IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 258

Originating Summons No 1010 of 2018

Between

Ng Tze Chew Diana

… *Applicant*

And

Aikco Construction Pte Ltd

… *Respondent*

Originating Summons No 1108 of 2018
(Summons No 5038 of 2018)

Between

Aikco Construction Pte Ltd

… *Plaintiff*

And

Ng Tze Chew Diana

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Breach of natural justice]

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Ng Tze Chew Diana
v
Aikco Construction Pte Ltd and another matter

[2019] SGHC 258

High Court — Originating Summons Nos 1010 of 2018 and 1108 of 2018 (Summons No 5038 of 2018)
Ang Cheng Hock J
3 December 2018, 28, 30 January 2019

5 November 2019 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 This is an application to set aside an arbitral award on the basis that there have been breaches of natural justice. There is also an accompanying application to set aside the leave that has been granted to enforce the arbitral award. The thrust of the application is that the arbitrator failed to determine issues that were in dispute, that he ignored certain submissions and that he had conducted himself in a manner which showed an apparent bias on his part. As a result, it is alleged that the claimant in the arbitration was deprived of the award of damages in several material respects.[1] The task of this court is to determine whether these claims for breach of natural justice have any basis.

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1 Applicant's Written Submissions (28 November 2018) paras 4 and 29.

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Facts

The parties

2 The applicant is the owner of a property situated at Jalan Sedap in Singapore ("the property").[2]

3 The respondent is the main contractor who the applicant appointed for a project involving the construction of a two-storey semi-detached house on the property. The contract between the applicant and respondent in this regard ("the contract") was dated 27 May 2009,[3] and it incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (7th Edition, 2005) ("the SIA Conditions").[4]

Background to the dispute

4 The construction on the property did not proceed smoothly. The commencement of the works began on 25 June 2009 and was to have been completed within 12 months, that is, by 25 June 2010 ("the contract completion date").[5] However, the work took longer than that.

5 On 4 January 2011, the architect appointed under the contract, Mr Liu Yaw Lin ("Mr Liu"), issued a delay certificate certifying that the works were in delay as of 23 November 2010 ("the first delay certificate").[6] This implied that

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2 Ng Tze Chiew Diana's first affidavit dated 17 August 2018 ("NTC1") p 2 para 5.

3 NTC1 p 718.

4 NTC1 p 714, clause 3.3 and pp 719 – 772.

5 NTC1 para 9 and p 714, clause 4.1; Michael Sng Boh Kwang's first affidavit ("MS1") para 9.

6 NTC1 p 773.

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an extension of time had been given to the respondent to complete the contract works up to 22 November 2010.

6 On 8 March 2011, the architect issued the completion certificate which certified that that the works "appear to have been completed and to comply with the [contract] in all respects". The date stipulated by the architect as the date of actual completion was 19 January 2011. The maintenance period of the contract works was stipulated to commence on 19 January 2011, and would end a year later on 19 January 2012.[7]

7 While the temporary occupation permit ("TOP") was issued on 2 February 2011[8] and the property was handed over on 4 July 2011,[9] the applicant claimed that there were numerous defects in the completed works that required rectification. Up to 30 May 2012, after the maintenance period had expired, the respondent continued to carry out rectification works on these alleged defects from time to time.[10]

8 In October 2012, the applicant commenced separate arbitration proceedings against the respondent and the architect with respect to the delay in completion and defects in the works.[11]

9 The applicant settled her claim against the architect on terms which are

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7 MS1 p 71.

8 MS1 p 70.

9 MS1 para 9, S/N 7.

10 NTC1 para 12.

11 NTC1 para 13; MS1 para 11.

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confidential and the arbitration proceedings against him were withdrawn.[12] Subsequent to this, the architect issued another delay certificate on 26 October 2015 ("the second delay certificate").[13] In this document, he purported to grant an extension of time of ten days for the respondent to complete the works. While it is not specifically stated in the certificate, it appears clear to me that the architect was referring to ten business days. Hence, according to the architect, the last day for the respondent to complete the works was on 8 July 2010 instead of 24 June 2010. As such, under the second delay certificate, the respondent was in delay from 9 July 2010 to the date of actual completion, 19 January 2011, this being a period of slightly over six months.[14]

The arbitration proceedings against the respondent

10 The arbitration brought against the respondent was commenced pursuant to the arbitration agreement in the SIA Conditions.[15] A sole arbitrator was appointed.[16]

11 The claims brought by the applicant against the respondent were for damages for breach of the contract. There were various heads of claims which are as follows:[17]

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12 MS1 para 16.

13 MS1 para 16; NTC1 p 774.

14 NTC1 p 774.

15 NTC1 p 767.

16 NTC1 p 52.

17 MS1 pp 80 – 81.

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(a) S$89,215.26 for discrepancies between the as-built condition of the house and the construction drawings issued by the architect;[18]

(b) S$374,305.24 for the costs of rectifying various defects in the works;[19]

(c) S$522,000 for loss of rental for the period of 20 January 2011 to 31 December 2017;[20] and

(d) S$1,200,000 for loss in value of the property.[21]

12 The applicant also had a claim for liquidated damages in the amount of S$58,500 for delay in the completion of the works. This was calculated on the basis of the contractually stipulated rate of S$300 per day of delay for the period from 9 July 2010 to 19 January 2011.[22]

13 The respondent counterclaimed against the applicant for the outstanding sum owed under the contract, which was quantified in the amount of S$135,676.58.[23] The respondent also counterclaimed S$54,304 for additional labour costs.[24]

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18 MS1 para 11.1 (wrongly stated as $89,245.26) and p 81, para 10.5.

19 MS1 para 11.2 and p 81, para 10.4.

20 MS1 pp 80 and 111, at para 36.1.

21 MS1 para 11.4 and p 111 at para 36.2.

22 MS1 para 11.5 and p 80.

23 MS1 p 81, para 11.1.

24 MS1 p 81, para 11.2.

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14 The arbitration hearing took place over two tranches in July 2016[25] and October to November 2016.[26] In July 2017, the arbitrator notified parties that his award was ready for collection, subject to the payment of the outstanding fees and expenses of the arbitration.[27] Neither party paid what was due. The award was not collected and remained with the arbitrator for over nine months.[28]

15 On 17 May 2018, despite not having received the amounts that were due to him from either party, the arbitrator released his award to the parties.[29] The award was dated 25 July 2017, which was when the arbitrator had stated it was available for collection.[30]

16 The award ran into 674 pages in length. In summary, the arbitrator determined that:

(a) The applicant's claim for discrepancies was not allowed save for one item, that is, the failure to install glass shelves in the steam room of the house, this loss being quantified as S$156.25.[31]

(b) The applicant's claim for defects in the works was allowed in the amount of S$42,979.06.[32]

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25 NTC1 pp 83 – 85.

26 NTC1 p 91.

27 Ng Tze Chiew Diana's first affidavit for HC/OS 730/2018 ("NTC-A") pp 762 – 764.

28 NTC-A p 768.

29 NTC-A pp 765 – 768.

30 NTC1 p 52.

31 NTC1 p 707.

32 NTC1 pp 707 – 708.

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(c) The applicant's claim for loss of rental was not allowed. This was because the arbitrator found that she had not proven that the defects in the works had caused her to be unable to rent out the property.[33]

(d) The applicant's claim for loss of value in the property was not allowed. This was for several reasons, but primarily because the arbitrator found that the applicant had not proven that the property could not be sold at the expected price of S$7m due to the alleged defects.[34]

(e) The applicant's claim for liquidated damages was not allowed. This was because the arbitrator found that the two delay certificates issued by the architect were invalid.[35] His reasons for this finding are important for the purposes of this application and will be explained later in this judgment at [60].

(f) As for the respondent's counterclaim for amounts due to it under the contract, the arbitrator allowed the counterclaim in the amount of S$98,797.34.[36]

17 As a consequence of the findings of the arbitrator, there was a net sum of S$59,558.37 due from the applicant to the respondent.[37] In terms of costs, the respondent was awarded 90% of its costs of the proceedings, while the applicant was awarded 10% of her costs of the proceedings.[38]

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33 NTC1 pp 572 – 573, paras 804 – 806.

