AUF *v* AUG and other matters
[2015] SGHC 305

Case Number : Originating Summons No 790 of 2014, Originating Summons No 791 of 2014 and Originating Summons No 789 of 2014 (Summons No 4899 of 2014)

Decision Date : 26 November 2015

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Alvin Yeo SC, Ian De Vaz, Nikki Ngiam, Wang Ye (Wong Partnership LLP) for the plaintiff in OS 789 and the defendant in OS 790 and 791; Davinder Singh SC, Cheryl Tan, David Fong (Drew & Napier LLC) for the defendant in OS 789 and the plaintiff in OS 790 and 791.

Parties : AUF — AUG — AUD — AUE — AUB — AUC

Arbitration – Award – Recourse against award – Appeal under Arbitration Act – Misconduct under Arbitration Act – Setting aside

Arbitration – Enforcement – Singapore award – Duty of full and frank disclosure

26 November 2015 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 There are before the court three applications. The first two challenged an arbitral award dated 29 July 2014 ("the Award"). The first challenge in Originating Summons No 790 of 2014 ("OS 790") is to set aside in part the Award pursuant to s 17(2) of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the 1985 Act"). The second challenge in Originating Summons No 791 of 2014 ("OS 791") is for leave to appeal on questions of law arising out of the Award. The third application is Summons No 4899 of 2014 ("SUM 4899") filed in Originating Summons No 789 of 2014 ("OS 789") to set aside an *ex parte* Order of Court dated 9 September 2014 to enforce the Award as a judgment of the High Court pursuant to s 46 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the 2002 Act").

2 AUF is the plaintiff in OS 790 and OS 791, and the defendant in OS 789. AUF was the respondent in the Arbitration. AUF is hereafter referred to as "the Contractor". The claimant in the Arbitration was AUG. Notably, AUG is the defendant in OS 790 and OS 791 and the plaintiff in OS 789. AUG is hereafter referred to as "the Owner". Mr Davinder Singh SC ("Mr Singh") is for the Contractor in all three applications, and Mr Alvin Yeo SC ("Mr Yeo") is for the Owner. In the Arbitration, Mr Yeo represented the Owner and Mr Alan Thambiayah ("Mr Thambiayah") was counsel for the Contractor.

3 The issues in the challenged part of the Award that fell to be decided by the sole Arbitrator was whether there was a breach of a contract in relation to design, supply and installation of the external wall system carried out by a nominated sub-contractor on a 13-storey commercial development in a premier shopping district of Singapore ("the Building"). The Arbitrator was to decide on the quantum of damages payable if he found the Contractor liable as main contractor for the defective works carried out by the nominated sub-contractor ("the NSC"). Specifically, the NSC's tender price of $8,100,000 was for the design, supply and installation of the external wall cladding of

the Building ("the Sub-Contract Works"). The final agreed sum for the Sub-Contract Works was $8,503,649.05 ("the Final Sub-Contract Sum"). Parties clarified in their respective letters dated 28 September and 6 October 2015 that the Final Sub-Contract Sum included the quantum of variation works accepted by the Contractor's quantity surveyor.

4 The dispute before the Arbitrator spanned a period of 14 years. At the end of it, the sole Arbitrator rendered a 90-paragraph award in favour the Owner. The Arbitrator held that the Contractor, as main contractor, was in breach of the Sub-Contract Works and awarded damages based on 40% of the Final Sub-Contract Sum.

5 The Contractor's main challenge in OS 790 is that the Arbitrator's award of damages was not the measure of damages that the Owner had pleaded and pursued in the Arbitration. As such, the Arbitrator acted outside his jurisdiction or reference ("the Jurisdiction Issue"). The second ground of challenge in OS 790, the natural justice ground, is related to the Owner's pleaded case on damages for diminution in the value of the Building which was based on cost of rectification. The Contractor's complaint was premised on the argument that it did not get a fair hearing because it was, in breach of natural justice, deprived of the opportunity to present its case on diminution in value in that: (a) the Award was made on a basis not put to the parties; and (b) alternatively, it was made on the basis of the Owner's 29 May 2014 Submissions ("the Owner's May 2014 Submissions"), which the Contractor was not given the opportunity to address, as a result of which the Contractor suffered prejudice. The third ground is that there was no evidence to support the conclusions in the Arbitrator's finding of diminution in value of the Building and quantum of damages based on diminished value and that outcome had taken the parties by surprise. This third ground raises the question whether the "no evidence rule" is a breach of the fair hearing rule. A separate and independent point is whether the "no evidence rule" should be accorded legal recognition as a third limb of natural justice.

6 Other related complaints were that the Contractor did not get a fair hearing in that, in breach of natural justice, it was deprived of the opportunity to present its case on interest and costs in the Award. The final blanket complaint was that the Arbitrator had not given any or proper reasons for the Award and, as a result, the Contractor had suffered prejudice.

7 As stated, OS 791 is for leave to appeal on questions of law arising out of the Award. However, it is envisaged that the court need not proceed with OS 791 if the Contractor succeeds in OS 790. Similarly, the parties ought to abide by the outcome of either OS 790 or OS 791 in relation to SUM 4899 in OS 789.

8 The relevant statute that is applicable to OS 789, 790 and OS 791 is the 1985 Act (see also s 65(2) of the 2002 Act).

The Arbitration

The underlying dispute in the Arbitration

9 The underlying dispute leading to the Arbitration arose out of the construction of the Building which was the subject of an agreement made between the Owner and the Contractor and dated 25 May 1995 ("the Main Contract"). The works in the Main Contract included the design, supply and installation of the external wall system that was carried out by the NSC. The Main Contract incorporated the SIA Conditions of Contract for Measurement Contract (4th Ed). Clause 37 of the Main Contract contained an agreement referring disputes to arbitration.

10 After completion of the Building in March 1997, complaints of leaks and water-seepage into the Building surfaced. From March 1997 to June 1998, the Contractor carried out *ad hoc* repair works by face-sealing and over-sealing the Building. Further rectification works were carried out between September 1998 and January 2000, but the leaks persisted. In February 2000, the Owner informed the Contractor that it wanted the external wall to be re-cladded. Although it was an item of claim pursued in the Arbitration, the claim for the re-cladding of the external wall was dropped in the course of the Arbitration.

11 The Arbitration that was commenced was *ad hoc.* Thus, it was not governed by any institutional set of arbitration rules or procedure. The NSC was joined as a third party to the arbitral proceedings on or around 30 October 2000, but the proceedings against the NSC were later abandoned when the NSC went into liquidation. The Arbitration continued between the Owner and the Contractor.

The pleadings in the Arbitration

12 The final pleadings in the Arbitration were as follows:

(a) The Owner's re-amended Points of Claim dated 9 May 2005, which included a list of 64 alleged defects set out in an appendix ("Appendix A1.1");

(b) The Contractor's re-re-amended Defence and Counterclaim dated 23 August 2005; and

(c) The Owner's amended Reply and Defence to the Contractor's Defence and Counterclaim dated 10 January 2004.

13 As can be seen from the re-amended Points of Claim, the Owner sought these reliefs:

(a) an order that the Contractor remedies the defects in the external wall by recladding the Building;

(b) alternatively, damages for the cost of recladding the Building;

(c) alternatively, damages for diminution in value of the Building;

(d) loss, damages and expenses for loss of rental, car park fees, damages and/or compensation paid or to be paid to the Building's tenants, rectification works, and costs related to the engagement of a façade consultant to investigate the façade defects;

(e) costs of the Contractor's use of the Owner's gondola to carry out rectification works;

(f) damages, loss and expense suffered by the Owner, including managerial staff, administrative, and/or site costs expended on the façade defects, rectifications and/or tenants' claims;

(g) interest and costs; and

(h) such further or other relief as the Arbitrator deems fit to award.

14 The Owner added its alternative claim for damages for diminution in the value of the Building to its pleadings on 5 December 2003.

15 Pursuant to this amendment, the Contractor requested further and better particulars on 12 December 2003 and 9 January 2004. In its request dated 9 January 2004, the Contractor asked the Owner to give full particulars of the damage it had allegedly suffered in respect of the Owner's alternative claim for damages for diminution in the value of the Building. The Owner responded on 19 January 2004, stating that the Contractor was "not entitled to any such particulars" as the request was "for evidence". [note: 1]

16 Dissatisfied with the Owner's response, the Contractor made another request on 25 March 2004 for particulars of: (a) the basis upon which alleged damages for diminution in value were to be computed; and (b) the alleged damages suffered. On 12 April 2004, the Owner wrote: [note: 2]

> (a) … Claimant's [*ie*, the Owner's] counsel had confirmed at the hearing on 1 March 2004 that the Claimant's diminution in value claim was based on the defects in the façade cladding. The Respondents [*ie*, the Contractor] are not entitled to particulars of computation of damages. This request is for evidence, to be furnished at the 2nd stage of the arbitration dealing with quantification.
>
> (b) The Respondents are not entitled to particulars of quantum of damages. This request is for evidence, to be furnished at the 2nd stage of the arbitration dealing with quantification.

The hearings and directions made

17 The first tranche of hearing, on the issue of liability, was held over a period of 13 days in August and September 2005 ("the First Hearing"). The Contractor had originally taken the position that all defects and leaks had been rectified, but changed its position after seven days of the First Hearing in August 2005 and accepted that there were defects which were "capable of rectification".

18 At a procedural meeting held on 10 August 2007, the Owner withdrew its claim for recladding of the external walls of the Building. The Arbitrator's directions are apposite: [note: 3]

> By consent, I confirm the following directions:
>
> (1) The Claimants will withdraw their claim for a recladding of [the Building] but *maintain their claim for loss and damage arising from defects*;
>
> (2) The issue of costs reserved;
>
> (3) The Parties agree there are some defects in [the Building] but are not agreed upon:
>
> (a) With reference to Appendix A1.1 of [the Owner's re-amended Points of Claim], what the defects are, their nature, the extent and liability therefor;
>
> (b) The appropriate method of rectification of these defects;
>
> (c) The cost of rectification of these defects; and
>
> *(d) Any other loss and damage arising from these defects.*
>
> [emphasis added]

19 The parties were directed to have their respective expert witnesses meet to try to agree on the defects listed in Appendix A1.1, and their nature and extent. Directions were given to counsel on both sides to meet thereafter to attempt to streamline the agreed views of the expert witnesses and the parties' respective positions. Further hearing dates in 2007 were fixed, but the dates were vacated subsequently.

20 The meetings were unsuccessful. In December 2008, the Arbitrator suggested that the parties consider the appointment of an independent expert instead. An independent expert was appointed on 13 May 2009 ("the Independent Expert") and he was to meet with the parties' experts to discuss the nature and extent of the defects listed in Appendix A1.1.

21 The Independent Expert issued a draft report on the defects listed in Appendix A1.1 in two parts: the first on 15 November 2010, and the second on 10 January 2011 (collectively "the Draft Report"). [note: 4] In the Draft Report, the Independent Expert opined that there was a "contractual defect" from the very fact that leaks were still being recorded. He further opined that the Owner's method of recording the leaks was "not the preferred way of assessing the extent of the leaks". [note: 5]

22 On 1 August 2012, a procedural meeting was held following the Contractor's proposal made through its counsel on 9 July 2012 to limit, *inter alia*, the scope of the arbitral hearing to each party making submissions on the list of defects referred to in the Award as Annex 1. Directions were issued accordingly.

23 In July 2012, the Owner called for tenders and invited prospective contractors and façade specialists to quote for the rectification and repair works needed for the Building based on the repair procedures and quantities prepared by its expert. At the end of the tender period in August 2012, two tenders were received in the sum of approximately $7.7m and $14.7m from Tender Company 1 and Tender Company 2 respectively.

24 The parties filed and exchanged written submissions on the issues of liability and quantum on 9 October 2012, 7 February 2013, 31 May 2013, 25 June 2013 and 8 July 2013. An oral hearing was held on 9 and 10 July 2013 for counsel on both sides to address the Arbitrator on their respective written submissions ("the Second Hearing"). During the Second Hearing, the Arbitrator directed the parties to tender further written submissions on the issues of liability and quantum. Hence, five other sets of submissions were filed between 9 September 2013 and 13 January 2014. In these submissions, the Owner advanced its primary claim for cost of rectification and based the quantum of the cost of rectification on the lower of the two tenders it had received in 2012, *ie*, $7.7m that was submitted by Tender Company 1 ("Tender 1").

25 By a letter dated 18 February 2014 addressed to the parties, the Arbitrator wrote: [note: 6]

> The Tribunal refers to the thorough submissions both oral and written made by solicitors for the parties. However, in the event that the Tribunal holds that the Claimants are entitled to their claim to be based on diminished value, could solicitors address the Tribunal within the next ten (10) days on the following:
>
> (1) the date based on which such loss should be calculated; and
>
> (2) what that amount should be and the reasons for the same.

[emphasis in original omitted]

These directions will hereinafter be referred to as "the February 2014 Directions".

26 Pursuant to the February 2014 Directions, the parties exchanged written submissions on 3 March 2014. The Contractor filed reply submissions on 12 March 2014. The Owner responded that it did not expect the Contractor to tender reply submissions and asked for leave to do the same. The Owner was given leave to respond and it submitted its reply on 1 April 2014. Notably, the Contractor had objected to the Arbitrator's remit to award damages on the basis of diminution in value at this stage and its submissions were submitted under protest and upon reservation its right to object to the Arbitrator acting in excess of jurisdiction.

