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

[2024] SGHC 133

Suit No 885 of 2021

Between

CIX

… *Plaintiff*

And

DGN

… *Defendant*

JUDGMENT

[Res judicata] — [Extended doctrine of res judicata]

[Tort] — [Misrepresentation] — [Fraud and deceit]

[Tort] — [Negligence] — [Duty of care]

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CIX
v
DGN

[2024] SGHC 133

General Division of the High Court — Suit No 885 of 2021
Andre Maniam J
17–19, 23–26 January, 1 March 2024

24 May 2024 Judgment reserved.

Andre Maniam J:

Introduction

1 If a party loses an arbitration because the tribunal relies on an independent expert's opinion, can that party blame his loss on the expert, and sue him? Or might this be an abuse of process?

Background

The sale of the Seller's company

2 Pursuant to a Share Purchase Agreement ("SPA"), the plaintiff ("Seller") sold a company in the "widget" industry to the "Buyer". The SPA provided for the purchase consideration to be adjusted depending on the company's "Final Valuation" as defined in the SPA.

3 In arriving at the "Final Valuation" under the SPA, the "Actual Compensation Cost"[1] for various "Key Management Roles" ("KMRs")[2] was to be compared to the "Market Benchmark"[3] for each of those KMRs.

4 Paragraph 1.2 of Schedule 10 to the SPA provided that the "Market Benchmark[s]" for the KMRs was to be determined by an independent human resource consultant to be appointed by mutual agreement between the Seller and the Buyer, and that "[s]uch human resource consultant shall act in such determination as expert and not as arbitrator and its determination shall be final and binding on the [p]arties".[4]

5 The Seller and the Buyer mutually agreed that "Phoenix" (the defendant in this suit) should be appointed as that independent human resource consultant, the Buyer appointed Phoenix, and Phoenix produced reports on compensation levels for the relevant KMRs.

The arbitration between the Seller and the Buyer

6 After receiving Phoenix's reports, however, the Buyer and the Seller were unable to agree on the Market Benchmarks to use in determining the Final Valuation of the Company.

7 By SIAC Arbitration 230 of 2017 and 233 of 2017 (which were consolidated) ("Arb 230") the Seller commenced arbitration against the Buyer

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1 Joint Core Bundle of Documents Volume 1 dated 12 January 2024 ("**1-JCB**") at p 16, 172.

2 1-JCB at p 172.

3 1-JCB at p 172; see also the First Partial Award in Joint Core Bundle of Documents Volume 4 dated 12 January 2024 ("**4-JCB**") at pp 2285 – 2286.

4 1-JCB at p 172; the First Partial Award at [28], [48] in 4-JCB at pp 2285, 2292.

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to resolve this dispute over the Market Benchmarks (and consequently the Final Valuation), and other disputes between them. The arbitral tribunal comprised Professor Tan Cheng Han, SC as sole arbitrator. (Pursuant to sealing and redaction orders in view of arbitration confidentiality, this judgment anonymises party names and identifying details.)

Phoenix's expert reports

8 In its expert reports, Phoenix did not give a *single figure* as the "Market Benchmark" for each of the KMRs; instead, Phoenix provided a *range* of possible benchmarks for the relevant KMRs.[5] From the range of compensation levels for each KMR, Phoenix set out P25 (25th percentile), P50 (50th percentile, *ie*, median), and P75 (75th percentile) benchmarks.

9 The Buyer's position was that the *most appropriate* of the benchmark values *put forward by Phoenix* should be chosen – the Buyer's expert suggested that P50 would be the appropriate Market Benchmark.[6]

10 This contrasted with the approach taken by the Seller's expert, "Falcon". As Falcon acknowledged, its report was based on a different data set from the Phoenix reports, and did not take headcount into account as a factor.[7] Falcon did not give its opinion (as the Buyer's expert in the arbitration had) on what the appropriate Market Benchmark should be, *based on whatever information was available in the Phoenix reports*; Falcon also did not generally pick from the

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5 The First Partial Award at [47]–[49] in 4-JCB at pp 2292–2293.

6 The First Partial Award at [49] in 4-JCB at p 2293.

7 The First Partial Award at [52] in 4-JCB at pp 2293–2294.

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range of benchmarks provided by Phoenix.[8] The tribunal found that Falcon may have departed materially from what Phoenix did.[9]

The First Partial Award

11 The tribunal issued a First Partial Award on 3 June 2020, in which the tribunal agreed with the Buyer's expert that the P50 / median benchmarks from the Phoenix reports should be the Market Benchmarks used in determining the Final Valuation.[10] The tribunal explained:[11]

> Essentially, the Tribunal holds the view that the [Phoenix] reports have to provide the basis from which the appropriate Market Benchmarks should be derived given the [p]arties' agreement that [Phoenix] (and not someone else) would be appointed as the independent expert. In addition, both [p]arties seem to be agreed that the Tribunal has to make sense of the [Phoenix] reports, not that the [Phoenix] reports are so fundamentally flawed that they should be disregarded entirely.

12 The tribunal set out the Buyer's expert's explanation of why it had adopted the median benchmark.[12] The tribunal then commented that that approach had the benefit of clarity and adopted one of the possible benchmarks set out in the Phoenix reports.[13] The tribunal also noted that for one of the KMRs, Falcon's recommended benchmark was based on Phoenix's P50 / median benchmark. The tribunal said this indicated that choosing the median

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8 The First Partial Award at [53] in 4-JCB at pp 2294–2295.

9 The First Partial Award at [53] in 4-JCB at pp 2294–2295.

10 The First Partial Award at [54] in 4-JCB at p 2295.

11 The First Partial Award at [53] in 4-JCB at pp 2294–2295.

12 The First Partial Award at [51] in 4-JCB at pp 2293.

13 The First Partial Award at [52] in 4-JCB at pp 2293–2294.

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benchmark (as suggested by the Buyer's expert) was not in itself absurd or unreasonable.[14]

13 The tribunal concluded the section in the First Partial Award on this issue as follows:[15]

> The Tribunal wishes to add that in the absence of [Phoenix] being called to give evidence, including of the questions that the [Seller's] expert would have liked [Phoenix] to answer, the Tribunal is not in a position to determine if there was any bias or manifest error on [Phoenix's] part.

14 The tribunal thus decided in Finding 6 of the First Partial Award: "[t]he Appropriate Market Benchmark is the median Market Benchmark provided by [Phoenix]."[16]

The Seller's failed application to set aside the First Partial Award

15 The Seller was dissatisfied with the First Partial Award and applied to set aside parts of it, including the aspects concerning the Final Valuation. That setting-aside application was dismissed on 5 March 2021 (*CIX v CIY* [2021] SGHC 53), and the Seller's appeal against that by Civil Appeal 4 of 2021 was dismissed on 21 October 2021.

The Seller's failed Corruption Application

16 After his setting-aside application was dismissed (but his appeal against that was still pending), the Seller sought to undermine Phoenix's reports and the First Partial Award, in a different way. The Seller alleged that there was (or at

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14 The First Partial Award at [53]–[54] in 4-JCB at pp 2294–2295.

15 The First Partial Award at [55] in 4-JCB at p 2295.

16 The First Partial Award at [83(6)] read with [24]–[29], [46]–[55] in 4-JCB at pp 2284–2286, 2292–2295, 2309.

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least might be) corruption involving Phoenix and the Seller, which the tribunal should investigate. The Seller made an application (the "Corruption Application")[17] asking that the tribunal call for relevant evidence to be adduced to investigate his allegations of corruption, and that "[a] determination should be made by the Tribunal on whether the [Phoenix] Reports remain safe to be relied upon in the arbitration given the Claimant's allegations of corruption, which directly impact the satisfaction of the requirements under paragraph 1.2 of Schedule 10 of the SPA."[18]

17 The Seller relied on:

(a) an email dated 29 September 2016 from the Buyer's representative "Mr T" to Phoenix, seeking a reduction of the fees Phoenix would charge, where Mr T mentioned that the Seller had a "significant project in progress with [Phoenix]";[19]

(b) Phoenix's Declaration of Conflict of Interest dated 20 October 2016 addressed to the Seller and the Buyer, stating, "as at the date hereof, [Phoenix has] no substantial business dealings with [the Buyer] or its related corporations or [the Seller]";[20]

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17 Defendant's Bundle of Documents Volume 2 dated 12 January 2024 ("**2-DB**") at p 296.

18 2-DB at p 318.

19 Joint Core Bundle of Documents Volume 2 dated 12 January 2024 ("**2-JCB**") at p 785.

20 1-JCB at p 239.

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(c) Phoenix's email dated 20 August 2019 stating that "the agreement on the purchase of services/offering is between [Phoenix] and [the Buyer], without any reference or mention of [the Seller.]"[21]

18 In his written submissions dated 3 August 2021, the Buyer contended at [15] that "it is reasonable to infer that [Phoenix] and [the Buyer] were in the same camp (i.e. there was no independence on the part of [Phoenix]) and [the Buyer] deliberately concealed this fact by misleading the Tribunal and the [Seller]."[22]

19 The Buyer further asserted in [7(f)] of his written submissions that he "now knows" that what was said in the Declaration of Conflict of Interest was simply untrue as there was a "significant project in progress" between Phoenix and the Buyer at that time.[23] In essence, he contended that by the "significant project", the Buyer had bribed Phoenix to act in a non-independent manner in preparing Phoenix's reports (at [45]–[46]).[24]

20 In response, the Buyer submitted that the Seller was untruthful in giving the impression that the Seller had only recently come to know of the 29 September 2016 email between the Buyer and Phoenix, when that email:

(a) was disclosed on 2 October 2019;

(b) was included in the agreed bundle of documents for the arbitration;

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21 Joint Core Bundle of Documents Volume 3 dated 12 January 2024 ("**3-JCB**") at p 1949.

22 2-DB at p 303.

23 2-DB at p 298.

24 2-DB at p 313.

