BNX
v
BOE and another matter

[2017] SGHC 289

High Court — Originating Summons No 871 of 2016 and Suit No 1097 of 2016 (Summons No 5305 of 2016)
Vinodh Coomaraswamy J
27 February; 7–8 March 2017

Arbitration — Award — Recourse against award — Setting aside

Civil procedure — Pleadings — Striking out — Res judicata

21 November 2017

Vinodh Coomaraswamy J:

Introduction

1 In December 2013, the plaintiff acquired from the defendant a business in Singapore. The plaintiff claims that the defendant fraudulently misrepresented to it that the public are permitted to patronise certain facilities which comprise part of the business. In fact, the Urban Redevelopment Authority ("URA") had imposed a condition which restricted the use of these facilities to customers and staff of the business.

2 The plaintiff learned for the first time in July 2014 that the URA had imposed a condition which permitted only the customers and staff of the

business to patronise the facilities. The plaintiff is aggrieved because it believed, when it acquired the business, that revenue earned at those facilities from members of the public would be a significant post-acquisition revenue stream for the business. It raised the issue with the defendant. The defendant denied any wrongdoing.

3 The parties' rights and obligations with respect to the acquisition are governed by a detailed sale and purchase agreement dated 16 December 2013 ("the SPA").[1] The SPA provides expressly that it is governed by Singapore law.[2] The SPA also contains an arbitration agreement which provides for disputes under the SPA to be resolved by arbitration in Singapore under the ICC Rules before a panel of three arbitrators.[3]

4 In October 2015, the plaintiff initiated an arbitration against the defendant claiming that the defendant was guilty of fraudulent misrepresentation and breach of warranty in relation to the SPA.[4] A tribunal comprising three arbitrators was duly constituted in January 2015. The tribunal delivered its final award in June 2016. It dismissed the plaintiff's claim in its entirety.

5 In August 2016, the plaintiff applied under s 48 of the Arbitration Act to set aside the award.[5] It relies on three grounds. First, the plaintiff submits that the tribunal exceeded its jurisdiction by deciding matters that were not before

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1 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 535.

2 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 577 (cl 33.1).

3 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 577 (cl 33.2).

4 DW's affidavit for OS 871/2016 (27 Sep 2016) at para 9.

5 HC/OS 871/2016.

it. Second, the plaintiff argues that there was a breach of natural justice which deprived it of a fair hearing. Third, the plaintiff submits that the award is contrary to public policy.[6] The defendant rejects each of the plaintiff's submissions and resists the setting-aside application.

6 Under the terms of the SPA, the plaintiff acquired not only the business from the defendant but also a leasehold interest in the premises from which the business is operated. Pursuant to the SPA, the plaintiff and the defendant entered into a lease for the premises which was comprised in a separate document. In October 2016, while the setting-aside application was pending, the plaintiff commenced an action against the defendant in the High Court on the lease.[7] Its claim in the action is that the defendant deceived the plaintiff into entering into the lease by fraudulently misrepresenting to the plaintiff that the public were permitted to patronise the facilities; alternatively that the defendant is in breach of the terms of that lease.

7 The defendant now cross-applies to strike out the plaintiff's action under O 18 r 19 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC").[8] The defendant argues that the plaintiff's action is unsustainable on its merits, alternatively that the plaintiff is precluded from pursuing its action by the doctrine of *res judicata* or abuse of process.

8 I have dismissed the plaintiff's setting aside application for the reasons set out at [50]–[111] below. I have allowed the defendant's striking out application for the reasons set out at [113]–[152] below. The plaintiff has

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6 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 31 (para 30).

7 HC/S 1097/2016.

8 HC/SUM 5305/2016.

appealed against my decision on both applications.[9] I now set out the grounds for each of my decisions.

9 On 8 March 2017, on the defendant's application but with the plaintiff's consent, I ordered the file in the setting-aside application and also in the plaintiff's action to be sealed.[10] At the conclusion of the hearing, again upon the defendant's application but without objection by the plaintiff, I agreed to anonymise this judgment.[11] I do not, therefore, refer in these grounds to the parties by name or include any details by which either party, the transaction or the business may be identified.

Factual background

The head grant

10 In 2008, the defendant acquired a 99-year lease of a parcel of land in Singapore by way of a head grant from the Singapore government. The defendant's intention was to erect upon that land a mixed-use development[12] in which, amongst other things, the business would be housed and operated. The head lease envisaged the defendant seeking planning permission from the URA for four mutually-exclusive uses. Only two of those four uses were obligatory and are relevant for present purposes. In order to preserve the parties' anonymity, I shall call them "Use A" and "Use B".

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9 CA/CA 61/2017 and CA/CA 62/2017.

10 ORC 1870/2017 in OS 871/2016; ORC 1892/2017 in S 1097/2016.

11 Notes of argument (8 Mar 2017) at p 45 (lines 13–17).

12 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 2074.

11 The head lease required no less than 25% of the development's maximum permissible gross floor area ("GFA") to be attributed to Use A. Use of the development to house and operate the business fell within – and only within – Use A. The head lease also required no less than 60% of the development's GFA to be attributed to what I shall call "Use B".[13] That meant, by implication, that no more than 15% of its GFA could be attributed to the remaining two uses.

The URA grants planning permission

12 The URA granted the initial written permission for the development under the Planning Act (Cap 232, 1998 Ed) in July 2009.[14] Construction commenced in late 2010 and concluded in October 2013.[15] From July 2009 until October 2013,[16] the URA issued fresh grants of written permission as the defendant amended its plans and as the URA reviewed the amendments. All of the URA's grants of written permission imposed use restrictions on the defendant which mirrored those in the head lease. As a result, in addition to its obligations to the government under the head lease, the defendant was obliged under the terms of the URA's written permissions to ensure that no less than 25% of the building's GFA was attributable to the business, *ie*, for Use A.

13 The critical question during planning and construction was precisely what use of the GFA qualified as use attributable to Use A. The URA had historically taken a very strict position on this. It counted as use attributable to

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13 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 128 (para 62).

14 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 128 (para 63).

15 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 274 (para 19).

16 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 142 (para 92[i]).

Use A only GFA that was within the core definition of Use A. But in a circular issued in 2002,[17] the URA relaxed its position. In the 2002 circular, the URA announced that all new developments granted planning permission for Use A could attribute to the quantum of GFA under that use any GFA which was used to house facilities *related* to Use A – *ie*, which were not within the core definition of Use A – provided that those facilities were for the sole use of the customers and staff of the Use A business.[18]

14 The defendant's plans for the development initially attributed less than the minimum 25% of the GFA to Use A.[19] In order to meet that minimum, the defendant engaged the URA in discussions from 2009 to 2013. The purpose of the discussions was to persuade the URA to accept that the facilities which lie at the heart of this dispute were indeed attributable to Use A. Throughout these discussions, as the tribunal found:[20]

> The evidence suggests that [Use A] was a less valuable use of space than [Use B] and that the URA was, accordingly, vigilant to ensure that the developer complied with the requirements of the Head Grant and did not reduce [Use A] and increase [Use B] for that reason.

15 The URA eventually agreed in 2010 to attribute the facilities to the development's Use A quantum if the defendant was willing to undertake that the facilities would be for the sole use of customers or staff of the business and not open to the public. The defendant agreed to the restriction. As a result, the defendant gave the URA a written undertaking acknowledging the restriction in

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17 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 128 (para 62); p 716-718.

18 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 128 (para 62).

19 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 129 (para 63); p 719 (para 3).

20 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 127 (para 61).

October 2010 with respect to one set of facilities.[21] The defendant gave a further undertaking to the same effect in March 2013 with respect to another set of facilities.[22] The restriction was also expressly annotated in the project architects' plans identified in all further grants of written permission by the URA.[23]

16 The defendant's project architects played a critical role in the defendant's discussions with URA. The project architects advised the defendant on how the URA's use restrictions should be understood and the effect of the restrictions on who could operate or patronise the facilities.[24] The project architects also communicated with the URA on the defendant's behalf.

The defendant approaches the plaintiff

17 In July 2013, the plaintiff approached the defendant with an unsolicited proposal to buy the business as a going concern.[25] The plaintiff had a significant tax incentive to complete the acquisition before 31 December 2013. The tribunal found that this incentive put considerable time pressure on all involved.[26]

18 The development received its temporary occupation permit in September 2013.[27] The parties had not, by then, reached agreement on the terms of the acquisition. As a result, the business and the premises within the development from which it operated were then still owned by the defendant.

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21 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 130 (para 69); p 722.

22 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 130 (para 73); p 723.

23 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 131 (para 74).

24 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 132 (para 78[iii] and [iv]).

25 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 136 (para 81).

26 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 136 (para 79).

27 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 140 (para 87).

19 The business had its soft opening in October 2013[28] and commenced operations about two weeks later in November 2013. The operations were managed by a third party with whom the defendant had entered into an operating agreement three years earlier.[29] The operator permitted the public to patronise the facilities from the very outset of operations.[30]

20 The parties signed the SPA on 16 December 2013. Completion under the SPA also took place in December 2013. As part of completion, the defendant carved out and granted to the plaintiff a sublease of the premises from which the business operates, running until the day before the defendant's head grant expires.[31] The defendant also novated the operating agreement to the plaintiff.[32]

21 After the defendant took over ownership of the business, the operator continued to permit members of the public to use the facilities. In July 2014, the plaintiff discussed with the operator the possibility of reconfiguring the facilities. It was then, for the first time, that the plaintiff became aware that the URA had restricted the use of the facilities to customers and staff of the business.[33]

22 The plaintiff accused the defendant of wrongfully failing to disclose the use restriction during the negotiations for the SPA.[34] The defendant rejected any wrongdoing.

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28 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 274 (para 20).

29 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 18 (para 22(a)(v)(4)).

30 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 20 (para 22(a)(v)(13)).

31 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 276 (para 21, final bullet point).

32 PW's affidavit for OS 871/2016 (26 Aug 2016) at para 22(v)(3)–(7).

33 PW's affidavit for OS 871/2016 (26 Aug 2016) at para 22(v)(7).

34 DW's affidavit for OS 871/2016 (27 Sep 2016) at para 90.

23 The parties' dispute was then referred to arbitration.

The arbitration

The plaintiff's case in the arbitration

24 The plaintiff's primary case in the arbitration was that, in order to induce the plaintiff to enter into the SPA, the defendant fraudulently misrepresented to the plaintiff that members of the public were permitted to patronise the facilities and that the facilities could therefore generate an independent revenue stream for the business after the plaintiff had acquired it.[35] In the alternative, the plaintiff argued that the defendant was in breach of warranty under the SPA because members of the public were not permitted to patronise the facilities.[36]

25 As its primary relief in the arbitration, the plaintiff claimed rescission of the SPA, return of the price and damages.[37] In the alternative, the plaintiff prayed for damages as compensation for the diminution in the value of the business by reason of the missing revenue stream from members of the public.[38]

26 The plaintiff also pursued a number of other causes of action in the arbitration based on unjust enrichment, constructive trust and non-fraudulent misrepresentation.[39] It withdrew all of these causes of action when it opened its case.[40]

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35 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 120-121 (para 11).

