AKN and another *v* ALC and others and other appeals
[2015] SGCA 18

Case Number	: Civil Appeals Nos [P], [Q] and [R]
Decision Date	: 31 March 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Andre Yeap Poh Leong SC, Adrian Wong Soon Peng, Jansen Chow Chao Wu, Ang Leong Hao and Ng Lip Chih (Rajah & Tann Singapore LLP) for the appellants in Civil Appeals Nos [P], [Q] and [R]; Philip Jeyaretnam SC and Evans Ng Hian Pheng (Rodyk & Davidson LLP) for the respondents in Civil Appeal No [P]; Davinder Singh SC, Zhuo Jiaxiang, Vishal Harnal, Chan Yong Wei and David Fong (Drew & Napier LLC) for the respondents in Civil Appeal No [Q]; Alvin Yeo SC, Chan Hock Keng, Lin Wei Qi Wendy Lin and Chong Wan Yee Monica (WongPartnership LLP) for the respondent in Civil Appeal No [R].
Parties	: AKN and another — ALC and others

Arbitration – Award – Recourse against award – Setting aside

31 March 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 At the heart of this judgment is the question of the proper relationship between arbitral tribunals and the courts. Before us are three appeals from the decision of the High Court judge ("the Judge") in *AKM v AKN and another and other matters* [2014] 4 SLR 245 ("the High Court Judgment") concerning an arbitral award issued by a three-member arbitral tribunal in an arbitration administered by the Singapore International Arbitration Centre ("the SIAC"). The Judge set aside the arbitral award ("the Award") in its entirety, primarily on the grounds of one or more breaches of natural justice. He also found that the arbitral tribunal ("the Tribunal") had acted in excess of its jurisdiction. The claimants in the arbitration, AKN and AKO, have appealed to this court. Their central contention is that the Judge overstepped his bounds by scrutinising the merits of the Award too closely, and further, that he should not have set aside the Award.

Background

2 To maintain the confidentiality of the arbitration, the Judge used pseudonyms in place of the names of the parties and their related entities. He also converted all sums denominated in local currency into the approximate equivalent in US dollars, and used fictional names for the countries and the products concerned. This device is maintained in this judgment.

The factual context

3 This case arose from the liquidation of a company in the country of Moria ("the Corporation"). The Corporation was the largest regional producer of a product called Mithril. Its principal production facility was in a city within Moria called Erebor.

4 The Corporation was heavily indebted to a number of secured creditors (generically referred to hereafter as "Secured Creditors") as well as to the city of Erebor in respect of unpaid taxes. Those taxes were due in respect of the land on which the Corporation's principal production facility was situated, the production facility itself and the machinery within the production facility. The liquidator of the Corporation ("the Liquidator") devised a plan to sell some of the Corporation's assets ("the Plant Assets") to AKN and AKO, the appellants in all three appeals before us (collectively referred to hereafter as "the Purchasers"), with the Corporation to retain its remaining assets ("the Retained Assets").

5 The Plant Assets comprised the Corporation's principal production facility in Erebor, and included the land on which the production facility was situated ("the Plant Land Assets") as well as the machinery and other aspects of the production facility ("the Plant Non-Land Assets"). To give effect to the sale of the Plant Assets, two key agreements were entered into, an asset purchase agreement dated 10 September 2004 ("the APA") and an omnibus agreement dated 15 October 2004 ("the OMNA").

The two key agreements

6 The APA was between the Liquidator, the Secured Creditors listed in Schedule I of the APA, the Corporation's shareholders and the Purchasers. The Corporation's shareholders are not parties to the present dispute, and for the purposes of this judgment, they can be discounted as parties to the APA.

7 Under the APA, the Purchasers agreed to purchase the Plant Assets from the Corporation. Section 2.1 of the APA reads:

> **Sale and Purchase of the [Plant Assets]**
>
> Upon the terms and subject to the conditions of this APA, … the [Liquidator], the [Secured Creditors] and the [Corporation's] Shareholders agree to sell, convey, transfer, assign and deliver to the [Purchasers], on the Closing Date, [the Plant Assets], free from and clear of all Liens of any kind …

8 The "Closing Date" referred to in s 2.1 was stipulated in s 5.1 of the APA to be 8 October 2004. However, this was eventually rescheduled to 15 October 2004, and it is that date which we shall term the "Closing Date" in this judgment. The Secured Creditors were referred to in s 2.1 because it was contemplated that they would retain their security interests in the Plant Assets. In return for their agreement under s 2.1 to deliver the Plant Assets to the Purchasers "free from and clear of all Liens of any kind", the Purchasers agreed to issue two notes for their benefit. The terms of these two notes ("the Notes") were set out in the second key agreement, the OMNA. This was between the Purchasers and the Secured Creditors, with a Morian bank acting as the facility agent. In essence, the Purchasers were to make payments at periodic intervals to the holders of the Notes. The original holders of the Notes were the Secured Creditors who were the original parties to the APA (also referred to hereafter as "Original Secured Creditors" where appropriate to the context).

9 The OMNA provided, in s 9.04, that the Secured Creditors were entitled to assign all or any portion of their rights and obligations under the OMNA and the Notes. By the time of the arbitral proceedings, a few of the Original Secured Creditors had sold their rights under the Notes to third parties, including the investment funds which are the respondents in Civil Appeal ("CA") No [P] ("the Funds"). The OMNA contained, in s 9.08(b), a distinct dispute resolution mechanism from the one found in the APA. The APA contained an arbitration agreement in s 10.2, which contemplated disputes

being referred to arbitration in Singapore in accordance with the rules of the SIAC. The OMNA, in contrast, contained a non-exclusive jurisdiction clause that pointed to the Morian courts, and did not contain any arbitration agreement.

10 One of the conditions precedent to the closing of the transactions contemplated under the APA was the approval by the Erebor municipal authorities of a deferred payment scheme for the unpaid taxes that were owed by the Corporation. The Liquidator eventually procured a tax amnesty agreement ("the TAA") with the Erebor municipal authorities on 13 October 2004. The TAA granted the Corporation relief from paying interest and penalties on all the unpaid taxes it had hitherto incurred, and allowed it to settle the unpaid taxes in eight instalments starting in December 2004 and ending in December 2012. Hence, although the TAA did not secure a waiver of the taxes owed by the Corporation, it did achieve a plan for deferred payment of the taxes to be made without the imposition of any penalties or interest as a result of the deferred payment. The TAA, however, was liable to be revoked if any taxes in relation to the Corporation's assets, including the Plant Assets, were not paid on time.

11 Soon after the Closing Date (*ie*, the revised closing date of 15 October 2004), the relationship between the parties started to sour. The breakdown of the parties' relationship was triggered by the revocation of the TAA, and that transpired apparently because certain tax liabilities were not paid. These tax liabilities can be broken down into three categories as follows (adopting the same terminology as that used by the Judge):

(a) The first category – "Pre-Closing Taxes" – comprised arrears of taxes that had accrued from 1999 to 15 October 2004 over all of the Corporation's real property, regardless of whether that real property was comprised in the Plant Assets or in the Retained Assets. The Pre-Closing Taxes were meant to be paid pursuant to the TAA, and were the Liquidator's responsibility.

(b) The second category of tax liabilities – "Post-Closing Plant Assets Taxes" – comprised current taxes owing on the Plant Assets (both the Plant Land Assets and the Plant Non-Land Assets). Although the Plant Land Assets had been transferred to the Purchasers on the Closing Date, they remained in the Corporation's name. As such, as far as the Erebor municipal authorities were concerned, the Corporation remained the registered owner and, therefore, the taxpayer responsible for those taxes. The APA was silent as to who was liable for the Post-Closing Plant Assets Taxes. However, from the sequence of events that led up to the revocation of the TAA, it seemed that the Purchasers had undertaken the responsibility of paying those taxes (see the Award at paras 170–192). On the Tribunal's analysis, the Purchasers had in fact attempted to pay the first instalment of the Post-Closing Plant Assets Taxes, but a portion of their payment was instead allocated to the third category of tax liabilities, the "Post-Closing Retained Assets Taxes" (see the Award at para 191). As a result, there were outstanding Post-Closing Plant Assets Taxes.

(c) As just mentioned, the third category of tax liabilities consisted of the Post-Closing Retained Assets Taxes. These were current taxes payable on the Retained Assets, and were clearly the responsibility of the Liquidator.

12 Right from the time of the first instalment payable under the TAA, problems arose and some of the aforesaid tax liabilities were not paid. The TAA was eventually revoked. However, it was unclear what exactly triggered the revocation of the TAA and when exactly the TAA was revoked (whether automatically upon non-payment, or only upon notice from the Erebor municipal authorities).

13 Upon the revocation of the TAA, the Purchasers stopped making payments pursuant to the

Notes. They also applied to the Morian courts on 9 October 2008 for an injunction restraining the Secured Creditors from, amongst other things, declaring that the Purchasers were in default of their payment obligations under the Notes. The Morian court dismissed the application on 10 October 2008. On the same day, the Purchasers commenced arbitration in Singapore. Their notice of arbitration dated 10 October 2008 ("the Notice of Arbitration") named as respondents the Liquidator, the Corporation's shareholders and the 24 Secured Creditors listed in Annex 1 of the notice (collectively referred to hereafter as the "Arbitration Secured Creditors" where appropriate to the context). During the arbitration, the parties proceeded on the basis that all the Arbitration Secured Creditors were Original Secured Creditors (as defined at [8] above), even though one of the Arbitration Secured Creditors was not among the Secured Creditors listed in Schedule I to the APA as parties to that agreement (that said, we should also point out that that particular Arbitration Secured Creditor was expressly named as a signatory to the APA). For the purposes of this judgment, we shall likewise regard all the Arbitration Secured Creditors as Original Secured Creditors. As in the case of the APA, the Corporation's shareholders can be discounted as parties to the arbitration as they took no part in the proceedings.

The arbitration

14 The crux of the dispute at the arbitration was whether the Liquidator and the Secured Creditors had fulfilled their obligation to deliver the Plant Assets to the Purchasers "free from and clear of all Liens of any kind" pursuant to s 2.1 of the APA. The answer to this depended on whether the statutory liens that arose over those assets from unpaid taxes caused the Liquidator and the Secured Creditors to be in breach of this obligation.

15 The substantive hearing of the arbitral proceedings commenced on 14 March 2011. The Funds joined the proceedings on 22 March 2011. From that point onwards, the Tribunal treated the Funds as if they were also Secured Creditors and part of the group of Arbitration Secured Creditors. Indeed, when the Tribunal referred to "the Secured Creditors" in the Award, it included the Funds as well.

16 The Award was issued on 9 May 2012. This was a partial award. It was subsequently amended twice, first by a further partial award dated 15 June 2012 and then by a memorandum of corrections issued on 5 July 2012.

17 The Purchasers' main argument at the arbitration was that the Liquidator and the Secured Creditors had failed to pay the Pre-Closing Taxes, which rendered the Plant Assets subject to statutory liens in favour of the Erebor municipal authorities. As such, the Liquidator and the Secured Creditors had breached their obligation under the APA to deliver the Plant Assets to the Purchasers with clean title, free of all encumbrances.

18 Separately, the Purchasers also claimed that the Secured Creditors had, in breach of s 6.8 of the APA, failed to discharge their obligation to settle certain legal proceedings which were referred to as the "Lost Land Claims" before both the Tribunal and the Judge. Those claims were legal proceedings brought by various third parties, each of whom sought a declaration that he or she was the rightful owner of (among other plots of land) a portion of the Plant Land Assets meant to be delivered to the Purchasers under the APA. On that portion of land ("the Disputed Land") stood a shop which formed part of the Plant Assets ("the Affected Shop"). A related issue which arose in this regard during the arbitration was which of the Lost Land Claims fell within the scope of the Secured Creditors' obligation under s 6.8, with the Purchasers and the Secured Creditors disagreeing on this point (amongst others) before the Tribunal.

The Purchasers' injunction application in Singapore

19 Having failed to obtain the injunction described at [13] above before the Morian court, the Purchasers sought a similar interim injunction against the Secured Creditors before the Singapore courts. The Purchasers' application was granted by an assistant registrar on 14 October 2008. The matter was eventually appealed all the way to the Court of Appeal, which, on 11 September 2009, dismissed the appeal against the High Court's refusal to set aside the interim injunction. The interim injunction was subsequently upheld by the Tribunal on 7 July 2010.

The Tribunal's decision

20 The Tribunal generally agreed with the Purchasers' case. In brief, the Tribunal reasoned in the following manner:

(a) First, the Liquidator and the Secured Creditors (which, as mentioned at [15] above, included the Funds in the context of the Award after they joined the arbitration) had a joint and several obligation to transfer the Plant Assets to the Purchasers free from encumbrances. The statutory liens that arose over those assets as a result of unpaid taxes were among the prohibited encumbrances.

