IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 29

Civil Appeal No 61 of 2017 (Summons No 132 of 2017)

Between

BNX

… *Applicant*

And

BOE

… *Respondent*

Civil Appeal No 62 of 2017 (Summons No 133 of 2017)

Between

BNX

… *Applicant*

And

BOE

… *Respondent*

In the matter of Originating Summons No 871 of 2016

Between

BNX

… *Plaintiff*

And

BOE

… *Defendant*

In the matter of Suit No 1097 of 2016 (Summons No 5305 of 2016)

Between

BNX

… *Plaintiff*

And

BOE

… *Defendant*

JUDGMENT

[Civil Procedure] — [Appeals] — [Admission of further evidence on appeal]

[Civil Procedure] — [Discovery of documents] — [Implied undertaking not to use discovered documents for collateral or improper purpose]

BNX
v
BOE and another appeal

[2018] SGCA 29

Court of Appeal — Civil Appeals Nos 61 and 62 of 2017 (Summonses Nos 132 and 133 of 2017)
Sundaresh Menon CJ, Judith Prakash JA and Steven Chong JA
23 March 2018

26 June 2018 Judgment reserved.

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

Introduction

1 The discretion to admit further evidence on appeal to the Court of Appeal is one that has, unsurprisingly, been exercised by this court with circumspection. Such cautious treatment of fresh evidence that an applicant seeks to introduce, at the eleventh hour, to the potpourri of factors that an appellate court is already obliged to consider in a civil appeal, is warranted by the need to balance the quest for a just outcome with the countervailing interest of finality in litigation. This balance has been given lucid expression in the three conditions set out by Denning LJ in the celebrated decision in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"), these being non-availability of the evidence at trial, its relevance and materiality to the appeal, and its reliability.

Locally, we have embraced the application of the *Ladd v Marshall* conditions to guide our determination of whether, pursuant to s 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") and O 57 r 13(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"), "special grounds" can be said to exist such that the admission of further evidence on appeal is warranted.

2 In the present proceedings, the applicant, BNX, seeks to adduce further evidence in support of the two appeals to the Court of Appeal that it has brought against the decision of the High Court judge ("the Judge"), which is reported as *BNX v BOE and another matter* [2017] SGHC 289 ("the GD"). Court of Appeal Summons No 132 of 2017 ("SUM 132") is an application to adduce further evidence in Civil Appeal No 61 of 2017 ("CA 61"). That is an appeal brought by BNX against the decision of the Judge in Originating Summons No 871 of 2016 ("OS 871") to dismiss the application it brought under s 48 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA") to set aside the arbitral award rendered in favour of BOE, the respondent in these proceedings, in International Chamber of Commerce ("ICC") Case No 20598/CYK ("the Award"). Court of Appeal Summons No 133 of 2017 ("SUM 133") is an application to adduce further evidence in Civil Appeal No 62 of 2017 ("CA 62"). That is the appeal of BNX against the decision of the Judge, made on the application of BOE in Summons No 5305 of 2016 ("SUM 5305"), to strike out Suit No 1097 of 2016 ("Suit 1097"), which was a suit commenced by BNX against BOE after the Award had been rendered.

3 The evidence that BNX seeks to introduce includes correspondence between BOE, the architectural firm hired by BOE (which we refer to as "[A]"), and the Urban Redevelopment Authority ("the URA"). BNX alleges that BOE had wrongfully withheld this correspondence during the arbitration proceedings

between BNX and BOE, which culminated in the Award. BNX also seeks leave to adduce the pleadings and some correspondence from another related suit brought by BNX against [A]. BNX further seeks leave to adduce affidavits from the individuals who, BNX alleges, were involved in withholding the correspondence, and leave for both parties to cross-examine those individuals. All these, BNX argues, will show that BOE had prevailed in the earlier arbitration proceedings by committing fraud and perjury, such that the Award ought to be set aside, and that Suit 1097, which was brought by BNX against BOE, ought not to be struck out.

4 We reserved judgment following the hearing, and now furnish our decision and the accompanying reasons.

Background

5 We begin by setting out the relevant facts in so far as they bear upon the present applications to adduce further evidence on appeal.

The dispute

6 The present dispute arose out of a Sale and Purchase Agreement ("the SPA") dated 16 December 2013 that BNX and BOE entered into for the sale of a hotel in Singapore by BOE to BNX.

7 BOE acquired a 99-year lease of a parcel of land by way of a grant from the Singapore Government on 17 November 2008. Pursuant to the head lease, BOE was to develop the land in accordance with plans approved by the competent authority under the Planning Act (Cap 232, 1998 Rev Ed), namely, the URA. Among other things, BOE had to ensure that at least 25% of the maximum permissible gross floor area ("GFA") in the proposed development

would be applied for use as a hotel, and at least 60% as office space. In accordance with the guidance provided in a circular issued by the URA on 2 September 2002, facilities within a development that did not fall within the core understanding of hotel use could nonetheless be included in the computation of the space deemed to have been set aside for hotel use as long as these were for the sole and exclusive use of guests and staff of the hotel.

8 Construction of a mixed-use development at the said parcel of land acquired by BOE took place from late 2010 to October 2013 ("the Development"). During this period, the URA imposed various use restrictions on the Development that mirrored those in the head lease by issuing grants of written permission specifying the restrictions.

9 On 29 July 2009, the URA issued the first grant of written permission for the Development ("the 2009 GWP"). On 22 October 2009, the URA raised concerns in a letter sent to BOE's project architects, [A], and suggested that BOE's plans for the Development failed to attribute the minimum 25% of the GFA for use as a hotel. These concerns stemmed from the fact that various parts of the Development appeared to be for facilities that would commonly be used by members of the public and hence could not be attributed as being for hotel use. At various times between 2009 and 2013, BOE engaged the URA in discussions as to what would be required to ensure that sufficient facilities in the Development could be attributed as being for hotel use. [A] played a significant role in BOE's discussions with the URA in this connection. [A] advised BOE as to how the URA's use restrictions could be understood as well as on the effect of the restrictions on who could operate or patronise the facilities in question, and communicated with the URA on BOE's behalf.

10 On 20 July 2010, the URA informed BOE that the meeting rooms on the third floor of the Development could be attributed as being for hotel use only if BOE provided a letter of undertaking declaring that those spaces were not to be open for use by the public. The URA further required those spaces to be annotated in the plans to state that they would be "for hotel staff use only", and also intimated that it would subsequently impose a condition in its written permission to that effect. On 14 October 2010, BOE undertook to the URA in writing ("the October 2010 Undertaking") as follows:

> We refer to our consultant's clarification regarding *3rd storey hotel meeting room* GFA quantum via email correspondence 28 July 2010 and 02 August 2010 and URA's reply dated 12 August requesting for Letter of Undertaking.
>
> We hereby agree and undertake that *meeting rooms* computed under Hotel quantum will be ***for hotel guests and staff use only (not open to public)***.
>
> [emphasis added in italics and bold italics]

11 On 27 March 2013, following a request from the URA for clarification of BOE's intentions in respect of the use of the food and beverage facilities (also referred to as guest lounges) on the 32nd and 33rd floors and the executive lounge, spa, gym and meeting rooms on the 35th floor, BOE furnished the URA with another written undertaking ("the March 2013 Undertaking") as follows:

> We refer to our consultant's meeting with URA held on 5 March 2013 for clarification on hotel facilities GFA quantum and noted that URA requested for Letter of Undertaking.
>
> We hereby agree and undertake that *32nd and 33rd Storey Guest Lounges, 35th Storey Health & Fitness Centre, Treatment Rooms, Business Centre Meeting Rooms and Executive Lounge* computed under Hotel quantum will be ***for hotel guests and staff use only***.
>
> [emphasis added in italics and bold italics]

12 On 10 May 2013, BOE gave the URA yet another written undertaking ("the May 2013 Undertaking") as follows:

> We refer to our consultant's meeting with URA held on 5 March 2013 for clarification on hotel facilities GFA quantum and noted that URA requested for Letter of Undertaking.
>
> We hereby agree and undertake that:
>
> *32nd and 33rd Storey Guest Lounges* computed under Hotel quantum will be ***for hotel guests and staff use only***.
>
> *35th Storey Health & Fitness Centre, Treatment Rooms, Business Centre Meeting Rooms and Executive Lounge computed under Hotel quantum will be* ***for hotel guests [sic] use only***. *From 32nd Storey Hotel Lobby, hotel guests need to transfer to another set of Lifts … to access the upper hotel floors (including 35th Storey).* ***This set of Lifts is card controlled hence access is restricted for hotel guests only***.
>
> [emphasis added in italics and bold italics]

13 On 23 May 2013, the URA issued another grant of written permission in respect of the Development ("the May 2013 GWP"). The May 2013 GWP granted BOE planning permission, subject to the condition that the facilities within the Development that were the subjects of the October 2010 Undertaking, the March 2013 Undertaking and the May 2013 Undertaking (specifically, the third floor meeting room, the 32nd and 33rd floor food and beverage facilities, and the 35th floor executive lounge, spa, gym and meeting rooms, henceforth referred to as "the Relevant Facilities") would be restricted for the exclusive use of hotel guests and staff, and would *not* be open to the public.

