# WCS Engineering Construction Pte Ltd *v* Glaziers Engineering Pte Ltd [2018] SGHC 28

**Case Number** : Originating Summons No 662 of 2017

**Decision Date** : 13 February 2018

**Tribunal/Court** : High Court

**Coram** : Vinodh Coomaraswamy J

**Counsel Name(s)** : David Ong and Magdalene Ong (David Ong & Co) for the plaintiff; Crystal Phuar (Michael Por Law Corporation) for the defendant.

**Parties** : WCS Engineering Construction Pte Ltd — Glaziers Engineering Pte Ltd

*Building and construction law – Dispute resolution – Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) – Adjudication – Natural justice*

13 February 2018

**Vinodh Coomaraswamy J :**

**Introduction**

1 An adjudicator appointed under the Building & Construction Industry Security of Payments Act (Cap 30B, 2006 Rev Ed) ("the Act") is obliged to comply with the principles of natural justice in determining an adjudication application under that Act. If he arrives at a holding on an issue of law in his determination which is wrong, and he does so without hearing from the parties on that issue, has he breached the rules of natural justice? Or has he simply made an error of law? That is the issue raised by the application before me now.

2 In the adjudication out of which this application arises, the adjudicator issued a determination in favour of the defendant (the claimant in the adjudication). In his determination, the adjudicator held that the plaintiff (the respondent in the adjudication) had to satisfy the adjudicator beyond reasonable doubt that the deductions it claimed to be entitled to make from the defendant's payment claim were valid deductions. The adjudicator arrived at this holding without soliciting or receiving submissions from either party on what standard of proof (using that term loosely (see [34] below)), the plaintiff had to meet to satisfy the adjudicator on the validity of its deductions. Indeed, this evidential issue was at no time a live issue in the adjudication. The plaintiff now seeks to set aside the adjudication determination on the principal basis that the adjudicator breached his obligation under s 16(3)(*c*) of the Act to comply with the principles of natural justice.

3 After hearing and considering the parties' submissions, and given the unusual features of this case, I have set aside the adjudication determination. The defendant has appealed against my decision. I now give the grounds for my decision.

**The factual background**

***The parties' roles and their relationship***

4 The plaintiff was the main contractor in a project to construct a residential development now known as "The Hillford". The Hillford is a substantial development, comprising 281 flats in six blocks of

between five and seven storeys. [note: 1] Construction of The Hillford commenced in March 2014 [note: 2] and concluded in or around October 2016. [note: 3] The Hillford's temporary occupation permit was then issued and the flats were duly handed over to their subsidiary proprietors. [note: 4]

5 The Hillford's unique feature is that it is especially designed to accommodate the elderly. The Hillford therefore includes not only the usual amenities found in a private condominium but also an elder-care centre and elderly-related supporting facilities.

6 By a letter of award issued and accepted in January 2015, [note: 5] the plaintiff appointed the defendant as its aluminium, stainless steel and glazing subcontractor for The Hillford. The value of the subcontract was a little over $900,000. The defendant's scope of works under the subcontract included fabricating, supplying and installing semi-frameless shower screens in all 321 bathrooms in The Hillford. The defendant commenced work in February 2015 and completed work in October 2016.

7 In October 2016, the defendant issued its Progress Claim No. 8, being its final progress claim under the subcontract. This progress claim would, in due course, be the basis of the defendant's adjudication application.

***Shattering shower screens***

8 Between October 2016 and January 2017, the sliding glass doors in at least nine shower frames in eight different units in The Hillford shattered while in use. [note: 6] In many of these instances, personal injuries resulted. [note: 7] Some of these injuries were serious. [note: 8] In December 2016 and January 2017, the plaintiff, the developer, the developer's architect and the defendant held meetings and had discussions to find out what was causing the glass shower doors to shatter, and to formulate and implement a solution. [note: 9] As part of this exercise, the developer asked its architect to gather facts and documents in order to determine the root cause of the shattering glass doors.

9 The plaintiff's initial position was that the glass doors were shattering because the defendant had used defective materials or was guilty of defective workmanship. The defendant's response was that the doors could be shattering for three other reasons: [note: 10] (i) the users of the doors may have used too much force to slide them open, causing the leading vertical edge of the glass door to strike the wall; (ii) the glass doors may be spontaneously shattering due to the presence of nickel sulphide inclusions in the glass, which was an inherent characteristic of tempered glass and not a defect; [note: 11] or (iii) there could be design and space constraints in the shower area where the frames had been installed resulting in glass doors striking the wall when they were opened.

10 On 27 December 2016, the plaintiff, through its then solicitors, formally put the defendant on notice that the plaintiff would look to the defendant for damages for, and an indemnity against, all losses occasioned by what the plaintiff characterised as the defendant's negligent installation of the shower screens. [note: 12] The plaintiff's solicitors' letter was drafted broadly enough also to cover a claim that the defendant had used defective materials. [note: 13]

11 On 11 January 2017, the defendant wrote to the plaintiff and to the developer's architect. This letter was not a direct response to the plaintiff's solicitors' letter of 27 December 2016 (see [10] above). Instead, this letter set out the defendant's position arising from the parties' meetings and discussions (see [8] above). [note: 14] Even though this letter was sent on the defendant's own letterhead, its structure and phrasing makes it clear that it was drafted for the defendant by

solicitors.

12 In its letter dated 11 January 2017, the defendant denied that there were any defects in the materials or in the installation. [note: 15] The defendant also noted that the only glass panels that were shattering were the sliding panels in the doors. None of the identical, fixed panels in the shower frames were shattering. The defendant therefore posited that the doors were shattering because they were striking the walls when slid open. [note: 16] The defendant pointed out that the plaintiff's consultants had approved the defendant's shop drawings and mock-up of the shower frame before the defendant commenced fabrication and installation. The defendant's position was that, if the doors were found to be shattering because they were coming into contact with the wall when slid open, the defendant would contest any back charge arising from the shattering doors and would consider any remedial work which the plaintiff might require to be a variation of their subcontract, and therefore to be carried out at the plaintiff's cost. [note: 17]

13 On 20 January 2017, the defendant's solicitors responded to the plaintiff's solicitors' letter dated 27 December 2016 (see [10] above). [note: 18] The response took broadly the same position as the defendant's letter to the plaintiff dated 11 January 2017. In addition, the plaintiffs' solicitors pointed out that the temporary occupation permit for The Hillford had already been issued, which meant that the developer's architect had accepted the defendant's work as being in compliance with the subcontract. [note: 19] The letter concluded by demanding that the plaintiff pay the defendant's Progress Claim No. 8 issued in October 2016 without further delay (see [7] above). [note: 20]

14 On 26 January 2017, the plaintiff's solicitors responded to the defendant's solicitors. [note: 21] In this response, the plaintiff denied that the defendant had completed the works in compliance with the subcontract. The plaintiff further denied that the defendant was entitled to payment on its Progress Claim No. 8.

15 On 13 February 2017, the developer's architect informed the plaintiff that there were two root causes for the shattering glass doors. [note: 22] First, the design of the shower frames required a 30mm buffer between the vertical edge of the glass door and the wall in order to avoid the edge striking the wall when it was slid open. However, the architect found that some frames had been installed with a buffer which was less than 30mm. Second, the rollers in the aluminium tracks for the doors allowed the doors to slide too freely. The doors therefore picked up too much speed and momentum when slid open. Both of these factors increased the likelihood of a glass door striking the wall at high speed and shattering, even when it was opened in normal usage. [note: 23]

16 To address these root causes, the developer's architect required the plaintiff to take three remedial steps for all 321 of the shower screens at The Hillford. First, rubber studs were to be installed on the aluminium tracks to slow down the doors. Second, clear plastic edge seals were to be applied to protect the leading edge of the door. Third, the doors were to be laminated with safety film so that, even if the door did strike the wall and shatter, the laminate would hold the shards of glass in place to prevent injury. [note: 24]

17 The defendant agreed to replace, at its own cost and without admission of liability, all of the doors which had shattered. [note: 25] But the defendant refused to perform any of the further remedial steps which the developer's architect required unless the plaintiff accepted that the work would be a variation to the parties' subcontract.

