IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 66

Civil Appeal No 144 of 2017

Between

GLAZIERS ENGINEERING PTE LTD

… *Appellant*

And

WCS ENGINEERING CONSTRUCTION PTE LTD

… *Respondent*

In the matter of Originating Summons No 662 of 2017

Between

WCS ENGINEERING CONSTRUCTION PTE LTD

… *Plaintiff*

And

GLAZIERS ENGINEERING PTE LTD

… *Defendant*

GROUNDS OF DECISION

[Building and construction law] — [Dispute resolution] — [Adjudication] — [Setting aside of adjudication determination] — [Breach of natural justice]

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v
WCS Engineering Construction Pte Ltd

[2018] SGCA 66

Court of Appeal — Civil Appeal No 144 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
2 July 2018

22 October 2018

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 It was observed in *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [2] that allegations against arbitral tribunals for committing breaches of natural justice are a serious matter. These are accusations against which the arbitrator in question is unable to defend him or herself, and which can have an adverse impact on the arbitrator's standing and reputation. Consequently, courts take a serious view of such challenges and will be careful to examine the substance of the allegation in deciding whether the line has been crossed.

2 The same holds equally true in the context of adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). In *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [43] ("*Bintai Kindenko*"), this court recently remarked that the

reasoning in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*") relating to an alleged failure by an arbitrator to consider an important pleaded issue, as well as other case law relating to the *audi alteram partem* principle in the international commercial arbitration context, are also applicable in the context of assessing challenges for breach of natural justice against an adjudication determination under the Act.

3 The requirement for an adjudicator to comply with the principles of natural justice is statutorily enshrined in s 16(3)(*c*) of the Act and it is uncontroversial that an adjudication determination may be set aside for such non-compliance. The present appeal arose from the decision of the High Court Judge ("the Judge") to set aside an adjudication determination where the adjudicator rejected the respondent's cross-claim ostensibly on the premise that the respondent had failed to prove its claim "beyond reasonable doubt" (see *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 ("the GD")). The respondent claimed, and the Judge accepted, that the adjudicator had breached the rules of natural justice in applying the standard of beyond reasonable doubt, because the applicable standard of persuasion was never a live issue in the adjudication. As a result, the Judge found that the adjudicator's application of the standard of persuasion took the parties by surprise, as neither had been afforded any opportunity to address the adjudicator on this point.

4 We heard and allowed the appeal on 2 July 2018 and ordered costs in favour of the appellant. It was apparent to us that the parties took opposing positions as regards the sufficiency of the evidence or lack thereof in relation to the respondent's cross-claim. We found that given the nature of the dispute, it was inherently within the province of the adjudicator in an adversarial decision-

making process to assess the evidence with reference to the applicable standard of persuasion. After all, this was the very task that the adjudicator was appointed to discharge. We therefore disagreed with the Judge that the standard of persuasion was not a live issue before the adjudicator. In our judgment, the parties must have been aware that the sufficiency of the evidence, judged against a standard of persuasion, was the very crux of the dispute. If they chose not to specifically address the adjudicator on the applicable standard of persuasion, they should not be permitted to complain even if the adjudicator had applied the wrong standard of persuasion. In any event, given the manner in which the adjudicator assessed the evidence, we were not persuaded that he had in fact applied the wrong standard, or that the respondent had suffered any prejudice as a result.

5 Given the recent trend of litigants seeking to set aside adjudication determinations for breach of natural justice, we consider it important to provide our detailed grounds to explain why we disagreed with the Judge. In the process, we shall explicate the boundaries of the principles of natural justice in the context of adjudication under the Act.

Background

Origins of the dispute

6 The respondent, WCS Engineering Construction Pte Ltd ("the respondent") was the main contractor for the construction of a development known as "The Hillford", which comprises 281 residential units. The Hillford is specially designed with features and facilities to accommodate the elderly. The respondent engaged the appellant, Glaziers Engineering Pte Ltd ("the appellant") under a subcontract to carry out aluminium, stainless steel and

glazing works, including the fabrication, supply and installation of shower screens in all bathrooms in The Hillford ("the subcontract"). The appellant commenced work in February 2015 and completed work in October 2016 (GD at [4]–[6]). It then issued its final progress claim under the subcontract. This final progress claim eventually became the basis of the appellant's adjudication application (GD at [7]).

7 After construction of The Hillford concluded in October 2016, The Hillford's temporary occupation permit was issued and the flats were handed over to the subsidiary proprietors (GD at [4]).

8 From October 2016 to January 2017, the sliding doors in the shower screens of at least eight units in The Hillford shattered while they were in use. Many of these incidents resulted in personal injuries (GD at [8]). This triggered a series of meetings and correspondence between the appellant, the respondent, the developer of The Hillford ("the developer") and the developer's architect, in which the parties discussed the cause of the shattering shower screens as well as possible solutions to the problem.

9 In gist, the respondent took the position that the appellant was responsible for the shattering shower screens either because it had used defective materials or had installed the shower screens with defective workmanship, and had generally failed to complete the works in compliance with the subcontract. The respondent thus stated that it would look to the appellant for damages for, and an indemnity against, all losses arising from the negligent installation of the shower screens, including the use of defective materials. The respondent also refused to pay the appellant the final progress claim (GD at [9]–[10] and [14]).

10 The appellant denied the respondent's allegations, and averred that the shower screens had been fabricated and installed according to shop drawings and mock-ups approved by the respondent's consultants. The appellant also took the position that any remedial work which the respondent might require would amount to a variation of the subcontract, to be carried out at the respondent's own cost (GD at [12]).

11 On 13 February 2017, the developer's architect told the respondent that there were two causes for the shattering: First, the shower frames required a 30mm buffer between the edge of the screen and the wall in order to avoid the edge striking the wall when the sliding shower door was opened. However, some shower frames had been installed without this 30mm buffer. Secondly, the rollers in the aluminium tracks for the shower screens allowed the screens to slide too freely when opened. This meant the shower screens might strike the walls at high speeds, shattering as a result. The developer's architect required the respondent to address the problem by installing rubber studs along the aluminium tracks, applying plastic seals along the leading edge of the shower screens, and laminating the shower screens with safety film so that if they shattered, the shards of glass would be held in place to prevent injury (GD at [15]–[16]).

