IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 103

Originating Application No 1285 of 2024

Between

DOM

… *Applicant*

And

DON

… *Respondent*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside]

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DOM
v
DON

[2025] SGHC 103

General Division of the High Court — Originating Application No 1285 of 2024
Wong Li Kok, Alex JC
27 March 2025

28 May 2025 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 The applicant ("DOM") was appointed as the main contractor for the construction of a project involving addition and alteration works to a 4-storey factory building belonging to the respondent ("DON") pursuant to a letter of award from the project architect (the "Contract").[1] The Contract adopted the Articles and Conditions of Building Contract, Lump Sum Contract 9th edition published by the Singapore Institute of Architects (the "SIA Conditions of Contract").

[1] Interim Award (Amended) Award (VOs and Defects) dated 12 September 2024 ("Award") at [4].

2 After the project was completed, DON took possession of and occupied the building from the beginning of 2017.[2] Disputes subsequently arose between DON and DOM out of and in connection with the Contract.[3]

3 On 31 January 2018, DOM referred the dispute to arbitration pursuant to clause 37 of the SIA Conditions of Contract.[4]

4 On 29 July 2024, the tribunal issued an interim award. This award was then amended on 12 September 2024 (the "Award").[5]

Facts

Procedural history

5 In DOM's statement of case, it claimed for, *inter alia*, additional work done by way of variation orders ("VOs"), extensions of time, loss and expense due to prolonging of the contract period (Award at [9]). In DON's statement of defence and counterclaim, it claimed for, *inter alia*, delay damages and the costs of rectifying defects to the work done.

6 In its counterclaim, DON alleged that there were numerous defects throughout the building, which DOM appeared unwilling or unable to address. As such, DOM appointed the following contractors to carry out rectification works (Award at [218]):

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2 Award at [5].

3 Award at [6].

4 Award at [7]

5 1st Affidavit of [NZ] ("NZ") at para 5.

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(a) On 1 September 2018, [X] Pte Ltd ("Contractor X") was appointed to carry out the repair works for a contract sum of $3,442,842.77.

(b) On 27 February 2020, Contractor X was awarded another contract for additional repair works for a contract sum of $1,018,930.59.

(c) On 16 October 2020, [Y] Pte Ltd ("Contractor Y") was appointed to carry out additional & alteration works to L5 Garment Care for a contract sum of $1,662,658.40.

(d) On 9 June 2022, [Z] Pte Ltd ("Contractor Z") was appointed to carry out snagging and additional works for $472,815.40.

7 The tribunal directed parties to prepare Scott Schedules setting out the disputed items of VOs and defects, and the other parties' response to each item. The tribunal referred to these as the VO Scott Schedule and the Defects Scott Schedule ("DSS") (Award at [11]). For the purposes of this decision, several references are made to "DSS" numbers, *eg*, DSS 38 relating to timber decking defects (below at [101]). These correspond to the "DSS" numbers referenced in the Award and the parties' submissions and I will use the same DSS numbers for ease of reference.

8 The hearing for the dispute was bifurcated. The first tranche of the hearing, addressing both the liability and quantum for DOM's claim for VOs and DON's counterclaim for defects rectification costs took place on 18 to 28 July 2023, 9 to 13 October 2023, and 6 to 7 November 2023 (Award at [35]).

9 Parties submitted their closing submissions on 12 January 2024 (Award at [38]). Further, pursuant to directions from the tribunal, on 7 February 2024,

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the parties submitted Tables of Positions setting out a summary of their respective positions *vis-à-vis* the disputed VOs and defects.

10 The Award provided that:

(a) DOM was awarded S$704,124.10 in respect of its claims for the VOs, and interest on the aforesaid sum at the rate of 5.33% per annum from the date of DOM's statement of case; and

(b) DON was awarded S$4,926,848.16 in respect of its claims for defects, and interest on the aforesaid sum at the rate of 5.33% per annum from the date of DON's statement of defence and counterclaim. A summary breakdown of the amount awarded by the tribunal for DON's counterclaim is set out below (Award at [385]):

S/No	Description	Award
A	Waterproofing defects	$991,499.02
B	Timber decking defects	$229,078.90
C	External ponding defects	$76,928.57
D	Floor defects	$26,017.32
E	Door defects	$424,158.00
F	Toilet defects	$156,972.88
G	ACMV defects	$4,000.00
H	Ducting defects	$901,965.56
I	Plaster defects	$766,697.72
J	Paint defects	$320,067.57
K	All other defects	$43,481.00

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L	Consultants' fees	$985,981.62
	Total	$4,926,848.16

11 On 9 December 2024, DOM filed the current application to set aside portions of the Award relating to DON's claims for defects and consultants' fees.

The parties' cases

12 DOM's application is for the Award to be set aside in so far as it:

(a) awards DON the following sums:

(i) the sum of S$985,981.62 being DON's claim for consultants' fees;

(ii) the sum of S$229,078.90 being DON's claim for timber decking defects in respect of DSS 38 and 40;

(iii) the sum of S$766,697.72 being DON's claim for plaster defects in respect of DSS 1, 2, 4, 5, 6, 7, 10, 11, 18, 121, 122, 123, 124 and 125;

(iv) the sum of S$424,158.00 being DON's claim for door defects in respect of DSS 48 and 49;

(v) the sum of S$397,531.23 being DON's claim for the garment care area under waterproofing defects in respect of DSS 182;

(vi) the sum of S$357,578.41 being DON's claim for roof waterproofing in respect of DSS 29, 30, 31, 33, 34 and 35;

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(vii) the sum of S$901,965.56 being DON's claim for ducting defects in respect of DSS 60, 61, 62, 63, 65, 67, 68, 69, 70, 72, 74, 76, 77, 80, 82, 84, 84A, 86, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107 and 108;

(viii) the sum of S$156,868.84 being DON's claim for toilet defects in respect of DSS 47;

(ix) the sum of S$318,537.57 being the DON's claim for painting defects in respect of DSS 19, 20, 21, 22 and 23; and

(b) orders DOM to pay to DON interest at a rate of 5.33% on the sum of S$4,926,848.16 from the date of the Statement of Defence and Counterclaim of 24 August 2018 (the "Pre-Award Interest").

13 DOM argues that these portions of the Award should be set aside or remitted to the tribunal on the following grounds:

(a) a breach of natural justice occurred in connection with the making of the aforesaid parts of the Award, by which the rights of DOM have been prejudiced;

(b) the making of the part of the Award in relation to DON's claim for timber decking defects in respect of DSS 38 and 40 (see above at [12(a)(ii)] and below at [101]) was induced or affected by fraud; and/or

(c) parts of the Award are contrary to public policy.

14 DON argues that the application should be dismissed. DON's position is that DOM has not made out any breaches of the rules of natural justice, no parts of the Award were induced or affected by fraud, and no parts of the Award

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are contrary to public policy. In the alternative, if such grounds are made out, the relevant portions of the Award that were affected should be remitted to the tribunal for reconsideration.

Issues to be determined

15 Hence, the issues to be determined are:

(a) whether any portion of the Award was made in breach of the rules of natural justice;

(b) whether any portion of the Award was induced or affected by fraud;

(c) whether any portion of the Award is contrary to public policy; and

(d) if any of the above grounds is made out, whether the relevant portion of the Award should be set aside or remitted to the tribunal for reconsideration.

16 Given that the bulk of DOM's arguments involve breaches of natural justice, I will briefly set out the law on the setting aside of arbitral awards on the grounds of the breach of natural justice. I will then turn to address each of the portions of the Award which DOM seeks to set aside.

The law

Natural justice

17 A party challenging an arbitration award as having breached the rules of natural justice must establish (*CVV and others v CWB* [2024] 1 SLR 32 ("*CVV*")

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at [29], citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29]):

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

18 Where parties have agreed to resolve their disputes by arbitration, they are deemed to accept the risk of having a very limited right of recourse to the courts (*Palm Grove Beach Hotels Pvt Ltd v Hilton Worldwide Manage Ltd and another* [2025] 1 SLR 526 ("*Palm Grove*") at [22], citing *Soh Beng Tee* at [65(c)].) Moreover, where a party seeks to set aside an arbitral award based on the manner in which the arbitration has been conducted, such as by alleging that there was a breach of the rules of natural justice, the court will exercise its power with restraint, setting aside awards only where there is good reason to (*Palm Grove* at [23], citing *CAJ and another v CAI and another appeal* [2022] 1 SLR 505 at [1]). The court will take a generous approach in reviewing the awards in this context. Awards will be read in a reasonable and commercial way, in the sense that the general approach of the courts is to strive to uphold the award (*Palm Grove* at [23]; *CDI v CDJ* [2020] 5 SLR 484 at [31(c)]).

19 The substantive merits of the award are beyond the remit of the seat court faced with a setting aside application (*Palm Grove* at [24]). Where an tribunal has simply made an error of law and/or fact, there is no right of recourse to the courts (*AKN and another v ALC and othersand other*

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appeals [2015] 3 SLR 488 ("*AKN*") at [37]). Setting aside applications must not be abused to mount a backdoor appeal on the merits. In that regard, the Court of Appeal has just recently in *Palm Grove* (at [2]) cautioned against nitpicking at awards and stressing that "[a] supervisory court will not trawl through materials before the tribunal with a fine-tooth comb to see whether something was raised (however tangentially) and not dealt with."

Fair hearing rule

20 DOM's case is focused on various breaches of the fair hearing rule, albeit not being always clear from DOM's submissions which breach of the fair hearing rule is being invoked. I note that a breach of the fair hearing rule can manifest in, *inter alia*, the following two ways (*CVV* at [30]; *DKT v DKU* [2025] SGCA 23 ("*DKT*") at [8] and [12]):

> (a) First, the tribunal's complete failure to apply its mind to the essential issues arising from the parties' arguments (*ie*, an *infra petita* challenge). The court will not set aside an award on this ground unless such failure is a clear and virtually inescapable inference from the award.
>
> (b) Second, from the chain of reasoning which the tribunal adopts in its award (*ie*, a chain of reasoning challenge). To comply with the fair hearing rule, the tribunal's chain of reasoning must be one that (i) parties had reasonable notice that the tribunal could adopt; and (ii) had sufficient nexus to the parties' arguments. To set aside an award based on a defect in the chain of reasoning, a party must establish that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award", and thus, could not have been expected to have addressed it in his previous arguments. Only then

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can a party be said to have been unfairly denied his opportunity to be heard on that issue.

21 DOM contends that the tribunal's findings "were not ones that could be concluded as they did not reasonably flow from the parties' arguments" [emphasis removed] (*ie*, irrational and capricious and at odds with its own findings and established evidence).[6] The language it uses here (*ie*, irrational and capricious) is derived from the following paragraph in *Soh Beng Tee* (at [65(d)]):[7]

> (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. *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 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***. To echo the language employed in *Rotoaira* ([55] *supra*), the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair. [emphasis added in italics and bold italics]

22 In the full context of [65(d)] of *Soh Beng Tee*, a tribunal will have conducted the arbitral process irrationally and capriciously when it breaches the

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6 Applicant's Written Submissions ("AWS") at para 16.

7 AWS at para 15.

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chain of reasoning rule, by adopting a chain of reasoning that was unforeseeable and had insufficient nexus to parties' arguments.

23 However, at certain points, DOM argues that an award was "capricious", or "incongruent" due to *logical errors* made by the tribunal. For example, in relation to plaster defects in the external façade, DOM argues that the tribunal's decision to apportion 10% of the rectification costs relating to the external plaster defects to DON was "capricious and purely arbitrary" and "fails to take into account or is incongruent" with its own findings.[8] The tribunal found that (a) there was an overlap in rectification works undertaken by the contractors and (b) there was a lack in proper supervision by DON (see below at [137]). However, it applied the same 10% discount that had been applied to DON's claim for the timber decking defects, where only one of the two factors applied, with no reasons given as to why.[9]

24 As noted by the Court of Appeal in *DKT*, incongruency, or, to use the Court of Appeal's words, "manifest incoherence", is not in itself a ground to challenge an award for a breach of natural justice. Any manifest incoherence or incongruence that is said to infect an award must be tied back to a demonstrable breach of an established rule of natural justice (at [12]).

25 Where DOM alleges that the award is incoherent due to logical errors made by the tribunal (as at [23] above), it appears to be alleging that such incoherence gives rise to a clear and virtually inescapable inference that the tribunal had completely failed to consider an essential point. In other words, it

8 Notes of Evidence dated 27 March 2025 ("NE") at pp 18–19.

9 NE at p 19.

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is making an *infra petita* challenge, rather than a chain of reasoning challenge (see, for example, below at [144]–[146] regarding the external plaster defects).

Duty to give reasons

26 Another argument for setting aside put forward by DOM was the tribunal's failure to give reasons for its decisions.[10] While DOM acknowledged that, there is no general duty to give reasons, it argued that, following the cases of *CYE v CYF* [2023] SGHC 275 ("*CYE*") and *AUF v AUG and other matters* [2016] 1 SLR 859 ("*AUF*"), the tribunal still has a duty to explain the basis on which it had reached its decisions on *material* or *essential* issues.

27 In *CYE*, the High Court noted that "[t]he failure to give a sufficiently reasoned decision *may* be a breach of natural justice, if the award *as a whole* does not address the bases upon which the arbitral tribunal reached its decision on the material or essential issues" [emphasis in original] (at [120], citing *AUF* at [77] and [78]). In turn, the High Court in *AUF* had derived this proposition from the case of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* ("*TMM Division*") (at [78], citing *TMM Division* at [104]).

28 However, the relevant observations in *TMM Division* have since been overruled. In *CVV* (at [33]–[34]), the Court of Appeal explicitly disagreed with the observation in *TMM Division* that the standards applicable to judges set out in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676, were "assistive indicia" to tribunals in determining the scope of their duty to give reasons.

[10] NE at pp 18 and 65.

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29 As such, neither *CYE* nor *AUF* can support DOM's argument that a tribunal has a duty to explain the basis on which it had reached its decisions on material or essential issues.

30 The Court of Appeal in *CVV* noted (at [35]) that it would not make a pronouncement on the issues of (a) whether a tribunal's failure to give reasons is a ground for setting aside an award, and (b) if so, what the scope of the tribunal's duty to give reasons is. However, the Court of Appeal has since suggested that a tribunal's failure to provide reasons for its decision remains to be "not [a ground] that can sustain the setting aside of an arbitral award" (*Wan Sern Metal Industries Pte Ltd v Hua Tian Engineering Pte Ltd* [2025] 1 SLR 88 at [26]).

31 In any case, I note that DOM's argument on the duty to give reasons is ultimately premised on a breach of the rules of natural justice – it forms part of its wider argument that the tribunal had failed to apply its mind to material or essential issues. In that regard, I highlight the Court of Appeal's observation in *CVV* (at [35]) that the inadequate provision of reasons and explanations is, without more, a mere error of law, and an allegation of the same is therefore incapable of sustaining a challenge against an award.

32 I now turn to each of the portions of the Award which DOM seeks to set aside.

Consultants' fees

33 In addition to its counterclaims for the cost of rectifying various defects (above at [5]), DON had also counterclaimed for five sets of consultants' fees that were incurred in connection with the rectification works. These consultants' fees represent the second largest amount of the sums awarded by the tribunal

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(above at [10(b)]). In support of its claim, DON cited the case of *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 ("*Sandy Island*"). In *Sandy Island*, Lee Seiu Kin J (as he then was) had allowed the plaintiff's claim for "costs incurred in engaging independent third parties to investigate the defects in the Property, to prepare lists to notify the Defendant of these defects and to engage architects and engineers in respect of the rectification works" (*Sandy Island* at [75] and [78]).

34 The sums claimed and the roles of each consultant are as follows (Award at [371]):

S/No	Consultant	Fee
1	[A] Pte Ltd ("Consultant A") – Contract Administrator & Technical Advisor	$1,149,710.24
2	[B] Pte Ltd ("Consultant B")– Project Manager	$254,303.00
3	[C] Singapore Pte Ltd ("Consultant C") – Quantity Surveyor	$328,000.00
4	[D] LLP ("Consultant D") – M&E Engineer	$174,950.00
5	[E] Pte Ltd ("Consultant E") – Structural Engineer	$65,000.00
	Total	$1,971,963.24

The tribunal's findings

35 The tribunal's analysis began with an introductory section in the Award that dealt generally with the consultants' fees (Award at [372]–[374]). It then went on to address each specific consultants' fees in separate individual sections (Award at [375]–[385]).

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Tribunal's introductory comments to the claim for consultants' fees

36 The tribunal first laid out DON's submissions, before making some comments on the evidence DON had put forward in support of its claim (at [372]–[373] of the Award):

> 372. [DON] submitted it was entitled to claim the costs paid to the various consultants, referring to the case of **Sandy Island** (Damages, HC) where the court allowed investigation costs incurred in engaging *"independent third parties to investigate the defects [in the Property], to prepare lists to notify the Defendant on the defects, and to engage architects and engineers in respect of the rectification works."* The court agreed that these third parties were "necessary", find that the claim for their costs was "reasonable" due to the extent of the defects in the Building.
>
> 373. [DON]'s claim for consultant's fees is by far the largest item of claim under 'defects.' As mentioned above, the Court has held that a plaintiff owner is entitled to claim for professional fees paid to *"independent third parties to investigate the defects [in the Property], to prepare lists to notify the Defendant on the defects, and to engage architects and engineers in respect of the rectification works."* However there is little or no explanation of why [DON] had to engage so many consultants to investigate the defects in respect of the rectification works. There was no explanation or evidence of what were the roles of each of these consultants or what they were doing. All that [DON] exhibit [*sic*] were invoices paid to these consultants. [DON] only exhibited invoices rendered by these consultants. There was no evidence of payments made to these consultants.
>
> [emphasis in original]

37 With this introduction in mind, the tribunal then went on to consider the claims for each of the consultants' fees.

Consultant A (Contract Administrator & Technical Advisor)

38 The tribunal found that professional fees of $1,149,710.24 were paid to Consultant A for "contract administration and technical expert services" provided by its then-director, Mr [NJ], starting from August 2017 (Award at

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[375]). Mr [NJ] was also DON's expert witness in the arbitration proceedings (Award at [37(e)]). However, there was "no proper explanation of what Mr [NJ] [was] doing as the contract administrator and as a technical expert" (Award at [376]).

