JRP & Associates Pte Ltd *v* Kindly Construction & Services Pte Ltd [2015] SGHC 86

Case Number : Originating Summons No 1023 of 2014 (Summons No 5789 of 2014)

Decision Date : 01 April 2015

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Freddie Lim and Gordon Lim (TSMP Law Corporation) for the claimant; Poonam Bai and Vani Nair (Eldan Law LLP) for the respondent.

Parties : JRP & Associates Pte Ltd — Kindly Construction & Services Pte Ltd

Building and Construction law – Dispute resolution

1 April 2015 Judgment reserved.

Chan Seng Onn J:

Introduction

1 On 4 November 2014, the claimant, JRP & Associates Pte Ltd ("JRP"), successfully obtained leave of court in Originating Summons No 1023 of 2014 to enforce an adjudication determination ("the Adjudication Determination") dated 14 October 2014 made under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") in the same manner as a judgment or an order of the court pursuant to s 27 of the Act. The Assistant Registrar ordered that the respondent, Kindly Construction & Services Pte Ltd ("Kindly Construction"), pay JRP the adjudicated amount of $98,427.81 excluding Goods and Services Tax ("GST") ("the Adjudicated Sum"), interest at the rate of 5.33% per annum on the Adjudicated Sum, a sum of $15,953.70 being 70% of the costs of the adjudication, and costs fixed at $1,200 (inclusive of disbursements) ("the AR's Order").

2 On 20 November 2014, Kindly Construction paid into court a sum of $105,317.76 (being the Adjudicated Sum including GST). Kindly Construction now takes out Summons No 5789 of 2014 to set aside the Adjudication Determination and the AR's Order.

Background Facts

3 Kindly Construction was the main contractor of a project for the "Proposed Erection of 2-Storey Multi-user Motor Workshops at Kaki Bukit Avenue 2/Kaki Bukit Road (HDB Project)" ("the Project"). By a Letter of Intent dated 12 October 2012, Kindly Construction engaged JRP as the sub-contractor for the Project to carry out, *inter alia*, the "supply and installation of metal roofing system/roof gutters/translucent roof system and metal cladding system". The quotation provided by JRP was $490,600.90 ("the Quotation Price").

4 The Project commenced. In the course of the Project, JRP made certain payment claims for progress payments in respect of work partially done and had issued four invoices. Kindly Construction paid JRP a total of $162,934.29 ("the Progress Payments"). The Project was delayed. The cause of the delay was disputed. The relationship between the parties soured, and on 6 August 2014, JRP stopped work. The Project was not completed at this point. On the same day, Kindly Construction

wrote to JRP stating that they would engage other contractors to complete the work and would seek indemnification from JRP.

5 On 29 August 2014, JRP submitted its payment claim for $222,647.92 to Kindly Construction pursuant to s 10 of the Act ("the Payment Claim") for work done up till 6 August 2014. Kindly Construction sent its payment response ("the Payment Response") on 12 September 2014, stating that no monies were due to JRP, but instead, it was JRP which owed Kindly Construction a sum of $220,009.37. On 19 September 2014, JRP lodged its adjudication application with an authorised nominating body, the Singapore Mediation Centre ("SMC"), pursuant to s 13(1) of the Act ("the Adjudication Application"). Kindly Construction received a copy of the Adjudication Application on 22 September 2014.

6 SMC notified JRP, by a letter dated 25 September 2014, that the Adjudication Application had been assigned Adjudication Application Number SOP/AA292 of 2014 and Ong Ser Huan of Enkon International had been appointed as the adjudicator ("the Adjudicator").

7 On 14 October 2014, SMC served the Adjudication Determination on JRP and Kindly Construction. The Adjudication Determination stated that Kindly Construction was to pay JRP the Adjudicated Sum by 21 October 2014 and in the event of non-payment by the stated date, interest at a rate of 5.33% per annum, compounded on an annual basis, would run from 22 October 2014. The Adjudication Determination also stated that 70% of the costs of the adjudication totalling $22,791 would be borne by Kindly Construction while the rest would be borne by JRP.

The Adjudication Determination

8 The arguments raised by counsel for Kindly Construction to set aside the Adjudication Determination and the AR's Order concern the conduct of the Adjudicator throughout the adjudication, and the manner in which he decided. It is thus useful to set out in detail the parties' respective claims, the adjudication proceedings, and the decision of the Adjudicator.

The parties' respective claims

9 JRP claimed the sum in the Payment Claim for primarily two items. The first was for materials that remained on site which were to be used in connection with the Project. According to JRP, the value of these materials was $219,234.19. The second item was for the works that JRP actually did up till the time it stopped working on the Project. According to JRP, this amount was $246,470.78. From this amount, two deductions were necessary. First, was the amount for the Progress Payments. The second was the amount of $80,122.76 for certain materials on site. The outstanding amount from the two items after the various deductions was the sum stated in the Payment Claim (*ie* $222,647.92).

10 Kindly Construction disputed the amount claimed by JRP on various grounds. In particular, it disputed the rates and measurements for quantification of claims for work done. It also asserted that JRP was double claiming in respect of materials on site because some of these materials had already been installed by JRP. In addition, Kindly Construction counterclaimed for various expenses including, *inter alia*, incomplete works eventually carried out by other sub-contractors, rectification works which had to be done due to JRP's negligence, damages to materials on site which were caused by JRP's negligence, and liquidated damages due to delays caused by JRP. According to Kindly Construction, the value of materials on site was $107,698.33. The value of work done by JRP was $189,113.54. The amount that ought to be deducted for incomplete works was $39,666.95. A further deduction of $263,160.00 was necessary for liquidated damages for delay caused by JRP. A deduction of

$49,060.00 and $2,000.00 should also be made for a warranty of 10% of the Quotation Price, and for back charges for safety infringement by JRP, respectively. The final deduction to be made was for the Progress Payments. The total deduction to be made in favour of Kindly Construction's was therefore $516,821.24, and the amount owed to JRP was $296,811.87. In sum, according to Kindly Construction, it was JRP which owed it $220,009.37.