34 NTC1 pp 594 – 595, paras 845 – 846.

35 NTC1 pp 562 – 563, paras 778 – 779.

36 NTC1 pp 708 – 709, para 1055.

37 NTC1 p 709.

38 NTC1 p 710.

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The applications filed in court

18 On 16 August 2018, the applicant filed Originating Summons 1010 of 2018 ("OS 1010/2018"), where she seeks an order that the arbitral award be set aside entirely. However, it is clear from the applicant's affidavit filed in support and her submissions that she is only seeking to set aside certain portions of the award.[39] This will be explained in greater detail later in my judgment. Also, I should mention that no issue is taken by the respondent that the application was made within the time period prescribed by statute.

19 On 7 September 2018, the respondent filed Originating Summons 1108 of 2018 ("OS 1108/2018") for leave to enforce the arbitral award. This was an *ex parte* application which was granted by the court on 10 October 2018. The applicant then filed, on 25 October 2018, SUM 5038 of 2018 ("SUM 5038/2018"), seeking to set aside the order of court granting the respondent leave to enforce the award.

20 This judgment is in respect of OS 1010/2018 and SUM 5038/2018. Both applications are the applicant's efforts to prevent the enforcement of the arbitral award, and were heard by me at the same time. The grounds relied upon by the applicant in both these applications are the same. These grounds are elaborated on later in my judgment.

21 For completeness, I should also add that the applicant has also filed, on 14 June 2018, an application for leave to appeal against the award on certain questions of law. This was via Originating Summons 730 of 2018 ("OS 730/2018"). That was heard together with this matter but immediately after the

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[39] Applicant's Written Submissions (28 November 2018) para 2.

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arguments were made in OS 1010/2018 and SUM 5038/2018. In the course of the hearing, counsel for the respondent had asked whether I would be issuing a single judgment in respect of both matters. As the issues raised in OS 730/2018 differ from those raised with respect to OS 1010/2018 and SUM 5038/2018, I decided eventually to issue a separate judgment in respect of OS 730/2018.

The parties' cases

The applicant's case

22 In its application in OS 1010/2018, the applicant has sought a prayer for the arbitral award to be set aside in its entirety. However, in the applicant's submissions, it was clarified that she is not seeking to set aside the parts of the award that deal with (i) the arbitrator's determination on the claim of discrepancies between the completed works and the construction drawings (see [16(a)] above), and (ii) the arbitrator's determination on the respondent's counterclaim (see [16(f)] above).[40] Apart from those parts, she submits that the rest of the award should be set aside.

23 The grounds of the applicant application are elaborated on in her affidavit filed in support. In summary, she asserts that the arbitrator had failed to decide certain issues that had been submitted to him for his determination. She also alleges that there were various breaches of natural justice by the arbitrator.

24 First, the arbitrator had allegedly failed to consider whether the applicant was entitled to general damages for the delay in the completion of the works.

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[40] Applicant's Written Submissions (28 November 2018) para 2.

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He had not decided whether the respondent was entitled to an extension of time to complete the works or what was otherwise a reasonable period for completion. As a consequence, the arbitrator had failed to decide matters which had been submitted to him for his decision. The applicant had suffered prejudice because she was deprived of an award of general damages for the delay in completion of the contractual works.[41]

25 Also, on the issue of delay, and in respect of the arbitrator's findings on the invalidity of the two delay certificates, it was also argued that the arbitrator disregarded certain written submissions made by the applicant on 8 January 2016 on the delay certificates ("the 8 January 2016 submissions"). These had been made prior to the arbitration hearing. As a consequence, there was a breach of natural justice that affected the arbitrator's findings on the validity of the delay certificates.[42]

26 Second, it is submitted that the arbitrator had breached natural justice when considering the applicant's claims for defects in the works and for loss in the value of the property. More particularly, it was alleged that the arbitrator had demonstrated apparent bias during the cross-examination of the applicant's expert on property valuation, Mr Goh Tiam Lock ("Mr Goh"). The arbitrator had also relied on his own knowledge and experience with regard to the issue of valuation of the property. Further, the arbitrator had subjected Mr Goh to excessive and unwarranted interruptions when he was giving his evidence. According to the applicant, all this showed that the arbitrator had already made

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41 NTC1 pp 11 – 13, paras 37 – 46.

42 NTC1 pp 8 – 10, paras 27 – 33.

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up his mind about the issue of the loss in value of the property.[43] The applicant thus suffered prejudice because she was deprived of an award of damages for the loss in value of the property.

27 Third, it is argued that the arbitrator had failed to consider the evidence that had been given by the applicant's building surveyor expert, Mr Chin Cheong ("Mr Chin"). Instead, the arbitrator had relied on the views of the architect, Mr Liu, on whether certain complaints were in fact defects in the works. In this vein, it is also argued that the arbitrator also exhibited apparent bias in the manner in which he treated the evidence given by Mr Chin on the issue of the defects in the works. The applicant suffered prejudice because she was not awarded the amounts that she sought as the damages for the defects.[44]

28 Finally, on the issue of the quantification of the costs of rectification of the defects, the applicant submits that the arbitrator had been biased against their quantum expert, Mr Amos Teo ("Mr Teo"), and instead preferred the evidence of the respondent's quantum expert, Mr Stanley Wong Kum Loong ("Mr Wong").[45] Again, the arbitrator's alleged bias against the applicant's expert caused the applicant prejudice in that she was awarded less than what she was entitled for the costs of rectification of the defects.[46]

The respondent's case

29 As a preliminary point, the respondent submits that the applicant has not

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43 NTC1 pp 19 – 32, paras 66 – 78.

44 NTC1 pp 32 – 45, paras 79 – 96; Applicant's Written Submissions (28 November 2018) para 138.

45 Applicant's Written Submissions (28 November 2018) paras 120 – 132.

46 Applicant's Written Submissions (28 November 2018) para 138.

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addressed the court in her affidavit or submissions as to why the part of the arbitral award that deals with the claim for loss of rental should be set aside.[47]

30 The respondent submits that the applicant did not actually advance any claim in the arbitration for general damages for delay in the completion of the works.[48] Her claim, in respect of delay, was confined to a claim for liquidated damages, and that claim had failed because of the arbitrator's finding as to the invalidity of the delay certificates.[49] Hence, the respondent argues that it is not correct to assert that the arbitrator had failed to decide an issue that was placed before him for determination.[50]

31 As for the 8 January 2016 submissions by the applicant on the issue of the validity of the delay certificates, the respondent points out that the arbitrator had referred to them in his award,[51] but ultimately did not have to consider all the submissions made given the bases of his ruling on the invalidity of the delay certificates.[52] The respondent refers to the case of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*"), where it was held at [72]–[73] that it is "neither practical nor realistic to require" the arbitral tribunal to deal with every argument raised by parties, and that "[a]ll that is required of the arbitral tribunal is to ensure that the *essential issues* are dealt with" [emphasis in original]. Hence, even if the arbitrator did not refer to the 8 January 2016 submissions, the respondent submits that this is not a

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47 Respondent's Written Submissions (28 November 2018) para 16.2.

48 Respondent's Further Skeletal Submissions (3 December 2018) para 4.

49 Respondent's Written Submissions (28 November 2018) paras 141, 146 and 148.

50 Respondent's Further Skeletal Submissions (3 December 2018) para 5.

51 NTC1 pp 268 – 269, paras 345 – 346.

52 Respondent's Written Submissions (28 November 2018) paras 151 – 152.

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sufficient basis to set aside the arbitral award.[53]

32 As for the conduct of the arbitration hearing, the respondent disagrees that the arbitrator had breached the rules of natural justice. He had not entered into the fray in his questions put to Mr Goh, but was merely seeking clarification from the witness in order to understand the evidence being given. Neither had he substituted his own views for that of Mr Goh.[54]

33 The respondent argues that the arbitrator had not exhibited any apparent bias in the award when he rejected the evidence of the applicant's experts, whether it was Mr Goh's evidence on the question of the loss of value of the property, Mr Chin's evidence on the question of the defects in the works, or Mr Teo's assessment of the rectification costs of the defects. Rather, the arbitrator had sound bases to ultimately reject the evidence of these three experts, and the applicant, by alleging that the arbitrator had been biased against her experts, is in fact simply attempting to overturn the award on its merits.[55]

Issues to be determined

34 From my analysis of the various rounds of submissions filed by the parties, the broad issues that I have to decide are as follows:

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53 Respondent's Written Submissions (28 November 2018) paras 153 – 154.