39 The tribunal found that in relation to Mr [NJ]'s role as a contract administrator, it "would expect Mr [NJ] to be responsible for not only administering the rectification contract, but also supervising the rectification works". This was supported by Mr [NJ]'s expert report, wherein he had stated that he had "worked alongside [the] contractors to carry out the rectification / investigative works" [emphasis in original omitted] (Award at [376]).

40 Bearing that in mind, the tribunal questioned why there was a need to appoint another project manager (*ie*, Consultant B):

> 376. … If Mr [NJ] was working so closely with these rectification contractors to carry out the rectification works, *why was there a need to appoint a project manager*, whom I assume *would also be supervising the rectification works*? In my view, there is a *duplication of Mr [NJ]'s role and time spent as the contract administrator with that of the project manager*. [emphasis added]

41 Moreover, the tribunal also found that the fees paid to Mr [NJ] / Consultant A for the contract administration and technical services overall were excessive. This was because there was an overlap in terms of the hours billed by Mr [NJ] as a consultant and as an expert in the proceedings (the latter not being claimable) (Award at [377]):

> 377. Secondly, although Mr [NJ] was appointed as [DON]'s defects expert to give his opinion on the cause of the defects for the purpose of this arbitration proceeding, he cannot be said to be an "independent" expert because he was also appointed as [DON]'s technical expert to advise on the rectification works. I find the fees paid to him to be excessive. The time and costs claimed by Mr [NJ] / [Consultant A] for contract administration and technical services is disproportionately high, compared to

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> the costs of rectifications. I agree with [DOM] that there is an overlap in terms of the hours billed by him as a consultant for the rectification works and as an expert in these proceedings. …

42 This was evidenced by the fact Mr [NJ] continued to bill DON for work done even *after* the last rectification works had been completed:

> 377. … There is no proper breakdown or description of the time he spent as a consultant and as an expert. The last rectification contract was awarded to [Contractor Z] in June 2022. [Contractor Z]'s works were completed in August 2022.
>
> 378. From September to December 2022, Consultant A billed [DON] $175,418.75 for 825.5 hours of work and from January to June 2023, [Consultant A] billed [DON] $316,837.50 for 1491 hrs [*sic*] of work. In other words, after the completion of the last rectification works by [Contractor Z] in August 2022, [Consultant A] billed [DON] $492,256.25 for 2,320.5 hours of work. There is no explanation of what Mr [NJ] was doing after August 2022 and why [Consultant A] was still billing [DON] for technical expert services from August 2022 to June 2023 when the last rectification works were completed in August 2022.
>
> 379. Mr [NJ]'s expert report is dated 7 June 2023. On the assumption that Mr [NJ] would have required some time to prepare his report before June 2023, it appears to me that there is an overlap between the time he spent as the technical expert / consultant and his time taken to prepare his report as an 'independent' expert for this arbitration. There is no proper breakdown or description in the invoices exhibited of the time he spent as a technical consultant and as an expert. If [DON] is claiming for the fees paid to him / [Consultant A] from August 2022 to July 2023 as its defects expert in this arbitration, then such fees are not claimable as professional fees in connection with the rectification works because such fees forms part of the costs of the arbitration, and cannot be considered as fees payable in connection with the rectification works. …

43 Thus, "[d]ue to insufficient evidence to support [DON]'s claim for [Consultant A]'s fees", the tribunal reduced Consultant A's fees by 50% (Award at [379]).

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44 Here, I would note that while the tribunal does point out deficiencies with DON's evidence, these deficiencies are with regard to the claim for Consultant B's fees, rather than the claim for Consultant A's fees (above at [40]). In my judgment, the fact that the tribunal *questions the need to appoint Consultant B* bearing in mind Mr [NJ]'s role as the contract administrator, indicates that the tribunal has implicitly accepted that Consultant A's role as a contract administrator was indeed reasonable and necessary.

Consultant B (Project Manager)

45 DON was also claiming for fees paid to Consultant B for project management services from October 2018 to November 2021, totalling $254,303.00. There was "no elaboration or explanation of why a project manager had to be appointed and what [Consultant B] was doing as project manager" (Award at [380]).

46 The tribunal repeated the findings it made (above at [40] and [46]) that there was no apparent need to appoint a separate project manager, as Mr [NJ] was already performing effectively the same role (Award at [380]):

> 380. … Mr [NJ] had said that he *'…worked alongside these [rectification] contractors to carry out the rectification / investigative works.'* If he was working alongside these rectification contractors, he would to [*sic*] be intimately involved with the rectification works carried out by these contractors, and be practically overseeing and managing the rectification works. Given his close involvement and management of the rectification works, I do not see why there was a need for [DON] to separately appoint a project manager. [emphasis in original]

47 The tribunal then went on to note that the contractors which Consultant B had been appointed to manage had carried out additional works that did not relate to the rectification works. However, there was no breakdown of which

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fees were incurred in the course of project managing the rectification works, as compared to the additional works (Award at [381]–[382]):

> 381. Further, [Contractor X] was appointed in September 2018 to carry out the defects rectification works for a contract sum of $3,442,842.77. In [Consultant C's] Valuation for Final Certificate dated 27 February 2023, [Contractor X] had apparently carried out $2,762,696.73 of variation works and optional works ("additional works"), bringing [Contractor X]'s total value of work completed to $6,205,539.50. In other words, nearly 45% of the total work done by [Contractor X] did not relate to the rectification works. Similarly for the Additional Repair Works which was awarded to [Contractor X] on 27 February 2022, the original contract sum was $1,018,930.59. In the Final Accounts dated 16 March 2022, [Contractor X] carried out $91,069.41 of further additional works. [Contractor Y] was awarded the contract for A&A works to L5 Garment Care area on 16 October 2020 for a contract sum of $1,662,658.40. The additional works carried out by [Contractor Y] was $488,583.60. Some of [Contractor Y]'s additional did not relate to rectification works.
>
> 382. As [Consultant B] was the Project Manager for the rectification works, [Consultant B] would presumably also be project managing not only [Contractor X]'s 2 contracts and [Contractor Y]'s contract, but also the additional works under these contracts as well. [Consultant B]'s invoices however did not distinguish between project managing the rectification works and the additional works. In my view, [Consultant B] was not only project managing the rectification works but also the additional works carried out by [Contractor X] and [Contractor Y], and [Consultant B] had claimed such fees from [DON] as such. …

48 As such, it again reduced Consultant B's fees by 50% "[d]ue to insufficient evidence" (Award at [382]).

Consultant C (Quantity Surveyor)

49 DON claimed for fees paid to Consultant C for quantity surveying services relating to the defect rectification works from September 2018 to July 2022, totalling $328,000.00 (Award at [383]).

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50 Here, the tribunal did not raise any issues with the necessity of Consultant C's role as a quantity surveyor. However, much like with Consultant B, it noted that the works that Consultant C undertook included surveying both rectification works and additional works. It therefore also applied a 50% discount to DON's claim for Consultant C's fees (Award at [383]):

> 383. [DON] is claiming for fees paid to [Consultant C] for quantity surveying services relating to the defects rectification works from September 2018 to July 2022 totalling $328,000.00. There is no explanation of which part of the quantity surveying services [Consultant C] provided was in relation to the rectification works, and which was in relation to [Contractor X]'s and [Contractor Y]'s additional works. [Consultant C] was also involved in valuing [Contractor X]'s and [Contractor Y]'s interim payments and the Final Certificate, not all of which relate to rectification works. As such and due to insufficient evidence, I will reduce [Consultant C]'s fees by 50%.

Consultant D (M&E Engineer)

51 DON made a claim for $174,950.00 in fees paid to Consultant D as the Mechanical & Electrical Engineer (Award at [384]).

52 The tribunal noted that there was no explanation of why an M&E engineer had to be appointed for the rectification works (Award at [384]). Moreover, it was unclear whether this was in relation to the rectification works, or in relation to the additional works:

> [DON] is claiming $174,950.00 in fees paid to [Consultant D] as the M&E engineer[.] However there is no explanation of why an M&E engineer had to be appointed for the rectification works and what M&E services were provided by [Consultant D]. It is not clear whether these were in relation to [Contractor X]'s or [Contractor Y]'s additional works or rectification works. As such and due to insufficient evidence, I will reduce [Consultant D]'s fees by 50%.

53 Hence, the tribunal's findings in relation to Consultant D differs slightly from its above findings in relation to Consultant A, Consultant B and

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Consultant C (above at [41]–[42], [47], and [50]). Where before, it was unclear what proportion of the professional fees were in relation to the rectification works versus the additional works, here, the tribunal states that it is uncertain if the professional fees were in relation to the rectification works *at all*.

Consultant E (Structural Engineer)

54 DON claimed for $65,000.00 in fees paid to Consultant E for civil and structural engineering services (Award at [385]).

55 Much like with Consultant D, the tribunal found that there was no explanation of why a structural engineer had to be appointed for the rectification work, and whether these fees were even in relation to the defect rectification or additional work (Award at [385]):

> 385. As for $65,000.00 in fees paid to [Consultant E] for civil & structural engineering services, there is also no explanation why a structural engineer had to be appointed for the rectification works and whether these were in relation to the defects rectification or additional work. As such, and due to insufficient evidence, I will reduce [Consultant E]'s fees by 50%.

Parties' arguments

56 DOM contends that the tribunal had adopted methods of valuation on an arbitrary basis to fill in fundamental deficiencies in DON's case, without first affording the parties an opportunity to address him on the same.[11] Further, this method of valuation did not reasonably flow from parties' arguments. The tribunal had alluded to the insufficiency of evidence to support DON's claim and questioned if payments were even made to the consultants.[12] Moreover, it

11 AWS at para 23.

12 AWS at para 31.

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noted that there was no evidence led on the roles undertaken by the different consultants, and no explanation of why the consultants had to be appointed. Despite this, it went ahead to award DON its claims after applying an "evidence discount" of 50% for all the consultants.[13]

57 In particular, DOM submitted that the current case is analogous to the case of *CEF and another v CEH* [2022] 2 SLR 918 ("*CEF*").[14] *CEF* involved an application to set aside, *inter alia*, an order allowing the respondent's claim for reliance loss against the appellants. The appellants argued that the order had been issued in breach of natural justice. The *CEF* tribunal had rejected and/or found that the respondent's evidence in support of its five heads of reliance to be deficient yet proceeded to adopt a "flexible approach" and awarded the respondent 25% of each head of reliance loss, without first inviting submission from the parties (at [108]).

58 The Court of Appeal in *CEF* agreed with the appellants and found that the *CEF* tribunal's chain of reasoning was not one which the parties had reasonable notice that the *CEF* tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments (*CEF* at [116]). First, both parties would have expected that the *CEF* tribunal would only award the respondent loss that the respondent could prove. Hence, a reasonable litigant in the appellants' shoes could not have foreseen that the *CEF* tribunal, having expressly noted that there were deficiencies in the respondent's evidence, would then go on to adopt a figure of 25% of the amount claimed as being the reliance loss incurred (*CEF* at [117]). Second, the *CEF* tribunal justified its reasoning with reference to the "flexible approach" in *Robertson Quay Investment Pte Ltd v Steen Consultants*

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13 AWS at para 29.

14 AWS at para 42.

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Pte Ltd [2008] 2 SLR(R) 623 ("*Robertson Quay*"). However, the parties in *CEF* had not cited *Robertson Quay* for this proposition. The sole reference to *Robertson Quay* was made by the respondent in support of its argument that "the question was simply 'whether the Tribunal is satisfied that [the respondent's] evidence on the loss and quantification is *more likely to be true than not*'" [emphasis in original] (*CEF* at [118]–[119]). In other words, even the respondent acknowledged that on the "flexible approach", the *CEF* tribunal had to first be satisfied that the respondent's evidence was more likely to be true than not. Hence, the *CEF* tribunal's reliance on the "flexible approach" in *Robertson Quay* had no connection to the parties' arguments.

59 In response, DON noted that, following *CEF* at [102], the "no evidence rule" does not apply in Singapore.[15] As such, the mere fact that the tribunal made its findings based on insufficient evidence is not grounds for setting aside the award relating to the consultants' fees.

60 DON also argued that the tribunal had, in fact, decided that DON was entitled to its claim for consultants' fees. At [373] of the Award, the tribunal noted that "the Court has held that a plaintiff owner is entitled to claim for professional fees" (above at [36]). From this, it appears that the tribunal had accepted that DON was entitled to its claim for the consultants' fees.[16] Hence, any references to inadequacies in DON's evidence in the later sections dealing expressly with each specific consultant's fees are simply the tribunal noting that there was insufficient evidence for him to make an exact apportionment, rather than any finding that there was insufficient evidence to show that DON had incurred the consultants' fees.

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15 NE at p 66.

16 NE at pp 40–41.

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Application to the law

61 In my judgment, DOM's complaint is not that the tribunal made its decision with insufficient evidence. Rather, its compliant is that the tribunal had explicitly found that there were deficiencies in DON's evidence, and despite this, had gone on to grant DON's claims after applying what DOM termed an "evidence discount" of 50%.

62 First, both parties have advanced arguments relating to the tribunal's comments in the introductory section of the Award (see above at [35]).

63 DON argues that by the tribunal stating, at [373], that "[a]s mentioned above, the Court has held that a plaintiff owner is entitled to claim for professional fees paid [to independent consultants]", the tribunal means that it accepts that DON is entitled to its claim for professional fees.[17]

64 On the other hand, DOM notes the tribunal's observation that all that DON had exhibited were invoices paid to the consultants, and there was no evidence of payments made to the consultants. Nor had DON provided much explanation of why it had to engage the consultants, their roles, or the work that they did. DOM thus argues that, in deciding to grant 50% of the consultants' fees despite its finding that DON's evidence was inadequate, the tribunal had adopted a chain of reasoning that was unforeseeable and had insufficient nexus to the parties' arguments.[18]

65 I disagree with DON's interpretation of the Award. Even reading the Award generously, I do not see how that statement is anything other than the

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17 NE at p 40.

18 AWS at paras 40–41.

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tribunal restating the law. It does not express a view that the tribunal concludes that DON is thus entitled to all consultants' fees such that it just becomes a question of appointment. Further, where the tribunal references "the Court" at [373] of the Award (above at [36]), it is clearly referring to the High Court in *Sandy Island*, which it had referenced in the paragraph above (at [372] of the Award), and not the specifics of DON's claim.

66 At the same time, I also disagree with DOM that the tribunal had adopted a chain of reasoning that was unforeseeable or had insufficient nexus to parties' arguments.

67 DON had cited the case of *Sandy Island* in support of its claim for consultants' fees, as noted by the tribunal at [372] of the Award.[19]

68 In *Sandy Island*, the plaintiff claimed "costs incurred in engaging independent third parties to investigate the defects in the Property, to prepare lists to notify the Defendant of these defects and to engage architects and engineers in respect of the rectification works" (at [75]). In support of this claim, the plaintiff stated in his AEIC that he had engaged independent third parties to do such works and exhibited invoices from those parties (*Sandy Island* at [76]).

69 In turn, the defendant submitted that the plaintiff was not entitled to the fees for certain consultants, as the plaintiff had either (a) not provided evidence to justify their engagement; or (b) certain parties' roles appeared to overlap with others (*Sandy Island* at [77]).

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[19] DON's Closing Submissions, Part I at para 60 (NZ at p 228)

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70 Despite this, Lee J found that the plaintiff had asserted in his AEIC that those three consultants were necessary, and *in Lee J's own view*, "given the extent of the defects, it was reasonable for the Plaintiff to engage these three consultants" (*Sandy Island* at [78]). As such, he allowed the entirety of the plaintiff's claim for investigation costs.

71 The proposition that arises from *Sandy Island* is thus that before an adjudicator may claim for investigative costs from independent third parties, he must first be satisfied that it was reasonable and necessary to hire those parties. The relevant adjudicator must make this determination based on the entirety of the evidence presented to him.

72 Hence, the mere fact that the tribunal observed that the only evidence DON produced in support of its claim were invoices, and that it had not provided an explanation of the roles of its consultants is not, in and of itself, fatal to DON's case. In my judgment and given that the same could be said of the claimant's case in *Sandy Island*, it was not unforeseeable that the tribunal would follow Lee J and decide that, on the entirety of the evidence before him, hiring the consultants was still reasonable and necessary. Relying on the logic in *Sandy Island*, the tribunal's chain of reasoning in this regard also has sufficient nexus to parties' arguments and DOM has failed to convince me otherwise.

Individual consultants' fees

73 Moving on to the positions taken with respect to the specific consultants' fees, these can be divided into two groups. The first are those consultants whom the tribunal had expressly found that the consultants' appointments were unnecessary (*ie*, Consultant B, Consultant D and Consultant E). The second are those consultants whom the tribunal did not express any doubts about their

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necessity, but noted some uncertainty about the *proportion* of fees that were incurred in relation to rectification works (which were relevant to DON's counterclaim) as opposed to other works (which were not relevant to DON's counterclaim) (*ie*, Consultant A and Consultant C).