The adjudication proceedings

11 JRP's Adjudication Application was made on 19 September 2014. This was in accordance with s 13 of the Act since the Payment Response was received on 12 September 2014.

12 Kindly Construction, on the other hand, received a copy of the Adjudication Application on 22 September 2014. Under s 15 of the Act, Kindly Construction had until 29 September 2014 to lodge an adjudication response.

13 On 25 September 2014, the Adjudicator issued Adjudicator's Direction No 1 which stated that two adjudication conferences would take place on 29 September 2014 from 10.00 am to 7.00 pm, and on 30 September 2014 from 9.15 am to 6.15 pm.

14 At the beginning of the adjudication conference on 29 September 2014, Kindly Construction's solicitors highlighted to the Adjudicator that the adjudication had not commenced under s 16 of the Act. Section 16 provided that adjudication commences immediately upon the expiry of the period referred to in s 15(1) of the Act within which the respondent may lodge an adjudication response. This shall hereinafter be referred to as the "commencement of the adjudication". According to Kindly Construction's solicitors, this meant that the adjudication only commenced on the following day, 30 September 2014. The scheduled adjudication conference on 29 September 2014 began at 10am and ended early at 11.45am.

15 Thereafter, on the same day, the Adjudicator issued Adjudicator's Direction No 2, which stated that the meeting held earlier on 29 September 2014 was "agreed to be a Preliminary Meeting", that the adjudication conferences would take place on 30 September and 1 October 2014, and that a site inspection would take place on 2 October 2014. [note: 1] On the same day, JRP's solicitors requested for a vacation of the 30 September 2014 adjudication conference. The Adjudicator then issued Adjudicator's Direction No 3 which stated that the adjudication conference would take place on 1 October 2014 and 10 October 2014 instead. In addition to the other directions in Adjudicator's Direction No 2, Adjudicator's Direction No 3 also stated that the Adjudication Determination would be made by 28 October 2014.

16 Under s 17(1)(*b*) of the Act, the Adjudicator had to determine the adjudication application within 14 days of the commencement of the adjudication or "*within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent*." Therefore, if the parties did not agree to any request of the Adjudicator to extend the period within which he was to render his Adjudication Determination, he had to determine the matter by 14 October 2014. This meant that after the completion of the Adjudication Conference on 10 October 2014, the Adjudicator would have only 4 days to render his Adjudication Determination.

17 On 30 September 2014, Kindly Construction's solicitors wrote to the Adjudicator clarifying that their clients had not agreed to any extension of time to render the Adjudication Determination.

18 After the adjudication conference on 1 October, the site visit on 2 October, and the adjudication conference on 10 October 2014, the Adjudicator immediately issued Adjudicator's

Direction No 4, which directed both parties to submit their final submissions by 11am on 11 October 2014. Adjudicator's Direction No 4 expressly stated that this was to meet Kindly Construction's request to meet the deadline of the Adjudication Determination (*ie* 14 October 2014) agreed by both parties.

19 On 13 October 2014, Kindly Construction's solicitors wrote to SMC to highlight certain issues which were of concern to their client. These issues included (a) the conference on 29 September 2014 which according to Kindly Construction was before the commencement of the adjudication; (b) certain remarks made by the Adjudicator relating to the extension of time for rendering the Adjudication Determination; and (c) the unnecessary costs incurred by the Adjudicator in ordering the third adjudication conference on 10 October 2014.

20 The Adjudication Determination was subsequently rendered by the Adjudicator on 14 October 2014, and served on both parties. On 21 October 2014, Kindly Construction's solicitors wrote to SMC again to raise objections to the Adjudicator's fees which it argued were excessive and not commensurate for a matter of the scale that was before him.

The Adjudicator's decision

21 The Adjudicator noted that both parties had complied with all the timelines provided in the Act including the Payment Claim, the Adjudication Application, and the Payment Response. He further noted that a "Preliminary Meeting" was held on 29 September 2014, where all parties agreed that adjudication conferences would be held on 30 September and 1 October 2014.

22 The Adjudicator explained that the "Preliminary Meeting" was for "all parties to meet, to plan for the schedule of the sessions and for [him] to gain a better understanding of the matter before the commencement of the Adjudication Conference."

23 Next, the Adjudicator detailed that he acceded to the request from JRP's solicitors to adjourn the adjudication conference on 30 September 2014, and he re-fixed it to the next available date on 10 October 2014. The Adjudicator then went on to state that "[d]espite the granted adjournment, [Kindly Construction] however requested that the original Adjudication Determination date was to stay."

24 According to the Adjudicator, the site inspection carried out on 2 October 2014 was done in order to obtain a "balanced view" given the wide disparity between the positions taken by each party at the adjudication in relation to the site condition.

25 Dealing with JRP's claim for costs of materials on site, the Adjudicator noted that both parties had agreed that the cost of all the materials delivered to the site and payable to JRP's suppliers was $195,275.68. The Adjudicator determined the cost of the materials payable to JRP by allowing for an industry acceptable mark-up of 15%. This meant that the cost of materials due to JRP and payable by Kindly Construction was **$224,567.03** .

26 As for the claim for work done by JRP, the Adjudicator took note of the Quotation Price in respect of the full project, the main roofing area of 12,075m^2, and the main roofing area as completed by JRP, which was agreed by both parties to be 3,172m^2. The percentage of roofing works completed by JRP was therefore 26.27% [note: 2] , which was estimated in the Payment Response to be 30%. However, the Adjudicator discounted this percentage down to 25% on account of the fact that some outstanding work remained. The Adjudicator then noted that an acceptable practice was to attribute

30% of the total contractual cost of the roofing work to labour content, which amounted to $147,180.27 (*ie* $490,600.90 × 30% = $147,180.27), and the remaining 70% of the total contractual cost to material content, which amounted to $343,420.63 (*ie* $490,600.90 × 70% = $343,420.63). As the Adjudicator had determined that the amount of roofing works completed in terms of labour content was 25% of the total labour content of $147,180.27 for the project, he valued the labour content for the partially completed roof to be $147,180.27 × 25% = **$36,795.07** . Therefore the total amount due to JRP for (a) all the contractual materials delivered to the site, and (b) the labour cost for the partially completed roofing work, was determined by the Adjudicator to be **$261,362.10**, being the sum of the two figures underlined and in bold above.