54 Respondent's Written Submissions (28 November 2018) paras 50 – 53.

55 Mr Goh: Respondent's Written Submissions (28 November 2018) paras 55.4, 106 – 110. Mr Chin: Respondent's Written Submissions (28 November 2018) paras 115 – 120; Mr Teo: Respondent's Written Submissions (28 Novemebr 2018) paras 85 – 86.

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(a) On the question of delay - did the arbitrator fail to determine the issue of whether the applicant was entitled to general damages for delay in the completion of the works?

(b) Was there a breach of natural justice because the arbitrator did not consider the 8 January 2016 submissions before he decided the question of the validity of the delay certificates and the extension of time granted to the respondent?

(c) On the question of the claim for loss in value of the property because of the defective works, did the arbitrator exhibit apparent bias in his dismissal of the applicant's claim for loss of value of the property? In particular, had the arbitrator already made up his mind in respect of the evidence given by Mr Goh that he would reject his evidence? Did the arbitrator rely on his own knowledge and experience in substitution for the views of Mr Goh?

(d) On the question of the claim for damages for rectification works for the defects - did the arbitrator exhibit apparent bias in his rejection of the evidence of Mr Chin on the claim for damages for defects and his preference for the evidence of the architect?

(e) On the question of the quantification of damages for rectification works for the defects - did the arbitrator exhibit apparent bias in his rejection of Mr Teo's evidence?

35 There are various sub-issues within these broad issues that I will have to deal with as well. These relate to the specific allegations as to the arbitrator's conduct on the question of his apparent bias, his alleged reliance on matters not raised to the parties for their submissions and also his alleged non-consideration

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of certain discrete issues on the question of general damages for delay.

Applicable legal principles

36 I first start with a review of the applicable legal principles that govern the applicant's application, brought under s 48(1)(*a*)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"), which provides as follows:

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

37 Essentially, a challenge made under s 48(1)(*a*)(vii) of the Act is one that is made on grounds of breach of natural justice. There are two pillars of natural justice. First, the arbitrator must be disinterested and unbiased. Second, the parties must be given adequate notice and opportunity to be heard; sub-branches of this second principle are that each party must be given a fair hearing and a fair opportunity to present its case (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396 with approval).

38 In this case, the applicant alleges that both pillars of natural justice have been breached by the arbitrator and that these breaches have caused the applicant prejudice, such that the award ought to be set aside.

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Adequate notice and opportunity to be heard

39 First, as regards the issues of whether the applicant is entitled to general, instead of liquidated, damages and whether the arbitrator had failed to consider the 8 January 2016 submissions, the query arises as to whether the applicant had been given a fair hearing and a fair opportunity to present her case.

40 The applicable principles in relation to this second pillar of natural justice were extensively canvassed by the Court of Appeal in *Soh Beng Tee* at [65], following a comprehensive review of the authorities in this respect. In summary, the Court of Appeal observed that parties to arbitration have a general right to be heard on *every issue* that may be relevant to the resolution of a dispute. Arbitrators in this regard ought to allow all parties reasonable opportunities to present their cases as well as to respond, and an arbitrator ought not to base his decision(s) on matters not submitted or argued before him (*Soh Beng Tee* at [65(a)]).

41 However, to ensure the integrity of the arbitral process, courts have adopted a policy of minimal curial intervention. In the context of applications to set aside an arbitral award, in so far as the right to be heard is concerned, the failure of the arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge (*Soh Beng Tee* at [65(c)] and [65(d)]). Instead, the overriding burden is on the applicant seeking to set aside the award to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. Certain examples of what would amount to such an instance were provided in *Soh Beng Tee* at [65(d)]:

> Only in instances such as where the impugned decision reveals a *dramatic departure* from the submissions, or involves an arbitrator receiving *extraneous evidence*, or adopts a view

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> *wholly at odds with the established evidence* adduced by the parties, or arrives at a *conclusion unequivocally rejected by the parties as being trivial or irrelevant*, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either *irrationally or capriciously*. [emphasis added]

42 In this respect, the court also recognised that it is "almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute." Nonetheless, the arbitrator is not bound to adopt either of the approaches proposed by the parties, and "[h]e is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him". In short, the arbitrator is not expected to inexorably adopt the parties' submissions or to consult parties on his thinking and reasoning process, "unless [his award] involves a dramatic departure from what has been presented to him" (*Soh Beng Tee* at [65(e)]).

43 Finally, "it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied" (*Soh Beng Tee* at [65(f)]).

Apparent bias

44 Second, the applicant also alleges that the arbitrator had been biased against her experts, namely Mr Goh, Mr Chin and Mr Teo. This amounts to an allegation that there has been a breach of the first pillar of natural justice, which requires the arbitrator to be disinterested and unbiased: *Soh Beng Tee* at [43].

45 To establish the existence of apparent bias, which could warrant the setting aside of the award, the test is whether "there are circumstances which

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would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased" (*Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [91]). This has been described as the "reasonable suspicion test".

46 In this regard, parties "are entitled to expect from an arbitrator *complete impartiality and indifference*" and "an arbitrator must always act judicially with a *detached mind* and patience. *He must not at any time descend into the arena* or take an adversarial role. *His response and words used must always be measured and circumspect*" [emphasis in original] (*Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [67], citing *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 1 SLR(R) 483 at [65] and [78]).

Need for actual or real prejudice

47 As a final point, aside from alleging a breach of the rules of natural justice, the applicant must also show how such a breach of natural justice has prejudiced the rights of the applicant who seeks to set aside the arbitral award: s 48(1)(*a*)(vii) of the Act and *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 ("*John Holland*") at [18]. The prejudice in this regard must be "some actual or real prejudice". While this is "a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis." This means 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" [emphasis added] (*Soh Beng Tee* at [91]).

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48 With these principles in mind, I proceed now to consider the issues before me.

Did the arbitrator fail to decide the issue of whether the applicant is entitled to general damages for delay?

49 The applicant submits that there is no dispute between the parties that the date when the works were actually completed was 19 January 2011.[56] Given that the contract completion date was on 25 June 2010,[57] there is *prima facie* a delay of almost seven months by the respondent in the completion of works. While the applicant might not have succeeded in her claim for liquidated damages due to the arbitrator's finding that the second delay certificate was invalid, the arbitrator should have gone on to determine whether there should be an extension of time granted to the respondent for the completion of the works. However, the arbitrator failed to analyse this issue and rule on it. By failing to determine whether the respondent was entitled to an extension of time, the arbitrator thereby failed to consider if the applicant ought to be entitled to general damages flowing from the respondent's delay in the completion of the works. This, it was alleged, constituted a breach of natural justice.[58]

50 This submission was superficially attractive, but ultimately flawed. As held in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 ("*Bintai Kindenko*") at [46]:

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56 MS1 p 71.

57 NTC1 para 9 and p 714, clause 4.1; MS1 para 9.

58 Applicant's Written Submissions (28 November 2018) paras 29 – 30; NTC1 paras 39 – 46.

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> … an adjudicator will be found to have acted in breach of natural justice for having failed to consider an issue in the dispute before him only if:
>
> > (a) the issue was essential to the resolution of the dispute; and
> >
> > (b) a clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind at all to the said issue.

51 Hence, whether the applicant can legitimately complain that the arbitrator did not consider and rule on a claim for general damages depends on whether such a claim was in issue before the arbitrator in the first place. If there was no claim for general damages, it cannot be said that the issue of general damages "was essential to the resolution of the dispute" (*Bintai Kindenko* at [46]). A review of the pleadings and the submissions made by the applicant in the arbitration reveals quite clearly that her claim for delay was one for *liquidated damages* based on the second delay certificate. As far as I can tell from the papers, there was no alternative claim made by the applicant for *general damages* because of the delay in the completion of the works.[59]

52 In the applicant's statement of case in the arbitration, there is a general plea for damages for the "loss and damages" suffered by the applicant as a consequence of the respondent's alleged breaches of the contract.[60] However, when the specific paragraphs of the statement of case elaborating on this claim for general damages are examined, it becomes clear that the claim for general damages relates only to the loss of value of the property and the loss of rental arising from the defects in the house that was built. As for the damages for the

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59 MS1 p 107.

