to which I shall also return later in this judgment.

19 The 3rd Certificate was dated [D0+14] and identified Co A as the transferor and the claimant as the transferee of a quantity of [redacted] mt or [redacted] barrels of the Product (the "2nd Parcel") at the Terminal and identified the supplying and receiving tanks as tanks Alpha, Delta, Bravo and Charlie.[22] It was the claimant's case that, under cl [redacted] of the 2nd Sale Contract, title in the 2nd Parcel had passed from Co A to the claimant at [time redacted] on [D0+14]. The defendant denied that the 3rd Certificate had been issued with its authority.[23]

20 Together with the 2nd Certificate, the claimant's Product was thus identified as having been stored in a total of six storage tanks, *ie*, tanks Alpha, Delta, Bravo, Charlie, Foxtrot and Echo (the "Storage Tanks").[24] According to the claimant's records, a total of [redacted] barrels of the Product were stored

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20 Claimant's 1st Affidavit at para 32; Claimant's Exhibit at Tab 15 of Tab C at pp 310–315.

21 Claimant's 1st Affidavit at para 33.

22 Claimant's 1st Affidavit at para 34; Claimant's Exhibit at Tab 17 of Tab C at p 319.

23 Claimant's 1st Affidavit at para 34.

24 Claimant's 1st Affidavit at para 34.

in the Storage Tanks by [D0+14]. However, as of [D0+14], the Storage Tanks were, in fact, empty save for tank Alpha which contained only [redacted] barrels of "Gasoil HS".[25]

21 On [D0+16], Co A instructed the defendant to transfer all the Product in tanks Alpha ([redacted] barrels) and Foxtrot ([redacted] barrels) into tank Hotel.[26] By [D0+17], all of the Storage Tanks were empty, on Co A's instructions.[27]

22 Several other entities subsequently asserted competing claims over the products stored in the Storage Tanks.[28]

23 Following Co A's collapse, the claimant gave formal notice of the immediate termination of the Storage Agreement on [D0+28] through its solicitor's letter addressed to the defendant.[29]

24 On [D0+29], the claimant requested confirmation from the defendant that the claimant's Product was still stored in the Storage Tanks and had not been commingled with other cargoes and that the Storage Tanks were sealed and would not be operated without the claimant's written consent.[30] Between [D0+30] and [D0+35], the claimant wrote to the defendant on numerous

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25 Claimant's 1st Affidavit at para 35; Claimant's Exhibit at Tab 18 of Tab C at pp 321–332.

26 Claimant's 1st Affidavit at para 36; Claimant's Exhibit at Tab 19 of Tab C at p 334.

27 Claimant's 1st Affidavit at para 35; Claimant's Exhibit at Tab 18 of Tab C at pp 321–332.

28 Claimant's 1st Affidavit at paras 37–38.

29 Claimant's 1st Affidavit at para 38; Claimant's Exhibit at Tab 20 of Tab C at p 336.

30 Claimant's 1st Affidavit at para 38; Claimant's Exhibit at Tab 20 of Tab C at pp 336–337.

occasions to arrange for the removal of Product from the Storage Tanks but those requests were not acceded to.[31]

The arbitration proceedings

25 On [D0+33], the claimant commenced arbitration proceedings against the defendant (the "Arbitration"), in accordance with the arbitration agreement set out in the General Terms and Conditions to the Storage Agreement and the Addendum to the Storage Agreement.[32]

26 The Arbitration was seated in Singapore and conducted in accordance with the SIAC Rules 2016.

27 Shortly after the commencement of the Arbitration, an Emergency Arbitrator appointed by the SIAC granted the claimant an interim injunction restraining the defendant from disposing of the Product claimed to be stored in tanks Alpha, Delta, Charlie and Bravo.[33]

28 Slightly more than three months after the Arbitration was commenced, the arbitral tribunal was constituted with the SIAC appointing Mr Stuart Isaacs QC (now KC) as the sole arbitrator.[34]

29 In the Arbitration, the claimant sought an order for the defendant to account for the claimant's [redacted] barrels of Product that should have been

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31 Claimant's 1st Affidavit at para 40; Claimant's Exhibit at Tab 22 of Tab C at pp 342–490.

32 Claimant's Exhibit at Tab 1 of Tab F at pp 567–575.

33 Claimant's Exhibit at Tab B (Final Award dated 12 July 2022 ("Final Award")) at p 111 (para 74).

34 Claimant's Exhibit at Tab B (Final Award) at p 111 (para 76).

stored in the defendant's Storage Tanks pursuant to the 2nd and 3rd Certificates, and claimed the full value of the claimant's Product, amounting to [US$X – quantum redacted]. Further and/or in the alternative, the claimant sought damages to be assessed.[35]

30 In the claimant's amended statement of claim (Statement of Claim (Amendment No. 1)) in the Arbitration ("SOC A1"), the claimant's case against the defendant consisted of the following claims:[36]

(a) The defendant breached the Storage Agreement fraudulently and/or otherwise in three respects:

(i) The defendant failed to allocate tanks for the claimant's exclusive use pursuant to Art [redacted] of the Commercial Conditions of the Storage Agreement and Arts [redacted] of the General Terms and Conditions of the Storage Agreement.

(ii) The defendant failed to deliver up the claimant's Product following termination of the Storage Agreement contrary to Art [redacted] of the General Terms and Conditions of the Storage Agreement.

(iii) The defendant took instructions relating to the claimant's Product from a third party (*ie*, Co A), in breach of Art [redacted] of the Commercial Conditions of the Storage Agreement and Art [redacted] of the General Terms and Conditions of the Storage Agreement.

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35 Claimant's Exhibit at Tab 8 of Tab F (Claimant's Statement of Claim (Amendment No. 1) in the Arbitration ("SOC A1")) at pp 862–863.

36 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 838–862.

(b) The defendant was liable for fraudulent and/or negligent misrepresentation in issuing the Certificates containing false representations.

(c) The defendant was liable for conversion and detinue.

(d) The defendant was negligent in failing to exercise reasonable care and skill over the use of its letterhead, watermarked paper and company stamp.

(e) The defendant conspired by unlawful means with Co A to defraud the claimant.

31 The defendant denied all the claims. Additionally, the defendant raised a counterclaim against the claimant for unpaid storage fees amounting to [quantum redacted]. The defendant also sought a declaration that it is entitled to assert a general or particular lien over the products stored in tanks Alpha, Delta, Bravo and/or Charlie insofar as the sum of [redacted] or any other sum remains outstanding from the claimant[37] – this claim for a declaration was withdrawn in the defendant's written opening submissions.[38]

32 The evidentiary hearing took place over five days, approximately one year and six months after arbitration proceedings were commenced.[39]

33 On [date redacted], the Arbitrator declared the proceedings closed.[40]

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37 Claimant's Exhibit at Tab 9 of Tab F (Defendant's Statement of Defence and Counterclaim (Amendment No. 1) in the Arbitration) at pp 895–897.

38 Claimant's Exhibit at Tab B (Final Award) at p 124 (fn 25).

39 Claimant's Exhibit at Tab B (Final Award) at pp 116–117 (para 138).

40 Claimant's Exhibit at Tab B (Final Award) at p 118 (para 154).

Key findings in the Award

34 On [date redacted], the Arbitrator published the Award. The Arbitrator dismissed all of the claimant's claims and allowed the defendant's counterclaim.[41]

Alleged breach of the Storage Agreement

35 With respect to the claimant's case that the defendant had breached the Storage Agreement in failing to allocate tanks for the claimant's exclusive use (see [30(a)(i)] above), the Arbitrator held that neither Art [redacted] of the Commercial Conditions of the Storage Agreement nor Art [redacted] of the General Terms and Conditions of the Storage Agreement required the defendant to allocate tanks for the claimant's exclusive use. Article [redacted] of the General Terms and Conditions made reference to "exclusive use", but in a "different context". Article [redacted] of the General Terms and Conditions imposed an obligation on the claimant, and not the defendant, to return possession of the Storage Tanks upon termination of the Storage Agreement; it also made no reference to exclusivity.[42]

36 The Arbitrator also addressed the claimant's argument that the defendant had breached Art [redacted] of the Commercial Conditions of the Storage Agreement by allocating some of the tanks used to store the claimant's Product to other parties. The Arbitrator stated that it preferred the defendant's submission that:[43]

> [t]he fact that there are three parties claiming for the products in the [tanks] does not mean that [the defendant] had triple

41 Claimant's Exhibit at Tab B (Final Award) at pp 95–177.

42 Claimant's Exhibit at Tab B (Final Award) at p 125 (para 168).

43 Claimant's Exhibit at Tab B (Final Award) at p 126 (paras 170–171).

> allocated the tanks; it means that [Co A] has allegedly sold the same products thrice (or more). As a terminal storage operator, [the defendant] was neither privy to nor concerned with [Co A's] arrangements with third parties regarding the ownership of the products in the tanks. [The defendant's] only responsibility was for the tanks, and in this regard, [the defendant] had dutifully ensured that the [tanks] had only been allocated to one customer at a time …

37 In respect of the claimant's case that the defendant had breached the Storage Agreement in failing to deliver up the claimant's Product following the termination of the Storage Agreement (see [30(a)(ii)] above), the Arbitrator held that Art [redacted] of the General Terms and Conditions of the Storage Agreement placed obligations on the claimant, and not the defendant, to take possession and remove all the Product stored in the Storage Tanks upon termination. Further, at the point of termination of the Storage Agreement, there was no Product belonging to the claimant stored in the Storage Tanks at the Terminal.[44]

38 As for the claimant's case that the defendant had breached the Storage Agreement by taking instructions relating to the claimant's Product from a third party (*ie*, Co A) (see [30(a)(iii)] above), the Arbitrator held that the defendant had been entitled to take instructions from Co A alone. Pursuant to Art [redacted] of the Commercial Conditions of the Storage Agreement, operational communications to the claimant were to be given *care of* Co A. The Arbitrator found that this applied not just to the making of communications by the defendant to the claimant via Co A, but also to the making of communications to the defendant by Co A on the claimant's behalf. The effect of Art [redacted]

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44 Claimant's Exhibit at Tab B (Final Award) at p 127 (paras 174, 176).

of the Commercial Conditions was to authorise Co A to act as *the claimant's agent* in respect of operational communications.[45]

Alleged fraudulent and/or negligent misrepresentation

39 With respect to the claimant's allegation that the defendant was liable for fraudulent and/or negligent misrepresentation in issuing the Certificates (see [30(b)] above), the Arbitrator held that the defendant had not issued or authorised the issuance of the Certificates.[46] Even assuming that X and Y had issued the Certificates, the Arbitrator found that they would have been acting in the pursuit of their or Co A's own interests, and thus the defendant would not be vicariously liable for X's and/or Y's issuance of the Certificates. The Arbitrator further found that if the Certificates were issued by Co A, otherwise than through X and Y, it would be even harder for the close connection test to be satisfied.[47]

Alleged conspiracy to defraud the claimant

40 In respect of the claimant's allegation that the defendant had conspired with Co A to defraud the claimant (see [30(e)] above), the Arbitrator noted that the allegation of conspiracy was "at the forefront" of the claimant's case[48] and that a key part of the claimant's case involved the knowledge of X and Y being attributed to both Co A and the defendant.[49]

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45 Claimant's Exhibit at Tab B (Final Award) at pp 128–129 (paras 180–184).

46 Claimant's Exhibit at Tab B (Final Award) at pp 132–133 (paras 193–200).

47 Claimant's Exhibit at Tab B (Final Award) at pp 133–136 (paras 201–211).

48 Claimant's Exhibit at Tab B (Final Award) at pp 123–124 (para 160).

49 Claimant's Exhibit at Tab B (Final Award) at p 140 (para 223).

41 The Arbitrator did not agree with the claimant's submission that X's and Y's knowledge of the non-existent Product in the Storage Tanks was to be attributed to the defendant under the agency doctrine because the defendant had not been under a duty to make inquiry into the non-existence of the Product. In the absence of a duty to make inquiry, X's and Y's knowledge was not attributable to the defendant under the agency doctrine.[50]

42 As for the identification doctrine, the Arbitrator found that the knowledge of X and Y could not be attributed to the defendant as if they were one and the same person, such that the defendant could be deemed as having combined with Co A to harm the claimant. In this regard, the Arbitrator was not satisfied that X and Y alone were free to commit the defendant to the alleged combination; they were not the directing mind and will of the defendant with full discretion to act independently of the board. The Arbitrator also found it important to bear in mind that the conspiracy as pleaded by the claimant was alleged to have occurred at a time before the Storage Agreement had been entered into. Matters relied on by the claimant in terms of X's and Y's roles subsequent to the entering into of the Storage Agreement could not form the basis on which to infer the alleged combination at a much earlier point in time.[51]

43 As for the claimant's submission that other employees of the defendant had been privy to the alleged conspiracy and that their knowledge of the combination should be attributed to the defendant via the agency doctrine, the Arbitrator reiterated that the defendant was not under a duty to make inquiry into the non-existence of the Product.[52]

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50 Claimant's Exhibit at Tab B (Final Award) at p 147 (para 243).