36 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 121 (para 12).

37 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 26 (para 25).

38 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 18 (para 22(a)(v)(4)).

39 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 121 (paras 12–14).

40 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 157 (para 121).

27 The tribunal dismissed the plaintiff's claim in its entirety. It analysed and rejected every element of the plaintiff's claim in tort for fraudulent misrepresentation.[41] It also analysed and rejected every element of the plaintiff's claim in contract for breach of warranty.[42] Indeed, it is fair to say that the tribunal took a very dim view of the merits of the plaintiff's claim and of the way in which the claim had been presented. In considering its award on costs, the tribunal held as follows:[43]

> The Tribunal does take the view that the Claimant has sought to persist in a case of fraudulent misrepresentation by an elaborate and unconvincing development of innocent and commonplace events and conduct. The allegations were serious and numerous and required a detailed answer in order to demonstrate that they were groundless. The Tribunal does consider that the Claimant's wholly unconvincing attempt to bolster its case through expert evidence was one which is bound to have involved the Respondent in significant expense. The Tribunal also observes that the Claimant's contractual claim was equally hopeless. Elaborate and unsustainable contractual arguments have been raised and have had to be met by the Respondent and dealt with by the Tribunal. …

The tribunal therefore held that the plaintiff was liable to the defendant for the costs of the arbitration. It quantified those costs at US$4.03m.[44]

28 Before considering the parties' submissions on the applications before me, it is necessary to identify the path of reasoning by which the tribunal concluded that the plaintiff's claim failed in every respect.

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41 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 195 (para 248).

42 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 195-206 (paras 259–296).

43 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 215 (paras 320).

44 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 216 (para 324).

Tribunal's reasoning in relation to fraud

Fraud on the plaintiff

29 The plaintiff's case in fraudulent misrepresentation rested on 17 separate representations by or on behalf of the defendant, each of which the plaintiff alleged implied that members of the public were permitted to patronise the facilities. Not all of the 17 representations were part of the plaintiff's pleaded case. The tribunal nevertheless analysed all 17 of them.

30 On every single representation, the tribunal found that one or more of the following was true:

(a) the representation was not made;[45]

(b) the representation, being an implied representation,[46] could not have been understood by a reasonable person in the sense ascribed to it by the plaintiff;[47]

(c) the representation was not adopted by the defendant and was not otherwise attributable to the defendant;[48]

(d) the plaintiff did not rely on the representation;[49]

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45 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 160 (para 143); p 166 (para 165); p 170 (para 172[ii]); p 176 (para 188[ii]); p 180 (para 201[i]); p 184 (para 218).

46 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 159 (para 137).

47 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 160 (para 143[ii]); p 163 (para 147[iii]); p 164 (para 154); p 170 (para 171[iv]); p 178 (para 191[iii]); p 179 (para 195[ii]); p 180 (para 201[ii]); p 182 (para 207); p 183 (para 213).

48 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 192 (para 243); p 169 (para 171[iii]); p 172 (para 176[iii]-[vi]); p 177 (para 189); p 182 (para 208).

49 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 161 (para 144[i] and [iii]); p 163 (para 148[i]); p 165 (para 155[i] and [ii]); p 166 (para 160[i]); p 168 (para 166[i]);

(e) the plaintiff did not reasonably rely on the representation;[50]

(f) the representation was made but carried no connotation about members of the public being permitted to patronise the facilities;[51]

(g) the defendant did not intend to make the representation in the sense in which the plaintiff claimed to have understood it;[52] or

(h) the defendant was not dishonest in making the representation.[53]

31 To be more precise, out of the 17 representations which it analysed, the tribunal found that 15 representations were complete non-starters. These 15 representations were either not made at all or, if made, could not have been understood by a reasonable person as a representation that the public were permitted to patronise the facilities.[54] The plaintiff's case on these 15 representations thus fell at the first two of the eight hurdles set out at [30].

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p 174 (para 178[iv]); p 175 (para 183); p 177 (para 190[iii]); p 179 (para 196[i]); p 181 (para 202[ii]); p 182 (para 209[i]); p 183 (para 214); p 185 (para 220).

50 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 161 (para 144[ii]); p 163 (para 148[ii]); p 181 (para 202[iii]).

51 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 161 (para 143[iv]); p 163 (para 147[ii]); p 166 (para 159).

52 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 162 (para 145[i]); p 163 (para 149); p 166 (para 156); p 167 (para 161); p 166 (para 165); p 169 (para 167); p 173 (para 177[i]-[ii]); p 175 (para 184); p 178 (para 191[iii]); ; p 181 (para 203); p 184 (para 215); p 184 (para 219).

53 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 162 (para 145[iii]); p 167 (para 161); p 169 (para 168); p 171 (para 173); p 173 (para 177[i]-[ii]); p 175 (para 184-185); p 178 (para 192); p 179 (para 197); p 185 (para 219).

54 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 171 (para 175[iv]); p 175 (para 182[i]).

32 That left only two representations to attempt the third hurdle onwards. But, on the tribunal's analysis, even these two survivors fell, at the latest, on the fourth hurdle.

33 The first of these two surviving representations was said to arise from a set of presentation slides and a draft budget which the defendant forwarded to the plaintiff during the due diligence exercise for the acquisition. The tribunal found that the slides and budget did contain an implicit representation that it was lawful to admit members of the public to patronise the facilities.[55] But the slides and the budget originated from the operator, not from the defendant.[56] The tribunal found that this implicit representation was not endorsed or adopted by the defendant when it forwarded the slides and budget to the plaintiff in response to the plaintiff's request.[57] Instead, it was received by the plaintiff as being attributable to the operator and not to the defendant.[58]

34 The second of the two surviving representations was found in an email from the defendant to the plaintiff dated 8 November 2013 in which the defendant enumerated the advance bookings already received for a certain subset of the facilities. The tribunal found that this email did carry an implicit representation, arising from the number of advance bookings which the defendant reported had been made in such a short period, that members of the public could patronise that subset of the facilities. But the tribunal went on to find that the plaintiff did not rely on the representation because the plaintiff had in fact given no conscious thought whatsoever to the issue of public access to

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55 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 171 (para 175[iv]).

56 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 172 (para 176[ii]).

57 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 172 (para 176[iii]).

58 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 172 (para 176[v]).

the facilities at the time that that second representation was made.[59] Indeed, it was one of the tribunal's overarching findings that the plaintiff gave no conscious thought whatsoever to the issue of public access to the facilities at any time while it was negotiating the acquisition.[60]

35 These findings sufficed for the tribunal to reject the plaintiff's claim in fraudulent misrepresentation without even having to consider the defendant's state of mind.

36 These findings sufficed also for the tribunal to reject the plaintiff's alternative case that the defendant had misrepresented fraudulently by silence. It was not seriously disputed[61] that the following proposition of law lay at the root of the plaintiff's case on misrepresentation by silence:[62]

> Silence cannot amount to a misrepresentation except where there is a failure to correct a representation of fact that has become untrue since it was made, or which, though false when made, was innocently made and, in either case, the representor has become aware of the true facts before the statement is acted upon.

But nothing the plaintiff had ever said had caused the plaintiff to labour under any misunderstanding about the public's right to patronise the facilities.[63] In fact, the plaintiff had never had any such misunderstanding because it had never given any conscious thought to the issue. The claim for misrepresentation by silence also failed.

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59 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 175 (para 183).

60 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 175 (para 185).

61 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 159 (para 130).

62 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 159 (para 138).

63 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 188 (para 231); p 192 (para 241 and 243).

37 The tribunal concluded its analysis of the plaintiff's case in fraudulent misrepresentation as follows:[64]

> **H. CONCLUSION – Fraudulent Misrepresentation**
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> 248. The Tribunal finds that the Claimant's claim for fraudulent misrepresentation fails. There were no Representations. There were no misrepresentations. There was no reliance. There was no dishonesty. The Claimant is, accordingly, not entitled to the relief it claims. It is not and was not entitled to rescind the SPA.

38 The important point to note about the tribunal's reasoning is that any finding as to whether any of the 17 representations was false or had been made dishonestly was wholly unnecessary for the tribunal to dispose of the plaintiff's claim in fraudulent misrepresentation. The tribunal's findings meant that it was wholly unnecessary to go beyond [30(b)] above for 15 of the representations or to beyond [30(d)] above for the two surviving representations. In other words, the plaintiff's case in fraudulent misrepresentation had failed well before the tribunal came to analyse, as it did, whether the alleged representation was false in the sense claimed by the plaintiff and whether the defendant had been dishonest in the sense required by the tort.

Fraud on the URA

39 In addition to contending that the defendant had perpetrated a fraud upon the plaintiff, the plaintiff also contended that the defendant had perpetrated a fraud upon the URA.[65] This fraud was said to lie in the defendant's conscious decision not to abide by its two voluntary undertakings to the URA (see [15]

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64 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 195 (para 248).

65 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 131 (para 78[i]).

above) and to breach the URA's restriction on the use of the facilities.[66] The plaintiff raised this contention only in its closing submissions, without foreshadowing it in its pleadings or in its list of issues.[67] Despite the belated nature of the contention, the tribunal addressed it in some detail in the award. The tribunal ultimately rejected it too.

40 In rejecting the contention, the tribunal accepted the defendant's evidence in all material respects and made the following findings. The issue over the quantum of GFA attributable to Use A was, at the time, a relatively small aspect of a very large development and only one of the many problems which the defendant had to resolve.[68] The defendant honestly believed at all times that members of the public could have access to the facilities and that the business could generate income from them.[69] It arrived at this belief based on professional advice from the project architects.

41 The project architects' advice to the defendant was that the URA had two underlying concerns in imposing the restriction on members of the public patronising the facilities. The first was to ensure that the defendant or, more accurately, its operator would run the facilities as an integral part of the business rather than hive the facilities off to another party for them to be run independently. The second concern was to ensure that the defendant and its operator would not specifically target members of the public to patronise the facilities.[70] The tenor of the project architects' advice to the defendant was that

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66 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 132 (para 78[ii]).

67 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 131 (para 78[i]).

68 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 131 (para 77).

69 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 162 (para 145[iii]).