14 In July 2013, BNX, which was looking to purchase a hotel in Singapore, approached BOE and inquired about purchasing the Development. BNX was keen to complete the acquisition of any property before the end of 2013 so as to enjoy a tax benefit worth about US$40m in the country of origin of its parent holding company.

15 On 2 September 2013, the Temporary Occupation Permit ("TOP") was issued for the Development. This signified that the Building and Construction Authority accepted that the Development was in compliance with the URA's requirements in relation to the various uses of the GFA.

16 On 20 September 2013, BNX wrote to BOE offering to purchase the Development for S$475m.

17 It is common ground that BOE was to arrange for access to all relevant materials to be provided to BNX as soon as practicable in order to enable BNX and its consultants to undertake their due diligence review prior to completing the purchase of the Development. As part of the due diligence process, BOE established a "virtual data room", which was a database containing soft copies of all the key documents relevant to the Development. BOE also set up a "physical data room", which was a room containing all the drawings and correspondence relating to the Development accumulated from the start of the project. This included about 30 large lever-arch files containing all the correspondence between BOE and the various authorities in Singapore, with six of these files containing BOE's and [A]'s correspondence with the URA in particular. Notably, the October 2010 Undertaking and the March 2013 Undertaking could be found in the *physical* data room, but *not* in the *virtual* data room. As for the May 2013 Undertaking, it was *not* included in either the physical data room or the virtual data room.

18 On 7 October 2013, BOE informed BNX that the relevant information for the purpose of due diligence had been prepared and could be accessed in the virtual data room. BOE provided BNX with the details required to gain access to the virtual data room and the list of categories of the documents that were there.

19 On 10 October 2013, the URA issued to [A] (on behalf of BOE) a final grant of written permission ("the October 2013 GWP") in respect of the Development. The October 2013 GWP referred to planning conditions stipulated in the approved plans at that time, which in turn specifically identified drawings that disclosed the use restrictions for the Relevant Facilities in the Development. BOE included the October 2013 GWP in the virtual data room.

20 On 21 October 2013, BOE agreed to sell the Development to BNX, and on 25 October 2013, it signed its acceptance of the offer letter from BNX dated 20 September 2013. The agreement that was concluded at this stage was subject to conditions, including the satisfactory completion of the due diligence process.

21 As it transpired, BNX did not make any due diligence enquiries in relation to the material in the virtual data room until 4 November 2013, which was about a month after the material had first been made available. On or about that date, BNX submitted a Microsoft Excel spreadsheet setting out a number of queries with separate columns showing: (a) the location within the disclosed materials of any document in relation to which the query or request related, (b) the nature of the information sought, (c) the importance of the query, and (d) a blank column for BOE to provide its response. The spreadsheet was updated on an ongoing basis to incorporate any further information required or requests or queries emanating from BNX. After the initial round of queries submitted on 4 November 2013, there were four further rounds of queries submitted on 14, 22 and 29 November, and 2 December 2013.

22 On 28 November 2013, WongPartnership LLP ("WongPartnership"), whom BNX had retained as solicitors for the purposes of this sale, wrote to BNX to draw its attention to two subfolders uploaded into the virtual data room and, in particular, the letters sent from URA on 22 October 2009 (in which the

URA had raised concerns as to compliance with the GFA requirements in the head grant of the Development), and 20 July 2010 (in which the URA had specifically raised the need for BOE to provide a letter of undertaking to the effect that facilities on the third floor of the Development were not to be leased out for public use) (see [9] and [10] above).

23 In a telephone conference between WongPartnership and BNX on 29 November 2013, WongPartnership advised BNX that the Development could not be occupied unless the issue regarding the fulfilment of the GFA requirements for the Development was resolved to the satisfaction of the URA. On the same day at 4.30pm, BNX requested from BOE details of any follow-up, including related correspondence between the URA and [A], regarding the issues raised by the URA in its letters sent on 22 October 2009 and 20 July 2010. At 6.23pm on the same day, BOE replied, stating that the issues raised in that letter had been resolved by the issuance of the TOP. Following this, WongPartnership referred the matter to EC Harris (a firm of consultants that BNX had hired to assist with the due diligence process) and specifically requested EC Harris to confirm with BNX that the GFA requirement prescribed by the authorities had been fulfilled and regularised.

24 Separately, a representative from EC Harris visited the physical data room from 5 to 7 November 2013 to review the drawings and documentation stored there. He was assisted by a representative of BOE who was familiar with the documents and remained on hand to assist him in finding anything that he might need.

25 On 11 November 2013, the hotel commenced operations.

26 On 2 December 2013, BNX sought a copy of the October 2013 GWP. This was duly provided on 3 December 2013.

27 Also on 2 December 2013, EC Harris informed BNX that in the light of the issuance of the TOP, it believed that the appropriate measures had been taken, but that BNX should nonetheless seek a legal opinion from its own legal counsel on whether the Development had any outstanding issues in relation to planning approvals. EC Harris also advised WongPartnership that it would be a good idea for it to check with [A] and BOE to satisfy itself that the issues raised in 2009 had been resolved. It is not clear whether or how WongPartnership specifically acted on that advice. It did send a copy of the October 2013 GWP to BNX, which, as noted above, referred to the planning conditions stipulated in the approved plans at that time, which in turn specifically identified drawings that disclosed the use restrictions for the Relevant Facilities in the Development; and it also informed BNX that the URA had confirmed that the issues raised in the 22 October 2009 letter had been resolved by the various grants of written permission issued thereafter.

28 Further, on 11 December 2013, when WongPartnership produced its legal due diligence report, among other things, it concluded that BNX should instruct its consultants to review the various grants of written permission that had been issued together with the accompanying permits, permissions and drawings. BNX did not follow up on that advice.

29 On 16 December 2013, BNX and BOE signed the SPA. On 19 February 2014, BNX and BOE entered into a lease agreement, which was to run until the day immediately before BOE's head grant would expire. The lease agreement, which was registered on 2 April 2014, was granted by BOE to BNX in order to effect the sale of the Development.

30 Despite the use restrictions, from the commencement of hotel operations in November 2013 until July 2014, members of the public were permitted to patronise the Relevant Facilities. However, in July 2014, BNX first became aware that the URA had restricted the use of the Relevant Facilities to guests and staff of the hotel. BNX accused BOE of wrongfully failing to disclose the use restrictions during the negotiations for the SPA. BOE rejected this allegation. This eventually led to the present dispute.

The arbitration proceedings

31 On 29 October 2014, BNX commenced arbitration proceedings against BOE by filing a Request for Arbitration with the Secretariat of the International Court of Arbitration of the ICC. This was pursuant to cl 33.2 of the SPA, which provides for disputes under the SPA to be resolved by arbitration in Singapore under the Rules of Arbitration of the ICC. The AA (and not the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA")) applied to govern the arbitration proceedings pursuant to s 3 of the AA, given that the arbitration was seated in Singapore and was *not* an international arbitration within the meaning of s 5(2) of the IAA, such that Part II of the IAA did not apply.

