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

[2021] SGHC 75

Originating Summons No 1184 of 2020

Between

CIM

… Plaintiff

And

CIN

… Defendant

JUDGMENT

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

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v
CIN

[2021] SGHC 75

General Division of the High Court — Originating Summons No 1184 of 2020
Philip Jeyaretnam JC
24 February 2021

1 April 2021 Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 It is axiomatic that arbitrators must make their decisions only on matters submitted or argued before them. Notice of those matters must have been given to the other party. When a party is taken by surprise by the arbitrator's chain of reasoning, it raises the question of whether that party has been denied the opportunity to be heard.

2 In this case, CIN, the claimant in an arbitration, answered one aspect of the arbitration respondent CIM's defence obliquely in its statement of reply, and only responded squarely in its final reply closing submissions. Along the way, CIM's counsel in the arbitration had articulated what it thought was CIN's case, which was something different from CIN's actual case and was wholly unpleaded. She was not corrected on her thinking by CIN's counsel in the

arbitration, at least not until CIN's final reply closing submissions. CIM contends that CIM's counsel did not anticipate the reasoning adopted by the arbitration tribunal (the "Tribunal"), and could not reasonably have done so. Consequently, CIM has brought this present application to set aside the portions of the Tribunal's award (the "Award") resting on the unanticipated reasoning.

3 In these circumstances, the question is whether it was reasonable for CIM not to anticipate the Tribunal's reasoning. In considering this question, a key aspect is how the court should look at CIN's counsel's silence when CIM's counsel said what she thought were the issues in play. It is this aspect which presents some novelty in what is otherwise a clearly signposted and brightly illuminated path for the court to take in its review of an arbitration award challenged on this ground.

Background

4 The arbitration, conducted under an agreed expedited procedure, concerned a long-term contract for the supply over time of a specified quantity of clinker at a fixed price. The approximate size of shipments was agreed, as well as the total period. That period was subsequently extended. Five shipments were made and paid for, leaving almost half of the originally contracted quantity still to be delivered. There was a second contract that featured in relation to a defence that is not in issue in this challenge, and there is no need to say more about it in this judgment.

The pleadings in the arbitration

5 CIN submitted a notice of arbitration to the Singapore International Arbitration Centre ("SIAC") under the applicable arbitration clause. In its notice of arbitration and its statement of claim (the "Statement of Claim"), CIN sought

to hold CIM liable for non-delivery of the remaining contracted quantity of clinker under the first contract, claiming damages to be assessed in accordance with s 51 of the Sale of Goods Act 1979 (c 54) (UK) (the "English Sale of Goods Act").[1]

6 In its statement of defence (the "Statement of Defence"), CIM contended, among other defences, that it was a condition precedent that, in respect of each shipment, parties had to agree a laycan, and thereafter CIN had to nominate a vessel. As no laycans had been agreed for the balance of the clinker, nor had any vessel been nominated by CIN, CIM was not obliged to deliver.[2]

7 CIN's primary response in its statement of reply (the "Statement of Reply") to this part of CIM's defence was to deny that there were any conditions precedent to delivery.[3] However, CIN's Statement of Reply then went on to add that "[i]n any event, [CIM was] relying on its own failures to agree on the shipment loading laycan".[4] Pleading that CIM was "evidently unwilling to proceed with a contract which price changes had made unfavourable to it",[5] CIN concluded that "[a]s such, without agreement on laycan [CIN] was unable to proceed with nominating the performing vessel … It is quite unrealistic for [CIM] to suggest otherwise".[6]

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1 Notice of Arbitration [4.6]–[5.1]; Statement of Claim [3.17] – [5.6], [7.1].

2 Statement of Defence [35.2(a)], [35.2(c)].

3 Statement of Reply [2.10]–[2.11].

4 Statement of Reply [2.13].

5 Statement of Reply [2.13].

6 Statement of Reply [2.14].

8 This passage seems to have in mind the principle that a party to a contract is not entitled to rely on the non-fulfilment of a condition precedent as a defence to an action for a breach of a contractual obligation, when it is the cause of that non-fulfilment. For convenience, I will refer to this as the "prevention principle", because it is one application of that principle, which is well known to common lawyers. It is a doctrine summed up in the legal maxim that no man shall take advantage of his own wrong. However, while this passage seems to have in mind the prevention principle, the Statement of Reply did not plead that CIM was on this basis not entitled to rely on non-fulfilment of the condition precedent. It only said that it was "unrealistic" for CIM to suggest that CIN was able to proceed with nominating the performing vessel.

The written submissions

9 CIN's written opening submissions still did not clearly state that CIN was invoking the prevention principle. Indeed, CIN said:[7]

> The Tribunal need not be drawn into the dispute between the Parties as to the history of their attempts to agree the next delivery and thus whether one side or the other can be faulted in relation to laycan dates or shipment sizes or nomination. …

This can be read as urging the Tribunal to steer clear of any inquiry into who was at fault for non-fulfilment of the condition precedent, a stance inimical to the invocation of the prevention doctrine.

10 Further in its written opening submissions, CIN added:[8]

> It is not suggested that the reason for failure to deliver was the absence of laycan dates or shipment sizes or nomination. The real problem was that [CIM] was unwilling to deliver at all because it could not secure a supplier which would allow

7 CIN's Arbitration Opening Submissions [4.44].

8 CIN's Arbitration Opening Submissions [4.45].

> profitable delivery. Faced with that problem the absence of laycan dates or shipment sizes or nomination went to nothing.

11 Without yet being completely clear about the legal significance of the facts mentioned, CIN went on to say:[9]

> For these reasons failures to deliver cannot be excused on the grounds that [CIN] failed to propose any laycan dates or shipment sizes, or nominate the vessel. Failure to agree these items was not the cause of the failure to deliver, it was the outcome of [CIM's] position on delivery given the difficulties it faced in obtaining supply on profitable terms.

12 From the two extracts set out at [10] and [11] above, CIN was plainly reaching toward the prevention principle, while not identifying it in plain language. In these two extracts, CIN identified that it was CIM's unwillingness to deliver that was the real problem, yet stopped short of stating that, as a result, CIM could not rely on the non-fulfilment of condition precedent.

13 CIM's written opening submissions, submitted at the same time as CIN's written opening submissions, if taken at face value, seem to show that its counsel understood CIN's position hitherto on this aspect differently from any invocation of the prevention principle. She understood CIN's position as alleging that CIM never intended to perform the contract and so was in anticipatory breach, such that CIN could accept and consequently be excused from further performance (including nominating the vessel) and claim damages. She identified a fatal flaw in this position that she attributed to CIN, namely that CIN had never purported to accept any anticipatory repudiation.[10]

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9 CIN's Arbitration Opening Submissions [4.52].

