Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd
[2006] SGHC 189

Case Number : OS 757/2006

Decision Date : 17 October 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

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

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

Arbitration – Award – Recourse against award – Misconduct under Arbitration Act – Whether arbitrator misconducting arbitration by failing to consider issue of whether defendant entitled to extension of time to complete works under contract with plaintiff regarding building project and deciding that time for performance of project was at large despite such decision not being sought in parties' pleadings

Arbitration – Award – Recourse against award – Setting aside – Whether not affording party opportunity to be heard on matter decided on but not raised in pleadings amounting to breach of natural justice and ground for setting aside of arbitral award

17 October 2006

Judith Prakash J:

Introduction

1 The plaintiff, Fairmount Development Pte Ltd ("Fairmount"), was incorporated in 1996 as a single purpose company to develop the condominium housing development project known as "Fairmount Condominium" ("the project"). The defendant, Soh Beng Tee & Company Pte Ltd ("SBT"), carries on business as a building contractor. In 1998, by a building contract that incorporated the form of the Singapore Institute of Architects' Articles and Conditions of Building Contract (Measurement Contract), 5th Edition ("the SIA Contract"), Fairmount employed SBT as the main contractor to construct the project.

2 Unfortunately, the project did not proceed smoothly. Disputes arose and Fairmount subsequently terminated the employment of SBT. Thereafter, SBT invoked the arbitration clause in the SIA Contract and commenced arbitration proceedings against Fairmount. Fairmount in turn mounted a counterclaim against SBT in the arbitration. The parties appointed a sole arbitrator ("the arbitrator") to arbitrate the dispute. On 15 March 2006, the arbitrator issued his final award ("the Award").

3 This originating summons was taken out by Fairmount in April 2006. Fairmount applied for an order that the Award be set aside pursuant to s 48(1)(*a*)(iv) or 48(1)(*a*)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"). The grounds of the application were as follows:

(a) The arbitrator did not determine SBT's claim for an extension of time but instead decided that time for performance of the project was at large without determining the reasonable period of time within which SBT should have completed the project.

(b) This decision was not sought by either party in its pleadings or arguments nor did the

arbitrator invite parties or their counsel to submit on the issue of whether time was at large nor was the issue included in the list of issues for submission.

(c) Fairmount therefore was deprived of the opportunity to argue this issue before the arbitrator.

(d) The effect of the decision was to excuse SBT from its failure to plead and prove the exact periods of time for which extension of time should have been granted to it and to place on Fairmount the burden of proving the consequences of SBT's own acts of delay.

(e) Severe prejudice had been caused to Fairmount by this breach of natural justice or decision on a matter beyond the scope of the submission to arbitration in that the arbitrator's holding that Fairmount's termination of the SIA Contract was wrongful flowed from the decision to put time at large without substituting a reasonable time for completion, against which SBT's lack of progress could be measured.

4 SBT contested the application. After hearing the parties, I held that the Award had to be set aside under s 48(1)(*a*)(vii) of the Act because Fairmount had proved to my satisfaction that a breach of the rules of natural justice had occurred in connection with the making of the Award by which its rights had been prejudiced. I therefore granted the application and set aside the Award. SBT has appealed.

Background

5 A full account of the facts constituting the background to the dispute can be found in the Award. To summarise, in January 1997, SBT (who was referred to as "the Claimant" in the Award) offered to execute, complete and maintain the works for the project for a sum of $16,330,595.84 within a period of 18 months. The project was awarded to SBT in July 1997 by a letter of acceptance issued by Archurban Architects Planners ("the architect") on behalf of Fairmount (who was referred to as "the Respondent" in the Award). The parties subsequently entered into a formal contract on 26 February 1998 and this contract included the letter of acceptance, the SIA Contract, specifications and various other documents. The commencement date stated in the contract was 2 August 1997 and the completion date was stated as 1 February 1999.

6 Whilst the works were in progress, SBT submitted numerous applications to the architect for extensions of time to complete the works on various grounds under cl 23 of the SIA Contract. On 19 July 1999, one Mr Daniel Law of the architect granted SBT an extension of time of five days and thereby revised the contractual completion date to 6 February 1999. The contract provided for liquidated damages for late completion of the main works and also for phased or staged completion and liquidated damages for two other parts of the works, *viz* the substation and the mock-up units. In May 1999, Mr Law issued a delay certificate in respect of the mock-up units and in July 1999, he issued a delay certificate for the main works but backdated it to 7 February 1999.