(b) Second, as the aforesaid statutory liens encumbered the Plant Assets, the Liquidator and the Secured Creditors had breached their obligation under the APA to deliver clean title to those assets to the Purchasers.

(c) Third, the Secured Creditors had breached their obligation in relation to the Lost Land Claims, and accordingly, were obliged to indemnify the Purchasers pursuant to s 6.8 of the APA.

(d) Fourth, the Tribunal had the jurisdiction to suspend the Purchasers' payment obligations under the Notes as those obligations arose under the APA.

21 The Tribunal awarded the Purchasers US$80m as damages for a lost opportunity to earn profits and about US$23.7m as an indemnity in respect of the Lost Land Claims. It also declared that the Purchasers were entitled to suspend performance of their payment obligations under the Notes without consequence for so long as the Liquidators and the Secured Creditors (including the Funds) remained in breach of their obligation to deliver clean title to the Plant Assets.

The Judge's decision

22 The Liquidator, 11 of the Arbitration Secured Creditors and the Funds (collectively, "the Respondents") applied to the High Court to set aside the whole of the Award primarily on the grounds of: (a) a breach of natural justice pursuant to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") read with Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"); and (b) excess of jurisdiction pursuant to Art 34(2)(*a*)(iii) of the Model Law. These setting-aside applications were brought by way of Originating Summons ("OS") No [N] (the Funds' application), OS No [M] (the Arbitration Secured Creditors' application) and OS No [L] (the Liquidator's application). We deal in detail below with the substance of the contentions made by the Respondents. In brief, these were presented in the form of arguments that the Tribunal: (a) had failed to consider material contentions put forward by one or more of the Respondents; and/or (b) had considered and addressed issues that had not been raised; and/or (c) had exceeded its jurisdiction.

23 The Judge dealt with the three setting-aside applications together. He identified seven issues as follows:

(a) Did the Tribunal fail to consider the Liquidator's arguments, evidence and submissions on whether "ss 2.1 and 7.1 of the APA" (see the High Court Judgment at [90(a)]) were qualified by the TAA ("Issue 1")? In this regard, we should point out that although the Judge referred to ss 2.1 and 7.1 of the APA in framing Issue 1, that appears to have been an oversight as the relevant provisions are ss 2.1 and 7.2 instead. It is the latter two provisions that we shall refer to in our analysis of the Judge's decision on Issue 1.

(b) Did the Tribunal fail to consider the Liquidator's and the Secured Creditors' arguments, evidence and submissions on whether the Purchasers were responsible for the revocation of the TAA ("Issue 2")?

(c) Did the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, exceed its powers by dealing with a matter that had not been the subject of submissions before it ("Issue 3")?

(d) If Issue 3 were answered in the negative, did the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, fail to give the Liquidator and the Secured Creditors an opportunity to address the Tribunal on that question ("Issue 4")?

(e) Did the Tribunal fail to consider the Secured Creditors' arguments, evidence and submissions in relation to the Lost Land Claims ("Issue 5")?

(f) Did the Tribunal act in excess of its jurisdiction in granting the Purchasers relief in respect of their payment obligations under the Notes ("Issue 6")?

(g) Did the Tribunal act in excess of its jurisdiction or in breach of natural justice in holding the Funds liable, alongside the Arbitration Secured Creditors, for breaches of the APA ("Issue 7")?

24 The Judge answered Issue 1 affirmatively, and found that the Award should be set aside in its entirety for that reason alone (see the High Court Judgment at [123]). Nevertheless, the Judge went on to consider the remaining six issues. In short, the Judge answered Issues 2, 3, and 4 affirmatively as well, and stated that he would have set aside the Award in its entirety on any one of those grounds in the alternative. He answered Issue 5 affirmatively, but did not specify whether he would have set aside the whole of the Award on that basis alone (see the High Court Judgment at [242]). He answered Issue 6 affirmatively, and stated that even if he had been wrong on Issues 1 to 5, he would have set aside the relief which the Tribunal granted in relation to the Purchasers' payment obligations under the Notes (see the High Court Judgment at [265]). He answered Issue 7 in the negative.

The parties to the present appeals

25 As mentioned earlier, the appellants in all three appeals are the Purchasers, two special purpose vehicles incorporated under the laws of Moria. Since the arbitration, they have been represented by a team of lawyers from Rajah & Tann Singapore LLP ("R&T") led by Mr Andre Yeap SC ("Mr Yeap").

26 The respondents in CA No [P] are the Funds (specifically, they comprise three investment funds and the sub-custodian and agent for these funds). During the arbitration, they were represented by a team from Allen & Gledhill LLP ("A&G") led by Mr Andrew Yeo. Before the Judge and this court, they were represented by a team from Rodyk & Davidson LLP led by Mr Philip Jeyaretnam SC ("Mr Jeyaretnam"). The Funds are in a unique position among the Respondents as they are challenging the Judge's determination of Issue 7 pursuant to O 57 r 9A(5) of the Rules of Court (Cap 322, R 5,

2014 Rev Ed).

27 The respondents in CA No [Q] are the 11 Arbitration Secured Creditors who were the plaintiffs in OS No [M]. During the arbitration, they were represented by the same team from A&G (led by Mr Andrew Yeo) that represented the Funds. Before the Judge and this court, they were represented by a team from Drew & Napier LLC led by Mr Davinder Singh SC.

28 The respondent in CA No [R] is the Liquidator. Since the arbitration, he has been represented by a team from WongPartnership LLP led by Mr Alvin Yeo SC.

The issues before this court

29 The broad question before this court is whether the Judge erred in setting aside the Award in its entirety. For convenience, we use the same seven issues identified by the Judge in our own analysis as to whether the Judge erred. The seven issues that we address in these appeals (the "Appeal Issues") are the following:

(a) Did the Judge err in setting aside the Award based on his finding that the Tribunal failed to consider the Liquidator's arguments, evidence and submissions on whether ss 2.1 and 7.2 of the APA were qualified by the TAA ("Appeal Issue 1")?

(b) Did the Judge err in setting aside the Award based on his finding that the Tribunal failed to consider the Liquidator's and the Secured Creditors' arguments, evidence and submissions on whether the Purchasers were responsible for the revocation of the TAA ("Appeal Issue 2")?

(c) Did the Judge err in finding that the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, exceeded its powers by dealing with a matter that had not been the subject of submissions before it ("Appeal Issue 3")?

(d) Did the Judge err in finding that the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, failed to give the Liquidator and the Secured Creditors an opportunity to address the Tribunal on that question ("Appeal Issue 4")?

(e) Did the Judge err in finding that the Tribunal failed to consider the Secured Creditors' arguments, evidence and submissions in relation to the Lost Land Claims ("Appeal Issue 5")?

(f) Did the Judge err in finding that the Tribunal acted in excess of its jurisdiction in granting the Purchasers relief in respect of their payment obligations under the Notes ("Appeal Issue 6")?

(g) Did the Judge err in finding that the Tribunal did not act in excess of its jurisdiction or in breach of natural justice in holding the Funds liable, alongside the Arbitration Secured Creditors, for breaches of the APA ("Appeal Issue 7")?

Summary of our decision

30 Our analysis of and decision on the seven Appeal Issues outlined at [29] above are set out from [50] below onwards. In brief, we allow all three appeals in part. The practical effect of our decision is that parts of the Award are set aside. In this section, we provide a brief overview of our analysis. We then revisit the relevant aspects of the law on setting aside arbitral awards on breach of natural justice grounds in the next section, before providing our detailed analysis on each of the Appeal Issues in the subsequent sections which follow.

31 First, we answer Appeal Issues 1 and 2 affirmatively. In our judgment, the Judge erred in dealing with the issues concerning the obligation to deliver clean title to the Plant Assets and the revocation of the TAA. Instead of restricting his inquiry to whether the Tribunal had committed a breach of natural justice in its resolution of these matters, the Judge seemed to us to have engaged with the merits of the underlying dispute. This is impermissible.

32 Second, we answer Appeal Issue 4 in the negative. We agree with the Judge that the Tribunal acted in breach of natural justice by raising the "loss of opportunity" point at the eleventh hour without hearing arguments and submissions from the parties, especially the Respondents. Our finding on Appeal Issue 4 makes it unnecessary for us to consider or deal with Appeal Issue 3, although we disagree with the Judge on this issue. Further, although we answer Appeal Issue 4 in the negative, we also disagree with the Judge that the effect of a finding of a breach of natural justice on this point in and of itself warrants setting aside the whole of the Award. Rather, the effect of such a breach is confined to invalidating that part of the Award that was directly related to or infected by the breach.

33 Third, we answer Appeal Issue 5 in the negative. In failing to consider the Secured Creditors' arguments in relation to the Lost Land Claims, the Tribunal acted in breach of natural justice, and this was to the prejudice of the Secured Creditors. The Judge was correct in this finding. The effect of such a breach is likewise confined to invalidating that part of the Award that was directly related to or infected by the breach.

34 Fourth, we answer Appeal Issue 6 in the negative. The Purchasers' payment obligations under the Notes were matters that were carved out of the arbitration agreement in the APA. The Judge was therefore correct to find that the Tribunal exceeded its jurisdiction in granting the Purchasers relief in respect of those obligations.

35 Fifth, and last, we answer Appeal Issue 7 affirmatively. There is a difference between submitting to the jurisdiction of an arbitral tribunal and altering one's contractual status and position. In this case, although the Funds joined the arbitral proceedings, they should not have been held liable for breaches of the APA as if they had in fact become Secured Creditors with contractual obligations under the APA.

The law – Setting aside arbitral awards on breach of natural justice grounds

36 The law on setting aside arbitral awards for breaches of natural justice is reasonably clear. Nevertheless, the three appeals before us present us with the opportunity to restate the proper relationship between arbitral tribunals and the courts, as well as revisit the seminal High Court decision of *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*").

The relevant legal principles

37 A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA (see *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [51]–[53]).

38 In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.

39 In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the *real* nature of the complaint. Among the arguments commonly raised in support of breach of natural justice challenges are these:

(a) that the arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party;

(b) that the arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider the latter's actual case; and

(c) that the arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the latter's case.

Although such arguments may be commonly raised, more often than not, they do not, in fact, amount to breaches of natural justice.

Revisiting Front Row

40 The decision of the High Court in *Front Row* was extensively relied on by the Respondents before the Judge. To understand the true significance and breadth of the case, it is necessary to examine the facts in some detail.

41 In *Front Row*, the parties were Front Row Investment Holdings (Singapore) Pte Ltd ("Front Row") and Daimler South East Asia Pte Ltd ("Daimler"). Pursuant to an agreement dated 15 September 2005, Front Row and Daimler agreed to jointly organise and run a series of races across Southeast Asia using 35 specially-built SLK AMG cars. A dispute subsequently arose. Daimler commenced arbitration against Front Row claiming $610,506.06. Front Row denied liability and mounted a counterclaim for misrepresentation. Front Row's pleaded case on misrepresentation included the following alleged representations (see *Front Row* at [12]):

(a) that 20 races would be organised; and

(b) that the SLK AMG cars were appropriate for racing or competitive events.

42 The arbitrator found that Front Row (see *Front Row* at [14]):

… had ceased to rely on a number of points pleaded, in particular on [Daimler's] alleged failure to organise 20 races or the absence of FIA homologation for the event cars. Thus, having asserted

that it was induced to enter into the Agreement by reason of several misrepresentations, [Front Row] ended up asserting inducement from a single alleged misrepresentation. [emphasis in original omitted]

43 Based on his finding that Front Row's case of misrepresentation had narrowed to one single pleaded representation, the arbitrator took the view that the "key question" in the arbitration was the race-worthiness of the cars. The arbitrator eventually found that there was no misrepresentation on that basis, and Front Row hence failed in its counterclaim.

44 Front Row applied to the High Court to set aside that portion of the arbitral award dealing with its counterclaim. It argued that the arbitrator had breached a rule of natural justice as he had reached his decision under the erroneous impression that Front Row had abandoned its arguments relating to its other pleaded representations apart from that relating to the race-worthiness of the cars. After considering a line of Australian cases brought by plaintiffs seeking to impugn determinations made by adjudicators of claims under the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999), the High Court judge gleaned the principle that there would be a breach of natural justice where the arbitrator disregarded the submissions made by a party, or had regard to them in only the most superficial sense without making any attempt to understand them and thereby failed to deal with them substantively (see *Front Row* at [37]). Applying that principle to the facts before him, the judge found that the arbitrator's mistaken impression that Front Row had abandoned a part of its case meant that he never in fact considered Front Row's submissions on the other pleaded representations and this amounted to a breach of natural justice (see *Front Row* at [46]).

