AQU *v* AQV
[2015] SGHC 26

Case Number : Originating Summons No 133 of 2014

Decision Date : 30 January 2015

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kelvin Chia (Samuel Seow Law Corporation) for the plaintiff; Ng Yuen (Malkin & Maxwell LLP) for the defendant.

Parties : AQU — AQV

Arbitration – Award – Recourse against award – Setting aside

30 January 2015

Judith Prakash J:

Introduction

1 The plaintiff applied to set aside, in part, an arbitration award dated 22 January 2014 ("the Award"), rendered by a single arbitrator ("the Arbitrator"). The application was made pursuant to s 48(1)(*a*)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) on the ground that there had been a breach of natural justice in the making of the Award. The plaintiff claimed that the Arbitrator committed the following breaches of natural justice:

(a) the Arbitrator reached a conclusion not argued by either party, depriving the plaintiff of its ability to effectively respond;

(b) the Arbitrator failed to consider an argument raised by the plaintiff; and

(c) the Arbitrator made a finding of fact in the absence of any logically probative evidence to support the same.

2 I found the plaintiff could not substantiate its grounds and dismissed the application. The plaintiff has now appealed.

Background

The Nominated Sub-contract

3 Following a tender exercise, the claimant in the arbitration who later became the defendant in this application ("the Supplier"), was awarded a contract on 12 January 2007 for the supply and delivery of stone finishing in the form of stone tiles intended for installation on a construction project ("the Project"). The original agreement was between the Supplier and Times Development Pte Ltd ("Times"). On 30 July 2007, this contract was novated with the result that the plaintiff in this application ("the Contractor") became a party to the contract with the Supplier in place of Times. The parties referred to this contract between the Contractor and the Supplier as "the Nominated Sub-Contract" ("NSC"). The Singapore Institute of Architects ("SIA") Conditions of Sub-contract for

use in conjunction with the Main Contract applied to the NSC.

4 On 25 January 2008, the Contractor sent the Supplier a document entitled "*Letter of Acceptance – Subcontract Standard Clauses (Supply Only)*") ("LOA"). The terms of the LOA required the Supplier to, among other things, ascertain and take measurements from the site (and not from drawings) and it provided that the Supplier would be paid on "as-built" (*ie*, installed) quantities. The Supplier characterised this as an attempt to unilaterally vary the NSC which it asserted had not provided such terms. It refused to sign the LOA at that point. Instead, it responded by way of two letters, dated 25 February 2008 and 10 April 2008, stating, among other things, that it was not responsible for taking any site measurements, that it would supply the confirmed quantities requested by the Contractor, and that it was entitled to payment based on the quantities that it actually supplied for the Project.

5 The parties met on 14 April 2008 to discuss the matters raised by the Supplier's letters. Thereafter, the Supplier sent a letter dated 25 April 2008 ("the 25 April letter") to the Contractor making reference to the prior letters and to the meeting. On 20 May 2008, the Supplier signed the LOA after adding an additional handwritten clause to it which referred to the 25 April letter and was intended to make that letter an integral part of the LOA. Thereafter, it appears that the Contractor did provide the Supplier with the quantities and dimensions of the tiles it required for the Project while maintaining on at least two occasions that it was not required to provide the Supplier with the order quantities. It should be noted that the Contractor did not dispute the contents of the 25 April letter before the Supplier annotated, signed and returned the LOA.

The Domestic Sub-contract

6 By a letter dated 12 March 2009, the Contractor engaged the Supplier to supply and deliver tiles and stone finishings to common areas in the Project as well. This was the second contract that the parties entered into. They referred to this contract as the Domestic Sub-contract ("DSC"). Only the letter of engagement specifying the lump sum price for the DSC was disclosed in the court papers filed in this application. Presumably, the other terms and conditions were identical in all material respects with those of the NSC.

