IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 76

Originating Summons No 388 of 2017

Between

FISHER, STEPHEN J

… Plaintiff

And

SUNHO CONSTRUCTION PTE LTD

… Defendant

GROUNDS OF DECISION

[Arbitration] — [recourse against award] — [setting aside]

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Fisher, Stephen J
v
Sunho Construction Pte Ltd

[2018] SGHC 76

High Court — Originating Summons No 388 of 2017
Kannan Ramesh J
8; 18 August; 8, 15 September; 27 November 2017

29 March 2018

Kannan Ramesh J:

Introduction

1 The plaintiff applied by Originating Summons ("OS") No 278 of 2017 ("OS 278") for leave to appeal to the court on questions of law arising out of an arbitral award ("the Award"), under s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"). The plaintiff also applied by OS No 388 of 2017 ("OS 388") for the Award to be set aside for breach of natural justice and on the basis that it was contrary to public policy, under s 48(1) of the Act. Having heard the parties' submissions, I dismissed both OS 278 and OS 388. The plaintiff has appealed against my decision in OS 388. As no appeal has been filed against my decision in OS 278, I say nothing further on that application save for the observation below (see [44]). I now give the reasons for my decision in OS 388.

Facts

The parties

2 The plaintiff Stephen J Fisher is the owner of a property along Ocean Drive, Sentosa ("the Property"). He purchased the Property intending to develop it for his matrimonial home.

3 The defendant Sunho Construction Pte Ltd is a Singapore incorporated company that carried on the business of providing construction services.

Background to the dispute

4 The facts of the dispute referred to arbitration were strongly contested by both sides. For present purposes, a broad account of the background facts to set the context for the issues raised by the plaintiff in OS 388 would suffice.

5 By a contract dated 14 July 2006 ("the Contract"), the plaintiff engaged the defendant as main contractor to build a house for the sum of $1,980,000. Under the Contract, GUZ Architects was appointed as the architect for the project ("the Architect") while Barton Associates Pte Ltd was appointed as the Quantity Surveyor ("the Quantity Surveyor"). The Contract incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract ("the SIA Conditions").

6 As things turned out, there was substantial delay in the completion of the project. The scheduled completion date was 1 December 2007. By April 2008, the project had not been completed. In a bid to expedite the completion of the project, the plaintiff appointed Mr Chow Chee Meng ("Mr Chow") to help facilitate completion of the project. It would appear that Mr Chow assisted from June 2008 to August 2008.

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7 On 2 June 2008, the Architect issued a delay certificate under the Contract declaring that the defendant was in default for not having completed the works by the scheduled completion date.

8 Subsequently, on 26 June 2008, the defendant submitted extension of time claims ("EOT Claims") to the Architect amounting to 287 days. On 11 May 2009, the Architect allowed the EOT Claims in part to the extent of 60 days (see [11] below]. The EOT Claims that were allowed and the other EOT Claims were the subject of dispute in the arbitration. For present purposes, it suffices to note that the plaintiff was of the view that the defendant was in delay due to severe financial difficulties whereas the defendant contended that it had met with numerous delaying events that entitled it to extensions of time under the Contract.

9 Mr Chow subsequently returned to the project in December 2008 upon the execution of a Memorandum of Understanding ("MOU") between the parties. A copy of the MOU was placed before me and was of some relevance given that the remuneration of Mr Chow was another issue considered in the Award. It was relevant to note the MOU did not state that the defendant would pay Mr Chow any remuneration or bear any of his fees for his services. Instead, it merely set out the understanding between the parties that the role of Mr Chow (and his company Oneness Engineering Pte Ltd) was that of a facilitator to expedite the completion of the project. The MOU also delegated authority as regards certain aspects of the project to Oneness Engineering Pte Ltd.

10 The Temporary Occupation Permit ("TOP") for the project was obtained on 27 February 2009 and the completion certificate for the project was issued by the Architect on 31 March 2009.

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11 On 11 May 2009, on the basis of the EOT Claims that were submitted on 26 June 2008, the Architect revised his earlier delay certificate, certifying that the defendant was entitled to an extension of time of 60 days ("the Allowed EOT"). The completion date for the project was revised to 16 February 2008. This date formed the basis for the plaintiff's computation of the liquidated damages that the defendant was liable to the plaintiff for under the Contract.

12 On 17 May 2013, the Architect finalised the accounts and issued the final certificate in which he certified that a sum of $71,047.01 was due and payable to the defendant.

Procedural history

13 On 3 February 2015, the defendant commenced arbitral proceedings against the plaintiff. This was pursuant to cl 37(1) of the Contract which incorporated the SIA Conditions. Clause 37(1) of the Contract provided as follows:

> Any dispute between the Employer and the Contractor as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and the final decision of a person to be agreed by the parties, or failing agreement within 28 days of either party giving written notice requiring arbitration to the other, a person to be appointed on the written request of either party by or on behalf of the President or Vice-President for the time being of the S.I.A. or, failing such appointment within 28 days of receipt of such written request, together with such information or particulars of the dispute as may be requested in writing by the President or Vice-President for the time being of the S.I.A., such persons as may be appointed by the Courts.
>
> The arbitration proceedings shall be conducted in accordance with the Arbitration Rules of S.I.A. for the time being in force

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> which Rules are deemed to be incorporated by references to this clause.

14 On 18 March 2015, upon application by both the plaintiff and the defendant, the President of the Singapore Institute of Architects appointed an arbitrator to hear the matter ("the Arbitrator"). The Arbitrator was a quantity surveyor by training and profession.

