L W Infrastructure Pte Ltd *v* Lim Chin San Contractors Pte Ltd and another appeal [2012] SGCA 57

Case Number	: Civil Appeals Nos 17 and 26 of 2012
Decision Date	: 18 October 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Sundaresh Menon JA
Counsel Name(s)	: Mr Tan Liam Beng and Ms Eng Cia Ai (Drew & Napier LLC) for the appellant in CA 17 of 2012 and the respondent in CA 26 of 2012; Mr Chia Swee Chye Kelvin (Samuel Seow Law Corporation) for the respondent in CA 17 of 2012 and the appellant in CA 26 of 2012.
Parties	: L W Infrastructure Pte Ltd — Lim Chin San Contractors Pte Ltd

Arbitration – Award

[LawNet Editorial Note: The decision from which these appeals arose is reported at [2012] 2 SLR 1040.]

18 October 2012 Judgment reserved.

Sundaresh Menon JA (delivering the judgment of the court):

Introduction

1 There are two appeals before us arising out of the judgment of the High Court Judge ("the Judge") in *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd* [2012] 2 SLR 1040 ("the Judgment"). One appeal (Civil Appeal No. 26 of 2012 ("CA 26/2012")) was filed by Lim Chin San Contractors Pte Ltd ("the Plaintiff") while the other (Civil Appeal No. 17 of 2012 ("CA 17/2012")) was filed by L W Infrastructure Pte Ltd ("the Defendant").

2 These appeals raise a number of important questions concerning the law of arbitration. Just what do the rules of natural justice require of an arbitrator? To what extent do these rules apply even to ancillary applications? And what is the threshold a party must cross if it is to obtain any relief even assuming it can show that an arbitrator has failed to observe the rules of natural justice? We are also presented with the occasion to consider the extent to which the Court retains any supervisory powers over arbitration beyond the expressly provided avenues for recourse that are spelt out in the relevant legislation.

Facts

3 The Plaintiff was the Defendant's sub-contractor for a building project. The Plaintiff failed to complete certain works by the agreed completion date, and the Defendant subsequently terminated the sub-contract. This gave rise to a dispute between them.

4 That dispute was referred to arbitration before an arbitrator, one Mr Johnny Tan Cheng Hye ("the Arbitrator"), pursuant to a notice of arbitration served on 22 June 2004 by the Defendant on the Plaintiff. In the arbitral proceedings, the Defendant was the claimant while the Plaintiff was the respondent. It was not disputed that the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") governed

the proceedings.

5 The Arbitrator rendered his final award ("the Final Award") on 29 June 2010. The Plaintiff was awarded the sum of $341,391.10 with simple interest at the rate of 5.33% per annum from the date of the award. [note: 1] Both parties were dissatisfied with the Arbitrator's decision and appealed against it on questions of law arising out of the Final Award. The High Court dismissed the Plaintiff's appeal and substantially allowed the Defendant's appeal and the Final Award was remitted to the Arbitrator for his reconsideration and final disposal (see *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477).

6 Following this, the Arbitrator rendered his Supplementary Award No 2 (Remitted Issues) on 21 September 2011 ("the Second Supplementary Award"), under which the Defendant was awarded the sum of $945,000 by way of liquidated damages. [note: 2] In satisfaction of this sum, the Plaintiff was ordered to pay the Defendant the sum of $603,608.90, after setting off the sum of $341,391.10 that had earlier been found to be due to the Plaintiff under the Final Award. [note: 3]

7 The Arbitrator expressly dealt with interest in the Second Supplementary Award, and as he had done in the Final Award, he awarded the successful party (*ie*, the Defendant) interest at the rate of 5.33% per annum on the sum of $603,608.90 from the date of the Second Supplementary Award. In short, on both occasions, only post-award interest was awarded. The relevant portion of the Second Supplementary Award states: [note: 4]

> **Award**
>
> FOR THE REASONS GIVEN ABOVE,
>
> I ORDER and AWARD that:
>
> I. The [Plaintiff] do pay the [Defendant] the sum of **S$603,608.90** (this sum includes the sum of S$341,391.10 awarded to the [Plaintiff] in the earlier Award);
>
> II. The [Plaintiff] pay the [Defendant] simple interest at the rate of 5.33% p.a. on the sum of S$603,608.90 from the date of this Supplementary Award;
>
> III. Costs of the reference and costs of the arbitration shall be fully borne by the [Plaintiff]. Such costs if not agreed to be taxed.
>
> [emphasis in original]

8 On 17 October 2011, almost four weeks after the issuance of the Second Supplementary Award, the Defendant's solicitors wrote a letter to the Arbitrator (copied to the Plaintiff's solicitors) requesting an additional award for "pre-award interest". The relevant portion of the letter is set out below: [note: 5]

> 2. The [Defendant] had made a claim for interest to be paid by the [Plaintiff]. This is prayed for in the Points of Claim (Amendment No. 3). The claim for interest, as prayed for by the [Defendant] would include both pre-award as well as post-award interest.
>
> 3. However, we note that the Tribunal had omitted from the Supplementary Award No. 2 (Remitted Issues) the award of pre-award interest on the sum of $603,608.90 to the

[Defendant]. The Tribunal had only awarded post-award interest on the sum of $603,608.90 in the Supplementary Award No. 2 (Remitted Issues).

4. It is provided in section 43(4) of the Arbitration Act ('the Act') as follows:-

Unless otherwise agreed by parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented during the arbitration proceedings but omitted from the award.

5. Pursuant to section 43(4) of the Act, our clients hereby request the Tribunal to make an additional award as to a claim for pre-award interest presented during the arbitration proceedings but omitted from the Supplementary Award No. 2 (Remitted Issues).

[emphasis in original]

9 The Arbitrator responded three days later even though the Plaintiff's solicitors had not responded to the request. In his reply dated 20 October 2011, the Arbitrator stated: [note: 6]

1. I refer to the letter from [the Defendant's solicitors] dated 17 Oct 2011.

2. I enclose herewith my Additional Award issued pursuant section 43(4) [*sic*] dealing with pre-award interest on the sum of $603,608.90 awarded.