The arbitration proceedings

7 Subsequently disputes arose between the parties as to the amount which the Contractor was obliged to pay the Supplier for the tiles supplied to the Project under both the NSC and the DSC. On 23 February 2012, the Supplier sent the Contractor a Notice of Arbitration. On 16 May 2012, both parties agreed to the appointment of the Arbitrator as the sole arbitrator to hear the dispute and on 1 August 2012 the Tribunal was constituted. In due course the Supplier served its Statement of Case and the Contractor served a Statement of Defence and Counterclaim. The Arbitrator heard evidence in August 2013 and, by the end of October 2013, both parties had filed their written submissions and reply submissions.

8 The Award was delivered on 22 January 2014. In [42] of the Award, the Arbitrator set out the five issues that the parties had agreed should be decided by the Tribunal. In the result, the Arbitrator found in favour of the Supplier in respect of its claims and also dismissed the counterclaim of the Contractor. The Arbitrator made the following awards:

(a) in respect of the amount claimed by the Supplier for the supply and delivery of stone finishings to the apartments in the Project under the NSC, he awarded the Supplier $383,290.92 (*ie*, the sum of $481,040.91 less the retention sum of $97,750);

(b) in respect of the amount claimed by the Supplier for the supply and delivery of stone finishings to the common area in the Project under the DSC, he awarded the Supplier $26,187.32 (*ie*, the sum of $30,887.32 less the retention sum of $4,700); and

(c) the Supplier was entitled to recover Goods and Services Tax ("GST") payable on the sums payable to it under the NSC and the DSC at the rate of 7% on the amounts due to be paid to the Supplier.

9 On 18 February 2014, the Contractor filed this application to set aside the Award on the ground that a breach or breaches of natural justice had occurred in the making of the Award.

The disputes

First dispute under the NSC: Was the Supplier entitled to payment on the basis of "as-built" quantities or "delivered" quantities?

10 The first broad area of contention between the parties was whether the Supplier was entitled to payment on the basis of "as-built" quantities or "delivered" quantities. The first and second issues identified in the list of issues that the parties agreed to submit to the Arbitrator are pertinent to the dispute as to the basis of payment.

11 The first issue that the Arbitrator considered was "whether the NSC was varied on 20 May 2008 when the [Supplier] signed and returned the [LOA] and, if so, what were the terms of the NSC after 20 May 2008". The Arbitrator held that the NSC was varied and that its terms included the following:

(a) The Supplier did not have to take site measurements;

(b) The Contractor was required to provide the dimensions and order quantities to the Supplier; and

(c) The Supplier would be paid according to quantities delivered to the site.

12 The second issue that the Arbitrator considered was whether "under the terms of the NSC, the [Supplier] is entitled to payment based on the as-built quantities or the quantities supplied by the [Supplier] for the Project". Flowing from his earlier findings, the Arbitrator held that the Supplier was entitled to payment based on delivered quantities.

13 In coming to his decision, the Arbitrator stated as follows:

91. After having carefully considered the evidence and the submissions of the Parties, I FIND AND HOLD that the NSC was varied by the [LOA] with the handwritten annotation when the [Supplier] signed and returned it to the [Contractor] on 20 May 2008. …

92. On 25 January 2008 the [Contractor] had attempted to unilaterally change the terms of the NSC by introducing terms and conditions contained in the [LOA], which the [Supplier] refused to accept.

…

94. On the evidence which is before me, I am satisfied that there was an agreement reached by the Parties at the meeting of 21 April 2008 regarding the terms and conditions which are to be

introduced by the [LOA]. The [Supplier] had made it clear that it would accept the [LOA] subject to conditions and this is clearly recorded in its letter dated 25 April 2008 addressed to the [Contractor]. The installation works for the stone and tile finishes to the apartment units were carried out by the [Contractor's] installers. The terms of the NSC as varied by the [LOA] states that the Sub-Contract Sum shall be paid on quantities stated in the [Supplier's] delivery orders duly signed by the [Contractor's] authorised representatives.

…

97. … I find that it was the [Contractor] who had attempted to unilaterally vary the NSC by issuing the [LOA] and that the [Supplier] after much resistance signed and returned the [LOA] with a handwritten Annotation on 20 May 2010. … Upon receipt of the [Supplier's] letter of 25 April 2008, the [Contractor] did not immediately inform the [Supplier] that it was not accepting the [LOA] with the handwritten annotation.