10 CIM's Arbitration Opening Submissions [41(b)].

The arbitration hearing

14 In oral opening on the first day of the evidentiary hearing, CIN's counsel asserted that CIM was relying on its own failures, describing this stance as having "an air of unreality" and being "an artificial position to take".[11] However, as with CIN's description of CIM's case as "unrealistic" in its Statement of Reply (see [7]–[8] above), describing a position as artificial or unreal is not the same as identifying the legal basis on which it is untenable or rebutted. Instead, such language generally relates more to persuading a tribunal to the proponent's view of the facts and how they connect to each other.

15 CIM's counsel must by now be taken to have read CIN's written opening submissions. Nonetheless, in her oral opening she continued to view CIN's position as resting on an anticipatory breach by CIM, and took the position she would not need to deal with it because it was not pleaded:[12]

> … if [CIN] wanted to contend that [CIM] had been unreasonable, as [CIN's counsel] wished to convey this morning, that this is a case where the innocent buyer was calling for performance and the selling [CIM] … didn't want to perform because they thought they could do better, then it would be for [CIN] to plead and establish what implicit duty of good faith or other notion of co-operation had been broken by [CIM]. Of course, that's not a case that's pleaded or put. If it were put, then it would require them to show a breach, and of course a breach that was accepted, because it would be inherently a refusal to perform a future obligation because the obligation doesn't arise until a laycan has been agreed.

16 CIN's counsel did not at this juncture point out that the view CIM's counsel took of his position was wrong.

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11 Arbitration transcript for 22 July 2020 p 33 to 35.

12 Arbitration transcript for 22 July 2020 p 57, lines 6–21.

17 Witness evidence then proceeded, and CIN's counsel did question witnesses about why laycans were not agreed, and about CIM's willingness to perform only if the price were higher than contracted. Such questions no doubt had more than one purpose, and likely also related to the defence of *force majeure* that CIM had raised. That defence was rejected by the Tribunal and is not relevant to this setting aside application. Nonetheless, this line of questioning certainly traversed the issue of who was at fault, and elicited a concession by CIM's witness that CIM's position was that if the price did not "work", the discussion between CIM and CIN would not proceed to the question of laycan dates,[13] a point that supported CIN's case that the real problem was CIM's difficulty with the contracted price. However, nowhere did CIN's counsel put to the witness that because CIM's stance on price meant they could not get to the next step of agreeing laycans, and so also could not get to the following step of CIN nominating the vessel, CIM could not rely on the non-fulfilment of conditions precedent, namely agreement on laycans and nomination of a vessel, to excuse its breach of the obligation to deliver.

The closing submissions

18 Closing submissions were directed to be sequential. Given the expedited character of the arbitration, time frames were compressed. CIN's counsel in his written closing submissions contended that CIM was "not entitled to rely on such a defence [*ie*, non-fulfilment of conditions precedent] when it is relying on its own failures to excuse its breach of the Contract".[14] This clearly set out CIN's reliance on the prevention principle. To support this contention, CIN elaborated on what CIM's alleged failures were, namely that CIM failed to

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13 Arbitration transcript for 23 July 2020 p 126, lines 2–4.

14 CIN's Arbitration Closing Submissions [2.6].

engage with CIN even though CIM was obliged to act in good faith and work with CIN to discuss the laycan. References were made to the cross examination of witnesses, legal authorities and correspondences between the parties.[15]

19 Shortly thereafter, CIM filed its written closing submissions. It devoted a section of these submissions to "[t]he allegation that [CIM] 'crashed' performance and is relying on its own wrongdoing". It began this section as follows:[16]

> This is an argument of necessity for [CIN]. It recognises that the claim to non-delivery fails without it showing dates for delivery. [CIN] thus casts around for ways to turn the lack of *mutual agreement* on this point … into a matter of *unilateral fault* by [CIM]. None of its proposed ways of transmuting one into the other are persuasive, and all overlook the problem that, even if any of them was successful, [CIN] has simply not claimed damages for any associated breach. The Tribunal may therefore treat these as academic questions only. [emphasis in original]

20 CIM summed up its response as follows:[17]

> 57. There is, given the above, simply no evidence from which [CIN] can sensibly ask the Tribunal to infer [CIM] was frustrating or preventing the occurrence of agreements on laycans, shipment sizes and [CIN's] nomination of a vessel in bad faith or was otherwise refusing to deliver cargo. It is plain on the evidence that this was not the case.
>
> 58. The bad faith argument thus fails on every level:
>
> 58.1 It fails on the evidence – see above.
>
> 58.2 It also fails because it is put in closing for the first time as an allegation of bad faith. This is a serious allegation which must be specifically pleaded and clearly put to the relevant witnesses before [CIN] can close on it. [CIN] has not done either. Basic principles of natural justice and procedural fairness mean that this allegation should be rejected out of hand, even if the

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15 CIN's Arbitration Closing Submissions [2.9]–[2.12], [2.18]–[2.19].

16 CIM's Arbitration Closing Submissions [35].

17 CIM's Arbitration Closing Submissions [57]–[58].

> Tribunal were to find there was any evidence to support it (which there is not).
>
> 58.3 Further, [CIN] has no damages claim for breach of an obligation to agree laycans and shipment sizes in good faith. As already noted, [CIN] simply has not grappled with (indeed, has not pleaded) the relevant issues here.

21 In its written closing submissions, therefore, CIM did address the allegation that it was frustrating or preventing agreement on laycans, including by reference to the evidence. However, it continued to view this point as requiring a claim of breach and damages for that breach, neither of which was pleaded, although the concern about what was not pleaded seems to have changed focus from anticipatory breach to breach of a good faith obligation to agree on laycans. CIM thus urged the Tribunal to disregard this allegation as unpleaded and academic.

22 CIN then filed its written reply submissions. Its response to the relevant section of CIM's written closing submissions began with the statement that "[t]his section of [CIM's] Closing is not entirely understood."[18] CIN then went on as follows:[19]

> 3.3 [CIM] is correct to categorise [CIN's] case as a question of [CIM's] fault. [CIM] is supplier [*sic*] and it alone has access to information from the manufacturer which is necessary for these matters to be agreed. As it was put in Opening, Closing and to the witnesses, [CIM] had to say what can be done and when. That meant dates, times and shipment sizes.
>
> 3.4 … [T]here is an implied term requiring this of [CIM] as the seller, as seen in *Harlow Jones Ltd v Panex International Ltd*. … *Harlow Jones* is, in any event, an application of a broader principle whereby '*each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect*'.

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18 CIN's Arbitration Closing Submissions [3.1].

