IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 10

Court of Appeal / Civil Appeal No 44 of 2024

Between

CIX

… *Appellant*

And

DGN

… *Respondent*

In the matter of Suit No 885 of 2021

Between

CIX

… *Claimant*

And

DGN

… *Defendant*

GROUNDS OF DECISION

[Res Judicata — Extended doctrine of res judicata]
[Abuse of Process — *Henderson v Henderson* doctrine]
[Tort — Misrepresentation]

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v
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[2025] SGCA 10

Court of Appeal — Civil Appeal No 44 of 2024
Steven Chong JCA, Belinda Ang Saw Ean JCA and Judith Prakash SJ
31 January 2025

13 March 2025

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 The doctrine of *res judicata* was developed to ensure finality in litigation and prevent endless litigation over the same subject matter typically between the same parties. Over time, it was observed that the courts should not permit litigants to circumvent the doctrine by strategically bringing claims in a piecemeal fashion in order to achieve an outcome more favourable than that in the previous unsuccessful action.

2 It was in this context that the doctrine was extended to cover situations where the claimant in the subsequent litigation relies on purportedly new claims premised on fresh evidence to mount a fresh action. If the court is satisfied that the new claims could and ought to have been raised in the earlier litigation, the fresh action could be barred by the extended doctrine of *res judicata* (the

"extended doctrine"), the rationale being that a party should not be twice vexed over essentially the same claim and the public interest requires finality in litigation.

3 With the advent of arbitration as a popular forum for dispute resolution, the extended doctrine was also applied in situations where the prior proceedings were by way of arbitration as opposed to court litigation. The English High Court took this approach in *Dallal v Bank Mellat* [1986] QB 441 ("*Dallal*") at 462–463, in the context of prior claims under the Iran-United States Claims Tribunal. This approach was similarly adopted by the High Court in *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 ("*Ultrapolis*") at [37], which this court approved of in *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 ("*AKN (No. 2)*") at [58].

4 The present appeal addressed a further permutation to the extended doctrine. It concerned the question of whether the extended doctrine could be invoked by a party who was neither a party to the earlier arbitration proceedings nor a party to the arbitration agreement. This is a point of law which hitherto has not been decided by this court, though we should add that this was first considered by Assistant Registrar Perry Peh of the Supreme Court, in his well-reasoned decision of *Cachet Multi Strategy Fund SPC on behalf of Cachet Special Opportunities SP v Feng Shi and others* [2023] SGHCR 16 ("*Cachet*").

5 We heard and dismissed this appeal on 31 January 2025. The appellant had brought multiple arbitral and court proceedings over essentially the same matter. We found that this was indeed a suitable case for the application of the extended doctrine. In our Grounds of Decision, we take the opportunity to

expound on the contours of the extended doctrine, and to explain how and when it should apply in the context of a prior arbitral award bearing in mind the limitations inherent in the arbitral process and the notion of party autonomy.

The Material Background Facts

Parties to the dispute

6 The appellant (the "Seller") is the founder, former sole shareholder of, and former Chief Executive Officer of a company (the "Company").

7 The respondent ("Phoenix") is in the business of providing human capital consulting services and data, including advisory services relating to executive and non-executive remuneration.

Background to the dispute

The SPA between the Seller and the Buyer

8 The Seller entered into a Sale and Purchase Agreement (the "SPA") with a corporate entity (the "Buyer") for the sale of his shares in the Company. Pursuant to the SPA, the sale was to be conducted in two tranches:

(a) The first tranche was for the sale of 62.5% of the outstanding share capital of the Company at a fixed price.

(b) The second tranche concerned the balance 37.5% of shares in the Company that the Seller held. The price for these shares was not fixed, and was to be determined by a further valuation exercise (referred to in the SPA as the "Final Valuation") that was based on the Company's average adjusted profit after tax and minority interests ("PATMI"). The

Buyer and the Seller exchanged call and put options over these shares with the following effect:

(i) if the Final Valuation was less than $60m, the Seller would pay the Buyer the difference between the Final Valuation and $60m, subject to a maximum sum of $15m; and

(ii) if the Final Valuation was more than $60m, the Buyer would pay the Seller the difference between the Final Valuation and $60m.

9 As mentioned, the Final Valuation was to be calculated by reference to the Company's average *adjusted* PATMI. Schedule 10 of the SPA sets out the adjustments to be applied against the Company's actual PATMI. One of the adjustments involved reducing or increasing the actual PATMI by an amount equal to the difference between the actual compensation costs and the market benchmark for six key management personnel in the relevant financial year (the "Market Benchmarks"). Further, cl 1.2 of Schedule 10 of the SPA states:

> The Market Benchmark for the Key Management Roles for such Relevant Financial Year shall be determined by an independent human resource consultant to be appointed by mutual agreement between [the Seller] and [the Buyer]. Such human resource consultant shall act in such determination as expert and not as arbitrator and its determination shall be final and binding on the Parties. The costs of such human resource consultant shall be borne equally between the Parties.

10 Pursuant to the terms of the SPA, the first tranche was completed and the Buyer, through its subsidiary, became the owner of 62.5% of, and the majority shareholder in, the Company.

The appointment of Phoenix

11 On or about 9 September 2016, the Seller served the Buyer a notice requiring the Buyer to purchase his remaining 37.5% shareholding of the Company. This therefore required the parties to the SPA to ascertain the Final Valuation, and thereby necessitated the determination of the Market Benchmarks by "an independent human resource consultant".

12 Initially, on 28 September 2016, the Seller, through his representative Mr [SLR], proposed the appointment of [Falcon]. Falcon is a management consulting firm in the field of executive compensation. The next day, Mr [BYR] of the Buyer proposed Phoenix for the appointment, sharing a proposal from it. After some correspondence between Mr SLR and the Buyer's representatives, Mr SLR requested for the Buyer to "run an independence check with [Phoenix] [to ascertain] whether they have done work for [the Buyer] in the last two years", stating that "[i]t is important that we get an independent consultant to provide the benchmarking". After some further correspondence, Mr SLR communicated the Seller's agreement to proceed with the appointment of Phoenix on the condition that Phoenix provide a declaration of no conflict of interest, as suggested by Mr BYR.

13 On 20 October 2016, Phoenix issued a "Declaration of Conflict of Interest" (the "COI Declaration"), addressed to the Buyer and the Seller, containing, *inter alia*, the following:

(a) Phoenix had "no conflict of interest with either [the Buyer] or [the Seller] in respect of [its] appointment as the human resources consultant for purposes of benchmarking of key management roles" (the "No Conflict Representation");

(b) "as at the date hereof [*ie*, 20 October 2016], we [*ie*, Phoenix] have no substantial business dealings with [the Buyer] or its related corporations or [the Seller]" (the "Substantial Dealings Representation"); and

(c) there were no disclosures to qualify the representations made in the COI Declaration.

We shall refer to the above representations collectively as the "Representations".

14 Subsequently, Phoenix was engaged as the independent human resource consultant contemplated under the SPA. On or around 12 December 2016, Phoenix issued seven market pricing and compensation data reports (the "Phoenix Reports"). In the Phoenix Reports, Phoenix did not identify a *single* market benchmark for the key management roles for each relevant financial year; instead, it provided *28* market benchmark figures, which were the market data for the 25th percentile, the average, the median (*ie*, the 50th percentile) and the 75th percentile of *seven* different compensation levels.