45 It will immediately be evident that the facts in *Front Row* were unique. There was no real dispute that the arbitrator *had failed to consider Front Row's other pleaded representations* because of his mistaken belief that they had been abandoned. The fact of the arbitrator's mistake was irrelevant except to evince clearly that he had not considered the other pleaded representations at all.

46 To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* (see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 386). *Front Row* is useful in so far as it demonstrates what must be shown to make out a breach of natural justice on the basis that the arbitrator failed to consider an important pleaded issue. It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.

4 7 *Front Row* was recently considered in *AQU v AQV* [2015] SGHC 26 ("*AQU*"), where the High Court judge distilled the very principles which we have just enunciated above (see *AQU* at [30]–[35]).

The judge in *AQU* also considered the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), and reiterated the proposition that no party to an arbitration had a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceived those arguments to be (see *AQU* at [35], citing *TMM* at [94]). This principle is important because it points to an important distinction between, on the one hand, an arbitral tribunal's decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's failure to even consider that argument. Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice.

48 If the first hurdle of establishing a breach of natural justice is crossed, then two remaining issues arise, namely, whether there was a causal nexus between the breach and the arbitral award, and whether the breach prejudiced the aggrieved party's rights (see *Soh Beng Tee* at [29], citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18]). With these principles in mind, we analyse the Appeal Issues in detail.

Our structural approach to the Appeal Issues

49 In considering each Appeal Issue, we propose first to revisit briefly the relevant facts and the Tribunal's findings, before coming to the Judge's analysis, and then why we differ from or agree with the Judge. We reiterate that our role in this process is not to analyse the merits of the underlying dispute between the parties (see also *BLC* at [53]). That responsibility lay within the province of the Tribunal. Where we consider the facts and arguments that were raised before the Tribunal, we do so purely to provide the context against which to consider the arguments relating to the Respondents' setting-aside applications.

Appeal Issue 1: Did the Judge err in setting aside the Award based on his finding that the Tribunal failed to consider the Liquidator's arguments, evidence and submissions on whether ss 2.1 and 7.2 of the APA were qualified by the TAA?

50 Where Appeal Issue 1 is concerned, the fundamental question that the Tribunal had to grapple with was what exactly s 2.1 of the APA obliged the Liquidator (and the Secured Creditors) to do. On the face of s 2.1, the obligation was clear – to deliver clean title to the Plant Assets to the Purchasers by the Closing Date. This is further reinforced in selected portions of s 7.2 of the APA, which read:

> **7.2 Representations and Warranties of the [Liquidator]**
>
> The [Liquidator] hereby represents and warrants to the other Parties as follows:
>
> …
>
> (g) The [Purchasers] will acquire the [Plant Assets] completely free from and clear of all claims, Liens and encumbrances of whatever kind and nature.
>
> …
>
> (i) There are no unpaid taxes which have accrued or will accrue on or prior to the Closing Date which constitute or at any time on or after the Closing Date will constitute a Lien on the [Plant Assets].

…

(n) At the Closing, full legal and valid title and ownership over the [Plant Assets] will be transferred and conveyed to the [Purchasers] free from and clear of all claims, Liens, and encumbrances whatsoever.

51 However, based on the sequence of events that preceded the signing of the APA, it seemed that all the parties were aware that there were unpaid taxes in relation to all the assets of the Corporation, including the Plant Assets.

52 Furthermore, s 5.3(b)(iii)(4) of the APA expressly listed the delivery by the Liquidator to the Purchasers of "[a] copy of the agreement duly signed by the appropriate Governmental Authority approving a deferred payment scheme for the unpaid realty taxes affecting the [Plant Assets]" as one of the conditions precedent to the completion of the transactions contemplated under the APA. It was undisputed by the parties that the TAA constituted this agreement.

53 On the one hand, it could be argued, based on a literal reading of ss 2.1 and 7.2 of the APA, that the obligation of the Liquidator (and the Secured Creditors) under the APA was to deliver clean title to the Plant Assets without qualification. In as much as taxes remained unpaid at the Closing Date, the Plant Assets were subject to statutory liens arising from those unpaid taxes. On this basis, clean title was not delivered to the Purchasers, and the Liquidator (and the Secured Creditors) had therefore breached the obligation under s 2.1.

54 On the other hand, based on the events preceding the signing of the APA, and in particular, the parties' awareness of the TAA, the condition precedent to closing in s 5.3(b)(iii)(4) and the fact that the parties accepted that the TAA fulfilled that condition precedent, it could be argued that the TAA qualified the obligation of the Liquidator (and the Secured Creditors) to deliver clean title to the Plant Assets by excluding any requirement for such title to be free also of any statutory liens arising from the unpaid taxes that were the subject of the TAA.

55 Even if we have simplified the two opposing arguments somewhat, it has to be said that they were not points of extreme complexity. The Tribunal preferred the former view, namely, that the Liquidator (and the Secured Creditors) had an obligation to deliver clean title to the Plant Assets without qualification. The Liquidator argued before the Judge that the Tribunal, in taking that view, had committed a breach of natural justice as it had failed to consider his submissions on whether the TAA qualified the APA. The Judge dealt with this argument in the following manner:

(a) The relevant rule of natural justice was the right to be heard. Specifically, an arbitral tribunal could not disregard submissions made by a party without considering them on their merits.

(b) This rule was breached in the arbitration because the Tribunal did not even consider the Liquidator's submissions on whether the TAA qualified his obligation under the APA to deliver clean title to the Plant Assets. The Liquidator's submissions, in essence, were that "clean title" did not mean a title which was free of the statutory liens that arose as a result of the unpaid taxes.

(c) The breach was connected to the making of the Award, in that the Tribunal ignored the aforesaid submissions of the Liquidator. The Tribunal took the view that there was "not a shred of contemporaneous evidence" that the parties thought that the TAA had amended the APA (see the Award at para 296). This was despite, for instance, the acknowledgement by all the parties that the unpaid taxes in question would be paid in instalments until 2012, and that the delivery of

the TAA to the Purchasers satisfied the condition precedent in s 5.3(b)(iii)(4) of the APA. Further, not only did the Tribunal disregard those pieces of evidence, it also mischaracterised the Liquidator's case as being that "the TAA had the effect of postponing his obligation to deliver clean title until after the payment of the last instalment under the TAA in December 2012" ("the Liquidator's Secondary Argument"). This characterisation of the Liquidator's case was based on the Purchasers' submissions, and the Liquidator denied that that was his case. Instead, the Liquidator's case was actually that based on a collective reading of the APA and the TAA, the warranties which he had provided in s 7.2 of the APA – including the warranties as to delivering clean title to the Plant Assets – had been qualified to the extent of the TAA ("the Liquidator's Primary Argument"). As such, in rejecting the Liquidator's Secondary Argument, the Tribunal was "rejecting an argument that was never made to it, … thereby ignoring the arguments that were made to it" (see the High Court Judgment at [122]).

(d) The Judge noted that the parties did not dispute that prejudice would result in a breach of natural justice (see the High Court Judgment at [95]), and as such, did not elaborate further on this point.

56 There were conceivably two arguments before the Tribunal on the effect of the TAA on the Liquidator's (and the Secured Creditors') obligation under the APA to deliver clean title to the Plant Assets to the Purchasers: the Liquidator's Secondary Argument (which the Liquidator claimed he did not even make) and the Liquidator's Primary Argument. The Judge found that the Tribunal had not engaged the latter, had mischaracterised the latter as the former and had engaged that instead. The Tribunal was hence found to have been attacking a straw man, and this was considered by the Judge to be a breach of natural justice.

57 In our judgment, it is plain that the Tribunal did attempt to engage the Liquidator's Primary Argument. The Tribunal did so after it rejected the notion that the TAA discharged or amended "an agreement as comprehensive as the APA" on the grounds that there was "not a shred of contemporaneous evidence" to that effect (see the Award at para 296). In this regard, the Tribunal first considered the expert evidence on the effect of statutory liens (see the Award at paras 315–321). It then noted:

322. In summary, therefore, [the Secured Creditors' expert's] conclusion turned upon his interpretation of the APA. In his view, once the existence and the terms of the TAA were known to the parties, and were incorporated by reference in the APA, the obligation to transfer the property free from liens would not apply to statutory liens arising out of unpaid taxes. It can be seen, therefore, that fundamental to [the Secured Creditors' expert's] opinion was that the TAA somehow became incorporated into or amended or varied the express provisions of the APA.

58 The Tribunal subsequently dismissed the Liquidator's Primary Argument, pointing out that "[n]one of the parties to the APA would have been able to achieve its respective aims if the [Plant Assets] had been encumbered by a lien in favour of [Erebor]" (see the Award at para 351). In short, the Tribunal concluded that it was a critical requirement of the APA that the Plant Assets had to be unencumbered even by statutory liens. The Tribunal's reasoning was that (see the Award at para 350):

… [T]he APA … envisaged [the Purchasers] being able to raise finance by mortgaging the [Plant Land Assets, among other Plant Assets]. The possibility of mortgaging land which was subject to a lien in favour of [Erebor] would have been remote.

The Judge ruled that this reasoning was not only wrong, but also contradicted the Tribunal's own

factual narrative, which showed that it was possible for the Purchasers to obtain the necessary tax clearances and thereby mortgage the Plant Land Assets (among other Plant Assets) notwithstanding the statutory liens (see the High Court Judgment at [102]).

59 With respect, poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award; even a misunderstanding of the arguments put forward by a party is not such a ground. As noted by this court in *BLC* at [86], the court "is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written" when considering whether an arbitral award should be set aside for breach of natural justice. Neither should it approach an arbitral award with a "meticulous legal eye endeavouring to pick holes, inconsistencies and faults … with the objective of upsetting or frustrating the process of arbitration" (likewise at [86] of *BLC*). Taking these considerations into account, we find no breach of natural justice as there is no basis for concluding that the Tribunal did not consider the Liquidator's Primary Argument. Accordingly, we answer Appeal Issue 1 affirmatively.

60 There is a further point. It was simply impossible, given the context of the arbitration, to draw the inference that the Tribunal had failed to apply its mind to the Liquidator's Primary Argument. Both Mr Alvin Yeo (counsel for the Liquidator) and the Judge embarked on a detailed and exceedingly fine analysis to make good the contention that the inference to be drawn in the circumstances was that the Tribunal had overlooked that argument. But, in our judgment, based just on the points raised by Mr Alvin Yeo and canvassed by the Judge, it was at least equally plausible that the Tribunal had simply misunderstood the Liquidator's Primary Argument, or had chosen to spend more time addressing the Liquidator's Secondary Argument because it considered that argument to be more deserving of closer scrutiny. In such circumstances, there was no basis for drawing the inference that Mr Alvin Yeo urged us to draw.

61 We further note that the Judge was, in any case, incorrect to set aside the whole of the Award on the basis of his finding on Issue 1 alone. Those portions of the Award unrelated to Issue 1, for instance, those portions relating to the Lost Land Claims, should not have been affected by the Judge's finding on Issue 1 even if we had upheld it. Given our finding on Appeal Issue 1, however, this is now academic.

Appeal Issue 2: Did the Judge err in setting aside the Award based on his finding that the Tribunal failed to consider the Liquidator's and the Secured Creditors' arguments, evidence and submissions on whether the Purchasers were responsible for the revocation of the TAA?

62 The focus of Appeal Issue 2 is on what triggered the Erebor municipal authorities' revocation of the TAA. The Judge found (in relation to Issue 2) that the Tribunal had ignored certain arguments made by the Liquidator as to who was to blame for the revocation of the TAA, and therefore, the Award should be set aside in its entirety (see the High Court Judgment at [154]). In the circumstances, he saw no reason to consider the Secured Creditors' arguments on Issue 2.

63 Before us, the Secured Creditors adopted the Liquidator's arguments, and also added a further ground on which to uphold the Judge's decision on Issue 2 – namely, that the Tribunal had disregarded an argument that was distinct to the Secured Creditors, and that was not and could not have been raised by the Liquidator. This distinct argument related to s 6.01(e) of the OMNA, which stated that the Purchasers were liable to pay and discharge all taxes in relation to the Plant Assets. With s 6.01(e) of the OMNA as the starting point, the Secured Creditors argued that the Purchasers, in having failed to pay certain taxes over the Plant Assets, had triggered the revocation of the TAA.

64 In the Award, the Tribunal did refer to s 6.01(e) of the OMNA, but seemed (perhaps mistakenly)

to have thought that it was the Liquidator who relied on that provision. The Tribunal hence stated (see the Award at para 247):

> … The Liquidator goes on to assert that [the Purchasers] had a contractual responsibility to the Liquidator for paying the [unpaid] taxes. The Tribunal finds no justification for that assertion in the APA, and the provision upon which the Liquidator relies (Section 6.01(e) of the [OMNA]) contains a covenant to the Secured Creditors and the Facility Agent [*ie*, the facility agent under the OMNA] but not to the Liquidator.

