AYH *v* AYI and another
[2015] SGHC 300

Case Number : HC/Originating Summons No 349 of 2015

Decision Date : 23 November 2015

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Francis Xavier SC, Alina Chia, Derek On and Tee Su Mien (Rajah & Tann Singapore LLP) for the plaintiff; Andre Maniam SC, Adeline Ong and Ho Wei Jie (WongPartnership LLP) for the defendants.

Parties : AYH — AYI — AYJ

Arbitration – Award – Recourse against Award – Setting aside

23 November 2015

Judith Prakash J:

Introduction

1 In July this year, I heard three applications involving, basically, the same subject matter which was the Final Award dated 29 December 2014 ("the Award") made by the tribunal in the arbitration known as SIAC No XXX of 2013 ("the Arbitration") and the decision dated 24 February 2015 ("the Decision") which clarified the Award. The parties to the applications were identical and comprised one individual and two companies. The individual, AYH, was the plaintiff in these proceedings and I shall refer to him as "Mr AA". The two companies, AYI and AYJ, were the defendants in the proceedings and I shall refer to the first defendant as "BB PLC" and to the second defendant as "PT BB".

2 The three applications before me were as follows:

(a) These proceedings, HC/Originating Summons No 349 of 2015 ("OS 349"), in which Mr AA who had been the respondent in the Arbitration applied to set aside the Award and the Decision;

(b) HC/Summons No 2438 of 2015 ("Sum 2438") which was taken out in HC/Originating Summons No 98 of 2015 ("OS 98") by BB PLC and PT BB against Mr AA for a Mareva injunction in respect of property up to the value of US$173m, £1,342,823.48 and $963,626.81; and

(c) HC/Summons No 2752 of 2015 ("Sum 2752") which was taken out in OS 98 by Mr AA seeking to set aside orders granting BB PLC and PT BB leave to enforce the Award and the Decision and, further, seeking to restrain BB PLC and PT BB from taking enforcement action pending the disposal of OS 349.

3 The grounds of OS 349 were the ones that are commonly encountered in setting aside awards, *viz*, that there was a breach of natural justice in connection with the making of the Award and, secondly, that the Award dealt with an issue which was not contemplated by nor fell within the terms of the submission to arbitration. I found no merit in either ground and, consequently, dismissed the application. This meant that I also dismissed Sum 2752. I then heard Sum 2438 and granted BB PLC

and PT BB an injunction restraining Mr AA from disposing of his assets in the terms prayed for. Mr AA has appealed against my decisions. This judgment contains my reasons for dismissing OS 349.

The facts

4 The following account of the background facts leading to the arbitration and the present proceedings comes from the parties' submissions and the Award.

5 The relationship between Mr AA, on the one part, and BB PLC and PT BB, on the other, is governed by a Deed dated 26 June 2013 ("the Deed") between the parties. The Deed was intended to settle disputes between the parties relating to the operations of an Indonesian mining company ("PTX") which Mr AA had previously been running and which was owned as to 90% of its shares (albeit indirectly) by PT BB which Mr AA also directed. PT BB and all companies in its group ("The Group") are now owned by BB PLC.

6 After BB PLC took over PT BB, investigations were carried out into certain transactions that had been undertaken by The Group. Mr AA vacated his executive posts in The Group in March 2013. Thereafter, there were meetings between him and members of the new management and its auditors at which Mr AA was asked to explain certain capital expenditure undertaken by The Group and, in particular, PTX. The new management took the view that much of this expenditure should not have been undertaken and asked Mr AA to repay the same to The Group. Mr AA did not accept that he was responsible for such repayment. The position taken by Mr AA then, and which he maintains now, was that all the impugned payments and transactions had had proper business purposes.

7 Between the end of May and 26 June 2013, the parties exchanged numerous drafts of a settlement deed. All were represented by solicitors. Finally, on 26 June 2013, the parties executed the Deed. By the Deed, Mr AA agreed to transfer assets and cash to PT BB in accordance with the schedule of payments set out in cl 1.11 of the Deed. According to the schedule, the first payment was due on 26 September 2013 while the second was due on 26 December 2013. Mr AA did not make any payment on either of those dates. Nor did he transfer any of the assets as promised. The aggregate value of assets and cash to be transferred under the Deed by Mr AA was US$173m.