15 This somewhat complicated matters because the Buyer and the Seller were unable to agree on which of those 28 market benchmark figures should apply to determine the Company's average *adjusted* PATMI, and in turn, the Final Valuation and the price and payee for the balance 37.5% of the Company's shares. On the one hand, the Seller opted to use the 25th percentile figures for varying compensation levels which, on calculation, translated into the Buyer having to pay the Seller for the shares. On the other hand, the Buyer opted to use the median figures for the highest compensation level provided in the reports, which, on calculation, translated into the Seller having to pay the Buyer.

The commencement of the Arbitration and the First Partial Award

16 This disagreement, amongst other disputes relating to the calculation of the Final Valuation, led the Seller to refer the dispute with the Buyer to arbitration proceedings administered by the Singapore International Arbitration Centre (the "Arbitration"). The Arbitration was commenced in June 2017. In the Seller's statement of claim for the Arbitration, he left the issue of what adjustments should be made to the average PATMI with respect to the compensation costs for key management personnel to be determined by the arbitral tribunal (the "Tribunal").

17 In the Arbitration, the Seller took the position that Phoenix had failed to carry out the task required of it. Therefore, it was impossible to determine the relevant Market Benchmarks without the assistance of expert evidence, which both the Seller and the Buyer introduced. The Buyer's expert chose the median market benchmark figures provided in the Phoenix Reports, while the Seller's expert (Falcon) adopted an entirely new market benchmark based on materially different data and analysis used by Phoenix.

18 In the Seller's 1st Witness Statement filed for the Arbitration, he attempted to cast doubt over the preparation of the Phoenix Reports, stating that he had "certain concerns as to the manner in which [Phoenix] has prepared the reports". He explained that in response to correspondence from his solicitors in August 2019 requesting clarifications and information from Phoenix, Phoenix stated that the agreement for its engagement was between itself and the Buyer, "without any reference to or mention of [the Seller]". From this, the Seller claimed, it was clear that Phoenix was unaware that it owed any duty or responsibility to him and that the reports from Phoenix were "suspect". The Seller went further to say that "[i]n all the circumstances, the information

provided in the [Phoenix] Reports must be treated by the Tribunal with circumspection".

19 Ultimately, in the Partial Award issued on 3 June 2020 (the "First Partial Award"), the Tribunal found that the Phoenix Reports had to provide the basis from which the appropriate Market Benchmarks should be derived, given the Seller's and the Buyer's agreement that Phoenix (and not someone else) would be appointed as the independent expert. As such, the Tribunal accepted the median market benchmark in the Phoenix Reports, *ie*, the position advanced by the Buyer's expert.

20 In addition, the Tribunal noted the following:

> 55. The Tribunal wishes to add that in the absence of [Phoenix] being called to give evidence, including of the questions that [the Seller's] expert would have liked [Phoenix] to answer, the Tribunal is not in a position to determine if there was any bias or manifest error on [Phoenix's] part.

The Seller's unsuccessful attempt to set aside the First Partial Award

21 On 2 September 2020, the Seller applied to the General Division of the High Court *vide* HC/OS 854/2020 to set aside certain findings of the First Partial Award, including the finding that the appropriate market benchmark was the median market benchmark provided by Phoenix. This was rejected by the Judge of the General Division of the High Court (the "Judge") on 16 December 2020. The grounds for the dismissal can be found in *CIX v CIY* [2021] SGHC 53 at [37]–[56]. The Seller appealed this decision *vide* CA/CA 4/2021.

The Corruption Application

22 In or around August 2021, *ie*, after the Seller had filed his appeal against his unsuccessful challenge to set aside the First Partial Award but prior to the

decision in that appeal, the Seller made an application in the Arbitration effectively asking the Tribunal to investigate allegations of corruption made by him against Phoenix and/or the Buyer and further, to determine whether it was safe to rely on the Phoenix Reports in the Arbitration (the "Corruption Application"). He principally relied on two facts in that application:

(a) At and around the time the Buyer was seeking a revised quote from Phoenix in respect of its potential appointment as the independent human resource consultant, the Buyer's representative had sent an e-mail to Phoenix's representative on 29 September 2016 (the "29 September 2016 E-mail") stating that "I hope you consider that we have a significant project in progress with [Phoenix]". Despite this, Phoenix proceeded to issue the COI Declaration containing the Representations in October 2016.

(b) The Buyer had directed Phoenix not to respond to the Seller's solicitors' request for information in August 2019 (see above at [18]) for the reason that Phoenix's engagement was to produce the Phoenix Reports on a joint basis and any request to revisit the contents of those reports had to be agreed by both parties. Following this, on 20 August 2019, Phoenix replied to the Seller's solicitors, refusing to comment on the requests substantively and taking the position that its engagement was with the Buyer only (the "20 August 2019 E-mail").

23 Taking these together, the Seller submitted that "it is reasonable to infer that [Phoenix] and [the Buyer] were in the same camp (i.e. there was no independence on the part of [Phoenix]) and [the Buyer] deliberately concealed this fact by misleading the Tribunal and [the Seller]". The Seller asserted that

Phoenix's conduct "must lend to the conclusion that [Phoenix] has aligned itself with [the Buyer] as a result of benefits and gratification conferred on it."

24 The Buyer contended that the Seller's allegation of corruption was barred by the doctrine of *res judicata*. The documents that the Seller relied on in advancing the Corruption Application were disclosed in the course of the Arbitration and the Seller even relied on the same in the conduct of his case leading up to the First Partial Award. Further, the Seller had already made the related allegation of bias and/or lack of independence against Phoenix. As such, he could and ought reasonably to have raised the issue of "corruption" in the course of the arbitration proceedings leading up to the First Partial Award. In any event, the Buyer argued that there was no evidence of corruption.

25 Having considered the parties' submissions, on 18 August 2021, the Tribunal rejected the Seller's request to investigate the allegations of corruption made against Phoenix. The Tribunal held that "any such allegation could and ought reasonably to have been raised at the evidentiary hearing before the [First] Partial Award was issued" and agreed with the reasons given by the Buyer. The Tribunal also did not think that any exception to the extended doctrine applied in the matter.

26 The Seller did not seek to set aside the Tribunal's decision in this respect.

The Seller's appeal against the dismissal of his setting-aside application

27 As mentioned, the Seller appealed against the dismissal of his application to set aside the First Partial Award (see above at [21]). That appeal was dismissed on 21 October 2021 by this court.

The commencement of S 885

28 On 29 October 2021, having failed in both his appeal against the dismissal of his setting-aside application and the Corruption Application, the Seller commenced the present proceedings, *ie*, HC/S 885/2021 ("S 885"), against Phoenix to recover, *inter alia*, the loss of earnings or income he would have been entitled to pursuant to the SPA had it not been for Phoenix's misrepresentations and/or misconduct (see below at [39(a)]).

The further Partial Awards

29 Subsequent to the issuance of the First Partial Award, the parties to the Arbitration were still unable to determine the market benchmark levels, particularly because Phoenix had set out seven compensation levels (see above at [14]). To resolve this, the Tribunal issued the Second Partial Award on 19 January 2022.

30 On 23 December 2022, the Seller commenced further arbitration proceedings against the Buyer, alleging that the First Partial Award had been procured by fraud. This was consolidated with the Arbitration.

31 The Tribunal issued the Third Partial Award on 28 July 2023 (the "Third Partial Award"), determining the Final Valuation at $61,707,965. This meant that, pursuant to the SPA, the Buyer would have to pay the Seller $1,707,965 (see above at [8(b)(ii)]).