7 On 21 September 1999, Mr Law issued a written notice to SBT putting it on notice that it had failed to proceed with diligence and due expedition. One month later, on 21 October 1999, he issued a termination certificate certifying that Fairmount was entitled to terminate the employment of SBT under the contract. On 9 November 1999, Fairmount terminated SBT's employment as contractor under the contract with immediate effect. SBT vacated the site the same day and handed it over to a replacement contractor appointed by Fairmount. The replacement contractor took over the works and completed them on 1 June 2000. In April 2003, Fairmount made a demand for payment of the sum of $3,212,113.16 that it alleged was due and owing from SBT as computed by the architect in its

statement of account dated 13 March 2003. This demand was followed by a statutory demand in June 2003. SBT rejected the demands and then called for arbitration pursuant to the terms of the contract.

The statutory provisions

8 Fairmount's application was made pursuant to s 48 of the Act. The Act was enacted in October 2001 and many of its features reflect the provisions of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ("the Model Law") as one of the purposes of the Act was to bring the regime for domestic arbitrations more into line with that applicable to international arbitrations. The Act does not, however, follow the Model Law in its entirety and the courts have more supervisory powers in respect of domestic arbitrations than they do in respect of international arbitrations.

9 Section 48 establishes the situations in which the court may set aside an arbitration award. The power to set aside is discretionary and the burden of proving that any ground for setting aside exists lies with the party applying to set aside the award. Some seven grounds for setting aside are provided. I am here concerned with only two of them. In so far as it is material to this application, s 48 states:

> **Court may set aside award**
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> **48.—**(1) An award may be set aside by the Court —
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> (*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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> …
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
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> …
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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; or
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> …
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> ...
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> (3) When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award.

The Award

10 The arbitrator recognised in para 60 of the Award that the main issue before him was whether Fairmount had rightfully terminated SBT's employment as contractor. By para 61, he stated that one of the sub-issues raised by the main issue was whether SBT was entitled to extensions of time for the completion of the project and, if so, whether it had been properly granted such extension or whether such extension had been taken into account by the architect in issuing the termination certificate. In para 99, after considering various authorities in relation to the contractor's duty to proceed with diligence, the arbitrator said:

> 99. It is clear from the authorities referred to above, one has to consider –
>
> (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 Daniel Law; and
>
> (b) whether there were any events that had occurred which would entitle the Claimant to any extension of time to explain any apparent lack of progress,
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> when considering the question when the Claimant was proceeding with diligence and due expedition. I will also have to consider the issue whether the 5 days' extension of time granted by Daniel Law on 19 July 1999 to the Claimant revising the completion date for the Project to 6 February 1999 was fair and reasonable.

11 Fairmount submitted that what was set out in para 99 of the Award was what the arbitrator was expected to do and what he ought to have done. Instead, the arbitrator had taken a different course. First, in section E3.8 of the Award, he considered the allegation "Late appointment of staff, inadequate site staff to supervise and coordinate the construction works" as Fairmount had said that this was one of the causes of SBT's failure to proceed with due diligence. At para 177, the arbitrator concluded that whilst frequent changes of site personnel may have had some impact on the progress of the works, the issue to be considered was whether Fairmount had demonstrated how these changes had caused the number of days of delay in completion. On the evidence, he found that Fairmount had not shown the number of days of delay that were caused by changes of site staff. The arbitrator next considered Fairmount's assertion that SBT's poor and defective construction works and the workmanship had delayed the project. He found in para 185 of the Award that Fairmount had not discharged its burden of proof to show how defects in the works had delayed the project in terms of the number of days via a construction programme analysis. Before me, Fairmount complained that the arbitrator had mistakenly put the burden of proof on it to prove delay rather than requiring SBT to prove its entitlement to extensions of time and that had led to the reasoning in paras 207 to 209 of the Award which formed the nub of Fairmount's complaint that the arbitrator had either decided a matter that was not submitted to him for decision or, in coming to this decision, had failed to observe the rules of natural justice.