15 The defendant claimed the sum of $500,598.18 in the arbitration. Amongst other things, the defendant claimed for a refund of liquidated damages wrongfully charged by the plaintiff to the defendant and set-off against the sums certified as due to the defendant. The defendant contended that it was entitled to an extension of time beyond the Allowed EOT, with the completion date consequently being adjusted to a later date and the quantum of liquidated damages payable by the defendant being correspondingly reduced. The defendant therefore argued that the excess liquidated damages which had been charged ought to be refunded.

16 The plaintiff counterclaimed that the defendant had breached the Contract or, in the alternative, a duty of care owed to the plaintiff. The plaintiff claimed the sum of $1,770,631.91 which included, among other things, liquidated damages allegedly owing to him for delay in completion of the project and the cost of rectification of defects, such as those that related to the construction of the swimming pool. It should be noted that the plaintiff claimed liquidated damages for 409 days commencing from the day after the Contract completion date of 1 December 2007 until the completion date for the works under the Contract, which was 31 December 2009. The plaintiff contended that the defendant was not entitled to any of the EOT Claims, including the Allowed EOT (see above at [11]). In this regard, the plaintiff further contended that the defendant had failed to satisfy two conditions precedent before an EOT Claim

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might be allowed. These were contained in cll 23(1) and (2) of the Contract. They provided as follows:

> 23.(1) The Contract Period and the Date for Completion may be extended and recalculated, subject to compliance by the [defendant] with the requirements of the next following sub-clause, by such further periods and until such further dates as may reasonably reflect any delay in completion which, *notwithstanding due diligence and the taking of all reasonable steps by the [defendant] to avoid or reduce the same*, has been caused by [a delaying event].
>
> 23.(2) It shall be a condition precedent to an extension of time by the Architect under any provision of this Contract including the present clause (unless the Architect has already informed the [defendant] of his willingness to grant an extension of time) that the [defendant] *shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers entitles him to an extension of time*, together with a *sufficient explanation* of the reasons why delay to completion will result…
>
> [emphasis added]

17 Before the Arbitrator, the plaintiff contended that cl 23(1) of the Contract provided for a condition precedent, *ie*, that the defendant had to take all reasonable steps to avoid such delay before making an EOT Claim in respect of the delaying event ("the First Condition Precedent"). The plaintiff further contended that cl 23(2) of the Contract provided for a second condition precedent, *ie*, that the defendant had to notify the Architect of any delaying event within 28 days of its occurrence ("the Second Condition Precedent"). The plaintiff submitted that the First Condition Precedent was not satisfied as the delay was caused by the defendant's own conduct and that the Second Condition Precedent was not satisfied as it had failed to give the requisite notice within 28 days.

18 In the alternative, the plaintiff contended that the defendant had breached three implied terms ("the Implied Terms") of the Contract or had

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wrongfully repudiated the Contract by reason of the breach of the Implied Terms. The Implied Terms were:

(a) That the defendant possessed the necessary knowledge, skills, care, work force and financial ability to undertake the Contract and to complete the works under the Contract by 1 December 2007.

(b) That the materials supplied and workforce employed by the defendant would be of good workmanship and quality.

(c) That the defendant would cooperate with the plaintiff and the Architect at all times and not in any way hinder or prevent the carrying out of the contract works and its completion by the completion date of 1 December 2007.

19 The arbitration was conducted over several tranches in 2016, and involved 28 days of hearing. Both the defendant's representative and the plaintiff testified, called witnesses and made submissions. The parties' positions were crystallised in comprehensive pleadings.

20 On 15 February 2017, the Arbitrator issued the Award ordering the plaintiff to pay to the defendant $278,064.40 and interest. Specifically, the Arbitrator had made the following orders which were relevant to OS 388:

(a) The sum of $71,047.01 set out in the final certificate was to be paid to the defendant (see above at [12]).

(b) The defendant was entitled to 297 days of extension of time. Consequently, liquidated damages for delay in completion of the project amounting to $118,800 was to be refunded to the defendant.

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(c) Mr Chow's remuneration of $15,000 for his services from December 2008 to February 2009 was to be paid by the plaintiff. As the plaintiff had deducted that amount from the sum payable to the defendant under the Contract, the Arbitrator ordered the plaintiff to refund that amount to the defendant.

(d) The defendant was entitled to variation costs in the sum of $10,224 for audio cabling works in relation to an audio cabling system and $16,950 for providing pre-insulated refrigerant piping for the air-conditioning refrigerant piping.

(e) In relation to the counterclaim, the plaintiff was entitled to $24,000 as rectification costs for defects in the swimming pool.

21 Dissatisfied with the outcome of the arbitral proceedings, the plaintiff commenced OS 388 to set aside the Award.

The parties' cases

22 The plaintiff made two broad submissions:

(a) The Arbitrator had breached the rules of natural justice under s 48(1)(a)(vii) of the Act. In this regard, the plaintiff submitted that the rules of natural justice had been breached in three distinct ways:

(i) First, the Arbitrator had failed to consider the plaintiff's submissions on crucial issues in the dispute ("the Issues"). The plaintiff identified no less than ten issues in his affidavit filed in support of OS 388.

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(ii) Second, the Arbitrator had deprived the plaintiff of his right to be heard in relation to the cost of rectification of the defects in the swimming pool.

(iii) Third, the Arbitrator had failed to exclude "false and fraudulent evidence" adduced by the defendant in the arbitration. Specifically, this was in relation to 58 photographs ("the Photographs") which the plaintiff claimed the defendant falsely held out as "Photographs of the Property" and which were allegedly relied upon by the Arbitrator.

