Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd
[2007] SGCA 28

Case Number : CA 100/2006

Decision Date : 09 May 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Jimmy Yim SC, Abraham Vergis and Daniel Chia (Drew & Napier LLC) for the appellant; Jeyaretnam Philip Antony SC and Ling Tien Wah (Rodyk & Davidson) for the respondent

Parties : Soh Beng Tee & Co Pte Ltd — Fairmount Development Pte Ltd

Arbitration – Award – Recourse against award – Setting aside – Rules of natural justice -Applicable principles – Arbitrator purportedly dismissing claims on basis that time was at large – Whether issue of time being at large pleaded and alive during arbitration – Whether decision that time was at large leading to making of award – Whether decision causing prejudice – Whether one party being denied right to be heard – Whether award should be set aside or remitted to arbitrator – Section 48(1)(a)(vii) Arbitration Act (Cap 10, 2002 Rev Ed)

9 May 2007

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 This appeal follows in the wake of a 44-day arbitration hearing that engendered 1,766 pages of transcripts and a 110-page award dated 15 March 2006 ("the Award"). In the course of the arbitration proceedings, the appellant, Soh Beng Tee & Company Pte Ltd ("SBT") and the respondent, Fairmount Development Pte Ltd ("Fairmount") had filed over 200 pages of pleadings, cumulatively examined 14 witnesses, and submitted at least 696 pages of written arguments. Fairmount, after having substantively failed in the arbitration proceedings, filed an application in the High Court seeking to set aside the Award of the arbitrator ("the Arbitrator"). The application was premised on two grounds: that the Arbitrator had dealt with an issue outside the scope of the submission to arbitration ("the jurisdiction issue"); and, that the Arbitrator had deprived it (*ie*, Fairmount) of its right to be heard on a critical issue that he had ultimately relied on to resolve the matter ("the natural justice issue"). These grave oversights by the Arbitrator, Fairmount alleged, were contrary to ss 48(1)(*a*)(iv) and 48(1)(*a*)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") respectively.

2 Although Fairmount failed on the jurisdiction issue before the High Court, it succeeded on the natural justice issue. This, the learned trial judge held, was sufficient to set aside the entire award: see *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* [2007] 1 SLR 32 ("the GD"). Dissatisfied, SBT filed this appeal against the learned trial judge's decision setting aside the Award based on the natural justice issue.

3 This appeal has raised several important and largely intertwined questions in relation to the conduct of arbitrations: What are the prerequisites of a fair hearing? What is the extent of an arbitrator's obligation towards the parties? Must he always apprise the parties of his thought processes? Can he rest his decision on an argument that the parties may have raised but omitted to delve into, develop or emphasise? Would it make a difference if an impugned decision was merely an inference or a legal conclusion flowing from facts and arguments already in play? These issues are of

major significance in all arbitrations, domestic or international, that may come under the purview of our courts as the relevant setting aside provisions under both regimes are identical.

4 Having heard arguments from both SBT and Fairmount, we unanimously allowed SBT's appeal, and held that the Arbitrator had not breached the rules of natural justice. We now set out our reasons in full.

The factual matrix

The background

5 Fairmount, in its capacity as the developer of a condominium project, employed SBT as the main contractor on 1 July 1997. The parties entered into a formal contract dated 26 February 1998 modelled on the standard terms of the Singapore Institute of Architects' Articles and Conditions of Building Contract ("the SIA Articles" and the "SIA Conditions" respectively). The original agreement between the parties was for the construction of the condominium, including mock-up units and a substation, to be completed by 1 February 1999. However, this was not to be. In fact, while the construction of the condominium was in progress, SBT submitted numerous applications for extensions of time. Mr Daniel Law ("Mr Law") of M/s Archurban Architects Planners ("the Architect") assessed SBT's applications for extension of time and ultimately granted a mere five-day extension that extended the date of completion of the project to 6 February 1999.

6 Having failed to complete the project by 6 February 1999, SBT was served with a delay certificate in May 1999 in relation to the mock-up units, and again in July 1999 in relation to the main works. These delay certificates, issued by Mr Law, purportedly entitled Fairmount to claim liquidated damages for the delay pursuant to cl 24(2) of the SIA Conditions, which reads:

> Upon receipt of a Delay Certificate the Employer shall be entitled to recover from the Contractor liquidated damages calculated at the rate stated in the Appendix to the Conditions from the date of default certified by the Architect for the period during which the Works shall remain incomplete, and may but shall not be bound to deduct such liquidated damages, whether in whole or in part, from any monies due under the Contract at any time.

7 SBT then submitted to Fairmount and the Architect a revised plan committing to complete the project by 21 December 1999. In spite of this, Mr Law immediately issued SBT a written notice dated 21 September 1999 declaring that SBT had failed to proceed with due diligence and expedition. A month later, Mr Law issued a termination certificate dated 21 October 1999 ("the Termination Certificate") pursuant to cl 32(3) of the SIA Conditions. On 9 November 1999, Fairmount terminated SBT's employment, relying on s 32(2) of the SIA Conditions, which states:

> *Without prejudice to any right of the Employer in an appropriate case to treat the Contract as repudiated by the Contractor under the general law, the Employer may at any time within one month of the receipt of a certificate of the Architect (in this Contract called a "Termination Certificate") give Notice of Termination of employment of the Contractor, which Notice shall take immediate effect*. In such a case the Notice of Termination shall identify any relevant Termination Certificate upon which it is based, and the date of its receipt by the Employer. The reliance on a Termination Certificate in the Notice of Termination may take effect additionally or as an alternative to reliance by the Employer upon any alleged repudiation by the Contractor which is also stated in the Notice, or which is the subject of any other notice or contemporary letter or document passing between the Employer and the Contractor. A Termination Certificate shall be issued to the Employer with a copy to the Contractor, who shall be informed by the

Architect in writing of the date of receipt by the Employer. [emphasis added]

8 Two grounds were stipulated to justify the termination. The first is a purely contractual one: As Mr Law had issued the Termination Certificate, Fairmount contended that it was entitled, as a matter of contract, to rescind its employment of SBT pursuant to s 32(2) of the SIA Conditions ("the contractual termination"). The second alternative ground was that as SBT was already in repudiatory breach of its agreement to complete the project, Fairmount was entitled to terminate the project.

9 Thereafter, Fairmount claimed a $1.5m performance bond provided by SBT while simultaneously claiming a further $3,212,113.16 from SBT as damages. SBT rejected such a claim and invoked the arbitration clause in the SIA Conditions, claiming damages for the wrongful repudiation of its employment.

The arbitration

10 In the course of the arbitration, three issues eventually took centre-stage:

(a) whether Fairmount had rightfully terminated SBT's employment as contractor under the SIA Conditions, pursuant to cl 32(2);

(b) if not, whether Fairmount had rightfully terminated SBT's employment on the ground that SBT was in repudiatory breach of its obligation to complete the project with diligence and due expedition; and

(c) whether Fairmount could counterclaim for liquidated damages under the SIA Conditions for SBT's delay in completing the project by the contractually stipulated time.

11 If the answers to these issues were negative, it would mean that Fairmount would not be entitled to its counterclaim of $3,212,113.16 as damages and that SBT would, on the contrary, be entitled to damages (it claimed some $7,490,154.50) as well as the return of $1.5m received by Fairmount pursuant to the SBT performance bond.

12 At the end of the lengthy arbitration proceedings, the Arbitrator ruled in favour of SBT on all the issues identified at [10] above, and awarded it $2,043,432.27 for work done under the contract (plus interest) and the return of its performance bond.

The Award

13 To better understand the purport of Fairmount's grievances against the Arbitrator's conduct of the arbitration, it is necessary to set out in some detail the reasoning of the Arbitrator.

14 The first issue that the Arbitrator addressed was whether Fairmount had rightfully terminated SBT's employment on the basis of the Termination Certificate. This, in turn, raised three further sub-issues, which the Arbitrator formulated as follows:

(a) whether the Termination Certificate issued by Mr Law was validly issued;

(b) *if the Termination Certificate was validly issued*, whether SBT had failed to proceed with the project with diligence and due expedition, and following the expiry of one month's written notice on 21 September 1999 from Mr Law if SBT continued to proceed without due diligence or expedition; and

(c) whether SBT was entitled to extensions of time for the completion of the project; and if so, whether SBT had been properly granted the requisite extension(s) of time and whether this in turn had been taken into account by Mr Law before he issued the Termination Certificate.