12 The appellant agreed to replace, at its own cost and without admission of liability, the shower screens which had shattered. However, it refused to perform the other remedial measures required by the developer's architect unless the respondent accepted that they would amount to a variation of the subcontract. Ultimately, the respondent and the developer made their own arrangements to have the remedial work carried out. The respondent apparently bore the cost of this remedial work and also reimbursed the medical expenses

of the residents who had suffered personal injuries due to the shattering shower screens (GD at [17]–[18]).

The adjudication proceedings

13 On 22 February 2017, the appellant served a payment claim on the respondent within the meaning of s 10 of the Act. The claim was for $204,279.96, covering all work done under the subcontract which remained unpaid. This included $109,910.40 for the supply and installation of the shower screens (GD at [19]–[20]). The respondent served a payment response on 7 March 2017, by which it sought to back charge $78,659.96 to the appellant for "COSTING INCURED [*sic*] FOR THE SHATTERING OF SHOWER SCREEN". This included medical claims from residents which the respondent had reimbursed, attendance costs incurred by the respondent and the developer in dealing with the issue, and the costs of the remedial measures taken to address the problem. The respondent also made certain other deductions and adjustments in its payment response. According to the respondent, taking all these deductions into account, it was the appellant which owed the respondent about $3,000 (GD at [21]).

14 On 29 March 2017, the appellant applied under s 13 of the Act to have its claim adjudicated. In its adjudication application, the appellant accepted as valid certain deductions and adjustments which the respondent had made in the payment response. It thus reduced its claim from $204,279.96 to $95,840.91. It maintained, however, that the respondent was not entitled to back charge the appellant for $78,659.96 in costs arising from the shattering shower screens. The appellant's adjudication application was accompanied by a set of written submissions in which the appellant provided its reasons for rejecting the back-charge. The appellant argued, among other things, that the respondent had

"produced insufficient evidence to prove that the shattered glass incident [was] due to the fault of the [appellant]",[1] and that the respondent "[had] not set out a sufficient explanation" of why it was withholding certain sums comprising the back charge,[2] and further that the back charge included costs of work which was outside the appellant's scope of work (GD at [24]).

15 The respondent filed an adjudication response on 6 April 2017. It maintained that it was entitled to deduct $78,659.96 from the appellant's claim. Among other things, it argued that the appellant had not installed the shower screens in accordance with the approved drawings. The respondent also averred that it had given sufficient particulars relating to the back charge in its payment response (GD at [25]–[26]).

16 After the parties agreed that the adjudicator would have until 15 May 2017 to issue his determination (GD at [28]), the adjudicator fixed an adjudication conference for 27 April 2017. Both parties lodged further written submissions in anticipation of this conference on 24 April 2017 (GD at [29]). In addition, the respondent also filed a set of skeletal arguments on the same day responding to the appellant's written submissions (GD at [35]).

17 In this round of submissions, the appellant specifically argued that the respondent had failed to meet its "burden of proof". In particular, the appellant argued that the adjudicator was required to take a "robust approach" to deciding whether the respondent could set off the costs arising from the shattering screens against the payment claim,[3] but it was impossible for the adjudicator to do this

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1 Agreed Bundle ("AB"), p 148, para 32.1.

2 AB, p 149 para 32.3.

3 AB, pp 185–186.

because the respondent had "failed to provide sufficient evidence to discharge its burden of proof" (GD at [31]). The appellant further submitted that the adjudicator could not address the respondent's alleged entitlement to set-off without a "fact-intensive investigation and expert evidence on the issues", and such an exercise was unsuitable to be undertaken in proceedings under the Act (GD at [31]). In response, the respondent's skeletal arguments asserted that the respondent *had* produced sufficient evidence and particulars. However, neither party proffered a test or standard against which the sufficiency of the evidence ought to be assessed (GD at [34] and [36]).

18 Similarly, when the adjudication conference took place on 27 April 2017, the parties (both represented by counsel) did not specifically address the adjudicator on the applicable standard against which to assess whether the respondent had established its entitlement to set-off. The adjudicator did not invite either party to address him on this issue (GD at [37]).

The adjudication determination

19 On 15 May 2017, the adjudicator released his written adjudication determination. He allowed the appellant's claim in full without making any deduction for the costs arising from the shattering shower screens, which the respondent had sought to back charge to the appellant (GD at [39]). In his view, whether the respondent was entitled to set off this back charge against the appellant's claim turned on two questions, which he framed for himself as follows:

> (a) Is [the appellant] responsible and liable for the shattering shower screen glass panels *beyond reasonable doubt* and to what extent?

> (b) Can [the respondent] claim for set-off against [the appellant's] claim if [the appellant] is found liable in Question [a] above?
>
> [emphasis added]

20 It appears that the adjudicator's view that he should be satisfied that the appellant was responsible for the shattering shower screens "beyond reasonable doubt" stemmed from his understanding that he should take a "robust approach" in examining the respondent's back charge. This is clear from the following extracts from the adjudication determination:

> 56. I would also like to cite [7.7] of Chow Kok Fong's Security of Payments and Construction Adjudication, 2013, Second Edition
>
> "In construction cases, the courts have indicated that they will take a 'robust approach' in examining the underlying premise of set-offs raised by a defendant. In *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc (1990)*, Yong Pung How J (as he then was) considered the position to be that 'if there is no defence to a claim other than a plausible counterclaim, then judgment must be entered on the claim'. In such a situation, the defendants will be left to pursue their counterclaim separately from the plaintiff's claim. **Adjudicators under the Singapore SOP Act are expected to take a similarly robust approach.**"
>
> …
>
> 57. ***As I am required take a robust approach that the claim on defects must be beyond reasonable doubt. Based on the above reasons set out in para. 50 to 55 above…I reject the Respondent's set-off/counterclaim of $78,659.96…***
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> [Emphasis in original in bold, emphasis added in bold italics]