(1) There are breaches of natural justice in relation to the award of consultants' fees for Consultant B, Consultant D and Consultant E's services

(A) CONSULTANT B (PROJECT MANAGER)

74 The tribunal repeatedly noted (above at [40] and [46]) that it did not see why there was a need to hire a project manager – in other words, it was quite emphatic that what Consultant B was doing was (with respect to DON's counterclaim) unnecessary. Even though it then went on to note (see [47] above) that Consultant B did not provide a breakdown of which fees related to rectification works or additional works, the tribunal never backtracked from its position that Consultant B's activities were unnecessary.

75 In my judgment, it is this clear finding that Consultant B's services were unnecessary that makes the award for Consultant B's fees akin to the award for reliance loss in *CEF* (above at [58]).

76 The parties in this case would have expected that, at the very least, the tribunal would only award consultants' fees that the tribunal found to be necessary. Hence, much like in the case of *CEF* (above at [58]), a reasonable litigant in DOM's shoes could not have foreseen that the tribunal, having *expressly* found that it did not think it was necessary to hire Consultant B, would then go on to award DON's claim for Consultant B's fees anyway, after applying a 50% discount.

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77 For the same reason, the tribunal's chain of reasoning had insufficient nexus to parties' arguments. DON's own case was that the tribunal had to be satisfied that the consultants' fees were necessary.[20] Hence, the tribunal's decision to award the Consultant B's fees despite its finding that Consultant B's services were unnecessary had no nexus to the issue before him.

78 That being the case, I agree with DOM that there was a breach of natural justice in the award of Consultant B's fees.

(B) CONSULTANT D (M&E ENGINEER) & CONSULTANT E (STRUCTURAL ENGINEER)

79 The tribunal's findings in relation to Consultant D and Consultant E are similar in that it was uncertain if their fees related to services performed for the rectification works (above at [53] and [55]). That being the case, much like with Consultant B, the tribunal seemed clearly unconvinced that the services of Consultant D and Consultant E were necessary for the rectification works.

80 Thus, I repeat my observations at [75]–[77] above, and agree with DOM that there was a breach of natural justice in the award of Consultant D's fees and Consultant E's fees.

81 These breaches of natural justice were also connected to the making of the award, as the tribunal awarded DON 50% of its claims for Consultant B's fees, Consultant D's fees and Consultant E's fees based on that chain of reasoning. This breach of natural justice also prejudiced DOM's rights, as had the tribunal informed parties of its intention to apply a discount to DON's claim for the consultants' fees, DOM would have had the opportunity to inform the

[20] DON's Closing Submissions, Part I at para 60.

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tribunal of its objections, which could reasonably have made a difference to the outcome of this arbitration (*CEF* at [121], citing *BZW and another v BZV* [2022] SGCA 1 ("*BZW*") at [63]).

(2) There are no breaches of natural justice in relation to the award of consultants' fees for Consultant A and Consultant C's services

(A) CONSULTANT A (CONTRACT ADMINISTRATOR & TECHNICAL ADVISOR)

82 Unlike Consultant B, it appears that the tribunal was of the view that Consultant A's services were necessary. Though it noted overlaps between Consultant A's role as a contract administrator and Consultant B's role as the project manager, the tribunal only questions *the need to appoint Consultant B* bearing in mind Mr [NJ]'s role as the contract administrator. In my judgment, this suggests that the tribunal was satisfied that the role played by Mr [NJ] and Consultant A was necessary (above at [40] and [44]).

83 The tribunal expressly noted that the fees of $492,256.25 billed by Consultant A from September 2022 to June 2023 did not appear to relate to rectification works. In my judgment, the fact that the tribunal decided to reduce Consultant A's fees on a percentage basis, rather than simply deducting the sum of $492,256.25 demonstrated that, similar to Consultant B's services, there was overlap in the services performed by Mr [NJ] and Consultant A such that those services did not all relate to rectification works (Award at [378]–[379]).

84 DOM thus argues that (a) the tribunal's choice to apportion the fees on a percentage basis, *per se*, was an unforeseeable departure from parties' arguments, and (b) that the tribunal's choice to award 50% of Consultant A's fees, without first deducting the sum of $492,256.25 from the claim was

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incongruous with its finding that the said sum did not relate to rectification works.[21]

85 I disagree with DOM's contention that the tribunal's decision to apportion the fees in and of itself was unforeseeable. DOM's own argument was that "there was a considerable overlap in terms of the hours billed by Mr [NJ] per month" between his work as (a) a consultant, and (b) an expert witness (Award at [374]). It was therefore foreseeable that some kind of apportionment would be necessary if the tribunal agreed that a portion of the sums should not be claimable. While DOM's argument was that Consultant A's fees should not be claimable in their entirety, it cannot seriously be said that the tribunal can only find that either (a) the entirety of Consultant A's fees should be claimable or (b) that none of it should be claimable. As the Court of Appeal held in *Soh Beng Tee*, "it is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute", but a tribunal "is not bound to adopt an either/or approach" and may adopt a middle path even without informing parties (at [65(e)]). As such, it must have been foreseeable that the tribunal might find that a portion of Consultant A's fees were claimable, while another portion was not, and as such, it would have to apportion the costs claimed.

86 Its chain of reasoning also has sufficient nexus to parties' arguments. As I noted above at [85], its chain of reasoning was based on DOM's own argument that there was an overlap in terms of the hours billed for the rectification works, and for other works.

87 Further, the tribunal is not filling a fundamental deficiency in DON's case by apportioning the claim for Consultant A's fees. As I noted above (at

[21] NE at p 15.

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[82]), the tribunal had already implicitly found that Consultant A's services were necessary, and thus, that its fees were claimable. The mere fact that the tribunal agreed with DOM that a portion of Consultant A's fees comprised sums billed in relation to works other than the rectification works is not fatal to DON's claim. Nor is it fatal that DON had not provided a breakdown of the fees that could be attributed to rectification works versus other works. The tribunal was entitled to, as it did, examine the *other available evidence* – *eg*, the time periods reflected in Consultant A's bills – to determine what portion of Consultant A's fees related to the rectification works (see above at [42]).

88 I also disagree with DOM's other argument (at [84(b)] above) that the tribunal's choice to award 50% of Consultant A's fees, without first deducting the sum of $492,256.25 from the claim was unforeseeable and/or had insufficient nexus to parties' arguments.

89 This argument would involve delving into the merits – whether the tribunal had made an error in how it apportioned costs or had applied the "correct" method of apportioning the costs – which is inconsistent with the ethos of the setting aside of arbitration awards (see [19] above). In the same vein, I also disagree with the suggestion that by awarding 50% of Consultant A's fees without first deducting the sum of $492,256.25, the tribunal is filling a fundamental deficiency in DON's case. Given that the tribunal was entitled to apportion the claim for Consultant A's fees, if the tribunal had made an error in calculation that is to the benefit of DON while undertaking this apportionment exercise, that is at best an error of fact, which is not a ground for setting aside an arbitral award.

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90 That being the case, I do not find that there has been any breach of natural justice in the tribunal's award for DON's counterclaim relating to Consultant A's fees.

(B) CONSULTANT C (QUANTITY SURVEYOR)

91 DOM's argument in relation to Consultant C's fees is that the tribunal's decision to apportion the claim for Consultant C's fees was in and of itself an unforeseeable departure from parties' submissions.[22] This argument is the same as that advanced at [84(a)] in respect of Consultant A's fees.

92 The tribunal's findings in relation to Consultant C are also similar to those relating to Consultant A. In other words, the tribunal did not raise any issues in relation to the necessity of Consultant C's services (see [50]). Rather, the concerns it raised were with the portion of the fees incurred for services relating to rectification works, as compared to additional works.

93 As such, I repeat my observations at [85]–[86] and do not find there has been any breach of natural justice in the tribunal's award for DON's counterclaim relating to Consultant C's fees.

(3) The award of Consultant B, Consultant D and Consultant E's fees should be set aside

94 The only question remaining is whether the portions of the Award relating to Consultant B's fees, Consultant D's fees and Consultant E's fees (where I found there has been a breach of natural justice (above at [78], [80] and [81])) should be, as DON argues, remitted to the tribunal for reconsideration, or, as DOM argues, simply set aside.

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[22] AWS at para 40.

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95 In *CEF*, the Court of Appeal noted that resolving the question of whether to remit should, among other considerations, involve applying the objective test of whether a reasonable person would be confident that a tribunal would be able to reconsider the issue in a fair and balanced manner. On the facts of that case, the Court of Appeal found that a reasonable person would not have that necessary confidence, after having assessed how the impugned decision had been arrived at (at [124]).

96 The impugned decisions in the current case had been arrived at in much the same way as that in *CEF*. In *CEF*, the tribunal found that the respondent had not proven its reliance loss. Despite that, the *CEF* tribunal went ahead to grant its claim for reliance loss after applying a percentage discount. Thus, the Court of Appeal found that a reasonable person would not have the necessary confidence after having assessed the aforesaid arbitrary manner in which the *CEF* tribunal had arrived at its decision (at [117]–[119] and [124]). Here, the tribunal found that DON had failed to prove that the services of Consultant B, Consultant D, and Consultant E were necessary. Despite this, the tribunal went ahead to award DON these fees after applying a percentage discount. Given the similarities between how the respective tribunals had arrived at impugned decisions in the current case and *CEF*, this suggests that similarly, no reasonable person would have the necessary confidence in the tribunal's ability to re-consider DON's claim for Consultant B, Consultant D, and Consultant E's fees in a fair and balanced manner.

97 The Court of Appeal also found that as the *CEF* tribunal had determined that there was insufficient evidence on the record to support each head of reliance loss claimed after having dealt with each head in detail, "it would be pointless to send the claim back to the Tribunal to repeat an exercise which, logically, should result in the same conclusion of lack of evidence" (at [124]).

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The same can be said here. The tribunal had examined the claims for Consultant B, Consultant D and Consultant E's fees in detail and found that DON had not proven that their services were necessary. Hence, if the claim was remitted to the tribunal, logically, it would come to the same conclusion.

98 DON has raised the concern that the tribunal has already heard the 2nd tranche of the arbitration, so if this award were set aside to be reheard by a new tribunal, it may result in parts of or the entire 2nd tranche to be reheard.[23] However, I do not think that the consequences of setting aside this portion of the Award will result in such dire consequences. The portion of the Award relating to Consultant B's fees, Consultant D's fees and Consultant E's fees concern self-contained and isolatable issues. I do not see how they would have the outsized impact raised by DON.

99 In summary and with respect to the consultants' fees, I conclude that the portions of the Award relating to DON's counterclaim for the sums of S$254,303.00, S$174,950.00 and S$65,000.00, for Consultant B's fees, Consultant D's fees and E Consultant's fees respectively, be set aside. I reach the opposite conclusion with respect to the portions of the Award relating to Consultant A's fees and Consultant C's fees and I dismiss DOM's application to set aside the Award with respect to Consultant A's fees and Consultant C's fees.

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[23] Respondent's Written Submissions ("RWS") at para 191.

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Timber decking

100 DOM argued that the part of the Award relating to the cost of rectifying defects for DSS 38 and 40 should be set aside on the grounds of breach of natural justice, and/or that such part of the Award was induced by fraud.

101 DSS 38 and 40 relate to rainwater ingress into the building from the timber decking at level 5 and level 6 caused by DOM's defective construction of the timber decking (the "Timber Decking Defects"). DON's case was that according to the architect's design/detailing of the timber decking, there should be a 3 mm gap between each of the timber strips of the timber decking. DOM had only provided a gap of 1 mm, thereby causing water to collect at the timber decking instead of draining into the concrete slab below (Award at [273]). DON also noted that the architect's floor design showed a drop / difference of 25 mm between the internal floor level and external timber decking (Award at [274]). However, the timber decking was incorrectly installed higher than the internal floor level, thereby resulting in the rainwater seepage into the building.

The tribunal's findings

102 The tribunal first referenced the Timber Decking Defects in its introductory remarks, noting (at [246] of the Award):

> 246. Some defects may be due to poor design or detailing, as with the Architect's design of an 'open' style canopy with a short 1.0 m cantilever at the L6 outdoor terrace, and the detailing of the entrance/doorway from timber decking at L5 and L6 and the internal area. Better design and detailing could have prevented or minimised the impact of the water ingress and seepage issues.

103 In its analysis of the Timber Decking Defects, the tribunal found that DOM's defective construction of the timber decking was "obvious". However, that raised questions of why this was not pointed out to DOM during

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construction. Thus, the tribunal found that the Timber Decking Defects were due to "a combination of bad workmanship and poor supervision" (Award at [277]):

> 277. From the photographs exhibited in Mr [NJ]'s report / supporting documents, it was obvious that the outdoor timber decking was constructed higher than the internal level. The gap between the timber strips was only about 1 mm and not 3 mm as indicated in the drawings. This was not disputed by [DOM]. The narrow gap could have caused rainwater to collect above the timber strips instead of draining to the floor slab below. This was exacerbated by the fact that the canopy / overhang above was too short and insufficient to prevent rainwater from splashing onto the glass panels at L5. As the gap between the timber strips would have been obvious during construction, the question is why was this not pointed out to [DOM] and why did the RTO, project manager or the Architect allow [DOM] to construct it this way. In my view, this defect was due to a combination of bad workmanship and poor supervision. I find that due to the narrower than specified gaps between the timber strips and the mismatch between the new and the old timber strips, it was reasonable for [DON] to replace all the timber strips. However, this could have been avoided had [DON]'s site supervisors pointed this out during construction and stopped [DOM] from installing the timber strips without the 3 mm gap.

104 That being the case, the tribunal found that DON was "only entitled to 90% of the cost of rectification claimed for DSS 38 and 40" (Award at [278]).

Breach of natural justice

105 DOM claims that the award was granted in breach of the fair hearing rule, as (a) the tribunal's award was incongruous with its previous finding of fact;[24] (b) it failed to explain the basis of its apportionment of liability;[25] and (c)

[24] AWS at para 55.

[25] AWS at para 58.

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it failed to invite submissions from parties before deciding to apportion the claim for the timber decking defects.[26]

106 DOM also raised the issue of whether DON "had truly claimed for and were awarded only 20% of the replacement of the timber strips" in its written submissions,[27] but conceded in its oral closing submissions that this was an error of fact, which cannot constitute the basis for setting aside an arbitral award.[28] I will thus not address this latter issue.

107 For completeness, DOM also observed that there was a "minor arithmetical error" in the tribunal's calculations, as "[i]f 100% of [DON]'s claim was accepted to be S$254,532.00, then 90% would S$229,078.80".[29] By DOM's own words, it accepts this is an error of fact. Hence, as errors of fact do not constitute grounds for setting aside (see above at [18]), I do not see DOM's point in bringing up this issue.

The tribunal's award is not incongruous with its finding regarding the design of the canopy / overhang

108 DOM argues that the tribunal should have considered or applied a discount to DON's claim for the Timber Decking Defects. According to DOM, a proper architectural design of the canopy / overhang would have prevented or minimised the impact of water ingress or seepage.[30] DOM's case is that this failure to take the design of the canopy / overhang into account is incongruent

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26 AWS at para 58.

27 AWS at paras 62– 63.

28 NE at p 18.

29 1st Affidavit of [MA] ("MA") at para 68 and 1st Affidavit of [MK] ("1MK") at para 11.

30 AWS at para 55.

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with the tribunal's own earlier finding that "[s]ome defects may be due to… the Architect's design of an 'open' style canopy with a short 1.0m cantilever at the L6 outdoor terrace" (Award at [246]).

109 DON counters that this was made as the tribunal's introductory remarks, and should be understood as an "observation that '*better*' design and detailing of the canopy and doorway entrance could have prevented or minimised water ingress" [emphasis in original].[31] It was "not a finding that the canopy design or entrance doorway detailing was defective" [emphasis in original]. While the tribunal's language "could have been more precise", DON argues that arbitral awards should be read generously and thus "any perceived ambiguity should be construed in favour of the Tribunal".[32]

110 It is unclear whether DOM is complaining that: (a) a reasonable litigant in its shoes could not have foreseen the possibility of reasoning of the type revealed in the award – *ie*, that the tribunal would make an award that is contrary with its earlier finding; or (b) that this logical error leads to the clear and virtually inescapable inference that the tribunal had failed to apply its mind to this issue.

111 In any case, this does not matter, as, in my judgment, there was no such finding by the tribunal of a defective design. I agree with DON's interpretation of the tribunal's statement. In fact, there is no need to resort to the general principle that arbitral awards should be read generously – the tribunal goes on to explain at [271]–[272] and [277] of the Award what it meant by its statement

31 RWS at para 51.

32 RWS at para 53.

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(at [246]) that "[s]ome defects may be due to… the Architect's design of an 'open' style canopy with a short 1.0m cantilever at the L6 outdoor terrace".

112 The tribunal addresses the impact of the architect's poor design in relation to defects DSS 36 and 37. Where the Timber Decking Defects in DSS 38 and 40 relate to defects in the installation of the timber decking, DSS 36 and 37 relate to waterproofing failures at the timber decking area on levels 5 and 6, which, according to DON, "caused leakage from the outdoor terrace area of L6 into the L5 office areas during periods of heavy rain" (Award at [269]). At [271], the tribunal notes DOM's argument that the rainwater seepage was "due to" the architect's poor design of the canopy/overhang. Following that, at [272] of the Award, it explains that while it *agreed* "that the short canopy cover was insufficient to prevent rainwater splashing onto the terrace area during heaving, had the upstand been properly constructed and aluminium flashing /cladding been properly installed as designed, it would have prevented rainwater from seeping from the outdoor terrace area into the office areas below".

113 Based on this explanation, DON's interpretation (above at [109]) of the tribunal's observation in its introductory remarks is correct. The tribunal clearly explains that, while it agrees that the design of the canopy/overhang could have minimised the rainwater seepage, it did not cause the rainwater seepage.

