IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 130

Originating Summons No 288 of 2015

Between

ASG

… Plaintiff

And

ASH

… Defendant

GROUNDS OF DECISION

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

[Arbitration] – [Arbitral tribunal] – [Duties]

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ASG
v
ASH

[2016] SGHC 130

High Court — Originating Summons No 288 of 2015
Vinodh Coomaraswamy J
1 – 2 December 2015

22 July 2016

Vinodh Coomaraswamy J

Introduction

1 By a principal award dated 2 January 2015, followed by a correction award dated 19 January 2015 and a costs award dated 6 April 2015, a sole arbitrator dismissed the bulk of the plaintiff's claims against the defendant. The plaintiff now applies on various grounds to set aside these awards. In relation to the principal award, the plaintiff's main ground is that a breach of the rules of natural justice occurred in connection with its making which has caused prejudice to the plaintiff. The breach on which the plaintiff relies is either that the arbitrator failed to consider or to attempt to understand the plaintiff's evidence and submissions on a central aspect of its case or that the plaintiff was unable to present its case on that aspect. In relation to the two subsequent awards, the plaintiff's ground is that the arbitrator had already

made an award on costs in his principal award and therefore, being *functus officio*, lacked the jurisdiction to revisit his costs orders as he attempted to do in the correction award and the costs award.

2 Having considered the parties' written and oral submissions, I have dismissed the plaintiff's application to set aside the principal award. I have, however, allowed the plaintiff's application to set aside the correction award insofar as it deals with costs and the costs award in its entirety.

3 The plaintiff has appealed against my decision not to set aside the principal award. It has not appealed against my decision in relation to the correction award and the costs award. I now set out the grounds for my decision.

Background facts

4 The defendant is a developer which undertakes large construction projects.[1] It is represented before me by Mr Mohan Pillay. The plaintiff is a contractor specialising in piling works and the construction of diaphragm walls.[2] It is represented before me by Mr Alvin Yeo SC.

5 In 2008,[3] the defendant employed the plaintiff to construct the foundations for a substantial construction project in Singapore.[4] The project consists of three blocks, which I shall call Blocks 1, 2 and 3. The scope of the

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1 Award at para 2, at p 95 of the plaintiff's officer's affidavit dated 1 April 2015.

2 Claimant's opening statement in the arbitration at para 1, at p 1350 of the plaintiff's officer's affidavit dated 1 April 2015.

3 Plaintiff's written submissions dated 24 November 2015 at para 7.

4 Award at para 3, at p 95 of the plaintiff's officer's affidavit dated 1 April 2015.

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plaintiff's works comprised constructing the diaphragm walls for all three blocks as well as installing the bored piles for Block 3.[5]

6 A number of external consultants were involved in the project. Only the civil and structural engineers[6] and the architects[7] are relevant for present purposes. In accordance with the contract, the defendant in due course appointed a specific architect employed by the firm of architects to exercise certain powers under the contract, including the power to approve drawings, extend time and certify completion. At all material times and for all material purposes, the parties treated this individual architect and the firm of architects as being interchangeable. I shall therefore draw no distinction between them.

The contract

7 The contract between the parties comprises a number of documents[8] including a letter of acceptance dated 10 December 2007,[9] a set of standard terms and conditions of contract ("the Standard Conditions"),[10] particular conditions of contract[11] and various appendices.[12]

8 Under the contract, the plaintiff was to take possession of the site on 17 December 2007 and to start work by 24 December 2007. The plaintiff was

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5 Award at para 11, at p 96 of the plaintiff's officer's affidavit dated 1 April 2015.

6 Award at para 37(c), at p 111 of the plaintiff's officer's affidavit dated 1 April 2015.

7 Award at para 37(b), at p 111 of the plaintiff's officer's affidavit dated 1 April 2015.

8 Award at para 8, at p 96 of the plaintiff's officer's affidavit dated 1 April 2015.

9 The plaintiff's affidavit dated 1 April 2015 at pp 189 – 194.

10 The plaintiff's affidavit dated 1 April 2015 at pp 245 – 315.

11 The plaintiff's officer's affidavit dated 1 April 2015 at pp 312 – 314.

12 The plaintiff's officer's affidavit dated 1 April 2015 at p 316.

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obliged to complete the works within 6 months, *ie* on or before 23 June 2008.[13] If the plaintiff failed to complete the works on time, it was obliged to pay the defendant liquidated damages at the rate of $89,000 per day for Blocks 1 and 2 and $46,000 per day for Block 3. The plaintiff's total exposure in liquidated damages for all three blocks was thus a total of $135,000 per day.[14]

9 The dispute between the parties in the arbitration arose from the architects' refusal to grant the plaintiff an extension of time under the contract. If the architects had granted that extension of time in full, the date for the plaintiff to complete the works, and its liability to pay liquidated damages to the defendant, would have been postponed by 12 days.

10 Under cl 14.2 of the Standard Conditions, the architects were empowered to extend time for the plaintiff to complete its works if any one of a number of specified events occurred. What those events have in common, broadly speaking, is that they cause a delay in completing the works which is not the plaintiff's fault. That clause reads as follows:[15]

> **14.2 Extension of the Time for Completion**
>
> The time within which the Works or any phase or part of the Works is to be completed may be extended by the [architects] either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works which, notwithstanding due diligence and the taking of all reasonable steps by [the plaintiff] to avoid or reduce such delay, will or might be or has been caused by any of the following events:

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13 Award at para 16, at p 103 of the plaintiff's officer's affidavit dated 1 April 2015.

14 Award at para 16, at p 103 of the plaintiff's officer's affidavit dated 1 April 2015.

15 Award at para 14, at p 97 of the plaintiff's officer's affidavit dated 1 April 2015; also cl 14.2 of the Standard Conditions at p 273 of the plaintiff's officer's affidavit dated 1 April 2015.

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> …
>
> (h) The issue of any instruction for a variation.
>
> …
>
> (l) [The plaintiff] not having received from the [architects] within a reasonable time necessary Drawings, instructions or other information in regard to the Works for which notice has been given by the [plaintiff] in accordance with Clause 3.4.
>
> …
>
> Provided always that the [plaintiff] shall not be entitled to any extension of time where the instructions, or acts of the [defendant] or the [architects] are necessitated by or intended to cure any default of or breach of Contract by the [plaintiff] and such disentitlement shall not set the Time for Completion at large.

11 Under cl 14.3 of the Standard Conditions,[16] if the plaintiff anticipated a delay in the works caused by any of the events listed in cl 14.2, it was obliged to notify the architects in writing within 60 days of the event. The plaintiff was also obliged to indicate the reasons for the delay, the length of the delay, the length of the extension of time required and the effect on the programme of works. Within 60 days of receiving this notice, the architects were required to notify the plaintiff in writing whether, in their opinion, the event which the plaintiff had cited did, in fact, entitle it to the extension of time sought.

The plaintiff's two claims for an extension of time

12 On 27 December 2007, the plaintiff submitted a baseline programme of works which indicated that construction of the diaphragm walls at Blocks 1 and 2 would commence on 22 January 2008.[17]

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16 Award at para 15, at p 98 of the plaintiff's officer's affidavit dated 1 April 2015; also cl 14.3 of the Standard Conditions at p 274 of the plaintiff's officer's affidavit dated 1 April 2015.

17 Award at para 59, at p 127 of the plaintiff's officer's affidavit dated 1 April 2015.

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13 The contract required the plaintiff to submit shop drawings of the diaphragm walls and related works to the architects before starting on the work.[18] The parties agree that the plaintiff was obliged, under the contract, to wait for the shop drawings to be approved before it could start constructing the diaphragm walls.[19]

14 From 2 January 2008 to 29 January 2008, the engineers issued a number of changes to the toe level and other specifications for the diaphragm wall panels.[20] These changes required the plaintiff to excavate deeper in order to construct the diaphragm walls. The changes also meant that the panels within each block were no longer uniform but varied individually.[21] On 6 February 2008, the engineers approved by email, and with certain amendments, the first set of shop drawings. These shop drawings were sufficient for the plaintiff to start constructing the diaphragm walls.