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(c) was referred to by the Seller's counsel at the arbitration hearing;

(d) was used by the Seller's counsel to cross-examine the Buyer's witness in the arbitration;

(e) was referred to in the Seller's written submissions in the arbitration; and

(f) was relied upon by the Seller in his unsuccessful contention in the arbitration that Phoenix lacked independence (since recast as allegations of corruption).[25]

21 On 18 August 2021, the tribunal dismissed the Claimant's Corruption Allegation. The tribunal said:

> …the Tribunal does not accede to the Claimant's request that the Tribunal investigates the allegations of corruption made against Phoenix. The Tribunal is of the view that any such allegation could and ought reasonably to have been raised at the evidentiary hearing before the Partial Award was issued. The Tribunal agrees with the reasons given by the Respondent for this.
>
> The Tribunal also does not think that any exception applies to this extended doctrine of res judicata in this matter….[26]

22 The Seller did not seek to set aside the tribunal's decision in favour of the Buyer on the Corruption Application. Instead, the Seller switched his target to Phoenix, and commenced the present suit in court.

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25 2-DB at pp 319–355.

26 2-DB at p 356.

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The Present Suit between the Seller and Phoenix

23 On 29 October 2021, the Seller sued Phoenix, seeking to recover the difference between what the Seller would receive under:

(a) a Final Valuation based on Phoenix's reports (as decided by the tribunal in the First Partial Award), and;

(b) a Final Valuation based on the report of the Seller's expert, Falcon (which the tribunal had rejected).

24 The Seller alleged: (1) that Phoenix had misrepresented matters relating to its appointment, and (2) that due to Phoenix's negligence its reports were flawed.

25 Besides seeking to recover more money for his sale of the Company (having failed in that regard vis-à-vis the Buyer), the Seller claimed costs of his legal experts and human resources expert (*ie*, Falcon) engaged to assist with the determination of the Market Benchmark for the Key Management Roles under Phoenix's reports; he also claimed $6,000 plus GST as his half-share of the cost of Phoenix's reports.

26 The Seller's claims were in tort, for the following:

(a) Fraudulent and/or negligent and/or innocent misrepresentation and/or a claim under the Misrepresentation Act (Cap 390, 1994 Rev Ed) (the "Misrepresentation Act"):[27]

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27 Amended Statement of Claim dated 17 January 2024 ("**SOC**") at [38A]–[55].

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(i) that by the COI Declaration, Phoenix had falsely represented that it had "no conflict of interest…in respect of [its] appointment as the human resources consultant for purposes of benchmarking of key management roles", and that "[a]s at the date of [the COI Declaration, i.e. 20 October 2016], [Phoenix had] no substantial business dealings with [the Buyer] or its related corporations or [the Seller]" (the "COI Declaration Claim");[28] and

(ii) that by an email of 20 August 2019, Phoenix had falsely represented that the agreement on the purchase of services/offerings was between Phoenix and the Buyer (*ie*, the Services Agreement), without any reference to the Seller; in other words, that Phoenix was engaged solely by the Buyer to prepare its reports (the "Appointment Claim").[29]

(b) Breaches of tortious duties owed by Phoenix to the Seller, in that due to Phoenix's negligence its reports were flawed in various ways (the "Flawed Reports Claim").[30]

Further proceedings between the Seller and the Buyer

Determination of the Final Valuation

27 The tribunal made a Second Partial Award on 19 January 2022.[31] The Seller did not seek to set aside the Second Partial Award.

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28 SOC at [39]–[47], read with [20]–[21].

29 SOC at [48]–[55], read with [35].

30 SOC at [56]–[60].

31 4-JCB at pp 2334–2341.

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28 The tribunal then made a Third Partial Award on 28 July 2023,[32] in which he determined the Final Valuation of the Company, based on the findings in the First and Second Partial Awards.

29 The Seller was dissatisfied with the Final Valuation as determined by the tribunal. He maintained that instead of using the median benchmarks from the Phoenix reports as the Market Benchmarks (as the tribunal had decided to do, in the First Partial Award), the Final Valuation should have been determined in the way suggested by the Seller's expert Falcon. The difference was in the millions of dollars.

OA 1109 of 2023 – the Seller's application to set aside the Third Partial Award

30 On 27 October 2023, by Originating Application 1109 of 2023, the Seller applied to set aside the Third Partial Award.

Arb 322 – the Seller's arbitration alleging that the Buyer had procured the First Partial Award by fraud

31 On 23 December 2022, by SIAC Arbitration 332 of 2022 ("Arb 322"), the Seller commenced arbitration proceedings against the Buyer alleging that the Buyer had procured the First Partial Award in Arb 230 by fraud. Arb 322 has since been consolidated with Arb 230.

Executive summary of decision

32 I agreed with Phoenix that the suit should be dismissed on two bases, either of which would be fatal:

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[32] 4-JCB at pp 2362–2364.

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(a) the Seller's claim was an abuse of process, having regard to the prior arbitral and court decisions against the Seller, in particular: (i) the First Partial Award; (ii) the Seller's failed application to set that aside; and (iii) the Seller's failed Corruption Application; and

(b) in any event, the Seller's claim fails on the merits, based on the pleadings and evidence before the court.

Abuse of process

General principles

33 Phoenix contended that the suit was an abuse of process because of the extended doctrine of *res judicata*, as discussed in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [17]–[24] and [51]–[53].

34 Such an abuse of process may be found in cases where there is no cause of action estoppel or issue estoppel, for instance, where the parties to the later proceedings are not the same as the parties to the earlier proceedings, as in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ("*Hunter*"), cited in *Goh Nellie* at [20] and [52]. In *Hunter*, a civil action was struck out as being merely a collateral attack against an earlier decision of the criminal court against the plaintiff in the civil action.

35 Menon JC (as he then was) stated in *Goh Nellie* at [53]:

> …a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these

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> enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.

36 One consideration is whether relitigation of an issue would result in a party being "twice vexed in the same matter" (*Hunter*, quoted in *Goh Nellie* at [52]).

37 The analysis of the extended doctrine of *res judicata* in *Goh Nellie* was approved by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [104], and *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 ("*Andy Lim*") at [38].

38 In *Andy Lim* at [44], the court added that:

> …the common thread linking the decisions relating to the doctrine of abuse of process is the courts' concern with managing and preventing multiplicity of litigation so as to ensure that justice is achieved for all. In our judgment, the rule in *Henderson* is applicable where some connection can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue. There is no reason in principle why the rule in Henderson ought to be confined only to repeated claims by the same plaintiff or to repeated claims against the same defendant.

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The extended doctrine of res judicata in relation to prior arbitration proceedings

39 Court proceedings following a prior arbitration (where there is no identity of parties) may be an abuse of process under the extended doctrine of *res judicata*. That has been accepted in England (*Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646 ("*Michael Wilson*") at [67], *Arts & Antiques Ltd v Richards & Ors* [2013] EWHC 3361 (Comm) ("*Arts & Antiques*") at [23]), and in Singapore (*AKN and another v ALC and others and other appeals* [2016] 1 SLR 996 at [57]–[59]; *Cachet Multi Strategy Fund SPC on behalf of Cachet Special Opportunities SP v Feng Shi and others* [2023] SGHCR 16 at [25]–[33]). (The extended doctrine of *res judicata* does not, of course, preclude a party from legitimately seeking to set-aside, or to resist enforcement of, an arbitral award: *BAZ v BBA* [2020] 5 SLR 226 at [61]–[66].)

40 In *Michael Wilson* (at [67]) the court said, "[t]here is no "hard edged" rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process. The court is concerned with an abuse of its *own* process; and there are abundant references in the authorities to the dangers of setting limits and fixing categories of circumstances in which the court has a duty to act so as to prevent an abuse of process". On the facts of that case, however, the Court of Appeal reversed the High Court's finding of abuse of process – one key consideration being that the claimant had sought to join the defendant to the earlier arbitration, but the defendant had refused to be joined and so the court was the only forum in which the claimant could seek relief against the defendant (see [76]–[95] of the decision).

41 While the appeal in *Michael Wilson* was pending, the English High Court also accepted in *Arts & Antiques Ltd v Richards & Ors* [2013] EWHC

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3361 (Comm) ("*Arts & Antiques*") at [23] that "abuse of process may be relied upon where the earlier decision was that of an arbitral tribunal rather than a court and that arbitration involved a different party." The decision in *Arts & Antiques* was approved by the English Court of Appeal in *Michael Wilson* at [66].

42 In *Arts & Antiques*, the claimant ("A&A") was a jeweller that had made claims against its insurers Zurich, in respect of a robbery. In an arbitration between A&A and Zurich, A&A's claim under the policy was dismissed on the basis that A&A had failed to satisfy Condition Precedent 2 ("CP2") under the insurance policy. The claimant's challenge to the arbitration awards against it failed. The claimant, however, also sued the insurance brokers Towergate, the individual Towergate broker Mr Richards, and Zurich on the basis that the brokers were Zurich's agents.

43 The court struck out, as an abuse of process, all of A&A's claims other than its claim against Towergate for negligence on the basis that it was not properly advised as to the effect of CP2. A&A had raised claims in the suit on the basis that the policy did not contain CP2, after having lost in the arbitration against Zurich with the arbitrator finding that the policy *did* contain CP2, which A&A had not satisfied.

44 The court concluded that Towergate and Mr Richards could rely on the outcome of the arbitration between A&A and Zurich (although Towergate and Mr Richards were not parties to that) to establish that it was an abuse of process for A&A to relitigate the issue of whether the policy contained CP2. The court stated at [46]:

> … For the issue to be relitigated in this court involves a collateral attack on the Arbitrator's final and binding decision.

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> Further, that decision relates to the terms of the contract as between A&A and Zurich, which have been determined in accordance with the agreed contractual machinery, namely by arbitration. In all the circumstances, I conclude that it would bring the administration of justice into disrepute, and would be oppressive and unfair on Towergate and Mr Richards, for A&A to be allowed to fight the issue of whether or not the contract contained CP2 all over again. It would accordingly be an abuse of process.

45 In arriving at the conclusion, the court in *Arts & Antiques* at [20]–[22] relied on *Taylor Walton (A Firm) v David Eric Laing* [2007] EWCA Vic 1146 ("*Taylor Walton v Laing*"). In that case, Mr Laing had sued his solicitors in negligence about the drafting of certain agreements. Mr Laing's case depended on him proving that the agreements were in the terms alleged by him, but in earlier proceedings between him and the other party to the agreement, the court had decided to the contrary. The English Court of Appeal held that it was an abuse of process to seek to relitigate that decision in the further proceedings Mr Laing brought against his solicitors.