114 The same applies in respect of the water ingress complained of in relation to DSS 38 and 40. At [277] of the Award, the tribunal notes that the "narrow gap [between the timber strips] could have caused water to collect above the timber strips instead of draining to the floor slab below", and this was "exacerbated by the fact that the canopy / overhang above was too short and inefficient to prevent rainwater from splashing onto the glass panels at L5". In other words, it is repeating the observation that it made in relation the

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waterproofing failures in DSS 36 and 37. The tribunal's use of "exacerbated" indicates that the canopy/overhang design merely worsened, rather than caused, the rainwater ingress. Ultimately, the rainwater ingress was caused by DOM's defective construction of the timber decking, *ie*, the 1mm gap between timber strips (instead of the specified 3mm) and the elevated deck level relative to the internal floor. These construction defects, not the poor design, were what necessitated the rectification works and the corresponding costs claims.

The tribunal had explained its basis for apportionment

115 DOM also complains that the tribunal did not explain its basis of apportionment of the costs of rectification.[33]

116 As I have noted above (at [29]), I do not agree that an tribunal's failure to give reasons, *per se*, is a ground for setting aside an arbitral award. The correct issue is whether this failure to give reasons suggests that the tribunal had failed to apply its mind to the issue.

117 In any case, I do not agree that the tribunal had failed to provide reasons. At [277] of the Award, it reviews the various potential causes of the Timber Decking Defects and finds that "this defect was due to a combination of bad workmanship and poor supervision". It then goes on to find that, given DOM's poor workmanship, it was reasonable for DON to incur the rectification costs claimed, but the need for rectification could have been avoided had there been better supervision. Those, in my view, are the tribunal's reasons for its apportionment – it is weighing the contributory effect of the bad workmanship and poor supervision.

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[33] AWS at para 58.

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118 In light of the above, I find that the tribunal had indeed applied its mind to the issue of apportionment. That being the case, I do not find that a failure to give reasons leads to the "inescapable inference that the tribunal did not even attempt to comprehend the essential issues" (*CVV* at [35]).

The tribunal was not required to invite submissions from parties on apportionment

119 DOM also submits that there has been a breach of natural justice because the tribunal failed to invite submissions from parties on the basis of apportionment.[34] As parties had presented their cases on the basis of the area which had to be rectified together with the appropriate unit rates for rectification, the tribunal's decision to instead apportion the rectification costs on a percentage basis caught the parties by surprise. Thus, as the tribunal had failed to invite submissions from parties on this point, DOM had not been given an opportunity to present its case.

120 In turn, DON argues that given parties had presented competing causes for the Timber Decking Defects, it flowed reasonably from those arguments and was foreseeable that the tribunal would find that there was no singular cause of the Timber Decking Defects, and thus, would have to apportion the corresponding rectification costs.[35] This was a case where DOM could have reasonably foreseen that the tribunal would apportion the rectification costs and had *chosen* to not present any arguments. In support of its argument, DON cites the case of *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 ("*Glaziers*"), wherein the Court of Appeal held that "where the outcome of a dispute is surprising to the parties because they have

34 AWS at para 58.

35 RWS at para 60.

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omitted to address a particular issue *even though* they could reasonably have foreseen that the issue would form part of the court's decision … this type of decision *cannot* be set aside on the basis of any breach of natural justice" [emphasis in original] (at [60]). Though *Glaziers* concerned an application to set aside an adjudication decision, it was cited as "the lodestar on challenges of this nature" in the case of *Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] 5 SLR 706, which concerned an application to set aside an arbitral award (at [93]). DON argues that, pursuant to the Court of Appeal's holding in *Glaziers*, to it did not lie in DOM's mouth to complain that the tribunal had not invited it to make submissions on this point.

121 I agree with DON. As the parties had presented competing causes for the Timber Decking Defects, it flowed reasonably from those arguments that the tribunal would assess the competing potential causes for the Timber Decking Defects and apportion liability for the Timber Decking Defects and the corresponding costs of rectification. It was thus entirely foreseeable that the tribunal would apportion the rectification costs. While DOM notes that the "normal way" is to conduct a defect mapping exercise with unit rates,[36] which was also how parties had presented their cases, this approach does not account for a scenario where multiple causes contributed to the Timber Decking Defects. It cannot seriously be said that DOM expected the tribunal to attribute the Timber Decking Defects exclusively to a single cause from the competing explanations advanced by DOM and DON. As such, it must have foreseen that the tribunal would apportion the costs of rectifying the Timber Decking Defectsif it found that there were multiple causes for said defects.

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[36] NE at p 19.

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122 This is not, as suggested by DOM, a case akin to *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC) ("*Balfour Beatty*").[37]

123 *Balfour Beatty* concerned a contract for the refurbishment of a building (at [1]). Though the claimant successfully obtained extensions of time, two certificates of non-completion were issued, which entitled the defendant to damages for delay (*Balfour Beatty* at [2]). The claimant contended that it was entitled to further extensions of time and sought payment of sums withheld by the defendant for such delay damages (*Balfour Beatty* at [3]). The dispute was referred to adjudication. The claimant failed to present a critical path analysis to the adjudicator. The defendant submitted to the adjudicator that the material provided by the claimant did not establish its claim. However, the adjudicator eventually relied on a critical path analysis he created and found in favour of the claimant. The adjudicator did not give parties an opportunity to comment on that analysis ((*Balfour Beatty* at [21] and [31]–[32]). The claimant then applied to court seeking to enforce the adjudicator's award in his favour. The English Court dismissed the application, finding that a critical path was essential to deciding the dispute (*Balfour Beatty* at [30]). However, by creating his own critical path analysis, the adjudicator had, in effect, done the claimant's work for it. While an adjudicator was entitled to use the powers available to him, he could not use them to make good fundamental deficiencies in the material presented by one party without first giving the other party a proper opportunity of dealing both with the intention and the results (*Balfour Beatty* at [33]).

124 The present case is distinguishable from *Balfour Beatty*. The tribunal was not filling in any fundamental deficiencies in DON's claim by finding that

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37 NE at p 17.

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both parties caused the defects and apportioning the rectification costs accordingly. In the present case, parties had put forward competing reasons for a defect, and the tribunal was acting within its power to arrive at a middle path. That path was that both sides had, to an extent, proven their respective cases.

125 DOM also suggests that the tribunal should have followed the approach taken in *Sandy Island*.[38] In that case, Lee J decided that it would be expedient to put an overall percentage discount on the cost of rectification to account for deterioration due to delay but he invited counsel to make further submissions on an appropriate deterioration discount (*Sandy Island* at [25]–[27]):[39]

> 25 As a result of the Plaintiff not permitting the Defendant to enter the Property to effect the repairs and the resulting standoff, the rectification works only started on 1 September 2014. I find that, had the Plaintiff acted reasonably, the rectification works could have commenced, at the latest, by 1 January 2013, about nine months after the Property was handed over. Hence there was a delay of one year and eight months caused by the Plaintiff's unreasonable conduct. During this period, the Property was vacant. The Defendant claimed that there was extensive deterioration during this period which the Plaintiff denied. From the evidence of the experts, I am satisfied that there was some degree of deterioration, the only issue is its extent. The items are set out in 25 pages of the SPQ. Given the quantity and nature of the items *I find that it is expedient to put an overall percentage discount on the cost of rectification* for these items as a detailed examination of each item would not be worthwhile, nor would it necessarily result in a more accurate figure. *I therefore invited counsel to make further submissions on a deterioration discount, based on my finding of a delay of one year and eight months*.
>
> 26 The Plaintiff's submission was that there should be no deterioration discount because, essentially, the methods proposed by the Plaintiff generally involved wholesale replacement of the affected parts. The Plaintiff also submitted that there was no evidence of deterioration. However, I find that there was evidence of deterioration as it is the Plaintiff's own case that there was flooding and roof leaks. In my view, the

38 NE at p 18.

39 AWS at para 30.

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> Plaintiff's submission disregards the fact that had the rectification works been done timeously, some of the parts may not have deteriorated to such an extent that wholesale replacement is required.
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> 27 I am therefore of the view that there should be a deterioration discount for the period of delay of one year and eight months. The Defendant had submitted various discounts for items that have suffered deterioration. I am of the view that it is appropriate in this case to take it in the round and apply a flat discount for those items. Taking into account the Defendant's submissions on the individual items, I assess the discount to be a flat 10% applied over the sum assessed for the items listed in [133] of the Defendant's Closing Submissions (Quantum). This amounts to $20,000 (rounded off).
>
> [emphasis added]

126 However, when Lee J notes (at [25]) that he "invited counsel to make further submissions on a deterioration discount, based on my finding of a delay of one year and eight months" because he found it was "expedient to put an overall percentage discount on the cost of rectification", he was just describing what he asked parties to do. He was not setting out a general principle that this should be the adopted process in all such instances. Even if he had, there is nothing to suggest that this should apply to arbitrations. Considering that there is already a broad base of case law suggesting that an tribunal is not required to consult parties on its thinking process unless it involves a dramatic departure from what has been presented to him (see *Soh Beng Tee* at [65(e)]), such a proposition would expand the scope of challenges to arbitral awards.

Tribunal's findings on Timber Decking Defects not induced by fraud

127 Finally, DOM argues that the tribunal's findings in relation to DON's claim for rectification costs for the Timber Decking Defects were induced or affected by procedural fraud arising out of perjury by Mr [NJ] and should be set

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aside.[40] DOM also submits that the requirement of reasonable diligence in uncovering evidence of fraud is no longer relevant to the test for fraud arising out of perjury.[41]

128 I do not agree with DOM that the award relating to the Timber Decking Defects were induced or affected by procedural fraud. Conduct constituting procedural fraud must have been aimed at deceiving the arbitral tribunal (*FIC Properties Sdn Bhd v PT Rajawali Capital International and another and another matter* [2024] SGHC(I) 33 ("*FIC*") at [44]). In my view, DOM has not demonstrated that Mr [NJ] had the necessary intention to deceive.

129 In this case, DOM is relying on the alleged "false" representation from Mr [NJ] that "[t]he defect repair contractor was instructed to try and find the same system as supplied but found that the company/manufacturer was no longer in business".[42] According to DOM, by saying this, Mr [NJ] had made an unqualified representation that the defect repair contractor had found that the original manufacturer, [S] Ltd ("Manufacturer S"), was out of business.[43] This representation was false as DOM's subsequent investigation found that Manufacturer S remains active and operating under the name [T] Ltd.[44]

130 Mr [NJ] explained that he had asked DON's subcontractor, Contractor X, to contact Manufacturer S and to purchase replacement timber decking. He was then informed by Contractor X that they were unable to contact

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40 AWS at para 188–189.

41 AWS at para 183.

42 AWS at para 189.

43 AWS at para 192.

44 AWS at para 194.

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Manufacturer S, and "[Contractor X]'s representatives surmised that [Manufacturer S] may have gone out of business".[45]

131 This was a reasonable and believable explanation and I have no reason to doubt it was an accurate retelling of events. DOM have also not presented any evidence that it was not accurate. As such, I do not conclude that the representation was made with the intention to deceive the tribunal.

132 As such, I decline to set aside the award relating to the timber decking due to fraud.

133 For completeness, similar to the position faced by the coram in *FIC* (at [56]–[59]), nothing in my finding on DOM's fraud argument turns on whether any fraud could have been discovered with reasonable diligence. I therefore do not need to make a finding to extend the principles in *FIC* (in the adjudication context) to the arbitral context.

134 Based on my conclusions above, I dismiss DOM's application to set aside the Award for Timber Decking Defects in respect of DSS 38 and 40.

Plaster defects

135 DON claimed that there were plastering defects at various locations inside and outside of the building. These can be broadly categorised into (a) external plaster defects and (b) internal plaster defects (Award at [342]).

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45 Affidavit of [NJ] ("NJ") at para 20.

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External plaster defects

136 DOM seeks to set aside DSS 1, 2, 4–11 and 18. These DSS items relate to water ingress into the building and the movement of water within the fabric of the building (Award at [345]), caused by:

> (a) the poor preparation of the surface finishes to the façade plaster, which resulted in repeated occurrence of crack lines and hollow plaster areas that allowed water ingress into the building fabric;
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> (b) inadequate plaster cover, which caused water to enter the building at random locations around the façade during long and heavy rain spells;
>
> (c) the use of various hollow construction materials in building the façade wall system, including hollow metal stiffeners (which form a route for water to move around the building along horizontal / vertical sections of the façade) in place of the solid concrete stiffeners stipulated in the Architectural Specifications; and
>
> (d) the poor sealing details around various windows and canopies which allowed further water ingress into the building,
>
> (collectively, the "External Plaster Defects").[46]

The tribunal's findings

137 The tribunal was "satisfied on the evidence that the external façade was in a state as described by Mr [NJ] in his report" (Award at [349]). However, he also found that a "lack of proper supervision of the façade construction, namely

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[46] DON's Closing Submissions, Section B at para 38 (NZ at p 258).

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the use of the materials for the plastering works, partly contributed to the façade plastering defects" (Award at [351]). Further, it found that there were "some overlaps" between the rectification works done by DON's two contractors – for example, Contractor Z's work could have been to address issues created by Contractor X's rectification work (Award at [353]).

138 As such, the tribunal allowed 90% of DON's claims for the External Plaster Defects "after taking into account the contributory factors of lack of supervision of the façade construction works and the overlap between Contractor Z and Contractor X's rectification work" (Award at [354]).

DOM's arguments

139 DOM submitted that the tribunal's award of costs of defect rectification for DSS 1, 2, 4, 5, 6, 7, 10, 11, and 18, which relate to external plaster defects, should be set aside for breach of natural justice on two grounds:

(a) that the tribunal's decision to apply a 10% discount to DON's claim was arbitrary and is incongruent with its findings;[47] and

(b) that by deciding to apportion the rectification costs, the tribunal had departed from the position adopted by both parties, who had submitted based on quantities of materials and rates for the same.[48]

140 For completeness, I also note that while this was not raised in DOM's written submissions or its oral submissions at the hearing, in its supporting affidavit, DOM also alleges that the tribunal's finding that it was satisfied that

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47 AWS at para 77.

48 AWS at para 78.

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the external façade was in a state as described by Mr [NJ] (at [349] of the Award), was inconsistent and incongruent with the undisputed evidence or earlier findings "that Mr [NJ] did not personally inspect the cracked areas [of the external façade]".[49]

141 DOM alleges that the tribunal had made a finding as to such at [347] of the Award, wherein it notes that "[w]hen questioned, Mr [NJ] admitted that he did not personally identify and mark out all the cracked and defective areas of the external façade but had got the rectification contractor [Contractor X] to identify and mark out the areas with crack lines that required rectification". This is a misrepresentation of the tribunal's statement. The tribunal starts [347] by noting that "DOM submitted that the evidence adduced by Mr [NJ] did not show and/or was insufficient to show that there were extensive cracks and defects throughout the external façade/elevations of the Building." The statement highlighted by DOM is merely the tribunal elaborating on the said argument raised by DOM, not a finding by the tribunal.

142 In any case, the tribunal's finding at [349] of the Award is not incongruous with a concession (assuming such existed) by Mr [NJ] that he had not personally inspected the External Plaster Defects. Mr [NJ]'s report also included photographs of the External Plaster Defects.[50] The tribunal may have made its finding based on the photographic evidence rather than Mr [NJ]'s testimony.

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49 MA at paras 92–95.

50 Tab 3 of NZ at pp 490–497.

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The tribunal's application of a 10% discount was not arbitrary

143 DOM notes that the tribunal applied a 10% discount to the claim for External Plaster Defects to account for the contributory factors of lack of proper supervision *and* an overlap between Contractor Z's and Contractor X's rectification works.[51] However, the tribunal had also applied the same 10% discount to the Timber Decking Defects, even though only one contributory factor (*ie*, lack of proper supervision) applied for that claim. According to DOM, this suggests that the discount of 10% was arbitrary. On this basis, DOM also argues that the tribunal failed to account for the overlap in rectification works between Contractor Z and Contractor X in making its award on this point.

144 DOM appears to be using "arbitrary" in its natural meaning – *ie*, it is claiming that the fact that the tribunal had applied a 10% discount to both claims suggests that the tribunal failed to apply its mind to this issue. At the hearing, counsel for DOM argued that the tribunal applying a 10% discount across the board is *arbitrary* and "smacks of the reasoning in the *CEF* case where the tribunal also applied a 25% for the reliance loss".[52]

145 While the Court of Appeal in *CEF* set aside the *CEF* tribunal's award for reliance loss as it resulted from "an arbitrary decision that could not have been anticipated by the parties" (at [123]), this was not because the *CEF* tribunal had applied a 25% discount across the board. Rather, the *CEF* tribunal had expressly found that the respondent had not proven its reliance loss. This meant that "*the only appropriate percentage to award was 0%*" [emphasis in original], yet the *CEF* tribunal had "randomly select[ed] a figure of 25%" (*CEF* at [119]).

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51 AWS at para 77.

52 NE at p 19.

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It was for that reason that the Court of Appeal called the *CEF* tribunal's award "arbitrary".

146 Here, DOM is claiming that the tribunal's award was arbitrary because it had applied the same 10% discount to the claim relating to the Timber Decking Defects and the claim relating to the External Plaster Defects, without giving reasons as to why. It complains that the tribunal had simply said that there was overlap and "just roll[ed] it all in under the 10%".[53] Hence, even though counsel for DOM tries to compare the current case to *CEF*, it appears that DOM's real complaint is that the tribunal failed to apply its mind to the issue of the appropriate apportionment.

