Lim Chin San Contractors Pte Ltd *v* L W Infrastructure Pte Ltd [2012] SGHC 75

Case Number : Originating Summons No. 988/2011

Decision Date : 10 April 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Kelvin Chia Swee Chye (Samuel Seow Law Corporation) for the plaintiff; Tan Liam Beng and Soh Chun York (Drew & Napier LLC) for the defendant.

Parties : Lim Chin San Contractors Pte Ltd — L W Infrastructure Pte Ltd

Arbitration – Award – Additional award; Recourse against award – setting aside

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 17 and 26 of 2012 were dismissed by the Court of Appeal on 18 October 2012. See [2012] SGCA 57.]

10 April 2012

Lai Siu Chiu J:

1 This Originating Summons ("the OS") was an application by Lim Chin San Contractors Pte Ltd ("the plaintiff") pursuant to s 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") to set aside an arbitrator's award. The award dated 20 October 2011 ("the Additional Award") was an additional award given by the arbitrator under s 43(4) of the Act to L W Infrastructure Pte Ltd ("the defendant") for pre-award interest. I granted the plaintiff's application with costs and ordered that the Additional Award be set aside. The defendant has appealed against my order (in Civil Appeal No 17 of 2012) while the plaintiff has cross-appealed (in Civil Appeal No 26 of 2012) against my refusal to grant a declaration that the Additional Award be declared a nullity and that it was not an award under s 43 of the Act. In the light of the appeals, I now set out the detailed grounds for my decision.

2 There is little case law on the operation of s 43(4) of the Act, and the main questions at issue in this case related to whether the court had the power to set aside an additional arbitral award on the basis that it was not validly made under s 43(4); and the extent to which the rules of natural justice applied to the operation of the same section.

Background

3 The parties were engaged in arbitration before an arbitrator, one 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 Act applied to these proceedings.

4 The procedural history relating to the arbitration is a little complicated, and involved the Arbitrator rendering several awards. The Arbitrator rendered his Final Award on 29 June 2010, in which 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. The Final Award took into consideration numerous claims and counterclaims, one of which was for liquidated damages to be paid by the plaintiff to the defendant.

The Arbitrator made no award of liquidated damages in the Final Award. To correct some typographical errors in the Final Award, the Arbitrator then issued a Supplementary Award on 15 July 2010 ("the First Supplementary Award").

5 Both parties were dissatisfied with the Arbitrator's decision, and appealed against it on questions of law arising out of the Final Award. The defendant filed Originating Summons No 759 of 2010 while the plaintiff cross-appealed by way of Originating Summons No 769 of 2010. Both appeals were heard before Justice Judith Prakash, who in her decision of 5 July 2011 (see *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477) dismissed the plaintiff's appeal and substantially allowed the defendant's appeal. The Final Award was remitted to the Arbitrator for reconsideration of the issue of whether the defendant should be entitled to liquidated damages in the light of the court's orders.

Following this remittance, the Arbitrator rendered his Supplementary Award No 2 (Remitted Issues) on 21 September 2011 ("the Second Supplementary Award"), in which the defendant was awarded the sum of $945,000 for liquidated damages. In satisfaction thereof, the plaintiff was ordered to pay the defendant the sum of $603,608.90, after setting off the sum of $341,391.10 due to the plaintiff in the Final Award. Interest was awarded at the rate of 5.33% per annum on the sum of $603,608.90 from the date of the Second Supplementary Award

7 The dispute in the OS was sparked off when the defendant's solicitor wrote to the Arbitrator on 17 October 2011 with a request for "pre-award interest". The letter was carbon copied to the plaintiff's solicitors. The pertinent portions of the letter are set out below:

> 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 original)

8 The Arbitrator's reply dated 20 October 2011 was sent to both parties' solicitors, and it stated:

> 1 I refer to the letter from M/s Drew & Napier LLC 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.

