IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 257

High Court — Originating Summons No 1081 of 2019

Between

(1) CDX
(2) CDY

… *Plaintiffs*

And

(1) CDZ
(2) CEA

… *Defendants*

GROUNDS OF DECISION

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

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v
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[2020] SGHC 257

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Vinodh Coomaraswamy J
13 March 2020

2 December 2020

Vinodh Coomaraswamy J:

Introduction

1 The plaintiffs apply to set aside an arbitral award issued in the defendants' favour in May 2019.[1] In his award, the arbitrator found that the plaintiffs had made fraudulent misrepresentations to the defendants in order to induce the defendants to invest in a company. The arbitrator awarded the defendants substantial damages for the fraud, adopting as the measure of damages the sum necessary to restore the defendants to the position they would have been in if the plaintiffs had not fraudulently induced them to make the investment. He therefore awarded the defendants damages which were

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1 [CDX]'s 1st affidavit dated 22 August 2019 ("[CDX]'s affidavit") at p 5447.

equivalent to the sums which the defendants had invested less the benefits which they had received by reason of the investment.[2]

2 The plaintiffs seek to set aside the award on two grounds. First, the plaintiffs submit that the arbitrator exceeded his jurisdiction.[3] Second, the plaintiffs submit that the arbitrator breached the rules of natural justice in holding the plaintiffs liable to the defendants in damages and in assessing those damages.[4]

3 Having considered the parties' submissions and evidence, I have dismissed the plaintiffs' application. The plaintiffs have appealed against my decision. I now set out the grounds for my decision.

Background facts

The parties

4 The first plaintiff is an individual. He is a Singapore citizen[5] residing in India.[6] The second plaintiff is a company incorporated in India.[7] The first plaintiff is the managing director and a shareholder of the second plaintiff.

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2 [CDX]'s affidavit at pp 5524–5525, para 340.4.

3 Plaintiffs' Written Submissions dated 2 January 2020 ("PWS") at paras 17–19.

4 PWS at paras 20–27.

5 [CDX]'s affidavit at p 5451, para 1.3.

6 [CDX]'s affidavit at p 1.

7 [CDX]'s affidavit at p 5451, para 1.4.

5 The first defendant is a company incorporated in Singapore.[8] The second defendant is a company incorporated in India.[9] The first defendant is a wholly owned subsidiary of the second defendant.[10]

The investment

6 The company at the centre of the parties' dispute is incorporated in Singapore and carries on business in the building and construction industry.[11] I shall refer to it as "the Company". The Company was initially a wholly owned subsidiary of the second plaintiff.[12] The Company was not a party to the arbitration or to the application before me.

7 Following an approach by the plaintiffs, the two defendants invested a total of US$1,999,238[13] and S$1,179,085[14] in the Company and came to hold 50% of the Company's shares. The defendants made their investment in two stages. First, in 2014/2015, the defendants invested US$1,199,238 and S$1,000 in the Company. Then, in 2016, the defendants invested a further US$800,000 and S$1,178,085 in the Company. As a result of the investment, the second plaintiff's shareholding in the Company was reduced to 50%.[15]

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8 [CDX]'s affidavit at p 5451, para 1.1.

9 [CDX]'s affidavit at p 5451, para 1.2.

10 [CDX]'s affidavit at para 6.

11 PWS at para 10.

12 PWS at para 12.

13 [CDX]'s affidavit at p 5511, para 274.

14 [CDX]'s affidavit at p 5511, para 274.1 and p 5512, para 276.

15 [CDX]'s affidavit at p 5464, para 43.5; PWS at para 14.

8 The defendants made their investment in the Company under two sets of two contracts. First, in December 2014, both plaintiffs, the second defendant and the Company entered into an Investment Agreement ("IA").[16] Then in January 2015, the same four parties entered into a Shareholders' Agreement ("SA").[17] Second, in January 2016, the four parties entered into a Restated Investment Agreement ("RIA").[18] Also in January 2016, the four parties plus the first defendant entered into a Restated Shareholders' Agreement ("RSA").[19] The RIA and RSA superseded the IA[20] and SA[21] respectively. I shall refer to all four of these contracts collectively as "the contracts".

9 There are three provisions in the RSA which are material to the present application. First, the RSA charges certain assets of the Company to the defendants as security for the plaintiffs' obligations under that agreement and grants the defendants the accompanying right to appoint a receiver to take control of and realise those assets in an event of default. Second, the RSA provides expressly that it is governed by Singapore law.[22] Finally, the RSA contains a tiered dispute-resolution clause which begins with an agreement to resolve disputes amicably and culminates in agreement to refer disputes to arbitration. The arbitration agreement provides that any arbitration is to be conducted before a sole arbitrator in Singapore and to be administered by the

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16 [CDX]'s affidavit at pp 142–143

17 [CDX]'s affidavit at pp 164–165.

18 [CDX]'s affidavit at pp 192–193.

19 [CDX]'s affidavit at pp 215–216.

20 [CDX]'s affidavit at p 207, cl 7.14.

21 [CDX]'s affidavit at p 246, cl 18.17.

22 [CDX]'s affidavit at p 111, para 212 and p 246, cl 18.15.

Singapore International Arbitration Centre ("SIAC").[23] This is the arbitration agreement which the defendants invoked to commence the arbitration. The IA, SA and RIA have similar arbitration agreements which the defendants have never invoked.

The dispute

10 The parties' relationship as equal shareholders in the Company descended into acrimony almost from the outset.[24] The defendants alleged that the first plaintiff had misapplied the funds which the defendants had invested[25] and had failed to develop the Company's business with the result that the Company failed to win any new orders after the parties entered into the RIA and the RSA in January 2016.[26] The plaintiffs in turn denied that any funds had been misapplied and alleged that it was the defendants who were in fact in charge of the Company from March 2015[27] and who were therefore responsible for its failure to win new business from January 2016 onwards.[28]

11 In July 2016, the defendants declared an event of default under the RSA.[29] They required the first plaintiff to remedy the default, failing which they would trigger the tiered dispute resolution clause in the RSA.[30] The default was not remedied.[31]

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23 [CDX]'s affidavit at p 110, para 207 and p 242, cl 17.

24 [CDX]'s affidavit at pp 5464–5465, paras 44–49.

25 [CDX]'s affidavit at p 5464–5465, paras 45–46.

26 [CDX]'s affidavit at p 5465, para 48.

27 [CDX]'s affidavit at p 5465, para 47.

28 [CDX]'s affidavit at p 5465, para 49.

29 [CDX]'s affidavit at p 3324 and p 3327, para 8.

30 [CDX]'s affidavit at p 5465, para 50.

12 In October 2016, the defendants discovered the plaintiffs' fraud.[32]

13 In November 2016, the defendants appointed a receiver over the assets which the Company had charged to the defendants (see [9] above).[33] The receiver sold the assets[34] and duly paid over to the first defendant the net proceeds of sale amounting to $618,312.30.[35]

The arbitration

14 In March 2017, the defendants issued a notice of arbitration against the plaintiffs, citing only the arbitration agreement in the RSA (see [9] above).[36] The defendants' case was that the plaintiffs had made several false representations about the Company's receivables, liabilities, fixed assets and future projects[37] in order to induce the defendants to enter into the contracts and invest in the Company and that these representations amounted either to actionable misrepresentations or breaches of the plaintiffs' express representations and warranties set out in the contracts.

15 The tribunal was constituted in June 2017.[38] In accordance with the parties' arbitration agreement, it comprised a sole arbitrator.

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31 [CDX]'s affidavit at p 3329, para 4.

32 [CDX]'s affidavit at p 1772, para 307; p 5004, para 29; p 5095, para 225; p 5122, para 284; p 5221, para 513.4; p 5413, para 165.2 to p 5414, para 165.3; pp 5340–5341, para 33.4.

33 [CDX]'s affidavit at p 2159, para 139 and p 5465, para 51.

34 [CDX]'s affidavit at p 2159, para 140 and p 5510, para 266.

35 [CDX]'s affidavit at p 5510, para 268.

36 [CDX]'s affidavit at pp 30–31.

37 [CDX]'s affidavit at pp 97–98, para 192.

38 [CDX]'s affidavit at p 5455, para 12.4.

16 Pleadings in the arbitration opened with the defendants' statement of claim in March 2017 and closed with the defendants' reply in August 2017. The parties completed discovery in November 2017.[39] In December 2017, the arbitrator fixed the evidential hearing in the arbitration to take place in May 2018.[40] The parties exchanged their principal witness statements in January 2018 and reply witness statements in March 2018.[41] Having failed to agree on a list of issues, they exchanged separate lists of issues in April 2018.[42]

17 Due to the first plaintiff's ill health[43] the evidential hearing was postponed from May 2018 to July 2018.[44] Neither party called any expert witnesses, whether on liability or on quantum. The plaintiffs' only witness was the first plaintiff.[45] The defendants called five witnesses of fact.[46]

18 Following the evidential hearing, the parties exchanged principal closing submissions in October 2018.[47] They exchanged responsive closing submissions in November 2018.[48]

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39 [CDX]'s affidavit at p 5455, para 12.10.

40 [CDX]'s affidavit at p 5456, para 12.17.

41 [CDX]'s affidavit at p 5456, paras 12.19–12.20.

42 [CDX]'s affidavit at p 5456, para 12.21.

43 [CDX]'s affidavit at p 5456, paras 12.17 and 12.22.

44 [CDX]'s affidavit at p 3815 and p 5457, para 12.26.

45 [CDX]'s affidavit at p 5468, para 68.

46 [CDX]'s affidavit at p 5466, para 56.

47 [CDX]'s affidavit at p 5457, para 12.28.

48 [CDX]'s affidavit at p 5457, para 12.29.

The award

19 The arbitrator issued his final award in May 2019. He found that the defendants' witnesses were generally credible, and that they had given evidence which was not only consistent with each other's evidence, but which was also supported by the contemporaneous documents.[49]

20 The arbitrator was not, however, impressed with the first plaintiff:[50]

> The Credibility of The [Plaintiffs'] Factual Witness
>
> 69. I did not find the evidence of [the first plaintiff] to be very credible. He was frequently evasive during cross-examination and much of his evidence was inconsistent with the contemporaneous documents. When confronted with specific issues he often resorted to generalities or legalistic defences. …

21 The arbitrator found, further, that there was evidence of the second plaintiff's fraud which was overwhelming, even bearing in mind the additional cogency required of evidence to prove fraud:[51]

> Fraud Must Be Distinctly Alleged and Proved
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> 214. In making this finding and the further finding below in relation to the allegation of fraudulent misrepresentation, I have of course taken account of the fact that, although the burden of proof remains the normal civil standard of 'balance of probablities' [*sic*], fraud must be distinctly alleged and proved. I however find that the [defendants] have satisfied this burden. A finding that fraud has been committed is not a finding that I make lightly but it is a finding that I believe to be overwhelmingly supported by the evidence that I have heard.

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49 [CDX]'s affidavit at p 5468, para 67.

50 [CDX]'s affidavit at p 5468, para 69.

51 [CDX]'s affidavit at p 5499, para 214.

22 The arbitrator made the following further holdings and findings in his award which are material for the purposes of this application:

(a) The plaintiffs made multiple serious fraudulent misrepresentations to the defendants about the Company's receivables, liabilities, fixed assets and future projects.[52]

(b) The defendants were induced by the fraudulent misrepresentations into entering into the contracts and investing in the Company.[53]

(c) The defendants are accordingly entitled *prima facie* to the remedy of rescission, unless rescission is barred either because it is impossible or because the defendants have affirmed the contract.[54]

(d) For affirmation to bar rescission, the innocent party must, "with full knowledge of the fraud … take an action which unequivocally confirms that it wishes to be bound by the contract".[55]

(e) The defendants were fully aware in November 2016 of the plaintiffs' fraud but chose to rely on and invoke their rights as a secured creditor under the RSA to appoint a receiver instead of rescinding the RSA (see [13] above).[56] This amounts to affirmation of the RSA and therefore bars rescission.[57]

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52 [CDX]'s affidavit at p 5499, para 212 and p 5508, para 252.

53 [CDX]'s affidavit at p 5503, para 228 and p 5508, para 256.

54 [CDX]'s affidavit at p 5510 at para 265.

55 [CDX]'s affidavit, p 5510 at para 265.

56 [CDX]'s affidavit at p 5510, paras 266–268.

57 [CDX]'s affidavit at p 5510, para 269 to p 5511, para 271.

