IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 39

Civil Appeal No 211 of 2017

Between

BINTAI KINDENKO PRIVATE LIMITED

… *Appellant*

And

SAMSUNG C&T CORPORATION

… *Respondent*

In the matter of Originating Summons No 975 of 2016
(Summons No 4276 of 2017)

Between

BINTAI KINDENKO PRIVATE LIMITED

… *Applicant*

And

SAMSUNG C&T CORPORATION

… *Respondent*

GROUNDS OF DECISION

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

[Civil Procedure] — [Costs] — [Principles] — [Personal liability of solicitor for costs] — [Order 59 rule 8(1) Rules of Court (Cap 322, R 5, 2014 Rev Ed)]

Bintai Kindenko Pte Ltd
v
Samsung C&T Corp

[2018] SGCA 39

Court of Appeal — Civil Appeal No 211 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
9 April 2018

9 July 2018

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 It should by now be familiar to all stakeholders in the building and construction industry that the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") was passed to facilitate cash flow in the industry by providing for an inexpensive and efficient mode for the resolution of payment disputes; and the courts promote this objective by ensuring limited curial intervention in the determination of such disputes where this has been done in accordance with the provisions of the Act. The rough nature of justice that sometimes emanates from this process is something we tolerate because these determinations are visited with the seemingly oxymoronic notion of temporary finality, in the sense that the determinations are final and binding on the parties to the adjudication temporarily *until* their differences are eventually resolved finally by litigation or arbitration.

2 But there are limits in terms of what will be tolerated. Where critical provisions of the Act are breached, even temporary finality cannot be accorded to a determination made under the Act. Such is the balance struck under the Act in service of its salutary aims. In general, curial intervention is justified where, among other things, it can be shown that the adjudicator has acted in breach of the rules of natural justice, including by failing to consider arguments that the parties have properly placed before him. The main question before us in this appeal pertained to an alleged failure by the adjudicator in this matter to consider some of the essential arguments that had been raised.

3 In this appeal, Bintai Kindenko Private Limited ("Bintai") appealed the decision of the High Court judge ("the Judge") to grant the application made by Samsung C&T Corporation ("Samsung"), the respondent in Originating Summons No 975 of 2017 ("OS 975/2017"), in Summons No 4276 of 2017 ("the Setting Aside Application") to set aside:

(a) the adjudication determination dated 15 August 2017 ("the Adjudication Determination") made by the adjudicator ("the Adjudicator") appointed in Adjudication Application No 190 of 2017 ("the Adjudication Application"); and

(b) the order of court dated 30 August 2017 ("the Order of Court") obtained by Bintai in OS 975/2017 granting Bintai leave to enforce the Adjudication Determination.

4 The Judge allowed the Setting Aside Application on the basis that the Adjudicator, in making Adjudication Determination, had failed to consider two issues raised in the adjudication response filed by Samsung ("the Adjudication Response"), and that this constituted a failure of natural justice and was contrary to s 16(3)(*c*) of the Act. Bintai appealed against the Judge's decision.

5 On 9 April 2018, we heard and dismissed the appeal, fixing the party-and-party costs in favour of Samsung in the sum of $20,000 (including disbursements). However, we also found that counsel for both parties had incurred costs in respect of the appeal unreasonably and had failed to conduct the proceedings with reasonable competence and expedition. We therefore ordered, pursuant to O 59 r 8(1)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") that 90% of the photocopying charges and the stamp fees for the Agreed Bundle of Documents ("the ABD") was not to be charged by Bintai's counsel to Bintai, and that Samsung's counsel was to contribute to 20% of the photocopying charges and stamp fees that Bintai's counsel was to bear. As we indicated we would do when we dismissed the appeal, we now furnish the grounds of our decision.

Background

6 Samsung is a company incorporated in the Republic of Korea and registered in Singapore carrying on the business of building construction. Bintai is a company incorporated in Singapore carrying on the business of mechanical and electrical engineering.

The dispute

7 This dispute arose out of a contract for construction works in respect of additions and alterations to Suntec City's convention centre and retail podium. Samsung was the main contractor for the project, while Bintai was engaged by Samsung as the subcontractor. Specifically in respect of the subcontract, Bintai was engaged pursuant to a letter of acceptance dated 3 December 2012 to supply and install mechanical, electrical and plumbing works. The subcontract was for the sum of $85,850,000.00 (excluding GST), with a further sum of

$4,475,000.00 (excluding GST) for optional prime costs and provisional sum items.

8 On 19 May 2017, Bintai submitted Payment Claim No 59 ("PC 59") for the claimed amount of $13,479,366.43. On 9 June 2017, Samsung submitted Payment Response No 59 ("PR 59"), stating a response amount of "($2,190,963.62)". In short, Samsung claimed that far from having any liability to pay Bintai, there was in fact a net balance in Samsung's favour.