9 The defendant's solicitors in its letter above, at [7], claimed that the Arbitrator had awarded only post-award interest, and thus requested for pre-award interest pursuant to s 43(4) of the Act. The Arbitrator acceded to the request by making the Additional Award three days after receipt of the defendant's solicitors' letter. The Additional Award stated that the defendant was to be entitled to pre-award interest:

> 1 Pursuant to section 43(4) of the Arbitration Act, a party may within 30 days of receipt of the award and upon notice to the other party, request the arbitrator to make an additional award as to claims presented during the arbitration proceedings but omitted from the award.
>
> 2 In my Supplementary Award No. 2 (Remitted Issues), I had awarded post-award simple interest at the rate of 5.33% p.a. on the sum of $603,608.90 from the date of the Supplementary Award No. 2. I have overlooked and omitted to deal with the pre-award interest on the sum of $603,608.90. I now deal with the pre-award interest in this additional award.

10 The Arbitrator then proceeded to award a further sum of $274,114.61 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 the date 13 January 2003 was selected because it was the date from which liquidated damages in the main arbitrated dispute accrued.

11 The plaintiff objected to the award of pre-award interest and filed the OS praying for the following reliefs:

> (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 of the Arbitration Act;
>
> (b) further or in the alternative, an order that the Additional Award be set aside under s 48(1)(a)(vii) of the Arbitration Act.

As stated in [1], I only granted the plaintiff the relief in prayer (b) and made no order on prayer (a).

The plaintiff's prayer (a) that the Additional Award was not an award made under s 43 of the Act

12 Given that the Arbitrator had issued the Additional Award pursuant to s 43(4) of the Act, the plaintiff's references to s 43 were taken to refer to s 43(4) of the Act (and for completeness, s 43(5)), which states:

> **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.
>
> (5) If the arbitral tribunal considers the request in subsection (4) to be justified, the tribunal shall make the additional award within 60 days of the receipt of such request.

13 The plaintiff's submissions on this point were very simple and were based on the plain reading of s 43(4) and the word "interest". Kelvin Chia, ("Mr Chia") counsel for the plaintiff, argued that the

Arbitrator had become *functus officio* upon making his final award, which in this case would presumably be the Final Award as varied by the First and Second Supplementary Awards. Section 44(2) of the Act only permitted variation of the final award insofar as this was allowed by s 43 of the Act, and by its words, s 43(4) only supported an additional award for claims which were presented during the arbitration proceedings but omitted from the award.

14 Central to Mr Chia's submissions on this point was that before the Arbitrator, the defendant had presented its claim for interest as a request for "interest", rather than as a bifurcated claim for pre-award and post-award interest. According to Mr Chia, this meant that the defendant's claim for and the Arbitrator's subsequent grant of pre-award interest fell outside s 43(4). Since the defendant's claim was for "interest", the claim for pre-award interest specifically was not presented to the Arbitrator. Since the Arbitrator had awarded interest to the defendant in the Second Supplementary Award (although this was only for the period subsequent to the award), pre-award interest was therefore not omitted from the claim.

15 Mr Chia's arguments were somewhat contradictory. If a claim for pre-award interest was not presented to the Arbitrator, how can it not have been omitted from the award? If pre-award interest is stated to be "not omitted", the suggestion is that it was included. But if pre-award interest was not presented as a claim in the first place, how could it have been included at all? A clearer way of presenting his arguments would have been to state them in the alternative. Either pre-award interest specifically was not presented to the Arbitrator or, it had been presented to the Arbitrator as part of the consolidated request for "interest" – and given that the Arbitrator had awarded "interest" to the defendant, pre-award interest could not be said to have been omitted from the award. This presentation of alternatives was supported by the very words of s 43(4) of the Act.

16 In any event, the plaintiff's submissions invited this court to make the finding that the award of pre-award interest in the Additional Award fell outside s 43(4), and on that basis the court should declare it a nullity. The plaintiff's case here was that the Arbitrator had exceeded his statutory powers to make an additional award, since he had not made this award within the purview of s 43(4) of the Act.