15 Even after 6 February 2008, however, the engineers made further changes to the shop drawings and responded to various queries by the plaintiff. It was not until 18 February 2008 that the engineers stamped their approval on the shop drawings. The plaintiff started construction of the diaphragm walls on 18 February 2008.

16 The defendant's case in the arbitration was that the architects had approved the shop drawings on 6 February 2008 and that the plaintiff should

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18 Appendix to the Standard Conditions, at p 336 of the plaintiff's officer's affidavit dated 1 April 2015.

19 Expert's Joint Statement at para 4.1, at p 342 of the plaintiff's officer's affidavit dated 1 April 2015.

20 Award at para 62, at p 127 of the plaintiff's officer's affidavit dated 1 April 2015.

21 1st Factual Witness Statement of Widjaja Wong (produced for the arbitration) at para 14, at p 499 of the plaintiff's officer's affidavit dated 1 April 2015.

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accordingly have started constructing the diaphragm walls on that date. The plaintiff's case was that the architects had approved the shop drawings only on 18 February 2008, and that the plaintiff was therefore not responsible for the 12-day delay from 6 February 2008 to 18 February 2008. The plaintiff refers to its claim for an extension of time arising from the delay in starting construction of the diaphragm walls as its first extension of time claim.

17 The changes to the toe levels for the diaphragm wall panels also required the plaintiff to excavate significant additional quantities of rock. The plaintiff refers to its claim for an extension of time arising from the delay caused by having to carry out this additional rock excavation as its second extension of time claim.

The architects grant extensions of time

18 By a letter dated 25 March 2008, the plaintiff sought an extension of time arising from the engineers' changes in the toe levels of the diaphragm wall panels for Blocks 1 and 2. The letter identified two effects that flowed from the engineers' changes. The first effect was the delay in starting construction of the diaphragm walls. The second effect was the additional rock excavation required to construct the diaphragm walls.

19 Arising from the first effect, the plaintiff claimed an extension of time of 30 days, from 23 January 2008 to 21 February 2008. Arising from the second effect, the plaintiff estimated that the additional rock excavation would result in 118 days of delay.[22] The plaintiff concluded its letter by characterising the letter as the notice required by cl 14.3 of the Standard Conditions that the

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[22] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at E1 (or Tab 1).

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plaintiff considered itself entitled to an extension of time under cl 14.2(h) of those conditions (see [9] above).

20 By a letter in reply dated 14 April 2008,[23] the architects rejected the plaintiff's first extension of time claim. The grounds given were that the true reasons for the delay in starting construction of the diaphragm walls were all within the plaintiff's control. As for the plaintiff's second extension of time claim, the architects informed the plaintiff that they would defer their decision on the claim until the plaintiff provided a revised computation of the additional rock to be excavated, and also so that the architects could assess the plaintiff's claim in the light of actual events.

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[23] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at E4 (or Tab 2).

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21 By a letter dated 15 May 2008,[24] the plaintiff denied that its first extension of time of claim was necessitated by causes within its own control. The plaintiff therefore maintained its claim under that head for an extension of 30 days. As for its second extension of time claim, the plaintiff recomputed the additional quantities of soil and rock and estimated that it was entitled to an extension of 64 days. It reiterated that this figure was only an estimate and that it could not conclusively determine the number of days it was entitled to until after it had completed the excavations. On that basis, the plaintiff asked the architect for a 94-day extension of time, comprising 30 days on its first claim and 64 days on its second claim. That would postpone to 25 September 2008 the completion date for the works at Blocks 1 and 2.

22 By a letter dated 23 June 2008,[25] the architects responded by granting the plaintiff a 39-day extension of time. The precise words of the architects' grant is important:

> We refer to *your claims for extension of time dated 15 May 2008*....
>
> Pursuant to Clauses 2.1 and 14 of the Conditions of Contract, *you are granted an extension of 39 days*. In view of this, the Time for Completion has been extended from 23 Jun 2008 to 1 August 2008 *on the ground of instructions issued for the changes in toe depth for diaphragm wall panels issued* (construction drawings version C to C4 inclusive).
>
> You are *not entitled to any other extension of time for any other items and grounds* claimed todate [*sic*].
>
> [emphasis added]

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[24] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at E7 (or Tab 3).

[25] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at H-578 (or Tab 6).

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23 The architects' 39-day extension of time was thus expressed to have been granted for changes to the toe depth of the diaphragm wall panels. The plaintiff's case in the arbitration was that this letter: (1) granted the plaintiff a 39-day extension of time for, and *only* for its first extension of time claim; and (2) by its concluding words, rejected outright the plaintiff's second extension of time claim. In response, the defendant's case was that this letter granted the defendant a 39-day extension of time for all delay arising from the changes to the toe depth of the diaphragm wall panels, which covered *both* the delay caused by the late start in constructing the diaphragm walls *and also* the delay caused by additional rock excavation.

24 In any event, the plaintiff did not complete the works by the extended completion date of 1 August 2008. On 4 August 2008, the architects wrote to the plaintiff asserting that the defendant was thus entitled to deduct liquidated damages from future progress payments to the plaintiff.

25 On 26 August 2008, the plaintiff issued a formal notice of dispute under the Standard Conditions to the architects.[26] The plaintiff's position was that the architects had fixed the 39-day extension of time prematurely, *ie* before the actual amount of additional rock excavated could be ascertained.

26 On 22 December 2008, the architects granted the plaintiff a further extension of time of 36 days, comprising three elements: (i) "an additional extension of 15 days for the late finalization of the [diaphragm wall] design"; (ii) "an additional 15 days for the additional rock excavation"; and (iii) a 6-day extension for site obstruction. The third of these three elements is not material

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[26] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at I-161 (or Tab 7).

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to the parties' dispute. This total extension of 36 days postponed the completion date from 1 August 2008 to 6 September 2008.

27 On 23 December 2008, the plaintiff replied to the architects.[27] The plaintiff noted that the architects had granted an additional 36-day extension of time by its letter dated 22 December 2008. When added to the earlier 39-day extension of time (see [22] above), that meant that the plaintiff had been granted in all a 75-day extension of time. But the plaintiff indicated that it did not accept the architects' assessment of its entitlement to extension of time. The plaintiff also sought further clarification and particulars on how the architects had arrived at their decision on the plaintiff's second extension of time claim:

> viii) *We understand that you have granted 54 days extension of time for additional rock excavation.* Please confirm the basis of your assessment and the quantity of additional rock that you consider [the plaintiff] actually excavated.
>
> [emphasis added]

The point to note about this letter is that the plaintiff implicitly accepted the earlier 39-day extension of time (see [21] above) as having been granted on its second extension of time claim. That is how the plaintiff arrived at its understanding, set out in this letter, that the architects had granted a total of 54 days "for additional rock excavation": by adding the 39-day extension of time granted on 23 June 2008 to the 15-day extension of time granted on 22 December 2008.

28 Subsequently, on 1 April 2009, the plaintiff sent the architects a second formal notice of dispute under the Standard Conditions.[28] In it, the plaintiff

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[27] Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at I-165 (or Tab 9).

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took the position that it was entitled to 74 days, and not 54 days, on its second extension of time claim:

> 23. We maintain that our proper extension of time entitlement *in respect of the additional rock excavation* is 74 days *and not 54 days* as you have, in the absence of any cogent explanation, seemingly arbitrarily assessed.
>
> [emphasis added]

This letter too implicitly accepted that the 39-day extension of time had been granted on the plaintiff's second extension of time claim.