32 On 27 October 2023, the Seller applied to set aside the Third Partial Award *vide* HC/OA 1109/2023 ("OA 1109"). That application was stayed on 28 February 2024: see *DJA v DJB* [2024] SGHCR 10.

The decision in S 885 and the filing of an appeal

33 Parallel to the arbitration proceedings and the issuance of the further awards, the Seller's action against Phoenix in S 885 proceeded. On 24 May 2024, the Judge dismissed the Seller's claims in S 885, setting out his reasons in *CIX v DGN* [2024] SGHC 133 ("Judgment").

34 On 20 June 2024, the Seller filed his notice of appeal, seeking to challenge the whole of the Judge's decision in S 885.

The Settlement

35 It was eventually disclosed that, in or around June 2024 and sometime after the Judge's dismissal of the claims in S 885, the Seller and the Buyer had reached a settlement (the "Settlement"). The fact of the Settlement was first disclosed in the Seller's Case in this appeal filed on 2 October 2024, and further confirmed by the Seller's counsel, Mr Hewage Ushan Saminda Premaratne ("Mr Premaratne"), at the hearing before us. However, the terms of the Settlement remain confidential and have not been disclosed to the court. As a result of the Settlement, OA 1109 was discontinued and a termination order for the Arbitration was issued by consent on 2 July 2024.

The Decision Below

36 The Seller advanced three broad claims in S 885:

(a) a claim in fraudulent and/or negligent and/or innocent misrepresentation in relation to the COI Declaration (the "COI Declaration Claim");

(b) a claim in fraudulent and/or negligent and/or innocent misrepresentation in relation to the 20 August 2019 E-mail (the "Appointment Claim"); and

(c) a claim for tortious breach of duty of care owed to him by Phoenix.

37 With respect to the COI Declaration Claim, the Seller took issue with the fact that, amongst other things, Phoenix had a "significant project in progress" with the Buyer (which was a reference to the contents of the 29 September 2016 E-mail sent by the Buyer to Phoenix) and "such a significant project had to be disclosed to [the Seller]". The Seller disclaimed having knowledge that the Representations in the COI Declaration were false, only coming to know of this after the Phoenix Reports were produced and the dispute between him and the Buyer "were at an advanced stage".

38 It is not necessary to set out the Appointment Claim and the claim for breach of duty of care in detail. It suffices to note that the claim for breach of duty of care was based on, *inter alia*, alleged defects within the Phoenix Reports, Phoenix's failure to declare its engagement(s) with the Buyer in the COI Declaration, Phoenix's failure to act independently and impartially in the discharge of its duties as a jointly appointed consultant and Phoenix's failure to exercise reasonable care and skill in carrying out its engagement and in preparing the Phoenix Reports.

39 As a result of the alleged misrepresentations or misconduct of Phoenix complained of, the Seller claimed it was entitled to:

(a) loss of earnings or income pursuant to the calculation of the Final Valuation under the SPA, to be assessed; and

(b) costs on an indemnity basis of his legal experts and alternative human resource compensation expert engaged to assist with the determination of the Market Benchmarks.

40 The Judge dismissed the Seller's claims on two grounds, finding that (a) they were an abuse of process, having regard to the prior arbitral and court decisions against the Seller; and (b) the claims failed on the merits, based on the pleadings and evidence before the court: Judgment at [32].

41 The Judge found that the suit was an abuse of process for four reasons: Judgment at [48]–[92]:

(a) S 885 constituted a collateral attack against prior decisions: the Tribunal's decision that the Market Benchmarks should be based on the Phoenix Reports, the court decisions upholding that decision, and the Tribunal's dismissal of the Seller's Corruption Application;

(b) S 885 relied on largely the same material that was put before the Tribunal;

(c) to the extent that new material was sought to be relied on in S 885, the belated reliance on the new material was unmeritorious; and

(d) allowing the claims in S 885 could have caused the Buyer to be "twice vexed in the same matter".

42 On the merits, the Judge dismissed the claims in innocent misrepresentation, and for damages under the Misrepresentation Act (Cap 390,

1994 Rev Ed): Judgment at [93] and [94]. As for the claims in fraudulent misrepresentation, the Judge held that: Judgment at [96]–[126]:

(a) The COI Declaration was not false, nor was it fraudulently made. In any event, while the Seller did rely on the COI Declaration, he failed to prove what damages he suffered as a result.

(b) The representation grounding the Appointment Claim was not false. The Seller failed to prove that it was made fraudulently or negligently, that he relied on it, and that he suffered loss.

43 For the same reasons, the Judge dismissed the claims in negligent misrepresentation: Judgment at [127].

44 The Judge also dismissed the Seller's claim in breach of duty of care, primarily because the Seller failed to prove a breach and damages as a result of the alleged breach: Judgment at [129]–[159].

45 Lastly, the Judge ordered the Seller to pay costs to Phoenix on an indemnity basis: Judgment at [162]–[164].

The Parties' Cases

The Seller's Case

46 The Seller appealed the following holdings of the Judge:

(a) there was no fraudulent and/or negligent misrepresentation in relation to the COI Declaration;

(b) the Seller failed to show that he had suffered loss and damage because of his reliance on the COI Declaration;

(c) S 885 was an abuse of process; and

(d) the Seller's conduct warranted an order of indemnity costs.

The COI Declaration Claim

47 The Seller submitted that the Judge had erred in finding that the Representations in the COI Declaration made by Phoenix were not false; his case was that the Representations were instead made with the knowledge that they were false, or at least made recklessly, not caring whether they were true or false. The Seller also submitted that his claim in negligent misrepresentation was made out as Phoenix owed him a duty of care when preparing the COI Declaration. Despite so, it failed to carry out proper checks.

48 With respect to the element of loss and damage, the Seller submitted that there was a loss of chance/opportunity to obtain a higher payment under the SPA because he had relied on the Representations and agreed to engage Phoenix. To this end, he submitted that the Judge had erred in determining that he was not entitled to claim damages on the basis of this loss of chance/opportunity. On his case, if Phoenix was not appointed, Falcon would instead have been the independent human resources consultant.

Abuse of process

49 The Seller contended that the Judge had erred in finding that:

(a) S 885 was a collateral attack on the First Partial Award, the decisions of the court in respect of the application to set aside that award, and the Tribunal's dismissal of the Corruption Application;

(b) S 885 relied largely on the same material that was put before the Tribunal;

(c) the present case was analogous to two other cases where an abuse of process was found; and

(d) any award for damages in S 885 would result in vexing the Buyer.

Indemnity Costs

50 Finally, the Seller challenged the Judge's decision to award indemnity costs against him. He argued that he had a legitimate basis to commence S 885 and further contested the Judge's criticism of his conduct *vis-à-vis* his discovery obligations.

Phoenix's Case

51 Phoenix defended the Judge's decision and contended that the Seller's appeal was a further abuse of process.

Abuse of process

52 Phoenix argued that the Judge rightly found S 885 to be an abuse of process for the same four reasons set out by the Judge (see above at [41]). Further, the Judge's determination was an exercise of discretion, having regard to all the circumstances of the case. As such, the court should be slow to disturb this finding.

The COI Declaration Claim

53 Phoenix submitted that the elements of fraudulent misrepresentation were not established as there were no false representations made nor was there

any fraudulent intent. Further, there was no breach of duty of care to support the claim in negligent misrepresentation.