70 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 132 (para 78[iv] and [v]).

it was consistent with the policy of the URA to operate the facilities with these two concerns in mind[71] even if that meant that members of the public were permitted to patronise the facilities. As a result, the tribunal found as follows:[72]

> The Tribunal rejects the [plaintiff's] case that the [defendant] perpetrated a fraud on the URA. It finds that, advised by its architects, the [defendant] honestly took the view that operating the [business] as they did would not offend the URA policy which underlay its planning conditions and that it was a reasonable business risk to take. …

42 In rejecting the plaintiff's contention that the defendant had perpetrated a fraud on the URA, the tribunal relied only on its findings of fact that: (a) the defendant's witnesses gave a truthful account of the project architects' advice to the defendant; and (b) that the defendant's belief was an honest belief. These findings meant that it was unnecessary for the tribunal to make any finding as to the true effect of the URA's restriction on the use of the facilities. These findings also allowed the tribunal to make the following two assumptions in the plaintiff's favour:

> (a) that the URA's restriction on the use of the facilities ought to be given the strictest possible interpretation, *ie*, that the restriction meant that *no* member of the public could use the facilities even if invited to do so by a customer of the business and even if accompanied by a customer of the business;[73] and

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71 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 133 (para 78[vii]); p 158 (para 127).

72 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 132 (para 78[viii]).

73 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 158 (paras 125).

(b) that the project architects' advice to the defendant on the effect and interpretation of the URA's restriction was wrong.[74]

Tribunal's reasoning in relation to breach of contract

43 The tribunal also rejected categorically the plaintiff's claim that the defendant was guilty of breaching a number of terms in the SPA.[75]

44 The tribunal began its analysis by re-emphasising that the defendant did not perpetrate a fraud on the URA or the Singapore government (see [39]–[42] above).[76]

45 The tribunal then went on to reject the plaintiff's contention that the SPA was illegal because it included the sale of a business which, at the time it was sold, allowed the public to patronise the facilities in breach of the URA's restriction.[77] It also found that the breach did not make the business unlawful. And it dismissed the plaintiff's argument that a breach of the use restriction meant that the defendant lacked the "power and authority" to sell the business because it was unlawful.[78]

46 The tribunal did, however, accept the plaintiff's argument that the defendant's failure to observe the URA's restriction did put it – on the basis of the two assumptions underpinning the tribunal's analysis (see [42] above) – in

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74 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 158 (paras 127).

75 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 206 (para 296).

76 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 198 (para 261).

77 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 201 (para 270) and p 202 (para 275).

78 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 202 (para 275[ii]).

breach of the head grant from the Singapore government. The plaintiff's case, further, was that the defendant's breach of the head grant constituted a breach of the defendant's express warranty in the SPA that it was not in breach of the head grant.[79] The tribunal rejected this contention. The warranty was expressly qualified by the words "So far as [the defendant] is aware". This proviso, as defined in the SPA, meant that the plaintiff's contention could not succeed unless the plaintiff could prove that the defendant had actual knowledge that it was in breach of the head grant. But the plaintiff failed to adduce any evidence as to the state of the defendant's knowledge of the impact of the breach of the URA's restriction on the head grant. In any event, given the tribunal's finding that the defendant had relied on the project architects' advice and honestly believed that allowing members of the public to patronise the facilities was not contrary to the use restriction, the tribunal found that it was highly unlikely that the defendant had actual knowledge that it was in the breach of the head grant.[80]

47 For present purposes, it is particularly important to note that the tribunal dismissed the plaintiff's argument that the SPA was void for illegality.

Conclusion on the tribunal's findings

48 I now turn to the two applications before me. I start with the plaintiff's setting-aside application before turning to the defendant's striking-out application.

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79 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 206 (para 292).

80 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 206 (paras 292–295).

Setting aside application

49 Both counterparties to the SPA are ultimately foreign entities. However, they both entered into the SPA through special-purpose vehicles incorporated in Singapore. As a result, the plaintiff's setting aside application is under the Arbitration Act (Cap 10, 2002 Rev Ed) rather than the International Arbitration Act (Cap 143, 1999 Rev Ed).[81]

First ground: tribunal acting in excess of its jurisdiction

The plaintiff's submissions

50 The first ground that the plaintiff relies on in its setting aside application under the Arbitration Act is that the tribunal exceeded its jurisdiction by deciding issues that the parties did not submit to it for decision.[82] The plaintiff's case is that only the following issues before the tribunal:[83]

(a) whether the defendant had made a false representation to the plaintiff expressly or impliedly;

(b) whether, if so, the defendant knew that the representation was false or was reckless as to its truth or falsity;

(c) whether the defendant intended the plaintiff to rely on the representation;

(d) whether the plaintiff did rely on the representation and suffered loss in consequence; and

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81 DW's affidavit for SUM 5305/2016 (1 Nov 2016) at para 5; PW's affidavit for OS 871/2016 (26 Aug 2016) at para 13.

82 Plaintiff's written submissions for OS 871/2016 at para 8(a).

83 Plaintiff's written submissions for OS 871/2016 at para 27.

(e) whether the defendant sold to the plaintiff a business which was an unlawful business, being a business that was operating by flouting the URA's restrictions.

51 Instead of confining itself to determining these five issues, the plaintiff complains, the tribunal took it upon itself to make findings on the policy of the URA which turned out to be the foundation of the award. In particular, the plaintiff is particularly aggrieved that the tribunal made the following three findings which it claims tainted the entirety of the award:[84]

(a) that the URA policy and the meaning of its use restriction were open to interpretation;

(b) that the project architects advised the defendant that it was reasonable to permit members of the public to use the facilities; and

(c) that, whether that advice was right or wrong, the defendant honestly believed that acting on the advice was not a breach of the defendant's undertaking or of the URA's use restriction.

52 The plaintiff's ire[85] is directed at the passages I have italicised in the following paragraphs of the award:[86]

> [vii] The Tribunal finds that *the tenor of the advice from [the project architects] was that operation of the [business's] facilities by the operators … and not by outside businesses was consistent with the policy of the URA such that no problems would arise by receiving business from persons not [customers of the business]*. This gave the [defendant's] representatives comfort that the restrictions would not pose a significant problem for the operation of the [business].

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84 Plaintiff's written submissions for OS 871/2016 at para 23.

85 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 50 (para 34).

86 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 133-134 (para 78).

> [viii] The Tribunal rejects the [plaintiff's] case that the [defendant] perpetrated a fraud on the URA. It finds that, *advised by its architects, the [defendant's] representatives honestly took the view that operating the [business] as they did would not offend the URA policy which underlay its planning conditions and that it was a reasonable business risk to take. The meaning of the URA's restrictions and the policy behind them are open to interpretation.* The Tribunal does not consider that a decision taken to interpret the undertakings and, the planning conditions, to which they gave rise, upon advice, in a commercially convenient way comes close to a fraud on the URA. It notes that the [business] has in fact been operated, by both Parties, in accordance with that advice since it opened in November 2013 and that that has given rise to no difficulties with the URA.
>
> [ix] It is true that [the defendant's] witnesses … referred to the difficulty or impracticality of monitoring the situation … The Tribunal understood that evidence to go to the conclusion that the team had reached that there would not be any real likelihood of a practical difficulty arising. The Tribunal observes that, if a very strict view is taken of the restriction, there is an inherent difficulty in monitoring access for the operator as well as for the URA – *something likely to colour a reasonable person's view of the point of the policy behind the restrictions and to encourage a practical interpretation of them.*
>
> [Emphasis added]

53 The nub of the plaintiff's complaint is that these three findings did not arise from either party's statement of its case. In particular, the following three issues were not pleaded or set out in the defendant's opening submissions:[87]

(a) that the URA's use restriction meant anything other than their ordinary and reasonable meaning;

(b) that the use restriction should be construed against an underlying policy of the URA which altered or mitigated their meaning or effect; and

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87 Plaintiff's written submissions for OS 871/2016 at para 24.

(c) that the project architects had given advice to the defendant which differed from the terms of the architects' correspondence with the URA or from the defendant's undertakings to the URA.

54 Before analysing this ground for setting aside further, I set out the applicable law.

The law

55 Section 48(1)(*a*)(iv) of the Arbitration Act provides that an award may be set aside if the applicant shows that:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

This provision is identical, for present purposes, to Art 34(2)(*a*)(iii) of the Model Law. Cases decided under the International Arbitration Act on that provision are therefore of highly persuasive value.

56 There are two steps in the analysis for setting aside an award on the ground that the tribunal exceeded its jurisdiction (*AMZ v AXX* [2016] 1 SLR 549 at [100] citing *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [44]). First, the court must identify what matters were within the scope of the submission to the tribunal. Second, the court must ascertain whether the award confined itself to those matters or whether it strayed into areas outside the scope of the submission to arbitration. If the latter is true, the award ought to be set aside.

57 As to how these two steps ought to be applied, the defendant relies on *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*"). The Court of Appeal held in *Kempinski* that a tribunal's jurisdiction is ultimately demarcated by the submission to arbitration (at [32]):

> … The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. …

58 The Court of Appeal also stressed that the scope of a tribunal's jurisdiction must not be approached too narrowly (at [48]). Therefore, although the pleadings play an important role in identifying the limits of the tribunal's jurisdiction, it is not invariably the case that a tribunal exceeds its jurisdiction by deciding an issue that is not specifically pleaded, provided that the issue is within the parties' submission to arbitration. For example, as in *Kempinski* itself, it is within the tribunal's jurisdiction to decide an issue which arises after the submission to arbitration, even if that issue is unpleaded, so long as all parties are aware that that issue is ancillary to the dispute submitted to arbitration (at [47]).

Whether the tribunal exceeded its jurisdiction

59 The plaintiff's submissions are wholly misconceived. First, the tribunal did not make any findings on the two issues set out at [53(a)] and [53(b)] above: it simply assumed them in the plaintiff's favour. And to the extent that the

tribunal did make any findings on these issues, they were within the scope of the plaintiff's submission to arbitration.

(1) Issues were not decided by the tribunal

60 Expressed at the highest level of generality, the plaintiff's submission to arbitration comprised three issues: (a) whether the defendant perpetrated a fraud upon the plaintiff;[88] (b) whether the defendant breached its warranties under the SPA;[89] and (c) whether the defendant perpetrated a fraud upon the URA.[90] The third issue was not, of course, set out in the plaintiff's notice of arbitration or in its pleadings. But it was an issue which the plaintiff itself chose to place before the tribunal just before it retired to consider its decision, and it is an issue which the tribunal received and determined.

61 I have traced the tribunal's path of reasoning to show that the tribunal rejected the plaintiff's claim in fraudulent misrepresentation because it found that all of the representations were not made, could not have been understood by the plaintiff in the sense alleged, were not attributable to the defendant or were not relied upon by the plaintiff.