It does appear from this extract that the Tribunal attributed an argument made by the Secured Creditors to the Liquidator, and then discredited that argument on the basis that it had been put forward by the wrong party. Even though this may have been unsatisfactory reasoning on the Tribunal's part, it does not assist the Secured Creditors' case on Appeal Issue 2 for two reasons.

65 First, this seems in essence to have been a case of the Tribunal having gotten into a muddle on the facts, the law and the arguments. This is not a sufficient ground to set aside the Award. Second, and perhaps more crucially, in the Tribunal's analysis, it was not the fact of the revocation of the TAA that gave rise to the breach of the obligation to deliver clean title to the Plant Assets to the Purchasers. It was simply the fact that taxes remained unpaid – which in turn gave rise to statutory liens over the Plant Assets; those statutory liens in themselves were considered to be impermissible encumbrances. In fact, the Tribunal only discussed the "TAA and its revocation" as part of the background to the parties' dispute (see the Award at paras 148–249). In its conclusion on the matter, the Tribunal made it clear that regardless of why the TAA was revoked, the statutory liens had already been in place over the Plant Assets at the time the APA was signed, and the Purchasers had not waived their right to clean title (free even of such liens) under the APA by reason of their knowing of the existence of the TAA (see the Award at para 249).

66 It might well seem a contradiction in terms that the parties would stipulate as a condition precedent to completion that the TAA be procured, which, on its terms, contemplated a continuing obligation to pay outstanding taxes (albeit on a deferred basis), and also contemplate that the existence of *any* outstanding taxes giving rise to a statutory lien would be a breach of the fundamental obligation to deliver clean title. But, this was what the Tribunal decided and there is no room to appeal to the court against such a holding.

67 Based on the Tribunal's conclusion that the TAA did not alter the obligation owed by the Liquidator and the Secured Creditors to transfer clean title to the Plant Assets to the Purchasers on the Closing Date, on the Tribunal's analysis, this obligation had been breached from the onset. Hence, even if the Tribunal had failed to consider the Liquidator's and/or the Secured Creditors' arguments on the revocation of the TAA or had wrongly attributed the arguments of one party to the other party, and even if this had amounted to a breach of natural justice, it was unlikely to materially affect the conclusion which the Tribunal reached on its analysis of the APA, namely, that the Liquidator and the Secured Creditors had breached the obligation to deliver clean title to the Plant Assets under the APA.

68 For these reasons, we do not agree with the Judge that there was a breach of natural justice which prejudiced the Liquidator and the Secured Creditors, and accordingly, also do not consider that there is any basis for setting aside the Award on this ground. We therefore answer Appeal Issue 2 affirmatively.

Appeal Issue 3: Did the Judge err in finding that the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, exceeded its powers by dealing

with a matter that had not been the subject of submissions before it?

69 Appeal Issues 3 and 4 concern the Tribunal's re-characterisation of the Purchasers' claim from a claim for loss of profits to one for loss of an opportunity to earn profits. In the Notice of Arbitration, the Purchasers prayed for, among other things, "damages". Throughout the arbitration, the parties proceeded on the basis that the Purchasers' claim was for actual loss of profits (see the Award at para 433). In fact, the Purchasers quantified this loss at US$368.6m. The Tribunal concluded that the Purchasers "cannot prove any actual loss" (see the Award at para 445), but then took it upon itself to re-characterise the Purchasers' claim as one for loss of an opportunity to earn profits. The idea of loss of such an opportunity was raised by the Tribunal only on 21 October 2011, the last day of the 20-day arbitral hearing. The relevant exchange (from 11.40am to 11.45am) bears setting out in some detail:

Chairman:	But what you are really then talking about, Mr Yeap, is not actually the inability to raise the funds, it's the loss of the opportunity.
Mr Yeap:	I know. I was going to say that also. At the end of the day, I was going to say that if the Tribunal felt that there was a loss of an opportunity, certainly it would be open to the Tribunal to analyse it as a loss of a chance, or alternatively what we call temperate damages, which incidentally has already been referred to in [the Purchasers' expert's] first statement. Like the common law principles, if the Tribunal is of the view that we have suffered loss and it's a question of difficulty in proving that loss, the quantum, then it is open to the Tribunal to give damages which it believes to be fair and reasonable. So they've got the same principles as we do in the common law system. It's not a new point, it has been flagged from day one.
Chairman:	But neither courts nor tribunals just pluck figures out of the air.
Mr Yeap:	Yes. I was going to say that in considering what is fair and reasonable, it would be open to the Tribunal to analyse this from a chance perspective. But it may not be seen as a loss of a chance per se, but it dovetails with the concept of temperate damages.
[Arbitrator 1]:	Yes so you are saying that temperate damages is the [Morian] equivalent of the concept of a loss of a chance?
Mr Yeap:	I would say that they may not be entirely equivalent, but the loss of a chance may well come within the temperate damages doctrine.
Chairman:	[The Purchasers' expert] refers to temperate damages, but I don't think so [the Secured Creditors' expert] specifically deals with this question.
Mr Yeap:	No one asked [the Purchasers' expert] about temperate damages.
Chairman:	No, but I think he did deal with temperate damages in his –
Mr Yeap:	Yes, it's in his statement. That's right we dealt with exemplary, we dealt with temperate, we dealt with all kinds of damages.
Chairman:	*All I said was I don't think that [the Secured Creditors' expert] actually dealt with temperate damages.*

Mr Yeap: *He had every opportunity to do so.*

Chairman: *Well.*

Mr Yeap: *You are correct.*

Chairman: But equally, I don't think that [the Purchasers' expert] gave us much of an [idea] as to how the [Morian] court might assess temperate damages, other than to stick one finger in a mouth and stick it in the air and see which way the wind was blowing.

Mr Yeap: The keywords [are] "reasonable in the circumstances", that's in the provision. Would you –

Chairman: But reasonableness by reference to what? You say, on the one hand, we would have wanted to raise 368 or 252 million US dollars. *Speaking for myself, I think you have some difficulty with those figures on the basis of the evidence we have heard. But if you now say, well, we lost the chance to raise that sort of money, and we should get temperate damages to represent that loss of a chance, what do we say? Do we say it's 1 per cent or 10 per cent or 5 per cent of that? How do we begin? That's where we need help.*

[emphasis added]

70 The Judge found that the Tribunal had acted in excess of its jurisdiction in awarding the Purchasers damages for loss of an opportunity to earn profits, and that this warranted setting aside the Award in its entirety (see the High Court Judgment at [200]). He reasoned as follows:

(a) First, a generic prayer for "damages", such as that in the Notice of Arbitration, was not broad enough to include damages for loss characterised as a lost opportunity to earn profits.

(b) Second, the Tribunal had, all throughout the proceedings, understood the Purchasers' claim to be one for loss of profits.

(c) Third, notwithstanding the aforesaid understanding, the Tribunal took it upon itself to re-characterise the Purchasers' claim as one for loss of an opportunity to earn profits.

71 The Judge also considered whether "loss of an opportunity to earn profits" was substantially different from "loss of profits". After analysing the difference between the two concepts (see the High Court Judgment at [183]–[188]), he concluded that, amongst other things, a "loss of profits" claim was binary in nature in that it was "an all or nothing claim [for] damages" (see the High Court Judgment at [194]), whereas a "loss of opportunity" claim was not. As such, in defending against a "loss of profits" claim, as the Liquidator and the Secured Creditors did before the Tribunal, an "all or nothing" defence was warranted. In contrast, in defending against a "loss of opportunity" claim, evidence and submissions directed towards ascertaining the quantum of the chance lost were crucial.

72 An example of an arbitral tribunal acting in excess of its jurisdiction under Art 34(2)(*a*)(iii) of the Model Law is when it makes an arbitral award that neither party requested. As we stated in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") at [34]:

> … [I]n order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute.

In order to set aside an arbitral award on the grounds of excess of jurisdiction, the court must further be satisfied that the aggrieved party has suffered actual or real prejudice (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [33]).

73 In *CRW*, we noted (at [33]) the distinction between the "erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law)" and the "purported exercise by the arbitral tribunal of a power which it did not possess". This distinction had earlier been enunciated by Lord Steyn in the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221 (at [25]) as follows:

> 25 Given the general importance of the point it is necessary to explain it in a little more detail. The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the [Arbitration Act 1996 (c 23) (UK)]. Sir Michael J Mustill (now Lord Mustill) and Steward Boyd QC (*Commercial Arbitration in England*, 2nd ed (1989), p 555) explained:
>
> > "If ... [the arbitrator] applies the correct remedy, but does so in an incorrect way – for example by miscalculating the damages which the submission empowers him to award – then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure."

74 In our judgment, the Tribunal's approach in this case was not indicative of its acting in excess of its jurisdiction. Returning to the summary of the Judge's analysis at [70] above, in our judgment, the Judge erred at the first step when he held that a generic claim for damages was not broad enough to encompass a claim that might be characterised as one for loss of a chance. A generic claim for damages is nothing more than a particular manner of asserting a right to damages. We agree with the second and third steps in the Judge's reasoning; but, as shall shortly become apparent, these go to issues such as fair process, notice and natural justice, rather than to jurisdiction. The point can be tested in this way: had the Purchasers brought an application to amend their claim from one for lost profits to one for loss of a chance to earn profits, then it cannot be doubted that the Tribunal would have had the *discretionary jurisdiction* to permit this amendment, subject to giving due opportunity to the Respondents affected by the amendment to make consequential amendments in their respective cases and their evidence. We emphasise "discretionary jurisdiction" to make it clear that it would, of course, also have been open to the Tribunal not to permit the amendment if it thought it inappropriate. For these reasons, we answer Appeal Issue 3 affirmatively, although, for the reasons set out in the next section, nothing turns on this.

Appeal Issue 4: Did the Judge err in finding that the Tribunal, in awarding damages to the Purchasers for their loss of an opportunity to earn profits, failed to give the Liquidator and the Secured Creditors an opportunity to address the Tribunal on that question?

75 As mentioned above, the potential of the Purchasers' claim resting on the loss of a chance or

an opportunity to earn profits was only raised by the Tribunal on the final day of the arbitral proceedings. The Tribunal then went on to suggest that were it to proceed on a "loss of chance" analysis, it would need help to determine the quantum of the chance lost (see the exchange between the Tribunal and Mr Yeap quoted above at [69]). However, the parties were never given the opportunity to address the Tribunal on that point. The extent of the parties' "submissions" on that point was their exchange with the Tribunal extracted above. The Award followed and the relevant portion of the Award reads as follows:

> 454. In any assessment of damages for the loss of an opportunity a Tribunal has to assess the quality of the opportunity. In the present case, the Tribunal has concluded that [the Purchasers] would have had a slightly better than even chance of making substantially enhanced profits, say 55%.

76 The Tribunal reached this conclusion of loss of a 55% chance (which was then translated to a monetary award of US$80m) without *any* apparent analysis or consideration over and above its "slightly better than even" approximation, and without any submissions having been sought or made on the quantum of the chance lost. Moreover, despite being cognisant of the fact that the Secured Creditors' expert had not addressed this matter at all, the Tribunal never gave an opportunity for any of the Respondents, let alone the Secured Creditors, to adduce further evidence on the matter.

77 The Purchasers argued that the situation in the present appeals was similar to that in *Kempinski*. There, one of the issues was whether the arbitral award should have been set aside because the arbitral tribunal made a finding on a certain matter – the "New Management Contract" – that had not been pleaded. We found (at [51]) that:

> Given the extensive correspondence, written submissions and expert opinions that were exchanged *vis-à-vis* the legal effect of the New Management Contract, we are of the view that Kempinski had ample notice of Prima's case on this particular point. … Kempinski did not suffer any prejudice in any way since it was given ample opportunity to address this issue of law. …

78 In our judgment, the situation presented in the current appeals is completely different and the Purchasers' reliance on *Kempinski* is therefore unfounded. During the arbitration, the Secured Creditors and the Liquidator did not have ample notice of the "loss of opportunity" claim. It was raised at the eleventh hour. Not only was the Tribunal apparently uncertain of and ill-equipped to deal with the quantum of the opportunity allegedly lost, it also did not request further arguments on the point.

79 In the circumstances, not only did the Secured Creditors and the Liquidator lack ample notice of the "loss of opportunity" claim, the Tribunal was also never furnished with extensive submissions or expert evidence on the "loss of opportunity" point. This was despite the fact that the Tribunal, as it had indicated to the parties, was alive to the need for such submissions and evidence. The analogy with *Kempinski* therefore completely fails.