8 Clause 6.1 of the Deed provides that it and any non-contractual obligations arising out of or in connection with the Deed are to be governed by and interpreted according to English law. Under cl 6.2, disputes arising out of or in connection with the Deed are to be finally settled under the Rules of the Singapore International Arbitration Centre ("SIAC") (5th Ed, 1 April 2013) ("SIAC Rules") by three arbitrators.

9 On 8 November 2013, BB PLC and PT BB gave Notice of Arbitration pursuant to Rule 3 of the SIAC Rules. This led to the Arbitration and the appointment of the tribunal by the SIAC. The hearing of the Arbitration took place in August 2014 and both sides adduced oral as well as documentary evidence. Parties then exchanged several sets of submissions and the Arbitration was declared closed on 6 November 2014. The Award was issued on 29 December 2014.

The Arbitration and Award

10 BB PLC and PT BB (whom I shall sometimes collectively refer to as the "Claimants") commenced the Arbitration seeking, *inter alia* orders for:

(a) the specific performance of Mr AA's obligations under the Deed and/or for the payment of sums due under it; and

(b) without prejudice to the foregoing, orders that Mr AA transfer or procure the transfer to PT BB of assets equal in value to, in aggregate, US$173m, including transfer of a 49% shareholding in another subsidiary company, or to pay or transfer to PT BB such amount in cash as equals the difference between US$173m and the value of the said shareholding in that subsidiary.

11 Mr AA disputed the claim. He filed a Defence and Counterclaim in which he averred that he was not in breach of his obligations under the Deed because:

(a) the Deed was void for common mistake;

(b) further, or in the alternative, it must be rescinded for misrepresentation; and

(c) further, or in the alternative, his obligations under the Deed had not yet fallen due.

He also counterclaimed for, *inter alia*, a declaration that the Deed was void for a mistake or, alternatively, rescission of the Deed for misrepresentation.

12 In order to follow the arguments, it is necessary to bear in mind two additional facts. First, during the discussions between the parties, Mr AA was shown a table entitled "Expenditures outside normal course of business". This table was amended subsequently and the last version of it was given to Mr AA on 20 June 2013 ("Exceptional Costs Table"). The Exceptional Costs Table listed the transactions that were being questioned. Most of these transactions comprised payments made by PTX. The second fact to remember is that PTX is not a party to the Deed.

13 It is also necessary to bear in mind cl 2.1 of the Deed, which provides that in relation to any transfers of cash or assets made by Mr AA in accordance with the terms of the Deed:

> … [Mr AA's] liability to the Companies [*ie*, BB PLC and PT BB] in respect of Potential Claims [as defined in the Deed] shall be reduced by an amount equal to the value of the Assets transferred pursuant to clause 1 (as determined by the reputable independent third party appointed by the Parties or as otherwise agreed between the Parties), such reduction being on a dollar for dollar basis and shall only be effective following receipt of the valuation referred to above, until the value of the Assets transferred pursuant to clause 1 (as determined by the reputable independent third party appointed by the Parties or as otherwise agreed between the Parties) equals no less than US$173,000,000 whereupon [Mr AA's] liability to the Companies in respect of Potential Claims shall be extinguished.

14 In the Arbitration, the arguments made on Mr AA's behalf on common mistake were:

(a) The Deed was void for common mistake because the parties shared a common mistaken belief that the payments classified in the Exceptional Costs Table were all made by PT BB ("the First Common Mistake").

(b) Alternatively, the Deed was void for common mistake because the parties shared a common mistaken belief that the Deed contained a self-executing release—that Mr AA would be automatically released from all Potential Claims in relation to the payments upon the transfer of assets referred to in the Deed ("the Second Common Mistake").

15 Mr AA noted that the terms of the Deed, in particular cl 2.2 thereof, expressly refer to the payments classified in the Exceptional Costs Table as having been made by PT BB. However, only

US$38.4m of the payments were made by PT BB – the bulk of the payments were made by PTX, an entity which is not party to the Deed. This meant that the transfer of assets to PT BB and BB PLC pursuant to the Deed would not effectively reduce Mr AA's liabilities in respect of the Potential Claims (as defined in the Deed) that PTX would have against him in respect of the payments.

16 In response, the Claimants argued the following:

(a) There was no shared belief that PT BB had made all the relevant payments, and at all times Mr AA was aware that the majority of the payments were made by PTX.

(b) The fact that not all the payments were made by PT BB did not render the performance of the contract impossible or make it different from what was anticipated.