9 The breakdown for the amount claimed in PC 59, the response amount in PR 59, and the difference between the two amounts may be seen as follows:

No	Description	PC 59 ($)	PR 59 ($)	Difference ($)
1	Subcontract works	85,850,000.00	85,850,000.00	-
2	Variation works	29,442,006.82	18,909,510.91	10,532,495.91
3	Omissions	(8,344,728.00)	(10,751,059.94)	2,406,331.94
4	Retention	(4,292,500.00)	(4,292,500.00)	-
5	Backcharges	-	(585,252.20)	585,252.20
6	Amount previously paid	(91,321,662.39)	(91,321,662.39)	-
7	Release of the first half of the retention monies	2,146,250.00	-	2,146,250.00
Total amount		**13,479,366.43**	**(2,190.963.62)**	**15,670,330.05**

10 The backcharges, comprising the sum of "($585,252.20)", and which had been included in Samsung's computation of its response amount in PR 59, were imposed by Samsung on Bintai for its failure to provide scaffolding. Samsung claims that this was part of Bintai's scope of works under the subcontract. On the other hand, the variation works reflected under PR 59 concerned a reassessment of various payments which had previously been made by Samsung to Bintai pursuant to Payment Response No 57 in respect of work that had already been completed by Bintai.

The adjudication proceedings

11 On 7 July 2017, Bintai served notice of intention to apply for adjudication ("the NOI"), and lodged the Adjudication Application on the same day. The Adjudication Application and the supporting documents, including Bintai's submissions made in support of the Adjudication Application ("the AA Submissions"), filled nine arch-lever files.

12 In the NOI, Bintai stated under the "Dispute Details" section that the payment response amount of "($2,190.963.62)" was "disputed", and that Bintai only intended to seek payment of the sum of $2,146,250.00 (which is for the release of the first half of the retention monies) in the adjudication proceedings.

13 In the AA Submissions, Bintai reiterated that while it disputed Samsung's computation of the response amount in PR 59 of "($2,190.963.62)", it was only seeking payment of the sum of $2,146,250.00 in the adjudication proceedings, though it expressly reserved its right to claim the balance amount reflected in PC 59 in due course. Bintai then stated that there were three issues in dispute for the purpose of the Adjudication Application. These were said to be the following: (a) the retention monies; (b) the backcharges for scaffolding

carried out during the project; and (c) the variation works that had been certified and paid in earlier payment responses but had been recomputed and reversed in PR 59. The remainder of the AA Submissions was organised in three distinct parts, each dealing with one of these three items and recognising that these were three discrete issues to be resolved in the adjudication.

14 The Adjudicator was appointed shortly after on 11 July 2017 by the Singapore Mediation Centre.

15 On 17 July 2017, Samsung filed the Adjudication Response, which consisted of two arch-lever files, and included its submissions in support of the Adjudication Response ("the AR Submissions"). In the AR Submissions, Samsung maintained its response amount of "($2,190.963.62)" as reflected in PR 59, and stated that its submissions would be organised in the following four sections: (a) a preliminary objection to the validity of the Adjudication Application; (b) the retention monies; (c) the backcharges for scaffolding; and (d) the variation works previously paid and re-assessed under PR 59. Samsung duly structured the remainder of the AR Submissions in four distinct parts. Thus, aside from raising the preliminary objection that the Adjudication Application failed to "contain such information or be accompanied by such documents as may be prescribed" as required under s 13(3)(*c*) of the Act, Samsung plainly joined with Bintai on the precise three issues that Bintai had identified in the AA Submissions.

16 The Adjudicator directed Bintai to provide a written response to the AR Submissions by 21 July 2017 and Samsung to file its reply by 22 July 2017, and fixed an oral conference on 25 July 2017.

17 Bintai filed its reply submissions on 21 July 2017, while Samsung filed its written reply to Bintai's reply submissions on 22 July 2017. Both sets of reply submissions dealt with all four issues raised by Samsung in the AR Submissions (see [15] above).

The Adjudication Determination

18 On 15 August 2017, the Adjudicator rendered the Adjudication Determination, finding in favour of Bintai. Specifically, the Adjudicator ordered Samsung to pay Bintai the sum claimed by Bintai in the Adjudication Application, namely $2,146,250.00 (excluding GST) ("the Adjudicated Amount"), within seven days after the Adjudication Determination had been served on Samsung. The Adjudicator also ordered the costs of the adjudication proceedings, comprising the Adjudication Application fee of $642 (inclusive of GST) and the Adjudicator's fee of $19,260.00 (inclusive of GST), to be borne by Samsung.

19 In arriving at his decision in the Adjudication Determination, the Adjudicator considered and gave his findings in respect of the following two issues:

(a) First, the Adjudicator addressed the preliminary issue raised by Samsung regarding the alleged invalidity of the Adjudication Application on the ground that it failed to "contain such information or be accompanied by such documents as may be prescribed" as required under s 13(3)(*c*) of the Act or failed to "contain an extract of the terms or conditions of the contract that are relevant to the payment claim dispute" as required under reg 7(2)(*d*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"). The Adjudicator rejected Samsung's

preliminary objection, and declined to dismiss the Adjudication Application pursuant to s 16(2)(*a*) on the ground that Adjudication Application was in breach of s 13(3)(*c*) of the Act read with reg 7(2)(*d*) of the Regulations.

(b) Second, the Adjudicator addressed the issue regarding the release of the first half of the retention monies. The Adjudicator found that Bintai was entitled to be paid the first half of the retention monies.