Adjudicator's decision on the counterclaim

27 As for the counterclaim by Kindly Construction for items mentioned above at [10], the Adjudicator found that both parties did not provide adequate substantiation on the issues. He therefore concluded that "the Liquidated Damages, warranty and other set-off and back charges as put up by [Kindly Construction] [were] beyond the ambit of the present Adjudication".

28 In arriving at the Adjudicated Sum, the Adjudicator deducted the Progress Payments from the amount he determined Kindly Construction owed JRP (see [26] above). He then concluded by making the orders mentioned in [7].

Arguments of the parties

29 Kindly Construction's arguments to set aside the Adjudication Determination and the AR's Order can be summarised as follows:

(a) The Adjudicator exceeded his powers under the Act by calling for an adjudication conference on 29 September 2014, before the commencement of the adjudication.

(b) The Adjudicator failed to comply with the principles of natural justice. Certain remarks made by the Adjudicator during the course of the adjudication displayed apparent bias. The Adjudicator deliberately attempted to restrict and hinder Kindly Construction's preparation of its adjudication response. The Adjudicator failed to give the parties an equal opportunity to submit during the adjudication conference.

(c) The Adjudicator failed to comply with the principles of natural justice because he did not afford the parties an opportunity to address him on the method of valuation that was utilised in reaching his decision on the matter.

(d) The Adjudicator breached his duty to avoid incurring unnecessary expense. The Adjudicator should not have called for an adjudication conference on 29 September 2014 since the adjudication had not yet commenced. The Adjudicator's fee of $20,000 (excluding GST) was not commensurate with a matter of the current scale. The third adjudication conference on 10 October 2014 was also not necessary since it was a rehashing of the same arguments made at the second adjudication conference on 1 October 2014. The site visit was also not necessary since it served no practical use and only served to increase costs.

30 On the other hand, JRP's arguments against setting aside the Adjudication Determination and the AR's Order can be summarised as follows:

(a) The Adjudicator had the power to call for an adjudication conference on 29 September

2014. Furthermore, the adjudication conference on 29 September 2014 did not adversely affect the quality of Kindly Construction's adjudication response since the meeting only lasted one hour and 45 minutes.

(b) The Adjudicator did not display apparent bias and thus the principles of natural justice were observed. The remarks of the Adjudicator were taken out of context. The adjudication conference was conducted in a fair manner, on an issue-by-issue basis, and parties were treated equally. In any event, the remarks were insufficient to show that there was apparent bias on the part of the Adjudicator. Furthermore, the final sum awarded by the Adjudicator was considerably less than the sum actually claimed by JRP. This also showed that there could not have been bias on the part of the Adjudicator.

(c) There was also no breach of natural justice because the Adjudicator did not go on a frolic of his own. The decision of the Adjudicator was based on evidence that was placed before him. The Adjudicator's decision was based entirely on the parties' agreement, with generous discounts given in favour of Kindly Construction. The Adjudicator's application of broad-brush estimates and discounts was justified by the fast paced, interim nature of adjudication under the Act.

(d) All three conferences and the site visit were necessary. Each conference and the visit had specific purposes in order to resolve the dispute between the parties. Even on the assumption that the Adjudicator did incur unnecessary costs, this would not be a ground for setting aside the Adjudication Determination.

The issues

31 The issues that have to be determined in the present case are:

(a) Did the Adjudicator act in excess of his powers in calling the 29 September 2014 meeting? If so, what are the consequences that follow?

(b) Did the Adjudicator display apparent bias and thus not comply with the rules of natural justice?

(c) Did the Adjudicator fail to comply with natural justice by not providing the parties with an adequate opportunity to be heard when he decided on the amount due to JRP?

(d) Should the Adjudication Determination be set aside on grounds that the Adjudicator incurred unnecessary costs?

My decision

32 Before dealing with the issues, it would be useful to set out the policy and purpose behind the Act, together with some general observations. Any decision on the specific issues before me would have to be made against the backdrop of the policy and purpose of the Act.

33 The Act was passed to solve a common problem in the construction industry of contractors or sub-contractors going unpaid for work done or materials supplied. The Act sought to establish a fast and low cost adjudication system in order to resolve payment disputes, thereby facilitating cash flow in the industry (*Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Terence Lee*") at [2]). In *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*WY Steel*"), Sundaresh Menon CJ

explained as follows:

> 18 … It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result. … The Act achieves its stated purpose of facilitating cash flow in the building and construction industry in two principal ways. First, it establishes that parties who have done work or supplied goods are entitled to payment as of right: see s 5 of the Act. Second, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved: see s 21 of the Act. This is what is referred to as temporary finality.
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> …
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> 20 Singapore's statutory adjudication process for building and construction disputes is modelled after systems already established in the United Kingdom, Australia and New Zealand, with some adaptations to suit our own conditions. All these systems share a common philosophical basis, which is the aforesaid feature of temporary finality. In essence, it entails the idea that the parties to a construction contract should "pay now, argue later"… The appeal of this philosophy is apparent: payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order to disentangle the knot of disputed claims and cross-claims. …
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> …
>
> 22 Statutory adjudication of building and construction disputes takes the concept one step further. Interim payment claims *per se* are not granted temporary finality under the adjudication scheme. *Instead, the parties enter into an expedited and, indeed, an abbreviated process of dispute resolution in which payment claims and payment responses must be made within the stipulated deadlines to an adjudicator, who is himself constrained to render a quick decision.* As a species of justice, it is admittedly somewhat roughshod, but it is fast; and any shortcomings in the process are offset by the fact that the resultant decision only has temporary finality. The party found to be in default has to pay the amount which the adjudicator holds to be due (referred to in the Act as the "adjudicated amount"), but the dispute can be reopened at a later time and ventilated in another more thorough and deliberate forum.
>
> [emphasis added]

34 The whole process of adjudication under the Act is characterised by strict time-lines (*Terence Lee* at [4]). As borne out by the passage above, even the adjudicator is constrained to render a quick decision. Any shortcomings of this quick and speedy approach can be countenanced only because the adjudicator's decision is accorded temporary finality. It does not finally dispose of the rights of the parties.