51 Claimant's Exhibit at Tab B (Final Award) at pp 148–149 (para 247).

52 Claimant's Exhibit at Tab B (Final Award) at pp 151, 154 (paras 250, 254).

44 Further, the Arbitrator held that there was insufficient basis for any inference that the conduct complained of was intended to injure the claimant. The terms of the Storage Agreement were not negotiated in such a way as to have been intended to cause the claimant loss. Causing loss to the claimant was also not a necessary part of achieving the alleged common goal of the defendant and Co A of getting paid under the Storage Agreement and under the 1st and 2nd Sale Contracts respectively.[53]

Alleged negligence

45 As for the claimant's alternative claim in negligence (see [30(d)] above), the Arbitrator concluded that no duty of care was owed by the defendant to safeguard access to its watermarked paper and company stamp.[54]

Alleged conversion and detinue

46 Finally, as regards the claimant's claim in the tort of conversion and detinue (see [30(c)] above), the claimant relied on the Certificates to establish both title and a right of possession to the cargoes stored in the Storage Tanks.[55] The claimant submitted that, to the extent that the defendant was estopped from denying that the cargoes were stored in the Storage Tanks, it was liable in conversion and detinue.[56]

47 As the Arbitrator concluded that the defendant was not responsible or deemed to be responsible for the issuance of the Certificates, the Arbitrator

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53 Claimant's Exhibit at Tab B (Final Award) at p 156 (para 262).

54 Claimant's Exhibit at Tab B (Final Award) at p 161 (para 282).

55 Claimant's Exhibit at Tab B (Final Award) at p 164 (para 297).

56 Claimant's Exhibit at Tab B (Final Award) at p 164 (para 296).

found that there was no representation made by the defendant on which to found the alleged estoppel, upon which the claimant's claims in conversion and detinue were based.[57] Therefore, the claimant's claim to recover in conversion and detinue, for the barrels of Product which should have remained in the Storage Tanks, failed.

Defendant's counterclaim for unpaid storage fees

48 In respect of the defendant's counterclaim for the unpaid storage fees (see [31] above), the Arbitrator found that there was no total failure to perform or breach of the Storage Agreement on the defendant's part.[58] Accordingly, the defendant was entitled to recover the storage fees due to it under the 1st and 2nd Tax Invoices in the full amount claimed.[59]

49 The net result was that the claimant's claim was dismissed entirely while the defendant's counterclaim succeeded.

The parties' cases

50 Dissatisfied with the Award, the claimant filed the present application to set aside the Award.

51 The claimant contends that the Arbitrator breached the rules of natural justice (*viz*, the fair hearing rule) in three respects:[60]

(a) The Arbitrator failed to consider:

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57 Claimant's Exhibit at Tab B (Final Award) at p 166 (para 305).

58 Claimant's Exhibit at Tab B (Final Award) at p 168 (para 320).

59 Claimant's Exhibit at Tab B (Final Award) at pp 168–169.

60 Claimant's Written Submissions dated 23 February 2023 ("CWS") at paras 2–3.

(i) the claimant's claim based on the breach of an implied term of the Storage Agreement (the "Implied Term Contention");

(ii) the claimant's argument that the defendant was vicariously liable for Co A's issuance of the Certificates, which constituted fraudulent or negligent misrepresentations (the "Vicarious Liability Contention"); and

(iii) the claimant's arguments on establishing a combination between the defendant and Co A (the "Combination Contention").

In this regard, the gist of the claimant's argument is that the Award was *infra petita* as the Arbitrator failed to decide a number of issues that were within the scope of submission.

(b) The Arbitrator failed to provide any or adequate reasons and explanations for the contentions set out in (a) above.

(c) The Arbitrator failed to give the claimant a reasonable opportunity to present its case on whether forensic evidence was required to prove that the company stamps on the Certificates were in wet ink.

52 Second, the claimant argues that the defendant suppressed material evidence and adduced false oral testimony in the Arbitration, such that the Award was induced or affected by fraud and, simultaneously, was also contrary to public policy.[61]

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61 CWS at paras 2–3.

53 The defendant contends that the claimant's setting aside application is completely lacking in merit. The defendant argues that the Arbitrator:

(a) determined the claimant's claim based on the implied term of the Storage Agreement;[62]

(b) determined and provided adequate reasons for his findings on the claimant's vicarious liability claims;[63]

(c) determined and considered the claimant's argument that the defendant had a duty to inquire in relation to the conspiracy claim;[64] and

(d) provided the claimant with a reasonable opportunity to present its case on the Certificates, including specifically on whether forensic evidence was required to prove that the company stamps on the Certificates were in wet ink and whether the defendant should be held liable if X and Y had apparent authority to issue the Certificates even if they had done so fraudulently.[65]

54 As regards the claimant's allegation that the Award was induced or affected by fraud and simultaneously contrary to public policy, the defendant submits that it did not suppress evidence or give false testimony in the Arbitration.[66]

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62 Defendant's Written Submissions dated 23 February 2023 ("DWS") at paras 27–45.

63 DWS at paras 46–57.

64 DWS at paras 58–69.

65 DWS at paras 70–88.

66 DWS at paras 89–122.

Whether the Arbitrator acted in breach of the rules of natural justice

Whether the Arbitrator failed to apply his mind to essential issues submitted to him

55 It is undisputed that under the AA, an arbitral award may be set aside by the court if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced: s 48(1)(*a*)(vii) of the AA. This provision is *in pari materia* with s 24(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA").

56 One of the pillars of natural justice is that parties must be given adequate notice and opportunity to be heard. This means that each party must be given a fair hearing and a fair or reasonable opportunity to present its case: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43].

57 The law is clear that the failure to consider an important issue that has been pleaded in an arbitration constitutes a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem*: *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [46].

58 For the reasons elaborated upon below, the claimant has not persuaded me that the Arbitrator failed to apply his mind to the relevant issues, *ie*, the Implied Term Contention, Vicarious Liability Contention, and Combination Contention. I will address them in turn.

Implied Term Contention

59 The claimant submits that the Arbitrator failed to consider the claimant's claim that there was a breach of a term in the Storage Agreement, implied in fact, that "[the defendant] would inform [the claimant] if as at the Commencement Date (as defined in the Storage Agreement) of the Storage Agreement, any Storage Tank (as defined in the Storage Agreement) contains product either belonging to other customers, or where [the defendant] does not know to whom the product belongs, or where [the defendant] has not been informed that the product belongs to [the claimant]" (the "Implied Term").[67]

60 The claimant argues that the existence and breach of the Implied Term were issues raised in the Arbitration, particularly in its amendments to the statement of claim; in the defendant's amended statement of defence and counterclaim; in the parties' respective lists of issues; at the oral hearing; and in the parties' closing submissions.[68] Core to its case, the claimant contends that its claim for breach of the Implied Term was advanced as a "standalone"[69], "independent"[70] and alternative basis to claim damages for loss of chance from the defendant, and was not withdrawn or abandoned by the claimant at any time.

61 The defendant does not contest that the "[p]arties had pleaded and made substantial submissions on the Implied Term Allegation".[71] Rather, the

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67 CWS at para 13.

68 CWS at para 14.

69 CWS at para 21.

70 CWS at para 39.

71 Affidavit of the defendant dated 21 November 2022 ("Defendant's 1st Affidavit") at para 24(a).

defendant's case is that the Arbitrator had, in the Award, determined and addressed the claimant's arguments on the Implied Term.

62 To set the context behind this ground of objection, it would be useful to set out the arguments and issues raised by the parties before the Arbitrator in relation to the Implied Term:

(a) At para 11A of SOC A1, the claimant pleaded the implication of the term into the Storage Agreement, *ie*, the existence of the Implied Term:[72]

> 11A. It was a term implied by fact into the Storage Agreement that the [defendant] would inform the [c]laimant if as at the Commencement Date (as defined in the Storage Agreement) of the Storage Agreement, any Storage Tank (as defined in the Storage Agreement) contains product either belonging to other customers, or where the [defendant] does not know to whom the product belongs, or where the [defendant] has not been informed that the product belongs to the [c]laimant ("Implied Term"), the Implied Term is implied into the Storage Agreement for the following reasons:
>
> …

(b) At paras 82A–82B of SOC A1, the claimant pleaded (in a section of SOC A1 dealing with the contention that the defendant had breached its obligation to allocate tanks for the exclusive use of the claimant) that the defendant had also breached the Implied Term and that as a result, the claimant had lost the chance to avoid the loss occasioned by the 1st and 2nd Sale Contracts:[73]

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72 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 814–815; Claimant's 1st Affidavit at para 47.

73 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 843–844; Claimant's 1st Affidavit at para 48.

> 82A. The [defendant] also breached the Implied Term. Paragraph 11A above is repeated.
>
> 82B. Had the [defendant] complied with the Implied Term, it would have informed the [c]laimant of the quantity and quality of the product in the Storage Tanks and/or set the [c]laimant on a chain of inquiry as to the ownership, quantity and quality of such product in the individual Storage Tanks and/or the aggregate quantity of the product in all relevant Storage Tanks. The [c]laimant would then have discovered that the Gasoil 10 ppm S contained therein did not correspond to the quantity later stated in [Co A's] commercial invoice and letter of warranty of title for the 1st [redacted] Sale and the 1st [redacted] Certificate or the 2nd [redacted] Certificate, or [Co A], having been made aware of such disclosure and/or investigation, would have revised down the quantity of the Gasoil 10 ppm S to be comprised in the 1st Parcel to the quantity actually contained in the relevant Storage Tanks or would have transferred and/or sold more Gasoil 10 ppm S to the [c]laimant to make up the shortfall. The [c]laimant has therefore lost the chance to avoid the loss occasioned by the 1st and 2nd Sale Contracts.

(c) At para 114D(d)(ii) of SOC A1, the claimant relied on the breach of the Implied Term as one of the unlawful acts committed pursuant to the alleged conspiracy:[74]

> 114D. The [defendant] conspired with [Co A] to defraud the [c]laimant.
>
> …
>
> (d) The [defendant] and [Co A] committed the following unlawful acts with the intention of injuring the [c]laimant:
>
> …
>
> (ii) As of [D0], the tanks allocated to the [c]laimant were filled with gasoil belonging to [Co A], but in breach of the Implied Term, the [defendant] did not inform the [c]laimant of this fact.

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74 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 859–860; Claimant's 1st Affidavit at para 49.

(d) The defendant, on the other hand, pleaded that the implication of the term was unnecessary, and parties would not have intended for its inclusion (para 9A of the defendant's Statement of Defence and Counterclaim (Amendment No. 1) ("DCC A1")):[75]

> 9A. Paragraph 11A of the SOC is denied. The [defendant] avers that the purported implied term is not necessary and parties would not have intended for its inclusion. Further and/or in any case, Clause [redacted] of the General Terms & Conditions of the Storage Agreement specifically states that "*no other terms and conditions shall be included or implied*".

(e) In response, the claimant averred at para 15A of its Reply to Defence and Defence to Counterclaim (Amendment No. 2) ("RDCC A2") that the implication of the term was necessary and not excluded by virtue of cl [redacted] of the General Terms & Conditions of the Storage Agreement:[76]

> 15A. Paragraph 9A of the [defendant's] SDCC is denied. The Implied Term is necessary to give business efficacy to the express terms of the Storage Agreement and consequently may not, as a matter of law, be excluded by a purported entire agreement clause such as Clause [redacted]. Further, the true construction of Clause [redacted] does not provide for the exclusion of the Implied Term. Clause [redacted] only applies to exclude implied terms, the subject matter of which were:
>
> (a) Contained in previous agreements, warranties and undertakings given or made by or between the [c]laimant and the [defendant]; and/or
>
> (b) Related to matters that are set out in the Storage Agreement.
>
> The Implied Term does not fall within either (a) or (b) above.

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75 Claimant's Exhibit at Tab 9 of Tab F (DCC A1) at p 873; Claimant's 1st Affidavit at para 50.