20 The Adjudicator did not then go on to consider or address either of the remaining two issues regarding the backcharges and the variation works, and accordingly did not make any findings in that connection. Instead, the Adjudicator specifically observed at [28] that "[i]n this adjudication, the payment claim disputes [*sic*] centers *solely* on the claim for release of the first retention monies" [emphasis added]. The Adjudicator also held that it was not a breach of s 13(3)(*c*) of the Act or reg 7(2)(*d*) of the Regulations for Bintai to omit including, among other things, Appendix I, which contains the schedule of rates for valuing variations, "since the payment claim dispute is centered solely on the release of the first retention monies, *and not the variations or backcharges*" [emphasis added] (at [50]).

The Setting Aside Application

21 The Adjudication Determination was served on Samsung on 15 August 2017. Although Samsung was obliged to make payment of both the Adjudicated Amount and the costs of the adjudication proceedings, it only made payment of the costs of the adjudication proceedings on 22 August 2017.

22 On 28 August 2017, Bintai filed OS 975/2017, seeking leave to enforce the Adjudication Determination in the same manner as a judgment or an order

pursuant to s 27(1) of the Act, and to enter a judgment in terms of the Adjudication Determination pursuant to s 27(2). On 30 August 2017, Bintai amended the originating summons, and on the same day, the assistant registrar granted the order of court sought by Bintai in OS 975/2017.

23 On 18 September 2017, Samsung filed the Setting Aside Application, seeking to set aside the Adjudication Determination on the sole ground that the Adjudicator had failed to consider the two issues regarding backcharges and variation works in the Adjudication Determination and that this amounted to a breach of natural justice.

The decision below

24 The Judge allowed the Setting Aside Application on the basis that the Adjudicator had failed to consider either of the two issues regarding the backcharges and the variation works, both of which had been raised in the Adjudication Response, and that this failure constituted a breach of natural justice: see *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2017] SGHC 321 ("GD").

25 The Judge concluded that the Adjudicator had failed to consider the two issues because:

(a) the Adjudicator did not substantively address or make any finding at all in respect of either issue in the Adjudication Determination (GD at [8] and [11]);

(b) the Adjudicator did not impliedly dismiss or make any finding on Samsung's position on the backcharges and variation works especially since Bintai's entitlement to the retention monies was not a

logically prior issue that would implicitly resolve the other two issues or render them moot (GD at [12]); and

(c) the Adjudicator was not entitled to postpone consideration of the backcharges and variation works as matters to be considered only when the release of the second half of the retention monies was being considered or when Bintai made a claim for payment of the variation works, given that neither party had raised the issue of the second half of the retention monies in the adjudication proceedings, nor had the Adjudicator asked the parties to address the point (GD at [13]).

26 The Judge also found that the Adjudicator's failure to consider the two issues of backcharges and variation works constituted a breach of natural justice because:

(a) those two issues were essential to the resolution of the adjudication and were at the forefront of the submissions of both parties (GD at [18] and [19]); and

(b) the Adjudicator's failure to consider the two issues did not stem from a mere omission to state reasons for rejecting the same or a finding that the issues were so unconvincing that it was unnecessary to make explicit findings on them, but from a conscious decision to exclude both issues from his scope of consideration (GD at [21] and [22]).

27 Finally, the Judge found that the Adjudicator's breach of natural justice was material and caused Samsung prejudice. A proper consideration of the two issues of backcharges and variation works could have changed the Adjudicator's mind as to the final outcome of the adjudication, given that the absolute value of the sum disputed in the payment response in relation to the

two issues amounted to $2,190,963.62, which exceeded Bintai's claim of $2,146,250.00 (GD at [23]).

The appeal

28 Bintai appealed against the Judge's decision. Bintai submitted that the Adjudication Determination should not be set aside because:

(a) There was no breach of natural justice. The Adjudication Determination, both on its own as well as when read together with the notes of the oral conference on 25 July 2017, showed that the Adjudicator had considered all the issues raised by both parties in arriving at his decision in the Adjudication Determination, and did not disregard the two issues of backcharges and variation works. Even if the Adjudicator had disregarded the said two issues, the Adjudicator had made a decision on the merits that cannot be challenged at this stage of the proceedings before the court.

(b) Even if there was any breach of natural justice, the breach was not material and would not cause Samsung any prejudice. The Adjudication Determination is interim in nature and Samsung would have the opportunity to litigate or arbitrate all issues subsequently. Also, even if Samsung had to release the first half of the retention monies to Bintai, Samsung retained sums due to Bintai which was well in excess of the amount that Samsung claimed was due to it in its payment response.

29 In response, Samsung contended that the Judge was correct to set aside the Adjudication Determination because:

(a) There was a breach of natural justice in the Adjudicator's failure to consider the two issues. Also, even if the Adjudicator had considered those issues, the Adjudicator's failure to give reasons in the Adjudication Determination regarding his finding for those issues was also a breach of natural justice.

(b) The breach of natural justice was material because it caused prejudice to Samsung. A proper consideration of the two issues regarding backcharges and variation works could have changed the Adjudicator's mind as to the final outcome of the adjudication, since the sum disputed in relation to those two issues was greater than Bintai's claim.