12 As these paragraphs of the Award were crucial to Fairmount's arguments, I must set them out in full:

> 207. In their Written Submissions the Respondent submitted that the Claimant has not given any evidence on the amount of extension of time that they claim they 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 the Claimant would be entitled to for all the alleged events in question. Further, the Tribunal does not have the pre-requisite expertise and skills to properly assess the Claimant's claim for extension of time for all these alleged events on its own. The Tribunal cannot be expected to guess at or speculate over the amount of delays that may have been caused by

these alleged events. Likewise, the Tribunal cannot be expected to guess at or speculate over what amount of additional time the Claimant would possibly need to complete the Project as a result of these alleged events. As there is no evidence or basis before the Tribunal to enable it to properly and correctly assess accurately or at all the Claimant's claim for an extension of time for the alleged events referred to above, the Tribunal accordingly has no power or jurisdiction to consider the Claimant'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. Whilst it is true that without any delay analysis given by a competent witness, I am not able to come to a conclusion on the exact periods of time that should be awarded to the Claimant, 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 the Respondent as listed out above had affected the Claimant's ability to complete their 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 the Claimant and the Claimant 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 the Claimant 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 the Claimant from completing the Works by the original contract date. Time for the performance of the Project was at large.

13 The above paragraphs show how the arbitrator tried to deal with the issue of the extension of time. As he himself said, he found that he was unable to assess accurately the number of days of extra time to which SBT was entitled because SBT had not put sufficient evidence before him to come to such a conclusion. He then went on to reject all the claims for extension of time for all the alleged delaying events. The arbitrator was not happy with this conclusion because he considered that acts of prevention by Fairmount had affected SBT's ability to complete its work so he then decided that SBT was entitled to a reasonable time to complete the work and that time for performance of the work was at large.

How important was the issue of the extension of time?

14 The central issue before me was whether the holdings that I have cited, even if wrong, justified the Award being set aside. SBT put forward the position in its affidavit that it would not because the question of whether SBT was entitled to additional extensions of time was not one of the main issues of the arbitration but only a sub-issue.

15 To Fairmount, however, this was the central issue in the case as, without a determination of this issue, it was not possible to decide whether SBT had proceeded with reasonable diligence nor could there be any legitimate finding as to whether SBT ultimately failed to proceed with diligence and due expedition; SBT's progress had to be judged against the time allowed for completion. Without the time frame for completion and with the holding that time was at large, the extent of delay was left undetermined to the prejudice of Fairmount who had terminated SBT for such alleged failure to proceed with reasonable diligence and for serious delay amounting to repudiatory breach. At the time of termination on 9 November 1999, SBT had overrun the extended contractual date (6 February 1999) by more than nine months, when the original construction period was 18 months and, by its own case, SBT only anticipated completion by June 2000.

16 Fairmount argued that the stand that the extension of time issue was peripheral could not be maintained. First, the bulk of the statements of evidence of Soh Eng Chong and Kong Peng Sun who were witnesses called by SBT was spent justifying SBT's claim for an extension of at least 850 days to complete the project. Second, in seeking a declaration from the arbitrator that the termination of its employment was wrongful or in breach of contract, it had relied on the following grounds:

(a) that SBT was entitled to extensions of time for the completion of the whole of the project, the substation and the mock-up units;

(b) that Fairmount was liable for the architect's failure to assess or fairly assess SBT's extension of time claims;

(c) that the architect had issued the delay certificates without considering the extension of time claims properly or adequately; and

(d) that the termination was wrongful because Fairmount was in breach of contract by reason of the architect failing to grant fair and reasonable extensions of time and because it had failed to take into account extensions of time to which SBT was entitled but had not been granted.

Thus, the essence of SBT's case as pleaded, from the evidence presented before the tribunal and in its submissions, was that the termination was wrongful because if it had been properly granted extensions of time, SBT would have been entitled to complete its work by end June 2000 and therefore it was not in default of the contract.

17 The third point put forward was that Fairmount itself had responded to SBT's contentions by contending that the architect had properly and adequately considered SBT's claims for extension of time. The fourth point was that the case had begun and ended with both parties requesting the arbitrator to determine the question of the extension of time. Finally, even the arbitrator in his award had noted (at para 88) that under cl 32(2) of the SIA Contract, the architect could issue a termination certificate when the contractor failed to proceed with diligence and due expedition. He then summarised the case law on what diligence and due expedition entailed and held in para 99 of the Award that he had to decide whether the events that had occurred entitled SBT to any extensions of time. Yet, the arbitrator had failed to decide this issue.

18 I accepted Fairmount's submissions summarised above. I agreed that the arbitrator had had before him the issue of what extensions of time, if any, SBT had been entitled to and that it was a pivotal issue on which the resolution of a substantial part of the case depended because it had an impact on the amount of liquidated damages Fairmount was entitled to claim as at the date of termination, and also the time for completion formed the essential yardstick against which progress of the works had to be judged.

Grounds of challenge

Submission to arbitration

19 As provided for in s 48(1)(*a*)(iv) of the Act, an award may be set aside if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains matters beyond the scope of the submission to arbitration. This was the first ground on which Fairmount contended that the Award should be set aside.