(b) The Award was contrary to public policy under s 48(1)(b)(ii) of the Act. Specifically, it was argued that enforcement of the Award would be an "affront to the basic notions of morality and justice due to the numerous and severe errors of law with grave repercussions to the construction industry".

23 The defendant denied that there was breach of natural justice. Specifically, in relation to the three allegations that the plaintiff made, the defendant made the following submissions:

(a) First, there was no evidence of any failure by the Arbitrator to consider any of the Issues.

(b) Second, the Arbitrator had not deprived the parties of the right to be heard in relation to the rectification costs for the defects in the swimming pool. Instead, he had exercised his power to assess the rectification costs correctly.

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(c) Third, there was no breach of the rules of natural justice in relation to the Photographs. Specifically, there was no evidence that the Photographs had in fact been relied upon by the Arbitrator.

24 The defendant also submitted that the circumstances alleged by the plaintiff did not amount to a contravention of public policy.

Issues to be determined

25 Accordingly, there were two broad issues I had to consider, namely:

(a) Whether the Arbitrator breached the rules of natural justice; and

(b) Whether the Award was contrary to public policy.

I address these issues in turn.

Natural justice

26 The plaintiff submitted that the Arbitrator breached the rules of natural justice in three ways. The plaintiff made several points which I shall examine in turn.

Failure to consider material issues

27 I shall first consider the applicable legal principles relating to the setting aside of an arbitral award due to the failure of an arbitrator to consider material issues. I shall then address the Issues raised by the plaintiff.

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The applicable legal principles

28 The starting point is the Act. The Award was the result of a domestic arbitration and therefore the Act is the relevant statutory regime. Section 48(1)(a)(vii) of the Act enables the Court to set aside an award for breach of the rules of natural justice. It provides as follows:

> **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; or
>
> …

29 It is settled law that in determining the scope of s 48(1)(a)(vii), regard may be had to cases involving the setting aside of *international* arbitral awards under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). As a starting point, it is evident that the two provisions are identically drafted and should therefore be given a similar interpretation. The Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") explained that this was because "Parliament intended that the Act … should largely mirror the IAA and international practices reflected in the [UNCITRAL Model Law on International Commercial Arbitration]" (see *Soh Beng Tee* at [61]). As such, the Court of Appeal concluded that the "same approach towards natural justice ought to be adopted for both international and domestic arbitrations in Singapore" (see *Soh Beng Tee* at [62]).

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30 It is also clear from the Court of Appeal decision in *Soh Beng Tee*, approving the decision in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, that a party seeking to set aside an arbitral award for breach of the rules of natural justice must *first* identify the rule of natural justice that was allegedly breached (at [29]). This approach was also endorsed more recently by the Court of Appeal in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") (at [48]). As will be seen below (at [56]), it is only after this first stage that the Court will proceed to consider whether there was a causal nexus between the breach and the arbitral award, and whether the breach prejudiced the aggrieved party's rights (see *AKN* at [48]).

31 In this regard, the rule of natural justice that the plaintiff alleged had been breached was the omission on the part of the Arbitrator to consider the Issues which, it was said, were raised in the pleadings and addressed in the submissions of the plaintiff. As mentioned above (at [22(a)]), there were 10 Issues in total.

32 The legal principles in relation to such an argument are clear. It is settled law that the inference that an arbitrator failed to consider an issue may only be drawn if it was "clear and virtually inescapable" (see *AKN* at [46]). In determining whether such an inference may be drawn, the Court of Appeal highlighted the distinction between, on the one hand, an arbitral tribunal's decision to *reject* an argument – whether *implicitly or otherwise*, whether rightly or wrongly and whether or not as a result of a failure to appreciate the merits of the argument – and, on the other hand, the tribunal's *failure to consider* the argument (see *AKN* at [47]). Only the latter would amount to a breach of natural justice. In this regard, the inference should *not* be drawn if the facts were consistent with the arbitrator having (1) misunderstood a party's case, (2) been mistaken as to the law or (3) chosen not to deal with a point because he thought

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it unnecessary (even if this was due to a misunderstanding of a party's case). It is clear that the inference ought not to be drawn lightly.

33 Another useful principle may be gleaned from the decision of Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*"). In *TMM Division*, the plaintiff submitted that the arbitrator had not tried to understand its arguments. However, as Chan J noted, the submission properly understood was "essentially to force the Arbitrator to accept – and not just consider or comprehend – its argument" (see *TMM Division* at [94]). Chan J thus rejected the submission, and observed that "no party has a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceives its own arguments to be" (see *TMM Division* at [94]). This was endorsed by the Court of Appeal in *AKN* at [47]. Chan J went on to explain that natural justice only protects the right to be heard. It does not function as a guarantee that the tribunal will fully comprehend the submissions made or that the tribunal will accept those submissions (see *TMM Division* at [96]). There is good reason for this. Accepting the submission that was made in *TMM Division* would be to allow a backdoor review of the merits of the arbitrator's conclusions, disguised as a challenge on the ground of breach of natural justice.

34 However, that is not to say that a party may never succeed in showing that an arbitrator failed to consider an issue. One instance in which an award was set aside because of the arbitrator's failure to consider an issue arose in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"). In *Front Row*, the arbitrator had expressly stated in the award that the defendant to the arbitration had "ceased to rely on a number of points pleaded" (see *Front Row* at [14]). Before the High Court, the defendant sought to set aside that portion of the award and argued

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that the arbitrator had reached his decision under the mistaken impression that it had abandoned its arguments on those points. The High Court agreed and held that the arbitrator had failed to accord the defendant natural justice (see *Front Row* at [46]). The Court of Appeal in *AKN* affirmed *Front Row*, but emphasised that the facts there were "unique" as there was "no real dispute" that the arbitrator had in fact failed to consider the party's pleaded representations. In my judgment, *Front Row* was an example of how high the threshold as set out in *AKN* really was. It must be a clear and virtually inescapable inference that the arbitrator had failed to consider the issue. Evidently, it is not frequent that such a situation will present itself.