17 On or about 18 August 2014, with less than a week to go before the hearing of the Arbitration commenced, Mr AA's lawyers were informed that an agreement dated 18 August 2014 had been entered into between BB PLC, PT BB and PTX ("the August 2014 Agreement"). A copy of the August 2014 Agreement was sent to Mr AA's lawyers and Mr AA was asked to confirm that he would not object to the Claimants producing this agreement at the hearing. Mr AA's lawyers subsequently responded that he did not object to the admission of the August 2014 Agreement as a document the Claimants wished to adduce. However, Mr AA did not admit its validity or legal effect.

18 The August 2014 Agreement refers to the Deed and to the obligation of Mr AA thereunder to transfer legal and beneficial title to various assets and/or cash in return for the release of Potential Claims. The essence of this agreement is that each of the Claimants undertakes that, in the event that Mr AA transfers cash or assets to PT BB, they will transfer the same onward to PTX. In return, PTX undertakes that it will release Mr AA from Potential Claims by an amount equal to the value of the assets transferred until the value of such assets equals no less than US$173m whereupon Mr AA's liability to PTX in respect of the Potential Claims shall be extinguished.

19 By the time the August 2014 Agreement was concluded, the Agreed List of Issues in the Arbitration had been settled. It had, in fact, been submitted to the tribunal on 29 July 2014.

20 The Arbitration went ahead as scheduled. Closing submissions were filed by the Claimants and Mr AA on 8 September 2014. The Claimants then filed Rebuttal Submissions on 23 September 2014 and Mr AA's lawyers submitted a Note on the Claimants' rebuttal on 2 October 2014.

21 The Award was issued on 29 December 2014. It is important to emphasise that in considering the parties' arguments on whether there was common mistake under English law that rendered the Deed void, the tribunal adopted the test put forward by both parties being that enunciated in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 ("*Great Peace Shipping*"). Under this test, the following elements must be present if common mistake is to avoid a contract:

(a) There must be a common assumption as to the existence of a state of affairs;

(b) There must be no warranty by either party that that state of affairs exists;

(c) The non-existence of the state of affairs must not be attributable to the fault of either party; and

(d) The non-existence of the state of affairs must render performance of the contract impossible (see *Great Peace Shipping* at [76]).

It was the last requirement, impossibility of performance, which was central to the arguments and to the decision of the tribunal.

22 The tribunal found in favour of the Claimants, rejecting Mr AA's arguments on both the First Common Mistake and the Second Common Mistake. It held that the misdescription in the Deed could be corrected by way of construction, implication or rectification. The tribunal then ordered specific performance of the Deed as amended in accordance with the Schedule to the Award. The main amendment made was to introduce the name of PTX into cl 2.1 of the Deed so that the clause also provided for the reduction of Mr AA's liability to PTX upon the transfer of assets and for the complete satisfaction of such liability when the value of the assets transferred reached US$173m.

23 In respect of the Second Common Mistake, the tribunal found that:

(a) there was no such common assumption of a self-executing release; and

(b) there was no impossibility of performance.

These findings are embodied in [161] to [163] of the Award. These read as follows:

> 161. It is apparent from Mr Connerty's note that the form of a release was not discussed on 12 June 2013. That discussion related to the scope of the release which continued to occupy the parties and their solicitors until the final version of the Deed was signed on 26 June 2013. As mentioned, the Deed referred to waiver of Potential Claims (as defined) and to the possibility of extinguishing them, but it does not state in terms that the release should be self-executing. Having construed the Deed against the background on which evidence was adduced, the Tribunal is unable to find that the parties intended that [Mr AA's] release would only be executed by the Deed. In particular, the review of their witness testimony and the contemporaneous documents convinces the Tribunal that what concerned [Mr AA] and Mr Connerty was the scope of the release rather than how it would be executed.
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> 162. On 18 August 2014, the Claimants entered into an agreement with [PTX]. That agreement which is expressed to be governed by English law provides that in consideration for the transfer of any Assets pursuant to the Deed, [PTX] would release [Mr AA] from liability on a dollar for dollar basis in respect of Potential Claims by an amount equal to the value of the Assets transferred. [Mr AA] has not yet transferred any Assets to the Claimants, but he has been given a copy of the 18 August 2014 agreement.
>
> 163. In order to establish a common mistake, [Mr AA] must satisfy the Tribunal that, among other things, the non-existence of the state of affairs, that is, a self-executing release, renders performance of the contract impossible. Even though [PTX] is not a party to the Deed, the Claimants have procured by the agreement of 18 August 2014 that [PTX] will give [Mr AA] a full release of any Potential Claims that it may have against him. Accordingly, the Claimants have demonstrated to the satisfaction of the Tribunal that they are able to perform their obligations under the Deed if and when [Mr AA] transfers the Assets. For the reasons stated, the Tribunal finds that the second mistake as well as the first mistake alleged by the Respondent are not common mistakes and thus the Deed is not void.