80 For these reasons, we answer Appeal Issue 4 in the negative. However, we must qualify our affirmation of this part of the Judge's decision. The Judge held that this breach of natural justice alone would warrant setting aside the Award in its entirety. In our judgment, this is wrong. Only those portions of the Award relating to the "loss of opportunity" claim that were in fact affected by the breach of natural justice, namely, the award of damages of US$80m, should be set aside as a result of this breach.

Appeal Issue 5: Did the Judge err in finding that the Tribunal failed to consider the Secured Creditors' arguments, evidence and submissions in relation to the Lost Land Claims?

81 To recapitulate, in the court below, Issue 5 centred on the obligation of the Secured Creditors to settle the Lost Land Claims. These claims were so labelled before the Tribunal and the Judge because they related to (among other plots of land) the Disputed Land, which the Purchasers should have obtained under the APA, but which was the subject of competing claims by various third parties.

The relevant provision

82 The Secured Creditors' obligation to settle the Lost Land Claims was contained in s 6.8 of the APA, which reads:

> In the event the [Secured Creditors] fail to settle and discharge the Claims for Settlement … more particularly described in Part A of Schedule VI hereof, in the manner set forth therein, on or before the Closing Date, the [Secured Creditors] shall fully settle and discharge the same claims prior to the expiration of this APA. … It is expressly understood that the [Secured Creditors] shall, at all times, indemnify and hold [the Purchasers] completely free from and clear of any and all liabilities, obligations, damages, costs and expenses of whatever kind of nature, arising from the Claims for Settlement …

The various Lost Land Claims

The "Claims for Settlement"

83 As can be seen from [82] above, reading s 6.8 of the APA on its face, the only Lost Land Claims covered by that provision were "the Claims for Settlement … more particularly described in Part A of Schedule VI [to the APA]". Part A of Schedule VI defined those "Claims for Settlement" as claims brought by two third parties, Lorien and Celeborn, as follows:

> **CLAIMS FOR SETTLEMENT BY THE [SECURED CREDITORS]**
>
> **PART A**
>
> **1. Petition for Reconstitution of Two Original Certificates of Title by [Celeborn]**
>
> This is a Petition filed in 1985 by [Celeborn] for the reconstitution of supposed titles of his mother over parcels of land with a total area of 38.2 hectares in [Erebor] (which included … the 3.4071 hectares on which [the Affected Shop (as defined at [18] above)] is situated). This was opposed by the Government [of Moria], [the Corporation] … and the City of [Erebor].
>
> Manner of Settlement: Note that none of the [Plant Assets] subject of this Asset Purchase Agreement are included in the above-mentioned cases, except the property over which [the Affected Shop] is situated. Accordingly, the undertaking of the [Secured Creditors] with respect to the settlement of the cases above-mentioned shall be limited to the property over which [the Affected Shop] is situated, and the liability of the [Secured Creditors] shall be limited to the value of such property at the time of expropriation.
>
> …
>
> **2. [LORIEN] vs. [THE CORPORATION]**
>
> Nature/Amount Involved:

> This is an action for ejectment brought by [Lorien] against [the Corporation]. [Lorien] claims to have bought the subject property from [Celeborn] (item 1 above). The total money judgment in favor of [Lorien] is [about US$864,000] representing yearly rental of [about US$34,000] from June 1978 to June 2003 plus rental payments in arrears, attorney's fees and cost of suit.
>
> Manner of Settlement: As provided in the [Celeborn] case above, the undertaking of the [Secured Creditors] with respect to the settlement of this [Lorien] case shall likewise be limited to the property over which [the Affected Shop] is situated, and the liability of the [Secured Creditors] shall be limited to the value of such property.

It should be noted that the Corporation was party to both of the "Claims for Settlement" defined in Part A of Schedule VI to the APA ("the two defined 'Claims for Settlement'").

Other claims

84 In addition to the two defined "Claims for Settlement" brought by Lorien and Celeborn, an individual named Mdm Vaire separately filed proceedings in the Morian courts in 1998 claiming that she – and not Celeborn – was the true heir and, hence, the true owner of (among other plots of land) the Disputed Land. It will be noted that Mdm Vaire's claim was not one of the two defined "Claims for Settlement" (see [82]–[83] above), even though it was already in progress at the time the APA was entered into. Mdm Vaire's claim was opposed by Lorien and Celeborn. The Morian court found in favour of Mdm Vaire. Lorien and Celeborn each filed a petition for review before the Morian Supreme Court in 2007.

85 Separately, the government of Moria commenced two sets of proceedings relating to (among other plots of land) the Disputed Land. The first was brought to "expropriate" the Disputed Land. Those proceedings were originally filed on 15 August 1983 by the Mithril Authority, an entity created to strengthen the Mithril industry in Moria, with a view to obtaining the Disputed Land for use by the Corporation. At that time, the Corporation was owned and controlled by the government of Moria (through the Mithril Authority). The Mithril Authority's case was dismissed as the Morian court found that the Mithril Authority lacked the requisite standing. The Morian government was allowed to substitute itself as the claimant in place of the Mithril Authority, but eventually, its case too was dismissed by the Morian court in October 2005. The Morian government filed a petition for review before the Morian Supreme Court in 2006.

86 The second set of proceedings brought by the Morian government was for the cancellation of certain certificates of title and reversion against the predecessor of Celeborn (Celeborn's mother), who was represented by Celeborn, the alleged heir. Those proceedings were filed on 12 October 2004. Lorien and Mdm Vaire were also involved in those proceedings. The Morian government's argument was that the certificates of title concerned had been issued to implement a decision by the Morian court, which decision, properly considered, did not cover the entire area set out in the certificates. The certificates were hence over-encompassing. The Morian government's claim was dismissed by the Morian court, and it similarly filed a petition for review before the Morian Supreme Court in 2006.

87 The above four matters, along with three other matters that concerned (among other plots of land) the Disputed Land, were heard together by the Morian Supreme Court. On 7 July 2010, it issued a judgment that upheld Mdm Vaire's claim to the Disputed Land. It dismissed Lorien's and Celeborn's petitions for review for lack of merit. At the same time, it also granted the Morian government's petitions for review and reinstated both the expropriation as well as the reversionary proceedings.

The disputed matters before the Tribunal

88 Before the Tribunal, the Purchasers argued that the Secured Creditors had not performed their obligation under s 6.8 of the APA to settle the Lost Land Claims and sought an indemnity from them. In response, the Secured Creditors' submitted as follows:

(a) Given the decision of the Morian Supreme Court on 7 July 2010 in favour of Mdm Vaire ("the Morian Supreme Court's 7 July 2010 judgment"), Celeborn and Lorien no longer had any claim to the Disputed Land. Therefore, there were no claims for the Secured Creditors to settle pursuant to s 6.8 of the APA, which did not include any obligation to settle Mdm Vaire's claim or any other Lost Land Claims.

(b) Even if s 6.8 covered the obligation to settle Mdm Vaire's claim, the Purchasers' allegation of a breach of s 6.8 was premature as the Secured Creditors had until "the expiration of [the] APA" to discharge any such obligation. The APA did not expire until the "full payment and discharge of all the obligations of the [Purchasers]", and that had not transpired yet. The expiration of the APA was provided for in s 8.1 of the APA, which reads:

> 8.1 Term
>
> This APA shall take effect from the date hereof and, unless terminated in accordance with Section 8.2, shall continue to be valid and in full force and effect until full payment and discharge of all the obligations of the [Purchasers] herein, including the payment in full of the Purchase Price and settlement of all their respective obligations under the [Notes].
>
> …

89 As we see it, there were three pertinent questions before the Tribunal:

(a) First, what was the ambit of the Secured Creditors' obligation under s 6.8? In particular, did it extend to procuring a settlement of other Lost Land Claims (especially Mdm Vaire's claim) in addition to the two defined "Claims for Settlement"?

(b) Second, arising from question (a) above, what was the size of the plot of land covered by the Secured Creditors' obligation under s 6.8 of the APA? The Purchasers initially claimed that the size of the plot of land concerned was 9.5 hectares, but subsequently took the position that it was 6.05 hectares, with an alleged value of US$23.7m. These figures may be contrasted with the figure of 3.4071 hectares that was stated in the APA (see s 6.8 read with Part A of Schedule VI). The Secured Creditors took the position that the size of the land in question was 3.4071 hectares, valued at around US$16,300.

(c) Third, what was the point in time by which the Secured Creditors had to fulfil their obligation under s 6.8? The Secured Creditors argued before the Tribunal that even if they were obliged under s 6.8 to procure a settlement of other Lost Land Claims (in particular, Mdm Vaire's claim) in addition to the two defined "Claims for Settlement" (which they denied, as we shall elaborate on below), that obligation had yet to fall due as they had until "the expiration of [the] APA" to settle those claims. For that reason, they argued that the Purchasers' claim for an indemnity based on s 6.8 was premature.

90 On 21 October 2011, Mr Andrew Yeo (counsel for the Secured Creditors) addressed the Tribunal on the Secured Creditors' case in respect of the Lost Land Claims. It is important to note the context of that exchange between Mr Andrew Yeo and the Tribunal. It took place during Mr Andrew Yeo's reply to the closing submissions of Mr Yeap (counsel for the Purchasers), and it appears to have been

the subject of much confusion. The exchange went as follows (from 3.17pm to 3.20pm on 21 October 2011):

Chairman:	But I thought yesterday your submission was it's ["it" being the Disputed Land] gone, [Mdm Vaire's] claim has decided that.
Mr Andrew Yeo:	That's why, sir, I had distinguished two things. I said in relation to … [the two defined "Claims for Settlement"], if you viewed the indemnity claim under clause 6.8 as being limited to claim, it is claim-specific.
Chairman:	It's too clever, Mr Andrew Yeo. You can't divide it up this way. You may be right that Mr Yeap has a problem that he can't have both of these. But if you can't transfer title to [the Disputed Land] because of the [Morian Supreme Court's 7 July 2010 judgment] then that is lost land, isn't it, and someone is going to have to sort out the paperwork.
Mr Andrew Yeo:	Well, if we are being ordered to pay damages, well either the [L]iquidator and/or us are being ordered to pay damages, to compensate [the Purchasers] for the complete loss of that already, and then there's still the possibility that they will get title and continue to occupy the premises. It does sound, sir, that there is –
[Arbitrator 2]:	Can you clarify how will they get title? Is there some way they can get title? Because what we remember of the earlier hearings was, in the face of the [Morian Supreme Court's] decision, as far as their getting title is concerned, that's history. They cannot get title.
Mr Andrew Yeo:	I don't recall myself saying that. I said that [the two defined "Claims for Settlement"] were defeated and –
[Arbitrator 2]:	No, but what's the implication of that judgment?
Mr Andrew Yeo:	The implication would be that, as I understand it, with tax clearances and with the old –
[Arbitrator 2]:	No, no, forget tax clearance. As a matter of title, does that judgment not bind the [Corporation]?
Mr Andrew Yeo:	That is where [the Secured Creditors' expert] – and we have put in our submissions – it does not bind [the Corporation] because they were not parties to [Mdm Vaire's] proceedings –
Chairman:	Mr Yeo, let's get realistic about this. There's this plot of land sitting slap bang in the middle. Now, on the one hand [Mdm Vaire] has got a judgment that says the land is hers. On the other hand, this is land which – let's assume for these purposes we come to a decision that this is land which the [L]iquidator and the Secured Creditors undertook to transfer to [the Purchasers]. Now, where do we go there? You make a submission that says that "at least part of this land has lost and gone forever, it's owned by someone else. We can't be in breach because it's owned by someone else".