The defendant's claim that it had made a claim for interest in the main arbitral proceedings

17 The defendant's position was that it had clearly presented a claim for pre-award interest in the main arbitral proceedings. The defendant relied on *Panchaud Frères SA v Pagnan and Fratelli* [1974] 1 Lloyd's Rep 394 and *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors.* [2006] 1 MLJ 710. In those cases, courts had remitted arbitral awards to the tribunal for reconsideration, on the ground that interest had not been allowed on the awards. The defendant also cited *dicta* to the effect that interest should be payable from the date the sum awarded had become due and payable, and claimed that therefore the Arbitrator was obliged to consider the defendant's entitlement to both pre-award and post-award interest in the main arbitration. The defendant also relied on s 35(2) of the Act which states that a sum to be paid pursuant to an award shall carry interest from the date of the award. Therefore, the defendant's claim for "interest" must have referred to pre-award interest, since post-award interest was automatically included under the Act.

18 I did not see any merit in the defendant's contentions on this point. The real issue at hand was whether the Arbitrator was empowered to revive his jurisdiction and make the Additional Award for pre-award interest, and not whether the Arbitrator was correct at law to have awarded pre-award interest. This turned in part on whether the claim for pre-award interest was in fact presented before the Arbitrator. Therefore, the defendant's first argument that the Arbitrator was as a matter of law obliged to consider both pre and post-award interest in the main arbitration is neither here nor there.

After all, we are concerned with what the Arbitrator actually did.

19 The defendant's second argument made on the basis of s 35(2) of the Act stemmed from a strained, untenable and disingenuous interpretation of the section. Further, I was not convinced that the defendant had framed its claim for "interest" with an awareness of the effect of s 35(2). It seemed more likely than not that the defendant had made a claim for "interest" without giving further thought to the distinction between pre- and post-award interest. The statute's automatic provision for post-award interest does not suffice to cure the defendant's lack of specificity. There was no indication that the defendant had sought to distinguish between the two forms of interest.

Can the court declare an additional award a nullity for falling outside s 43(4)?

20 In my view, s 43(4) was not in and of itself a ground upon which the court could declare the Additional Award a nullity and set it aside. The section conferred no such jurisdiction on the court to do so. Judicial intervention in arbitration proceedings should be kept to a minimum, and the courts should only interfere with the arbitral award where there are very good reasons to do so. This principle is reflected in the clear words of s 47 of the Act, which states:

> **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.

21 A reaffirmation of this principle was found in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [65] where the Court of Appeal stated:

> ...minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts.

22 The only provision in the Act which allows the court to set aside an arbitral award is s 48, which subsections list several instances in which the court has jurisdiction to interfere with an arbitral award. It should be emphasised that the list in s 48 is exhaustive; the court does not otherwise have inherent or residual discretion to set aside an arbitral award. The only other provision in the Act which confers jurisdiction upon the court to set aside an arbitral award is s 49(8)(d) in the context of an appeal against the award on a question of law. However, this provision was not in issue in the instant case.

23 Therefore, in order for the plaintiff to have succeeded on this point, it would have had to show that its case fell within one of the subsections of s 48. The most applicable subsection would be s 48(1)(a)(iv), which states that a court may set aside an arbitral award if it dealt with matters or contained decisions beyond the scope of the submission to arbitration. The ambit of this subsection clearly covers situations where the arbitrator had exceeded his statutory powers. Counsel for the defendant, Tan Liam Beng ("Mr Tan"), had raised the point that the plaintiff had not pleaded s 48(1)(a)(iv) in the OS. Mr Chia acknowledged that it was not pleaded because he was not relying on s 48(a)(iv).

24 At the hearing, Mr Chia did not depart from his position that the court had to decide whether s 43(4) gave the Arbitrator a valid basis for issuing an Additional Award. As discussed previously,

since s 43(4) was not an empowering provision, no relief could be granted pursuant to this section alone, without reference to s 48.

25 Mr Tan on the other hand maintained his position that the court did not have the power to declare the Additional Award a nullity on the basis of s 43(4). In response thereto, Mr Chia raised another argument – that O 15 r 16 of the Rules of Court (Cap 322, 2006 Rev Ed) and the court's general jurisdiction under para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") enabled the court to do so. Mr Chia's point was that this court was conferred jurisdiction under the SCJA to grant all manner of reliefs at law and in equity, and this extended to jurisdiction to make a declaratory judgment.