15 On the validity of the issuance of the Termination Certificate, the Arbitrator determined that it should not have been issued by Mr Law but instead by one Mr Tan Cheng Siong, who had been expressly named in Art 3 of the SIA Articles as the project architect and, further, that SBT had not waived its right to insist, nor was it estopped from insisting, on the Termination Certificate being issued by the correct person. Accordingly, the arbitrator held that the Termination Certificate was invalid. Having ruled against Fairmount on this first sub-issue, the Arbitrator remarked (at para 86 of the Award):

> *If … [Mr Law] was entitled to sign the Termination Certificate*, the question which then arises is whether [SBT] had failed to proceed with diligence and due expedition and he was entitled to issue the Notice of Failure to Proceed with Due Diligence on 21 September 1999 and later the Termination Certificate. [emphasis added]

16 Notwithstanding his threshold determination that the Termination Certificate was invalid, the Arbitrator then proceeded to also determine the second and third sub-issues: whether SBT had failed to proceed with the project with due diligence and expedition and whether SBT had been improperly denied an extension of time. The Arbitrator took into consideration the following circumstances in assessing these issues (at para 99 of the Award):

> (a) what had happened and was happening on site against the progress achieved when the Letter of Warning dated 21 September 1999 was issued by [Mr Law]; and
>
> (b) whether there were any events that had occurred which would entitle [SBT] to any extension of time to explain any apparent lack of progress,
>
> … I will also have to consider the issue whether the 5 days' extension of time granted by [Mr Law] on 19 July 1999 to [SBT] revising the completion date for the Project to 6 February 1999 was fair and reasonable.

17 After analysing the various events that SBT alleged were responsible for its delay, the Arbitrator resolved the second sub-issue in the following manner:

> *E3.13 Architect's assessment of [SBT's] application for extension of time made in March 1998*
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> …
>
> 207. In their Written Submissions [Fairmount] submitted that [SBT] has not given any evidence on the amount of extension of time that [it claims it] would be entitled to for all these alleged delaying events and no expert has been called to assess the amount of extension of time that [SBT] would be entitled to for all the alleged events in question. … As there is no evidence or basis before the Tribunal to enable it to properly and correctly assess accurately or at all [SBT's] claim for an extension of time for the alleged events referred to above, the Tribunal accordingly has no power or jurisdiction to consider [SBT's] claim for an extension of time for these items. The Tribunal therefore must reject all the claims for extension of time for all these alleged events.
>
> 208. … I find that I have no difficulty in arriving at the conclusion that in principle,

substantially more than 5 days of extension of time were due to the Claimant and *I also find that acts of prevention by [Fairmount] as listed out above had affected [SBT's] ability to complete [its] work by the contractual completion date*. Accordingly, I find and hold that the 5-day extension of time granted by the Architect no longer binds [SBT] and [SBT] was entitled to a reasonable time to complete the Works after 6 February 1999.

209. After having considered the evidence before me and the submissions by counsel for the parties I find and hold that the Architect failed to give a fair and reasonable extension of time to [SBT] to complete the Project. *The Architect had issued Architect's Instructions which caused further delay to the performance of the Works and had thus prevented [SBT] from completing the Works by the original contract date. Time for the performance of the Project was at large.*

[emphasis added]

18 In relation to whether SBT had been improperly denied an extension of time in July 1999 before the warning letter was issued on 21 September 1999, and accordingly whether the issue of the Termination Certificate was justified, the Arbitrator determined (at para 228 of the Award):

After having considered what had happened and was happening on site against the progress achieved before the Letter of Warning dated 21 September 1999 was issued by [Mr Law], the events that had occurred after 21 September 1999 and the events which would entitle [SBT] to any extension of time to explain any apparent lack of progress, I have on balance come to the conclusion and find [SBT] was not in breach of [its] obligations to proceed with the work with diligence and due expedition and that the Architect had not acted fairly and reasonably in issuing the said Letter of Warning and subsequently the Termination Certificate pursuant to Clause 32(4) of the Conditions of Contract. The Architect's grant of 5 days' extension of time to [SBT] in July 1999 was not fair and reasonable in the circumstances and [SBT] was entitled to a reasonable time to complete the Project. …

19 Having found that Fairmount could not rightfully rescind its employment of SBT on the basis of a contractual termination, the Arbitrator also found (at para 229) as a corollary that the claim for liquidated damages by Fairmount was unsustainable because the delay certificates, an essential prerequisite for the counterclaim to succeed, were invalid:

229. One of the secondary issues in this case is whether liquidated damages payable under the Contract are enforceable. As regards to the Liquidated Damages for PG Substation and Mock Up Units, one has to consider whether they are a genuine pre-estimate of the loss that [Fairmount] will be likely to suffer due to delay, and it will be necessary to ascertain how the Liquidated Damages were computed. *However, I am of the view that it is not necessary for me to make any ruling on this issue since the Delay Certificates issued by [Mr Law] are unenforceable.* [emphasis added]

20 The Arbitrator then turned his attention to whether Fairmount could rely on SBT's alleged repudiatory breach to justify the termination of its employment of SBT. His findings (at para 254 of the Award) were as follows:

Having regard [to] the evidence that was before me and to my earlier findings on the issue of whether [Mr Law] was entitled to [issue] the Termination Certificate under the express terms of the Contract and after considering the submissions of counsel for the parties, I find and hold that on a balance of probability [Fairmount has] failed to establish that [SBT] was in repudiatory breach of the Contract on 9 November 1999. *Delay on the part of [SBT] where time is not of the*

essence of the contract does not amount to repudiation unless … it is such as to show that [SBT] will not, or cannot, carry out the contract. On the evidence that was before me, I am unable to find that [SBT] had evinced an intention that [it] will not carry out [its] contractual obligations under the contract. … In the circumstances, I therefore find and hold that *[Fairmount]* by terminating the contract on 9 November 1999 had evinced an intention of no longer to be bound [*sic*] by the contract. A party who asserts a right to terminate that is later found to be unjustified or wrong may find his own conduct held to be repudiatory … [emphasis added]

21 In the result, SBT was held entitled to the return of its performance bond and damages. The Arbitrator, after scrutinising the various heads of claim awarded SBT a total sum of $2,043,432.27 for work done including interest and costs.

The application to set aside the Award in the High Court

Fairmount's position

22 Fairmount's position at the hearing below may be summarised as follows:

(a) The Arbitrator decided that Fairmount had prevented SBT from completing its work on time and that SBT was therefore entitled to an extension of time under the contract beyond the five days granted. However, because there was insufficient evidence to assess the appropriate extension of time, the Arbitrator could not determine the precise period of extension. The Arbitrator, after determining that SBT was entitled to a reasonable amount of time to complete, set "time at large" without fixing what that reasonable extension of time ought to have been (see, in particular, [17] above).

(b) However, as the issue of whether time was at large as a result of Fairmount's acts of prevention ("the Disputed Issue") had not been submitted on or canvassed before the Arbitrator, Fairmount had been unfairly deprived of the opportunity to present countervailing arguments to the Arbitrator.

(c) The actual issue before the Arbitrator (and left undecided) was whether SBT was entitled to an extension of time under the SIA Conditions beyond the five days granted by Mr Law, and, if so, the actual length of such extension.

(d) Since the Arbitrator did not decide on the reasonable time for SBT to complete after setting time at large, the effect was that SBT could not be found in breach of its obligation to exercise due diligence and expedition as there was no time limit against which to compare the speed of SBT's progress. This had significantly affected both of Fairmount's defences. First, Fairmount was found to have wrongfully issued and relied on the Termination Certificate in terminating its contract with SBT. In so doing, Fairmount was found in breach of its contract with SBT. Secondly, SBT was found not to be in repudiatory breach of the contract and therefore Fairmount had no common law right to terminate its employment of SBT.

23 In the light of this, Fairmount sought to set aside the Award pursuant to s 48 of the Act, alleging that:

(a) contrary to s 48(1)(*a*)(iv) of the Act, the Disputed Issue was not contemplated by and did not fall within the terms of the submission to arbitration, or contained a decision on a matter beyond the scope of the submission to arbitration; and

(b) contrary to s 48(1)(*a*)(vii) of the Act, a breach of the rules of natural justice had occurred in connection with the making of the Award because Fairmount had been deprived of an opportunity to submit on the Disputed Issue. Accordingly, its rights had been prejudiced.

SBT's position

24 SBT opposed Fairmount's application to set aside the Award, contending as follows:

(a) The Disputed Issue (*viz*, whether time was at large as a result of Fairmount's acts of prevention) was essentially one and the same as the issue of whether SBT was entitled to a further extension of time under the SIA Conditions. Given that the latter issue was clearly submitted to arbitration, it must follow that the Disputed Issue had also been submitted to arbitration.

(b) In any event, the Disputed Issue was expressly pleaded and further developed in its final written submission.

(c) The above two points also explain why there was no breach of the rules of natural justice. Fairmount had every opportunity to respond to SBT's allegations regarding time being at large.

(d) Moreover, no serious prejudice was caused by the Arbitrator simply setting time at large without determining the precise period of the extension SBT was entitled to.

(e) To the extent that the Arbitrator did not decide what he was supposed to decide (*viz*, whether SBT was entitled to an extension of time), and had embarked on a excursion of his own (in deciding that time was set at large), the proper recourse would be to apply for an additional award under s 43(4) of the Act.