46 So long as the later proceedings would relitigate an *essential issue* decided in the earlier proceedings (*Andy Lim* at [44]), the later proceedings might be an abuse of process even if they involve a different *cause of action* from that in the earlier proceedings (as in *Taylor Walton v Laing* – a claim for solicitor's negligence as compared to a claim between contract counterparties), or indeed different types of proceedings (as in *Hunter* – criminal proceedings followed by civil proceedings).

47 With that, I turn to consider whether the present suit is an abuse of process.

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The suit was an abuse of process

48 There are four reasons for my conclusion that the present suit should be dismissed as an abuse of process. First, the present suit constitutes a collateral attack against prior decisions: the tribunal's decision that the Market Benchmarks should be based on Phoenix's reports, the court decisions upholding that, and the tribunal's dismissal of the Seller's Corruption Application ([49]–[61]). Second, the present suit relies on largely the same material that was put before the tribunal ([62]–[70]). Third, and to the extent that new material is sought to be relied on now, the belated reliance on new material is unmeritorious ([71]–[89]). Fourth, allowing the present suit could cause the Buyer to be "twice vexed in the same matter" ([90]–[91]).

The present suit is a collateral attack against prior decisions

49 First, the suit is a collateral attack against prior decisions on the use of benchmarks from Phoenix's reports as the Market Benchmarks to determine the Final Valuation of the Company.

50 The dispute over the Market Benchmarks was a contractual issue between the Buyer and the Seller; they had agreed to resolve that dispute by arbitration, and that dispute was resolved by the First Partial Award. The Seller's application to set aside the First Partial Award was dismissed, and the Seller's appeal against that was dismissed as well.

51 In the present suit, the Seller contends that the Market Benchmarks should be those put forward by the Seller's expert, Falcon (which the tribunal had rejected), instead of the P50 benchmarks in Phoenix's reports (which the tribunal had accepted).

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52 This is a collateral attack:

(a) on the First Partial Award which decided that the P50 benchmarks in the Phoenix's reports should be used as the Market Benchmarks;

(b) on the High Court and Court of Appeal decisions rejecting the Seller's application to set aside the First Partial Award – having dismissed the Seller's setting-application, the court is now asked to find that the correct Market Benchmarks are not those determined by the tribunal, but other benchmarks); and

(c) on the Seller's Corruption Application, which the tribunal dismissed, in that the tribunal had decided that the extended doctrine of *res judicata* barred the Seller from continuing to attack Phoenix's independence after that point had been decided against him in the First Partial Award.

53 In considering whether a collateral attack on an earlier decision is an abuse of process, the nature of that earlier decision is relevant. For instance, a collateral attack on a criminal conviction (by a subsequent civil case seeking to prove that a criminal conviction was wrong) would be an abuse of process. As the Court of Appeal stated in *Chong Yeo and Partners and another v Guan Ming Hardware and Engineering Pte Ltd* [1997] 2 SLR(R) 30 ("*Chong Yeo*") at [52]:

> … The real concern then is to ensure that criminal convictions are challenged in the proper forum: because of the interests of the state, attacks on such convictions should only be made as part of the criminal trial process. It would be invidious if the conviction of a criminal were to be found by a civil case to have resulted from the negligence of his advocate and solicitor, for it follows then that the conviction was wrong. A wrong conviction ought not to stand at all.

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54 A party who has been convicted thus cannot sue his lawyer for negligence, seeking to prove that he should not have been convicted (*Chong Yeo* at [55]): "[a] claim in negligence against an advocate and solicitor is not barred save where that claim is against the conduct of a criminal case; in such a case, the bar arises not because of an immunity, but because the action is an abuse of the court process."

55 Whether a collateral attack on a prior decision in a *civil* case amounts to an abuse of process depends on whether relitigation would be unjust in all the circumstances of the case: *Andy Lim* at [44], *Goh Nellie* at [53].

56 In evaluating this, the nature of the prior decision is relevant:

(a) if the earlier decision involved the necessary and proper parties for the resolution of the issue in question, relitigation of that issue in subsequent proceedings would more likely be an abuse of process; but

(b) if one or more of the necessary and proper parties was absent from the earlier decision, subsequent litigation against the absent parties would less likely be an abuse of process.

57 An example of category (a) above is where a *contractual* issue has been decided in earlier proceedings between the contracting parties, and the losing party then seeks to relitigate that issue against other parties, such as in:

(a) *Arts & Antiques* (whether the insurance policy between A&A and Zurich contained a certain condition precedent); and

(b) *Taylor Walton v Laing* (what were the terms of the agreements between Mr Laing and his contract counterparty).

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58 An example of category (b) above is where a *proprietary* issue has been decided in proceedings that do not involve all of the parties who potentially have an interest in the subject property. That was the case in *Michael Wilson*, in relation to the issue of beneficial ownership of the Max shares (which were held by Eagle Point Investments Ltd ("EPIL")). There, the earlier proceedings were an arbitration between the claimant Michael Wilson and one Mr Emmott, its director and employee, in which Michael Wilson claimed that the Max shares were bribes Mr Emmott had received in breach of duties owed to Michael Wilson, and so Michael Wilson were entitled to the shares. However, the other party who might potentially own the shares was Mr Sinclair, and he was not a party to the arbitration. Michael Wilson had invited Mr Sinclair to join in the arbitration so that the issue of beneficial ownership of the Max shares could conclusively be determined in a way binding on Michael Wilson, Mr Emmott, and Mr Sinclair, but Mr Sinclair had refused to join in the arbitration. In those circumstances, the English Court of Appeal held that although Michael Wilson had lost the arbitration against Mr Emmott (with the tribunal finding that the shares belonged to Mr Sinclair), Michael Wilson's subsequent suit against Mr Sinclair for the shares was *not* an abuse of process.

59 Whilst the issue of breach of duty as between Michael Wilson and Mr Emmott was properly resolved between them in arbitration, and the subsequent proceedings between Michael Wilson and Mr Sinclair would revisit that issue, the ultimate issue of ownership of the shares was still a proprietary one properly resolved between the two parties claiming the shares: Michael Wilson and Mr Sinclair.

60 In the present case, the issue of the appropriate Market Benchmarks to use in determining the Final Valuation of the Company, was a contractual issue as between the Buyer and the Seller, like the contractual issues in *Arts &*

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Antiques, and *Taylor Walton & Laing*. As in those cases, the necessary and proper parties for the resolution of the issue (*ie*, the contracting parties) were parties to the earlier decision. Further, as in *Arts & Antiques*, the contracting parties had agreed that their contractual issues would be resolved in arbitration, and that duly took place. Moreover, the Seller did not seek to join Phoenix to his arbitration with the Buyer (unlike the claimant in *Michael Wilson*, who had sought such joinder).

61 By the present suit, the Seller now seeks to relitigate the issue of the appropriate Market Benchmarks to use in determining the Final Valuation of the Company, mounting a collateral attack against the tribunal's decision against him on that issue. That tends to make the suit an abuse of process, like the subsequent proceedings in *Arts & Antiques*, and *Taylor Walton & Laing*.

The present suit relies on largely the same material that was before the tribunal

62 Second, not only does the Seller attack the tribunal's decision on the Market Benchmarks, but he also does so largely on the same material that was before the tribunal (see *Michael Wilson* at [22]–[29]).

63 In the present suit, the Seller takes issue with Phoenix's independence (by the COI Declaration Claim), the circumstances of Phoenix's appointment (by the Appointment Claim), and flaws in Phoenix's reports (by the Flawed Reports Claim). The same matters: Phoenix's independence, the circumstances of its appointment, and alleged flaws in its reports, were raised, considered, and decided upon by the tribunal.

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64 On Phoenix's independence:

(a) the Seller said in his 2nd witness statement in the arbitration that the fact that Phoenix and the Seller's insurance brokers were part of the same group of companies, "casts doubt as to [Phoenix's] ability to be independent and impartial;[33]

(b) the Seller's counsel cross-examined the Buyer's witness Mr H on the "significant project in progress" mentioned in Mr T's 29 September 2016 email, but Mr H said he was not aware of what that project was;[34]

65 On Phoenix's appointment:

(a) the Seller in his 1st witness statement in the arbitration cited Phoenix's 20 August 2019 email (the subject of the Appointment Claim) to say "[i]t is clear from this that [Phoenix] was unaware that they owed any duty or responsibility to me. In the circumstances, a report provided by [Phoenix] is suspect."[35]

(b) The Seller's Opening Statement in the arbitration states: "There are several unanswered questions surrounding the appointment of [Phoenix], including what instructions were provided by the Respondent to [Phoenix] (which have yet to be fully disclosed) … [Phoenix's] statement that it was only appointed by the Respondent further casts doubt as to the independence of Phoenix as a human resource consultant

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33 4-JCB at p 2103, [13(c)].

34 4-JCB at pp 2174–2175.

35 4-JCB at p 2029, [226].

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appointed under the SPA. Phoenix was supposed to act as an independent expert for both parties, but is essentially unaware that it owes any duty to the Claimant."[36]

(c) In the Seller's Oral Opening Submissions, his counsel stated:

> … [Phoenix] is supposed to be an independent human resource consultant acting as an expert…[but] [Phoenix] did not actually act as a joint expert for both parties… that was not the way an independent human resource consultant – and they were seeking [the Buyer's] approval on this, so we say that is not how a joint expert should have acted. So, for all these reasons, the [Phoenix] report does not fall within schedule 10.
>
> But what really puts it all conclusively beyond doubt is that [Phoenix's] own position when they wrote to my firm this year…[reference was then made to Phoenix's 20 August 2019 email].
>
> So they are actually saying they don't owe any duty to [the Seller], the agreement is with [the Buyer]. So we feel that puts it beyond doubt.[37]

(d) In the Seller's Post-Hearing Submissions in the arbitration, the Seller referred to Phoenix's 20 August 2019 email as part of his submission that "there are good reasons to doubt the independence of [Phoenix]", and that the Buyer was not aware of Phoenix's lack of independence until later 2019 when (among other things) Phoenix sent its 20 August 2019 email.[38]

66 On the alleged flaws in Phoenix's reports, in the arbitration the Seller complained about the same matters that he is suing Phoenix for in this suit:

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36 Defendant's Bundle of Documents Volume 1 dated 12 January 2024 ("**1-DB**") at p 275, [34(d)].