27 A procedural meeting was held on 3 April 2014, after which the Arbitrator wrote to the parties to confirm the following matters:

> I confirm Respondent's [*ie*, the Contractor's] solicitors are to revert to me on the following issues:
>
> (1) Could [the NSC's] tender for the sub-contract works be used for determining the diminished value of their works.
>
> (2) (i) If the answer to (1) above is in the affirmative, what date should be the diminished value of their works be based on. Should it be the date of completion of [the Building] as certified by the Architect or any other dates; and
>
> (ii) What amount should it be and the basis for [arriving] at the same.
>
> (3) The Respondents are to file and serve their submissions by 1 May 2014 and the Claimants [*ie*, the Owner] are to reply thereto by 22 May 2014.

These directions will be referred to as "the April 2014 Directions".

28 Once again the Contractor objected that the Arbitrator did not have jurisdiction to determine and make an award for damages based on diminution in value at this stage. The Contractor's submissions of 1 May 2014 were submitted under protest and upon reservation of its rights. The Owner served its reply submissions on 29 May 2014. The Contractor took the view that the Owner had raised new points and legal material in its May 2014 Submissions and sought leave from the Arbitrator to respond on 4 June 2014. Specifically, Mr Thambiayah's argument was that the Owner had, amongst other things, introduced a "new case" of abatement and that it was relying on *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2006] EWHC 1314 (TCC) ("*Multiplex*") and Keating on Construction Contracts for this "new case". Thus, the Contractor wanted to reply to this "new case".

29 The Arbitrator declined to give leave to reply. It is important to set out the relevant portion of the Arbitrator's e-mail of 18 June 2014 to Mr Thambiayah: [note: 7]

> Both parties have rendered adequate assistance to the Tribunal on the issue of diminished value. The Tribunal does not require further submissions unless it is by mutual consent.

30 Separately, the Owner objected when the Contractor sought the Owner's consent to the Contractor submitting a reply.

The parties' cases in the Arbitration on damages

The parties' cases in the Arbitration on damages

The Owner's case on damages and quantum

31 The Owner's case on damages and quantum prior to the Second Hearing was comprehensively tabulated in its submissions dated 9 October 2012:

S/N	Description	Amount (S$)
1.	Cost of Rectification	7,688,984.00
2.	Facade Consultant Fees	564,800.00
3.	Project Management Consultant Fees	150,000.00
4.	The Owner's management fees for employment of Clerk of Works, overtime for existing security guards and employment of additional maintenance technician / security guards	240,000.00
5.	Loss of rental arising from reduction of let-able space due to working space required by the Contractor for the duration of the rectification works	2,671,643.14
6.	Loss, damage and expense which have been incurred by the Owner as at 2 December 2003	162,825.18
7.	Cost of the Contractor's use of the Owner's gondolas	146,208.07
	TOTAL:	**11,624,460.39**

Prior to the Second Hearing, the Owner was undeniably advancing first and foremost a claim for damages based on the cost of rectification of the defects with reference to Appendix A1.1. However, diminution in value of the Building was still a positive alternative claim in the Owner's Points of Claim as amended in 2003 and maintained in the Arbitrator's directions in August 2007 (see [18] above). That was how the Arbitrator saw it for he raised the possibility of an award of damages based on diminution in value in the course of the Arbitration and asked for submissions on diminution in value.

32 That happened during the Second Hearing. I refer to the exchange on 9 July 2013 between the Arbitrator, Mr Yeo (counsel for the Owner in the Arbitration) and Mr Thambiayah (counsel for the Contractor in the Arbitration) during the Second Hearing: [note: 8]

> [Arbitrator]: Supposing let us say that the defects are there but they do not fundamentally amount to, say, failure of purpose, it doesn't serve the purpose as a building. Then the next best would be on depreciated value. … You have a building that is not 100 per cent, it's not perfect but then it's a useable building, it can serve the purpose of a building. Then would it be reasonable for me to say, let us say, deduct it on the basis of ---
>
> Mr Yeo: Should I try to address that, sir?
>
> ….

Mr Yeo: Sir, as I said, I think it's open to you to look at different bases but I suppose at the end of the day there needs to be some correlation to the costs of rectification and so on and I think you can look at it in terms of perhaps whether you would make any sort of adjustments but I won't try to suggest to you [that] we put forward valuation reports on that basis, we haven't, and the reason is because the consultants all told us that it would go back to costs of rectification.

[Arbitrator]: Another method would be what they call diminished value; that's one way we could look at it.

Mr Yeo: Actually, sir, when we talked to the consultants we didn't use the word "depreciation" because that's generally an accounting term, but it's diminished value and they basically said, "I have got no comparables so I will have to go on costs of rectification"; that was our difficultly, sir. …

33 The following day, 10 July 2013, the Arbitrator raised the issue of diminished value again: [note: 9]

[Arbitrator]: Let's go to the point I brought up yesterday, would it be better if we address the issue of diminution in value? That is what ---

Mr Yeo: I understand. Sir, I do think so some extent you still end up at the same position because, as I've said, and I accept I'm saying this from the bar so apologies, but we did check with property valuers because we were thinking of calling such evidence and they ended up saying the diminished value in their view would relate to cost of rectification.

Sir, you will recall that in the course of my submissions yesterday I did say you could look at the amount of claims, certainly the cost of rectification, you could make some adjustments to it. I wasn't trying to suggest that you do some kind of form of palm tree justice and just make an adjustment; when I was talking about you could make some adjustments what I had in mind obviously you don't believe there was such a defect, for instance, the respondents persuade you, or you could make an adjustment for an element of what you considered to be betterment because, yes, there has been an effluxion of time from then until now. …

[Arbitrator]: Give a discount.

Mr Yeo: Give some form of discount, that's right. As I said, I don't think this is inviting you to do some form of palm tree justice.

[Arbitrator]: The concern is how to do it, that's why I bring up this issue, maybe you all can help me. I'm looking at this definition here. It says: "If the cost of rectification of the defects is disproportionate to the injury, the employer will be awarded damages based on the difference in value between the value of the building as it would have been had the contract been properly performed".

So I think maybe I would like you to address me on that as well. This is not giving an indication that this is the direction.

[Both Mr Thambiayah and Mr Yeo agree that they will address this in their submissions.]

…

Mr Yeo: I appreciate nobody has put forward an affidavit or an expert's report on the amount of adjustment you would make. … [I]f there's an adjustment to be made for wear and tear I accept as a matter of principle that is something you can certainly consider but I would not expect that to be a major discount. …

…

Mr Thambiayah: Judge, I think [Mr Yeo] is right, neither party has considered or addressed this diminution in value point. However, I think I better make this clear right from the outset in relation to the points [Mr Yeo] has just made about the building's capacity to earn rental or to earn less rental, less than market rental; there is absolutely no evidence of that before you. …

Mr Yeo: Sir, just to clarify, of course, Mr Thambiayah can make submissions on a proper legal case. When he said there's no evidence of what the lost rental would be during this period, that's correct because, as I've said, we've made a decision not to claim for it.

34 After the Second Hearing, the Owner addressed the issue of diminution in value in its submissions dated 12 November 2013 in the following manner: [note: 10]

10. Without prejudice to the position as stated above, the Claimants set out below their brief response to the considerations raised by [the Contractor]:

S/N	**Alleged considerations as to Reasonableness**	**Claimants' Response**
…		
2	Diminution in value is a consideration. The Claimants has shown no evidence in respect of diminution in value. Thus, it should be assumed that there is no diminution in value.	Absence of evidence of diminution in value does not mean that there is no diminution in value. *The Claimants are entitled to claim for cost of rectification, rather than diminution in value, as is appropriate here and the Claimants have shown genuine intention to carry out the repairs*. …
…		

[emphasis added]

35 The Owner's stated reason for pursuing a claim for cost of cure was its genuine intention to carry out the repairs. However, as early as the Second Hearing, it was Mr Yeo's submission that "diminished value … would relate to costs of rectification". This was a submission repeated in the Owner's submissions dated 12 November 2013. The Owner approached the February 2014 Directions (*ie*, "the Owner's March 2014 Submissions") by repeating that it had put forth its case on the basis of cost of rectification; and that on diminution in value, it had no evidence of the "difference between the reduced value of the Building as defectively built and what it would have been worth had it been completed as promised". Despite the evidential difficulty, it actually kept the alternative claim of diminution in value open in case it could not persuade the Arbitrator on the cost of rectification and the Arbitrator was minded to award damages on the basis of diminution in value. In so doing, the Owner submitted, relying on *St Louis LLC v Final Touch Glass & Mirror Inc* 386 NJ Super 177 ("*St Louis*"), a decision of the Superior Court of New Jersey, for the proposition that the tribunal could use the cost of repair as a measure of diminution in value, even though the market value could be ascertained. In its reply submissions dated 1 April 2014, the Owner also relied on the case of *State Property & Building Commission of the Department of Finance v H W Miller Construction Company Inc* Ky 385 SW 2d 211 ("*State Property*") where the Court of Appeal of Kentucky held that "in the absence of evidence to the contrary it would ordinarily be presumed … that as between a willing seller and willing buyer of a new building known to be in need of certain repair work the anticipated cost of the remedial work would reduce the price by an equivalent amount". It is noteworthy to quote from the Owner's March 2014 Submissions:

> … in the absence of an expert professional valuer's report on the value of the Building, the amount ought to be based on the cost of rectification of the defective façade derived from the lower of 2 tenders … since it is reasonable to expect that no one would want to buy a building with a history of leaky façade until and unless the façade was repaired (with warranty) or an amount equivalent to the cost of complete rectification is given as a discount of the market value of the Building (in assumed good condition); and
>
> … this cost of rectification can, however, be subject to a discount for betterment, given that the award is being made some 17 years after completion of the [B]uilding. [emphasis in original]

36 The Owner then proposed a "betterment discount" of 20% to 30% off the tender price of $7.7m submitted by Tender Company 1. Effectively, the Owner was proposing that the Arbitrator award approximately $5.4m (70% of Tender 1) as damages for diminution in value of the Building.

37 The Arbitrator's April 2014 Directions followed. The Contractor was directed to file its submissions first. In the Owner's reply to the Contractor's submissions (*ie*, "the Owner's May 2014 Submissions"), the Owner introduced the concept of abatement of value, citing the case of *Multiplex* (at [28] above) to support the proposition that the price paid for the defective Sub-Contract Works could be abated "as a claim to recover monies overpaid". This was, in the Owner's submissions, "another way of arriving at the diminution in value, viewed in the context of [the NSC's] tender". [note: 11] The Owner agreed that the NSC's tender for the Sub-Contract Works could be used for determining the diminished value of the works in so far as the tender established the value of the works "as it ought to be". The reference point of the quantum of damages therefore remained the value of Tender 1, abatement being a concept used to connect the costs of rectification with the NSC's tender.

38 The Owner also submitted that there was no material difference between diminution in value of *the Building* and diminution in value of *the Sub-Contract Works* given that the Sub-Contract Works were part of the Building, and parties were arguing about diminution in value as a consequence of the

same defects. [note: 12]

The Contractor's case on damages and quantum

39 Turning to the Contractor's case on damages and quantum, the Contractor had submitted after the Second Hearing that there was never any claim made by the Owner for diminution in market rental, and that there was no evidence of diminution in value of the Building either. The Contractor highlighted the undisputed fact that the book value of the Building did not appear to be affected by the alleged defects in the Sub-Contract Works. [note: 13] In its submissions made in September 2013 after the Second Hearing ("the Contractor's September 2013 Submissions"), the Contractor also comprehensively enunciated the relevant legal principles governing the measure of loss and its reasons for rejecting the Owner's claims in the Arbitration. Given the importance of this submission, it merits quoting in full: [note: 14]

> **VIII. Measure of Loss**
>
> 146. The issue of the measure of [the Owner's] loss will be relevant only if the tribunal were to find a contractual breach on the part of [the Contractor]. The expositions of principles in the numerous authorities are clear. [The Owner] cannot recover what it claims in this arbitration. … [The Contractor] is confident that basic principles such as the following will remain untrammelled notwithstanding [the Owner's] best efforts…:
>
> a. the cost of reinstatement is not the appropriate measure of damages if the expenditure would be all out of proportion to the benefit to be obtained. … In such a case, the appropriate measure of damages is the difference in value, even though it would result in a nominal award;
>
> b. if the cost of performance far exceeds the diminution in value, and, in particular, where the cost of performance is "grossly disproportionate" to the benefit of that performance (that is, any increase in value, as a result of performance), damages may be limited to the diminution in market value;
>
> c. it is not the diminution in value of the freehold, but the diminution in value of the work which is given as the measure. ***In many cases, diminution in value of the work may be equal to diminution in value of the building*** ;
>
> …
>
> h. *where it is not appropriate to assess the claimant's loss by reference to the costs of cure, and if no evidence had been led as to the claimant's loss by reference to the diminution in value of the subject property, the diminution should be taken to have been negligible;*
>
> j. … a claimant will not be entitled to recover, as damages, the cost of performing repairs *which would result in its receiving a significant "windfall" or "overcompensation" or "betterment"* – for example, a claimant will not be entitled to that portion of remediation costs which would elevate the quality or serviceability of the construction work beyond that which would have resulted had the contract been properly performed.
>
> 147. Applying the law to the facts there can be only one outcome in this arbitration, being the one contended for by [the Contractor].
>
> [emphasis added in italics and in bold italics]

40 In its response to the February 2014 Directions (*ie*, "the Contractor's March 2014 Submissions"), the Contractor took the position that the Owner had "made a forensic decision" not to seek damages for diminution in value. Again, it reiterated that there was therefore no evidence or submissions before the Arbitrator on diminution in value of the Building or diminution in value of the Sub-Contract Works. It followed that the Arbitrator had no jurisdiction to award damages on that basis. In any event, the Contractor submitted that diminution in value had not been proved and no damages or only nominal damages should be awarded. [note: 15] As for the Owner's suggestion to the Arbitrator to use the cost of rectification in determining diminution in value, the Contractor submitted that the Owner should not be allowed to "benefit in any way from its forensic decision not to put before the Tribunal any valuation report or evidence about diminution in value". [note: 16] The Contractor also submitted, in its reply submissions, that it should not be required to meet a "case which was not conducted by [the Owner]". [note: 17]

41 By the April 2014 Directions, the Contractor was to file its submissions first, before the Owner. This was a matter which the Contractor protested against in its answers to the April 2014 Directions (*ie*, "the Contractor's May 2014 Submissions") and it asked for an opportunity to reply if the Owner's answers introduced a case that the Owner had not previously made. [note: 18]

42 The Contractor then reiterated its position that the Arbitrator had no jurisdiction to make an award for damages on the basis of diminution in value claiming that the Owner's conduct of its case showed that it had abandoned its alternative claim based on diminution in value. It also pointed out that the Owner had claimed for diminution in value of *the Building*, and not diminution in value of *the Sub-Contract Works*, the latter being the basis on which the Arbitrator had posed his questions. Subject to that caveat, the Contractor agreed that the Arbitrator could use the NSC's tender for the Sub-Contract Works as a basis to determine the diminished value of the works, although it submitted that any diminution in value of the Sub-Contract Works was *de minimis*.