147 In any case, I cannot fathom how DOM can fairly argue that it was caught by surprise by the tribunal deciding to award a specific percentage (*ie*, 90%) of DON's claim. This is, again, unlike the *CEF* case, where it could be fairly said that the parties would have expected the tribunal to grant a specific percentage (*ie*, 0%) of the respondent's claim. Given that the tribunal in *CEF* had explicitly found that the respondent had not proven its claim, it *should* have granted 0% of said claim. Here, the findings DOM points to are that there was a lack of proper supervision by DON *and* there was an overlap in rectification works by Contractor Z and Contractor X. As I elaborate on below at [149]–[150], that does not lead to any particular expectation about the percentage the tribunal would apportion.

148 In my judgment, the tribunal did not fail to apply its mind to the issue of apportionment. As noted at [20(a)], an award will not be set aside on the ground that the tribunal failed to apply its mind to an essential issue unless the failure

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[53] NE at p 19.

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is "a clear and virtually inescapable inference from the award" (*CVV* at [30(a)]). An inexplicable decision is only a factor which goes towards establishing that the tribunal failed to apply its mind (*CVV* at [30(a)]).

149 In this case, just because the tribunal applied the same discount for the External Plaster Defects as it did for the Timber Decking Defects, does not mean that the discount of 10% was arbitrary. Neither does it lead to an inescapable inference that the tribunal had come up with a pre-conceived figure without reference to the evidence or the facts, or that the tribunal had failed to consider the overlap at all. The tribunal could well have found that the lack of proper supervision regarding the external plaster defects was less egregious than that regarding the timber decking defects.

150 Indeed, the tribunal found that the lack of supervision regarding the External Plaster Defects was related to the "use of materials for the plastering works" (Award at [351]). However, the use of improper hollow materials was only one of the causes of the External Plaster Defects (see above at [136]). On the other hand and in relation to the Timber Decking Defects, both the the 1 mm gap between timber strips (instead of the specified 3 mm) and the elevated deck level relative to the internal floor were "obvious" (Award at [277]). The poor supervision by DON thus appears to be a bigger contributing factor to the Timber Decking Defects as opposed to the External Plaster Defects.

151 As such, the inference that the tribunal did not apply its mind to the issues and made its decision arbitrarily is not an inescapable inference from the mere fact that the same discount was applied for the timber decking defects and the external plaster defects.

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The tribunal's method of apportionment did not constitute a dramatic departure from parties' submissions

152 DOM also argues that by apportioning the rectification costs relating to the External Plaster Defects on a percentage basis, the tribunal had departed from the position adopted by both parties, who had submitted based on quantities of materials and their related rates.[54]

153 This is the same chain of reasoning challenge it raised above relating to the Timber Decking Defects (at [119]). Moreover, in this case, DOM had submitted on the extent of its liability for the costs of rectification. DOM argued, *inter alia*, that it was prevented from attending to the External Plaster Defects by DON's slow and late approvals of the Permission to Work submitted by DOM; and there was an overlap of works by DON's contractors. That being the case and much like with the rectification costs for the Timber Decking Defects, it was entirely foreseeable that the tribunal might agree with DOM and hence apportion the rectification costs relating to the External Plaster Defects.

154 As such, for the same reasons as at [121]–[125] above, this argument must fail.

Internal plaster defects

155 DSS 121 to 124 related to cracks or damage observed in the plaster/plasterboards at various locations inside the building. DSS 125 related to water seepage. [55]

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54 AWS at para 78.

55 NZ at p 2430 at S/N 109–113.

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The tribunal's findings

156 The tribunal found that in relation to the "internal plastering defects in DSS 121–124", it accepted that "the internal plastering also had defects, namely cracks in the internal plastering and signs of water seepage that had to be rectified in the manner described by Mr [NJ]" (at [355] of the Award). Hence, it "allow[ed] [DON]'s claim in DSS 121 – 124" (at [356]).

Parties' arguments

157 It is unclear whether DOM is seeking to set aside the awards relating to DSS 121 to 125, or simply the award relating to DSS 125. DOM did not raise any issues regarding DSS 121 to 124 in the affidavits filed in support of this application. However, in the "Non-Agreed List of Issues" that DOM had submitted to the court, it noted that one of the issues was whether there was a breach of natural justice in relation to "the Tribunal's determination that [DON] is entitled to 90% of the costs of rectification claims for DSS 121 to 124".[56] Its written submissions on the internal plaster defects are also under the sub-heading of "B3. Internal plaster defects: DSS 121 to 125".[57] Nevertheless, the body of its submissions only addresses DSS 125. During oral submissions, DOM did not advance any arguments relating to DSS 121 to 124.

158 DON had, in its written submissions, noted this issue, and that, for completeness, the allegation raised in the Non-Agreed List of Issues was baseless – the tribunal had not ruled that DON was entitled to 90% of the

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56 Annex A of Applicant's Letter to Court dated 11 March 2025, Non-Agreed List of Issues at S/N 1.

57 AWS at Section B3.

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rectification costs for DSS 121 to 124. It had allowed the *full claim* for DSS 121 to 124.[58]

159 I agree with DON. Hence, I dismiss DOM's application (if any) to set aside the awards relating to DSS 121 to 124.

160 DOM's remaining complaints relate to DSS 125. DOM's complaints are as follows:

(a) the tribunal rendered an award for the sums claimed in DSS 125 despite not making any findings in relation to DSS 125;[59] and

(b) it was not afforded a reasonable opportunity to inspect DSS 125.[60]

The tribunal's award of the sums claimed in DSS 125 is not incongruous with its findings

161 DOM argues that there was no express finding of defects relating to DSS 125, yet the tribunal rendered an award for it.[61] DOM was therefore "surprised" by this conclusion. DOM notes that the cases cited by DON on this point related to implied rejections of an argument, not implied findings.[62] Moreover, the nature of the defect complained of in DSS 125 was "completely different" from that in DSS 121 to 124.[63] Thus, the tribunal's discussions regarding DSS 121 to

58 RWS at para 96(a).

59 AWS at para 82.

60 AWS at para 84.

61 AWS at para 82.

62 NE at p 71.

63 NE at pp 20 and 71.

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124 could not apply to DSS 125. Hence, there was no basis for DON to argue that there was an implied finding.

162 DON, in turn, argues that the tribunal had explicitly included DSS 125 in the category of "internal plaster defects" (Award at [343]).[64] Thus, any findings that the tribunal made in relation to internal plaster defects would also have related to DSS 125. That being the case, DON contends that the tribunal might have inadvertently omitted it in its discussion of "the internal plastering defects in DSS 121 – 124" (Award at [355]–[356]).

163 Even though DOM suggests that it was "surprised" by the tribunal making an award in relation to DSS 125, DON had expressly claimed for the damages from the defects relating to DSS 125. As DON has noted, both parties had also made submissions regarding DSS 125.[65] As such, I do not see how DOM can now claim that it was surprised and could not have foreseen an award on this category of defects.

164 I also find that the lack of express reference to DSS 125 does not suggest that the tribunal failed to apply its mind to the issue. In my judgment and taking a generous reading of the Award (as I am required to do (above at [18])), it cannot be said that DSS 125 was not considered. As DON has correctly noted, the tribunal had included DSS 125 in the category of internal plaster defects. As such, the logical conclusion I draw is that the tribunal's findings relating to internal plaster defects includes DSS 125.

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64 RWS at para 90.

65 RWS at para 88.

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165 Further, the tribunal makes findings relating to the internal plaster defects that must be in relation to DSS 125, even though it is not explicitly stated. As DOM itself has highlighted (above at [161]), the nature of DSS 125 was different from DSS 121 to 124. Of all the claims relating to the internal plaster defects granted, only DSS 125 related to water seepage in the internal plaster – DSS 121 to 124 related to cracks.[66] As such, when the tribunal found that it accepted Mr [NJ]'s evidence that the internal plastering also had defects in the form of signs of water seepage at [349], and that it accepted that the internal plastering had defects in the form of "signs of water seepage that had to be rectified in the manner described by Mr [NJ]" at [355], it could only be referring to DSS 125.

There is no breach of natural justice regarding the alleged denial of a reasonable opportunity to inspect DSS 125

166 DOM also complains that it was not afforded reasonable opportunity to inspect DSS 125.[67] As such, it was prejudiced in the preparation of its case.

167 DON, in turn, argues that this issue of whether DOM had the opportunity to inspect and verify defects was ventilated in the arbitration.[68] In so far as DOM suggests that the alleged denial to inspect defects is a denial to a fair hearing, it notes that this is an issue that relates to the tribunal's discretion to determine the arbitral procedure, which the court offers a "margin of deference to" (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [103]).

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66 MA at p 447.

67 AWS at para 84.

68 RWS at para 94.

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168 The tribunal noted this argument from DOM (that it had no opportunity to verify the defects (after it was instructed not to rectify the remaining defects in 2017) up until the commencement of these proceedings) at [224]–[225] of the Award. The tribunal also explicitly noted, in response to the argument that DOM was prevented from attending to the defects by DON, (at [352]) that DOM no longer had an entitlement to rectify the defects after the expiry of the maintenance period in June 2017. That being the case, I can only conclude that parties were able to ventilate this issue and the tribunal had applied its mind and came to a finding. I thus agree with DON that DOM's complaint of prejudice in not having a reasonable opportunity to inspect the defects fails.

169 Based on my conclusions above, I dismiss DOM's application to set aside the award for External Plaster Defects in respect of DSS 1, 2, 4, 5, 6, 7, 10, 11 and 18, and for internal plaster defects in respect of DSS 121, 122, 123, 124 and 125.

Door defects

170 DON's case is that all the doors in the building suffered from varying degrees of defects, *eg*, sagging, misalignment, cracking, mould growth, gaps, missing bolt holes, missing threshold details that allowed water seepage beneath external-facing doors, rust at bases and hinges, chipped and damaged laminates, missing seals, and damaged / missing locksets (Award at [300]). Some of the doors were repairable, while some of the doors had to be replaced. This was based on Mr [NJ]'s assessment after, apparently, inspecting all of the doors in the building (Award at [299]). Mr [NJ] exhibited photographs of the defective doors in his report (Award at [304]). All in all, DON's claimed the cost of $72,177.00 for repairing 142 doors under DSS 48, and $351,981.00 for replacing 149 doors under DSS 49 (Award at [300]–[301]).

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The tribunal's findings

171 The tribunal's findings at [303]–[304] of the Award are as follows:

> 303. In the course of the arbitration, parties produced a schedule / table identifying each and every door that [DON] claims had to be made good (C-9) and another identify each door that had to be replaced (C-10). Parties also came to an agreement on the number of defective doors that had to be repaired or replaced. Based on its own assessment, [DOM] conceded liability for $1,295.00 for the doors identified in DSS 48 an (sic) $33,855.25 for the doors identified in DSS 49 totalling $35,150.25.
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> 304. In my view, while the photographs exhibited in the DSS and Mr [NJ]'s report do not show all the defective doors, these photographs do show that many of these doors showed signs of defects. I accept Mr [NJ]'s evidence that he (or his assistant) had inspected all the doors and found most of them to have defects. I accept that some of the doors suffered from *inter alia* sagging, misalignment, cracking, mould growth, gaps, missing bolt holes, missing threshold details that allowed water seepage beneath external-facing doors, rust at bases and hinges, chipped and damaged laminates, missing seals, and damaged / missing locksets and had to be made good (DSS 48). Other doors had to be completely replaced due to, *inter alia* warping or swelling which caused doors to be unable to fit in the door frame, cracked and mouldy beadings, debonded or bulging laminates, extensive rust corrosion, and lifting of the door frame from the floor panels (DSS 49).

DOM's arguments

172 DOM argued that the tribunal's award of costs for DSS 48 and 49 should be set aside for breach of natural justice on two grounds:

(a) the award is incongruent with the incontrovertible evidence;[69] and

[69] AWS at para 87.

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(b) the tribunal rubberstamped the rates for the rectification works relating to the defective doors put forward by DON without applying its mind to the issue.[70]

The tribunal's award is not incongruent with the incontrovertible evidence

173 DOM complains that "the [tribunal]had awarded the entire sums claimed in DSS 48 and 49 despite incontrovertible evidence that not all of the 291 doors needed to be replaced or repaired".[71] The incontrovertible evidence referred to by DOM is that

(a) the parties had come to an agreement on the number of doors needed to be repaired or replaced;[72]

(b) there was a "striking lack of evidence to prove that the doors claimed for [were] in fact defective"[73]; and

(c) the tribunal had failed to consider "established evidence during the arbitration where Mr [NJ] had conceded in cross-examination that a number of the doors did not need to be repaired, replaced, or the defects were due to fair wear and tear"[74].

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70 AWS at para 98.

71 AWS at para 87.

72 AWS at para 88.

73 AWS at para 91(a).

74 NE at p 22.

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The agreement

174 DOM notes [303] of the Award, where the tribunal refers to two tables (C9 and C10) stating the defective doors that had to be repaired (C9) and those that had to be replaced (C10):[75]

> 303. In the course of the arbitration, parties produced a schedule / table identifying each and every door that [DON] claims had to be made good (C-9) and another identify [*sic*] each door that had to be replaced (C-10). Parties also *came to an agreement on the number of defective doors that had to be repaired or replaced*. Based on its own assessment, [DOM] conceded liability for $1,295.00 for the doors identified in DSS 48 an $33,855.25 for the doors identified in DSS 49 totalling $35,150.25. [emphasis added]

175 DOM argues that, based on the tribunal's own finding that there had been an agreement on the number of doors that had to be repaired or replaced, the award should have been limited to the agreed doors in Tables C9 and C10.

176 DON counters that, in finding that there was an agreement, the tribunal was referencing the fact that there was no dispute between the parties on some of the defective doors because DOM had conceded liability for them.[76] The tribunal was not saying that there was an agreement on the total number of doors claimed under DSS 48 and 49.

177 I agree with DON. Tables C9 and C10 laid out DON's case on which doors were defective or needed to be replaced. DOM then noted in the tables whether it agreed with DON's views on the doors in question. This was the "agreement" that the tribunal referred to in the Award at [303]. This is made clear from the last sentence of [303] (above at [174]), where the tribunal

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75 AWS at para 88.

76 NE at pp 55–56.

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explains the "agreement" it referenced in the preceding sentence as "*[DOM] conced[ing] liability* for $1,295.00 for the doors identified in DSS 48 an $33,855.25 for the doors identified in DSS 49 totalling $35,150.25" [emphasis added].

178 Thus, the tribunal was entitled to make a separate finding on those doors identified by DON as needing replacement or repair in Tables C9 and C10, but on which there was no agreement from DOM, as it indeed did. Having found that parties had come to an agreement on a portion of the doors, and that DON's claim for the remaining doors had been made out, it was open for the tribunal to conclude that DON was entitled to its claims for all the doors identified in Tables C9 and C10.

Failure to produce evidence of all defective doors

179 DOM notes that the tribunal had accepted that DON did not have sufficient evidence to substantiate the entirety of DON's claim for DSS 48 and 49.[77] DOM points out that the tribunal had made such a finding at [304] of the Award:

> 304. In my view, while the photographs exhibited in the DSS and Mr [NJ]'s report *do not show all the defective doors*, these photographs do show that *many* of these doors showed signs of defects. I accept Mr [NJ]'s evidence that he (or his assistant) had inspected all the doors and found *most of them* to have defects. I accept that some of the doors suffered from *inter alia* sagging, misalignment, cracking, mould growth, gaps, missing bolt holes, missing threshold details that allowed water seepage beneath external-facing doors, rust at bases and hinges, chipped and damaged laminates, missing seals, and damaged / missing locksets and had to be made good (DSS 48). Other doors had to be completely replaced due to, *inter alia* warping or swelling which caused doors to be unable to fit in the door frame, cracked and mouldy beadings, debonded or bulging

[77] AWS at para 93.

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> laminates, extensive rust corrosion, and lifting of the door frame from the floor panels (DSS 49). [emphasis added]

180 In particular, it points to the tribunal's findings that "[the] photographs … do not show all the defective doors", and that Mr [NJ] had "found *most of them* to have defects".[78] Based on these statements, it argues that the tribunal himself had found that DON had not proven that *all* of the 291 doors in DSS 48 and 49 required repair or replacement. Therefore, by awarding the full costs claimed in relation to DSS 48 and 49 despite such finding, the tribunal had adopted a chain of reasoning that was internally inconsistent and unforeseeable.

181 I do not agree with DOM's interpretation of the tribunal's statements. First, by the latter statement that Mr [NJ] had "found *most of [the doors]* to have defects", the tribunal does not mean that Mr [NJ] had only found that a portion of 291 doors in DSS 48 and 49 were defective. In my judgment, the tribunal means that Mr [NJ] had found that a portion of *all the doors in the building* were defective. The full statement is "I accept Mr [NJ]'s evidence that he (or his assistant) had inspected *all the doors* and found *most* of them to have defects." [emphasis added]. Admittedly, looking at [304] in isolation, it is unclear whether "all of the doors" refers to all 291 doors in DSS 48 and 49, or all of the doors in the building. However, earlier at [299], the tribunal noted that Mr [NJ] had "apparently carried out an inspection of *all the doors in the Building*" [emphasis added]. Therefore, by finding Mr [NJ] had inspected "all the doors", the tribunal means that Mr [NJ] had inspected all the doors in the building, as opposed to the 291 doors in DSS 48 and 49. Hence, the tribunal accepting Mr [NJ]'s evidence that he had inspected all the doors in the building and found a portion of them to be defective is not inconsistent with the tribunal's decision

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78 AWS at paras 93 and 95.

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to award costs for all the doors in DSS 48 and 49. The 291 doors in DSS 48 and 49 do not constitute all the doors in the building.

182 Second, just because the tribunal found that the photographs do not show all the defective doors does not make the tribunal's decision internally inconsistent. Although the tribunal had identified that the photographs do not show all the defective doors or that those doors that were shown were actually defective, it still found that the photographs demonstrated that many of those doors showed signs of defects (Award at [304]). For that reason, it accepted Mr [NJ]'s evidence.