(f) Even though rescission is barred, the defendants are nevertheless entitled to damages in the tort of deceit for the plaintiffs' fraudulent misrepresentations.[58]

(g) The measure of those damages is the sum necessary to place the defendants in the position they would have been in if the tort had never been committed.[59] The defendants are therefore entitled to be repaid the sums they invested under the contracts plus any further sums which they expended as a result of entering into the contracts, but must deduct the benefits which they received as a result of entering into the contracts.[60]

(h) The benefits which the defendants must deduct from the sums they invested are: (i) the sum of S$618,312.30 which the receivers realised and paid over to the defendants (see [13] above);[61] and (ii) the value of the defendants' 50% shareholding in the Company (see [7] above) which the defendants will now retain given that rescission is barred.[62]

(i) The defendants' shareholding in the Company ought to be valued as at the date on which the defendants discovered the fraud, *ie*, October 2016 (see [12] above).[63]

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58 [CDX]'s affidavit at p 5511, para 272.

59 [CDX]'s affidavit at p 5511, para 272.

60 [CDX]'s affidavit at p 5511, para 273.

61 [CDX]'s affidavit at p 5512, para 277.

62 [CDX]'s affidavit at p 5512, paras 278–279.

63 [CDX]'s affidavit at p 5512, para 278.

(j) At that date, the value of the shares was nil. This was because: (i) the Company had had no projects since the parties entered into the RIA and the RSA in January 2016; (ii) the first plaintiff had turned his back on the Company; and (iii) the only value in the Company was the charged assets which the receivers have sold.[64]

(k) The defendants' claims for further damages[65] and the plaintiffs' claims for further deductions by way of setoffs[66] are all dismissed.

(l) The plaintiffs are therefore liable to repay to the defendants the sum invested by the defendants, *ie*, US$1,999,238 and $1,179,085, less only the sum of $618,312.30, *ie*, with no deduction to account for the value of the defendants' 50% shareholding in the Company.[67]

(m) The first plaintiff is jointly and severally liable with the second plaintiff for the fraudulent misrepresentations. The first plaintiff was a party to all of the contracts and executed them both for himself and for the second plaintiff. He made the fraudulent misrepresentations personally and therefore committed the tort of deceit personally. His concurrent status as a director of the second plaintiff could not shield him from personal liability for his personal tort.[68]

(n) The defendants have been awarded damages in tort assessed on the same basis as damages on the reliance measure in contract. The

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64 [CDX]'s affidavit at p 5512, para 278.

65 [CDX]'s affidavit at pp 5512–5513, paras 280–285.

66 [CDX]'s affidavit at p 5513–5514, paras 286–292.

67 [CDX]'s affidavit at p 5512, para 279.

68 [CDX]'s affidavit at p 5514–5515, para 294.

defendants cannot therefore recover additional damages for their expectation loss in contract. It is therefore not necessary to consider the defendants' alternative claim for damages for breach of contract (see [14] above).[69]

23 In June 2019, in response to a request from the defendants under Art 33.1 of the SIAC Rules 2016,[70] the arbitrator issued a memorandum of correction to his final award.[71] Neither the memorandum itself nor the corrections it effected to the final award are material to the issues before me.

The parties' cases

24 As I have mentioned (see [2] above), the plaintiffs seek to set aside the award on two grounds: because the arbitrator exceeded his jurisdiction and because the arbitrator breached the rules of natural justice.

Excess of jurisdiction

25 I can deal with the excess of jurisdiction ground summarily. The ground, briefly stated, is that the defendants invoked in their notice of arbitration only the arbitration agreement in the RSA. They did not invoke the separate arbitration agreements in the other three contracts between the parties: the IA, the SA and the RIA. But the defendants sought in the arbitration rescission not only of the RSA, but also of those other three contracts. Further, the arbitrator took as his starting point in awarding damages to the defendants a sum equal to their entire investment in the Company under all four of the contracts. But the

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69 [CDX]'s affidavit at p 5518, paras 308–309.

70 [CDX]'s affidavit at p 5573, para 33.1.

71 [CDX]'s affidavit at p 5527.

defendants made only one tranche of their investment under the RSA. They made the remainder of their investment under the IA and the RIA.

26 The plaintiffs raised these very same points as a preliminary jurisdictional objection in the arbitration. The arbitrator rejected the objection in his award. He held that the plaintiffs had failed to take their jurisdictional objection in their statement of defence as required by Art 16(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), given force of law by s 2(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed), and Rule 18.3 of the SIAC Rules 2016. He also held that there was no justification for the plaintiffs' delay in taking the jurisdictional objection.[72]

27 Counsel for the plaintiffs informed me at the outset of oral arguments on this setting aside application that the plaintiffs, although not abandoning the excess of jurisdiction ground, would not pursue it at first instance before me.[73] The reason given was the state of the authorities by which I am bound, and in particular the decision of the Court of Appeal in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131. Counsel for the plaintiffs therefore confirmed that the plaintiffs place the excess of jurisdiction ground before me on this application, not for my decision, but purely to preserve the plaintiffs' ability to pursue it on appeal as a ground for setting aside the award.[74] It is therefore not necessary for me further to analyse this ground.

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72 [CDX]'s affidavit at pp 5473–5474, paras 82–87.

73 Certified Transcript (13 March 2020) at p 11, lines 3–8.

74 Certified Transcript (13 March 2020) at p 36, line 31 to p 37, line 31.

Natural justice

28 On the natural justice ground, the plaintiffs rely on s 24(*b*) of the International Arbitration Act and Art 34(2)(*a*)(ii) of the Model Law.[75] The particular rule of natural justice which the plaintiffs allege the arbitrator breached is the fair hearing rule. The plaintiffs allege that the arbitrator:[76]

> … did not afford the Plaintiffs a fair opportunity to present their case on damages, to present the evidence and to advance propositions of law necessary to respond to the Defendants' case made against the Plaintiffs prior to/at the evidential hearing;

29 The plaintiffs rely on two distinct and independent limbs to advance their case on natural justice. One limb goes to the arbitrator's finding that they were liable in principle for damages and the other goes to his assessment of the quantum of those damages.

The parties' cases on liability

30 The plaintiffs' case on liability is as follows. The defendants' pleaded claim in the arbitration was *always* and *only* predicated upon the defendants being entitled to rescission. The defendants did not at any time plead a claim for damages if rescission was barred.[77] Having found that rescission was indeed barred, the arbitrator should have dismissed the defendants' claim in its entirety. Instead, he went on to award the defendants substantial damages.[78] The plaintiffs were thus denied a reasonable opportunity to address the arbitrator on whether the plaintiffs could, in principle, be held liable to the defendants in damages

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75 PWS at para 32.

76 PWS at para 2(c).

77 PWS at para 20.

78 [CDX]'s affidavit at p 16, para 49.

even though rescission was barred. The arbitrator breached the rules of natural justice on liability.

31 The defendants' response is as follows. The defendants included a general prayer for damages to be assessed at the conclusion of their statement of claim (see [46] below). That prayer is wide enough to ground an award of damages if rescission was barred. The plaintiffs are not the victims of any breach of natural justice on liability.

The parties' cases on quantum

32 The plaintiffs' case on quantum proceeds as follows. Even if the arbitrator did not breach natural justice in finding the plaintiffs liable to the defendants in damages, he denied the plaintiffs natural justice in assessing those damages. The defendants failed to plead the measure of their damages. They also failed to plead, particularise and prove the quantum of their damages. The plaintiffs were thus denied a reasonable opportunity to address the arbitrator on the measure and quantum of damages. The arbitrator breached the rules of natural justice on quantum.

33 The defendants' response is as follows. The measure of the defendants' damages for the plaintiffs' deceit was obvious: it was the sum necessary to put the defendants in the same position they would have been in if the tort had never been committed. Further, the defendants did adduce evidence on the quantum of damages, albeit for the purpose of proving other facts in issue in the arbitration. The plaintiffs are not the victims of any breach of natural justice on quantum.

Applicable legal principles

34 The principles of law which I must apply to ascertain whether a breach of natural justice has taken place are common ground. They can therefore be summarised in the following propositions without need for further development:

(a) There are two pillars of natural justice: (i) the right to a disinterested and unbiased tribunal; and (ii) the right to be heard: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*" at [43]; *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [87].

(b) Article 18 of the Model Law gives express effect to these two pillars by providing that every party to an arbitration has a right to be treated with equality and a right to a "full opportunity" of presenting its case: *China Machine* at [88], [90].

(c) Despite what the word "full" in Art 18 of the Model Law might suggest, a party's right to an opportunity to present its case in an arbitration is not of unlimited scope. The right is "impliedly limited by considerations of reasonableness and fairness": *China Machine* at [97] and [104(b)].

(d) A party's right to be heard in the arbitration comprises:

(i) a party's right to have reasonable and fair notice:

(A) from the opposing party of the case it must meet on each issue of fact or law which the opposing party raises in the arbitration as an essential link in the chain of

reasoning leading to the relief it seeks in the arbitration (see *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 468 ("*JVL Agro*") at [147]); and

(B) from the tribunal of any other issue which the tribunal adopts as an essential link in the chain of reasoning leading to its decision on the matters before it (*eg Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063 at [44]–[45]);

(ii) a party's right to a reasonable and fair opportunity:

(A) to present its case on all of those issues; and

(B) to respond to the case presented against it on those issues: *China Machine* at [87]; and

(iii) a party's right to have the tribunal make *some* attempt *bona fide* to understand, engage with and apply its mind to its case on those issues (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [35]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 ("*TMM Division*") at [89]–[91] and [106]).

(e) Where a party complains that a tribunal deprived it of a reasonable and fair opportunity to be heard on an issue which the tribunal has incorporated as a link in its chain of reasoning, that party must show that a reasonable party could not have foreseen that the tribunal would incorporate that issue. That test will be satisfied, for example, where the tribunal's incorporation of that issue in its chain of

reasoning is a dramatic departure from the parties' submissions: *Soh Beng Tee* at [65(d)].

(f) Where a party complains that a tribunal deprived it of a reasonable and fair opportunity to be heard because of the manner in which the tribunal exercised a discretion in its procedural management of the arbitration, "the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done". This test is a fact-sensitive inquiry to be applied from the arbitrator's perspective: *China Machine* at [98] and [104(c)]–[104(d)].

(g) It is not a breach of natural justice, in itself, for a tribunal to fail to refer every issue which it incorporates as a link in its chain of reasoning to the parties for submission: *Soh Beng Tee* at [65(d)], citing at [58] *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 ("*Hochtief*").

(h) In particular, it is not a breach of natural justice:

(i) for a tribunal to adopt an issue as a link in its chain of reasoning even if the parties:

(A) did not plead or include that issue in a formal list of issues, provided that the issue surfaced in the course of the arbitration and was known to all the parties: *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [47].

(B) did not raise or contemplate that issue, provided that the issue is reasonably connected to the issues which the parties did raise and contemplate and if the party

aggrieved had a reasonable opportunity to address all of "the essential building blocks" for the tribunal's conclusion on that issue: *TMM Division* at [63] citing Tomlinson J in *Hochtief* at [72].

(ii) for a tribunal's chain of reasoning to adopt a middle path between diametrically opposed positions taken by the parties, so long as the building blocks for that middle path were before the tribunal, even if the tribunal did not give the parties notice that it might adopt that middle path: *Soh Beng Tee* at [65(e)].

(iii) if a party was deprived of a reasonable opportunity to present its case by its own conduct and not by any conduct of the tribunal (*Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi")* at [51]).

(iv) if a party fails to present evidence or submissions to a tribunal on an issue which is a link in the tribunal's chain of reasoning, either because the party fails to appreciate that the issue is before the tribunal through mistake or misunderstanding or because the party makes a conscious tactical choice not to engage the opposing party on that issue: *Triulzi* at [137].

(i) Finally, and axiomatically, it is not a breach of natural justice for a tribunal simply to make an error in its award: *BLC v BLB* [2014] 4 SLR 79 at [53].

35 In addition to showing that a breach of natural justice has taken place, a party seeking to set aside an award under s 24(*b*) of the International Arbitration Act must also establish two additional factors: (a) that the breach of natural justice "occurred in connection with the making of the award", *ie*, that there is

a causal nexus between the breach of natural justice and the aspect of the award with which the party is aggrieved (*Soh Beng Tee* at [73]); and (b) that the breach of natural justice caused actual or real prejudice to the party (*Soh Beng Tee* at [86]), though it need not show that the prejudice is substantial (*Soh Beng Tee* [91]).