Completion of the works

29 On 8 January 2009, the architects certified that the works for Blocks 1, 2 and 3 were substantially completed on 2 October 2008. This was 26 days after the extended completion date of 6 September 2008 as stated in the architects' letter of 22 December 2008 (see [26] above).

30 On 16 January 2009, the defendant notified the plaintiff that it was entitled to impose liquidated damages on the plaintiff in the sum of approximately $3.51m for an alleged delay of 26 days in completing the works.[29]

31 Clause 34 of the Standard Conditions stipulates arbitration as the parties' agreed dispute-resolution procedure.[30] On 18 August 2009, the plaintiff served on the defendant its notice of arbitration issued under cl 34.[31]

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28 Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at I-168 (or Tab 10).

29 Tay Ah Chai's affidavit dated 6 May 2015 at p 118.

30 Cl 34 of the Standard Conditions, at p 306 of the plaintiff's officer's affidavit dated 1 April 2015.

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32 On 3 March 2010, the tribunal was duly constituted.[32]

The arbitration

33 The plaintiff sought the following relief in the arbitration:[33]

(a) A declaration that the plaintiff was entitled to an extension of time of a further 26 days to complete the works, comprising a further 12-day extension of time for the late start in constructing the diaphragm walls and a further 14-day extension of time for additional rock excavation;

(b) A declaration that the defendant had wrongfully imposed liquidated and ascertained damages; further and/or in the alternative that the defendant was not entitled to impose liquidated damages because the sums amounted to a penalty;

(c) Recovery of miscellaneous monetary claims totalling approximately $2.7m comprising prolongation costs, loss and expense, payment for variation works and/or materials escalation costs; and

(d) The sum of approximately $3.6m outstanding under the last four payment certificates together with contractual interest.

34 The defendant denied all of the plaintiff's claims. It also counterclaimed the sum of $966,000 by way of additional liquidated damages for the plaintiff's delay in completing the works.[34]

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31 Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at H-604 (or Tab 11).

32 Award at para 24, at p 106 of the plaintiff's officer's affidavit dated 1 April 2015.

33 Award at para 32, at p 108 of the plaintiff's officer's affidavit dated 1 April 2015.

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35 The evidential phase in the arbitration took place over nine days in March and April 2014. The plaintiff called five witnesses, including two expert witnesses. The defendant called nine witnesses, including three expert witnesses.[35]

36 The closing oral submissions took place over two days in June and July 2014. In the course of oral closing submissions, the parties agreed that the arbitrator should make his award save as to costs, with the parties to address the issue of costs separately.

The award

37 The arbitrator issued his award on 2 January 2015. In it: (i) he dismissed the plaintiff's claim for an extension of time of a further 26 days to complete the works; (ii) he allowed several of the plaintiff's miscellaneous claims; and (iii) he made no order on the defendant's counterclaim.

38 In the final paragraph of the principal award, having apparently overlooked the parties' agreement that the award should be made save as to costs (see [36] above), the arbitrator made the following orders on costs:

> 162. The Tribunal therefore pronounces as follows:
>
> …
>
> (12) …[The defendant] is awarded ¾th costs of these proceedings as between party and party, such costs to be agreed, failing which to be taxed.
>
> (13) The fees and expenses of the Tribunal and the costs and expenses of this Award shall be borne by the parties in the proportion of ¾th by [the plaintiff] and

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[34] Award at para 33, at p 108 of the plaintiff's officer's affidavit dated 1 April 2015.

[35] Award at paras 35 and 36, at pp 109 – 110 of the plaintiff's officer's affidavit dated 1 April 2015.

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> ¼th by [the defendant]. The Tribunal determines its fees and expenses at S$297,500.00 which shall be paid in the first instance out of the deposits held by the solicitors for the parties to account of the Tribunal's fees. Payment by one party in excess of the apportionment shall be reimbursed by the other party.

The correction award

39 By a letter dated 9 January 2015, copied to the defendant's solicitors, the plaintiff's solicitors asked the arbitrator to correct a computational error in the award.[36] It is common ground that the error identified was indeed an error.

40 On 14 January 2015, the defendant's solicitors reminded the arbitrator that the parties had agreed during the oral closing submissions that the award should be made save as to costs, with the parties to address the issue of costs separately. The defendant's solicitors therefore asked the arbitrator to give directions for the parties to present written submissions on costs.

41 On 14 January 2015, the plaintiff's solicitors objected to the defendant's solicitors' request that the arbitrator deal with costs separately. They took the position that the arbitrator had already made his decision on costs, and was thereby *functus officio* with no jurisdiction or power to revisit that decision.[37]

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36 The plaintiff's officer's affidavit dated 1 April 2015 at p 3602.

37 The plaintiff's officer's affidavit dated 1 April 2015 at p 3608.

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42 On 19 January 2015, the arbitrator issued the correction award. It made three corrections to his principal award of 2 January 2015. The first correction was to rectify the non-controversial computational error (see [39] above). It is common ground that the arbitrator was entitled to correct the error in this way. The second and third corrections, however, attempted to withdraw his earlier orders on costs by replacing sub-paragraphs 162(12) and 162(13) of the award (see [38] above) with the following sub-paragraphs:

> (12) …[C]osts of and or related to these proceedings reserved.
>
> (13) The Tribunal determines its fees and expenses to the date of this Award at S$297,500.00 which shall be paid in the first instance of the deposits held by solicitors for the parties to account of the Tribunal's fees. Payment by one party in excess of the apportionment of such fees and expenses by the other party should be reimbursed by the other party.

Costs award

43 On 20 January 2015, the defendant's solicitors repeated their request to the arbitrator for directions to the parties to submit on costs.[38] On 30 January 2015, the plaintiff's solicitors indicated that they maintained their position taken on 14 January 2015 (see [41] above) that the arbitrator was *functus officio*.[39]

44 On 3 February 2015, the arbitrator directed the parties to file and serve written submissions on the costs of the arbitration.[40] The defendant's solicitors lodged their submissions on 10 February 2015.[41] The plaintiff's solicitors

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38 The plaintiff's officer's affidavit dated 1 April 2015 at p 3611.

39 The plaintiff's officer's affidavit dated 1 April 2015 at p 3613.

40 The plaintiff's officer's affidavit dated 1 April 2015 at p 3616.

41 The plaintiff's officer's affidavit dated 1 April 2015 at p 3624.

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lodged theirs on 27 February 2015,[42] expressly without prejudice to their position that the arbitrator was *functus officio*.

45 On 6 April 2015, the arbitrator delivered the costs award.[43] The substance of the costs award was in the same terms as the orders on costs in his principal award (see [38] above), save that the costs now included his additional fees and expenses arising from the costs award itself.

Application to set aside the award

46 Meanwhile, in anticipation of the costs award, the plaintiff commenced these proceedings on 1 April 2015, applying for the principal award, the correction award and "any subsequent award on costs…made by the arbitrator"[44] to be set aside.

47 The plaintiff brings its application to set aside the principal award on the following grounds:

(a) That there was a breach of the rules of natural justice in connection with the making of the award which prejudiced the plaintiff's rights

(b) That the award failed to deal with a dispute or issue which was contemplated by or fell within the terms of submission to arbitration or which was otherwise a subject of the arbitration; and

(c) That the plaintiff was unable to present its case.

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42 The plaintiff's officer's affidavit dated 1 April 2015 at p 3645.

43 Tay Ah Chai's affidavit dated 6 May 2015 at p 62.

44 OS288/2015, prayer 1.

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48 The plaintiff brings its application to set aside that part of the correction award which deals with costs and the entirety of the costs award on the following grounds:

(a) That the arbitrator had become *functus officio* on 2 January 2015 upon rendering his decision on costs in the principal award and was therefore devoid of jurisdiction to issue further decisions on costs; or

(b) That the arbitrator dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or that the awards contain matters beyond the scope of the submission to arbitration.