21 The "reasons set out in para. 50 to 55 above" referred to six doubts which the adjudicator identified in relation to the question of whether the appellant was responsible for the shattering shower screens. These doubts may be summarised as follows:

(a) There were scientific investigative procedures which could have been carried out to determine whether the appellant was responsible for the shattering shower screens, and to what extent. The parties' submissions had revealed that some investigative procedures might have been carried out by the respondent, but no reports or documents were presented as evidence to the adjudicator, which he "found strange". Without such a specialist report, the adjudicator was "unable to reach a conclusion beyond reasonable doubt" on the extent of the appellant's responsibility for the shattering shower screens.[4]

(b) There was no evidence of the specifications which the appellant was required to comply with under the subcontract, and no evidence to show that the appellant had failed to comply with any such specifications.[5]

(c) There was no evidence of any guideline or code stipulating that shower frames required a 30mm gap between the wall and the sliding door in order to avoid the shattering of glass panels. Further, there were many units within the Hillford which did not have the requisite 30mm buffer and yet had not reported any shattering shower screens.[6]

(d) It appeared to the adjudicator that the shower doors had been designed in such a way that the door openings were too narrow, given that guidelines set by the Building and Construction Authority ("BCA") suggested that shower areas designed to accommodate the elderly should have openings of at least 800mm in width, to accommodate

4 AB, p 227, paras 50–53.

5 AB, p 228, para 54(a).

6 AB, p 228, para 54(b).

wheelchair use. The adjudicator was unsure which party should be liable for breakages arising from this apparent flaw in the design.[7]

(e) A shower screen had shattered in one unit even after the remedial works suggested by the developer's architect had been carried out. This cast doubt on the efficacy of the respondent's remedial measures, the costs of which it sought to back charge to the appellant.[8]

(f) One of the documents which the respondent relied upon in the adjudication asserted that shower screens had shattered in three units which were mentioned nowhere else in the respondent's submissions. This raised further doubts as to the accuracy of the respondent's submissions.[9]

22 The adjudicator thus concluded that the appellant was entitled to receive substantially the whole of its claim, subject to some minor deductions. The adjudicator also awarded the appellant interest on this sum, and 50% of the costs of the adjudication.

23 The respondent commenced Originating Summons No 662 of 2017 on 14 June 2017, seeking to have the adjudication determination set aside on four separate grounds. It is unnecessary to delve into the details of all but one of these grounds: namely, that the adjudicator breached his obligation under s 16(3)(*c*) of the Act to comply with the principles of natural justice by failing to give the respondent an opportunity to address him on the applicable standard of persuasion. The Judge considered that the other three grounds relied upon by

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7 AB, pp 228–229, para 54(c).

8 AB, p 229, para 54(d).

9 AB, p 229, para 54(e).

the respondent for setting aside the adjudication determination were subsidiary to this main point, and it therefore formed the focus of his decision, as well as this appeal.

The decision below

24 As a preliminary matter, the Judge noted that in the context of adjudication proceedings, it was incorrect to speak of either party as having a burden of *proof*. This was because the adjudicator's function was not to determine the *truth* of either parties' case, but rather to determine which is the amount, if any, out of the applicant's payment claim to which temporary finality ought to attach under s 21(1) of the Act (GD at [32]). It was therefore more accurate to speak of a burden or standard of persuasion rather than a burden or standard of proof (GD at [33]). This court has, in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [63], expressed agreement with this aspect of the Judge's reasoning. We shall therefore adopt this terminology in our analysis.

25 The Judge found that the adjudicator had breached the rules of natural justice (GD at [51]). In his judgment, a decision maker would breach the rules of natural justice if he failed to hear from both parties on an issue which would be crucial to his decision, regardless of whether the parties are agreed on that issue (GD at [57] and [58]). The Judge disagreed with the appellant's argument that the adjudicator could not have breached the rules of natural justice because the very issue before him was whether the appellant was liable for the shattering shower screens, and the adjudicator had heard from the respondent fully on this point. In rejecting this argument, the Judge held that the appellant had framed the issue at too high a level of generality, and that its argument overlooked the fact that there were many subsidiary issues which the adjudicator had to decide

on the path to determining the ultimate issue before him. The adjudicator had a duty to comply with the principles of natural justice, not only in relation to the ultimate issue, but also in relation to the subsidiary issues (GD at [59]–[60]).

26 The Judge further held that the adjudicator's breach of natural justice was "material" because there was a clear causal connection between the breach and the eventual outcome of his determination. The adjudicator had understood the import of his formulation of the standard of persuasion, and had gone on to apply that standard as the framework of his analysis. He rejected the respondent's case precisely because of the six reasonable doubts which he harboured (GD at [69]–[71]).

27 Finally, the Judge found that the adjudicator's breach of natural justice had caused the respondent prejudice. This was because if the adjudicator had heard from both parties on the applicable standard of persuasion, it was highly likely that the adjudicator would have accepted the parties' common position that the standard of persuasion was the standard of a *prima facie* case (GD at [74]–[75]). Drawing an analogy from arbitration (citing *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54]), the Judge held it was sufficient for the respondent to show that this *could reasonably* have made a difference to the outcome of the adjudication, and the respondent did not have to show that it *would* have led to a different outcome. On the facts, if the adjudicator had accepted that the applicable standard was that of a *prima facie* case, he could reasonably have reached a different determination (GD at [76]). Thus, the Judge concluded that the breach of natural justice caused the respondent prejudice. The adjudication determination was set aside.

The parties' cases on appeal

The appellant's case

28 The appellant argued that the court should only set aside the adjudication determination if the evidence disclosed a "clear and virtually inescapable inference" that the principles of natural justice had been breached. On the facts, the appellant submitted that no such clear inference could be drawn because the adjudicator was not a legally-trained person, and it was not possible to conclude that he had applied the standard of "beyond reasonable doubt" in the way that a legally-trained person would have understood that term. Rather, the appellant submitted that the adjudicator had used the term "beyond reasonable doubt" simply to express his view about the insufficiency of the evidence. In oral submissions, counsel for the appellant, Mr Nicholas Poon ("Mr Poon"), also argued that the Judge was wrong to have found that the standard of persuasion was not a live issue. In his submission, the standard of persuasion *was* a live issue between the parties, even if the parties did not use that precise term. In any event, even if the adjudicator had misapplied the standard of persuasion, the appellant submitted that this was, at best, an error of law which did not amount to a breach of natural justice.