The trial judge's decision

25 On the first issue of whether the Arbitrator's decision that time was at large was beyond the scope of submission, *ie*, the jurisdiction issue, the trial judge found in favour of SBT. Essentially, she held that while the parties might not have conducted their respective cases on the basis that various acts by the Architect and/or Fairmount had led to time being at large, the central dispute was, in the end, about the period of time within which SBT had to complete its work. She observed (at [22] of the GD):

> In theory, such a dispute could involve various considerations. One of these would be considering the contractual period specified originally and whether that contractual period could be extended by reason of any valid claims by the contractor. The other would be, in appropriate circumstances, considering whether the contractual completion date had been wholly set aside and time set at large. Theoretically therefore, *a finding that time was at large would not necessarily be unanticipated or extraordinary or completely outside the contemplation of the parties when questions of delay had to be considered.* [emphasis added]

26 On the second issue as to whether there had been a breach of the rules of natural justice, the learned trial judge found that there was. The crux of her finding was that the Disputed Issue was not a live issue before the Arbitrator and therefore Fairmount had been deprived of an opportunity to be heard on this issue, including the consequential question of what would constitute a reasonable time within which SBT would have to complete. As a result, Fairmount had been deprived of an

opportunity to present the requisite evidence to the tribunal. Moreover, Fairmount was prejudiced because the consequence of the Arbitrator's decision to set time at large was that SBT was held not to be in breach of its contractual and common law obligations and that Fairmount in turn had wrongfully repudiated its contract with SBT. In any case, the learned trial judge observed that a breach of natural justice itself created prejudice that would be suffered by one of the parties: see [31] of the GD.

27 Having found that Fairmount had been deprived of its right to be heard on whether time should be set at large, the judge then decided to set aside the entire award, holding that applying for an additional award under s 43(4) of the Act would be futile since the whole basis on which the Arbitrator had set time at large was that he did not have the evidence on which to make an award on the exact number of additional days to which SBT was entitled under the contract. Therefore, he would not be able to decide on the reasonable time SBT should have been allowed. In addition, having rendered the Award, the Arbitrator was *functus officio*: see [32] of the GD. At this juncture, it would be appropriate to observe in passing that while it is true that an arbitrator is usually *functus officio* once he makes his award, his jurisdiction is immediately revived by the terms of the remission to the extent of the remission: see Robert Merkin, *Arbitration Act 1996* (Lloyd's of London Press, 3rd Ed, 2005) at p 174, citing *The Avala* [1996] 2 Lloyd's Rep 311.

The appeal

28 This appeal by SBT is *only* against the trial judge's decision that there had been a breach of the rules of natural justice, contrary to s 48(1)(*a*)(vii) of the Act, that warranted the setting aside of the Award. Section 48(1)(*a*)(vii) of the Act reads:

> **48.**—(1) An award may be set aside by the Court —
>
> (a) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that —
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> …
>
> (vii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced …

As will be seen, however, there should have been perhaps only a small degree of divergence between the outcomes in respect of the natural justice issue and the jurisdiction issue. Interestingly, Fairmount has not appealed against the adverse ruling it received on the jurisdiction issue.

29 It has been rightly held in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262 ("*John Holland*"), at [18], that a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights. The rule of natural justice alleged to have been breached in the present case is the alleged right of Fairmount to be heard on an issue that it maintains was crucial to the outcome of the Arbitrator's decision. In the circumstances, the core issues on appeal telescoped into the following:

(a) whether the Disputed Issue was alive during the arbitration or whether it was, as the trial judge found, "entirely the arbitrator's own idea";

(b) if there was a breach of natural justice, how that breach affected the Award; and

(c) whether the breach was merely technical or whether it caused prejudice to Fairmount.

Whether the decision to set time at large was a breach of the rules of natural justice

30 The question as to whether the Disputed Issue was alive during the arbitration may be analysed along two dimensions:

(a) the extent to which the Disputed Issue was pleaded and/or raised in the arbitration; and

(b) the extent to which the alleged failure to plead and argue the Disputed Issue ought to have precluded the Arbitrator from arriving at the Award.

31 As to whether the Disputed Issue was alive, SBT relied on several paragraphs of its amended statement of claim ("ASOC"), where it had pleaded the alternative argument that time was set at large as a result of Fairmount's multifarious acts of prevention. In particular, SBT referred to the following paragraphs in its ASOC:

Liquidated Damages Unenforceable

27. Further and in the alternative, [SBT] aver that pursuant to the Architect's Site Management and Control Procedure, the Contract Period and the Date for Completion could not be extended. [SBT] aver that by virtue of the same the provisions for liquidated damages are invalid and/or unenforceable and *that time for completion of the Works is at large*.

…

31. [SBT] aver that by virtue of the said document the Architect was not empowered to grant extensions of time and hence the liquidated damages clause was thus unenforceable *and time was at large for [SBT] to complete the Works*.

32. Further and in the alternative [SBT] aver that insofar as the mock up works were concerned the Architect was not empowered to grant extensions of time [and therefore] the liquidated clause with respect to the Mock Up Units was unenforceable *and time was at large for [SBT] to complete the Mock Up Units*.

33. Further and in the alternative [SBT] aver that insofar as the PG substation works were concerned [and] insofar as there was no power to grant extensions of time the liquidated damages clause with respect to such works was unenforceable *and time was at large for [SBT] to complete such works*.

34. Further and in the alternative [SBT] aver that insofar as the Works were concerned [and] insofar as there was no power to grant extensions of time the liquidated damages clause with respect to the Works was unenforceable *and time was at large for [SBT] to complete the Works*.

[emphasis added]

32 Elsewhere in the ASOC, SBT pleaded that its delay in completing the condominium project had been caused by the unreasonable interference and disruptions by the clerks of works and/or site

staff. After setting out these particulars, SBT additionally pleaded:

> 40. As a result [SBT was] delayed and/or disrupted in the Works and/or the phases of the Works. [SBT was] accordingly entitled to extensions of time.
>
> 41. Further and *in the alternative as a result of the matters aforesaid, time to complete the Works and/or any phase was at large*.
>
> [emphasis added]

33 Fairmount's response was that in so far as SBT's pleadings reproduced in [31] above were concerned, they related merely to the enforceability of the liquidated damages clauses but not to the actual acts of prevention that the Arbitrator had relied on to set time at large. This contention, Fairmount added, was further supported by the fact that the Arbitrator himself had held it unnecessary to deal with this issue. As for the pleadings reproduced in [32] above, the Arbitrator's only finding was that SBT's complaints had not been duly investigated by the Architect. Therefore, it did not form the basis of the Arbitrator's actual decision on the Disputed Issue.

34 We accept Fairmount's rebuttal that the reasons given by SBT as to why time was at large were not identical to those given by the Arbitrator for his decision to set time at large. Even the broadly-worded pleading contained in para 41 of the ASOC is confined to "the matters aforesaid" in arguing that time was at large. In so far as those matters related to the particulars of SBT's complaints against the site staff, the Arbitrator had simply found that they were not sufficiently investigated. That said, the constantly reiterated refrain that time had been set at large (albeit in different contexts) must have alerted and sensitised Fairmount to the fact that SBT was not only submitting that it was entitled to an extension of time under the SIA Conditions because of Fairmount's acts of prevention (this was indisputably pleaded), but that, in the alternative, time to complete was indeed at large. Indeed, it is pertinent to point out that in para 89 of its re-amended defence and counterclaim, Fairmount itself unequivocally pleaded:

> Paragraph 41 of the Amended Statement of Claim is denied for the reasons set out [in] the Defence. [Fairmount] further [denies] that the time to complete the Project or any phase thereof *was at large as alleged in paragraph 41 of the Amended Statement of Claim or at all*. [emphasis added]

In our view, it is clear that Fairmount was denying all possible contentions that time had been set at large, quite apart from those explicitly pleaded by SBT. This lends some support to SBT's claim that Fairmount had anticipated that SBT might contend that Fairmount's acts of prevention had the effect of setting time at large.

35 In addition to these pleadings, SBT also drew our attention to paras 87–94 of the ASOC, where it pleaded additional acts of prevention and delaying events caused by Fairmount, its agents, consultants and/or employees, which entitled SBT to a fair and reasonable extension of time to complete. There was, however, no express mention of the Disputed Issue. The pleaded acts of prevention caused by Fairmount were alleged only to have entitled SBT to an extension of time under the contract, an entitlement SBT was unfairly and unreasonably denied. Nevertheless, the crucial link to time being generally set at large was indeed ultimately made in para 76 of SBT's final submissions:

> [I]t is trite law that [Fairmount is] not entitled to the alleged liquidated damages if [SBT] were prevented by [Fairmount's] own and/or [its] servants or agents conduct from complying with the contract completion date. *Time therefore is at large*. [emphasis added]

36 This was reiterated in para 109(a)(ii)(2) of SBT's final reply submissions:

> [Fairmount's] claim … ought to be dismissed because:
>
> …
>
> (2) There was no liquidated damages *because* time was at large as [Fairmount] had prevented [SBT] from completing the works …
>
> [emphasis added]

37 Fairmount's response was that this argument had been addressed in para 229 of the Award, and as such this was not what the Arbitrator had in mind when he decided to set time at large at paras 207–209 of the Award. We disagree. In our view, it is plain that para 229 of the Award only addressed the issue of whether the liquidation clause was in the nature of a penalty or a genuine pre-estimate of loss, and did not go on to assess whether it was unenforceable because time had been set at large as a result of Fairmount's alleged acts of prevention. Paragraph 229 of the Award reads:

> One of the secondary issues in this case is whether liquidated damages payable under the Contract are enforceable. *As regards to the Liquidated Damages for PG Substation and Mock Up Units, one has to consider whether they are a genuine pre-estimate of the loss that [Fairmount] will be likely to suffer due to delay*, and it will be necessary to ascertain how the Liquidated Damages were computed. *However, I am of the view that it is not necessary for me to make any ruling on this issue* since the Delay Certificates issued by [Mr Law] are unenforceable. [emphasis added]

38 Therefore, SBT's case as set out at [35] and [36] above did expressly contend and press that time could be set at large by reason of Fairmount's acts of prevention – the precise point decided by the Arbitrator and which Fairmount now challenges. In other words, not only was the *factual basis* for the Disputed Issue raised in SBT's pleadings (*viz*, the particularised acts of prevention), but the *legal conclusion* (*viz*, that time was set at large as a result) that Fairmount now challenges had also been raised and argued in SBT's final submissions and in its reply submissions. In our view, it is plain that it was Fairmount that had failed to fully avail itself of the available opportunities it was accorded to rebut this argument in its reply submissions and supplemental reply submissions.