76 Claimant's Exhibit at Tab 10 of Tab F (RDCC A2) at p 912; Claimant's 1st Affidavit at para 51.

(f) In the list of issues ("List of Issues") submitted by the claimant to the Arbitrator, the claimant framed the following questions (among others) for the Arbitrator's determination:[77]

> ***Breach of Storage Agreement – Failure to inform [the claimant] that there were products in the allocated tanks as of the Commencement Date of the Storage Agreement and/or the effective date of the Addendum***
>
> 3. Was there a term implied by fact in the Storage Agreement as amended by the Addendum that [the defendant] would promptly inform [the claimant] if, at the Commencement Date (as defined in the Storage Agreement) of the Storage Agreement … any Storage Tank (as defined in the Storage Agreement) contains product either belonging to other customers, or where [the defendant] does not know to whom the product belongs, or where [the defendant] has not been informed that the product belongs to [the claimant] (the "Implied Term")?
>
> 4. If the Implied Term exists, did [the defendant] breach the Implied Term by failing to inform [the claimant] of the quantity and quality of the product in the Storage Tanks?
>
> 5. Did [the defendant], by failing to inform [the claimant] of the quantity and quality of the product in the Storage Tanks, cause [the claimant] to lose the chance to avoid the loss suffered under the two [redacted] Sale Contracts?

(g) In the defendant's List of Issues, the defendant framed the following questions (among others) for the Arbitrator's determination:[78]

> ***Alleged Breach of Storage Agreement***
>
> 4. Did [the defendant] breach the implied term of having to inform [the claimant] of any products that

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77 Claimant's Exhibit at Tab G (Claimant's List of Issues) at pp 981–982; Claimant's 1st Affidavit at para 52.

78 Claimant's Exhibit at Tab H (Respondent's List of Issues) at p 991; Claimant's 1st Affidavit at para 53.

> were in the Allocated Tanks which did not belong to [the claimant] at the Commencement Date?
>
> > 4.1. Is there a term implied in fact that [the defendant] must inform [the claimant] if, at [D0] … any Allocated Tanks contain product that [the defendant] is not aware belongs to [the claimant] (the "Implied Term")?
> >
> > 4.2. Did [the defendant] breach the Implied Term?
> >
> > 4.3. Does Clause [redacted] of the [General Terms and Conditions of the Storage Agreement] prevent and/or exclude such an Implied Term in any case?

(h) During the parties' oral opening submissions, lead counsel for the claimant, Mr Lok Vi Ming SC ("Mr Lok"), submitted on why there should be an implication of the term in fact into the Storage Agreement:[79]

> MR LOK: … one of the requirements, or one of the provisions in the storage agreement is that the principal takes responsibility for the cargo that is in the tank and would be liable for any taxes or any charges in relation to the cargo within those tanks. We relied upon that, your Honour, to say that *that's really one of the reasons why there should be an implied term for the operator to inform the principal*. In the event that we assign you a tank and the tank contains the oil products of somebody else, I have to tell you, so that you would be able to make your own checks, do your own inspection, do your surveys, because otherwise you would be held to accept certain responsibilities in relation to those cargoes.
>
> [emphasis added]

(i) This was picked up and addressed by lead counsel for the defendant, Mr Nandakumar Ponniya ("Mr Nandakumar"):[80]

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79 Claimant's Exhibit at Tab I (Notes of Evidence, 18 October 2021) at pp 1003–1004 (p 32 ln 17 – p 33 ln 5); Claimant's 1st Affidavit at para 54.

80 Claimant's Exhibit at Tab I (Notes of Evidence, 18 October 2021) at p 1013 (p 72 ln 5–13); Claimant's 1st Affidavit at para 55.

> MR [NANDAKUMAR]: *The implied terms, sir, which they took a year to come up with, there was no need, sir, for an implied term.* Typically if you're going to pay [redacted] for products, you would inspect that is in the tank. You chose not to do it. We would say, sir, *the breach on our part, even if we failed to notify, did not cause the loss*; the loss came about because you signed up to a sale and purchase agreement for non-existent products. That is where the loss came from.
>
> [emphasis added]

(j) At paras 112–124 of the claimant's closing submissions (under a section dealing with the claimant's claim for unlawful means conspiracy and specifically, the acts alleged to have been performed by the defendant in furtherance of the alleged conspiracy), the claimant submitted that it was necessary to imply the term into the Storage Agreement and that there was a breach by the defendant of the Implied Term:[81]

> 113. [The claimant] submits that it is, therefore, necessary to imply a term into the Storage Agreement that [the defendant] would inform [the claimant] if as at the Commencement Date of the Storage Agreement any Storage Tank contained product that did not belong to [the claimant] or where [the defendant] did not know who the product belonged to or had not been informed that the product belonged to the [c]laimant (the "Implied Term").
>
> …
>
> 117. Here, the Implied Term was breached by [the defendant] when it failed to inform [the claimant] of the existence of gasoil in the Storage Tanks as at the Commencement Date of the Storage Agreement. …
>
> 118. [The claimant] submits that [the defendant's] breach of the Implied Term constitutes one of the unlawful acts done pursuant to the conspiracy. [The defendant] intentionally omitted to inform [the claimant] of the existence of Gasoil in the Storage Tanks because

[81] Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at pp 1070, 1072, 1073 (paras 113, 117, 118); Claimant's 1st Affidavit at para 56.

> if [the claimant] found out that there were [redacted] barrels of Gasoil in the Storage Tanks as at [D0] … this would have led [the claimant] to a train of inquiry that would likely have foiled or made it more difficult for [Co A] and [the defendant] to perpetrate the conspiracy scheme.

(k) The claimant also referred to the breach of the Implied Term in its prayers for relief in its closing submissions:[82]

> 470. The orders that [the claimant] seeks from the [Arbitrator] are:
>
> On [the claimant's] claims:
>
> (a) In respect of [the claimant's] claims for conspiracy, fraudulent or negligent misrepresentation, breach of contract and negligence, [the defendant] is to pay [the claimant]:
>
> (i) damages in the sum of [US$X]; and
>
> (ii) exemplary damages in the sum of [redacted];
>
> (iii) alternatively, *for [the claimant's] claim for breach of Implied Term, damages for loss of chance in the sum of [US$X]* or such sum the [Arbitrator] deems fit.
>
> [emphasis added]

(l) At paras 94–113 of the defendant's closing submissions, the defendant responded to the claimant's arguments on the Implied Term, arguing that it was unnecessary to imply the term into the Storage Agreement and that the claimant had not proved a causal nexus between

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82 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at p 1174 (para 470(a)); Claimant's 1st Affidavit at para 57.

any breach of the alleged Implied Term and the claimant's claimed losses:[83]

> 97. First, there is no gap in the [Storage Agreement] to be filled by the Alleged Implied Term.
>
> …
>
> 103. Second, and in any event, the Alleged Implied Term is not necessary for the business or commercial efficacy of the [Storage Agreement].
>
> …
>
> 109. For completeness, even if there is basis for the implication of the term suggested by [the claimant] (which is strenuously denied), the nexus between any breach of this implied term and [the claimant's] claimed losses is completely speculative at best. In essence, [the claimant] claims that, if [the defendant] had informed it of the existence of remaining products in the tanks, it would have set off a "*chain of inquiry*" leading [the claimant] to discover that the 1st and 2nd [Co A] Parcels had not actually been present in the tanks and could have averted its loss.
>
> 110. However, that is not only conjecture – but in fact a demonstrably false conjecture. …

(m) Finally, in the defendant's oral reply submissions, the defendant's counsel elaborated on the defence to the claimant's case on the breach of the Implied Term:[84]

> MR [NANDAKUMAR]: … just a week before the hearing, [the claimant] introduced an 11th hour case. So one was the *implied term that [the defendant] is to notify [the claimant] if there are any products left over*. So they make the argument now that this was a necessary and obvious term. I can't help but remark, sir, if it was so obvious, it wouldn't have taken them a year to make this amendment.

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83 Claimant's Exhibit at Tab K (Defendant's Closing Submissions) at pp 1238–1248; Claimant's 1st Affidavit at para 58.

84 Claimant's Exhibit at Tab L (Notes of Evidence, 25 January 22) at pp 1345, 1354–1355 (p 104 ln 16–22; p 138 ln 22–p 142 ln 10); Claimant's 1st Affidavit at para 60.

> …
>
> *So I move on to the implied term*, if I may …They are alleging, sir, that there is an implied term, and they don't stop there, sir. They are alleging that there's a breach of the implied term, and on top of that, sir, they are saying that there is a conspiracy founded on the breach of the implied term.
>
> …
>
> We say, sir, that there is no gap in the [Storage Agreement].
>
> …
>
> Then, sir, … they are relying on two clauses to suggest that it is necessary to imply this term.
>
> …
>
> In any case, sir, we say that there is no breach of this implied term.
>
> [emphasis added]

63 From the arbitral record, it is undisputed that the parties pleaded and made submissions in relation to the Implied Term and that this issue was in play in the Arbitration. The question is whether the Arbitrator applied his mind to the issue and dealt with it, based on (i) the pleadings and submissions of the parties *and* (ii) the manner in which they were eventually presented to the Arbitrator for his determination.

64 The defendant maintains that the Arbitrator did apply his mind to this issue, when he "dealt with and wholly dismissed [the claimant's] claim that [the defendant] had breached the express terms of the Storage Agreement by failing to allocate tanks for [the claimant's] exclusive use ("Failure to Allocate Allegation")".[85] The defendant's position is that the claimant's arguments on the Implied Term were pleaded as a "*subset* of the Failure to Allocate Allegation

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85 DWS at para 29.

and **not** as a standalone breach of contract" [emphasis in original].[86] The Failure to Allocate Allegation was one of the pleaded breaches of the Storage Agreement and the claims for breach of the Storage Agreement were in turn presented only as *part* of the claimant's claims in *conspiracy* in the claimant's closing submissions, and not as a standalone claim.[87]

65 As I mentioned above at [60], the claimant contends that the alleged breach of the Implied Term was, contrary to the defendant's characterisation, a "standalone and alternative basis for [the claimant's] damages claim".[88] The claimant disagrees that the Implied Term claim was a "subset of the Exclusive Use Argument (as opposed to a distinct claim *per* [the claimant's] prayers for relief)".[89]

Analysis and decision

66 In my judgment, the Arbitrator *did* determine and address the parties' arguments on the Implied Term. Let me elaborate.

67 I agree with the defendant that it is plainly apparent from the arbitral record that the alleged breach of the Implied Term was *not* argued as a *standalone* breach of contract claim as contended by the claimant. To be clear, the question I am considering is not whether the Implied Term was pleaded, or argued, but whether it was pleaded and eventually argued as a *standalone* claim for breach of contract. I answer this question in the negative for a number of reasons.

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86 DWS at para 30.

87 DWS at para 33.

88 CWS at para 21.

89 CWS at para 24.

68 First, the claimant pleaded that "[t]he [defendant] also breached the Implied Term" at para 82A of its amended statement of claim (SOC A1) under sub-sub-section (1) of SOC A1 sub-headed "the [defendant] failed to allocate tanks for the claimant's exclusive use". This was one of three overarching pleaded breaches of the Storage Agreement (see [30(a)] above).[90]

69 The claimant's decision to structure its pleading as such is not inexplicable. The underlying grievance behind the claimant's argument on the Failure to Allocate Allegation was that "[c]onsequently, the [c]laimant's Product was dissipated and/or dealt with by the [defendant] in a manner inconsistent with the [c]laimant's superior possessory title".[91] Ostensibly, the claimant's arguments on the Implied Term were grounded on a *similar* complaint and concern, namely the claimant's ownership of the Product in the tanks, and in what quantities. The contended term to be implied into the Storage Agreement was, after all, that the defendant would inform the claimant if the Storage Tanks contained product either belonging to other customers, or where the defendant did not know to whom the product belonged, or where the defendant had not been informed that the product belonged to the claimant (see [59] above).[92] According to the claimant, this would have "set the [c]laimant on a chain of inquiry as to the *ownership, quantity and quality* of such product in the individual Storage Tanks and/or the aggregate quantity of the product in all relevant Storage Tanks" [emphasis added].[93]

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90 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 838–844 (paras 76, 82A–82B).

91 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at p 842 (para 81).

92 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at p 814 (para 11A).

93 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at pp 843–844 (para 82B).

70 As such, it is not surprising to find that the arguments raised regarding the Implied Term were, in reality, a *subset* of the claimant's case that the defendant had breached the Storage Agreement in failing to allocate tanks for the claimant's exclusive use. This would explain the structure of SOC A1 in which para 11A (where the Implied Term Contention was pleaded) was referred to at paras 82A and 82B as part of the pleading relating to the Failure to Allocate Allegation. In short, the Implied Term was intimately linked to the Failure to Allocate Allegation.

71 The second instance in SOC A1 where the claimant raised the alleged breach of the Implied Term was at para 114D(d)(ii). The alleged breach of the Implied Term was pleaded as one of the unlawful acts committed by the defendant and Co A with the intention of injuring the claimant – "[a]s of [D0], the tanks allocated to the [c]laimant were filled with gasoil belonging to [Co A], but in breach of the Implied Term, the [defendant] did not inform the [c]laimant of this fact" (see [62(c)] above).[94] This was part of the particulars pleaded in support of the claimant's conspiracy claim, namely that the defendant had conspired with Co A to defraud the claimant.