29 Finally, the appellant argued that even if there had been any breach of natural justice, it had not caused the respondent any prejudice because the adjudicator would nevertheless have arrived at the same determination. In this regard, the appellant argued that it was not even clear that the parties would have agreed, if they had been invited to submit on the applicable standard of persuasion, that the respondent only needed to show a *prima facie* case that it was entitled to deduct the back charge from the appellant's claim (despite the fact that before the Judge, the parties had agreed that they would have submitted

that the applicable standard of persuasion was that of a *prima facie* case). Yet regardless of the applicable standard, the appellant argued that there would be no difference to the outcome of the adjudicator's determination. This was because the adjudicator was of the view that there was no evidential basis to support the respondent's back charge *at all*. Thus, regardless of the standard of persuasion which the adjudicator had applied, he would have come to the same conclusion and held that the respondent was not entitled to any set-off.

The respondent's case

30 The respondent submitted that the adjudicator had breached the rules of natural justice by adopting reasoning which had no nexus to the case advanced by the parties, and which the parties had no reasonable opportunity to address. In this regard, the respondent argued that it was entirely speculative to suggest that the adjudicator had used the term "beyond reasonable doubt" without understanding its legal significance and import. In oral submissions, counsel for the respondent, Mr Melvin Chan, pointed out that even if the adjudicator was not a legally-qualified person, as an accredited adjudicator, he would have undergone some level of training. In light of this, and also in light of how the adjudicator had analysed the evidence, the respondent submitted that the adjudicator *had* used the term "beyond reasonable doubt" in the sense that a legally-trained person would understand it.

31 The respondent further submitted that the adjudicator's breach of natural justice had caused it to suffer material prejudice. First, the breach was causally connected with the adjudication determination because the standard of persuasion applied by the adjudicator was of pivotal significance to his decision. Secondly, the breach caused the respondent prejudice because if the adjudicator had afforded the parties an opportunity to be heard, he could reasonably have

arrived at a different result. This is because, according to the respondent, if the parties had been given an opportunity to make submissions on this point, both parties would have agreed that the respondent was only required to raise a *prima facie* case that it was entitled to deduct the back charge from the appellant's claim. If the adjudicator had examined the evidence according to this standard of persuasion, this could reasonably have led him to a different conclusion because, in the respondent's submission, there was at least *some* evidence to support the respondent's entitlement to a set-off.

Analysis

32 In the international arbitration context, it is well-established that a party seeking to challenge an award on the ground that the arbitral tribunal breached the rules of natural justice must (a) identify 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 (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [29] citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18]). These same principles are equally applicable to challenges to an adjudication determination where it is alleged that the adjudicator failed to comply with the principles of natural justice.

33 In the present case, the rule of natural justice alleged to have been breached was the fair hearing rule. The key issues which arose for determination related to, first, whether this rule was breached ("Issue 1") and second, whether the breach caused prejudice to the respondent ("Issue 2"). However, before we delve into our analysis of the above issues, we make two preliminary points.

The standard of proof

34 The first preliminary point relates to the standard of proof which must be met by an applicant who seeks to have an adjudication determination set aside. As this court recently affirmed in *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890 at [29], such an applicant must establish his case on the balance of probabilities. This is the relevant standard in *all* applications to set aside adjudication determinations, including situations where the applicant is relying on an alleged breach of natural justice.

35 We note that in both written and oral submissions, Mr Poon argued that the court should only infer that there had been a breach of natural justice if such an inference was "clear and virtually inescapable", citing the decision of this court in *AKN v ALC* at [46]. We would stress, however, that our remarks in *AKN v ALC* should not be read as modifying in any way the standard of proof which the applicant seeking to set aside an adjudication determination has to meet. Such an applicant is required to show, on the balance of probabilities, that there has been a material breach of natural justice which has caused it to suffer prejudice (see [32] above). In our judgment, there is no inconsistency between this standard of proof and our observation in *AKN v ALC* at [46] that the court should only infer that a decision-maker failed to consider an important pleaded issue if such an inference is clear and virtually inescapable. The remarks in *AKN v ALC* should be read in context. The court was concerned with a specific type of breach of the fair hearing rule whereby the arbitrator is alleged to have wholly failed to consider a key pleaded issue. The unique considerations which arise in this type of situation were summarised by the court in *AKN v ALC* at [46] as follows:

> 46 … It will usually be **a matter of inference rather than of explicit indication** that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. **If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary** (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party's case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should *not* be drawn.
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> 47 [*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80] was recently considered in *AQU v AQV* [2015] SGHC 26 ("*AQU*"), where the High Court judge distilled the very principles which we have just enunciated above (see *AQU* at [30]–[35]). The judge in *AQU* also considered the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), and **reiterated the proposition that no party to an arbitration had a right to expect the arbitral tribunal to accept its arguments**, regardless of how strong and credible it perceived those arguments to be (see *AQU* at [35], citing *TMM* at [94]).
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> [emphasis added in bold]

36 As the above extract suggests, where the allegation is that the decision-maker has wholly failed to consider an important pleaded issue, the court must be especially careful. It is often being invited to conclude, not from any "explicit indication" (at [46]), but rather from the decision-maker's *silence* on a submission that he has failed to even address his mind to that submission. Yet such silence may be equally consistent with the decision-maker considering the submission, but then choosing to disregard or reject it without explaining himself. The difficulty in drawing such an inference is that the decision-maker's silence is inherently ambiguous. This may be contrasted against other breaches of natural justice which may be more easily verified, such as where the decision-

maker decided the case on the basis of an issue which was never raised by the parties (which will be clear from the determination itself), or where the decision-maker never heard or received submissions from one party on a given point (which will often be clear from the record of the proceedings) or where the decision-maker decided not to address a specific issue on his mistaken understanding that the issue had been abandoned. Given the ambiguities inherent in the decision-maker's silence, the court must be wary that a disaffected party may wrongly characterise what is, in truth, the decision-maker's misunderstanding of or disagreement with a certain submission as a failure to consider that submission entirely.