39 While the Disputed Issue was tangentially alluded to in SBT's pleadings (and recognised as such in Fairmount's own pleadings) as well as in SBT's written submissions, it is also relevant to examine whether the Disputed Issue was alive *during the arbitration hearing*. As the trial judge quite aptly put it (at [30] of the GD):

> Whilst in the initial stages of the proceedings the parties may raise many issues by way of their pleadings, once the evidence has been given, *the submissions of the parties will indicate the issues that remain alive and that are to be decided by the tribunal*. [emphasis added]

For completeness and a holistic assessment of the present controversy, it is of some importance to examine whether, *in reality*, the relevant issue was raised and fully ventilated in the course of the actual oral hearing.

40 Counsel for SBT, Mr Jimmy Yim SC forthrightly acknowledged that the parties had not emphasised or strenuously debated whether time was at large during the oral-hearing phase. In fact,

as counsel for Fairmount, Mr Philip Jeyaretnam SC correctly submitted, the oral submissions were largely focused on the amount of time, if at all, that SBT might be entitled to under the SIA Conditions as a result of Fairmount's alleged acts of prevention. Be that as it may, it is apparent to us that the parties were given the opportunity to submit on the Disputed Issue. In point of fact, the Arbitrator had towards the end of the proceedings actually called for additional written submissions on the Disputed Issue, as evidenced in this transcript of the arbitration:

> [The Arbitrator]: Repudiatory breach, then will have to look into the delays. Whether the architect acted fairly. For delays, how many days SBT claiming?
>
> [Counsel for SBT]: 800 days.
>
> [The Arbitrator]: There are overlapping claims. Which particular event would entitle them to the longest period of [extension of time]?
>
> [Counsel for SBT]: Found in the [Notices of Delay]. *Alternatively, fair and reasonable time*.
>
> [The Arbitrator]: *[SBT] to revert within 1 week and [Fairmount] to reply within 1 week.*
>
> [emphasis added]

SBT then took the opportunity to submit on what would constitute a reasonable time in its supplemental final submission (at para 30):

> [SBT] reiterate[s] that [its] submission is intended to be an alternative claim for the extension of time on the basis of "just and reasonable" time and is NOT a contradiction to [its] previous claim for 809 days. [Its] claim contained in this supplemental submission for the total of *495 days* on the ground of "just and reasonable" extension of time is for the following … [emphasis in original]

The reference to "just and reasonable" time is clearly a submission on the Disputed Issue, *viz*, if time was set at large, what would be the reasonable time within which SBT should complete the project? It appears to us that the Disputed Issue was eventually animated after a long period of hibernation.

41 In addition, even if we were to determine that the issue of whether time was at large was not truly alive during the arbitration, that *per se* would not be sufficient to inexorably lead to the conclusion that the Arbitrator had *necessarily* failed to adhere to the rules of natural justice in denying Fairmount an occasion to present its contentions on the issue. It is frequently a matter of degree as to how unexpected the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it. As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Commercial Arbitration*") at p 312:

> If the arbitrator decides the case on a point which he has *invented* for himself, he *creates surprise* and deprives the parties of their right to address full arguments on the base which they have to answer. Similarly, if he receives evidence outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him. [emphasis added]

Relevant case law

42 It would be appropriate at this juncture to examine and analyse some of the more significant

cases on the requirements imposed on an arbitrator by the rules of natural justice, and, in particular, the right to be heard and the extent to which an arbitrator may decide on issues that have not been addressed. At the outset, it must be acknowledged that it is an indispensable, one might even say universal, requirement in every arbitration that the parties should have an opportunity to present their respective cases as well as to respond to the case against them. This is more commonly referred to in common law systems as due process or the Magna Carta of arbitration. In civil law systems, the right of the parties to have a full opportunity to present their case, the classic *droit de la défence*, invariably incorporates the *principal de la contradiction* which mandates that no evidence or argument can justify a decision unless it has been subject to the possibility of comment or contradiction by the parties. It can be confidently stated that all established legal systems require parties to be treated fairly, although different terminology may be employed. Fairness includes the opportunity to be heard and the equality of treatment. Section 22 of the Act in fact expressly prescribes the general duties of an arbitral tribunal in the following terms:

> The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case.

This is identical to Art 18 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") which applies to all international arbitration embraced by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). Indeed, a similar provision may also be found at s 33(1)(a) of the UK Arbitration Act 1996 (c 23), which mandates that arbitral tribunals should "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".

43 In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, Marks J helpfully distilled the essence of the two pillars of natural justice in the following terms:

> The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo judex in causa sua*. *The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim* – audi alteram partem. *In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done; (*Lord Hewart, C.J. *in R. v Sussex Justices; ex parte McCarthy,* [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233*). Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.* [emphasis added]

44 There is now an established line of cases that vividly illustrates the principle that arbitrators or judges should not surprise the parties with their own ideas. In *Fox v PG Wellfair Ltd* [1981] 2 Lloyd's Rep 514, a decision relied on by both the learned trial judge and Mr Jeyaretnam, the claimants claimed for deficiencies arising from the defendant's construction of their block of flats. The defendant did not appear at the arbitration, and hence the only pertinent evidence was adduced by the claimant's three expert witnesses. Notwithstanding this, the arbitrator rejected their views, preferring instead to base his conclusion on an impression he had personally formed when inspecting the construction site. The English Court of Appeal held that while the arbitrator could certainly rely on knowledge he had gained from his site visit, he ought not to have unilaterally rejected the claimants' expert evidence without first according them an opportunity to refute it (at 529–530, *per* Dunn LJ):

> That principle seems to me to apply to questions of fact as much as to a question of law. *If the*

expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. This is especially so where there is only one party and the arbitrator is in effect putting the alternative case for the party not present at the arbitration.

Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it.

[emphasis added]

4 5 Fairmount also relies on the decision in *Société Franco-Tunisienne D'Armement-Tunis v Government of Ceylon* [1959] 1 WLR 787, where the main issue to be decided was the liability for demurrage (the cost of delay in the discharge of a vessel). While both parties had different assessments on the quantum of liability, they assumed that, if liability was established, the time would commence from a particular date. Despite the parties' common and undisputed understanding, the umpire unilaterally decided that time ought to start running later and proceeded to award the charterers dispatch money that they had not even claimed for. Morris LJ, at 799–801, held:

It seems to me that the point that occurred to the umpire was a point that would bring about a *dramatic development* of the case, and I am satisfied that the import of it was not communicated to Mr. Ellis [the vessel owners' advocate] in such a way as enabled him to deal with it. I have no doubt that something was said; but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that *if some entirely new point*, *not taken by the charterers, and running quite counter to their willingness to pay a sum, was being taken, it should be made quite clear*. The new point which appealed to the umpire – it may be right or it may be wrong, it is not for me to say – involves a complete departure from the course followed in the litigation up to that moment. [emphasis added]

46 In *The Vimeira* [1984] 2 Lloyd's Rep 66, the arbitrators were confronted with the question as to whether a particular port where a ship docked to discharge was unsafe for the vessel. The kernel of the dispute, it appeared, was whether there was sufficient water in the port for the ship to dock safely. However, the arbitrators reached the decision that the port was unsafe because the turning area was unduly restrictive for the vessel. The English Court of Appeal set aside the award on the basis that this finding of fact had not been referred back to the parties to address. Ackner LJ chastised the arbitrators and observed (at 76):

The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but *the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.* [emphasis added]

47 Robert Goff LJ noted that (at 75):

> In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has *never been raised* in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. [emphasis added]

48 These *dicta* must, however, be read measuredly in the context of that case, and, in this respect, it is pertinent to note that the court was clearly influenced by the fact that the issue on the turning area being unduly restrictive was: (a) unpleaded; (b) expressly repudiated as a point of contention by both parties; and crucially, (c) expressly excluded as a possibility by expert evidence. It was cumulatively for these reasons that the court determined that the parties had not been given an opportunity to rebut the finding of fact arrived at by the arbitrators.

49 Finally, the general proposition that arbitrators should refrain from deciding on issues that have not been placed in the ring by the parties was also reiterated in *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730. There the arbitrator relied on matters that had not been raised by the parties in assessing costs. Judge Humphrey Lloyd QC opined, at 740, that:

> A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have not been advanced by either party. It is not suggested by the claimant contractor that either of the two points mentioned in the arbitrator's letter was raised by it in the arbitration as being influential on the overall burden and determination of costs. Unless such an opportunity is given there is danger that the final result will not be determined fairly against the party who would be ordered to pay the costs.