Application to the facts

35 Before I consider the Issues, I note as a preliminary observation that despite identifying ten Issues in his affidavit in support of OS 388, the plaintiff, in his submissions, in fact referred to thirteen Issues. The defendant objected to the plaintiff's reliance on the three further Issues, *ie*, Issues 11 to 13. Upon consideration of Issues 11 to 13, I was satisfied that they were distinct from Issues 1 to 10 and were unsupported by the plaintiff's affidavit in OS 388. I therefore did not consider Issues 11 to 13.

36 The Issues were as follows:

> [Issue] 1: that there are the following implied terms in the contract:
>
> > i. That the Claimant [Sunho] possessed the necessary knowledge, skills, care, work force and financial ability to undertake the whole contract and to complete the Works as contracted on 1 December 2007.
> >
> > ii. That the material supplied and workforce employed by Sunho will be of good workmanship and quality
> >
> > iii. That Sunho will cooperate with me & the Architect at all times and not in any way hinder or prevent the

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> carrying out of the works and its completion on the scheduled & contracted completion date of 1 December 2007.

[Issue] 2. Sunho, by reason of its failure to comply with the express and/or implied terms of the Contract and proceed with due diligence, has caused inordinate delay and therefore it has wrongfully repudiated the contract and is in breach of contract.

[Issue] 3: Sunho, by failing to proceed with the works in a workmanlike or professional manner with proper materials, has caused inordinate delay and was in dominant delay, thereby breaching its duty of care owed to me and causing me loss and damages

[Issue] 4: Sunho, by failing to comply with Clause 23(1) of the Contract and failing to proceed with the works with "due diligence and the taking of all reasonable steps by the Contractor" to avoid or reduce delays, are not entitled to any extension of time.

[Issue] 5: In the context of Clause 23(2), an EOT claim that does not contain "a sufficient explanation of the reasons why delay to completion will result" (including, for instance, specific details on how a potential delay will affect the progress of the works, the specific number of days claimed, or even how the number of days claimed was calculated) does not constitute a valid EOT claim and therefore Sunho is not entitled to EOT for such claims.

[Issue] 6: The Architect's change in roofing material had no time implication or impact on the progress of the works. This is because Sunho was, as at the end of April 2008, not ready to commence installation of the roofing material because they had yet to complete the roof structure, even though the roofing material had already arrived earlier in the same month. Given that the roof was not even ready to receive the roofing material when the roofing material arrived, the change in roofing material or delay in its arrival could not have any time implication or impact on the progress of the works and therefore Sunho is not entitled to EOT for the change in roofing material.

[Issue] 7: Chow's evidence that he had worked for Sunho pursuant to the MOU and for that reason he had addressed his invoice to Sunho for his salary for his services from December 2008 to February 2009

[Issue] 8: Sunho, by failing to comply with Clause 1(5) of the Contract and dispute or claim extra payment for a direction by the Architect within 28 days of receipt of the direction, is "conclusively deemed to have undertaken to comply with the direction without an increase in the Contract Sum or any

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> additional payment or compensation", and are not entitled to claim variation costs (under Variation Order 17) for supplying labour to install the cabling for the audio system.
>
> [Issue] 9: My evidence and the Architect and QS' evidence that the three of us, together with the M&E consultant had, at the negotiations, insisted on pre-insulated refrigerant piping to be provided and Sunho had accepted the same.
>
> [Issue] 10: Pursuant to Clause 37(3)(f) of the SIA Conditions, the Learned Arbitrator does not have the power to grant any EOT to Sunho where Sunho had failed to comply with the requirements of Clause 23(2).

37 The plaintiff made the following submissions:

(a) On Issue 1, there was an absence of any evaluation or conclusion on whether the defendant was in breach or in wrongful repudiation of the Contract. In addition, despite the Arbitrator accepting that the defendant was in delay, he failed to grant the plaintiff the declaration that he sought, *ie*, that the defendant was in breach or in wrongful repudiation of the Contract.

(b) On Issues 2 to 6, despite the plaintiff having made extensive submissions on these Issues, they were not addressed in the Award.

(c) On Issue 7, the Arbitrator must have omitted to consider the evidence of Mr Chow because, if he had, the "natural conclusion" would have been that the defendant was not entitled to claim for the sum of $15,000 that was deducted by the plaintiff for Mr Chow's salary as it was the defendant which was liable for the same. The plaintiff also raised the further point in his skeletal submissions that the defendant had not pleaded the claim for the refund of the $15,000 that was deducted by the plaintiff for Mr Chow's remuneration.

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(d) On Issues 8 to 10, that there was no consideration or assessment of these Issues in the Award.

38 I first address Issues 2 to 6 and 8 to 10. The plaintiff's submissions broadly adopted the approach that the Arbitrator failed to consider these Issues since (a) the Award did not expressly state the Arbitrator's findings regarding each of these Issues, and (b) if the Arbitrator had considered them, he would have reached different conclusions. Evidently, such an argument was insufficient to lead to a clear and virtually inescapable inference, as required by *AKN*, that the Arbitrator had failed to consider each of these Issues. In fact, the argument was simply a variant of the argument that Chan J in *TMM Division* had rejected, *ie*, the plaintiff's argument here amounted simply to an assertion that these Issues must not have been considered because, if they had, the Arbitrator would have found in the plaintiff's favour as the conclusion was plainly correct. As highlighted above (at [33]), such an argument was untenable as it effectively required the Arbitrator to accept, and not just consider, the plaintiff's submissions on these Issues. The submission that there was a failure to consider Issues 2 to 6 and 8 to 10 was therefore a non-starter as the plaintiff was unable to establish that the Arbitrator had in fact omitted to consider these Issues.