37 It was in view of these specific concerns that this court stated in *AKN v ALC* that we would only infer that the decision-maker had wholly failed to consider an issue if the inference was clear and virtually inescapable. That is not to say that the applicant who alleges such a breach of natural justice must do anything more than to establish its case on the balance of probabilities. In fact, the statement (at [46]) that the court will not draw the inference against the decision-maker "…if the facts are *also consistent* with the [decision-maker] simply having misunderstood the aggrieved party's case, or having been mistaken as to the law, or having chosen not to deal with [the] point …" [emphasis added] dovetails with the rule that the applicant must show that the facts are more consistent with the decision-maker having failed to consider the point entirely – that is to say, the applicant must show that this hypothesis is *more likely than not*.

38 Thus, the remarks of this court in *AKN v ALC* at [46] should not be taken as a general rule that every alleged breach of natural justice must be made out to the level of being "clear and virtually inescapable" to justify a setting aside

of an adjudication determination. The court will examine if the alleged breach is made out on the balance of probabilities. Where the alleged failure is that the adjudicator has wholly failed to consider an important pleaded issue, then the court, being mindful that the adjudicator's silence may be equally consistent with his rejection of that submission as it is with a failure to consider that submission entirely, will require a "clear and virtually inescapable inference" before finding that the latter hypothesis is to be preferred on a balance of probabilities. We would point out that in this case, the respondent's complaint was that the adjudicator made his decision using a certain standard of persuasion without having heard from the parties on the applicable standard. The complaint was *not* that the adjudicator failed to consider any important pleaded issue. The requirement of a "clear and virtually inescapable inference" was, therefore, not in play.

39 This may also be a convenient juncture to address an authority referred to in Mr Poon's submissions, albeit only in passing: *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC v BLB*"). The appellants in that case (collectively, "BLC") brought arbitration proceedings against the respondents (collectively, "BLB") alleging that BLB had supplied defective goods under a joint venture between the parties. BLB counterclaimed against BLC for certain sums, including monies due on certain unpaid goods ("the Disputed Counterclaim"). The parties submitted separate lists of issues to the arbitrator as they could not agree on a joint list. The arbitrator based his award substantially on BLC's list of issues, and did not expressly identify two points relating to the Disputed Counterclaim as issues to be decided in the arbitration. BLB commenced proceedings in the High Court to have the arbitral award set aside, alleging that the arbitrator had breached the rules of natural justice because he had extensively adopted BLC's list of issues and had thereby failed

to deal with the Disputed Counterclaim. The High Court Judge agreed with BLB and set aside the part of the arbitral award dealing with the Disputed Counterclaim. BLC appealed.

40 This court allowed the appeal and found that, on a closer examination of the award and the parties' pleadings, lists of issues and submissions, the arbitrator had not failed to consider the Disputed Counterclaim (at [88]–[98]). The issue central to the Disputed Counterclaim – *ie*, BLB's entitlement to payment for the goods – was directly linked to the issue of defectiveness in the goods which formed the heart of BLC's claims against BLB (at [56]). In dealing with BLC's claims against BLB, the arbitrator had simultaneously determined the issues pertaining to BLB's Disputed Counterclaim (at [93]).

41 Having allowed the appeal on this basis, this court went on further to say that it would have allowed the appeal *even if* it had accepted BLB's case at its highest and assumed that the arbitrator had failed to address the substantive merits of the Disputed Counterclaim because he did not realise that it was an independent and distinct claim unrelated to the issues which were canvassed in BLC's list of issues. The court held that such an error would have gone merely to the substantive merits of the decision "as it consisted in the arbitrator conflating issues of law and/or fact" (at [102]); it would not have amounted to a breach of natural justice (at [99]–[102]).

42 These remarks in *BLC v BLB* at [99]–[102] were strictly *obiter dicta* since the court allowed the appeal on the primary basis that the arbitrator had considered and dealt with the issues relating to BLB's Disputed Counterclaim (see [40] above). Insofar as these remarks suggest that where a decision-maker misapprehends the key issues and therefore fails to consider an important

pleaded issue, this may not amount to a breach of natural justice, we take this opportunity to clarify that this is not representative of the current position. As this court stated in *AKN v ALC* at [46], endorsing the decision of the High Court in *Front Row*, where a decision-maker fails entirely to consider an important pleaded issue, this would constitute a breach of the principles of natural justice.

The standard of persuasion

43 The second preliminary point relates to the standard of persuasion which the adjudicator ought to have applied in assessing both the appellant's claim and the respondent's alleged entitlement to a set-off. This issue arose because if a breach of natural justice was present on the facts, the court would have to consider whether the adjudicator's breach of natural justice (if any) caused the respondent to suffer any prejudice. To that end, the court would have to examine the counterfactual situation of what would have happened if the adjudicator had invited the parties to submit on the applicable standard of persuasion. Before the Judge, it was common ground between both parties that they would have agreed that the applicable standard was that of a *prima facie* case (GD at [38]). In this appeal, however, Mr Poon took a different position and argued that it was not clear that both parties would have accepted that the respondent only had to make out a *prima facie* case. Mr Poon suggested that the standard of a *prima facie* case may only apply in situations where the respondent in the adjudication has not served any payment response on the claimant. In situations where the respondent did serve a payment response, Mr Poon suggested that the applicable standard might be the balance of probabilities.

44 This was ultimately not a point of decisive importance because, as will be seen, we were of the view that any error which the adjudicator made regarding the applicable standard of persuasion did not amount to a breach of

natural justice on the facts of this case. Nevertheless, it should be noted that this court has clarified in *Comfort Management* at [57] that the correct standard of satisfaction to be applied by an adjudicator in an adjudication under the Act is that of a *prima facie* case that the payment claim is supported by the facts. We specifically held that this was the standard which applies *regardless* of whether a payment adjudication response has been filed, because it is part of the adjudicator's core duty to adjudicate (at [56]). We would add that this is also the standard which ought to be applied to any alleged entitlement to a set-off which a respondent may raise in the payment response.

