HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

CBI CONSTRUCTORS PTY LTD
First Appellant

KENT PROJECTS PTY LTD
Second Appellant

and

CHEVRON AUSTRALIA PTY LTD
Respondent

APPELLANTS' REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet. They reply to Chevron's submissions filed on 16 February 2024 (**RS**).[1]

Part II: Reply

2. ***Incorrect starting point for analysis*** **(RS [2], [5]-[9])**: Chevron's reframing of Issue One as being premised on the "*unchallenged finding*" of the supervisory court "*that the arbitral tribunal's first interim award decided all issues of liability between the parties*" (RS [2]), together with its emphasis on the findings of the courts below (RS [5]-[9], [16]-[18]) indicate error. This appeal is not concerned with the correctness of those findings, or even their consequences. It is concerned with whether the courts below should have addressed those matters at all.

3. This mistakes the proper role of a supervisory court under the CAA. In an application to set aside under CAA s 34 (and especially under s 34(2)(a)(iii)),

[1] These submissions use the same defined terms as used in CKJV's submissions in chief (**AS**).

the necessary foundation for analysis by the supervisory court is the body of findings of the arbitral tribunal that were made within jurisdiction and within the scope of the submission to arbitration. It is common ground that those matters cannot be challenged: J [63] (CAB 23-24). In this case, those foundational findings included that the Contract Criteria Case had *not* been finally determined by the tribunal.

4. The questions in this appeal involve whether (and if so on what basis) a supervisory court is empowered under s 34(2)(a)(iii) to make findings which contradict those foundational findings, under the guise of an inquiry as to whether the Tribunal was *functus officio*, that is, an inquiry that is "*jurisdictional*"[2] in character. Insofar as that inquiry entailed a reconsideration of findings made within jurisdiction and within the scope of the submission to arbitration, it was not permitted by s 34(2)(a)(iii) of the CAA, and therefore was prohibited by s 5 CAA.

5. It is therefore wrong to proceed, for example, on the basis that CKJV had made relevant admissions of liability (cf. RS [6(b)], [9], [16], [17], [34(b)]), since that very characterisation had been rejected by the arbitral tribunal in finding, within its jurisdiction, that it had not determined the Contract Criteria Case.[3]

6. ***Issue One* (RS [11]-[44])**: It is certainly "*orthodox and well-established*" that an arbitral tribunal only has jurisdiction to decide a dispute finally and only once, and that it cannot reopen or revisit the dispute: cf. RS [11]. The question that arises here is, in the context of an interim award, what is the significance of a decision by the tribunal, made within the scope of the submission to arbitration, as to whether a dispute had been finally resolved by its earlier award.

7. Chevron does not contend that the question whether the dispute had been finally resolved is outside the scope of the arbitration agreement and, in that sense, outside the scope of the matters submitted to arbitration. Instead, the proposition advanced by Chevron (at RS [14]) is that to "*reopen a dispute*"

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[2] J [96] (CAB 32), [118] (CAB 37), [218] (CAB 80); CA [85]-[91] (CAB 186-188).
[3] Second Interim Award at [8.23(j)], cited at J [201] (CAB 76).

attracts the operation of s 34(2)(a)(iii) since there is "*no submission to again arbitrate that dispute*". However, the logic is circular: given the premise is that the question of final determination, yea or nay, was within jurisdiction, no issue of scope can arise so as to attract s 34(2)(a)(iii).

8. Nothing in the statutory scheme suggests that s 34(2)(a)(iii) should be read so as to permit such a challenge. Rather, it suggests otherwise. CAA ss 32, 33 and 34(4) appear to cover the field of the termination of the tribunal's mandate. Subject to those provisions the tribunal's mandate persists, along with its control over all questions of procedure. Section 34(2)(a)(iii) may apply to permit review of an interim award where there is a real question as to whether an interim award is within the scope of a submission to arbitrate in the first or second senses (as described in AS [53(a) and (b)]). However, neither text nor context supports a conclusion that s 34(2)(a)(iii) may apply where the determination in question is simply the corollary of a finding within jurisdiction (as, in this case, the finding that there was no estoppel was merely the corollary of a finding that there was no prior final determination, and likewise, as regards "*functus officio*").

9. The position more recently adopted by the High Court of Singapore (on which Chevron relies at RS [14]) is not relevant, since it is based on a statutory scheme that had been amended[4] to "*align the effect of interim awards with that of final awards*".[5] Notably, those amendments were a response to a decision of the Singapore Court of Appeal, which had held that an interim award did *not* exhaust the tribunal's mandate such that the tribunal was not functus officio.[6] English decisions must also be read with caution, since successive UK statutes (which are not based on the Model Law) contain similar aligning language.[7] In contrast, the CAA contains no language of that nature.