43 Elaborating on its answers, the Contractor pointed out that the Owner had appeared to be collecting market rental for the past 16 years after the Building had been completed. The Owner had therefore suffered no loss, and there could not be any diminution in value of the Sub-Contract Works. However, the Contractor then went on to state the following: [note: 19]

> 7. …the Architect, in his Interim Certificate No. 34 dated 14 October 2002 assessed the value of the [NSC] Subcontract Works to be $7,772,925.00. The difference between the Architect's certified value of [the NSC] Subcontract Works as performed and the [NSC] Tender/Subcontract Sum of $8,100,000 is in the region of about $330,000 (i.e. $8.1 million less $7.7 million).
>
> 8. Even considering the [Quantity Surveyor's] draft final account dated 15 April 2002 which showed the [NSC] Final Subcontract Sum of $8,503,649.05 (including variations but excluding [the NSC's] variation claim of $638,868.89), the difference in the certified value of the Subcontract Works as performed and the QS's draft final account is $730,724.05.
>
> 9. Be that as it may, based on the Architect's certification in October 2002, the diminished value of [the NSC] Subcontract Works amounts to about $330,000.00 and it should not exceed $730,724.05 even if the variations in [the Owner's] draft final account are taken into consideration. …

44 The Contractor's point was that if diminution in value of the Sub-Contract Works was applied on the established basis by comparing two values, *ie*, the value of the Sub-Contract Works as

contracted for less the value of the allegedly defective Sub-Contract Works, the diminution in value of the Sub-Contract Works would amount to either $330,000 or $730,724.05 (depending on whether the NSC's tender price or the Final Sub-Contract Sum of $8,503,649.05 was used as the value of the "non-defective" Sub-Contract Works).

Events that occurred before the Award was handed down

45 I now refer to the events that developed after the Owner's May 2014 Submissions were served. The Contractor sought leave to reply, alleging, among other matters, that the Owner had presented a new concept of abatement of value. The Owner strenuously objected on the basis that the Contractor had already implicitly addressed the issue of abatement as follows: [note: 20]

> … In relation to the doctrine of abatement, in answering "yes" to the Tribunal's question that [the NSC's] tender for the Subcontract work can be used for determining diminished value of the Subcontract Works, and going on to address what the value should therefore be … the Respondents have already addressed abatement of the subcontract price … [emphasis in original]

46 As stated above at [29], the Arbitrator's direction on 18 June 2014 against this backdrop was that he required no further assistance. The Arbitrator recorded in the Award that he received a total of 16 written submissions by 18 June 2014. Notably, the opening sentence of the April 2014 Directions expressly "confirmed" that it was "[the Contractor's] solicitors" who were to "revert" to the Arbitrator on the issues set out in the April 2014 Directions (see [27] above). The upshot of the Arbitrator's confirmation is that the Owner was to have the last word on the very issues.

The Award

47 Against the entire background facts, history of the arbitral proceedings, arguments and developments narrated above in [9]–[46] above, I now turn to the Award.

48 The Arbitrator found for the Owner on the main claim. He construed cl 28(2) of the Main Contract to mean that the Contractor would be fully responsible for the Sub-Contract Works that were carried out by the NSC. The Contractor was therefore held liable for the defects in, *inter alia*, the installation of the external wall cladding arising from the NSC's default or breach of contract. Paragraphs [51] and [61] of the Award read:

> 51. On liability, the Tribunal finds for the Claimants based on the conclusion in [the Independent Expert's] Report cited *supra* and the admission of the Respondents by way of their repeated offers to the Claimants to use the retention moneys to effect repairs pending the outcome of this arbitration.
>
> …
>
> 61. Accordingly, quite apart from [the Contractor's] admission of liability vide paragraphs 51 and 52 *supra*, the Tribunal finds against [the Contractor] on the issue of liability for the works referred to [in] Annex 1.

49 The Arbitrator summarised the Independent Expert's conclusions which he accepted in [31] of the Award:

> [The Independent Expert] in his report summarised his views as follows:

"(1) The fact that leaks are being recorded is in my opinion a contractual defect.

(2) The intent of the design, as required by the specification, is for the facade to be pressure equalised so that any water penetrating the face of the facade can be drained to the outside.

(3) It is apparent from the interface details described in the defects list a pressure equalised facade system has not been achieved.

(4) This has resulted in a direct water path into the building at interfaces where there is no internal air seal and the external weather seal is not effective.

(5) Many of the areas where it would be necessary to gain access from inside the building are now no longer accessible without severe disruption to the occupants.

(6) The Respondent agreed that some of the leaks are caused by poor workmanship.

(7) I support the comment of the Respondent that tracing the position of leak can be difficult as the point of entry into the building may be some distance away from the point of entry at the façade. The method of repair of a leak requires a forensic approach that progressively addresses the cause until the repair is successful. This may take more than one remedial action.

(8) I support the Respondent's statement that the Claimant's method of recording leaks by complaints is not the preferred way of assessing the extent of the leaks.

(9) I would prefer to see the leaks tabulated to record, date of report, location, position of water entry, severity and weather condition at time of the report. This would allow an assessment to be made on the extent of the defect, the severity of the leak and whether the leak is new or recurring.

(10) In my opinion, on the basis of the data prepared by the Claimant, there appears to be evidence that over 2010 the number of leaks are increasing and previous leaks may be recurring."

50 Before me, the Owner argued that the parties had implicitly or effectively treated the Draft Report as the final version. The Contractor disputed this. Be that as it may, the Arbitrator accepted the Independent Expert's conclusions in the Draft Report that analysed the 64 pleaded defects in Appendix A1.1 and came to a landing that there were 31 defects (whether by agreement between the parties, or in the Independent Expert's opinion), with five other pleaded defects requiring further investigation.

51 Having found against the Contractor on the issue of liability, the Arbitrator then approached the issue of the quantum of damages. He cited the principle that compensatory damages are aimed at putting the innocent party in "as good a position as if the contract had been performed". The Arbitrator quoted from *The Law of Contract in Singapore*, Andrew Phang Gen Ed (Academy Publishing, 2012) at para 21.058 which I set out here for background:

Expectation loss: Cost of cure, diminution in value or loss of amenity?

There are at least three ways by which damages may be quantified to place the promisee in the position it would have been had the contract been performed. These may be termed the "cost of cure" basis, the "diminution of value" basis and the "loss of amenity" basis. Briefly:

(a) "cost of cure" refers to the loss sustained by a promisee in terms of what it would cost the promisee to procure some entity other than the defaulting promisor to provide that which the promisor had failed to provide – *ie*, the cost of obtaining *substitute* performance;

(b) "diminution in value" refers to the loss sustained by a promisee in terms of the difference between the market value of the contracted for performance and the market value of the actual performance rendered; and

(c) "loss of amenity" refers to a conventional award made by the costs to reflect the level of *subjective* loss sustained by the promisee as a result of the defective performance by the promisor. [emphasis in original]

52 In the Arbitrator's view, "loss of amenity" was not a basis to quantify the damages in the present case. He then examined damages on a cost of cure basis noting that it was "in principle" the most equitable relief. He observed that cost of cure was, however, "only a prima facie position" (at [73] of the Award).

53 The Arbitrator observed that the Building was more than 16 years old at the time of the Award. He also noted that the Owner had not undertaken regular maintenance of the façade since its completion in March 1997. Furthermore, a prime tenant of the Building had covered the first four levels of the Building's façade. Besides, the Owner based its claim for cost of rectification on the basis of Tender 1 which had already lapsed. In these circumstances, on the pertinent question before the Arbitrator – whether the Owner would have proceeded with rectification of the Building if damages were awarded on a cost of cure basis – the Arbitrator held that the Owner would not carry out the repairs.

54 The second reason for the Arbitrator's finding that a cost of cure basis was not the appropriate measure of damages was that it would be unreasonable to base an award on the cost of rectification as claimed when only 31 items of defects represented the loss sustained by the Owner. Notably, the Arbitrator based his Award of damages on only 31 items of defect as set out in [27] of the Award and not on all 64 items as claimed in the re-amended Points of Claim and Appendix A1.1. The Arbitrator cited *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 ("*Ruxley Electronics*") for the legal principle that damages must be reasonable and found that the claim for cost of cure did not satisfy the test set out in *Ruxley Electronics.*

55 The Arbitrator opined that "the appropriate award [would be] one based on diminution in value". Paragraph [82] of the Award reads:

The Tribunal thus rejects the Claimants' claim for $11, 617,383.37 plus interest. The Tribunal holds that the appropriate award is one based on diminution in value taking into account the defects confirmed in [the Independent Expert's] Report.

56 In deciding on diminution in value as the appropriate measure of damages, the Arbitrator made the following findings of fact in [79] of the Award:

(a) In view of the defects, the Building sustained diminution in value ("the DIV Finding").

(b) The parties had agreed that the NSC's Final Sub-Contract Sum was $8,503,649.05.

57 Importantly, the Arbitrator also held that the diminution in value of the Building would be the difference between "the value in terms of the works supplied compared with the works contracted

for" (see [80] of the Award). As shown in [82] of the Award (see [55] above), in arriving at the diminution in value, the Arbitrator took into account the defects confirmed in the Draft Report (*ie*, the 31 items of defects). In arriving at these conclusions contained in the Award, the Arbitrator would have accepted the legal proposition advanced by both sides that diminution in value of the work may be equal to diminution in value of the Building (see [38] and [39] above).

58 The Arbitrator cited *Philips v Ward* [1956] 1 WLR 471 ("*Philips v Ward*") and *Watts v Morrow* [1991] 1 WLR 1421 ("*Watts v Morrow*") as illustrative authority. As to how to derive the value of work supplied, the Arbitrator found guidance, as can be seen from [81] of the Award, from the speech of Gibson LJ in *Watts v Morrow*. The Arbitrator quoted Gibson LJ at 1434–1435:

> The task of the court is to award to a plaintiff that sum of money which will, so far possible, put the plaintiff into as good a position as if the contract for the survey had been properly fulfilled: see *per* Denning LJ in *Philips v Ward* [1956] 1 WLR 471, 473. It is important to note that the contract in the present case, as in *Philips v Ward* was the usual contract for the survey of a house for occupation with no special terms beyond the undertaking of the surveyor to use proper care and skill in reporting on the condition of the house.
>
> The decision in *Philips v Ward* was based upon that principle: in particular, if the contract had been properly performed the plaintiff either would not have bought, in which case he would have avoided any loss, or, after negotiation, he would have paid the reduced price. In the absence of evidence to show that any other or additional recoverable benefit would have been obtained as a result of proper performance, the price will be taken to have been reduced to the market price of the house in its true condition because it cannot be assumed that the vendor would have taken less.
>
> The cost of doing repairs to put right defects negligently not reported may be relevant to the proof of the market price of the house in its true condition (see *Steward v Rapley* [1989] 1 E.G.L.R 159); and the cost of doing repairs and the diminution in value may be shown to be the same. If, however, the cost of repairs would exceed the diminution in value, then the ruling in *Philips v Ward* , where it is applicable, prohibits recovery of the excess because it would give to the plaintiff more than his loss. It would put the plaintiff in the position of recovering damages for breach of a warranty that the condition of the house was correctly described by the surveyor and, in the ordinary case as here, no such warranty has been given.
>
> It is clear, and it was not argued to the contrary, that the ruling in *Philips v Ward* may be applicable to the case where the buyer has, after purchase, extricated himself from the transaction by selling the property. In the absence of any point on mitigation, the buyer will recover the diminution in value together with costs and expenses thrown away in moving in and out and of resale: see Romer LJ in *Philips v Ward* [1956] 1 WLR 471, 478. I will not here try to state the nature or extent of any additional recoverable items of damage [emphasis is the Arbitrator's]

59 The Arbitrator had earlier cited Romer LJ in *Philips v Ward* in [80] of the Award. Romer LJ at 477 said:

> It appears to me that in order to arrive at a correct solution of the problem in this case one has to compare the position into which the plaintiff was put by the defendant's failure to perform his duty with the position in which he would have been had the defendant performed it; and in so far as the first position is more unfavourable to the plaintiff than the second, and the difference can be assessed in terms of money, then prima facie that assessment is the measure of the

defendant's liability to the plaintiff.