62 I have also traced the tribunal's path of reasoning to show that the tribunal rejected the plaintiff's claim in contract because it found that: (a) the SPA did not include the sale of a business which was illegal or unlawful;[91]

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88 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 121 (para 11).

89 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 121 (para 12).

90 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 131 (para 78[i]).

91 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 201 (para 270) and p 202 (para 275).

(b) the defendant did not lack the "power and authority" to sell the business;[92] and (c) it was highly unlikely that the defendant had actual knowledge that it was in breach of the head grant, as the SPA required for there to be a breach of warranty.[93]

63 Finally, I have traced the tribunal's path of reasoning to show that it rejected the plaintiff's claim that the defendant had perpetrated a fraud on the URA because it found that the defendant honestly believed the project architects' advice.

64 In rejecting all three heads of the plaintiff's claim, the tribunal did not have to consider, let alone to determine, the two issues set out at [53(a)] and [53(b)] above, *ie*: (a) whether the URA's use restriction meant anything other than its ordinary and reasonable meaning; and (b) whether the use restriction should be construed against an underlying policy of the URA which altered or mitigated their meaning or effect.

65 As the tribunal itself said in connection with the fraudulent misrepresentation claim:[94]

> … The evidence called was … more than enough to dispose of the case of fraudulent misrepresentation without exploring in evidence the true meaning of the planning condition or the advice given about it at the time. The Tribunal is not willing to infer that [the project architects'] advice was different from that described by the [defendant's] witnesses.

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92 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 202 (para 275[ii]).

93 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 206 (paras 292–295).

94 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 134 (para 78[x]).

66 These findings also allowed the tribunal to make the following two critical assumptions in the plaintiff's favour: [95]

> 125. … In the light of its other findings, it is not necessary for the Tribunal to decide the true effect of the planning condition. *It is prepared to assume, as the* [*plaintiff*] *has argued, that the true effect of the condition is that it is not even permissible for* [*customers of the business*] *to book* [*the facilities*] *in which they could meet* [*members of the public*] *or to book* [*other facilities*] *at which they could entertain* [*members of the public*] *as their guests. …*
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> …
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> 127. … [T]he Tribunal also finds that [the defendant's] management was guided by advice from its architects … to the effect that there would be no difficulties caused to the operation of the [business] by the condition because the focus of the URA's concern was facilities leased out by the [business] to others and that facilities under the control of the [business] itself would not offend the policy which the URA sought to enforce – such that the [facilities] could be used by members of the public who were not [customers of the business]. *The Tribunal is willing for the purposes of the claim in fraudulent misrepresentation to assume that* [*the project architects'*] *advice was wrong but it finds that the* [*defendant's*] *representatives honestly believed it was right and that, as a consequence, no problem arose about use of the facilities by* [*non-customers*].
>
> [emphasis added]

67 Although the tribunal made these assumptions in the context of the fraudulent misrepresentation claim, the tribunal applied them also in dealing with the breach of contract and the fraud on the URA claim. Thus, towards the end of the award, the tribunal expressly addressed each question in each party's list of issues and made the following general point:[96]

> For the purposes of the arbitration, the Tribunal is willing to assume that the use restrictions prohibited access to the [facilities] to all but persons [who were customers or staff of the business]. The effect, if those restrictions had been enforced by

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95 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 158 (paras 125 and 127).

96 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 207 (para 299(1)(d)).

> the owners and the operators of the [business], would have been to prevent the [business] receiving revenue from or referable to persons [who were not customers of the business] from the use of those facilities.

68 The first two issues which the plaintiff now complains of were not actually decided by the tribunal. They were all assumed in its favour. The tribunal did not stray beyond the confines of its jurisdiction in this regard.

(2) Issues were within the submission to arbitration

69 The plaintiff's claim in fraudulent misrepresentation, for breach of contract and for fraud on the URA all rested on establishing that the defendant knew that allowing members of the public to use the facilities constituted a breach of the URA's use restriction. Accordingly, the defendant's state of mind was squarely within the plaintiff's submission to arbitration.

70 This meant that the tribunal had to determine two issues ancillary to the plaintiff's submission to arbitration which, by their very nature as ancillary issues, were also within the scope of the submission. First, the tribunal had to determine whether the defendant honestly believed that permitting members of the public to use the facilities was not a breach of the URA's restriction. Second, and in turn, the tribunal had to determine whether the defendant subjectively believed that the project architects' advice was correct. It is immaterial for this finding whether the advice was in fact correct. Finally, as evidence from which to draw an inference whether the defendant's state of mind was as its evidence suggested, the tribunal also had to consider whether it was reasonable to rely on the project architects' advice.

71 The plaintiff had notice that these issues relating to the URA's use restriction would be before the tribunal.[97] The defendant set out its position on the URA's use restriction in its statement of defence.[98] The witness statement of the relevant witness for the defendant gave evidence of the project architects' advice and what he had understood URA's use restriction to mean in light of that advice.[99] Perhaps most importantly, in its closing submissions for the arbitration, the plaintiff noted that the test for fraud requires proof of dishonesty for which one factor may be an assessment of whether it is reasonable for the representor to hold a particular state of belief.[100] All of this taken together shows that the plaintiff cannot say that the tribunal went beyond its jurisdiction by considering these issues.

Conclusion on jurisdiction

72 In the premises, I dismiss the plaintiff's application to set aside the award under s 48(1)(*a*)(iv) of the Act. The tribunal did not exceed its jurisdiction. All of the issues which the plaintiff contends the tribunal decided outside its jurisdiction were either not decided at all, simply being the subject of an assumption, or were well within its jurisdiction, being either an issue raised by the plaintiff's submission to arbitration or an issue ancillary to such an issue which both parties were aware would be placed before the tribunal for determination.

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97 Defendant's written submissions for OS 871/2016 at para 42.

98 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 1305–1307.

99 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 1405 at paragraph 15.

100 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 7420 (para 146).

Second ground: breach of the rules of natural justice

Law on breach of natural justice

73 The second ground on which the plaintiff submits that the award must be set aside is that the tribunal breached the rules of natural justice. Section 48(1)(*a*)(vii) of the Arbitration Act allows the court to set aside an award if:

> a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced

74 Before an award can be set aside under s 48(1)(*a*)(vii) of the Act for breach of the rules of natural justice, an applicant has to show: (a) which rule of natural justice was breached; (b) how that rule was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the applicant's rights: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [48].

The plaintiff's case

75 The rule of natural justice which the plaintiff claims this tribunal breached is the fair hearing rule.[101] The plaintiff's arguments rests on two grounds, both of which assume that the tribunal found as a fact that the project architects' advice on the URA's policy and the use restriction was correct.[102] The plaintiff's arguments are as follows:

> (a) First, the plaintiff argues that it had no notice that the URA's policy would be an important issue in the arbitration. More

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101 Plaintiff's written submissions for OS 871/2016 at para 32; Notes of argument (7 Mar 2017) at p 25 (lines 14–16).

102 Plaintiff's written submissions for OS 871/2016 at paras 33–34; Notes of argument (7 Mar 2017) at p 25 (lines 17–26) and p 27 (lines 23–27).

fundamentally, it claims that there was a breach of natural justice because it was not given an opportunity to be heard on what the URA's policy is.

(b) Second, it submits that the tribunal erred in admitting and giving weight to hearsay evidence. Specifically, the tribunal should not have admitted evidence from the defendant as to what the project architects had advised it in relation to the URA's policy and use restriction without giving the plaintiff the chance to cross-examine the project architects. The plaintiff further argues that the tribunal gave undue weight to the project architects' advice and was "clearly influenced in its reasoning process by virtue of this advice"[103] when determining whether there was fraud and whether the SPA was unlawful.[104]

No breach of the fair hearing rule

76 Once again, the plaintiff's submissions are misconceived. There was no breach of the fair hearing rule. I address the plaintiff's arguments in turn. I start with the plaintiff's argument that it had no notice of the case it had to meet.

77 On the URA's policy, the plaintiff had no case to meet because the tribunal made no determination as to what that policy was. The tribunal merely found as a fact that the defendant's evidence of the advice it had received from the project architects – including advice on the issue of the URA's policy – was truthful evidence which it ought to accept.

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103 Notes of argument (7 Mar 2017) at p 4 (lines 1–5) and p 27 (lines 1–2).

104 Notes of argument (7 Mar 2017) at p 23 (lines 11–30).

78 Further, contrary to the plaintiff's submission,[105] the tribunal made no finding that the project architects' advice was correct, whether about the URA's policy or about anything else. Once again, the tribunal simply assumed in the plaintiff's favour at [127] of the award that the project architects' advice was wrong (quoted at [66] above).

No breach of the hearsay rule

79 As for the plaintiff's submissions on the hearsay rule, they are doubly misconceived. First, the hearsay rule does not apply in arbitration. Second, even if the rule does apply, the defendant's evidence of what the project architects told it is not hearsay when it comes to making a finding about the defendant's state of mind.

(1) Hearsay rule does not apply

80 What is commonly called the hearsay rule in litigation before the Singapore courts is in fact the requirement in s 62 of the Evidence Act (Cap 97, 1997 Rev Ed) that oral evidence in all cases must be direct evidence. The section then defines direct evidence, in connection with evidence of fact, as being evidence from a witness who is able to say from his own personal knowledge that the factual content of his evidence is true.

81 Section 62 is found in Part II of the Evidence Act. Section 2(1) of the Evidence Act expressly provides that Part II of that Act, amongst others, shall not apply to proceedings before an arbitrator. If there is a hearsay rule in Singapore arbitration, it must be found outside the Evidence Act. As Judith Prakash J (as she then was) observed in *Permasteelisa Pacific Holdings Ltd v*

105 Notes of argument (8 Mar 2017) at p 13 (lines 35–36) to p 14 (lines 1–8).

Hyundai Engineering & Construction Co Ltd [2005] 2 SLR(R) 270 at [32] after citing s 2 of the Act, "[I]n arbitration proceedings, generally, the law of hearsay and the manner of proving the truth of written statements *as set down in the Evidence Act*, are not applicable." [emphasis added]

82 Despite the existence of the Evidence Act, there continues to be a common law of evidence in Singapore. Section 2(2) of the Act provides only that common law rules of evidence which are inconsistent with the Act are repealed, not that *all* common law rules of evidence are repealed.

83 I shall therefore assume in favour of the plaintiff, without deciding, that the rule against hearsay is part of the common law of evidence in Singapore and, further, that it applies to proceedings before an arbitrator. The second assumption is an exceedingly generous assumption to make in favour of the plaintiff. I say that because it is not at all apparent that the legislature intended – when it freed proceedings before an arbitrator from the technicalities of the rules of evidence found in the Evidence Act – to subject those proceedings to the equally arcane rules of evidence at common law. Indeed, there is an almost insurmountable argument to be made that in all arbitrations conducted with Singapore as the seat, the tribunal is empowered to receive all relevant evidence, with the concerns which underlie the exclusionary rules at common law such as the hearsay rule going only to weight and not to admissibility. That principle of free admissibility would be subject only to the parties' agreement and to principles of public policy, which will include the rules of natural justice.