60 MS1 pp 98 – 99, para 11(a) and (c).

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delay in the completion of the works, the applicant claimed solely for liquidated damages in the sum of S$58,500, calculated in accordance with the SIA Conditions, by which the parties had agreed to liquidated damages of S$300[61] for each day of delay.[62]

53 That general damages were not pleaded in the applicant's statement of case is also made obvious when comparing the original statement of case, and the statement of case after it had been amended by the applicant. In an earlier version of the statement of case, the applicant claimed generally for "[d]amages (whether general or liquidated) suffered by the [applicant] as a result of the [respondent's] breaches of the [c]ontract to be assessed."[63] The statement of case was then subject to three rounds of amendments. In the third round of amendments, the applicant struck out the portion stipulating "(whether general or liquidated)", and inserted a further paragraph (1A), where she claimed "[l]iquidated damages of $58,500",[64] being the same sum which had been calculated for the period of delay alleged by the applicant. This demonstrates that, with respect for damages claimed for the delay in the completion of works, general damages were *not* pleaded as an alternative to the liquidated damages sought.

54 What is also relevant is that there is no plea by the applicant that time for completion has been set at large and when a reasonable date for completion of the works ought to have been, if the claim for liquidated damages were to

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61 NTC1 p 747 clause 24(2) read with p 771.

62 MS1 p 99, para 11B.

63 MS1 p 107.

64 MS1 p 107.

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fail. The fact that the applicant did not make a claim for general damages for delay was also confirmed by my review of the applicant's opening statement[65] and closing submissions in the arbitration.[66] That being so, in my judgment, having decided that the applicant was not entitled to the liquidated damages claimed for, the arbitrator would not have been remiss in not deciding the issue of delay and what would have been an appropriate extension of time for completion.

55 Critically, there was also no evidence before the arbitrator on how he should have assessed such general damages for delay for the period of 25 June 2010 to 19 January 2011. This would have had to been proven by the applicant for the arbitrator to quantify the amount of her claim. The applicant submits that such general damages could have been assessed with reference to the contractually specified rate of $$300 per day of delay.[67] I cannot accept this submission. This is because it would effectively allow the applicant to claim for liquidated damages even though the delay certificates were found to be invalid, with the consequence that the claim for liquidated damages were thus dismissed by the arbitrator.[68] More importantly, under clause 24(2) of the SIA Conditions, it is stated that, "[u]pon *receipt of a Delay Certificate*" [emphasis added], the applicant shall be entitled to recover from the respondent "liquidated damages calculated at the rate [agreed by the parties] from the date of default certified by the Architect for the period during which the Works shall remain

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65 Respondent's Core Bundle of Documents ("DCBD") at pp 5 and 12, para 19.

66 NTC2 pp 20 – 21, at para 10 and pp 85 – 87, at paras 170 – 176.

67 Applicant's Written Submissions (28 November 2018) at para 30(c).

68 NTC1 pp 562 – 564, paras 778 – 783.

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incomplete".[69] That being the case, the claim for damages at the agreed rate of S$300 per day of delay can only be sustained if there is a valid delay certificate. Given the arbitrator's finding that both the first and second delay certificates were invalid,[70] it would be plainly incorrect to rely on the contractually agreed rate of damages of S$300 per day of delay to calculate general damages.

56 The above notwithstanding, due to the importance of this issue to the applicant's case, I permitted her counsel to file further written submissions to address me on this issue of whether she had made such a claim for general damages for delay in the arbitration. In those further submissions, there was a clear shift in the applicant's arguments on the type of general damages she had claimed in the arbitration. It was argued in these further submissions that the applicant had claimed general damages in terms of the loss of rental for the delay in completion of the works and there was evidence of such loss of rental.[71] However, as pointed out by counsel for the respondent, it is clear from the position taken by the applicant in the arbitration that loss of rental was only claimed for the period *after* the actual completion date of 19 January 2011 where it was claimed that the property could not be rented out because of the defects in the works.[72] For the period just prior to 19 January 2011, the only claim I could discern from the arbitration papers is the claim by the applicant for liquidated damages for delay.

57 The applicant next argues that there were contentions raised by

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69 NTC1 p 747, clause 24.2.

70 NTC1 pp 562 – 563, paras 778 – 779.

71 Applicant's Skeletal Reply Submissions (30 January 2019) pp 8 – 14.

72 DBOD p 17, paras 34.1 – 36.2; NTC2 p 87, at paras 178 – 179 and p 109, para 219.

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respondent in the arbitration that an extension of time should be granted to the latter. Hence, the issue of an extension of time ought to have been determined by the arbitrator.[73] These contentions must be placed in their proper context. In response to the applicant's claim for liquidated damages based on the second delay certificate, the respondent had pleaded and raised issues such as prevention on the part of the applicant.[74] This was a defence to the claim for delay. If time had been set at large because of the acts of prevention on the part of the applicant, then the claim for liquidated damages might be defeated because the respondent might be granted an extension of time to complete the works. However, the arbitrator eventually did not have to decide this issue of whether there were acts of prevention, whether time was set at large and what was a reasonable extension of time for the respondent to complete its works. This is because the applicant failed to prove that it was entitled to liquidated damages for the delayed completion given the invalidity of the delay certificates. As such, in the award, while these issues were mentioned by the arbitrator as having been raised, a proper analysis of his reasoning shows that the arbitrator was simply setting out the various arguments and contentions raised by the parties.[75]

58 An arbitrator only has to decide the essential issues, which are necessary for him to decide the dispute and the claims made by the parties (*TMM Division* at [72]–[73]; *Bintai Kindeko* at [46(a)]). The issues of an extension of time and when the respondent should have completed the works were matters that the arbitrator did not have to decide since the claim for liquidated damages failed

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73 Applicant's Skeletal Reply Submissions (30 January 2019) paras 16 – 21.

74 MS1 p 202, para 14.1, p 203, para 15, and p 217 para 49 – p 227 para 61.

75 NTC1 p 118 para (j) – p 121 para (xii).

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and there was no alternative claim for general damages for delay. Hence, the arbitrator had not breached any rules of natural justice by failing to consider whether the applicant was entitled to general damages for the delay in works.

Did the arbitrator fail to consider the applicant's 8 January 2016 submissions on the questions of the validity of the delay certificates?

59 Next, the applicant asserts that the arbitrator had failed to consider her 8 January 2016 submissions.[76] The 8 January 2016 submissions were provided following the arbitrator's directions, whereby he requested parties to submit on two interrelated issues relating to the delay certificates:[77]

(a) first, whether the architect, Mr Liu, had the power under the SIA Conditions to issue his second delay certificate to supersede the first delay certificate; and

(b) second, whether the second delay certificate was valid since it was issued some four years and nine months after the completion date of 19 January 2011.

60 Before I consider this allegation of breach of natural justice, it is important to understand how the arbitrator came to decide that the two delay certificates were flawed and invalid. His reasoning was actually quite straightforward. First, he relied on Mr Liu's own evidence that the first delay certificate, which stipulated that the works had gone into delay from 23 November 2010, thus effectively granting the respondent an extension of time of up to 22 November 2010 to complete the contract works, was flawed. This

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[76] Applicant's Skeletal Reply Submissions (30 January 2019) pp 2 – 5.

[77] NTC1 p 784.

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was because, amongst other reasons, the date of 23 November 2010 had been arbitrarily arrived at.[78] In any event, the applicant did not rely on the first delay certificate as the basis of its claim for liquidated damages, since to do so would only entitle her to S$17,400 (S$300 x 58 days) in liquidated damages, as the works would only have gone into delay from 23 November 2010 under the first delay certificate,[79] as opposed to the earlier date of 9 July 2010[80] under the second delay certificate.[81] Second, given that clause 31(6) of the SIA Conditions only permits the architect to amend an earlier *interim,* but not *delay*, certificate,[82] the arbitrator determined that the architect had no power to issue the second delay certificate in order to amend the first delay certificate.[83] Mr Liu had admitted in his evidence that it was his intention to amend the first delay certificate.[84] As the second delay certificate formed the basis of the applicant's claim for liquidated damages, the arbitrator's finding that the second delay certificate was invalid meant that liquidated damages claim failed.[85]

61 The complaint made by the applicant is that there had been a breach of natural justice because the 8 January 2016 submissions were not considered by the arbitrator in the award. As set out above, this was a set of submissions which the arbitrator had requested for at an interlocutory hearing with parties' counsel

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78 NTC1 pp 559 – 560, para 770.