10 The additional award ("the Additional Award") was for a further sum of $274,114.61 payable to the Defendant as pre-award interest calculated on the sum of $603,608.90 from 13 January 2003 to the date of the Second Supplementary Award. The Arbitrator stated that 13 January 2003 was selected as the date from which pre-award interest would be payable because liquidated damages accrued then. [note: 7] At the time he issued the Additional Award, the Arbitrator had not heard submissions on issues such as (a) the principal amount that should carry interest, (b) the rate of interest, (c) the time from which interest should be awarded, or (d) why the situation in favour of the Defendant should differ from that which applied when he made his Final Award in favour of the Plaintiff and confined interest to post-award interest (see above at [5]).

11 The Plaintiff's solicitors protested on the same day, taking issue with the Additional Award having been made prior to the Plaintiff having the opportunity to present its "position and/or arguments on the issue of pre-award interest". [note: 8] In a letter to the Arbitrator, the Plaintiff's solicitors stated: [note: 9]

For the record, we had intended to write to you today to rebut the [Defendant's] request or application on *inter alia* the basis that the claim presently sought by the [Defendant] was not omitted as such by the Tribunal since the [Defendant] did obtain interest on its claim. We would also have pointed out that, in [the Second Supplementary Award], only post-award interest was added … the Tribunal is *functus officio* in regard to the award of interest for the reasons stated above. [emphasis in original]

12 The Arbitrator responded on 21 October 2011, stating: [note: 10]

2. … I held my hands for 3 days till 20 Oct 2011 pending a response from [the Plaintiff]. Since there was no objection raised and no interim reply to suggest that the [Plaintiff] intended to

object to the request, I proceeded to deal with the application.

3. I am also surprised by your suggestion that because the original award had only dealt with post-award interest that it was my intention to exercise my discretion on pre-award interest. It is obvious from [the Additional Award] that it was indeed an oversight in the original award. If it was my intention not to award pre-award interest, I would have refused the [Defendant's] application.

13 The Plaintiff's solicitors replied to this letter and this elicited a final reply from the Arbitrator on 27 October 2011 which stated in material part: [note: 11]

2. As stated in my letter dated 21 Oct 2011, there was no interim reply from [the Plaintiff] to suggest that [the Plaintiff] intended to object to the application for the Additional Award. ... Having not heard from [the Plaintiff] I had assumed that [the Plaintiff] did not object to the application.

3. In any event … the basis of your objection is that you assumed to be able to read my intention that I had chosen to exercise my discretion to award only post award interest. If that had been the case I would have rejected [the Defendant's] application for pre-award interest. It was because I had in fact overlooked to order pre-award interest that I had issued the Additional Award.

14 A brief observation may be made on the Arbitrator's response. It appears on the one hand that the Arbitrator proceeded to make the Additional Award because he inferred from the Plaintiff's three-day silence that there was no objection to this. The corollary to this is that if the Plaintiff had objected, the Arbitrator would have considered this with an open mind. But on the other hand, the Arbitrator appeared also to be saying that he had already formed the intention to award pre-award interest in the manner he eventually did in the Additional Award but had simply overlooked reflecting this in the Second Supplementary Award. While this might explain the seeming haste with which the Additional Award was issued, it raises other questions. If indeed the Arbitrator had already arrived at a decision and had simply forgotten to mention it in the earlier award, then it is unclear on what basis he had done so since he had not yet been addressed on the sort of matters referred to at [10] above; and it is also unclear how in that case he would have been in a position to consider submissions on such matters with an open mind had the Plaintiff indicated its objections within the three-day period.

15 Following this exchange of correspondence, the Plaintiff filed an originating summons in the High Court on the 15 November 2011, praying for the following relief: [note: 12]

(a) that the Additional Award be declared a nullity in that it was not an award made under or for the purposes of s 43(4) of the Act; and

(b) further or in the alternative, an order that the Additional Award be set aside under s 48(1)(*a*)(vii) of the Act on the ground that it had been made in breach of natural justice.

The decision below

16 In the Court below, the Judge set aside the Additional Award under s 48(1)(*a*)(vii) of the Act in favour of the Plaintiff, but decided against declaring the award a nullity.

The Judge's decision not to declare the Additional Award a nullity

17 Before the Judge, the Plaintiff argued that the Defendant had presented an aggregated claim for interest that included both pre- and post-award interest even though it had not expressly been bifurcated as such. The Arbitrator had dealt with the interest claim in the Second Supplementary Award by awarding only post-award interest. This was said to be the Arbitrator's response to the Defendant's claim for both pre- and post-award interest. On this basis, the Plaintiff contended that the Defendant's claim for and the Arbitrator's subsequent award of pre-award interest fell outside s 43(4) of the Act. The section provides:

> **Correction or interpretation of award and additional award**
>
> **43.**— ...
>
> ...
>
> (4) Unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented during the arbitration proceedings but omitted from the award.

18 The Plaintiff contended that this was not a case of a claim which had been presented in the arbitration being omitted; rather, it was a case of a claim that had implicitly been rejected. Accordingly, the Plaintiff contended that there was no room to invoke s 43(4) of the Act at all and on this basis, it was contended that the Additional Award should be declared a nullity.

19 On this, the Judge held that even if s 43(4) of the Act was not applicable, this did not afford a ground upon which the Court could declare the Additional Award a nullity (see the Judgment at [20]). Relying upon s 47 of the Act, the Judge concluded that the Court has no jurisdiction to make such a declaration.

20 The Judge also held that the only provision in the Act which empowers the Court to set aside an arbitral award is s 48, which she understood to be exhaustive (see the Judgment at [22]). The Plaintiff had not relied upon s 48(1)(*a*)(iv) of the Act to set aside the Additional Award on the basis that the Arbitrator had exceeded his statutory powers, and no relief could be granted pursuant to s 43(4) of the Act alone (see the Judgment at [23]-[24]).