Issues to be determined

30 In this light, two main issues arose for our determination: (a) whether the Adjudicator had acted in breach of natural justice; and (b) whether the breach was sufficiently material as to cause prejudice to Samsung.

31 We address each in turn.

Our decision

32 After hearing the arguments and having considered the matters placed before us, we were satisfied that the Adjudication Determination should be set aside because the Adjudicator had acted in breach of natural justice in failing to consider the issues regarding the backcharges and variation works that had been raised by Samsung in the Adjudication Response when arriving at his determination, and this breach was sufficiently material as to cause prejudice to Samsung. We therefore dismissed the appeal.

Whether there was a breach of natural justice

33 The duty of an adjudicator to act in accordance with the principles of natural justice is provided for in s 16(3)(*c*) of the Act, which states:

> **Commencement of adjudication and adjudication procedures**
>
> **16.**— …
>
> (3) An adjudicator shall —
>
> …
>
> (*c*) comply with the principles of natural justice.

34 It is not controversial that the court has the power to set aside an adjudication determination if an adjudicator has acted in breach of his duty to comply with the requirements of natural justice: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [47], citing *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [45]. It is also well established that there are two aspects to the natural justice principles – first, the parties to the adjudication must be accorded a fair hearing (the fair hearing rule), and second, the adjudicator must have been independent and impartial in deciding the dispute (the no bias rule): *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [24]; *SEF Construction* at [49]; *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*") at [23].

35 Samsung relied only on the fair hearing rule in these proceedings, and it maintained that this was implicated in two different ways. The first was by the requirement for an adjudicator to receive and *consider* the submissions of both parties: *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277 ("*Metropole*") at [57], citing *AM Associates* at [25]; the second was on the basis

of its contention that the fair hearing rule requires an adjudicator to *give reasons* for his decision in respect of the material or essential issues.

Failure to consider

36 We were satisfied that the Adjudicator had indeed failed to consider the issues regarding the backcharges and variation works. This, in our judgment, was sufficient to amount to a breach of natural justice.

37 In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN v ALC*"), we dealt with this issue and noted that the question whether there has been such a failure will usually be resolved by drawing the appropriate inference. In this regard, we said (at [46]) that:

> ***To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him.*** Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* (see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 … at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 386). *Front Row* is useful in so far as it demonstrates what must be shown to make out a breach of natural justice on the basis that the arbitrator failed to consider an important pleaded issue. ***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. [emphasis in original italicised; emphasis added in bold italics]

38 Critically, we also emphasised (at [47]) the importance of drawing a distinction between:

> … on the one hand, an arbitral tribunal's ***decision to reject an argument*** (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal's ***failure to even consider that argument***. ***Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice***. [emphasis added in bold italics]

39 In arriving at this conclusion, we affirmed the decision of the High Court in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), which was the genesis of the line of High Court decisions standing for the proposition that an arbitral award may be set aside on the basis of a breach of natural justice where the tribunal has completely failed to consider the arguments raised in respect of an important issue in the arbitration. In *Front Row*, Andrew Ang J (as he then was) set aside an arbitral award on the ground of a breach of natural justice because the arbitrator there had dismissed the aggrieved party's counterclaim without considering the grounds of the counterclaim in full; in particular, the arbitrator had failed to consider the submissions of the aggrieved party on a particular issue in the counterclaim due to his mistaken belief that the aggrieved party had abandoned its reliance on that issue (at [31], [35] and [45]).

40 In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), Chan Seng Onn J developed the principle set out in *Front Row*, clarifying that:

(a) an arbitral tribunal does not have a duty to deal with every *issue* raised by the parties, and need only deal with the essential issues raised (at [73]); and

(b) in deciding the essential issues:

(i) the tribunal need not deal with every *argument* canvassed under each essential issue as long as one argument may resolve the issue (at [73] and [76]);

(ii) the tribunal may resolve an issue implicitly without addressing it expressly if the outcome of that issue flows from the conclusion of a specific logically anterior issue (at [77]); and

(iii) the tribunal must demonstrably have at least attempted to comprehend the parties' arguments on those essential issues (at [89]).

41 In *BLB and another v BLC and others* [2013] 4 SLR 1169, Belinda Ang Saw Ean J cited and applied the principles set out in both *Front Row* and *TMM* (at [74]–[88]). Judith Prakash J (as she then was) did likewise in *AQU v AQV* [2015] SGHC 26 (at [31]–[35]).

42 The principle set out in *AKN v ALC* – that the inference that an arbitrator has failed to consider an important pleaded issue may only be drawn if it was "clear and virtually inescapable" – has since been applied in the decisions of the High Court in *ASG v ASH* [2016] 5 SLR 54 (at [61]–[62]) and *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 (at [32] and [34]).

43 Although *AKN v ALC* and the other authorities referred to above are decisions issued in the context of either domestic or international commercial arbitration, we found these principles to also be applicable in the context of assessing challenges against an adjudication determination under the Act. Indeed, this is consistent with the guidance provided in decisions of the High Court that have dealt with the failure of adjudicators to consider important issues in adjudication determinations.