72 Therefore, in my judgment, the alleged breach of the Implied Term was *not* pleaded as a *standalone* breach of contract, but in support of (a) one of the pleaded heads of breaches of the Storage Agreement, namely that the defendant had failed to allocate tanks for the claimant's exclusive use; and (b) the claimant's conspiracy claim.

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94 Claimant's Exhibit at Tab 8 of Tab F (SOC A1) at p 859 (para 114D(d)(ii)).

73 I turn now to the treatment by the claimant of the Implied Term subsequent to the pleadings which, in my judgment, supports my conclusion at [72] above.

74 I have already summarised above (at [62(f)]–[62(g)]) how the parties identified the issues pertaining to the Implied Term.

75 However, a List of Issues is, as the phrase suggests, simply that and nothing more. The inclusion of the alleged breach of the Implied Term as an issue to be decided is entirely unsurprising, considering that this was contested by both parties and thus was indeed in issue in the Arbitration. In my view, the mere inclusion of a sub-issue in the parties' respective List of Issues is not inconsistent with my finding that the alleged breach of the Implied Term was not pleaded (and more importantly, not ultimately argued) as a *standalone* breach of contract.

76 Second, I note that arguments on the Implied Term were raised in the parties' oral opening submissions (see [62(h)] and [62(i)] above). However, an appreciation of the *context* in which these arguments were made is critical. A closer analysis of the oral opening submissions advanced by Mr Lok in the Arbitration shows that arguments for the implication of the term were made in response to the Arbitrator's question as to why there could not, in theory, be commingling of the Product under the terms of the Storage Agreement. In fact, the Arbitrator's questions arose directly out of the claimant's submissions on the defendant's obligation *to allocate tanks for the claimant's exclusive use*. This is consistent with the defendant's case, and my own view, that the alleged breach of the Implied Term was not pleaded (and was certainly not being argued) by the claimant as a standalone breach of contract but as a "*subset* of

the Failure to Allocate Allegation" (see [64] above). I set out the relevant exchange below between the Arbitrator and Mr Lok:[95]

> CHAIRMAN: Yes, but all the other provisions don't use the word "exclusive".
>
> …
>
> MR LOK: But when one looks at the structure of the entire agreement, your Honour, *it leaves no doubt that the use would have to be exclusive, it can't be co-mingling, your Honour, of the products which are stored.*
>
> CHAIRMAN: Why not? Why not? I mean, in theory, why not, if they were the same product?
>
> MR LOK: Your Honour, one of the requirements, or one of the provisions in the storage agreement is that the principal takes responsibility for the cargo that is in the tank and would be liable for any taxes or any charges in relation to the cargo within those tanks. *We relied upon that, your Honour, to say that that's really one of the reasons why there should be an implied term for the operator to inform the principal. …*
>
> [emphasis added]

77 Third and finally, arguments on the alleged existence and breach of the Implied Term were canvassed in the parties' closing submissions, made by way of Powerpoint slides and post-hearing written submissions (see [62(j)]–[62(l)] above). Here, the claimant's closing submissions that there was a breach of the Implied Term were packaged only as *part* of its *conspiracy claim*, which incorporated the claimant's allegations of breach of contract and misrepresentation as the unlawful acts that were undertaken pursuant to the conspiracy.[96] The claimant's submission was that the defendant's alleged breach of the Implied Term, in failing to inform the claimant of gasoil in the Storage Tanks that did not belong to the claimant, was one of the acts performed in

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95 Claimant's Exhibit at Tab I (Notes of Evidence, 18 October 2021) at p 1003 (p 32 ln 1–24).

96 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at pp 1053, 1068.

furtherance of the conspiracy.[97] There was no separate section in the claimant's closing submissions on its contractual cause of action or on the Implied Term. Whatever allegations of breach of contract that were levelled at the defendant were only raised in the closing submissions as acts in furtherance of the unlawful means conspiracy. In my judgment, this only serves to confirm that the alleged breach of the Implied Term was never raised by the claimant as a *standalone* argument; that was certainly not the case by the time the claimant was pulling all the threads together and presenting its closing arguments to the Arbitrator. As I mentioned above, in the claimant's closing submissions, the Implied Term was presented to the Arbitrator as one of the unlawful acts pleaded in support of the claimant's conspiracy claim. I would go so far as to say that the decision to argue it in this manner must have been a deliberate or strategic choice on the part of the claimant. At the hearing before me, I asked Mr Lok if he could point me to any part of the claimant's closing submissions in the Arbitration where breach of contract by the defendant had been argued and submitted on as a standalone cause of action, distinct from the conspiracy claim. Mr Lok candidly replied that he could not.[98] While Mr Lok's response to the court was that there was no separate section in the claimant's closing submissions dealing with breach of the *express terms* of the contract, that response must apply equally to the Implied Term, as would be plainly apparent from the closing submissions themselves.

78 A cursory reading of the claimant's prayers for relief in para 470(a) of its closing submissions might, however, suggest otherwise. The claimant sought "*alternatively*, for [the claimant's] claim for breach of Implied Term, damages

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97 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at pp 1068, 1072 (para 118).

98 Transcript 2 March 2023 at p 9 ln 5–9.

for loss of chance in the sum of [US$X] or such sum the Arbitrator deems fit" [emphasis added] (see [62(k)] above). Mr Lok argues that this shows that the claim for breach of the Implied Term was distinct from the conspiracy claim, as damages for loss of chance are not available for a conspiracy claim.[99] However, it is important not to lose sight of the fact that the primary purpose of para 470 of the claimant's closing submissions was to set out the *remedies* sought by the claimant, and not to detail the claimant's causes of action. Further, the prayers for relief were structured in a manner where the breach of the Implied Term under sub-section (iii) fell under the claimant's allegations of "*conspiracy*, fraudulent or negligent misrepresentation, *breach of contract* and negligence" [emphasis added] under section (a). In my view, reading para 470 in accordance with its internal structure *and* the broader context of the pleadings and submissions made by the parties, para 470 is best understood to mean: *if* the Arbitrator were to find that the claimant's breach of contract and/or conspiracy claims succeeded, *and* that there was a breach of the Implied Term as analysed under those two claims, there would be available to the claimant an alternative head of damages for loss of chance in the same sum (*ie,* US$X).

79 From the discussion above, one could surmise (and perhaps be forgiven for doing so) that the claimant's case and arguments on the Implied Term before the Arbitrator were not particularly easy to understand but, more importantly, evolved as the case progressed from pleadings to closing arguments. There are several possible ways of interpreting the claimant's arguments – the alleged breach of the Implied Term could have been (a) a subset of one of the pleaded heads of breaches of the Storage Agreement, namely that the defendant had failed to allocate tanks for the claimant's exclusive use; and/or (b) an unlawful

[99] Transcript 2 March 2023 at p 8 ln 15–17; p 9 ln 12–16; p 10 ln 29–32.

act under the conspiracy claim; and/or (c) a combination of both (a) and (b), where the breach of the Implied Term as a breach of contract (*ie*, (a)) was an unlawful act under the conspiracy claim (*ie*, (b)). It appears to me that the answer lies somewhere closer to (c). Regardless, *any* of these permutations leads me to the same conclusion – that the breach of the Implied Term was *not* a standalone argument and was not pitched or argued as such.

80 Therefore, and material to the claimant's objection that there was a breach of natural justice in the Arbitrator's alleged failure to consider or apply his mind to the Implied Term Contention, if the Arbitrator had resolved and found against the claimant on the *larger questions* under which the Implied Term was raised, the Arbitrator would have *in effect* also determined the arguments raised by the parties concerning the Implied Term, *even if* the Arbitrator did not deal with the Implied Term in the Award expressly, specifically or in great detail. With these observations setting the stage, I turn now to consider the Award in some detail.

81 The Arbitrator started off this section of the Award "VII. The Claim for Breach of the Agreement" (at para 164) by identifying the question as being whether the defendant had breached the Storage Agreement in any of the three overarching respects pleaded by the claimant (see [30(a)] above).

82 In paras 165–171 of the Award, the Arbitrator then proceeded to address and *dismiss* the claimant's argument that the defendant had breached the Storage Agreement in failing to allocate tanks for the claimant's exclusive use, finding that there was *no* such obligation under the terms of the Storage Agreement in the first place (see [35] above).[100]

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100 Claimant's Exhibit at Tab B (Final Award) at pp 124–126 (paras 165–171).

83 In the section of the Award dealing with the conspiracy claim (starting at para 214 of the Award), the Arbitrator set out the undisputed elements of the tort of unlawful means conspiracy, all of which had to be satisfied for the claimant to succeed. At para 265 of the Award, the Arbitrator acknowledged the claimant's case that one of the alleged unlawful acts it relied on for its unlawful means conspiracy claim was "the [defendant's] alleged breaches of the Agreement in that the [defendant] … did not inform the [c]laimant of the presence of gasoil in the Storage Tanks that did not belong to the [c]laimant".[101] That was, in effect, a summation of the Implied Term Contention which the claimant had submitted on in its written closing submissions in the Arbitration under Section (III)(E)(1) dealing with "acts performed in furtherance of the conspiracy."[102]

84 However, as the Arbitrator concluded that the first and second elements of the tort of conspiracy (*viz*, (1) the existence of a combination between Co A and the defendant and (2) the intention of the alleged conspirators to cause damage or injury to the claimant by the unlawful acts) were not made out, the issue of the unlawfulness of the acts did not arise and thus it was unnecessary for the Arbitrator to determine the issue.[103] In particular, on the existence of the alleged combination, what appeared to trouble the Arbitrator was the nature and timing of the alleged conspiracy as pleaded by the claimant. It is apposite at this juncture to set out para 222 of the Award:[104]

> 222. It is important at the outset to focus on what precisely is the combination alleged by the [c]laimant, which it is

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101 Claimant's Exhibit at Tab B (Final Award) at p 156 (para 265).

102 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at pp 1068–1073 (paras 107–118).

103 Claimant's Exhibit at Tab B (Final Award) at p 157 (para 266).

104 Claimant's Exhibit at Tab B (Final Award) at p 140 (para 222).

> essential for the [c]laimant to establish in order to found its conspiracy claim; and, in particular, on the time when the alleged combination came into existence. The [c]laimant's pleaded case is that the alleged combination came into existence in or about [M0-1]: it is alleged that the [defendant] and [Co A] "*conceived a plan*" on or about [D0-5] to sell non-existent Product to the [c]laimant; and that, on or before [D0], X and Y, together with certain employees of the [defendant] and [Co A], "*hatched a plan*" to sell non-existent Product to the [c]laimant: paragraphs 114D(a) and (b) of the Amended Statement of Claim. The alleged combination, therefore, must have preceded the 1st and 2nd Sale Contracts and the [Co A] Sale Contract, to none of which was the [defendant] a party. The [defendant's] case is that there is also no evidence that it was aware of those contracts at the material time. Given the timing of the alleged combination, it is difficult to see how, as the [c]laimant alleges, the [defendant] was operating in "*clear tandem against the background of the Agreement, the 1st and 2nd Sale Contracts and the [Co A] Sale Contract*" …
>
> [emphasis in original]

85 Therefore, in my judgment, the Arbitrator had addressed and determined the two larger questions under which arguments on the Implied Term were raised, namely whether the defendant had breached the Storage Agreement in failing to allocate tanks for the claimant's exclusive use and whether the defendant had committed the tort of unlawful means conspiracy. In doing so, the Arbitrator had, at the very least, implicitly also addressed what needed to be addressed in relation to the parties' arguments on the Implied Term. Alternatively, having found against the claimant on the two larger questions, it could equally be the case that the Arbitrator found it unnecessary to deal with the Implied Term Contention. Accordingly, I disagree with the claimant that one is compelled to draw the inference or reach the conclusion that the Arbitrator failed completely to apply his mind to the Implied Term Contention and thereby breached the rules of natural justice.

86 The conclusion I have reached above is sufficient to dismiss the claimant's case on the Implied Term Contention. However, I venture further to

add that the Arbitrator, having found that there was *no* obligation on the defendant's part under the Storage Agreement to allocate tanks for the claimant's exclusive use (see [35] above), could be taken to have impliedly rejected the Implied Term Contention as well. In this regard, I agree with Mr Nandakumar's submission that the Implied Term Contention "would fall away" if the Arbitrator found that there was no requirement to allocate tanks for the claimant's exclusive use in the first place[105] – after all, as a matter of commercial sense, it would not be logical for the defendant to be contractually obliged to inform the claimant if any of the Allocated Tanks contained product belonging to other customers (*ie*, the Implied Term), if there was no obligation to allocate tanks for the claimant's exclusive use to begin with. This also explains the structure of SOC A1, as canvassed in [69] above. As such, I do not accept that simply failing to expressly refer to or decide the Implied Term Contention, *after* having already found that there was no obligation to allocate tanks for the claimant's exclusive use, leads to the inescapable inference that the Arbitrator was guilty of failing to apply his mind to the Implied Term Contention at all. It could equally be a case of the Arbitrator's implicit rejection of the Implied Term Contention – the law is unequivocal in this regard that "an issue need not be addressed expressly in an award but may be *implicitly* resolved": *BLB and another v BLC and others* [2013] 4 SLR 1169 ("*BLB*") at [75].