18 As a result, in January and February 2017, the developer and the plaintiff made their own arrangements to have all of the remedial work carried out. [note: 26] It appears that it was the plaintiff who ultimately bore the cost of this work. [note: 27] In addition, the plaintiff reimbursed the medical expenses of residents who had suffered personal injuries. [note: 28]

***The defendant serves its payment claim***

19 On 22 February 2017, the defendant served a payment claim on the plaintiff within the meaning of the Act. [note: 29] This payment claim covered all work done under the subcontract for which the defendant had yet to be paid. As it was served long after the defendant had completed its work and left the site, it was in substance the defendant's version of the parties' final account under their subcontract.

20 In this payment claim, the defendant claimed that the plaintiff owed the defendant the total sum of $204,279.96 (including goods and services tax) for all work remaining unpaid. Part of that sum was $109,910.40 (including goods and services tax) which the defendant claimed for supplying and installing 321 glass shower screens. [note: 30]

21 On 7 March 2017, the plaintiff served a payment response. [note: 31] In it, the plaintiff sought to back charge $78,659.96 to the defendant for "COSTING INCURED [*sic*] FOR THE SHATTERING OF SHOWER SCREEN". [note: 32] The back charge included the medical claims reimbursed by the plaintiff, the attendance costs incurred by both the plaintiff and the developer in dealing with the issue and the costs of the remedial work. [note: 33] The plaintiff also made certain other deductions and adjustments in the payment response. The net result of all this was that the plaintiff's version of the final account showed that it was the defendant who owed the plaintiff just under $3,000.

**The adjudication**

***The adjudication claim and response***

22 On 29 March 2017, the defendant applied under s 13 of the Act to have its claim adjudicated. [note: 34] In its adjudication application, the defendant conceded that certain deductions and adjustments in the plaintiff's payment response had been validly made. [note: 35] As a result, the defendant voluntarily reduced its claim in the adjudication from $204,279.96 to $95,840.91. But the defendant continued to reject the plaintiff's back charge of $78,659.96 arising from the shattering glass doors.

23 There is no dispute that the defendant validly invoked the adjudication procedure. [note: 36]

24 In its submissions filed together with and in support of its adjudication application, the defendant gave four reasons for rejecting the back charge. [note: 37] First, the defendant had installed the shower screens in accordance with the drawings approved by the plaintiff's consultants. The defendant was therefore not liable if the doors nevertheless shattered. [note: 38] Second, even if the defendant was liable to the plaintiff in the sum of $78,659.96, that was a liability for general damages for breach of contract. That type of liability could not in law be asserted against a payment claim in an adjudication under the Act. [note: 39] Third, the plaintiff's computation of the back charge in its payment response did not sufficiently explain how the various component sums had been

calculated and why they were being withheld. That was contrary to the plaintiff's obligation under Regulation 6(1)(*d*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"). [note: 40] Finally, the back charge included sums for work which were both outside the defendant's scope of work and which were excessive.

25 On 30 March 2017, the Singapore Mediation Centre referred the adjudication to the adjudicator. On 3 April 2017, he formally accepted the reference. [note: 41]

26 The plaintiff lodged its adjudication response on 6 April 2017. [note: 42] In it, the plaintiff accepted parts of the defendant's claim. As a result, the plaintiff's response showed that the plaintiff owed the defendant just over $11,000. [note: 43] But the plaintiff maintained that it was entitled to deduct $78,659.96 from the defendant's claim. The plaintiff made four key points. First, the defendant failed to install the shower frames in accordance with the approved drawings. [note: 44] The approved drawings required a 30mm gap between the vertical edge of the open door and the wall. [note: 45] The defendant had installed the shower frames with less than a 30mm gap. That gap was insufficient to prevent the vertical edge of the door from striking the wall when the door was opened. [note: 46] Second, the plaintiff denied that it had failed to comply with Regulation 6(1)(*d*) of the Regulations. It had given sufficient particulars of the back charge in its payment response. [note: 47] Third, the plaintiff was entitled to rely on the back charge in the adjudication because the adjudicator had an obligation under s 17(3)(*b*) of the Act to have regard to the plaintiff's express contractual right under the sub-contract to set-off the cost of rectification works arising from the defendant's defective workmanship or materials. [note: 48] Alternatively, the plaintiff relied on its rights by way of equitable set off. Finally, the plaintiff denied that any of the sums comprised in the deduction arose otherwise than from the defendant's non-compliant installation of the glass doors or were unreasonable in amount. [note: 49]

27 On 13 April 2017, the plaintiff voluntarily revised its computation yet again. The result was that the plaintiff accepted that it owed a sum of $5,749.32 to the defendant. The plaintiff tendered payment to the defendant of that sum. [note: 50] The defendant accepted the payment without prejudice to its right to proceed in the adjudication for the balance of its claim. [note: 51]

28 The adjudicator was initially obliged to render his determination by 22 April 2017. However, the parties agreed to extend time for the adjudicator's determination to 15 May 2017. [note: 52]

29 In due course, the adjudicator fixed an adjudication conference for 27 April 2017. [note: 53] In anticipation of the conference, and with the adjudicator's leave, [note: 54] both plaintiff and the defendant lodged further written submissions with the adjudicator on 24 April 2017.

30 The defendant's further written submissions [note: 55] continued to reject the plaintiff's deduction of $78,659.96. The defendant made three principal points. First, the defendant had been compelled to install certain shower frames with a gap of less than 30mm [note: 56] because the plaintiff had insisted that the defendant make the shower openings as wide as possible [note: 57] even though it knew that the width of the shower areas actually handed over by the plaintiff to the defendant for installation of the shower frames was smaller than anticipated when the defendant had prepared the shop drawings and the mock-up and when the plaintiff's consultants had approved them. Second, the plaintiff was seeking to deduct the entire cost of remedying the shower frames in The

Hillford even though it could not prove that the defendant had installed all of those shower frames with a gap of less than 30mm. [note: 58] The defendant's final point was that the poor quality of the evidence which the plaintiff had produced in the adjudication meant that the plaintiff had failed to meet its burden of proof. As a result, and because of the inherent evidential limitations of the adjudication process, the defendant submitted that the adjudicator was not in a position to decide the plaintiff's entitlement to a set-off. [note: 59]

31 This submission by the defendant is the first time that burden of proof became a live issue in the adjudication. It is therefore worth setting out this part of the defendant's further written submissions verbatim: [note: 60]

> Further, the [defendant] submits that it is not possible for the Learned Adjudicator to take a robust approach in this case to decide on the [plaintiff's] entitlement to set-off due to the [plaintiff's] failure to make out its claim by failing to particularise the alleged breaches of the [defendant] and *failure to provide sufficient evidence to discharge its burden of proof for the proposition advanced by it with regards the work carried out by the [defendant] (which the [defendant] maintains is in compliance with the shop drawings) and the link, if any, between the buffer gap and the shattered glass incident.* Further, without the benefit of a fact-intensive investigation and expert evidence on the issues, the Learned Adjudicator is not equipped to deal with the present issues arising from the alleged breach of non-compliance with the shop drawings, notwithstanding that … such an exercise is also unsuitable to be undertaken in these SOP proceedings. The [defendant] humbly submits that this is not the forum to decide the Respondent's entitlement to set-off and accordingly, the Learned Adjudicator should only allow the [defendant's] claim in respect of work done by the [defendant]. [emphasis added]

32 It is, of course, not strictly speaking correct to speak of either party in an adjudication application as having a burden of *proof*. That is simply because neither side in an adjudication has any obligation to "prove" its case to the adjudicator in the sense of demonstrating to the adjudicator that its case is objectively true (*cf* s 3(3) of the Evidence Act (Cap 97, 1997 Rev Ed)). Determining whether a party has demonstrated its case to be true is not the function of an adjudicator. The function of an adjudicator is to determine the issues listed in s 17(2)(*a*) of the Act, the most important of which is the amount, if any, out of the applicant's payment claim to which temporary finality ought to attach under s 21(1) of the Act. It is therefore no part of the adjudicator's role to find whether the claimant's payment claim – or indeed the respondent's deduction from it – has or has not been *proven*. That finding is within the exclusive province of the dispute-resolution tribunal which will resolve the parties' dispute with full finality (see s 21(1)(*b*) of the Act).