…

103. … The NSC as varied by the [LOA] does not require the [Supplier] to take site measurements and it expressly provides that the [Supplier] would be paid according to quantities stated in the [Supplier's] delivery orders duly signed by the [Contractor's] authorised representatives.

First alleged breach of natural justice: Arbitrator reached a conclusion not argued by either party, depriving the Contractor of its ability to effectively respond

14 In the present application to set aside the Award, the Contractor's primary argument was that there was a breach of natural justice because the Arbitrator had radically departed from the position the Supplier had taken in its pleadings and submissions in finding, as the Contractor put it, "that there was an oral agreement in April 2008, which was formalised by way of Annotation on 20 May 2008".

15 The Contractor claimed that the Supplier's position at arbitration was that the LOA with the handwritten annotation was accepted by the Contractor's silence. This is not entirely accurate. The Supplier's position at arbitration appears to have been twofold. First, it argued that the Contractor had not rejected the 25 April letter. Second, it argued that the Contractor had actually impliedly accepted the 25 April letter by providing the Supplier with order quantities. Underpinning these assertions of the Supplier was its stand that all along its position as to its obligations under the NSC had been as stated in its earlier letters of 25 February 2008 and 10 April 2008, and that it was the Contractor who had tried to vary these obligations by the LOA.

16 However, it is true that the Supplier had not argued that an oral agreement was reached at the meeting between the parties on 14 April 2008 which was subsequently formalised by way of the annotated and signed LOA. Hence, the Contractor claimed that it was responding to a different case at the arbitration and that it was "truly taken by surprise" by the Arbitrator's finding that there was a prior oral agreement.

17 It was accepted by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [41] that there may be a breach of natural justice if an "arbitrator decides the case on a point which he has invented for himself". This is because by doing so "he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer" (citing Sir Michael J Mustill & Steward C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 312). However, this does not

mean that arbitrators cannot make any findings not argued for by the parties. As the High Court stated in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*"):

> 65. … arbitrators cannot be so straightjacketed as to be permitted to *only* adopt in their conclusions the premises put forward by the parties. If an unargued premise flows reasonably from an argued premise, I do not think that it is necessarily incumbent on the arbitral tribunal to invite the parties to submit new arguments. The arbitral tribunal would be doing nothing more than inferring a related premise from one that has been placed before it. [emphasis in original]

18 Similarly, the Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc and Another Appeal* [2008] 2 SLR(R) 491 explained this principle of natural justice as it applies to courts in the following terms:

> 32. … The important point to note is that we are not suggesting that a court is hogtied by the issues canvassed before it such that it is unable to make reasonable inferences of fact, or that a court cannot make a finding that the just solution lies somewhere between the extreme positions taken by parties. The emphasis on this aspect of natural justice is on the opportunities given to parties to address the determinative issue(s) in a matter. Reasonable inferences, findings of fact or lines of argument adopted by the court, even though not specifically addressed by the parties, are entirely acceptable.

Therefore, it is clear that the principles of natural justice are not breached just because an arbitrator comes to a conclusion that is not argued by either party as long as that conclusion reasonably flows from the parties' arguments.

19 After hearing the arguments, I decided that there was no breach of natural justice because the conclusion reached by the Arbitrator was aligned to the position that the Supplier had taken at arbitration. The Contractor's characterisation of the Arbitrator's finding was incorrect. To reiterate, the Contractor referred to [94] of the Award and argued that the Arbitrator found that an oral agreement was reached at the meeting between the parties on 14 April 2008 which was subsequently formalised by way of the annotated and signed LOA. In fact, that was not the Arbitrator's finding. In [94] of the Award, the Arbitrator stated an "agreement" was reached as to:

> … the terms and conditions which *are* to be introduced by the [LOA]. The [Supplier] had made it clear that *it would* accept the [LOA] subject to conditions and this is clearly recorded in its letter dated 25 April addressed to the [Contractor] … [emphasis added].