37 1-DB at pp 309–311.

38 2-DB at pp 38–40, [100], [102]–[105].

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(a) that Phoenix's reports were incomplete, in particular, that the data was not regressed (the Seller's Opening Statement at [34(c)],[39] the Seller's Oral Opening Submissions,[40] the Seller's Post-Hearing Submissions at [95(a)], [127], [131],[41] the Seller's Responsive Post-Hearing Submissions at [45], [58], [66]);[42]

(b) that Phoenix provided a range of benchmarks rather than a single benchmark for each KMR (the Seller's Oral Opening Submissions[43], the Seller's Post-Hearing Submissions at [88]–[94], [129],[44] the Seller's Responsive Post-Hearing Submissions at [64], [83]).[45]

(c) that Phoenix had failed to provide a market benchmark for the Country "X" Managing Director position for the "widget" industry (the Seller's Post-Hearing Submissions at [129]).[46]

67 In the arbitration, the Seller used the circumstances of Phoenix's appointment (and, in particular, what Phoenix said in its 20 August 2019 email about having been appointed by the Buyer) to support its contention that Phoenix lacked independence. The Seller then used its contentions about Phoenix's lack of independence, and about flaws in Phoenix's report, to contend

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39 1-DB at p 275.

40 1-DB at pp 306–309.

41 2-DB at pp 35, 47, 48.

42 2-DB at pp 215, 218, 220–221.

43 1-DB at pp 306–309.

44 2-DB at pp 33–35, 47.

45 2-DB at pp 219, 226.

46 2-DB at p 47.

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that Phoenix's reports were not final and binding as stipulated in the SPA. These contentions failed.

68 The tribunal did not accept the Seller's contention that Phoenix lacked independence. As stated at [55] of the First Partial Award:

> The Tribunal wishes to add that in the absence of [Phoenix] being called to give evidence, including of the questions that the [Seller's] expert would have liked [Phoenix] to answer, the Tribunal is not in a position to determine if there was any bias or manifest error on [Phoenix's] part.[47]

69 In his setting-aside application, the Seller contended that the tribunal had failed to consider his arguments about Phoenix's lack of independence. That was rejected by the court (see *CIX v CIY* at [47]–[48]): in saying that the tribunal was not in a position to determine if there was any bias on Phoenix's part, the tribunal indicated that he was aware that the Seller had contended that Phoenix lacked independence. But the tribunal did not accept the Seller's contentions. Thus, the tribunal held at [53] of the First Partial Award that:

> the [Phoenix] reports have to provide the basis from which the appropriate Market Benchmarks should be derived given the [p]arties' agreement that [Phoenix] (and not someone else) would be appointed as the independent expert.[48]

70 In similar vein, the tribunal did not accept the Seller's contention that because Phoenix's reports were flawed, the Seller was not bound by them. That aspect of the First Partial Award was also challenged by the Seller in his setting-aside application, and that challenge similarly failed: *CIX v CIY* at [47]–[50].

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47 4-JCB at p 2295.

48 4-JCB at pp 2294–2295.

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The Seller's purported reliance on new material in the present suit is unmeritorious

71 Third, insofar as the Seller says that there is new material in the suit that was not in the arbitration, that does not help him if it was material that he ought reasonably to have put before the tribunal (see *Goh Nellie* at [53]).

72 There are three aspects to this point:

(a) the Seller seeks to resile from positions that he took in the arbitration and his failed application to set aside the First Partial Award;

(b) the Seller ought reasonably to have sought and adduced further evidence in the arbitration to support his contentions; and

(c) the further evidence which the Seller put forward in this suit does not materially change the complexion of the case: *Phosphate Sewage v Molleson* (1879) 4 App Cas 801 at 814 ("*Phosphate Sewage*")

(1) Shifts in the Seller's positions

73 Some contentions in the suit were not made in the arbitration leading up to the First Partial Award, because on those points the Seller had taken the opposite position in the arbitration. In particular:

(a) In the arbitration, the Seller did not say that Phoenix's 20 August 2019 email was false in stating that Phoenix had been appointed by the Buyer. Instead, the Seller put forward that statement by Phoenix to support his contention in the arbitration that Phoenix lacked independence. But in this suit the Seller now says that Phoenix's 20 August 2019 email is a misrepresentation.

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(b) In the arbitration, the Seller did not say that Phoenix's reports should be disregarded (and the tribunal duly noted this in the First Partial Award – see [11] above). The Seller continued to maintain this position in the setting-aside application. The Seller said, "I should emphasise that it is not my position that the [Phoenix] [r]eports should be disregarded. Rather, expert evidence is necessary to assist parties with the determination of the appropriate market benchmark". This was noted by the court in *CIX v CIY* at [49]. But in the present suit, the Seller's claim is premised on disregarding Phoenix's reports – he says that Phoenix should never have been appointed, and that another expert would have been appointed instead, coming up with its own report and its own benchmarks.

74 These shifts in the Seller's positions strengthen the case on abuse of process – not only does the Seller seek to relitigate the issue of the Market Benchmarks, but he also seeks to resile from positions he took in the arbitration; and there are no good reasons for the Seller's changes of position.

75 Regarding Phoenix's 20 August 2019 email – after the First Partial Award had gone against him on 20 June 2020, the Seller's solicitors sent a demand letter to Phoenix on 16 June 2021 asserting (among other things) that Phoenix had been engaged *by the Buyer and the Seller jointly*.[49] This was an about turn from the position taken by the Seller in the arbitration, where he referred to Phoenix's statement that it had been engaged by *the Buyer solely*, to contend that Phoenix lacked independence. At the time of that demand, the Seller did not have any contemporaneous documents relating to Phoenix's appointment besides what he had at the time of the arbitration. The Buyer then

[49] 3-JCB at pp 1953–1955.

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compounded the position when he sued Phoenix, alleging that Phoenix's statement that it had been engaged by the Buyer solely, was a fraudulent misrepresentation; but the Buyer still had no further contemporaneous documents relating to Phoenix's appointment, indeed he had no further evidence to support a charge of fraud.

76 Regarding whether Phoenix's reports should be disregarded – the Seller challenged Phoenix's independence in the arbitration, yet he did not say that Phoenix's reports should be disregarded for its alleged lack of independence. This was first suggested in the Corruption Application, when the Seller asserted that it was unsafe to rely on Phoenix's reports because of his allegations of corruption. However, he had no contemporaneous documents relating to dealings between the Buyer and Phoenix, besides what he had at the time of the arbitration. He then sued Phoenix claiming damages on the basis that Phoenix should never have been appointed, but when he started the suit the Buyer still had no further contemporaneous documents relating to Phoenix's independence.

77 I can only conclude that the Seller's changes of position were purely a tactic: to try something different from what had not worked earlier. His reliance on Phoenix's 20 August 2019 email to say that Phoenix lacked independence did not find favour with the Tribunal, so the Seller turned around and alleged that the email was fraudulent. His reliance on Phoenix's reports as evidence that the Tribunal could consider in the arbitration did not work, so the Seller turned around and alleged that those reports should be disregarded. All this is unmeritorious conduct.

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(2) Further evidence in this suit ought reasonably to have been adduced in the arbitration

78 The Seller contends that in this suit there is evidence that was not in the arbitration. Indeed there was, such as contemporaneous documents passing between Phoenix and the Buyer, evidence from Phoenix, and evidence from Mr T who had sent the email about the "significant project in process". But all of this ought reasonably to have been sought by the Seller in the arbitration if he had wanted to pursue this aspect. However, the Seller did not seek production of contemporaneous documents from Phoenix or the Buyer, he did not subpoena Phoenix to give evidence, and he did not subpoena Mr T to give evidence.

79 The Seller's failure to pursue the point evidentially, is even more inexcusable when set in context. By the COI Declaration, Phoenix had represented that (among other things): "[a]s of at the date of [the COI Declaration, *ie* 20 October 2016], [it had] no substantial business dealings with [the Buyer] or its related corporations or [the Seller]".[50]

80 In the arbitration and in this suit, the Seller challenged that by reference to an email dated 29 September 2016 from the Buyer's representative "Mr T" to Phoenix, where Mr T mentioned that the Seller had a "significant project in progress with [Phoenix]".

81 However, even if the Buyer had a significant project in progress with Phoenix as at the date of Mr T's email, 29 September 2016, it did not follow that that project was still in progress as at the date of the COI Declaration, *ie*, 20 October 2016, which was three weeks later. The Seller took no steps to investigate this, for example by seeking documents from the Buyer and/or

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[50] 1-JCB at p 239.

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Phoenix, or by subpoenaing Mr T or Phoenix to give evidence. The Seller simply asked another of the Buyer's representatives, Mr H (the Buyer's witness in the arbitration), about the project referred to in Mr T's email, but after Mr H said he was not aware of what that project was, the Seller did not pursue the matter further evidentially. Instead, the Seller simply submitted that the 29 September 2016 email showed that Phoenix was not independent, but the tribunal did not accept this. As noted above at [13], the tribunal held that in the absence of Phoenix being called to give evidence, he was not in a position to determine if there was bias or manifest error on Phoenix's part.

82 The Seller's decision not to call Phoenix as a witness was held against him by the tribunal, after submissions had been made on that. For instance, in his post-hearing submissions in the arbitration, the Seller submitted: "[t]he [Buyer's] complaint that the [Seller] had '*decided not to call [Phoenix]*' and should '*stand or fall by that decision as far as [Phoenix's] non-presence here*' is disingenuous … if the [Buyer] intended to rely solely on the [Phoenix] Reports, it ought to have called [Phoenix] as an expert witness to provide context to and explanations for its reports".[51] Further, in his responsive post-hearing submissions in the arbitration, the Seller submitted, "[i]t is ridiculous for the [Buyer] to suggest that the [Seller] must subpoena a representative of Phoenix to give evidence on his behalf".[52]

83 In contending that he should be allowed to attack Phoenix's independence in this suit, despite deciding not to call Phoenix as a witness in the arbitration, the Seller mounts a further collateral attack on the First Partial

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51 Claimant's Post-Hearing Submissions at [105] in 4-JCB at p 2224.

52 Claimant's Responsive Post-Hearing Submissions at [81(c)] in 4-JCB at p 2257.

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Award: the tribunal had relied on the Buyer's decision not to call Phoenix, as a basis for rejecting the Buyer's allegation that Phoenix was not independent.