No breach of natural justice on liability

36 I begin my analysis with the first limb of the plaintiffs' case on natural justice. Their case is that the arbitrator failed to give them a reasonable opportunity to be heard on whether he could in principle hold them liable to the defendants in damages even if he found that rescission was barred. In other words, the arbitrator went wrong by going beyond his holding at [22(e)] above. The plaintiffs submit that, on the parties' cases as pleaded and presented to the arbitrator, he ought to have dismissed the defendants' claim upon arriving at that holding in his chain of reasoning.[79]

37 The premise of this argument is that the defendants did not plead a claim for damages for misrepresentation in the alternative to rescission for misrepresentation.[80] I do not accept this premise. The defendants' pleadings, when read in their evolving context, show that the defendants did advance a case for damages in the alternative to rescission. Further, the plaintiffs' conduct at the evidential hearing shows that they accepted that this was one of the issues which the arbitrator would have to decide. I now turn to examine the parties' pleadings.

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79 Certified Transcript (13 March 2020) at p 15, lines 1–4 and p 16, lines 14–17.

80 PWS at paras 20, 38; Certified Transcript (13 March 2020) at p 15, lines 4–11.

The statement of claim

38 The defendants' principal pleading was their statement of claim. The statement of claim pleads alternative causes of action against the plaintiffs in misrepresentation[81] and in contract:[82]

> 193. [The plaintiffs] fraudulently made representations to induce [the defendants] into relying on them and thereby entering into the RIA and RSA.
>
> 194. [The first plaintiff], in his personal capacity and as a representative of [the second plaintiff] made the representations fraudulently in that he knew they were false or reckless, not caring whether they were true or false.
>
> 195. Further or in the alternative, if, which is not admitted, each or any of the representations was not made fraudulently, the [defendants] shall rely upon the provisions of Section 2 of the Misrepresentation Act (Cap 390) entitling them in the circumstances to the relief claimed.
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> …
>
> 205. As a result of [the plaintiffs] fraudulent and/or negligent misrepresentations, and breach of contract, [the defendants] suffered loss and damage.

The defendants continued to assert these alternative causes of action against the plaintiffs all the way to the award.

The width of the defendants' pleading

39 For the reasons which follow, my view is that the defendant's statement of claim was wide enough to encompass a claim for damages for all varieties of misrepresentation and to yield damages as a remedy in addition to *and* as an alternative to rescission. The claims pleaded in the defendant's statement of claim encompassed the tort of fraudulent misrepresentation, the statutory tort of

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81 [CDX]'s affidavit at p 81, para 127; p 98, paras 193 and 195.

82 [CDX]'s affidavit, p 98 at para 196 *et seq*.

negligent misrepresentation inducing a contract under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Act"), innocent misrepresentation under s 2(2) of the Act and the common law tort of negligent misrepresentation in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*").

40 Paragraphs 193 and 194 of the statement of claim (see [38] above) expressly plead the claim in fraudulent misrepresentation.

41 Paragraph 195 of the statement of claim advances a claim sounding in damages for both statutory negligent misrepresentation and for innocent misrepresentation. That is because paragraph 195 expressly pleads a claim under s 2 of the Act. Section 2 of the Act creates two grounds of relief. By referring to s 2 of the Act generally, paragraph 195 therefore pleads a cause of action under each of s 2(1) and s 2(2). Section 2(1) of the Act creates a statutory cause of action for a negligent misrepresentation. That cause of action is available to a misrepresentee when a misrepresentor's misrepresentation induces the misrepresentee to enter into a contract and without any need to establish a duty of care in tort. Section 2(2) allows a court to award damages for either a negligent or an innocent misrepresentation (see *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 ("*RBC Properties*") at [67] per Andrew Phang JA; *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 ("*Salt v Stratstone*") at [17] *per* Longmore LJ).

42 Paragraph 205 pleads a claim in the common law tort of negligent misrepresentation under the principle in *Hedley Byrne*. That is because paragraph 205 pleads negligent misrepresentation *simpliciter*. This plea makes no reference to s 2 of the Act and is distinct from the separate plea in paragraph

195 which does.[83] The plea in paragraph 205 can therefore only be a claim for negligent misrepresentation at common law, *ie*, under the principle in *Hedley Byrne*.

The scope of the arbitration agreement

43 All of these claims are within the scope of the parties' arbitration agreement in the contracts. The operative words of the arbitration agreement in the RSA read as follows:[84]

> Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this Clause…

The operative words of the arbitration agreements in the IA, the SA and the RIA are identical to these words in the RSA.

44 A claim for breach of contract is clearly within the scope of the arbitration agreement. So too is a claim for damages under either limb of s 2 of the Act arising from that contract. So too, in my view, is a claim for damages at common law for inducing the defendants to enter into that contract either in the tort of fraudulent misrepresentation or in the tort of negligent misrepresentation under *Hedley Byrne*. Such a claim is – on a conceptual level – accurately described as a "dispute arising out of or in connection with" that contract. Such a claim is especially one which raises a "question regarding [the contract's] existence, validity or termination". This is because rescission is the primary

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83 [CDX]'s affidavit at p 109, para 205.

84 [CDX]'s affidavit at pp 243, para 17.2.

remedy for all misrepresentation claims, and rescission avoids a contract *ab initio* (see also *Fiona Trust & Holding Corporation v Privalov* [2007] 2 All ER (Comm) 1053 at [13], *per* Lord Hoffman).

45 In any event, the plaintiffs have thus far accepted without objection that the defendants' claims in tort for fraudulent or negligent misrepresentation come within the scope of the parties' arbitration agreement in the RSA and therefore within the jurisdiction of the arbitrator (subject only to the plaintiffs' separate reservation on jurisdiction (see [25]–[27] above)). Certainly, the plaintiffs have never suggested, whether in the arbitration or before me, that claims in tort are by that fact alone outside the scope of the parties' arbitration agreement.

The prayers in the statement of claim

46 The defendants concluded their statement of claim with the following prayers for relief in paragraph 206:[85]

> 206. [The defendants] thus seek the following reliefs [*sic*], for which [the plaintiffs] are to be jointly and severally liable:
>
> a. A declaration that the RIA and RSA are rescinded on the grounds of fraudulent misrepresentation, alternatively, negligent or innocent misrepresentation;
>
> b. A declaration that the IA, SA are rescinded on the grounds of fraudulent misrepresentation, alternatively, negligent or innocent misrepresentation;
>
> c. A return of [the total monies invested by the defendants];
>
> d. Interest on the loans extended at a rate of 10% per annum;
>
> e. Damages to be assessed;

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85 [CDX]'s affidavit at p 109, para 206.

> f. Alternatively, damages for misrepresentation pursuant to Section 2 of the Misrepresentation Act (Cap 390);
>
> g. Interest;
>
> h. Costs;
>
> i. Such further or other relief as this Honourable Tribunal deems just and necessary.

47 Prayer (e) prays for "Damages to be assessed". The defendants submit that prayers (a) to (b) pray for rescission and prayer (c) prays for the consequences of rescission. Prayer (e) prays for damages at common law in the alternative to rescission, *ie*, if rescission is denied.[86] Prayer (f) prays for damages under the Act in the alternative to damages at common law.

48 The plaintiffs do not accept this interpretation.[87] They submit that prayer (e) is just like prayer (c) and is therefore a prayer for relief *only* if rescission is granted under prayers (a) and (b). They point out that prayer (f) is the only prayer introduced by the word "Alternatively". Prayer (e) is not qualified by the same word. The plaintiffs therefore submit that the natural reading of prayer (e) is that it is a claim for relief which is dependent upon rescission and not a claim for relief in the alternative to rescission.[88]

49 Prayer (e) must be interpreted in context and not in isolation. Its context includes all the other prayers for relief in paragraph 206 of the statement of claim. In that context, it appears to me that the plaintiffs' submission is wrong. That is because prayer (d) is unconnected to rescission. Prayer (d) is a claim for contractual interest due to the defendants under a specific clause of the RSA on

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86 Certified Transcript (13 March 2020) at p 48, line 14 to p 50, line 13.

87 Defendants' Supplementary Submissions dated 4 March 2020 ("DSS") at paras 21–22.

88 Certified Transcript (13 March 2020) at p 24, line 21 to p 25, line 12.

the aggregate sum of $1,005,000 which the defendants lent to the plaintiffs after they entered into the RSA in an attempt to salvage their investment.[89] That claim, framed as a contractual claim, can stand only if rescission is denied. That suggests to me that *only* prayer (c) is advanced as relief sought as a consequence of rescission and that prayers (d) onwards are not.

50 But it also seems to me that the context for interpreting prayer (e) is far wider than just the other prayers in paragraph 206. Prayer (e) must be read in the wider context of the entirety of the statement of claim as well as the notice of arbitration, the response to the notice of arbitration, the parties' subsequent pleadings and, most importantly, the general law. It is now necessary, therefore, to state some propositions from the general law on the nature of rescission which form part of the wider context in which prayer (e) must be read.

On the nature of rescission

51 Rescission is the dissolution of a contract *ab initio* on the ground that the apparent assent of a party to the contract is vitiated by one or more of the factors recognised by law. The remedy of rescission therefore vindicates the right of that party to withdraw his assent to the contract and to be restored to his pre-contractual position. The right is vindicated by reversing the exchange of benefits under the rescinded contract. This reversal must of necessity be bilateral. Rescission therefore necessarily entails restoring not only the rescinding party but also the *counterparty* to its pre-contractual position.

52 Rescission is a remedy both at common law and in equity. Rescission is available at common law for a contract induced by misrepresentation. But

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89 [CDX]'s affidavit at p 5214, paras 498–499.

common law rescission is available *only* if the contract is induced by fraudulent misrepresentation. Common law rescission is not available for contracts induced by any other variety of misrepresentation, *ie*, negligent or innocent.

53 Like all common law remedies, rescission at common law is available as of right to every representee who can establish the prerequisites for its grant. A common law court has no discretion to withhold rescission.

54 One of the prerequisites for common law rescission is that it must be possible to effect precise and complete *restitutio in integrum*, *ie*, a precise and complete reversal of the benefits exchanged under a rescinded contract. Even a precise and complete reversal, however, may not suffice to restore a misrepresentee to its pre-contractual position. That could happen, for example, if the misrepresentee has incurred expenses by paying money to third parties in order to perform its obligations under the rescinded contract. In that situation, the common law has the power to award the usual common law remedy of damages in addition to common law rescission. But if a misrepresentee cannot establish any of the prerequisites for common law rescission, including the ability to effect precise and complete *restitutio in integrum*, the claim for rescission must fail. The only remedy available then at common law is the usual remedy of damages *instead of* rescission.

55 Even if a claim for rescission at common law fails, a claim for rescission in equity may yet be available. Equitable rescission is wider and more flexible than common law rescission. It is wider than common law rescission because it is available as a remedy for a contract induced by negligent and innocent misrepresentation, not just fraudulent misrepresentation. It is more flexible than common law rescission because it does not require precise and complete

restitutio in integrum. It requires only substantial *restitutio in integrum*.[90] All that is required is that "practical justice" can be done in restoring the misrepresentee and misrepresentor to their pre-contractual positions (*Salt v Stratstone* at [30]).

56 Equitable rescission may be supplemented by other equitable remedies as necessary to do justice between the parties. Thus, for example, equitable rescission may be supplemented by the taking of an account where that is necessary to reflect the benefits which a misrepresentee has received under the rescinded contract or the losses which a misrepresentor will suffer as a result of rescinding the contract. Equitable rescission can also be accompanied by an equitable indemnity to make a misrepresentee whole for the losses it has suffered or will suffer in the performance of its obligations under the rescinded contract.

57 Equity cannot, however, accompany rescission with an award of "damages" *stricto sensu*. Damages are solely a common law remedy. Equity cannot award damages save where expressly permitted by statute. For example, s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2013 Rev Ed) read with paragraph 14 of the First Schedule allows a court to award damages in lieu of an injunction or specific performance. An example more pertinent for present purposes is s 2(2) of the Act, which allows a court to award damages in addition to or in lieu of equitable rescission, but only for negligent or innocent misrepresentation. There is no general statutory power which permits equity to award damages in addition to or in lieu of equitable rescission and, in particular, for fraudulent misrepresentation. The pecuniary compensation which equity

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90 [CDX]'s affidavit at p 5207, para 487.

awards is not "damages" but "equitable compensation". And even then, equity awards equitable compensation only for an equitable wrong such as a breach of fiduciary duty. Inducing a misrepresentee to enter into a contract may yield the remedy of rescission in equity but is not an equitable wrong.