By reason of the defendant's inaccurate report, the plaintiff bought for £25,000 what he believed to be property which was in good condition, only to discover after he had bought it and moved in that it would require an additional expenditure of £7,000 to put the property into the state which the defendant had advised him that it was in already. The plaintiff accordingly contends that he is entitled to recover more than £7,000, if the cost of the necessary work to the property be taken at the date of the hearing before the official referee, which he submits it should be, instead of 1952. At first sight, there would seem to be much to be said in favour of the view that the extra expenses with which the plaintiff was unexpectedly confronted is the proper measure of the damage recoverable from the defendant-subject, possibly, to some deduction for the fact that, as a result of the work done, the plaintiff would have new material in the house instead of old. It is, however, as I have already suggested, necessary to consider not only what did in fact happen, but also what the plaintiff's position would have been if the defendant had performed his contract by sending in an accurate report as to the condition of the property; and this position has to be considered in the light of the official referee's finding that the market price of the property, after taking into account the defects which the defendant failed to disclose, was £21,000. If the plaintiff had received a report which revealed these defects, he would have known that he would have to spend £7,000 in addition to finding the purchase money for the house. With this knowledge, he might have decided that he would not buy the property at all, in which case he would have kept his money in his pocket and had no house. (On this hypothesis his ignorance of the defects may be said to have worsened his position to the extent of £4,000, for he parted with £25,000 and became the possessor of property worth only £21,000.) As an alternative to deciding not to buy the house, with knowledge of its defects, he might have made up his mind to purchase it at the reduced value of £21,000 and carry out the work which had to be done, at the cost of £7,000. In that event, he would have had to spend £28,000 instead of the £32,000 total expenditure which resulted from his buying the property on the faith of the defendant's report. On this hypothesis also, then, his position was worsened to the extent of £4,000, namely, the difference between £28,000 and £32,000. …

60 In [83] of the Award, the Arbitrator awarded to the Owner $3,401,459.62 being 40% of the Final Sub-Contract Sum as compensation for diminished value of the Building as of the cut-off date of 18 July 2005 ("the DIV Award") as well as other sums which the Contractor had admitted. In [84] of the Award, he also awarded the Contractor the sum of $2,056,306.54, being the sum of the Contractor's undisputed Counterclaim.

61 These consequential orders were also made:

(a) The amounts awarded to each of the parties to carry interest at the rate of 5.33% per annum from 8 November 2001 to the date of the Award ("the Interest Award").

(b) The Owner and the Contractor were awarded costs on their claim and Counterclaim, such costs to be agreed, failing which to be taxed ("the Costs Award").

(c) The fees and expenses of the Arbitrator and the costs and expenses of the Award to be borne by the parties in the proportion of 60% by the Contractor and 40% by the Owner ("the Arbitrator's Costs Award").

OS 790 to set aside the Award in part

62 The challenged part of the Award related to the DIV Finding and the DIV Award (collectively

"the DIV challenge"). The Arbitrator's Costs Award seems to correspond to the DIV Award and is, in principle, consequential on the outcome of the DIV challenge. In any event, my comments on the Contractor's challenge to the Arbitrator's Costs Award are to be found below. Many arguments were raised in the oral and written submissions in the DIV challenge. In this judgment, I propose to deal only with the key points of the DIV challenge and the broad issues are briefly as follows:

(a) Whether the Arbitrator exceeded his jurisdiction by: (i) finding that the Building sustained diminution in value; and (ii) making the DIV Award that referenced damages based on 40% of the Final Sub-Contract Sum, which had not been pleaded or referred to him for determination (*ie*, the Jurisdiction Issue).

(b) Whether the DIV Award should be set aside because there was no evidence or reasons to support the Arbitrator's conclusions that the Building had sustained diminution in value and in making the DIV Award ("the Natural Justice Issue 1").

(c) Whether the Arbitrator failed to give the Contractor a fair hearing as it was deprived of the opportunity to present its case on diminution in value, namely: (i) the DIV Award was made on a basis not put to the parties; and (ii) alternatively, it was made on the basis of the Owner's May 2014 Submissions, which the Contractor was not given the opportunity to address ("the Natural Justice Issue 2").

(d) Whether the Arbitrator failed to give the Contractor a fair hearing in making the Interest Award ("the Natural Justice Issue 3").

(e) Whether the Arbitrator failed to give the Contractor a fair hearing in making the Costs Award and the Arbitrator's Costs Award ("the Natural Justice Issue 4").

63 The Contractor also contended that as a result of the Arbitrator's misconduct of the arbitral proceedings, it had suffered prejudice.

64 The Contractor's DIV challenge is brought under s 17(2) of the 1985 Act. It is necessary to show that the approach of the Arbitrator in the proceedings constituted misconduct of the proceedings within the meaning and scope of s 17(2) of the 1985 Act. The DIV challenge is disputed by the Owner on the basis that none of the criteria of s 17(2) is satisfied in relation to the matter this court is now considering and/or to the extent that s 17(2) is relied on. In short, Mr Yeo contended that the Contractor was seeking to re-litigate the substantive issues and merits in the arbitration.

Statutory framework of s 17 of the 1985 Act

65 Section 17 of the 1985 Act provides for recourse against arbitration awards where the arbitrator had misconducted himself or the proceedings:

Power to set aside award

17.—(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the court may set aside the award.

66 "Misconduct" for the purposes of s 17(2) of the 1985 Act refers to "a mishandling of the

arbitration, which may lead to some substantial miscarriage of justice" (*Halsbury's Laws of Singapore* (Butterworths Asia, 1998) at para 20.127). A "mishandling of the arbitration" may include cases where the arbitral tribunal acted in excess of jurisdiction, or where it committed a breach of natural justice (see Judith Prakash J in *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063 ("*Koh Bros*") at [32]). The mere fact that a "mishandling of the arbitration" occurred would not *ipso facto* amount to "misconduct" within s 17(2) of the 1985 Act; the mishandling must be shown to be likely to cause an injustice that warrants correction.

67 The point is that s 17(2) of the 1985 Act is about due process, not whether the tribunal reached the right conclusions. Section 17(2) is only to be available in cases where the tribunal had gone so far wrong in its conduct of the arbitration that the court would be expected to take action to correct the injustice. Choo Han Teck JC (as he then was) stated in *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 ("*John Holland*") (at [19]–[20]):

> … The complaint, if valid, reveals no more than a plain error of law, or of a mixed fact and law. That is … outside the ambit of s 17(2) of [the 1985 Act]. I am of the view that an error of this nature does not amount to misconduct. *It is also my view that although the misconduct envisaged under s 17(2) is not necessarily conduct of the wilful sort, it must nonetheless, be of a serious nature that one can plainly see that justice was not done*.
>
> …
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> … A mistaken view of the application of *Hadley v Baxendale*, for example, is an error of law that cannot be challenged. A mistaken calculation of the number of days of delay is a mistake of fact which cannot be challenged. On the other hand, if an arbitrator shows his draft award to one party without showing it to the other before publication, that would, in my view, be misconduct within s 17(2) of [the 1985 Act] and also a breach of the rules of natural justice…

68 Plainly, errors of fact or law do not qualify as "misconduct". This statement of principle is articulated in s 28(1) of the 1985 Act which provides that subject to s 28(2) (which allows for appeals to court on a question of law arising out of the award), the court does not have the jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

69 It has been accepted that arbitrators should not come to decisions which surprise the parties. This oft-quoted passage in Mustill & Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) ("Mustill & Boyd") encapsulates the principle (at p 312):

> If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer.

70 However, this observation is to be viewed and understood in light of the issues and circumstances of each case seeing that it will often not be necessary for an arbitral tribunal to request submissions on every point in its decision. The English Court of Appeal in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358 ("*Carillion Construction*") explained (at [53]):

> It is often not practicable for an adjudicator to put to the parties his provisional conclusions for

comment. *Very often those provisional conclusions will represent some intermediate position, for which neither party was contending.* It will only be in an *exceptional case* … that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision. [emphasis added]

71 The Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 66 ("*Soh Beng Tee*") considered the authorities and distilled the following principles (at [65]):

(a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* …, is fairness. The best rule of thumb is to treat parties equally and allow them reasonable opportunities to present their case as well as to respond. ***An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw.*** *Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.*

…

(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 [International Arbitration Act]. 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 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 the 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*. … ***[T]he 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.

(e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. *He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him*. … [emphasis added in italics and bold italics]

72 The Court of Appeal in *Soh Beng Tee* cited extensively with approval the principles set out in the New Zealand case of *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452. In that case, Fisher J opined that the test of whether a particular decision reasonably flows from or may be foreseen from parties' arguments is to be tested on an objective basis. He also explained (at 463):

… when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

73 In sum, there is no misconduct constituting breach of natural justice because an arbitrator comes to a conclusion which is not argued by either party as long as that conclusion, on an objective assessment, reasonably flows from or may be foreseen from parties' arguments.

74 I come to the "no evidence rule". The Contractor said that the "no evidence rule" could be a "third pillar" of natural justice that had yet to be decided by the Singapore courts. The "no evidence rule" was explained by Lord Diplock in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at 488 in an administrative law context:

> The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value… If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.

75 The "no evidence" rule was considered by the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 ("*TCL Air Conditioner*") in the context of international commercial arbitration, and the court held at [83] and [112] that the making of a factual finding without evidence in the context of international commercial arbitration may in the appropriate case be characterised as a breach of the rules of natural justice offending the fair hearing rule, but it does not follow that lack of probative evidence (and so as to amount to error of law) should without more be characterised as a breach of natural justice. Caution was raised in *TCL Air Conditioner* by Allsop CJ, Middleton and Foster JJ who opined (at [113]) that the "no evidence" rule should not be used as a disguise to rehear the facts or submissions in the case and thus a party should be able to demonstrate the practical injustice suffered shortly without a detailed re-examination of the facts. What is important is not the application of formalistic rules, but whether "true practical injustice" had been occasioned. In *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414, the "no evidence" rule was analysed from a public policy perspective as a breach of natural justice would, under Australian law, render an arbitral award in conflict with the public policy of Australia.

76 Whilst the status of the "no evidence" rule was expressly left open in two High Court decisions (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [118]–[120] and *AQU v AQV* [2015] SGHC 26 at [45]), there is no reason to consider this issue in the present case. The outcome of OS 790 turns on different grounds. Besides, there is a no compelling need to recognise the "no evidence" rule as a separate free standing rule of natural justice. As stated, the focus of the inquiry under s 17(2) is due process, and due process is to be examined in the context of the fair hearing rule. In the context of "misconduct", Mustill and Boyd remarked (at p 561):

> It is conceivable that where the state of the evidence is such as to show, not merely that no reasonable arbitrator would reach a particular conclusion of fact upon the basis of it, but also that there is *no evidence at all to sustain the finding*, the award can be attacked – either on the ground that the arbitrator has acted unjudicially, *or on the ground that by deciding that contrary to the obvious facts he has* ***taken the parties by surprise*** *, and hence been* ***guilty of misconduct*** . [emphasis added in italics and bold italics]

77 Another aspect of fairness in proceedings is the need for the arbitral tribunal to give reasons for its decision. Under the 2002 Act and the International Arbitration Act (Cap 143A, 2002 Rev Ed), an arbitral award must state the reasons on which it is based unless parties have otherwise agreed. While there is no similar provision in the 1985 Act, the provision of reasons for a decision is a facet of fairness. As the Court of Appeal in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 ("*Thong Ah Fat*") stated (at [15]):

> … it has been acknowledged in all mature common law jurisdictions as an *elementary principle of fairness* that parties are not only to be given a fair opportunity to be heard, but also apprised of how and why a judge has reached his decision. [emphasis added]

78 Although the Court of Appeal in *Thong Ah Fat* was referring to the *judicial* duty to give reasons, the court in *TMM Division* found the standards set out in *Thong Ah Fat* "assistive indicia" to arbitrators. I agree with the approach of the court in *TMM Division*. While it has been suggested in *Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2012] 1 SLR 917 that the inadequate provision of reasons by an arbitral tribunal is a mere error of law, the concept of inadequacy exists within the bandwidth of a spectrum. As noted by the court in *TMM Division* (at [104]):

> Even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety of reasons why an arbitral tribunal may elect not to say something. In my view, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues: *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122. …

79 Hence, whether a given decision is sufficiently reasoned is a matter of degree and must be considered in the circumstances of each case. Even if *no* reasons were given in an arbitral award, this would not invariably cause the award to be set aside for breach of natural justice.

80 For misconduct to constitute a breach of natural justice, and in order to succeed in challenging the award as having been made in contravention of the rules of natural justice, the Contractor must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights (see *John Holland* at [18] and *Soh Beng Tee* at [29]).