26 I was not with Mr Chia on this point. If the Act did not confer jurisdiction on the court to decide whether an arbitral award could be set aside on the basis of non-compliance with s 43(4), then obviously the court had no jurisdiction to deal with the matter and would not be able to grant declaratory relief. A request for such would appear to be a last ditch attempt at circumventing s 47 of the Act.

The alleged breach of the rules of natural justice

27 The plaintiff's second prayer for relief was framed as an application under s 48(1)(a)(vii) 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 –
>
> ...
>
> (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...

Quite clearly, the plaintiff had to show that a rule of natural justice had been breached and that consequentially its rights were prejudiced.

28 The plaintiff put forward two arguments in support of this claim, both of which complained of a breach of the rule of natural justice known as *audi alteram partem* or, that each party must be given adequate notice and opportunity to be heard before the tribunal makes its decision (see *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [30], [32] and [33]). The first was that the Arbitrator had failed to give the plaintiff an opportunity to be heard before issuing the Additional Award. The Arbitrator had rendered the Additional Award a mere three days from the defendant's solicitors' letter of request for an additional award, without inviting the plaintiff's solicitors to respond or giving them reasonable time to so do. The second was that the Arbitrator had decided the issue on a basis not raised or contemplated by the parties. The Arbitrator had awarded pre-award interest that ran from 13 January 2003, which pre-dated the commencement of the arbitration proceedings on 22 June 2004. The plaintiff claimed that the parties did not contemplate that interest would be awarded for any period preceding the commencement of arbitration.

29 The legal principles which apply when determining whether there was a breach of the rules of natural justice were set out by the Court of Appeal in *Soh Beng Tee* at [29], approving of *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443:

> ...a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

The four steps enumerated by the Court of Appeal were simply the requirements set out in s 48(1)(a)(vii), plus the question of causation. Having alleged that it was the rule of *audi alteram partem* that had been breached, it then fell to the plaintiff to establish how the rule had been breached.

Applicability of the rules of natural justice to s 43(4) of the Arbitration Act

30 Before examining the plaintiff's arguments on how the rule had been breached, I shall first consider the defendant's position that there could not have been a breach of the rules of natural justice in the making of the Additional Award, because the rules of natural justice only applied to the arbitration hearing proper and not to the making of the Additional Award. As a result, it was contended, no fresh submissions were necessary, and the parties had already had a full opportunity to present their cases during the arbitration hearing proper.

31 The argument raised by the defendant in support of its position was that the purpose of s 43(4) was to allow the Arbitrator to correct any omissions in the award caused by inadvertent oversight, and therefore no further submissions should be necessary. Mr Tan pointed to the plain words of s 43(4), and argued it was not meant to deal with claims that were not submitted during the arbitration, such as would warrant fresh submissions from the parties. Mr Tan submitted that the"... [a]rbitrator was not required to give such notice or consider any further submissions from the plaintiff in the present case." This argument was supported by a reference to the *Analytical Commentary on Draft Texts of a Model Law on International Commercial Arbitration, Report of the Secretary-General*, U.N. Doc A/CN.9/264 (March 25, 1985) produced by the United Nations Commission on International Trade Law ("UNCITRAL Commentary"), which contains commentary on the UNCITRAL Model Law. Article 33 of the Model Law is in *pari materia* with s 43 of the Act. Indeed, the entire Act was drafted with reference to the Model Law. The commentary on Article 33 states:

> The third possible measure (in *pari materia* to ss 43(4) and (5) of the Arbitration Act) 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 in bold added)

32 Mr Tan also referred to s 39(5) of the Act, which explicitly states that before an arbitrator makes a decision on the costs of arbitration, he first had to give the parties a reasonable opportunity to be heard. In contrast, s 43(4) made no such explicit statement, and therefore did not require the Arbitrator to consider fresh submissions from the parties before issuing the Additional Award.