Mr Andrew Yeo:	*Sir, what I was raising was the fact that because the orders [in the Morian Supreme Court's 7 July 2010 judgment] require – and I'm paraphrasing – the sum effect would be to get [the Purchasers] in a position to get title to SP-06 as well –*
Chairman:	*I see that point, Mr Yeo.*
Mr Andrew Yeo:	*That's the point I'm focusing on.*
Chairman:	*I see that point –*
Mr Andrew Yeo:	*But I'm not arguing the merits of the claim.*

[emphasis added]

91 "SP-06" in the above extract was a reference to the Disputed Land. Mr Andrew Yeo appeared to be saying that notwithstanding the Morian Supreme Court's 7 July 2010 judgment, the Purchasers were still in a position to get title to (among other plots of land) the Disputed Land. The Tribunal eventually found that the Secured Creditors had failed to perform their obligation under s 6.8 of the APA and agreed with the Purchasers' quantification of their indemnity claim, awarding them an indemnity of approximately US$23.7m. The relevant portions of the Award read as follows:

> 473. The Secured Creditors' obligations [under s 6.8] were either to settle the [two defined "Claims for Settlement"] on or before the Closing Date or, if, as happened, they had not settled those claims by the Closing Date, to settle them prior to the expiration of the APA, that is, prior to … 15th October 2012. …
>
> 474. [The Purchasers'] claim is put in the following way:
>
> (a) the requirement that the Secured Creditor settle the [two defined "Claims for Settlement"] so that the [Disputed Land] is transferred to [the Purchasers];
>
> (b) alternatively, in the event that the [Disputed Land] is not transferred to [the Purchasers], the value of that land at the time of its loss;
>
> (c) the Secured Creditors have until … 15th October 2012 to settle those actions or to pay [the Purchasers] in respect of them;
>
> (d) the Secured Creditors are obliged to indemnify and hold [the Purchasers] completely harmless from any and/or [all] liabilities, obligations, damages, costs and expenses of whatever kind and nature arising from the [two defined "Claims for Settlement"].
>
> 475. The Secured Creditors' original submission was that the [Purchasers' indemnity] claim was premature. However, in his closing oral submissions Mr Andrew Yeo told the Tribunal that the claim was *"not really premature"*, but that it was *"a dead claim now"*. That submission relied upon [the Morian Supreme Court's 7 July 2010 judgment] in which it was held that title to the [Disputed Land] did not belong to [Celeborn], but to a third party.
>
> 476. Mr Yeo's submission assumed that the indemnity could not be triggered because of the [Morian] Supreme Court's judgment. That submission cannot be accepted. When the parties entered into the APA it was known that there was a potential difficulty in delivering the

[Disputed] Land, and so the [Disputed] Land was carved out of the transfer requirements and treated separately. In effect, the Secured Creditors undertook to sort out the position in relation to the [Disputed] Land or indemnify [the Purchasers] in respect of it. As a result of the [Morian] Supreme Court judgment, the Secured Creditors are not in a position to sort out the position and, as a result, must indemnify [the Purchasers].

477. The submission that the claim is premature must also fail. It is not open to the Secured Creditors to contend, on the one hand, that the claim for indemnity is *"dead"*, and, on the other hand, that it is premature. The fact that the APA gives the Secured Creditors until October 2012 to transfer the [Disputed Land] is of no consequence in the light of the acceptance by both [the Purchasers] and the Secured Creditors, that there is no prospect of the Secured Creditors being able to make the transfer.

[emphasis in original]

92 The Tribunal characterised the Secured Creditors' position as being that the Purchasers' indemnity claim was "dead" because a phrase to that effect had been used by Mr Andrew Yeo in his exchange with the Tribunal on 20 October 2011 at around 4.33pm. The relevant portion reads:

Mr Andrew Yeo:	So we think [the Purchasers' indemnity claim] is premature at this stage. There is also the point that we made. I think, there was some exchange on this in the opening and we had said that there was [the Morian Supreme Court's 7 July 2010 judgment] … where [the two defined "Claims for Settlement"] were defeated, as it were, by [the] competing claim from [Mdm Vaire] …
Chairman:	Yes.
Mr Andrew Yeo:	As far as [the two defined "Claims for Settlement"] are concerned, there is nothing for us to settle because it has been settled by the [Morian Supreme Court's] decision. So not really premature, we actually said it's a dead claim now. …

93 The Tribunal appeared to have thought that because the Secured Creditors (through Mr Andrew Yeo) had said that the Purchasers' indemnity claim was "dead", this meant that the Secured Creditors accepted that they would not be able to transfer title to the Disputed Land to the Purchasers in any event, not even by 15 October 2012 (eight years after the Closing Date), which the Tribunal thought was the maximum extent of the time permitted to the Secured Creditors to perform their obligation under s 6.8. In the premises, the Tribunal held, the Secured Creditors could not mount an argument that the Purchasers' indemnity claim was premature. This appears to be the effect of para 477 of the Award, which we have reproduced above, and as we shall shortly see, this, significantly, was also the position of Mr Yeap (counsel for the Purchasers).

The Secured Creditors' case before the Judge

94 Before the Judge, the Secured Creditors argued that the Tribunal was mistaken in thinking that they had conceded that they would not, in any event, be able to settle the Lost Land Claims which fell within the ambit of their obligation under s 6.8 of the APA. The Secured Creditors' submissions were as follows:

(a) As was clear from para 477 of the Award, the Tribunal found that the Secured Creditors had until 15 October 2012 to settle the Lost Land Claims covered by s 6.8.

(b) However, the Tribunal concluded that: (i) there was "no prospect" of the Secured Creditors being able to procure the settlement by that time; and (ii) that position was accepted by the Secured Creditors in view of Mr Andrew Yeo's contention that the Purchasers' claim for an indemnity was "dead".

95 The Secured Creditors argued that the Tribunal was mistaken in concluding that they had conceded that they would not be able to fulfil their obligation under s 6.8 of the APA in any event. Rather, their contention that the Purchasers' indemnity claim was "dead" went to a wholly different point: they were saying that because of the Morian Supreme Court's 7 July 2010 judgment upholding Mdm Vaire's claim, the two defined "Claims for Settlement" were "dead", and therefore, there was nothing under s 6.8 for them to indemnify the Purchasers against as Mdm Vaire's claim was not one of the claims listed in Part A of Schedule VI to the APA. If the Tribunal did not accept this, the Secured Creditors' second or fall-back argument was that the time for performance of their obligation under s 6.8 had yet to lapse in any event. Hence, it was central to the Secured Creditors' case that performance of their obligation was not yet due, and the suggestion that they had conceded that they would not be able to perform the obligation within the time available for performance was directly contrary to this. The Secured Creditors argued that because the Tribunal mistakenly thought they had conceded that they would not, in any event, be able to resolve those Lost Land Claims which fell within the ambit of their obligation under s 6.8 and proceeded on that erroneous basis, this constituted a breach of natural justice in the vein of *Front Row*.

96 The Judge agreed with the Secured Creditors. He found that the Tribunal had breached the rules of natural justice to the prejudice of the Secured Creditors (see the High Court Judgment at [242]).

The Purchasers' case on appeal

97 Before us, the Purchasers argued that the Judge was wrong. Relying on that portion of the exchange between Mr Andrew Yeo and the Tribunal cited above at [90], the Purchasers submitted that the Secured Creditors had indeed conceded before the Tribunal that: (a) "the Lost Land Claims were 'not really premature' but … [were] a 'dead claim now'"; and (b) "there was … no longer a possibility of transferring the land in question to [the Purchasers]" [emphasis in original omitted]. The Purchasers' arguments read as follows:

> 92. In reaching his decision on this issue, the Judge appeared to not have taken cognizance of the matters raised by the Tribunal at [475] of the Award, where the Tribunal noted that the [Secured Creditors'] original submission was that the Lost Land Claims were "premature". However, in his oral closing submission, then Counsel for the [Secured Creditors] (Mr Andrew Yeo) informed the Tribunal that the Lost Land Claims were "not really premature" but that it was a "dead claim now". Mr Yeo had relied on the GD of the [Morian] Supreme Court in July 2010 which held that title to the [Disputed Land] did not belong to [Celeborn] but to a third party. Mr Yeo's oral submission [referring] to … [475] of the Award occurred on 21 October 2011. *If one reads the transcript in its entirety, it is clear that this oral exchange between Mr Yeo and the Tribunal (which had occurred after the filing of the [Secured Creditors'] Closing Submissions on Liability on 23 May 2014 and 4th July 2014) clearly showed that Mr Yeo had expressly informed the Tribunal that there was, in the [Secured Creditors'] view, no longer a possibility of transferring the [Disputed Land] to [the Purchasers].* …

93. The Judge did not appear to have taken cognizance of the exchange between the Tribunal and Mr Yeo as highlighted above when he held (wrongly) that from the objective records of the Arbitration proceedings, the [Secured Creditors] had never conceded that there was no prospect of transferring the [Disputed Land].

[emphasis in original omitted; emphasis added]

Mr Yeap (counsel for the Purchasers) therefore submitted that this was not a case of a breach of natural justice at all because, according to him, Mr Andrew Yeo had conceded that the Secured Creditors would not be able to transfer the Disputed Land to the Purchasers.

Our analysis

98 To begin, we consider that there are two separate issues that should not be conflated – first, the scope of the Secured Creditors' obligation to settle *specific* claims under s 6.8 read with Part A of Schedule VI to the APA (which is the first issue we have set out at [89] above); and second, the point in time by which that obligation had to be performed (which is the third issue we have set out there). As to the first of these issues, the Tribunal disagreed with Mr Andrew Yeo's submissions that the Secured Creditors' obligation under s 6.8 was "claim-specific" (as Mr Andrew Yeo put it), and accordingly held that the indemnity in that provision was not confined to the two defined "Claims for Settlement". We are not concerned with whether the Tribunal's ruling on this point was correct or not. What is more important is that the Secured Creditors had a second line of defence, which is the second of the two issues we have just highlighted – namely, that the time for performance of their obligation under s 6.8 had yet to expire.

99 In this light, it is important to contextualise the exchange between Mr Andrew Yeo and the Tribunal. In the extract that we have cited above (at [90]), Mr Andrew Yeo was addressing the Tribunal on the orders it could make *if* it found that the Purchasers had *succeeded* in their case that title to the Disputed Land had "gone". This hypothetical setting was premised on the supposition that the Tribunal agreed with the Purchasers that: (a) clean title to the Disputed Land (along with the rest of the Plant Land Assets) had to be transferred to the Purchasers; and (b) owing to the Morian Supreme Court's 7 July 2010 judgment upholding Mdm Vaire's claim to the Disputed Land, title to that land had indeed been "lost" and could not be transferred to the Purchasers.

100 Mr Andrew Yeo was explaining that if, indeed, the Tribunal made a finding in terms of the premises spelt out above, it should not also make an order that there was an obligation on the Secured Creditors' part to transfer clean title to the Disputed Land to the Purchasers together with the rest of the Plant Land Assets because on the aforesaid premises, part of the Plant Land Assets would already have been "lost". Accordingly, Mr Andrew Yeo's real point was that any order pertaining to an obligation to transfer the Plant Land Assets to the Purchasers would have to incorporate a carve-out of the Disputed Land, and could, perhaps, be accompanied by an order of compensation. This much is apparent from the transcript of the exchange between Mr Andrew Yeo and the Tribunal (from 3.16pm to 3.17pm on 21 October 2011) preceding the portion cited above at [90]. The relevant part of that earlier exchange is as follows:

Mr Andrew Yeo: … So on the one hand, as I understand it, the reliefs in 1, 2, 3, and 4 cause [the Purchasers] to have title to the [Disputed Land] in their name, presumably since buildings don't walk they will be there as well. So *they'll be getting the [Disputed Land] with the buildings on it and also seeking damages* to be awarded to them for the loss of that in fee simple.

	So I think there is something that needs to be clarified because I think it does *sound like double recovery* if they were to get both.
Chairman:	I think your short point is that [the Disputed Land] has gone, it is history, and you can't transfer title to it.
Mr Andrew Yeo:	Well that is the thing, sir. *The certificate of title for [the Disputed Land] still remains in [the Corporation's] name.* …
Chairman:	Yes.
Mr Andrew Yeo:	There has [*sic*] been no proceedings to revoke that title. It still remains … [the Corporation's] land.

[emphasis added]

101 With an understanding of the context in which the exchange took place, the following can be gleaned from the two passages that we have extracted above at [90] and [100]:

(a) First, Mr Andrew Yeo did not at any time concede that the Disputed Land had indeed been "lost", or that it was impossible for the Secured Creditors to deliver title to that plot of land to the Purchasers. His point was instead directed at the danger of double-recovery if the Tribunal did not make an appropriate carve-out of the Disputed Land from any order it might eventually be minded to make in relation to the transfer of the Plant Land Assets to the Purchasers.

(b) Second, when it was put to Mr Andrew Yeo by the Tribunal that title to the Disputed Land had "gone", Mr Andrew Yeo maintained that it remained with the Corporation.

(c) Third, Mr Andrew Yeo maintained that the Morian Supreme Court's 7 July 2010 judgment upholding Mdm Vaire's claim did not bind the Corporation.

102 On the Tribunal's own determination, the Secured Creditors had until 15 October 2012 to transfer the Disputed Land to the Purchasers. However, the Tribunal found that that was inconsequential given the "concessions" (as the Tribunal saw it) made by Mr Andrew Yeo. As we have noted above, there were no such "concessions". The question then is whether the Tribunal's failure to consider the merits of the Secured Creditors' position as to the time for performance of their obligation under s 6.8 of the APA was materially prejudicial to them.