19 CIN's Arbitration Closing Submissions [3.3]–[3.8].

> 3.5 It should not be controversial [CIM] was under this obligation or that it required it to say what they could do and when. [CIM's witness] agreed it was part of the seller's responsibility to propose laycans.
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> 3.6 In Closing [CIM] denies bad faith or deliberately 'crashing' the contracts. It said it never evinced an intention not to perform to be in anticipatory repudiatory breach. It says it did not refuse to agree laycan dates. But these things are not alleged and [CIN] does not need to establish them.
>
> 3.7 … [CIN's employee's] repeated attempts to turn the discussion to dates and amounts went unanswered. That meant no laycans could be agreed under either contract and without that [CIN] could not nominate or provide shipping instructions.
>
> 3.8 [CIM] says [CIN] has no damages claim but no damages are sought for this breach. The consequence is not damages, but that [CIM] is unable to rely on any failure to satisfy the alleged pre-conditions as to laycans, nomination etc.
>
> [emphasis in original]

23 Thus, CIN's written reply submissions were the first occasion on which counsel for CIN corrected what he considered to be counsel for CIM's misunderstanding of CIN's case. There was, again, reliance on the prevention principle, but this time, it was more clearly and fully articulated with *Mackay v Dick* (1881) 6 App Cas 251 ("*Mackay v Dick*") being cited for the first time in a footnote at the end of para 3.4 in CIM's written closing submissions. CIN contended that CIM had an obligation to say what it could do and when, but CIM failed to do so because it was not willing to deliver at the contracted price. This was the reason that there was no agreement concerning laycans and no nomination of vessels. As the cause of the non-fulfilment of the conditions precedent, CIM could not rely on their non-fulfilment to excuse its non-delivery. CIN did not refer to CIM's obligation as a standalone duty, a breach of which sounded in damages; rather, reference to that obligation was part of a broader contention as to why CIM could not rely on the non-fulfilment of the conditions precedent.

24 There was no provision for CIM to respond to CIN's written reply submissions. Nor did CIM write in to request the opportunity to respond to them, whether generally or specifically to the citation of new authorities. CIM was content to rest on its own written closing submissions, apparently believing that the Tribunal would accept its stance that this aspect of CIN's case was unpleaded and so had to be disregarded.

The Award

25 The Tribunal issued its Award on 19 September 2020. The Award accepted CIN's case that CIM would not supply at the contracted price, and so would not agree laycans. It also accepted the principle set out in *Mackay v Dick* as applying to the facts. The relevant parts of the Award, which I will term the "Cooperation Finding", are as follows:[20]

> 140. The flaw in [CIM's] argument, in my view, is that it overlooks that the conditions precedent on which [CIM] relies are the culmination of a *mutual* process which depends on engagement by both parties. Applying the normal principles of construction to the '*Scheduling and Shipments*' clause, I have no doubt that a reasonable reader standing in the Parties' shoes would understand it as meaning that both Parties are obliged to engage in good faith and attempt to agree reasonable laycans. This is, in my view, a matter of construction of the *express* provision, but if any element of implication is involved, I am also satisfied that such implication is both necessary and obvious, amply satisfying the 'test' for implication of contractual terms. This mutual obligation under the '*Scheduling and Shipments*' clause still leaves some flexibility: the distribution of shipments over time is, in principle, more flexible than under an express term for 'monthly' or perhaps even 'fairly evenly spread' shipments. But the obligation to engage in good faith to agree reasonable laycans would not allow either Party to avoid or delay performing because the market had moved against it, which is a mutual risk that both Parties accepted in contracting at a fixed price per MT on unconditional terms.

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[20] Award [140]–[144].

141. In this case, the facts were (and I so find) that in and after November 2018, [CIN] continually approached [CIM] seeking delivery of clinker under the Contract (as well as seeking performance of the 2nd Contract), asking [CIM] to confirm appropriate laycans so that [CIN] could make shipping arrangements to take delivery. All those approaches were met with responses that amounted to [CIM] telling [CIN] that it was not in a position to supply, and certainly not at the Contract price. … The salient point is that [CIM] was consistently telling [CIN] that it was unable to confirm any laycans and that it was pointless for [CIN] to arrange a vessel to come to [X] ready to load, as [CIM] was not in a position to deliver any clinker. This was (I find and hold) a breach of [CIM's] obligations under the Contract to cooperate in agreeing shipment laycans. The consequence of [CIM's] breach was to prevent [CIN] from being able to satisfy the conditions precedent on which [CIM] seeks to rely. Laycans could only be fixed by agreement; [CIN] could not unilaterally create them without [CIM's] cooperation. Without laycans confirmed by [CIM], [CIN] had no date ranges for which to nominate vessels. There can be no suggestion that [CIN] should have arranged for vessels to arrive at [X] without an agreed laycan. This would have achieved nothing except to give rise to claims from the shipowners for delays and for non-performance of the carriage contracts, which [CIN] would in the ordinary course look to pass on to [CIM], thus adding further losses to the problems the Parties already faced.

142. In my view, the consequences of [CIM's] breach are provided for by well-established legal principles discussed in (for example) *Chitty on Contracts*, (33rd Ed.) Vol. I §2-160 – 167. These passages from *Chitty* were adduced by [CIM] in support of its written opening submissions. However, in my view, they support [CIN's] case. In particular, the principles discussed in *Chitty* §2-163 (headed '*Duty not to prevent occurrence of the event*') are pertinent, as is the case of ***Mackay v Dick*** (1881) 6 App. Cas. 251 which is discussed in some detail in that paragraph. [CIN] provided a copy of ***Mackay v Dick*** with its reply closing, and also referred to *Benjamin* (10th Ed.) §8-036 which makes the same point as *Chitty*, more succinctly.

143. To summarise the law, there is a well-established doctrine going back to ***Mackay v Dick***, which holds that where the satisfaction of conditions precedent to a particular obligation is dependent on both parties cooperating, there is an implied duty on both to cooperate, and a party which wrongfully withholds its cooperation is, generally, not entitled to set up that condition precedent as a defence to an action for breach of the obligation. …

144. Applying these principles, I find and hold that [CIM] waived the right to rely on the conditions precedent to its

> obligation to deliver. [CIM] is not entitled to rely on its own failure to engage with the contractually required process for agreement on laycans in order to say that no laycans were fixed and the steps consequent on agreement of laycans, such as vessel nomination and tender of NOR, did not occur. To accept [CIM's] argument based on the conditions precedent to delivery not having been met would be to allow [CIM] to rely on its own breach of its obligation to cooperate in the process for fixing the shipment laycans.
>
> [emphasis in original]

26 The nub of the Cooperation Finding is this: the conditions precedent that CIM relied on entailed a mutual obligation to engage in good faith and attempt to agree reasonable laycans; however, CIM breached this obligation and thus, it could not rely on the non-fulfilment of these conditions precedent to excuse its breach of the obligation to deliver. The Cooperation Finding rested on the prevention principle.