35 A respondent who is dissatisfied with the result of the statutory adjudication under the Act has the right, pursuant to s 18, to apply for an adjudication review. However, the respondent has to do so within seven days after the adjudication determination is served on him (s 18(2)). The respondent may not lodge an application for adjudication review until he has paid the adjudicated amount to the claimant (s 18(3)).

36 The court thus has a limited role when it comes to setting aside an adjudication determination made under the Act given the speedy and economical nature of the adjudication procedure. The court's role is not to look into the parties' arguments before the adjudicator and determine for itself whether the adjudicator arrived at the correct decision (see *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [41] ("*SEF Construction*")).

37 In *SEF Construction*, Judith Prakash J further distilled the court's role in the context of setting aside an adjudication determination under the Act. She described it as follows:

> 45 Thus, I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:
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> (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
>
> (b) the service by the claimant on the respondent of a payment claim (s 10);
>
> (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
>
> (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
>
> (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));
>
> (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
>
> (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.
>
> 46 If the court finds that the answer to any of those questions is in the negative, then the adjudication determination and any judgment arising therefrom must be set aside. …

38 Although the list provided by Prakash J seems to be exhaustive of the situations in which the court may set aside an adjudication determination, the Court of Appeal in *Terence Lee* explained that there may be other grounds on which a court would set aside an adjudication determination:

> 66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction* ([14] *supra*) that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.
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> 67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act

which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.

[emphasis in original]

39 Therefore, the touchstone for determining if an adjudication determination should be set aside for breach of a provision or provisions under the Act is whether the provision or provisions breached are *so important that it is the legislative purpose that an act done in breach of the provision or provisions should be invalid*. The list of situations provided in *SEF Construction* in which a court may set aside an adjudication determination, although not exhaustive, still serves as a useful guide.

40 With these general observations in mind, I now turn to the specific issues.

Did the Adjudicator act in excess of his powers in calling the 29 September 2014 meeting? If so, what consequences are to follow?

41 In *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] SGHC 02 ("*Quanta Industries*"), I set aside an adjudication determination on the basis that the adjudicator had acted outside his powers when he determined that the plaintiff, who was the claimant in the adjudication, shall pay the defendant, who was the *respondent*, a sum of $141,508.56. Under s 17(2)(*a*) of the Act, the adjudicator may determine the amount the *respondent* has to pay the *claimant*. By determining that the claimant instead should make payment to the respondent, the adjudicator had acted in excess of the powers conferred upon him by the Act. In any event, I noted that the case was unusual because the defendant did not deny that the adjudicator had acted outside his powers under the Act.

42 Counsel for Kindly Construction relies on the decision in *Quanta Industries* to argue that the Adjudication Determination should be set aside since the Adjudicator had acted in excess of the powers conferred by the Act when he called for an adjudication conference on 29 September 2014, before the commencement of the adjudication.

43 As mentioned above at [14], the adjudication was to commence on 30 September 2014. Prior to that, Kindly Construction had seven days to lodge an adjudication response, which was due by 29 September 2014. The Adjudicator was seized of jurisdiction on 25 September 2014, when he was appointed by SMC pursuant to s 14(1) of the Act (*Chia Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [54]). Once an adjudicator has been appointed, he can issue directions and orders in relation to the adjudication as long as the directions and orders are in compliance with the Act. Under s 16(4)(*a*), an adjudicator may conduct the adjudication in such manner as he thinks fit. Section 16(4)(*e*) confers on an adjudicator the power to call a conference of the parties. Section 16(6) provides that the parties "shall comply with any requirement made or direction issued by the adjudicator in accordance with this section".

44 While one reading of s 16(4) may suggest that an adjudicator has the power to call for a conference of the parties at *any* time, I am of the view that the powers that an adjudicator has to call a conference of the parties to deal with substantive matters (and not purely administrative matters) in relation to an adjudication must necessarily be tied to the commencement of the adjudication. I shall elaborate on this.

45 The timelines provided under the Act are extremely short, and non-compliance with the timelines may be detrimental to the parties. If an adjudicator were to call a full-day conference to

deal with substantive matters in relation to the adjudication *before* the time afforded to a respondent to file an adjudication response under the Act has expired, this would, in substance, shorten the seven days under the Act to lodge an adjudication response because a respondent would be pressured to file its adjudication response earlier so as to be in time for the adjudication conference. In my view, it cannot be the intention of the Act that an adjudicator has the power to shorten indirectly the already short time-period of seven days afforded to a respondent to lodge an adjudication response. Furthermore, it would not be fair and may well amount to a breach of natural justice for an adjudicator to go ahead and deal with substantive matters at the adjudication conference *before* a respondent has managed to lodge its adjudication response and *before* an adjudicator is even aware of what the respondent's response is going to be, should the respondent fail to file its adjudication response in time for the adjudication conference. Therefore, an adjudicator does not have the power to call for an adjudication conference, to be held *before* the commencement of the adjudication, to deal with substantive matters in relation to the adjudication.

46 However, where purely administrative matters are concerned, I do not think that an adjudicator is precluded from calling the parties to meet him prior to the commencement of the adjudication. Examples of purely administrative matters include the fixing of dates and times suitable to all parties for the site inspections (if any), the adjudication conferences which deal with substantive matters, and other ancillary matters with regards to the conduct of adjudication conferences which are to be held *after* the statutorily stipulated date of commencement of the adjudication. Getting common available dates for all parties is always a practical problem. The earlier these administrative matters are dealt with, the sooner the adjudication can be completed within the tight timelines stipulated by the Act. I see no good reason why purely administrative matters, which are entirely facilitative in nature, can only be dealt with after the statutorily stipulated date of commencement of the adjudication. If purely administrative matters are not dealt with early, the risk of the tight timelines being exceeded and the adjudication being unnecessarily delayed will be increased. I do not think this is the intention behind s 16 of the Act since it is not consonant with the purpose or object of the Act. Section 16(4) must be interpreted in a manner that promotes the purpose and object behind the Act. An overly restrictive interpretation of s 16 that limits the power of an adjudicator to deal with purely administrative matters at any time in relation to the adjudication would not promote the purpose and object underlying the Act which, as mentioned above, is to establish a fast and low cost adjudication system.