87 In my view, this also means that even if, *arguendo*, there was a breach of natural justice, no prejudice could be said to have been occasioned to the claimant. To succeed in setting aside an award on the basis that there was a breach of the rules of natural justice, the applicant must also show that there has

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105 Transcript 12 April 2023 at p 15 ln 20–23.

been some actual or real prejudice caused by the alleged breach: *Soh Beng Tee* at [91]. The requirement to demonstrate that the rights of a party have thereby been prejudiced is expressly set out in s 48(1)(*a*)(vii) of the AA. The test is whether as a result of the breach, the tribunal was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to its deliberations: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

88 The Arbitrator's finding that there was no obligation to allocate tanks for the claimant's exclusive use was a finding of fact, based on the evidence before the Arbitrator and the Arbitrator's interpretation of the terms of the Storage Agreement – this was a finding on the merits that cannot be appealed or otherwise challenged before the court. Having found no such obligation to allocate exclusive use and therefore no breach by the defendant in that regard, it would, in my judgment, be *fanciful* to suggest that had the Arbitrator expressly addressed the Implied Term Contention, he could have come to the conclusion that the Implied Term existed and that it was breached by the defendant. As mentioned in [86] above, it would not make commercial sense for the defendant to be required to inform the claimant if any of the Allocated Tanks contained product belonging to other customers (*ie*, the Implied Term), if there was (as the Arbitrator found) no obligation to allocate tanks for the claimant's exclusive use to begin with.

89 Finally, even if the alleged breach of the Implied Term had in actual fact been raised as a standalone argument, the inference that the Arbitrator failed to consider this independent breach should still not be drawn. In this regard, I refer to the oft-quoted passage from the Court of Appeal's decision in *AKN* at [46]:

> … It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more

> important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be ***clear and virtually inescapable***. If the facts are also consistent with ***the arbitrator simply having misunderstood the aggrieved party's case***, or having been mistaken as to the law, or ***having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case)***, then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.
>
> [emphasis in original in italics; emphasis added in bold italics]

90 In my judgment, a "clear and virtually inescapable" inference that the Arbitrator failed to consider the independent breach of the Implied Term simply cannot be drawn. As my analysis above demonstrates, the claimant's pleadings and submissions on the alleged breach of the Implied Term lacked the clarity required for such an inference to be drawn. Even if the breach of the Implied Term had in actual fact been raised as a standalone argument, this was not articulated to the Arbitrator with sufficient clarity in the claimant's pleadings and submissions. One would be hard-pressed to find a single instance, in the entire arbitral record that was put into evidence by the parties in this application, where the claimant intimated to the Arbitrator that the Implied Term Contention was being advanced by the claimant as a standalone claim or argument which had to be decided by the Arbitrator independently of the claim(s) for (a) breach of contract in failing to allocate tanks for the claimant's exclusive use; and/or (b) conspiracy. Viewed in this light, the Arbitrator's decision not to address the breach of the Implied Term as an independent allegation would, at best (if at all), simply be a case of the Arbitrator "having misunderstood the aggrieved party's case" (*AKN* at [46]). To be clear, I am not in any way suggesting that this is indeed what happened in this case, but simply pointing out the formidable hurdles that stand in the claimant's way.

91 Further, the Arbitrator expressly indicated in para 265 of the Award (see [84] above) that he chose not to deal with the issue of the unlawfulness of the acts relied on by the claimant as regards the conspiracy claim *because* the other elements of the alleged conspiracy had not been made out. Thus, the Arbitrator could not have been clearer in expressing his thought process that he "[chose] not to deal with a point pleaded by the aggrieved party because he thought it unnecessary" (*AKN* at [46]).

92 For the foregoing reasons, the claimant's case that the Arbitrator failed to apply its mind to the Implied Term Contention cannot succeed.

93 I make a final observation: in the claimant's written submissions for this application, the claimant submits that the Arbitrator "came up with [his] own argument that there was no obligation of exclusivity notwithstanding that [the defendant] had not even made this contention" and the claimant "had no opportunity to address this reasoning".[106] These submissions were made, not when dealing with the substantive arguments on the Implied Term Contention, but in a section dealing with remission of the Award. There are two inherent problems with these arguments.

94 First, the claimant appears to be *hinting* that the Arbitrator had exceeded his jurisdiction and/or breached natural justice in utilising a chain of reasoning that was not foreseeable or coming up with an idea of his own without giving the parties an opportunity to address him on it. Yet, no arguments were advanced in the claimant's written submissions or at the oral hearing before me on this issue when the claimant submitted on the Implied Term Contention. As I indicated at [93] above, these submissions were contained under a section

106 CWS at paras 172(d)–(e).

dealing with *remission*, and not when dealing with the *grounds for setting aside the Award*. The claimant's sole objection in relation to the Implied Term is that the Arbitrator had, in breach of natural justice, failed to apply his mind to the Implied Term.

95 Second, and more fundamentally, the claimant's complaint that the Arbitrator came up with his own argument that there had been no obligation of exclusivity is, with respect, puzzling. One of the claimant's arguments before the Arbitrator was *precisely* that the defendant breached the Storage Agreement by failing to allocate tanks for the claimant's *exclusive* use (see [30(a)(i)] above). That necessarily required a determination as to whether such an obligation of exclusivity even existed, in circumstances where the burden of proof lay on the claimant alleging the breach since the existence of the obligation was never conceded or admitted by the defendant. Viewed in this light, the claimant's grievance that it "had no opportunity to address this reasoning" rings hollow. The claimant not only had every opportunity to present its case on this issue, but also bore the burden of proof to make good its case.

Vicarious Liability Contention

96 The claimant's next objection is that the Arbitrator failed to address the claimant's argument that the defendant was vicariously liable for Co A's issuance of the Certificates – specifically, that "[Co A] was the agent for communications between [the defendant] and [the claimant] as evidenced by its role in relation to the negotiation and execution of the Storage Agreement and subsequent communications pursuant to that agreement; and that in this

capacity, [Co A] had authority to communicate that legally binding documents such as [redacted] Certificates had been issued by [the defendant]".[107]

97 In my view, the claimant's submission does not cohere with paras 207–208 of the Award, which dismissed the claimant's argument on vicarious liability in unequivocal terms:[108]

> 207. … If the [Certificates] were issued by [Co A], other than through [X] and [Y], it would be even harder for the close connection test to be satisfied.
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> 208. [Co A's] initial involvement in the negotiation of the Agreement for the [defendant] is insufficient to found vicarious liability in relation to the delivery of the [Certificates]. …

98 In fact, the claimant acknowledges that "the [Arbitrator] disposed of [the claimant's] claim that [the defendant] should be held vicariously liable for [Co A's] misrepresentation to [the claimant]".[109] Rather, the claimant's chief complaint appears to be that the Arbitrator failed to give *sufficient reasons* for its disposal of the claimant's vicarious liability claim in "three terse sentences" and that its decision on the matter was "undecipherable".[110] In this regard, I note that an allegation of inadequate reasons and explanations is generally not capable of sustaining a challenge against an award: *CEF and another v CEH* [2022] 2 SLR 918 ("*CEF*") at [127] (see [120]–[121] below). Nevertheless, I proceed to consider the claimant's arguments.

99 In my judgment, contrary to the claimant's assertion, the "proverbial dots" connect well enough on the face of the Award (*BZW and another v BZV*

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107 CWS at para 54.

108 Claimant's Exhibit at Tab B (Final Award) at pp 135–136 (paras 207–208).

109 CWS at para 54.

110 CWS at paras 54, 60.

[2022] 1 SLR 1080 ("*BZW*") at [58]), and when it is read as a whole and in a reasonable, commercial way. The Award was sufficiently reasoned and, in particular, where it mattered. I agree with the defendant's submission that, on the face of para 207 of the Award (see [97] above), the Arbitrator employed "*a fortiori* reasoning"[111] in dismissing the claimant's argument on vicarious liability *vis-à-vis* Co A. The Arbitrator concluded that it would be "even harder" for the close connection test to be satisfied *vis-à-vis* Co A, which was a distinct and separate entity from the defendant, as opposed to *vis-à-vis* X and Y, who were employees of the defendant and *yet* did not satisfy the close connection test. The reasoning for the latter was canvassed by the Arbitrator in some detail in paras 201–207 of the Award. Thus, reading the Award in context and in a reasonable and commercial way, does not, in my view, lead one to the conclusion that the Arbitrator failed to provide any or sufficient reasons for dismissing the Vicarious Liability Contention.

100 This is sufficient for me to dismiss the claimant's objection that the Arbitrator failed to apply his mind to the argument that the defendant was vicariously liable for Co A's issuance of the Certificates. However, and without speculating on the Arbitrator's thought processes, I also agree with the defendant's submission that as X and Y were the principals of Co A and also held key positions in the defendant, the Arbitrator could have logically considered them to be the *strongest* nexus for vicarious liability to arise between Co A and the defendant,[112] thereby leading to his *a fortiori* reasoning.

101 The claimant also contends, with reference to the Arbitrator's finding that the case of *Ong Han Ling and another v American International Assurance*

111 DWS at para 54.

112 DWS at para 54.

Co Ltd and others [2018] 5 SLR 549 ("*Ong Han Ling*") was "distinguishable on the facts" (para 208 of the Award), that the question remains unanswered by the Arbitrator as to why *Ong Han Ling* was distinguishable.[113] In my view, this is an instance of the claimant nitpicking at the Award. It was not necessary for the Arbitrator to launch into an elaborate explanation for why he concluded that *Ong Han Ling* was distinguishable on its facts – natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made: *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 (at [60]). Belinda Ang J (as she then was) explained the position clearly in *BLB*:

> 75 … an arbitral tribunal is not obliged as a matter of practicality to deal with every argument canvassed by the parties, but it must ensure that all *essential* issues are dealt with. In determining what is considered "essential", tribunals should be given a ***fair amount of latitude*** and should be ***entitled to take the view that the dispute may be disposed of without further consideration of certain issues***.
>
> [emphasis in original in italics; emphasis added in bold italics]

102 Whilst the claimant may disagree with the Arbitrator's reasoning, that is *not* a permitted ground for setting aside the Award. I reject the Vicarious Liability Contention objection accordingly.

Combination Contention

103 Next, the claimant submits that the Arbitrator also failed to address the claimant's argument on the combination between the defendant and Co A to defraud the claimant, particularly on the question as to whether the defendant had a duty to enquire into whether the claimant had title to the cargoes stored in

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113 CWS at para 56.

the Storage Tanks.[114] If this question were answered in the affirmative, the claimant's case before the Arbitrator was that X's and Y's knowledge on title to the cargoes could then be attributed to the defendant, forming a necessary link in the combination allegation. The crux of the claimant's case in this application is that the Arbitrator's determination centred on a different duty altogether (*viz*, to make inquiry into the *non-existence* of the Product), as opposed to that which the parties had engaged on (*viz*, the duty to make inquiry into the claimant's *ownership* of the Product).[115]

104 I accept that the claimant's closing submissions did refer to the defendant's "duty to enquire into the matters that [X and Y] had knowledge of, in this case, whether *[the claimant] had title to the cargo* stored in the Storage Tanks" [emphasis added].[116] Paragraph 25 of DCC A1 and para 29 of RDCC A2 also made reference to the defendant's knowledge (or lack thereof) as to who had ownership and title to the products stored at the Terminal.[117]

105 In my judgment, the Arbitrator was alive to this issue. In summarising the parties' arguments in relation to the agency doctrine, the Arbitrator noted that "the [c]laimant submitted that the [defendant] had a duty to enquire into the matters of which [X] and [Y] had knowledge, namely whether the [c]laimant had title to the cargo stored in the Storage Tanks" and that "the [defendant] disputed that it had any duty to inquire into whether the [c]laimant had title to the cargo stored in the Storage Tanks".[118]

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114 CWS at para 66.

115 CWS at para 75.

116 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at p 1060 (para 89).

117 Claimant's Exhibit at Tab 9 of Tab F (DCC A1) at p 876 (para 25); Claimant's Exhibit at Tab 10 of Tab F (RDCC A2) at p 921 (para 29).