Indemnity Costs

54 Finally, Phoenix submitted that the Judge's award of indemnity costs should be maintained given the abuse of process. In any event, such costs were justified on the basis of the Seller's conduct of S 885 and this appeal, particularly in relation to his failure to disclose relevant documents.

The Issues

55 There were four issues before this court:

(a) whether the extended doctrine was applicable to prevent the Seller from pursuing the claim against Phoenix in S 885;

(b) whether the Judge erred in finding that S 885 was otherwise an abuse of process and the impact of the Settlement on this issue;

(c) whether the Judge erred in deciding that the Seller's claims in S 885 would have failed in any event; and

(d) whether there was any proper basis to award costs on an indemnity basis below.

Our Decision

The extended doctrine of res judicata

The contours of the extended doctrine

56 It is settled that the genesis of the extended doctrine is Sir James Wigram VC's statement in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*") at 115:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. …

57 The policy behind the extended doctrine (as with the broader doctrine of *res judicata*) is that litigants should not be twice vexed in the same matter, and that the public interest requires finality in litigation: see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [98].

58 Drawing from these policy objectives, the essence of the extended doctrine thus concerns a collateral attack against prior decisions. In this regard, it is crucial to identify the relevant prior decision which is the subject matter of the collateral attack.

59 To the same end, in examining the extended doctrine, it is crucial to determine the nature of the claim and the essential issues in the earlier proceedings (whether in court or arbitration). In that regard, it will not be helpful to claim that the present action deals with claims which were not dealt with in the earlier proceedings. For the extended doctrine to apply, there is no requirement that the claims in the earlier proceedings should be the same as those pursued in court. In fact, the doctrine is extended precisely to apply to situations of claims and/or issues which were not raised earlier but which could and ought to have been raised in the previous action.

60 One needs to look no further than *Henderson* to appreciate this principle. There, the plaintiffs had brought legal proceedings in the Colonial Court in Newfoundland against the defendant, alleging that some sums were owed to them arising from the administration of a deceased person's estate. The plaintiffs were successful in those proceedings and obtained an order for the defendant to pay a sum of money to them. The plaintiffs then brought subsequent proceedings in England, which were the subject of the judgment in *Henderson*, to enforce the judgment debt. In those subsequent proceedings, the defendant sought to resist the claim, alleging, *inter alia*, that he was owed money because the plaintiffs were liable for certain sums which had been overdrawn from the deceased person's estate. However, those claims were not advanced in the earlier proceedings in Newfoundland. It was in that context that Wigram VC observed at 116 that "undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled".

61 When undertaking an inquiry as to whether the extended doctrine applies, the court has a higher degree of flexibility as compared to situations of

cause of action or issue estoppel. Lord Bingham of Cornhill, in the House of Lords decision of *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Johnson*") at 31D, saw the question of whether a litigant should be estopped from taking a point that could have been raised in earlier proceedings between the same parties not as a "dogmatic" inquiry, but rather, as a "broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case": *TT International* at [104]. To this end, the High Court in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") stated at [53] (as endorsed by this court in *TT International* at [104] and in *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [38]):

> …To put it shortly, a court should determine whether there is an abuse of process by looking at all the circumstances of the case, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant. In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been. …

62 As the High Court in *Tan Bee Hoon (executrix for the estate of Quek Cher Choi, deceased) and another v Quek Hung Heong and others* [2015] SGHC 229 at [21] observed, cases in which the extended doctrine were

held not to apply can generally be seen as involving reasonable grounds for not having raised the issue earlier. These include instances of:

(a) Consequential matters. The second action came as a consequence of the first, to deal with consequential matters or to effect a remedy contemplated in the earlier proceedings: see *Lee Hiok Tng (in her personal capacity) v Lee Hiok Tng (executors and trustees of the estate of Lee Wee Nam, deceased) and others* [2001] 1 SLR(R) 771 and *Ng Chee Chong and another v Toh Kouw and another* [1999] 2 SLR(R) 909.

(b) New circumstances. The second action came after new circumstances arose: see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53.

(c) Impecuniosity or other reasonable explanation for initial inaction: see *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 and *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] 3 SLR 710.

(d) General reasonable grounds: see *Goh Nellie*.

63 Finally, a proper understanding of the burden of proof is important in any analysis for the application of the extended doctrine. Essentially, the legal burden is on the party invoking the extended doctrine in the court proceedings to demonstrate that the claims could have been brought in the earlier proceedings. Thereafter, the evidential burden would fall on the other party to explain why those claims could not have been brought there.

64 In the case where the prior proceedings were arbitral proceedings (such as the instant case), we found the exposition by the Assistant Registrar in *Cachet* at [32] to be very instructive. The invoking party would need to demonstrate that the claims come within the scope of the arbitration agreement, and if so, the other party would need to explain why those claims could not have been brought in the arbitration either because they were outside the scope of the arbitration agreement or that there was a good reason for not pursuing them in the arbitration.

The application of the extended doctrine in favour of non-parties to the arbitration proceedings

65 It was not disputed by either party that the extended doctrine can, in principle, apply in favour of a defendant who was neither a party to the earlier arbitration proceedings nor a party to the arbitration agreement, provided that the claims in the subsequent court proceedings fall within the scope of the arbitration agreement. This was confirmed by Mr Premaratne during the oral hearing. Instead, the Seller's case was that the extended doctrine did not apply on the facts of the present case.

66 It is nevertheless helpful to track the genesis of and rationale for the application of the extended doctrine to such situations. The extended doctrine applies, in its most quintessential form, in circumstances where the earlier and later proceedings (a) involve the same parties and (b) are proceedings before a competent court. Indeed, this was the case in *Henderson* (see above at [60]). But this is not the only instance when the extended doctrine would operate.

67 The extended doctrine also applies where the parties to the earlier (court) proceedings are different from those to the later (court) proceedings: see *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 ("*Kwa Ban*

Cheong") at [30] and [32]; see also *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 at [74]. The decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, which the courts in *Kwa Ban Cheong* and *Goh Nellie* referred to, is notable in this respect. There, the appellant was one of the defendants in the notorious "Birmingham Six" criminal trial. In the criminal trial, the appellant and the other defendants alleged that their confessions had been induced by police violence. The trial judge ruled that their confessions were voluntary and they were accordingly convicted. Subsequently, the appellant brought a civil claim against the police for damages for assault based on the alleged violence inflicted in the course of extracting his confession. The House of Lords unanimously held that the claim should be struck out as an abuse of process because it was in fact an attempt to relitigate an issue that had already been decided, and so was a collateral attack against the decision of the criminal court on the same point. This was despite the earlier proceedings having involved the appellant and the Crown and the later proceedings simply involving the appellant and the police, with the Crown and the police being, formally, different persons in law.

68 The extended doctrine can also apply to situations where the earlier decision was that of an arbitral tribunal. As such, a court may disallow a party to raise certain points in later court proceedings which it could and should have raised in the earlier arbitration proceedings: *AKN (No. 2)* at [58], citing the decisions of *Ultrapolis* at [30]–[46] and *Dallal* at 462–463 as examples. This is provided that the matters sought to be reopened in the subsequent court proceedings (a) are covered by the arbitration agreement, (b) are arbitrable, and (c) could and should have been raised in the earlier arbitration proceedings already concluded: *AKN (No. 2)* at [59]. The facts of *Ultrapolis* amply illustrate

this point. In that case, the defendant owed the plaintiff a debt pursuant to an arbitration award which the plaintiff had successfully registered as a judgment under the International Arbitration Act (Cap 143A, 2002 Rev Ed). Having served the defendant a statutory demand that went unsatisfied, the plaintiff applied for the defendant's winding up. The defendant challenged that application on the basis of, *inter alia*, a genuine cross-claim against the plaintiff. The High Court found that the defendant could and should have brought the cross-claim in the arbitration proceedings, especially when the cross-claim arose out of the same facts and transaction. As such, the cross-claim was a thinly veiled collateral attack on the arbitration award, which clearly showed that the cross-claim was not a genuine one.