50 While we accept the essence of Judge Lloyd's holding, there may be a danger in reading this particular *dictum* too expansively. What appears to have truly impressed the court in that case was that the arbitrator relied on matters that he ought not to have considered in exercising his discretion on assessing costs. Indeed, one of the considerations he based his costs order on inexplicably contradicted his express finding in a prior interim award.

51 On what can be said to be the other side of the line are cases such as *Burne v Young* (High Court, Wellington, CP 68/89, 29 May 1991), where the arbitrator had rejected the evidence of a witness on grounds that were not put to him or other witnesses. The complaint against the arbitrator's award was dismissed and Neazor J declared:

> The case is not one in which it can be said that the arbitrator had introduced a *new idea* of his own on which the parties … have not been able to comment or adduce evidence. What happened here was not 'a new point which occurred to the arbitrator' which involved *a complete departure from the course of the litigation up to that time and which was never raised or argued before the arbitration* … Nor does it involve the arbitrator considering material not put before him by the parties, or even making a decision based on his own knowledge without giving the parties the opportunity to present a different view.
>
> … *It is for counsel to lay out and develop the case, and for the Judge or arbitrator to decide as best he may on the materials the parties have given him*.
>
> …
>
> [T]he decision as to what *inferences* as to fact could or should be drawn was for the arbitrator and what *conclusions* relevant to the issues before him were to be drawn from what the evidence established was also a matter for the arbitrator.

[emphasis added]

52 Broadly along similar lines, although pronounced in quite a different context, are the views of Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:

> [O]nce a fair hearing has been given to the rival cases presented by the parties *the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision*. [emphasis added]

53 The English High Court noted in *The Pamphilos* [2002] 2 Lloyd's Rep 681 at 687:

> *[T]he duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact.* Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, *it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration.* Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. [emphasis added]

54 The English Court of Appeal adopted a similar stance in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 at [53] in endorsing the following approach of the High Court judge that circumscribed the court's right to intervene in arbitral awards:

> It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. *Very often those provisional conclusions will represent some intermediate position, for which neither party was contending.* It will only be in an *exceptional case* … that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision. [emphasis added]

55 In articulating what is perhaps the most thorough and perceptive modern conspectus on this issue, the New Zealand High Court in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ("*Rotoaira*") dismissed a challenge by the plaintiff that the arbitrator had, by rejecting rental pricing models proposed by both plaintiff and defendant and thereafter formulating his own model, breached the rules of natural justice. After a survey of English and New Zealand cases, the court summarised the applicable principles as such (at 463):

> (a) Arbitrators must observe the requirements of natural justice and treat each party equally.
>
> (b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.
>
> (c) As a minimum each party must be given a full opportunity to present its case.

(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

(e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.

(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

(j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

56 In the prevailing concatenation of circumstances, the court in *Rotoaira* held that it should have been reasonably expected that the arbitrator would arrive at a more moderate pricing model as compared to those proposed by the parties. Not only was the model adopted fairly common in the industry as a method of assessing rent, its basis had a real nexus to the other models proposed by the parties.

57 Fairmount initially sought to downplay both the significance and relevance of this case, submitting initially that the case had not been cited or applied in any subsequent decisions. As pointed out by Mr Yim, this is not correct; in fact, the case has been cited fairly recently in *Downer Connect Limited v Pot Hole People Limited* (High Court, Christchurch, CIV-2003-409-2878, 19 May 2004). In any event, we are of the view that *Rotoaira* does not represent a marked departure from established principles. On the contrary, it contains a useful perspective and succinct summary of the principles applicable to this area of the law.

58 Very recently in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 ("*ABB AG v Hochtief*"), Tomlinson J, after scrutinising recent English case law developments on the extent of an arbitrator's duty to accord the parties an adequate opportunity to respond on a significant issue,

concluded (at [67]):

> All of these authorities and judicial observations emphasise the restricted ambit of the jurisdiction under [the UK equivalent of s 48 of the Act]. It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length.

In upholding the arbitrator's decision, Tomlinson J remarked (at [72]):

> It is of course correct to observe by way of reiteration that all of this discussion took place in the context of the bad faith argument rather than in the context of an argument directed simply to establishing that the purported transfer to Horizon was a nullity because effected pursuant to an agreement or collection of agreements that was itself a breach of article 37.8 which acquired the force of Greek law. *However in my judgment all of the essential elements that might lead to that conclusion were fairly in play or, to use a different expression, in the arena. … In my judgment the tribunal has extracted an alternative case from the parties' submissions in a manner foreshadowed by the chairman's question to Professor Spyridakis which I have set out in para 70. I do not consider that the duty to act fairly required the tribunal to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it. In my judgment ABB had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion*. [emphasis added]

59 These cases must be read in the context of the current judicial climate which dictates that courts should not without good reason interfere with the arbitral process, whether domestic or international. It is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention: see, for instance, *Arbitration Act 1996* ([27] *supra*) at p 1 on the English position; and Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (Butterworths Asia, 1997) on the position in Hong Kong, which also essentially reflects the English practice. As rightly observed in *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264 ("*Weldon*") at [22], "[a]n award should be read supportively … [and] given a reading which is likely to uphold it rather than to destroy it". Similarly, in *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, the court, at [90], held:

> Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.

60 This judicial philosophy of minimal interference is not only manifested in relation to an arbitrator's obligation to adhere to the principles of natural justice, but is also adhered to by our courts in addressing other types of challenges to arbitral awards. For instance, in deciding whether to remove an arbitrator in a domestic arbitration, Tay Yong Kwang J observed in *Anwar Siraj v Ting Kang Chung* [2003] 2 SLR 287 at [41]–[42]:

> The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice (see the *Handbook of Arbitration Practice* (3rd Ed, 1998)). A subjective lack of confidence in the arbitrator by one party is not a sufficient ground to remove him. The test is an objective one and there must exist real grounds for which a

reasonable person would think there is a real likelihood that the arbitrator could not or would not fairly determine the issue on the basis of the evidence and the arguments to be adduced before him (*Hagop Ardahalian v Unifert International SA (The "Elissar")* [1984] 2 Lloyd's Rep 84 at 89).

It is therefore plain that the Court's supervisory role is to be exercised with a light hand and that arbitrators' discretionary powers should be circumscribed only by the law and by the parties' agreement.

[emphasis added]

61 Similarly, in deciding whether an award should be set aside on the ground that it is contrary to the public policy of Singapore pursuant to s 19B of the IAA, Judith Prakash J astutely resisted an expansive construction of the term "public policy" so as to avoid providing "a fertile basis for attacking arbitration awards": see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197 ("*Dexia Bank*") at [29], approved by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 at [54] and [55]. While this may have been articulated in the context of international arbitration, it is clear that Parliament intended that the Act (as recently amended in 2002) should largely mirror the IAA and international practices reflected in the Model Law save that the courts have been vested with more supervisory powers in the case of domestic arbitrations: see Second Reading of the Arbitration Bill (Bill 37 of 2001) on 5 October 2001 (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213).

62 This minimal-interference policy underscores two further considerations. The *first* is the need to support arbitration as a "useful and efficient alternative dispute resolution (ADR) process to settle commercial disputes": *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213. As one commentator has perceptively noted, the promotion of arbitration in Singapore needs to be supported by the Legislature, the Executive and the Judiciary: see, in general, Warren B Chik, "Recent Developments in Singapore on International Commercial Arbitration" (2005) 9 SYBIL 259. Aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to arbitral award by dissatisfied parties. Left unchecked, an interventionist approach can lead to *indeterminate challenges*, cause *indeterminate costs* to be incurred and lead to *indeterminate* delays. As acknowledged by Stewart J in the Ontario Superior Court of Justice in *Webber v Seltzer* 2005 CanLII 3209 at [12], citing *Mungo v Saverino* [1995] OJ No 3021:

The great merit of arbitrations is that they should be, compared to courts, comparatively quick, cheap and final. There is a trade-off between perfection on the one hand and speed, economy, and finality on the other hand. If you go to arbitration, you can get quick and final justice and you [can] get on with your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.

For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.

It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process. If an arbitration is basically fair, courts should not resist the temptation to plunge into detailed complaints about flaws in the arbitration process.

> Nothing in this evidence in this defeats that principle. The arbitration process was not perfect, and it is arguable that it was far from perfect. But when all is said and done, and all the phone calls and mutual misunderstandings and disappointed expectations have been explored, this arbitration was jurisdictionally sound enough and fair enough to pass the generous tests of jurisdiction and natural justice that are necessary to preserve the integrity, if not the perfection, of the arbitral process.
>
> [emphasis added]

While the stark comparisons and contrasts made between the court processes and arbitration as regards delays and costs certainly do not have the same resonance in Singapore, we are in agreement with the more general observations made by Stewart J. Generally speaking, the same approach towards natural justice ought to be adopted for both international and domestic arbitrations in Singapore. After all, this is justice that is *natural* in the discharge of all manner of adjudicative functions. It is highly pertinent to also note in this context that the applicable provisions addressing breaches of natural justice in the Act (s 48(1)(*a*)(vii)) and the IAA (s 24(*b*)) are identical.