The issues

49 In arguments before me, Mr Yeo focused on his application in respect of the principal award and, within that award, focused on the plaintiff's second extension of time claim.[45] He did not, however, abandon the plaintiff's case on the first extension of time claim. The plaintiff's appeal, however, is against only my decision to dismiss the plaintiff's application in respect of the second extension of time claim.

50 In the circumstances, the substance of the plaintiff's case raises the following single issue: whether the arbitrator breached the principles of natural justice in the way in which he dealt with the plaintiff's case on its second extension of time claim.

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[45] Transcript of 1 December 2015, p 23 at line 9; p 34 at line 3.

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51 I begin with a brief summary of the relevant legal principles.

Setting aside for breach of natural justice

52 Section 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") allows a court to set aside an award for breach of natural justice. That provision reads as follows:

> **Court may set aside award**
>
> **48.**—(1) An award may be set aside by the Court –
>
> (a) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that –
>
> …
>
> (vii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced …

53 In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"), the Court of Appeal held (at [29]) that a party challenging an arbitration award for breach of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

The policy of minimal curial intervention

54 The Court of Appeal also identified (in *Soh Beng Tee* at [65]) the court's approach to an application to set aside an award for breach of natural justice. As a general proposition, the courts will not readily accede to such an application, given the policy of minimal curial intervention. That policy is characterised by a desire to "support, and not to displace, the arbitral process" (*Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29]). That desire is, in turn, founded on the courts' recognition that the

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parties have chosen arbitration as their dispute resolution process and, within that process, have chosen their own adjudicators. Just as they accept the benefits of the party autonomy which they bargained for, so must they accept its consequences (*AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*") at [37]).

55 I summarise briefly the principles stated in *Soh Beng Tee* that are relevant to the present case:

(a) Parties to arbitration have, in general, a right to be heard on every issue that may be relevant to the resolution of a dispute.

(b) A successful party should not be deprived of the fruits of arbitration by technical challenges or an attempt to reagitate the merits of the dispute disguised as a setting-aside application.

(c) Minimal curial intervention is underpinned by two considerations: first, the need to recognise the autonomy of the arbitral process by encouraging finality; and second, that parties who opt for arbitration acknowledge and accept the attendant risk of having only a very limited right of recourse to the courts.

(d) It is not the function of the court to comb an award to assign blame or to find fault in the process. Rather, the court should read an award generously so as to remedy only meaningful breaches of the rules of natural justice which actually cause prejudice.

An arbitrator's duty to deal with the issues and submissions

56 Where a dissatisfied party alleges that a tribunal failed to deal with an issue before it, the courts will take a "generous approach" toward reading the

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arbitral award: *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [86]. In this regard, Chan Seng Onn J in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") (at [44]) cited with approval certain observations of the English High Court in *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 ("*Atkins*"). In that case, Akenhead J said at [36]:

> I consider that it is very important that, where the Court is asked to conduct an exercise to determine whether or not in reality and substance an arbitrator has failed to deal with all the issues put to it [*sic*] within the meaning of Section 68(2)(d), *the Court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written.* This is particularly so where the arbitrator in question is not only eminent and highly respected in his field but also has immense legal experience in the relevant field of law concerned. In a clear and obvious case, of course the Court will find that the ground exists and can then move on to consider whether or not the circumstances merit interfering with the award.
>
> [emphasis added]

57 Chan Seng Onn J also cited the decision of Bingham J (as Lord Bingham then was) in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ("*Zermalt*") 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]

58 The observations in *Atkins* and *Zermalt* were approved by the Court of Appeal in *BLC* at [86] and *AKN* at [59]. In *AKN*, the Court of Appeal explained (at [38]) that the parties do not have a right to a "correct" decision

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from an arbitrator. They have only a right to a decision which is within the ambit of their consent to have their dispute arbitrated and which follows a fair process. This means that "poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award; even a misunderstanding of the arguments put forward by a party is not such a ground" (at [59]). Thus, following the policy of minimal curial intervention, the courts will not interfere in the merits of an award in order to rescue parties who have made forensic choices that they might come to regret, or to offer them a second chance to canvass the merits of their respective cases (at [37]).

59 In *TMM*, Chan J identified and discussed an arbitrator's duty to deal with the arguments presented (at [72] – [77]) and the duty to attempt to understand the parties' submissions (at [88] – [91]). First, in relation to a tribunal's duty to deal with the arguments presented:

(a) A tribunal does not have a duty to deal with every issue that each party raises. The tribunal is required only to deal with the essential issues.

(b) Tribunals must be given fair latitude to select which issues are essential. A court should not be too ready to intervene in this regard.

(c) In deciding the essential issues, the tribunal need not deal with every argument which the parties have canvassed under each essential issue.

(d) As long as a decision on one argument suffices to resolve an essential issue, the tribunal need not go on to consider all other arguments canvassed under that issue and which have become of academic interest only. As Judith Prakash J stated in *SEF Construction*

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Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733 at [60], "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made".

(e) An issue need not be resolved expressly in an award; it may be resolved implicitly. Resolving an issue does not have to entail navigating all the arguments and all the evidence. If the outcome of certain issues flows from the conclusion of a specific logically anterior issue, the tribunal may dispense with delving into the merits of the arguments and evidence for the former.

60 As for the tribunal's duty to attempt to understand the parties' submissions:

(a) A tribunal must demonstrably have at least attempted to comprehend the parties' arguments on the essential issues.

(b) The inability to ascertain the explanation for a tribunal's decision is only one of the factors which may establish that the tribunal did not in fact properly attempt to consider or comprehend the parties' arguments.

(c) The central inquiry is whether the award shows that the tribunal applied its mind to the critical issues and arguments.

(d) An assessment of whether the tribunal attempted to understand the parties' submissions is effectively an investigation into the tribunal's mind. The tribunal may, after applying its mind to an issue, come to a decision which may be characterised as inexplicable because it has failed to comprehend the submissions or has comprehended them erroneously. That is not a breach of the rules of natural justice.

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61 In *AKN*, the Court of Appeal explained that a court will not infer that a tribunal has failed to consider an important issue unless the inference is clear and virtually inescapable (at [46] – [47]):

> 46 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 ("*Soh Beng Tee*") 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.*
>
> 47 *Front Row* 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]). This principle is important because it points to *an important 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*

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> *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 italics; emphasis in original in bold italics]

62 This passage from *AKN*, applied to the present case, means that the plaintiff must demonstrate that this is not a case where the arbitrator simply misunderstood the plaintiff's submissions or the law on an important issue, or merely chose not to deal with an aspect of the plaintiff's submissions on that issue because he thought it unnecessary to do so. What the plaintiff must demonstrate is a clear and virtually inescapable inference that the arbitrator did not apply his mind at all to that aspect of the plaintiff's submissions. That undoubtedly sets a high bar for the plaintiff. That is rightly so, given the policy of minimal curial intervention and its underlying basis in party autonomy.

The requirement of prejudice

63 The terms of s 48(1)(a)(vii) of the Act (see [52] above) make clear that a successful plaintiff must not only show that a breach of natural justice took place but also that it suffered prejudice by reason of the breach. The Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") set out at [54] in clear terms that the requirement to show prejudice requires the plaintiff to show that the breach of natural justice could reasonably have made a difference to the arbitrator's reasoning:

> 54 … To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle 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. Seen in this light, it

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

The first extension of time claim

64 As I have mentioned, the plaintiff's first extension of time claim was that it was entitled to an additional 12 days for the delay in starting construction of the diaphragm walls. The plaintiff's case before me is that the arbitrator breached the rules of natural justice in rejecting this claim. The plaintiff did not advance this part of its case with great enthusiasm. Indeed, Mr Yeo conceded candidly that, on this issue at least, the arbitrator "posed the right question" to himself"[46] and came to a conclusion on the question.[47] That is no doubt why the plaintiff does not pursue this aspect of its case on appeal.