84 I nevertheless assume in the plaintiff's favour that this eminently sensible position is wrong. I do that in part because counsel for the plaintiff reframed his objection during oral submissions as being based not on the tribunal's decision to receive hearsay evidence but on the fact that the plaintiff

was denied an opportunity to cross-examine the project architects because the defendant did not call them as witnesses in the arbitration.

85 At common law, not every out of court statement falls within the hearsay rule. In *Lee Chez Kee v PP* [2008] 3 SLR(R) 447, the Court of Appeal observed at [70] that a statement made out of court is hearsay and inadmissible only if adduced to prove the truth of the facts set out in the statement. Evidence of a statement made out of court which is adduced to establish only that the statement was *made* (as opposed to establishing that the contents of the statement are *true*) does not infringe the hearsay rule.

86 The defendant's evidence of the project architects' advice is not hearsay. That evidence of the architects' advice was not adduced to prove: (a) what the URA's policy actually was; or (b) that the project architects' advice about that policy or use restriction was correct. Instead, the defendant adduced this evidence to prove only that that the project architects gave that advice. That was then supplemented with direct evidence that the defendant honestly believed that advice to be correct. The rule against hearsay was not engaged at all.

87 The tribunal accepted both aspects of the defendant's evidence, as it was its prerogative to do. The plaintiff cannot complain that the tribunal's findings are wrong in fact.

88 The plaintiff's argument that there was a breach of natural justice in receiving evidence of the architects' advice without a witness from the architects proving it is wholly misconceived.

89 The tribunal's findings about the project architects' advice and the defendant's belief in that advice establishes further that the tribunal's decision

on the lawfulness of the SPA (see [43]–[46] above) was not tainted by any breach of the fair hearing rule. The plaintiff points to paragraph 78 of the award[106] where the tribunal addresses the plaintiff's argument that the defendant was committing a fraud against the URA. In this paragraph, the tribunal examines the evidence in relation to the project architects' advice and the URA's use restriction before rejecting the plaintiff's contention that the defendant was guilty of a fraud on the URA. Before me, the plaintiff points to a number of instances in the award where the tribunal refers to paragraph 78 of the award to justify its findings that the defendant did not perpetrate a fraud or that the SPA was not a sale of an unlawful business.[107] The plaintiff submits that these repeated references to paragraph 78 show that the tribunal's assessment of the evidence of the project architects' advice and the URA's use restriction influenced its eventual determination that the SPA was not unlawful.

90 But the point remains the tribunal did not breach the hearsay rule in receiving that evidence. The plaintiff was therefore not improperly deprived of the chance to cross-examine the project architects. Indeed, the tribunal was clear in paragraph 78 that it was not necessary for it to determine the correctness of the architects' advice:[108]

> [viii] The Tribunal rejects [the plaintiff's] case that [the defendant] perpetrated a fraud on the URA. It finds that, advised by [the project architects], [the defendant] *honestly took the view* that operating the [business] as they did would not offend the URA policy which underlay its planning conditions and that it was a reasonable business risk to take. …
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> …
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> [x] The Tribunal is invited by [the plaintiff] to draw an inference adverse to [the defendant's] case that the fact that the

106 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 131–135.

107 Notes of argument (7 Mar 2017) at p 39 (lines 8–35) to p 40 (lines 1–4).

108 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 133–134.

> [project architect] has not been called to give evidence to confirm its advice. It declines to do so. … The evidence called was, as will be seen, more than enough to dispose of the case of fraudulent misrepresentation *without* exploring, in evidence, the *true meaning of the planning condition or the advice given about it* at the time. …
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> [emphasis added]

91 In other words, the tribunal did not rely on the defendant's evidence of the project architects' advice to find that that advice was correct. On the contrary, the tribunal declined to assess the "true meaning" of the project architects' advice (see also [78] above). It merely relied on the defendant's evidence of that advice to establish that the defendant had in fact been advised by the architects in those terms and honestly believed the advice to be correct.

92 In sum, there is no breach of the rules of natural justice that warrants setting aside the award. The plaintiff was not denied a fair hearing. First, it had reasonable notice of the case that it had to meet. Second, there is clearly no failure of natural justice in the plaintiff's lack of an opportunity to cross-examine the project architects' representatives on the content of their advice.

Third ground: Award being contrary to public policy

Law on public policy considerations

93 The third and final ground which the plaintiff says justifies setting aside the award is that the award is contrary to public policy. To this end, it relies on s 48(1)(*b)*(ii) of the Arbitration Act. Both parties' submissions on the scope of this ground rely on a number of cases on Art 34(2)(*b*)(ii) of the Model Law. I accept that they are of persuasive value in considering the scope of s 48(1)(*b*)(ii). That provision is similar, although not identical, to its analogue in the Model Law (see [97] below). A number of propositions as to when a court should set

aside a domestic award for being contrary to public policy can hence be distilled from those cases.

94 First, the court is empowered to decide for itself what the public policy of Singapore is. It is not constrained to defer to the tribunal's decision on that issue. The issue of contractual illegality under Singapore law is one aspect of Singapore's public policy. Thus, for example, where the court differs from the tribunal on the principles of law to be applied in order to determine whether a contract is vitiated by illegality under Singapore law, it is within the court's supervisory power to set aside the award. So too, the court may set an award aside if the tribunal has ignored "palpable and indisputable illegality". But setting aside is not legitimate where the court and the tribunal disagree not on the principles of law which ought to be applied but on the underlying facts to which those principles should be applied. If that is the case, the court must defer to the tribunal (*AJU v AJT* [2011] 4 SLR 739 at [62]–[64]).

95 Second, the party who wishes to set aside an award on the ground that it is contrary to public policy must establish two things. It must first identify the rule or principle of public policy to which the award is allegedly contrary. It must then ascertain the part of the award conflicting with that public policy (*VV and another v VW* [2008] 2 SLR(R) 929 at [17]).

96 Third, an award will be set aside for being contrary to public policy only if it offends "fundamental notions and principles of justice": *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ & Denis Brock eds) (Sweet & Maxwell, 2014) at paras 14.055–14.057. This is a narrow conception which will not be satisfied unless upholding the award (i) would "shock the conscience"; (ii) is "clearly injurious to the public good" or "wholly offensive to the ordinary reasonable and fully informed member of the public; or

(iii) would violate the "most basic notion of morality and justice" (*PT Asuransi* ([56] *supra*) at [59]).

97 That plaintiff submits that "public policy" in s 48(1)(*b*)(ii) of the Arbitration Act sets a lower threshold for setting aside on this ground in a domestic arbitration than the threshold set by Article 34(2)(*b*)(ii) of the Model Law in international arbitrations.[109] That is said to be because the Arbitration Act enables the court to set aside a domestic arbitration award on the *domestic* standard of public policy which is wider than the narrow, international standard of public policy which the Model Law applies to an international arbitration. It is not necessary for me to determine in this case whether the plaintiff's argument is correct. As will be seen, the plaintiff's submission that the award contravenes public policy is thoroughly misconceived, whatever the applicable threshold.

Whether the award is contrary to public policy

98 The plaintiff submits that there are three ways in which the award is contrary to public policy. First, the tribunal violated "basic notions of justice" in admitting and relying on hearsay evidence of the architects' advice to the defendant.[110] Second, the tribunal's finding that the URA's use restriction was open to interpretation and did not require the defendant to limit the use of the facilities to customers of the business is "injurious to the public good" and "violates in a fundamental way notions of both morality and justice".[111] Third, the tribunal's determination that the SPA was not void for illegality is wrong

109 Notes of argument (7 Mar 2017) at p 4 (lines 33–35) to p 5 (lines 1–3).

110 Plaintiff's written submissions for OS 871/2016 at para 53.

111 Plaintiff's written submissions for OS 871/2016 at para 51.

because the agreement involved the sale of an unlawful business conducted in breach of URA's planning conditions.[112]

Admission and consideration of hearsay evidence

99 I address these arguments in turn, starting with the plaintiff's argument regarding hearsay evidence. I have already rejected this argument under the natural justice head. I can reject it again swiftly under the public policy head.

100 As a start, it is unclear why admitting and relying on hearsay evidence amounts to a breach of public policy. There is nothing in the public policy of Singapore which requires a tribunal to exclude hearsay evidence in finally determining a party's rights and obligations in a civil claim. There is, of course, a rule of evidence in Singapore that, in a trial in open court, facts must be proved by direct evidence as defined in s 62 of the Evidence Act. But that is a rule of evidence not of public policy. And that rule of evidence is any event subject to exceptions. Further, the courts routinely act on hearsay evidence in determining with finality the parties rights and obligations in chambers, *eg* on a summary judgment application, on a striking out application or on an originating summons. Finally, Parliament has specifically legislated s 2(2) of the Evidence Act that Singapore's domestic rules of evidence, which includes s 62 of the Evidence Act, shall not apply to proceedings before an arbitrator.

101 In any case, as I have found at [78]–[91] above, the tribunal neither admitted nor relied on hearsay evidence in reaching its decision. It bears re-emphasising that evidence of the project architects' advice to the defendant was admitted and relied upon to prove the fact that the architects advised the

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112 Plaintiff's written submissions for OS 871/2016 at para 52.

defendant on URA's policy and use restriction, not to prove that the architects' advice was correct.

URA's policy

102 With respect to the second argument, I agree with the defendant that a reading of the tribunal's award makes it apparent that it did not make any findings as to the effect of the URA's policy and use restriction.[113] The tribunal's findings on this issue centred on only two questions: first, how *the defendant subjectively understood* the URA's policy and use restriction in light of the professional advice it had received from the project architects; and second, whether a reasonable person would have understood the advice in the same way.

103 And as examined above at [69], it was necessary for the tribunal to do so in order to determine whether the defendant was guilty of making fraudulent misrepresentations. In my view, the tribunal did not make any findings on what the URA's policy and use restriction *objectively* allowed the defendant to do. This is made clear in the following passage from paragraph 78 of the tribunal's award (see also [90] above):[114]

> [viii] … The meaning of the URA's restrictions and the policy behind them are *open to interpretation*. The Tribunal does not consider that a decision taken to interpret the undertakings and, the planning conditions to which they gave rise, upon advice, in a commercially convenient way comes close to a fraud on the URA. …
>
> [ix] … The Tribunal observes that, if a very strict view is taken of the restriction, there is an inherent difficulty with monitoring access for the operator as well as the URA – something likely to colour a *reasonable person's* view of the point of the policy behind the restrictions and to encourage a practical interpretation of them.