27 In concluding that there was a duty to cooperate to agree laycans, the Tribunal spelled out its reasoning in ways that counsel for CIN had not. One such way was to read into the mutuality of the obligation to agree laycans an express element of cooperation. Another was to add the words "in good faith". A third was to put the obligation on the basis of an implied term to cooperate. In addition, the Tribunal described the consequence of CIM's breach of this duty in terms of waiver, stating that CIM had thereby waived the right to rely on the conditions precedent. It is fair to infer that in these parts of its Award the Tribunal read a little more deeply into the prevention principle and particularly its modern juridical basis and terminology. Counsel for CIN had adopted a more broad-brush approach, had been content with the language used in *Mackay v Dick* and had appealed particularly to "reality".

28 The Tribunal went on to rule that CIN was entitled to recover damages assessed according to s 51(3) of the English Sale of Goods Act.[21] In its calculation of damages (the "Calculation of Damages Finding"), the Tribunal considered, *inter alia*, four scenarios submitted by CIN as to when the remaining goods ought to have been delivered.[22] In so doing, it noted that "[CIM] did not enter into this debate."[23] Eventually, however, the Tribunal adopted none of CIN's submitted scenarios, choosing instead to assess damages on the assumption that there would have been five evenly spaced shipments, "if [CIM] had complied with its obligation to engage and had attempted to agree laycans with [CIN]".[24] On this basis, the Tribunal ordered CIM to pay CIN damages in the sum of US$949,543.09,[25] along with attendant sums of interest and costs.[26]

The issues in the present application

29 CIM has now filed this present application, seeking to set aside each of the two findings of the Award highlighted above (*ie*, the Cooperation Finding and the Calculation of Damages Finding) on three grounds:[27]

(a) that there was a breach of the rules of natural justice, pursuant to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed);

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21 Award [160]–[182].

22 Award [205].

23 Award [206].

24 Award [207]–[210].

25 Award [211].

26 Award [213]–[230].

27 Plaintiff's written submissions dated 17 February 2021 ("Plaintiff's Written Submissions") [29]–[35], [40].

(b) that CIM was deprived of an opportunity to present its case on the respective findings, pursuant to Art 34(2)(*a*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"); and

(c) that the respective findings were beyond the scope of the submission to arbitration, pursuant to Art 34(2)(*a*)(iii) of the Model Law.

30 The right to present one's case is an aspect of natural justice: see *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [18]. CIM's arguments in relation to these two grounds also feature significant overlap. I will hence deal with CIM's arguments in relation to these two grounds together, as a single challenge on a combined basis, which for convenience I will refer to as the natural justice challenge.

31 Therefore, the issues before me in the present application are:

(a) whether the Cooperation Finding should be set aside on the basis that there was a breach of the rules of natural justice;

(b) whether the Cooperation Finding should be set aside on the basis that it was beyond the scope of the submission to arbitration;

(c) whether the Calculation of Damages Finding should be set aside on the basis that there was a breach of the rules of natural justice; and

(d) whether the Calculation of Damages Finding should be set aside on the basis that it was beyond the scope of the submission to arbitration.

The natural justice challenge to the Cooperation Finding

CIM's complaint

32 CIM's challenge to the Cooperation Finding on the basis of natural justice forms the bulk of its submissions. Taking issue with the Tribunal's finding that there was "an obligation to cooperate in good faith to agree laycans, and that [CIM] had breached such good faith obligation", CIM argued that:[28]

> As the alleged good faith obligation, and [CIM's] alleged breach of such obligation, had not been pleaded by [CIN] and had not been brought to the notice of [CIM] prior to the hearing of the Arbitration, [CIM] was deprived of the opportunity to present its responsive case in relation to those issues.

33 CIM described the Tribunal's findings as threefold, all of which were said to be unpleaded:[29]

(a) an obligation on CIM to cooperate in good faith to agree laycans, either by interpretation of the express wording of the "Scheduling and Shipments" clause of the contract, or by an implied term;

(b) a breach by CIM of this obligation to cooperate in good faith to agree laycans; and

(c) by reason of this breach of the good faith obligation, a waiver by CIM of the condition precedent.

34 While CIM acknowledged what CIN had pleaded in its Statement of Reply concerning CIM relying on its own failures, CIM distinguished this from what CIN did not say, noting that CIN "never suggested that [CIM] was under

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28 Plaintiff's Written Submissions [73].

29 Plaintiff's Written Submissions [74], [75].

any obligation to cooperate in good faith to agree laycans and had breached such obligation".[30]

35 CIM also relied on the fact that its counsel had expressly stated during her oral opening what she understood to be CIN's case, namely that (i) CIN was not advancing any case that CIM had breached a duty in good faith to agree laycans; and that (ii) it would be for CIN to "plead and establish what implicit duty of good faith or other notion of cooperation had been broken", though "[o]f course, that's not a case that's pleaded or put". CIM stressed that this was said by their counsel "without any demur from [CIN's] counsel".[31]

36 CIM further relied on its having objected to what it considered to be a belated and unpleaded attempt to rely on an obligation of good faith in its written closing submissions.[32] As the Tribunal did not invite CIN to apply to amend its pleadings or invite submissions on this attempt to introduce unpleaded issues, CIM reasonably assumed that it would not entertain this new point.[33] CIM therefore could not reasonably foresee that the Tribunal would ultimately decide the case based on a chain of reasoning that it considered involved the unpleaded elements of an obligation to cooperate in good faith to agree laycans, a breach of that obligation and a waiver of the condition precedent.[34]

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30 Plaintiff's Written Submissions [75(c)].

31 Plaintiff's Written Submissions [92].

32 Plaintiff's Written Submissions [94].

33 Plaintiff's Written Submissions [95].

34 Plaintiff's Written Submissions [109] and [111].

CIN's response

37 CIN's principal response was that the chain of reasoning in the Award was not as CIM described it. The Tribunal's reasoning rested on the principle that a party cannot rely on non-fulfilment of a condition precedent that it has itself caused by its own lack of cooperation.[35] Nothing in the Tribunal's reasoning turned on any question of engaging in good faith, since the Tribunal concluded that there was no engagement at all.[36]

38 CIN also pointed out that the Tribunal had itself rejected the suggestion that CIN had mounted its case on the basis of bad faith.[37] On this issue, the Tribunal had said that "[CIM's] post-hearing submissions made much of *supposed* accusations of bad faith by [CIN], but in my view these were not a fair reflection of [CIN's] position and were something of a 'straw man'" [emphasis in original].[38]

39 CIN further contended that the Tribunal's actual chain of reasoning did not depart from what it had pleaded[39] (including its plea in the Statement of Reply that CIM was "relying on its own failures to agree on the shipment loading laycan"[40]), nor from what was in play throughout the rest of the arbitration.[41]

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35 Defendant's written submissions dated 17 February 2021 ("Defendant's Written Submissions") [32(d)], [33], and amplified at the oral hearing.