44 In *SEF Construction*, Prakash J held (at [60]) that:

> In the present case, having studied the Adjudication Determination, I am satisfied that the Adjudicator did have regard to the submissions of the parties and their responses and the other material placed before him. The fact that he did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. ***It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings.*** Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice. ***Natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made***. [emphasis added in bold italics]

45 In *Metropole*, Vinodh Coomaraswamy J cited (at [77]–[78]) both the decision in *Front Row* as well as the foregoing passage from *SEF Construction* with approval, before going on to hold (at [79]) that:

> These authorities establish that ***the fact that this adjudicator did not find it necessary to discuss his reasoning and explicitly state his conclusions in relation to the Defences does not inevitably lead to the conclusion***

> ***that he did not have regard to those submissions at all.***
> [emphasis added in bold italics]

46 In our judgment, the upshot of the foregoing survey of the relevant authorities is that an adjudicator will be found to have acted in breach of natural justice for having failed to consider an issue in the dispute before him only if:

(a) the issue was essential to the resolution of the dispute; and

(b) a clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind at all to the said issue.

47 If the facts show that the issue was not essential to the resolution of the dispute at all, or that the adjudicator had considered the issue but had wrongly rejected the aggrieved party's submissions in respect of that issue, such an inference should not be drawn. This is especially so in the context of adjudications under the Act, where adjudicators do not have the luxury of time to craft immaculately reasoned adjudication determinations.

48 Applying these principles to the present facts, we were satisfied that the Adjudicator had acted in breach of natural justice by failing to consider the two issues regarding the backcharges and variation works.

49 First, these issues were clearly essential to the resolution of the Adjudication Application. They had been raised in the Adjudication Response, which featured a response amount of "($2,190,963.62)" (see [15] above). Given that Bintai's claim in the Adjudication Application for the release of the first half of the retention monies was $2,146,250.00 (see [13] above), this meant that Samsung's position was that an amount was due to it that was greater than the amount claimed by Bintai. Accordingly, for Bintai to prevail in its Adjudication Application, it not only had to persuade the Adjudicator to find in its favour in

respect of its position on the first half of the retention monies, but it also had to persuade the Adjudicator to rule against Samsung in respect of the contentions it had raised in the Adjudication Response, which included the matters it had raised in relation to the backcharges and variation works. It would have been insufficient for the Adjudicator to merely find that Bintai was entitled to the release of the first half of the retention monies amounting to $2,146,250.00, because if the Adjudicator had gone on to consider and had then concluded that Samsung was entitled to be paid by Bintai in respect of the backcharges and variation works an amount of $2,190,963.62, then Bintai's Adjudication Application would have been defeated by Samsung's Adjudication Response. Hence, there is simply no escaping the fact that these were essential issues that had to be dealt with by the Adjudicator.

50 However, it was evident from the Adjudication Determination as a clear and virtually inescapable inference that the Adjudicator did not apply his mind at all to the issues of the backcharges and variation works. As we had observed at [20] above, not a single paragraph in the Adjudication Determination related to the issues of the backcharges and variation works. Bintai suggested that it could be concluded, from various parts of the Adjudication Determination, that the Adjudicator had in fact considered those two issues. In our judgment, the Judge rightly rejected this argument when Bintai had raised the same argument below. Some of the paragraphs mentioned by Bintai (namely, [16], [20] and [22]) were located in the introductory portion of the Adjudication Determination, and were clearly not a part of any finding made by the Adjudicator. As for [50], it was a part of the Adjudicator's findings regarding the preliminary objection raised by Samsung regarding the invalidity of the Adjudication Application, and had nothing to do with those two issues.

51 If anything, it could instead be inferred from the language of [28] and [50] of the Adjudication Determination (which we have referred to at [20] above) that the Adjudicator had in fact shut his mind to the issues regarding the backcharges and variation works, given his surprising statement at [28] that "the payment claim disputes [*sic*] centers solely on the claim for release of the first retention monies" and at [50] that "the payment claim dispute is centered solely on the release of the first retention monies, and not the variations or backcharges". The latter in particular was almost an express assertion that for some unexplained reason, he did not think the issues pertaining to backcharges and variation works needed to be considered at all even though this was plainly not the case. In our view, this was analogous to the factual matrix that confronted Andrew Ang J in *Front Row*, where the arbitrator failed to consider submissions regarding an issue in the aggrieved party's counterclaim because he mistakenly believed that issue in the counterclaim had been abandoned (see [39] above). Here, the Adjudicator, like the arbitrator in *Front Row*, was similarly under the mistaken impression that the two issues regarding the backcharges and variation works were not relevant to the resolution of the payment claim dispute. This rendered the Adjudication Determination vulnerable to challenge, not because he made a mistake, but because, as a result of that mistake, he failed to consider those two issues even though they were in fact essential to the resolution of the dispute at hand.

52 Additionally, the Adjudicator certainly could not be said to have implicitly resolved the issues of the backcharges and variation works in the Adjudication Determination (in the manner described by Chan J in *TMM* at [77] (see [40] above)). The outcome of these two issues did not flow from the Adjudicator's conclusion regarding the issue of the release of the first half of

the retention monies, given that the latter could not possibly be construed to be an issue that was logically anterior to the former.