103 The Secured Creditors reiterated before us that performance of their obligation under s 6.8 was not in fact due even as at 15 October 2012. Rather, the obligation extended until such time as the APA expired. We say "reiterated" because this argument was raised by the Secured Creditors on 23 May 2011 in their first Closing Submissions on Liability to the Tribunal. The relevant portions of the submissions read:

(3) Moreover, The Claim Under Section 6.8 Of The APA Is Premature

278. Furthermore, even if there is an obligation under Section 6.8 of the APA in relation to [Celeborn's] Petition, [Lorien's] Motion, [Mdm Vaire's] Petition and/or the [Morian Supreme Court's] Judgment (which is denied), the [Purchasers'] right of action has not accrued. Section 6.8 of the APA clearly states that the Secured Creditors have until the "*expiration of the APA*" to discharge the obligation stated therein.

279. The APA does not expire until the "*full payment and discharge of all obligations of the [Purchasers] herein, including the payment in full of the Purchase Price and settlement of all their respective obligations under the [Notes]*" (see Section 8.1, APA).

280. As there are still outstanding amounts due from the [Purchasers] on account of the Purchase Price, it is clear that the APA … has not expired. By no means, therefore, can it be asserted that the [Purchasers'] right of action under Section 6.8 has arisen.

281. Even if the [Purchasers] had thus far been diligent in paying the Purchase Price instalments in accordance with the schedules of [the Notes], that would still mean that the APA would only expire in October 2012. The [Purchasers'] claim under Section 6.8 of the APA would thus be premature, regardless of the circumstances.

[emphasis in original omitted; emphasis added]

In this regard, we note that similar arguments had been made by the Secured Creditors as early as 8 March 2011 in their Opening Submissions.

104 We are satisfied that the aforesaid arguments by the Secured Creditors, which dealt with the time for performance of their obligation under s 6.8 of the APA, were potentially crucial at the arbitration. If it were the case that: (a) either of the two defined "Claims for Settlement" (or, for that matter, any other Lost Land Claim that the Tribunal might have found to be covered by the obligation in s 6.8) remained afoot; and (b) the Secured Creditors' obligation to resolve those claims did indeed fall due on 15 October 2012, given that that deadline has already passed, it might then be argued that even if the Tribunal mistakenly thought the Secured Creditors had conceded that they would not be able to resolve those claims and transfer the Disputed Land to the Purchasers, and found against them on this basis, no prejudice has resulted because, as history has shown, the Secured Creditors were indeed unable to perform their obligation. However, this is not the case.

105 It is certainly arguable that performance of the Secured Creditors' obligation under s 6.8 has yet to fall due. The Tribunal never considered the merits of this contention because it mistakenly thought that the Secured Creditors had conceded that they would not, on any basis, be able to comply in a timely manner with that obligation and therefore would not be able to transfer the Disputed Land to the Purchasers. As the Tribunal in effect plainly overlooked merits of the Secured Creditors' case as to whether the Purchasers' indemnity claim was premature because it mistakenly thought the Secured Creditors had conceded that they would not be able to transfer the Disputed Land to the Purchasers in any event, we are satisfied that this comes within the narrow ambit of *Front Row*. We therefore answer Appeal Issue 5 in the negative. In our judgment, this would warrant setting aside only that portion of the Award relating to the Lost Land Claims. Given this finding, it is not necessary for us to consider a further argument that was raised by the Secured Creditors, namely, whether the Tribunal also made its finding as to the size of the "lost" land in breach of natural justice.

Appeal Issue 6: Did the Judge err in finding that the Tribunal acted in excess of its jurisdiction in granting the Purchasers relief in respect of their payment obligations under the Notes?

The relevant provisions

106 Appeal Issue 6 concerns the scope of the arbitration agreement in the APA. The arbitration agreement is contained in s 10 (specifically, s 10.2), and reads as follows:

> **10.1 Amicable Settlement**
>
> Any dispute or controversy of any kind whatsoever arising between or among the Parties (such dispute or controversy being referred to herein as a "Dispute") in respect of all matters relating to or in connection with this APA and also in all matters concerning the provisions of this APA and the performance of the obligations provided herein, shall be settled amicably by mutual consultations between or among the Parties as far as practicable.
>
> **10.2 Arbitration**
>
> If the Dispute cannot be settled amicably within thirty (30) days by amicable settlement, the same shall be resolved through arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre (the "Centre") for the time being in force.
>
> …
>
> **10.3 Other Defaults**
>
> Notwithstanding anything herein, the provisions of Sections 10.1 and 10.2 of this APA shall not apply to any default under the [OMNA], the [Notes], … or any contract, agreement or document supplemental or accessory thereto.
>
> For the avoidance of doubt, a default under the [OMNA], the [Notes], … or any contract, agreement or document supplemental or accessory thereto shall be subject to, and governed by, the respective terms thereof and the [Secured Creditors] shall have the right to immediately enforce any and all remedies available to them under such agreements.

107 The question at the heart of Appeal Issue 6 is whether the Tribunal exceeded its jurisdiction in granting certain reliefs in relation to the Purchasers' payment obligations under the Notes. These reliefs were in the following terms:

> 5. A declaration that for so long as the Liquidator and the Secured Creditors, and each of them, remains in breach of its obligation to convey, transfer, assign and deliver title [to] the [Plant Assets] free from and clear of all Liens of any kind or nature whatsoever, [the Purchasers] are entitled … to withhold performance of their respective payment obligations under the APA and the [OMNA].
>
> …
>
> 9. An Order that the Liquidator and the Secured Creditors be restrained and enjoined, whether jointly or severally, from declaring [the Purchasers] to be in default of [their] payment obligations until further Order of the Tribunal or, if later, unless and until any such default is made by reference to the dates for payment ordered by the Tribunal.

108 The Respondents' argument is that the Purchasers' payment obligations arose under the Notes and should hence be subject to the dispute resolution mechanism contained in the OMNA in view of

s 10.3 of the APA. The OMNA contemplated that all disputes would be referred to the municipal courts of Moria. The relevant provision, s 9.08(b) of the OMNA, reads:

> **9.08 Governing Law; Submission to Jurisdiction**
>
> …
>
> (b) Any suit, action or proceeding against the [Purchasers] with respect to the Relevant Documents or on any judgment entered by any court in respect thereof may be brought in any competent court in [the capital of Moria], and the parties hereby submit to the non-exclusive jurisdiction of such courts for the purpose of any such suit, action, proceeding or judgment. The foregoing, however, shall not limit or be construed to limit the rights of the [Secured Creditors] to commence proceeding[s] or to obtain execution of judgment against the [Purchasers] in any venue or jurisdiction where assets of the [Purchasers] may be found.
>
> …

The "Relevant Documents" in s 9.08(b) are defined in s 1.01 of the OMNA as "this Agreement, the Notes, the Security Documents and all other documents required or otherwise contemplated to be executed or delivered thereto or pursuant thereto".

The Tribunal's analysis

109 The Secured Creditors argued before the Tribunal that the reliefs in relation to the Purchasers' payment obligations under the Notes were beyond the scope of the arbitration because they were not the subject of the APA (or the arbitration agreement contained therein in s 10). The Tribunal disagreed, and found that it had the jurisdiction to grant the reliefs in question for two reasons.

110 First, the Tribunal found that the Purchasers' payment obligations under the Notes stemmed from the APA, and not the OMNA (see the Award at para 85). Second, in construing ss 10.2 and 10.3 of the APA, the Tribunal concluded that a dispute between the parties would be excluded from the arbitration agreement in s 10 by virtue of s 10.3 only if the dispute: (a) related to the breach of any obligation owed by the Purchasers under (for the purposes of the present analysis) the OMNA, including the obligation to make payment under the Notes; *and* (b) did not relate to the rights and obligations of the parties under the APA. The example provided by the Tribunal was a case where the Liquidator and the Secured Creditors had fulfilled their obligations under the APA (and had transferred clean title to the Plant Assets to the Purchasers), but the Purchasers failed in their obligations under the OMNA (by failing to make payments under the Notes). In such a case, the Tribunal considered, the matter would be governed by s 10.3 (see the Award at para 98).

The Judge's analysis

111 The Judge disagreed with the Tribunal in two respects. First, he found that the Purchasers' payment obligations under the Notes did not stem from the APA – in his view, they stemmed instead from the OMNA. Second, he held that the purpose of s 10.3 of the APA was to "break a deadlock", such that where an obligation under the APA overlapped with an obligation under the OMNA (and there was a dispute over that obligation), s 10.3 would take the matter out of the dispute resolution framework contained in the APA and s 9.08(b) of the OMNA would govern instead (see the High Court Judgment at [253]).

Our analysis

112 As a preliminary point, we note that although the courts should not, in general, engage with the merits of the dispute when dealing with applications to set aside arbitral awards, an exception arises when the courts are confronted with arguments relating to the jurisdiction of the arbitral tribunal. In such a case, the court undertakes a *de novo* hearing (see *AQZ v ARA* [2015] SGHC 49 at [49] and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [163]). The Judge was therefore correct to consider Issue 6 on the merits.

113 The main issue before the Judge in relation to Issue 6 concerned the true interpretation of s 10.3 of the APA. The Purchasers argued that the Tribunal's interpretation of s 10.3 should be upheld, and that s 10.3 provided a very limited "gateway" [emphasis in original omitted] to the OMNA. In the Purchasers' words:

> … It is only when the particular dispute would in essence be a "*default*" referred to in Section 10.3 APA that the [Secured Creditors] may seek to invoke the jurisdiction of the [Morian] Courts under [the OMNA] (see the illustration provided by the Tribunal at [98] of the Award). … [emphasis in original]

114 The problem with the Purchasers' – and the Tribunal's – interpretation of s 10.3 of the APA is that it would render that provision otiose. If s 10.3 of the APA were meant to cover only those situations that dealt solely and exclusively with either party's obligations under the OMNA – such as the Purchasers' payment obligations under the Notes – there would be no need for that provision at all. This is because ss 10.1 and 10.2 of the APA only purport to cover disputes or controversies "in respect of all matters relating to or in connection with [the] APA". Hence, even without s 10.3, it is clear that a matter which concerns the parties' obligations under the OMNA alone cannot and would not fall within the ambit of the arbitration agreement in s 10 of the APA. We put this proposition to Mr Yeap and he was unable to offer a plausible response.

115 The Purchasers also pointed to the difference between the words used in s 10.1 and s 10.3 – "dispute" in the former and "default" in the latter – to make the point that s 10.3 of the APA should only apply to undisputed defaults. This, as pointed out by the Judge, would mean that the Purchasers would have the unilateral power to dictate whether a disagreement regarding their payment obligations under the Notes would be resolved under the APA or under the OMNA (see the High Court Judgment at [258]). Like the Judge, we do not think there is much to be made of the default-dispute dichotomy.

116 We are therefore satisfied, as was the Judge, that s 10.3 of the APA directs the parties to the OMNA where a dispute under the APA overlaps with a dispute under the OMNA. In this case, the disputes relating to the Purchasers' payment obligations under the Notes fell squarely within s 10.3, and were hence beyond the remit of the arbitration agreement in s 10. Accordingly, we are satisfied that the Judge was correct both in finding that the Tribunal acted in excess of its jurisdiction in granting the Purchasers relief in respect of their payment obligations under the Notes, and in setting aside the affected portions of the Award.

Appeal Issue 7: Did the Judge err in finding that the Tribunal did not act in excess of its jurisdiction or in breach of natural justice in holding the Funds liable, alongside the Arbitration Secured Creditors, for breaches of the APA?

117 We turn now to Appeal Issue 7, the last of the Appeal Issues before us.

118 To recapitulate, the Funds purchased the right to receive payments under the Notes on the

secondary market. They were not involved when the APA was signed; nor were they party to the arbitration when the arbitral proceedings commenced. They were only added as parties to the arbitration on 22 March 2011, and even then, their status in the arbitral proceedings remained unclear. Throughout the arbitration, the Funds were not referred to as a separate group. Rather, they were treated as part of the Arbitration Secured Creditors. They were also represented by the same legal team from A&G (led by Mr Andrew Yeo) that represented the Arbitration Secured Creditors.

119 We propose, first, to revisit how the Funds acquired their interests pursuant to the Notes, then analyse how they began participating in the arbitration, and lastly consider whether the Judge was correct in his finding that the Tribunal did not act in excess of its jurisdiction or in breach of natural justice in holding the Funds liable, alongside the Arbitration Secured Creditors, for breaches of the APA. Before doing so, we reiterate what we have said at [112] above as Appeal Issue 7 likewise concerns (among other things) a matter of jurisdiction.