32 In the Statement of Case filed by BNX on 3 June 2015, the following claims were raised against BOE:

> (a) A primary claim for fraudulent misrepresentation, alleging that BOE had fraudulently misrepresented to BNX that members of the public would be permitted to patronise the Relevant Facilities, and that the Relevant Facilities could therefore generate an independent revenue stream for the business after BNX acquired it. BNX contended on this basis that it was entitled to rescind the SPA, and obtain a refund of the price and an award of damages.

(b) An ancillary claim for breach of contract, alleging that because BNX could not permit members of the public to patronise the Relevant Facilities, BOE was in breach of certain warranties under the SPA. BNX thus submitted that it should receive damages as compensation for the diminution in the value of the business by reason of losing the stream of revenue which it had expected would flow from its being able to open the Relevant Facilities to members of the public.

(c) Alternative claims for breach of an alleged collateral contract, unjust enrichment, constructive trust and non-fraudulent misrepresentation.

33 We pause to make an observation, to which we shall return. The case mounted by BNX rested on its belief at the material time that there were *no* applicable use restrictions as far as the Relevant Facilities were concerned. Hence, it had anticipated that these could be used to generate an independent stream of revenue. BNX further contended that this was so as a result of a representation or warranty to this effect made or given by BOE.

34 By 19 March 2015, the arbitral tribunal ("the Tribunal") was duly constituted.

35 Pursuant to Procedural Order No 1 issued by the Tribunal on 17 April 2015, the parties agreed, among other things, that the conduct of the arbitration would be governed by the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules").

36 On 29 July 2015, BOE filed and served on BNX its Statement of Defence, as well as its witness statements accompanied by the relevant factual exhibits and legal materials.

37 On 19 August 2015, each party delivered to the other a request for the production of documents in the form of a Redfern Schedule. BNX made 12 separate document requests in relation to correspondence between the URA, [A] and BOE, and for internal communications within BOE on planning approval, GFA calculations, the use restrictions, and the written permissions. BOE objected to all of these requests, ostensibly on the ground that these did not meet the requirement stipulated in Art 3(3)(a)(ii) of the IBA Rules that such requests concern a "narrow and specific category" of documents that were "reasonably believed to exist". Nonetheless, BOE offered to disclose all hard copy correspondence in its possession between [A] and the URA pertaining to the use restrictions. This included the October 2010 Undertaking and the March 2013 Undertaking, both of which had been available in the physical data room during the due diligence process before the parties had entered into the SPA. Notably, this offer to disclose did not include the May 2013 Undertaking. It was suggested that this was the case because the May 2013 Undertaking had somehow been inadvertently omitted from both the physical data room and the virtual data room during the due diligence process preceding the signing of the SPA (see [17] above).

38 On 10 September 2015, the Tribunal issued its ruling in respect of the various requests for the production of documents. The Tribunal rejected all of BNX's requests relating to the planning approval, GFA calculations, use restrictions and written permissions, finding that these requests did not satisfy the requirements under the IBA Rules because the categories of documents sought were too wide and inadequately specified. Instead, the Tribunal only made disclosure orders relating to the fraudulent misrepresentations alleged by BNX in its Statement of Case. These were restricted to documents that were relevant and material to showing the states of mind of the alleged representors

identified in BNX's pleadings. The Tribunal also acknowledged BOE's offer of voluntary disclosure and observed that no order was required in respect of the hard copy files that had been voluntarily made available by BOE. Subsequently, in late September 2015, BNX's counsel attended BOE's offices to review the hard copy files that BOE had voluntarily offered to disclose, and made copies of these.

39 There followed the filing of further pleadings and further document requests. On 20 November 2015, BOE served its Statement of Rejoinder, supplemental factual witness statements, supplementary supporting materials, and supplemental expert reports.

40 On 27 November, 2 December, and 4 December 2015, BNX sent letters to BOE, requesting the disclosure of various documents following BNX's inspection of the materials served by BOE on 20 November 2015. In particular, in the letter sent on 4 December 2015, BNX made the following requests:

> 5. (i) Please let us have ***all letters between URA and [A]***, i.e. referred to where [one of BOE's witnesses] states "…there was plenty of back and forth between the URA and [A]…"
>
> …
>
> (iv) Please also let us have ***the particular letters of undertaking*** referred to in the last sentence of paragraph 4 of [the supplemental witness statement of one of BOE's witnesses] where he ***states "…[BOE] provided letters of undertaking to the URA, in 2010 and also in 2013…"***
>
> 6. Please let us have ***all the "further correspondence" with URA about the restrictions in 2013***, as referred to.
>
> [emphasis added in bold italics]

41 BOE responded to BNX on 2 and 8 December 2015, declining to produce any of the further documents requested by BNX on the ground that the requests were untimely, irrelevant and immaterial to the issues in dispute. In particular, BOE stated in its letter dated 8 December 2015 that:

> …
>
> ***Insofar as you see fit to request correspondence between the URA and [A]***: (i) neither are party to the arbitration; (ii) ***you already have been provided access to all of [BOE's] hard copy files containing correspondence with the URA***; and (iii) the timeframe in question (2009/2010) is wholly irrelevant to any issues in dispute or, indeed, to your pleaded case. On any measure, the request is specious.
>
> …
>
> [emphasis added in bold italics]

42 On 7 December 2015, BNX made an application to the Tribunal for an order for BOE to produce the documents referred to at [40] above. BOE responded on 8 December 2015, maintaining its position that further disclosure was unwarranted as BNX's latest documents requests were untimely, and irrelevant and immaterial to the issues in dispute. On 9 December 2015, the Tribunal dismissed BNX's application for further document disclosure on the grounds that these requests: (a) overlapped significantly with the documents sought in BNX's original requests reflected in its Redfern Schedule, which had earlier been rejected by the Tribunal; (b) related to documents that went towards showing that a particular representative of BOE who was different from the two representatives referred to in BNX's pleadings had misled BNX about the use restrictions at the Development, which was not a part of BNX's case in the first place; and (c) were too wide, and BNX had failed to show how the documents requested were relevant or material.

43 We return to a point we alluded to at [33] above. BNX's case was that BOE had always represented that there were *no* relevant use restrictions at all. Hence, its claim rested on the fact that the discovery of the existence of *any* use restrictions came as an unexpected surprise contrary to the alleged representations. BNX's case was not that BOE had misled it as to the *scope* of the restrictions since its essential case was that it had been led to believe that there were *no* restrictions. As against this, BOE maintained that from the October 2013 GWP as well as the two undertakings that were disclosed in the virtual data room, it was evident that there were use restrictions in place and further, at the material time, BNX was in fact alive to this fact as well as the need to ascertain just what these were.

44 The oral hearings for the arbitration took place between 26 January and 4 February 2016. During the oral hearings, BNX maintained its primary claim in fraudulent misrepresentation and its ancillary claim in breach of contract. However, it dropped its alternative claims founded upon the breach of an alleged collateral contract, unjust enrichment, constructive trust and non-fraudulent misrepresentation. In its written closing submissions at the very end of the hearing, BNX mounted an alternative claim in fraud for the first time. Specifically, BNX alleged that BOE had perpetrated a fraud against the URA and the Singapore Government by making a conscious decision to breach the use restrictions, and the October 2010 Undertaking and the March 2013 Undertaking given to the URA in its operation of the Development, such that the SPA should be rendered a nullity. We mention here that BNX evidently remained unaware of the May 2013 Undertaking throughout the course of the hearing.

45 The Tribunal issued the Award on 1 June 2016, dismissing all of BNX's claims. Its key findings may be summarised as follows:

(a) Regarding the claim for fraudulent misrepresentation, the Tribunal found, amongst other things, that BOE made none of the representations alleged by BNX; that in any case, there was no reliance by BNX which had never given conscious thought to the issue of public access to the Relevant Facilities; that further, BNX could easily have found out about the use restrictions from the due diligence process; and that BOE had not been dishonest since it had no specific duty of disclosure that had been breached.

(b) In relation to the claim for breach of warranty, the Tribunal found that BOE's failure to observe the use restrictions, while in breach of the head grant from the Singapore Government, did not constitute a breach of the terms of the sale or render the sale unlawful.