33 In adjudication proceedings, therefore, it is more accurate to speak of a burden of persuasion. The claimant hopes to persuade the adjudicator to give temporary finality to the entirety of the claim. The respondent hopes to persuade the adjudicator to withhold temporary finality from all or part of the claim. Each party who advances a proposition to the adjudicator bears the burden of persuading the adjudicator to accept that proposition in and for the purposes of the adjudication. The defendant was therefore correct, in a loose sense, to submit that the plaintiff bore the burden of persuading the adjudicator that he should withhold temporary finality from $78,659.96 out of the defendant's payment claim by reason of the shattering glass doors.

34 But the defendant, having challenged the sufficiency of the plaintiff's evidence, did not propose in its further submissions a qualitative test which the adjudicator could apply to ascertain whether the plaintiff had "provide[d] sufficient evidence to discharge its burden of proof". To put it another way, the adjudicator was not given a qualitative standard against which to weigh the plaintiff's

evidence in the adjudication. That qualitative test is, of course, analogous to the standard of proof where a decision is to be reached with full finality. In the current context, for accuracy and consistency, I shall refer to that qualitative test as the "standard of persuasion".

35 The plaintiff too lodged further written submissions on 24 April 2017. [note: 61] The plaintiff made no new points in those submissions. But, also on 24 April 2017, the plaintiff lodged written skeletal arguments. [note: 62] The skeletal arguments took the form of a paragraph by paragraph response to the defendant's further submissions. The plaintiff made four principal points. First, the plaintiff took the position that the defendant had a design obligation under its subcontract which the defendant had breached in designing the shower frames. [note: 63] Second, the plaintiff denied that it had insisted on the openings for the showers being as wide as possible. Its position was that the defendant's obligation was to comply with the specifications in the shop drawings by maintaining a 30mm gap regardless of the size of the shower area. [note: 64] Third, the plaintiff pointed out that if it were indeed true that the shower areas were smaller than expected, the parties' subcontract provided that the risk of site constraints was on the defendant. [note: 65] Fourth, the evidence that the plaintiff had presented to the adjudicator was the best evidence then available to it, given that The Hillford's temporary occupation permit had been issued and that the subsidiary proprietors were by then occupying the flats. [note: 66] Finally, the plaintiff denied ever instructing the defendant to reduce the 30mm gap in order to maintain the width of the shower opening. [note: 67]

36 The plaintiff, in its skeletal arguments, did address the specific paragraph in the defendant's further submission (set out in full at [31] above) which had first raised the sufficiency of the plaintiff's evidence as an issue in the adjudication. [note: 68] However, the plaintiff pitched its response at the highest level of generality. It simply asserted that it *had* produced sufficient evidence with sufficient particularity to satisfy the adjudicator that the plaintiff was entitled to deduct $78,659.96 from the defendant's claim in and for the purposes of the adjudication. Like the defendant's further submission, the plaintiff's skeletal arguments did not suggest a qualitative test by which the adjudicator was to weigh the sufficiency of the plaintiff's evidence.

***The adjudication conference***

37 The adjudication conference took place as scheduled on 27 April 2017. Both parties were represented by solicitors. Both parties placed all of the written material which I have summarised above before the adjudicator. Both parties supplemented the written material with oral submissions. But neither party addressed the adjudicator on the standard of persuasion. Nor did the adjudicator invite either party to address him on this issue.

38 It is not surprising that the parties did not take the initiative to address the adjudicator on the standard of persuasion. It was simply not a live issue in the adjudication, even at the close of the adjudication conference. It is common ground today that, if the adjudicator *had* invited the parties to address him on the issue, both parties would have told the adjudicator that all that the defendant had to do was to raise a *prima facie* case [note: 69] that it was entitled to deduct the sum of $78,659.96 from the defendant's claim.

***The adjudication determination***

39 On 15 May 2017, the adjudicator released his written adjudication determination. [note: 70] He allowed the defendant's claim in full, giving credit to the plaintiff only for its earlier, voluntary payment (see [27] above).

40 In dealing with the plaintiff's deduction of $78,659.96 arising from the shattering glass doors, the adjudicator began with a brief summary of the facts and the parties' submissions [note: 71] and then posed two questions for himself: [note: 72]

> Arising from the shattered shower screen glass incidents, there are two principal questions to address before deciding whether the claim is allowed:
>
> (a) Is [the defendant] responsible and liable for the shattering shower screen glass panels *beyond reasonable doubt* and to what extent?
>
> (b) Can [the plaintiff] claim for [*sic*] set-off against the [defendant's] claim if the [defendant] is found liable in Question … (a) above?
>
> [Emphasis added]

It is clear from the manner in which he framed both of these questions that the adjudicator, quite correctly, considered that it was the plaintiff who bore the burden of persuasion on the questions.

41 The adjudicator then set out what evidence he would expect the plaintiff to produce in order to address the first question: [note: 73]

> 50. To fully address the first question of whether the [defendant] is responsible and liable for the shattering shower screen glass panels and to what extent, one has to determine what causes the shattering in the first place. There are scientific investigative procedures that can be carried out (usually by a third party specialist acceptable to both [defendant] and [plaintiff]) for such incidents. These procedures include recording of statements from the affected persons and witnesses, recording of the shattered glass and all the devices involved at the site as well as the testing of the glass and devices.
>
> 51. Based on these findings and test results, the third party specialist would then be able to identify the cause or a combination of causes of the glass shattering. After the causes are identified, the third party specialist would be able to recommend the proper and best course of actions. The third party specialist's report, if carried out diligently would enable us to determine objectively the party liable for each of the individual incidents as well as which party is responsible for which subsequent remedial actions.
>
> 52. Careful reading of the submissions made revealed that there were some indications that the above investigative procedures might have been carried by the [plaintiff]. I refer to … the Adjudication Response at the various dates:
>
> (a) 9 January 2017 – there was a discussion with external glass specialist on [the] third party report[;]
>
> (b) 13 January 2017 – attendance to Noptic Glass Test[;]
>
> (c) 26 January, 26 February 2017 – Site inspection for 3rd party report.
>
> 53. However, before me, there are no report or document presented as evidence. I therefore find it strange that for about three months after the discussion with the third party was held, there is still no report available for this adjudication proceeding. I am not aware of the reason for

the absence of the report and why the [plaintiff] did not present it as evidence. This is my first doubt.

42 Paragraph 52 of the adjudicator's determination – which I have included in the passage cited at [41] above – is a reference to three entries in a spreadsheet which the plaintiff tendered in the adjudication as evidence of the attendance costs which formed part of its deduction of $78,659.96. That spreadsheet records that on 9 January 2017, the plaintiff, the developer and the developer's consultants had a discussion on site with an external glass specialist on producing a third-party expert report. On 13 January 2017, a "Noptic Glass Test" was carried out in the presence of the plaintiff and the developer's consultants to detect whether nickel sulphide inclusions in the glass panels were causing them to shatter spontaneously. And on 26 January 2017 and 26 February 2017, the plaintiff and the developer's consultants are recorded as carrying out a "site inspection …for 3rd party report". [note: 74]

43 The concluding sentence in para 53 of the adjudicator's determination – "This is my first doubt." – foreshadowed the framework which he then followed in this critical part of his determination. The adjudicator, having adopted as his starting point (see [40] above) that the plaintiff had to persuade him beyond reasonable doubt that the defendant was liable for the shattering glass doors, set out in para 53 his first reasonable doubt: the plaintiff's failure to produce in the adjudication the third-party specialist report, which he assumed to exist.

44 The adjudicator then went on in para 54 of his determination to set out five other reasonable doubts which he harboured about the defendant's liability to the plaintiff for the shattering glass doors: [note: 75]

(a) There was no evidence of the specifications which the defendant's glass panels had to meet under the subcontract and no test results to show that the defendant had failed to meet those specifications;

(b) There was no evidence of any stipulation in the building code which required there to be a gap of minimum 30mm between the glass shower door and the wall. The adjudicator pointed out that there was evidence of some shower frames which the defendant had installed with a gap less than 30mm in which the doors had not shattered and also of some shower frames which the defendant had installed with a gap larger than 30mm, which could not – on the plaintiff's own case – constitute a breach of contract.

(c) The width of the shower doors in The Hillford – a project designed for the elderly – were below the minimum width of 800mm mandated in the Building and Construction Authority's Code on Accessibility in the Built Environment 2013 ("BCA Code") in order to allow a wheelchair to be used in the shower. The adjudicator therefore asked rhetorically: "I wonder how many of the reported incidents are cases in which an elderly and his helper shatter [*sic*] the glass [while entering] the shower together. I have no answer to it because there are no incident reports submitted to me."