63 The *second* consideration is that the parties to arbitration or the appointing authority would usually appoint an arbitrator who is himself an expert in the field of law and/or trade that is the subject of dispute. In so doing, they, *inter alia*, intend to rely on his expertise to obtain a sound and expeditious judgment. It would therefore be wrong for the courts to blindly and/or willy-nilly mechanically apply the rules of natural justice so as to require every conclusion that the arbitrator intends to make to be put to or raised with the parties. As helpfully pointed out in *Commercial Arbitration* ([41] *supra*), at p 299:

> When the parties appoint an experienced merchant as arbitrator in a quality dispute, they do not expect him to behave as if he were a High Court Judge. Their wish is that he shall use skill and diligence in finding out the facts as quickly and cheaply as possible … [A]n attempt to apply uncritically the rules which have been developed in relation to a High Court action would serve merely to confuse and irritate the commercial community, without improving the quality of arbitral justice.

64 In *The Pamphilos* ([53] *supra*), Colman J also incisively observed (at 687) that:

> [A]rbitrators [are] appointed because of their professional, legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasized that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties.

Summary of applicable principles

65 The foregoing survey of case law and principles may be further condensed into the following core principles:

> (a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* ([45] *supra*), is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other

words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.

(b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.

(c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

(d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira* ([55] *supra*), the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.

(e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.

(f) Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural

justice that have actually caused prejudice are ultimately remedied.

Application of relevant principles

66 With these principles in mind, and for the reasons that follow, we are of the view that Fairmount's complaints about the impropriety of theArbitrator determining that time had been set at large are entirely without merit.

67 First of all, the factual basis or the "building blocks" of the decision reached by the Arbitrator (*ie*, that there were acts of prevention by Fairmount) were in play and fully alive throughout the proceedings – from the pleadings to the final submissions. This is not disputed. The Arbitrator, in other words, had not conjured up facts or reached a view inconsistent with the facts presented. The only thing that the Arbitrator did that was "new" – if at all – was to *infer* from the underlying facts that time had been set at large. This, as evident from the cases, is well within the ambit of his fact-finding powers. Indeed, it is apposite to refer to *Weldon* ([59] *supra*), where Judge Humphrey Lloyd QC held, in the context of the UK Arbitration Act 1996, at [33]:

> Obviously the tribunal should inform the parties and invite submissions and further evidence before making an award if the finding is novel and was not part of the cases presented to the arbitral tribunal. *On the other hand in many arbitrations, especially those in the construction industry, there are many findings other than those which the parties have invited the tribunal to make*. Matters of quantification and valuation frequently lead to the tribunal taking a course which is not that put forward by either party, but which lies somewhere between. 'Doing the best one can on the material provided' almost inevitably produces such a result. *Provided that the finding is not based on a proposition which the parties have not had an opportunity of dealing with the arbitral tribunal will not be in breach of its duties* under s 33 of the 1996 Act nor will its award be liable to challenge under s 68(2)(a) or (d) of that Act if it makes such a finding without giving the parties a chance of dealing with it. In many such cases the tribunal will have been appointed for its expertise so that in addition there would be no obligation to consult the parties. Any other course could defeat the objective of avoiding 'unnecessary delay and expense' as provided by s 1(a) of the 1996 Act. [emphasis added]

68 Secondly, given that time is usually set at large when an architect unreasonably fails to extend time under the contract (see Vincent Powell-Smith & David Chappell, *A Building Contract Dictionary* (Legal Studies & Services (Publishing) Ltd, 2nd Ed, 1990) at p 435), it appears to us that the issues of whether time had been set at large by Fairmount's acts of prevention and whether time should have been extended under the SIA Conditions because of the acts of prevention by Fairmount are in reality two sides of the same coin. To borrow the terminology adopted by the court in *Rotoaira* ([55] *supra*), they "shade" into each other. The same factual matrix (whether Fairmount caused SBT's delay) is relevant to the determination of both issues. Whether the arbitrator should (and could) have decided that time was set at large without fixing the time that SBT was reasonably entitled to is not relevant to whether there has been a breach of the rules of natural justice. If anything, it is pertinent only to whether the Arbitrator had arguably technically committed an error of law – a question well outside the ambit and jurisdiction of this appeal.

69 Thirdly, the concept of time being set at large is not at all alien to construction disputes. It is firmly established that, as mentioned above, time may be set at large due to acts of prevention where there is no contractual provision governing the situation or where the architect fails to properly grant an extension of time under the contract. See also, I N Duncan Wallace QC, *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 11th Ed, 1995) vol 2 at para 10.040; Keith Pickavance, *Delay and Disruption in Construction Contracts* (Lloyd's of London Publishing Ltd, 3rd Ed,

2005) at ch 6. As such, the Arbitrator cannot be accused of using specialist knowledge that the parties could not have contemplated, which would have been contrary to the rules of natural justice: see *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at 15, wherein Bingham J (as he then was) held that:

> [T]he rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties.

70 Finally, we agree with SBT's submission that if one indication of whether the Arbitrator had come to his own conclusion in breach of the rules of natural justice is that the decision was wholly unexpected or unforeseeable, it was rather inconsistent for the trial judge to have determined that the Arbitrator's decision was not outside the scope of submission but yet in breach of the rules of natural justice. Paradoxically, the trial judge held at [22] of the GD:

> [A] finding that time was at large would not necessarily be *unanticipated or extraordinary or completely outside the contemplation of the parties* when questions of delay had to be considered. [emphasis added]

It should have inevitably followed from this ruling that Fairmount should have been precluded from asserting that it was surprised by the Arbitrator's finding.

71 It is true, as Fairmount contends, that just because an issue is within the scope of submission it does not *ipso facto* mean that the rules of natural justice have been obeyed. An extreme example would be an arbitrator who simply refuses to hear from a party on an issue which he eventually finds is critical and was submitted to him for a decision; see *eg*, *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 4 SLR 748. We also accept that SBT's reliance on the decision of *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR 278 may be misplaced because, unlike that case, the issues of whether time was at large and whether SBT was entitled to an extension of time are not necessary adjuncts to each other even though, as we hold, they are closely related. However, in the ordinary run of cases, and certainly in the present case, it is only logical and commonsensical that the answer to one should be the same as to the other. The same reason why the trial judge held that the issue was within the scope of submission should have been the very reason why the Arbitrator's decision, that time was at large, could not be said to be "a dramatic development" in the case and thus contrary to the principles of natural justice. In fact, we are fortified in our finding that, on any view, Fairmount could not reasonably argue that it had been surprised by the Arbitrator's decision, given our analysis on SBT's pleadings and submissions, and, in particular, the fact that Fairmount had sought to pre-empt any allegation that time was at large (see, especially, [35] above).

72 For these reasons, with all due respect to the trial judge's decision, we are of the view that there was no breach of the rules of natural justice.

Whether the breach of the rules of natural justice, if any, affected the Award?

73 Pursuant to s 48(1)(*a*)(vii) of the Act, the breach complained of must occur "in connection with the making of the award". Therefore, even if there had been a breach of the rules of natural justice, a causal nexus must be established between the breach and the award made: see also *John Holland* ([29] *supra*).

74 According to the trial judge, this requirement was met (at [31] of the GD):

> It was also apparent from the Award how the breach affected the Award. The holding that time was at large and that SBT was entitled to reasonable time to complete, without the tribunal making a concurrent finding as to the length of that period of reasonable time, had serious consequences for Fairmount. It led to the conclusion that *SBT had not failed in its duty to act with diligence and due expedition and therefore that the termination of its employment was wrongful*. [emphasis added]

75 Unfortunately, this is an entirely inaccurate characterisation of the Arbitrator's decision. The finding that time was set at large was in relation only to whether the Architect had properly assessed SBT's application for the extension of time in March 1998. It is clear that this finding had no effect on whether Fairmount could rely on the Termination Certificate to rescind its employment with SBT, and was accordingly merely *obiter*. The question of whether or not Fairmount could rely on the Termination Certificate had been answered when the Arbitrator found that the Termination Certificate and delay certificates issued by Mr Law were invalid because they had been signed and issued by the wrong person (and not because time had been set at large): see [15] above. Once these certificates were held to be invalid, it followed that Fairmount was itself in breach of the contract when it purported to terminate its relationship with SBT pursuant to cl 32(2) of the SIA Conditions. The validity of the Termination Certificate was an essential prerequisite. Indeed, the Arbitrator himself recognised this as such when he wrote (at para 86 of the Award) that:

> *If … [Mr Law] was entitled to sign the Termination Certificate*, the question which then arises is whether [SBT] had failed to proceed with diligence and due expedition and he was entitled to issue the Notice of Failure to Proceed with Due Diligence on 21 September 1999 and later the Termination Certificate. [emphasis added]

Therefore, having found the Termination Certificate to be wrongly issued, any finding that SBT was dilatory or had failed to exercise due diligence and expedition was only a subsidiary finding and did not lead to the making of the Award.