(c) As for the claim that BOE had defrauded the URA and the Singapore Government, the Tribunal found that BOE's representatives had honestly, even if mistakenly, believed at the material time that a more generous interpretation of the use restrictions was permissible, and that BOE had always relied on advice from [A] regarding the effect of the use restrictions.

The post-award proceedings

46 Having had its claims dismissed in their entirety by the Tribunal, BNX proceeded to take a series of steps either to challenge the Award directly or to gather additional evidence in aid of its intended challenges against the Award. Initially, BNX did the following:

(a) On 14 July 2016, BNX commenced Originating Summons No 651 of 2016 ("OS 651"), seeking leave to appeal against the Award

on purported questions of law under s 49 of the AA. On 13 September 2016, this was dismissed by an assistant registrar on the ground that BNX had contracted out of its rights of appeal under s 49 of the AA when it agreed to an ICC arbitration clause in the SPA. BNX appealed to a High Court judge in chambers, but this too was dismissed on 14 November 2016.

(b) On 21 July 2016, BNX commenced Originating Summons No 735 of 2016 ("OS 735"), seeking leave to serve pre-action interrogatories on [A]. Neither party had led any evidence from any witness from [A] in the arbitration. The interrogatories were directed at the advice given by [A] to BOE on the use restrictions, and referred directly to the written and oral evidence of BOE's witnesses during the arbitration, which was in breach of BNX's confidentiality obligations pursuant to the arbitration. On discovering this, BOE applied successfully to intervene in OS 735, and on the basis of its submissions, the Judge dismissed those proceedings.

47 Then, on 30 August 2016, BNX commenced OS 871, seeking to set aside the Award pursuant to s 48 of the AA on the grounds that: (a) the Tribunal had exceeded its jurisdiction by deciding matters that were not before it; (b) there was a breach of natural justice which deprived it of a fair hearing; and (c) the Award was contrary to public policy. The Judge dismissed OS 871 on 8 March 2017 and CA 61 is an appeal against this.

48 Regarding the first ground of challenge, BNX claimed that the Tribunal exceeded its jurisdiction by making findings on the meaning of the use restrictions and the URA's policy in respect of them, as well as on the advice given to BOE on the effect of the use restrictions by [A]. The Judge rejected

this and found that the Tribunal did not in fact make any such findings but instead had proceeded on assumptions as to these matters that were all in BNX's favour (GD at [60]–[68]). As to [A]'s advice on the use restrictions, the Judge found that the Tribunal had only addressed this in the context of determining the subjective state of mind of BOE's representatives. This was well within the scope of the arbitration and BNX was or ought reasonably to have been aware that the subjective belief of BOE's representations, based on the advice they had received from [A], was a live issue before the Tribunal (GD at [69]–[71]).

49 In relation to the second ground of challenge, BNX contended that the Award was made in breach of natural justice in so far as the Tribunal found that [A]'s advice on the use restrictions and the URA policy was correct, because: (a) BNX had no notice that the URA's policy would be an issue in the arbitration, and hence was not given an opportunity to be heard on it; and (b) the Tribunal had wrongly admitted hearsay evidence on [A]'s advice and BNX had wrongly been denied an opportunity to cross-examine [A]'s representatives. The Judge rejected this. First, he found that the Tribunal did not make any finding on the URA policy, but had accepted that the evidence given by BOE's representatives in respect of [A]'s advice was honest and should be accepted even though the Tribunal assumed that such advice was wrong (GD at [77]–[78]). Secondly, there was no breach of the hearsay rule because it did not apply to arbitration (GD at [79]), and even if it did, it was not engaged here because the evidence went solely to the state of mind of BOE's representatives (GD at [86]–[92]). BOE's representatives were perfectly competent to testify as to the advice they received and the effect this had on them.

50 As for the third ground of challenge, BNX claimed that the Award was contrary to public policy because: (a) the Tribunal had relied on hearsay evidence, which was against basic notions of justice; (b) the Tribunal's alleged

finding on the meaning of the use restrictions and the URA policy was in violation of morality and justice; and (c) the Tribunal erred in finding that the SPA was not void for illegality as a sale of an unlawful business. The Judge rejected this too. First, the Judge found that the Tribunal did not rely on hearsay evidence, and that even if it did, there was no breach of public policy in its doing so (GD at [100]–[101]). Secondly, the Judge found that the Tribunal had not made findings on the meaning of the use restrictions or URA policy, but had considered those issues only in the context of BOE's representatives' subjective understanding of them (GD at [102]–[104]). Thirdly, the Judge found that the SPA was not illegal because there was nothing requiring BNX to continue operating the hotel in a manner that breached the use restrictions (GD at [108]–[110]).

51 In the meantime on 17 October 2016, BNX commenced Suit 1097, seeking to rescind the lease agreement that BOE had granted BNX in order to effect the sale of the Development. We have touched on this lease agreement at [29] above. BNX relied on substantially the same allegations of fraudulent misrepresentation as those it had relied on in the arbitration in its attempt to rescind the SPA, but claimed that the lease and the SPA were distinct agreements, and that the arbitration had dealt only with the parties' rights under the SPA and not the lease.

52 On 1 November 2016, BOE filed SUM 5305 to strike out Suit 1097 on the basis that the claims advanced there were: (a) precluded by the doctrine of *res judicata* or were an abuse of process; and (b) legally unsustainable in any event. On 8 March 2017, the Judge granted BOE's application and struck out BNX's claims in Suit 1097 because the lease bore a true and subordinate relationship to the SPA. Suit 1097 was thus a collateral attack on the Award and an abuse of process, and was in any event legally unsustainable (GD at [137]

and [152]). The Judge rejected the notion that the lease agreement and the SPA were independent agreements that conferred rights and obligations that were independent of each other (GD at [134]–[136]). The Judge also dismissed all the other subsidiary points taken by BNX. CA 62 is the appeal brought by BNX against this decision.

53 Finally, on 29 June 2017, BNX commenced Suit No 585 of 2017 ("Suit 585") against [A], which was a claim in negligence. BNX claimed that [A], as BOE's architect, had been negligent and breached its duty of care to BNX, a buyer of the Development, to advise BOE with reasonable care and skill. BNX claimed that such a duty of care arose because [A] knew or ought to have known that its advice to BOE would be made available to a prospective buyer of the Development (namely BNX), who would rely on it in entering into a sale transaction (in this case, the SPA). [A] filed its defence in the suit on 24 July 2017, and subsequently amended it on 22 August 2017.

54 In its defence filed in Suit 585, [A] made references to various documents recording correspondence in May 2013 between BOE, [A] and/or the URA, as well as to the May 2013 Undertaking ("the May 2013 Documents"), as follows:

> 14. As with the earlier clarification sought by the URA, [A] engaged with the URA over several months to provide the necessary clarifications.
>
> **Particulars**
>
> …
>
> (e) On 9 May 2013, by way of an email, the URA informed [A] that the letter of undertaking dated 27 March 2013 needed to be amended to include proposed measures to restrict public access to the thirty-fifth storey (and by extension, the Health Club and L35 Meeting Rooms).

> (f) [BOE's] representative … confirmed via an email to [A] dated 9 May 2013, that [BOE] would be agreeable to issuing a letter of undertaking to comply with the URA's requirements.
>
> (g) On 10 May 2013, by way of a series of emails to [BOE], [A]:-
>
> > (i) advised [BOE] that public access to the thirty-fifth storey would be restricted as the lifts to, *inter alia*, the thirty-fifth storey would be card-controlled, only allowing hotel guests access; and
> >
> > (ii) further explained that the URA's concern over the restriction of access to the thirty-fifth storey was because the URA's definition of hotel guests was limited to resident hotel guests, and the URA was therefore concerned with access to the thirty-fifth storey by the public.
>
> (h) On 10 May 2013, [BOE] executed a letter of undertaking pursuant to which it declared that, *inter alia*, the Restaurants computed under Hotel GFA would be for hotel guests and staff use only, and the L35 Meeting Rooms and Health Club would be for hotel guests' use only. To emphasise the latter point, [BOE] highlighted that floors above the thirty-second storey were card controlled, and therefore, access was restricted to hotel guests only.
>
> …

BNX claims that it only came to know about the existence of the May 2013 Documents following the aforementioned references made in [A]'s defence in Suit 585. [A] has since applied to strike out Suit 585.