53 Finally, Bintai emphasised in its written and oral submissions that having regard to the notes of the oral conference, the Adjudicator could not be said to have completely failed to apply his mind to the two issues regarding the backcharges and variation works. On this basis, Bintai submitted that it could be inferred that the Adjudicator was in fact aware of and alive to those two issues, given that he had allowed full submissions on those two issues at the oral conference and had even asked questions and expressed his provisional views on those two issues at the conference. And this, when read together with the Adjudication Determination, in turn led to the inference that the Adjudicator had implicitly rejected Samsung's submissions on those two issues.

54 We rejected this submission. In our judgment, observations made by an adjudicator in the course of an oral hearing are generally nothing more than musings on his part. At least in the absence of exceptional grounds, the adjudicator's decision must be limited by the four corners of the adjudication determination, and should not be supplemented by speculative or provisional references to portions of the notes of any oral conference. This is so because it would be impossible to ascertain whether the thoughts expressed by the adjudicator in the course of such an oral hearing reflected his final determination on those issues or were, on the contrary, provisional and susceptible to change. Accordingly, if those observations are then wholly omitted from the adjudication determination that is later issued, far from inviting an inference that the adjudicator has implicitly rejected those submissions, such an omission only reflects a gaping lacuna in the reasoning presented in the adjudication determination and nothing more. In this light, Bintai's attempt here to argue that the observations made by the Adjudicator in the oral conference, when read

together with the Adjudication Determination, impliedly showed that the Adjudicator had made a final decision to reject Samsung's submissions on the two issues, was wrong in principle and must be rejected.

55 In a nutshell, therefore, the problem with the Adjudication Determination was *not* that the issues regarding the backcharges and variation works had been incorrectly analysed, but that the issues had not even been considered even though they were an essential element of the dispute. We were thus satisfied that the Adjudicator's failure to consider the issues regarding the backcharges and variation works, was a breach of the fair hearing rule and was contrary to the requirements of natural justice.

Failure to give reasons

56 Given our finding that the Adjudicator had completely failed to consider the issues regarding the backcharges and variation works, it was unnecessary for us to consider Samsung's alternative submission that the failure of an adjudicator to give reasons in an adjudication determination would also be sufficient to constitute a breach of the fair hearing rule and accordingly a breach of natural justice. Nevertheless, we make some brief observations in this regard in case it should be helpful when it becomes necessary for the matter to be considered more fully and to be decided on a future occasion.

57 The duty to give reasons has received fairly extensive treatment in the context of both court litigation (see *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [14]–[46], *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [66]–[69] and *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2015] 5 SLR 438 at [40]–[42]) and arbitration (see *TMM* at [97]–[105] and *AUF v AUG and other matters* [2016] 1 SLR 859 ("*AUF v AUG*") at [77]–[79]).

In *TMM*, Chan J observed that the standards for giving reasons applicable to judges in court litigation ought to be regarded as "assistive indicia" to arbitrators, given that the general duty of a judicial body to explain its decision is ineluctably a function of due process and justice, which are ideals that arbitrators should also subscribe to. At the same time, he also recognised the importance of considering the practical realities of the arbitral ecosystem such as promptness and price (at [102]–[103]). In practical terms for arbitrators, this meant that (at [104]):

> [e]ven 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. … [emphasis added]

58 The approach adopted in *TMM* was affirmed in *AUF v AUG*, where Belinda Ang Saw Ean J held that (at [79]):

> … 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.* [emphasis added]

59 If we were to adopt for adjudicators appointed under the Act the same practical approach that was taken in establishing the content of the duty to give reasons for arbitrators, it seems to us that any duty on adjudicators to give reasons when issuing their adjudication determinations might be even more attenuated. This is so because the main objective underlying the Act is, as we have pointed out earlier (at [1] above), to provide for an inexpensive and efficient mode of dispute resolution for payment disputes. To this end, the Act sets out a very robust set of timelines, many of which are mandatory, and adjudicators will often have much factual material to consider within a relatively

short span of time. Accordingly, balancing these various considerations may require a considerable margin of tolerance to be applied when the court considers a challenge mounted against a determination based solely on the alleged failure to give adequate reasons. Beyond this, however, we think it would be prudent to say no more until we are required to address this question on another occasion with the benefit of comprehensive submissions.

Whether the breach was sufficiently material as to cause prejudice to Samsung

60 It was common ground between the parties that an adjudication determination may only be set aside on the basis of a breach of natural justice that is sufficiently material as to cause prejudice to the aggrieved party in the adjudication. This much was first recognised in *Aik Heng Contracts and Services Pte Ltd v Deshin Engineering & Construction Pte Ltd* [2015] SGHC 293, when Lee Seiu Kin J affirmed and applied the decisions of the courts in England and in New South Wales (at [24]–[27], quoting *Balfour Beatty Construction Limited v The Mayor and Burgesses of the London Borough of Lambeth* [2002] BLR 288 at [27] and [29] and *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 168 at [142]–[147]). In *Metropole*, Coomaraswamy J further clarified that this was so in the context of the setting aside of adjudication determinations even though s 16(3)(*c*) of the Act does not expressly provide for such a requirement (at [62]–[67]). We agreed with the principles set out in both those decisions.