21 The Judge also rejected the Plaintiff's argument that O 15 r 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") confers upon the Court the power to declare the Additional Award a nullity. She observed that such a power had to be found in the Act (if at all), and that in fact the Act does not sanction the granting of such declaratory reliefs. The Judge saw this as "a last ditch attempt at circumventing s 47 of the Act" (see the Judgment at [26]).

The Judge's decision to set aside the Additional Award on the basis of s 48(1)(a)(vii) of the Act

22 On s 48(1)(*a*)(vii) of the Act, the Plaintiff advanced two main arguments in support of its position that the Additional Award had been made contrary to the rules of natural justice:

(a) the Arbitrator had failed to give the Plaintiff an opportunity to be heard before issuing the Additional Award; and

(b) the Arbitrator had decided the issue on a basis not raised or contemplated by the parties.

23 The Judge held that although s 43(4) of the Act was a corrective provision, the rules of natural

justice continue to apply (see the Judgment at [33]) and did so throughout the entire arbitration proceedings (see the Judgment at [35]).

24 The Judge observed that the ability of an arbitrator to make an additional award supports "the principle of minimal curial intervention because it allows the arbitrator to correct his award for genuine oversights" (see the Judgment at [41]). However, she thought that there was a limitation to the circumstances in which the power to make an additional award could be invoked, namely, that "all the submissions and evidence necessary for an arbitrator to make his additional award must have been placed before him during the main arbitral proceedings" (see the Judgment at [42]).

25 The Judge held that before an arbitrator can make an additional award under s 43(4) of the Act, he must first be satisfied that s 43(4) applies, and in the making of this decision, both parties should have the opportunity to be heard (see the Judgment at [43]-[45]).

26 The Judge held that in this instance, the *audi alteram partem* rule of natural justice (*ie*, a party's right to be heard) had been breached, given the "haste" with which the Arbitrator had rendered the Additional Award (see the Judgment at [49]). The Judge found that the Plaintiff had not been given an adequate opportunity to respond and it was unreasonable for the Arbitrator to infer from the Plaintiff's failure to respond for three days that the Plaintiff did not intend to object to the Additional Award being made (see the Judgment at [50]).

27 The Judge also held that "the breach of the rule was connected to the making of the Additional Award because it was made without affording the Plaintiff the opportunity to be heard as to whether the Additional Award should or should not be made" (see the Judgment at [52]). As to the Defendant's contention that there was no prejudice since the Arbitrator would have awarded pre-award interest in any event, the Judge observed that what the Plaintiff was denied here was the very opportunity to submit on the applicability of s 43(4) of the Act (see the Judgment at [53]) – a denial of sufficient prejudice to warrant the setting aside of the Additional Award.

28 The Judge accordingly set aside the whole of the Additional Award under s 48(1)(*a*)(vii) of the Act (see the Judgment at [54]).

Issues before this Court

29 The two main issues before this Court are as follows:

(a) Did the Judge err in refusing to declare the Additional Award a nullity?

(b) Did the Judge err in setting aside the Additional Award under s 48(1)(*a*)(vii) of the Act for breach of natural justice?

The decision of this Court in CA 26/2012

The Plaintiff's arguments

30 In CA 26/2012 (*ie*, the Plaintiff's appeal), the Plaintiff submits that the Judge erred in failing to see that the Plaintiff was seeking a declaration that the Additional Award was a nullity and a "non-award". [note: 13] According to the Plaintiff, the Additional Award simply could not come within the ambit of s 43(4) of the Act and therefore, the "alleged Additional Award – despite its form and appearance – was not an award as such" [note: 14] (underline in original). In the circumstances, the Plaintiff contended that "there is nothing for the Court to "*set aside*" and the proper remedy is for the

Court to declare that the alleged Additional Award was a nullity" (emphasis in original). [note: 15]

31 The Plaintiff also submits that the Court's power to grant a declaratory judgment in arbitration has not been excluded by the Act, since the Court retains supervisory jurisdiction over an arbitral tribunal. [note: 16] And given that s 43(4) of the Act was not properly invoked, the Plaintiff contends that the Judge erred in refusing to declare the Additional Award a nullity.

The exclusion of the Court's inherent jurisdiction to interfere in arbitral proceedings on matters governed by the Act

32 The key issue that arises in CA 26/2012 is whether the Court has the power to declare the alleged Additional Award a nullity assuming s 43(4) of the Act has no application in these circumstances. This is a nuanced issue which requires some understanding of the legislative intent underlying the passing of the Act in Singapore.

33 The Act was passed in 2002 and a significant concern was the desire to ensure that while the framework governing domestic arbitration would retain the provision for a greater degree of judicial involvement than would be case with international arbitration, in general the two should be broadly consistent. Associate Professor Ho Peng Kee explained in Parliament as follows (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213):

> … this Bill repeals the Arbitration Act. In its place, the Bill enacts a new Arbitration Act which is *more in line with our International Arbitration Act* (IAA) and international practices, as reflected in the UNCITRAL Model Law on International Commercial Arbitration … As the Model Law has been well received by Singapore arbitrators and practitioners, the next step is to *align our domestic laws with the Model Law*. *This will narrow the differences between the two regimes* … Sir, this 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]

34 Given the clear legislative intent to "align our domestic laws with the Model Law", unless a clear departure is provided for in the Act, the Court is entitled and indeed even required to have regard to the scheme of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") or the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") for guidance in the interpretation of the Act. This is undoubtedly so where similar provisions are found in the Act and in the IAA or the Model Law. In this context, art 5 of the Model Law, with the commentaries which shed light on its purpose and effect, is of assistance.

35 Article 5 of the Model Law (found in the First Schedule to the IAA) states:

> ARTICLE 5.—EXTENT OF COURT INTERVENTION
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.

36 The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to "exclude any general or residual powers" arising from sources other than the Model Law (see HM Holtzmann & JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) ("*Holtzmann & Neuhaus*") at p 216). The

raison d'être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to "satisfy the need for certainty as to when court action is permissible" (*ibid*).