39 In any event, it was clear that the Arbitrator had, in the course of the Award, considered and decided Issues 2 to 6 and 8 to 10. In this regard, I did not find that there was a clear and virtually inescapable inference that the Arbitrator had omitted to consider these Issues. As mentioned above (see above at [32]), it had to be borne in mind that so long as it appeared that the Arbitrator had dealt with each of these Issues implicitly, it could not be said that he had not considered it. I deal with these Issues as follows:

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(a) On Issue 2 (*ie*, that the defendant had caused inordinate delay by failing to comply with the Implied Terms and thereby wrongfully repudiated and breached the contract), the Arbitrator expressly noted in the Award that "both parties chose to affirm the Contract leading to the Completion of the Project". This would suggest that the Arbitrator did consider the question of repudiatory breach. Indeed, it seemed correct to conclude that the Arbitrator, having granted a significant extension of time, took the view that the defendant had *not* caused inordinate delay. It could not therefore be said that there was an inescapable inference that the Arbitrator had failed to consider Issue 2. The more likely inference was therefore that the Arbitrator had considered Issue 2 but decided it against the plaintiff.

(b) On Issue 3 (*ie*, that the defendant had caused inordinate delay by failing to proceed with the works in a workmanlike manner and thereby breached its duty of care to the plaintiff), the same analysis with regard to Issue 2 would apply. The fact that the Arbitrator granted the defendant significant EOT claims again suggested that the Arbitrator took the view that the defendant had not caused inordinate delay. In this regard, the more likely inference was therefore that the Arbitrator had considered Issue 3 but decided against the plaintiff.

(c) On Issues 4 and 5 (*ie*, that the defendant was not entitled to any extension of time as it had failed to comply with the First and Second Conditions Precedent), the fact that the Arbitrator allowed some of the defendant's EOT Claims alone would create the equally probable inference that the Arbitrator had considered these Issues but decided them against the plaintiff. In fact, the Award went further. The Arbitrator expressly rejected one EOT Claim made by the defendant on the basis

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that the defendant had "failed to submit notice as required under Clause 23(2) within 28 days". This was a clear indication that the Arbitrator had considered the Second Condition Precedent for each EOT Claim in coming to his decision that the defendant was entitled to the EOT Claims granted but nevertheless had decided against the plaintiff on these Issues. In my view, it stood to reason that the Arbitrator had also considered the *First* Condition Precedent but decided that it did not assist the plaintiff.

(d) On Issue 6 (concerning the impact of the Architect's decision to change the roofing material on the progress of works), it seemed evident that the Arbitrator did find against the plaintiff. Specifically, the Award directly considered the defendant's EOT Claim in respect of the change of roofing material. The Arbitrator noted the evidence of the Architect that he was aware that the change of roofing material "would delay the project completion". He also observed that the decision to change the roofing material was "taken at a very late stage of the project". Consequently, this change "delayed the architectural finishing works to the 2nd storey" and upset the sequence of works. Taking these findings in totality, the inference must be that the Arbitrator considered but rejected the plaintiff's submissions on Issue 6.

(e) On Issue 8 (*ie*, that the defendant was deemed to have undertaken to comply with the Architect's direction in relation to the audio cabling system without any additional payment by not raising a dispute under cl 1(5) of the Contract), it is true that the Award made no specific mention of cl 1(5) of the Contract. However, this alone did not give rise to the inescapable inference that the Arbitrator had failed to consider Issue 8. It was evident that the Arbitrator decided that the defendant was entitled

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to variation costs in respect of the audio cabling system. This would suggest that he was of the view that cl 1(5) of the Contract was not relevant or had been satisfied. Even if he was wrong in his conclusion, that did not give rise to a breach of natural justice. Again, this gave rise to the equally probable inference that the Arbitrator had considered but simply disagreed with the plaintiff on Issue 8.

(f) On Issue 9 (*ie*, that there was evidence to show that the defendant had accepted that pre-insulated refrigerant piping was within the original scope of works), the Award indicated that the Arbitrator had considered this Issue and decided against the plaintiff. The Award stated that the defendant had qualified during the tender stage that pre-insulated refrigerant piping would be at additional costs *and* that the evidence showed that this qualification had not been withdrawn during the negotiation stages. This was contrary to what the plaintiff contended the evidence showed. I did not consider that the failure of the Arbitrator to mention and deal specifically with the evidence of the plaintiff, the Architect and the Quantity Surveyor in the Award on this point showed that he had failed to consider their evidence. The equally likely, if not more likely, inference was that the Arbitrator had considered their evidence but disagreed with the plaintiff as to its weight or effect.

(g) On Issue 10 (*ie*, that, pursuant to cl 37(3)(f) of the Contract, the Arbitrator did not have the power to grant any EOT Claims as the defendant had failed to comply with the Second Condition Precedent), a similar analysis as stated above in [39(c)] applied. It is true that under cl 37(3)(f) of the Contract, the Arbitrator had no power to grant extensions of time where the defendant failed to comply with the Second Condition Precedent. However, this simply begged the question as to whether the

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> defendant had indeed failed to comply with the Second Condition Precedent. As stated above (at [39(c)]), there was an indication in the Award that the Arbitrator had considered the Second Condition Precedent. In fact, he had specifically refused one EOT Claim on the basis that the Second Condition Precedent was not fulfilled. His decision to grant the remaining EOT Claims therefore suggested that he had disagreed with the plaintiff that the defendant had failed to comply with the Second Condition Precedent on those EOT Claims. It followed therefore that the Arbitrator did not find that cl 37(3)(f) of the Contract prevented him from granting the remaining EOT Claims. In this regard, the likely inference was that the Arbitrator had considered Issue 10 but simply decided it against the plaintiff.