(d) The glass shower door in one unit shattered in March 2017, [note: 76] *after* the remedial works were carried out. [note: 77] That cast doubt on the efficacy of the plaintiff's remedy, the costs of which the plaintiff wanted the defendant to bear.

(e) One of the documents which the plaintiff relied upon in the adjudication asserted that shower doors had shattered in three units which were mentioned nowhere else in the plaintiff's

submissions as having suffered from shattering glass.

45 The adjudicator then rejected the plaintiff's entitlement to deduct $78,659.96. He did so expressly on the basis that the plaintiff had failed to establish its claim of defects beyond reasonable doubt:

> 55. On the above considerations, I am therefore not persuaded that at this stage, I can conclude that the [defendant] is wholly responsible and liable for the glass shattering incidents. It is, however, not to say that the [defendant] is not responsible and liable at all. Neither am I convinced to accept that the rectification works carried out by the [plaintiff] are effective and sufficient that the claim amount is justified or accurate.
>
> 56. I would also like to cite [7.7] of Chow Kok Fong's Security of Payments and Construction Adjudication, 2013, Second Edition
>
> "In construction cases, the courts have indicated that they will take a 'robust approach' in examining the underlying premise and set-offs raised by a defendant. In *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc (1990)*, Yong Pung How J (as he then was) considered the position to be that 'if there is no defence to a claim other than a plausible counterclaim, then judgment must be entered on the claim'. In such a situation, the defendants will be left to pursue their counterclaim separately from the plaintiff's claim. **Adjudicators under the Singapore SOP Act are expected to take a similarly robust approach.**"
>
> *(sentence in bold highlighted by me)*
>
> 57. ***As I am required take a robust approach that the claim on defects must be beyond reasonable doubt.*** Based on the above reasons set out in para. 50 to 55 above and the case of *MU Pte Ltd v MV Ltd (2009) (ARA01 of 2009 [2009] SCAdjR 995)*, I reject the [plaintiff's] set-off/counterclaim of S$78,659.96 in this adjudication proceeding. The [plaintiff] can however address its claim separately on another forum.
>
> [emphasis added in bold italics]

46 The adjudicator concluded his determination by holding that the defendant was entitled to receive substantially the whole of its claim against the plaintiff. He therefore determined that the plaintiff was obliged to pay to the defendant: (i) the sum of $89,451.95; (ii) interest on that sum at the rate of 5.33% per annum starting seven days after the date of the determination; and (iii) 50% of the costs of the adjudication.

**The parties' arguments**

***The plaintiff's case***

47 The plaintiff relies on four grounds to argue that this adjudication determination ought to be set aside:

(a) First, the adjudicator breached his obligation under s 16(3)(*c*) of the Act to comply with the principles of natural justice by failing to give the plaintiff an opportunity to address him on the standard of persuasion which the plaintiff had to meet. [note: 78]

(b) Second, the adjudicator breached the rules of natural justice by failing to give the plaintiff

an opportunity to address the adjudicator on the relevance of the BCA Code. [note: 79] It will be recalled (see [44(c)] above) that the adjudicator cited possible non-compliance with the BCA Code as one of the adjudicator's reasonable doubts about the plaintiff's claim.

(c) Third, the adjudicator misdirected himself by adopting irrelevant considerations in arriving at his determination because he focused on the factual cause of the glass doors shattering rather than focusing on the identity of the party to be held responsible for it. [note: 80]

(d) Finally, the adjudicator breached his duty of impartiality.

48 Although the plaintiff raised and argued the last three grounds separately, they are all in one way or another subsidiary to the plaintiff's first ground. I therefore begin my analysis with that ground.

49 The plaintiffs' argument on its first ground proceeds as follows. The standard of persuasion on a party in an adjudication is merely to raise a *prima facie* case with respect to any proposition which it advances to the adjudicator. By expecting the defendant to persuade him beyond reasonable doubt as to its claim for $78,659.96, the adjudicator not only made a patent error of law but went "on a frolic of his own". [note: 81] If the adjudicator wished to adopt persuasion beyond reasonable doubt as the standard of persuasion which the plaintiff had to meet, the fair hearing rule required the adjudicator to give both parties an opportunity to address him on the issue. Although the adjudicator's breach of that rule in this case led him to make what both parties agree was an error of law, that is not the gist of the plaintiff's challenge. The plaintiff in substance is challenging, not the *content* of the adjudicator's decision, but his *conduct* in arriving at that decision. [note: 82] Finally, the breach of natural justice in this case was pivotal in that it was material to the outcome of the determination [note: 83] and has caused the plaintiff prejudice.

***The defendant's case***

50 The defendant accepts that the adjudicator adopted the wrong standard of persuasion and that he did so without hearing from the parties. But the defendant argues that the adjudicator did not thereby commit a breach of the rules of natural justice but instead merely fell into an error of law. His determination is therefore beyond the scope of the High Court's supervisory powers on an application to set aside an adjudication determination. [note: 84] The defendant denies that there was any breach of natural justice on three grounds. First, the adjudicator's adoption of the wrong standard of persuasion was an error of law and not a breach of natural justice. [note: 85] Second, the result of the adjudicator's error of law on the standard of persuasion was, at most, that he weighed the evidence before him incorrectly, which is not a ground for setting aside an adjudication determination. [note: 86] Finally, the result of the adjudicator's error of law caused the plaintiff no prejudice. [note: 87]

51 I accept the plaintiff's submissions and reject the defendant's. In my view: (i) the adjudicator did breach the rules of natural justice; (ii) the breach of natural justice was causally connected to the outcome of the determination; and (iii) the breach of natural justice caused the plaintiff actual, as opposed to notional, prejudice.

***The adjudicator breached the rules of natural justice***

52 It is common ground that the adjudicator did not hear submissions from either party on the standard of persuasion before he adopted persuasion beyond reasonable doubt as the applicable

standard in his determination. So it is correct, at least in a factual sense, that the plaintiff was not heard on this issue.

53 The defendant argues that there was no breach of justice in this case for two reasons. First, because the standard of persuasion was never in issue in the adjudication. The defendant goes further to point out that it could never have been in issue in the adjudication even if it had become a live issue, because the parties were agreed on it. [note: 88] It is, the defendant argues, not a breach of natural justice for a decision-maker to fail to hear from the parties on an issue on which they do not take opposing positions. Second, there was no breach of natural justice because this is not a case where an adjudicator heard from one party and accepted that party's position on an issue without hearing from the other party. In this case, the adjudicator failed to hear from *both* parties. [note: 89]

54 On both points, the defendant is wrong.

55 Underlying the rules of natural justice is the recognition that procedural fairness has intrinsic value. Ensuring that a decision-making process is fair is inherently valuable because it accords dignity to those persons who participate in the process and whose interests are affected by the decision which is the outcome of the process. But procedural fairness also has instrumental value. Given that it is virtually impossible to be assured that the outcome of any decision-making process is objectively "correct" – or even, in some cases, "fair" – according procedural fairness to those who participate in the process and are affected by its outcome makes it more likely that they, and the wider community that they come from, will accept the legitimacy of the decision even if they do not accept its substance.

56 Both components of the rules of natural justice therefore have both intrinsic and instrumental value. In the particular case of the fair hearing rule, it has added instrumental value in that hearing from the parties contributes to rectitude of decision. That is particularly so in adversarial proceedings, which is what adjudication applications remain by their fundamental nature. Adversarial proceedings are founded on the expectation that an objectively correct decision is more likely to emerge from a contest of self-interested submissions by the parties rather than from a decision-maker's self-directed inquiries and ingenuity. To put it simply, hearing from the parties before arriving at a decision not only helps to ensure that the parties accept the legitimacy of the decision but also assists the decision-maker in getting the decision objectively right.