37 Article 5 of the Model Law has been described as "being comparable" with s 47 of the Act (see Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) ("*Singapore Law on Arbitral Awards*") at para 4.13). Section 47 of the Act provides:

> **No judicial review of award**
>
> **47**. The Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act.

38 In our view, having regard to the need for a broadly consistent approach to the interpretation of the Act and the Model Law, s 47 of the Act should be construed in a manner that is consistent with the intent underlying art 5 of the Model Law. Section 47 of the Act states that the Court shall not have jurisdiction to interfere with an arbitral award except where so provided in the Act. The certainty which is sought to be achieved by this provision would be significantly undermined if the courts retained a concurrent "supervisory jurisdiction" over arbitral proceedings or awards that could be exercised by the grant of declaratory orders not expressly provided for in the Act.

39 In short, in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act (see Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1990) at p 32; see also *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another* [2004] 2 SLR(R) 14 at [23]).

The Plaintiff's complaint is a matter governed by the Act

40 In the present case, the Plaintiff seeks a declaratory order that the Additional Award be deemed a nullity on the basis that s 43(4) of the Act does not apply and so there was no basis for the Arbitrator to have made it. We consider, however, that this is precisely a grievance which has been expressly regulated under s 48(1)(*a*)(v) of the Act, which states:

> **Court may set aside award**
>
> **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 —
>
> …
>
> (v) the composition of the arbitral tribunal or *the arbitral procedure is not in accordance with the agreement of the parties*, unless such agreement is contrary to any provisions of this Act from which the parties cannot derogate, or, in the absence of such agreement, *is contrary to the provisions of this Act*;
>
> …
>
> [emphasis added]

The procedure that has been agreed by the parties includes anything in the legislative framework that is provided by the applicable governing law of the arbitration – in this case, the Act. Thus the powers

(or the lack thereof) of the Arbitrator are circumscribed by the Act aside from anything else that might have been specifically agreed between the parties. If the Arbitrator was wrong to render the Additional Award because s 43(4) of the Act did not in fact empower him to do so, the "arbitral procedure" leading to the issuance of the Additional Award would be contrary both to "the agreement of the parties" and also "the provisions of this Act". In the course of the oral submissions, counsel for the Plaintiff accepted that he could perhaps have relied on s 48(1)(*a*)(v) of the Act to set aside the Additional Award. This is also the position reflected in the case law.

41 In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 ("*Denmark Skibstekniske*"), the defendant attempted to resist enforcement of a "corrected award" on the basis that the tribunal was *functus officio* when the corrected award was issued. The defendant relied on s 31(2)(*e*) of the IAA, which is *in pari materia* with s 48(1)(*a*)(v) of the Act. Although the High Court eventually found that the tribunal was not *functus officio* when it issued the corrected award (see *Denmark Skibstekniske* at [52]), it does not seem to have been doubted that had the defendant made out its assertion that the tribunal was *functus officio*, s 31(2)(*e*) of the IAA (and by analogy, s 48(1)(*a*)(v) of the Act) would indeed have afforded the defendant an appropriate avenue for seeking recourse.

42 It follows from the fact that the Act does make provision for seeking relief in such circumstances, that there is simply no basis for finding that there is any residual or concurrent jurisdiction for the Court to make a declaration as to the validity of the Additional Award. We are strengthened in this view by the legislative removal of what had previously existed as O 69 r 2(3) of the ROC. This provision had expressly provided for a court to declare that an award was not binding. The removal of this provision was explained in the report of the Law Reform and Revision Division of the Attorney-General's Chambers entitled *Review of rules of court relating to arbitration* (23 January 2002) at para 1.2:

> The new [Arbitration Act] is closer to the [Model Law] and the [IAA] … Order 69 has to be amended to support the new provisions in the Arbitration Act 2001 and to weed out obsolete references to the "old" Arbitration Act.

43 This is also the view of the learned author of *Halsbury's Laws of Singapore*, vol 1(2), (LexisNexis, 2011 Reissue) at footnote 6 of [20.120] where he states:

> Under the old RC O 69 r 2(3), a party could, in addition to the statutory power to appeal and set aside the award, apply to court to declare that an award was not binding. Such an application which was not an appeal and not subject to the same tests and time limits for appeals, could only be justified on the inherent jurisdiction of the court. The Arbitration Act s 47 now removes this avenue. Henceforth, aggrieved parties may only seek recourse against an award on the bases set out under the Act viz to set aside for procedural irregularities or appeal on a question of law … The new RC O 69 ... no longer contains any procedural rule to allow for such a declaration.

44 Finally, the Plaintiff has referred to the decision of this Court in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") in support of its contention that there may well be occasion for the Court to find that something which purports to be an award is in fact and in substance not an award at all. As true as this may be, it simply does not assist the Plaintiff. The crux of this Court's holding in *PT Asuransi* was that the alleged award in that case was not an award at all because it did not even purport to dispose of any substantive issue on the merits. Given this, there was simply no basis for seeking to set it aside as an award. The setting aside jurisdiction

of the Court can only be invoked against something that purports to be an award in fact and in substance, even if it ultimately turns out to be an invalid award. Such was the case here. The Additional Award had clearly dealt with a substantive issue on the merits (*ie*, whether pre-award interest should be awarded). The Plaintiff's real complaint was that this was an *invalid* award because it had been issued without any basis. In the circumstances, *PT Asuransi* offers no assistance.

45 For the foregoing reasons, we uphold the Judge's decision not to declare the Additional Award a nullity and the Plaintiff's appeal in CA 26/2012 is dismissed.

The decision of this Court in CA 17/2012

46 The Judge nonetheless held in favour of the Plaintiff and set aside the Additional Award under s 48(1)(*a*)(vii) of the Act on the basis that the Plaintiff had not been given a reasonable opportunity to be heard and was in fact prejudiced. CA 17/2012 is the Defendant's appeal against the Judge's decision to set aside the Additional Award.

The law on setting aside an award due to a breach of the rules of natural justice

47 Section 48(1)(*a*)(vii) of the Act reads as follows:

> **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 —
>
> …
>
> (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;
>
> …

48 In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), this Court held (at [29]) that a party challenging an arbitration award as having contravened the rules of natural justice has to establish the following:

> (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.