79 NTC1 p 773.

80 NTC1 p 774.

81 NTC1 p 559 para 769.

82 NTC1 p 757.

83 NTC1 p 563 para 779.

84 NTC1 p 560 paras 770 – 771.

85 NTC1 p 562 para 778 – p 564 para 784.

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on 26 November 2015.[86] The applicant argues that the arbitrator eventually failed to refer to the 8 January 2016 submissions in his award at all even though he had indicated at the interlocutory hearing that he would do so. According to the applicant, this showed that the arbitrator had failed to consider those submissions which were on critical issues in the arbitration, namely, the validity of the second delay certificate and the architect's grant of a ten business days extension of time to the respondent in that certificate.[87]

62 In my judgment, there is no merit to this complaint. In the first place, it is not accurate to assert that the arbitrator failed to refer to 8 January 2016 submissions in his award. The arbitrator had expressly mentioned the 8 January 2016 submissions and noted that these submissions had also been annexed and incorporated into the applicant's reply submissions filed after the hearing.[88] Given that, the arguments made in the 8 January 2016 submissions about the second delay certificate and the architect's grant of a ten business days extension were effectively repeated in the applicant's reply submissions,[89] which the arbitrator had expressly considered and summarised.[90]

63 I also accept the respondent counsel's point that there had been no argument raised by the applicant in the 8 January 2016 submissions which the arbitrator did not have the opportunity to consider before he came to his conclusion, as stated in the award, that the second delay certificate was invalid.[91]

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86 NTC1 pp 776 and 780.

87 Applicant's Skeletal Reply Submissions paras 1 – 7.

88 NTC1 pp 268 – 270 and 549 – 550.

89 NTC2 pp 310 – 324.

90 NTC1 pp 549 – 557.

91 Minute Sheet (30 January 2019) p 2.

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Both parties also had the opportunity to make full arguments to the arbitrator on the issue of the validity of the delay certificates and they made full use of the opportunity.

64 From my review of the award, the arbitrator did refer to relevant arguments raised by both parties[92] before eventually deciding on the fundamental point that the SIA Conditions simply did not permit the architect to issue a second delay certificate to amend the first delay certificate.[93] What is key is the fact that the arbitrator had considered that Mr Liu himself had agreed that he was trying to amend the first delay certificate, and that he had made this clear by stating in the second delay certificate that it superseded the first delay certificate, which had to be amended because it did not state the information required under clause 24(1) of the SIA Conditions.[94] Mr Liu's admission ran contrary to the applicant's submission that the second delay certificate did not have the effect of amending the first delay certificate, and that it was thus not in breach of clause 31(6) of the SIA Conditions.[95] Given the bases of his findings and decision, it was not necessary for the arbitrator to expressly deal with the rest of the applicant's arguments made in the 8 January 2016 submissions concerning the delay certificates. For example, it was not necessary for the arbitrator to deal with the argument made by the applicant that clause 23(3) of the SIA Conditions permitted the architect to delay his decision on whether to grant an extension of time until he is in receipt of sufficient information, which it was said was the reason why the architect waited until 2015 to decide on a ten

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92 NTC1 pp 549 – 557.

93 NTC1 p 563, para 779.

94 NTC1 p 552, p 559 at para 770 – p 560 at para 773.

95 NTC2 pp 320 – 321, paras 40 – 44.

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business days extension in the second delay certificate.[96] This is because the second delay certificate issued in 2015 was, as admitted by the architect, an attempt to amend the first delay certificate, and this rendered the second delay certificate invalid as the architect simply had no power to do so under clause 31(6) of the SIA Conditions.[97]

65 As made clear in *TMM Division* at [73]:

> All that is required of the arbitral tribunal is to ensure that the *essential issues* are dealt with … In determining the essential issues, the arbitral tribunal also should not have to deal with *every* argument canvassed under each of the essential issues. [emphasis in original]

66 Hence, the arbitrator did not have to decide all the issues and deal with all the arguments, but only those which were essential and necessary for his decision. In this case, his decision on the validity of the second delay certificate rested on a straightforward basis. None of the other arguments raised in the 8 January 2016 submissions could have made a difference to the arbitrator's decision *vis-a-vis* the claim for delay given his reasoning. There was therefore no breach of the rules of natural justice.

Did the arbitrator breach the rules of natural justice in the manner in which he dealt with the applicant's claim for loss in value of the property?

67 The applicant's claim for the loss in value of the property was that the defects prevented the property from being sold between October 2012 and April 2013, when its market value was between S$6.8m and S$7m. Due to the defects, the two offers to purchase the property were only S$6.18m in October

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96 NTC2 p 319 paras 36 – 38.

97 NTC1 p 757.

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2012 and S$6.3m in April 2013.[98]

68 The applicant criticises the arbitrator for not accepting the evidence that was tendered by the applicant as to the value of the property. In particular, the applicant complains about the arbitrator's rejection of the evidence of a text message from a bank officer which stated the value of the property and the expert evidence given by the applicant's property valuation expert.[99]

The text message

69 The applicant had relied on a text message sent on 29 October 2012 by a bank officer, Ms Jasmine Tan ("Ms Tan"), to the applicant's real estate agent where Ms Tan had simply stated "Ok max 7m if brand new" as the market value of the property in response to a query by the real estate agent.[100] Ms Tan was not called to give evidence. In his award, the arbitrator did not accept the text message as evidence of the value of the property because he found it to be hearsay.[101]

70 The applicant submits that the arbitrator's rejection of Ms Tan's evidence showed double standards because he had referred to other pieces of hearsay evidence in his award.[102] For example, the arbitrator had referred to an email from another property agent as evidence that there was an offer of

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98 Applicant's Written Submissions (28 November 2018) p 28, paras 54 – 55.

99 Applicant's Written Submissions (28 November 2018) pp 28 – 30, paras 56 – 60.

100 NTC1 p 925.

101 NTC1 p 581 paras 820 – 821.

102 Applicant's Written Submissions (28 November 2018) p 29, para 58.

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S$6.18m for the property.[103] The submission was that the arbitrator had displayed apparent bias.

71 I can dispose of this submission briefly. The arbitrator's decision on the weight of the evidence to be given to Ms Tan's text message was correct in law and is unimpeachable. I am unable to comprehend how the arbitrator's refusal to give such evidence any weight can show that he was biased. It was the applicant's burden to establish the loss she had suffered and the rejection of one of her supporting pieces of evidence was simply an exercise of judgment by the arbitrator in deciding whether she had discharged her burden. As for the reference to the other email showing an offer of S$6.18m, the arbitrator did not rely on any hearsay evidence to determine the value of the property. He only found that the applicant had not proven what the value of the property was, "as there was never any proper valuation report that was provided by a qualified valuer".[104] In this regard, the arbitrator had rejected Mr Goh's report because he found the valuation methods used to be unacceptable.

Entering into the fray during the oral evidence of Mr Goh

72 Next, the applicant submits that the arbitrator demonstrated apparent bias by entering into the fray by posing a long series of questions to the applicant's property valuation expert, Mr Goh. It was submitted that the arbitrator's interjections showed that he had made up his own mind about the valuation of the property and had shut his mind from impartially considering

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103 NTC1 p 579, para 815 and p 583, para 826.