69 The application of the extended doctrine to such situations is not difficult to justify: it ensures the finality of litigation and concomitantly the avoidance of multiplicity of proceedings (see above at [57]). Viewed from this perspective, the critical inquiry is on the substance of the litigation and not its form, and that entails a consideration of all the circumstances of the case. That would typically require the identification of the essential issue(s) of the litigation. For this reason, it should not matter whether the duplicative or sequential litigation involved the same or different parties, or what fora the litigation took place in, so long as it involved essentially the same matter. It is thus clear that the extended doctrine can apply to situations where (a) there is no identity of parties and (b) where the earlier proceedings are in arbitration and the later proceedings are before a competent court.

70 Two English cases serve as illustrations of such application, both of which the Judge had cited in the Judgment: (a) *Arts & Antiques Ltd v Richards & Ors* [2013] EWHC 3361 (Comm) ("*Arts & Antiques*") and (b) *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646 ("*Michael Wilson*").

71 In *Arts & Antiques*, the claimant who was a jeweller made claims against its insurers and its insurance brokers (as agents of its insurer) in connection with a robbery. Prior to this, the claimant had commenced arbitration proceedings against its insurers and its claims in the arbitration were dismissed on the basis that the claimant had failed to satisfy a particular condition precedent under the insurance policy. Part of the claimant's case in the court proceedings was that the insurance policy did not contain the said condition precedent. The English High Court struck out the claims (save for the claim against the insurance brokers for negligence), finding that the defendants could rely on the outcome of the arbitration to establish that there was an abuse of process. Notably, the court observed at [23] that "[i]t is also apparent that abuse of process may be relied upon where the earlier decision was that of an arbitral tribunal rather than a court and that arbitration involved a different party".

72 These remarks were cited by the English Court of Appeal in *Michael Wilson*. There, the claimant company had commenced arbitration proceedings against a director-employee alleging that he had received certain shares and cash as a bribe or secret commission, and so the claimant was entitled to those shares and cash. The claimant had invited the first defendant, who was its managing director, to join as a party to that arbitration so that the issue of the beneficial ownership of the shares could be conclusively determined. The first defendant declined the invitation and the arbitration proceeded, with the tribunal dismissing the claim and finding that the director-employee had received the shares and cash on behalf of the first defendant. The claimant then brought a claim against, *inter alia*, the first and second defendants, alleging that (a) they had knowingly assisted the director-employee to acquire the shares and cash in breach of his contractual and/or fiduciary duties and/or (b) the shares and cash constituted payment of a bribe or secret commission for which the first and

second defendants were liable. The first and second defendants applied to strike out the claim as an abuse of process on the ground that the claimant was repeating factual allegations which had already been rejected by the arbitral tribunal. While the English Court of Appeal did not strike out the claim, it had recognised at [67] that there was "no "hard edged" rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process". In reaching this conclusion, the court rejected the claimant's counsel's criticism that *Arts & Antiques* had been wrongly decided: *Michael Wilson* at [66].

73 It is therefore uncontroversial that the extended doctrine can apply in favour of non-parties to arbitration proceedings to stave off repeated claims in later court proceedings.

74 It must however be remembered that the above proposition does not amount to a conclusion that the extended doctrine *will always* apply to prevent claims in such circumstances; this involves a separate analysis that entails undertaking a broad, merits-based assessment in a flexible manner, considering all the circumstances of a case, to determine if there is an abuse of process (see above at [61]–[62]).

75 Despite the possibility of the extended doctrine applying to situations where the prior proceedings were in arbitration, further considerations should be borne in mind. Particular attention should be paid to the fact that, unlike court proceedings, the arbitral tribunal does not have the power to join a non-party to the arbitration agreement and to the arbitration, without the consent of the parties to the arbitration and that non-party: see, *eg*, Rule 18.1 of the Singapore International Arbitration Centre Rules 2025. Nor is it for the court to compel the participation of non-parties to an arbitration agreement in the arbitral

proceedings: see *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2024] 2 SLR 279 at [106]–[107].

76 This could have some bearing on the ability of a party to an arbitration to obtain discovery and/or information against a non-party. In turn, this may have an impact on the analysis as to the application of the extended doctrine in favour of a defendant in the later proceedings who was neither a party to the earlier arbitration nor a party to the arbitration agreement. Accordingly, in applying the extended doctrine in the context of prior arbitration proceedings, the court must be satisfied that the claims and/or issues arising under the fresh court proceedings could and ought to have been raised in the earlier arbitration proceedings *bearing in mind the limitations inherent in arbitral proceedings*.

77 The contentious issue over the application of the extended doctrine in favour of a party who was not a party to the earlier arbitral or court proceedings typically concerned the question of whether that party should have been added to the earlier action (be it in the arbitral or court proceedings). This explains the controversy in cases like *Cachet* and *Michael Wilson*, where the issue was whether a non-party to the arbitration agreement should have been invited to participate in the arbitration proceedings as a party together with the parties to the arbitration agreement. Similar considerations have arisen in the context of court proceedings: see, *eg*, *PricewaterhouseCoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9. The resolution of the issue requires the court to consider whether there was a good reason why that non-party was not *invited* to participate in the arbitration irrespective of how that party might have responded to the invitation.

78 That said, it was unnecessary to consider this in the present appeal since the situation here was quite different. It was never the Seller's case during the

Arbitration that Phoenix was separately liable to the Seller either in contract or in tort. Therefore, the question as to whether the Seller should have attempted to join Phoenix as a party to the Arbitration simply did not arise. The involvement and relevance of Phoenix in the Arbitration was never *qua* a party to the Arbitration but as a *potential witness* to address the issue of Phoenix's declared independence in the COI Declaration. The issue of Phoenix's liability to the Seller only arose after a series of unfavourable outcomes against the Seller, *ie*, the First Partial Award, the General Division of the High Court's decision to dismiss the Seller's application to set aside the First Partial Award and this court's decision to uphold the same, and the Tribunal's dismissal of the Corruption Application (see above at [28]). Consequently, it was not necessary to examine whether the Seller should have attempted to join Phoenix as a party to the Arbitration. Instead, the relevant inquiry was simply whether the issue of Phoenix's declared independence should have been raised directly in the Arbitration.

The application of the extended doctrine to this case

79 As an anterior matter, it was important to identify the prior decision(s) which formed the subject matter of the collateral attack (see above at [58]). In our view, it was not appropriate to group the First Partial Award, the two court decisions not to set aside this award and the decision of the Tribunal in respect of the Corruption Application as a collective, as the Judge below appeared to have done: Judgment at [52].

80 Instead, in identifying the subject matter of the collateral attack, the relevant question was: which prior decision was the Seller in truth seeking to attack and/or revisit? In our view, that would have been the First Partial Award which decided that the Phoenix Reports should be used to determine the Final

Valuation. One of the principal objectives of the Seller's claims in S 885 was to demonstrate that the Phoenix Reports should not have been relied on, and therefore damages flowed from such reliance by the Tribunal. In this sense, S 885 was a challenge to the finding in the First Partial Award.