Whether the Award should be set aside

24 The two grounds which Mr AA put forward as warranting the setting aside of the Award were both focussed on the validity and effect of the August 2014 Agreement. He argued that the tribunal

had found (when it should not have) that the legal effect of the August 2014 Agreement was that it validly granted him release from Potential Claims (as defined in the Deed) by PTX and:

(a) that this was not an issue that was contemplated by and/or fell within the terms of the submission to Arbitration and/or was a decision/matter beyond the scope of the Arbitration – see Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("Model Law"); and

(b) the tribunal did not afford him a reasonable opportunity to be heard on the issue of the legal effect of the August 2014 Agreement and this was a breach of the rules of natural justice under Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA").

Whether the award dealt with a dispute beyond the scope of the Arbitration

25 All parties accepted that when a court has to determine whether an arbitral award ought to be set aside under Art 34(2)(*a*)(iii), it must undertake a two-stage enquiry. The court will have to decide first, what matters were within the scope of the submission to the arbitral tribunal; and, second, whether the Award involves such matters, or whether it involves a new difference outside the scope of the submission to arbitration and, accordingly, irrelevant to the issues requiring determination (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [44]). They also agree that the parties' pleaded cases and the issues of law and fact raised in the pleadings are generally looked upon as delineating the matters which are within the scope of submission to arbitration. However, in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*PT Prima*"), the Court of Appeal, while affirming that the pleadings are central in the arbitration context, also stated that a new fact arising after submission to arbitration, which would affect the remedies recoverable in the proceedings must fall within the scope of the parties' submission to arbitration and, therefore, need not be specifically pleaded (at [48]).

26 In his submissions before me, Mr AA made the following points:

(a) The August 2014 Agreement did not form part of the pleaded issues and was not referred to in the parties' opening skeletal submissions nor in the Agreed List of Issues jointly submitted to the tribunal. This list was set out in full by the tribunal at [71] of the Award which demonstrated that the tribunal had accepted it as delimiting the scope of issues to be decided in the arbitration.

(b) The effect of the August 2014 Agreement and whether it provided Mr AA with a valid release under the Deed was not placed before the tribunal as an issue to be determined at any point during the course of the oral hearing.

(c) The tribunal fell into error when it made a substantive finding that the August 2014 Agreement validly granted Mr AA the necessary release under the Deed.

(d) The tribunal's findings had caused Mr AA prejudice because he did not have the opportunity to make submissions on the validity and enforceability of the August 2014 Agreement and he was not given notice that he was required to address the tribunal on the legal effect that it had on the release mechanism provided for under the Deed.

Was the August 2014 Agreement properly put forward before the tribunal?

27 I will take the first two points together. This requires an examination not only of the pleadings and the Agreed List of Issues but also a consideration of what occurred during the Arbitration. Whilst it is correct that the August 2014 Agreement was not mentioned as such in either the pleadings or the Agreed List of Issues, that does not mean that the matters dealt with in the August 2014 Agreement were not within the scope of the submission to the Arbitration.

28 The Claimants did not seek by their claim in the Arbitration to enforce the August 2014 Agreement. When their original claim was filed, the August 2014 Agreement did not exist but, even after it was concluded, they did not seek to amend the claim to include a reference to this document. The Claimants' position, when they produced the August 2014 Agreement, was that it was a piece of evidence which they were adducing in the Arbitration to support their contention that there was no impossibility of performance of cl 2.1 of the Deed. They said that the August 2014 Agreement showed that they were able to procure that PTX would release Mr AA from Potential Claims.