33 The defendant's argument appeared to be premised on the notion that s 43(4) was merely a corrective provision, and did not permit the Arbitrator to make fresh awards on claims that were not canvassed before him. On the defendant's case, there is no room within which the rules of natural justice could operate. I agreed insofar as s 43(4) is a corrective provision; however, I was not with

the defendant on its submission that the rules of natural justice thus do not apply. This conclusion was not only rather extreme, it also did not logically follow. The reasons for my disagreement will be explained later.

34 The plaintiff countered the defendant's position by referring to s 22 of the Arbitration Act, which states:

> **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.

The plaintiff also referred to an excerpt from the textbook by David St. John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd Ed, Sweet & Maxwell 2007) ("*Russell*") at p 64 which stated that before the tribunal exercised its power to make an additional award, it should give the parties notice and reasonable opportunity to make representations. This statement from *Russell* however, was written with reference to the English Arbitration Act 1996, in which provision for making an additional award specifically includes a reference to the rule *audi alteram partem*. Mr Chia candidly admitted that our legislation did not have such specific inclusion, but stressed that the effect of s 22 of the Act was that natural justice was an overarching concept that would affect the entire arbitration proceedings including the making of the Additional Award.

35 The question therefore, really was whether natural justice should apply to the entire arbitration proceedings, or whether natural justice only applied where the statute specifically provided that it should. I was of the view that the former is the correct answer. In fact, natural justice should apply to the entire arbitration proceedings even if s 22 did not specifically allow for it and even if the Act made no provision for it. Natural justice is an implied requirement of all arbitral proceedings, and each and every aspect of the same.

36 Without going into a long exposition on the provenance of the rules of natural justice, it would suffice to state that those rules apply to a tribunal whenever it is acting in a judicial capacity; and a tribunal so acts when it is deciding on the rights of parties whether substantive or procedural. This is so because the rules of natural justice aim to protect parties from a miscarriage of justice, and they should therefore apply whenever there is occasion for justice to be carried out. These principles are immutable.

37 An arbitral tribunal is undoubtedly acting in a judicial capacity, being in a position to decide on the rights of the parties who have submitted to arbitration before it. Therefore, the rules of natural justice should permeate and impregnate every single one of its findings and determinations.

The manner in which the rules of natural justice applied to s 43(4)of the Act

38 The defendant argued that s 43(4) being a corrective provision, it was not meant to be used for claims that were not the subject of the main arbitration. This must be right, and s 43(4) certainly does not allow an arbitrator a backdoor to consider issues that were not part of the main arbitration and thereby subvert the principle that an arbitrator who has made his final award is *functus officio*. Section 43 provides for the ability of the arbitrator to correct errors that he had made in the award; it allows an arbitrator to deal with claims that he had omitted to address. The purpose of allowing an arbitrator to make an additional award in respect of claims presented during the arbitral hearing is not immediately obvious from a superficial reading of s 43(4); it seems puzzling to allow a tribunal to make additional awards after the conclusion of arbitration proceedings. The provision allows for the

correction of genuine inadvertent omissions made by the arbitrator, but why should the principle of finality have to make room for the arbitrator's oversight? The answer may well lie in the principle of minimal curial intervention in arbitral proceedings and the associated need to maintain the autonomy and utility of the arbitral process.

39 If an arbitrator in his award genuinely omitted to deal with a claim presented during the arbitral proceedings, a claimant may well bring an action in the courts to set aside the arbitral award for failing to comply with the rules of natural justice. This would be on the basis that the arbitrator had failed to consider the claimant's claim and the claimant therefore failed to receive a fair hearing. The court would then be constrained to intervene in the arbitral proceedings, no matter which way it decides. If the court decides that there was no breach of natural justice, it would uphold the award; if otherwise, it would set aside the award or that tainted part of the award insofar as it was separable. In either case, there would be curial intervention.

40 The desirability of minimal curial intervention was comprehensively dealt with in *Soh Beng Tee*, where the Court of Appeal stated at [59]:

> It is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention...