40 As regards Issue 1 (*ie*, that there were the Implied Terms in the Contract), the argument at first glance appeared to be on a different footing from those made in respect of Issues 2 to 6 and 8 to 10. However, on closer scrutiny, this was not the case. Insofar as the argument was predicated on the Arbitrator not granting the declaration sought by the plaintiff, namely that the defendant was in breach or wrongful repudiation of the Contract (see above at [37(a)]), this was simply another way of saying that the Arbitrator ought to have found in the plaintiff's favour on Issue 1. This argument could therefore be dismissed for the same reasons as stated above (at [33] and [38]). In any event, it was evident from the Award that the Arbitrator had decided against granting the declaration. In fact, the Award expressly stated that both parties had chosen to affirm the Contract throughout and leading up to the completion of the project. I did not think that a further statement expressly stating that the declaration sought by the plaintiff was not granted was necessary; it was obvious from the fact that the Arbitrator had taken the view that the parties had affirmed the

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Contract. Any declaration that the defendant was in repudiatory breach of the Contract was not only unnecessary but also incorrect.

41 I would also make some observations on Issue 7 (*ie*, that Mr Chow's evidence – that he had worked for the defendant pursuant to the MOU and therefore addressed the invoice for his salary to the defendant – was not considered). The plaintiff's first submission in relation to Issue 7, that it was not considered because, if it had been considered, the Arbitrator would have come to another conclusion, was essentially another variant of the argument raised in respect of Issues 2 to 6 and 8 to 10. In this regard, that argument might be dismissed for the same reasons (see above at [38]).

42 In any event, I was of the view that the Arbitrator had considered Mr Chow's evidence on Issue 7. The plaintiff relied on Mr Chow's evidence that he had been re-engaged as an employee. Specifically, Mr Chow had given evidence that he understood the MOU to mean that the defendant would pay his remuneration, and that this was evidenced by the submission of his invoice to the defendant in December 2008. By contrast, the defendant's position in the arbitration was that Mr Chow was engaged by the plaintiff as his "representative". The crucial point was that the Arbitrator found that Mr Chow had *not* been re-engaged as an employee. Specifically, the Award stated that in August 2008, Mr Chow "left the *employ* of the [defendant] and came back as a *facilitator* in December 2008 to February 2009 under the [MOU]" [emphasis added]. It went on to state, in express terms, that "Mr Chow was an independent party and *was not under the employment* of the [defendant]" [emphasis added]. In this regard, the more probable inference was that the Arbitrator had considered Mr Chow's evidence on this matter and how it measured up against the defendant's position, and rejected the plaintiff's submission as to the weight to be attributed to or the effect of Mr Chow's evidence.

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43 The second submission that the plaintiff made was that the defendant had not pleaded the claim for a refund of the $15,000, being Mr Chow's alleged remuneration, that was deducted by the plaintiff. The Arbitrator had ordered the sum to be refunded to the defendant. Two remarks are apposite here.

(a) The plaintiff did not depose that (part of) the Award was in breach of natural justice because the Arbitrator had awarded the defendant a sum that it did not plead for. The only complaint in relation to Issue 7 was that the Arbitrator had failed to consider Mr Chow's evidence. That was therefore the only point that I could consider in relation to Issue 7. In any event, counsel for the defendant noted that the question of whether Mr Chow was employed by the defendant, on which the Arbitrator found for the defendant and ordered refund of the $15,000 to the latter, was put into issue by the plaintiff in his pleadings in the Arbitration. There was therefore no prejudice.

(b) Nonetheless, I acknowledge that the question remained whether the Award dealt with a point that fell outside the scope of the submission to arbitration, given that the plaintiff did not specifically claim for the $15,000 sum. I believed that the question could be satisfactorily answered in the defendant's favour in the following manner. If in resisting the defendant's claim in the arbitration, the plaintiff had put into issue, which he did, his entitlement to set-off Mr Chow's remuneration represented by the $15,000 against monies payable by him to the defendant under the Contract, it seemed correct that a determination of the point against the plaintiff ought to result in the defendant being entitled to a refund as the set-off by the plaintiff was incorrectly made. Even if it was incorrect to analyse the question in this manner, the critical point was that the plaintiff did not seek to set aside

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> (this part of) the Award on this basis. OS 388 was brought on the grounds of breach of natural justice and public policy alone. There was therefore no basis for me to set aside this part of the Award on the ground that the Arbitrator had exceeded his jurisdiction in awarding the sum of $15,000.

44 Assessing the plaintiff's submissions in the round, it seemed apparent to me that the crux of the plaintiff's complaints was that the Arbitrator's findings were incorrect, and not that the Arbitrator had failed to consider the plaintiff's pleadings and submissions. The plaintiff was, in gist, seeking to appeal against the Arbitrator's findings by disguising it as a failure to consider the Issues. However, there was no (general) right of appeal against the merits of an arbitral award and a party could not circumvent this principle by bringing a backdoor appeal in the guise of an argument on natural justice. If the plaintiff had intended to challenge the merits of the arbitral award, the proper course would have been for him to appeal my decision in OS 278, which was his application for leave to appeal to the Court on certain questions of law. That would have given him the opportunity, provided the conditions in s 49(5) of the Act were fulfilled, to have the correctness of the Arbitrator's decisions on those questions of law examined by the Court. However, the plaintiff elected not to do so, presumably out of recognition of the difficulties with his application in OS 278.