Issue 1: Whether the fair hearing rule was breached

45 We turn now to our analysis of the issues proper, starting with the question of whether the fair hearing rule was breached. We analysed this in terms of two sub-issues:

(a) The first sub-issue was whether the adjudicator actually applied the standard of "beyond reasonable doubt" in the way that a legally-trained individual would understand that standard. We shall refer to this as the "criminal standard of persuasion".

(b) Assuming that the adjudicator applied the criminal standard of persuasion, the second sub-issue was whether this was a breach of the fair hearing rule.

We examine these sub-issues in turn.

The standard of persuasion which the adjudicator applied

46 In the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM"*), Chan Seng Onn

J discussed several "[g]eneral principles for curial scrutiny" to be applied when a challenge is brought against an arbitral award. His comments regarding the approach which courts ought to take to reading and construing arbitral awards merit reproduction (at [45] and [47]):

> 45 *The court should not nit-pick at the award. Infelicities are to be expected and are generally irrelevant to the merits of any challenge*…In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14…Bingham J stated (at 14):
>
> > As a matter of general approach, the courts strive to uphold arbitration awards. *They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards* and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be *no substantial fault* that can be found with it. [emphasis added]
>
> …
>
> 47 It should also not be forgotten that one of the main reasons for choosing arbitration is the fact that arbitrators are commercially-minded persons with expertise and experience with the subject-matter which may be extremely technical. *Their value to the parties comes from their knowledge of the trade, and not necessarily their knowledge of the law. Some may have a legal background, but the legislation and rules usually do not prescribe a law degree or training as a prerequisite for appointment as an arbitrator.* This is not a suggestion that a lower standard is expected of such arbitrators but a reminder that if parties have agreed to appoint specific individuals to preside over their disputes, they should be held to their agreement to the fullest extent possible.
>
> [emphasis added]

47 Chan J also cited the remarks of this court in *Soh Beng Tee* at [65] (*TMM* at [43]):

> … 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.

48 The principles enunciated by this court in *Soh Beng Tee* and by Chan J in *TMM* with regard to arbitral awards are equally, if not more applicable to adjudication determinations under the Act. Of course, the underlying consideration of encouraging finality – in the sense of *absolute* finality – in the arbitration context (see *Soh Beng Tee* at [65(c)]) does not apply in the adjudication context. Yet it is precisely because adjudication determinations only enjoy *temporary* finality that the courts ought to read such determinations more generously, bearing in mind that the dispute between the parties may later be reopened and ventilated in another more thorough and deliberate forum (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [22]). The courts should also read and interpret adjudication determinations more generously in light of the roughshod but quick species of justice provided for by the Act, bearing in mind that an adjudicator is required to render his decision within a fairly short timeframe (*W Y Steel* at [22]).

49 Chan J's remarks in *TMM* at [47] regarding the profile, experience and expertise of arbitrators are also apposite. As with arbitrators, adjudicators are often commercially-minded individuals who have a special familiarity with the construction industry or some particular technical expertise. There is no legislation or regulation requiring that they be legally-trained, and indeed many adjudicators are not. This is yet another reason why the courts ought to take a generous approach to reading and interpreting adjudication determinations.

50 Here, the adjudicator was not a legally-trained person and the adjudication determination must be read in that light. Of course, the

uncertainties surrounding what the adjudicator meant by "beyond reasonable doubt" would not have arisen if he was a legally-trained person because then he would be taken to have intended the ordinary legal meaning of that expression. On the facts, however, he was not schooled in the law and it would thus be inappropriate to fixate on the term "beyond reasonable doubt". That is not to say that a non-legally trained adjudicator would invariably not have intended the ordinary meaning of legal terms. It remains necessary to examine the context under which the legal expression was used in the adjudication determination.

51 In our judgment, although the adjudicator used the term "beyond reasonable doubt" on a few occasions, it was doubtful that he intended to use those words with all the import that they would carry if they were used by a lawyer or a judge. On balance, it was more likely that the adjudicator used the term "beyond reasonable doubt" to mean that he needed to be satisfied that there was a basis for the respondent's back charge, and that he would not be so satisfied if he entertained reasonable concerns or doubts. In other words, it would appear that the adjudicator simply used the term "beyond reasonable doubt" to express his views about the insufficiency of the evidence to support the respondent's claimed entitlement to a set-off. This would become more apparent when we consider the evidence in relation to the question of prejudice at [70]–[71] below. We therefore turn to our primary reason for allowing the appeal, which is that there was no breach of the fair hearing rule, regardless of whether the adjudicator actually applied the criminal standard of persuasion.

No breach of the fair hearing rule

52 There were two crucial points which informed the Judge's decision to set aside the adjudication determination. One of these was a proposition of law: that it is a breach of natural justice for a decision-maker to determine a dispute

on a point that the parties never had an opportunity to address (GD at [63]). The second point was a finding of fact: that the standard of persuasion was never a live issue between the parties (GD at [38] and [60]).

53 We certainly have no quarrel with the first legal proposition, but we found that the Judge erred in applying this principle to the facts before him for two reasons, which we now turn to explain.

(1) An omission to invite submissions on the applicable standard of persuasion or proof is not a breach of the fair hearing rule

54 It is well-established that a decision-maker may breach the fair hearing rule if he decides a dispute on a point which the parties have not had a fair opportunity to address (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [30] and *AKN v ALC* at [76]–[80]). In articulating the type of mischief or unfairness which this principle is designed to address, the courts often speak in terms which suggest that a decision may be unfair by virtue of the fact that it catches the parties by *surprise*. Thus, for instance, in *Soh Beng Tee* at [41], this court noted that where a breach of natural justice is alleged, "[i]t is frequently a matter of degree as to how *unexpected* the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it" [emphasis added]. Similarly, in *Rex v Paddington and St. Marylebone Rent Tribunal, Ex parte Bell London & Provincial Properties Ld* [1949] 1 KB 666, Lord Goddard CJ of the Divisional Court suggested that the decision of a rent tribunal on a basis which the parties had never addressed violated notions of "common fairness" as the decision "…[had], in fact, taken the advisers of the applicants entirely *by surprise*" [emphasis added] (at 683). So, too, the Judge noted that the adjudicator's holding that the respondent had to persuade him of the

appellant's liability for the shattering screens beyond reasonable doubt "was a decision which a reasonable party to an adjudication in the position of the [respondent] *could not have foreseen*" (GD at [65]).