81 In contrast, the courts' decisions not to set aside the First Partial Award concerned due process arguments and did not engage the merits or the correctness of the First Partial Award. From this perspective, it was both incorrect and infelicitous to say that S 885 constituted a collateral attack on the decisions of the General Division of the High Court and this court in refusing to set aside the First Partial Award. The claims in S 885 did not purport to challenge those decisions in any meaningful way.

82 We turn to the main inquiry: whether, looking at all the circumstances, S 885 was an abuse of process because, in substance, it was nothing more than a collateral attack upon the First Partial Award. In this regard, as we have set out (see above at [64]), Phoenix had to demonstrate that the claims in S 885 came within the scope of the arbitration agreement, and if it did so, the Seller had to explain why those claims could not have been brought in the Arbitration either because they were outside the scope of the arbitration agreement or that there was a good reason for not pursuing them in the Arbitration.

83 It was clear that any claim concerning the validity of the Final Valuation came within the scope of the arbitration agreement between the Buyer and the Seller. After all, a key issue in the Arbitration concerned the use of and reliance on the Phoenix Reports to determine the Final Valuation of the Company. The First Partial Award was arrived at based on the use of and reliance on these reports. As such, any issue which concerned or had any impact on the use of

and reliance on the Phoenix Reports could and ought to have been raised fully and exhaustively in the Arbitration.

84 Significantly, in the Arbitration, the Seller did not challenge the relevance or use of the Phoenix Reports. In fact, the Seller proceeded to rely on the Phoenix Reports to support his own interpretation of the data stated therein with the assistance of his own expert (Falcon). The Seller's contention was not that the Phoenix Reports should be disregarded, but rather that they were "non-conclusive and non-binding" on their own, and that they could not be relied on *solely*. In adopting this position, the Seller effectively accepted that the issue of the use of and reliance on the Phoenix Reports was within the scope of the arbitration agreement. It would follow that there was no question that this issue fell squarely within the scope of the arbitration agreement. In any event, it was not the Seller's case that this issue fell outside the arbitration agreement, but simply that it was an issue that did not feature in the Arbitration. We rejected that argument (see below at [102]–[105]).

85 Therefore, it was clear that the issue of Phoenix's independence, which had an impact on the use of and reliance on the Phoenix Reports, could and should have been raised in the Arbitration. In these circumstances, the assessment turned on the reasons put forward by the Seller to explain his omission to pursue this issue in the Arbitration.

86 We make several observations which we found to be key to set the context of this assessment.

87 First, it was necessary to appreciate what the Seller was aware of at the material time. Prior to the evidential hearing of the Arbitration, the Seller was already aware of the 29 September 2016 E-mail. According to the Seller, this

had been disclosed by the Buyer in its reply witness statement filed before the evidential hearing. Similarly, the Seller was aware that Phoenix had refused to respond to his solicitor's queries and had taken the position that its engagement was with the Buyer only, both of which were expressed in the 20 August 2019 E-mail that the Seller referred to in his 1st Witness Statement filed in the Arbitration (see above at [18]).

88 Second, it was telling, as will be shown below, what the Seller apprehended about what he knew. The Seller had obviously appreciated the materiality of the issue of Phoenix's independence or any lack thereof, as evidenced from his case in the Arbitration.

(a) This can be seen from as early as his 1st Witness Statement filed for the Arbitration, where he had characterised the Phoenix Reports as "suspect", and stated that they must be treated "with circumspection" (see above at [18]).

(b) Subsequently, in his Reply Witness Statement filed for the Arbitration, he stated that the fact that Phoenix and the Buyer's insurance brokers were part of the same corporate group had "[cast] doubts as to [Phoenix's] ability to be independent and impartial".

(c) Similarly, in the Seller's Opening Statement for the Arbitration, he stated that Phoenix's assertion that it was only appointed by the Buyer "further casts doubt as to the independence of [Phoenix]".

(d) In the Seller's oral opening submissions, his counsel stated that "[Phoenix] is supposed to be an independent human resource consultant as an expert … However, we say that [Phoenix] did not actually act as a

joint expert for both parties … We say that was not the way an independent human resource consultant [should act]".

(e) In the Seller's Post-Hearing Submissions, he argued that "there are good reasons to doubt the independence of [Phoenix]" and that the Seller "was not aware of [Phoenix's lack of independence] until late 2019". This suggested that the Seller *was* aware of Phoenix's lack of independence by late 2019.

These references were acknowledged by Mr Premaratne at the oral hearing of this appeal. Further, he also recognised that the issue of Phoenix's independence was raised in the Arbitration, albeit in a "very limited form".

89 The Seller similarly appreciated the materiality of the 29 September 2016 E-mail. At the evidential hearing of the Arbitration, his counsel questioned Mr BYR of the Buyer, the recipient of that e-mail, about the "significant project in progress with [Phoenix]".

90 Ultimately, despite what he knew and all his reservations about Phoenix's independence, the Seller elected not to call anyone from Phoenix as a witness in the Arbitration to demonstrate that the COI Declaration was false, inaccurate or misleading. Indeed, counsel for Phoenix, Mr Chew Kei-Jin, emphasised in his oral submissions before us that the Seller, having notice of the 29 September 2016 E-mail, could have (a) asked for discovery of the documents relating to the "significant project" referenced therein; (b) called the maker of the e-mail to give evidence at the Arbitration on the statement made by her therein; and (c) called employees of Phoenix to give evidence on the "significant project" in general. Nevertheless, he chose not to do any of these. Clearly, the Seller must be taken to have made a judgment call that it was not

necessary to directly challenge the independence of Phoenix for the purposes of the Arbitration. The result of this was that the Tribunal found that "in the absence of [Phoenix] being called to give evidence, … the Tribunal is not in a position to determine if there was any bias or manifest error on [Phoenix's] part" (see above at [20]).

91 The Seller suggested that although the 29 September 2016 E-mail was disclosed to him, he had limited information at the material time. This caused him to take a certain course of action, that being to not vigorously pursue the challenge to Phoenix's independence at the Arbitration prior to the First Partial Award. In short, the 29 September 2016 E-mail was insufficient in his view.

92 After an unfavourable outcome in the First Partial Award, the Seller tried to set aside that award on grounds of a breach of natural justice. When he failed to do so, he then decided to change tack to directly attack the independence of Phoenix via the Corruption Application. It appeared to us that his litigation strategy was largely shaped by his reaction to the unfavourable outcomes in the arbitral and court proceedings.

93 In our view, his explanation that limited information precluded him from pursuing the issue directly in the Arbitration before the release of the First Partial Award was contradicted and completely undermined by his later actions, specifically his subsequent conduct in filing the Corruption Application. Importantly, with the *same* information, the Seller did not hesitate to raise very serious allegations of corruption against both Phoenix and the Buyer. It certainly cannot be said that on the one hand, the 29 September 2016 E-mail was sufficient to raise the serious allegations of corruption, but on the other hand, it was somehow deficient as support for a challenge to Phoenix's independence in

the Arbitration. That would amount to impermissible approbation and reprobation.

94 More significantly, the Corruption Application was rejected precisely because the Tribunal found that the issue could and ought to have been raised in the Arbitration prior to the issuance of the First Partial Award. The Seller remained bound by that decision, which he did not even attempt to set aside.