20 I am of the view that the Arbitrator only meant that at the meeting the parties reached a mutual understanding as to each other's views on the terms and conditions that the LOA attempted to introduce to the NSC. There was no concluded agreement then. The use of the word "agreement" may create some confusion. However, it should be kept in mind that the court should not approach "an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration. Rather, the award should be read in a reasonable and commercial way …": *BLC v BLB* [2014] 4 SLR 79 at [85]–[86]. I should also state that the fact that the Award in [94] refers to the date of the meeting as "21 April 2008" is not significant. That was obviously a typographical error because there was no meeting on 21 April 2008. The meeting took place on 14 April 2008 as recorded in the 25 April letter itself. The Contractor made much of this error as being indicative of a "non-existent fact" on which the Award was allegedly based. In my opinion, the Contractor was trying to make bricks without straw.

21 In [95] of the Award, the Arbitrator sets out the Supplier's pleaded case and in [97] his finding is that, as alleged by the Supplier, it was the Contractor who had attempted to unilaterally vary the NSC by issuing the LOA. He noted that the parties had met and discussed the Contractor's proposal to vary the terms of the NSC. He further noted that at that meeting the Supplier had made it clear that it would accept the LOA subject to conditions and it was in that context that the Arbitrator mentioned the "agreement" regarding the terms and conditions which were to be introduced by the LOA. These observations supported his finding that the NSC was varied by the LOA with the handwritten annotation as signed and returned to the Contractor on 20 May 2008 which intended course of action the Contractor had not objected to when it received the 25 April letter. Although the Arbitrator does not say so expressly, the effect of the annotation was simply to reject the proposed changes to the way in which the quantity supplied would be calculated.

22 The Contractor also argued that the Arbitrator's decision on the first issue was not based on a position taken by the Supplier in the pleadings or in the evidence. This argument is not supported by the Award which sets out the arguments and the pleadings in some detail. The Arbitrator specifically held that the Supplier's position that the NSC was varied on 20 May 2008 was consistent with the Supplier's pleaded case which was to the effect that the Contractor had tried to vary the terms of the NSC by way of the LOA; that the Supplier did not agree to the same and that by its letters of 25 February 2008 and 10 April 2008 the Supplier had put forward its position and conditions and thereafter had, by the 25 April letter, confirmed that it would sign the LOA on the basis that all these letters which reinstated the original position should be incorporated into the LOA.

23 The Contractor argued that the Arbitrator had not dealt with substantial parts of the Contractor's arguments in its submissions made to him. The Arbitrator had only dealt with the Contractor's first main argument before deciding against it. However, as has been repeatedly stated by the courts, a judge or an arbitrator does not need to deal with all arguments put forward by a party. If it is clear to the arbitrator that a particular finding on a particular argument satisfactorily disposes of an issue, then he need not go on to consider and reject further arguments in relation to that issue. *TMM Division* put the point this way:

> 77 It should be emphasised that an issue need not be addressed expressly in an award; it may be implicitly resolved. Resolving an issue does not have to entail navigating through all the arguments and evidence. If the outcome of certain issues flows from the conclusion of a specific logically prior issue, the arbitral tribunal may dispense with delving into the merits of the arguments and evidence for the former. …

24 In view of the way in which the arguments were put to me during the hearing, it perhaps bears repeating that it is not a breach of natural justice for an arbitrator to make an error of law or fact in determining the issues before him. It was apparent from the Award that the Arbitrator was apprised of the parties' respective positions in relation to the first issue and that he considered them, albeit more briefly than the Contractor desired. In so far as the Contractor's submissions before me suggested that the Arbitrator had not considered all the evidence or was incorrect in his approach to the law of acceptance in contract, such suggestions could not establish a breach of natural justice.

Second dispute under the NSC: Was the Contractor entitled to an abatement of price for works that the Supplier had allegedly omitted to perform?

25 The second point of dispute between the parties at the arbitration was whether the Contractor was entitled to an abatement of price ("the omission"), assessed at $346,806.08, to be set-off against the amount it owed the Supplier under the NSC for works that the Supplier had omitted to perform.