The present applications

55 BNX filed CA 61 and CA 62 on 27 March 2017. On 24 November 2017, BNX filed SUM 132 and SUM 133, seeking leave to adduce further evidence in aid of these appeals. Specifically, BNX seeks leave to be granted three categories of orders.

56 First, BNX seeks: (a) an order for BOE to produce, or leave for BNX to disclose, and (b) leave to adduce as further evidence, the May 2013 Documents, which it claims had been wrongfully withheld by BOE but which BNX had managed to obtain from [A] in Suit 585.

57 Secondly, BNX seeks leave to adduce further evidence the material part of which for present purposes consists of the pleadings and correspondence from Suit 585, which BNX claims will show that BOE's witnesses gave false evidence in the arbitral proceedings ("the Suit 585 Documents").

58 Thirdly, BNX seeks leave:

> (a) to adduce: (i) the affidavits of BOE's representatives and solicitors regarding BOE's alleged withholding of the May 2013 Documents and their evidence given in Suit 585; (ii) the affidavits of [A]'s representative regarding [A]'s role in BOE's alleged withholding of the May 2013 Documents; and (iii) the affidavits of BNX's own representative regarding BOE's alleged withholding of the May 2013 Documents and whether BOE's witnesses gave perjured evidence in the arbitral proceedings; and
>
> (b) for the cross-examination, by both parties, of BOE's representatives and solicitors, [A]'s representative as well as BNX's representatives respectively regarding BOE's alleged withholding of the May 2013 Documents and whether BOE's representatives and solicitors gave perjured evidence or misled the Tribunal.

59 According to BNX, this further evidence, if admitted, would show that BOE had obtained the Award by: (a) defrauding the Tribunal in that it had wrongfully withheld the May 2013 Documents from BNX during the arbitration

proceedings, and (b) giving false evidence before the Tribunal, in that the evidence given in the arbitration proceedings as to [A]'s advice to BOE differed from the position taken by [A] in Suit 585. This, BNX submits, would have a material bearing on its appeals in that:

(a) CA 61 would be allowed because the new evidence would show that the Award should be set aside on the grounds that: (i) the Award was induced or affected by fraud (s 48(1)(*a*)(vi) of the AA); (ii) a breach of the rules of natural justice had occurred in connection with the making of the Award by which BNX's rights have been prejudiced (ss 48(1)(*a*)(iii) or 48(1)(*a*)(vii) of the AA); and/or (iii) the Award was contrary to public policy (s 48(1)(*b*)(ii) of the AA); and

(b) CA 62 would be allowed because Suit 1097 had been struck out on the basis that it was a collateral action on the Award, but that action would not be an abuse of process if the Award were set aside.

Issues to be determined

60 The central issue that arises for our determination is whether leave should be given for the various classes of documents to be adduced in connection with the appeals. We consider this by reference to:

(a) the May 2013 Documents;

(b) the Suit 585 Documents; and

(c) whether BNX should be allowed to adduce fresh affidavits and seek leave for both parties to cross-examine the deponents of the fresh affidavits on appeal.

Our decision

61 In our judgment, the applications in SUM 132 and SUM 133 to adduce further evidence on appeal should be dismissed for the reasons that follow.

The May 2013 Documents

62 We first address the May 2013 Documents.

The Riddick *principle*

63 In our judgment, there is, in the first place, a preliminary objection that stands in the way of BNX's application, which is that these documents were obtained in the course of discovery in Suit 585. BNX was therefore subject to an implied undertaking not to use the May 2013 Documents for any purpose other than the determination of Suit 585. To be released from this undertaking, it was incumbent on BNX to first apply to the court presiding over Suit 585.

64 The implied undertaking arises from the principle established in the decision of the English Court of Appeal in *Riddick v Thames Board Mills Ltd* [1977] QB 881 ("the *Riddick* principle"). In *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 ("*Beckkett*"), we explained the *Riddick* principle in these terms (at [14]):

> … where a party to litigation has been ordered to give discovery, the discovering party may not use the discovered documents, and the information obtained therefrom, for a purpose other than pursuing the action in respect of which discovery is obtained. Public interest requires that in relation to an action, there should be full and complete disclosure in the interest of justice. On the other hand, it cannot be denied that discovery on compulsion is an intrusion of privacy. The *Riddick* principle seeks to strike a balance between these two interests. …

65 We also observed that the implied undertaking not to use the documents for other purposes is an obligation owed to the court (not just to the party who was compelled to make discovery) and it is *an obligation which only the court can modify* (at [15], citing *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1WLR 756 at 764–765). We also held that a party seeking to be released from the implied undertaking must: (a) demonstrate cogent and persuasive reasons warranting this, and (b) show that the party giving discovery would not suffer any injustice or prejudice if the other party were to be released from its implied undertaking (at [16] and [19]).

66 BNX submits that the *Riddick* principle does not apply to the May 2013 Documents because the May 2013 Documents had been disclosed *voluntarily*. We reject this. We agree that, as a matter of principle, the *Riddick* principle can have no application to documents that have been voluntarily disclosed in the course of legal proceedings. The rationale for this gloss on the *Riddick* principle was explained in *Hong Lam Marine Pte Ltd and another v Koh Chye Heng* [1998] 3 SLR(R) 526 (at [21]) as follows, citing *Derby & Co Ltd v Weldon (No 2)* The Times (20 October 1988):

> The voluntary disclosure of documents in the course of interlocutory proceedings by a party does not come within the rationale which is the basis of the implied undertaking relating to documents disclosed on discovery. In relation to documents voluntarily disclosed the court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the plaintiff or the court … it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks that such evidence becomes available to others. In my judgment the special protection given to documents disclosed under compulsion of discovery procedures does not apply to any wider class of documents.

67 However, BNX is wrong to assert that the May 2013 Documents had been voluntarily disclosed for two reasons. First, it is not the case that [A] had handed over the May 2013 Documents voluntarily in Suit 585. In Suit 585, after [A] filed its defence in which it had stated its position on the advice that it had given BOE during the construction of the Development, BNX filed Summons No 3687 of 2017 ("SUM 3687") seeking the production of the May 2013 Documents. Although [A] opposed SUM 3687, the court ordered production. [A] had therefore been *compelled* by a court order to disclose the May 2013 Documents.

68 Second, it is disingenuous for BNX to suggest that the May 2013 Documents had been disclosed voluntarily by BOE when BOE included the May 2013 Documents as exhibits in its affidavits filed in connection with SUM 132 and SUM 133. In the first place, BOE was not party to Suit 585 and could not sensibly be said to have consented to the release from the undertaking that BNX was subject to in that action. In any case, BOE included the May 2013 Documents as exhibits in order to *resist* BNX's application for these to be adduced as further evidence in CA 61 and CA 62. Indeed, BOE expressly included the following reservation in the affidavit that included the documents:

> … For the avoidance of doubt, the May 2013 Documents are being provided notwithstanding, and without prejudice to, [BOE's] position that they should not be admitted into the appeals in CA 61 and CA 62 at all and that the present application seeks to circumvent the requirement that [BNX] obtain leave of the Court in Suit 585 to use them for the purposes of the proceedings against [BOE].

69 The *Riddick* principle therefore applies to the May 2013 Documents. The next question is whether this precludes us from dealing with the issue, and in our judgment, it does because it is not for *us* to release BNX from its implied undertaking in Suit 585. Any application for BNX to be released from its

undertaking in this regard must be addressed to the court presiding over Suit 585 and this is so for two reasons. First, since the undertaking is an obligation owed *to the court* before which the documents in question were first disclosed, it is an obligation that *only that court* can modify (*Beckkett* at [15]).

70 Secondly, the undertaking is an obligation owed in the context of proceedings to which [A] was a party and had been *compelled* to make discovery. It is only right, as a matter of procedural fairness in such circumstances, that [A] be afforded the opportunity to be heard in respect of the application by BNX to be released from its implied undertaking not to use the disclosed documents for purposes outside the original suit (*Beckkett* at [15]). [A] is not a party to the present proceedings. It would therefore not have the opportunity to make submissions on whether it would be prejudiced in any way if we were to release BNX from its implied undertaking in the present proceedings.