65 I will nevertheless state very briefly my reasons for rejecting the plaintiff's case before insofar as it relates to the first extension of time claim. The plaintiff makes three main submissions. First, the award does not attempt to analyse the plaintiff's evidence and submissions as to how events *after* 6 February 2008 entitled it to an extension of time up to 18 February 2008.[48]

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46 Transcript for 1 December 2015, p 33 at lines 25 to 29.

47 Transcript for 1 December 2015, p 108 at lines 12 to 19.

48 Plaintiff's written submissions dated 24 November 2015 at para 133.

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Second, despite this, even if the arbitrator did have regard to the plaintiff's case in this regard, he nevertheless departed dramatically from it in arriving at his decision.[49] Finally, the plaintiff suffered prejudice because a consideration of the plaintiff's evidence and submissions could reasonably have made a difference to the arbitrator's decision.[50]

66 The defendant makes four points in response. First, the arbitrator was alive to events after 6 February 2008 because he makes reference to them in the award.[51] Second, even if the award makes no mention of the events after 6 February 2008 on which the plaintiff relied, this does not lead to a clear and virtually inescapable inference that the arbitrator failed to consider those events in coming to his decision.[52] Third, there was no credible basis to suggest that the arbitrator simply overlooked or ignored[53] the parties' evidence and submissions on events after 6 February 2008, which was substantial. Finally, all of the matters which the plaintiff complains of are also at least equally consistent with the arbitrator having simply misunderstood the plaintiff's case, or having been mistaken as to the law, or having chosen not to deal with the plaintiff's arguments because he found it unnecessary to do so, notwithstanding that such a view may have been formed due to a misunderstanding of the plaintiff's case.[54]

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49 Plaintiff's written submissions dated 24 November 2015 at para 138.

50 Plaintiff's written submissions dated 24 November 2015 at para 140.

51 Defendant's written submissions dated 24 November 2015 at para 86.

52 Defendant's written submissions dated 24 November 2015 at para 88.

53 Defendant's written submissions dated 24 November 2015 at para 92.

54 Defendant's written submissions dated 24 November 2015 at para 94.

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67 I accept the defendant's second, third and fourth points. The arbitrator understood clearly the primary disputed issue on the plaintiff's first extension of time claim:[55] the date on which the shop drawings for a particular diaphragm wall panel were approved or deemed approved. He identified the parties' opposing positions on the disputed issue: that the defendant contended that the date of approval was 6 February 2008, while the plaintiff contended that it was 18 February 2008. He then identified specifically an email dated 6 February 2008 as the approval necessary to enable the plaintiff to start constructing the diaphragm walls. The arbitrator's sequence of reasoning is entirely logical. His omission in his award of any reference to events after 6 February 2008 is explicable on grounds other than those advanced by the plaintiff.

68 For these reasons, I have rejected the plaintiff's complaint about the manner in which the arbitrator dealt with the first extension of time claim.

The second extension of time claim

The parties' cases before the arbitrator

69 In the arbitration, the plaintiff's case on its second extension of time claim rested on two propositions: (a) the architects had granted the plaintiff only a *15-day* extension of time for additional rock excavation on 23 December 2008 (see [26] above);[56] and (b) based on the quantities of rock actually excavated, the plaintiff was entitled to a 14-day extension of time in addition to the 15 days already granted.

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55 Award at para 58.

56 Points of Claim (Amendment No. 2), paras 9 – 16.

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70 The defendant's response was that: (a) the architects had granted the plaintiff in total a *54-day* extension of time for additional rock excavation on 23 June 2008 (see [22] above) and 23 December 2008 (see [26] above); and (b) even based on the quantities of rock actually excavated, the plaintiff was not entitled to any extension of time beyond those 54 days.[57]

The arbitrator's decision

71 The arbitrator begins this section of his award by observing that the parties' experts agree that the time taken by the additional rock excavation (expressed in days) is calculated by applying the following formula:[58]

$$\text{Time} = \frac{\text{Additional rock quantity (cubic metres)}}{\text{Output (cubic metres per day)}}$$

He notes, however, that the parties' experts disagree on the quantity of additional rock excavated by the plaintiff. They also disagree on whether the formula should be applied using the plaintiff's *planned* output or its *actual* output.[59]

72 The arbitrator first considers the quantity of additional rock excavated. The plaintiff's expert's opinion was that the quantity was 1,153 cubic metres. The defendant's expert's opinion was that the quantity was 623 cubic metres, and that even on the plaintiff's best case, it was no more than 871 cubic metres. The arbitrator accepts the defendant's expert's opinion[60] because it is based on contemporaneous documentary records[61] compiled and maintained

57 Plaintiff's written submissions dated 24 November 2015 at para 147.

58 Award at para 76, at p 130 of the plaintiff's officer's affidavit dated 1 April 2015.

59 Award at para 77, at p 130 of the plaintiff's officer's affidavit dated 1 April 2015.

60 Award at para 90, at p 134 of the plaintiff's officer's affidavit dated 1 April 2015.

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by the plaintiff itself[62] and acknowledged to be accurate by the plaintiff's own project manager.[63] The arbitrator thus find that the additional rock excavated was only 623 cubic metres.

73 On the issue of the output or excavation rate, the arbitrator accepts[64] that the rate to be applied must be based on the plaintiff's planned output rather than its actual output.[65] Based on the planned output of 1,000 cubic metres over a contractual period covering 58 working days, the planned output was 17.24 cubic metres per day. Applying the rate of 17.24 cubic metres per day to the additional rock quantity of 623 cubic metres, the arbitrator finds that the plaintiff is entitled to a 36-day extension of time for additional rock excavation.[66]

74 The arbitrator then concludes as follows:

> 106. … *This is less than the 54 days [extension of time] granted by the [architects].*
>
> 107. [The plaintiff] is therefore not entitled to further [extension of time] of 14 days for additional rock excavation claimed. Hence [the plaintiff's] 2nd [extension of time] claim fails.
>
> [emphasis added]

75 The crux of the plaintiff's case on its second extension of time claim is that the arbitrator fails, in these paragraphs of the award, to deal with the first proposition of the plaintiff's case (see [69] above). In other words, the

61 Award at para 79, at p 131 of the plaintiff's officer's affidavit dated 1 April 2015.

62 Award at para 80, at p 131 of the plaintiff's officer's affidavit dated 1 April 2015.

63 Award at para 84, at p 132 of the plaintiff's officer's affidavit dated 1 April 2015.

64 Award at para 105.

65 Award at para 105, at p 136 of the plaintiff's officer's affidavit dated 1 April 2015.

66 Award at para 106, at p 137 of the plaintiff's officer's affidavit dated 1 April 2015.

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arbitrator does not, at this point in his award, address the plaintiff's case that the architects had granted the plaintiff only a 15-day extension of time for additional rock excavation. Instead, he simply adopts the defendant's figure of 54 days without even acknowledging that the figure is disputed.