95 Ultimately, the inquiry remained the same: was there sufficient objective evidence to demonstrate that the allegedly "new" issues which the Seller wanted to litigate in these proceedings could and ought to have been raised in the earlier arbitral proceedings? Based on the various reasons above, it was clear to us that the Seller could and ought to have directly raised the issue of Phoenix's independence in the Arbitration. The Seller admitted as much under cross-examination in the trial below when he acknowledged that he simply "didn't put [in] the effort" to obtain the evidence from Phoenix at the material time. In our judgment, the extended doctrine applied *a fortiori* to the present appeal.

96 We thus turned to examine the reasons put forward by the Seller to challenge the application of the extended doctrine. The Seller relied principally on fresh evidence which he obtained by way of discovery in S 885. However, it was important to bear in mind that the fresh evidence was essentially just more evidence in aid of the same point.

97 Significantly, this fresh evidence could be traced back to the 29 September 2016 E-mail. The Seller had referred to this e-mail in his statement of claim for S 885, averring that the Representations made in the COI Declaration were false because, *inter alia*, Phoenix had a significant project with the Buyer as stated in the e-mail. To this, Phoenix responded in its defence that

(a) it had carried out its internal checks and assessments before signing the COI Declaration and (b) it and the Buyer had one engagement in 2016 at the material time of its engagement for the market benchmarking exercise that the Seller and the Buyer were interested in. The Seller then requested further and better particulars, which Phoenix responded to by providing details of this other project as well as the internal checks it would have conducted. Phoenix also referenced some internal e-mails in its particulars. On top of this, the Seller filed an application (HC/SUM 2053/2022) seeking discovery of, *inter alia*, Phoenix's internal correspondence relating to (a) the internal checks and assessments it had carried out concerning Phoenix's engagement for the benchmarking exercise and (b) the other project that Phoenix had with the Buyer. At the hearing before us, Mr Premaratne confirmed as much. In short, the fresh evidence arose because of the contents of the 29 September 2016 E-mail, which the Seller had first sight of during the Arbitration. As was mentioned during the hearing, the position might well be different if the Seller had had no material whatsoever which could have had an impact on Phoenix's independence prior to the discovery in S 885.

98 If the Seller considered that he would require more evidence to support his point, he could have subpoenaed the relevant witness from Phoenix to produce the relevant documents and/or information in the Arbitration as was rightly observed by the Tribunal. Different considerations might apply if the party (to the arbitration) had no means whatsoever to compel the non-party (to the arbitration) to provide discovery of the additional documents and/or information to support the new point, *eg*, where the non-party is resident overseas and there are no means to compel disclosure.

99 The Seller had offered several reasons for not calling Phoenix as a witness to the Arbitration. The Judge rejected these, finding them to be

unmeritorious: Judgment at [86]. We agreed. First, the Seller justified his failure to subpoena Phoenix by speculating that such a step "would derail the procedural timetable and likely postpone the evidential hearing [of the Arbitration]" and that the Tribunal would have required "very compelling reasons" for him to introduce further evidence. This was in light of the 29 September 2016 E-mail being disclosed only less than two months before the evidential hearing. But, the Seller took no steps to even attempt to obtain and introduce such evidence. In fact, he accepted that he simply did not put in the effort to do so (see above at [95]).

100 Second, the Seller referred to his previously unsuccessful attempts to obtain information from Phoenix. It suffices to say that in such circumstances, the obvious course of action would have been to subpoena the uncooperative witness and compel that witness to give evidence. The Seller accepted under cross-examination that even as the Buyer had objected to Phoenix being called as a witness in the Arbitration, this did not stop him from applying for a subpoena, which he did for other witnesses but not for Phoenix.

101 In our judgment, the Seller made the considered and calculated decision not to pursue the issue of Phoenix's lack of independence evidentially in the Arbitration by obtaining direct evidence from Phoenix, and the Seller must therefore be bound by the consequences of this decision.

102 The Seller also purported to defend his decision not to add Phoenix as a party to the Arbitration. This, however, was not an explanation to why the Seller failed to pursue his allegations by way of evidence adduced at the Arbitration. It remained open for the Seller to seek the necessary evidence to advance his claims comprehensively at the Arbitration, notwithstanding that Phoenix was a non-party. In any event, as explained at [78] above, the issue was never about

adding Phoenix as a party to the Arbitration, but rather seeking the evidence from Phoenix if the Seller was minded to pursue his challenge against Phoenix's independence.

103 The Seller also relied on the fact that Phoenix's independence was not a pleaded issue in the Arbitration. This did not assist the Seller for several reasons.

104 First, the jurisdiction of an arbitral tribunal in deciding a dispute is not framed only by the statement of claim and notice of arbitration. Instead, the tribunal is entitled to have regard to the agreed list of issues, the evidence in the arbitration, and the parties' respective opening and closing submissions: see *CDM and another v CDP* [2021] 2 SLR 235 at [18] and *Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2025] 1 SLR 88 at [39]–[40]. The issues placed before the tribunal are therefore derived from these sources. In the present case, the issue of Phoenix's independence was in fact raised by the Seller consistently throughout the Arbitration: this issue featured in his witness statements, his cross-examination of the Buyer's witness, his opening statement, his oral opening submissions and his post-hearing submissions (see above at [88]–[89]).

105 In fact, in the Seller's oral opening statement, his counsel expressly addressed this issue, stating:

> Now, the respondent in its opening has made the point that we did not plead that [Phoenix] was not independent, we did not plead that they had not fulfilled their role, but *we say there was no necessity to do so*. I've outline [*sic*] to you the issues that this tribunal has to decide, which is the sub-issue is what adjustments [to the Company's PATMI] must be made. So how those adjustments are to be made is really a matter of evidence.
>
> …

> So I say, I don't think I need to go through it, but *the issues between the parties is clearly set out; neither party is taken by surprise. There is really no need for pleadings to be amended.*
>
> [emphasis added]

Thus, it was somewhat disingenuous for the Seller to confine himself to the pleadings having taken the position at the Arbitration that the pleadings alone did not determine the issues that the Tribunal had to decide.

106 Second, the ultimate issue, in any event, was not the independence of Phoenix *per se* but the use of and reliance on the Phoenix Reports. That being the case, it cannot be denied that the independence of Phoenix was central to the use of and reliance on the Phoenix Reports. Indeed, that was precisely the case that the Seller attempted to run in the Arbitration.

Abuse of Process

107 The concepts of *res judicata* and abuse of process are distinct but overlapping areas of law which share the common aim of preventing unfair litigation from proceeding: see *Lim Oon Kuin and others v Rajah & Tann Singapore LLP and other appeals* [2024] 2 SLR 654 ("*Lim Oon Kuin*") at [31], citing the UK Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [25]; see also *TT International* at [102]. The extended doctrine is often recognised as falling under, and is but one category of, the broader doctrine of abuse of process: *Lim Oon Kuin* at [26], citing *Goh Nellie* at [19] and [52] and *Johnson* at 90.

108 However, there are several other recognised categories of abuse of process, such as (a) proceedings which involve a deception on the court or are fictitious or constitute a mere sham; (b) proceedings where the process of the court is being employed for some ulterior or improper purpose or in an improper

way; (c) proceedings which are manifestly groundless or which serve no useful purpose; and (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression: *Lim Oon Kuin* at [26], citing *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [34].