183 Therefore, DOM's real complaint is that the tribunal made its decision based on insufficient evidence.[79] This cannot constitute grounds for setting aside of the Award. As the Court of Appeal held in *CEF*, the no-evidence rule, whereby an award that contains findings of fact with no evidential basis is liable to be set aside, is not applicable in Singapore (at [102]).

Admissions by Mr [NJ]

184 DOM argues that Mr [NJ] had admitted that the defects in some doors were "obviously a result of wear and tear".[80] Furthermore, Mr [NJ] had also admitted that certain doors could be repaired instead of being replaced.[81] Hence, the tribunal's decision to allow DON's claim for all the doors was incongruous with the admissions from its own expert.

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79 AWS at para 97.

80 AWS at para 92.

81 AWS at para 96.

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185 While DOM has not explained precisely how this results in a breach of the fair hearing rule, it may constitute a departure from parties' submissions if parties had agreed that there were such admissions by Mr [NJ], rendering this issue one that was no longer live (*Soh Beng Tee* at [65(d)]).

186 However, that is not the case here. While it may have been DOM's case that Mr [NJ] had made these admissions, DON, in its closing submissions, continued to deny that certain defects in the doors were due to wear and tear or that some doors could be repaired instead of being replaced.[82] That being the case, I find no incongruity with the tribunal's conclusions on this point.

The tribunal applied its mind to the costs of rectifying the door defects

187 DOM also argues that the tribunal simply rubberstamped the rates claimed by DON without proper enquiry being undertaken.[83] DOM had argued that the rectification costs claimed by DON were excessive based on both the level of rectification and/or replacement needed and the unit rate. However, the tribunal had simply allowed DON's claims in DSS 48 and 49 without addressing this argument. DOM had included a consolidated list of the doors which could have been repaired instead of replaced at Tables C9 and C10.

188 I agree with DOM that the tribunal did not expressly address this argument in the Award. However, the fact that an award fails to address one of the parties' arguments expressly does not, without more, mean that the tribunal failed to apply its mind to that argument. There is no breach of natural justice if the tribunal reaches its decision implicitly (*CVV* at [30(a)]; *ASG v ASH* [2016] 5 SLR 54 ("*ASG*") at [91]). The "crucial question" is still whether there is a

82 DON's Closing Submissions, Part E at para 22–24 (NZ's affidavit at p 300).

83 AWS at para 98.

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clear and virtually inescapable inference that the tribunal failed to consider that argument (*ASG* at [92]).

189 The tribunal had expressly noted the existence of Tables C9 and C10 (at [303] of the Award). That would indicate that it was cognisant of DOM's argument that the level of rectification and/or replacement needed and the unit rates used were excessive, as DOM had highlighted such doors in Tables C9 and C10. Indeed, the tribunal noted that based on Table C9, DOM conceded liability for $1,295.00 for the doors identified in DSS 48. This sum of $1,295.00 was DOM's own assessment of the appropriate costs (the sum derived using DON's unit rates was $9,947.00).[84]

190 In my judgment, it does appear that the tribunal had considered DOM's position on the appropriate costs, even if it did not explicitly address its argument that DON's claimed costs were excessive. That being the case, I am not persuaded that there is a clear and virtually inescapable inference that the tribunal failed to apply its mind to this argument.

191 Based on my conclusions above, I dismiss DOM's application to set aside the award for door defects in respect of DSS 48 and 49.

Waterproofing defects at the Garment Care Area

192 DSS 182 relates to waterproofing defects at the garment care area at Level 5 of the building ("Garment Care Area"). The Garment Care Area comprises (a) Quality Test Lab; (b) Live Test Lab; (c) CC Lab; (d) Chamber; (e) Burn Room; and f) Measurement Lab. In short, this was an area where DON

[84] 1MK at p 512.

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would test its products on actual garments for which the products may be used.[85] The Live Test Lab was a "wet area". Hence, according to the design details, DOM should have applied a waterproofing membrane to the floor with an upstand of at least 300 mm at the Live Test Lab to prevent water from seeping out. However, DON claimed that DOM had failed to install the required upstands in the Live Test Lab, and failed to properly install the floor pipes and drains. This resulted in the hollow concrete raised floor under the Live Test Lab and the adjacent Quality Test Lab accumulating water and becoming waterlogged (Award at [253]).

193 Further, according to DON, the entire Garment Care Area had to be re-located permanently to another location. This was because the nature of the work and operations that were being carried out in the Live Test Lab did not make it financially feasible to suspend operations in the Garment Care Area to carry out rectification works (Award at [254]).

The tribunal's findings

194 The tribunal found that both DOM and DON caused the water seepage / leakage at the Garment Care Area, and hence, "both … should bear some liability". Further, it found that some of the costs claimed were in relation to improvement works, for which DOM should not be held liable. As such, the tribunal pro-rated the total costs claimed by DON based on the area of the original Garment Care Area (the "Original Garment Care Area") as compared to the extended / relocated Garment Care Area (the "New Garment Care Area"), and awarded DON the sum of $397,531.23 for the rectification of the defects at the Original Garment Care Area (Award at [257]–[261]):

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85 NE at p 59.

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257. In my view, there is no singular cause of the water seepage / leakage at the Garment Care Area. It was probably due to a combination of factors. One of the likely cause was the absence of a properly waterproofed upstand between the walls and floors of the Garment Care Area. I accept Mr [NJ]'s evidence that [DOM] did not properly waterproof the Garment Care Area by not constructing an upturn / upstand between the wall and floor and applying the waterproofing member up to 300mm as indicated in the waterproofing design detail. This resulted in water seeping out from the Garment Care Area onto floor slab below the raised floors onto the adjacent areas. I am also persuaded by [DOM]'s evidence that some water could have leaked from the water pipes installed by [DON] to drain its machinery. These pipes were not properly installed resulting in water leaking into the Life Test Lab area as highlighted by DOM in its meeting with [DON] on 19 May 2017.

258. I find that the water seepage and leaks from the Garment Care Area were due [to] [DOM]'s poor workmanship as well as the poorly installed water pipe draining water from the machinery installed by [DON] caused the water seepage. As such, I find that both [DOM] and [DON] should bear some liability.

259. [DON] is claiming $1,980,295.10 for rectifying the defective waterproofing works at the Garment Care Area including the costs of relocating the Garment Care Area to a new location, and waterproofing the new location. [DOM] says the costs claimed is excessive as it amounts to new improvement works. I agree with [DOM]. While I accept [DON]'s argument that moving the equipment and machinery in the Garment Care Area may disrupt operations, I do not think it was reasonable for [DON] to relocate and overhaul the entire Garment Care Area, and waterproofing a more extensive area than the original Garment Care Area. The associated works of relocating the Garment Care Area together with the waterproofing works would amount to an improvement over the original which [DOM] cannot be held liable for.

260. In my view, [DOM] should only liable for the cost of rectifying the original Garment Care Area, and not for the new extended / relocated Garment Care Area. This is represented by the pro-rated amount of the costs incurred to re-waterproof the new extended area of 1097.76 m2 to the original Garment Care Area of 290 m2. Based on my measurements, the original Garment Care Area from Gridline 1 – 4/5 (27.95m) and I / J – K (10m) is about 290 m2. The new extended areas that were waterproofed from Gridline 1 – 9 (60.95m) and H / I – K (20.8m) is about 1097.76 m2 (less the areas around the 2 staircases / lift cores). Although in the Table of Positions (Defects), [DON] is

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> claiming $1,980,295.10, I note that in Mr [NJ]'s report, the costs incurred for DSS 182 is only $1,504,806.50. Pro-rated, this works out to $397,531.23 (290 m2 x $1,504,806.50 / 1097.76 m2)
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> 261. I therefore award [DON] **$397,531.23** for DSS 182 for the rectification of the defects at the Garment Care Area.
>
> [emphasis in original]

DOM's arguments

195 DOM argues that the award for DSS 182, which relates to waterproofing defects at the Garment Care Area, should be set aside as:

(a) the tribunal failed to apportion the award despite its own finding that "both [DOM] and [DON] should bear some liability";[86]

(b) the tribunal had applied a method of apportionment that was unforeseeable and that constituted a departure from parties' submissions;[87]

(c) in any case, the tribunal's method of apportionment was incongruous with its own finding that DOM should only be liable for the costs of re-waterproofing the Original Garment Care Area;[88]

(d) the tribunal failed to consider that there were inconsistent figures used in Mr [NJ]'s report;[89] and

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86 AWS at paras 106–107.

87 NE at p 23.

88 AWS at para 115.

89 AWS at para 105(c).

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(e) the tribunal failed to discount the VO costs, which have no bearing or nexus with the rectification costs for waterproofing, from the award.[90]

The tribunal had apportioned the costs of rectification between DOM and DON

196 DOM complains that the tribunal did not apportion the costs of rectification between the parties despite his finding that "both [DOM] and [DON] should bear some liability" (above at [194]).[91] The tribunal had thus adopted an unforeseeable chain of reasoning by coming to a decision that was incongruous with its own prior finding. Although the tribunal had pro-rated DON's claim to limit it to the costs of re-waterproofing the Original Garment Care Area, that was because it had found that it was not reasonable for DON to relocate and overhaul the entire area and waterproof a more extensive area.[92] It had not apportioned the amount having regard to the matters in [258] of the Award.

197 DON argued that there was no such incongruity. The tribunal had held that DON should bear some of the rectification costs. The tribunal had then pro-rated DON's claim down to the area of the Original Garment Care Area. This approach resulted in an apportionment in which DON was made to bear a large portion of the rectification costs it incurred. Thus, DON was, in fact, made to bear some portion of the rectification costs.

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90 AWS at para 105(d)

91 AWS at paras 106–107.

92 AWS at paras 106–107.

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198 I agree with DON's argument. The court will take a generous approach in reviewing an arbitral award, in the sense that it is to strive to uphold the award. At no point did the tribunal say that its finding at [260] of the Award that DOM should only be liable for the cost of rectifying the Original Garment Care Area was solely because of the reasons given at [259]. As such, on a generous reading of the Award, the tribunal pro-rated the rectification costs claimed by DON not only because it was minded that a portion of such costs related to improvement works, but also because of its observation at [258] that both DON and DOM should bear some liability.

The tribunal's calculation is not incongruous with its findings

199 DOM argues that the tribunal had found that the costs of rectification of the Original Garment Care Area should be limited to waterproofing.[93] This is because at [260] of the Award, the tribunal states that "the cost of rectifying the original Garment Care Area … is represented by the pro-rated amount of the costs incurred to *re-waterproof* the new extended area of 1097.76 m2 to the original Garment Care Area of 290 m2" [emphasis added]. DOM thus takes the position that they should only be made specifically to pay for the rectification of the waterproofing works for the Original Garment Care Area. That being the case, the tribunal's calculation, which takes into account figures that are not directly related to waterproofing works for the Original Garment Care Area, is incongruous and excessive.

200 DON notes the tribunal's finding at [260] that "[DOM] should be liable for the cost of *rectifying* the original Garment Care Area".[94] By using the word

93 AWS at para 115.

94 RWS at para 108.

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"rectifying", as opposed to "waterproofing", the tribunal meant that DOM would not only be liable for the re-waterproofing, but also for other associated works.[95] For example, in order to fix the waterproofing in the Original Garment Care Area, DON would have to remove the equipment from the room.

201 I agree with DON. On a generous reading of the Award, by "costs incurred to re-waterproof", I agree that this is not just a question of the cost of only waterproofing works to the Original Garment Care Area but would include other associated works.

The tribunal was not required to invite parties to submit on valuation

202 DOM also complains that the tribunal did not invite parties to submit on the method of valuing the rectification costs to the Original Garment Care Area.[96]

203 I note that this is not a case where both parties had presented their own valuation of the costs of rectifying the Original Garment Care Area, and the tribunal had instead come up with its own method of valuation. DON's claim was for the full costs, including the costs of relocating the Garment Care Area and waterproofing the New Garment Care Area. DOM's response was that it was not the cause of the defects, and that the claim by DON was grossly exorbitant, as they were blatantly improvement works. DOM's case was thus that DON should not be entitled to claim *anything* from DOM.[97] As such, it appears that DOM did not submit any alternative valuation to the tribunal.

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95 NE at pp 58–59.

96 NE at p 23.

97 DOM's Closing Submissions at para 165 (1MK at p 571).

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204 In my judgment, it flowed from DOM's own submissions, and was evidently foreseeable that the value of the costs of rectifying the Original Garment Care Area may be in issue. Applying the principle in *Glaziers* (above at [120]), having foreseen from its own arguments that the valuation of the costs of rectifying the original Garment Care Area may be in issue, and yet choosing not to make any arguments on this point, DOM should not be allowed to complain that it was not given the opportunity to put forward its arguments.

205 In any case, I would note the dicta in *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264 at [33] (cited with approval in *Soh Beng Tee* (at [67])) that, in the case of construction arbitrations in particular, "[m]atters of quantification and valuation frequently lead to the tribunal taking a course which is not that put forward by either party, but which lies somewhere between".

206 This is precisely the case imagined in *Soh Beng Tee* at [65(e)] where the tribunal, faced with diametrically opposite solutions to resolve a dispute (*ie*, DON claiming all costs, including costs of improvement works, and DOM's position that *no* costs at all should be allowed), embraces a middle path on the evidence that is before it.

207 The tribunal decided that DON should not be entitled to claim for the costs of improvement works, but DOM should still be liable for the costs of rectifying the Original Garment Care Area. The tribunal then came to its own conclusion on the value of that claim, using a rough-and-ready calculation based on the numbers in Mr [NJ]'s report. Following *Soh Beng Tee*, it was entitled to do so. It was not required to consult the parties on its thinking process, considering that, as I noted above at [204], this was not a dramatic departure from what has been presented to him.

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The tribunal had applied its mind to the inconsistent figures

208 DOM also argues that the tribunal had failed to consider that there were inconsistent figures used in Mr [NJ]'s report – namely, he stated that the overall cost incurred for DSS 182 amounted to S$1,504,806.50, but the sums in his costs breakdown for the rectification works add up to S$1,841,190.10.[98]

209 It is unclear what rule of natural justice DOM is relying on here. The tribunal had clearly been live to the fact that there were inconsistent figures, even if it did not highlight the inconsistent figures within Mr [NJ]'s report itself. This is evident from [260] of the Award, where he notes that "[a]lthough in the Table of Positions (Defects), [DON] is claiming $1,980,295.10, I note that in Mr [NJ]'s report, the costs incurred for DSS 182 is only $1,504,806.50" (above at [194]). He then resolved the inconsistency by adopting the lower sum of S$1,504,806.50 in his calculations.

210 Further, while DOM alleged at the hearing that they "do not know how this figure [of S$1,504,806.50] is derived", [99] their own evidence suggests otherwise. In the supporting affidavit by Mr [MK], he explains that "[t]he contract sum for the entire re-configuration contract carried out by [Contractor Y] was S$1,662,658.40".[100] From this contract sum, "an amount of S$160,620.00 was attributable to Preliminaries", and "[t]he cost directly related to actual works was therefore S$1,502,038.40".[101]

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98 AWS at para 105(c).

99 NE at p 24.

100 1MK at para 43.

101 1MK at para 44.

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211 In any case, given that the arbitrator had adopted the lower sum, there was no prejudice caused to DOM. They thus cannot set aside the tribunal's award on this basis (*BZW* at [63]).

The tribunal's failure to exclude VO costs is not incongruous with its findings

212 DOM argues that the tribunal failed to discount the VO costs, which have no bearing or nexus with the rectification costs for waterproofing, from the award. This is incongruent with his finding that the costs of rectification of the Original Garment Care Area should be limited to waterproofing.[102]

213 This is, in essence, the same argument it raised at [199], that the tribunal's calculation, *which takes into account figures that are not directly related to waterproofing works*, is incongruous and excessive. As such, I repeat my points at [201] above.

214 For these reasons, I dismiss DOM's application to set aside the award for the Garment Care Area under waterproofing defects in respect of DSS 182.

Waterproofing defects for Roof

215 DON claimed that there were leaks and water ingress into the building from the Level 6 Plant Area (DSS 29 and 30), the Level 7 AHU Roof Area (DSS 31), the Atrium Skylight Roof (DSS 33), the Staircase 'E' Roof Area (DSS 34) and the Level 7 Lower Roof Area (DSS 35) (the "Roof Water Ingress Defects") (Award at [262]).

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102 AWS at para 105(d).

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216 These leaks were allegedly caused by a combination of (Award at [262]):

(a) defective protective screed installed by DOM which allowed water to enter at various joints, and poorly constructed scrapper drains, wall junctures and movement / shrinkage cracks which caused the screed to become waterlogged over time; and

(b) failed upstand / kicker details between the upstand and slab due to DOM's failure to properly waterproof the joints, allowing water seepage between the slabs and the wall.

217 In order to rectify the Roof Water Ingress Defects, DON (a) overlaid a Greenfelt waterproofing membrane / system over the *entire roof area*; and (b) removed water retained below the protective screed and installing air vents to allow water / moisture trapped below the screed to escape over time. DON opted to overlay the roof with a new layer of Greenfelt because it was, allegedly, more reasonable than hacking off the protective screed of the entire roof and applying a new waterproofing membrane (Award at [263]).

The tribunal's findings

218 The tribunal agreed that the Roof Water Ingress Defects resulted from the causes put forward by DON. However, DON should not have rectified the Roof Water Ingress Defects by overlaying Greenfelt over the entire roof. As the Roof Water Ingress Defects were only detected at localised areas, rectifications should have been limited to "the localized areas around where there was water seepage / leakage along the perimeters at the joints between the upstands and the slab areas" (Award at [267]).