29 Whilst the August 2014 Agreement was not mentioned in the pleadings, those pleadings show clearly that the issue of whether the Claimants had the ability to procure a release from PTX and therefore to perform cl 2.1 of the Deed so that the Deed could not be void by reason of mistake, indeed fell squarely within the submission to the Arbitration. In the statement of claim in the Arbitration ("SOC"), the Claimants sought specific performance of Mr AA's obligations under the Deed and/or of the payments of sums due under it.

30 In his statement of defence and counterclaim ("D&C"), Mr AA averred that he had agreed by the Deed to transfer assets to PT BB equal to US$173m to extinguish the Potential Claims and in return for such transfer he was to receive a waiver of the Potential Claims from the Claimants. However, the Potential Claims had been defined as payments made by PT BB whilst in fact most of the payments comprising the Potential Claims had been made by PTX. The Deed was void for common mistake because the parties had a shared but mistaken belief that all the relevant payments had been made by PT BB and this mistake made the contract impossible to perform because any payment made under the Deed by Mr AA to PT BB would not extinguish by satisfaction, his liability, if any, in respect of the Potential Claims arising from earlier payments made by PTX.

31 To me, one of the issues that arose clearly from the SOC and the D&C was whether the Deed could be performed in such a way that Mr AA's liability to PTX could be extinguished. Whilst the issue was not phrased in this way in the Agreed List of Issues, it was inherent in the wording of the second issue under the heading "Mistake" which was:

> 2. In particular whether the Deed is void because the parties entered into the Deed in the common mistaken belief that:
>
> (1) The payments classified as "*other exceptional costs*" in the [Exceptional Costs Table] had all been made by [PTX]; and/or
>
> (2) [Mr AA] would obtain a release from all potential claims for those payments by reducing and extinguishing his liability in respect of them upon the transfer of the assets referred to in the Deed.
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> [emphasis in original]

It was apparent from the wording of issue 2(2) that one of the disputes was whether the parties believed, in common, that the Deed provided a self-executing release or whether it had been contemplated that some external form of release could be provided by the relevant party when Mr AA

complied with his obligations under the Deed.

32 The question of whether common mistake under the *Great Peace Shipping* test (which both parties accepted as the test applicable to the issues raised in the Arbitration) had been established encompassed the legal effect/enforceability of the August 2014 Agreement. The parties had corresponded on adducing this agreement as evidence in the Arbitration and Mr AA's solicitors, by letter dated 20 August 2014, had expressly reserved his right to deal with its validity at the hearing. In that letter, they highlighted that he did not admit its validity or legal effect and did not agree that it addressed and redressed the parties' common mistake as to the party that made the payments which were the subject of the Deed.

33 The fact that the August 2014 Agreement was entered into only after the submission to Arbitration did not preclude its admission in the Arbitration proceedings. In the case of *PT Prima*, the Court of Appeal held (at [47]) that any new fact which arises after submission to arbitration, which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration proceedings as long as the other party is given sufficient notice of it and the opportunity to meet it.

34 I agreed with the submission that the requirements set out in *PT Prima* were satisfied in this case. The Claimants made the existence of the August 2014 Agreement known to Mr AA almost as soon as it was concluded and also notified him of the use that they were going to make of it. The August 2014 Agreement was ancillary to the dispute on common mistake because the Claimants were using it as evidence that cl 2.1 of the Deed could be performed by them and that the contractual obligation contemplated by the Deed was not impossible of performance. The Claimants did not contend that the August 2014 Agreement itself granted Mr AA the necessary release. Mr AA also had sufficient opportunity to consider the validity and effect of the August 2014 Agreement. Although it was concluded less than a week before the start of the hearing, there was ample time for consideration and submission thereafter. Indeed, the last submission made by Mr AA's lawyers was only given to the tribunal on 2 October 2014.

35 Apart from considering that, in general terms, the August 2014 Agreement fell within the submission to arbitration, I also accepted the submission on behalf of PT BB and BB PLC that rule 24(n) of the SIAC Rules permitted the tribunal to consider the legal effect of the August 2014 Agreement. Rule 24(n) reads as follows:

> **Rule 24: Additional Powers of the Tribunal**
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> 24.1 In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:
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> …
>
> n. decide, where appropriate, any issue not expressly or impliedly raised in the submissions filed under Rule 17 provided such issue has been clearly brought to the notice of the other party and that other party has been given adequate opportunity to respond;
>
> …