26 The Contractor argued that the only two elements that it had to prove to succeed in its claim for an omission were:

(a) that a particular work had been priced into the Supplier's unit rates; and

(b) that the said work was not carried out.

27 The Contractor pointed out that the Supplier did not cut the tiles to "the odd shaped or sized pieces required at the edges/perimeters of the rooms" ("the Cutting Works"). It further claimed that these Cutting Works were within the Supplier's scope of work under the NSC and that the performance of the Cutting Works had been priced into the unit rates quoted by the Supplier.

28 The Supplier's position at arbitration was that its scope of work under the NSC was all along only to cut the tiles to size in accordance with what was specified on the Shop Drawings that were approved by the Contractor ("Approved Shop Drawings"). It further argued that the dimensions of the tiles that it supplied were in accordance with the Contractor's employee's handwritten instructions on the Approved Shop Drawings. The Supplier also pointed out that although it supplied tiles of standard sizes, it still had to arrange to have the tiles cut to those tile sizes at its overseas factory. The Supplier maintained that it had performed what it was contractually required to do and that therefore the Contractor was not entitled to claim an omission. In its reply submissions, the Contractor raised for the first time the argument that the handwritten instructions on the Approved Shop Drawings constituted a variation "for the [Supplier] to supply tiles of the Standard Sizes in lieu of the Original Requirement (of cutting them to non-standard size as required at the edges)" ("the variation argument").

29 The Arbitrator's summary of the parties' position and his conclusion are as follows:

> 107. The [Contractor's] position is that the NSC required the [Supplier] to prepare shop drawings on the basis of site measurements and/or cutting lists showing the exact dimensions and number of all stone pieces (and the cutting of the stone finishings to the required sizes). However, the [Supplier] chose to supply stone finishings of a common or standard size (rather than cutting the pieces to the required sizes). Since the [Supplier] had omitted to cut the stone finishings to the required dimensions (which is part of the Sub-Contract Works), the [Contractor] says it is entitled to an abatement of price and/or damages …
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> …
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> 113. The [Supplier's] position is that its scope of works under the NSC was, amongst others, to cut stone and tile finishings in accordance with the dimensions as shown in the Shop Drawings which were prepared by the [Supplier] and approved by the [Contractor]. It had supplied the stone and tile finishings in accordance with the approved shop drawings and those approved drawings have the [Contractor's] handwritten instructions inserted therein.
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> …
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> 118. After having carefully considered the evidence and the submissions of the Parties, I FIND AND HOLD that –
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> (a) the [Supplier's] scope of works under the NSC was to supply cut tiles according to standard dimensions which were agreed amongst the Parties; and

(b) the [Supplier] did not fail or omit to carry out its contractual obligations to the [Contractor] under the NSC.

119. The [Supplier] had supplied stone and tile finishings of standard dimensions with the agreement of the [Contractor]. I accept the [Supplier's] evidence that there was an agreement by the Parties that the stone and tile finishings would be supplied according to standard dimensions which would allow the [Contractor's] installer to cater for the [Contractor's] variation, tolerance and tile gaps for the Project and any cutting which had to be carried out by the installer near the edges and the door frames. This must be so since the NSC is for the supply of tiles and stone finishings only and the [Supplier] was not required to carry out any installation works.

120. The evidence for the Parties' agreement referred to in the preceding paragraph is found in the approved shop drawings which have written instructions inserted therein by the [Contractor] that the [Supplier] should place orders for tiles of standard dimensions. Clause 5.1 of the Conditions of Sub-contract required the [Supplier] to comply with all directions and instructions of the [Contractor] and hence the [Supplier was] complying with the instructions given by the [Contractor] on the Approved Shop Drawings as regards the sizes and dimensions of the stone and tile finishings to be supplied under the NSC.

121. The [Contractor's] Counterclaim for the sum of $366,497.86 is premised on the alleged breach by the [Supplier] of its above-mentioned contractual obligations under the NSC. For the reasons set out above, the [Contractor's] counterclaim is dismissed.