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113 Defendant's written submissions for OS 871/2016 at para 182.

114 PW's affidavit for OS 871/2016 (26 Aug 2016) at pp 133–134.

[emphasis added]

104 Accordingly, as far as the interpretation of URA's policy and use restriction is concerned, there is no basis for the plaintiff to argue that the tribunal made any findings that are contrary to public policy.

Illegality of the sale and purchase agreement

105 I move on to the third argument. The plaintiff argues that the tribunal erred in giving effect to the SPA, which it claims is tainted by illegality. The plaintiff argues that the SPA is illegal because it is an agreement for an illegal purpose. More specifically, the submission is that the SPA involved the sale of a business that is prohibited under the URA's use restriction, *ie*, a business in which the facilities are open to members of the public.[115] In this regard, the plaintiff also points to paragraph 293 of the award, where the tribunal finds that the defendant was in breach of its head grant with the Singapore government because the business was being operated in breach of the URA's use restriction.[116]

106 In my judgment, there is no merit in the plaintiff's submissions. I begin by setting out the law on illegality briefly. There are broadly two types of illegality that can vitiate a contract: statutory illegality and illegality at common law (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 13.003). The first step in every analysis involving illegality is to identify the alleged illegality (*Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [79]). A contract is not necessarily

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115 Plaintiff's written submissions for OS 871/2016 at para 52; Notes of argument (7 Mar 2017) at p 29 (lines 6–21).

116 Plaintiff's written submissions for OS 871/2016 at para 52; Notes of argument (7 Mar 2017) at pp 31 (lines 30–34) to 32 (lines 1–4); PW's affidavit (26 Aug 2016) at p 206.

void and unenforceable simply because it was entered into for an illegal purpose, such as where the parties intended to contravene a statutory provision. As held in *Ting Siew May* at [70]–[71], the court has to calibrate a proportionate response to the illegality in each case by assessing factors such as the gravity of the illegality and the parties' intentions.

107 In this case, the illegality alleged is statutory in nature. The plaintiff alleges that the SPA contravenes the Planning Act (Cap 232, 1998 Rev Ed) because it was being operated in breach of the URA's use restriction.[117] The plaintiff claims that this breach "amounts to an illegal act and to an illegal operation of the [business]".[118] The plaintiff further relies on Devlin LJ's decision in *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 388 for the proposition that a party cannot claim under a contract if it has to rely on its own illegal act to prove his rights under that contract.[119]

108 But as the defendant points out, it is not clear to begin with why the plaintiff says that the SPA is tainted by illegality and is vitiated even if it is assumed that the defendant was operating the business facilities in breach of the URA's use restriction *before* the parties entered into the SPA. The effect of the SPA was to sell the business and the leasehold interest in the premises from which it was being operated to the plaintiff. Upon completion of the sale, it would be entirely up to the plaintiff to determine how to operate the business.[120] There is certainly nothing to suggest that the parties entered into the SPA for the purpose of contravening the URA's use restriction. There is also nothing in

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117 Notes of argument (7 Mar 2017) at p 22 (lines 1–20).

118 Plaintiff's written submissions for OS 871/2016 at para 52.

119 Notes of argument (7 Mar 2017) at p 28 (lines 24–25).

120 Defendant's written submissions for OS 871/2016 at para 168.

the SPA which obliges the plaintiff to continue to operate the business as the defendant did if the plaintiff truly believes that doing so is in breach of the URA's use restriction. It is therefore difficult to see any basis for the plaintiff's submission that the SPA is tainted by illegality.

109 The plaintiff's inability to demonstrate any illegality is therefore the end of the inquiry. I add only the observation that the tribunal did not find that the defendant had operated the business in breach of the planning conditions. The tribunal's analysis simply took the plaintiff's case at its highest and *assumed* – to the plaintiff's benefit – that there was a breach (see [27] above).[121] In fact, the tribunal went so far as to suggest that there might be no breach at all at paragraph 78[viii] of the award where it noted that the URA had taken no action against the defendant during the period when the plaintiff alleged that the business was being operated in breach of the use restriction:

> … [The tribunal] notes that the [business] has in fact been operated, by both Parties, in accordance with that advice since it opened in November 2013 and that that has *given to no difficulties with the URA*.
>
> [emphasis added]

110 For these reasons, I reject the plaintiff's submission that the SPA was a contract that the parties entered into with the object of committing an illegal act. The award therefore cannot be said to be contrary to public policy on this final ground.

Conclusion on the setting aside application

111 In sum, I find that the plaintiff has failed to satisfy any of the grounds that it relies on for setting aside the award under s 48 of the Act. I have therefore

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121 Notes of argument (8 Mar 2017) at p 17 (lines 23–29).

dismissed the setting aside application in its entirety. The award thus stands and continues to bind the parties.

112 Bearing this in mind, I now proceed to analyse the defendant's related application to strike out the action that the plaintiff has brought against it.

Striking out application

Background and parties' arguments

113 Having set out the facts of the substantive dispute between the parties, it suffices for me to now set out the facts underlying the striking out application. As noted at [4] above, the tribunal delivered its award in June 2016. In October 2016, the plaintiff initiated an action against the defendant. While the focus of the arbitration (and therefore the award) was on the SPA, the focus of the plaintiff's action is on the *lease* for the business which the defendant granted to the plaintiff pursuant to the SPA.[122] The purpose of the lease was to give full effect to the sale of the business by transferring from the defendant to the plaintiff the leasehold title to the premises from which the defendant was operating the business.[123]

114 The plaintiff's case is that the lease and the SPA are distinct agreements. The arbitration and the award was concerned only with the parties' rights under and in relation to the SPA, not the lease. On that basis, it submits that nothing that occurred in the arbitration bars it pursuing an action against the defendant for breach of the lease.

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122 Statement of claim (17 Oct 2016) at para 9.

123 DW's affidavit for HC/SUM 5305/2016 (1 Nov 2016) at paras 29–30.

115 The defendant contends that this action is nothing but an impermissible collateral attack on the award. It argues that the SPA and the lease are not distinct agreements but a single transaction because the defendant was bound to grant – and the plaintiff was bound to accept – the lease once the parties had entered into a contractual relationship under the SPA. It also points to the similarities between the plaintiff's claims in the action on the lease and the plaintiff's claims in the arbitration on the SPA. In particular, the plaintiff's action likewise concerns the URA's use restriction and the inability of the plaintiff to allow members of the public to use the business' facilities.

116 The plaintiff's pleaded claims in the action can be put into three categories:[124]

(a) First, the defendant fraudulently induced the plaintiff to enter into the lease by making three representations.[125] These representations led the plaintiff to understand that the *facilities would be accessible and usable by members of the public*, which turned out to be contrary to the URA's use restriction.[126] In the alternative, the plaintiff claims damages under s 2 of the Misrepresentation Act in the event these three representations were not fraudulent.[127]

(b) Second, the defendant breached the covenant in the lease for quiet enjoyment.[128] The plaintiff entered into the lease on the basis that

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124 Defendant's written submissions for HC/SUM 5305/2016 at para 45.

125 Statement of claim (17 Oct 2016) at paras 13–32.

126 Statement of claim (17 Oct 2016) at paras 18(c), 18(k), and 18(n).

127 Statement of claim (17 Oct 2016) at para 31.

128 Statement of claim (17 Oct 2016) at paras 33–41.

the facilities could lawfully be used by members of the public. But this turned out to be untrue, because such use would contravene the URA's use restrictions. This means that the business is not fit for the purpose that the plaintiff intended to use it for, thereby breaching the covenant for quiet enjoyment.[129]

(c) Third, that the defendant derogated from its grant under the lease.[130] The terms of the lease allegedly provided that *the facilities could be used by members of the public*. But as stated above, this turned out to be false. The defendant has thereby derogated from its grant to the plaintiff.[131]

117 The defendant submits that the tribunal has dealt with all of these claims. Alternatively, the plaintiff could have and ought to have raised these claims during the arbitration. Therefore, by virtue of the doctrine of *res judicata*, the plaintiff is precluded from bringing these claims now.[132]

Issue to be decided

118 The issue that I have to decide is whether the plaintiff's action ought to be struck out under O 18 r 19 of the ROC. This requires me to consider whether the doctrine of *res judicata* precludes the plaintiff from proceeding with its action. I have to consider that issue in light of the fact that I have just decided,

129 Statement of claim (17 Oct 2016) at paras 38–41.

130 Statement of claim (17 Oct 2016) at paras 42–46.

131 Statement of claim (17 Oct 2016) at paras 43–45.

132 Defendant's written submissions for HC/SUM 5305/2016 at para 12.

by dismissing the plaintiff's setting aside application, that the award binds both parties.

Law on striking out

119 The law on striking out under O 18 r 19 of the ROC is well-established. In this case, the defendant relies specifically on O 18 r 19(1)(*b*) to argue that the action is frivolous and vexatious, and on r 19(1)(*d*) to argue that the action is an abuse of the process of the court.

120 In order to strike out an action as being "frivolous or vexatious", an applicant must show that it is "plainly or obviously" unsustainable: *The Bunga Melati 5* [2012] 4 SLR 546 at [39]. There is a distinction between legal and factual unsustainability. An action is legally unsustainable if a party would not be entitled to the remedy being sought as a matter of law *even if it can prove all the facts*. An action is factually unsustainable when it has no factual basis and is therefore clearly fanciful. In this case, the defendant submits that the action is plainly *legally* unsustainable because the doctrine of *res judicata* precludes the plaintiff from pursuing all of the claims comprised in this action.[133]

121 On the "abuse of process" ground, the Court of Appeal held in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22] that the term "abuse of process" imports considerations of public policy and the interests of justice. The court will not allow itself to be abused by litigants seeking to use the judicial apparatus to vex and oppress other parties. In this regard, it has been observed that the court will strike out an action under this limb if it involves re-litigating matters or litigating matters which ought to

133 Defendant's written submissions for HC/SUM 5305/2016 at para 27.

have been raised in earlier proceedings: *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) at para 18/19/15.

122 Both grounds on which the defendant relies in its striking out application therefore rest on the doctrine of *res judicata*. To that doctrine I now turn.

Doctrine of res judicata

123 The doctrine of *res judicata* has been comprehensively discussed and set out in a number of decisions (see *eg, 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 and *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453). It therefore suffices for present purposes to set out only the essential principles. The term "*res judicata*" comprises three principles, namely, (a) cause of action estoppel; (b) issue estoppel; and (c) the "extended" doctrine of *res judicata* or the abuse of process doctrine (*TT International* at [98]). These principles are underscored by the public policy consideration that there should be finality in litigation and that parties should not be unduly harassed or multiply vexed in the same matter. But while they share the same underlying purpose, they are distinct principles which operate differently (*TT International* at [98]).