20 Fairmount argued that as it was SBT's case that it was entitled to additional periods of extension of time beyond the contractually extended date of completion or 6 February 1999, Fairmount never contemplated that the tribunal would set time for performance of the works at large. It did not contemplate either, that in spite of the repeated requests by both parties for the appropriate extension of time to be determined, the arbitrator would just leave this issue hanging.

21 It further submitted that an analysis of the whole course of the arbitration made it plain that the issue of whether time for performance of the works was at large, because of the acts of prevention by Fairmount's site staff and the architect, never became an issue at the arbitration. SBT may have taken an alternative position in its pleadings that time was at large as a result of the delays and disruption caused by the clerk-of-works and site staff, but SBT never raised this point again either during the proceedings or in submissions. Instead, it abandoned this argument at the arbitration.

22 On this point, I was not with Fairmount. Whilst the parties may not have conducted their respective cases on the basis that various actions had led to time being at large and whilst (as I go on to discuss below) there may have been a breach of the rules of natural justice when the arbitrator came to a decision on this point, I do not consider that one can say the decision that time was at large resulted from a matter that was beyond the scope of the submission to arbitration. The dispute that was contemplated and dealt with by the parties was the dispute revolving around the period of time within which SBT had to complete its work. 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. Thus, I did not accept that Fairmount had any basis under s 48(1)(*a*)(iv) of the Act for criticising the tribunal's decision.

Breach of natural justice

23 To establish that a breach of the rules of natural justice had occurred in order to justify a setting aside under s 48(1)(*a*)(vii) of the Act, Fairmount had to establish which rule of natural justice was breached; secondly, how it was breached; thirdly, in what way the breach was connected to the making of the award and fourthly, how the breach had prejudiced its rights: see *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262.

24 Fairmount submitted that the rule of natural justice that had been breached in this case was the rule that each party should be given the opportunity to be heard on all relevant matters. In this case, the tribunal had decided on an issue (that time was at large and completion should take place within a reasonable time) without this issue having been raised either in written submissions or in oral arguments by any of the parties or by the tribunal itself. In particular, SBT did not raise this point in any of its submissions and it was not invited by the tribunal to address this issue at any stage of the arbitration. A list of the issues to be decided had been submitted by each of the parties to the tribunal and the issue of time being at large was not on either party's list. At no time during the proceedings did the arbitrator notify the parties, particularly Fairmount, that he was considering this issue and that he wanted submissions on it from them.

25 Fairmount's allegation that the conduct described above amounted to a breach of natural justice was supported by the case of *Société Franco-Tunisienne D'Armement-Tunis v Government of Ceylon* [1959] 1 WLR 787 ("*The Massalia*"). There, the owners and charterers of a vessel had

submitted their dispute to an umpire. The owners subsequently challenged the decision of the umpire on the basis that his view of the law as applied to the facts before him involved a radical departure from the cases as presented by the parties and contended that as the owners were not given a sufficient opportunity to reframe their case in the light of the umpire's views, the proceedings were unsatisfactory and contrary to natural justice. The English Court of Appeal agreed. Morris LJ observed (at 799) that "the point that occurred to the umpire was a point that would bring about a dramatic development of the case" and should have been communicated to the owners to enable them to deal with it. He further stated (at 800) that though the umpire had "acted with the best of intentions", he had decided the case "on a basis which differed from that which the charterers were asserting and on a basis of which the owners did not have satisfactory warning". The owners ought to have had a real opportunity of dealing with the new point and of putting forward reasons for submitting that the umpire was wrong. Pilcher J agreed that the proceedings before the umpire were not, in all the circumstances, conducted in accordance with the principles of natural justice because the owners did not have the opportunity of presenting arguments on the umpire's views to the umpire.

26 The principles established in *The Massalia* were adopted by Mocatta J in *Faghirzadeh v Rudolf Wolff (SA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630 in the following passage at 639:

> It is clear from *The Massalia*, [1952] 2 Lloyd's Rep.1 that if evidence is given before an arbitral tribunal, which the tribunal accepts as evidence of truth, but which does not accord with a claim made by one of the parties before that tribunal, the tribunal is not prevented from coming to conclusion based upon that evidence although such a conclusion is not contended for before it. It must not, however, appear in any way to be acting unfairly and it should not therefore, without more, award in favour of the claim that has not been made before it, although it may reject a claim that has been made before it. If it wishes, on the facts which it finds, to make an award supporting a claim that has not been advanced before it, before it does so it must in the interests of fairness indicate to the parties to the arbitration that it is inclined to come to such conclusion and give the parties the fullest opportunity of dealing with this development and if necessary, apart from arguing about it, calling any evidence to deal with it.