84 The Seller attempted to attack Phoenix's independence even after the First Partial Award had gone against him, by making allegations of corruption (in the Corruption Application), the tribunal rebuffed that on the basis that the Claimant was barred by the extended doctrine of *res judicata* from pursuing the point further. The tribunal expressly stated that "any such allegation [of corruption] could and ought reasonably to have been raised at the evidentiary hearing before the Partial Award was issued."

85 Insofar as the Seller seeks to justify his challenge to Phoenix's independence in the suit based on matters he did not raise in the arbitration, that is a collateral attack on the tribunal's decision in the Corruption Application that any allegations about Phoenix's independence ought reasonably to have been raised in the arbitration before the First Partial Award was issued.

86 The excuses the Seller gives for not seeking further evidence for the arbitration, are unmeritorious. The Seller says that the Buyer had taken the position that Phoenix was a "non-speaking" expert, but that misses the point. A non-speaking expert report is simply one for which the expert is not obliged to provide reasons: see, *eg*, *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*") at [44]–[47]. If the Seller called Phoenix as a witness, it would not be to elicit Phoenix's *reasons* for what was stated in its reports, but rather to challenge Phoenix's independence and whether Phoenix had carried out its instructions: see, *eg*, *Evergreat* at [41]. Calling Phoenix as a witness on those matters would not be inconsistent with Phoenix's reports being "non-speaking" reports. Indeed, the tribunal decided that in the absence of Phoenix being called to give evidence,

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he was not in a position to determine if there was any bias or manifest error on Phoenix's part. This was fatal to the Seller's contentions about Phoenix's alleged lack of independence, and about manifest error in Phoenix's reports, the Seller also says that Phoenix had taken the view that it was engaged solely by the Buyer and was not obliged to and was not prepared to make any comments.[53] It is, however, common for subpoenas to be issued to persons who do not wish to testify.

(3) The further evidence in this suit is not of a new "fact which entirely changes the aspect of the case"

87 Third, not only must the Seller have acted with reasonable diligence in obtaining evidence for the arbitration, if he wishes to relitigate the decision(s) against him he must point to a (new) "fact which entirely changes the aspect of the case": *Phosphate Sewage* at 814 per Earl Cains, LC, with whom the other law lords agreed. There is no such evidence here.

88 The Seller says that in the course of the suit he has uncovered evidence that there were three projects between the Buyer and Phoenix, one of which had a value of over $300,000 but was not disclosed in the COI Declaration.[54] However, at the time of the arbitration the Seller already had the 29 September 2016 mentioning a "significant project in progress", but he did not press to find out details of that project, or other projects between the Buyer and Phoenix. The documents obtained in the course of the suit flesh out details of the projects, but this is not something that "entirely changes the aspect of the case".

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53 Plaintiff's Closing Submissions dated 1 March 2024 ("**PCS**") at [41].

54 PCS at [38].

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89 Similarly, the Seller says that in the suit Phoenix admitted to deficiencies in its reports,[55] but in the arbitration the Seller already alleged that there were deficiencies in its reports, and if the Seller had wanted to elicit evidence about that from Phoenix, the Seller could and should have called Phoenix to give evidence. On this, too, there is nothing new that "entirely changes the aspect of the case."

Allowing the present suit could cause the Buyer to be "twice vexed in the same matter"

90 Fourth, allowing the Seller to relitigate issues that had already been decided against him, could lead to a party being "twice vexed in the same matter": see [36]. That party is the Buyer. In respect of the Seller's tortious claims against Phoenix, the Buyer would be a joint tortfeasor or otherwise jointly liable for the damage suffered by the Seller:

(a) On the Seller's case, his misrepresentation claims against Phoenix are for matters where Phoenix and the Buyer knew what the truth was (regarding Phoenix's independence and whether it was solely or jointly engaged), but Phoenix and the Buyer misrepresented the position to the Seller (and moreover the Buyer misled the Tribunal, as the Seller alleged in the Corruption Application).

(b) The Seller's claims about Phoenix's negligently flawed reports relate to reports that Phoenix had sent to the Buyer in draft; the Buyer did not require Phoenix to revise the draft reports to correct the supposed flaws, but proceeded to rely on Phoenix's reports in the arbitration as being contractually final and binding on the parties. Indeed, the Buyer

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55 PCS at [38].

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in a 16 August 2019 letter from its solicitors stated that Phoenix's reports were "clear and fit for purpose".[56]

91 If Phoenix were held liable to the Seller on these claims, Phoenix could seek a contribution from the Buyer pursuant to ss 15 and 16 of the Civil Law Act 1909 (2020 Rev Ed) on the premise that the Buyer is liable in respect of the same damage jointly with Phoenix, and that the court should order such contribution as is just and equitable having regard to the extent of the Buyer's responsibility for the damage in question. The Buyer would then find itself having to defend against allegations that it was well entitled to think it had already defeated in the arbitration against the Seller.

Conclusion on abuse of process

92 For the above reasons, I found the Seller's suit against Phoenix to be an abuse of process. Indeed, the Seller's conduct in this case is more egregious than that of the claimants in *Taylor Walton v Laing* and *Arts & Antiques*, where relitigation was likewise found to be an abuse of process.

Substantive merits

Misrepresentation

Innocent misrepresentation

93 The Seller claimed damages for innocent misrepresentation by Phoenix, but there is no such cause of action, this claim was not pursued in closing submissions, and this claim must be dismissed.

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[56] 3-JCB at p 1942, [3].

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Misrepresentation Act

94 The Seller claimed damages against Phoenix under the Misrepresentation Act, but section 2 of the Act would only apply if he had entered into a contract (with the representor). That is not his case, those are not the facts, this claim was not pursued in closing submissions, and this claim must be dismissed.

Fraudulent misrepresentation

95 For the Seller to succeed, he would need to prove: (a) a false representation, (b) made with the knowledge that it was false or in the absence of a genuine belief that it was true, (c) made intending that he should act on them, (d) that he relied on the representation, and (e) that he suffered damage in relying on the representation: *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14].

(1) COI Declaration Claim

96 The Seller relies on the 29 September 2016 email which refers to the Buyer having a "significant project in process with [Phoenix]" as showing that "there was an ongoing business / commercial relationship between [the Buyer] and [Phoenix] as at 29 September 2016."[57] From that, the Seller extrapolates that as at the date of the COI Declaration, *ie*, 20 October 2016, Phoenix had falsely (and fraudulently or negligently) represented in the COI Declaration that it had no substantial business dealings with the Buyer, and there was no conflict of interest in respect of its appointment.[58]

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57 SOC at [13]–[14].

58 SOC at [41].

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97 The "significant project in progress" that Mr T had referred to in his 29 September 2016 email was a project for the job architecture of the Buyer. Mr T was not sure when that project ended,[59] and Mr T left the Buyer's employ on 12 October 2016, before the COI Declaration was made on 20 October 2016. Contemporaneous documentary evidence shows that the project that Mr T's email referred to had ended in February 2016. That project was thus not relevant to the representation about "substantial business dealings" "as at the date hereof", *ie*, the date of the COI Declaration, 20 October 2016. The Seller submitted that "as at the date hereof" covers all substantial business dealings "as at and before the date".[60] That is incorrect: "as at the date hereof" does not mean "as at the date hereof *and before the date*" as the seller suggests. Ironically, when the Seller in his pleadings referred to the COI Declaration, he recognised that "as at the date hereof" simply meant "as at the date of [the COI Declaration, i.e. 20 October 2016]",[61] and not as at that date and at any time in the past. The Seller's pleadings also used the phrase "as at 29 September 2016" with reference to the 29 September 2016 email, to mean that there was a "significant project in progress" *as at that date*, and not "as at that date and before that date".

98 Although the Seller's pleadings were about the "significant project in process" mentioned in Mr T's 29 September 2016 email (for over $300,000), in the Seller's closing submissions he also relied on two other projects between the Buyer and Phoenix: an executive compensation review in August 2016 and an extension of that in November 2016. Phoenix's position is that there was only one project between it and the Seller as at the date of the COI Declaration,

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59 Official Transcript of 19 January 2024 ("**NE Day 3**") at p 103, ln 13–20.

60 PCS at [55].

61 SOC at [21(c)].

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namely the executive compensation review, for fees of $128,000 which Ms S (who procured the issuance of the COI Declaration) did not consider substantial as she had been involved in projects of more than $500,000.[62]

99 The Buyer's pleaded case is founded on the job architecture project referred to in Mr T's 29 September 2016 email (which had ended some 8 months before the COI Declaration). Accordingly, it is unnecessary for me to decide whether the executive compensation review for $128,000 in fees (which is what was in progress as at the date of the COI Declaration) was a *substantial* business dealing rendering the "no substantial business dealings" representation in the COI Declaration false.

100 As for the "no conflict of interest" representation, on the evidence that was not false even if the executive compensation review were a substantial business dealing. I accept Phoenix's evidence that its engagement was a pure data extraction exercise,[63] and as such, whatever business dealings it had with the party engaging it would not have affected the contents of the reports. Phoenix knew that it was being appointed "for purposes of benchmarking of key management roles" (as stated in the COI Declaration), but it was not provided with a copy of the SPA, and it did not know that its reports would be used to derive Market Benchmarks for KMRs and thus affect the Final Valuation of a company that the Seller was selling to the Buyer.[64] In the present case, higher benchmarks would be to the Seller's disadvantage (because the Final Valuation, and thus what the Seller would receive from the sale of the Company would be lower). But Phoenix did not know that. The "benchmarking of key management

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62 Official Transcript of 23 January 2024 at p 83 ln 15 – p 84 ln 10.

63 Defendant's Closing Submissions dated 1 March 2024 ("**DCS**") at [60].

64 DCS at [51].

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roles" could equally have covered a hiring rather than "sale of company" scenario, such as where the Buyer was looking to hire the Seller and persons associated with him to fill KMRs (in which case higher benchmarks would be to the Seller's advantage). Based on what Phoenix knew – that it was being appointed for "benchmarking of key management roles" – Phoenix would not know *how* to favour the Seller in its reports, if it even wanted to do so.