Second alleged breach of natural justice: Arbitrator failed to consider the Contractor's variation argument

30 In the present application, the Contractor's main contention was that there was a breach of natural justice because the Arbitrator was labouring under the misapprehension that the Contractor had to show that the NSC was breached in order to succeed in its claim for an omission and as a result of that misunderstanding, the Arbitrator had not even considered its argument that the handwritten instructions on the Approved Shop Drawings constituted a variation.

31 The High Court accepted in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") that it would be a breach of natural justice for an arbitrator to disregard submissions and arguments made by parties without considering the merits thereof (at [31], [32] and [39]. It would equally be a breach of natural justice for an arbitrator to have regard to the submissions and arguments of the parties without really trying to understand them (at [37]; *TMM Division* at [89]).

32 The Court of Appeal in *BLC v BLB* cautioned that courts should not undertake a review of the substantive merits of the underlying dispute between the parties in an application to set aside an arbitral award on grounds that the arbitrator had not considered certain arguments. It stated:

53 In considering whether an arbitrator had addressed his mind to an issue, however, the court must be wary of its natural inclination to be drawn to the various arguments in relation to the substantive merits of the underlying dispute between the parties. In the context of a setting aside application, it is crucial for the courts to recognise that these substantive merits are *beyond* its remit notwithstanding its natural inclinations. Put simply, there is no right of recourse to the courts where an arbitrator has simply made an error or law and/or fact. … [emphasis in original]

33 The court has to look at the face of the arbitral award to determine whether the arbitrator had fulfilled his duty to apply his mind to the issues placed before him and to consider the arguments raised (*Front Row* at [39]; *TMM Division* at [89]. In *TMM Division*, the High Court stated that even if the decision is inexplicable, it does not necessarily follow that the arbitrator had not applied his mind to the parties' submissions. It stated:

> 91 … Ostensibly, the arbitral tribunal may, after applying its mind, fail to comprehend the submissions or comprehended them erroneously, and thereby come to a decision which may fall to be characterised as inexplicable. In my view, such a situation falls short of a breach of the rules of natural justice. …

I repeat here that not all issues have to be expressly resolved.

34 This case was not an instance where the Arbitrator failed to consider or understand an argument that had been raised. It is true that the Arbitrator did not expressly deal with the Contractor's variation argument in the Award. However, the Arbitrator in essence agreed with the Supplier that its obligation under the NSC was all along to supply tiles that were cut to the dimensions specified by the Contractor in the Shop Drawings that it had approved and hence, by implication, the handwritten instructions on the Approved Shop Drawings did not constitute a variation. This is particularly evident from the last sentence of [119] of the Award. It appears that the Arbitrator reasoned that since the NSC was always only a contract for the supply of tiles and stone finishings and not for the installation of the same, the Supplier could never have been required to supply tiles of non-standard dimensions for the perimeters of rooms.

35 The Arbitrator's statement that the Contractor's claim was premised on the Supplier's "alleged breach" of the NSC at [121] of the Award is just another instance of unfortunate choice of words. It does not show that the Arbitrator failed to understand the variation argument. His summary of the Contractor's position in [107] of the Award clearly shows that he fully understood the variation argument. Therefore, the true position is that he considered and rejected the variation argument. "No party has a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceives its own arguments to be": *TMM Division* at [94]. Therefore there was no breach of natural justice.

Dispute under the DSC: Was the Supplier entitled to the sum it claimed for the additional quantities of stone finishings it supplied to the Contractor?

36 The third point of dispute between the parties at the arbitration was whether the Contractor had to pay the Supplier $30,886.32, being the balance due after the sum claimed by the Supplier for the additional quantities of stone finishings, on top of the "net quantities" that it supplied the Contractor, was taken into account. The Supplier termed this "Variation Order 1" in its Statement of Case (Amendment No 1).

37 The Supplier's position was that this claim raised the same issues as those arising under the NSC. It maintained that it supplied the Contractor with the quantities specified in the Shop Drawings. It argued that it should be entitled to payment for all the quantities "delivered to and accepted by" the Contractor and not just the "net quantities".