45 For these reasons, I held that the plaintiff did not establish that the Arbitrator failed to consider the Issues. Hence, the allegation of breach of natural justice failed.

Deprivation of right to be heard

46 The plaintiff's second submission in relation to breach of natural justice was that the Arbitrator had deprived him of his right to be heard in awarding

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him $24,000 as the costs of rectifying the swimming pool. The plaintiff made two points. First, that the Arbitrator departed from the expert evidence adduced by both parties in unilaterally assessing the costs of rectification without affording the plaintiff an opportunity to address the conclusion that the Arbitrator had arrived at. Second, that the Arbitrator did not consider the evidence of the plaintiff's expert witness on the structural integrity of the swimming pool.

47 I did not accept the second contention. It was premised on the following statements in the Award:

> There were *no evidence produced* during the hearing to support *that the structural integrity of the swimming pool was a problem.*
>
> …
>
> There is no necessity to demolish and re-construct the whole pool structure as suggested by the [plaintiff's expert] since the *structural integrity of the pool was not in question.*
>
> [emphasis added]

48 I did not think that it could be inferred from these statements that the Arbitrator had not considered the plaintiff's expert evidence. It seemed a stretch for the plaintiff to assert, based on the less than tight language used in the Award, that the Arbitrator had failed to consider the evidence of the plaintiff's expert whom he had heard and whose expert report was before him. It seemed more likely and fairer to the Arbitrator to conclude that he had considered the evidence, but had rejected it on the basis that it was not satisfactory.

49 In respect of the first contention, I accepted that the Arbitrator appeared to have departed from the evidence of the expert witnesses of both parties. It appeared that the Arbitrator found the area to be reinstated was 24m^2. This was not an area submitted by either party. It was plain from the Award that the

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Arbitrator made this finding after considering the evidence of Mr How Yong Meng ("Mr How") adduced in the arbitration as the plaintiff's witness. Mr How's report was commissioned by the plaintiff and he provided the report on the defects in the swimming pool. Multiple references to Mr How's testimony at the hearing were made throughout paragraph 5.4 of the Award. Mr How was an Assistant Manager at Setsco Services Pte Ltd which had been engaged by the Quantity Surveyor to carry out a survey of the defects in the swimming pool. In terms of the relevant rate, it seemed that the Arbitrator awarded $24,000 by applying a rate of $1,000/m^2. The defendant submitted that this rate was based on the evidence of its expert, who allegedly opined that $6,000 should be awarded on the basis of works to 6m^2 of the pool's surface area giving a per square metre rate of $1,000. Having reviewed the defendant's expert report, I did not accept this submission. The defendant's expert opined that it was only necessary to perform works covering approximately 0.7m^2, not 6m^2. The Arbitrator also appeared to have accounted for the cost of hacking works in assessing the cost of the rectification works; yet the defendant's expert opined that there was no need for such works. Thus, it was clear that the $1,000/m^2 rate was not based on the defendant's expert's evidence.

50 The Arbitrator therefore seemed to have made his own assessment of the area and rate in quantifying the cost of rectification of the defects in the swimming pool. However, I did not consider that this was a breach of natural justice that warranted the setting aside of the Award for two reasons.

51 First, each party had the opportunity to adduce evidence on the issue of the rectification costs for the defects in the swimming pool and to make submissions on this point. Each party also had the opportunity of responding to the evidence and submissions presented by the opposing party. The facts here were distinguishable from those in *Permasteelisa Pacific Holdings Ltd v*

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Hyundai Engineering & Construction Co Ltd [2005] 2 SLR(R) 270 ("*Permasteelisa*"), where the arbitrator had adopted a method of apportioning liquidated damages that was only advanced in one party's reply submissions and was not put forward in the course of the proceedings (see *Permasteelisa* at [42]). The other party was therefore not given an opportunity to challenge that new method of computation. The breach of natural justice in *Permasteelisa* consisted in the arbitrator's failure to grant the opposing party an opportunity to respond to the plaintiff's submission, which the arbitrator had adopted. In contrast, in this case, there was no allegation by the plaintiff that it did not have the opportunity to challenge or respond to the evidence or submissions made by the defendant at the arbitration in relation to this issue. Instead, the Arbitrator had not accepted either party's position on the rectification costs. He had adopted a middle ground in assessing the rectification costs. The question was therefore whether, by so doing, the Arbitrator was within the holding in *Permasteelisa*. I did not think so.

52 Second, it is settled law that a court should not mechanically apply the rules of natural justice in arbitration such as to require that every conclusion that the arbitrator intends to make be put to or raised with the parties. Parties to an arbitration frequently appoint or accept the appointment of an expert in the relevant field as arbitrator for the purpose of relying on his or her expertise for a sound and swift judgment (see *Soh Beng Tee* at [63]). Indeed, an arbitrator is "not bound to accept an either/or approach" and is "perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis)" (see *Soh Beng Tee* at [65(e)]). Here, the Arbitrator was an experienced professional architect. In my judgment, he was entitled to rely on his expertise in assessing the rectification costs. It was also unchallenged evidence that the Arbitrator had told the parties during the arbitration that he would be engaging a quantity surveyor to assist him in quantifying damages,

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and the parties had not objected to this (albeit it is not completely clear that the $1,000/m^2$ rate was based on the evidence of the quantity surveyor). The parties were thus aware that the Arbitrator might undertake an independent assessment of the cost of rectification and did not object to this course of action. In my judgment, while the Arbitrator had adopted a "middle path", he had given parties the opportunity to object to him obtaining the independent assessment of the appointed quantity surveyor. Presumably, parties would also have had the opportunity to indicate if they had wished to respond to, or make submissions in relation to, the findings of the appointed quantity surveyor. As such, the Arbitrator did not fall foul of the standard required by *Permasteelisa*. In that light, I considered that the plaintiff's complaint – that he did not have the opportunity to address the Arbitrator's assessment of costs of rectification – was without force.