104 NTC1 p 594, para 845.

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Mr Goh's evidence.[105]

73 The applicant referred to specific portions of the transcript of the cross-examination of Mr Goh in support of this submission. There were portions where the arbitrator asked whether the price at which a property could be sold would depend on the location, whether the house on the land was new or old, whether the orientation of the house was such that it faced the sun, and whether the house number had any impact on the price. It was submitted that this showed that the arbitrator preferred his own knowledge over that of Mr Goh. It also showed, according to the applicant, that the arbitrator had subjected Mr Goh's answers to excessive and unwarranted interruptions in order to steer his evidence towards answers that the arbitrator wanted.[106]

74 From the transcripts, it is clear that the arbitrator had shown a keen interest in the evidence of Mr Goh. He wanted to understand the bases of Mr Goh's opinion as to the market value of the property. The arbitrator thus asked questions of Mr Goh. The questions raised were mostly after the conclusion of the cross-examination of Mr Goh, during the course of his re-examination.[107] I see nothing wrong in what the arbitrator did. What is relevant is that the arbitrator allowed Mr Goh to give his answers fully, including an explanation of the factors that would be relevant to the market value of the property. He also allowed the applicant's counsel at the arbitration to further re-examine Mr Goh on these points as well. I do not accept the submission that the arbitrator,

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105 Applicant's Written Submissions (28 November 2018) p 33 para 65 – p 38 para 69, p 40 para 73, p 41 para 74 – p 43 para 75, p 53 para 95.

106 Applicant's Written Submissions (28 November 2018) p 33 para 65 – p 38 para 69, p 40 para 73, p 41 para 74 – p 43 para 75.

107 MS1 pp 365 – 369.

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through his questions of Mr Goh, entered into the fray and displayed an apparent bias with regard to the evidence of Mr Goh.

75 Quite apart from this, I find that there is no basis for the submission that the arbitrator had interrupted Mr Goh's answers during his oral evidence with the aim of trying to steer Mr Goh's evidence in a particular direction. The questions posed were open-ended in nature, and Mr Goh was not prevented from elaborating on his answers given to the arbitrator's questions.

The arbitrator's alleged reliance on his own knowledge and experience

76 Next, the applicant submits that the arbitrator had preferred his own knowledge and experience over that of the expert, Mr Goh. There are two aspects to the applicant's complaint in this regard. First, the applicant submits that, from the questions raised by the arbitrator to Mr Goh, it was clear that the arbitrator preferred his own knowledge and experience over the evidence given by Mr Goh. It was contended that the arbitrator should not have done this because he was not qualified to do so.[108]

77 I find there to be no merit to this submission. As I have explained earlier, the arbitrator simply raised his concerns to Mr Goh during his oral evidence about the factors that might be relevant to a determination of the market value of the property. From my review of the award, the arbitrator decided not to place any reliance on the valuation of Mr Goh because of his assessment of the quality of his expert evidence. He found that Mr Goh could not substantiate why his valuation of the property was significantly higher than the other transactions concluded around the same time in the vicinity of the property, as

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[108] Applicant's Written Submissions (28 November 2018) p 43 para 76.

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shown by the records of property transactions maintained by the Urban Redevelopment Authority.[109]

78 It was entirely proper for the arbitrator to consider the appropriate reliance to be placed on Mr Goh's evidence. As explained in *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [76], "a court must not … unquestioningly accept unchallenged evidence. Evidence must invariably be sifted, weighed and evaluated in the context of the factual matrix and in particular, the objective facts." Given the foregoing, the applicant's counsel was correct to accept that the arbitrator was not bound to accept Mr Goh's expert opinion just because the respondent had not called a property valuer to give expert evidence.[110] In short, the arbitrator's decision to reject Mr Goh's evidence was entirely proper, and the applicant was not able to point to me any part of the award which showed that the arbitrator took into account his own knowledge or experience as a reason for his rejection of Mr Goh's valuation of the property.

Reliance on a "well-known fact"

79 The other aspect of the applicant's complaint is as to the arbitrator's alleged reliance on "a well-known fact" that leaving defects in a building unrepaired would cause the defects to deteriorate. This was in the context of the issue of whether the applicant had mitigated her losses that arose from the defects in the property. What the applicant had done was to leave the defects in the building as they were in order to preserve the evidence of the defects.[111] At

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109 NTC1 pp 591 – 592, paras 841 – 842.

110 Minute Sheet (3 December 2018), p 2.

111 NTC1 p 573 para 807 and pp 574 – 575, para 809.

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[809] of the award, the arbitrator observed:[112]

> It is a ***well-known fact*** and I believe [the applicant] will not deny it that leaving the defects in a building un-rectified and/or not made good would undoubtedly cause the defects to further deteriorate especially under our tropical weather of heat built-up and high humidity without proper regular maintenance of the building, and proper and continuous daily ventilation of the premises. [emphasis added]

80 The applicant submits that this point had not been advanced by the respondent in the arbitration, or mentioned by any of the parties' experts. Thus, it did not form part of the respondent's case. If the arbitrator wanted to rely on this "well-known fact" in his reasoning, he should have invited the parties to address him on it. By not doing so, the applicant was deprived of an opportunity to show that the arbitrator's reliance on the "well-known fact" was misplaced. Hence, there was breach of natural justice, which caused the applicant to suffer prejudice.[113]

81 I have no hesitation in rejecting this completely unmeritorious submission. An arbitrator, like a judge, is entitled to rely on his own common sense when analysing and determining the issues in the case. It is plainly common sense that defects in a building which are left un-remedied, like the water seepage in this case, would just deteriorate over time and cause further damage to the building. The arbitrator cannot be expected to refer such obvious points to the parties to ask them whether they agree with it: see *Soh Beng Tee* at [65(e)].

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112 NTC1 p 574.

113 Applicant's Written Submissions (28 November 2018) p 49 paras 88 – 94, p 54 paras 97 – 98.

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82 However, quite apart from this, as counsel for the respondent pointed out at the hearing before me, there was evidence given by the respondent's building surveyor expert, Ms Catherine Loke ("Ms Loke"), also an architect by profession, on how defects would deteriorate over time if they are not promptly rectified.[114] Ms Loke's evidence in this regard was corroborated by the architect, Mr Liu, who gave evidence that leaving the defects in the unoccupied building would cause further deterioration.[115] Given such evidence, the applicant was unable to explain to me how the "well-known fact" observed by the arbitrator was actually incorrect. Counsel for the applicant also accepted in the hearing before me that the arbitrator did not rely on this "well-known fact" to dismiss the claim for loss from the defects wholesale.[116]

83 More importantly, it was misconceived for the applicant to make this submission because no prejudice could have arisen *even if* I was to find that the arbitrator should have referred this "well-known fact" to the parties so that they could address him on it. This is because the arbitrator had determined that the applicant had failed to prove that the value of the property was indeed S$7m, or that the loss in value of the property was due to the alleged defects in the works.[117] In other words, it had not been shown that the property was even valued at S$7m, such that there had been a "loss in value". Further, even if the property was indeed valued at S$7m, it had not been proven that the subsequent loss in value of the property was caused by the defects in the property. Given the arbitrator's finding that the applicant had not proven the causative link

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114 MS1 p 31 para 59; p 355.

115 MS1 p 352.

116 Minute Sheet (3 December 2018) p 2.

117 NTC1 p 594, para 845.

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between the defects in the property and her inability to sell the property at her expected price of S$7m between October 2012 and April 2013, it is clear that the arbitrator's reference to the "well-known fact" when dealing with the issue of mitigation had no impact on the applicant's claim for loss in value of the property due to the defects. Strictly speaking, any finding by the arbitrator on the point of mitigation, whether with reference to the "well-known fact" or otherwise, was irrelevant given the findings on causation.

84 I should also point out that counsel for the applicant agreed in the hearing before me that, on the face of the award, the issue of causation of the loss in value of the property was not linked to the arbitrator's observation about the "well-known fact" that un-remedied defects would deteriorate over time in Singapore's climate.[118] That being so, the question of the applicant having failed to mitigate her losses by remedying the defects was an issue that had no bearing on the dismissal of the applicant's claim for loss in value of the property.

85 For the above reasons, I find that the applicant's complaints about the arbitrator's breaches of natural justice in relation to the claim for loss in value of the property as a result of the defective works are without basis. The applicant has not established that there are such breaches of natural justice. Further, even if there were such breaches, the applicant has not shown that she had suffered any real prejudice as a consequence.

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118 Minute Sheet (3 December 2018) p 2.

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Did the arbitrator breach natural justice in the manner in which he dealt with the applicant's claim for damages for defective works?