58 This historical anomaly creates no remedial gap, only a terminological gap. Our courts administer both law and equity concurrently and can therefore award every type of relief for misrepresentation, whether at common law or in equity, in every civil cause or matter (see s 3(*h*) of the Civil Law Act (Cap 43, 1999 Rev Ed)). So it is indeed now possible for a misrepresentee to seek rescission and damages from the same court and in the same action. But it remains the case that equitable rescission and common law damages are two remedies which come from two different historical sources. The court invokes two separate jurisdictions to grant the two remedies and any associated remedies. To put it another way, equitable rescission can be accompanied only by other equitable relief. Common law rescission can be accompanied only by other common law relief. It is therefore only in a claim in fraudulent misrepresentation that a prayer which seeks both rescission and "damages" can seek them cumulatively. That is because only the common law can grant rescission in addition to "damages" *stricto sensu* and because it is only for fraudulent misrepresentation that common law rescission is available. In all other cases, a prayer which seeks both rescission *and* "damages" must necessarily be seeking them as mutually exclusive alternatives.

59 Equitable rescission is also more precarious than common law rescission. Unlike common law rescission, equitable rescission is a discretionary remedy. Even if all the prerequisites for equitable rescission are made out, the remedy may yet be denied on any of the grounds upon which equitable relief may generally be denied, *eg*, by applying the maxims that those

who come to equity must come with clean hands or that those who seek equity must do equity. In addition, there are four specific situations in which equitable rescission will be barred when it is sought as a remedy for misrepresentation: (a) if the misrepresentee has affirmed the contract; (b) if substantial *restitutio in integrum* (in the sense of doing practical justice) is not possible; (c) if there has been an inordinate lapse of time; or (d) if *bona fide* third parties have purchased rights for value in any property which would be affected by rescission.

Analysis of the prayer in the statement of claim

60 I now return to the prayers in the defendants' statement of claim. Prayer (c), read in context, is certainly sought as a consequence of rescission. But even when prayer (e) is read in the context prayers (a) to (c), it is reasonably capable of being read as a claim for damages in the alternative, *ie*, even if rescission is denied. I say that for two reasons.

61 First, prayer (e) is reasonably capable of being read as encompassing a claim for damages without rescission. The defendants' statement of claim advances two claims, both of which sound in damages and both of which have no connection to rescission. These are the defendants' alternative claims for negligent misrepresentation *outside* s 2 of the Act[91] and for damages for breach of contract (see [39] above). There is no power at common law or in equity to award "damages" *in addition* to rescission for negligent misrepresentation outside s 2 of the Act. That is because at common law, damages can be awarded in addition to rescission only for *fraudulent* misrepresentation, not for non-fraudulent misrepresentation. And in equity, the monetary compensation which can be awarded in addition to rescission for negligent misrepresentation is not

91 [CDX]'s affidavit at p 109, para 205.

an award of "damages", it is an "indemnity". In short, the power to award "damages" for a negligent misrepresentation arises *only* either under s 2 of the Act, or at common law on the principle in *Hedley Byrne* (see *RBC Properties* at [64]–[66] *per* Andrew Phang JA).

62 Accordingly, prayer (e) cannot be read as a claim for monetary compensation in equity in addition to rescission in equity if the defendants can prove only negligent misrepresentation (otherwise, it would pray for an "indemnity", not "damages"). It equally cannot be read as a statutory claim for damages under s 2 of the Act (since the statutory claim is covered by prayer (f)). The plaintiffs are therefore wrong to say without qualification that prayer (e) "covers consequential damages where the order for rescission does not fully compensate the representee".[92] A prayer for "damages" has that meaning only for fraudulent misrepresentation, the only type of claim for which the common law remedy of damages can accompany the common law remedy of rescission. Prayer (e) is therefore reasonably capable, at the very least, of encompassing damages for negligent misrepresentation *without* equitable rescission. To that extent, it is reasonably capable of being read as a claim for damages independent of rescission, *ie*, as an alternative to rescission.

63 The statement of claim also advances a claim for breach of contract as an alternative to the defendants' claim for fraudulent misrepresentation. Rescission is not a remedy for breach of contract. Indeed, seeking damages for breach of a contract and seeking rescission of the contract are mutually exclusive remedies. The defendants never abandoned their claim for breach of contract. As a result, the arbitrator had to deal with the claim in contract in his

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92 [CDX]'s affidavit at p 13, para 37.

award (see [22(n)] above).[93] There is no other prayer in paragraph 206 which could possibly be read as seeking damages on the defendants' claim in contract. Prayer (e) is therefore reasonably capable, at the very least, of encompassing damages for breach of contract. To that extent also, it is reasonably capable of being read as a claim for damages independent of rescission, *ie*, as an alternative to rescission.

64 Second, an award of "damages" with or without rescission is a possibility in every misrepresentation claim. Rescission may be denied both at common law and in equity. When rescission is denied, a misrepresentee can recover "damages" *stricto sensu* (*ie*, as opposed to an equitable indemnity) only: (a) in the tort of deceit for fraudulent misrepresentation; (b) under the principle in *Hedley Byrne* for negligent misrepresentation; or (c) under s 2(1) of the Act for negligent misrepresentation. Against this context, the plain wording of prayer (e) is broad. It is not qualified by any express link to rescission. It is reasonably capable on its face of being read as a claim for damages for misrepresentation independent of rescission, *ie*, as an alternative to rescission.

65 This conclusion is buttressed by two general points. First, the burden to plead and prove that equitable rescission is barred rests on the misrepresentor, not on the misrepresentee (*Salt v Stratstone* at [25]). A misrepresentee therefore has no way of knowing, when it frames its pleadings, whether the misrepresentor will or will not plead a bar to rescission. Any rational and well-advised misrepresentee will therefore frame its pleadings in order to maximise its ability to succeed in its claim, whatever defences the misrepresentor might choose to plead in response. Second, I am mindful of the principle (which the

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93 [CDX]'s affidavit at p 5518, para 309.

plaintiffs themselves accept) that pleadings in arbitration should not be read as strictly or as technically as pleadings in litigation are.[94]

66 For these reasons, I do not think that the missing qualifier "Alternatively" in prayer (e) is so significant as to lead to the conclusion that the unqualified words of prayer (e) are incapable of bearing the meaning which the defendants contend they have. In my view, prayer (e) can reasonably be read as a claim for damages at large, to be assessed for breach of contract or for any of the varieties of misrepresentation which can yield damages without rescission.

67 As matters stood at the date of the statement of claim, therefore, I hold that prayer (e) was reasonably capable of being read as a claim for damages to be assessed in any of the following events: (a) if the defendants succeed in their claim for breach of contract; (b) if the defendants succeed in their claim for fraudulent misrepresentation and rescission is granted; (c) if the defendants succeed in their claim for fraudulent misrepresentation and rescission is denied; and (d) if the defendants succeed in their claim for negligent misrepresentation under the principle in *Hedley* Byrne. Of course, the defendants were not obliged to pursue every one of these claims. But they had pleaded their case sufficiently widely that they retained the ability to pursue any of these claims if they chose to, obviously within the procedural bounds of the arbitration. To put it another way, if they were precluded from pursuing any of these claims, it would not be because the wording of their pleadings was too narrow to permit it.

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94 Certified Transcript (13 March 2020) at p 27, lines 22–25.

The statement of defence

68 The plaintiffs' statement of defence advances a defence only to the defendants' substantive claim. It does not advance any defence specific to the remedies which the defendants claim in their statement of claim. Thus, the statement of defence limits itself to denying the principal elements of the defendants' substantive claim for misrepresentation and breach of contract. It advances no separate defence to the plaintiffs' remedial claim for rescission:[95]

> 163. Paragraphs 201 to 206 of the [statement of claim] are denied and the [defendants] are put to strict proof thereof.
>
> 164. In any event, regardless of any representations made by [the first plaintiff] (which is expressly denied), pursuant to Clause 15.4.5 of the RSA, [the first plaintiff's] total liability shall be restricted to S$1 million.

The plaintiffs' decision not to advance a remedial defence is significant. The burden is on the plaintiffs, as the misrepresentor, to plead and prove that rescission is barred (*Salt v Stratstone* at [25]). Merely raising a *substantive* defence to a misrepresentation claim for which rescission is sought as a remedy is therefore insufficient to put the bars to rescission in play as a *remedial* defence.

69 The statement of defence could not, of course, change the text of the statement of claim. But the statement of defence could and did change the context of the statement of claim. Reading the statement of claim in the new context supplied by the statement of defence, I accept that the statement of claim and prayer (e) could not be read as advancing a claim for damages without rescission. But that is not because of any limitation inherent in the words of the statement of claim or of prayer (e). It is simply because the text of the statement

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95 [CDX]'s affidavit at p 1102, paras 163–164.

of claim and prayer (e) must be read in the context of a statement of defence which does not plead that rescission is barred. In that context, prayer (e) obviously cannot be read as a claim for damages in the alternative if rescission is barred. The statement of defence simply did not put that issue in play in the arbitration.

The reply

70 The next pleading was the defendants' reply in August 2017. In their reply, the defendants responded to a statement of defence which did not plead that rescission was barred. The defendants' reply expressly reiterated the prayers at paragraph 206 of the defendants' statement of claim.[96]

71 Although the reply restated prayer (e), it remained the case that prayer (e) could still not be read, in the total context, as a claim for damages in the alternative if rescission is barred.

The lists of issues

72 The parties were unable to agree on a list of issues. They therefore submitted separate lists of issues to the arbitrator. The defendants' list of issues treats rescission and damages as two separate and distinct issues, with rescission aimed at restoring the defendants to their pre-contractual position and damages aimed at compensating for loss:[97]

> 24. Whether the RIA / RSA / IA / SA should be rescinded such that [the defendants] be put back into a situation in which they had not invested at all in the Company;

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96 [CDX]'s affidavit at p 1845, para 523.

97 [Defence Witness]' affidavit dated 26 September 2019 at p 133.

> 25. To what extent should [the first plaintiff] and/or [the second plaintiff] should pay damages to [the first defendant] and/or [the second defendant] for their loss and/or damage suffered.

73 The plaintiffs' list of issues also treats rescission and damages as two separate and distinct issues. The plaintiffs' issue 4 characterises one of the issues before the arbitrator as whether the defendants are entitled to rescission *or* to damages, the disjunctive "or" being significant:[98]

> 4. Whether the [defendants] prove that in the event if it is proved that there was inducement or any fraudulent and/or negligent and/or innocent misrepresentation by the [plaintiffs], then these fraudulent and/or negligent and/or innocent misrepresentation were of the nature which entitles them to rescind the RIA and RSA *or* claim damages on these grounds?
>
> [emphasis added]

74 The position on the pleadings, however, remained unchanged after the parties exchanged their lists of issues. The plaintiffs had yet to raise the issue formally of whether rescission was barred, *ie,* by pleading it in their statement of defence. Nor had the plaintiffs raised that issue informally, *eg*, by including it in their list of issues or even in correspondence with the defendants or the arbitrator. The issue of rescission being barred was simply not in play in the arbitration.

75 The arbitration had proceeded up to this stage on the basis that the defendants' claim for rescission would follow as a matter of course if the defendants succeeded in their misrepresentation claim. That is because rescission is the normal remedy for all varieties of misrepresentation (*British and Commonwealth Holdings v Quadrex* [1995] CLC 1169 at 1199–1200). In the absence of any attempt to advance a claim on the principle in *Hedley Byrne*,

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98 [Defence Witness]' affidavit dated 26 September 2019 at p 125.

the only issue on damages which was in play in the arbitration was whether the defendants could recover damages in addition to rescission at common law for fraudulent misrepresentation or under s 2 of the Act.

76 Neither party sought to bifurcate the evidential hearing into a liability phase and a damages phase. As a result, throughout the arbitration, both parties were aware that they were proceeding to a single climactic evidential hearing at which the arbitrator and each party expected both parties to bring forward all of their evidence on their entire case at once, *ie*, on the facts and on the law and on all issues relating to both liability and quantum. And both parties were aware that, after the evidential hearing and the post-hearing submissions, the arbitrator would deliver his award on all issues of both liability and quantum.

The opening statements

77 The defendants served their opening statement shortly before the evidential hearing was scheduled to begin in May 2018.[99] The defendants maintained their causes of action: (a) misrepresentation; and (b) breach of contract.[100] The defendants' opening statement also included a verbatim reproduction of paragraph 206 from the statement of claim. The defendants therefore reiterated prayer (e) praying for damages to be assessed.[101]

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99 [CDX]'s affidavit at p 3688.

100 [CDX]'s affidavit at p 3711, para 49.

101 [CDX]'s affidavit at p 3718, para 61.

The plaintiffs raise the bars to rescission for the first time

78 The plaintiffs' opening statement was delayed because the May 2018 hearing dates were postponed due to the first plaintiff's illness.