The Court of Appeal went on to discuss the considerations behind this principle at [62], one of which was:

> Aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to the arbitral award by dissatisfied parties. Left unchecked, an interventionist approach can lead to *indeterminate challenges*, cause *indeterminate costs* to be incurred and lead to *indeterminate* delays. (emphasis original)

41 The ability to make an additional award, therefore, supports the principle of minimal curial intervention because it allows the arbitrator to correct his award for genuine oversights and fortify it against litigious challenges based on natural justice principles. The award would be less vulnerable to attack in the courts, and the autonomy of the arbitral process would thus be upheld.

42 The limitation on this ability of course is that the claim could not be one which was not presented during the arbitral proceedings because that would be tantamount to reopening the proceedings. Therefore, 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. It is in this context that the UNCITRAL Commentary excerpt cited by the defendant should be read (see [31] above). The defendant relied on that portion of the Commentary which states:

> 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.

This excerpt above does not mean that the tribunal should be able to come to a determination without regard to whether any further hearings or evidence was required. It cannot mean this, because such a meaning would effectively exclude the operation of the rules of natural justice, which as stated above should apply to each and every aspect of the arbitral process. Rather, the preferred meaning would be that an arbitrator should not need any further hearings or evidence in order to

come to his decision, because everything would have already been presented to him during the main arbitral proceedings.

43 The defendant rode on the corrective nature of s 43(4) to argue that natural justice thus did not apply to the section; I disagreed. Before an arbitrator can make an additional award under s 43(4), he must first correctly decide that s 43(4) applies at all. It is at this point that natural justice is especially pertinent to the section. This decision would involve his being satisfied that the subject of the request was both presented during the arbitral proceedings and omitted from the final award. Both requirements are questions of fact, which if answered affirmatively would admit of significant consequences, namely to allow an arbitrator who was *functus officio* after the making of his final award, to revive his jurisdiction and make an additional award. The conclusions on these questions of fact go towards the question of law of whether the arbitrator was empowered to make an additional award under s 43(4).

44 Given that these questions of fact and law only arise when one party makes a request under s 43(4), it is only fair that the other party should be given an opportunity to submit on what the answers to those questions should be. That should be the purpose of the requirement imposed by s 43(4) itself, *viz* that the requesting party gives notice to the other party of the request made to the tribunal. The notice is not simply meant to warn the other party of what is to come, but rather to give the other party an opportunity to respond to the request and address the arbitrator on the applicability of s 43(4).

45 The plaintiff argued strenuously on the issues of whether pre-award interest had been presented during the main arbitral proceedings and whether it had been omitted from the final award. The answers to those questions turned on the meaning of "interest" as it had been presented by the parties before the arbitrator, and were not questions that I could decide. Those were the two questions of fact which the arbitrator had to answer before he could decide if at law he was empowered to make an additional award. It bears repeating that judicial review of arbitral awards does not lie for alleged errors of law or fact made by the tribunal.

46 Further, those questions of fact are not necessarily straightforward or easy to answer, and under most circumstances would benefit from the submissions of parties. Indeed, the Court of Appeal in *Soh Beng Tee* at [30] –[40] took considerable length to discuss the issue of "whether time was at large" was presented to the arbitral tribunal and was a live issue in that case.

Whether the rule of audi alteram partem had been breached in this case

47 The applicability of the rules of natural justice to s 43(4) have been established, and it remained to be determined if the plaintiff had established how the rule of *audi alteram partem* had been breached; how the breach was connected to the Additional Award; and how this prejudiced the plaintiff's rights.

48 As stated above at [28], the plaintiff complained that the Arbitrator had failed to give it an opportunity to be heard before issuing the Additional Award, and the Additional Award decided the issue of pre-award interest which had not been contemplated by the parties.

49 In my view, this sufficed to establish that the rule of *audi alteram partem* had been breached. The plaintiff pressed the point that the Arbitrator had rendered the Additional Award within three days of receipt of the letter of request from the defendant's solicitors when, pursuant to s 43(5), the Arbitrator had a generous sixty days within which to render the same. The Arbitrator's haste to render the Additional Award certainly raised eyebrows, and struck directly at the root of the inquiry as to

whether he had given the plaintiff adequate opportunity to respond.