101 I further find that the Seller has failed in any event to prove the "no conflict of interest" representation was fraudulently made – Phoenix honestly believed that it was not in a position of conflict of interest.

102 The Seller pleads that Phoenix failed to act independently and impartially in the discharge of its duties as human resources consultant, but there is no evidence of that whatsoever. Indeed, the thrust of the Seller's case is more that Phoenix *was not in a position* of independence and impartiality (because of the past and present business relationship with the Buyer) rather than that Phoenix *failed to act* independently and impartially in some way.

103 I go on to consider whether, in any event, the Seller relied on the representations in the COI Declaration. The Seller says he relied on them in agreeing to the appointment of Phoenix, suffering damage as a result. I accept that if Phoenix had said it had substantial business dealings with the Buyer, or was in a position of conflict of interest, the Seller would not have agreed to the appointment of Phoenix.

104 What then? The Seller says that his expert, Falcon, would have been appointed independent expert instead of Phoenix, and that Falcon would have put forward benchmarks leading to a more favourable Final Valuation of the Company.

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105 Falcon was the other potential expert mentioned in the discussions between the Buyer and the Seller preceding Phoenix's appointment. However, I do not accept that if the parties did not agree on Phoenix, Falcon would have been appointed instead. The contemporary documents show that the Buyer did not want to appoint Falcon given its limited database and lack of data, especially for country "X".[65] In any event, Falcon's report in the arbitration bore out these reservations: for country "X", Falcon simply adopted Phoenix's P50 benchmark. If the parties did not agree on Phoenix or Falcon, another expert would have been appointed instead. But there is no evidence what benchmarks that other expert would have put forward.

106 Even if Falcon had been appointed as the independent expert, it does not follow that its report in the arbitration reflects the benchmarks it would have put forward, in the "but for" world where Phoenix had never been appointed. There is no evidence as to what report Falcon would have come up with, if Phoenix had never been appointed. Falcon's report in the arbitration consists of comments on Phoenix's reports, some publicly available data Falcon had added, and reliance on Phoenix's P50 benchmark for country "X". Indeed, Falcon said that its report "focuses on the application of market data provided by [Phoenix]".[66]

107 If one were to strip out from Falcon's report all the references to Phoenix's reports, one cannot tell what (if anything) Falcon would have used in place of Phoenix's data, and that is most pointed in relation to country "X" (where Falcon simply used Phoenix's benchmark).

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65 See 2-JCB at p 780.

66 4-JCB at p 2035, [1.2].

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108 The Seller acknowledges that Falcon "did not have data for [country "X"] and had to rely on [Phoenix's] data", but says "this is besides the point".[67] The Seller says that Phoenix's report merely serves as a reference showing that an alternative HR consultant would have and could have produced complete reports, different from Phoenix's reports; and if Phoenix had not been engaged, the Seller would not have been bound by Phoenix's reports. All that still begs the questions: if Phoenix had not been appointed, who would have been appointed; and what would the Market Benchmarks then have been?

109 The Seller maintains that Falcon's report constitutes evidence of what a non-deficient report from a HC consultant would have contained, which the court should accept. But that ducks the issue of Falcon's reliance on Phoenix's reports. On the evidence before the court, one cannot tell what benchmarks Falcon would have put forward if Phoenix had not been appointed (and so Falcon could not have drawn on the contents of Phoenix's reports), and one cannot tell what benchmarks another HR consultant would have put forward. The Seller quantifies his damages claim (in relation to the Final Valuation) based on Falcon's report, but for the above reasons that cannot be accepted.

110 Furthermore, as an expert in the arbitration, Falcon was provided with different instructions than Phoenix had been given for its engagement. In particular, the instructions to Falcon included the determination of the adjustment to PATMI,[68] whereas Phoenix never knew that its reports would be used by the Buyer and Seller to determine PATMI in the transaction between them. One cannot say what benchmarks Falcon (or another HR consultant)

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67 PCS at [79].

68 4-JCB at p 2037, [3].

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would have come up with, based on *the same* instructions that Phoenix had been given.

111 I accept that the Seller relied on the representations in the COI Declaration in agreeing to the appointment of Phoenix. However, the Seller has failed to prove what damage he has suffered as a result: he has failed to prove that Falcon would have been appointed instead; and he has failed to prove what the Market Benchmarks would have been if Falcon, or another HC consultant, had been appointed instead.

112 The remaining two components of damage claimed by the Seller are for (a) costs of his legal experts and human resources expert (*ie*, Falcon) engaged to assist with the determination of the Market Benchmark for the Key Management Roles under Phoenix's reports; and (b) $6,000 plus GST as his half-share of the cost of Phoenix's reports. He has failed to prove either of these heads.

113 On legal and expert costs, the Seller conceded that he could not recover costs of pursuing a case in the arbitration against the Buyer that he was not entitled to.[69] Indeed, it is an abuse of process for him to seek to recover the costs of his legal and expert strategy which the Tribunal had rejected. Moreover, the Seller conceded that he knew that Phoenix's reports would provide a range of figures and not a single Market Benchmark for each KMR: accordingly, the parties had to select one number from a range of numbers and might require expert assistance in that regard.[70] The Seller is not entitled to recover such costs as damages from Phoenix.

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69 Official Transcript of 18 January 2024 ("**NE Day 2**") at p 96, ln 7–10.

70 3-JCB at p 1915; NE Day 2 at p 60 ln 1–p 61 ln 10, p 74 ln 4–24.

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114 As for his half-share of the cost of Phoenix's reports, if Phoenix had not been engaged the Seller would not have had to incur that. However, on the Seller's own case another HR consultant would have been engaged instead: either Falcon or someone else. That would have come at a cost, and there is no evidence that that cost would have been less than the $12,000 plus GST which Phoenix had charged: the Seller has thus suffered no loss to speak of, comparing the cost of appointing Phoenix to the cost of appointing Falcon or someone else.

115 For the reasons set out in this section, the Seller's fraudulent misrepresentation claim in respect of the COI Declaration Claim is substantively without merit and would be dismissed in any event, if it were not an abuse of process in the first place.

(2) Appointment Claim

116 The Seller says that in Phoenix's email of 20 August 2019, Phoenix had falsely represented that it was engaged solely by the Seller to prepare its reports.

117 At trial, however, the Seller conceded that:

(a) it was true that the Services Agreement was between Phoenix and the Buyer; and

(b) there was no mention of the Seller in the Services Agreement.

118 It follows that it was not false of Phoenix to say in its 20 August 2019 email, that the Services Agreement was between Phoenix and the Buyer (*ie*, the Services Agreement), without any reference to the Seller; in other words, that Phoenix was engaged solely by the Buyer.

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119 Those concessions by the Seller are also borne out by the evidence: one sees from the Services Agreement that the contracting parties are just Phoenix and the Buyer, without any reference to the Seller. Moreover, from the contemporaneous documents there is no indication that in appointing Phoenix, the Buyer was acting as agent for the Seller, such that the Seller was also a contracting party. Indeed, the Seller was sent a draft of the Purchase Confirmation before it was finalised and signed, and he had made comments and amendments to the draft,[71] but he did not amend it to add himself as a contracting party, or to indicate that the Buyer was acting as his agent in engaging Phoenix.

120 In his own pleadings the Seller took the position that the Services Agreement was a contract between just Phoenix and the Buyer. In his further and better particulars of the statement of claim, the Seller responded to Phoenix's request for full particulars of "whom [Phoenix] was contractually obliged to provide its deliverables under the Services Agreement to", by saying "[Phoenix] was contractually obliged to provide its deliverables under the Services Agreement to [the Buyer], for work to be performed for [the Buyer] and [the Seller] and/or work to be relied on by [the Buyer] and [the Seller]".[72] In other words, the Seller did not regard himself as a contracting party under the Services Agreement: rather, he was (together with the Buyer) someone that Phoenix would be performing work for, someone who would be relying on Phoenix's work.

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71 2-JCB at pp 777–781.

72 Further and Better Particulars of the Statement of Claim dated 11 February 2022 ("**11 Feb F&BP**") at p 3, Answer [2(a)].

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121 In the same further and better particulars, the Seller responded to Phoenix's request to "state whether the Plaintiff's case is that [Phoenix's] provision of "a range of market data, ranging from P25, Average, Median, and P75 as well as across 7 different compensation levels" was in breach of [Phoenix's] deliverables under the Services Agreement", and if so to particularise "the specific contractual provisions(s) of the Services Agreement which [Phoenix] allegedly was in breach of" and "the manner in which [Phoenix] allegedly breached the contractual provision(s) of the Services Agreement". The Seller's response was: "The request for particulars is not relevant to the issues in dispute, vis-à-vis the Plaintiff and the Defendant, as the Plaintiff is not relying in the SOC on any breach of contract against the Defendant."[73] Thus, not only did the Seller not regard himself as a contracting party under the Services Agreement, but he was also not relying on any breach of the Services Agreement.

122 The Services Agreement was a contract between Phoenix and the Buyer, without reference to the Seller: this was conceded by the Seller on the stand, and in his pleadings; and it is borne out by the evidence. What Phoenix said in its 20 August 2019 email about it having been engaged solely by the Buyer, was not false. That is fatal to the Buyer's Appointment Claim, for there was no false representation to begin with (whether that is said to be fraudulent, negligent, or otherwise).

123 In any event, the Seller has failed to prove that what Phoenix said about it being solely engaged by the Buyer, was made fraudulently or negligently. From the Services Agreement and the contemporaneous documents, Phoenix

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[73] 11 Feb F&BP at pp 6–7, Request [5(c)] and Answer [5(d)].

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honestly believed that it was engaged solely by the Buyer, and it was not careless of Phoenix to say so.

124 On reliance, the Seller says that when Phoenix represented that it had been solely engaged by the Buyer, he did not believe that to be true;[74] but he went ahead and took the same position in the arbitration, using that to contend that Phoenix lacked independence. On this premise, there was no reliance by the Seller on the truth of Phoenix's representation; he was simply being opportunistic in repeating what he did not believe to be true, in the hope of some advantage in the arbitration.

125 I do not, however, believe that the Seller thought that what Phoenix said about its appointment was untrue: my conclusion is that he believed it to be true (and indeed, it was true). Thus, the Seller took no steps to assert the contrary, for instance, by informing Phoenix that the Buyer had engaged Phoenix not only on its own behalf, but as agent for the Seller as well, and so he too was a contracting party (see: [119] above).