79 The plaintiffs served their opening statement in July 2018,[102] just one week before the re-fixed evidential hearing. For the first time, the plaintiffs raised the remedial defence that rescission was barred on grounds of affirmation, lapse of time or substantial *restitutio in integrum* being impossible:[103]

> 21. Further, it will be argued that the [defendants] are not entitled to rescission of the RIA and RSA on account of:
>
> a. RIA and RSA having been affirmed subsequent to notice of the alleged misrepresentations inasmuch as rights over charged assets have been exercised by the [defendants];
>
> b. The [defendants] being responsible for considerable time to lapse subsequent to the alleged misrepresentations;
>
> c. It being not possible for the parties to be placed in the same position that they held prior to execution of the RIA and RSA (*status quo ante*) inasmuch as the Company has been completely robbed of its assets and value on account of the acts and omissions of the [defendants].

80 The plaintiffs did not raise the remedial defence in any formal way in the arbitration, whether before or after they served their opening statement. The plaintiffs also had never before raised the remedial defence informally, *eg*, in their response to the notice of arbitration, in their list of issues, in their witness statements or even simply in correspondence either with the arbitrator or the

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102 [CDX]'s affidavit at pp 3817 and 3825.

103 [CDX]'s affidavit at p 3824, para 21.

defendants. The plaintiffs were, however, clearly determined to pursue the new remedial defence at the evidential hearing scheduled to begin in a week's time.

81 The arbitrator had three choices open to him. His first choice was to require the plaintiffs to amend their statement of defence to plead formally the new remedial defence. But that would have required permitting the defendants to amend their reply to respond to the new defence. That would in turn have required permitting the plaintiffs to file a rejoinder so that they could have the final plea on a defence on which they bore the burden of proof. That would also have required reopening discovery and directing the parties to exchange supplemental witness statements on the new factual issues which the remedial defence raised. The evidential hearing would also in all likelihood have to be postponed, with all of the attendant cost, delay and inconvenience to the parties and to their witnesses.

82 The arbitrator's second choice was to shut the plaintiffs out from pursuing the remedial defence entirely. But the defendants were not asking the arbitrator to do that. The defendants gave every indication that they were happy to deal with the remedial defence on the merits. In any event, shutting out the plaintiffs would have deprived the plaintiffs of a remedial defence on which they appeared to have a good case, and on which they indeed ultimately succeeded.

83 The arbitrator's third choice was to allow the plaintiffs to raise the remedial defence informally and to allow the defendants to respond to it informally, without postponing the evidential hearing. This is the approach which the arbitrator adopted, in the absence of any request to the contrary by either party. The plaintiffs were content to proceed in this way without any procedural accommodation. At this point, if anyone could have complained

about a breach of natural justice arising from the plaintiffs raising the remedial defence at short notice and informally, it would have been the defendants. But the defendants too were content to proceed in this way. They did not ask for leave to amend their reply, to reopen discovery, to supplement their witness statements or to postpone the evidential hearing.

84 From this point forward, the plaintiffs adopted the remedial defence as an integral part of their response to the defendants' case. The plaintiffs did not require the defendants to amend their pleadings to take a position as to what should happen to the defendants' claim in misrepresentation if the remedial defence succeeded. The plaintiffs were content to proceed without knowing whether the defendants agreed that the defendants' claim should fail entirely if the remedial defences succeeded. If the plaintiffs were now proceeding blind, this was ultimately the result of the plaintiffs' own belated decision to raise the remedial defence at short notice and informally.

This was a new point, not merely a responsive point

85 The plaintiffs submit that they raised the remedial defence in their opening statement for the first time only because the defendants "sneakily" revealed to the plaintiffs in two paragraphs of a witness statement for the first time that the defendants had appointed receivers under the RSA who had sold the Company's charged assets and paid $618,312.30 over to the defendants.[104] The plaintiffs suggest that the defendants, by these paragraphs, adopted and sprung affirmation as part of the defendants' case on the plaintiffs at the

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104 [CDX]'s affidavit at p 2159, paras 139–140.

eleventh hour.[105] The plaintiffs suggest further that there was some sort of burden on the defendants to disclose and plead affirmation as a material fact, which the defendants failed to comply with.

86 The plaintiffs are incorrect on every level, whether as a matter of fact or as a matter of law.

87 As a matter of fact, the purpose of the paragraphs which the plaintiffs point to in the witness statement, read in context, is not to advance any sort of a pre-emptive case on affirmation. The purpose of these paragraphs is twofold. The first purpose is simply to recount as part of the factual background the events which occurred after the parties' dispute arose. These paragraphs are thus the concluding paragraphs under the heading "Dispute Conciliation Proceedings and the Appointment of Receivers" in the witness statement.[106] The second purpose is to disclose to the arbitrator a benefit which the defendants had received under the contract. The defendants thereby signalled to the arbitrator and to the plaintiffs that the defendants were prepared to bring that benefit into account in if rescission were granted.

88 As a matter of law, the burden to plead and prove that rescission is barred rests on the misrepresentor, not on the misrepresentee (*Salt v Stratstone* at [25]). It was therefore for the plaintiffs to plead and prove this remedial defence, not for the defendants pre-emptively to plead and disprove it. I assume in favour of the plaintiffs that they did not know the factual basis for raising pleading affirmation as a remedial defence until they read this witness statement. Even

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105 [CDX]'s 2nd affidavit dated 30 October 2019 ("[CDX]'s 2nd affidavit") at paras 93–94.

106 [CDX]'s affidavit at p 2158.

then, however, the plaintiffs never pleaded that rescission was barred by affirmation. All they did was to raise affirmation in this informal way in their opening statement.

89 The most that can be said about a connection between these two paragraphs of the witness statement and the plaintiffs' remedial defence is that the two paragraphs disclosed facts to the plaintiffs for the first time which allowed the plaintiffs to raise the defence. But what the plaintiffs did upon learning these facts was entirely up to them. They were not obliged to raise the defence. And if they chose to do so, they were not obliged to raise the defence informally, through only the opening statement.

90 In fact, what the plaintiffs did went well beyond simply raising affirmation as an issue. What they did was to raise all three of the bars to rescission as a remedial defence in the arbitration, not just the one bar plausibly disclosed by the witness statement.

91 The purposes of these two paragraphs in the defendants' witness statement are entirely unconnected to adopting affirmation as part of the defendants' positive and pre-emptive case in the arbitration. The remedial defence raised is in large part unconnected to the facts disclosed in the witness statement. The plaintiffs' position that they raised the remedial defence purely in response to the defendants' witness statement is disingenuous to say the least.

The significance of paragraph 21

92 The remedial defence which the plaintiffs raised in paragraph 21 of their opening statement (see [79] above) is significant. It could not and did not, of course, change the text of the defendants' pleadings. But paragraph 21 of the plaintiffs' opening statement could and did change radically the context in

which the defendants' pleadings were now to be read. The context of the defendants' pleadings was not set in aspic. This new context shed a whole new light on the prayers for relief in the statement of claim, and in particular prayer (e). Read in this new context, what was latent in prayer (e) became patent. The remedial defence engaged and enlivened the full scope of the meaning of prayer (e). Until then, prayer (e) was only *capable* of advancing a claim for damages even if rescission was barred. Now, read in context, prayer (e) *did* advance that claim.

93 To put it another way, if the plaintiffs had applied for leave to amend their statement of defence to plead the remedial defence as part of their formal case in the arbitration, they would almost certainly have been granted it, subject of course to the usual costs consequences. The defendants would then have been permitted to make consequential amendments to their statement of claim and to their reply. The statement of claim would not have required amendment. The defendants would still have no reason to pre-empt the remedial defence by introducing a new plea in their statement of claim. A statement of claim is forensically anterior to a statement of defence and is not expected to respond to an issue on which a claimant bears no burden of proof. The only appropriate place for a response would be in the defendants' reply. But, as far as relief was concerned, the plaintiffs' reply had already expressly pleaded and restated all the prayers set out in paragraph 206 of the statement of claim.[107] That included in prayer (e) the general prayer for damages to be assessed. The defendants could therefore have responded to the plaintiffs' hypothetical amendment without amending their existing pleadings at all, taking the position that those

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107 [CDX]'s affidavit at p 1845, para 523.

pleadings were sufficiently wide without amendment to encompass a claim for damages even rescission was barred.

94 So too, the plaintiffs' remedial defence enlivened the full scope of the meaning that issues 24 and 25 of the defendants' list of issues (see [72] above) and issue 4 of the plaintiffs' list of issues (see [73] above) were capable of bearing. In the new context, these issues now raised squarely the question whether the arbitrator could award damages even if rescission was barred. Contrary to the plaintiffs' assertion,[108] that question was now very much in play. And it was in play not because of any act of the arbitrator or of the defendants. It was in play because the plaintiffs themselves had consciously chosen to put it in play by raising a new remedial defence in their opening statement.

The commencement of the evidential hearing

95 The position when the evidential hearing began in July 2018 was as follows. The plaintiffs had given the defendants notice, albeit short notice, that they now relied on the remedial defence. The arbitrator appreciated that this had an impact on the issues before him. Therefore, on the first day of the hearing, before calling the first witness, the arbitrator asked defendants' counsel what the defendants' position would be if he found that rescission was barred or withheld it in his discretion:[109]

> ARBITRATOR: … Now, there was one point that I was interested to hear from you… your clients exercised some rights under the contract which effectively enabled them to, and I may not have my words precisely right, but to liquidate the assets of the company and to take some benefit from those assets. You're asking me now to rescind the contract. Can I ask you what your position is as to how I should approach that fact?

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108 [CDX]'s 2nd affidavit at para 96.

109 [CDX]'s affidavit at p 3839, line 4 to p 3841, line 14.

[Defendant's counsel]: I think the charges given to the second [defendant], and, if at the end of the day, if the position is that at law their position [*sc.* rescission] is not permitted then we'll just go for damages because not the entire investment has come back and the rest of it we will claim as damages.

As for the second [defendant], they were ordinary shareholders and the position is that they're entitled to rescind. At the end of the day, if you, sir, find that the case has been made out of [*sic*] misrepresentation and breaches of contract, if any.

ARBITRATOR: So as regards the first [defendant], do you say I can still rescind, notwithstanding that that right --

[Defendants' counsel]: The fact that there's been affirmation by sale of assets that --

ARBITRATOR: Well, I didn't say affirmation but the fact that that sale of assets, that's obviously what I have in my mind.

[Defendants' counsel]: That's the argument that's being presented. I'll have to look at it, sir, because the two agreements have cross-references, [RIA] appears as a schedule. In the [RSA], all the parties from the [RIA] are back on as parties to the [RSA], there are clauses on entire agreement and we will have to see the knock-on effect of all these, what is the effect of all these clauses.

At the end of the day, it might be a question of law and of intention of the parties' construction of the contracts and how, sir, you will interpret those contracts.

ARBITRATOR: Yes, but I would like to have your position, not necessarily now.

[Defendants' counsel]: *I will hold alternate positions. If the law is on the RIA, if we are deemed to have barred the terms from being able to rescind the contract assuming that the arguments are presented on the facts, then we will claim for damages. In any event, on the RSA, all of them are parties, and the common relief is sought for rescission and alternatively damages.*

So we'll have to see how this plays out as a matter of construction, sir.

ARBITRATOR: *Okay. And if I decide that I can't rescind or I'm not prepared to rescind, but I'm persuaded that I should award damages, on what basis do I assess those damages?*

[Defendants' counsel]: *I would say on the basis that we have invested and that we have only received 600,000 and the balance will remain to stand as damages.*

[emphasis added]

The reference to "600,000" in the last paragraph is a reference to the sum of $618,312.30 which the receivers realised from the sale of the Company's charged assets and paid to the first defendant (see [13] above).

96 In the last two paragraphs of this exchange, the arbitrator asked defendants' counsel expressly to state the defendants' position in two events: (a) if the arbitrator found that rescission was barred ("I can't rescind"); and (b) if the arbitrator did not find that rescission was barred but declined in his discretion to award rescission ("I'm not prepared to rescind"). Defendants' counsel responded that the defendants would in both events seek damages equivalent to the defendants' investment less the $618,312.30 recovered through the receivers. Plaintiffs' counsel was invited to respond to this position. But the only response he advanced was to reiterate the plaintiffs' jurisdictional objections.[110]

97 The defendants thereby gave notice to the plaintiffs that the defendants were seeking an award of damages in the alternative to rescission if rescission was denied. This was more than merely informal notice. This was a position which was open to the defendants formally, on the defendants' pleadings even without amendment, when read in the new context supplied by the plaintiffs' opening statement.