57 Given this background, there are two reasons why I reject the defendant's submissions. First, it is certainly true that a decision-maker who fails to hear from both parties will have treated them both equally and, in that sense, acted with impartiality. But the failure is nevertheless a breach of the fair hearing rule. That is because the failure leads to the very harm – both on an individual basis and on a systemic basis – which the rules of natural justice seek to avoid. On the individual basis, failing to hear from both parties on an issue before arriving at a decision on that issue is equally capable of giving rise to a lingering procedural grievance as failing to hear from one party before doing so. If, following that failure, the decision-maker arrives at a decision which neither party desires, both parties will harbour a procedural grievance. And if the decision-maker arrives at a decision which only one party desires, the procedural grievance harboured by the unsuccessful party is indistinguishable in principle from the grievance he would harbour if the decision-maker had in fact heard only from the successful party. On the individual level, then, both cases lead to an increased risk that one or both parties will reject the legitimacy of the decision. That is one of the very risks which the rules of natural justice are designed to mitigate. On the systemic level, a failure to hear from both parties is equally capable of undermining the legitimacy of the decision-making process in the eyes of potential participants who are not parties to the particular case at hand.

58 Second, because part of the underlying purpose of requiring the decision-maker to hear from both parties on an issue is the instrumental purpose of increasing rectitude of decision, it is equally a breach of natural justice not to hear from the parties where they are agreed on an issue as it is when that issue is contested. A decision-maker who decides an issue without hearing from both parties on that issue deprives himself of a specific forensic benefit which the adversarial system offers him. The forensic benefit is clear where the parties are opposed on the issue. It arises from the decision-maker hearing and testing the parties' submissions in competition with each other. But there is equally a forensic benefit even when the parties are agreed on the issue. The benefit arises from the opportunity which hearing from both parties gives the decision-maker to avoid error.

59 The defendant's submissions proceed on two fundamental misconceptions. The first is to frame the issue before the adjudicator at too high a level of generality. Thus, the defendant submits that the issue before the adjudicator was whether the defendant was liable to the plaintiff for the shattering glass doors. [note: 90] The adjudicator heard from the plaintiff fully on that issue. [note: 91] Therefore, the defendant says, the adjudicator cannot have breached the rules of natural justice.

60 All of that may be true, but only because the defendant has framed the issue for present purposes in the same terms as the ultimate issue in the adjudication. The defendant overlooks that there were subsidiary issues on the adjudicator's path to his decision on the ultimate issue. The adjudicator had an equally real obligation under s 17(3)(*c*) of the Act to comply with the principles of natural justice in dealing with those subsidiary issues. One of those issues, which emerged only in his determination, was the applicable standard of persuasion which the plaintiff had to meet. And it is not to the point to say that the plaintiff had an opportunity in a general sense to deal with this subsidiary issue. It is, of course, true that the plaintiff had every opportunity to address the adjudicator on any issue it wished to in its written and oral submissions. So in that sense, the adjudicator did afford the plaintiff a general opportunity to be heard on all issues. But that general opportunity to be heard on any issue cannot constitute a specific opportunity to be beard on the issue of the applicable standard of persuasion. That is because the standard of persuasion was never a live issue in the adjudication. As a result, the plaintiff had no notice that the adjudicator was going to decide that issue as a subsidiary issue on his way to his ultimate determination of the ultimate issue.

61 The defendant's second fundamental error is to assume that a breach of natural justice and an error of fact or law operate on the same plane, such that a particular aspect of the adjudicator's determination can be only one or the other but not both. The defendant therefore begins by characterising the adjudicator's error in this case as an error of law and not a breach of natural justice and then submits that where there is an error of law, there cannot be a breach of natural justice. [note: 92] That is not correct. A breach of natural justice and an error of law operate on separate planes. The distinction which the plaintiff draws [note: 93] between conduct – or process – and outcome is crucial. A breach of natural justice operates on the procedural plane and is a feature of the decision-maker's *conduct* in his decision-making. An error of law operates on the outcome plane and is a feature of the substance of his decision-making. A breach of natural justice may or may not result in an error of law. If it does, the error of law does not subsume the breach of natural justice. The parties are agreed in this case that the adjudicator's holding on the standard of persuasion was an error. But characterising it as an error of law does not operate to immunise his anterior breach of the rules of natural justice from challenge.

62 The defendant relies on the decision of Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Company Ltd ("MV Pamphilos")* [2002] EWHC 2292 to suggest that the adjudicator in this case did not breach the rules of natural justice because he had no duty to forewarn the parties of his intended

holdings and therefore, presumably, had no duty to forewarn the plaintiff that he intended to hold that the plaintiff had to persuade the adjudicator of its case in the adjudication beyond reasonable doubt. [note: 94] The passage from Colman J's judgment on which the defendant relies reads as follows (at page 7/13):

> …In substance, [the charterers'] complaint is that the arbitrators made findings of fact of which they did not forewarn the parties and for which there was no evidential basis. They thereby unfairly deprived the charterers of the opportunity of addressing them on those matters and therefore failed to provide a fair means for the resolution of the dispute.
>
> The arbitrator's duty was to give the parties a fair opportunity of addressing them on all factual issues material to the intended decision as to which there had been no reasonable opportunity to address them during the hearings ….
>
> It has to be emphasised, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submission every single inference of fact from the primary facts which the arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration.

63 The defendant's reliance on this passage is misplaced. This passage establishes that a decision-maker who reaches a decision without affording the parties an opportunity to address him on that decision does not necessarily breach the rules of natural justice, even if the parties could not have anticipated that decision. But this passage also establishes that it is normally contrary to the rules of natural justice for a decision-maker to arrive at a decision on a major issue without affording the parties an opportunity to address him on that issue. All the more so if that issue is not a live issue. That is precisely what the plaintiff submits the adjudicator did in this case. [note: 95]

64 The defendant also cites my decision in *AMZ v AXX* [2016] 1 SLR 549 at [97] as authority for the proposition that an arbitral tribunal does not breach the rules of natural justice if it does not refer every issue which falls for decision to the parties for submissions. [note: 96] In that passage, I said:

> … [A] tribunal is not required to refer every issue which falls for decision to the parties for submissions. A tribunal's decision may be considered unfair only when a reasonable litigant in the position of the party challenging the award could not have foreseen the possibility of the tribunal's actual reasoning in the award...

65 That proposition, when read in full and in context, assists the plaintiff more than the defendant. The adjudicator's holding that the plaintiff had to persuade him of the defendant's liability beyond reasonable doubt was a decision which a reasonable party to an adjudication in the position of the plaintiff could not have foreseen. That is so, not because the adjudicator's holding is objectively wrong, but because the applicable standard of persuasion was never a live issue in the adjudication. Indeed, for that very reason, I daresay that even a reasonable party in the position of the *defendant* could not have foreseen that the adjudicator would arrive at that holding.

66 A final point troubled me in the course of the parties' submissions. It seemed to me that the adjudicator's breach of natural justice in this case arose because the issue in question – the

applicable standard of persuasion – was to him an unknown unknown. He did not know that he did not know the standard of persuasion which the plaintiff had to meet as a matter of procedural law in order to discharge its burden. As a result, he did not know that he required assistance on this issue and did not appreciate that he should afford both parties an opportunity to render that assistance to him. Does that make a difference? To put it another way, is it a breach of natural justice for a decision-maker to fail to hear from the parties on an issue when he does not appreciate the need to hear from them on that issue? I consider that that is nevertheless a breach of natural justice. The focus of the rules of natural justice is not on the subjective moral or legal quality of a decision-maker's conduct, but on the objective effect which his conduct has on the fairness of the decision-making process and on the stakeholders in that process, including the parties to it.

67 For all these reasons, therefore, I have found that the adjudicator did breach the rules of natural justice.

***The breach was material***

68 The defendant's next submission is that the breach of natural justice was not material to the adjudicator's determination. It is certainly true that not every breach of natural justice will result in an adjudication determination being set aside. There are two aspects of materiality. The first is whether the breach of natural justice was causally connected with the adjudicator's determination. This requires considering the role played in his determination by his holding that the standard of persuasion which the plaintiff had to meet amounted to persuasion beyond reasonable doubt. I deal with that aspect of the submission in this section of the judgment. The other aspect is whether the breach of natural justice caused the plaintiff prejudice. I will deal with that issue in the next section of this judgment.