49 This Court then summarised the principles relating to the application of rules of natural justice which should be adopted for both international and domestic arbitrations in Singapore. The relevant principles which assist us in the present appeals can be found in *Soh Beng Tee* at [65]:

> (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 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 ...

...

(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 …

…

(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*.

[emphasis added]

The test of prejudice in determining whether an arbitral award should be set aside

50 To begin, it is the last of the quoted paragraphs above that warrants some attention. What is the threshold of prejudice that must be crossed before a court may intervene under s 48(1)(*a*)(vii) of the Act? It is undoubtedly the case that not every breach of the rules of natural justice will in itself amount to the required "prejudice" (see *Soh Beng Tee* at [83]-[84]). In *Soh Beng Tee*, this Court was careful to state that there must be some causal connection between the breach of natural justice and the making of the award in order to establish actual or real prejudice. This is reflected in *Soh Beng Tee* at [86] and [91]:

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.

…

91 … 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.

51 These passages should not be understood as requiring the applicant for relief to demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice. Nor conversely do they mean that the application for relief is bound to fail if there is a possibility that the same result might have been arrived at even if the breach of natural justice had not occurred. However, this was the way in which counsel, Mr Tan Liam Beng ("Mr Tan"), framed his arguments for the Defendant. In our view, the principal requirement that was highlighted in *Soh Beng Tee* at [91] is the demonstration that "there has been some actual or real prejudice caused by the alleged breach ... [which] is obviously a lower hurdle than substantial prejudice, [though] it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis".

52 The threshold of "substantial injustice" is adopted in s 68(2) of the UK Arbitration Act 1996. In *Soh Beng Tee*, this Court considered (at [91]) that the threshold to be applied in Singapore should indeed be lower:

> 91 … 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. …

53 Robert Merkin and Louis Flannery, having reviewed the authorities interpreting s 68(2) of the English Arbitration Act 1996, summarised the position in their book as follows (see Robert Merkin & Louis Flannery, *Arbitration Act 1996* (Informa Publishing, 4 Ed, 2008) at p 158):

> ... the Court's task on [an application alleging the breach of the right of fair hearing] is *not to second-guess the tribunal's views* on any additional submissions which one side might have made if called upon to do so. It may be sufficient if that party has been deprived of the opportunity *to advance submissions which were "at least reasonably arguable"*, or even simply something better than "hopeless". [emphasis added]

54 The proliferation of labels may not ultimately be helpful. Nevertheless, it is important to bear in mind that it is never in the interest of the Court, much less its role, to assume the function of the arbitral tribunal. To say that the Court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the Court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (*cf Soh Beng Tee* at [86]).

The rules of natural justice vis-à-vis additional awards

55 What then was the nature of the breach in this instance and was there real prejudice in the sense just described? *Soh Beng Tee* did not involve, and thus the Court in that case did not consider, the relevance of the rules of natural justice to ancillary matters such as a request for an additional

award. It is to this that we now turn.

How do the rules of natural justice apply to additional awards?

56 The Judge held that "natural justice should apply to the entire arbitration proceedings" because these are immutable principles which ought to apply to any tribunal acting in a judicial capacity (see the Judgment at [35]-[37]). We agree. This is fundamental and also finds statutory support in s 22 of the Act, which states without qualification as follows:

> **General duties of arbitral tribunal**
>
> **22**. The arbitral tribunal shall act fairly and impartially and shall give each party a reasonable opportunity of presenting his case.

57 While the Defendant does not challenge the general position that the rules of natural justice apply to additional awards, it argues that there was no specific requirement for the Arbitrator to provide the Plaintiff an opportunity to be heard and therefore contends that the rules of natural justice have not been breached. [note: 17] The Defendant's argument that it was not necessary for the Arbitrator to hear the Plaintiff rested on the fact that such a requirement is not expressed in s 43(4) of the Act [note: 18] and, besides, the parties would already have had the full opportunity to present their respective cases earlier. [note: 19] The Judge however held that natural justice demanded that the Arbitrator provide "the other party" (*ie*, the Plaintiff) a reasonable opportunity to be heard before making the Additional Award.

(1) The two distinct questions that the Plaintiff could have been heard on

58 It is important to distinguish between *two different questions* in respect of which the Plaintiff could have expected to be afforded a reasonable opportunity to be heard (see Darius Chan, "Role of natural justice in the making of an additional award" in *Singapore Law Watch Commentary Issue 2/April 2012* ("*SLW Commentary*") at p 6):

> (a) firstly, whether the requirements of s 43(4) of the Act were met – *ie*, whether pre-award interest was a presented claim that had been omitted from the Second Supplementary Award ("the jurisdictional question"); and
>
> (b) secondly, if the requirements of s 43(4) of the Act were met, whether pre-award interest should be awarded, and if so, to what extent ("the substantive question").

59 From the Judgment, it appears that the Judge directed her mind solely to the jurisdictional question and the Additional Award was set aside under s 48(1)(*a*)(vii) of the Act on the basis that the Plaintiff had been deprived of the right to submit on whether s 43(4) of the Act applies at all to enable the Arbitrator to issue the Additional Award. Much of the Defendant's arguments on the appeal therefore pertained to the applicability of the rules of natural justice to the jurisdictional question. However, the two questions are analytically distinct.