81 On the test of prejudice in determining whether an arbitral award should be set aside, the Court of Appeal in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure (CA)*") clarified the statement of "actual prejudice" in *Soh Beng Tee* at [65(f)] in its review of the matter in the context of s 48(1)(*a*)(vii) of the 2002 Act. For convenience, I set out the text of *Soh Beng Tee's* [65(f)]:

> Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

82 As to the threshold of prejudice that must be crossed, the Court of Appeal said (*LW Infrastructure (CA)* at [50] and [54]):

> … It is undoubtedly the case that not every breach of the rules of natural justice will in itself

amount to the required "prejudice" (see *Soh Beng Tee* at [83] – [84]). In *Soh Beng Tee*, this court was careful to state that there must be some casual connection between the breach of natural justice and the making of the award in order to establish actual or real prejudice. This is reflected in *Soh Beng Tee* at [86] and [91]…

…

… [T]he real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (*cf Soh Beng Tee* at [86]). [emphasis in original]

83 Although *LW Infrastructure (CA)* concerned the provisions of the 2002 Act, in my reading of the authorities, the approach in *LW Infrastructure (CA)* is consistent with the earlier authorities under the 1985 Act (see for *eg*, *John Holland* at [19]–[20], *Koh Bros* at [32], and *Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 at [40]) and sets out the applicable test for prejudice required under s 17(2) of the 1985 Act.

84 Finally, in a setting aside application, the court may instead of setting the award aside remit any of the matters referred to the arbitral tribunal for reconsideration under s 16 of the 1985 Act.

85 With the relevant principles outlined above in mind, I now turn to the issues which arise for this court's determination in OS 790.

The Jurisdiction Issue

86 Paragraph [83] of the Award is where the Arbitrator awarded the Owner the sum of $3,401,459.62 being 40% of the Final Sub-Contract Sum as compensation for diminished value of the Building as of the cut-off date of 18 July 2005 (*ie*, the DIV Award) as well as other sums which the Contractor had admitted. In [84] of the Award, the Arbitrator awarded the Contractor the sum of $2,056,306.54, being the sum of the Contractor's undisputed Counterclaim for the retention money. Hence, the net amount payable to the Owner (before the Interest Award) was $1,491,934.26.

87 The Contractor considered the outcome of [83] of the Award as not a matter that was pleaded or pursued in the Arbitration. Furthermore, the Arbitrator exceeded his reference using a method of assessment which he did not put to the parties and which neither party argued. Mr Singh submitted: [note: 21]

[The Owner] never pleaded or pursued a case that DIV of the Building could be arrived at by taking the Final Sub-Contract Sum as the market value of the Building, as contracted, then applying a percentage discount to that sum. No one put forward, or could have put forward, any such case because it is not known in law and even today no one is suggesting that it is permissible in law. … Although the Arbitrator referred to the correct formula which was premised on the difference between two values, he used the wrong starting point of $8.5 million when no one had said that was the market value of the Building, as contracted. He also had no second number, and simply applied a 60% discount plucked from thin air…

88 At first blush, Mr Singh's contentions are attractive. However, with respect, there is nothing to the excess of jurisdiction point upon closer scrutiny of the Award read with the relevant documentary evidence before this court. Let me elaborate.

89 The underlying claim was the breach of the Main Contract in relation to the Sub-Contract Works. On ordinary principles, the innocent party is to be put in the same position, so far as money can, as if there had been no breach. If there was a breach and loss had been suffered, the question for determination in the Arbitration was this: "What was the true amount of the loss suffered by the innocent party?" In short, the Arbitrator's reference was to decide on liability and quantum of damages. Indeed, this was made clear by the Owner's general prayer for "loss and damage arising from defects" as stated in the Arbitrator's August 2007 directions (see [18] above).

90 The important distinction which must be borne in mind is between an "erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law)" and the "purported exercise by the arbitral tribunal of a power which it did not possess" (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [33]). Applying this distinction in the present case, the reference to Arbitration gave the Arbitrator the power to determine the damages which should be awarded to the Owner in the event he found that the NSC had performed defective works for which the Contractor was liable under the Main Contract. Specifically, the Owner had prayed for diminution in value of the Building as an alternative relief.

91 As the Court of Appeal stated in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 (at [33]):

> The role of pleadings in arbitration is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication.

92 The point that arises in relation to this jurisdiction issue as described is in essence a pleading point – that the Arbitrator was confined to reaching a decision on the issues identified between the parties by the pleadings filed between them. As stated, the Owner's re-amended Points of Claim included a positive alternative claim based on diminution in value of the Building. Thus, the real question in argument was whether the Owner had unequivocally abandoned this alternative claim in the course of the Arbitration by advancing on its submissions a case based on cost of cure alone, and if so, whether the Arbitrator misconducted the proceedings by purporting to resolve the issue of quantum on a basis of diminution in value of the Building that had been unequivocally abandoned by January 2014. [note: 22] Mr Singh submitted that the Arbitrator "descended into the arena" to revive what was not or no longer the Owner's case. It was contended that the articulation of the DIV Award in [83] was hardly the same as the pleaded alternative claim and the DIV Award took the parties by surprise.

93 It is true that the Owner's main argument on quantum of damages was based on cost of cure rather than on the alternative basis of diminution in value of the Building on which the Owner in the DIV Award in fact succeeded on. Prior to the February and April 2014 Directions, the Owner dealt with the cost of cure as its primary relief. The Owner was not able to show otherwise and did not deny this.

94 It is also true that the Owner saw evidential difficulty, not the absence of a positive pleaded alternative claim, for not robustly advancing an alternative claim based on diminution in value of the Building (see [35] above). Nonetheless, the alternative claim was left open in case the Arbitrator was not minded to award damages based on cost of cure. That was how the Arbitrator saw it. After all,

parties agreed that there were "some defects", and the Independent Expert was appointed to assist the Arbitrator in identifying and assessing the defects. There is no doubt that it was within the Arbitrator's overall broad remit to decide on liability and quantum if the Sub-Contract Works were defective, such that it caused the Building to suffer a diminution in value.

95 Mr Singh relied on the case of *Nada Fadil Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 ("*Al-Medenni*") to press his point that the Arbitrator's February and April 2014 Directions seeking further submissions on damages for diminution in value, were in excess of the Arbitrator's jurisdiction and remit, and was an unwarranted descent into the arena. In *Al-Medenni*, the claimant was injured by a reel of wrapping paper weighing about 10 kg, which fell from a machine above her as she was going about the course of her employment. The claimant sued the employer for negligence. She pleaded that one Mr Braich had negligently placed the reel of wrapping paper on the machine. The defendant's position was that the claimant herself had placed the reel on the machine. During the course of the opening submissions, the Judge suggested that there was another possibility – someone other than Mr Braich or the claimant had placed the reel on the machine ("the third man theory"). This suggestion was not taken up by the claimant or the defendant, and no cross-examination of witnesses proceeded on that basis. However, in the claimant's closing submissions, the third man theory and the doctrine of *res ipsa loquitur* appeared to have been adopted as alternatives to her primary case that Mr Braich was responsible. Although the Judge found for the claimant, he did not accept that the claimant had proved that Mr Braich had placed the reel on the machine. In his judgment, the reel was negligently placed on the machine by another unidentified employee (*ie*, the third-man theory). Dyson LJ, with whom the other members of the English Court of Appeal agreed, stated (at [19] and [21]):

> 19 I am in no doubt that the particulars of claim did not plead the third man theory. The pleading, as supplemented by the further information, made it clear that the claimant's case was that the reel had been placed on the machine by Mr Braich and no one else. Furthermore, there was nothing in the claimant's pleadings, witness statements or how the case was conducted on her behalf to indicate that she was relying on *res ipsa loquitur*.
>
> …
>
> 21 In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.

9 6 *Al-Medenni* is distinguishable on the facts. Unlike the third man theory in *Al-Medenni*, the Owner's claim for diminution in value of the Building featured in the pleadings. The parties also agreed at the Second Hearing that they would, in their written submissions, address the Arbitrator on damages for diminution in value of the Building after this measure of damages had been raised as a possibility by the Arbitrator then.

97 I agree with Mr Yeo that the Owner had not abandoned unequivocally diminution in value of the

Building as an alternative basis of claim. This was left open whilst the Owner advanced its primary case based on cost of rectification. As stated in [94], that was how the Arbitrator saw it. In fact, the Arbitrator had been told at the Second Hearing that "diminished value … would relate to costs of rectification" and he was expecting to see written submissions dealing with this. The history of the arbitral proceedings showed that: (a) the Arbitrator wanted submissions on diminution in value and the parties agreed at the Second Hearing to deal with the matter in their written submissions (see [33] above); (b) the Arbitrator was not satisfied with the submissions received after the Second Hearing; and (c) the Arbitrator sought further submissions on diminution in value in his February 2014 Directions. Viewed in context of points (a) to (c) and of the fact that the alternative measure of damages was within a party's pleading diminution and that alternative measure of damages had not been unequivocally abandoned or withdrawn by a party, an arbitral tribunal would not be acting in excess of jurisdiction by requesting further submissions where in the tribunal's view, the matter had not been satisfactorily addressed. As will be elaborated in [98]–[99] below, the Owner's submissions as well as the Contractor's submissions before February 2014 Directions showed that the Owner had not unequivocally abandoned diminution in value of the Building as an alternative basis of claim. Furthermore, the Owner's submissions in response to the February and April 2014 Directions were largely within the line of argument which Mr Yeo had advanced at the Second Hearing, *ie*, that cost of rectification could be applied within a diminution in value framework.

98 At the Second Hearing, Mr Yeo explained to the Arbitrator that even though there was no evidence to show the market value of the Building, the Arbitrator could base his decision on diminution in value using, in principle, rectification costs. This was a point which the Owner again made in its November 2013 Submissions, where the Owner stated that "[a]bsence of evidence of diminution in value does not mean that there is no diminution in value" (see [34] above).

99 That the Contractor formed and took a view of the Owner's case on cost of cure – that it was "all or nothing" – is not the point. Even though the Contractor had submitted after the Second Hearing that there was never any claim made by the Owner for diminution in market rental and that there was no evidence of diminution in value of the Building either, the Arbitrator was clearly told in the Contractor's September 2013 Submissions that "in many cases, diminution in value of the work may be equal to diminution in value of the building" (see [39] above). That same proposition was made by the Owner (see [38] above). It is beyond doubt that the Arbitrator accepted this simple proposition in his Award and his decision stemmed from his acceptance and finding on that point. As the Arbitrator saw it, despite the evidential difficulty highlighted, he did not think that on the available evidence damages based on diminution in value was impossible to quantify.

100 In the circumstances, it was thus reasonable, and entirely within the Arbitrator's remit, to seek submissions on diminution in value which the Arbitrator had raised at the Second Hearing. In my view, given the state of affairs *prior* to the Arbitrator issuing his February 2014 Directions (see [35], [39], [94] and [97] –[98] above), the Owner had not unequivocally abandoned its alternative pleaded claim for diminution in value of the Building (unlike its express withdrawal of its claim for recladding (see [18] above)).

101 I return to Mr Singh's contention that the Arbitrator exceeded his jurisdiction in making the DIV Award in the *manner* and on the *basis* which he did (see [87] above). The Arbitrator was criticised for making findings of fact that had nothing to do with the market value of the Building as contracted for and the market value of the Building as supplied. In reality, Mr Singh's submissions go to the *substance* of the DIV Award in that the contention is that the Arbitrator made an error by making use of the Final Sub-Contract Sum. This type of error (assuming there was an error) is plainly not misconduct that would go to the Arbitrator's jurisdiction.

102 To the extent that the award was erroneous on the basis of legal principle, the following passage in Mustill & Boyd, which was cited with approval in the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221at [25], is instructive (at p 550):

> If … [the arbitrator] applies the correct remedy, but does so in an incorrect way – for example by miscalculating the damages which the submission empowers him to award – then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure.

103 Mr Singh quoted *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") at [72] where the Court of Appeal stated that an example of an act in excess of jurisdiction would be where an arbitral tribunal "makes an arbitral award that neither party requested". However, the "request" referred to by the Court of Appeal in *AKN v ALC* relates back to the terms of the tribunal's reference and the pleadings. Plainly, the Owner had requested, in its pleadings, for an award of damages for breach of contract, and specifically, an award of damage on the basis of diminution in value of the Building in the alternative.

104 I make two other points in relation to the argument that the DIV Award was unexpected and neither party had requested it. It was said that neither party had made submissions on the use of the Final Sub-Contract Sum, or that a percentage of the Final Sub-Contract Sum could be taken as the quantum of damages for diminution in value of the Building. This same contention was repeated in the complaint of breach of natural justice.

105 The first point is the Arbitrator's use of the Final Sub-Contract Sum which nobody had raised and was said to be a wholly unexpected outcome. This contention lacks credence seeing that the Final Sub-Contract Sum was raised by the Contractor itself in its May 2014 Submissions, in response to the Arbitrator's April 2014 Directions, and in the context of the Final Sub-Contract Sum being used as the value of the works contracted for (see [43] above). Having put the Final Sub-Contract Sum explicitly before the Arbitrator, it is a bad point to take that "neither party made submissions on the Final Sub-Contract Sum being taken as the first value". The Final Sub-Contract Sum was put forward as one of the values for consideration.