36 Defendant's Written Submissions [35].

37 Defendant's Written Submissions [36]–[37].

38 Award [223(2)].

39 Defendant's Written Submissions [38]–[41].

40 Defendant's Written Submissions [40]; Statement of Reply [2.13].

41 Defendant's Written Submissions [42]–[52].

The law relating to natural justice

40 Both parties referred to *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") for the applicable framework in this area. In *Soh Beng Tee* (at [29]), V K Rajah JA, giving the judgment of the Court of Appeal, affirmed that a party seeking to set aside an award on the basis of a breach of natural justice had to show:

(a) which rule of natural justice had been breached;

(b) how that rule had been breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced that party's rights.

41 In the present case, as noted above at [30], the rule of natural justice alleged to have been breached is the right to present one's case. The guiding lights illuminating this particular rule of natural justice include two clear and succinct dicta. Both emphasise that in evaluating whether there was a breach of this rule, the approach is to consider what a reasonable person in the position of the party challenging the award should have foreseen or anticipated:

(a) The applicant in a setting aside application must show that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award", per V K Rajah JA at [65(d)] of *Soh Beng Tee*.

(b) "An alternative way of looking at the question of a nexus between the tribunal's chain of reasoning and the parties' cases is to consider whether a reasonable party to the arbitration could objectively

> have foreseen the tribunal's chain of reasoning," per Vinodh Coomaraswamy J at [160] of *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768.

42 Implicit in this approach is that it is not enough that the party did not in fact foresee the possibility of the tribunal's chain of reasoning, if a reasonable party, in the same position, would have done so. The court will not rescue a litigant who failed to apprehend that an issue was alive or in play, if he should reasonably have done so.

43 For the purpose of determining what case it had to meet, CIM emphasised the role of the pleadings, by which it meant the Statements of Claim, Defence and Reply served in accordance with the applicable SIAC Rules.[42] CIM cited the dictum of Judith Prakash J (as she then was) at first instance in *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [55]:

> … An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. …

44 At the same time, the form which the pleadings should take is a matter of the institutional or other rules applying to an arbitration, as well as a matter of the arbitrator's discretion in the exercise of control over proceedings. Moreover, an unpleaded point may become live and in play if sufficient notice of it is given outside the pleadings proper, such that the other party has sufficient opportunity to meet the case. In this way, the battle lines drawn by the pleadings may, without any formal amendment, shift as a case progresses. This is not

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[42] Plaintiff's Written Submissions [74]–[89].

objectionable so long as there is sufficient opportunity for both parties to be heard on the new battle lines.

45 There is considerable judicial guidance on what an arbitrator should do when faced with a departure from pleadings. The Court of Appeal, in *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers Engineering*"), a case that concerned an adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), has explained that a decision-maker may need to invite submissions on a given issue before he decides that issue if (i) even though parties have addressed the issue, the way in which he will do so is so far removed from parties' positions that neither of them could have contemplated the result; or if (ii) parties have not addressed the issue at all because they did not know and could not reasonably have expected that it would be in issue at all (at [56]–[59]). However, the Court of Appeal also pointed out (at [60]) that sometimes the outcome of a proceeding is surprising to a party only because it failed to apply its mind to the issue, or failed to appreciate its significance, or just assumed the decision-maker would adopt their position on the issue.

46 More recently, the Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"), has authoritatively summarised the principles applicable to a natural justice challenge as follows (at [104]):

> (a) The parties' right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a 'full opportunity' of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.
>
> (b) The Art 18 right to a 'full opportunity' of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.

> (c) What constitutes a 'full opportunity' is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and 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.
>
> (d) In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that (i) the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently.

47 The last principle offers an important cautionary note. As with all aspects of review of an arbitration, the exercise is fact-sensitive and must have regard to the dynamic nature of the process, and the way it unfolds in real time.

Discussion

Outline of steps for review

48 In determining whether there is a breach of the right to present one's case, I have to consider whether the links in the Tribunal's chain of reasoning should reasonably have been anticipated by counsel for CIM (see [40]–[42] above). In so doing, I must:

(a) identify what those links were;

(b) consider whether objectively those links were pleaded, or otherwise given notice of;

(c) even if those links were pleaded or otherwise notified, consider whether counsel for CIN's silence in the face of CIM's counsel's

expressed misunderstanding impacted whether or not they were or continued to be in play; and

(d) even if those links were not on objective consideration in play on the face of the pleadings, consider whether the Tribunal's view that they were in play was itself a determination of an issue before it, and what the impact of that should be.

The links in the Tribunal's chain of reasoning

49 The first question is what the Tribunal decided, and what the links in its chain of reasoning were. It may be helpful to start with what the Tribunal did not decide. The Tribunal certainly did not proceed on the basis of an alleged anticipatory breach by CIM that was accepted by CIN and for which damages were payable. There was no mention of anticipatory breach at all. This is significant because it is this line of reasoning that counsel for CIM had identified in her oral opening as what CIN was relying on without having pleaded.

50 While the Tribunal did refer to an obligation to "engage in good faith", the Tribunal did not decide that there was a *free-standing* obligation to cooperate in good faith, a breach of which sounded in damages. There was no suggestion or discussion of this at all.

51 Rather, the Tribunal's reference to the obligation to "engage in good faith" was part of its broader analysis of how the prevention principle applied to the facts. The Tribunal first decided that both parties were obliged to engage in good faith and attempt to agree reasonable laycans. This obligation existed as a matter of construction of an express provision, or as a matter of implication. However, CIM breached this obligation by failing to cooperate with CIN, with the result that the conditions precedent, on which CIM sought to rely, could not

be satisfied. As a consequence, CIM waived its right to rely on the non-fulfilment of the condition precedent to excuse its breach of the obligation to deliver. Strong reliance was placed on "well-established legal principles" discussed in *Chitty on Contracts* (H G Beale) (Sweet & Maxwell, 33rd Ed, 2018) ("*Chitty*") at paras 2-160–2-167, *Benjamin's Sale of Goods* (Michael Bridge) (Sweet & Maxwell, 10th Ed, 2017) at para 8-036 and the case of *Mackay v Dick* (see [25] above). Read in its entirety, the Tribunal's analysis rested on the prevention principle: CIM could not rely on the non-fulfilment of the condition precedent, because it caused that non-fulfilment by failing to cooperate with CIN.