Other cases which have ruled that an arbitrator must give the parties the opportunity to deal with arguments or matters that have not been advanced by either party are *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 and *Fox v P G Wellfair Ltd* [1981] 2 Lloyd's Rep 514.

27 SBT submitted that the arbitrator's findings at paras 208 and 209 of the Award were directly in response to the issue of whether the architect had properly granted extensions of time and were conclusions that were well within the proper ambit of the question posed for the arbitrator's determination. After hearing extensive evidence and submissions on the issue, the arbitrator reached the conclusion that while Fairmount was correct to say that without specific evidence in the form of a "delay analysis" from a competent witness it was not possible for him to reach a definite view as to the exact number of days SBT was entitled to, the overall evidence was sufficient to justify a finding that in principle SBT was entitled to more than an extension of five days and thus he set the time at large. This finding, said SBT, was based entirely on and in response to the evidence and submissions presented at the arbitration and therefore there was no breach of the principles of natural justice.

28 Having heard the arguments, I agreed with Fairmount that it had not been given an opportunity to be heard on the issue whether time was at large and, if so, what would constitute a reasonable time within which SBT would have to complete. Simply making time at large could not mean that SBT could complete at its leisure. It would still have to meet a reasonable schedule. The arbitrator did not inform Fairmount that he was considering setting time at large. If he had, Fairmount would have been able to address the issue and submit not only why that should not be done but also,

if the arbitrator still considered it should be done, address what the consequences would be and suggest a reasonable time for completion.

29 In this connection I also took into account Fairmount's submissions that if the tribunal had informed the parties of what it had in mind, Fairmount would have sought to persuade the arbitrator that time for performance of the project was not at large by referring to cll 23 and 37 of the SIA Contract and citing relevant authorities. Of additional significance was what SBT had actually done. SBT had invoked the relevant provisions of cl 23 concerning acts of prevention and architect's instructions in relation to its own claims for extension of time and therefore had not proceeded on the basis that such acts would set time at large. Its position was that it would be entitled under cl 23 to the claimed number of additional days because it could prove these acts of prevention by Fairmount's staff and the architect. Thus, it was entirely the arbitrator's own idea that the conundrum could be solved by setting time at large.

30 The tribunal was constituted to resolve the issues raised by the parties. 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. As Fairmount submitted, if the tribunal considered that the parties had missed any point which the arbitrator thought was crucial or which he wished to pursue, then it was not only a matter of obvious prudence but the tribunal was obliged in all fairness to put the point to them so that they had the opportunity to deal with it. This is a particularly important obligation in the context of arbitration because a party's rights of recourse after the making of an award are extremely limited. In this case, the issue of whether time for performance was at large was not put to the parties. No submissions were made on it and thus the fact that it may have been raised initially in SBT's pleadings did not entitle the arbitrator to deal with it without asking for further submissions.

31 Fairmount did establish which rule was breached and also how it was breached. 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. Fairmount submitted that its rights were seriously prejudiced as a result. I agreed. It is also the law that the breach of natural justice itself creates a prejudice that is suffered by the party, in this case, Fairmount, who has been deprived of its rights: see *The Vimeira* [1984] 2 Lloyd's Rep 66.

32 SBT submitted that Fairmount's proper recourse, in the event that its case was established, was not to apply to set aside the Award but instead to have applied for an additional award. In so far as Fairmount's complaint was that the arbitrator had failed to determine the exact period of additional time for completion to which SBT was entitled, despite having been asked to do so, Fairmount could apply under s 43(4) of the Act to the arbitrator to make an additional award in respect of a claim presented during the arbitration proceedings but omitted from the award. I did not agree with SBT's contention. I considered that s 43(4) could not be resorted to 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. In addition, as Fairmount contended, the arbitrator had not just left his job incomplete but had done something completely different from what the parties had asked him to do. Thus, it would not be right to send the matter back to him under s 43(4). In any case, there would be nothing he could do to remedy the defect because he had no power to call for further evidence after rendering the Award. The arbitrator was *functus officio.* The court therefore had no choice but to set aside the Award.

Conclusion

33 In my judgment, Fairmount had established that a breach of natural justice had taken place in the course of the arbitration and that its rights had thereby been prejudiced. The Award therefore had to be set aside under s 48(1)(*a*)(vii) of the Act. I accordingly allowed Fairmount's application with costs.