118 Claimant's Exhibit at Tab B (Final Award) at p 142 (paras 227–228).

106 The Arbitrator went on to determine that he was "unable to accept the [c]laimant's submission that [X's] and [Y's] knowledge of the *non-existent Product* in the Storage Tanks [was] to be attributed to the [defendant] under the agency doctrine" as "the [defendant] was not under a duty to make inquiry into the *non-existence* of the Product" [emphasis added].[119] In this application, the claimant takes issue with the characterisation of the duty as relating to the non-existence of the Product instead of title and/or ownership over the Product.

107 In my view, the claimant is splitting hairs and, in essence, nitpicking at the Award again. Reading section (IX)(1) of the Award in context and as a whole, it appears that the Arbitrator considered the two framings of the duty to be interchangeable – after all, the Arbitrator's determination on the agency doctrine in para 243 (see [106] above) followed shortly after his summary of the parties' cases on the agency doctrine in paras 227–228 (see [105] above).

108 In any case, the respective enquiries as to the existence or non-existence of the Product and the claimant's title to the Product are, in my view, intertwined; they are not clear and discrete lines of questioning separated by a bright line. The non-existence of the Product (sold and allegedly allocated to the claimant) was the direct result of there being competing claims of title over the Product; fundamentally, and as a matter of logic and common sense, existence of the property is a necessary precursor to ownership and title. The rhetorical question thus follows: if there was no duty to enquire into *existence*, how could there be a duty to enquire into *ownership*? Viewed in this light, the Arbitrator's negative conclusion on the former would summarily determine the latter in the negative as well. But more to the point – the claimant has again failed to demonstrate that the inescapable inference to be drawn here is that the Arbitrator

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119 Claimant's Exhibit at Tab B (Final Award) at p 147 (para 243).

completely failed to decide the Combination Contention. On the contrary, the available evidence within the Award itself, when read in its proper context, is that the Arbitrator *did* determine the issue, just not in the way the claimant had hoped.

109 Finally, one must bear in mind that the claimant's overarching case on conspiracy was that the defendant and Co A conspired to "sell non or partially existent oil to [the claimant]".[120] The Arbitrator recognised this, stating at the outset that "the [c]laimant's pleaded case [was] that the alleged combination came into existence in or about [M0-1]: it is alleged that the [defendant] and [Co A] "*conceived a plan*" on or about [D0-5] to sell non-existent Product to the [c]laimant" [emphasis in original].[121] The difficulty in the claimant's case before the Arbitrator was thus with attributing knowledge of the non-existence of the Product to the defendant, by way of X's and Y's knowledge of the same. *In that context*, under the agency doctrine, the question as to whether the defendant was under a duty to enquire into the non-existence of the Product became relevant.

110 That question was accordingly addressed by the Arbitrator. It is not up to the claimant now, after the event and when the Award has gone against it, to split hairs over the phraseology of the duty that was in contention. In doing so, the claimant runs the risk of being seen as attempting a backdoor appeal on the merits in the guise of a purported process breach – our courts have repeatedly deprecated attempts by unsuccessful arbitrants to do so and I would repeat that deprecation in this case. Accordingly, I reject the claimant's case that the Arbitrator failed to apply his mind to the Combination Contention.

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120 Claimant's Exhibit at Tab J (Claimant's Closing Submissions) at p 1042 (para 40).

121 Claimant's Exhibit at Tab B (Final Award) at p 140 (para 222).

111 On the same issue of the Combination Contention, the claimant contends that:[122]

> 78. … the Tribunal failed to consider [the claimant's] extensive reference to Singapore case law in both its presentation slides and oral Reply Submissions (*viz*, *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2016] 2 SLR 597 [("*UOB v Lippo*")]) that had interpreted the *Hampshire Land* principle to apply in a situation where a company was seeking redress from its defaulting officer, and not in the case where an innocent third party was seeking redress.

112 The principle that the defendant sought to rely on in *Re Hampshire Land Company* [1986] 2 Ch 743 ("*Re Hampshire Land Company*"), as recognised by the Arbitrator in para 229 of his Award, is that knowledge will not be attributed to the principal where it is acquired by an agent who is defrauding the principal in the same transaction.[123] It is, in my view, clear as day that arguments on this principle would only be relevant if X and Y could be said to be the *defendant's agents* and the defendant had a duty to enquire into whether the claimant had title to the cargo in the relevant tanks. As canvassed in [105]–[109] above, the Arbitrator concluded that there had been no such duty to enquire (in para 243(1) of the Award). This effectively put an end to the claimant's Combination Contention. The subsequent comments and findings by the Arbitrator on the *Re Hampshire Land Company* principle at paras 243(2)–(3) of the Award were purely *obiter* – this much is clear from the wording of the Award itself – "*Even if, contrary to* the [Arbitrator's] findings …" [emphasis added].[124]

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122 CWS at para 78.

123 Claimant's Exhibit at Tab B (Final Award) at p 143 (para 229).

124 Claimant's Exhibit at Tab B (Final Award) at p 147 (para 243(2)).

113 Second, from the tenor of paras 233 and 243(2)–(3) of the Award, it appears to me that the claimant's arguments on *UOB v Lippo* were implicitly rejected by the Arbitrator. The claimant relied on *UOB v Lippo* to demonstrate its point that the *Re Hampshire Land Company* principle did not apply in the defendant's favour:[125]

> MR LOK: … The Re Hampshire principle steps in to preserve the right to sue. It doesn't constitute the defence: it preserves the right to sue of the victim of the fraud …
>
> [The defendant] also at best is a secondary and not a primary victim. The Re Hampshire principle does not apply to secondary victims.

In my view, the Arbitrator addressed this point in substance, even if no express reference was made to *UOB v Lippo*:[126]

> 233. In the course of the [c]laimant's oral closing submissions, it was submitted, in reliance on *Bilta (UK) Ltd v Nazir (No. 2)* [2015] UKSC 23 ("***Bilta***") that the [defendant's] reliance on the *Re Hampshire Land Company* principle was misplaced since the principle applies only to preserve the right of the victim of a fraud to sue (here, the [c]laimant) and does not apply to a secondary victim of the fraud (here, the [defendant]) so as to afford a defence to a claim by the primary victim. …
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> 243. The Tribunal is unable to accept the [c]laimant's submission that [X's] and [Y's] knowledge of the non-existent Product in the Storage Tanks is to be attributed to the [defendant] under the agency doctrine, for the following reasons:
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> …
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> (2) Even if, contrary to the Tribunal's findings, the [defendant] was under a duty to make inquiry, the Tribunal considers that the [defendant] is entitled to rely on the *Re Hampshire Land Company* principle, which remains good law …

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125 Claimant's Exhibit at Tab L (Notes of Evidence, 25 January 2022) at p 1325 (p 24 ln 6–14).

126 Claimant's Exhibit at Tab B (Final Award) at pp 144, 147, 148 (paras 233, 243).

> (3) In that regard, the Tribunal rejects the [c]laimant's submission that the effect of *Bilta* is to confine the *Re Hampshire Land Company* principle to primary victims in the way contended for by the [c]laimant … In the Tribunal's view, those observations … support the application of the principle to so-called secondary victims such as the [defendant]. …

114 Third, the primary difficulty of the Arbitrator was his view that the claimant had not made out its case based on X's and Y's knowledge that the defendant had been a party to a combination with Co A to defraud the claimant by selling non-existent Product to the claimant.[127] Critically, this is a finding by the Arbitrator that is unappealable. The struggle that the Arbitrator faced, at a more fundamental level, was in ascertaining the contents and extent of X's and Y's knowledge to determine whether they had carried out or coordinated the alleged unlawful acts – in this regard, the Arbitrator observed that "the [c]laimant adduced no evidence from [X] or [Y] or from any other [Co A] employee with which it dealt directly".[128] In my judgment, as the evidence had fallen short at that stage, the Arbitrator's determination on the issues of agency or identification were secondary and strictly speaking unnecessary for his ultimate decision, much less his determination on the *Re Hampshire Land Company* principle. Therefore, even if there was any defect in the *process* by which the Arbitrator arrived at his determination on those issues, no causative prejudice could have been occasioned to the claimant (see [87] above for the applicable principles on prejudice).

115 Finally, the claimant also contends that:[129]

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127 Claimant's Exhibit at Tab B (Final Award) at p 148 (para 246).

128 Claimant's Exhibit at Tab B (Final Award) at p 148 (para 247(1)).

129 CWS at para 81.

> 81. … the Tribunal did not appear to consider [the claimant's] separate and distinct argument that [the defendant] was complicit by replenishing the Competing Interest Tanks with Product … which constituted clear evidence of an extant combination between [the defendant] and [Co A].

116 In my judgment, it would be unfair to contend that the Arbitrator did not consider this argument at all. The Arbitrator made clear his position in para 247(6) of the Award that matters *subsequent to* the alleged combination could not be relied upon to infer the existence of the alleged combination at an earlier point in time:[130]

> (6) In this respect, the time at which the alleged combination came into existence is important. That is alleged to have been in [M0-1], prior to the [Storage Agreement]. The subsequent matters relied on in terms of the roles played or alleged to have been played by [Y] and [X] following the conclusion of the Agreement do not provide a sufficient basis from which to infer the existence of the alleged combination at a much earlier point in time.

117 As the claimant acknowledges, the defendant's act of replenishing the Competing Interest Tanks only took place in the middle of [M0], *ie*, *subsequent to* the point at which the alleged combination pleaded by the claimant came into existence ([M0-1]). The Arbitrator made clear that he could not and would not rely on such *subsequent matters* to infer the existence of the alleged combination at an earlier point in time, thereby implicitly rejecting the claimant's argument.

118 Even if the Arbitrator expressly addressed such subsequent matters specifically, it could not have made any real difference to the Arbitrator's determination, given that the Arbitrator already concluded in the Award that such matters "[did] not provide a sufficient basis from which to infer the

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130 Claimant's Exhibit at Tab B (Final Award) at p 149 (para 247(6)).

existence of the alleged combination at a much earlier point in time". Therefore, it cannot be said that any prejudice was occasioned to the claimant.

Whether the Arbitrator failed to issue a sufficiently reasoned award

119 The claimant contends that the Arbitrator also failed to provide adequate reasons and explanations for his decision on the three contentions set out above at [30(a)], thereby also breaching the rules of natural justice.

120 The failure to give a sufficiently reasoned decision *may* be a breach of natural justice, if the award *as a whole* does not address the bases upon which the arbitral tribunal reached its decision on the material or essential issues: *AUF v AUG and other matters* [2016] 1 SLR 859 at [77] and [78]. However, an allegation of inadequate reasons and explanations is generally not capable of sustaining a challenge against an award: *CEF* at [127].

121 Given the conclusions I have reached above, it is strictly not necessary for me to decide whether the claimant's objections regarding an insufficiently reasoned award in this case are capable of sustaining its challenge against the Award and I need say no more on it.

Whether the Arbitrator failed to give the claimant a reasonable opportunity to present its case

122 It is hornbook law that if a party is not given a reasonable opportunity to present its case, that could also constitute a breach of natural justice: *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [144]–[145] ("*JVL*"). Such a breach would engage both ss 48(1)(*a*)(iii) and 48(1)(*a*)(vii) of the AA, although I note that the claimant does not rely on s 48(1)(*a*)(iii) of the AA in OA 642.

123 The principles relating to a party being afforded a reasonable opportunity to present its case were succinctly summarised by Vinodh Coomaraswamy J in *JVL* at [146]–[147]:

> 146 There are two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it. …
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> 147 The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it either: (a) requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice; or (b) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case. But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

124 The claimant submits that the Arbitrator failed to give the claimant a reasonable opportunity to present its case on (a) whether forensic evidence was required to prove that the company stamps on the Certificates were in wet ink (the "Forensic Evidence Allegation"); and (b) whether the defendant should be held liable if X and Y had apparent authority to issue the Certificates even if they had issued them fraudulently (the "Apparent Authority Allegation").[131] The claimant contends that these allegations were relevant to the claimant's case that

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131 CWS at paras 97–121; Claimant's 1st Affidavit at para 46(d).

the defendant was liable for fraudulent and/or negligent misrepresentation in issuing the Certificates. I address them in turn.

Forensic Evidence Allegation

125 The claimant submits that it did not have a reasonable opportunity to address the Arbitrator's chain of reasoning in para 197 of the Award, specifically on the issue of whether the company stamps on the Certificates were in wet ink:[132]

> 197. The Tribunal does not agree that the fact … that the originals of the 2nd and 3rd [redacted] Certificates clearly show the watermark and the company stamp in wet ink gives rise, as submitted by the [c]laimant, to "*a strong prima facie case*" that the [redacted] Certificates were issued by the [defendant]. There is no evidence that the watermark was embossed. ***There is also, in any event, an issue as to whether the company stamp was in fact in wet ink. The [c]laimant adduced no forensic evidence to that effect.*** Since it is not in issue that the watermark was not embossed and the [c]laimant has not proved that the stamp was in wet ink, no strong prima facie case has been made out that the [redacted] Certificates were issued by the [defendant]. Even if the watermark was embossed and the company stamp was in wet ink, it would not follow, in the Tribunal's view, that the [defendant] would be liable for the issuance of the [redacted] Certificates.
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> [emphasis in original in italics; emphasis added in bold italics]

126 The crux of the claimant's case is that the defendant never challenged the claimant's position that the company stamps were in wet ink throughout the arbitration proceedings, until the oral reply submissions at closing.[133] Then, the defendant belatedly asserted that there was "no forensic evidence that the ink on [the Certificates] is a wet stamp ink"[134] and that the authenticity of the

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132 Claimant's Exhibit at Tab B (Final Award) at p 133 (para 197).