47 On the facts of the present case, I am not persuaded by the Adjudicator's re-labelling of the adjudication conference on 29 September 2014 as a "Preliminary Meeting". It was clearly intended to be an adjudication conference to deal with substantive matters. Adjudicator's Direction No 1 stated that the meeting on 29 September 2014 was to be held from 10am to 7pm. I cannot imagine that the "Preliminary Meeting", which according to the adjudicator was held in order for "all parties to meet, to plan for the schedule of the sessions and for [him] to gain a better understanding of the matter before the commencement of the adjudication conference", was envisaged to last a whole day.

48 It was only after the objection of the solicitors for Kindly Construction that the Adjudicator decided to limit the 29 September 2014 conference to purely administrative matters. The Adjudicator adjourned the conference after an hour and 45 minutes and subsequently relabelled it as a "Preliminary Meeting". The Adjudicator must have realised during the 29 September 2014 adjudication conference that he had made a mistake by ordering a full day adjudication conference on substantive matters to be held on the day before the commencement of the adjudication.

49 As can be seen from the further directions given in Adjudicator's Directions No 1 and 2, the Adjudicator had, from the very beginning, decided to set aside two full days for the adjudication conference in order to deal with substantive matters and had intended the first day to be on 29

September 2014. I therefore find that by directing and ordering the adjudication conference to take place on 29 September 2014 through Adjudicator's Direction No 1 in order to deal with substantive matters, the Adjudicator had, technically, acted in excess of his powers under the Act. Notwithstanding this, I am of the view that the Adjudication Determination should not be set aside on the basis of this technical breach. It must be pointed out that upon receiving the objections of Kindly Construction, the Adjudicator did not proceed to deal with any substantive matters at the adjudication conference to the prejudice of Kindly Construction. At that point in time, Kindly Construction had yet to file its adjudication response since the time allowed under the Act for filing the adjudication response had not expired.

50 In *Quanta Industries*, the adjudicator acted in excess of his powers when he ordered that the claimant pay the respondent a certain sum. He acted in excess of his powers in relation to an order which related to the very heart of the adjudication determination. The situation is patently different here. The Adjudicator had merely acted in excess of his power by calling a substantive adjudication conference before the statutorily stipulated date of commencement of the adjudication. When objections were raised, the Adjudicator decided not to deal with any substantive matters but only dealt with purely administrative matters. After this, two other full day adjudication conferences were legitimately called, *ie*, to be held after the statutorily stipulated date of commencement of the adjudication. While the adjudication determination made in excess of the adjudicator's powers in *Quanta Industries should be set aside, the same cannot be said of the present case, where the Adjudicator had only technically acted in excess of his powers by calling a substantive adjudication conference before the commencement of the adjudication under the Act. It must again be stressed that the Adjudicator realised his mistake during the 29 September 2014 meeting and did not deal with any substantive matters in relation to the adjudication. To adopt the language of the Court of Appeal in Terence Lee, the mere calling of an adjudication conference in excess of an adjudicator's powers to deal with substantive matters, even if done in breach of s 16, is not a breach which is* so important that it is the legislative purpose of the Act that the Adjudication Determination should be declared invalid.

5 1 *I therefore find that the Adjudication Determination should not be set aside on the ground that the Adjudicator had acted in excess of his powers under the Act by merely calling an adjudication conference to deal with substantive matters on 29 September 2014, before the statutorily stipulated date of commencement of the adjudication.*

Did the Adjudicator display apparent bias and thus not comply with the rules of natural justice?

52 Counsel for Kindly Construction also argues that the Adjudicator had displayed apparent bias when making the Adjudication Determination. If an adjudicator fails to act independently, impartially, or fails to comply with the principles of natural justice in accordance with s 16(3) of the Act, an adjudication determination will be set aside by the court (see *SEF Construction* at [45(f)] reproduced above at [37]).

53 The rules of natural justice require that the Adjudicator act without bias—actual or apparent. The submissions by counsel for Kindly Construction focus on the conduct and certain remarks of the Adjudicator, which she argues show that the Adjudicator had displayed apparent bias. The test for apparent bias is set out in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [76]. The test is whether a reasonable and fair-minded person knowing all the relevant facts would have a reasonable suspicion or apprehension that a fair trial for the party concerned is not possible. I will now deal with each of the allegations made against the Adjudicator which, according to counsel for Kindly Construction, displays apparent bias.

54 Counsel for Kindly Construction submits that the Adjudicator had deliberately attempted to restrict and hinder Kindly Construction's preparation of its adjudication response by holding the 29 September 2014 meeting before the commencement of the adjudication. I find that this is not made out by the evidence. As I have mentioned above at [49], it is likely that the Adjudicator made a mistake by calling the 29 September 2014 adjudication conference before the commencement of the adjudication. I find no support for the bare allegation that the conference was called to deliberately sabotage Kindly Construction's preparation of its adjudication response.

55 Counsel for Kindly Construction also highlights the fact that during the presentation of arguments by Kindly Construction, the Adjudicator constantly interrupted Kindly Construction to seek JRP's clarification. It was only when Kindly Construction's solicitor insisted that she be allowed to argue before JRP was entitled to respond, did the Adjudicator stop seeking JRP's clarification. I find that this fact is not very material. An adjudication conference is not a hearing. Moreover, under s 16(4)(*a*), an adjudicator may conduct the adjudication in such manner as he thinks fit. Counsel for JRP submits that the adjudication was conducted on an issue-by-issue basis, where one party would make submissions on an issue, after which, the other party would be given an opportunity to respond. The Adjudicator is perfectly entitled to carry on the adjudication conference in such a manner. The Adjudicator's constant interrupting of Kindly Construction's solicitor by seeking clarification from JRP would not create a reasonable suspicion or apprehension of bias in the mind of a reasonable and fair-minded person. I agree with the submission of counsel for JRP that this allegation of bias by Kindly Construction is self-perceived and a clear afterthought in its bid to avoid payment.