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219 As regards the valuation of such rectification works, the tribunal noted that "[DOM] had carried out its own measurements and valuation of the waterproofing works that should have been carried out to the localized areas", but that its own expert, Mr [MK], had "also valued such works based on the contract specifications". The tribunal thus accepted Mr [MK]'s valuation as it had "no reason to doubt his assessment" (Award at [268]).

DOM's arguments

220 DOM argues that the award relating to DSS 29, 30, 31, 33, 34, and 35 should be set aside as:

(a) the tribunal's award is incongruous with its own findings;[103] and

(b) the tribunal failed to apportion or reduce the amount to be awarded on account of the waterproofing warranty that had been provided by DOM.[104]

The tribunal's adoption of Mr [MK]'s valuation is not incongruous with its findings

221 The tribunal accepted (at [268]) Mr [MK]'s (DOM's expert) valuation of the costs that would have been incurred had the contractual specifications been complied with (the "Expert CS Computation"). In doing so, it appears the tribunal agreed with para 217 of DOM's Closing Submissions,[105] which is as follows:

> 217. In the alternative, [DOM] has also provided an assessment of the costs that would have been incurred had the contractual

103 AWS at para 121.

104 AWS at para 123.

105 1MK at pp 585–586.

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> specifications been complied with. These are exhibited in Mr [MK]'s Report at Appendix B, marked with the "CS" label. If [DOM] is found liable for the waterproofing complaints, but this Tribunal agrees that the rectification method ought to have been based off the contractual specifications, then [DON] should only be allowed to claim the costs as assessed by [DOM] in the alternative.

222 DOM complains that this is incongruous with the tribunal's finding that the rectification should have been carried out at localised areas. This is because there were two "CS Computations" – the Expert CS Computation, and a separate one done by DOM (the "DOM CS Computation"). *Both* computations are located in Mr [MK]'s expert report at Appendix B, in two different columns.[106]

223 According to DOM, the DOM CS Computation "plainly accounted for localised areas", while the Expert CS Computation "applied the CS rates to the entire roof".[107] When DOM referred to the "costs as assessed by DOM" in para 217 of DOM's Closing Submissions, it was referring to the former.[108] That being the case, the tribunal should have adopted the DOM CS Computation rather than the Expert CS Computation.

224 By utilising the Expert CS Computation which applied the CS rates to the entire roof, despite its finding that the rectification should have been limited to localised areas, the tribunal had adopted an incongruous and unforeseeable chain of reasoning. This also showed that the tribunal had "failed to apply its mind properly" to the Expert CS Computation.[109]

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106 AWS at para 121.

107 AWS at para 121(b).

108 AWS at para 121(c).

109 AWS at para 119.

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225 DON argues that this is at most an error of fact on the part of the tribunal.[110]

226 I agree with DON. This cannot be characterised as an "incongruity", as DOM claims. The heart of DOM's complaint is that the tribunal misunderstood its submission at para 217 of its Closing Submissions, as well as Mr [MK]'s expert report. This is at best an error of fact. It is trite law that errors of fact, *no matter how irrational*, do not constitute a breach of natural justice (*CEF* at [99], citing *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [57]).

227 Although DOM frames this as a defect in the tribunal's chain of reasoning, in my judgment this alleged unforeseeable chain of reasoning is simply a mistake by the tribunal. First, it cannot be fairly said that a reasonable litigant could not have foreseen an arbitral tribunal making an error of fact. Second, such a finding would be inconsistent with the principle that where the tribunal has made an error of fact or law, there is no right of recourse to the courts (see [19] and [226] above).

228 If DOM is suggesting that this mistake demonstrates that the tribunal had failed to apply its mind to the Expert CS Computation, that argument also cannot stand. First, DOM's own claim is that the tribunal failed to *properly* apply its mind to the Expert CS Computation, not that it failed to apply its mind at all. This, again, shows that DOM's real complaint is that the tribunal made an error of fact by misunderstanding the Expert CS Calculation. That a tribunal failed to "properly" apply its mind to a material issue cannot be a ground for setting aside an arbitral award. This is because to determine if a tribunal had

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110 RWS at para 123.

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indeed "properly" applied its mind would require the court to go into the substantive merits of the award.

229 Second, in my judgment, it was not so clear that the Expert CS Computation was "for the entire roof wholesale" such that the tribunal's use of the Expert CS Computation leads to the virtually inescapable inference that the tribunal had failed to apply its mind to the issue.

230 Not even Mr [MK] himself seems to be clear on this issue. While counsel for DOM states in its written submissions that the Expert CS Calculation was "for the entire roof wholesale",[111] that is not what Mr [MK] has stated in his supporting affidavit. Mr [MK]'s evidence at para 61 is that "*some* of [the Expert CS Calculation] included calculations for an entire level of Level 7 lower roof (see DSS 31 at1st Affidavit of [MK], Tab 1 at page 86) and the entire level of Level 7 upper roof (see DSS 35 at 1st Affidavit of [MK], Tab 1 at page 87)" [emphasis added]. That is not unequivocally "the entire roof wholesale".

231 Furthermore, at paras 30–31 of Mr [MK]'s expert report, he disagrees with DON's view that rectifying the water seepage defects required the repair of the entire roof area.[112] It would hence follow that his Expert CS Computation should not include calculations for the entire roof. In his actual calculations, in the pages labelled "CS" at Appendix B, Mr [MK] also does not explain the figures he uses.[113]

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111 AWS at para 122.

112 1MK at pp 38–40.

113 See, for example, 1MK at p 83.

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The tribunal applied its mind to the issue of the warranty

232 DOM also submits that the tribunal failed to reduce the amount to be awarded on account of the fact that DON could have invoked the waterproofing warranty for the roof to mitigate its loss.[114] This is despite the fact that DOM had made submissions to the tribunal on this point. As such, DOM argues that the tribunal had failed to apply its mind to this issue.[115]

233 DON, in turn, points out that the tribunal applied its mind to the parties' arguments and concurred with DON's arguments, citing [214] to [222] of the Award, as well as [352] of the Award, where the tribunal had held that DON was "contractually entitled to engage its own contractor to rectify the defective works."[116]

234 I agree that [214] to [222] of the Award demonstrates that the tribunal was aware of DON's arguments regarding the issue of the warranty. At [214] to [222] of the Award, the tribunal laid out DON's response to DOM's argument that DON should have called on the warranty and had DOM rectify the defects – *ie*, that DON was contractually entitled to engage third party contractors to rectify the defects.

235 I agree that the tribunal had expressly agreed with DON's argument at [214] to [222] of the Award at [352]. For context, [352] is as follows:

> 352. [DOM] had claimed that they were prevented from attending to the defects by the slow and later approvals of the PTWs. As the Court pointed out in **Sandy Island**, [DOM] no longer had a right / entitlement to rectify the defects after the expiry of the Maintenance Period in June 2017. [DON] was

114 AWS at para 123.

115 NE at pp 25–26.

116 RWS at para 126.

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> entitled to carry out its own rectification works after the expiry of the Maintenance Period. [DON] was *also* contractually entitled to engage its own contractor to rectify the defective works. I therefore find that [DON] was entitled to engage its own contractor to rectify the external façade defects as well as the internal plastering defects. [emphasis added]

236 At [352], the tribunal first addresses DOM's argument that they were prevented from attending to the defects by the slow and late approvals from DON. It finds that DOM could not complain that they were prevented from attending to the defects, as they no longer had such an entitlement after the expiry of the Maintenance Period. The tribunal then separately finds that DON was "*also* contractually entitled to engage its own contractor to rectify the defective works" [emphasis added]. Here, the tribunal is clearly agreeing with DON's argument that it laid out earlier at [214]–[222] of the Award.

237 Hence, I agree with DON that the tribunal had expressly found against DOM on the warranty issue. It had found that the DON's was contractually entitled to engage third party contractors, and thus, was not obliged to invoke the warranty.

238 Based on my conclusions above, I dismiss DOM's application to set aside the award for roof waterproofing in respect of DSS 29, 30, 31, 33, 34 and 35.

Ducting defects

239 DON claimed a total of $901,965.56 for 43 DSS items (DSS 60–106) relating to defects in the air-con ducting that was supplied and installed by DOM (Award at [325]). These defects were categorised into three categories in the Table of Defects: (a) water penetration at roof ducts (DSS 60, 61, 69, 77, 84A, 95–100, 107 and 108); (b) defects caused by missing clips (DSS 62–66, 68, 70–

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76, 79, 80, 82, 83, 84 and 88–94); and (c) miscellaneous defects (DSS 67, 85, 86, 96 and 101–106).[117]

240 The last update to the Schedule of Defects DOM received before it was directed to vacate the site on 27 June 2017 was by way of Architect's Direction No AD/A/67 ("AD 67A"), which was issued to DOM on 9 June 2017 (Award at [198] and [229]). Only two of the 43 DSS items above were included in AD 67A (Award at [330]).

241 Regarding the defects caused by missing clips, DON claimed that duct clips were specified and required under the Contract to join the different section of the ducts to one another. These ducts would mechanically ventilate the internal staircases B, C & F. However, the duct clips were missing and/or insufficient, leaving gaps between different sections of the ducts. These gaps allowed cold air in the ducts to escape, resulting in water condensation and/or mould growth on the outside of the ducts, *ie*, on the staircase walls. The water condensation also damaged the insulation material within the ducts (Award at [329]).

The tribunal's findings

242 The tribunal held that based on the photographs exhibited by Mr [NJ] in his report, it was "satisfied that there were numerous defects in the ductwork as highlighted by Mr [NJ]" (Award at [337]). It also noted that regarding the mould in the staircases, DOM had tried applying a layer of breathable plaster to staircase C, but this rectification method was ineffective in preventing further growth of moulds (Award at [338]–[339]).

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117 NZ at pp 2425–2428 S/N 47–91.

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DOM's arguments

243 DOM has raised complaints regarding (above at [239]):

(a) DSS 60, 61, 69, 77, 84A, 95, 97, 98, 99, 100, 107 and 108, which relate to the water penetration at roof ducts (the "Roof Duct Defects");

(b) DSS 62, 63, 65, 68, 70, 72, 74, 76, 80, 82, 84, 90 and 94, which relate to the defects caused by missing clips (the "Missing Clip Defects"); and

(c) DSS 67, 86, 96, 101, 102, 103, 104, 105 and 106, which relate to miscellaneous defects (the "Miscellaneous Defects").

244 First, DOM's complaint regarding the ducting defects in general is that it was prejudiced in its defence on these claims as DON had only informed it of two out of 43 items in AD 67A and that it was deprived of the opportunity to inspect the alleged rectification works.[118]

245 Second, in relation to the Missing Clip Defects in particular, DOM argues that:

(a) the award made in relation to the Missing Clip Defects is incongruent with the evidence led;[119]

(b) the tribunal had failed to apportion the rectification costs relating to the Missing Clip Defects to account for DON's poor supervision;[120] and

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118 AWS at para 127.

119 MA at paras 145, 151 and 156.

120 AWS at para 134.

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(c) the tribunal failed to apply its mind to the proper evaluation of the costs of rectification in relation to the condensation and mould growth at the internal staircases.

246 Third, for completeness, there were also some arguments raised by DOM in its supporting affidavits that were not raised in DOM's written submissions or its oral submissions at the hearing. DOM alleges that the "[tribunal]'s decision appears to be a rubber-stamping exercise that was made, which was not supported by the evidence placed before [the tribunal]".[121] It notes, for example, the tribunal's finding regarding the Roof Duct Defects (at [338] of the Award) that "the rainwater ingress from the roof was largely due to gaps around the duct penetrations at the roof level that were not properly sealed", which "allowed water to enter the duct shaft below within the staircase".[122] DOM argues that the photographs produced by DON "simply showed the presence of water below the [roof] ducts complained of at the floor below but not within the [roof] ducts themselves", and that Mr [NJ] had conceded that (a) there was no evidence of water entering the roof ducts; and (b) there was no evidence of water inside the roof ducts.[123] Another example it raises is that "there was also a glaring lack of evidence that [the] condensation issues even existed in all the areas claimed for by [DON]". In other words, DOM's complaint is that the tribunal has undertaken a "rubber-stamping exercise" in the sense that it had made its findings based on insufficient evidence. This is not a ground for setting aside an award, as the no-evidence rule is not applicable in Singapore (see above at [183]).

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121 1MK at para 51.

122 MA at para 143.

123 MA at para 144; 1MK at para 51(a).

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There is no breach of natural justice regarding the alleged denial of a reasonable opportunity to inspect the ducting defects

247 DOM's case with respect to the ducting defects in general is that it was prejudiced in its defence on these claims as DON had only informed it of two out of 43 items in AD 67A and that it was deprived of the opportunity to inspect the alleged rectification works.[124] This led to DOM being prejudiced in the preparation of its defence, and hence, it was denied a fair opportunity to present its case properly.

248 However, DOM had the opportunity to, and did in fact submit on this issue.[125] At [330] of the Award, the tribunal notes DOM's argument that it had not been given the opportunity to verify 41 of the 43 defects, or to inspect the rectification works:

> 330. [DOM] challenged the legitimacy of [DON]'s claim for the ducting defects and pointed out that out of the 43 DSS items, only 2 items were identified in AD 67A. *[DOM] had no opportunity to verify the other 41 items or the rectification works carried out.* [DON] had also failed to mitigate its loss by acting unreasonably in carrying out destructive investigations of the entire ducting works. [emphasis added]

249 While the tribunal did not expressly address DOM's argument that it was unable to present its case properly in the Award, its other findings suggest that it was because it found it meritless. At [337] of the Award, the tribunal found that it was "satisfied that there were numerous defects in the ductwork as highlighted by Mr [NJ]" based on the photographs in Mr [NJ]'s report. Given that the tribunal was of the view that the photographic evidence was sufficient, I cannot exclude the possibility that the tribunal viewed DOM's submission that

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124 AWS at para 127.

125 See DOM's Closing Submissions at para 415 (1MK at p 645).

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it was prejudiced by not being able to inspect 41 of the defects as so unconvincing that analysis of it was unnecessary. At [339], the tribunal notes that "during the inspection after the rectification works, DOM's expert Mr [U] could only find minor mould growth". This shows that the tribunal found that DOM was in fact able to inspect the rectification works.

250 If DOM's allegation is that the tribunal's aforementioned views on its argument that it was prejudiced by its inability to inspect the defects or rectification works (above at [249]) is wrong in some way, this issue relates to the tribunal's discretion to determine the arbitral procedure, which the court offers a "margin of deference to" (*China Machine* at [103]).[126]

The tribunal's award is not incongruent with the evidence

251 DOM claims that out of the 13 DSS items relating to the Missing Clip Defects (above at [243(b)]), DON only claimed there were missing clips in the descriptions of four of those DSS items – namely, DSS 65, 74, 82, and 90.[127] The description of claim in those items states "record clip locations around the 4 sides of duct joints". DOM also argues that there was no evidence showing that there were missing clips, or that the missing clips were attributable to DOM.[128] Even though the description in DSS 65, 74, 82, and 90 required the recording of clip locations, there was no such records. This is consistent with [333] of the Award (below at [255]), which states that the evidence tendered by DON did not support its claims that the Missing Clip Defects were wholly attributable to DOM. DOM thus claims that the tribunal's award for all the DSS items that allegedly related to the Missing Clip Defects is incongruent with the

126 RWS at para 20(b).

127 AWS at para 129.

128 AWS at para 131.

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evidence led. This incongruity shows that the tribunal had failed to apply its mind to the extent of the alleged defects and rectification required.[129]

252 DON argues that even though not all 13 DSS items referenced missing clips in their description of claim, they all related to missing clips. This is reflected by their categorisation under the heading "Defects caused by missing clips" in the Table of Positions submitted by parties.[130] Moreover, at [333], the tribunal is merely laying out DOM's own argument. It is not making any finding that the evidence tendered by DON does not support its claims.

253 I agree with DON. The fact that some of the 13 DSS items did not reference the missing clips in their description of claim does not necessarily mean that they do not relate to missing clips. The fact that they were categorised under the heading "defects caused by missing clips" in the table of positions shows that, at the very least, DON's position was that they related to missing clips. Thus, it was not agreed between the parties that only DSS 65, 74, 82, and 90 were relevant to this claim for defects caused by missing clips, and the tribunal was entitled to come to its own view on this issue.

254 DON also rightly points out that at [333] of the Award, the tribunal was simply laying out DOM's arguments.

255 Paragraphs [332] to [333] of the Award explains this:

> 332. [DOM] submitted that although [DON]'s claim of $901,965.56 for 43 DSS items of ducting defects, DOM was only informed of 2 out of the 43 DSS items in AD 67A. The rectification works undertaken by [Contractor X] were unnecessary because *firstly*, all the internal staircases had

129 MA at para 156.

130 NE at p 61.

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> passed their staircase pressurization tests before they were handed over to [DON] in 2015. The complaints [DON] now make about missing or insufficient clips could have and should have been discovered or detected during inspection. No such issues were identified. likewise, the vast majority of [DON]'s claims now for ducting defects were also not identified when AD 67A was issued. As such, [DOM] submitted that the ducting defects now claimed by [DON] could not have been attributable to [DOM]'s workmanship.
>
> 333. *Secondly*, the evidence tendered by [DON] did not support its claims that the missing duct clips were wholly attributed to [DOM]. The photographs exhibited in Mr [NJ]'s reports show the use of clips to fasten the ducts, and do not show any missing or insufficient clips.
>
> [emphasis added]

256 At [332], the tribunal is clearly laying out DOM's submissions as the paragraph starts with "[DOM] submitted". In this paragraph, the tribunal sets out DOM's first argument for why "the rectification works undertaken by [Contractor X] were unnecessary", *ie*, "firstly" because the internal staircases had passed their staircase pressurisation tests. At [333], the tribunal was then moving on to DOM's second argument evidenced by the paragraph starting with "[s]econdly", corresponding to the "firstly" in [332].