71 As BNX has not applied to the court in Suit 585 to be released from its implied undertaking, this is sufficient, in and of itself, to dispose of the application by BNX to adduce the May 2013 Documents.

72 We nonetheless go on to consider the merits of the application so as to avoid further delaying the proceedings, in case BNX were now to apply in Suit 585 to be released from its implied undertaking.

The Ladd v Marshall *test*

73 Having considered the record of the proceedings before, during and after the arbitration, we are not persuaded that BNX has shown that "special grounds" exist to admit the May 2013 Documents as further evidence on appeal in CA 61 and CA 62.

74 As a starting position, pursuant to s 37(4) of the SCJA and O 57 r 13(2) of the ROC, the Court of Appeal will not grant leave to admit further evidence in an appeal unless there exist "special grounds" warranting this. It is well established, as we have noted earlier (at [1] above), that these special grounds are defined by the three cumulative conditions laid down in *Ladd v Marshall*:

> (a) the evidence could not have been obtained with reasonable diligence for use in the lower court (non-availability);
>
> (b) the evidence would probably have an important influence on the result of the case, although it need not be decisive (relevance and materiality); and
>
> (c) the evidence must be apparently credible, although it need not be incontrovertible (credibility or reliability).

See *Tay Kar Oon v Tahir* [2017] 2 SLR 342 ("*Tay Kar Oon*") at [28], *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [27], *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [47], *Tan Hwee Lan v Tan Cheng Guan and another appeal and another matter* [2012] 4 SLR 785 at [21] and *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd and another application* [2012] 3 SLR 1088 at [17]–[18].

75 Here, it is not disputed that the third condition, credibility, is met. Only the first two conditions, non-availability and relevance, have been disputed by BOE. It is to these that we now turn.

(1) Non-availability

76 In our judgment, the May 2013 Documents could have been obtained with reasonable diligence for use during the arbitration and the post-award proceedings.

77 To begin with, BNX failed to take the necessary steps to seek direct evidence from [A] during the arbitration. If it had considered the matters which it now seeks to adduce as being relevant, BNX could have corresponded directly with [A]'s representatives, or applied for a subpoena to compel their attendance at the arbitration hearing. Had it done so, direct evidence could have been obtained from [A] in relation to the precise terms of the restrictions and the advice [A] had rendered to BOE as to how these could be applied. Instead, BNX was content to invite the Tribunal, at the close of the arbitration, to draw an adverse inference against BOE for failing to call [A] to give evidence during the arbitration to confirm the advice that BOE claimed that [A] had given regarding the practical effect of the use restrictions imposed by the URA. The Tribunal declined to draw that inference against BOE and BNX must now live with the consequences of its tactical decisions made in the arbitration.

78 As against this, BNX contends that it is not necessary for it to show that it had exercised reasonable diligence and yet failed to obtain the May 2013 Documents. In other words, it contends that the first limb of *Ladd v Marshall* does not apply to its present application. It takes this position on the ground that the documents reveal fraud on the part of BOE that would strike at the very root of the arbitration. It further contends that no amount of diligence could possibly have led to the discovery of the May 2013 Documents because the May 2013 Documents had been *deliberately* withheld by BOE during the arbitration proceedings and the post-award proceedings.

79 We reject these submissions.

80 First, we disagree that this is a situation where the requirement of non-availability may be dispensed with. In *GAK v GAL* [2013] SGCA 19, we acknowledged that there are certain exceptional circumstances where the court would be entitled, in its discretion, to admit further evidence on appeal even though the *Ladd v Marshall* criteria might not, strictly speaking, be met. We held there that *Ladd v Marshall* is not always to be applied without some flexibility, and especially without regard to whether to do so would cause injustice (at [32]–[33]). Examples of situations where some attenuation of the requirements might be called for include those where a party has been denied a fair opportunity by the trial judge to put forth relevant facts before the court (see *Wong Phila Mae v Shaw Harold* [1991] 1 SLR(R) 680 at [16]), or where the trial judge made a decision on a new point of a substantial nature that the parties did not have the opportunity to address (see *Tay Kar Oon* at [30] and *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 at [44]–[45]).

81 More pertinently, for the purposes of the present applications, we recognised in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 (at [36]) that:

> … where the fresh evidence uncovers the fraud or deception of the other party, and such fraud strikes at the very root of the litigation [or arbitration], then, provided the second and third conditions in *Ladd v Marshall* [(*ie*, relevance and credibility)] are cumulatively satisfied, the court would, in exceptional circumstances, be prepared to exercise measured flexibility in relation to the application of the first *Ladd v Marshall* condition [(*ie*, non-availability)]. … [original emphasis removed]

That dictum contemplates that two requirements should be met before the requirement of non-availability will be relaxed or waived: (a) the May 2013

Documents must be shown to uncover fraud or deception on the part of BOE, and (b) such fraud must strike at the very root of the arbitration proceedings.

82 In our judgment, BNX has not demonstrated how the May 2013 Documents can be said to demonstrate that BOE has perpetrated a fraud in the present case. In *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1, we recognised that fraud encompasses "a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or wilful destruction or withholding of evidence" (at [55], citing *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [41]). We also observed in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 ("*Bebe*") that the hallmark of fraud is "dishonesty or moral turpitude" (at [34]). And in the decision of the High Court in *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869, Steven Chong J (as he then was) affirmed the holding in *Bebe* that dishonesty is the cornerstone for fraud (at [43]), and added that "inadvertent errors in the evidence, the drawing of wrong inferences, conjectures, lack of corroborative evidence or even false evidence … short of actual and deliberate fraud would not be sufficient to discharge the burden of proof [of establishing fraud]" (at [59]). What is clear from this is that the threshold for establishing fraud, which is rooted in dishonesty, is a high one. This has clearly not been met on the present facts.

83 It is true that BOE failed to disclose any of the May 2013 Documents, particularly the May 2013 Undertaking, during both the due diligence process preceding the signing of the SPA and the formal document disclosure phase of the arbitration (see [17] and [37] above). BOE explains that the absence of the May 2013 Documents from the hard copy files that it had voluntarily disclosed to BNX during the arbitration is attributable to the fact that the hard copy files

it provided during document disclosure in the arbitration were meant to be the very same files that BOE had made available in the physical data room during the due diligence process before the SPA was signed. And the omission of the May 2013 Documents from the physical data room during due diligence was in turn nothing more than an "internal oversight" on BOE's part to update its internal hard copy records in May 2013 during the construction of the Development. This omission, BOE claims, was excusable on the basis that it had been "very busy dealing with multiple other tasks at that time, given that all construction and completion issues had to be resolved so that the [Development] could be opened before the end of 2013", such that it was "hardly surprising that some letters did not make it into [BOE's] internal hard-copy files".

84 BNX demurs and relies heavily on the letters of undertaking and the correspondence between the URA and BOE in 2010 and 2013, further correspondence between the URA and BOE in 2013 about the use restrictions, and BOE's reply dated 8 December 2015 to BNX's request dated 4 December 2015 for further correspondence between the URA and [A] in 2013. In its reply dated 8 December 2015 in particular, BOE stated, among other things, that BOE had already provided BNX with access to all its hard copy files containing correspondence with the URA (see [40]–[41] above). BNX asserts that this amounted to a representation by BOE that it had given BNX *all* the documents that it had in its possession relating to correspondence between the URA and BOE, and the subsequent discovery of the May 2013 Documents shows that the representation was an "outright deception".