56 Next, counsel submits that the Adjudicator had responded to Kindly Construction's arguments against the holding of the 29 September 2014 meeting by stating, "I am the master of the proceedings". I find that this statement is neutral in its effect. As mentioned in the preceding paragraph, s 16(4)(*a*) states that an adjudicator may conduct an adjudication in such manner he thinks fit. In this regard, he is the master of the proceedings. Again, I fail to see how this leads to the conclusion that a reasonable and fair-minded person would entertain a reasonable suspicion or apprehension of bias.

57 Counsel for Kindly Construction next points to certain remarks made by the Adjudicator against Kindly Construction, which she argues display his unhappiness (and thus apparent bias) at Kindly Construction's refusal to agree to an extension of time for him to determine the adjudication under s 17(1)(*b*) of the Act. Counsel for Kindly Construction submits that she was harassed for 45 minutes during the 1 October 2014 meeting to agree to an extension. The submissions in relation to the specific remarks made by the Adjudicator and their effects are as follows:

(a) The Adjudicator said "there is a need to have mutual empathy" which according to Kindly Construction, insinuated it had none;

(b) The Adjudicator asked "Is this reasonable?", referring to Kindly Construction's objection to the extension of time to render the Adjudication Determination;

(c) The Adjudicator said that Kindly Construction was pressurising him and his whole schedule was upset; and

(d) The Adjudicator made a veiled threat when he asked, "Do you really want to start off the adjudication by making it so difficult".

58 Counsel for Kindly Construction also refers to the Adjudicator's Direction No 4 which directed that "… [i]n order to meet the Respondent's request to meet the dateline [*sic*] of the Adjudication

Determination….the Final Submission by both parties … shall be by 11.00 am on 11th October 2014". Finally, counsel points to a line in the Adjudication Determination itself which reads, "[d]espite the granted adjournment, the Respondent however requested that the original Adjudication Determination date was to stay". According to counsel for Kindly Construction, the Adjudicator was implying that Kindly Construction was being unreasonable.

59 Taking Kindly Construction's case at its highest, and considering the effect of all of these statements as a whole, I do not see how apparent bias is made out. While some of the statements do point to unhappiness on the part of the Adjudicator because Kindly Construction did not agree to any extension of time for the Adjudicator to render his Adjudication Determination, most of the statements are neutral. In fact, nothing much can be inferred from the statements described in [57]–[58]. I do not agree with Kindly Construction's strained interpretation of these phrases. Under s 17(*b*) of the Act, an adjudicator can only have more than 14 days from the commencement of the adjudication to render a determination if he requests for an extension and the parties agree. The starting point must be that whenever a request by an adjudicator is denied by one party, it does not automatically lead to apparent bias. This is in spite of the fact that some unhappiness is to be expected on the part of the Adjudicator when his request is turned down. In the present case, I find that the statements made by the Adjudicator do not establish more than this general unhappiness. I do not think this is sufficient to establish apparent bias leading to a breach of the rules of natural justice. In other words, looking at all the relevant facts, a reasonable and fair-minded person would not harbour a reasonable suspicion or apprehension of bias on the part of the Adjudicator against Kindly Construction.

60 I thus find that the Adjudicator did not breach his duty to comply with the principles of natural justice. His acts do not raise a reasonable suspicion or apprehension of bias in the mind of a reasonable and fair-minded person, such that it can be said to be a breach of natural justice.

Did the Adjudicator fail to comply with natural justice by not providing parties with an adequate opportunity to be heard when he decided on the amount due to JRP?

61 Counsel for Kindly Construction also argues that the Adjudicator had failed to comply with natural justice as he used a method of valuation which was not canvassed by the parties, and did not provide the parties an opportunity to submit or respond to the methodology used.

62 I have already set out in detail, above at [25]–[26], the method used by the Adjudicator. I do not propose to do so again. It is not disputed that the method used by the Adjudicator was not argued or suggested by any party. The argument raised by counsel for Kindly Construction is one based on a breach of natural justice, and not on any error in the Adjudicator's methodology or his decision on the merits. This is rightly so, given that it is not within the purview of this court to evaluate the merits, robustness, reliability or accuracy of the valuation method used by the Adjudicator. I must emphasise that it is not for the court (a) to analyse whether the Adjudicator had used an appropriate method of computation; or (b) to set aside the Adjudication Determination simply because the court is of the view that the Adjudicator's method is not appropriate or is incorrect (see *SEF Construction* above at [36]).

63 In *Primus Build Limited v Pompey Centre Limited, Slidesilver Limited* [2009] EWHC 1487 ("*Primus*"), the claimant's claim for loss of profit was based on a 3% construction and management fee percentage identified in the contract. The defendants raised many points in opposition to the claim, including a submission that the 3% fee did not represent the claimant's actual loss of profit. The adjudicator awarded the claimant 1.3%, which was a figure he calculated from the profit to sales ratio identified in the set of the claimant's accounts which had been provided by the claimant. It was not a percentage that was expressly stated in the accounts. The defendants argued, *inter alia*, that

this was in breach of natural justice since it was based on an approach neither side had raised, and was a basis of claim which the adjudicator had not given the parties a chance to deal with. The court held that the adjudicator was obliged to go back to the parties with his new calculation. The court reasoned that the adjudicator had rejected the entire approach advanced by Primus which was based on the 3% identified in the contract. According to the court, the adjudicator had agreed with the defendant's principal case that proof of actual loss was required. In the circumstances of the case, the adjudicator had filled up gaps in the claimant's case without any reference to the other side. The court explained as follows:

> 39 … It is a fine line for an adjudicator between wanting to help the parties on the one hand, and making one side's case for them, on the other. But if an adjudicator believes that, in the interests of justice, there is a legitimate alternative course which has not been considered or put forward by the referring party, but which may, on its face, meet the objections of the responding party, he should immediately ask himself the question: do I need to give notice of, and obtain submissions about, that alternative approach?
>
> 4 0 *As I have said, these things are always a matter of fact and degree. An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions.* But where, as here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision. It seems to me that that principle must apply *a fortiori* in circumstances where the document from which the alternative approach is to be derived, is a document which the adjudicator was told by the parties to ignore. In those circumstances, common sense demands that, before reaching any conclusion, the adjudicator must ask the parties for their submissions on that alternative approach.
>
> [emphasis added]

64 In *Balfour Beatty Construction Ltd v The London Borough of Lambeth* [2002] EWHC 597 ("*Balfour Beatty*"), the adjudicator had, with the help of his own programming expert, provided a method to determine the critical path of the contract (a path of execution that is most significant and critical to establish the time needed to complete the works) without providing the defendant an opportunity to voice its views on the method. The court, in dismissing the application to enforce the adjudicator's decision, explained as follows (at [33]):

> … Nor did [the adjudicator] inform either party of the methodology that he intended to adopt, or to seek observations from them as to the manner in which it or any other methodology might reasonably and properly be used in the circumstances to establish or to test [the claimant's] case. In my judgment he ought to have done so. [The claimant] had not presented its case on that basis. [The defendant] had criticised [the claimant] both at the outset and in its final, if belated, submissions that it had failed to establish its case in any proper way. One would ordinarily expect the appropriate method of analysis to be agreed before it was used by an architect or other contract administrator. The adjudicator steps into the shoes of such a person. If an adjudicator intends to use a method which was not agreed and has not been put forward as appropriate by either party he ought to inform the parties and to obtain their views as it is his choice of how the dispute might be decided. *An adjudicator is of course entitled to use the powers available to him but he may not of his own volition use them to make good* ***fundamental deficiencies*** *in the material presented by one party without first giving the other party an proper opportunity of dealing both with that intention and with the results.* The

principles of natural justice applied to an adjudication may not require a party to be aware of "the case that it has to meet" in the fullest sense since adjudication may be "inquisitorial" or investigative rather than "adversarial". That does not however mean that each party need not be confronted with the main points relevant to the dispute and to the decision.

[emphasis added]

The court in *Primus* had stated that the adjudicator in *Balfour Beatty* had been criticised for filling in the gaps in the claimant's case without affording the other party an opportunity to respond.

65 In *Herbosh-Kiere Marine Contractors Limited v Dover Harbour Board* [2012] EWHC 84 ("*Herbosh-Kiere*") the court declined to enforce an adjudicator's decision on the basis that the adjudicator had breached the rules of natural justice by deciding the case on a basis not argued by either party at any stage, and without giving the opportunity to each party to make submissions on the method adopted to resolve the dispute. The parties had made submissions on the basis that individual contract resource rates would be applied to determine the delay for each individual resource in order to decide the final account between the parties. However, the adjudicator had applied a composite overall rate for all resources to determine the delay. By not allowing the parties to address him on this methodology, the adjudicator had breached the rules of natural justice.

66 In *Joseph Musico (aka Giuseppe Musico) and Ors v Philip Davenport and Ors* [2003] NSWSC 977, the Supreme Court of New South Wales, in the context of the Building and Construction Industry Security of Payment Act 1999 (which is *in pari materia* with the Act), made the following observations:

> 107 … It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). *If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it.* …
>
> 108 It follows, in my opinion, that where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have "a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it".
>
> [emphasis added]

67 Locally, in the context of arbitration proceedings, an arbitrator is entitled to embrace a middle path in making a determination as long as it is based on evidence that is before the arbitrator. The arbitrator is not bound to adopt an either/or approach. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*"), the Court of Appeal distilled several principles in the context of arbitration proceedings, which are relevant for the present purposes. They are as follows:

64 The foregoing survey of case law and principles may be further condense[d] into the following principles:

(a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* ([46] *supra*), is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. *An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw.* Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.

…

(e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. *The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him.* In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.

[emphasis added]

68 In *AQU v AQV* [2015] SGHC 26 ("*AQU v AQV*"), the party seeking to set aside the arbitration award argued that there was a breach of natural justice because the arbitrator had radically departed from the position taken by the other party in its pleadings and submissions when the arbitrator found that "there was an oral agreement in April 2008, which was formalised by way of Annotation on 20 May 2008" (at [14]). Prakash J, in dismissing this argument, explained the applicable principles as follows:

17 It was accepted by the court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [41] that there may be a breach of natural justice if an "arbitrator decides the case on a point which he has invented for himself". This is because by doing so "he creates surprise and deprives the parties of their right to address full arguments on the base which they have to answer" (citing Sir Michael J Mustill & Steward C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 312). However, this does not mean that arbitrators cannot make any findings not argued for by the parties. As the High Court stated in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*"):

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

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

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

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

[emphasis added]

69 The principles that emerge from the preceding discussion of the cases are clear. An adjudicator should not fill in gaps or *fundamental deficiencies* for the claimant after rejecting an approach or claim advanced by the claimant, without first giving an opportunity to the other side to respond to the proposed method (*Primus* at [39] and *Balfour Beatty* at [33]). He should not make bricks without straw (*Soh Beng Tee* at [64]). The adjudicator should not find "a method of assessment which formed no part of the dispute referred to him" without giving each party an opportunity to make submissions (*Herbosh-Kiere* at [27] and [34]). However, an adjudicator can, without being in breach of the rules of natural justice, adopt a middle path between the parties, or come to his own conclusions or inferences from the primary facts and evidence placed before him in making his decision. He is not compelled to adopt an either/or approach (*Soh Beng Tee* at [64]) as long as he arrives at a conclusion which reasonably flows from the parties' arguments (*AQU v AQV* at [18]). At the end of the day, this is always a matter of fact and degree (*Primus* at [40]).