69 My analysis of the adjudicator's determination (see [39] to [45] above) shows that the adjudicator's on the standard of persuasion was an integral part of the framework of his decision. It was one step on the critical path which led to his determination in the defendant's favour. It would have been different, for example, if the adjudicator had formulated the plaintiff's standard of persuasion as persuasion beyond reasonable doubt but analysed the evidence to explain why he could not accept the plaintiff's evidence as sufficient to raise a *prima facie* case. In that hypothetical situation, it could be said that the adjudicator's formulation of the standard of persuasion in terms of proof beyond reasonable doubt was a mere matter of semantics, given that he had adopted the correct analytical approach in assessing the sufficiency of the plaintiff's evidence. It would be difficult in that hypothetical scenario to hold that the adjudicator's formulation had been causally connected to his determination because his analysis would show that he had not applied it in arriving at his determination. But that is not the case here.

70 The adjudicator's formulation of the standard of persuasion as being persuasion beyond reasonable doubt was a matter of substance rather than semantics. The adjudicator understood the import of his formulation of the standard and went on actually to apply that standard as the framework of his entire analysis. Thus, he rejected the plaintiff's case in the adjudication because – and only because – he harboured the six reasonable doubts about it which he enumerated in his determination at (see [43] to [44] above). There is a clear causal connection between the adjudicator's breach of natural justice and his holding on the issue of the standard of persuasion, and a clear causal connection between that holding and the outcome of his determination. In that sense, then, the breach of natural justice was material.

71 The defendant submits that the part of the adjudicator's decision where he lists his reasonable doubts was no more than ancillary to his decision on the main issue of liability. [note: 97] It was not:

for the reasons I have set out above, it was at the core of his determination.

72 The defendant also suggests that the plaintiff's submission amounts to attacking the weighing exercise which the adjudicator undertook to assess whether the plaintiff had adduced sufficient evidence to meet its burden of proof. But the defendant misunderstands why the plaintiff makes reference to the adjudicator's reasoning. The plaintiff's argument is not that the determination should be set aside because the adjudicator's reasoning in analysing the plaintiff's evidence is faulty. The plaintiff's argument remains that the determination should be set aside because the adjudicator failed to hear from the parties on the applicable standard of persuasion. The plaintiff relies on the adjudicator's reasoning, not to establish error, but to establish a causal connection between the breach of natural justice and the outcome of his determination. That is a causal connection which I accept exists.

***The breach caused the plaintiff actual prejudice***

73 The defendant's final submission is that the adjudicator's breach of natural justice did not cause the plaintiff any prejudice. The defendant submits that the plaintiff's evidence of its right to deduct the $78,659.96 was weak and therefore the outcome of the determination would have been the same regardless of the standard of persuasion which the adjudicator had applied. [note: 98] I reject this submission also.

74 In order to assess prejudice, I must consider the counterfactual situation in which the adjudicator had heard from the parties on the standard of persuasion. If that had happened, the parties are agreed that they would both have submitted to the adjudicator that it sufficed for the plaintiff to raise a *prima facie* case that it was entitled to deduct $78,659.96 from the defendant's claim in and for the purposes of the adjudication.

75 In that counterfactual situation, two consequences would have flowed. First, it is virtually certain that the adjudicator would have accepted the parties' common submission that the applicable standard of persuasion was the *prima facie* standard. It would be highly unusual for an adjudicator to reject a common position taken by both parties represented by counsel. That is especially so when counsel take a common position on a question of law and the adjudicator, as the adjudicator was in this case, is not legally trained. It would be even more unusual for an adjudicator who is not legally trained to reject the parties' common position on a question of *procedural* law. I consider it legitimate to take this factor into consideration as prejudice. It does not amount to me usurping the function of the adjudicator or substituting my judgment for his. That is because the issue of the applicable standard of persuasion is an issue does not have to do with the merits of the parties' claims in the adjudication – which is within the exclusive province of the adjudicator – and will not be revisited when the substantive dispute between the parties is resolved with full finality.

76 The second consequence is that the adjudicator's determination on the merits of the adjudication – arrived at after applying the correct standard of persuasion – *could* have been different from that which he actually reached after applying the incorrect standard. To draw an analogy with arbitration by paraphrasing *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 (at [54]), the plaintiff will have suffered prejudice arising from this breach of the rules of natural justice if it can show that compliance with the rules of natural justice *could reasonably* have made a difference to the outcome of the adjudication. The plaintiff need not show that it *would necessarily* have done so. Certainly, if the adjudicator had not breached the rules of natural justice and received a common submission from the parties that the plaintiff need only raise a *prima facie* case, he *could* have accepted that common submission. Indeed, for the reasons I have given at [75] above, he is almost certain to have done so. If he had done so, the structure of his analysis in his

determination *could* have been different. Whether the plaintiff had adduced sufficient evidence to discharge its burden of persuasion would no longer turn on whether the adjudicator harboured a reasonable doubt. In the counterfactual, applying the *prima facie* standard, the adjudicator *could* have eschewed the negative approach of identifying and listing the reasonable doubts which he continued to harbour about the plaintiff's case, even after considering the plaintiff's evidence. The adjudicator *could* instead have adopted the positive approach of marshalling and analysing the plaintiff's evidence to see whether it was sufficient to persuade him that, *prima facie*, he ought not to confer temporary finality on $78,659.96 of the defendant's claim in and for the purposes of the adjudication.

77 The defendant submits that the plaintiff did not suffer prejudice because, even if the adjudicator had invited the parties to address him on the applicable standard of persuasion, and even if the adjudicator had adopted and applied the standard which the parties are agreed he ought to have applied, his decision would have been no different because the plaintiff's evidence did not suffice even to raise a *prima facie* case. [note: 99] I reject that submission. As a judge exercising supervisory jurisdiction over the adjudicator, it is not appropriate or desirable for me to base my decision on whether to set aside the adjudication determination on my own weighing of the evidence before the adjudicator, applying the correct standard of persuasion. For the reasons I have set out at [76] above, I accept that the adjudicator's analysis and therefore his determination *could* have been different and that that suffices to demonstrate prejudice.

**The plaintiff's four other grounds**

78 The reasons set out above suffice for me to set aside the adjudicator's determination on the grounds that he breached the rules of natural justice. It is therefore not necessary for me to consider the plaintiff's three other grounds (see [47] above). In any event, I do not consider any of those grounds to be independent of the first ground in any true sense.

79 The plaintiff's second ground is that the adjudicator breached the rules of natural justice by failing to give the plaintiff an opportunity to address the adjudicator on the relevance of the BCA Code. It is true that this point was not advanced by the defendant in the adjudication and that the adjudicator did not hear from the plaintiff on this point before including it in his determination as one of his reasonable doubts about the plaintiff's case.

80 But I do not consider that to be a ground which is independent of the plaintiff's first ground. If the adjudicator had been procedurally correct in his formulation of the standard of persuasion, his approach to analysing whether the plaintiff had met that standard could not be faulted. On that hypothesis, the plaintiff's second ground would not have sufficed in and of itself to set aside the adjudication determination. This is because, even if this particular finding of a reasonable doubt had been reached in breach of natural justice, the result would be to remove only one out of the six reasonable doubts identified by the adjudicator. The finding on the BCA Code reached in breach of natural justice would therefore not be causally connected with the outcome of the determination and could not, in itself, justify setting it aside.

81 The plaintiff's third ground is that the adjudicator misdirected himself by adopting irrelevant considerations in arriving at his determination because he focused on the factual cause of the glass doors shattering rather than focusing on the identity of the party to be held responsible for it. I would have difficulty accepting that this ground was made out in the case and, even if made out, that it justified setting aside the adjudication determination in itself. It is not possible to separate the factual and legal responsibility for the shattering glass doors from the factual cause of the doors shattering. For example, if the factual cause of the doors shattering was defective materials, legal responsibility

for the loss would rest with the defendant. In any event, as with the BCA Code, if this misdirection was the only error which the adjudicator had made, it would have affected only one out of his six reasonable doubts. His analysis would still have rested on at least four other reasonable doubts. Thus, this alleged misdirection, even if established, would have had no causal connection to the adjudicator's ultimate determination.

82 The plaintiff's fourth ground is that the adjudicator breached his duty of impartiality. The plaintiff put this argument, it appears, in two ways. First, the plaintiff submits that by not hearing from the parties on the issue of the standard of persuasion and arriving at a decision adverse to the plaintiff, the adjudicator displayed a lack of impartiality. I do not accept the plaintiff's submission on this point. As far as the process is concerned, as I have already mentioned, the fact that the adjudicator failed to hear from *both* parties on this issue *demonstrates* his impartiality rather than falsifying it. And as far as the adverse outcome is concerned, the mere fact that an adjudicator arrives at a decision which is adverse to a party cannot even constitute *prima facie* evidence of a lack of impartiality, at least where the adjudicator has treated the parties equally in the procedural sense.