52 That the Tribunal invoked the prevention principle is made even clearer at para 144 of its Award, where the Tribunal held that "[t]o accept [CIM's] argument based on the conditions precedent to delivery not having been met would be to allow [CIM] to rely on its own breach of its obligation to cooperate".

53 The Tribunal did qualify the duty to cooperate with the words "in good faith". It also labelled the consequence of CIM's prevention of the occurrence of the conditions precedent as CIM waiving reliance on them. This was an elaboration and refinement of how CIN's counsel had described the prevention principle.

What were the matters pleaded or otherwise in play

54 Turning to the second question of what matters had been pleaded or were otherwise in play, my task is to read the pleadings, transcripts and other material objectively. In doing so, I must keep in mind the context, including that some participants in the arbitration, such as counsel and the Tribunal, would be legally trained, and, in particular, trained in the common law, while others, such as the witnesses would not be. The objective meaning of a communication is shaped

by its context, including its audience. When considering utterances for which we have to depend on a transcript, we cannot depend purely on the dry text, but must try to re-enter the room in which they were spoken, because that is the context that has to be considered. The context would potentially include non-verbal aspects and reactions. In this particular case, the hearing was conducted by remote means, so the room in question was a virtual one.

55 The starting point is CIN's Statement of Reply. It responded to the defence of non-fulfilment of conditions precedent. I accept that it brought into play CIM's entitlement to rely on the non-fulfilment of the conditions precedent, when CIM had itself failed to agree on the laycans because the contracted price was not favourable. That the Statement of Reply excoriated CIM's position for being "unrealistic" rather than squarely referring to the prevention principle made it imprecise. This imprecision obscured but did not entirely block the meaning. CIM was put on notice that in order to rely on non-fulfilment of the conditions precedent, it had to either show on the facts that it was not at fault for their non-fulfilment, or that on the law any such fault was immaterial. Having been put on notice in this way, it was CIM's prerogative to develop its case as it saw fit in order to meet the point.

56 Read in context, the sentence in the Statement of Reply that the Tribunal did not need to be drawn into the dispute over who was at fault in relation to agreeing on laycans, was a rhetorical flourish. It was a lead-in to telling the Tribunal that the responsibility for non-fulfilment of conditions precedent stemmed from something more fundamental, namely CIM's unwillingness to deliver at the contracted price. In other words, what CIN's counsel was saying was that the Tribunal need not concern itself with the detailed back-and-forth of the messages between CIM and CIN because underlying them all was CIN's unwillingness to deliver at the contracted price. That was the root of the

problem. I am satisfied that this is how these paragraphs should be read. It is also how they were in fact understood by the Tribunal. This is shown by how it addressed the issues in the Award. The attempt to detach this sentence from its context and rely on it as a representation by CIN's counsel that the question of fault for non-agreement of laycans was not in issue in the arbitration is itself artificial and unreal.

57 That is not to say that CIM might not have applied successfully for particulars or some other appropriate amplification of CIN's case. CIM would have been entitled to know the case against it more precisely. Proper particulars would have included whether the obligation CIM was alleged to be under was said to be express or implied and what the content of the obligation was (*eg*, to cooperate, to act in good faith, or to do all necessary on its part). Nonetheless, CIN's case was clear in substance. The nub of CIN's pleaded case was that CIM was unwilling to agree on laycans because it considered the contracted price to be unfavourable. It hardly mattered then how precisely the duty to cooperate was defined, because whether broad or narrow, deep or shallow, it had not been met. This was what the Tribunal effectively found, when it later described CIM's conduct as a "failure to engage".[43]

58 As the arbitration proceeded, CIN did flesh out its case on this aspect, and repeatedly targeted the point that CIM was simply unwilling to supply at the contracted price and that this rendered it pointless to try to agree laycans or to nominate vessels. This was done through CIN's written opening submissions (see [10] above) and the questions that CIN's counsel posed to witnesses (see [17] above). Subsequently, CIN's written closing submissions also contended that CIM could not rely on the non-fulfilment of conditions precedent to excuse

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[43] Award [144].

its breach, as it would be relying on its own failure to engage with CIN on the issue of laycans (see [18] above). Though CIN, in its Statement of Reply, did not explain the legal significance of its point that it was "unreal" for CIM to rely on the conditions precedent, CIM itself included extracts from *Chitty* that discussed *Mackay v Dick*.[44] There could not have been any mystery that the prevention principle was in play.

59 Therefore, on an objective view of the materials before the Tribunal, the prevention principle was brought into play by CIN's Statement of Reply and consistently raised throughout the course of the arbitration even before CIN filed its written reply closing submissions. It follows that the Tribunal was entitled to make the Cooperation Finding, which rested on the prevention principle.

60 That the Tribunal said that CIM had waived its right to rely on the conditions precedent did not introduce any additional point. The Tribunal described the consequence in those terms following what appears to be its own research into the debate over the juridical basis of the prevention principle, as footnoted by it.[45] That an arbitrator sees fit to polish or hone the law relied on by counsel may be an indulgence, but it does not begin to amount to a breach of natural justice.

The impact of silence in the face of an expressed misunderstanding

61 Turning to the third question, of the impact of counsel for CIM articulating her (mis)understanding of CIN's case without demur from CIN, the inquiry must be as to whether this interaction during the hearing objectively

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44 Award [142]; Index to Hearing Bundle C-2 (Legal Authorities), s/n 42.

45 Award [144], fn 22.

altered what was in play in the arbitration. It is possible that oral interactions during the course of a hearing are sufficiently clear that they do impact the state of play, including what issues remain alive. For example, if one party's counsel represented that a particular part of that party's pleading would no longer be relied upon, then the arbitrator should not decide the case based on that part of the pleading even though it remained on the face of the pleading. Doing so might take the other party by surprise. Similarly, if a pleading was vague or ambiguous and it was not clarified by amendment but simply orally in the course of the hearing, it would not ordinarily be open to the arbitrator to decide the case based on an interpretation of the pleading different from how it was orally clarified. In principle, if the counsel for the other party stated that she understood the pleading in a particular way and the counsel for the first party confirmed that understanding expressly, this too would shape the issues and what was in play. While good practice on the part of an arbitrator would be to require the withdrawal or clarification to be clearly pinned down by some written record of amendment, the dynamic nature of the arbitral process, as well as time and resource pressures, inevitably means that this does not always happen, and sometimes matters are left to an oral exchange.