106 The second point is the percentage figure of 40% in the DIV Award. It is true that the Arbitrator did not spell out how and where he derived the percentage figure of 40%. However, this does not mean that the Arbitrator had "applied a 60% discount plucked from thin air" (see [87] above) if the DIV Award is examined in light of the legal principles the Arbitrator took pains to reproduce in the Award. Let me elaborate.

107 While the Arbitrator may have awarded damages for diminution in value of the Building on the basis of a percentage of the Final Sub-Contract Sum, this was not an approach which was out of line with the legal principle stated at [80] of the Award (*ie*, that diminution in value is the difference between the value of the works supplied as compared to the value of the works contracted for). Reading the Award, the Arbitrator applied the stated legal principles and came to the view that the Sub-Contract Works were only worth 60% of what the Owner had actually paid for it (and hence, found the diminished value of the Building to be 40% of that). He arrived at the view that the Sub-Contract Works were worth only 60% of the Final Sub-Contract Sum by taking into account the rectification costs of the 31 defects which he found to have existed at [27] of the Award.

108 It seems to me that the Arbitrator worked out the diminution in value adopting the approach

set out in *Watts v Morrow* and *Philips v Ward* (see [58] and [59] above) and made use of the rectification costs of the 31 items of defects based on information contained in the PowerPoint slides ("the Slides") that were included in the Owner's May 2014 Submissions. The Owner had previously shown the Slides to the Arbitrator who was taken through the Slides at the Second Hearing on 9 July 2013. [note: 23] The Slides showed a breakdown of the costs, the repair method and the rates from Tender 1. From this breakdown, the rectification costs for the 31 defects would add up to approximately $3.35m. The Arbitrator would have applied the concept of a reduction in price which Gibson LJ articulated in *Watts v Morrow* by reducing the Final Sub-Contract Sum with this value of $3.35m in mind to obtain the putative market value of the Sub-Contract Works at approximately $5.15m which amounts to 60.5% of the Final Sub-Contract Sum. This approach as described was probably how the Arbitrator derived damages for diminished value of the Building at 40% of the Final Sub-Contract Sum being approximately $3.4m.

109 The Contractor's September 2013 Submissions, after the Second Hearing, had referred to the Slides and made comments in relation thereto. Annexed at Tab 22 of its September 2013 Submissions was a document entitled "Reply to [the Owner's] Slides tendered at the Hearing of 9 July 2013". [note: 24] The Contractor did not deal with the breakdown of the cost of rectification of each item shown in the Slides, but argued from an overall and general basis that the extent of the defects must first be determined before a reasonable calculation of the repair costs could be made. In the main body of the Contractor's September 2013 Submissions, the Arbitrator was told to be "very circumspect about the submissions made in [the Owner's] Reply, [the Owner's] Executive Summary and in [the Owner's] Oral Submissions, in particular most of all the Slides presented at the Hearing". The Contractor further said that "almost every Slide distort[s] the opinion of the tribunal's expert, … and the agreements reached between the experts in respect of the [Appendix] A1.1 items by excluding relevant excerpts from [the Independent Expert's] opinion and the agreement between the experts to present an utterly inaccurate and misleading record of [the Independent Expert's] opinion and the agreement between the parties' experts …". The Contractor concluded that the extent of the alleged loss, including cost of rectification, was not proven. Notwithstanding the Contractor's arguments, the Arbitrator preferred the Owner's submissions.

110 In conclusion, the Arbitrator, in finding that the Building had sustained diminution in value and awarding damages on that basis, did not act in excess of jurisdiction. For the reasons stated, the Jurisdiction Issue fails.

A breach of natural justice that constitutes misconduct

111 Before considering the DIV Award and the Contractor's specific complaints about it in more detail, it bears stating again that the focus of the inquiry under s 17(2) is due process, not the correctness of the Arbitrator's decision. Hence, the court's inquiry is on whether there was due process: did the Arbitrator fail to give the parties the opportunity to address points, facts or arguments which occurred to the Arbitrator but had not been raised by the parties? This point that s 17(2) is about due process, not whether the tribunal reached the right conclusions, is of particular importance in the present case, where upon close analysis, the Contractor's real complaint is that the Arbitrator reached the wrong result.

Natural Justice Issues 1 and 2

112 The same grounds raised in the Jurisdiction Issue are being relied upon to set aside the DIV Award for breach of natural justice. This is not surprising since the grounds do overlap considerably.

113 The Contractor argued that anyone reading the DIV Award would not be able to understand the basis on which the Arbitrator reached his decision since the DIV Award was so bereft of reasons, "completely out of the ballpark and arbitrary". The Arbitrator had asked for submissions on the NSC's tender price but ended up using the Final Sub-Contract Sum. The Contractor argued that "neither party made submissions on the Final Sub-Contract Sum being taken as the first value" or that a percentage of the Final Sub-Contract Sum could be taken as the quantum of damages for diminution in value of the Building. In addition, there was no evidence to support the DIV Award; the Contractor had not been given the opportunity to respond to the "new case" based on doctrine of abatement raised in the Owner's May 2014 Submissions and there was a lack of reasons for the DIV Award, which reinforced the startling and unexpected outcome of the Arbitration. It is the final holding of damages for diminished value of the Building that the Contractor submits constituted a breach of natural justice.

114 I will first deal with the allegation that the Contractor was not given an opportunity to respond to the Owner's "new case" that was raised in the Owner's May 2014 Submissions. The Contractor had sought leave from the Arbitrator to reply to the Owner's May 2014 Submissions. Leave was not granted. The Arbitrator made a clear decision that he did not require further assistance and submissions from the Contractor. That was the end of the discussion as far as the Arbitrator was concerned. The fact that he did not preclude the parties from agreeing between themselves to make further submissions was not the point and it did not controvert the decision he had made.

115 Even if this case management decision could be characterised as a breach of natural justice, the Contractor would not have suffered any prejudice. The threshold prejudice required to set aside for breach of natural justice is explained in *LW Infrastructure (CA)* (see [82] above). The Contractor must show that the alleged breaches of natural justice were not merely technical or inconsequential.

116 The Contractor submitted that it would have made submissions on the points below had it been given an opportunity to respond: [note: 25]

(a) The award of a percentage sum of the Final Sub-Contract Sum as damages should be reconsidered.

(b) The values of diminution in value of the Sub-Contract Works and diminution in value of the Building are different and cannot be equated.

(c) Evidence of diminution in value of the Building was required to show that the defects in the Sub-Contract Works affected the value of the property. The Owner cannot simply rely on what Mr Yeo had said at the Second Hearing as this was not admissible evidence.

(d) There was no evidence to support a figure of 40% of the Final Sub-Contract Sum as damages.

(e) The concept of abatement and *Multiplex* were inapplicable as abatement had not been pleaded and can only be applied as a defence.

(f) The appropriate discount for betterment and for leave to adduce evidence on the same.

(g) The Owner cannot rely solely on the cost of rectification without evidence of other factors to calculate diminution in value because this amounts to a conflation of two entirely different heads of damage.

Points (b), (c), (e), (f) and (g) echoed the matters stated in Mr Thambiayah's letter of 4 June 2014, where he sought leave to respond to the Owner's May 2014 Submissions. [note: 26] I have already dealt with points (a) and (d) when discussing the Jurisdiction Issue in [105] to [109] above and I adopt the matters stated there as applying equally to the complaints of breach of natural justice in the present case.

117 In my judgment, the Contractor had ample opportunity to make and had in fact made the submissions in respect of points (b), (c), (d), (e), (f) and (g) above in the Arbitration. Let me elaborate.

118 As regards points (b) and (c), the Contractor had made its counter-submissions to the Owner's case that the Arbitrator should use the evidence on the rectification costs with a discount for betterment to derive the quantum of damages for diminution in value of the Building. The Contractor's counter submissions were not accepted by the Arbitrator. In reality, the Contractor's case for setting aside is that the Arbitrator was wrong in not accepting its submissions. At the highest, this is an allegation that the Arbitrator made an error of law or fact, and does not provide grounds for the setting aside of the DIV Award.

119 One related objection to the Arbitrator's legal approach concerned the fact that the Owner had sought in its pleadings diminution in value of the Building, and not diminution in value of the Sub-Contract Works. In my judgment, there was no failure of due process or breach of natural justice here because the Arbitrator had given the both parties a chance to comment on an award for diminution in value of the Sub-Contract Works pursuant to his April 2014 Directions. Even at that stage, the Contractor had already made the argument that diminution in value of the Building could not be equated with diminution in value of the Sub-Contract Works. In fact, the Contractor's submissions in 2014 showed a shift in its position that contradicted its earlier submissions in September 2013 where the Contractor had said that "[i]n many cases, diminution in value of the work *may be equal to* diminution in value of the building" [emphasis added] (see [39] above). In contrast, the Owner took the position that diminution in value of the Sub-Contract Works could amount and would be equivalent to diminution in value of the Building: [note: 27]

> Further, [the Contractor's] distinction between diminution in value of the *Sub-Contract Works* and of the *Building* is superficial insofar as it relates to any and all relevant evidence presented in this regard, given that the Sub-Contract Works are part of the Building, and parties are arguing about diminution in value as a consequence of the same defects. [emphasis in original]

120 As early as the Second Hearing, it was Mr Yeo's submission that "diminished value … would relate to costs of rectification". This was a submission repeated in the Owner's submissions dated 12 November 2013, and the Owner's March 2014 Submissions. The Contractor had more than ample opportunity to, and did in fact make contrary submissions (see [39]–[40] above). It was in the Owner's May 2014 Submissions in response to the April 2014 Directions that the Owner suggested that the Arbitrator could abate or reduce the price of the Sub-Contract Works in order to account for diminished value of the Building, with the amount to be abated decided by reference to Tender 1 with a discount for betterment (see [37] above). Mr Singh argued that to the extent that the Arbitrator relied on the Owner's May 2014 Submissions to arrive at the DIV Award, this was a breach of the fair hearing rule because the Contractor was not given an opportunity to respond to the Owner's "new case" and that the DIV Award should be set aside on that basis. I do not accept this contention for the reasons stated at [123]–[125] below.

121 Hence, the Contractor's objection on this count was a matter that was squarely before the

Arbitrator, and the Arbitrator had already the benefit of submissions from both parties. The Arbitrator awarded damages based on diminution in value of the Building, and not the Sub-Contract Works, which was in line with the Owner's submissions and in fact, the Contractor's September 2013 Submissions. The fact that he preferred and decided to adopt these submissions could not be said to be a breach of natural justice, and indeed a contrary finding would be an unwarranted and impermissible intrusion into the merits of the decision. As stated, misconduct in s 17(2) of the 1985 Act is about due process, and errors of fact or law on the face of the award is not indicative of misconduct of the arbitral process.

122 Specifically with respect to point (f), the Contractor already knew – if not after the Second Hearing, then at least after the Owner's March 2014 Submissions (see [35] –[36] above) – that the Owner was proposing to the Arbitrator that he should apply a "betterment discount" on the rectification costs adduced in evidence to arrive at a value for damages for diminution in value. The Contractor had in fact addressed the issue of betterment in its September 2013 Submissions. It was open to the Contractor at all material times to make submissions on the appropriate discount to be applied for betterment, if the Arbitrator was minded to do so. Having taken a strategic decision not to do so at these various junctures, the Contractor cannot be heard to allege that procedural injustice had occurred. To the extent that Mr Thambiayah in his June 2014 letter sought leave to press home the point that there was no evidence that related to the market value of the Building, this was not a point that was disputed by the Owner, and was a point which the Arbitrator had already been informed of umpteen times. It is clear from context of the Arbitration that in issuing the April 2014 Directions, the Arbitrator would have put the point aside for a moment until he heard from the parties on his directions.

123 On abatement in point (e), although the Owner had introduced "abatement" in its May 2014 Submissions, its argument in the application of this concept was fully in line with what its case had been since the Second Hearing, *ie*, that it is legally permissible for Tender 1 to be used as evidence for diminution in value of the Building. The concept of abatement of price was introduced only to address the Arbitrator's question of whether the NSC's tender could be used for determining the diminished value of the Sub-Contract Works. In other words, the Owner used the concept of abatement in order to fit what it had already been submitting since the Second Hearing to match the Arbitrator's queries in the April 2014 Directions; the essence of the Owner's submissions remained consistent with its earlier submissions, of which the Contractor had been given a full opportunity to respond to. From this perspective, there was really no "new case".

124 The Contractor's submission that abatement can never be used as a sword, but is only relevant as a defence, is not entirely correct. There have been instances where abatement was used as a sword. In *Chong Ah Kwee and another v Viva Realty Pte Ltd* [1990] 1 SLR(R) 244 ("*Chong Ah Kwee*") and *Ling Kai Seng and another v Outram Realty Pte Ltd* [1991] 1 SLR(R) 885, decisions of Chan Sek Keong J (as he then was) and Goh Joon Seng J respectively, were cases where the court allowed the purchaser to reclaim moneys which it had overpaid by way of a proportionate abatement of price where property had been sold with an inaccurate and inflated estimated floor area. The force of the Contractor's submission that there was a failure of procedural fairness because it had been deprived of the chance to show that abatement could only be employed as a defence to a claim is considerably weakened. It is also not clear from the evidence that at the material time in June 2014, the Contractor would have made the submission that abatement could only be used as a defence. Mr Thambiayah's letter of 4 June 2014 merely states, to support his argument that leave should be granted for the Contractor to reply to the Owner's May 2014 Submissions, that: [note: 28]

> … In relation to the doctrine of abatement it is the fact that this has never been raised by [the Owner] in ALL its previous submissions. I also point out that [the Owner] relies on new material in

support of this new case – *Multiplex Construction (UK) Ltd v Cleveland Bridge* and Keating on Construction Contracts…

The Contractor's *ex post facto* statement that it would have made the submission that abatement could only be relied on as a defence would not assist the Contractor.