133 CWS at paras 103, 106–107.

134 Claimant's Exhibit at Tab M (Defendant's Closing Slides) at p 1433 (Slide 47).

Certificates could only have been proven "through a forensic expert".[135] In the premises, the claimant argues that it was prejudiced – had it been given a reasonable opportunity to address this issue earlier, it would have sought to adduce forensic evidence or at the very least argue why forensic evidence was not required to prove that the stamps were in wet ink.[136]

127 I disagree with the claimant's submissions. The claimant's *positive* case before the Arbitrator was that the defendant was liable for the issuance of the Certificates, which constituted the fraudulent and/or negligent misrepresentation. Therefore, on first principles, the *claimant* bore the burden of proving the authenticity of the Certificates, especially considering that the defendant denied issuing any of them thereby placing their authenticity directly into issue. Proof of authenticity by the claimant would have entailed making good its case that the company stamps on the Certificates were in wet ink. Thus, the mere fact that the defendant had not made extensive arguments on this specific issue does not mean that the claimant had thereby discharged its burden of proof.

128 Further, the defendant always maintained its challenge to the authenticity of the Certificates – from the outset, the defendant's pleaded position was that it did not issue any of the Certificates, did not authorise their issuance, and was not aware of the Certificates having been issued prior to the commencement of the Arbitration.[137] There could be no clearer indication that the authenticity and provenance of these documents was front and centre in the

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135 Claimant's Exhibit at Tab L (Notes of Evidence, 25 January 2022) at p 1358 (p 155 ln 4–p 156 ln 1).

136 CWS at para 116.

137 DWS at para 76; Claimant's Exhibit at Tab 9 of Tab F (DCC A1) at pp 877, 881 (paras 27(b), 41).

Arbitration. In that context, the claimant's assertion that it could not have anticipated that there remained a live issue as to whether the company stamps were in wet ink[138] is, in my judgment, weak and an afterthought.

129 The claimant relies on the case of *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 ("*CAJ*") to support its argument that the Award should be set aside because the claimant did not have a reasonable opportunity to present its case before the Arbitrator on the Forensic Evidence Allegation.[139] In my view, *CAJ* is easily distinguished on its facts and affords no support to the claimant. As the claimant itself acknowledges, *CAJ* dealt with a situation where the defendant raised an extension of time defence for the *first time* in their written closing submissions seeking to reduce the amount of liquidated damages that was payable. The Court of Appeal agreed with the Judge below that "[a] chance to respond to the counterparty's *legal submissions* on a newly raised defence cannot constitute a reasonable opportunity to present one's case" [emphasis in original] (*CAJ* at [58]). Here, the defendant's assertion that there was "no forensic evidence that the ink on [the Certificates] is a wet stamp ink" was not a *newly* raised defence; rather, and as I have indicated above, it was a component of an existing and hotly contested issue between the parties on the authenticity of the Certificates. The burden of proof lay squarely on the claimant's shoulders to make good its case. Having failed in that endeavour, it cannot now come before the court and cry foul.

130 In my judgment, the claimant had not only reasonable but every opportunity to present its case on the authenticity of the Certificates. Whether the claimant took it for granted that the authenticity of the Certificates would

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138 CWS at para 107.

139 CWS at para 108.

not be challenged on the basis of whether the company stamps were in wet ink is not for me to speculate. However, the fact that the claimant made the call not to run certain arguments or adduce forensic evidence on this point, in circumstances when the issue was squarely in the arena, cannot mean that the claimant was denied a reasonable opportunity to present its case. Accordingly, I also reject this ground of the application.

Apparent Authority Allegation

131 The claimant contends that the Arbitrator's finding that X and Y had "no apparent authority" was tainted by the Arbitrator's failure to apply his mind and consequentially to decide the real issues at play.[140] The claimant submits that the Arbitrator decided a different, unargued, point, namely whether X and Y had apparent authority to issue Certificates *with* fraudulent misrepresentations, when the real issue, according to the claimant, was whether X and Y had apparent authority to issue the Certificates on the defendant's behalf (the fact that such authority was alleged to have been exercised fraudulently was beside the point).

132 On this point, the Arbitrator held as follows at para 199 of the Award:[141]

> 199. The Tribunal does not accept that Article [redacted] of the [defendant's] memorandum and articles of association conferred on [Y] actual authority to issue [redacted] Certificates which contained fraudulent misrepresentations. The Tribunal also does not accept that, as directors (and, in [Y's] case as CEO), [X] and [Y] were vested with apparent authority by the [defendant] to issue such [redacted] Certificates. The issue of fraudulent [redacted] Certificates does not fall within the usual scope of the office of the CEO. The so-called indoor management rule is not engaged.

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140 CWS at para 118.

141 Claimant's Exhibit at Tab B (Final Award) at p 133 (para 199).

133 In my view, this was at best an instance where the Arbitrator's phrasing was perhaps infelicitous. However, I do not accept that the Arbitrator determined the (wrong) question of whether X and Y had apparent authority to issue *fraudulent* Certificates. I cannot imagine that this would have even been an issue raised or worth exploring – it is inconceivable for any director of a company to be clothed with apparent authority to engage in fraud. It is also unbelievable for any company's memorandum and articles of association to confer *actual* authority on its directors to make fraudulent misrepresentations. Reading the Award closely and in context, it is sufficiently clear, in my view, that the Arbitrator was in fact deciding on the question posed to him by the claimant – *viz*, whether X and Y had apparent authority to issue the Certificates on the defendant's behalf. As such, the claimant was heard and did in fact present its case, only that the Arbitrator disagreed with the claimant and found that the indoor management rule was not engaged.

134 In any event, even if I accept the claimant's argument that the Arbitrator decided a different unargued point, I am of the view that no prejudice would have been occasioned to the claimant. I elaborate below.

135 Even if X and Y had been vested with apparent authority, the Arbitrator found that there was no evidence that it was *X and Y* who *had issued* the Certificates. The Arbitrator also noted that the circumstances in which the Certificates had come to be issued "remain[ed] opaque" and that the claimant had adduced no evidence of "the roles played by [X] and [Y]" or any other person sufficient to fix the defendant with liability.[142] These were all conclusions arrived at by the Arbitrator based on the evidence adduced during the Arbitration, or the lack thereof; significantly, these are all conclusions that

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142 Claimant's Exhibit at Tab B (Final Award) at p 133 (para 198).

the claimant *does not* (and indeed, cannot) challenge. Viewed through this lens, the claimant's attempt, through this application, to obviate this inherent weakness in its case runs the risk, again, of being construed as a backdoor attempt to relitigate the merits of the matter and obtain a second bite of the cherry. For the foregoing reasons, I also reject this ground of the application.

Whether the making of the Award was induced or affected by fraud

136 Finally, the claimant contends that the making of the Award was induced, or was affected, by procedural fraud as (a) the defendant had concealed material documents in the Arbitration which it was obligated to disclose pursuant to the Arbitrator's orders for disclosure, and there are likely to be more material documents that remain undisclosed; and (b) one of the defendant's witnesses (an employee of the defendant) (the "Employee") had committed perjury and given false evidence in the Arbitration.[143]

The applicable law

137 "Fraud" under s 24(*a*) of the IAA includes procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award: *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 at [41]. In my view, the same applies to the *in pari materia* provision under s 48(1)(*a*)(vi) of the AA.

138 In *CLX v CLY and another and another matter* [2022] SGHC 17 ("*CLX*") at [59], I summarised the key principles concerning perjury and concealment of evidence in an arbitration, including concealing documents or

143 CWS at para 122.

information – my summary was based on the succinct exposition of those principles by Ang J (as she then was) in *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 3 SLR 725 at [103]–[106]:

> (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.

Non-disclosure of the Whatsapp Message

139 The claimant argues that the defendant's non-disclosure of one Whatsapp message between the Employee and Y dated [D0+21] (the "Whatsapp Message") constituted fraud that induced or affected the making of the Award. The Whatsapp Message conveyed that the Employee wished to seek Y's advice on a written undertaking that the defendant had given to another entity (the "Entity").[144]

140 The claimant's case is that the Whatsapp Message fell within the categories of documents ordered to be disclosed by the Arbitrator, as set out below:[145]

> 3 In respect of the period [M0-3] to [D0+28]:
>
> - All documents produced by, and correspondence (including emails, WhatsApp, WeChat and SMS messages) exchanged between the [defendant] and [Co A], their employees and agents (including but not limited to [Y], [X], … and [the Employee]) that refer to and/or relate to Tanks [Delta, Bravo, Charlie, Foxtrot and/or Echo].
>
> 8. In relation to the period [M0-2] to [D0+34]: All documents and/or records … and/or correspondence (including letters, acknowledgements, confirmations, emails, WhatsApp, WeChat and SMS messages) exchanged between the

144 CWS at paras 133–134; Defendant's 1st Affidavit at p 241.

145 CWS at paras 131–132.

> [defendant], [the Entity] and/or [Co A] and their employees and agents (including but not limited to [Y], [X], … and [the Employee]) in relation to:
>
> 1. [The Entity's] alleged interest in and/or the allocation of storage tanks [Alpha, Bravo and Charlie] to [the Entity]; and
>
> 2. [The Entity's] inventory allegedly being stored at the [defendant's] Terminal.
>
> …
>
> 10. In relation to the inspection of the Competing Interest Tanks by [the Entity] … on or about [D0+19] and [D0+20], any documents… and/or correspondence (including letters, acknowledgements, confirmations, emails, WhatsApp, WeChat and SMS messages or any other form of writing) that were provided by the [defendant's] representatives to any director, officer, employee or secondee of the [defendant] and/or [Co A], or any instructions received by the [defendant's] representatives from any such person, whether provided or received before, during or after the inspections.
>
> 11. All documents and/or records… and/or correspondence (including letters, acknowledgements, confirmations, emails, WhatsApp, WeChat and SMS messages or any other form of writing) exchanged between the [defendant], other third parties, and/or [Co A] and their employees and agents (including but not limited to [Y], [X] … and [the Employee]) in relation to the discharge of a shipment of approximately [redacted] barrels of Gasoil 10 ppm sulphur into Tanks [Bravo] and [Charlie] on [D0-1].

141 I agree with Mr Nandakumar's submission that the Whatsapp Message was not responsive to any of the above categories.[146]

(a) Category 3: The Whatsapp Message did not refer to and/or relate to tanks Delta, Bravo, Charlie, Foxtrot and/or Echo.

(b) Category 8: The Whatsapp Message did not relate to (a) the Entity's alleged interest in and/or the allocation of storage tanks Alpha,

146 DWS at pp 49–50 (Annex A).

Bravo and Charlie to the Entity; or (b) the Entity's inventory allegedly being stored at the defendant's terminal.

(c) Category 10: The Whatsapp Message did not relate to inspection of the Competing Interest Tanks.

(d) Category 11: The Whatsapp Message did not relate to the discharge of a shipment of approximately [redacted] barrels of Gasoil 10 ppm sulphur into tanks Bravo and Charlie on [D0-1].

142 Accordingly, there was no obligation on the defendant's part to disclose the Whatsapp Message in the Arbitration. In the absence of such an obligation, I am not persuaded that there was deliberate concealment on the defendant's part aimed at deceiving the Arbitrator or the claimant (see [138(c)(i)] above). I also bear in mind that the Whatsapp Message was disclosed by the defendant in another suit pending before the court; this does not appear to be conduct consistent with a party intent on deliberately concealing or suppressing evidence.[147] In my judgment, the claimant has failed to prove that there was fraud by the defendant in the suppression or withholding of documents.

143 Even if I am wrong on this, the claimant's case also fails for a second reason, namely that the alleged concealment of the Whatsapp Message did not substantially impact the making of the Award (see [138(c)(ii)] above). First, the substance of the information in the Whatsapp Message was already made known in the Arbitration by way of the disclosure of the Employee's email to the Entity dated [D0+20], wherein the Employee informed the Entity that she was

147 Transcript 13 April 2023 at p 12 ln 8–12.

"awaiting instructions from [Co A] on the [undertaking]".[148] Second, I fail to see how the single Whatsapp Message conveying that the Employee needed Y's advice on the undertaking given to the Entity could have made any substantial impact on the Arbitrator's decision on any of the claimant's claims.