70 Further, in my opinion, considerable latitude should be given to adjudicator who makes an adjudication determination under the Act. Section 17(1) provides as follows:

> **17.—(1**) An adjudicator shall determine an adjudication application —
>
> (*a*) within 7 days after the commencement of the adjudication, if the adjudication relates to a construction contract and the respondent —
>
> (i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or
>
> (ii) has failed to pay the response amount, which has been accepted by the claimant, by the due date; or
>
> (*b*) in any other case, within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

As is immediately apparent, the timelines given to an adjudicator to make a determination are tight. This is in line with the purpose of the Act which is to facilitate cash flow by providing a swift and

effective adjudication mechanism. An adjudicator should not be subject to allegations of breach of natural justice as long as he makes a determination which reasonably flows from the parties' arguments, and his conclusions or inferences are drawn from the primary facts and evidence placed before him. The rules of natural justice must be applied in the context of the Act, and in particular, the need for a quick method of adjudication to facilitate cash flow (see *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 at [84], cited with approval in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [23] and by the Court of Appeal in *WY Steel* at [28]). In *Primus*, Coulson J said (at [29]):

> Generally speaking, the rules of natural justice apply to adjudication, but they cannot always be fully applied, given the short timetable and 'the crude methodology' sometimes involved. …

Any deficiency in the reasoning or methodology of the adjudicator is tolerable because of the concept of temporary finality. The parties are at liberty to seek a fuller ventilation of their arguments regarding the dispute at another more thorough and deliberate forum (see *WY Steel* at [22]).

71 In this case, I find that the Adjudicator had made the Adjudication Determination from the primary facts and evidence that were before him, and the Adjudication Determination reasonably flowed from the parties' arguments. He did not fill up any fundamental deficiencies in the claimant's case. The Adjudicator was appointed to decide the sum of money owed by Kindly Construction to JRP for materials on site and for work done up till 6 August 2014. He was not appointed to determine if JRP's method or Kindly Construction's method of valuation was correct. To my mind, framing the dispute in such a manner is too narrow.

72 To deal with the objection of double counting raised by Kindly Construction, the adjudicator dealt with the matter by calculating the total amount due for materials supplied and the total value of labour expended by JRP. He had utilised the agreed cost of materials payable to the suppliers of JRP, the Quotation Price, total roof area and agreed roof area completed by JRP. These were all from the primary evidence before the Adjudicator. He assessed that the percentage of the partially completed roofing works in terms of labour content was 25%. The mark-up of 15% for materials supplied and the 70-30 proportion of materials to labour content for roofing works were derived from acceptable practices in the construction industry. This method of determining the adjudication reasonably flowed from the parties' arguments. They were not applied to fill in fundamental deficiencies in JRP's case. I therefore find that the Adjudicator did not breach any rules of natural justice in failing to invite the parties to submit or respond to the method that he had used to determine the adjudication. As stated above, it is also not for the court to look into the merits of the Adjudicator's decision.

73 Before I leave this point, I must add that JRP had claimed a total of $222,647.92 after deducting the Progress Payments of $162,934.29. In response, Kindly Construction contended that the valuation for materials and the partial work done was $296,811.87. On Kindly Construction's own valuation, the amount due to JRP after deducting the Progress Payments would be $133,877.58. As it turned out, the Adjudicated Sum came out to be only $98,427.81. This is in fact $35,449.77 less than what Kindly Construction contended it owed to JRP for the materials provided and work done. The Adjudicator thus used a conservative method which turned out favourably for Kindly Construction. Oddly enough, it is Kindly Construction which seeks to set aside the Adjudication Determination on the basis that it was not given an opportunity to submit or respond to the method used by the Adjudicator when it is manifestly apparent the conservative method adopted was in its favour. This argument is plainly an opportunistic attempt to get around the deficiencies in the substantiation of Kindly Construction's own counterclaim, which was dismissed by the Adjudicator, and thus avoid paying JRP the Adjudicated Sum. In any event, as explained above, this argument of Kindly

Construction leaves no favourable impression on me.

Should the Adjudication Determination be set aside on grounds that the Adjudicator incurred unnecessary costs?

74 Lastly, Kindly Construction seeks to set aside the Adjudication Determination on grounds that the Adjudicator incurred unnecessary costs. This argument can be dismissed summarily.

75 In SEF Construction, Prakash J said at [46]:

> … Whilst I note that s 16(3)(*b*) requires the adjudicator to avoid incurring unnecessary expense, I do not consider that a failure to comply with that requirement should result in the setting aside of the adjudication determination since, even if unnecessary expense is incurred in connection with the adjudication, that is unlikely to affect the correctness of the determination as long as the adjudicator was independent and impartial and afforded the parties natural justice. …

I am in full agreement with the above passage. To use the touchstone provided in *Terence Lee*, the duty to avoid incurring unnecessary expense is not one which is so important that it is the legislative purpose of the Act that an adjudication determination made in breach of such a duty should be declared invalid.

76 Thus, whether or not the Adjudicator did incur unnecessary costs in the present case is irrelevant given that it is not a valid ground for setting aside the Adjudication Determination.

Conclusion

77 In conclusion, I have found no grounds on which the Adjudication Determination should be set aside. The Adjudication Determination should not be set aside on the ground that the Adjudicator had acted in excess of his powers under the Act when he called the 29 September 2014 adjudication conference before the statutorily stipulated date of commencement of the adjudication. I also find that the Adjudicator did not breach his duty to comply with the rules of natural justice. There was no apparent bias, nor was the Adjudicator required to provide an opportunity for the parties to submit or respond to the specific method he used to determine the valuation of the materials and work done by JRP in the course of his Adjudication Determination. I also find that the failure to avoid incurring unnecessary costs is not a valid ground for setting aside the Adjudication Determination.

78 Therefore, I dismiss Kindly Construction's application in Summons 5789 of 2014 in its entirety. The AR's Order is to remain and the money paid into court by Kindly Construction is to be released to JRP.

79 I will hear the parties on costs separately if no agreement can be reached on costs.

[note: 1] There was an error in the Adjudicator's Direction No 2 which stated the date to be 29th October 2014 when it should have been the 29th September 2014.

[note: 2] 3,172 sq m ÷ 12,075 sq m = 26.27%