125 Besides, the Arbitrator did not rely on either *Multiplex* or *Keating on Construction Contracts* in the Award. It therefore could not be said that anything that the Contractor might have submitted on the doctrine of abatement would have had a reasonable chance of making a difference to the eventual Award. The breach of natural justice, if any (and in my judgment, there was none), did not cause any significant prejudice to the Contractor.

126 Points (a) and (d) at [116] above concern the Arbitrator's use of a percentage of 40% of the Final Sub-Contract Sum to obtain the quantum of damages for diminution in value. I will adopt and repeat here my explanation and understanding on how the Arbitrator came to use the Final Sub-Contract Sum (see [107]–[108] above).

127 Still on point (d), as stated, the Arbitrator arrived at the quantum of the diminished value of the Building with reference to the evidence adduced on the rectification costs in line with the Owner's submissions; it follows from this analysis that the Contractor's submission that the DIV Award was not supported by evidence is untenable. As stated, the evidence which the Arbitrator based his decision on included the evidence of defects in the Building, the evidence of the nature, extent and causes of the defects, the evidence of the costs of rectification, and the evidence of the NSC's Final Sub-Contract Sum. It is also pertinent that the Contractor had made this submission of lack of evidence to support diminution in value of the Building, *inter alia*, at the Second Hearing and in its September 2013 Submissions (see [33] and [39] above). It is plain that the Arbitrator did not accept the Contractor's submission that there was no evidence for diminution in value and instead proceeded on the basis, as submitted by the Owner, that he was entitled to refer to the rectification costs adduced by the Owner in awarding damages for diminution in value of the Building. Whilst the Arbitrator rejected cost of cure as a *prima facie* measure of damage, it does not necessarily follow from that that he was required to reject the entire evidence introduced to support that measure of damage, such as Tender 1, in applying diminution in value as a measure of damage to only 31 items where the breakdown of the repair costs for the 31 items were available from the Slides. In light of the aforesaid, the Arbitrator held that the Sub-Contract Works were only worth 60% of what the Owner had actually paid for it. That is to say, the value of the work as contracted for being the Final Sub-Contract Sum and the value of the work as performed being 60% of the Final Sub-Contract Sum, with the diminished value being 40% of that.

128 The finding that the Building had decreased in value as a result of the faulty Sub-Contract Works was a finding of fact which, on the evidence before him, such as the Independent Expert's opinion, the Arbitrator was entitled to come to. The Contractor's complaint in respect of this finding, at the highest, only comes to the point that the Arbitrator made an error of fact, which does not amount to a breach of natural justice constituting misconduct under the 1985 Act.

129 For the reasons stated, the DIV Award is sufficiently reasoned and is also "reasonable either as a matter of inference or from the arguments made" before the Arbitrator (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [33]). The Arbitrator's decision in respect of both the DIV Finding and the DIV Award are supportable and are far from arbitrary and capricious.

130 Lastly for completeness, the Arbitrator was and is an experienced and well regarded arbitrator

with extensive expertise in the area of construction disputes. The parties had intended to rely on the Arbitrator's expertise to come to a fair and expeditious resolution of the dispute. These observations by Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd ("The Pamphilos")* [2002] 2 Lloyd's Rep 681 speak directly to the point at hand (at 687):

> [A]rbitrators [are] appointed because of their professional, legal, commercial or technical expertise and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without proper warning. It needs to be emphasized that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties.

131 In summary, I find that there was due process and the challenge under s 17(2) for breach of natural justice constituting misconduct fails. In any event, even if it was a procedural wrong to disallow the Contractor from replying to the Owner's May 2014 Submissions, this did not cause any prejudice to the Contractor which would justify a setting aside of the DIV Award.

Natural Justice Issue 3: The Interest Award

132 In the present case, the Arbitrator awarded interest at the same rate to run from the same date in respect of *both* parties' successful claims (*ie*, 8 November 2001). The Contractor did well despite seeking a lower interest on its Counterclaim from March 2003 onwards. [note: 29] Hence, the Contractor has taken issue only with the interest awarded to the Owner arguing that interest should run from the "cut-off date of 18 July 2005" which was rather odd since that "cut-off date" of 18 July 2005 referred to the Owner's agreement not to claim for defects arising after the date so as to expedite the Arbitration. This does not necessarily mean that the Interest Award should run from the cut-off date.

133 The Contractor had made submissions on the interest to be awarded in respect of its Counterclaim in at least four separate submissions. [note: 30] Yet, it did not make submissions on the interest to be awarded to the Owner in the event the Owner succeeded on its claim. Having not done so (and it does not appear that the Contractor had reserved its right to make submissions on interest), it is now too late for the Contractor to complain about want of procedural fairness. At para 324–325 in the Contractor's written submissions filed in OS 790, the Contractor raised a host of potential arguments it might have made before the Arbitrator, which it posits might have brought about a different outcome. Practically all of these "potential" arguments go back to the Contractor's submission that there was no evidence for the DIV Award. They were all arguments which had been made before the Arbitrator and he had rejected them. It follows from this that the Arbitrator was entitled to award interest to the winning party from 8 November 2001.

134 It seems to me that the challenge here is against the wrongful exercise of the Arbitrator's discretion as to interest. It is undisputed that an award of interest is at the discretion of the arbitral tribunal (see for eg, *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1994] 3 SLR(R) 669 at [19]–[21]). The point is that s 17(2) is not applicable here because the complaint in essence is nothing more than a failure to apply the correct principles governing the exercise of the Arbitrator's discretion. Put another way, the Interest Award cannot be set aside for an error of fact or law.

135 The Contractor's application to set aside the Interest Award hence fails.

Natural Justice Issue 4: The Costs and Arbitrator's Costs Award

136 The Contractor argued that it was denied an opportunity to make submissions on costs, and that if it had been given a chance to submit, it would have argued that costs should not necessarily follow the event because:

(a) The Contractor had made certain Calderbank offers which were higher than the sum which the Owner was eventually awarded under the DIV Award.

(b) The Owner had pursued a claim solely based on cost of rectification, and diminution in value of the Building was only raised late in the day by the Arbitrator.

(c) Damages for diminution in value of the Building were determined at 40% of the Final Sub-Contract Sum. There was no reason or basis why the Contractor should be liable for the Arbitrator's costs and expenses in a greater percentage than was found in respect of the diminished value of the Building.

137 The Contractor also pointed to the fact that both parties had, in their written submissions tendered in the Arbitration, reserved their position as to costs. I cite one illustrative example from both sets of submissions:

(a) In the Contractor's submissions dated 3 December 2013, it submitted that the Arbitrator should make an award in its favour and "reserve jurisdiction to deal with costs [as] neither party has served any submissions on liability for and quantum of costs". [note: 31]

(b) In the Owner's submissions dated 30 December 2013 (being a response to the Contractor's 3 December 2013 submissions), it requested the Arbitrator, at para 27, to "make the following findings in its Final Awards (on the merits, save as to costs)". [note: 32]

138 Section 6 of the 1985 Act provides that in an arbitration agreement, unless a contrary intention is expressed therein, the provisions of the First Schedule of the 1985 Act are applicable to the reference under the arbitration agreement. Paragraph 7 of the First Schedule to the 1985 Act then states that:

> The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

139 It is clear from s 6 read with para 7 of the First Schedule that an award of costs for the reference and the award is in the discretion of the Arbitrator in the present arbitration, which is an *ad hoc* one and not governed by any prescribed rules. It has been held by the Court of Appeal in *Chin Yoke Choong Bobby and another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 at [28]–[29] that the provision confers a "wide discretion". The phrase "costs of the reference and award" would include party and party costs, solicitor and client costs, and as well as the tribunal's fees and expenses (see also Mustill & Boyd at p 400). The discretion to award costs, as in the case of interest, is one that should be exercised judicially.

140 The effect of para 7 of the First Schedule of the 1985 Act (which is *in pari materia* with s 18(1) of the English Arbitration Act 1950 (c 27) (UK)) is explained further in Mustill & Boyd at p 394–396:

> Unless the arbitration agreement otherwise provides, the costs of the award and of the reference

are within the discretion of the arbitrator, who may direct by and to whom and in what manner these costs or any part of them shall be paid.

…

Although the Act gives the arbitrator a full discretion as to costs, his exercise of the discretion is limited to this extent, that he must apply the same principles when deciding upon his award of costs as are applied in the High Court. This means that the discretion must be exercised judicially: the arbitrator must confine his attention strictly to facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, and must not take into account conduct unconnected with the cause of action …

The practice of the High Court is that "costs follow the event": i.e. that in the ordinary way, the successful party should receive his costs. The arbitrator must apply the same principle. … But the arbitrator should not depart from the rule that costs follow the event without substantial reasons, he should always bear in mind the duty to act judicially, by excluding his mind from any matter not strictly connected with the arbitration. If he is minded to depart from the rule he should give the parties an opportunity to address him on costs before he makes his award: but failure to do so will not invalidate his award if the parties ought to have contemplated a special award as to costs.

141 It is clear from the facts that both parties had requested the Arbitrator to reserve his jurisdiction to hear parties on costs if either of them won on the main claim. As the Arbitrator saw it, the Owner won and costs followed the event. Arguably, in deciding not to hold a hearing on costs, the Arbitrator was exercising his discretion having read the submissions to reserve costs as outlined in [137] above. Importantly, there has been no complaint that the Arbitrator, in exercising his discretion to make an award on costs, acted in excess of jurisdiction when both sides had asked for costs to be held over. While it may be said that in so exercising his discretion on costs in the face of parties' submissions for costs to be held over, the Arbitrator committed an error of law and/or fact, this error does not amount to misconduct within the meaning of s 17(2) of the 1985 Act.

142 The Contractor's submissions at [136(b)] and [136(c)] above were without merit. A claim for damages for diminution in value of the Building was a claim which remained on the Owner's pleadings at all times, and I have found that it was within the Arbitrator's jurisdiction to make an award of damages on that basis. The fact that the award of damages was 40% of the Final Sub-Contract Sum did not detract from the fact that the Arbitrator found that: (a) the Contractor was liable for the defects in the Sub-Contract Works; and (b) the Building suffered diminution in value of a more than nominal sum. The Owner was therefore successful on its claim against the Contractor, and the Contractor had similarly been successful in its Counterclaim against the Owner. It is also pertinent to note the Owner had succeeded on the issue of liability, and that although the Arbitrator did not award damages on the basis of cost of cure, the arguments and material presented in respect of that measure of damage in the Arbitration were nonetheless necessary and featured in the Arbitrator's finding on liability, the DIV Finding and the DIV Award. It was therefore well within the Arbitrator's wide discretion as to costs and the established principle that costs follow the event to decide that he did not need further assistance or arguments on the issue of costs and to award the Owner costs on its claim, and the Contractor costs on its Counterclaim.

143 I also mentioned earlier that the Arbitrator's Costs Award would follow the outcome of the application to set aside the DIV Award. Suffice to say that the Arbitrator's Costs Award reflected in percentage terms the value of the work as performed being 60% of the Final Sub-Contract Sum.

Crucially, the Contractor had, at all material times, contested its liability to the Owner on its claims for breach of contract while the Owner had, at an early stage, admitted liability on the Contractor's Counterclaim. Furthermore, the total sum awarded to the Owner inclusive of interest in the Award amounted to approximately $5.9m. The Contractor was awarded a total sum, inclusive of interest, of $3.4m. Setting off the awards on the claim and the Counterclaim, the net sum payable from the Contractor to the Owner under the Award is $2.5m. Taking all these into account, it was well in line with the Arbitrator's "wide discretion" under the 1985 Act and the principle that costs follow the event for the Arbitrator hold that the Contractor should bear 60% of the Arbitrator's fees and expenses.

144 Thus, any complaint with respect to the Costs Award and Arbitrator's Costs Award would pertain to an error in the application of the Arbitrator's discretion, which, put at the highest, would amount to only an error of law or fact for which neither setting aside nor remission would be granted (see s 28(1) of the 1985 Act). In such a situation, the only possible recourse to the courts is via s 28(2) of the 1985 Act through the formulation of a question of law arising out of the Award for appeal.