The plaintiff's submissions

76 The plaintiff therefore submits that the arbitrator has disregarded, or failed to attempt to understand, an essential element of the plaintiff's case on the second extension of time claim.[67]

77 Mr Yeo described to me the plaintiff's argument on this proposition.[68] He refers to the chain of correspondence which I have described at [18] to [28] above and draws a contrast between the architects' letter of 23 June 2008 granting a 39-day extension of time (see [22] above) and their letter of 22 December 2008 granting a 36-day extension of time (see [26] above). He points out that the 22 December letter specifically characterises the 15-day extension of time which it grants as being "for additional rock excavation".[69] The 23 June letter does not characterise the 39-day extension of time which it grants in the same specific way. Instead, it characterises the extension of time as being granted "on the ground of instructions issued for the changes in toe depth for diaphragm wall panels issued". He notes, further, that that letter ends by expressly rejecting all of the plaintiff's other claims for extensions of time up to that date on all other grounds. He argues that, "on the plain natural reading" of the concluding sentence, the architects thereby rejected all of the plaintiff's claims preceding 23 June 2008 for an extension of time for

67 Plaintiff's written submissions dated 24 November 2015 at paras 143 and 153.

68 Transcript of 1 December 2015, p 40 line 18 to p 44 line 26.

69 Transcript of 1 December 2015, p 44 at line 12.

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additional rock excavation.[70] The result, he says, is that the architects granted the plaintiff in total only a 15-day extension of time for additional rock excavation.[71]

78 The arbitrator's failure to deal with this argument, Mr Yeo submits, gives rise to a breach of natural justice for the following reasons:

(a) As was the case in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), the arbitrator failed to consider the issue (*ie*, how many days' extension of time did the architects in fact grant) because he mistakenly thought that the issue was not in dispute when it was.[72]

(b) The arbitrator did not acknowledge or refer to any submissions or evidence on the issue. He considered and analysed only the additional quantities of rock actually excavated.[73]

(c) This failure was despite extensive submissions tendered by the parties on this issue.[74]

(d) When the arbitrator states in his award that the architects granted the plaintiff a 54-day extension of time for additional rock excavation (see [74] above),[75] he does so as though this were an

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70 Transcript of 1 December 2015, p 42 at line 4.

71 Transcript of 1 December 2015, p 44 at line 21.

72 Transcript of 1 December 2015, p 12 at line 26.

73 Plaintiff's written submissions dated 24 November 2015 at para 152.

74 Plaintiff's written submissions dated 24 November 2015 at para 151.

75 Award at paragraphs 40 and 106.

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uncontested fact, and not as a disputed issue on which he had to make a finding.[76]

(e) The plaintiff's position on this issue had been expressly pleaded.[77] Thus the arbitrator should have been conscious that this issue was in dispute.[78]

(f) Even though the first time the plaintiff made submissions on this issue was in its written closing submissions, there was no prejudice to the defendant because the arbitration was still live at the time.[79]

(g) Thus the "irresistible inference" was that the arbitrator had either disregarded the plaintiff's evidence and submissions or had failed to attempt to understand them.[80]

(h) Even if the arbitrator did have regard to the plaintiff's submissions, he nevertheless dramatically departed from them. A reasonable litigant would have expected the arbitrator to have at least weighed the competing arguments before him before arriving at a finding that the architects had granted a 54-day extension of time.[81]

(i) The plaintiff suffered prejudice as a result of the arbitrator's failure to consider or his failure to attempt to understand the plaintiff's evidence and submissions on this issue.[82] The calculations of the

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76 Transcript of 1 December 2015, p 34 at line 13.

77 Points of Claim (Amendment No. 2), paras 9 – 16.

78 Transcript of 1 December 2015, p 47 at line 15.

79 Transcript of 1 December 2015, p 91 at line 13.

80 Plaintiff's written submissions dated 24 November 2015 at para 153.

81 Plaintiff's written submissions dated 24 November 2015 at para 154.

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defendant's own expert showed that the plaintiff was entitled to a 36-day extension of time for additional rock excavation.[83] If the arbitrator had considered the issue, therefore, he might have agreed with the plaintiff that the architects had granted only a 15-day extension of time for additional rock excavation and awarded the plaintiff an additional 21-day extension of time.

The defendant's submissions

79 The defendant denies that the architects' letters of 23 June 2008 (see [22] above) and 22 December 2008 (see [26] above) support the plaintiff's position that the architects granted the plaintiff only a 15-day extension of time for additional rock excavation. Further, it was always common ground between the parties, right up to the plaintiff's closing submissions, that the architects had granted a 54-day, and not a 15-day, extension of time.

80 Mr Pillay took me through a close reading of the relevant letters to establish these points.[84] He emphasises that the plaintiff's own letter of 25 March 2008 (see [18] above) took the express position that the change in the toe depth for the diaphragm walls created two types of delay, one of which was the additional rock excavation. Thus, the additional rock excavation came within the grounds on which the architects had granted the 39-day extension of time on 23 June 2008 (see [22] above).

81 Mr Pillay also points to the plaintiff's letter of 15 May 2008 (see [21] above). That letter referred to the plaintiff's letter of 25 March 2008, and

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82 Plaintiff's written submissions dated 24 November 2015 at para 156.

83 Plaintiff's written submissions dated 24 November 2015 at para 157.

84 Transcript of 2 December 2015, p 21 at line 26 to p 37 at line 15.

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reiterated[85] the plaintiff's claim for an extension of time arising from the additional rock excavation. It concluded with a claim for an extension of time of "94 days (30 days delay in commencement and 64 days to undertake additional rock excavation)". Mr Pillay submits that this is a clear echo of the two types of delay that the plaintiff had identified in its letter of 25 March 2008.[86]

82 The architects' letter of 23 June 2008 refers to the plaintiff's letter of 15 May 2008 and grants a 39-day extension of time "on the ground of instructions issued for the changes in toe depth for diaphragm wall panels issued". Mr Pillay reiterates that the plaintiff had itself characterised additional excavation of rock as one of the effects of the design changes in the toe depth of the diaphragm walls.[87]

83 According to Mr Pillay, the plaintiff acknowledged this understanding in its notice of dispute of 26 August 2008 (see [25] above), in which the plaintiff complained that the architects could not properly conclude that a 39-day extension of time was sufficient when the architects could not know the additional quantity of rock to be excavated.[88] The plaintiff thus understood that the architects had granted the 39-day extension of time for additional rock excavation.

84 The architects then reconsidered their decision to grant only a 39-day extension of time. The architects' letter of 22 December 2008 (see [26] above)

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85 Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at E9 (Tab 3), at para 13.

86 Transcript of 2 December 2015, p 26 at line 10.

87 Transcript of 2 December 2015, p 29 at line 22.

88 Transcript of 2 December 2015, p 32 at line 11.

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indicated that they had reviewed the points raised by the plaintiff in its letters, including the notice of dispute, and granted the plaintiff an additional 15-day extension of time for additional rock excavation. In its letters dated 23 December 2008 and 1 April 2009 (see [27] – [28] above), the plaintiff expressly accepted that the architects had granted a 54-day extension of time for additional rock excavation.[89] That 54-day extension comprises the 39 days granted on 23 June 2008 and the 15 days granted on 22 December 2008.[90]

85 In response to the plaintiff's allegations that a breach of natural justice occurred, the defendant makes the following submissions:

(a) *AKN* requires the plaintiff to show a clear and inescapable inference that the arbitrator failed to analyse the number of days' extension of time which the architects had actually granted the plaintiff for additional rock excavation and the plaintiff's evidence and submissions on this issue. In order to do that, the plaintiff must eliminate any other reason why the arbitrator dealt with this issue in the way he did.[91]

(b) The arbitrator did in fact come to a decision on this issue. He made this decision implicitly. *AKN* and *TMM* acknowledge that a tribunal is entitled to reach a decision on a disputed issue implicitly.[92]

(c) None of the allegations made by the plaintiff about the conduct of the arbitrator leads to the clear and inescapable inference that the

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89 Defendant's bundle "Chronology of events relating to EOT for additional rock excavation" dated 2 December 2015, at I-166 (or Tab 9), at para 4(viii).