(2) The right to be heard is implicit in the "notice requirement"

60 As noted above, the Defendant relied primarily on the fact that s 43(4) of the Act does not expressly provide that the other party has a right to be heard. [note: 20] The Defendant contrasted this with s 57(3) of the UK Arbitration Act 1996 (the correspondent of s 43(4) of the Act) which

reads:

> **57 Correction of award or additional award**
>
> …
>
> (3) The tribunal may on its own initiative or on the application of a party—
>
> (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
>
> (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
>
> *These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal*.
>
> [emphasis added]

61 The Defendant also highlighted s 39(5) of the Act which specifically provides that the arbitral tribunal shall give parties a reasonable opportunity to be heard on the amendments to costs:

> **Costs of arbitration**
>
> **39.—** …
>
> …
>
> (5) The arbitral tribunal shall, *after giving the parties a reasonable opportunity to be heard*, amend its award by adding thereto such directions as it thinks fit with respect to the payment of the costs of the reference.
>
> [emphasis added]

Since the words "giving the parties a reasonable opportunity to be heard" are missing in s 43(4) of the Act, the Defendant contended that this suggests a deliberate choice that there would be no requirement for an arbitrator to hear the other party before deciding whether to render an additional award. [note: 21]

62 In our view, the Defendant's argument is incorrect because it ignores the fact that s 43(4) of the Act is modelled on art 33(3) of the Model Law. Given that the Act was passed to align domestic arbitration with the rules governing international arbitration (see above at [33]-[34]), the materials which are relevant to the interpretation of art 33(3) of the Model Law will also assist in the interpretation of s 43(4) of the Act.

63 Article 33(3) of the Model Law contains virtually the identical provisions which are found in ss 43(4) and (5) of the Act:

> **ARTICLE 33.—CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD**
>
> ...

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

64 The Defendant referred us to the *Analytical Commentary on Draft Texts of a Model Law on International Commercial Arbitration, Report of the Secretary-General*, UN Doc A/CN.9/264 (March 25, 1985) produced by the United Nations Commission on International Trade Law ("*Analytical Commentary*"), which commented on art 33(3) as follows (at p 69):

> The third possible measure is to make an additional award as to any claim presented in the arbitral proceedings but omitted from the award (e.g. claimed interest was erroneously not awarded). If the arbitral tribunal considers the request, not necessarily the omitted claim, to be justified, *it shall make an additional award, irrespective of whether any further hearing or taking of evidence is required for that purpose*. [emphasis added]

Based on the italicised portion of the *Analytical Commentary* above, the Defendant submitted that this contemplated that an arbitrator may make an additional award *without* any further hearing and so a party's right to be heard prior to the rendering of an additional award cannot be read into s 43(4) of the Act.

65 The Judge, however, took a different view of the meaning to be placed on the words "irrespective of whether any further hearing or taking of evidence is required" in the *Analytical Commentary*. The Judge's view was that if an arbitrator was minded to make an additional award, he should not require any further hearing because "everything would already have been presented to [the arbitrator] during the main arbitral proceedings" (see the Judgment at [42]). However, the Judge held that an arbitrator can only determine whether to make the additional award *after* giving "the other party" a reasonable opportunity to submit on this question. In short, the Judge confined the operation of the quoted phrase in the *Analytical Commentary*, as she understood its meaning, to the substantive question (see above at [58]); but not to the jurisdictional question on which, in her view, the Arbitrator was required to afford "the other party" a reasonable opportunity to be heard.

66 In our view, it is necessary first to correctly understand the "notice requirement" that is contained both in art 33(3) of the Model Law and s 43(4) of the Act. According to the Defendant, the "notice requirement" is simply an extension of the general rule that a party to arbitration proceedings may not communicate with the arbitrator without informing the other party of such communications. [note: 22]

67 In our judgment, this is mistaken. It is clear that a broader intention underlay the "notice requirement" in the minds of the drafters of art 33(3) of the Model Law. In *Holtzmann & Neuhaus*, it is observed (at pp 889-890):

> One other point of significance to the Article as a whole that was discussed in the legislative history was the necessity of providing parties to the proceedings with an opportunity to respond to a request by a party for … an additional award. On this there appears to have been broad agreement. The Working Group considered but did not adopt a proposal to lay down a time schedule for this purpose, but it noted in its Report that "*it was understood that the arbitral tribunal should allow sufficient time for a reply*". During the later discussion of the matter by the Commission, this view was repeated and it was said that the *requirement of an opportunity to respond flowed from the general standards of fairness* imposed by Article 18 [in *pari materia* to s

22 of the Act] and was also *encapsulated in the phrase "with notice to the other party"*, which is contained in both the Model Law and the UNCTIRAL Arbitration Rules. [emphasis added]

68 It is thus evident that the "notice requirement" in art 33(3) was included on the premise that embedded within it was the requirement that "the other party" be afforded the opportunity to respond to the requesting party's request for an additional award. Prior to the arbitrator even determining whether any further hearing or taking of evidence is required to deal with the substantive question, "the other party" must have been given a reasonable opportunity to be heard on the jurisdictional question.

69 The Defendant's reliance on the words in the *Analytical Commentary* – *ie*, "whether any further hearing or taking of evidence is required" – was also misplaced and this probably arose out of an incomplete appreciation of the drafting history of the art 33(3) of the Model Law. A variant of these words – *ie*, "can be rectified without any further hearings or evidence" – had originally been included in the early stages of the drafting of art 33(3) of the Model Law, but these words were subsequently deleted by the Working Group. The reason for this deletion was explained in *Holtzmann & Neuhaus* at p 891, as follows:

> This was done in response to a question raised by the Secretariat of what would happen where claims were omitted as to which further hearings or evidence would be needed. The Secretariat suggested that "[f]rom a practical point of view" the arbitral tribunal should be permitted to resolve such claims because the alternative might be that the award as a whole would be set aside. The Working Group agreed, and the restriction [*ie*, that the omission by the arbitrator is rectifiable without any further hearings or evidence] was omitted.

70 In this light we agree with the observations found in the *SLW Commentary* at pp 4-5:

> Accordingly, what the Working Group intended was precisely the opposite of what [the Defendant] contended: Art 33 of the Model Law was deliberately drafted so as to allow tribunals to make additional awards on claims that may well require further hearings or evidence, as well as claims that may not require further hearings or evidence, as long as the claim had been presented as part of the tribunal's mandate.

71 To this extent, we also disagree with the Judge's view that "all the submissions and evidence necessary for an arbitrator to make his additional award must have been placed before him during the main arbitral proceedings, and nothing further should be required of him to make his decision" (see the Judgment at [42]).