98 This exchange with the arbitrator therefore said nothing new. It merely confirmed that the defendants were advancing a position in response to the

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110 [CDX]'s affidavit at p 3841, line 17 to p 3843, line 24.

plaintiffs' remedial defence which it was formally open to the plaintiffs to advance.

99 The defendants' position took nobody by surprise. The arbitrator gave no indication of any surprise. He simply accepted that it was open to the defendants to claim damages in the alternative to rescission. The plaintiffs gave no indication of any surprise. They did not object to the defendants making this claim, either in this exchange with the arbitrator or indeed at any time before the arbitrator delivered his award. Nor did the plaintiffs ask the arbitrator for time to consider how to address the defendants' claim in the evidential hearing which was about to start. That is because, for the reasons I have already given, the defendants' claim was an obvious claim, and one legitimately and formally open to the defendants to make.

100 The evidential hearing therefore proceeded without objection on the basis that: (a) the plaintiffs were raising the remedial defence that rescission was barred; and (b) the defendants were claiming damages in the alternative to rescission if rescission was denied for any reason.

The close of the evidential hearing

101 At the close of the evidential hearing, after the last witness had been cross-examined and released, the arbitrator asked the parties to address these very issues in their closing submissions. The arbitrator's question is not recorded in the transcript[111] but is recorded in the defendants' principal closing submissions:[112]

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111 [CDX]'s affidavit at p 4946, lines 9–14.

112 [CDX]'s affidavit at p 5008, para 34(4).

> The relief sought is rescission of everything (IA, SA, RIA, RSA). The learned Tribunal asked if, for whatever reason, he cannot or decides not to rescind the IA and SA, but decides to rescind the RSA / *award damages in lieu of rescission*, he would like parties to tell him how to calculate those damages.
>
> [emphasis added]

102 An award of "damages in lieu of rescission" is not a term of legal art. It is simply an award of damages instead of rescission. The phrase can therefore bear two meanings: (a) an award of damages instead of rescission because rescission is barred; and (b) an award of damages instead of equitable rescission because rescission is available but is withheld on discretionary grounds.

103 In that sense, counsel for the plaintiffs is not correct to say that it is a misnomer to call the arbitrator's award an award of "damages in lieu of rescission" because the term applies only to an award of damages where rescission is not barred.[113] Read with the arbitrator's comments at the outset of the evidential hearing (see [95] above), it is clear that he had both meanings in mind. On the premise that the defendants were advancing an alternative claim for damages if rescission was denied, whether because it was barred or on discretionary grounds, the arbitrator framed this issue expressly to ask both parties to address him in their closing submissions on how to calculate the defendants' damages in both events.

The defendants' principal closing submissions

104 In response to the issue raised by the arbitrator (see [101] above), the defendants continued to take the position in their principal closing submissions

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113 Certified Transcript (13 March 2020) at p 18, lines 17–21.

that they were entitled to damages in the alternative to rescission, relying for authority on both textbooks and cases:[114]

> **Response to Tribunal's 4th question: Measure of damages in lieu of rescission**
>
> 121. During the hearing, the learned Tribunal stated that [defendants'] primary relief is the rescission of all the agreements (IA, SA, RIA, RSA). Tribunal directed parties to submit how damages should be calculated where, for whatever reason, the Tribunal cannot or decides not to rescind the IA and SA, but decides to rescind the RSA / award damages in lieu of rescission.
>
> **Remedies for fraudulent misrepresentation**
>
> 122. *Halsbury's Laws of Singapore: Tort (2015 Reissue, Vol. 18)* at [240.376) reads *inter alia*:
>
> > [W]here the representee has been induced by fraudulent misrepresentation to enter in to a contract or binding transaction with the representor, **he may either maintain an action for damages, or repudiate the contract or transaction** .. However, these claims may be made alternatively in a single writ and a claim for relief by way of rescission of a contract will not, it seems, preclude an **alternative or additional claim for the recovery of such further damage as may have been suffered by a representee who, as a result of a fraudulent misrepresentation, not only has entered into the contract but also has further altered his position and suffered damage by reason of that further alteration.** [emphasis added]
> >
> > See: CBA at Tab 24
>
> **The learned Tribunal is bound to award the equivalent of rescission and indemnity in damages**
>
> 123. *McGregor on Damages (2014, Thomson Reuters)* in discussing innocent misrepresentation at [47-071] reads inter alia:
>
> > If then the court declines to give rescission, what is the equivalent of rescission in damages? Since

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114 [CDX]'s affidavit at pp 5051–5052.

> the first and foremost aim of rescission is the mutual restoration of benefits conferred, it is the equivalent of this which will mark the starting point and indeed the *prima facie* measure. **The claimant who must retain what he has received and cannot have restored to him what he has transferred will need, to be put monetarily into the same position as if there had been mutual restoration, to be awarded the value transferred by him less the actual value received by him.** So far, this is the same as the normal measure of damages in tort where the claimants has [*sic*] been induced to contract by fraudulent or negligent misrepresentation. **Next, there has to be found the equivalent to the indemnity, which is available in the claim for rescission, against the obligations arising under the contract.** For if the contract is not going to be rescinded, the claimant is going to have to continue to bear and discharge those very obligations ... [emphasis added]
>
> See: CBA at Tab 25

[emphasis in original]

105 The very next paragraph of the defendants' principal closing submissions cites the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] 1 AC 254 ("*Smith New Court*").[115] That case was decided on the basis that a misrepresentee was seeking damages against a misrepresentor *without* rescission (at 261C–D and at 262D–E). The defendants then commenced the final substantive section of their submissions by reiterating that they were seeking damages against the defendants in lieu of rescission, relying on the extracts I have cited at [104] above and *Smith New Court* as the applicable law.[116]

106 The defendants' principal closing submissions thus addressed directly the issue which the arbitrator had raised, *ie*, how damages were to be assessed if rescission were denied for whatever reason. In doing so, the defendants once again put the plaintiffs on notice that they did not accept that any of the bars to rescission which the defendants had raised (see [78] above) would be a complete defence to their claim. It is true that the plaintiffs cited *Smith New Court* not as authority for this proposition but as authority on the measure of damages in lieu of rescission. But the defendants' citation of the case would have made it clear to the plaintiffs that the defendants were in fact claiming damages even if rescission were denied, *ie*, as a remedy alternative to rescission.

The plaintiffs' principal closing submissions

107 As foreshadowed in their opening statement, the plaintiffs' principal closing submissions continued to raise the issue that rescission was barred (see [78] above). More importantly, the plaintiffs accepted that the defendants were

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115 [CDX]'s affidavit at p 5053, para 124.

116 [CDX]'s affidavit at p 5212, para 494.

claiming damages in the alternative to rescission ("rescission *or* damages" italicised in the extract cited below) and responded directly to it. The plaintiffs' response was that if rescission was barred, an award of damages to achieve the same economic effect as rescission was equally barred:[117]

> 59. Without prejudice to the above, it is submitted that even if it is held that the [plaintiffs] are guilty of misrepresentation and/or breach of contract, the [defendants] have still not been able to make out a case for *rescission or damages*.
>
> 60. It is submitted that the [defendants] have lost their right to rescind for the following reasons …
>
> …
>
> 66. It is finally submitted that in the present case the [defendants] can also not be awarded damages by permitting them to recover the remainder of their investment after accounting for the amount realized by them by sale of the charged assets, since that would in effect amount to granting the [defendants] the same benefit as rescission, even though rescission is evidently impermissible in the facts of the case.
>
> [emphasis added]

Although it is not my concern on this application, this proposition is quite clearly wrong in law. The authorities cited by the defendants (see [104]–[105] above) establish quite clearly that a claim for common law damages for misrepresentation will not fail simply because rescission is barred.

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117 [CDX]'s affidavit at p 5312, paras 59–60; p 5316, para 66.

The responsive closing submissions

108 The defendants' responsive closing submissions maintained that rescission was not barred[118] and maintained that the defendants were entitled to damages even if rescission was barred, *ie*, in the alternative to rescission:[119]

> 157. For the avoidance of doubt, the [defendants] state at the outset that even where rescission is not possible, it is trite law that the [defendants] are still entitled to damages suffered as a result of the [plaintiffs] misrepresentations. …

109 The plaintiffs' responsive closing submissions dealt with the specific issue framed by the arbitrator (see [101] above). They maintained their position that the defendants were not entitled to damages if rescission was barred, but for a slightly different reason than that advanced in their principal closing submission (see [107] above):[120]

> **III. DAMAGES IN LIEU OF RESCISSION**
>
> (ISSUE NO.4 IN [DEFENDANTS'] CLOSING SUBMISSIONS)
>
> 25. It is important to mention at the outset that the [defendants] have offered no rebuttal in their Closing Submissions to the bars to rescission pleaded by the Respondents in its Opening Statement before this Hon'ble Tribunal.
>
> 26. Insofar as the issue of damages in lieu of rescission is concerned, the [defendants] have now after the conclusion of the hearing attempted to set up an entirely new case: (i) which has never been pleaded or quantified before, (ii) with respect to which no supporting material or documents have been supplied, and (iii) which has not even been tested in evidence.

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118 [CDX]'s affidavit at pp 5407–5414, paras 158–165.

119 [CDX]'s affidavit at p 5407, para 157.

120 [CDX]'s affidavit at p 5433, paras 25–26.

110 The transition from paragraph 25 to paragraph 26 shows that the argument which the plaintiffs were now raising as to what should happen if the arbitrator found rescission to be barred was that the plaintiffs had failed properly to plead, quantify and prove their loss and damage. This implicitly accepts that it is open to the arbitrator to award damages in the alternative to rescission. But, to be fair to the plaintiffs, they did not abandon the argument of law raised in their principal closing submissions (see [107] above).

111 The plaintiffs' closing submissions were therefore advancing two alternative arguments to meet the defendants' claim for damages in the absence of rescission: (a) a legal argument that, if rescission was barred, an alternative claim for damages to achieve the same economic result as rescission was equally barred; and (b) a procedural or evidential argument that the defendants had failed to plead, quantify and prove their loss and damage. The important point is that the plaintiffs did not even suggest, let alone allege, that they had not been given reasonable notice of the defendants' case that the defendants were entitled to damages if rescission was denied, or a reasonable opportunity of being heard on that aspect of the defendants' case.

Conclusion on liability

112 I find it impossible to identify any failure by the arbitrator or any link in the arbitrator's chain of reasoning in his award which could conceivably amount to a breach of natural justice on the issue of the plaintiffs' liability in damages to the defendants if rescission was denied.

113 Formally, the defendants pleaded a substantive claim in fraud with a prayer for consequential relief seeking rescission and damages. The defendants' prayer was wide enough to cover a claim for damages both *in addition to* rescission (if rescission was granted) and *instead of* rescission (if rescission was

denied). The plaintiffs bore the burden of pleading and proving a bar to rescission as a remedial defence. But the plaintiffs pleaded only that the defendants were not entitled to any relief at all, *ie*, only a substantive defence. They did not plead a remedial defence even as an alternative. As a result, the defendants chose never to put in play formally in the arbitration the issue of what should happen remedially if the defendants succeeded on fraud but failed on rescission.

114 The formal position at the close of pleadings therefore was that rescission would follow as a matter of course if the defendants established fraud. The only issue on remedies which was in play was the mechanics of rescission.

115 Informally, however, the plaintiffs did put in play the issue of what should happen remedially if the defendants succeeded on fraud but failed on rescission. They did this when they served their opening statement raising the remedial defence for the first time. Neither the arbitrator nor the defendants required the plaintiffs to amend their statement of defence to plead this defence, whether before or after serving the opening statement. Neither the arbitrator nor the plaintiffs required the defendants to amend their statement of claim or reply to plead a response. Both parties and the arbitrator proceeded to and through the evidential hearing on the basis that the defendants had reasonable notice of this remedial defence without need for amendment. They proceeded also on the basis that the plaintiffs had reasonable notice of the defendants' position in response without need for amendment. The plaintiffs put the remedial defence in play knowing that the evidential hearing was not bifurcated. They thus knew that they were expected to and obliged to bring forward their entire case on liability and quantum, including all consequential issues arising from their remedial defence, at the evidential hearing.

116 The forensic consequence of the plaintiffs being permitted to put the issue of whether rescission was barred in play in their opening statement was that, from that time forward, both parties were aware that rescission no longer followed as a matter of course if the defendants succeeded in establishing fraud. But what would then happen if the defendants' claim for rescission failed? Would the defendants' alternative claim for damages fail too? This consequential question was now in play. It was in play not just informally and not just because of the plaintiffs' opening statement. It was in play formally upon any reasonable reading of the defendants' statement of claim and reply and of both parties' lists of issues in the context of the plaintiffs' opening statement.