83 The second way in which the plaintiff puts the impartiality argument is that the framework which the adjudicator adopted for his reasoning in the critical part of his determination – which I have summarised at [40] to [45] above – suggests that the adjudicator had predetermined the issue of the shattering glass doors against the plaintiff and was reasoning backwards to support a predetermined outcome. I reject this argument also. There is no basis in the adjudicator's reasoning for suggesting that the adjudicator lacked impartiality by reason of predetermination.

**The unusual features of this case**

84 My decision to set aside this adjudication determination must be understood in the context of the many unusual features of this case. It is unusual for an adjudicator to fail to hear from both parties to an adjudication application before arriving at a holding on an issue of law. It is unusual for an adjudicator to fail to do so because he does not know that he needs assistance on that issue of law. It is unusual for the parties to agree that they would have made identical submissions to the adjudicator on that issue of law if he had solicited submissions before arriving at his holding. And it is unusual to be able to draw a clear line of causal connection from a breach of natural justice to an adjudicator's holding of law, from his holding of law to the critical path to his decision and through his critical path to his ultimate determination. If any of those features had been missing in this case, I would almost certainly not have set aside the determination.

85 Thus, for example, I would not have set the determination aside if the adjudicator had failed to hear from the parties on the standard of persuasion but had instead reframed question (a) (see [40] above) as follows: "Is the defendant *prima facie* responsible and liable for the shattering shower screen glass panels?". In that situation, at least, the adjudicator would have posed the right question for himself. There would still be a notional breach of natural justice, but the breach would no longer be causally connected to the adjudicator's holding of law. Hearing from the parties could not have made any difference to his holding. There are then two alternatives approaches which the adjudicator could have taken. If the adjudicator had gone on in his determination to adopt the *wrong* approach to answering the right question – *eg*, by looking for reasonable doubts instead of *prima facie* evidence – that would still not warrant setting aside the determination. The fact would remain that there was no causal connection between the breach of natural justice and his holding of law. The first link in the chain of causation being already broken, that precludes a causal connection between the breach of natural justice and his error of approach. If, instead, the adjudicator had gone on to apply the *right* approach to answering the right question, in addition to there being no causal connection between

the breach of natural justice and the adjudicator's approach, there would also be no prejudice to the plaintiff.

86 By the same token, I would not have set aside the determination if the adjudicator had heard conflicting submissions from the parties on whether the standard of persuasion should be persuasion of a *prima facie* case or persuasion beyond reasonable doubt and had framed question (a) (see [40] above) without modification. Given that he had complied with the rules of natural justice by hearing both parties on this issue of law, and given that the parties' submissions to him on the issue conflicted, his holding that the plaintiff had to satisfy him beyond reasonable doubt rather than simply to raise a *prima facie* case would have been nothing more than an error of law.

87 Similarly, I would not have set the determination aside if the adjudicator had failed to hear from the parties on the standard of persuasion, framed question (a) (see [40] above) without modification and then analysed the plaintiff's evidence positively, searching for a *prima facie* case, rather than negatively, searching for reasonable doubts. In that situation, there would have been a breach of natural justice which was causally connected to the question which the adjudicator framed for himself. But that would have been an unusual case where – because the parties are agreed on the standard of persuasion and because the adjudicator applied that very standard of persuasion in his analysis despite framing his question in different terms – the plaintiff would be unable to show that the adjudicator's decision *could* have been different in the counterfactual situation where the adjudicator had heard the parties on the standard of persuasion.

88 By contrast to the three preceding examples, there is in this case a direct causal connection running from the breach of natural justice through every element of the adjudicator's analysis directly to the outcome of the determination. Given the unusual features, I have no alternative but to set the determination aside. If the system of adjudication is to have the legitimacy necessary to perform the function for which Parliament intended it, it is essential that stakeholders have confidence in the process. Where an adjudicator breaches his duty under s 16(3)(*c*) of the Act to comply with the principles of natural justice in these circumstances, the breach is not a mere technicality. It gives rise, in an objective sense, to a legitimate procedural concern sufficient to engage the court's supervisory jurisdiction.

89 The framework I have adopted in this judgment mirrors very closely the circumstances under which a court will set aside an arbitration award for breach of natural justice under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). Resolved to its elements, that provision requires: (i) a breach of the rules of natural justice to have occurred: (ii) a connection between the breach and the making of the arbitral award; and (iii) actual prejudice to the rights of a party going beyond the nominal prejudice arising from the breach itself.

90 Given that not every breach of an adjudicator's obligation to comply with the principles of natural justice under s 16(3)(*c*) of the Act will result in his adjudication determination being set aside, and given that the Act provides no guidance as to when a breach of s 16(3)(*c*) does warrant setting aside an adjudication determination, the framework of s 24(b) of the IAA appears to me to be a useful *prima facie* approach to see precisely which breaches of natural justice will have that warrant setting aside an adjudication determination.

91 The arbitration framework, however, is applicable by analogy rather than directly. An application to set aside an adjudication determination (or to set aside an order granting leave to enforce an adjudication determination under s 27 of the Act) is quite different from an application to set aside an arbitration award in at least two principal ways. First, an application to set aside an adjudication determination invokes the High Court's inherent supervisory jurisdiction at common law over inferior

courts and tribunals. An application to set aside an award in an international or a domestic arbitration invokes a jurisdiction created and defined by statute. Second, the purpose of adjudication is to arrive at a determination which carries only temporary finality. Procedural unfairness in adjudication therefore has no capacity to affect the parties' substantive rights and obligations. Arbitration, on the other hand determines the parties' rights and obligations with full finality.

**Conclusion**

92 For all of the reasons above, I have set aside the adjudication determination. It follows that the sum of $89,451.95 which the plaintiff paid into court as a prerequisite for pursuing this application must be released to the plaintiff. I have also ordered the defendant to pay the plaintiff's costs fixed at $8,700 plus reasonable disbursements to be taxed if not agreed.

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[note: 1] First affidavit of Ke Koon Seng filed on 14 June 2017, paragraphs 5 to 6, page 46.

[note: 2] First affidavit of Ke Koon Seng filed on 14 June 2017, paragraphs 5 to 6, page 46.

[note: 3] First affidavit of Ke Koon Seng filed on 14 June 2017, page 32 at paragraph 8.

[note: 4] First affidavit of Ke Koon Seng filed on 14 June 2017, page 198 at paragraph 2(a).

[note: 5] First affidavit of Ke Koon Seng filed on 14 June 2017, page 46.

[note: 6] First affidavit of Ke Koon Seng filed on 14 June 2017, page 198 at paragraph 2.

[note: 7] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 259 to 260.

[note: 8] First affidavit of Ke Koon Seng filed on 14 June 2017, page 195 at paragraph 2(e).

[note: 9] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 214 to 225.

[note: 10] First affidavit of Ke Koon Seng filed on 14 June 2017, page 224.

[note: 11] First affidavit of Ke Koon Seng filed on 14 June 2017, page 199 at paragraphs 4 to 5.

[note: 12] First affidavit of Ke Koon Seng filed on 14 June 2017, page 196 at paragraph 6.

[note: 13] First affidavit of Ke Koon Seng filed on 14 June 2017, page 195 at paragraph 3.

[note: 14] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 197 to 203.

[note: 15] First affidavit of Ke Koon Seng filed on 14 June 2017, page 199 at paragraph 10.

[note: 16] First affidavit of Ke Koon Seng filed on 14 June 2017, page 199, paragraphs 7 to 9.

[note: 17] First affidavit of Ke Koon Seng filed on 14 June 2017, page 200 at paragraphs 12 and 14.

[note: 18] First affidavit of Ke Koon Seng filed on 14 June 2017, page 204.

[note: 19] First affidavit of Ke Koon Seng filed on 14 June 2017, page 205 at paragraph 5.

[note: 20] First affidavit of Ke Koon Seng filed on 14 June 2017, page 206 at paragraphs 10 to 12.

[note: 21] First affidavit of Ke Koon Seng filed on 14 June 2017, page 213.

[note: 22] First affidavit of Ke Koon Seng filed on 14 June 2017, page 173.