The recalling of the architect as a witness on the issue of defective works

86 The applicant submits that the arbitrator took the view early in the cross-examination of Mr Chin, the applicant's building surveyor expert, who was called to give evidence on the defects in the works, that his evidence would be of no help in deciding whether the allegations of defective works had been made out. The arbitrator then expressed his view that the architect was the best person who could testify on whether the matters stated in Mr Chin's report were actually defects. After considering the view expressed by the arbitrator, the applicant decided to recall the architect to give evidence on the claim for defective works.[119]

87 According to the applicant, she was thus prevented from presenting her evidence on the claim for defective works, in the form of Mr Chin's expert evidence.[120] The arbitrator had been mistaken in thinking that Mr Chin's evidence would not provide assistance on the claim for defective works. This is because Mr Chin had inspected the works for the purpose of identifying existing defects, taken photos of them and considered the rectification methods.[121] The applicant also criticised the arbitrator for failing to appreciate that the architect was not a neutral party since he had been appointed and paid by the applicant.[122] There was thus a breach of natural justice because the

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119 NTC1 p 32 para 79 – p 43 para 91; Applicant's Written Submissions (28 November 2018) p 55, paras 99 – 101, p 60, para 104, pp 68 – 71, paras 109 – 119.

120 Applicant's Written Submissions (28 November 2018) p 71, para 119.

121 NTC1, p 45, para 94.

122 Applicant's Written Submissions (28 November 2018) pp 70 – 71, para 116.

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applicant was unable to present her case in relation to the claim for defective works in the way that she wanted.

88 It is not disputed that the architect's evidence on the alleged defects was adduced pursuant to the arbitrator's request during the course of hearing.[123] However, it is necessary for me to delve a little into why the arbitrator was of the view that the architect's evidence would be helpful in this regard. Mr Chin had given evidence that his brief was simply to conduct a physical inspection of the works and form an opinion as to whether there were defects. He confirmed that he was not instructed to review the correspondence between the parties, or other documents and drawings to determine what parties had actually agreed.[124] As a result, Mr Chin was unaware of why certain items of work were carried out in a certain way, which might have contributed to his conclusion that the items in question were defects.

89 During the course of Mr Chin's evidence, and after it was completed, the arbitrator expressed his concerns to the parties' counsel that it was difficult to determine based on Mr Chin's evidence whether a complaint was really a defect or a result of the architect's design or an agreed variation. The arbitrator informed both counsel that his view was that the architect's evidence would be relevant in determining whether each complaint can really be characterised as a defect that was attributable to the respondent in that they did not comply with the terms of the contract, as varied or otherwise.[125] Further, the arbitrator felt that the architect's evidence would be relevant because he had issued his

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123 Respondent's Written Submissions (28 November 2018) p 61 para 113.

124 MS1 pp 44 – 46, pp 372 – 382; NTC1 pp 1281 – 1282.

125 NTC1 pp 1263 – 1264, 1269, 1283 – 1284.

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maintenance certificate in 19 January 2013, confirming that, as of 30 May 2012, all "remaining defects, omissions and other faults … were made good …".[126] Mr Chin had only carried out his inspection between October to December 2013,[127] after the issuance of the maintenance certificate, whereby the architect had already stated that all remaining defects had been rectified or "made good". Hence, the "defects" identified in Mr Chin's report[128] might not have been defects in the first place. After hearing these views and considering the matter over the course of a few days, the applicant then decided to recall the architect, who had given his evidence before Mr Chin,[129] as a witness.[130]

90 In such circumstances, I find that the arbitrator was actually giving an opportunity to the applicant to remedy the problems with her evidence about the defects in the works. The arbitrator did so by pointing out the deficiencies in Mr Chin's evidence, and giving the applicant the option of recalling the architect so that he could give evidence on the defects. Ultimately, it was a decision made by the applicant to recall the architect and adduce evidence from him in relation to the claim for defective works.

91 I should also add that Mr Chin's evidence was not shut out, as suggested by the applicant. He was cross-examined for four out of the 15 hearing days. He was allowed to physically re-examine some allegedly defective works, before returning to give evidence. This was all done before the architect was

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126 MS1 p 76.

127 NTC1 p 997, para 1.3.

128 NTC1 p 1001 – 1030.

129 NTC1 p 83: "1st witness would be the Architect".

130 NTC1 p 37 para 85 and p 43 para 91.

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recalled to give evidence.[131] I do not find that the applicant was impeded in the way she was allowed to present Mr Chin's evidence.

92 In my judgment, it cannot be said that the applicant was prevented from presenting all her evidence on her claim for defects. She had presented her evidence of the defects through Mr Chin, *and* then decided to present further evidence of the defects through the architect. She then made arguments in her closing submissions that the *architect's* evidence on the defects claim should be accepted by the arbitrator because they were "superior" to that of the respondent's expert, Ms Loke.[132] That being so, I am puzzled as to the applicant's submission now that she was not permitted to present her case as to her claim for defects.

93 There is no merit whatsoever to the applicant's complaint that the arbitrator failed to recognise that the architect was not a neutral witness just because he had been appointed by the applicant and paid by her. In the first place, this is not a complaint that can be raised by the applicant given that any bias, if any, would be in her favour. Secondly, the applicant had already called the architect as a witness in the proceedings before this issue of his knowledge of the defects was raised during the course of Mr Chin's oral evidence. Thirdly, it is preposterous to suggest, without any evidence, that a professional man would not testify truthfully and honestly just because he had been appointed by a party and paid by that party. If the applicant is right, such a criticism would apply to Mr Chin as well.

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131 Minute Sheet (3 December 2018) p 3 and Minute Sheet (28 January 2019) p 3 (last paragraph).

132 NTC2 p 132, para 294.

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94 The applicant also points out that the architect's final inspection of the property was on 22 February 2012 to check if the defects listed in the "defects list" dated 19 December 2011 had been rectified. As such, the defects that manifested after 19 December 2011 would not have been examined by the architect in person. He would have only seen these defects from the photos in Mr Chin's report.[133] For this reason, the architect's evidence was complementary to that of Mr Chin's. Considering the architect's familiarity with the project[134] and Mr Chin's thorough investigation of the property over four occasions, the applicant argued in her closing submissions in the arbitration[135] that *both* the evidence of Mr Chin and the architect had to be considered for the claim for defective works.

95 This argument does not assist the applicant in showing that she had been deprived of an opportunity of presenting her case in relation to the claim for defects. On the contrary, it shows that she was given the fullest opportunity to make her case to the arbitrator as to why both Mr Chin's and the architect's evidence were relevant. In the award, the arbitrator explained why he found Mr Chin's evidence to be less reliable than the architect's evidence. This was the conclusion he reached after reviewing Mr Chin's, the architect's and Ms Loke's evidence. He did not just disregard Mr Chin's evidence without explanation.[136] If it is the applicant's complaint that the arbitrator did not give weight to Mr Chin's evidence, that is not a breach of natural justice. It is an assessment of

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133 NTC1 pp 43 – 44, para 92 and p 1296 para 4 – p 1297 para 8; Applicant's Written Submissions (28 November 2018) p 70, para 115.

134 NTC2 p 133, para 295 and p 134, para 299.

135 NTC2 p 135, para 303.

136 NTC1 pp 609 – 610, paras 871 – 872; p 639, para 914; p 645, para 925 and p 647, paras 931 – 934.

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the evidence by the arbitrator.

96 I should add that there is nothing in the arbitrator's statements in the course of the hearing about Mr Chin's evidence that suggests any apparent bias against his evidence, as has been alluded to by the applicant. In my judgment, the arbitrator was simply expressing his view as to the relevance and helpfulness of Mr Chin's evidence to the issues that he had to decide. This cannot, by any stretch, give rise to any reasonable suspicion of bias on the arbitrator's part.

97 Finally, on this issue, the applicant also makes the rather startling submission that the arbitrator had abdicated his task of determining what were defects to the architect. It was claimed that the arbitrator allowed the architect to decide on his behalf what were defects and what were not.[137] This was a plainly untenable submission to make. As pointed out by the respondent's counsel, the arbitrator did not accept the entirety of the architect's evidence. For example, he did not completely accept the architect's evidence that the rotten timber battens were as a result of defective work, but instead found that the architect's design flaw in not having sufficient rainwater outlet pipes had contributed to the rotting of the timber battens. However, the arbitrator also found that the respondent had failed to properly treat the timber battens. In the result, he found that the respondent was only liable for 50% of the costs of rectification.[138]

98 In this regard, it is important to note that the arbitrator never stated during the hearing that he would accept the architect's evidence about the

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137 NTC1 pp 44 – 45, para 93; Minute Sheet (3 December 2018) p 2.