85 We disagree that from the foregoing narrative, the only conclusion that can reasonably be drawn is that BOE had *deliberately* withheld the May 2013 Documents or that it had perpetrated a fraud on the Tribunal. BOE claims that the omissions are attributable to its internal oversight. We pause to note that

while that might well explain the omission of these documents from what was made available during the due diligence process, it does not fully address the failure to disclose these documents in the arbitration. Mr Philip Antony Jeyaretnam *SC* ("Mr Jeyaretnam") appeared for BOE in the appeal, but it has to be made clear that he was not involved in the arbitration. Instead, BOE was represented by White & Case Pte Ltd ("White & Case"), which is the Singapore office of the well-known international law firm White & Case LLP. We asked Mr Jeyaretnam for confirmation that nothing was put forward by White & Case to explain the failure to disclose the May 2013 Documents in the arbitration and he confirmed this. We asked Mr Jeyaretnam whether White & Case wished to put forward an affidavit explaining this but after taking instructions, Mr Jeyaretnam informed us that there was no request from those involved in the arbitration on behalf of BOE to do so. We found this regrettable because it seemed clear to us that those having charge of the arbitration must have known of the existence of the May 2013 Undertaking. Indeed, when we put this to Mr Jeyaretnam, he accepted this, though he was not able to say precisely when this would have been so. The material time for this purpose would include, in particular, December 2015 when BNX requested disclosure of the letters of undertaking. If the lawyers representing BOE in the arbitration knew of the May 2013 Undertaking at the time BNX's request was rejected, then the response given on 8 December 2015 might have called for further explanation. An affidavit by representatives of White & Case addressing these matters candidly is something we would have expected and been assisted by, and we were surprised that this was not forthcoming, either initially, or even when we offered them the opportunity.

86 Having said that, we do not think this omission affects the outcome of the present application, given that it is insufficient to evince fraud on the part of

BOE, much less fraud that went to the root of the arbitration (see [81] above). It is certainly plausible that White & Case, either on its own or on BOE's instructions, was conscious of the May 2013 Documents at the time it rejected the document request in question during the arbitration. But even if we approach the present inquiry on this basis, in our judgment, such consciousness alone would be insufficient. We mention again the high threshold to be met in establishing fraud, as noted at [82] above. Given this, in assessing the significance of any withholding, it will be relevant to consider how BOE or its lawyers would have understood the potential relevance of these documents. In this regard, the requests made by BNX during the formal document disclosure phase of the arbitration are to be seen in the light of its own pleaded case at the start of the arbitration, which was premised on there being *no* use restrictions (see [33] and [43] above). In this light, it is certainly plausible that BOE and its lawyers never saw these documents as being relevant to the case mounted by BNX. Further, as we have noted, BNX plainly had access to the other two undertakings (though whether it in fact examined these or not is another matter). Seen in this light and taken together with BNX's pleaded case, we find it impossible to conclude that even if White & Case and BOE were conscious of the May 2013 Documents at the time of the document request, their failure to produce it can be said to lead to the irresistible inference that this was done dishonestly or fraudulently. Even if the May 2013 Documents might have been relevant to BNX's alternative claim based on the alleged fraud against the URA and the Singapore Government, the document disclosure requests BNX made *during* the arbitration would not have been understood in that light because it only advanced the alternative claim at the close of the proceedings (see [44] above). Hence, it is not at all evident to us that there was anything necessarily suspicious in BOE's failure to provide the documents. BNX therefore may not

argue that the May 2013 Documents reveal fraud on the part of BOE that would strike at the very root of the arbitration.

87 Secondly, we also disagree that no amount of diligence on the part of BNX could possibly have led to the discovery of the May 2013 Documents. During the due diligence process preceding the signing of the SPA, BNX does not appear to have sufficiently reviewed the October 2013 GWP even after receiving it in the virtual data room on 3 December 2013. The October 2013 GWP, as explained at [19] above, referred to the planning conditions stipulated in the approved plans, which in turn disclosed the use restrictions imposed by the URA on access to the Relevant Facilities. BNX had been advised by EC Harris on 2 December 2013 to conduct further checks to satisfy itself that the Development was in compliance with the GFA requirements, and by WongPartnership on 11 December 2013 to review all the grants of written permission that had been issued (see [27] and [28] above). BNX did not act on the advice of either EC Harris or WongPartnership. If BNX had diligently reviewed the October 2013 GWP, as it should have done, it would most likely have discovered the use restrictions imposed by the URA, which, in turn, would in all likelihood have led it to discover the October 2010 Undertaking, the March 2013 Undertaking and the May 2013 Undertaking. But it did not do this, and its failure to properly inform itself of the relevant use restrictions during the due diligence process, even though it had the means to, is something for which it, alone, is responsible. Nothing has been put forward to explain how, in all the circumstances, it could be said to have acted reasonably in failing to realise the existence of the restrictions. In our judgment, this makes its present position untenable.

88 It is clear to us that the May 2013 Documents could have been obtained if BNX had acted with reasonable diligence during the arbitration, as explained

at [77] above, and there are no grounds for exempting BNX from having to meet this requirement. On this ground alone, BNX's application for leave to adduce the May 2013 Documents fails. For completeness, we also consider whether the second *Ladd v Marshall* requirement of relevance would in any event be satisfied.

(2) Relevance

89 BNX claims that the May 2013 Documents would have had a material impact on the Tribunal's findings in the Award or those of the Judge in the proceedings below. In this regard, BNX claims that the May 2013 Documents (especially the May 2013 Undertaking) show that BOE was fully aware of the use restrictions, and specifically that BOE had undertaken to restrict access by members of the public to the Relevant Facilities by requiring the use of the hotel card key to access them. On this basis, BNX contends that it would not have been open to the Tribunal to find that BOE honestly believed, on the basis of [A]'s advice, that it was possible to accord a more practical interpretation to use restrictions imposed by the URA. Separately, BNX also suggests that the May 2013 Documents would have caused the Judge to set aside the Award on the ground that it had been obtained by fraud.

90 We do not agree.

91 In the first place, the May 2013 Documents do not, in our view, make a substantial difference to the use restrictions that were already in place by reason of the October 2010 Undertaking and the March 2013 Undertaking. This therefore would not have had a material impact on the outcome of the arbitration proceedings. In relation to the May 2013 Undertaking in particular, which BNX

relies on heavily, it is clear to us that this would not have had the impact on the arbitration and the post-award proceedings that BNX claims that it would.

92 The May 2013 Undertaking is no more than a refinement of the previous letters of undertaking in that it confirms and repeats the existence of the use restrictions imposed by the URA on the Relevant Facilities especially as captured in the March 2013 Undertaking, but it goes slightly further in asserting that access to the 35th floor of the Development is to be restricted by card control and available only to hotel guests (see [12] above). In other words, the difference between the contents of the May 2013 Undertaking and that of the earlier letters of undertaking is marginal and lies solely in the *scope* of the URA restrictions and specifically the assurance it sought as to the measures in place that would secure adherence to those restrictions. At the arbitration, BNX's case was that BOE had knowingly failed to disclose the *presence of any use restrictions* imposed by the URA on the Relevant Facilities. BOE's case, on the other hand, was that: (a) while its representatives were aware of the use restrictions, they had simply adopted [A]'s advice and believed that a more practical and generous interpretation of the use restrictions was possible; and (b) BNX either was or ought reasonably to have been aware of the restrictions because these were evident from the October 2013 GWP. It is thus clear that the *scope* of the URA restrictions was never in issue; neither party had run cases at the arbitration that turned on either the scope of the restrictions or the *degree* to which the URA *policed* its use restrictions. It is equally clear that the Tribunal was in fact aware of the existence of the October 2010 Undertaking and the March 2013 Undertaking. The Tribunal was thus adequately placed to make a finding in respect of the cases actually run by the parties during the arbitration proceedings. It is therefore clear to us that the introduction of the May 2013

Undertaking would not have had any impact on the outcome of the proceedings.

93 In any event, the Tribunal rejected all the claims brought by BNX in the arbitration on multiple grounds. It has simply not been shown that the same result would not have ensued on the basis of the alternative independent grounds on which the Tribunal arrived at its various decisions.

94 For these reasons, we are satisfied that BNX should not be permitted to introduce the May 2013 Documents.

The Suit 585 Documents

95 We turn to consider BNX's application in respect of the Suit 585 Documents.

96 Suit 585 is a claim commenced by BNX against [A] on 29 June 2017 (see [53] above) *after* the Judge decided on 8 March 2017 to dismiss BNX's application in OS 871 to set aside the Award and also to grant BOE's application in SUM 5305 to strike out Suit 1097 (see [47] and [52] above). The Suit 585 Documents all arise out of Suit 585.