53 For all these reasons, I did not accept that the Arbitrator's award of $24,000 as the rectification costs for the swimming pool should be set aside for breach of natural justice.

Failure to exclude allegedly fraudulent evidence

54 The plaintiff's third submission on breach of natural justice was that the Arbitrator had failed to exclude the Photographs that had been adduced by the defendant. The Photographs, it was argued, were fraudulently held out by the defendants as being photographs of the Property when they were not so. I did not accept this submission.

55 The plaintiff's complaint in relation to the Photographs was not so much that he had not been given the opportunity to address them, but that they had not been excluded. In the first place, it was not entirely clear that the Photographs were in fact included. Crucially, the Award did not refer to the

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Photographs at all which would suggest that the Arbitrator did not include or at the very least did not have regard to the Photographs. Nevertheless, I considered it important to note that the plaintiff had been given the opportunity to address the Photographs. It appeared that the first hint of the allegation that the Photographs were fraudulent, *ie*, not being of the Property, arose in the course of the cross-examination of the Architect, who was the *plaintiff's* witness. Accordingly, the plaintiff had the opportunity to re-examine the Architect and lead comprehensive evidence on why the Architect considered the Photographs to be of a different work site. The issue of admission or exclusion of the Photographs as evidence was thus an issue that arose in the course of the arbitration. Subsequently, the plaintiff had the opportunity to make submissions as to why the Photographs should not be admitted and he had actually done so. In the circumstances, I was of the view that the plaintiff could not claim that he had not been given the opportunity to be heard or to address the issue of exclusion of the Photographs.

56 I next consider the issue of whether the decision not to exclude the Photographs from evidence itself amounted to a breach of natural justice. The Arbitrator was entitled to take a view as to whether the Photographs were indeed fraudulent based on his assessment of the evidence and the parties' submissions. If he had concluded that they were not fraudulent, it was well within his remit to have included them. Indeed, he would be duty bound to do so. It is difficult to fathom how this could be regarded as a breach of natural justice. In any event, even assuming that the Photographs were wrongly included, the plaintiff did not suffer any prejudice as a result. A party seeking to set aside an award for breach of the rules of natural justice had to show that the relevant breach caused prejudice to the party. This was clear from the wording of s 48(1)(a)(vii) of the Arbitration Act which requires that the "rights of any party have been prejudiced" (see above at [28]). The Court of Appeal has also confirmed, first

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in *Soh Beng Tee* and more recently in *AKN*, that there must be a causal nexus between the breach and the award, and the breach must have prejudiced the aggrieved party's rights (see *Soh Beng Tee* at [29]; *AKN* at [48]). In *Soh Beng Tee*, prejudice was explained as follows (at [91]):

> … 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.

57 On the facts, I did not see how the admission of the Photographs into evidence by the Arbitrator had prejudiced the plaintiff by altering the final outcome of the arbitration in any meaningful way. As noted above (see [55]), the Award made no mention whatsoever of the Photographs. In this regard, there was simply no evidence that the Arbitrator had relied on the Photographs in making the Award and in reaching the decisions that he did on the issues put before him. As a result, it could not be said with any degree of certainty that the Photographs had altered the final outcome of the arbitral proceedings in any meaningful way.

58 Accordingly, there was no basis to set aside the Award on this ground.

Public policy

59 The plaintiff's second broad submission was that the Award contained "numerous and severe errors of law with grave repercussions to the construction industry", and it should therefore be set aside for being contrary to public policy under s 48(1)(b)(ii) of the Act. Section 48(1)(b)(ii) of the Act provides as follows:

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> **Court may set aside award**
>
> 48.—(1) An award may be set aside by the Court —
>
> …
>
> (b) if the Court finds that —
>
> …
>
> (ii) the award is contrary to public policy.

60 This was a submission built on weak foundations. Even if the plaintiff was correct that the Award contained errors of law, such errors do not generally suffice to establish that an award was in breach of public policy. As the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") made clear, "errors of law or fact, *per se*, do not engage the public policy of Singapore" (see *PT Asuransi* at [57]). More generally, it is trite that the threshold for setting aside an arbitral award for breach of public policy was very high. As the Court of Appeal put it in *PT Asuransi*, it encompasses a narrow scope and should only operate in situations where the upholding of an award would, for example, "shock the conscience" or is "clearly injurious to the public good" (see *PT Asuransi* at [59]). Given that the plaintiff's submission was simply that the Award involved errors of law, I found that the public policy ground was not engaged in this case.

61 In conclusion, there was no basis to set aside the Award on the ground that it was contrary to public policy.

Conclusion

62 For all the above reasons, I dismissed OS 388.

63 Costs should follow the event. I therefore awarded costs for OS 388 to the defendant, to be taxed if not agreed.

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Kannan Ramesh
Judge

S Magintharan, Liew Boon Kwee James, Vineetha Gunasekaran and Tan Yixun (Essex LLC) for the plaintiff;
Ashwin Singh Riar (Salem Ibrahim LLC) for the defendant.

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