90 Transcript of 2 December 2015, p 34 at line 2.

91 Transcript of 1 December 2015, p 145 at line 23.

92 Transcript of 1 December 2015, p 144 at line 32.

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arbitrator failed to consider the plaintiff's case on this issue. There are at least the following plausible reasons why the arbitrator decided this issue without analysis:

(i) It was common ground between the parties throughout the evidential phase that the architects had granted a 54-day extension of time for additional rock excavation. The chain of correspondence between the plaintiff and the architects establish that this was common ground.[93] During the evidential phase, plaintiff's counsel also repeatedly confirmed that this was the plaintiff's position.[94]

(ii) Accordingly, the lateness of the plaintiff's challenge of this understanding, and the diametric change of position involved, undermined its credibility.[95] The arbitrator might therefore have seen the plaintiff's argument as so lacking in credibility that it was undeserving of mention in the award.[96]

(iii) The arbitrator might simply have misunderstood the plaintiff's submission that only a 15-day extension of time had been granted for additional rock excavation.

None of these possibilities warranted setting aside the award. The plaintiff failed to dispel any of these possibilities.[97]

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93 Defendant's written submissions dated 24 November 2015 at para 114.

94 Defendant's written submissions dated 24 November 2015 at paras 118 – 120.

95 Transcript of 2 December 2015, p 62 at line 1.

96 Defendant's written submissions dated 24 November 2015 at para 126.

97 Defendant's written submissions dated 24 November 2015 at paras 126 and 127.

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(d) Even if a breach of natural justice had occurred, no prejudice was caused to the plaintiff. There was overwhelming evidence that the architects had granted a 54-day extension for additional rock excavation. If the arbitrator had considered this issue, he would have dismissed the plaintiff's argument that the architects granted a 15-day rather than a 54-day extension of time for additional rock excavation.

No breach of natural justice and no prejudice

86 I accept the defendant's submissions. Although the arbitrator failed to set out his reasoning on this issue, I am unable to draw a clear and virtually inescapable inference from that omission that he failed to consider, or failed to attempt to understand, the plaintiff's evidence and submissions on the issue. In my view, the arbitrator did make a finding on this issue, albeit implicit. In any event, even if he did fail to consider this issue, it caused the plaintiff no actual prejudice.

The arbitrator made a finding on this issue

87 In an earlier part of his award,[98] well before he analyses the plaintiff's second extension of time claim, the arbitrator sets out a table in which he states the extension of time granted by the architects for additional rock excavation to be 54 days. I set out the table together with the preceding two paragraphs and the heading for this section of the award:

> ***The Tribunal's findings***
>
> 38. [The plaintiff] seeks in this arbitration a total extension of 101 days from the Contract Completion Date of 23 June 2008 to 2 October 2008 resulting in an extension of twenty-six

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98 Award at para 40.

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(26) days beyond the Extended Completion Date of 6 September 2008.

39. The twenty-six (26) days comprise:

(a) Additional 12 days of [extension of time] for delay to the commencement of the diaphragm wall excavation allegedly caused by the [architects'] late finalisation of the diaphragm wall design and late approval of [the plaintiff's] shop drawings. [1st extension of time claim]

(b) Fourteen (14) days of [extension of time] for delay allegedly caused by increase in the volume of rock excavation carried out by [the plaintiff]. [2nd extension of time claim]

40. A snapshot of the EOT claims is provided in the table below:

Basis of EOT claims	**Total EOT claimed by [the plaintiff]**	**Number of days granted**	**Further EOT claimed**
Delay for commencement of diaphragm wall excavation	27	15	12
Delay caused by increased volume of rock excavation	68	54	14
Delay caused by site obstructions	6	6	0
Total	**101**	**75**	**26**

88 The defendant relies on the figure in the third row and third column of this table as a finding by the arbitrator that the architects awarded the plaintiff a 54-day extension of time for additional rock excavation. The plaintiff rejects[99] this characterisation, pointing out that this table is simply a reproduction of a specific paragraph in one of the defendant's written submissions.[100] Be that as

[99] Plaintiff's written submissions dated 24 November 2015 at para 152(ii).

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it may, the fact remains that the arbitrator included this table under the heading "The Tribunal's findings". I cannot find that the arbitrator did not apply his mind to the issues before him when he included this table amongst his findings.

89 I therefore read the figure "54" which appears in this table as the arbitrator's finding on the disputed issue of how many days' extension of time the architects granted the plaintiff for additional rock excavation.

The lack of reasoning does not lead to the required inference

90 It remains the case, however, that this finding is not supported by reasoning either in this section of the award or in the later section dealing with the second extension of time claim. If a tribunal does not express its reasoning on an issue which the parties place before it, there are three possible scenarios. First, the tribunal might have realised that it was an issue for determination but deliberately avoided grappling with it. Second, the tribunal might have overlooked entirely that it was an issue for determination. Third, the tribunal might have realised that it was an issue for determination and arrived at a decision on it without articulating its reasoning.

91 It is only in the first and second scenarios that a breach of natural justice occurs. As the Court of Appeal stated in *AKN* (at [47]), there is a crucial difference between a tribunal's decision to reject an argument, whether explicitly or implicitly, and its failure even to consider that argument. There will be no breach of natural justice if the tribunal reaches its decision implicitly, or reaches the wrong decision, or in fact fails to understand the argument.

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[100] Defendant's closing submissions dated 7 May 2014 at para 90.

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92 The crucial question is that which the Court of Appeal framed in *AKN*: is there a clear and virtually inescapable inference that the arbitrator failed to consider the first proposition of the plaintiff's case on the second extension of time claim? In my view, the answer is no. There are a number of alternative explanations which I cannot exclude as to why the arbitrator did not address the plaintiff's contentions on this issue in finding[101] that the architects had granted a 54-day extension of time for additional rock excavation.

93 First, the arbitrator had before him the exchange of letters which passed between the plaintiff and the architects from March 2008 to April 2009. I cannot exclude the possibility that the arbitrator drew from that exchange of correspondence the conclusion not only that the 39-day extension of time granted on 23 June 2008 was for the additional rock excavation, but also that this was the common understanding between the plaintiff, the architects and the defendant. I bear in mind that it was the plaintiff's own letter of 25 March 2008 which first characterised delay caused by additional rock excavation as an effect which flowed from the design changes to the toe levels of the diaphragm wall panels. Those design changes were the very cause which the architects identified as their basis for granting the 39-day extension of time. In the light of the clear tenor of this correspondence, it is perfectly plausible that the arbitrator viewed the plaintiff's submission that only a 15-day extension of time had been granted for additional rock excavation as so unconvincing that analysis of it was unnecessary.

94 Second, the plaintiff did not develop this issue as part of its case until its closing submissions. Before me, Mr Yeo points to his pleadings[102] to

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101 Award at paras 40 and 106.

102 Points of Claim (Amendment No. 2), at paras 9 – 16.

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suggest that the plaintiff clearly pleaded its position on this issue.[103] I find nothing in the paragraphs to which he refers me to support his suggestion. Those paragraphs merely describe in abbreviated form the correspondence passing between the plaintiff and the architects between March and December 2008. If this pleading was the plaintiff's attempt to put this issue in play in the arbitration, it did so so obliquely as to be invisible. As I say in the preceding paragraph, I cannot exclude the possibility that the arbitrator read the letters referred to in these paragraphs of the plaintiff's pleading as supporting, on their face, the defendant's case that the extension of time granted was 54 rather than 15 days.