126 In any event, it is difficult to see what loss the Seller claims to have suffered in reliance on Phoenix's representation about its appointment. He submits that he relied on Phoenix's representation (that it had solely been appointed by the Buyer) in deciding not to call Phoenix in the arbitration.[75] This, however, does not follow. If the Seller considered Phoenix's evidence to be relevant and material, he could have sought to subpoena Phoenix as a witness, whether or not Phoenix considered itself solely appointed by the Buyer, and

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74 Seller's Affidavit of Evidence-In-Chief dated 22 August 2023 at [117]; NE Day 1 at p 130 ln 23 – p 131 ln 1.

75 PCS at [89].

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whether or not Phoenix was a willing witness. In any event, the Seller's decision not to call Phoenix as a witness formed part of the Tribunal's reasoning in deciding the First Partial Award against the Buyer; and it would not be appropriate to undermine that in this suit. The Seller cannot blame his decision not to call Phoenix, on Phoenix saying it had solely been appointed by the Buyer, but even if he could, he has failed to prove how that translates into damage he suffered. The Seller only goes so far as to say that "as [Phoenix] declared themselves to be solely appointed the Plaintiff made a reasonable decision not to call [Phoenix] as a witness in the arbitration", and that he "had to proceed on the [Arbitration] and conduct his case on the basis of the Appointment Representation."[76] The Seller has failed to prove that if he had called Phoenix as a witness, the result of the First Partial Award would have been different.

127 For the reasons set out in this section, the Seller's fraudulent misrepresentation claim in respect of the Appointment Claim is substantively without merit and would be dismissed in any event, if it were not an abuse of process in the first place.

Negligent misrepresentation

128 The Seller's failure to prove his pleaded case on the falsity of the alleged misrepresentations, and his reliance on them to his detriment, have been discussed above in relation to fraudulent misrepresentation. They are no less fatal to his claim in negligent misrepresentation. I would simply add that the Seller has failed to prove his pleaded case that Phoenix acted negligently in making the alleged misrepresentations.

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[76] PCS at [89].

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Breach of duty of care

129 The Seller's final claim is that Phoenix's reports were negligently prepared, in breach of a duty of care owed to him, with the result that he suffered loss.

Duty of care

130 The first stage of the test to be applied to determine the existence of a duty of care is that of proximity; if there is a *prima facie* duty of care, the question then is whether policy considerations negate the imposition of a duty of care: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [77]–[85].

131 Phoenix contends that there was no proximity between it and the Seller (notwithstanding that it issued the COI Declaration to both the Seller and the Buyer), and that in any event policy considerations negate the imposition of a duty.[77]

132 I find that Phoenix did owe the Seller a duty of care: a duty to take reasonable care in the preparation of its reports.

133 Although Phoenix did not know specifically what the data in Phoenix's reports would be used for, and the Seller concedes this,[78] Phoenix still knew that it was being appointed human resources consultant "for purposes of benchmarking of key management roles" (as stated in the COI Declaration). Moreover, although the Buyer was Phoenix's client, Phoenix knew that the

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77 DCS at [72]–[75], [93]–[96].

78 NE Day 2 at p 16 ln 10–25.

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Seller was interested in its appointment as human resources consultant, and the reports it would produce. Not only did Phoenix issue the COI Declaration to both the Seller and the Buyer, but Phoenix was also informed by the Buyer that the Buyer was "seeking the concurrence of [the Seller] on the data requirements for the 6 roles";[79] and when Phoenix asked the Buyer to confirm certain data requirements, the Buyer replied to say that it would update the Seller and circle back to Phoenix later.[80]

134 In determining whether there is legal proximity for a finding of a duty of care, it is relevant to consider whether the representor knew what his representation would be used for – here, Phoenix knew that its reports would be used for "benchmarking of key management roles". It did not have the SPA, and it did not know that Market Benchmarks would be derived from its reports, in turn affecting the Final Valuation of a company that the Seller was selling to the Buyer – but in my view what Phoenix knew is sufficient for there to be proximity between Phoenix and the Buyer, and for a *prima facie* duty of care to arise.

135 In *Pilgrim Private Debt Fund v Asian Appraisal Company Pte Ltd* [2022] SGHC 10 ("*Pilgrim*"), the court found that the defendant valuer owed the plaintiff a duty of care, although the defendant was engaged by another party. The court found that the defendant was aware that a class of persons, including the plaintiff, would rely on the reports for "financing" (at [116]) and "corporate management" (at [179]). In the present case, Phoenix was aware that both the Buyer and the Seller would rely on its reports for "benchmarking of key management roles". In the circumstances, not only was it foreseeable that

79 3-JCB at p 1515.

80 3-JCB at p 1553.

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if Phoenix were negligent in preparing its reports, the Buyer and/or the Seller might suffer loss in using those reports for "benchmarking of key management rules", but there is also sufficient proximity for a *prima facie* duty of care.

136 I do not accept that the *prima facie* duty of care is negated by the disclaimer notice in para 1.3 of Phoenix's reports, which reads: "[t]he information and data contained in this report are for information purposes only and are not intended nor implied to be a substitute for professional advice. In no event will [Phoenix] be liable to you or to any third party for any decision made or action taken in reliance of the results obtained through the use of the information and/or data contained or provided herein."[81] Phoenix first introduced this disclaimer in the draft report provided to the Buyer, and the disclaimer was then included in the finalised Phoenix reports. By the time Phoenix belatedly introduced the disclaimer, it had already issued the COI Declaration, the Buyer and the Seller had agreed to Phoenix being appointed, and the Seller had appointed Phoenix on the terms of the Services Agreement (which did not include the disclaimer). Phoenix's inclusion of the disclaimer in its draft and finalised reports, was contractually ineffective to make it a term of the contract between Phoenix and the Buyer, and that also robs it of much, if not all, effect as a consideration negating a *prima facie* duty of care.

137 In any event, I consider that the disclaimer does not satisfy the requirement of reasonableness under the Unfair Contract Terms Act 1977. Phoenix knew that the Buyer and the Seller would be relying on its reports for "benchmarking of key management roles", and it was not reasonable of Phoenix to seek to exclude liability for "any decision made or action taken in reliance of the results obtained through the use of the information and/or data contained or

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81 Agreed Bundle of Documents Volume 7 dated 10 January 2024 at p 3845.

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provided [in Phoenix's reports]". If the disclaimer were effective, it would mean that the human resources consultant appointed for "benchmarking of key management roles" would not be liable if its reports were used for that very purpose.

Breach of duty

138 Although I have found that Phoenix owed the Seller a duty of care – to take reasonable care in preparing its reports – I find that the Seller has failed to prove that Phoenix breached that duty. In this context, it is relevant to note that there was no contract between Phoenix and the Seller; Phoenix's client was the Buyer.

139 The contractual matrix between the parties is relevant to the scope of any duty of care, and consequently whether that duty has been breached. The point was expressed as follows in *Pilgrim* at [108]–[109]:

> … the scope of the defendant's duty of care must clearly be circumscribed by NKI's instructions. Given that it was NKI's instructions that lenders would rely on a value based on the forced sale scenario provided by the defendant, the plaintiff could only reasonably rely on the definition and quantum of the forced sale value (and the fair market value) provided in the 1st Report… this duty did not extend to providing a scrap value of the Assets…

140 If a plaintiff sues in negligence about the performance of a contract that he is not a party to, if there is no breach of contract (or if performance was otherwise to the satisfaction of the other contracting party) there would ordinarily not be a breach of a tortious duty either.

141 So it was in the present case. The Buyer (Phoenix's client) had no issue with the draft reports provided by Phoenix, and Phoenix proceeded to finalise its reports accordingly. The Buyer then proceeded to rely on Phoenix's reports

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in the arbitration as being contractually final and binding on the parties, taking the position (as stated in a 16 August 2019 letter from the Buyer's solicitors) that Phoenix's reports were "clear and fit for purpose".[82]

142 As far as Phoenix's client – the Buyer – was concerned, Phoenix did not breach the Services Agreement. Insofar as there was any variance between what Phoenix had *originally* contracted to do, and what it produced in its reports, it was open to the Phoenix and the Buyer to vary the contract between them, or for the Buyer to waive strict compliance with that contract; or the Buyer might be estopped from complaining about any breach, given its approval and use of the reports. The Buyer could not sue Phoenix in respect of the services it rendered. In those circumstances, it would cut across the contractual arrangements for an outsider to the contract – like the Seller – to be able to sue Phoenix on account of its performance of the contract, as a breach of a tortious duty of care. Insofar as the Buyer had agreed to varied performance under the contract, the duty of care owed by Phoenix to the Seller would be circumscribed accordingly.

143 I accept Phoenix's evidence that, as with other job pricing reports, it was open to Phoenix to "scope and rescope" the deliverables with its client – the Buyer – even after the Purchase Confirmation.[83] Ultimately, Phoenix was entitled to deal with its client in determining how the contract was to be performed, and then rest on its client's approval of its performance. Although Phoenix knew that the Seller (to whom the COI Declaration was also addressed) had some interest in what it was doing, Phoenix was still entitled to perform the

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82 3-JCB at p 1942, [3].

83 Official Transcript of 25 January 2024 ("**NE Day 6**") at p 71 ln 23 – p 72 ln 4.

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Services Agreement in the manner agreed with, or to the satisfaction of, its client – the Buyer.

144 The Seller faces a further problem with his claim for breach of duty – in his pleadings, he took the position that he was "not relying in the SOC on any breach of contract against the Defendant", and that was the basis on which he justified refusing provide particulars as to whether it was his case that Phoenix's provision of a range of market data was in breach of its deliverables under the Service Agreement, and if so to particularise the specific contractual provisions allegedly breached, and the manner in which they were breached: see [121] above.