76 It is true that the Arbitrator did go on to consider whether, in March 1998, Fairmount had unreasonably failed to extend time to complete or whether SBT was simply in breach of its obligation to exercise due diligence and expedition in its work. It was in this context that the Arbitrator, at paras 207–209 of the Award, appeared to set time at large due to Fairmount's acts of prevention. Yet, in the final analysis, the Arbitrator made no reference to this in determining whether SBT was entitled to more than the five days granted by the Architect when assessing his reasons for issuing the warning letter on 21 September 1999 and the Termination Certificate. At para 228 of the Award, the Arbitrator held:

> After having considered what had happened and was happening on site against the progress achieved before the Letter of Warning dated 21 September 1999 was issued by [Mr Law], the events that had occurred after 21 September 1999 and the events which would entitle [SBT] to any extension of time to explain any apparent lack of progress, I have on balance come to the conclusion and find [SBT] was not in breach of [its] obligations to proceed with the work with diligence and due expedition and that the Architect had not acted fairly and reasonably in issuing the said Letter of Warning and subsequently the Termination Certificate … *The Architect's grant of 5 days' extension of time to [SBT] in July 1999 was not fair and reasonable in the circumstances and [SBT] was entitled to a reasonable time to complete the Project*. [emphasis added]

77 Hence, contrary to Fairmount's assertion, the fact that the Arbitrator appeared to set time at large at paras 207–209 of the Award had no appreciable impact on the final assessment as to whether SBT was in breach of its obligation to complete the works with due expedition, let alone whether the termination was in accordance with cl 32(2) of the SIA Conditions.

78 In relation to whether Fairmount was entitled to liquidated damages, the Arbitrator found the issue irrelevant: see [19] above. This was again reiterated at para 241 of the Award:

> Since the Delay Certificates issued by [Mr Law] are invalid for the reasons set out earlier in this Award and no liquidated damages are payable by [SBT] for late completion of the Project, *the question posed by [Fairmount]… namely, whether [SBT] are entitled to extensions of time so as to extend the contractual completion date of the Project … does not arise at all*. [emphasis added]

The Arbitrator made it clear that the reason why there was no need to engage the issue of whether the liquidated damages provision was enforceable was because the various delay certificates were invalid *in liminie*, and not because time had been set at large.

79 In the face of these considerations, Mr Jeyaretnam appeared to acknowledge that the Arbitrator's decision on the Disputed Issue did not materially affect his findings in relation to whether Fairmount was entitled to (a) terminate SBT's employment based on the Termination Certificate; and (b) claim liquidated damages. Mr Jeyaretnam then pegged his case on the submission that the Arbitrator's decision to set time at large had led to the mistaken corollary finding that SBT was not itself in repudiatory breach of its contract to finish the work with reasonable expedition. According to Mr Jeyaretnam, this was because the effect of setting time at large was to give SBT an indefinite period of time within which to complete the construction of the condominium project.

80 In our opinion, this argument is misconceived for two reasons. First, it is apparent from the Award itself that the real reason why the Arbitrator had held that SBT was not in repudiatory breach of the terms of its employment was because time was not of the essence and because the delays on the part of SBT were insufficient to evince any repudiatory intention that SBT did not intend to carry out its obligations: see [20] above. As such, Fairmount was not entitled to rescind the employment with SBT. Again, whether time was at large was not relevant to the Arbitrator's decision rejecting Fairmount's defence. The second reason that Mr Jeyaretnam's argument must fail is because he has put the cart before the horse: Whether or not SBT was in repudiatory breach was dependent on a showing that it had no intention to complete the project. Since the Arbitrator had found that Fairmount's acts of prevention had caused SBT's delay, this intention could not be proved and SBT was not in repudiatory breach. The decision to set time at large was, if at all relevant, the *effect* of finding that SBT could not be in repudiatory breach and hence entitled to a reasonable time to complete; and *not* the *cause* of or the reason why the Arbitrator found that SBT was not in repudiatory breach of its obligations.

81 For these reasons, we hold that even if it could be said that the Arbitrator had breached the rules of natural justice in holding that time had been set at large, that breach did not influence or affect the ultimate decision.

If there was a breach of natural justice, and it led to the making of the Award, whether the breach caused prejudice to Fairmount?

82 Under the Act, the breach of natural justice must prejudice the rights of a party before the court may intervene. In this regard, the trial judge found for Fairmount on two bases (at [31] of the

GD):

(a) a breach of the rules of natural justice itself creates a prejudice that is suffered by the party, citing *The Vimeira* ([46] *supra*); and

(b) in any event, Fairmount had been prejudiced because the Arbitrator had reached a finding adverse to it as a result of the breach.

83 It is true that in *The Vimeira*, Robert Goff LJ held that a breach of the rules of natural justice itself created a prejudice that was suffered by the party who had been deprived of its rights. However, it is unclear whether Ackner LJ agreed with this proposition. In his judgment, Ackner LJ simply proceeded to consider whether the complainant was able to show that there would be any difference had the breach not occurred. In *Rotoaira* ([55] *supra*), though, the New Zealand High Court was of the view that it would usually be reasonable to assume prejudice in the absence of indications to the contrary once it was shown that there was significant surprise.

84 We do not agree with this unqualified proposition because if it were accurate, every breach of the rules of natural justice could constitute some form of prejudice. This would invariably dilute, indeed negate, the force of the plain statutory requirement in s 48(1)(*a*)(vii) of the Act that "a breach of the rules of natural justice occurred in connection with the making of the award *by which the rights of any party have been prejudiced*" [emphasis added]. Had Parliament intended that a breach of the rules of natural justice was sufficient to set aside an arbitral award, it would not have included the italicised words. In this regard, it must be appreciated that the courts in both *The Vimeira* and *Rotoaira* were not addressing the legal position in the context of a similar statutory provision as Singapore's. It is not even clear whether *The Vimeira* was decided under the old UK Arbitration Act 1950 (c 27), in which case there would have been no statutory requirement that prejudice be shown. A demonstration of "misconduct" was sufficient. In any event, Goff LJ did not cite any authority or basis for his holding that the breach of the rules of natural justice would itself be sufficient to attract curial intervention. As for *Rotoaira*, it is plain that in New Zealand, there was and is no requirement to show that prejudice had been caused by the breach: see s 34(2)(b)(ii) read with s 34(6) of the New Zealand Arbitration Act 1996 (No 99).

85 Indeed, in *Dexia Bank* ([61] *supra*), Judith Prakash J correctly held (at [50]):

> Whilst the Tribunal in this case did, as I have explained above, make an issue of a point that was never raised by either party, to wit, the applicant's purported non-participation in the Previous Arbitration, that finding was not determinative of its final conclusion, and therefore any breach of natural justice that might have occurred because the Tribunal did not notify the applicant that it considered this to be a point in issue did not prejudice the applicant. In *John Holland* … the court held that to succeed under s 24(*b*) of the Act, an applicant had to establish how the breach of natural justice was connected with the making of the award *and how such breach had prejudiced the rights of the party concerned*. I am satisfied that there is no substance in the applicant's complaints of there having been a breach of natural justice in relation to the right of the applicant to be heard and to present its case fully. [emphasis added]

86 It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly.

87 In this context, it is helpful to consider some of the more recent English authorities, which have also stipulated for more than just an arid breach of the rules of natural justice as an essential

prerequisite to ground a successful challenge. This approach is neatly encapsulated in Robert Merkin, *Arbitration Law* (Informa UK Limited, Looseleaf Ed, 1991, 27 November 2006 release) at para 20.8 as follows:

> If the result would most likely have been the same despite the irregularity there is no basis for overturning an award. However, in determining whether there has been substantial injustice, the court is not required to attempt to determine for itself exactly what result the arbitrator would have come to but for the alleged irregularity, as this process would in effect amount to a rehearing of the arbitration. Instead, if the court is satisfied that the applicant had not been deprived of his opportunity to present his case properly, and that he would have acted in the same way with or without the alleged irregularity, then the award will be upheld. By contrast, if it is possible that the arbitrator could have reached the opposite conclusion had he acted properly, there is potentially substantial injustice. … [T]he fact that a different result might have been reached is not necessarily enough to justify judicial intervention: the term "substantial injustice" did not mean injustice which was more than *de minimis*, and what was required was injustice which had real effect. The most obvious, although not the only, illustration of real effect is financial loss ...

88 This summary is amply supported by other case law. In *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2004] 2 P&CR 6, the English Court of Appeal held, also on the issue of whether there had been substantial injustice (at [58]):

> In the instant case, I am not satisfied that the case which Mr Gillott [the surveyor for the appellant] would have put had he been afforded the opportunity to submit a further report along the lines indicated in his witness statement would have been so different as to justify the conclusion that the lack of that opportunity in itself caused a substantial injustice, regardless of what the outcome of the arbitration would have been. Nor, for that matter, am I satisfied that the outcome in that event would have been materially different.