97 Because this further material came into existence after the date of Judge's decisions which are being appealed, pursuant to s 37(3) of the SCJA, it might be contended that BNX may *produce* them on appeal without leave of the Court of Appeal. While at one level this is correct, this cannot mean that any and all such evidence produced by a party will be *admitted* by the appellate court. This is because even in such circumstances, the underlying interest in upholding finality in litigation should nonetheless be protected (see [1] above). In this regard, O 57 r 13(2) of the ROC provides that the Court of Appeal has

the power to determine whether to *receive* on appeal further evidence as to matters that have occurred after the date of trial or hearing. In such circumstances, it is clear that the *Ladd v Marshall* requirements would not apply in the usual way. For one thing because the relevant matters must have occurred after the trial or hearing that resulted in the decision, there can be no question of considering the first condition of *Ladd v Marshall*, namely having to establish unavailability of the material at the time of the trial. However, the second and third requirements of *Ladd v Marshall*, which pertain to relevance or materiality and reliability, will remain relevant in at least two ways: first, in assessing whether leave should be given under O 57 r 13(2) for such evidence to be admitted; and second, as to the weight to be placed on any such evidence as is admitted. In *Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 ("*Yeo Chong Lin*") we said as follows (at [13]):

> Obviously while this court has the general discretion to allow a party to adduce fresh evidence, the principle of *finis litium* should not be lightly disregarded. In the English House of Lord cases of *Mulholland v Mitchell* [1971] AC 666 and *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023, it was held that no precise formulation should be laid down regarding the admission of further evidence on matters that occurred after the decision. Clearly, further evidence which will materially alter the basis of the decision should be allowed. It stands to reason that the conditions governing the admission of further evidence on matters that occurred after trial should not be more restrictive than the special grounds laid down in *Ladd v Marshall*. The second special ground enunciated in *Ladd v Marshall* only requires the further evidence to have an important influence on the outcome of the appeal, but it need not be determinative. Therefore, perhaps, **the test should be: would the further evidence have a *perceptible impact* on the decision such that it is in the interest of justice that it should be admitted**? [emphasis in original in italics; emphasis added in bold]

98 This approach was followed in our subsequent decisions in *TDT v TDS and another appeal and another matter* [2016] 4 SLR 145 at [25] and *Tay Kar Oon* at [27]. Further, in *Zhu Xiu Chun (alias Myint Myint Kyi) v Rockwills*

Trustee Ltd (administrators of the estate of and on behalf of the dependants of Heng Ang Tee Franklin, deceased) and other appeals [2016] 5 SLR 412, we developed the principles set out in *Yeo Chong Lin*, and explained that "the justification behind admitting further evidence as to matters occurring after the date of the judgment is that the further evidence 'materially affects the basis of the earlier decision' and 'the change must substantially affect a basic assumption made at the trial'" (at [58], citing *Singapore Civil Procedure 2015* vol I (G P Selvam gen ed) (Sweet & Maxwell, 2015) at para 57/13/16).

99 In our judgment, a court faced with an application to adduce further evidence of matters that occurred after the trial or hearing that resulted in the decision of the court below that is being appealed, and deciding whether the further evidence would have a perceptible impact on the decision, should:

(a) first, ascertain what the relevant matters are, of which evidence is sought to be given, and ensure that these are matters that occurred after the trial or hearing below;

(b) second, satisfy itself that the evidence of these matters is at least potentially material to the issues in the appeal; and

(c) third, satisfy itself that the material at least appears to be credible.

100 Because the relevant matters must have occurred after the trial or hearing below, the court's principal concern is with securing the interests of justice. In that pursuit, the balance should be struck in favour of admitting such evidence as long as it is at least potentially relevant and seemingly credible. Also, even if the material is admitted on this basis, it remains necessary to assess the weight that is to be placed upon it. But, as we have noted above, it is critical first to

ascertain that the evidence pertains to "matters which have occurred after" the date of the decision being appealed.

101 Applying these principles to the present facts, we are satisfied that the Suit 585 Documents should not be admitted as further evidence in the appeal. BNX claims that the Suit 585 Documents show that BOE had obtained the award by perjury during the arbitration and this would be a potential ground for the setting aside of the award. Specifically, BOE's representatives had asserted in the arbitration that they had relied on the advice of [A] in allowing non-resident hotel guests to access the Relevant Facilities. But this was apparently contradicted by the Suit 585 Documents, in so far as [A] denies having given advice to BOE in the manner described by BNX in Suit 585.

102 In the first place, the Suit 585 Documents do not, in our judgment, concern matters that have occurred after the date of the decision below. What BNX contends to be material is the evidence it obtained by commencing Suit 585, which evidence, it contends, refutes the evidence that was given at the arbitration by BOE's witnesses as to how they understood the use restrictions. It was clear at the arbitration that this understanding was said to have been obtained from what [A] had allegedly told BOE's representatives at the material times. The relevant evidence in this context would be what [A] had told BOE's representatives, and once that is seen, it becomes immediately evident that that is not something that occurred after the arbitration but in fact occurred long before that. As noted at [77] above, evidence from [A]'s representatives could and should have been led at the arbitration. The substance of this part of the present application is therefore simply not concerned with evidence of matters that occurred after the trial. Instead, the only matter that occurred after the relevant date is the commencement of Suit 585, but that is not even remotely relevant to the issues in the appeal. To the extent that BNX only discovered

certain matters after it commenced Suit 585, that is beside the point; it is no different than if BNX had first sought to interview [A] after the arbitration. That too would be a matter that occurred after the arbitration but it would not afford BNX a means to bypass the first requirement of *Ladd v Marshall*. And as has been already noted, this has been an obstacle to BNX's present efforts to adduce additional evidence at this stage and BNX has not been able to clear this.

103 In any event, the matters to which the Suit 585 Documents purport to relate are also not even remotely relevant or material to the issues that are before us. Contrary to BNX's submissions, the Suit 585 Documents do not show that BOE's representatives had given false evidence during the arbitration and the setting aside proceedings for two reasons. First, there is no necessary contradiction between the Suit 585 Documents and BOE's evidence at the arbitration. In the Suit 585 Documents, [A] states that BOE was instructed that it had to comply with the letters of undertaking, but this says nothing about how the use restrictions were to be implemented as a practical matter. BOE's representatives do not deny their knowledge of the URA use restrictions or of the first two letters of undertaking. Instead, their evidence went to how they thought or were given to understand the restrictions might be interpreted and could be applied. Secondly, the Suit 585 Documents simply do not establish that BOE's representatives had given false evidence. These witnesses had been cross-examined by BNX's counsel and the Tribunal found their evidence to be credible. That evidence went to their understanding of the effect of the use restrictions imposed by the URA in the light of the advice provided by [A]. The fact that [A] provides a different description in Suit 585 of the advice that it had given BOE does not necessarily show that BOE's representatives had lied during the arbitration.

104 We therefore refuse the application to admit the Suit 585 Documents.

Admission of fresh affidavits and cross-examination of the deponents of the affidavits on appeal

105 Finally, in the light of our decision that neither the May 2013 Documents nor the Suit 585 Documents should be admitted as further evidence in CA 61 and CA 62, we find that BNX's applications to admit the affidavits of BOE's representatives and solicitors, [A]'s representative and BNX's own representative, and for both parties to be given leave to cross-examine those individuals, fall away. This follows from the fact that these applications are premised on the May 2013 Documents and the Suit 585 Documents being admitted in the first place. If the May 2013 Documents and the Suit 585 Documents are not admitted, then BNX would have no evidence upon which to ground its allegations that the Award had been obtained by fraud and perjury. It would accordingly be unnecessary to admit fresh affidavits on appeal and permit the cross-examination of the deponents of those affidavits.

106 We therefore also dismiss these aspects of BNX's applications.

Conclusion

107 In the circumstances and for these reasons, we dismiss BNX's applications in SUM 132 and SUM 133.

108 The costs of the applications in SUM 132 and SUM 133 are costs to BOE in any event. Unless the parties come to an agreement on quantum, the parties are to include their submissions on quantum, limited to no more than eight pages each, in their respective cases and submissions that will be filed for the main appeals in CA 61 and CA 62, and we will then deal with this at the time we dispose of the appeals.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

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