36 I accepted that the legal effect of the August 2014 Agreement was not separately an issue and was merely one aspect of the broader issue of whether the Second Common Mistake rendered

performance of the Deed impossible. Even then, what was in issue was not whether the August 2014 Agreement itself contained the release by PTX but whether it demonstrated that the Claimants could obtain such a release when required. As I pointed out several times in the course of argument to counsel for Mr AA, there was no dispute that PTX was controlled by PT BB. As a matter of practicality it could not be denied that PT BB therefore had the power to compel PTX to release Mr AA from Potential Claims to the extent that he transferred assets or paid cash satisfying the same. The August 2014 Agreement was a sample of what PT BB could procure from PTX. I was also satisfied that the issue regarding what the August 2014 Agreement meant had been brought to Mr AA's notice and that he was given an opportunity to respond.

37 The transcripts of the hearing before the tribunal were adduced in evidence before me. These show that during the course of the hearing, the tribunal had specifically queried the legal effect of the August 2014 Agreement with the Claimants' counsel, Mr Pymont. In answer, Mr Pymont informed the tribunal that he was putting that agreement forward as a piece of evidence which said that PT BB was able to deliver a release because it was in charge of PTX. Mr AA's counsel, Mr Moriaty, responded to this point when he submitted to the tribunal shortly afterwards, that the August 2014 Agreement was a separate agreement between BB PLC, PT BB and PTX to which Mr AA was not a party and therefore he did not have, ultimately, a right to ensure that he would get the release.

38 It was clear from the transcript that the issue of the legal effect of the August 2014 Agreement was raised during the course of the Arbitration as part of the broader issue of whether the Deed could be performed and that Mr AA's counsel had made arguments on that in the opening submissions. After the hearing, both parties made submissions on the effect of the August 2014 Agreement. The Claimants' submission was that that agreement was a binding commitment from PTX to grant the required release in the event that Mr AA made the payment he was obliged to make. In his closing submission, Mr AA argued that neither the Deed nor the August 2014 Agreement granted Mr AA an automatic self-executing release. He also said that contrary to what the Claimants had suggested, the UK Contracts (Rights of Third Parties) Act 1999 (c 31) did not assist Mr AA to enforce the obligation of PT BB to transfer assets to PTX under cl 2 of the August 2014 Agreement.

Did the tribunal find that the August 2014 Agreement granted him a release?

39 Mr AA submitted that the tribunal fell into error when it made a substantive finding that the August 2014 Agreement validly granted him the necessary release under the Deed. In this respect, Mr AA relied on the following portion of para 163 of the Award:

> … Even though [PTX] is not a party to the Deed, the Claimants have procured by the agreement of 18 August 2014 that [PTX] will give [Mr AA] a full release of any Potential Claims that it may have against him. Accordingly, the Claimants have demonstrated to the satisfaction of the Tribunal that they are able to perform their obligations under the Deed if and when [Mr AA] transfers the Assets. [emphasis added by Mr AA]

It was Mr AA's position that the above paragraph contained the finding of the tribunal and that that finding clearly exceeded the scope of the submission to arbitration.

40 I was not able to accept this argument. It ignored the first sentence of para 163 (and the context set out in the preceding paragraphs) and thereby cast a slant on the succeeding sentences which the tribunal obviously (to my mind at least) never intended them to have. The first sentence of para 163 stated:

> In order to establish a common mistake, [Mr AA] must satisfy the Tribunal that, among other

things, the non-existence of the state of affairs, that is, a self-executing release, renders performance of the contract impossible.

41 Thus, it was clearly within the context of whether Mr AA could satisfy the tribunal that the non-existence of a self-executing release renders the performance of the Deed impossible that the tribunal went on in the second sentence to consider the evidence that the Claimants had adduced showing their ability to perform the contract. The August 2014 Agreement showed to the satisfaction of the tribunal that the Claimants had the power to compel PTX to release Mr AA from Potential Claims when he transferred the assets. With this evidence before them, the tribunal was not able to find that performance of the contractual obligations of the Claimants under the Deed was impossible. When para 163 of the Award is read as a whole together with the preceding paragraphs (see [23] above) it is impossible to find support in it for the interpretation which Mr AA contended for. The tribunal did not consider the August 2014 Agreement to be an actual release. Indeed, how could it be since Mr AA had not transferred the requisite assets or cash? All that the August 2014 Agreement showed was that an actual release would be granted by PTX when it was necessary to do so.