Cause of action estoppel

124 Cause of action estoppel operates to prevent a party from asserting or denying against another party the existence of a cause of action, when its existence or non-existence has previously been decided in proceedings between the same parties by a court of competent jurisdiction (*TT International* at [99] citing *Thoday v Thoday* [1964] P 181 at 197). In *Zhang Run Zi v Koh Kim Seng*

and another [2015] SGHC 175 at [40], George Wei J distilled the elements of cause of action estoppel as follows:

(a) first, there must be identity of parties;

(b) second, there must be identity of *causes of action*;

(c) third, the earlier judgment must have been pronounced by a court of competent jurisdiction; and

(d) fourth, the judgment must be final and conclusive on the merits.

Issue estoppel

125 Issue estoppel precludes a party from re-litigation an issue rather than a cause of action. Issue estoppel applies when a litigant raises a question of fact or law which has already been determined by a court of competent jurisdiction (*TT International* at [100]). The elements to be satisfied for a party to raise issue estoppel successfully are set out in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [14]. These elements mirror closely the elements for cause of action estoppel and can be summarised as follows:

(a) first, there must be identity of parties;

(b) second, there must be identity of *subject matter*;

(c) third, the earlier judgment must have been pronounced by a competent court; and

(d) fourth, the judgment must be final and conclusive on the merits.

126 At this juncture, I pause to note that issue estoppel overlaps with cause of action estoppel, although the former is of wider application (*TT International* at [100]; *Goh Nellie* at [41]). Certainly, it is evident from the above that the two estoppels are similar in that they operate when a party attempts to raise a point that has been determined by a competent court (*TT International* at [101]).

Extended doctrine of res judicata or abuse of process

127 Cause of action estoppel and issue estoppel are quite distinct from the abuse of process doctrine. It is the doctrine of abuse of process which operates to bar a litigant from litigating matters even though those matters *have not* before been determined by a court of competent jurisdiction. As Menon JC (as the Chief Justice then was) observed in *Goh Nellie* at [41], the two estoppels and their overlapping areas of application are less applicable when the court is confronted with an issue which has not been previously litigated. The focus then shifts to the abuse of process doctrine and whether the party now raising that issue *ought* to have raised it in prior proceedings (at [41]):

> As one moves further away from what was directly covered by the earlier decision, then the relevant doctrine becomes the defence of abuse of process rather than issue estoppel. Thus where the issue ought to have been raised and was not, it might nonetheless amount to an abuse of process subsequently to litigate that same issue.

128 Accordingly, the abuse of process doctrine has wider application than both cause of action estoppel and issue estoppel. To ascertain whether the abuse of process doctrine is engaged, the court must examine the circumstances of the case to determine whether the matter which the plaintiff seeks to litigate now could reasonably have been raised in the earlier proceedings (*TT International* at [104]). Ultimately, the law must strike a balance between ensuring that a the defendant is not unduly harassed by repeated litigation and allowing a plaintiff

to pursue a genuine claim. To do this, the court considers the following factors, which are neither exhaustive nor determinative (*Goh Nellie* at [53]):

(a) whether the later proceedings in substance are nothing more than a collateral attack upon the decision in the earlier proceedings;

(b) whether there is fresh evidence that might warrant re-litigation;

(c) whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and

(d) whether there are some other special circumstances that might justify allowing the fresh proceedings to continue.

Analytical approach to the doctrine of res judicata

129 From the above, it can be seen that cause of action estoppel and issue estoppel find application in significantly different situations from the abuse of process doctrine. In *TT International* at [105], the Court of Appeal described the analytical approach to be applied when a defendant argues that the doctrine of *res judicata* prevents a plaintiff from bringing a claim or raising an argument. First, the court must determine whether the matter has been previously decided by a competent court in proceedings between the same parties. If so, then one or perhaps both of the estoppels are triggered. Second, if not, the question is whether the matter could reasonably have been raised in the earlier proceedings. If it could have been, then the abuse of process doctrine operates to prevent the plaintiff from raising it in the fresh proceedings.

Whether the plaintiff's action ought to be struck out

130 The plaintiff makes the preliminary point that the SPA and the lease are wholly independent agreements. As such, it says, the lease engages the parties

in rights and obligations which are entirely independent from those arising from the SPA[134] and therefore outside the scope of doctrine of *res judicata* not only in its narrow sense but also in its wider sense.

131 The plaintiff's preliminary point is misconceived. The plaintiff accepts that entering into the lease was expressly contemplated by the SPA. It acknowledges also that it had a legal obligation to enter into the lease once the SPA had been executed and certain conditions precedent satisfied, as they were.[135] Nevertheless, it maintains that the two agreements are in truth independent for a number of reasons. First, the SPA involved the transfer of a number of assets such as inventory and goodwill of the business. The lease is only one of the assets to be transferred under the SPA, and the two agreements thus cannot be treated as the same.[136] Second, and as a consequence of its first point, a vitiation of the lease by misrepresentation or breach is independent of any vitiation of the SPA by misrepresentation or breach.[137] Third, cl 23.1 of the lease provides that disputes arising from the lease are to be submitted for determination to the "exclusive jurisdiction of the Singapore courts".[138] Therefore, the plaintiff's claim that the lease has been vitiated by misrepresentation or breached could not have been presented and resolved in the earlier arbitration together with the plaintiff's claims arising from the SPA.[139] From this argument, the plaintiff invites me to conclude that the arbitration (which dealt only with the SPA) is wholly distinct from this action (which deals

134 Plaintiff's written submissions for HC/SUM 5305/2016 at para 13.

135 Notes of argument (27 Feb 2017) at p 26 (lines 13–24).

136 Plaintiff's written submissions for HC/SUM 5305/2016 at para 12.

137 Notes of argument (27 Feb 2017) at p 17 (lines 31–34) to p 18 (lines 1–4).

138 Defendant's core bundle for HC/SUM 5305/2016 at p 347.

139 Plaintiff's written submissions for HC/SUM 5305/2016 at para 17.

only with the lease). Therefore, it says that the doctrine of *res judicata* does not apply to prevent it from bringing an action against the defendant.

132 The plaintiff's argument ignores the plain wording of the SPA and the substance of the transaction it encompassed. As the defendant points out, the lease arises directly from the express terms of the SPA and is simply the mechanism under the SPA by which the defendant transferred to the plaintiff an interest in the property from which the business was operated.[140] To this end, the defendant points to a number of provisions in the SPA to demonstrate that the SPA and the lease cannot be treated as independent agreements.

133 It suffices for me to set out a few examples. First, cl 23.1 of the SPA[141] provides that the SPA and the transaction documents, which includes the lease, collectively constitute the "whole agreement" between the two parties.[142] Second, cl 3.1 of the SPA[143] provides that the sale of the business encompasses the sale of the business "and assets". "Assets" is defined in the SPA to include "the interest in the [business] to be granted under the [l]ease".[144] Third, Schedule 2 of the SPA provides that upon execution of the SPA, the defendant is to deliver to the plaintiff copies of the lease executed by the defendant.[145]

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140 Defendant's written submissions for HC/SUM 5305/2016 at para 48.

141 Defendant's core bundle for HC/SUM 5305/2016 at p 276.

142 Defendant's written submissions for HC/SUM 5305/2016 at para 48(d)(ii); DW's affidavit for HC/SUM 5305/2016 (1 Nov 2016) at para 33.

143 Defendant's core bundle for HC/SUM 5305/2016 at p 252.

144 Defendant's core bundle for HC/SUM 5305/2016 at p 241; Defendant's written submissions for HC/SUM 5305/2016 at para 48(d)(i); DW's affidavit for HC/SUM 5305/2016 (1 Nov 2016) at para 37.

145 Defendant's core bundle for HC/SUM 5305/2016 at p 282; DW's affidavit for HC/SUM 5305/2016 (1 Nov 2016) at para 35(b).

134 Therefore, it is clear to me, contrary to the plaintiff's submissions, that the SPA and the lease are not in truth independent agreements. The SPA is the express contractual cause of the lease.

135 It is also important to bear in mind the substance of the transaction. As the defendant points out, the plaintiff has an obligation to pay a nominal annual rent of $1 a year under the lease. The true economic value of the lease forms part of the value of the business reflected in the consideration payable under the SPA.[146] Although the lease requires a lease premium of $408m to be paid, that figure has no independent existence. It is a figure stipulated in the SPA and is subsumed in the total purchase consideration of $469m paid under the SPA. The defendant has no independent right to receive a lease premium of $408m under the lease.

136 In the same vein, the gist of the plaintiff's claim in this action is for the same economic loss arising from the same case that it presented in the arbitration, *ie*, that it was misled into agreeing to pay too much money for the business under the SPA (*ie*, $469m). That is why the plaintiff claims in the action, among other things, damages for the "diminution in the value of the [business]".[147] That was one of its alternative claims in the arbitration (see [25] above).[148] Its claim in this action has nothing in reality to do with the bargain represented by the lease, under which its sole economic obligation is to pay a nominal rent of $1 a year to the defendant.[149] Thus, even by the plaintiff's own

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146 Defendant's core bundle for HC/SUM 5305/2016 at p 338; Notes of argument (27 Feb 2017) at p 3 (lines 24–31).

147 Statement of claim (17 Oct 2016) at para 57.

148 Defendant's written submissions for HC/SUM 5305/2016 at paras 125–127; Notes of argument (27 Feb 2017) at p 41 (lines 24–35).

149 Notes of argument (27 Feb 2017) at p 10 (lines 13–16).

case, the SPA and the lease are not and cannot be treated as wholly distinct agreements.

137 Bearing in mind my analysis of the true and subordinate relationship which the lease bears to the SPA, it is clear that the plaintiff's action ought to be struck out. In my view, the plaintiff's action is a collateral attack on the award or an abuse of process. In any event, its claims are also unsustainable. I now examine each category of the plaintiff's claims against the defendant, starting with its allegation that the defendant's representatives induced it to enter the lease by way of a misrepresentation.

Misrepresentation claim

138 The statement of claim in the action alleges that the defendant made three misrepresentations to the plaintiff which conveyed to the plaintiff that members of the public were able to use the facilities.[150] The first representation was made in a draft budget prepared by the operator.[151] I have dealt with this in passing at [33] above. The second representation was made during a tour of the business.[152] The third representation was made in a letter which the defendant sent to the plaintiff stating that the plaintiff's acquisition of the business "[would] not result in any change to the current business model of the…business".[153]

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150 Statement of claim (17 Oct 2016) at paras 13–15.