117 The arbitrator appreciated that this question was now in play. That is why he asked the defendants expressly on the first day of the evidential hearing to state their position on it. The defendants expressly stated that their position was that the claim for damages did not stand or fall together with rescission because they were seeking an award of damages in the alternative to rescission.

118 No reasonable party in the plaintiffs' position could complain that this question being in play or the position that the defendants took upon on it in response took them by surprise. I say that for three reasons.

119 First, a party who raises an issue cannot possibly or plausibly claim to be surprised by the opponent taking a position in response to the issue which arises naturally and obviously from it. To put it another way, the plaintiffs cannot claim that they believed, when they raised the remedial defence that rescission was barred, that the defendants simply accepted that a bar to rescission was a complete defence to their claim, *ie*, that it must follow as a matter of course that the defendants' claim in fraudulent misrepresentation must

be dismissed and the defendants must be denied relief entirely if rescission was barred.

120 Second, the defendants' position in response to the remedial defence was not only the natural and obvious position, it was one which they were entitled formally to pursue on a reasonable reading of their pleadings and the parties' lists of issues in the new context supplied by the plaintiffs' opening statement.

121 Third, whether a party is given reasonable notice of a natural and obvious responsive position taken by an opponent must, in large part, be measured against the reasonableness of the notice which that party itself gave to its opponent of the issue to which the opponent is now responding. By that measure, the defendants gave the plaintiffs reasonable notice of their position, measure for measure. This is especially the case if one bears in mind that it was still open to the plaintiffs when the defendants stated their position on this question (see [95] above) to seek an adjournment of the evidential hearing to consider how to deal with it. To put it another way, a party who springs an issue informally and at short notice on its opponent must expect that the opponent's natural and obvious response on that issue will come back equally informally and at equally short notice. When that happens, the first party cannot complain that it was not given reasonable notice of the opponent's response or that it was unable to present its case on the response.

122 In any event, the plaintiffs' reaction to the defendants' position on this question shows that they were not, in fact, taken by surprise at all. When the arbitrator asked the plaintiffs to respond to the defendants' position, the plaintiffs took no objection, whether as to informality or short notice. They simply restated their fundamental jurisdictional objection to the defendants'

claim (see [96] above). And the plaintiffs were content immediately and without objection to commence the evidential hearing and to cross-examine the defendants' witnesses. That is not how a party taken by surprise by the defendants' position would have behaved. A party taken by surprise would have objected both to being taken by surprise and also to being expected to commence the evidential hearing immediately after being taken by surprise. A party taken by surprise would have asked for an adjournment in order to reconsider the sufficiency of the evidence and of its cross-examination plan and to reframe the witness statements of its own witnesses and its cross-examination plan for the opponent's witnesses. Yet the plaintiffs commenced and completed the evidential hearing without objection or hesitation.

123 The defendants' principal closing submissions continued to maintain a claim for damages even if rescission was denied. They cited textbooks establishing that a claimant in an action for fraudulent misrepresentation was entitled to recover damages in the alternative to rescission. They relied on a leading English authority, *Smith New Court*, in which a victim of a fraudulent misrepresentation had abandoned a claim for rescission yet was awarded damages in the tort of deceit as an alternative remedy.

124 The plaintiffs understood that the defendants were advancing a claim for damages even if rescission was barred. And they responded to the claim in both sets of closing written submissions. The plaintiffs made clear in their principal closing submissions that their response was that, if rescission was barred, an award of damages to achieve the economic equivalent of rescission was equally barred as a matter of law. The plaintiffs' responsive closing submissions advanced an alternative procedural or evidential argument: that the defendants had failed to plead, quantify and prove their damages claim in the alternative to rescission. The plaintiffs did not allege anywhere in either their principal closing

submissions or their responsive closing submissions that they were in any way taken by surprise by the defendants' alternative claim for damages in the event rescission was denied.

125 There is of course no doctrine of estoppel, let alone of turnabout being fair play or sauce for the goose being sauce for the gander, which precludes a party from complaining about a breach of natural justice. But the facts of this case can easily be accommodated within the existing framework of s 24(*b*) of the International Arbitration Act without any reliance on any such principle.

126 First, there was no breach of natural justice at all. The plaintiffs were not unable to present their case on the question of damages in the event that rescission was barred and were not deprived of reasonable notice of the defendants' case on that question, when that is measured against the notice which they gave the defendants that they were raising the issue that rescission was barred. Further, the arbitrator's procedural management of the arbitration on the issue of liability cannot be said to fall outside "the range of what a reasonable and fair-minded tribunal in those circumstances might have done" (see [34(f)] above). In addition, by the first day of the evidential hearing, any reasonable party would have appreciated that the arbitrator's chain of reasoning could include a link (see [34(e)] above) proceeding from a holding that rescission was barred by affirmation to a consideration of whether the defendants were entitled in the alternative to damages in the tort of deceit.

127 Second, even if there was a breach of natural justice in some technical sense, it was not connected to the making of the award within the meaning of s 24(*b*) of the International Arbitration Act. The root cause of the arbitrator's holding in the award that it was open to him to award damages to the defendants in lieu of rescission was not his failure to hear from the plaintiffs on this point

but the plaintiffs' own failure to ask for the evidential hearing to be postponed or bifurcated in order for them to have a reasonable opportunity to present their case on the defendants' response to the plaintiffs' remedial defence.

128 And finally, the plaintiffs suffered no prejudice from the arbitrator's supposed breach of natural justice over and above the prejudice which they caused to themselves by raising the remedial defence late and informally and by failing to ask for the evidential hearing to be postponed or bifurcated in order for them to have a reasonable opportunity to present their case on the defendants' response to the plaintiffs' remedial defence.

129 The plaintiffs' case that there was a breach of natural justice on liability therefore fails.

No breach of natural justice on quantum

130 I now turn to the second limb of the plaintiffs' case on natural justice. The argument is that the plaintiffs did not have reasonable notice of, or a reasonable opportunity to be heard on, the quantum of the damages which he awarded to the defendants.[121]

131 The arbitrator awarded damages to the defendants in the sum necessary to place the defendants in the position they would have been in if the plaintiffs had never deceived the defendants into investing in the Company.[122] The arbitrator therefore held the plaintiffs liable to pay to the defendants the sums which the defendants had invested in the Company under the contracts less the

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121 [CDX]'s affidavit at p 11, para 31(a)(ii).

122 [CDX]'s affidavit at p 5511, para 272.

benefits the defendants had received as a result of entering into the contracts.[123] He accepted that one such benefit was the sum of $618,312.30 which the receivers had realised and paid over to the defendants (see [13] above).[124] He also accepted in principle that another such benefit was the value of the defendants' 50% shareholding in the Company (see [7] above), ascertained as at the date the defendants discovered the plaintiffs' fraud, *ie*, October 2016.[125] But he assessed the value of those shares on that date as nil.[126] The arbitrator thus gave no credit to the plaintiffs for the value of those shares. He therefore awarded the defendants damages equivalent to the sums which the defendants had invested under the contracts (*ie*, US$1,999,238 and $1,179,085 (see [7] and [22(l)] above)) less *only* the $618,312.30.[127]

132 There are two aspects to the plaintiffs' natural justice argument on quantum.[128] The first aspect is that the plaintiffs did not have reasonable notice of and were denied a reasonable opportunity to be heard on the measure of damages which the arbitrator adopted.[129] The second aspect is that the plaintiffs did not have reasonable notice of and were denied a reasonable opportunity to be heard on issues which went to computing the quantum of damages.[130]

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123 [CDX]'s affidavit at p 5511, para 273.

124 [CDX]'s affidavit at p 5512, para 277.

125 [CDX]'s affidavit at p 1772, para 307; p 5004, para 29; p 5095, para 225; p 5122, para 284; p 5221, para 513.4; p 5413, para 165.2 to p 5414, para 165.3; p 5512, para 278.

126 [CDX]'s affidavit at p 5512, para 278.

127 [CDX]'s affidavit at p 5512, para 279.

128 PWS at para 52.

129 PWS at para 38; [CDX]'s affidavit at p 13, para 38.

130 PWS at para 39.

133 The second aspect of the plaintiffs' argument is principally a complaint that they did not have reasonable notice of and were denied a reasonable opportunity to be heard on the arbitrator's finding that the defendants' 50% shareholding in the Company was worthless. The arbitrator's assessment of damages comprised only three elements: (a) the sums which the defendants invested in the Company; (b) the sums which the receivers paid over to the defendants; and (c) the value of the defendants' 50% shareholding in the Company. The plaintiffs, quite rightly, do not challenge the arbitrator's handling of the first two elements, which were not the subject of any dispute which is material to this setting aside application. The plaintiffs now challenge the arbitrator's handling of only the third element. The plaintiffs do not, however, limit themselves to this. They submit also that they were denied a reasonable opportunity to be heard on other issues going to the quantum of damages such as causation[131] and mitigation.[132]

The measure of damages

The pleadings

134 I begin with the plaintiffs' complaint about the measure of damages which the arbitrator adopted. It is true that the defendants did not plead or set out in any other way before the evidential hearing the measure of the damages claimed if rescission was denied. This is simply because, for reasons I have already given, what should happen if rescission was denied was not in play in the arbitration until the plaintiffs raised the issue that rescission was barred in their opening statement.

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131 [CDX]'s affidavit at p 20, para 64; Certified Transcript (13 March 2020) at p 32, lines 17–22.

132 [CDX]'s affidavit at p 20, para 65; p 3825, para 22(b); p 5316, para 63(iii).

The evidential hearing

135 The defendants did give the plaintiffs notice of the measure of the damages they were seeking at the first available opportunity after the plaintiffs served their opening statement. The defendants gave this notice in the exchange with the arbitrator on of the first day of the evidential hearing (see [95] above). In this exchange, the arbitrator did not confine himself to asking the defendants what their position was if rescission was denied. When the defendants took the position that they would then pursue a claim for damages in the alternative, he expressly asked the defendants what the measure of damages would be for that alternative claim:[133]

> ARBITRATOR: Okay. And if I decide that I can't rescind or I'm not prepared to rescind, but I'm persuaded that I should award damages, on what basis do I assess those damages?
>
> [Defendants' Counsel]: I would say on the basis that we have invested and that we have only received 600,000 and the balance will remain to stand as damages.

136 The defendants, at this point, gave notice to the plaintiffs that the measure of the damages they were seeking if rescission was denied was that sum of money which would achieve the economic equivalent of rescission, *ie*, repayment of the sums invested adjusted to account for the fact that there would not be the reversal of benefits *in specie* which is the hallmark of rescission. It is true that the defendants gave the plaintiffs short notice and informal notice of the measure of damages. But, for reasons I have already given at [118] to [122] above, the plaintiffs cannot possibly or plausibly say that they were taken by surprise. The measure of damages which the defendants advanced is the natural and obvious measure of damages for fraudulent misrepresentation if rescission

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133 [CDX]'s affidavit at p 3841, lines 8–14.

is denied. The defendants' notice to the plaintiffs that this was the measure of damages they were pursuing is reasonable notice given the notice which the defendants themselves had that the issue was now in play. Equally, if the plaintiffs were genuinely taken by surprise by the measure of damages advanced, they would not have proceeded to the evidential hearing without objection.

The closing submissions

137 The defendants' principal closing submissions[134] reiterated the measure of damages which the defendants were asking the arbitrator to adopt if rescission was barred. They asked the arbitrator to award damages equivalent to the sums which they had invested under the contracts less the benefits which they received under the contracts. The defendants also accepted that those benefits comprised the $618,312.30 paid over by the receivers and the value of the defendants' 50% shareholding in the Company.[135]

138 The plaintiffs by this time had had one opportunity to object to the defendants' claimed measure of damages. That opportunity came on the first day of the evidential hearing, or indeed at any time during that hearing. They did not take the opportunity.

139 They now had a second opportunity to object: in their principal closing submissions. The plaintiffs served these submissions more than two months after the evidential hearing. The plaintiffs had presumably had by then time to reflect on the measure of damages which the defendants had proposed on the

134 [CDX]'s affidavit at p 4973.

135 [CDX]'s affidavit at pp 5056–5057, para 132; p 5212–5213, para 495.

first day of the hearing. Once again, however, the plaintiffs did not even suggest that they were taken by surprise by the proposed measure of damages. The plaintiffs chose instead to raise a point of law on the plaintiffs' liability for damages on that measure (see [107] above). That point of law implicitly acknowledged that the measure of damages which the defendants were seeking was the economic equivalent of rescission.