145 Despite his pleadings, the Seller's submissions on breach of duty *are* based on alleged breaches of the Services Agreement.[84] Thus, on whether Phoenix acted negligently in breach of its duty of care, the Seller submits (among other things) that "[Phoenix] did not meet the deliverables set out in the Services Agreement". Further, one of the Seller's specific complaints is that "[Phoenix] failed to provide a single market benchmark figure for each of the kay management roles" and so Phoenix had failed to carry out its job, for the purposes of benchmarking of key management roles.[85] That was the complaint which Phoenix had asked the Seller to particularise (whether provision of a range of market data was in breach of Phoenix's deliverables), which the Seller had refused to particularise on the basis that was not relying on any breach of contract by Phoenix. Ironically, the Seller's submission on this is still lacking in particulars: he does not say what specific contractual provisions Phoenix allegedly breached, or how they were breached. But the point remains that the

84 PCS at [93]–[102].

85 PCS at [98].

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Seller's pleadings asserted that he was not relying on any breach of contract by Phoenix, but his submissions on breach of duty are premised on alleged breaches of contract by Phoenix: that Phoenix did not meet the deliverables in the Services Agreement.

146 Given the Seller's pleaded position, it is not open to him to assert breaches of contract against Phoenix (which he said he was not relying on) as the basis of his submissions of breach of duty.

147 In any event, I find each of the Seller's complaints about Phoenix's performance of the Services Agreement, to lack merit. In the Seller's submissions he raises five complaints, which I address in turn.

148 First, the Seller complaints that one of Phoenix's deliverables was to provide three years' data but Phoenix only provided one year's data.[86] As noted above, I accept Phoenix's evidence that it was open to Phoenix to "scope and rescope" its job with its client – the Buyer – and the Buyer had agreed to accept, or was otherwise satisfied with, Phoenix providing just one year's data (see: [143]).

149 Second, the Seller complains that Phoenix failed to provide regressed data and failed to provide data for the "widget" industry peer group for a particular management role. Phoenix indeed did not provide regressed data, but that needs to be viewed in context. Regression was not requested by the Buyer to begin with, regression had been offered by Phoenix as an option to serve as a reference;[87] regressed data might provide an additional data point, but it was

86 PCS at [94].

87 NE Day 6 at p 32 ln 3 – p 36 ln 7.

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not the most important deliverable.[88] In any event, the Buyer was content to accept and rely on Phoenix's reports without regressed data.

150 As for Phoenix not providing data for the "widget" industry for one of the management roles, Phoenix explained that there was no data available as there was only one data point in their 2016 survey. The Services Agreement was not breached, for it expressly stated that Phoenix's deliverable was "subject to data availability". Moreover, Phoenix mentioned this issue to the Buyer (and the Seller also knew about it) prior to Phoenix finalising its reports, and neither the Buyer nor the Seller raised any issue with this.[89] Further, this complaint featured in the arbitration, as well as in the Seller's setting-aside application (see *CIX v CIY* at [33]–[34]). This was in issue in the arbitration, the Seller had the opportunity to address it (and did address it), and the Tribunal decided nevertheless to derive the Market Benchmarks from Phoenix's reports, and the court upheld that.

151 Third, the Seller complains that Phoenix failed to provide a single benchmark figure for each KMR. The Seller says that because Phoenix provided a range instead, its reports did not fulfil the "purposes of benchmarking of key management roles" (as stated in the COI Declaration). The Seller sought to attribute this to Phoenix not providing regressed data. The Seller maintained his complaint about Phoenix not providing a single benchmark figure for each KMR, despite having conceded in the arbitration that:

(a) he had never instructed Phoenix to provide only one set of benchmarks;

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88 NE Day 6 at p 57 ln 15 – p 60 ln 13.

89 NE Day 2 at p 26 ln 20–25, p 35 ln 15 – p 38 ln 13.

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(b) he had never complained about Phoenix providing several sets of benchmarks rather than a single set of benchmarks;

(c) he had never complained that Phoenix had not completed its tasks, and in fact he had provided his own calculations on the basis that Phoenix had completed its task; and

(d) he always knew that he would have to pick the applicable Market Benchmark from the list of benchmarks that Phoenix had provided.[90]

152 The Seller then made each of those concessions again at trial.[91] He made two further concessions:

(a) that even if Phoenix was meant to provide a single benchmark figure, and he decided not to go back to Phoenix to ask for that to be done, he would not now hold Phoenix responsible or liable for any loss from his failure to ask Phoenix to provide a single benchmark figure;[92] and

(b) that if not Phoenix's purported lack of independence, the Seller would not have sued Phoenix for not providing a single benchmark figure – which shows that the Seller's grievance was really about Phoenix's supposed lack of independence, rather than the alleged flaws in its reports.[93]

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90 2-DB at p 136.

91 NE Day 2 at p 39 ln 22 – p 40 ln 5, p 60 ln 2 – p 61 ln 10; NE Day 3 at p 25 ln 8–13.

92 NE Day 2 at p 67 ln 21 – p 68 ln 5.

93 NE Day 3 at p 28 ln 17 – p 31 ln 20.

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153 In his closing submissions, the Seller then put forward a somewhat different argument: not that Phoenix was negligent in not providing a single benchmark figure for each KMR, but that Phoenix was negligent in not providing regressed data – and if only Phoenix had provided regressed data, the P50 benchmark would then have been the appropriate Market Benchmark.[94]

154 That takes us back to the issue of regression. I accept Phoenix's evidence that if it had carried out regression, it would have done statistical regression which would express the extent to which (if at all) position class and compensation are related.[95] That would still have resulted in a range of benchmarks, not a single benchmark (although the Seller now says that, in that instance, he would have accepted the P50 benchmark). To the extent that the Seller's complaint about Phoenix not providing a single benchmark figure for each KMR, is simply a complaint about Phoenix not providing regressed data, I have addressed that at [149] above.

155 Ironically, the Seller highlights Phoenix's evidence that it was possible for Phoenix to give a client a single market benchmark figure, if a client provided it with the specific percentile and what compensation component the client was interested in.[96] The short point is: those instructions were not provided to Phoenix; Phoenix can only be judged against the instructions that it based its reports on.

156 Fourth, the Seller complains that Phoenix failed to provide data "for [widget] industry peer group", including data from very large multinational

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94 PCS at [98].

95 DCS at [105(b)(ii)].

96 PCS at [98].

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companies in reports, whereas the Company sold by the Seller was a much smaller local company.[97] On this, I accept Phoenix's explanation that "[widget] industry peer group" did not mean "companies in the [widget] industry like the Seller's Company"; instead, it referred to the way companies were categorised in the plaintiff's compensation survey, such as by industry.[98]

157 Fifth, the Seller says that its expert was able to provide a reasonable comparison of what a proper and completed report by an alternate human resources consultant would look like.[99] The point the Seller tries to make here is not entirely clear: if the complaint is that Phoenix failed to provide a proper and complete report, then the Seller should provide evidence of what a proper and complete report *by Phoenix* would have been, rather than what some alternate human resources consultant might have done. Moreover, as I have already noted above (at [105]–[111]), the report from the Seller's expert Falcon does not reflect what an alternate human resources consultant might have done, in the scenario where Phoenix had never been appointed:

(a) Falcon drew on Phoenix's data (which, by definition, would not have been available, if Phoenix had not been appointed).

(b) Falcon's expert report was based on different instructions from those given to Phoenix.

(c) In relation to regression of data, Falcon's approach was different from Phoenix's: Phoenix would have regressed data in relation to position class, whereas Falcon would have regressed data in relation to

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97 PCS at [101].

98 DCS at [105(e)].

99 PCS at [102].

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revenue (revenue being a factor – but not the only factor – going into the determination of a position class). In the arbitration, the Tribunal noted that, for instance, the Seller's expert did not take headcount into account as a factor: see [10] above.

Damage

158 Even if the Seller were able to prove that Phoenix owed him a duty of care, which Phoenix breached, the Seller would still need to prove damage.

159 I find that the Seller has failed to prove what damage he suffered as a result of the matters complained about. In essence, he says Phoenix failed to provide proper and complete reports, but there is no evidence what those proper and complete reports by Phoenix would have been, and more specifically what the Market Benchmarks derived from those reports would have been. Instead, the Seller engaged an expert (Falcon) to provide a report commenting on Phoenix's reports, using some of Phoenix's data, rejecting some of Phoenix's data, and adding some other data. Falcon was given different instructions from Phoenix, and the two experts had different approaches to regression. Simply put, the benchmarks put forward by Falcon (which the Tribunal rejected) do not represent the Market Benchmarks that would have been derived from Phoenix's reports, if those had been made "proper and complete" in the manner alleged by the Seller.

Conclusion and costs

160 For the above reasons, I dismiss the Seller's claims against Phoenix.

161 The Seller continues to be dissatisfied with the Tribunal's decision (that the Market Benchmarks to be used in determining the Final Valuation should

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be derived from the Phoenix reports). But he should not have kept trying to undermine that decision after his setting-aside application was dismissed, and even after the appeal against that was dismissed as well. His attempt to do so by alleging corruption was rebuffed by the Tribunal deciding that that was barred by the extended doctrine of *res judicata*. His attempt to do so by suing Phoenix, the independent expert, I have found to be an abuse of process. Moreover, I have found the Seller's claims to be substantively unmeritorious.

162 On costs, I agree with Phoenix that this is an appropriate case for an award of indemnity costs. The suit is an abuse of process, and moreover the Seller failed to disclose relevant documents (such as arbitration documents in relation to his concession that he was not expecting a single benchmark figure, and his failed Corruption Application).

163 Indemnity costs are justified where an action "is brought in bad faith, as a means of oppression or for other improper purposes", where an action "is speculative, hypothetical or clearly without basis", "where the party's conduct in the course of proceedings is dishonest, abusive or improper" and "where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process": *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [23]. Further, in *Pradeepto Kumar Biswas v Sabyasachi Mukherjee and another and another matter* [2022] 2 SLR 340 at [95], the Court of Appeal awarded indemnity costs having regard to conduct that was "dishonest, abusive and improper" and which was an abuse of process under the extended doctrine of *res judicata* – it was thus "wasteful or duplicative litigation".

164 I thus order the Seller to pay indemnity costs to Phoenix. Unless the parties can agree on the quantum of those costs by 14 June 2024, they are to file

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their respective costs submissions, limited to 8 pages (excluding any schedule of disbursements), by 21 June 2024.

Andre Maniam
Judge of the High Court

Deborah Barker, SC, Yvonne Mak, Farahna Alam (Withers KhattarWong LLP) for the plaintiff;
Chew Kei Jin, Lee Chia Ming, Tyne Lam (Ascendant Legal LLC) for the defendant.

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