257 As such, the tribunal had not actually made a finding that DON had presented insufficient evidence to support its claims.

258 Given the above, it was thus not incongruent for the tribunal to find that DON had proved its case and awarded the full costs claimed in relation to the Missing Clip Defects.

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The tribunal's decision to not apportion liability is not incongruous with its findings

259 DOM also argues that if there were missing or insufficient duct clips, this should have been observed at the time of inspection.[131] DOM thus complains that the tribunal had failed to apportion the rectification costs for the Missing Clip Defects, despite its finding at [247] that some of the obvious construction defects could have been avoided if there was proper supervision of works. This shows that the tribunal had failed to apply its mind to the impact of DON's poor supervision of the ducting works.[132]

260 DON argues that the tribunal's decision to not apportion the cost of rectification for poor supervision of the ducting works is consistent with its remarks at [247] of the Award.

261 I agree with DON.

262 Paragraph [247] of the Award is as follows:

> 247. While some defects often do not manifest themselves until after completion of the works, *some can be prevented by proper supervision of works* during construction to avoid mistakes in construction. Under the Building Control Act 1989, a developer must appoint a qualified person (QP) to, among other things, supervise the carrying out of the building works. the QP in turn must appoint appropriate full-time site supervisors to supervise the carrying out of such works. A project of this size would require at least 1 Resident Engineer (RE) and 1 Resident Technical Officer (RTO) to supervise the carrying out of the building works and ensuring that the works are carried out in accordance with the approved building plans. For this Project, [DON] had employed not only an RE and RTO but also a Project Manager [Consultant C], a construction manager, site engineer, an M&E co-ordinator and an Archi co-ordinator. These

131 AWS at para 134; MA at paras 148–149.

132 MA at Section I.4 and paras 148–149.

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> personnel are employed to look after the interests of [DON] and to ensure that the works are carried out not only in accordance with the approved building plans but also in accordance with the approved designs and specifications in the Contract. If any defective or non-compliant work was being carried out by [DOM], *these supervisors and consultants could and should have pointed these out and/or stopped [DOM] from carrying out such works*. Had this been done, *some of the obvious construction defects could have been avoided*. [emphasis added]

263 The tribunal's words at [247] were thus clearly an opening observation, and there is nothing to indicate that it was referring specifically to the Missing Clip Defects.

264 Further, it does appear that the tribunal was at least aware of DOM's allegation that the Missing Clip Defects could have been prevented by proper supervision of works. At [332] of the Award, it notes DOM's argument that the missing clips "should have been discovered or detected during inspection". Though it does not make an explicit finding on this issue of whether DON should also bear some liability for poor supervision of works, that alone is insufficient to show that it did not apply its mind to it. It may well be that it did not deal explicitly with this issue because it either thought that the missing clip defects could not be prevented by proper supervision of works, or that even if it could be so prevented, it did not warrant any apportionment of rectification costs.

The tribunal had applied its mind to the rectification costs relating to condensation and mould growth

265 DOM then argues that the tribunal "failed to apply its mind to the proper valuation of the costs of rectification" relating to the condensation and mould growth at the internal staircases.[133] DOM argued that there was no need to

[133] AWS at para 136.

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engage Contractor X and subsequently another independent contractor to rectify the mould growth, as DOM's bioclimatic mock-up was effective in preventing mould growth.[134] Mr [NJ] had expressly conceded that no mould had occurred after the bioclimatic application was implemented.[135] Thus, the fact that the tribunal still awarded the full costs relating to the mould growth showed that the tribunal had failed to apply its mind to Mr [NJ]'s evidence.[136]

266 DON counters that Mr [NJ] had not made such a concession.[137] In support of this, it points to the fact that in re-examination, Mr [NJ] had clarified that the mock-up used for the bioclimatic application was "completely covered in mould".

267 I agree with DON that Mr [NJ] had not made this concession. When asked in cross-examination if the bioclimatic mock-up installed at staircase C was shown to be effective, Mr [NJ] responded "[n]ot when it was covered in mould". When DOM's counsel questioned if he was saying that there was mould on the mock-up, he said "[n]o, I'm sorry … [i]t was before my time"..[138] From this exchange, it appears that Mr [NJ] was saying that he doesn't know if there was mould, as it was before his time. Thus, whether the bioclimatic application was effective remained a live issue, and the tribunal "failing" to consider the concession does not suggest that it has failed to apply its mind to the issue.

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134 MA at para 161.

135 AWS at para 137.

136 MA at para 162.

137 RWS at para 136(b).

138 MA at pp 1546–1547.

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268 Further, it does appear that the tribunal had expressly considered the issue of rectification costs for the condensation and mould growth issue. Reading the Award, the tribunal's position was quite emphatic in finding against DOM. As noted by DON, at [338] of the Award, it found that "[a]s for the mould found in the staircase, DOM had tried applying a layer of breathable plaster to L4 staircase C, but this proved ineffective".[139]

269 Based on the conclusions above, I dismiss DOM's application to set aside the award for ducting defects in respect of DSS 60, 61, 62, 63, 65, 67, 68, 69, 70, 72, 74, 76, 77, 80, 82, 84, 84A, 86, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107 and 108.

Toilet defects

270 DSS 47 relates to defects in the waterproofing of all the toilets that caused water seepage into adjacent compartments, including the LAN room. DON alleged that DOM had failed to properly apply the waterproofing membrane at the floor / wall of the toilet compartments and the WC bulkheads. DOM had also failed to construct upstands for the WC bulkheads in accordance with the waterproofing details (Award at [307]).

The tribunal's findings

271 The tribunal found that it was reasonable for DON to re-waterproof the toilets that failed the water ponding tests (Award at [311]). Hence, it awarded costs of $156,868.84 (Award at [312]).

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139 RWS at para 136(d).

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The tribunal had applied its mind to the toilet warranty issue

272 DOM's complaint is that the tribunal had failed to reduce the rectification costs because DON could have invoked the waterproofing warranty for the roof to mitigate its loss. No reasonable litigant in DOM's shoes could have foreseen that the tribunal would find that DOM would be held liable to make payment in full notwithstanding the existence of a valid warranty.[140]

273 I disagree. DON had put forward arguments in its closing submissions in response to DOM's claim that DON should have invoked the warranty. DOM is thus essentially arguing that no reasonable litigant could have foreseen that the tribunal would agree with DON. That is clearly untenable.

274 If DOM actually means to argue that the tribunal had failed to apply its mind to the issue of the warranty, this is the same argument it made in relation to the waterproofing defects for the Roof Water Ingress Defects. At the hearing, DOM stated that its arguments on the warranty point would apply generally.[141] I took this to mean that it would apply across both issues where the warranty argument was raised. As such, I repeat my points at [234]–[236] above.

275 For these reasons, I dismiss DOM's application to set aside the award for toilet defects in respect of DSS 47.

Painting defects

276 DOM's complaint on DSS 19–23 relate to the cost of DON repainting the external façade of the building (the "Plaster Repainting Works").[142]

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140 AWS at para 145; NE at p 27.

141 NE at p 25.

142 NZ at p 2432 S/N 121–125.

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According to DON, the external façade of the building needed to be repainted for two reasons:

(a) DOM had allegedly failed to comply with the contractual painting specifications. The external façade was supposed to have been finished with the SKK Elganstone 6-coat textured paint system and emulsion paint finish. Instead of applying the specified SKK Elganstone textured paint finish, DOM had apparently applied some other manufacturer's paint. Thus, the paint work "potentially suffered from severe issues arising from incompatibility of the different coats applied" (Award at [359]).

(b) These were follow-up works necessitated by DON's rectification of the External Plaster Defects. Specifically, the repairs to the hollowed, cracked or debonded plaster necessitated re-application of the textured and emulsion finishes.[143]

The tribunal's findings

277 The tribunal's findings on the Plaster Repainting Words are set out at [362] of the Award:

> 362. As mentioned above, I accept Mr [NJ]'s finding that there were extensive cracklines and signs of water seepage in the external plastering of all 4 elevations/façade of the Building. The external façade was supposed to have been finished with SKK Elganstone textured paint system and emulsion paint finish. On the evidence, I find that [DOM] did not follow the paint specifications in applying the SKK textured finish as disclosed in the SETSCO report. As a result, the textured paint and emulsion paint finish did not properly bond / adhere to the substrate. The external façade also showed signs of fading with streak marks and stains along with multiple crack lines. Sections of the plaster were also found to be "hollow". The

143 DON's Closing Submissions, Part F at para 3 (NZ at p 304).

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> cracks and hollow plaster and crack lines had to be repaired which necessitated a re-application of the textured and emulsion finishes. I therefore allow [DON]'s claim to repaint the 4 elevations by [Contractor X] in DSS 19, 20, 21, 22 and 23 using SKK Elganstone textured paint finish to match the existing finish.

DOM's arguments

278 DOM argues that:

(a) the tribunal failing to apportion the costs of the Plaster Repainting Works is incongruent with its prior decision to apportion the rectification costs in respect of the External Plaster Defects;[144] and

(b) the tribunal's decision to award repainting costs for emulsion paint for DSS 20, 22 and 23 as contrary to, and incongruent with its finding that it allowed DON's claim for the cost of repainting the external façade using SKK Elganstone textured paint.

279 DOM also observed that the tribunal awarded 95% for DSS 20 and 81% for DSS 21 in respect of the amounts claimed by DON but "there is no explanation of the basis of apportionment adopted".[145] This observation in respect of DSS 20 is untrue. The tribunal awarded the full sum of $153,540.86 claimed in respect of DSS 20. This is also DOM's position, as it is DOM's own argument that the tribunal had wrongly awarded DON's full claim in relation to DSS 20 (above at [278(b)]). While it is correct that the tribunal awarded 81% of the sum claimed by DON in respect of DSS 21, DON's own position is that the arbitrator had done so to (rightly) exclude the repainting costs for emulsion

144 AWS at paras 149–150.

145 MA at para 175.

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paint in respect of DSS 21 (at [283] below). DOM clearly knows and agrees with the basis of the tribunal's apportionment of the claim for DSS 21.

The tribunal's decision not to apportion liability is not incongruous with its findings

280 DOM's position is that the tribunal failing to apportion the costs of the Plaster Repainting Works is incongruent with its prior decision to apportion the rectification costs in respect of the External Plaster Defects.[146] This was because the Plaster Repainting Works were necessitated by DON's rectification of the External Plaster Defects. Given that the tribunal had found that DON's poor supervision had contributed to the External Plaster Defects, it thus follows that the same would apply to the Plaster Repainting Works that were consequent to the External Plaster Defects.

281 DON responds that there is no incongruity because there were two reasons why the Plaster Repainting Works were necessary.[147] DOM's painting works were in any event defective because DOM had failed to follow the contractual specifications, which prevented the SKK Elganstone textured paint and the emulsion paint from properly adhering to the substrate. As such, there was no need to follow the External Plaster Defects in apportioning the costs of repainting.

282 I agree with DON. At [362] of the Award, the tribunal found that DOM had failed to follow the paint specifications (above at [277]). "[T]he textured paint and emulsion paint finish did not properly bond / adhere to the substrate" as a result of this. Admittedly, the tribunal also found that "[t]he cracks and

146 AWS at paras 149–150.

147 NE at pp 62–63.

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hollow plaster and crack lines had to be repaired which necessitated a re-application of the textured and emulsion finishes". However, on a generous reading of the Award, [362] should be interpreted as the tribunal finding two distinct reasons for the Plaster Repainting Works, either of which independently necessitated the Plaster Repainting Works. As such, given that Plaster Repainting Works would still have been necessary even if there were no External Plaster Defects, no incongruity arises from the tribunal's decision to not apportion the costs of Plaster Repainting works.

The tribunal's award of the full costs claimed in DSS 20, 22 and 23 is not incongruous with its findings

283 DOM then attacks the tribunal's decision to award repainting costs for emulsion paint for DSS 20, 22 and 23 as contrary to, and incongruent with its finding that it "allow[ed] [DON]'s claim to repaint the 4 elevations by Contractor X in DSS 19, 20, 21, 22, and 23 using SKK Elganstone textured paint finish to match the existing finish" (Award at [362]). DOM notes that the tribunal did not make any finding that emulsion paint would be required.[148] The award for DSS 20, 22 and 23 is in contrast with DSS 21, where the tribunal rightly decided to not award repainting costs for emulsion paint.

284 DON explains that the tribunal did not say that it was allowing only the claim regarding the Elganstone textured paint.[149] As such, there was nothing incongruent about the tribunal's decision. It also argued that the tribunal made a mistake in not awarding repainting costs for emulsion paint for DSS 21, but as the mistake was in DOM's favour, they are in no position to complain.

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148 AWS at para 154.

149 NE at pp 63–64.

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285 I agree with DON that, by finding that repainting of DSS 19 to 23 would be carried out with SKK Elganstone paint finish, the tribunal did not mean that it would be carried out only with SKK Elganstone paint finish. The tribunal already explained that while it would not be giving reasons for each of the DSS items under Paint Defects, it had come to a decision on quantum based on the evidence and after considering the submissions of the parties (Award at [363]). As such, the fact that the tribunal did not come to a finding on the emulsion paint in the Award does not mean that it failed to apply its mind to this issue. In fact, the fact that the tribunal excluded the cost of emulsion paint for DSS 21, while including it for DSS 20, 22 and 23 suggests that it actually applied its mind to the issue of whether emulsion paint was necessary, as it was not indiscriminately granting such claims.

286 Having read [362] and [363] of the award generously, I also agree with DON that if there was a mistake in the Award for DSS 21, this was a mistake in DOM's favour which DOM has sought to turn on its head and paint as an incongruous finding by the tribunal. Thus, as there was no prejudice caused to DOM, they cannot set aside the tribunal's award in relation to DSS 21 (*BZW* at [63]).

287 Based on the conclusions above, I dismiss DOM's application to set aside the award for painting defects in respect of DSS 19, 20, 21, 22 and 23.

Pre-award interest

288 DOM put forward two arguments on the award of pre-award interest:

(a) that it breached the rules of natural justice;[150] and

[150] AWS at para 168.

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(b) that it was against public policy.[151]

Breach of natural justice

289 DOM argues that it was not given the opportunity to put forward its case on pre-award interest.[152]

290 I disagree. Given DON had explicitly claimed for interest in its Defence & Counterclaim,[153] DOM would have reasonable notice of the issues relating to the date from which interest would accrue, and the amount on which interest would be levied.[154] That being the case, if DOM wished to put forward arguments on these issues, it should have done so in its submissions. As DOM had decided not to address it (knowingly or not), it cannot complain now that it was not given an opportunity to be heard (*Glaziers* at [60] and [64]).

291 The case cited by DOM[155] – *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*Lim Chin San*") – is distinguishable from the current case. The Court of Appeal in *Lim Chin San* found a breach of natural justice from an tribunal awarding an additional award of pre-award interest without hearing arguments from either party. This was even though a party had previously asked for, and been awarded, post-award interest. In *Lim Chin San*, the parties' previous submissions on interest would not have considered an *additional* award of, specifically, pre-award interest, after post-award interest had already been granted. In that regard, it was only

151 AWS at para 184.

152 AWS at para 168.

153 NZ at pp 3526–3527.

154 RWS at paras 180–181.

155 AWS at para 162.

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right that the tribunal invite further arguments from parties. However, the current case does not involve an additional award that parties could not have expected.

Public policy

292 In its written submissions, DOM also argued that the award of pre-award interest is contrary to public policy.[156] However, during the oral closing submissions, DOM conceded that it was no longer pursuing this point, as the case law dealing with the public policy ground related to breaches of national laws, and there is no national law breached in this case.[157]

293 In any case, I would note the case of *VV and another v VW* [2008] 2 SLR(R) 929 ("*VV*"), where an applicant applied to set aside a costs award on the basis that it was so disproportionate that it was against public policy. Prakash J rejected this argument, holding that it was not part of the public policy of Singapore to ensure that arbitration costs were to be assessed on the basis of any particular principle, including the proportionality principles (at [31]). Further, Prakash J questioned if "the amount of costs awarded by an [tribunal] to a successful party in an arbitration proceeding could *ever* be considered to be injurious to the public good or shocking to the conscience *no matter how unreasonable such an award may prove to be upon examination*." [emphasis added]. Prakash J made the point that it would be odd for the courts to be able to justify interfering with the quantum of costs awarded by an tribunal by invoking public policy, considering the prevailing public policy being that

156 AWS at para 184.

157 NE at pp 31–32.

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substantive arbitral awards are inviolable notwithstanding mistakes of fact or law.

294 Following *VV*, I do not see how DOM can argue that the award for pre-award interest is contrary to public policy.

295 DOM also argues that the parts of the Award which were induced by fraud should also be set aside on public policy grounds.[158] However, as I found (at [132] above) that the Award was not induced by fraud, this argument is rendered moot.

296 For the above reasons, I dismiss DOM's application to set aside the award ordering DOM to pay to DON interest at a rate of 5.33% on the sum of S$4,926,848.16 from the date of the Statement of Defence and Counterclaim of 24 August 2018.

Conclusion

297 In conclusion, I allow DOM's application to set aside the portion of the Award for DON's claims for consultant fees in part and for the sums of S$127,151.50, S$87,475.00 and S$32,500.00, being the award of 50% of DON's claims for Consultant B's fees, Consultant D's fees and Consultant E's fees respectively.

298 For the avoidance of doubt, I dismiss DOM's application to set aside the other portions of the Award (in prayers 1(a) and (b) of DOM's application).

[158] AWS at para 196.

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299 Unless parties agree on costs and disbursements, they are to provide written submissions on costs (not exceeding five pages) within one week of this decision.

Wong Li Kok, Alex
Judicial Commissioner

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