55 In our judgment, a surprising or unforeseen outcome *may* usefully indicate that there has been a breach of the fair hearing rule, but this is hardly conclusive. The courts should be mindful that a surprising outcome may be the product of several distinct types of situations, some of which may not involve any breach of natural justice at all (see [56]–[63] below). The true question is whether the parties have been deprived of a *fair opportunity* to be heard (see *Soh Beng Tee* at [43] and *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [73] and [77]). Here we speak of fairness not in terms of equal treatment between the parties, but in terms of reasonableness. At the risk of stating the obvious, a fair and reasonable opportunity of being heard *may or may not* require a decision-maker to take the overt step of inviting submissions from the parties on a given issue.

56 We shall illustrate the above propositions by discussing three distinct types of proceedings which may result in surprising outcomes. First, the outcome of a dispute may be surprising to the parties because although they each have addressed the particular question which the decision-maker has posed as a decisive issue, the decision-maker has ultimately answered that question in a way that is so far removed from any position which the parties have adopted that neither of them could have contemplated the result. An example of this was seen in *Pacific Recreation*, where the point in issue was the governing law of a deed. Both parties *had* addressed this issue – the respondents had submitted that

the deed was governed by Singapore law while the appellants had submitted that the deed was governed by Chinese law – but neither party had suggested or contemplated what the judge eventually decided – which was that the governing law was US law.

57 On appeal, this court found that the appellants had been deprived of their right to be heard on a decisive issue because they had no opportunity to raise arguments as to why US law was inapplicable, or alternatively, why US law also supported their interpretation of the deed (*Pacific Recreation* at [33]–[34]). In such a situation, the parties were rightly said to have had no fair opportunity to be heard because although they knew the question which was of decisive importance (*ie*, the governing law of the deed), they (a) did not know; and (b) could not reasonably have expected that the judge may have answered the question in the way that she did. Natural justice required that if the judge took the view that neither Chinese law nor Singapore law were satisfactory alternatives, she ought to have invited the parties to make submissions on whether US law was the governing law, and if so, what the applicable principles were (at [34]). This must be so because the content of each party's submissions would in turn depend on the applicable governing law.

58 Alternatively, the outcome of a dispute may be surprising to the parties by reason of the fact that they have not even addressed the very question which the decision-maker has posed as being a decisive issue, because they (a) did not know; *and* (b) could not reasonably have expected that it would be in issue at all. An example of this may be seen in the case of *The Vimeira* [1984] 2 Lloyd's Rep 66, where the issue in dispute was whether a particular port where a ship had docked to discharge was unsafe for the vessel. The parties argued the case on the basis that the decisive issue was whether there was sufficient water in the

port for the ship to dock safely. The arbitrators, however, decided that the port was unsafe because the turning area was unduly restrictive for the vessel, notwithstanding that this issue had not been raised in the pleadings.

59 The English Court of Appeal held that this amounted to a breach of natural justice, Robert Goff LJ stating that it was unfair for the arbitrators "to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it" (at 75). In our view, the court rightly found that the parties did not have a fair opportunity to be heard on the issue of the adequacy of the turning area for the vessel. Such a finding is necessarily fact sensitive and would be a function of the evidence before the arbitrator. The parties did not have an opportunity to adduce evidence or address the arbitrator because they were subjectively unaware that the adequacy of the turning area was an issue at all. They did not have a *fair* opportunity because they objectively could not have reasonably foreseen that it was a live issue. In such situations, the arbitrator would be in breach of natural justice unless he has taken the step of inviting submissions on that issue.

60 The final type of situation is where the outcome of a dispute is surprising to the parties because they have omitted to address a particular issue *even though* they could reasonably have foreseen that the issue would form part of the court's decision. The parties may have chosen not to address the issue because they failed to apply their minds to it, or failed to appreciate its significance, or because they each assumed that the decision-maker would adopt their position on that issue. Whatever the case may be, this type of decision *cannot* be set aside on the basis of any breach of natural justice because if the parties could reasonably have foreseen that the issue would arise, and if they choose not to

address that issue, they cannot complain that they have been deprived of a fair hearing.

61 One type of case which comes within this category are those where the decision-maker has decided the dispute on a premise which, though not directly raised by the parties, is reasonably connected to an argument which the parties have raised (see *TMM* at [63]). In *TMM*, the key issue in dispute between a ship purchaser and a ship seller was whether the ship purchaser was entitled to terminate the contract on the basis of an alleged repudiatory breach on the ship seller's part. Central to this question was whether the term which the ship seller had breached ("clause 11") was a condition of the contract. The ship purchaser alleged that clause 11 was a condition, whereas the ship seller alleged that it was an innominate term. The dispute was referred to arbitration and the arbitrator found that clause 11 was not a condition, but a collateral warranty. The ship purchaser sought to have the arbitrator's decision set aside, alleging that he had breached the rules of natural justice by deciding the case on the basis that the term was a collateral warranty, when neither party had advanced that case.

62 On the facts, Chan J held that it *was* in fact the ship seller's case before the arbitrator that clause 11 was a warranty (at [68]). He thus dismissed the application to have the decision set aside. Going further, however, he held that even if the only issue put before the arbitrator was whether clause 11 was a condition or an innominate term, the arbitrator could not be said to have deprived the ship purchaser of its right to be heard. This was because the finding that clause 11 was a collateral warranty was not only reasonably connected to the arguments raised by the parties, but was a reasonable *follow-through* from the arbitrator's finding that clause 11 was not a condition (at [70]).