42 To repeat, the tribunal considered the August 2014 Agreement as evidence that cl 2.1 of the Deed could be performed (*ie*, there was no impossibility of performance under limb (d) of the *Great Peace Shipping* test). That was the only finding by the tribunal in relation to the August 2014 Agreement. This finding related to the pleaded issue of the Second Common Mistake and therefore was well within the submission to arbitration. The tribunal held that the Deed itself did not need to effect a release and that Mr AA could be given the release to which he was entitled if and when he transferred the assets. There was no mistake as to the nature of the release and no impossibility of performance.

Was Mr AA prejudiced?

43 The fourth point which Mr AA made regarding how he was prejudiced by the tribunal's finding in relation to the August 2014 Agreement had also to be rejected. That argument of prejudice was premised on my agreeing that the tribunal had made a finding that the legal effect of the August 2014 Agreement was to provide an actual release by PTX. Since I did not agree with that proposition, the assertion that Mr AA was prejudiced by having no opportunity to deal with the validity and legal effect of the agreement also fell away. In any case, it was not correct factually to say that he had no opportunity to make submissions on the August 2014 Agreement. As stated above, Mr AA and his counsel were aware of the Agreement from 18 August 2014 and had the opportunity before, during and after the hearing of the arbitration to make whatever submissions they wanted to on its nature, effect and validity. Indeed they made use of this opportunity though perhaps not as extensively as they could have. The Note on the Claimants' rebuttal which was served on 2 October 2014 contained no reference to the August 2014 Agreement though there was nothing to prevent Mr AA's lawyers from dealing with it.

Whether there was a breach of natural justice

44 Mr AA submitted that the tribunal had breached the rules of natural justice by:

(a) making a finding that the August 2014 Agreement provided Mr AA with a valid release from Potential Claims by PTX, an issue which was outside the scope of submission to the Arbitration and which Mr AA had not been given an opportunity to address; and

(b) relying on the August 2014 Agreement as a valid release mechanism in determining the issue of common mistake, without giving Mr AA an opportunity to submit on the effect of the

August 2014 Agreement on the Deed.

45 I had no hesitation in dismissing both these contentions. First, as I have already mentioned, the tribunal did not find that the August 2014 Agreement itself constituted a release.

46 Second, the documents put before me indicated that Mr AA was afforded ample opportunity to be heard on the issue of the legal effect of the August 2014 Agreement (so far as it was an issue) but simply chose not to pursue that point.

47 To reiterate the facts briefly, when Mr AA was first informed of the existence of the August 2014 Agreement and that the Claimants wished to adduce it in evidence, he did not object to this. He was satisfied to put in a caveat that he did not admit the validity or legal effect of the document. During the course of the hearing, his counsel elaborated on his concerns about the enforceability of the August 2014 Agreement and the tribunal itself raised queries on this point. As I have stated above, after the hearing was concluded the parties made submissions on the legal effect and nature of the August 2014 Agreement. In fact, during the tribunal's closing remarks on 28 August 2014, the tribunal specifically directed parties to submit on how the August 2014 Agreement was to be treated. The parties were thus notified that the tribunal was interested in how that agreement was to be handled in the context of the issues to be decided in the Arbitration. Both parties had experienced and competent counsel who would have considered this point and how it should be dealt with in the course of their respective submissions.

48 Counsel for PT BB and BB PLC submitted before me that Mr AA did not pursue the question of the legal effect of the August 2014 Agreement further simply because it was a dead-end point for him: the real issue before the tribunal was whether the Claimants could procure a release by PTX. The Claimants had openly said that if there was a genuine problem with doing so by way of the August 2014 Agreement, they could address that by way of an amended or further document. Mr AA had argued that he could not himself enforce the August 2014 Agreement because he was not a party to it. However, in response, the Claimants had offered to make him a party to it if he wanted this; but he did not take up this offer.

49 I was satisfied on the facts that Mr AA had a full opportunity to be heard on the issue of the August 2014 Agreement. If he now thinks that he did not make full use of that opportunity, that is not a ground on which to allege a denial of natural justice. Mr AA had every opportunity to make further submissions or adduce further evidence in relation to the August 2014 Agreement but he chose not to do so. He also had the opportunity to file rebuttal submissions but he did not do so. Where a party has failed to make full use of the opportunities afforded to him, he cannot complain later.

Conclusion

50 I was satisfied that there was no merit in the setting aside application and dismissed it with costs.