95 In addition to the paucity of pleading, there is also little if anything to suggest that the plaintiff put this issue in play during the arbitration before closing submissions. In its written submissions before me,[104] the plaintiff asserts that it made "extensive submissions (i.e. there was an aggregate of some *55 pages* of written submissions on this point alone) and/or evidence in support of the respective contentions" (emphasis in original) on this issue. It suffices for me to observe that the five sets of submissions which the plaintiff refers to are closing submissions put in after the evidential phase; and the transcript references set out are to the oral closing submissions before the arbitrator. And much of this material deals, not with the substance of this issue, but with the defendant objecting to the plaintiff's change of position on this issue.

96 Finally, by raising this argument only in its written and oral closing submissions, the plaintiff resiled from the common understanding of the

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103 Transcript of 1 December 2015, p 47 at line 24.

104 Plaintiff's written submissions dated 24 November 2015 at para 151.

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parties during the evidential phase that the architects had granted a 54-day extension of time. I accept the defendant's submission that this last-minute change of position may well have so adversely affected the credibility of the plaintiff's position on this issue in the eyes of the arbitrator that he did not think it worthy of analysis.

97 In *AKN* (at [46]), the Court of Appeal observed that if the facts are consistent with the arbitrator having chosen not to deal with a point pleaded by a party because the arbitrator thought it unnecessary, then an inference that the arbitrator did not apply his mind at all to the dispute cannot be drawn. No breach of natural justice would have occurred. The plaintiff has not persuaded me that there is a clear and virtually inescapable inference to be drawn that such a breach has occurred. The plaintiff is unable to explain why these other inferences are not equally available to be drawn as the one which it urges me to draw. I cannot exclude the possibility that he did not deal explicitly with this issue in the award because he saw no merit in it.

No dramatic departure from the submissions

98 For the same reasons, I reject the plaintiff's submission that the arbitrator departed dramatically from the parties' evidence and submissions, or that he failed to consider an essential issue.

99 As the plaintiff has not satisfied me that the arbitrator failed to consider this issue, I need say no more about these submissions.

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The plaintiff suffered no prejudice

100 I find also that no prejudice was caused to the plaintiff even if the arbitrator did indeed fail to consider or fail to attempt to understand the plaintiff's submissions on this issue.

101 In *TMM*, an alternative ground for Chan Seng Onn J's dismissal of the setting aside application was that, applying the test in *L W Infrastructure*, even if a breach of the rules of natural justice had occurred, the plaintiff had nevertheless not suffered actual or real prejudice (at [115] – [117]). Chan J's reasoning was that even if the arbitrator had found that certain repairs had not been completed, that finding would probably not have made a difference to his deliberation on the outcome. The arbitrator, in all likelihood, would have maintained his view that the plaintiff ought not to have rejected the notice of readiness.

102 Likewise, I find myself unable to conclude that it could have made a difference to the outcome on this issue if the arbitrator had applied his mind to it. As I have explained earlier, the correspondence between the plaintiff and the architects makes it clear that the 39-day extension of time granted on 23 June 2008 was for additional rock excavation. Therefore, even if I were to assume that the arbitrator had indeed failed to apply his mind to this issue, the tenor of the correspondence is so overwhelmingly against the plaintiff's case on this issue that I cannot conclude that it could have made a difference to the outcome if he had applied his mind to it.

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Remaining claims

103 The plaintiff makes various other complaints about the arbitrator's conduct during the arbitration and about the award. In my view, these complaints are meritless and I reject them.

104 The plaintiff alleges that the arbitrator was unable to follow the oral submissions and to grasp the key facts and the critical submissions. As an example, the plaintiff submits that the arbitrator was unable to understand something "as fundamental as who the key personnel in the project were",[105] and observes that the arbitrator repeated the same or similar questions throughout the hearing. The plaintiff submits that this is "very serious cause for concern",[106] and suggests that the arbitrator did not read or have regard to the submissions before him.[107]

105 I disagree. Even if the arbitrator asked questions which the plaintiff considers to be basic, the very fact that the arbitrator asked those questions indicates that he was alive to their importance, was engaged in the matter and was taking steps to ensure that he understood the dispute. It is noteworthy that the plaintiff has not suggested that the arbitrator was mistaken in his award on any of the issues underlying his questions.

106 Ultimately, it is not enough for the plaintiff to suggest that because the arbitrator was apparently experiencing difficulty remembering or registering key facts, it is therefore likely that he overlooked or did not have regard to the

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105 Plaintiff's written submissions dated 24 November 2015 at para 178.

106 Plaintiff's written submissions dated 24 November 2015 at para 182.

107 Plaintiff's written submissions dated 24 November 2015 at para 187.

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key issues and submissions before him. There is no sufficient basis for me to draw such a conclusion.

107 I also agree with Mr Pillay that a court should be slow to draw inferences about whether an arbitrator has applied his mind to the issues in an arbitration from the questions which the arbitrator asks.[108] The ultimate effect of that approach would be to inhibit arbitrators from asking questions which are necessary to understand and determine disputes. An arbitrator ought not to fear that any question he asks might be used by the unsuccessful party as ammunition in a later setting aside application.

108 The plaintiff also claims that there are "striking similarities" between the award and the defendant's closing submissions of 7 May 2014,[109] and suggests that that must be because the arbitrator copied or reproduced these submissions.[110] Accordingly, the plaintiff submits, the "inescapable inference" is that the arbitrator did not have regard to any written submissions other than the defendant's closing submissions of 7 May 2014.

109 I cannot draw a clear and inescapable inference from the materials presented by the plaintiff that the arbitrator simply lifted sections of his award from the defendant's closing submissions without applying his mind to the issues. Linguistic similarities between the award and the closing submissions do not lead clearly and inescapably to the conclusion which the plaintiff urges upon me.

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108 Transcript of 2 December 2015, p 78 at line 22.

109 Plaintiff's written submissions of 24 November 2015 at para 189.

110 Plaintiff's written submissions of 24 November 2015 at para 190.

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The costs award

110 My decision to set aside that part of the correction award which deals with costs and the entirety of the costs award is not the subject of appeal. I arrived at that decision because of the operation of s 44 of the Act. Section 44(1) deems the principal award to be final and binding on the parties from the moment it was made. Section 44(2) read with s 44(3) prohibits the arbitrator from varying, amending, correcting, reviewing, adding to or revoking the principal award or any part of it after it has been signed and delivered, except as provided in s 43. Section 43 permits the arbitrator only to correct his award, to interpret his award and, unless the parties have agreed otherwise, to make an additional award on a claim presented in the arbitration but omitted from his award. None of those provisions permitted the arbitrator to withdraw the costs orders in his principal award, as he did in his correction award, much less to issue fresh costs orders, as he did in the costs award.

111 In his costs orders in the principal award, the arbitrator rendered a comprehensive decision on all matters relating to the costs of the arbitration, including the defendant's legal costs, the fees and expenses of the arbitrator and the costs and expenses of the award. Once he had made these costs orders,[111] he became *functus officio*, certainly on the issue of costs and, in the circumstances of this case, on the entire dispute presented to him. The arbitrator could not revisit the issue of costs because he no longer had jurisdiction to do so. That is the result even though the parties had agreed that the arbitrator should defer his decision on costs for further submission.

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[111] Award at para 162.

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Conclusion

112 For the above reasons, I have dismissed the plaintiff's application to set aside the award and allowed the application to set aside that part of the correction award which deals with costs and also the entirety of the costs award.

113 I have also ordered the plaintiff to pay to the defendant 85% of the defendant's costs of and incidental to this application, such costs to be taxed on the standard basis if not agreed. The discounted costs order reflects the fact that the plaintiff did succeed in a small part of its application.

Vinodh Coomaraswamy
Judge

Mr Alvin Yeo SC, Mr Ian De Vaz, Mr Chua Minghao and Ms Thiang Zhen Li (WongPartnership LLP) for the plaintiff;
Mr Mohan Pillay, Mr Toh Chen Han and Ms Jasmine Kok (MPillay) for the defendant.

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