109 While *res judicata* is concerned primarily with protecting the finality of prior determinations, abuse of process addresses a wider range of unfair litigation. The latter focuses on the propriety of an action, often examining the facts and circumstances of a case to ascertain the subjective state of mind of the parties: *Lim Oon Kuin* at [31]–[32].

110 Turning to the present case, apart from the application of the extended doctrine, the Judge – having analysed this issue separately – had also found that there was an abuse of process on the Seller's part on other grounds. In his view, there was abuse because the Seller had largely used the same material that was before the Tribunal to pursue his claims in S 885. However, it must be borne in mind that the extended doctrine deals with situations where the issues being raised in the latter proceedings had not been raised earlier although they could and ought to have been (see above at [56]). Therefore, the finding that the Seller was largely using the same material would appear to contradict the basic notion of the extended doctrine.

111 That said, this does not foreclose the finding of an abuse of process for the reason identified by the Judge. In our view, the abuse was precipitated *after* the Tribunal's determination of the Corruption Application. This was so for two reasons:

(a) First, it was only in the Corruption Application that the Seller *directly* challenged Phoenix's independence. Until then, the Seller was also relying on the data and information within the Phoenix Reports for his own purposes (see above at [84]).

(b) Second, having failed in the Corruption Application, the Seller proceeded to advance substantially the same allegations against Phoenix in S 885 to directly attack Phoenix's independence. The fact that the Seller had managed to obtain more evidence in S 885 does not change the fact that the evidence covered largely the same point, *ie*, Phoenix's independence.

In our view, it was from the point of the Tribunal's dismissal of the Corruption Application that it could be said that the Seller largely used the same material against Phoenix in S 885 and the action was hence an abuse of process.

The Impact of the Settlement

112 What was more significant and obvious in the abuse of process analysis was the Settlement. The Settlement was concluded on or around June 2024, *after* the Judge's decision was issued. Notwithstanding the Settlement, the Seller persevered with this appeal.

113 The Settlement made it clear beyond peradventure that the pursuit of the present appeal was an abuse of process. Through the Settlement, the Seller's dispute with the Buyer over the sale of his shares in the Company pursuant to the SPA was "amicably resolved". Indeed, at the hearing before us, Mr Premaratne readily accepted that as between the Buyer and the Seller, "everything has been resolved". Despite the lack of details provided by the Seller, it was clear to us that the Settlement stood as a settlement of the

contractual dispute between the Seller and the Buyer about what the Seller was entitled to – and what was due to him – (if anything) under the SPA. In short, by entering into the Settlement, the Seller accepted that he had received everything that he was entitled to under the SPA.

114 This, however, contradicted the very claim in S 885 which was predicated on the case theory that the Seller had suffered a loss in that he had received less than what he was otherwise entitled to under the SPA *because* of Phoenix's conduct. The Settlement completely undermined this claim.

115 Further, on the Seller's case, the loss claimed against Phoenix was based on the difference between what he in fact received from the Buyer and the amount which he claimed he would have been entitled to if another expert had been appointed in place of Phoenix (such as Falcon). There were at least two fatal flaws in this argument:

(a) As the amount paid to (or by) the Seller under the Settlement had not been disclosed, it was simply mathematically impossible to determine if there was *any* difference between the two values and in turn, whether the Seller had suffered any net loss under the SPA. In any calculation to ascertain the Seller's loss, the amount received under the Settlement Agreement had to be deducted from the amount of the claim.

(b) There was simply no evidence that the Seller's expert, Falcon, would have been appointed in lieu of Phoenix or that the data which Falcon (or any alternative expert) might have generated would support the Seller's claim for loss and damage. This omission would have been fatal to the Seller's tortious claims against Phoenix in any event.

No merit in S 885

116 In so far as the merits of the Seller's claims were concerned, we noted that the Seller had only appealed against the Judge's decision in respect of some of the misrepresentation claims. However, given our finding that the claims were barred by the extended doctrine as well as for being an abuse of process, it was not necessary to examine whether the legal requirements for the claims had been made out. That said, it was clear to us (as explained at [115] above) that the claims would have failed for the lack of evidence and the absence of any proof of loss and/or damage.

117 As an aside, we observe that representations as to the absence of a conflict of interest are commonplace in the commercial marketplace, especially when transacting with another or engaging a third party to perform a significant role in a transaction such as in the present case. Great care should be taken when making any such representations. An inaccurate assertion could lead to unnecessary and costly litigation, whether the party making the declaration was dishonest or simply negligent. It would be wise to conduct thorough due diligence and seek the relevant advice to ensure that all factors have been properly considered before making such statements. As a corollary, it would be imprudent and ill-considered to make such representations without performing the proper checks or while turning a blind eye to any potential conflicts, all in an effort to close the deal or secure the appointment. It should go without saying that, in the appropriate context, false representations of this nature may attract regulatory or even criminal consequences.

Indemnity Costs Below

118 The Judge found it appropriate to order indemnity costs, on account of S 885 being an abuse of process and the Seller's failure to disclose several

relevant documents (such as arbitration documents in relation to his concession that he was not expecting a single benchmark figure, and his failed Corruption Application): Judgment at [162]–[164].

119 An order for indemnity costs is appropriate only in exceptional circumstances: see *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] 1 SLR 1648 at [83], citing *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32]. The High Court in *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [23] set out the following non-exhaustive categories of conduct which may provide good reason to order indemnity costs:

(a) where the action is brought in bad faith, as a means of oppression or for other improper purposes;

(b) where the action is speculative, hypothetical or clearly without basis;

(c) where a party's conduct in the course of proceedings is dishonest, abusive or improper; and

(d) where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

120 In *Pradeepto Kumar Biswas v Sabyasachi Mukherjee and another and another matter* [2022] 2 SLR 340 at [95], this court ordered indemnity costs against the appellant on the basis that the two applications before the court were an abuse of process: one was essentially seeking identical relief as a claim filed subsequently by the appellant, indicative of a desire to oppress the respondents, while the other fell afoul of the extended doctrine.

121 It is trite that a court is exercising its discretion when fixing costs. In this regard, an appellate court should not upset the decision of a lower court on a discretionary matter just because it may have been inclined to exercise the discretion differently had the matter come to it afresh. In order for the appellate court to disturb the (discretionary) decision of the lower court, it must be showed that the latter erred in some way, such as by exercising the discretion while under some mistake of law or misapprehension of the facts or by taking into account irrelevant factors or failing to take into account mandatory relevant factors: see *Senda International Capital Ltd v Kiri Industries Ltd and others* [2020] 2 SLR 1 at [32].

122 We found the basis for the Judge's order of indemnity costs to be sound. As canvassed at length above, S 885 was an abuse of process. As for the non-disclosure of particular documents, we rejected the Seller's reasons and instead found those documents to be relevant and pertinent to the material issue at hand in the Arbitration.

Conclusion

123 For the reasons set out above, we dismissed the appeal. We granted indemnity costs in favour of Phoenix payable by the Seller, fixed at $100,000 inclusive of disbursements. Given our finding that it was proper to award indemnity costs below, we saw no reason why a similar order should not be made for the appeal, especially where the reasons underpinning the indemnity

costs order below applied equally and perhaps more forcefully to the appeal in light of the Settlement.

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Judith Prakash
Senior Judge

Hewage Ushan Saminda Premaratne and Tan Liqi Joseph (Meritus Law LLC) for the appellant;
Chew Kei-Jin, Eunice Chan Swee En, Lee Chia Ming and Lam Yan-Ting Tyne (Ascendant Legal LLC) for the respondent.