[note: 23] First affidavit of Ke Koon Seng filed on 14 June 2017, page 261 at paragraph 15 to page 264 at paragraph 30.

[note: 24] First affidavit of Ke Koon Seng filed on 14 June 2017, page 263 at paragraph 27 to page 264 at paragraph 30.

[note: 25] First affidavit of Ke Koon Seng filed on 14 June 2017, page 474 at paragraphs 1.1 to 1.3.

[note: 26] First affidavit of Ke Koon Seng filed on 14 June 2017, page 260 at paragraphs 14(k) to 14(l).

[note: 27] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 326 to 327.

[note: 28] First affidavit of Ke Koon Seng filed on 14 June 2017, page 272 at paragraph 51(b).

[note: 29] First affidavit of Ke Koon Seng filed on 14 June 2017, page 117.

[note: 30] First affidavit of Ke Koon Seng filed on 14 June 2017, page 112 at Item F.

[note: 31] First affidavit of Ke Koon Seng filed on 14 June 2017, page 147.

[note: 32] First affidavit of Ke Koon Seng filed on 14 June 2017, page 150.

[note: 33] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 150 to 151.

[note: 34] First affidavit of Ke Koon Seng filed on 14 June 2017, page 252.

[note: 35] First affidavit of Ke Koon Seng filed on 14 June 2017, page 36 at paragraph 24.

[note: 36] First affidavit of Ke Koon Seng filed on 14 June 2017, page 257 at paragraph 7; page 452 at paragraph 7.

[note: 37] First affidavit of Ke Koon Seng filed on 14 June 2017, page 258 at paragraph 13.

[note: 38] First affidavit of Ke Koon Seng filed on 14 June 2017, page 39 at paragraph 32.1.

[note: 39] First affidavit of Ke Koon Seng filed on 14 June 2017, page 39 at paragraph 32.2.

[note: 40] First affidavit of Ke Koon Seng filed on 14 June 2017, page 39 at paragraph 32.3.

[note: 41] First affidavit of Ke Koon Seng filed on 14 June 2017, page 454 at paragraphs 15 to 16.

[note: 42] First affidavit of Ke Koon Seng filed on 14 June 2017, page 252.

[note: 43] First affidavit of Ke Koon Seng filed on 14 June 2017, page 276.

[note: 44] First affidavit of Ke Koon Seng filed on 14 June 2017, page 263 at paragraph 25.

[note: 45] First affidavit of Ke Koon Seng filed on 14 June 2017, page 262 at paragraph 22.

[note: 46] First affidavit of Ke Koon Seng filed on 14 June 2017, page 263 at paragraph 24.

[note: 47] First affidavit of Ke Koon Seng filed on 14 June 2017, page 264 at paragraph 31 to page 267 at paragraph 42.

[note: 48] First affidavit of Ke Koon Seng filed on 14 June 2017, page 267 at paragraphs 43 to 46.

[note: 49] First affidavit of Ke Koon Seng filed on 14 June 2017, page 270 at paragraph 49 to page 274 at paragraph 55.

[note: 50] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 399 and 402.

[note: 51] First affidavit of Ke Koon Seng filed on 14 June 2017, page 403.

[note: 52] First affidavit of Ke Koon Seng filed on 14 June 2017, page 455 at paragraph 24.

[note: 53] First affidavit of Ke Koon Seng filed on 14 June 2017, page 455 at paragraph 25.

[note: 54] First affidavit of Ke Koon Seng filed on 14 June 2017, page 455 at paragraph 26.

[note: 55] First affidavit of Ke Koon Seng filed on 14 June 2017, page 332.

[note: 56] First affidavit of Ke Koon Seng filed on 14 June 2017, page 336 at paragraph 13.

[note: 57] First affidavit of Ke Koon Seng filed on 14 June 2017, page 336 at paragraph 10.

[note: 58] First affidavit of Ke Koon Seng filed on 14 June 2017, page 338 at paragraph 18.

[note: 59] First affidavit of Ke Koon Seng filed on 14 June 2017, page 340 at paragraph 24 to page 342 at paragraph 29.

[note: 60] First affidavit of Ke Koon Seng filed on 14 June 2017, page 341 at paragraph 28.

[note: 61] First affidavit of Ke Koon Seng filed on 14 June 2017, page 391.

[note: 62] First affidavit of Ke Koon Seng filed on 14 June 2017, page 432.

[note: 63] First affidavit of Ke Koon Seng filed on 14 June 2017, page 433 at paragraph 3(a).

[note: 64] First affidavit of Ke Koon Seng filed on 14 June 2017, page 435 at paragraph 4(d).

[note: 65] First affidavit of Ke Koon Seng filed on 14 June 2017, page 435 at paragraph 5(b).

[note: 66] First affidavit of Ke Koon Seng filed on 14 June 2017, page 437 at paragraph 6(b).

[note: 67] First affidavit of Ke Koon Seng filed on 14 June 2017, page 438 at paragraph 7(b).

[note: 68] First affidavit of Ke Koon Seng filed on 14 June 2017, page 441 at paragraph 11.

[note: 69] Defendants' written submissions, paragraph 5. Certified Transcript, 18 July 2017, page 9 at lines 28 to 32; page 24 at lines 33 to 34. Certified Transcript, 26 July 2017, page 5 at lines 23 to 25; page 12 at lines 24 to 29; page 13 at lines 28 to 30.

[note: 70] First affidavit of Ke Koon Seng filed on 14 June 2017, page 450.

[note: 71] First affidavit of Ke Koon Seng filed on 14 June 2017, page 459 at paragraphs 41 to 45.

[note: 72] First affidavit of Ke Koon Seng filed on 14 June 2017, page 462 at paragraph 49.

[note: 73] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 462 to 463.

[note: 74] First affidavit of Ke Koon Seng filed on 14 June 2017, page 329.

[note: 75] First affidavit of Ke Koon Seng filed on 14 June 2017, pages 464 to 465.

[note: 76] First affidavit of Ke Koon Seng filed on 14 June 2017, page 329 at Item 22.

[note: 77] First affidavit of Ke Koon Seng filed on 14 June 2017, page 281 at Item 48.

[note: 78] Plaintiff's written submissions, page 9 at paragraph 23.

[note: 79] Plaintiff's written submissions, page 9 at paragraph 23.

[note: 80] Plaintiff's written submissions, page 5 at paragraph 13. First affidavit of Ke Koon Seng filed on 14 June 2017, paragraph 43.

[note: 81] Plaintiff's written submissions, page 8 at paragraph 23.

[note: 82] Plaintiff's written submissions, page 11 at paragraph 26(a); Certified Transcript, 18 July 2017, page 2 at lines 24 to 35; page 3 at lines 1 to 3.

[note: 83] Certified Transcript, 18 July 2017, page 8 at lines 18 to 20; Certified Transcript, 26 July 2017, page 12 at lines 1 to 11; lines 15 to 23.

[note: 84] Defendant's written submissions, page 3 at paragraph 5.

[note: 85] Defendant's written submissions, page 3 at paragraph 4.

[note: 86] Defendant's written submissions, page 4 at paragraph 6(c).

[note: 87] Defendant's written submissions, page 15 at paragraph 28; page 16 at paragraph 31.

[note: 88] Defendant's written submissions, page 3 at paragraph 6(a).

[note: 89] Defendant's written submissions, page 4 at paragraph 6(b).

[note: 90] Certified Transcript, 26 July 2017, page 2 at lines 35 to 36.

[note: 91] Certified Transcript, 26 July 2017, page 1 at lines 40 to 41; page 2 at lines 1 to 4.

[note: 92] Certified Transcript, 26 July 2017, page 1 at lines 30 to 34.

[note: 93] Certified Transcript, 26 July 2017, page 11 at lines 18 to 33.

[note: 94] Certified Transcript, 26 July 2017, page 2 at lines 22 to 34.

[note: 95] Certified Transcript, 26 July 2017, page 13 at lines 21 to 27.

[note: 96] Certified Transcript, 26 July 2017, page 6 at lines 25 to 28.

[note: 97] Certified Transcript, 26 July 2017, page 3 at lines 10 to 19.

[note: 98] Certified Transcript, 18 July 2017, page 36 at lines 4 to 8.

[note: 99] Certified Transcript, 26 July 2017, page 5 at lines 11 to 19.