61 As for what must be shown in order for a breach of natural justice to be considered to be sufficiently material, we held in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 that "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 … proceedings in some

meaningful way" (at [91]). But in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125, we clarified that it would be incorrect in principle to require the court to be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated because "it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator" (at [54]). We thus held that the test for whether a breach of natural justice is considered sufficiently material should be (also at [54]):

> … 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 … [emphasis in original]

62 In our judgment, the Adjudicator's failure to consider the issues regarding the backcharges and variation works was sufficiently material as to prejudice Samsung. We repeat our observation, once again, that those two issues had been raised in the Adjudication Response, which featured a response amount of "($2,190,963.62)" (see [15] above), and that the absolute value of this response amount was clearly greater than Bintai's claim in the Adjudication Application of merely $2,146,250.00 (see [13] above). Accordingly, had the Adjudicator properly considered those two issues in coming to his decision in the Adjudication Determination, the Adjudicator *could reasonably* have found that Samsung's response was valid, such that even if Bintai's claim for the release of the first half of the retention monies were valid, Samsung would still

not be liable to pay Bintai any sum of money. For these reasons, we dismissed the appeal.

Personal liability of solicitors for costs

63 We now turn to our reasons for the costs order that we made against the solicitors in this appeal.

64 In the course of preparing for the appeal, counsel for Bintai filed and served – aside from Bintai's written submissions and accompanying Bundles of Authorities – the ABD, which comprised 13 volumes of documents, almost all of which had about 300 pages each. In our judgment, to present the court with a bundle of almost 4,000 pages of documents for the purpose of this appeal, which concerned narrow issues of law and even narrower issues of fact, was manifestly excessive and plainly unnecessary. Accordingly, we invited counsel for both parties during the hearing before us to show cause regarding why they should not be made to bear, pursuant to O 59 r 8(1) of the ROC, personal liability for the costs incurred in respect of the preparation of the ABD.

65 Order 59 r 8(1) of the ROC provides as follows:

> **Personal liability of solicitor for costs (O. 59, r. 8)**
>
> **8.**—(1) Subject to this Rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may make against any solicitor whom it considers to be responsible (whether personally or through an employee or agent) an order —
>
> (*a*) disallowing the costs as between the solicitor and his client; and
>
> (*b*) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or

> (*c*) directing the solicitor personally to indemnify such other parties against costs payable by them.

66 Pursuant to this provision, the court is empowered to make an order for costs personally against a solicitor provided the following three-step test laid down by the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 231 is satisfied:

> (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

See *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 ("*Prometheus*") at [75], citing *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 220 at [58] and *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 at [71].

67 There are, in our view, at least two different types of situations where a solicitor may be regarded as having acted improperly, unreasonably or negligently, such that personal costs orders pursuant to O 59 r 8(1) of the ROC may be made against the solicitors in question. The first is where the solicitor advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action. The appropriate costs order in such a situation would be to direct, pursuant to O 59 r 8(1)(*b*), the solicitor in question to bear a portion of the party-and-party costs that have been ordered against his or her client. An example of this can be seen in our decision in *Prometheus*, where the appellant had filed appeals against the decision of the High Court judge below to dismiss two originating summonses seeking to set aside an arbitral award on broadly identical grounds. The appellant also filed two additional summonses

in the Court of Appeal shortly after the appeals had been filed, alleging that the High Court judge had been biased against the appellant. We dismissed the appeals and the summonses, fixing costs of $55,000 plus disbursements of $1141.40 in favour of the respondent (at [74]). We also ordered, pursuant to O 59 r 8(1)(*b*), Mr Arvind Daas Naaidu, who was the solicitor for the appellant, to personally bear $10,000, being the portion of the costs that had been apportioned to the filing and prosecution of the summonses (at [75]). We held that this costs order was justified because Mr Naaidu had assisted in prosecuting the summonses even though he had no reasonable basis for doing so, given that the summonses were "wholly ill-conceived applications that should never have been filed" and hence were an abuse of the process (at [76]).

68 The second situation would be where the solicitor engages in the thoughtless and undiscerning preparation of documents in respect of court proceedings. The appropriate costs order in such a situation would generally be, pursuant to O 59 r 8(1)(*a*), to disallow the costs as between the solicitor and his or her client. An example of this may be found in the recent matter before us in *Tommy Wong Poh Choy @ Wong Pau Chou and others v Devagi d/o Narayanan @ Devaki Nair and another*, Civil Appeal No 75 of 2017 (28 February 2018) ("CA 75/2017"), in which the appellants, who were members of the Management Committee of the Neptune Court Owners' Association ("NCOA"), brought an appeal against the decision of the High Court judge granting the respondents' application for a declaration that the appellants' use of funds belonging to the NCOA to fund their legal costs for certain defamation proceedings that they had brought against other Neptune Court unit-owners was wrongful, and ordering the appellants jointly and/or severally to refund to the NCOA the funds that had been used to pay for the legal fees for those defamation proceedings. The appellants also filed a summons seeking to adduce

further evidence. We dismissed both the summons and the appeal, and fixed the costs of the proceedings at $60,000, inclusive of disbursements.