138 NTC1 pp 655 – 663, paras 948 – 956.

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defective work without qualification. Rather, the arbitrator's position was that he would decide whether he would agree with the architect after hearing his evidence and the parties' submissions on the issue post-hearing.[139] That is exactly what he did, and there was thus no breach of natural justice as alleged.

The arbitrator's treatment of the applicant's quantum expert's evidence

99 Finally, on the issue of the quantum of damages occasioned by the need to rectify the defects, the applicant had called Mr Teo as her quantum expert. The respondent called Mr Wong as its quantum expert.

Preference for Mr Wong's evidence

100 The applicant submits that the arbitrator had exhibited apparent bias against Mr Teo because he did not accept Mr Teo's evaluation of the costs of rectification for any of the defects, but instead preferred Mr Wong's evaluation. It is argued that the arbitrator only stated that he found Mr Teo's evaluation to be less reliable, without going further to give reasons as to why he came to this view.[140]

101 On reviewing the award, it became clear that the applicant has mischaracterised the arbitrator's findings. In his award, the arbitrator took notice that both parties had taken issue with the other party's quantum expert.[141] However, while the applicant only made sweeping and unsubstantiated remarks about how Mr Wong's valuation of the cost of rectification for the defects were

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139 DCBD p 116 line 15 – p 117 line 22.

140 Applicant's Written Submissions (28 November 2018) p 72 para 124 – p 75 para 132.

141 NTC1 p 632, para 901.

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arbitrary and inaccurate,[142] the respondent had provided concrete examples to show why Mr Teo's evidence was unreliable. For example, the arbitrator had considered that Mr Teo had included the cost of the provision of scaffolding for a single item of defect even though he had already provided a separate amount for scaffolding under "Preliminaries". According to the arbitrator, this separate provision for scaffolding was not logical, unless Mr Teo was suggesting that for "ten such areas of defects, the [applicant] is going to appoint ten different contractors … and each individual contractor must install its own scaffold" to make good the defects.[143]

102 In another example, Mr Teo had claimed that the costs of making good a tempered glass railing would be S$13,600. Mr Teo had arrived at this figure solely based on a quotation of S$12,000 by another contractor. In contrast, Mr Wong provided that the cost of rectification of the railing would only be S$2,270.64. The reason for the significant difference in the pricing was because Mr Teo's quotation was for *laminated*, rather than ordinary tampered glass. This was not part of the contract, and would have constituted a betterment for the applicant.[144] Given the above, the arbitrator did not accept Mr Teo's quotation, and instead preferred Mr Wong's quotation, which was close to two other quotations of S$2,300 and S$2,080 that had been obtained from two other contractors.[145]

103 On the whole, the arbitrator was therefore more inclined to prefer Mr

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142 NTC1 p 630 para 898.

143 NTC1 pp 633 – 635, paras 904 – 905.

144 MS1 pp 44 – 46; NTC1 p 677, para 989.

145 NTC1 p 677 para 990.

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Wong's evidence. His rejection of Mr Teo's assessment was by no means cursory given that, in many cases, the arbitrator had set out the submissions made by both parties before coming to a decision as to whose views were to be preferred.[146]

104 Even if the applicant's point is that the arbitrator had not given sufficient reasons for rejecting Mr Teo's evidence, in my judgment, this lack of detailed reasons is not a sufficient basis for the court to come to the view that the arbitrator had breached the rules of natural justice in his treatment of Mr Teo's evidence. As Judith Prakash J (as she then was) observed in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF*") at [60], "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made." In *SEF*, the adjudicator had failed to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues. Prakash J found that given that the adjudicator had taken pains to explain the reasons for his other determinations, and even indicated matters on which he was not making a determination, it may have been an accidental omission on his part, and whatever may be the reason for the adjudicator's omission, she did not think that the applicant was not afforded natural justice as a result. Here, the arbitrator had provided clear, albeit sometimes brief, reasons for preferring Mr Wong's evidence. These reasons were objective, and did not evince a blatant and unwarranted preference for Mr Wong. In the circumstances, it cannot be argued that he failed to consider Mr Teo's evidence, or that a reasonable suspicion is raised in relation to the arbitrator's bias. Therefore, I reject the applicant's assertion that the arbitrator had exhibited apparent bias against Mr Teo.

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146 NTC1 pp 640 – 642, 645 – 646, 651 – 655, 663.

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Arbitrator's mistake

105 The applicant also points out that, in one instance, the arbitrator had mistakenly read Mr Teo's assessed costs of rectification as being a far larger figure. This was for the attic bathroom and the master bedroom steam room. Mr Teo had indicated the costs of rectification of the defects to be $1,111 and $973 respectively. He then provided an "optional" assessment based on a "full replacement cost", which he found to be $19,721 and $13,225 respectively.[147] The arbitrator obviously missed the word "optional" and found Mr Teo's evaluation for making good the defects to be "exorbitant and honestly, ridiculous and cannot be correct".[148] He then accepted Mr Wong's assessed figures for rectifying the defects, which were in fact *higher* than those of Mr Teo.[149] The result of the arbitrator accepting Mr Wong's assessed figures was that *more* damages were allowed to the applicant for this item than should have been the case.

106 As a preliminary point, it is unclear what rule of natural justice this mistake encroached upon, since it neither shows that the arbitrator failed to consider the applicant's submissions, nor does it *ipso facto* show that the arbitrator was biased against Mr Teo.

107 The more fundamental point, however, is that while the arbitrator clearly made a mistake in this regard, it is clear that no real prejudice was suffered by the applicant which would justify a setting aside of the award. Quite the contrary, the applicant fortuitously received *more* damages as a consequence of

147 NTC1 pp 1365 and 1366.

148 NTC1 p 654 para 945.

149 NTC1 p 654 para 946.

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the arbitrator's mistake. Hence, this is clearly not a basis for setting aside the award.

Conclusion

108 In this judgment, I have sought to consider every allegation of a breach of natural justice that was raised by the applicant. In certain instances, the prejudice suffered by the applicant was patently absent, while in other instances, allegations of bias were simply unfounded. The issue of general damages was also raised for the first time before me, when the issue was clearly not before the arbitrator during the arbitration proceedings. In the circumstances, I am inclined to agree with the respondent's counsel that the various allegations of breaches of the rules of natural justice is but a disguised attempt to challenge the merits of the award.

109 It bears reminding parties that arbitration is often selected by parties as an *efficient* means to dispose of the dispute before them. This is the fundamental reason minimal curial intervention is warranted, as backdoor attempts to challenge the merits of an arbitrator's decision conflict with the policy of facilitating the prompt resolution of disputes. I stress that, when a breach of natural justice is alleged, courts *do not* evaluate the merits of the arbitrator's decision, and the award is only set aside if four elements can be shown: first, which rule of natural justice was breached; second, how it was breached; third, in what way was the breach connected with the making of the award; and fourth, how the breach had caused real prejudice to the rights of the party concerned: *John Holland* at [18]. Before filing a setting aside application, parties who may be dissatisfied with an arbitral award ought to carefully consider whether all four of the above elements have been met, or whether any other grounds for setting aside are reasonably available. Submissions on breaches of the rules of

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natural justice ought to be structured in accordance with the four elements above, so that it will be clear to the court how the alleged breach arose, and how it caused prejudice to the applicant. Needless to say, only meritorious applications to set aside an award will be looked upon favourably, and frivolous applications may be met with adverse cost consequences if the circumstances call for such orders.

110 For the foregoing reasons, I dismiss the applicant's applications in OS 1010/2018 and SUM 5038/2018 entirely.

111 I will hear parties separately on the question of costs.

Ang Cheng Hock
Judge

Koh Choon Guan Daniel, Lim Khoon and Ang Minghao (Eldan Law LLP) for the applicant in HC/OS 1010/2018 and the defendant in HC/OS 1108/2018;
Por Hock Sing Michael and Li Jiaxin (Michael Por Law Corporation) for the respondent in HC/OS 1010/2018 and the plaintiff in HC/OS 1108/2018.

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