The Funds' purchase on the secondary market

120 Between 2005 and 2008, the Funds entered into a series of four agreements by which they purchased interests (from three different entities) entitling them to payment under the Notes. The first and the last agreements were with the same entity. The Liquidator and the Purchasers were not party to those agreements. The main document in each of the agreements was an assignment agreement, which was typically a brief document about 12 pages long. Although the form of the agreements changed from one transaction to another, the substance was largely the same – the governing law was English law, the agreements were subject to the non-exclusive jurisdiction of the English courts and none of them contained any arbitration agreement. Each agreement also contained a "Form of Notice of Transfer and Adherence" (a "Notice of Transfer"), typically annexed as the first schedule thereto.

121 The Notice of Transfer was important not only because it clarified what exactly was being assigned, but also because it was subsequently forwarded to the Purchasers. The relevant portions of the Notice of Transfer read:

> We wish to confirm that [the Transferor] assigned and transferred [to] [the predecessor of ALF] as subcustodian and agent for [ALC, ALD and ALE] … the Transferor's rights, interest and obligations in the outstanding principal amount … under the following, with effect from 4 April 2005 (the **"Effective Date"**):
>
> (i) [the OMNA];
>
> (ii) [the Notes];
>
> …
>
> (iv) [the APA];
>
> …
>
> and all other documents executed in substitution of, pursuant to or in connection with any of the above documents (together, the **"Restructuring Documents"**).
>
> The Transferee, as assignee and successor-in-interest of the Transferor, hereby conforms with, adheres to and is bound by the terms of the Restructuring Documents with effect from the

Effective Date, and shall assume all the obligations of the Transferor under the Restructuring Documents to the extent of the Transferred Amount with effect from the Effective Date.

…

Please update your records to register the Transferee as assignee and successor-in-interest of the Transferor to the Restructuring Documents (including [the Notes]) to the extent of the Transferred Portion with effect from the Effective Date.

[emphasis in bold in original]

The Funds' participation in the arbitration

122 When the Notice of Arbitration was filed on 10 October 2008, not only were the Funds not named as parties, there were also no facts raised in support of any claim against them. Instead, the Purchasers only named as respondents (apart from the Liquidator and the Corporation's shareholders) the Arbitration Secured Creditors, all of whom were Original Secured Creditors (as defined at [8] above). This is important because by the time of filing the Notice of Arbitration, the Purchasers knew that some of the Arbitration Secured Creditors had already sold their interests in the Notes to third parties. The Purchasers also knew that the Funds had eventually acquired some of those interests.

123 On 3 November 2010, A&G sent an email to the Tribunal as follows:

Dear Sirs,

Whereas we previously acted exclusively for [AKP, one of the Arbitration Secured Creditors], we wish to inform [you] that we have since been appointed to act on the collective behalf of [other Arbitration] Secured Creditors. A list of specific parties for whom we act is enclosed for your reference.

…

The second entry in the "list of specific parties" in A&G's email referred to the four parties that constitute the Funds, and it reads as follows:

2. [ALF]

As subcustodian and agent for

[ALC]

[ALD]

[ALE]

…

(Note: As Successor in interest of the following: [list of Original Secured Creditors who sold their rights under the Notes on the secondary market].)

[emphasis in bold italics in original]

124 The Funds joined the arbitration because they had an interest in receiving payments under the Notes. As mentioned above (at [19]), the Tribunal upheld the interim injunction restraining the Secured Creditors from declaring that the Purchasers were in default of their payment obligations under the Notes. It was with the aforesaid interest in mind that the Funds took part in the arbitral proceedings and agreed to be bound by the decision of the Tribunal.

125 On 2 March 2011, R&T wrote to A&G to seek confirmation that the Funds would "only be relying on the pleadings filed thus far and [would] not be filing separate pleadings".

126 At the start of the arbitral hearing on 22 March 2011, the day on which the Funds joined the Arbitration, the Tribunal addressed the issue of the Funds' participation. That was when Mr Andrew Yeo set out the Funds' position in relation to the Tribunal's decision. The relevant portion reads:

Chairman:	Good morning, everybody. … So far as outstanding housekeeping matters are concerned, there's the issue of joinder.
Mr Yeap:	Yes. We've looked at the documents and in principle, we have no objections, but I just wanted to clarify two things. Number one is that presumably, [the Funds] would agree to be bound by the decision.
Chairman:	If they have become parties to the arbitration then they have very little choice, having applied.
Mr Yeap:	I would have thought so, yes. Presumably in the context of the application that is being made, Allen & Gledhill would be considered as representing them in the proceedings? I just wanted clarity on the point, that's all.
Mr Andrew Yeo:	Yes, we are representing the applicants to be joined.
Mr Yeap:	Very well then. Yes.

127 The exchange was scant, to say the least. Thereafter, the Tribunal did not issue any procedural order that recorded the terms on which the Funds were taking part in the arbitral proceedings. Nor did the Purchasers amend their pleadings to include a cause of action against the Funds. In the Award, however, the Funds were held liable as if they were Arbitration Secured Creditors. This meant that although the Funds had joined the arbitral proceedings presumably in the hope that payments pursuant to the Notes would resume, they ended up being held liable (along with the Liquidator and the Arbitration Secured Creditors) to the Purchasers in the sum of around US$103.7m.

The Judge's analysis

128 Although the Judge expressed "much sympathy for the Funds' position" and found it odd that the Tribunal held *both* "the original noteholders" (*ie*, the Arbitration Secured Creditors, all of whom were, as mentioned earlier, Original Secured Creditors) *and* the Funds, which were "mere assignee[s] of rights under the [N]otes", liable at the same time, he came to the conclusion that it was not within the remit of the court in a setting-aside application to interfere in such matters (see the High Court Judgment at [276]).

129 After considering the series of events that led to the Funds' participation in the arbitral

proceedings as well as certain events that followed, the Judge came to the view that the Funds had "joined the arbitration on the basis that they were content to be treated just like the other [Arbitration] [S]ecured [C]reditors, without distinction and for all purposes" (see the High Court Judgment at [296]).

Our analysis

130 With respect, we disagree with the Judge. The issue, properly framed, is whether the Tribunal acted in excess of its jurisdiction or in breach of natural justice in holding the Funds liable for breaches of certain obligations under the APA alongside the Arbitration Secured Creditors (and the Liquidator). It is trite that even if the Funds were party to the arbitration, that fact alone does not dispose of the inquiry into the exact capacity in which they participated in the arbitration and the exact ambit of the Tribunal's jurisdiction over them.

131 We accept that the state of affairs at the point of the Funds' joining the arbitration was confusing, to say the least. This point was repeatedly made by Mr Yeap. Not only were the Funds represented by the same counsel as the Arbitration Secured Creditors, they were seemingly held out as one of the Arbitration Secured Creditors based on the list tendered by A&G (see above at [123]). However, the question before us is whether any of this had the effect of conferring upon the Tribunal the jurisdiction to hold the Funds liable *qua* Arbitration Secured Creditors.

132 The ambit of the Tribunal's jurisdiction was spelt out in the Notice of Arbitration. As mentioned above, no claims were brought against the Funds when the Notice of Arbitration was filed. At all times, the Purchasers seemed intent on pressing their case against (apart from the Liquidator) the Arbitration Secured Creditors. Even after the Funds joined the arbitral proceedings, the Purchasers did not amend their pleadings to include claims against them. Nor did the Purchasers exercise their right, which they reserved at para 59 of the Notice of Arbitration, "to assert other claims arising out of and/or relating to and/or in connection with the APA, and to seek to have such claims determined in this arbitration".

133 Before us, Mr Yeap's argument that the Funds held themselves out as one of the Arbitration Secured Creditors eventually boiled down to little more than a matter of semantics. His argument hinged on the fact that the Funds were listed in A&G's email of 3 November 2010 along with the Arbitration Secured Creditors represented by A&G, notwithstanding the notation in that email that the Funds were "Successor[s] in interest" [emphasis in original omitted]. The Funds' status in the arbitration was never clarified by anybody – neither by the Tribunal nor by the Purchasers. Moreover, Mr Yeap could not explain to us how, why and on what basis the Purchasers could pursue claims against *both* (among other Arbitration Secured Creditors) those Arbitration Secured Creditors who had already assigned their rights (through various third parties) to the Funds *and* the Funds. The Funds might have been liable had there been a novation; but there was no novation, as evidenced in the Purchasers' resolute pursuit of the Arbitration Secured Creditors.

134 Furthermore, if it were indeed the case that the Funds were simply one of the Arbitration Secured Creditors or had "stepped into the shoes" of the respective Original Secured Creditors when they purchased those Secured Creditors' rights to receive payment under the Notes on the secondary market, there would have been no need to join the Funds as parties to the arbitration. Neither would counsel for the Purchasers have been concerned about whether they were "filing separate pleadings", or whether they agreed to be bound by the Tribunal's decision (see above at [125]–[126]). Nor was it possible to demonstrate that the Purchasers would be prejudiced in some way by the Funds' participation in the arbitration such that it was appropriate to impose upon the Funds a liability which they would not otherwise have.

135 Mr Jeyaretnam (counsel for the Funds) accepted before the Judge – as he did before us – that the Funds were indeed prepared to be bound by the Tribunal's decision on matters relating to the Purchasers' payment obligations under the Notes. However, he drew a distinction between "agreeing to be bound" by the Tribunal's decision on those matters on the one hand and taking on the full suite of liabilities of being an Arbitration Secured Creditor on the other. The former meant that the Funds would be bound by the Tribunal's findings on those specific matters. Indeed, this was the extent of the clarification that Mr Yeap sought at the time the Funds were joined as parties to the arbitration. The latter, on the other hand, connotes a fundamental change of status affecting the rights and obligations of the Funds, the Purchasers and the Arbitration Secured Creditors. Nowhere (neither in Mr Yeap's submissions for the Purchasers, nor in the Award, nor in the High Court Judgment) was it explained how or on what legal basis such a change of status could possibly have come to pass; nor on what basis the Tribunal acquired the jurisdiction to effect such a change of status by ruling that the Funds should be held liable alongside the Arbitration Secured Creditors (and the Liquidator) for breaches of the APA. The Judge accepted that the former (*ie*, that the Funds would be bound by the Tribunal's findings on matters pertaining to the Purchasers' payment obligations under the Notes, but *would not* take on the full suite of liabilities of being an Arbitration Secured Creditor) "may have been what the Funds thought at the time … [but] this did not appear to be the objective message that they were sending to either the [T]ribunal or … the [Purchasers]" (see the High Court Judgment at [292]). With respect, in our judgment, this fell woefully short of a sound legal basis for giving effect to the dramatic consequences that the Tribunal felt able to visit upon the Funds.

136 We agree with the Judge's analysis that the Funds were only prepared to be bound by the Tribunal's decision in respect of findings that concerned the Purchasers' payment obligations under the Notes, but we disagree that the objective evidence indicated anything else. It is important to note that the burden was always on the Purchasers to establish their claims before the Tribunal. All along, the Purchasers conducted their case as being against the Liquidator and the Arbitration Secured Creditors, all of whom (it bears reiterating) were Original Secured Creditors. Even after the Award was handed down on 9 May 2012, during a hearing to clarify the Award on 12 June 2012, Mr Yeap maintained the Purchasers' position that the Arbitration Secured Creditors remained liable as respondents.

137 It bears repeating that the Funds were only ever involved in the arbitration because they had purchased the right to receive payments under the Notes on the secondary market. As noted by Mr Jeyaretnam, the risk they bore in that transaction was that the Notes would turn out to be worthless. It was never within their contemplation – nor, we think, the contemplation of anyone else involved in the transaction – that they would eventually face the prospect of bearing liabilities in excess of US$100m. It is true that the Funds did become party to the arbitration, but the question then is: what jurisdiction did they vest in the Tribunal by doing so? In our judgment, the Funds vested only a limited jurisdiction in the Tribunal to make findings of fact on the substantive matters that were already in dispute between the parties in relation to the Purchasers' payment obligations under the Notes, and to the extent of such findings, they agreed that they would be bound by the Tribunal's decision. The Funds did not vest jurisdiction in the Tribunal to ascertain whether they had become Arbitration Secured Creditors and thereby taken on the substantive obligations that went with such a change of status; much less did they vest the Tribunal with the jurisdiction to convert their status from being "mere assignee[s] of rights under the [N]otes" (see the High Court Judgment at [276]) to being Arbitration Secured Creditors with the accompanying obligations of being such.

138 In the circumstances, we are satisfied that the Tribunal did not have the jurisdiction to hold the Funds liable for breaches of the APA as it did. Accordingly, we answer Appeal Issue 7 affirmatively.

Conclusion

139 For these reasons, we allow these appeals to the extent set out above. We shall hear the parties on costs and on any consequential orders that may be needed. Further, the parties have liberty to apply should they need our directions on settling the terms of the order(s) to be extracted.