89 This view was later echoed in *Cameroon Airlines v Transnet Limited* [2004] EWHC 1829 (Comm) at [102]–[103]:

> The requirement that the serious irregularity "has caused or will cause substantial injustice" to the applicant has most recently been addressed by the Court of Appeal in the rent review case Warborough Investments v S. Robinson & Sons EWCA [2003] Civ 751 in which previous statements of principle were reviewed. I take from that two matters. First it is the procedural irregularity, the denial of a fair hearing, if such there be, which must be shown to have caused a substantial injustice. Second what is required to satisfy the test is indeed an extreme case "where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". On the other hand, in agreement with the submissions made by both parties, I do not think it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome.
>
> If it be the case that an applicant had an opportunity to deal with any procedural unfairness and did not avail itself of that opportunity by way of further submissions or evidence, as Colman J pointed out in Kalmneft v Glencore [2002] 1 Lloyd's Rep 128 at page 141 it will fail to establish "substantial injustice".

90 The upshot of these cases seems to be that there must be something more than the

existence of a breach which has prejudiced the rights of the complainant to justify curial intervention. Moreover, it is abundantly clear that the Act was amended precisely to reflect international practice. Indeed, it is not lost upon us that s 48(1)(*a*)(vii) of the Act was adopted directly from s 24(*b*) of the IAA (see *Review of Arbitration Laws*, March 2001, LRRD 2/2002 at 31), which in turn was enacted to reflect international practice. It may also be surmised that legislative change was, in fact, inspired by the UK Arbitration Act 1996 (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2214):

> In 1996, the UK revamped their arbitration laws and incorporated many provisions from the Model Law. In the light of these developments, the Attorney-General initiated a review of our Arbitration laws, spearheaded by the Chambers' newly formed Law Reform and Revision Division. ...
>
> [T]his Bill is largely based on the UNCITRAL Model Law, which already forms the basis of Singapore's International Arbitration Act. The Bill also incorporates useful provisions from the 1996 UK Arbitration Act. *This approach allows the creation of an arbitration regime that is in line with international standards and yet preserves key features of those existing arbitration practices that are deemed to be desirable for domestic arbitrations*.
>
> [emphasis added]

91 However, we pause here to acknowledge Mr Jeyaretnam's submission that there is a difference between the UK Arbitration Act 1996 and the Act in so far as the former states (at s 68(2)) that:

> Serious irregularity means an irregularity of one or more of the following kinds [including a breach of the rules of natural justice] *which the court considers has caused or will cause substantial injustice to the applicant* … [emphasis added]

In our view, this difference, while noteworthy, is not crucial. The fact that Parliament may have chosen different language does not invariably mean that it has intended a wholly different meaning, especially where the Act itself expressly prescribes that prejudice must be shown in addition to the breach: see [83] above. Section 48(1)(*a*)(vii) of the Act plainly requires the "rights" of "any party" to have been "prejudiced". The "rights" referred to in s 48(1)(*a*)(vii) of the Act cannot simply mean the right to be heard; otherwise, s 48(1)(*a*)(vii) of the Act would be a tautology. It does, however, appear that Parliament, in steering away from the "substantial injustice" formula adopted in the UK Arbitration Act 1996, had intended to set a lower bar to establish a remediable "prejudice". The statutory formula adopted in England would only bite in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that the court would take action: see the Departmental Advisory Committee on Arbitration Law Report (February 1996) at para 220 and *ABB AG v Hochtief* ([58] *supra*) at [63]. It appears to us that in Singapore, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness. It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing

would almost invariably be insufficient to set aside the award.

92 In addition, assuming that the breach is in respect of only a single isolated or stand-alone issue or point, it would normally not be sensible or appropriate to set aside the entire award. Instead, the policy of minimal curial intervention implies that the court's focus should be on the proportionality between the harm caused by the breach and how that can be remedied: see also the statutory directive in s 49(9) of the Act. In the present case, for instance, had there been a breach of Fairmount's right to be heard, the appropriate remedy would have been to remit the matter to the Arbitrator for him to receive further evidence on the Disputed Issue. This is because setting aside the whole Award would have forced the parties to re-arbitrate the entire case when the Disputed Issue was only one among several other severable issues that the Arbitrator had decided, and which were not challenged by either Fairmount or SBT.

93 Our reading of the Act is consonant with the objective that Parliament intended the Act to fulfil, namely, to promote the autonomy and finality of the arbitral process, so as to preclude unnecessary satellite litigation which would undermine arbitration as an efficient and cost-effective alternative dispute resolution mechanism: see [48]–[53] above. As mentioned above, this, too, is the justification for the trend towards minimal curial intervention among common law jurisdictions, including the UK Arbitration Act 1996 from which our amended legislation drew guidance: on the UK position, see Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press, 2005) at para 27.14.

94 In the present case, we are of the opinion that even if there had been a breach of the rules of natural justice, Fairmount would not be able to show that it has been prejudiced, apart from the alleged technical breach standing by itself. Given our analysis that the Arbitrator's finding that time had been set at large was not critical in the final decision as to whether Fairmount was entitled to terminate the contract with SBT, it should follow that there would not be any appreciable difference in the outcome even if the breach had not occurred. Moreover, since the questions of whether time was at large and whether SBT was entitled to an extension of time under the contract are two sides of the same coin, in so far as the determination of what would constitute a reasonable period of time and the determination of the length of extension respectively would be based on the same facts, Fairmount would already have made whatever submissions it needed to because the issue of the extension of time under the contract was vigorously pursued during the arbitration. In fact, one of the reasons the trial judge cited for not remitting the Award back to the Arbitrator was because all the evidence had already been adduced, and it would make no difference to send the Award back to the Arbitrator for further submissions on the Disputed Issue: see [32] of the GD. Finally, as we have also held, Fairmount had every opportunity in its written reply and supplemental reply to address the issue of time being set at large due to its acts of prevention. Having opted not to take this opportunity, any prejudice that may have resulted cannot be attributed to the Arbitrator's failure to act properly.

95 Indeed, the very reason the Arbitrator set time at large was because he *agreed* with Fairmount that SBT had not persuasively shown how much time it was entitled to under the SIA Conditions. Having found Fairmount to have prevented SBT from completing the project with due expedition, the Arbitrator had no option but to set time at large. His subsequent failure to determine a reasonable period of time for SBT to complete the project was, if anything, an error in law and not a breach of the rules of natural justice. Even so, since the issues of the time that SBT was entitled to under the SIA Conditions and the time SBT should be given having set time at large fell to be decided upon the same evidential basis, it is no surprise that having been unable to determine the former issue, the Arbitrator would also be unable to determine the latter. In other words, the Arbitrator's failure to determine the reasonable period of time SBT was entitled to, after setting time at large, was

a consequence of a lack of evidence presented by the parties and not the result of his "inventing" a new point. In these circumstances, any prejudice suffered by Fairmount was because it too had failed to present satisfactory evidence as to how much time SBT would be entitled to should the Arbitrator have rejected Fairmount's absolutist position that SBT was not entitled to any further extension of time at all – even though this alternative position was the precise point that the Arbitrator had asked the parties to submit upon in their supplemental submissions: see [40] above. Hence, we find that even if the Arbitrator had acted properly (which we have found he did), the same result would have been obtained. Accordingly, Fairmount has not shown how it was prejudiced by the Arbitrator's supposed failure to adhere to the rules of natural justice.

Conclusion

96 To summarise, the principal complaint by Fairmount is that because the Arbitrator made a decision on a point that was neither pleaded nor argued, namely, that time was set at large, Fairmount was denied an opportunity to present the necessary evidence to counter his conclusion. The main question in this appeal is whether Fairmount had indeed been taken by surprise as claimed, and whether any prejudice had been suffered as a result. In our view, Fairmount has not shown why it was caught unawares by the finding that time was at large. In fact, as our analysis amply demonstrates, the Disputed Issue was not only alluded to in SBT's pleadings, and later argued (though not emphasised) during the arbitration, but it was also further expounded upon in SBT's written submissions, as directed by the Arbitrator. In any event, we hold that the Arbitrator was fully entitled to extract an alternative position (that time was at large as of March 1998) from the submissions of Fairmount and SBT (whether SBT was or was not entitled to an extension of time under the SIA Conditions) especially since the building blocks of the Arbitrator's decision (*ie*, that Fairmount had committed acts of prevention) were already "in the arena". Furthermore, as explained, the Disputed Issue was simply another reflection of whether SBT was entitled to an extension of time under the SIA Conditions, a point that had already been explored and vigorously contested. Indeed, given that the trial judge had found that the Disputed Issue was not outside the scope of submissions and that a finding apropos the Disputed Issue was not beyond the contemplation of the parties (Fairmount did not challenge this part of the trial judge's decision), it stands to reason that the Arbitrator had not surprised the parties by his decision to set time at large as of March 1998.

97 Even if we were to accept Fairmount's position that there had been a breach of the rules of natural justice, we find that there was no causal nexus between the breach and the Award. The Arbitrator had clearly decided in favour of SBT on other premises that were cogently founded on both lucid and logical grounds. Moreover, we find that any purported breach of the rules of natural justice failed to prejudice Fairmount to any significant extent because, for the reasons explored above, the same result would have been obtained in any event, even if the Arbitrator was not in breach of the rules of natural justice, as indeed we have found he was not.

98 As a matter of both principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process in order to promote the two primary objectives of the Act; namely, seeking to respect and preserve party autonomy and to ensure procedural fairness. Fairness includes the right to be heard and mandates equality of treatment. Arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced. It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should be made available.

99 For these reasons, we have allowed the appeal and awarded costs both here and below to SBT.

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