HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Apr 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P22/2023
File Title:	CBI Constructors Pty Ltd & Anor v. Chevron Australia Pty Ltc
Registry:	Perth
Document filed:	Form 27F - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	16 Apr 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY P22/2023
BETWEEN:

CBI CONSTRUCTORS PTY LTD
First Appellant

KENT PROJECTS PTY LTD
Second Appellant

and

CHEVRON AUSTRALIA PTY LTD
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1 This submission is in a form suitable for publication on the internet.

Part II: Outline of Argument

2 As to the first ground of appeal: the first award decided all issues of liability (including, relevantly, the contractual entitlement of the Appellants to be paid for Staff provided and the basis of the Respondent's right to be repaid overpayments to the Appellants). Having done so, the Tribunal lacked the authority, jurisdiction or capacity to reopen the first award and to decide the Contract Criteria Case, which was an issue of what was that contractual entitlement to payment and the resultant entitlement to recover the overpayments. The second award was properly set aside pursuant to s 34(2)(a)(iii) of the CAA. (RS [9])

3 As to the second ground of appeal, upon the proper construction of s 34(2)(a)(iii), and consistently with the authoritative view in this country and other Model Law countries, the review by the court under s 34(2)(a)(iii) is a de novo determination to a standard of correctness, and not one requiring the court to give absolute or some other predetermined level of deference to the views of the Tribunal. (RS [10])

Ground 1

4 The tribunal's authority is derived from the consent of the parties. The orthodox position is that once the tribunal has made a final award (including an interim, in the sense of partial final award), and subject to specific statutory exceptions, it may not revisit or reopen the subject matter of that award. It has been variously described as lacking jurisdiction, authority or capacity to do so, because the parties only conferred authority on the tribunal to make a final decision once. The tribunal is said to be functus officio. (RS [11]-[12])

5 The courts below, after a careful analysis of the facts, found that the first interim award decided all issues of liability, that the Contract Criteria Case was an issue of liability, and that accordingly it was beyond the conferred jurisdiction, authority or capacity of the Tribunal to render the second award making a decision on that issue of liability. The factual finding is not challenged in this Court. (RS [6]-[7], [16]-[18])

6 It is wrong for the Appellants to contend that the parties conferred on the Tribunal the authority to make a final decision as to its own jurisdiction, either by the terms of the contract, or by the objection made to the Tribunal's jurisdiction (neither of which is a matter the subject of the Notice of Appeal). (RS [38])

7 The Tribunal could make a decision on the challenge to its jurisdiction but not one which excluded the court's review of the decision's correctness: s 16 of the CAA; ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251

CLR 533 at [12] (JBA3 Tab 8); ***Dallah*** *Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] AC 763 at [24] (JBA5 Tab 16); ***C v D*** [2023] HKCFA 16 at [31], [120] (JBA4 Tab 12); and *United Mexican States v* ***Cargill*** *Inc.* (2011) 341 DLR (4th) 249 at [41] (JBA7 Tab 34). (RS [15])

8 The circumstance that the Tribunal decided both the objection to its jurisdiction and the issues as to the preclusionary estoppels (and that the relevant facts or many of them are common) is no basis for any different conclusion as to the Tribunal being *functus officio*.

(a) They concern different issues: one whether the Tribunal had any jurisdiction to decide the Contract Criteria Case; the other, whether the Appellants were prevented by an estoppel from presenting such a case: ***BTN*** *v BTP* [2021] SLR 276 at [71] (JBA4 Tab 11).

(b) Section 34(2)(a)(iii) permits the jurisdictional challenge and the Respondent is not precluded from bringing it because of the Tribunal's findings on the estoppels. The language of the proviso to s 34(2)(a)(iii) reinforces this.

(c) The CAA cannot be construed as putting a party objecting to the tribunal's jurisdiction in a materially worse position as regards that objection if, rather than decide it as a preliminary issue, the tribunal determines to decide it in an award (under s 16(8)). (RS [21], [24], [25])

9 Neither of the asserted "two awkward results" (AS [27]) arises. (RS [26])

(a) The second award has been wholly set aside pursuant to the power in s 34(2)(a)(iii) and no issue has been taken with that particular exercise of discretion. (RS [27]-[28])

(b) The conclusion for which the Respondent contends is consistent with principle: namely that the Tribunal draws its authority from the parties and that is to decide issues of liability finally and only once. (RS [29]-[31])

10 Nor do any of the four additional matters (AS [30], [37], [40], [42]) relied on by the Appellants assist them. They include matters not the subject of the Notice of Appeal and at times inconsistent with the way the Appellants advanced their case before the Tribunal, the Primary Judge and the Court of Appeal. But in any event they can be rejected. (RS [32])

(a) These parties agreed to authorise the Tribunal to make interim awards and each was to be a final decision. There is nothing in the terms of s 32 of the CAA that precludes the court from setting aside an award under s 34(2)(a)(iii) where having made an earlier interim award dealing with all issues of liability the Tribunal sought to reopen it in a second award. (RS [34])

(b) Further, the distinction, drawn by other courts considering the Model Law, between challenges which go to jurisdiction and those going to admissibility (sometimes called the tribunal verses claim distinction), supports the decisions below. See ***BBA*** *v BAZ* [2020] SLR 453 at [73]-[79] (JBA4 Tab 9); and *C v D* at [1], [51]-[53], [97], [110]-[111]. (RS [43]-[44])

Ground 2

11 The Appellants' contention that the courts below were required to give the reasoning of the Tribunal absolute or substantial deference and by not doing so fell into error, should be rejected. (RS [45])

12 Such a contention is contrary to:

(a) the power conferred by and the language of s 34(2)(a); (RS [46])

(b) the approach taken to the operation of s 36(1)(a) of the CAA and its equivalents in this country and elsewhere: see *TCL*; *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 (cited at PJ [104] (CAB 34) and CA [92] (CAB 188-189); and *Dallah*; (RS [48(a)-(b)])

(c) the approach taken in other Model Law countries in relation to the operation of s 34(2)(a): the Ontario Court of Appeal in *Cargill* and *Russian Federation v Luxtona Limited* [2023] ONCA 393 (JBA6 Tab 31); the British Columbia Court of Appeal in *lululemon athletica canada inc. v Industrial Color Productions Inc* [2021] BCCA 428 (JBA6 Tab 23); the Singapore Court of Appeal in *BTN* and *BBA*; and the Hong Kong Court of Final Appeal in *C v D*; which in turn are consistent with the approach of the US Supreme Court in *First Options of Chicago Inc v Kaplan*, 514 US 938 (1995) (JBA5 Tab 19) and *Oxford Health Plans LLC v Sutter*, 569 US 564 (2013) (JBA6 Tab 28). (RS [48(c)-(e)], [51])

13 In any event, the courts below gave careful and detailed consideration to the Tribunal majority's reasoning and the facts in the case. They identified significant critical errors in that reasoning: see CA at [98] and appendix [21]; [100] and appendix [80]; and [121] (CAB 196-197, 202, 210, 241). There is no scope for further deference to the majority's conclusions in the circumstances. (RS [52]-[53])

Dated: 16 April 2024

Shane Doyle KC
Level Twenty Seven Chambers
(07) 3008 3990
sdoyle@level27chambers.com.au