62 Returning to the interaction in question, CIM's counsel expressed to the Tribunal in the presence of CIN's counsel her misunderstanding that what was being relied on was an accepted anticipatory breach that was not pleaded and so was not in play. She said she understood CIN's case as being one of acceptance of an anticipatory breach of an implicit duty of good faith or other notion of cooperation, and that that case was not pleaded. CIN's counsel remained silent. It was not in fact CIN's case that it had accepted any anticipatory breach, and for that reason no such case was pleaded. However, CIM's counsel's characterisation of CIN's case in this way meant that she had failed to appreciate that CIN was relying on the prevention principle. What she said meant that

CIN's counsel, if alert and sensitive to the nuances, could have become aware of her misunderstanding. He could have understood that if CIM's counsel proceeded to act on this misunderstanding, she would not engage with CIN's case of the prevention principle, because subjectively she was not aware of it.

63 While inferring all of these consequences was possible, making these inferences would have entailed a degree of speculation. Objectively, CIN's counsel's silence was far from sufficient to alter the shape of the issues in play. It was her oral interchange with the Tribunal, not with CIN's counsel. If CIM's counsel wanted a formal confirmation or clarification from opposing counsel she could have invited the Tribunal to seek that from CIN's counsel. She did not do so. Not having done so, it would be wrong to treat silence as if it amounted to a formal confirmation of CIN's position.

64 To elaborate, there are two distinct difficulties with CIM's reliance on this interaction. First, it imposes on opposing counsel a heavy burden of interpretation of and inference from their own counsel's words. After all, nothing was said by her about whether the prevention principle was in play. It is only by inference that one could conclude that CIM's counsel had not understood that the prevention principle was in play. Even then, it is not an irresistible inference – one could also infer that CIM's counsel was deliberately mischaracterising her opponent's case to make it seem weaker. To expect CIN's counsel to infer that CIM's counsel had a genuine misunderstanding places far too much burden on CIN's counsel to read the mind of opposing counsel.

65 Secondly, it imposes on opposing counsel a duty of intervention and correction. There is no basis for such a duty. Counsel is not expected to intervene whenever opposing counsel seems to misunderstand something. This is especially so because not every expression of misunderstanding by counsel

can be taken at face value. It may well be engaged in for forensic or rhetorical purposes. For example, a rhetorician may choose to engage not with his opponent's actual argument but a misstated or mischaracterised form of it that is easier to refute. This seems to have been how the Tribunal saw what was happening, at least in part, when it referred to CIM's counsel attacking a straw man. Ultimately, counsel are responsible for what they say, not what opposing counsel say. One may wonder where it would end if it were otherwise. Would CIN's counsel in this matter upon hearing the misunderstanding have to show CIM's counsel where the point is pleaded? What if CIM's counsel had been unconvinced that that was what the pleading meant, or had disagreed about the potential relevance of the prevention principle?

66 It bears repeating. Counsel are responsible for arguing their own case, not for ensuring that the other side meets their case.

67 To sum up, CIN's silence objectively did not alter the shape of the issues at play. A finding that it did would impose an unwarranted burden on one counsel to read the opposing counsel's mind and intervene whenever the latter appeared to have misconceptions about the former's case.

68 As a final remark, CIM linked the absence of demur to its surprise when, according to it, the alleged obligation to cooperate in good faith to agree laycans was first raised in CIN's written closing submissions.[46] But the reason for its surprise was two misreadings. First, it misread the Statement of Reply, and did not appreciate the significance of CIN blaming the failure to agree laycans on CIM's unwillingness to supply at the contracted price. Secondly, it misread CIN's written closing submissions, which did not raise any new free-standing

[46] Plaintiff's Written Submissions [93].

obligation to cooperate in good faith to agree laycans. Certainly, CIM's own misinterpretation of CIN's case could not have altered what was objectively in play during the arbitration; and where a litigant failed to apprehend that an issue was in play even though a reasonable person would have, the court will not come to its rescue (see above at [41]–[42]).

The impact of the Tribunal's own understanding of what was in play

69 Turning to the fourth question, of the impact of the Tribunal's own determination of what was in play, I do not strictly need to consider this, given my view that the prevention principle was objectively in play from the Statement of Reply onwards. Nonetheless, how the Tribunal understood the submissions made to it is part of the material from which the court discerns an objective understanding of those submissions. This is because the Tribunal was in the room, and would have heard or read them in that context. In addition, an arbitrator may be called upon to determine what is meant by the pleadings, after hearing arguments on that meaning. It is not uncommon when a case nears its end for parties to disagree over what the pleadings encompass. The arbitrator's responsibility is to hear what both parties have to say on the pleading point and then make its decision. As the Court of Appeal in *China Machine* explained (see [46] above), the court should accord a measure of deference to the tribunal's decisions on matters of procedure. How formal the pleadings are required to be is a matter of procedure. Thus, if in this case I had come to a different view of what was raised in the Statement of Reply, I would then have brought into consideration what the Tribunal said in the Award, concerning the objections raised by counsel for CIM as to the pleadings. The Tribunal expressed the view that "any new submissions made at the hearing were in line with [CIN's]

pleaded case".[47] As it happens, I accept that objectively CIN did not depart from its pleaded case, and so agree with the Tribunal's view on this point. As for CIM's accusations that CIN had made allegations of bad faith, the Tribunal went so far as to describe them as a "straw man".[48] For the purposes of this challenge, I do not need to decide whether I agree with the Tribunal's suggestion that CIM's counsel was attacking a straw man. I do not need to decide whether CIM's counsel expressed a genuine misunderstanding of CIN's pleadings or deliberately mischaracterised them for rhetorical purposes. On either view, the prevention principle was properly in play in the arbitration.

70 I will add for completeness that a tribunal's wrong decisions on what pleadings objectively entailed could still potentially raise natural justice or jurisdictional issues in appropriate cases. This is distinct from the two points made in the preceding paragraph, namely that how a tribunal views the submissions is part of the context when seeking to determine their objective meaning, and that a measure of deference should be given to a tribunal's procedural decisions.

71 In this case, it is clear that the Tribunal understood that from the pleadings, the opening, the course of the evidence-taking and the submissions that CIN did rely on the prevention principle, and that CIM had to deal with it if it wished to succeed. The Tribunal was right to arrive at this understanding. Given its understanding, the Tribunal never considered that CIN's case was misframed in the way CIM contended, or at all. The Tribunal went a step further, explicitly coming to the view that CIM was employing a rhetorical tactic, that of attacking a straw man. In these circumstances, the question of indicating

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47 Award [223(1)].