151 Defendant's written submissions for HC/SUM 5305/2016 at para 51; Statement of claim (17 Oct 2016) at paras 18(a)–(c).

152 Statement of claim (17 Oct 2016) at paras 18(d)–(k).

153 Statement of claim (17 Oct 2016) at paras 18(l)–(n).

139 The first two representations were made before the parties executed the SPA. The third representation, however, was made after the parties had executed the SPA and before they entered into the lease. The third representation could not, therefore, have been part of the plaintiff's case in the arbitration.[154]

140 The first and second representations were part of the plaintiff's case before the tribunal in the arbitration, albeit in the context of the SPA. The tribunal rejected the plaintiff's case. It found that neither representation was made by the defendant, let alone fraudulently. The tribunal accepted that the draft budget containing the first representation did impliedly misrepresent that the facilities were open to members of the public. But it held that the misrepresentation was not attributable to the defendant. The draft budget was prepared by the operator, not by the defendant, and the defendant did not by conveying the draft budget to the plaintiff, adopt the misrepresentation as its own.[155] As for the second representation, the tribunal found that there was no representation at all on that occasion. The defendant said nothing during the tour that could have amounted to an express or implied representation that the public would have unrestricted access to the facilities.[156]

141 Accordingly, it is clear that the first two representations alleged by the plaintiff in its statement of claim are caught by issue estoppel. The tribunal has determined that the defendant did not, for differing reasons, represent to the plaintiff on these two occasions that members of the public could have access to the facilities. It is therefore no longer open to the plaintiff to litigate these two

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154 Defendant's written submissions for HC/SUM 5305/2016 at para 70.

155 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 172 (para 176) to p 173 (para 177).

156 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 184 (para 218).

representations again, even in the context of the lease. It is hence unsurprising that the plaintiff eventually withdrew its claim in relation to these two representations for the purposes of the action.[157] But the plaintiff continues to contends that it is not precluded from pursuing a claim on the third representation – which was not before the tribunal – in this action. In this regard, the plaintiff argues further that the first two representations, while not actionable in themselves, constitute factual background which gives meaning to the third representation.[158]

142 While the third representation was not before the tribunal, and therefore not subject to any finding by the tribunal, it is my view that the plaintiff is precluded by the doctrine of abuse of process from pursuing an action based on the third representation.

143 It is to my mind plainly legally unsustainable for the plaintiff to attempt to found a misrepresentation action (fraudulent or not) on the third representation. As mentioned at [138] above, the third representation was in the form of an e-mail sent to the plaintiff *after* the SPA had been executed. By that time, and by virtue of the SPA, the defendant was already contractually bound to enter into the lease. That is something the plaintiff itself acknowledges (see [130] above). It therefore cannot be said that the plaintiff was induced by the representation to enter into the lease. It is therefore legally unsustainable for the plaintiff to contend now that it was the third representation which, in any legal sense, induced it to enter into the lease. Thus, in my judgment, the plaintiff's action ought to be struck out under O 18 r 19(1)(*b*) of the ROC.

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157 Notes of argument (27 Feb 2017) at p 37 (lines 8–14).

158 Notes of argument (27 Feb 2017) at p 35 (lines 9–16).

Quiet enjoyment and derogation from grant

144 I now address the plaintiff's claims that the defendant is in breach of the lease by breaching the covenant for quiet enjoyment and derogating from its grant. As will be seen, both claims are founded on the notion that the defendant is in breach of the lease because the facilities cannot be used by members of the public. In my judgment, it is an abuse of process for the plaintiff to bring these claims, which are in any event misconceived.

145 I begin by setting out the basis of both claims. The plaintiff's relies on cl 2 of the lease, which provides that the defendant has an obligation to ensure that the plaintiff may "peaceably hold and enjoy the [premises of the business]".[159] It further relies on cl 4 of the lease, under which the plaintiff has an obligation not to use the leased premises to conduct any business aside from that which is prescribed under the lease.[160] Given the importance of cl 4 to the plaintiff's claim, I set out the relevant portion of the clause in full here:

> **Prescribed Business**
>
> The Lessee covenants to the Lessor to:
>
> (a) not conduct or permit to be conducted any business or operations in, or otherwise use for any purpose, the Demised Premises, except as follows:
>
> (i) during the Commitment Period, the Lessee will conduct a [business] on the whole of the Demised Premises which is either:
>
> (A) operated by the Initial … Operator pursuant to the Initial … Agreements; or
>
> (B) in the event that the Initial … Agreements have been terminated by the Lessee in accordance with their terms, operated by the Lessee or a … Operator (not being the Initial … Operator) in a manner and of a quality and

159 Statement of claim (17 Oct 2016) at paras 33 and 42.

160 Statement of claim (17 Oct 2016) at para 34.

> standard that is at least commensurate with the market positioning of the business conducted by the Lessor on the Servient Tenement; and
>
> (ii) during the remainder of the Term after expiry of the Commitment Period, the Lessee will conduct a business on the whole of the Demised Premises,
>
> (subparagraphs (i) and (ii) together, "**Prescribed Business**");

146 The plaintiff's case is that the operator provided a budget pursuant to the "Initial … Agreements" mentioned in cl 4(a)(i)(A) of the lease, and that the budget included income obtained from the facilities being used by members of the public.[161] Presumably, this led the plaintiff to believe that the facilities could be used by members of the public. But the plaintiff argues that, because such use of the facilities would be in breach of the URA's use restriction, the business is "materially less fit" for the use contemplated by the lease.[162] Therefore, the plaintiff argues, the defendant is in breach of the covenant of quiet enjoyment[163] and has derogated from its grant.[164]

147 The plaintiff's argument essentially revolves around the question of what the phrase "prescribed business" in the lease entails. But as the defendant submits,[165] that issue has in substance been dealt with by the tribunal in the award. Before the tribunal, the plaintiff sought to argue that cl 3.1 of the SPA

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161 Statement of claim (17 Oct 2016) at para 35.

162 Statement of claim (17 Oct 2016) at paras 38–40.

163 Statement of claim (17 Oct 2016) at para 41.

164 Statement of claim (17 Oct 2016) at para 45.

165 Defendant's written submissions for HC/SUM 5305/2016 at para 94.

contemplated the sale of a business without any restrictions as to who can use the facilities. The relevant portion of cl 3.1 provides as follows:[166]

> [the defendant] will sell and [the plaintiff] will buy and pay for the Business as a going concern together with the Assets free from all Encumbrances …

148 As part of its argument in the arbitration, the plaintiff also relied on the definition of "business" under the SPA, which is as follows:[167]

> "Business" means [the defendant's] business of owning the [business] and conducting its affairs under the operatorship of the…Operator as at the date of this Agreement and immediately before the Completion Date.

149 The plaintiff relied on cl 3.1 of the SPA and the definition of "business" to argue that consideration should be given to the operator's operating plan, which is effectively its budget. In this regard, the plaintiff argued that the budget contemplated income from customers of the business as well as from members of the public.[168] But because the plaintiff is not permitted by the URA's use restriction to allow members of the public to use the facilities, the plaintiff submitted that the defendant was therefore in breach of cl 3.1 of the SPA.

150 The tribunal roundly rejected this argument, holding that cl 3.1 does "no more than identify the subject matter of the sale in the SPA".[169] And it is evident that the plaintiff's claims for breach of the covenants of quiet enjoyment and derogation of grant are merely re-characterisations of the arguments that it placed before the tribunal in the arbitration, and which the tribunal rejected. This is especially in the light of my finding that the SPA and the lease are not distinct

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166 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 549.

167 Defendant's core bundle for HC/SUM 5305/2016 at p 537.

168 Defendant's core bundle for HC/SUM 5305/2016 at p 540.

169 PW's affidavit for OS 871/2016 (26 Aug 2016) at p 202 (para 272).

agreements, but are part of a single transaction with the lease being subsidiary to the SPA. The plaintiff's claims thus constitute a collateral attack on the tribunal's findings. The doctrine of abuse of process (in the *res judicata* sense) is squarely engaged. As Menon JC notes in *Nellie Goh* at [21], the abuse of process doctrine is to prevent a situation where litigants attempt to re-litigate an issue that has been decided by re-characterising it. Accordingly, the plaintiff's action ought to be struck out under O 18 r 19(1)(*d*) of the ROC as an abuse of process.

151 In any case, it is clear that the plaintiff's claims are legally misconceived. It is trite that the covenants for quiet enjoyment and non-derogation from grant operate *prospectively*. They are therefore inapplicable to acts which occurred *before* the lease is granted or, in the case of continuing acts, which started before the lease is granted (*Overseas Union Enterprise Ltd v Three Sixty Degree Pte Ltd and another suit* [2013] 3 SLR 1 at [73]). Here, the plaintiff's claims are premised on the inability to let members of the public use the facilities. That restriction was in place before the defendant granted the plaintiff the lease. The plaintiff's claims under this head are therefore legally unsustainable and ought to be struck out under O 18 r 19(1)(*b*) of the ROC.

Conclusion on the striking out application

152 For the reasons above, I strike out the plaintiff's action entirely under O 18 r 19 of the ROC. In my view, the plaintiff's claims are essentially the same as the claims that it placed before the tribunal. It is therefore prevented by the doctrine of *res judicata* from litigating them again. In any case, it is clear that its claims are legally unsustainable.

Conclusion

153 To recapitulate, the plaintiff's setting aside application is dismissed. None of the grounds under s 48 of the Arbitration Act that the plaintiff claims to justify the setting aside of the award are applicable in this case. The tribunal neither exceeded its jurisdiction by deciding issues that were not before it nor did it deny the plaintiff a fair hearing. The SPA is also not tainted by illegality and the award is not contrary to public policy.

154 The defendant's striking out application is allowed. I strike out the plaintiff's action. In my judgment, the action is barred by the doctrine of *res judicata* and constitutes an abuse of process under O 18 r 19(1)(*d*) of the ROC. The plaintiff's claims for breach of the lease are also legally unsustainable and ought to be struck out under O 18 r 19(1)(*b*).

155 As for costs, the plaintiff shall pay to the defendant the costs of and incidental to the applications. The costs of the setting aside application is fixed at $50,000 including disbursements. With regard to the striking out application, the plaintiff is to pay to the defendant the costs of and incidental to the application and the costs of and incidental to the remainder of the action. Such costs are fixed at $21,000 excluding disbursements, which are to be taxed if not agreed.

Vinodh Coomaraswamy
Judge

Peter Gabriel, Kevin Au and Charmaine Jin (Gabriel Law Corporation) for the plaintiff in both applications;

Philip Jeyaretnam SC, Ajinderpal Singh, Joel Yeow and Kayleigh Wee (Dentons Rodyk & Davidson LLP) for the defendant in both applications.