38 The Supplier had initially also made a claim for another alleged variation involving 20mm + 20mm thick stone materials supplied by the Supplier which were rejected by the Contractor ("Variation Order 2"). However, it dropped its claim for Variation Order 2 in the course of the arbitration. In its Reply Submissions filed in the arbitration, the Supplier was at pains to distinguish its claim for Variation

Order 1 from its claim for Variation Order 2. It stated:

> 37. … Variation (1) under the [DSC] was not an Architect's VO, and had nothing to do with the rejected 20mm + 20mm thick stone materials supplied by the [Supplier]. The rejected 20mm + 20mm thick stone materials were claimed for in the [Supplier's] Variation Order 2 ("VO2"). This VO2 was withdrawn during the Arbitration Hearing. Instead, Variation (1) was concerned with the supply of quantities by the Claimant which were greater than the Net Quantities set out in the [DSC]. …

39 It appears that the Supplier was in essence differentiating its purported "variation" claim from a claim for an "Architect's VO" (*ie*, a variation under cl 7 of the SIA Conditions of Sub-contract). I agreed that the two were distinct. The Supplier's claim only raised the issue of whether it was entitled to payment for the all the quantities it supplied in compliance with the Contractor's instructions in the Shop Drawings. Assuming that the DSC and NSC are materially identical, the Arbitrator's prior determination on the scope of the Contractor's contractual obligation under the NSC would be relevant in deciding this issue as well. This claim would not raise any separate question of variation pursuant to cl 7 of the SIA Conditions of Sub-contract.

40 The Arbitrator found in favour of the Supplier. His reasoning was as follows:

> 122. The DSC is concerned with the supply of stone finishings to the common areas in the Project. The Parties have an agreed Statement of Accounts for the stone finishings supplied to the [Contractor] under the DSC. The dispute between the Parties is with respect to the [Contractor's] liability to pay the sum claimed by the [Supplier] for the quantity of stone finishings supplied to the Respondent under the DSC.
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> …
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> 128. The [Supplier] says it supplied quantities of materials which were specified by the [Contractor] in the shop drawings as well as the additional quantities which were ordered by the [Contractor] by way of handwritten annotations on the shop drawings. It says those shop drawings have unfortunately been lost. Nevertheless, the [Supplier] carried out the dry-lay and delivery of the stone materials without any objection from the [Contractor]. The [Contractor] had accepted delivery of these stones materials and its installers cut and installed the same (including the additional quantities over and beyond the Net Quantities).
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> …
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> 131. After having carefully considered the evidence and the submissions of the Parties, I FIND AND HOLD that the [Supplier] is entitled to its claim for payment under the DSC. I am satisfied that the [Supplier's] claim is not a variation claim and that it raises the same issue with respect to the Claimant's claim under the NSC, namely, whether the [Contractor] should pay for quantities of stone and tile finishings ordered by and supplied to the [Contractor] or that the [Supplier] should be paid for net quantities installed on site. In view of my finding for Issue No. 2 above, the [Contractor] should likewise be held responsible to pay for the claim which is characterised as Variation No. 1 under the DSC.

41 At the hearing, counsel for the Contractor argued that the Arbitrator ought not to have decided this issue with reference to his finding for Issue No 2. Counsel pointed out that the Arbitrator had previously found that the NSC had been varied by the LOA and the Supplier's handwritten annotation thereon. The DSC was not similarly varied. Therefore the Arbitrator's finding for Issue No 2 would be

of limited significance in relation to a dispute concerning the DSC. I did not agree.