48 Award [223(2)].

concerns to parties and inviting further submissions never arose. CIM was not entitled to assume that the Tribunal had agreed to its pleadings objection and that that was why the Tribunal did not invite further submissions. If CIM desired a formal ruling on the pleadings point before proceedings closed so that, if the ruling went against it, it could decide whether to seek leave to make additional submissions on the prevention principle, then it was incumbent on CIM to make that application in its closing submission or separately.

72 Counsel that attack a straw man can only blame themselves for missing the real target.

Conclusion on the natural justice challenge to the Cooperation Finding

73 Having regard to the framework set out in *Soh Beng Tee* (see [40] above), the rule of natural justice in question is the right to present one's case. I do not consider this rule to have been breached in relation to the Cooperation Finding: the prevention principle was, as I have found, objectively in play, such that it was not open to CIM to claim that it could not have reasonably foreseen the reasoning in the Award. This finding is not affected by the silence of CIN's counsel in the face of CIM's counsel's expressed misunderstanding. There is therefore no need to proceed with the remaining steps in the *Soh Beng Tee* framework. I dismiss the natural justice challenge to the Cooperation Finding.

The jurisdictional challenge to the Cooperation Finding

74 CIM also challenged the Cooperation Finding on jurisdictional grounds, namely that it was a decision on a matter beyond the scope of the submission to arbitration. This point was not separately argued at the oral hearing, and rested on no material other than that relied on for the natural justice challenge. Given my views on what was in play in the arbitration, including what was pleaded in

the Statement of Reply, I am satisfied that the Tribunal's decision was within the scope of the submission to arbitration, and I dismiss this challenge as well.

The natural justice challenge to the Calculation of Damages Finding

75 I turn to CIM's arguments on the Calculation of Damages Finding. CIM's first challenge to this finding was that it should be set aside if the Cooperation Finding was set aside.[49] Having dealt with the latter, this argument naturally fails. However, quite apart from that, CIM challenged three aspects of the Calculation of Damages Finding, asserting that there had been a breach of natural justice in relation to each. These three challenges were not really developed at the oral hearing, and essentially rested on the material set out in its written submissions.

76 The first complaint made was that the Tribunal recorded at para 206 of the Award that "[CIM] did not enter into this debate", when in fact CIM had made the submission that it would be inappropriate to assess damages under s 51(3) of the English Sale of Goods Act on the basis of notional or hypothetical dates of delivery.[50] This complaint is misplaced. The Tribunal from paras 162 to 182 of the Award did indeed deal with CIM's arguments that the claim failed because of the absence of agreed delivery dates and that CIN had to prove actual loss and not proceed on notional or hypothetical dates. In truth, what the Tribunal meant when it said that "[CIM] did not enter into this debate" was that CIM did not present its own alternative models or scenarios for how damages should be calculated, in particular, on the question of when the undelivered clinker would have been delivered if the contract had been performed. The Tribunal was not suggesting that CIM stayed silent on the appropriateness of

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49 Plaintiff's Written Submissions [151].

50 CIM's Arbitration Closing Submissions [89]–[94].

assessing damages based on notional or hypothetical dates, or that CIM had conceded anything.

77 The second complaint was that the Tribunal did not simply choose one of the four alternative scenarios for calculation of damages pleaded by CIN at para 4.6 of the Statement of Claim but adopted a different assumption, namely that the agreed laycans would have been evenly spaced over the span of the contract. CIM then said it was deprived of the opportunity to address the Tribunal on how this assumption should not be adopted.[51] This complaint again fails. CIM knew or ought to have known that for the purposes of assessing damages the question of when the undelivered clinker would have been delivered was in issue. It had the opportunity of putting in its own arguments, models and scenarios but chose not to do so. It effectively adopted the position, as a matter of its own litigation strategy, that it would focus its contentions on whether damages could be assessed at all by any exercise of looking to notional or hypothetical delivery dates. It chose not to engage with the further question, that was obviously in play, of which delivery dates should be assumed for the calculations. In any event, an arbitrator is not required to slavishly follow one or other of the alternatives presented, but may apply his own reasoning to assess them and make adjustments that he considers just, so long as he does not, in the words of the Court of Appeal in *Glaziers Engineering* at [56], "[answer the] question in a way that is so far removed from any position which the parties have adopted that neither of them could have contemplated the result."

78 The third complaint was that the method adopted by the Tribunal rested on the unpleaded assumption that evenly spaced deliveries was broadly what the parties would have come to if they had sought to agree laycans in good

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[51] Plaintiff's Written Submissions [157]–[161].

faith.[52] This complaint too is without merit. All the Tribunal did was undertake the common or garden exercise of trying to work out, for the purpose of assessing damages, what would have happened if the contract had been performed. The assumption made by the Tribunal did not have to be pleaded for this purpose, because any litigant in CIM's shoes would have known that this was the exercise the Tribunal would have had to embark on. Moreover, there was evidence before the Tribunal that the parties indeed contemplated roughly monthly shipments of clinker, in short, evenly spaced deliveries.[53]

79 Consequently, as with the Cooperation Finding, I find that there was no breach of natural justice in relation to the Calculation of Damages Finding, and so dismiss CIM's challenge in this respect.

The jurisdictional challenge to the Calculation of Damages Finding

80 I turn finally to CIM's argument that aspects of the Calculation of Damages Finding (namely the Tribunal's departure from CIN's four scenarios and the Tribunal's assumption of evenly spaced deliveries) lay beyond the scope of submission to the arbitration. Once more, CIM's contentions in this regard were confined to its written submissions, as they were not developed at the oral hearing. Even in its written submissions, this jurisdictional challenge was not elaborated upon in its own right, and appeared to rest upon the preceding material on natural justice.[54] Given my views on the natural justice challenge to the Calculation of Damages Finding, I am satisfied that the Calculation of

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52 Plaintiff's Written Submissions [163].

53 Defendant's Written Submissions [80]; Arbitration transcript for 23 July 2020 pp 121–124.

54 Plaintiff's Written Submissions [162], [165].

Damages Finding was within the scope of submission to arbitration. I therefore dismiss this jurisdictional challenge as well.

Conclusion

81 I conclude that the Award was made on matters submitted and argued within the proceedings. CIM had adequate notice of the case it had to meet. There was no breach of natural justice or excess of jurisdiction.

82 Accordingly, I dismiss this originating summons. I will hear parties on costs.

Philip Jeyaretnam
Judicial Commissioner

Nakul Dewan SA (instructed), Loong Tse Chuan and Lim Wei Shen Mark (Allen & Gledhill LLP) for the plaintiff;
Siraj Omar SC, Allister Brendan Tan Yu Kuan, Cheng Hiu Lam Larisa and Joelle Tan (Drew & Napier LLC) for the defendant.