63 In our judgment, the present case comes within this category of cases where the parties are precluded from complaining of a breach of the fair hearing rule because they ought reasonably to have foreseen that the issue in question (here, the applicable standard of persuasion) would arise, but failed to make submissions on the point. Indeed, it is a gross understatement to say that the parties could "reasonably foresee" that the issue of the standard of persuasion would arise, or that the issue was "reasonably connected" to arguments raised by the parties. Rather, the standard of persuasion was *so integral and crucial* to the adjudicator's very task of determining the dispute that there was no way he could have decided the dispute without coming to a position on the standard to be applied. In an adversarial decision making process, it is inherently the remit of the decision-maker to assess the evidence against some standard of proof or persuasion. Therefore, the parties may well have been surprised by *the view* that the adjudicator formed as to the applicable standard, but they could not have been surprised that he had to form *a view* on this very point.

64 Seen in this light, it could not have been a breach for the adjudicator to have omitted to invite submissions from the parties as to the applicable standard of persuasion. The applicable standard was a question so obviously crucial to his determination that he was not obliged to highlight to the parties that it would be a live issue. If the parties decided not to address it, knowingly or otherwise, they cannot complain that they had no fair or reasonable opportunity to be heard. We would thus qualify the Judge's observation that an adjudicator must comply with the principles of natural justice not only with regard to the ultimate issue before him but also with regard to the "subsidiary issues on the path to his decision on the ultimate issue" (GD at [60]). While it is undoubtedly true that a decision-maker must adhere to the principles of natural justice even in dealing with subsidiary issues, this does *not* necessarily mean that the decision-maker

must specifically invite submissions or hear from the parties on all subsidiary issues if the subsidiary issues ought reasonably to have been foreseen by the parties.

65 In summary, it is not a breach of the fair hearing rule for a decision-maker to fail to invite submissions on an issue as fundamental and inherent in *every* legal dispute as that of the standard of persuasion or proof to be applied.

(2) The parties engaged each other on the sufficiency of the evidence

66 We also noted that on the facts, the parties *did* engage each other as to the sufficiency of the evidence. Having regard to the submissions which were filed in connection with the adjudication, it should have been obvious to the parties that they had diametrically opposing positions regarding the sufficiency of the evidence, and that the standard of persuasion to be met was thus an issue of decisive importance. From the time the appellant set the proceedings in motion in its adjudication application, it had argued in its accompanying submissions that the respondent had produced insufficient or no evidence to prove that the shattering shower screens were attributable to the appellant (see [14] above). The parties also joined issue over the sufficiency of the respondent's explanations and the particulars which were furnished to support its computation of the back charge (see [15]–[16] above). The appellant *expressly* argued that the respondent failed to meet its burden of proof in its written submissions dated 24 April 2017 (see [17] above).

67 In light of these facts the parties must have realised, or ought to have realised, that the adjudicator would need to choose which of their submissions he would accept with regard to the keenly disputed issue of the back charge. This process would necessarily involve him applying *some* standard of

persuasion. The parties nevertheless chose not to address the adjudicator on the applicable standard, either because it never crossed their mind or they assumed that the answer was clear and obvious. In our judgment, the parties could not then complain that the adjudicator applied the incorrect standard. This may amount to an error of law, but would not constitute a breach of natural justice.

Issue 2: Whether the breach (if any) resulted in prejudice to the respondent

68 The above point was sufficient reason for us to allow the appeal. However, even if we had found that there had been a breach of the principles of natural justice, we would nevertheless have allowed the appeal because any such breach did not cause prejudice to the respondent.

69 As noted by the Judge at [76] of the GD, the test for prejudice is whether the decision-maker could reasonably have come to a different decision if it were not for the breach of natural justice (*L W Infrastructure* at [54]). Before the Judge, the parties had agreed that if the adjudicator had invited them to address the point, they would have submitted that the applicable standard of persuasion was that of a *prima facie* case (GD at [75]). Notwithstanding Mr Poon's arguments to the contrary (see [43] above), we saw no reason to doubt that this was what would have happened.

70 Yet even if the adjudicator had accepted this and applied the standard of a *prima facie* case, we found that he could not reasonably have come to a different decision. In his determination, the adjudicator highlighted multiple reasons as to why he was doubtful about various aspects of the respondent's case. He could not conclude that the glass panels supplied by the appellant did not meet the respondent's specifications, because he did not even know what the respondent's specifications were (see [21(b)] above). Further, he was not

convinced that the respondent had correctly identified the inadequate buffer between the sliding door and the wall as the true cause of the shattering shower screens (see [21(c)] above). He noted that there was no expert evidence or specialist report which would allow him to draw such a conclusion (see [21(a)] above). He was also doubtful about the efficacy of the remedial measures which the respondent had taken (see [21(e)] above) and which the respondent sought to back charge to the appellant.

71 In our judgment, the overall tenor of the adjudication determination suggests that the adjudicator saw no evidential basis for the respondent's back charge whatsoever. It follows that even if he had applied the standard of a *prima facie* case, he would still have found that the respondent's claim was unsupported and rejected it. We therefore concluded that, even assuming that there had been a breach of natural justice, it had not caused the respondent to suffer any prejudice as a result. This was another reason why we allowed the appeal.

Conclusion

72 We would conclude by highlighting that the adjudicator's award in this case was only for $89,451.95 plus interest and costs. Given the relatively small quantum in dispute, we were surprised that the parties had pursued an application to have the award set aside, which eventually led the matter to be brought before us. We stress that it is important for litigants to conduct a cost-benefit analysis and to consider, in each case, whether the consequence of a matter justifies the effort and expense of going to court. This is all the more so where the matter concerns an adjudication determination under the Act which only enjoys temporary finality and which may be superseded when the parties eventually ventilate their dispute more fully in litigation or arbitration.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Poon Guokun Nicholas (Drew & Napier LLC) for the appellant;
Melvin Chan and Yvonne Mak (TSMP Law Corporation)
(instructed), and Ong Lian Min David and Ong Li Min Magdalene
(David Ong & Co, Advocates & Solicitors) for the respondent.