50 The plaintiff had produced to the court a letter from the Arbitrator to the plaintiff dated 21 October 2011 which was carbon copied to the defendant. The Arbitrator explained the speed of his action as follows:

> M/s Drew & Napier LLC wrote to me on 17 Oct 2011 requesting for the additional award pursuant to Section 43(4). I held my hands for 3 days till 20 Oct 2011 pending a response from the Respondent. Since there was no objection raised and no interim reply to suggest that the Respondent intended to object to the request, I proceeded to deal with the application.

As the Arbitrator pointed out, the plaintiff could well have written an interim reply indicating its intention to object to the defendant's request, and which might have avoided this litigation. Even so, I was of the view that what the Arbitrator had done here was wrong. He justified his own actions by stating that he had given the plaintiff three days to reply to the defendant's request, and by that statement seemed to suggest that he had given the plaintiff adequate opportunity to respond. However, this was hardly an adequate opportunity given that s 43(5) did allow the Arbitrator sixty days to render the Additional Award, and that the consequences of the Additional Award were to impose a liability on the plaintiff to pay the defendant a further sum of $274,114.61. In other words, the short time given for the plaintiff to respond and the grave consequences of the Additional Award made it unreasonable to say that the plaintiff here had been given adequate opportunity to respond and unreasonable to infer that the plaintiff did not intend to object to the making of the Additional Award. Further, the Arbitrator had not contacted the plaintiff to ascertain if it actually did not intend to object to the making of the Additional Award.

51 The question of whether the plaintiff had been given adequate opportunity to respond in this case turned on the short time given for the latter's response and the serious consequences of the Additional Award. However, the two factors alone should not necessarily be conclusive of the question in other cases; in every case, it should be determined if there are other factors which would persuade the court that adequate or inadequate opportunity had been given. These could include the manner in which the request was made and the timing of the request, both of which remain unspecified by s 43(4) of the Act and therefore would admit to some flexibility in interpretation. In this case the request was made by way of a letter sent on 17 October 2011, which was a Monday, a working day. To my mind the timing and manner of this request was perfectly reasonable, but that did little to ameliorate the prejudicial weightiness of the two factors discussed above.

52 Having established that the rule of *audi alteram partem* had been breached, the next two stages of the inquiry can be dealt with in brief. 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, and the breach prejudiced the plaintiff's rights because the sum of $274,114.61 was awarded against the plaintiff in consequence of the breach.

53 I shall now address the defendant's contention that the plaintiff had not suffered prejudice because the Arbitrator would have awarded pre-award interest to the defendant anyway, even if the plaintiff had been allowed to make submissions on s 43(4). The defendant stressed that this was because as a matter of law, the defendant would have been entitled to pre-award interest in any event (see also its submissions at [17] above). The defendant relied on *dicta* from *Soh Beng Tee* at [91] which stated: "an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach". In my view, this contention was without merit, because as a result of the breach of *audi alteram partem*, the plaintiff was denied an opportunity to submit on

the applicability of s 43(4). If the plaintiff had successfully resisted the Additional Award, the award of pre-award interest would not have been made against it, no matter how sound the defendant's arguments on the law of pre-award interest were. Simply put, there would have been no scope for the Arbitrator to have corrected his alleged error of law on pre-award interest.

Conclusion

54 For the reasons stated above, I found that the rule of natural justice, *audi alteram partem*, had been contravened by the Arbitrator's action in making the Additional Award, by which the plaintiff's rights were prejudiced. I therefore set aside the whole of the Additional Award under s 48(1)(a)(vii) of the Act with costs to the plaintiff fixed at $6,000 inclusive of disbursements. Given that I had granted an order in terms of the alternative prayer (b) of the OS, it was unnecessary in my view, to grant the declaration sought for in prayer (a) at [11] above; hence, I made no such order.

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