140 The plaintiffs had a third opportunity to object to the measure of damages. This opportunity came in their responsive closing submissions. The plaintiffs served these submissions almost four months after the evidential hearing. The plaintiffs had presumably had even more time to reflect on the measure of damages which the defendants had proposed on the first day of the hearing and reiterated in their principal closing submissions. The plaintiffs objected to the defendants' case on damages as being an entirely new case in paragraph 26 of their responsive closing submissions (see [109] above).[136] The plaintiffs' complaint in this paragraph is not that the measure of damages is new. The complaint is that the defendants' case on damages is not pleaded, quantified, particularised or proven. It is true that the measure of damages is not pleaded. But that is because of the informal way in which the plaintiffs themselves had put in play the issue of damages in lieu of rescission. Furthermore, the defendants' measure of damages was not a new case. The defendants had raised this measure of damages expressly on the first day of the evidential hearing. The plaintiffs had implicitly acknowledged it in their principal closing submissions (see [107] above).

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136 [CDX]'s affidavit at p 5433, para 26.

Conclusion on the measure of damages

141 In the circumstances, the arbitrator's procedural management of this arbitration in relation to the measure of damages fell well within "the range of what a reasonable and fair-minded tribunal in those circumstances might have done" (see [34(f)] above). Furthermore, by the first day of the evidential hearing, any reasonable party would have appreciated that the arbitrator's chain of reasoning could proceed from a holding that the defendants were entitled to damages in the tort of deceit to an assessment of those damages on the measure proposed by the defendants (see [34(e)] above). In any event, the arbitrator's handling of this issue is unconnected to the making of the award and caused no prejudice to the plaintiffs over and above what they caused to themselves (see [125]–[128] above).

142 The plaintiffs' case that there was a breach of natural justice on the measure of damages fails.

No evidence to support the damages claimed

143 I turn now to the plaintiffs' argument that the defendants failed to adduce any evidence to support the quantum of damages which they claimed. The most important aspect of this argument for the plaintiffs is that they had no notice of the defendants' case in the arbitration that their 50% shareholding in the Company was worthless. In this regard, the plaintiffs' complaint is different in one critical respect from the other limbs of the plaintiffs' case on natural justice. The defendants did not give any notice to the plaintiffs on the first day of the evidential hearing that their case was that their 50% shareholding in the Company was worthless. Indeed, they arguably gave no such notice until their principal closing submissions, which were served after the evidential hearing.

144 In order to analyse this head of the plaintiffs' application, it is necessary to trace how the parties dealt with the defendants' evidence of their damages claim.

Opening statement

145 The plaintiffs' opening statement, immediately after raising the remedial defence (see [78]–[80] above), objected to the defendants' claim for damages as being unpleaded, unparticularised and unquantified:[137]

> 22. It will further be argued that the [defendants] are also not entitled to any damages on account of:
>
> a. *No particulars or details of damages allegedly suffered by the [defendants] having been supplied*, including, *inter alia,* failure to establish the basis or grounds for damages; failure to provide the heads under which the damages are being claimed; and failure to quantify the damages suffered; thereby, *inter alia,* also failing to meet the requirements of Rule 20 of the Singapore International Arbitration Rules (6th Edition, August, 2016);
>
> …
>
> [emphasis added]

The principal closing submissions

146 The defendants submitted expressly for the first time that their 50% shareholding in the Company was worthless only in their principal closing submissions.[138]

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137 [CDX]'s affidavit at p 3825, para 22(a).

138 [CDX]'s affidavit at p 5213, para 495.2.

147 The plaintiffs' principal closing submissions maintained the objection in their opening statement, asserting that the defendants' claim for damages was unpleaded, unparticularised, unquantified and now unproven:[139]

> 62. **It is trite law that damages have to be properly pleaded, quantified and proved**. In the present case, *the [defendants] have neither given any details, particulars or basis for computation of damages nor has any evidence been led with respect thereto.* Consequently, the [plaintiffs] have also not been afforded an opportunity to challenge or refute the damages sought by the [defendants]. It is submitted that even in terms of Rule 20.2(c) of SIAC Rules, the [defendants] were under an obligation to quantify the damages sought to be claimed by them.
>
> [emphasis in bold in original; emphasis added in italics]

The responsive closing submissions

148 In their responsive closing submissions, the defendants denied that they had failed to plead, particularise, quantify and prove their claim for damages:[140]

> 168. The [defendants] deny that they are not entitled to any damages for … misrepresentations. They had pleaded and quantified their losses and damages properly, and from the very start where possible.
>
> 169. The [defendants] had pleaded the particulars of loss and damage, and reliefs sought at paragraphs 201 to 206 of the [statement of claim]. The [defendants] had further quantified and proved the damages suffered and this was *inter alia* set out in paragraphs 121 to 142 and 492 to 510 of the [defendants' closing submissions]. Legal submissions on damages should rightly be made in submissions, but otherwise the full facts on damages had been set out much earlier in the pleadings and witness statements.

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139 [CDX]'s affidavit at p 5315, para 62.

140 [CDX]'s affidavit at p 5415, paras 168–169.

149 The plaintiffs, on the other hand, listed in their responsive closing submissions the "innumerable obstacles in way" of the defendants' claim for damages: (a) the defendants had failed to supply a specific date on which the defendants discovered the plaintiffs' fraud; (b) the defendants had failed to prove that their 50% shareholding in the Company was in fact worthless on that date; (c) the defendants' shares in the Company were not in fact worthless on that or any other date; (d) the defendants had failed to prove that the fall in the value of the Company's shares was caused by the plaintiffs' misrepresentations; and (e) the defendants had failed to prove that the receivers' sale of the charged assets was fair and transparent.[141]

The plaintiffs' submissions

150 The plaintiffs' case before me was that it was too late for the defendants to allege only in their closing submissions that the defendants' 50% shareholding in the Company was worthless. The allegation came only after the close of the evidence, when the plaintiffs no longer had any opportunity to address it through evidence in chief or cross-examination.[142] As a result, the plaintiffs had no reasonable opportunity to present their case on quantum, and in particular on the value of the Company's shares and on whether any loss as a result of their fall in their value was caused by the plaintiffs' misrepresentations, by business misadventure or by the defendants' mismanagement.[143]

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141 [CDX]'s affidavit at pp 5434–5436, para 28.

142 Certified Transcript (13 March 2020) at p 102, lines 7–17.

143 Certified Transcript (13 March 2020) at p 16, lines 28–32 and p 32, lines 4–13.

151 The plaintiffs also rely on passages in their opening statement and closing submissions (see [147] and [148] above) in which the plaintiffs pointed out to the arbitrator that the defendants had failed to plead, particularise, quantify and prove their claim for damages.[144]

152 According to the plaintiffs, a reasonable and fair-minded arbitrator would have, in effect, bifurcated the evidential hearing of his own motion by rendering a partial award which found fraud to be established but which denied rescission on grounds of affirmation. He would then have fixed a second evidential hearing to give the plaintiffs an opportunity to adduce evidence on issues of fact going to quantum.[145] Instead, the arbitrator simply accepted the defendants' case that the shares were worthless with no evidence whatsoever, on the basis of the defendants' submissions alone.[146] He therefore denied the plaintiffs natural justice.

The defendants' submissions

153 Defendants' counsel struggled in oral submissions to point to any document served before their principal closing submissions in which the defendants alleged that their 50% shareholding in the Company was worthless. But the defendants submit that the plaintiffs chose in their responsive closing submissions to address the defendants' case on the value of the Company's shares on the merits without seeking any procedural accommodation from the

144 Certified Transcript (13 March 2020) at p 20, lines 1 to p 21, line 26.

145 Certified Transcript (13 March 2020) at p 33, line 30 to p 34, line 7.

146 Certified Transcript (13 March 2020) at p 14, lines 24–32.

arbitrator.[147] The plaintiffs therefore ran the risk of a finding against them on that issue, which is what eventuated.

154 Further, the defendants argue that they did in fact adduce evidence at the hearing on the value of the Company's shares. This evidence was admittedly adduced to establish the defendants' case on fraudulent misrepresentation, and not to prove that the shares were worthless in October 2016. But the presence of *some* evidence suffices to insulate the arbitrator's finding that the Company's shares were worthless as at October 2016 from being vitiated on any natural justice ground.

My analysis

155 I accept the defendants' submissions.

156 First, in my view, the plaintiffs' complaint in their responsive closing submissions that the defendants were attempting to "set up an entirely new case" on damages[148] (see [109] above) was not in substance a complaint the plaintiffs were being denied a reasonable opportunity to present their case on damages. If that were indeed the plaintiffs' complaint, they would not have stopped short at simply complaining that the defendants' case on damages was new, unpleaded, unquantified and unproven. The plaintiffs would have expressly asked the arbitrator to reopen the evidential phase to permit them to have an opportunity to present their case on damages. They would have particularised the evidence they wished to present in the reopened evidential phase. And they would have

147 Certified Transcript (13 March 2020) at p 90, lines 3–17 and p 97, lines 6–14.

148 [CDX]'s affidavit at p 5433, para 26.

identified the witnesses they would call or recall to present it.[149] In the absence of any such express request, in my view, a reasonable and fair arbitrator would have read the plaintiffs' responsive closing submissions as the plaintiffs' engaging with the merits of the defendants' case on damages. In other words, the plaintiffs' complaint is fairly and reasonably read as a reason for the arbitrator to reject the claim for damages without further inquiry.

157 Second, I do not accept the plaintiffs' submission that the defendants placed *no* evidence before the arbitrator from which he could make a finding as to the value of the defendants' 50% shareholding in the Company as at October 2016. There was at least *some* evidence of the value of the shares. It was common ground between the parties that the Company's value was negative in July 2017.[150] The plaintiffs complain that this is not evidence of the Company's value in October 2016 because the receivers sold the charged assets between October 2016 and July 2017. But evidence was also led in chief and elicited in cross-examination about the Company's overstated receivables, understated liabilities, overstated fixed assets and inflated future projects in 2016. A witness for the defendants gave evidence that the Company's business had come to a halt in October 2016: it had no new projects, all the staff had been removed, judgment creditors were levying execution by way of garnishee proceedings and it no longer had any money beyond the minimum to meet statutory payments and to pay a skeleton staff.[151] The plaintiffs' counsel in the arbitration did not challenge this evidence.

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149 Certified Transcript (13 March 2020) at p 116, line 31 to p 117, line 7.

150 [CDX]'s affidavit at p 1106, para 175.

151 [CDX]'s affidavit at p 4265, lines 12–18.

158 It is true that this evidence was elicited to go to a different issue. In this case, the issue was whether the defendants had mismanaged the Company after taking control of it (see [10] above). It therefore suited the plaintiffs' case not to challenge this evidence. But evidence is evidence just as the truth is the truth. And even if this evidence was not tied directly to the October 2016 valuation date selected by the arbitrator or to his assessment of the quantum of damages in lieu of rescission, it was nevertheless circumstantial evidence from which he could draw an inference as to the Company's value in October 2016. The arbitrator's three reasons for his finding that the Company's shares were worthless as at October 2016 (see [22(j)] above) shows that he was aware of this evidence. It does not matter on an application to set aside an award on grounds of natural justice whether the evidence was strong or weak, comprehensive or incomplete, focused or incidental, direct or circumstantial. Even if it is assumed that the arbitrator drew an unwarranted inference from the evidence which was before him, that is an error of fact and not a breach of natural justice.

159 I accept therefore that the evidence led and elicited in the arbitration and the parties' submissions on that evidence formed *some* basis on which a reasonable and fair-minded arbitrator could have found that the value of the defendants' 50% shareholding in the Company was worthless. Having engaged with the merits of the defendants' case on damages, it is not open to the plaintiffs now to recharacterise their complaint during the arbitration as a complaint that natural justice was being breached in order to try their luck at a backdoor appeal.

Conclusion

160 In conclusion, whether it is on damages as an alternative remedy to rescission, the measure of damages or the quantum of damages, the plaintiffs

are not a victim of a breach of natural justice. They are entirely the authors of their own misfortune.

161 For all the foregoing reasons, I have dismissed with costs the plaintiffs' application to set aside the award.

Vinodh Coomaraswamy
Judge

Philip Jeyaretnam SC (instructed), Ashwin Nair (Dentons Rodyk & Davidson LLP), Daniel Tay (Chan Neo LLP) for the plaintiffs;
Andre Francis Maniam SC (instructed), Wang Chen Yan (WongPartnership LLP), Foo Soon Yien and Jennifer Ang (BR Law Corporation) for the defendants.