Employee's evidence during the hearing

144 The claimant submits that the Employee committed perjury when cross-examined on whether the Employee had failed to disclose all relevant communications in the Arbitration. The nub of the claimant's allegations is that the Employee lied (a) about the frequency of the Employee's WhatsApp communications with Y; and (b) that the Employee had not exchanged any messages with Y that were relevant to the Arbitration.[149]

145 In my view, the claimant's case on perjury fails for the fundamental reason that the claimant has not proved that the Employee gave false evidence.

146 The Employee's evidence was that (a) the Employee and Y exchanged minimal Whatsapp messages for business over the years; and (b) they did not exchange messages that were relevant to the Arbitration:[150]

> Q: … are you saying that you do not exchange WhatsApp messages for business with [Y]?
>
> A: To the best of my recollection, over the years it's very minimal. He would rather call me and give me instructions over the phone.
>
> …

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148 DWS at para 98; Claimant's 1st Affidavit at para 169; Claimant's Exhibit at Tab 24 of Tab C at p 495.

149 CWS at para 137.

150 CWS at para 137; Claimant's Exhibit at Tab Q (Notes of Evidence, 21 October 2021) at p 1825 (p 15 ln 9 – p 16 ln 6).

> Q: Has anybody [seen] [the five-six WhatsApp messages] to see whether these are relevant to these proceedings?
>
> A: It is not relevant, because if you're asking me for these proceedings regarding [the claimant's] matter, there was no message from him at all, nothing at all.

147 On the evidence before me, I disagree that the Employee's evidence was demonstrably untrue. The Whatsapp messages exhibited in the defendant's affidavit suggest that Y rarely corresponded with the Employee via WhatsApp. In fact, Y did not even reply to the Employee's Whatsapp Message that the claimant argues should have been disclosed.[151] The other messages exhibited pertained to the then-prevailing COVID-19 restrictions and the defendant's intended legal representation. Further, for the reasons canvassed above at [143], the Whatsapp Message was not of relevance to the Arbitration. I also disagree with the argument made by Mr Lok that the messages exchanged between Y and the Employee on the defendant's intended legal representation demonstrated the senior position and influence that Y had in the defendant, and therefore this evidence would (if not suppressed) have had a material impact on the issues of attribution of knowledge of Y to the defendant and the identification doctrine, in the context of the claims advanced by the claimant in the Arbitration for unlawful means conspiracy. Those arguments make a leap too far and are somewhat speculative. In my judgment, the claimant has not demonstrated that there could have been any meaningful difference to the outcome of the Arbitration, bearing in mind again the Arbitrator's fundamental difficulty with the lack of evidence adduced by the claimant on the alleged combination involving the defendant, X and/or Y (see [84] above).

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151 Defendant's 1st Affidavit at pp 240–242.

Other allegedly suppressed documents

148 The claimant contends that there are likely to be further WhatsApp exchanges or correspondence between the Employee and Y on matters that fall within the ordered disclosures, but which were not disclosed.[152] The claimant relies on the case of *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 ("*Dongwoo*") at [146] to argue that the present case was one where "a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production".[153]

149 Assuming, for argument's sake, that the defendant indeed suppressed other documents, the claimant's reliance on *Dongwoo* is misplaced. *Dongwoo* dealt with the question of whether *the tribunal* could and should draw an adverse inference for non-production – if a party hid even the existence of the damning document and dishonestly denied its very existence, the question of whether an adverse inference for non-production should be drawn would not even arise as the opposing party and the tribunal would be kept in the dark (at [146]). Suppression of the relevant documents was thus viewed from the perspective of the tribunal during the arbitration proceedings.

150 In my judgment, when a setting aside application on the ground of fraud by way of concealment of evidence is placed before the seat court, there must be *actual* evidence of the existence of those documents that the party allegedly concealed in the arbitration proceedings before the court can even conclude that

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152 CWS at para 158.

153 CWS at para 162.

the making of the award was indeed induced or affected by fraud, bearing in mind the high standard of proof required for an allegation of fraudulent conduct (*Dongwoo* at [147]; *CLX* at [57]–[58])). Otherwise, the allegation of fraud would be purely speculative. A conclusion that a party *had* concealed documents during the arbitration proceedings, such that the making of the award was induced or affected by fraud, is a finding of fact which can only be reached after those documents are first proved to *exist*.

151 Here, as the claimant concedes, it has no way of knowing what communications took place between the Employee and Y and whether such conversations touched on issues relevant to the Arbitration. Consequently, the claimant is also unable to say with certainty whether such evidence could have any material impact on the Arbitrator's findings.[154] For these reasons provided by the claimant itself, I am of the view that the claimant's allegation, that unidentified further documentary evidence (the existence of which remains unrevealed and a mystery) was concealed in the Arbitration, is bound to fail.

152 Separately from its written submissions in this application, the claimant seeks to match in its supporting affidavit the description of the documents in the defendant's list of documents ("DLOD") filed in HC/S [redacted] to discovery categories ordered by the Arbitrator.[155] This also does not assist the claimant. The description of the documents in the DLOD is vague at best and does not shed much light on the contents of these allegedly concealed documents. The description of the correspondence in the DLOD (by email and WhatsApp) only contains: (a) the names of the sender and recipient(s); (b) the date and time of

154 CWS at para 161.

155 Claimant's 1st Affidavit at para 165.

the communication; (c) in the case of emails, the subject title of the email.[156] It is therefore difficult to reach the conclusion that these documents were responsive to any of the categories of documents ordered to be disclosed by the Arbitrator.

153 For the reasons set out above, the claimant's case that the Award was induced or affected by fraud because the defendant had concealed further material documents which the claimant alleges are likely to exist (but which have not been identified or proven to exist), does not pass muster and I reject it accordingly.

Whether the Award is contrary to public policy

154 An award may be set aside by the court if it finds that the award is contrary to public policy: s 48(1)(*b*)(ii) of the AA.

155 It is trite that that an award obtained by fraud would violate the basic notions of morality and justice, thus amounting to a breach of the public policy of Singapore: *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [41]; *CLX* at [119].

156 For the reasons articulated above at [136]–[153], I am of the view that the making of the Award was not induced or affected by fraud. Accordingly, the Award cannot be contrary to public policy. Consequently, this ground of the application also fails.

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156 Claimant's 1st Affidavit at pp 60–62.

Remission

157 As I have rejected all of the claimant's grounds for setting aside the Award, the question whether these proceedings should be suspended and for the matter to be remitted to the Arbitrator is rendered moot. Nevertheless, I feel compelled to make some remarks on the manner in which the claimant has chosen to mount its case on remission.

158 The claimant submits that the Award should be set aside and that remission is inappropriate in this case given the "[Arbitrator's] apparent predisposition against [the claimant]".[157] One of the arguments raised by the claimant is that "there is reasonable cause for concern that the [Arbitrator] may hold it against [the claimant] for having asked the [Arbitrator] to clarify certain entries in the [Arbitrator's] *curriculum vitae* ("CV")".[158]

159 By way of background and to explain the context behind this "reasonable cause for concern", *after* the issuance of the Award, the claimant (through its solicitors) wrote to the Arbitrator on [date redacted] seeking clarification on certain entries in the Arbitrator's CV regarding his prior experience in certain commercial arbitration and insolvency proceedings that were listed in his CV. The claimant queried whether those proceedings were related to the Arbitration and the parties to the Arbitration.[159] The Arbitrator's initial response was that he had "heavy court commitments and will give it consideration in due course when time permits".[160] On [date redacted], claimant's counsel requested that the Arbitrator attend to their query by [date

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157 CWS at para 165.

158 CWS at para 176.

159 Claimant's 1st Affidavit at para 212.

160 Claimant's 1st Affidavit at para 213.

redacted], to which the Arbitrator replied on the same day that he would respond "as soon as [he] [was] able during the course of next week when clear of [his] current court and other commitments".[161] Claimant's counsel proceeded to chase the Arbitrator on the same day, expressing its disappointment and highlighting that "[t]he relevance of our client's request for clarification and the sensitivity of the timing of receipt of [the Arbitrator's] response is self-evident". The email also requested for a response by [date redacted] and stated that "[i]f no response is received by then, our client will take it that your preference is not to respond".[162] The Arbitrator responded three days later:[163]

> Further to my email of [date redacted], I have now considered the inquiry raised by your client in your email of [date redacted]. I have done so now rather than next week at considerable professional and personal inconvenience, in view of your client's request in your email of [date redacted] for a response by next Monday.
>
> The suggestion by you in your email of [date redacted] that there is any connection between the timing of my response and, I presume, the time limit for any application by your client to set aside the Final Award is both unwarranted and unfounded.
>
> Having considered the inquiry, your client has no entitlement to the information requested. Notwithstanding that, (i) neither of the bullet points on my website to which your clients refers pertains to [the Arbitration]; and (ii) the arbitrations in question and the claim referred to by your client in my experience statement did not involve any of the persons to which your email refers.
>
> As you will be aware, I am functus in the arbitral proceedings in [the Arbitration] and shall not be engaging in further correspondence on this matter with the parties or their counsel.

160 To begin with, if the claimant had any concerns over the Arbitrator's impartiality or that there might exist a conflict of interest, it should have perused

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161 Claimant's 1st Affidavit at paras 214–215.

162 Claimant's 1st Affidavit at para 216.

163 Claimant's 1st Affidavit at para 217.

the Arbitrator's CV, which the claimant acknowledges is "publicly available",[164] at the time the tribunal had been constituted and not only after the Award was released. Given the amounts at stake, it would be surprising if the claimant or its representatives had not undertaken any checks at all on the Arbitrator when the parties had been notified of his appointment by the SIAC and only purported to do so after the Award was published. The claimant's decision to raise questions relating to the Arbitrator's CV after the release of the Award could therefore be construed as more than just mere coincidence but rather, an attempt by the claimant to self-induce an impression that the Arbitrator would "hold it against" the claimant because the claimant had raised doubts over the Arbitrator's impartiality and professionalism, and that therefore, it would be inappropriate to remit the matter to the Arbitrator. According to the claimant, from the Arbitrator's "terse response" to the claimant's solicitors' questions, the Arbitrator "displayed obvious displeasure" in having to respond to the questions raised, and thus the claimant was concerned that objectively there was a risk that the Arbitrator may be "sub-consciously tempted to achieve the same result as before" (*BZW* at [67(a)]).[165]

161 I do not find any merit in these arguments. I note in this regard that the claimant did *not* seek to set aside the Award on the basis that the Arbitrator was biased in any way, despite the serious suggestions in the claimant's written submissions ([158] above) of (i) the Arbitrator's "apparent predisposition against [the claimant]"[166] and (ii) that reading the Award objectively would give a reasonable person the sense that the Arbitrator had a "strong leaning" in favour of the defendant and that he "went out of [his] way to find in favour of [the

164 CWS at para 177.

165 CWS at paras 181–183.

166 CWS at para 165.

defendant]".[167] This then raises questions as to the *bona fides* and real motive of the claimant in seeking the Arbitrator's clarification, post-Award, on whether the Arbitrator was in a position of conflict of interest.

162 As a matter of principle, I should say that the court would not look fondly on applicants who attempt, post-award, to create evidence or circumstances to portray an arbitral tribunal as being incapable of viewing the matter objectively should the dispute be remitted to it by the court. If parties can prevent remission simply by being antagonistic towards a tribunal after it is *functus officio* and questioning (by innuendo) the tribunal's impartiality without any real bite to any implied suggestion of bias, such conduct would, in my view, make a mockery of the process of arbitration *and* the process of seeking recourse from the court against an arbitral award.

163 There were, regrettably, traces of such conduct by the claimant in this case. Nonetheless, since the question of remission does not arise for my consideration, I will say no more on this.

Conclusion

164 For the reasons detailed in this judgment, none of the grounds upon which the claimant relies to set aside the Award has succeeded. Accordingly, I dismiss the claimant's application.

165 I shall hear the parties separately on costs. For the avoidance of doubt, the time for filing any appeal against this judgment shall start to run from the

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[167] CWS at para 172.

date of this judgment and not after the court has determined the question of costs.

S Mohan J
Judge of the High Court

Lok Vi Ming SC, Lee Sien Liang Joseph, Mohammad Haireez bin Mohameed Jufferie, Muk Chen Yeen Jonathan, Thong Ying Xuan, Jean Chan Lay Koon (LVM Law Chambers LLC) for the claimant; Nandakumar Ponniya Servai, Wong Tjen Wee, Emmanuel Duncan Chua, Lee Yu Lun, Darrell, Irvin Ho Jia Xian, Lim Jia Ren (Wong & Leow LLC) for the defendant.