42 The Arbitrator had earlier found in relation to Issue No 1 that the Contractor was obliged to pay for all quantities delivered to the site pursuant to the NSC. It is important to note that his finding was that the effect of the LOA with the Supplier's handwritten annotation thereon was to preserve certain terms as they originally were under the NSC. He stated at [98]:

> … I FIND AND HOLD that the terms of the NSC as varied by the [LOA] with the hand written annotation *are the terms as expressly stated in the NSC which was novated to the [Contractor]* including the following terms:
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> (d) the Claimant would be paid according to quantities delivered to the site"
>
> [emphasis added]

His finding in regard to Issue No 2 at [102] of the Award must be read in light of this holding. Therefore he cannot be faulted for his reference to Issue No 2. The Arbitrator's finding as to the scope of the Contractor's contractual obligation to pay for tiles under the NSC would be relevant in resolving the same dispute arising under the DSC as well.

43 In any event, even if his reference to Issue No 2 was wrong, it amounted, at best, to an error of law/fact and did not warrant the court's curial intervention.

Third alleged breach of natural justice: Arbitrator had made a finding of fact in the absence of any logically probative evidence to support the same

44 The Contractor contended that the Arbitrator had breached natural justice because he had made his finding even though there was a complete lack of evidence to support the Supplier's claim for $30,886.32. It pointed out that the Supplier had admitted in the arbitration that it had lost the shop drawings that allegedly contained the Contractor's instructions for additional quantities. It also highlighted the fact that none of the Supplier's witnesses were able to explain how the quantum that was claimed for had been derived.

45 It may be a breach of natural justice for an arbitrator to make findings of fact when there is no logically probative material before him to base those findings on ("the no evidence rule"). To date, there has been no Singapore case that expressly applied the no evidence rule to set aside an arbitral award for breach of natural justice. However, the High Court in *TMM Division* did allude to this possibility:

> 118. … there appears to be some recognition of this "no evidence" rule falling under the umbrella of natural justice in Australia and New Zealand, both of which are jurisdictions which apply the Model Law: see *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [103]–[109]; and *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [83].

It appears that it is not fully settled whether the no evidence rule should be a basis for setting aside an arbitral award or whether a situation where the arbitrator has made a finding of fact in the absence of any logically probative evidence to support the same should be treated as an egregious error, but one that does not invite the curial intervention of the court: *International Commercial Arbitration* (Marcus Jacobs gen ed) (Thomson Reuters, Looseleaf Ed, 2014) at para 630.120. This matter was not fully ventilated by the parties at the hearing. I do not express a concluded view on

this matter because I consider that the Award was indeed grounded on the evidence before the Arbitrator which was that, in respect of this claim, the parties had agreed on quantum.

46 The Arbitrator starts his analysis of this issue by stating expressly at [122] that the parties had agreed to a "Statement of Accounts" for the stone finishings supplied by the Supplier under the DSC and that the dispute concerned only the Contractor's "liability to pay the sum claimed by the [Supplier]". The Statement of Accounts was in evidence before the Arbitrator. Therefore, I was of the view that the Contractor's argument that the Arbitrator reached his decision in the absence of any evidence was misconceived. It did appear to be the case that that there was nothing on record to show how the sum of $30,886.32 was derived. But that was immaterial because the parties had agreed on the quantum in the Statement of Accounts and were only disputing liability. It should be noted that Contractor's solicitor's letter of 24 June 2013 to the Supplier's solicitor itself also stated that in respect of the DSC works, the quantum had been agreed and the dispute was as to liability. The question of liability was purely one of construction of the DSC. The Arbitrator undertook this exercise and reached his conclusion. In [132] of the Award the Arbitrator said:

> …I FIND AND HOLD that the [Supplier] is entitled to its claim of an amount of $30,886.32 under the DSC, which is *the agreed sum* in the event that this Tribunal finds and hold (*sic*) that the [Supplier] is entitled to be paid for this Claim. [emphasis added]

47 Therefore there was no breach of natural justice.

48 For completeness, in [137(a)] of the Award, the Arbitrator made a clerical error by mis-stating the sum of $30,886.32 as being $30,887.32 which meant that after he deducted the retention sum of $4,700 and added GST of $1,833.11, he ordered the Contractor to pay the Supplier $28,020.43 for this claim which was about $1 more than the Supplier was entitled to. But nothing turned on this error.

Conclusion

49 For the reasons stated above, this application was dismissed with costs.