69 In preparation for that appeal, counsel for the appellants, Mr Au Thye Chuen and Ms Carolyn Tan Beng Hui, filed a 3535-paged Record of Appeal ("RA") as well as a three-volume Core Bundle ("CB") comprising a total of about 550 pages of documents, even though the appeal only concerned a very narrow issue. We considered significant portions of both the RA and CB to be entirely superfluous and irrelevant to the sole issue on appeal and to be duplicative of other material that was already before the court. Pursuant to O 59 r 8(1)(*a*), we therefore disallowed Mr Au and Ms Tan from recovering from their clients the disbursements for the photocopying of documents in preparation for the appeal. However, given the especially unsatisfactory manner in which the appeal was prosecuted by Mr Au and Ms Tan in that case, we also directed, pursuant to O 59 r 8(1)(*b*), that they personally bear half the amount of $60,000 that we had awarded against the appellants.

70 We now return to the facts in the present appeal. On 24 January 2018, the legal registry of the Supreme Court ("the Registry") had conveyed to both parties the directions issued by Tay Yong Kwang JA, which included the following:

> **Annex A**
>
> After considering the correspondence between the Registry of the Supreme Court and the parties in this matter, Judge of Appeal Justice Tay Yong Kwang has decided that the parties do not need to attend a Case Management Conference (CMC) and has given the directions set out below:
>
> …
>
> 6 The Appellant shall file and serve an Agreed Bundle of Documents, together with the Appellant's written submissions, containing the following:

> a. The High Court Judgment;
>
> b. The Originating Summons to enforce/set aside the adjudication determination;
>
> c. The Summons to set aside the adjudication determination;
>
> d. The ***affidavits relevant to the issue(s) in the appeal (with exhibits edited for relevance)***;
>
> e. The High Court order ordering the payment out of the amount adjudicated upon or staying the payment out of the amount adjudicated upon;
>
> f. Any other documents directed by the Judge at the Case Management Conference.
>
> [Note: There is no need to include the written submissions used in the High Court]
>
> …
>
> [emphasis added in bold italics]

71 Pertinently, the parties were directed, amongst other things, to file the "affidavits relevant to the issue(s) in the appeal (with exhibits edited for relevance)". Before us, counsel for Bintai conceded that they had been mistaken in interpreting the directions provided by the Registry, and should not have included the entirety of the affidavits filed in the hearing before the Judge below. As for counsel for Samsung, they initially submitted that they should not be personally responsible for the costs incurred in the filing and serving of the ABD because counsel for Bintai had prepared the ABD. However, they subsequently admitted that they too carried the responsibility of objecting to the inclusion in the ABD of the entirety of the affidavits that both parties had relied on below.

72 In our judgment, this was an appropriate case to order counsel for both parties to bear personal liability for the majority of the photocopying charges and the stamp fees incurred in respect of the ABD. The three-step test set out at [66] above was satisfied, and the present case fell comfortably within the second

situation described at [68]–[69] above for which a personal costs order under O 59 r 8(1)(*a*) of the ROC may be appropriate.

73 Counsel for both parties had acted unreasonably and improperly in failing to conduct proceedings with reasonable competence and expedition by preparing the relevant documents for the appeal in an indiscriminate, undiscerning and thoughtless manner. Despite direction 6(d) in the letter from the Registry, which specifically required that the affidavits to be included in the ABD should be "relevant to the issue(s) in the appeal (with exhibits edited for relevance)", it was clear to us that counsel for *both* parties had made no attempt to abide by this. The voluminous documents placed before us instead revealed a lack of any attempt whatsoever on the part of counsel for *both* parties to select the relevant affidavits for inclusion in the ABD and to edit the exhibits for relevance to the issues in dispute. Although it was counsel for Bintai who filed and served the ABD, we considered that counsel for *both* parties should be held responsible, because the ABD was ultimately meant to be an *agreed* set of documents. In this regard, counsel for Samsung ought to have objected to the counsel for Bintai's indiscriminate inclusion of every affidavit that had been presented before the Judge below. However, we accept the greater responsibility in this respect falls on Bintai's counsel.

74 The inclusion of copious amounts of unnecessary material in the ABD caused the parties to incur unnecessary costs and also inconvenienced the court and it was, in all the circumstances, just to order Bintai's counsel to bear 90% of the photocopying charges and the stamp fees for the ABD, with Samsung's counsel contributing to 20% of the sum borne by Bintai's counsel.

Conclusion

75 For these reasons, we dismissed the appeal. As for the costs of the appeal, we fixed the party-and-party costs to Samsung in the sum of $20,000 (including disbursements). We also ordered that 90% of the photocopying charges and the stamp fees for the ABD was not to be charged by Bintai's counsel to Bintai, and that Samsung's counsel was to contribute to 20% of the photocopying charges and stamp fees that Bintai's counsel was to bear.

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

Chong Kuan Keong and Sia Ernest (Chong Chia & Lim LLC) for the appellant;
Aw Wei Keng Kelvin and Lee Kok Wee, Eugene (Morgan Lewis Stamford LLC) for the respondent.