10. Chevron next contends (at RS [24]) that s 34(2)(a)(iii) empowers the court to set aside an interim award on the basis that the arbitral tribunal was functus

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[4] *International Arbitration Act 1994* (Singapore), s 19A and s 19B.
[5] *PT First Media TBK v Astro* [2014] 1 SLR 372 at [137]-[140].
[6] *Tang v Tan* [2001] 2 SLR(R) 273 at [32]-[40].
[7] *Arbitration Act 1950* (UK), s 14 and s 16; *Arbitration Act 1996* (UK), s 47 and s 58.

officio notwithstanding that that would involve challenging findings incontestably made within jurisdiction.

11. Contrary to RS [24], however, the text of the proviso to that section does not assist Chevron.[8] It does not say anything that empowers the court to set aside the award as a whole where the matters submitted to arbitration *cannot* be separated from the matters not so submitted. If anything, it assists CKJV, since "*only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*", and here what was challenged and set aside went well beyond that (cf. RS [28]).

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12. The thrust of Chevron's remaining submissions on Issue One is to support the operation of the notion of functus officio by reference to finality: cf. RS [34(d), [35], [42]]. There are two problems with this. The first is that the goal or value of finality is what informs doctrines of estoppel, and is given effect by a conclusion of functus officio. It has limited relevance to the question of scope of submission to arbitration, which is the subject of s 34(2)(a)(iii). That is simply a product of consent, arising out of what had been submitted to arbitration pursuant to the agreement to arbitrate.[9] The second is that finality is undermined, not promoted, by the decisions below. Using s 34(2)(a)(iii) in this way invites fresh scope for lengthy, multi-tiered curial review of arbitral decisions. This case is an example. Finality is better served by leaving to the parties' chosen tribunal the power, exclusive of the courts, to say what they have or have not decided in an earlier interim award,

20 just as they do with earlier awards of other tribunals.

13. ***Issue Two* (RS [45]-[53])**: Each of the decisions cited at RS [48] can be traced to *Dallah* [2011] 1 AC 763. However, *Dallah* did not in fact require full "*de novo*" review, to the "*correctness*" standard, for every set aside ground. At [24], Lord Mance was careful to limit the principle to circumstances where the question posed by the set aside ground was "*the existence and extent of [the tribunal's] authority*". That authority derived from the parties' agreement, and could not be created or extended absent their consent. That

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[8] The proviso to s 34(2)(a)(iii) states: "*if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*".

[9] *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4 at [26].

is what gives rise to the rationale for *de novo* review by the supervisory court to the correctness standard.[10]

14. The "*beyond scope*" ground in s 34(2)(a)(iii) is unique among the grounds in s 34(2)(a), in that it does not *necessarily* raise any question of the tribunal's authority to decide. If (as here) the parties' submission to arbitration on any view falls within the arbitration agreement and in the document commencing or constituting the arbitration,[11] and the real question is whether there has been some form of subsidiary submission to arbitration in the sense of whether the matter falls within the scope of the pleadings, particulars and submissions,[12] then that latter question is a matter which properly requires absolute, or alternatively substantial, deference on the part of the supervisory court to the tribunal's assessment of the scope of that submission. That is *a fortiori* where (as here) the basis of the parties' submission turns on the construction of procedural orders issued by the tribunal itself pursuant to the consensual foundation supplied by the arbitration agreement, and the procedural context in which those orders were issued.

15. Finally, contrary to RS [51], the issue before the US Supreme Court in *Oxford Health Plans* related not to a question of general contractual construction, but rather a question of construction of *the arbitration agreement*. That is submission in the first sense, which, the Court held, is a matter which required absolute deference: at 572-573. And contrary to RS [51(e)], this case does not involve a question of arbitrability in the relevant sense.

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[10] See *TCL* (2013) 251 CLR 533 at [12] (French CJ and Gageler J), citing with approval *Dallah* at [24] (Lord Mance).
[11] Submission in the first and second senses: see AS [53(a) and (b)].
[12] Submission in the third sense: see AS [53(c)].

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Appellants set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in these submissions.

Legislation	Provisions	Version
International Arbitration Act 1994 (Singapore)	s 19A and s 19B	Version as at 1 March 2023 (2020 Ed.)
Arbitration Act 1950, 14 Geo 6	s 14 and s 16	Version as at 29 July 1959 (1950 c. 27)
Arbitration Act 1996 (UK)	s 47 and s 58	Version as at 24 November 2023 (1996 c. 23)