72 For completeness, we observe that the quoted portion of the *Analytical Commentary* has been misunderstood. This has arisen once again from the failure to distinguish between the jurisdictional question and the substantive question. The words, "If the arbitral tribunal considers the request, not necessarily the omitted claim, to be justified" in fact preserves such a distinction. The tribunal must first decide the jurisdictional question, namely whether the provision is properly invoked in the sense that a claim presented in the arbitration has in fact been omitted; and as noted above, in doing so the tribunal must give "the other party" an opportunity to be heard.

73 The subsequent words of the *Analytical Commentary* – *ie*, "it shall make an additional award, irrespective of whether any further hearing or taking of evidence is required for that purpose" – apply to the *substantive question*; and they simply mean that once the tribunal decides that a claim has been omitted, it must make an additional award to deal with that omitted claim and it must proceed to do so whether additional evidence is required or not**.** Nothing in the *Analytical Commentary*

excludes the opportunity for evidence to be led or hearings to be held if the tribunal deems that this is necessary.

74 Accordingly, we hold that the Arbitrator should have given the Plaintiff the right to be heard on the applicability of s 43(4) of the Act prior to coming to his decision, notwithstanding the absence of the express words "giving the parties a reasonable opportunity to be heard" in s 43(4) of the Act.

The Plaintiff's right to be heard on the jurisdictional question

The breach of natural justice

75 In the present case, the Arbitrator rendered the Additional Award just three days after the Defendant had submitted its request, even before the Plaintiff had responded on the applicability of s 43(4) of the Act. We affirm the Judge's finding that the "short time given for the [P]laintiff to respond" was unreasonable; and agree that if he wanted to render the Additional Award after just three days, the Arbitrator should have "contacted the [P]laintiff to ascertain whether it intended to object to the making of the Additional Award" (see the Judgment at [50]).

76 We therefore agree with the Judge that the Additional Award was "made without affording the [P]laintiff the opportunity to be heard" on the applicability of s 43(4) of the Act (see the Judgment at [52]-[53]). A breach of the Plaintiff's right to be heard on the jurisdictional question had therefore occurred.

Did the breach result in actual prejudice?

77 The Judge held that there was actual or real prejudice and found such prejudice in the very fact that "the [P]laintiff was denied an opportunity to submit on the applicability of s 43(4)" (see the Judgment at [53]). If by this, the Judge meant to say that there was prejudice because there was a failure to afford an opportunity to be heard, then with respect, the Judge appears to have employed the *very* mode of reasoning which this Court had earlier rejected in *Soh Beng Tee* at [84] and which we have affirmed above at [50] and elaborated on at [51]-[54].

78 The "prejudice" which has to be demonstrated is conceptually distinct from the fact of the breach. What then is the material on the jurisdictional question which could have been advanced by the Plaintiff and could reasonably have made a difference to the outcome?

(1) The Plaintiff's first argument: the claim for pre-award interest was "not presented" by the Defendant

79 It was not disputed that no argument had been presented to the Arbitrator on "pre-award interest" specifically. The dispute was over whether the claim for interest had been presented in the arbitration and specifically whether the generic claim for "interest" in the Defendant's "Points of Claims" was wide enough to cover "pre-award interest". We are unable to see why this proved controversial.

80 Given that the Defendant would automatically have been entitled to post-award interest even if it did not include a claim for "interest" in its "Points of Claims" by virtue of the previous s 35(2) of the Act, there can be no real basis for contending that the prayer for interest was not wide enough to cover pre-award interest. What else could it have meant? The claim for pre-award interest had therefore been presented to the Arbitrator.

81 It follows that no "actual or real prejudice" could be shown to have been suffered by the Plaintiff in having been deprived of the right to advance this argument before the Arbitrator since even if it had presented this argument to the Arbitrator it could not reasonably have made any difference to the outcome.

(2) The Plaintiff's second argument: the claim for pre-award interest was "not omitted" by the Arbitrator

82 But there is a separate question as to whether the claim for interest had in fact been omitted. This was the Plaintiff's second contention in support of its position that there was no basis for invoking s 43(4) of the Act in this instance.

83 An arbitrator's liberty to render an additional award under s 43(4) of the Act is narrowly circumscribed and must be seen in the light of the general position stated in s 44 of the Act, which provides:

> **Effect of award**
>
> 44**.** —(1) An award made by the arbitral tribunal pursuant to an arbitration agreement *shall be final and binding* on the parties ...
>
> (2) *Except as provided in section 43*, upon an award being made ... *the arbitral tribunal shall not vary*, amend, correct, review, add to or revoke the award.
>
> [emphasis added]

84 Section 44 of the Act expresses the principle of finality that is of vital importance in arbitration. An arbitral tribunal, having rendered an arbitral award, is in no position and possesses no general authority to reconsider its decision. As noted in *Singapore Law on Arbitral Awards* at paras 2.7 and 2.8:

> 2.7 A final award is issued at the conclusion of the arbitral proceedings and its issue terminates the proceedings. The tribunal's mandate ends with it. All awards … are "final" in the sense that they close the issues that are decided and the tribunal cannot re-open these issues for reconsideration.
>
> 2.8 … the tribunal is *functus officio* on the matters decided, ***save for the slip rule*** , or where ordered by a court to reconsider any aspects of its awards on remission, or where the award is set aside on grounds that does not affect its jurisdiction as a whole.
>
> [emphasis in bold added]

85 The "slip rule" as emphasised above refers to the post-award action that may legitimately be undertaken by the tribunal pursuant to s 43 of the Act provided that certain conditions have been satisfied.

86 In this case, the Arbitrator had provided in the Second Supplementary Award (see above at [7]) that:

> The [Plaintiff] pay the [Defendant] simple interest at the rate of 5.33% p.a. on the sum of S$603,608.90 from the date of this Supplementary Award.