145 In this case, the contention was that the Arbitrator's discretion whether or not to hear the parties' on costs was constrained by the existence of Calderbank letters to which the Arbitrator's attention had not been drawn until the substantive issues were disposed of, as is the custom in practice. This was probably the reason why both parties had requested the Arbitrator to reserve his jurisdiction to award costs at a later stage. The conduct of the parties, and the Owner in particular, was entirely consistent with the accepted practice stated in *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2008) at para 6–161:

> A sealed offered may be given to the tribunal for it to open and consider only after it has decided upon the substantive award. This may avoid the expense of reconvening for a further hearing to deal with costs, but it does of course mean that the tribunal will know that some offer has been made, even though it does not know the amount. *Rightly or wrongly, parties are sometimes concerned that this knowledge might colour the tribunal's thinking in reaching its decision. The alternative, therefore, is to invite the tribunal to make an award dealing with the substantive issues and to postpone determining the question of costs pending further submissions and/or a further hearing. The extent to which such a request will itself suggest the existence of a sealed offer will depend on the circumstances of the case and whether, for example, potentially complex costs issues may not need to be addressed at all if the tribunal's decision goes a particular way*. [emphasis added]

146 Arguably, where valid Calderbank letters exist, and the Arbitrator is asked to hold over the costs hearing, there would be a procedural misstep that would justify remitting a costs award under s 16 of the 1985 Act, if the arbitrator makes a final award on costs without hearing parties. In the present case, the Arbitration was one that did not, on its face, appear to present "potentially complex costs issues", and by the parties seeking a reservation to be heard on costs, the Arbitrator ought to have been mindful of the fact that there could be Calderbank offers that they might have a bearing on the eventual costs award. However, in the present case, remission is unnecessary despite the procedural misstep for the reasons set out below.

147 The Contractor relied on the Calderbank offers to contend that the Arbitrator would have reached a different decision on costs if the Calderbank letters had been shown to the Arbitrator and submissions made on that basis. The Calderbank letters have been exhibited in the evidence filed in this court. I have examined the Calderbank letters and I disagree with the Contractor's submissions that the Calderbank letters would have made a difference to the Costs and Arbitrator's Costs Award

to justify the remission of these awards.

148 There were four Calderbank letters exhibited in court for the setting aside application. Two were from the Contractor, and two were from the Owner. Mr Singh relied mainly on an offer from the Contractor to the Owner dated 26 August 2005. In that letter, the Contractor offered the Owner a sum of $4.43m in full and final settlement of the Owner's claims, as well as 50% of the Owner's costs and disbursements up to 26 August 2005. The Owner also sought payment on the Counterclaim of a total of $2.4m. The net amount under this offer payable from the Contractor to the Owner if the offer were accepted would then be about $2.03m, excluding costs and disbursements.

149 This Calderbank letter does not assist the Contractor since the offer was expressly withdrawn by the Contractor's then-solicitors, Rajah & Tann LLP in a letter to the Owner's solicitors dated 3 July 2006. Simply put, this offer was no longer valid at the time the Arbitrator made his Award to make a difference to the Costs Award or Arbitrator's Costs Award so as to satisfy the test in *LW Infrastructure (CA)* that would justify remission. No miscarriage of justice has occurred in the present case as the effect of the Calderbank letter on the Arbitrator's discretion as to costs, given the withdrawal, would be minimal, if not negligible. It bears noting that the costs consequences stipulated in O 22A r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) are applicable only where the unaccepted offer to settle have not expired or have not been withdrawn before the disposal of the claim in respect of which the offer to settle is made. The principles ought to apply analogously here.

150 My comments on the other three Calderbank letters are as follows:

(a) The Contractor's offer of 13 August 2005 was withdrawn by the Contractor's subsequent offer of 26 August 2005. If anything, this 13 August 2005 Calderbank letter would not have a reasonable or meaningful effect on the Costs Award because the sum which the Contractor offered to pay to the Owner in settlement of the Owner's claims was $2,430,000, which was $1m less than the DIV Award.

(b) The Owner's offer of 20 August 2005 was withdrawn in the Owner's subsequent Calerbank letter of 29 September 2005. In any event, this offer gave the Contractor two alternatives: (i) admit to liability for the all defects in Appendix A1.1 amongst others and to proceed to an assessment of damages, or (ii) to agree to carry out rectification works for all the defects identified. Neither alternative would reasonably have changed the Costs Award since both were, from the Contractor's perspective, worse options as compared to the Award.

(c) The Owner's offer on 29 September 2005, which did not appear to be withdrawn during the Arbitration, was for the Contractor to pay it a net sum of about $6.5m that was more than the Award. The Contractor had to pay less under the Award which was clearly more favourable to the Contractor, and thus this offer would not reasonably have affected the Costs Award.

151 It bears repeating that the fact that the Arbitrator might have reached a different conclusion on costs if there had been a hearing on costs is not enough. The Costs Award was one that had been open to the Arbitrator to make on the material before him. An analysis of the remaining valid Calderbank letter shows that it would unlikely to lead to a different outcome in respect of costs. As was stated in *Soh Beng Tee* at [91]:

> What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. *If, on the other hand, the same result could or would ultimately have been attained*, or if it can be shown that the complainant could not have

presented any ground-breaking evidence and/or submissions regardless, *the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.* [emphasis added]

152 The Contractor fails on Natural Justice Issue 4.

Conclusion in OS 790

153 For the reasons given above, I dismiss the Contractor's application to set aside the Award under OS 790.

OS 791 for leave to appeal on a question of law

154 OS 791 is the Contractor's application for leave to appeal on a question of law under s 28(2) of the 1985 Act. The two questions raised by the Contractor in seeking leave to appeal are:

(a) The First Question: Whether the Arbitrator was entitled to make the DIV Award without any evidence to support it?

(b) The Second Question: Whether interest is payable on an award for damages based on diminution in value?

155 Having regard to the conclusions reached in OS 790, the first question in OS 791 is not a question of law arising out of the Award and therefore s 28(2) of the 1985 Act does not apply. The Arbitrator had made findings of fact on the evidence which was before him, and even if there was an error of fact, his finding of fact is conclusive.

156 On the second question, the Owner submitted that the Contractor was unable to show that there was a strong *prima facie* case that the Arbitrator was wrong or that he had misdirected himself in law, or that his decision was one that no reasonable arbitrator could reach. The Contractor has not referred to any authority which specifically states that the court should not award interest on damages for diminution in value. In contrast, the Owner referred to the case of *Watts v Morrow* where the English Court of Appeal awarded interest on damages for diminution in value of the property in question from the date of payment to the date of judgment. Another case relied on by the Owner was *Chong Ah Kwee* where Chan Sek Keong J (as he then was) awarded interest on the plaintiff's claim (made by way of proportionate abatement on the purchase price) from the date of completion of the sale up to the date of judgment.

157 From the authorities cited, the Arbitrator had not committed an error of law. In principle, I do not see why interest should not be awarded for damages for diminution in value. In mounting a claim for diminution in value, the plaintiff takes the position that he obtained less than what he bargained for as a result of the defendant's breach of contract. If successful, the plaintiff would have shown that he was kept out of use of the sum awarded as damages and an award of interest for diminution in value appears to me to be appropriate. Even if the Arbitrator got the law wrong, it does not give rise to any question of law; it is not a question of law arising out of the Award within the meaning of s 28(2) of the 1985 Act. As stated by the Court of Appeal in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 at [19]:

To our mind, a 'question of law' must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an *erroneous application*

of law) which does not entitle an aggrieved party to appeal. [emphasis added]

158 For the above reasons, OS 791 is dismissed.

SUM 4899 to set aside *ex parte* Order dated 9 September 2014

159 Having regard to the outcome of OS 790 and OS 791, the *ex parte* Order of 9 September 2014 ought to stand. However, the Contractor argued that the *ex parte* court order should be set aside due to the Owner's alleged failure to give full and frank disclosure when applying for the *ex parte* court order. This alleged failure to give full and frank disclosure related to the Owner's knowledge that the Contractor had intended to apply and had applied to court in OS 790 and OS 791 to set aside the Award and appeal on a question of law respectively.

160 The Contractor referred me to the following passage in Mustill & Boyd where the learned authors state that an applicant would be obliged to disclose to the court his knowledge of whether the respondent intends to appeal a question of law from the arbitral award (at p 614):

> An application for summary enforcement of an award may be made ex parte; but if the claimant is aware, as he generally will be, that the respondent intends to appeal, he will be obliged to disclose this fact to the Court, which will almost certainly refuse to proceed ex parte, and will direct a summons to be issued. This all takes time, and the result is likely to be that in the great majority of cases the application to enforce the award will come on for hearing either at the same time as, or after, the respondent's application for leave to appeal. If the judge gives leave to appeal, he will have done so after forming a provisional view of the merits of the appeal, and in the case of a "one-off" point, a provisional view which will be strongly favourable to the respondent. In such circumstances, it will be difficult to envisage that the court would nonetheless allow the claimant to enforce the award or, for that matter, order the respondent to bring the amount of the award into court.

161 In contrast, the Owner contended that the enforcement of an arbitral award is dealt with in two stages. At the first stage, the court adopts a mechanistic approach in relation to the *ex parte* application and grants leave to enforce so long as the formalistic procedural rules are complied with. It is only at the second stage, after the other party is notified of the order granting leave to enforce the award and applies to set it aside that the court is concerned with the substantive grounds for challenging the award. The Owner also pointed to the fact that the sealed copy of OS 789 filed on 19 August 2014 had stated: "Hearing Date/Time: For determination by Judge/Registrar. Solicitor(s)/parties need not attend unless specifically directed to do so." [note: 33]

162 The applicable procedural rules in respect of the Award may be found in O 68 r 7 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the 1997 ROC"), which provide that:

> **Enforcement of arbitration awards (O. 69, r. 7)**
>
> 7.—(1) An application for leave under section 20 to enforce an award on an arbitration agreement in the same manner as a judgment or order *may be made ex parte but the Court hearing the application may direct a summons to be issued*.
>
> (2) If the Court directs a summons to be issued, the summons must be by originating summons.
>
> (3) An application for leave must be supported by affidavit —

(*a*) exhibiting the arbitration agreement and the original award or, in either case, a copy thereof;

(*b*) stating the name and the usual or last known place of abode or business of the applicant (referred to in this Rule as the creditor) and the person against whom it is sought to enforce the award (referred to in this Rule as the debtor) respectively; and

(*c*) as the case may require, stating either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

…

(6) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the Court may fix, the debtor may apply to set aside the order and the award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of.

163 The Owner relied on *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ("*Aloe Vera*") for the proposition that the first stage of enforcing an arbitral award is a "mechanistic" one and that it need only satisfy the court that the formalistic requirements in O 69 r 7(3) of the 1997 Rules of Court were complied with. However, *Aloe Vera* does not stand for the proposition which the Owner seeks to advance. In *Aloe Vera*, the respondent had argued that before the court granted an order enforcing the arbitral award, it would have to be satisfied that a valid and binding arbitration agreement existed (at [21] and [24]). In holding that the first stage of the enforcement process was a "mechanistic" one, the court was concerned to not have to, go behind the face of the arbitral agreement and arbitral award at that stage. The holding in *Aloe Vera* does not detract from the applicant's duty to give full and frank disclosure of the relevant facts, including the existence of pending applications for setting aside of the award and/or leave to appeal on a question of law.

164 It is well-established that a party applying for an *ex parte* court order has a duty to make full and frank disclosure of the all the facts material to the application. In *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 at [87]:

> The test for materiality is always an objective one. … [T]he duty imposed on the applicant requires him to ask what might be relevant to the court in its assessment of whether or not the remedy should be granted, and not what the applicant alone might think is relevant. This inevitably embraces matters, both factual and legal, which may be prejudicial or disadvantageous to the successful outcome of the applicant's application. It extends to all material facts that could be reasonably ascertained and defences that might be reasonably raised by the defendant. It is important to stress, however, that the duty extends only to plausible, and not all conceivable or theoretical, defences. …

165 Under this test, applications by the Contractor to set aside the Award and appeal on questions of law would be facts that would be material to the Assistant Registrar in deciding on the *ex parte* application.

166 Whilst the Owner was obliged to disclose OS 790 and OS 791 at the time it applied for leave to enforce the Award, the breach was technical and inconsequential having regard to the conclusions reached in OS 790 and OS 791. There is no reason to the set aside the *ex parte* court order of 9 September 2014. Accordingly, SUM 4899 is dismissed.

Outcome of the three applications

167 For the various reasons stated above, all of the Contractor's three applications are dismissed with costs to be taxed if not agreed.

[note: 1] 1PCB196.

[note: 2] 1PCB203.

[note: 3] 1PCB250A-B.

[note: 4] Owner's Written Submissions, [35].

[note: 5] 4CBE836.

[note: 6] 6PCB2141.

[note: 7] 6PCB2218.

[note: 8] 13CB5202-5203.

[note: 9] 13CB5216.

[note: 10] 5PCB1712.

[note: 11] 6PCB2206.

[note: 12] 6PCB2199.

[note: 13] 5PCB1522-1525.

[note: 14] 5PCB1596–1589.

[note: 15] 6PCB2143–2156.

[note: 16] 6PCB2710.

[note: 17] 6PCB2171.

[note: 18] 6PCB2185.

[note: 19] 6PCB2190.

[note: 20] 6PCB2220.

[note: 21] Para 8.3 of the Contractor's Aide Memoire dated 24 July 2015.

[note: 22] Para 5.4 of the Contractor's Aide Memoire dated 24 July 2015.

[note: 23] Transcript of 9 July 2013.

[note: 24] HSF's 1st Affidavit, pp 6654–6662.

[note: 25] Contractor's Written Submissions in OS 790 at para 183–212 and 249–264.

[note: 26] 6PCB2219.

[note: 27] HSF's 1st Affidavit, p10693.

[note: 28] HSF's 1st Affidavit, p10883.

[note: 29] 5PCB1590-1591.

[note: 30] Para 109 of HSF 1st Affidavit.

[note: 31] 5PCB1728.

[note: 32] 6PCB2135.

[note: 33] Affidavit of FWL dated 23 October 2014, Exhibit "FWL-1".