87 On a straight-forward reading of this, it is possible to construe it as meaning that the Arbitrator had decided to confine his award to post-award interest only. He had, after all, dealt specifically with the interest rate, the principal amount and the exact date from which interest should accrue. Moreover, if, as the Defendant submits, the Arbitrator was operating within the legislative framework of the previous s 35(2) of the Act where there was no need for him to make an express award of post-award interest, his expressly articulated decision to do so might reasonably appear to be a deliberate decision *not* to award pre-award interest. This is borne out by a comment made in Gary Born, *International Commercial Arbitration*, Vol II (Kluwer Law International, 2009) at p 2542 that:

> The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief …
>
> On this basis, the rendering of the Additional Award would have been impermissible if in effect it was varying the Second Supplementary Award contrary to s 44(2) of the Act.

88 It is obvious of course that these views are not meant to be determinative of the question whether there has in fact been an "omission" of a claim presented within the meaning of s 43(4) of the Act. It is not the role of this Court to make that determination. But it will be evident from what we have said that such an argument could reasonably have made a difference to the outcome in this case had it been presented and therefore the element of prejudice is made out in this instance. Given the observations we have made at [14] above, it is no answer to such an argument to suggest, as Mr Tan did for the Defendant, that the Arbitrator's response to the correspondence from the Plaintiff's solicitors seemed to suggest that he knew best whether he had or had not already formed an intention to award pre-award interest.

The Plaintiff's right to be heard on the substantive question

89 Although the breach of natural justice in relation to the jurisdictional question is sufficient to set aside the Additional Award under s 48(1)(*a*)(vii) of the Act, we will, for completeness, also briefly consider the breach of natural justice in relation to the substantive question since this too was raised in the course of the arguments.

The breach of natural justice

90 The Plaintiff was not given the opportunity to be heard at all on the substantive question before the Additional Award was made. Specifically, the Arbitrator does not appear to have heard either party before he fixed the rate of interest, selected the date from which interest should accrue, determined the amount on which interest would be levied and considered whether in the circumstances there was a reasonable basis for him to adopt a different approach in the Additional Award than he had done in the Final Award that had been in favour of the Plaintiff (see above at [5]). Hence the Arbitrator's failure to observe the requirements of natural justice in deciding the substantive question is clear.

Did the breach result in actual prejudice?

91 In our view, the Plaintiff also suffered actual or real prejudice in being deprived of its right to be heard on each of these issues in relation to the substantive question. This is because the arguments the Plaintiff may have made on some or perhaps even all of these points could reasonably have affected the outcome of the Arbitrator's decision.

92 For example, the Plaintiff submitted that the period of pre-award interest should have been reduced as the Defendant was "guilty of inordinate delay in prosecuting the arbitration". [note: 23] To substantiate its argument, the Plaintiff submitted that even though the notice of arbitration was served on 22 June 2004, the Defendant "only communicated with the arbitrator to confirm his appointment on 7 November 2007, [resulting in] nearly three and a half years of delay". [note: 24] The Plaintiff submitted that it is plausible that the Arbitrator would have taken this delay into consideration had the Plaintiff been given an opportunity to draw it to his attention. Although counsel for the Defendant sought to rebut this allegation in the course of oral submissions, this is clearly an issue of fact on which the Arbitrator ought to have heard the parties before he adjudicated on the matter.

The consequential orders

93 By reason of the matters aforesaid, we affirm the decision of the Judge setting aside the Additional Award. In the course of the arguments, we invited submissions on whether and if so what consequential orders we should make in this event. Counsel for the parties had different views. Mr Tan for the Defendant suggested that the proper course would be for us to remit the matter to the Arbitrator. Mr Chia Swee Chye Kelvin ("Mr Chia") for the Plaintiff did not agree that this would be appropriate in the circumstances. Mr Chia contended that (a) it was doubtful whether the Court had a power to remit at all in such circumstances; (b) the only relief sought was for the Additional Award to be set aside and once that was done, it was up to the Defendant to attempt to revive its application, and if they did so, the Plaintiff would contend that this was impermissible because it would fall outside the statutory time limits provided in the Act for an application to be made under s 43(4) of the Act; and (c) even if these hurdles could be overcome, the Plaintiff might have objections to the matter being returned to the Arbitrator in all the circumstances. These points were not fully argued before us. Furthermore, the only issue before us was whether the order setting aside the Additional Award should be affirmed. Accordingly, we confine ourselves to this and make no special consequential orders.

Conclusion

94 In the premises we dismiss both appeals with costs and the usual consequential orders.

[note: 1] Appellant's Core Bundle in CA 17/2012, Vol II at p 206.

[note: 2] Appellant's Core Bundle in CA 17/2012, Vol II at p 218.

[note: 3] Appellant's Core Bundle in CA 17/2012, Vol II at p 219.

[note: 4] *Ibid*.

[note: 5] Appellant's Core Bundle in CA 17/2012, Vol II at p 225.

[note: 6] Appellant's Core Bundle in CA 17/2012, Vol II at p 227.

[note: 7] Appellant's Core Bundle in CA 17/2012, Vol II at p 222.

[note: 8] Appellant's Core Bundle in CA 17/2012, Vol II at p 228.

[note: 9] *Ibid*.

[note: 10] Appellant's Core Bundle in CA 17/2012, Vol II at p 229.

[note: 11] Appellant's Core Bundle in CA 17/2012, Vol II at p 231.

[note: 12] Joint Record of Appeal, Vol II at p 20.

[note: 13] Appellant's Case in CA 26/2012 at [17].

[note: 14] Appellant's Case in CA 26/2012 at [21]

[note: 15] *Ibid*.

[note: 16] Appellant's Case in CA 26/2012 at [26].

[note: 17] Appellant's Case in CA 17/2012 at p 23.

[note: 18] Appellant's Case in CA 17/2012 at p 24.

[note: 19] Appellant's Case in CA 17/2012 at p 33.

[note: 20] Appellant's Case in CA 17/2012 at [46].

[note: 21] Appellant's Case in CA 17/2012 at [52].

[note: 22] Appellant's Case in CA 17/2012 at [62].

[note: 23] Respondent's Case in CA 17/2012 at [61].

[note: 24] *Ibid*.

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