IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 45

Originating Summons No 384 of 2016

In the matter of Section 27 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

And

In the matter of Order 95, Rule 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of Adjudication Application No SOP/AA089 of 2016 between Designshop Pte Ltd as the Claimant and Metropole Private Limited as the Respondent and the Adjudication Determination dated 1 April 2016 issued thereunder

Between

Metropole Pte Ltd

… *Applicant*

And

Designshop Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Terms]
[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]

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Metropole Pte Ltd
v
Designshop Pte Ltd

[2017] SGHC 45

High Court — Originating Summons No 384 of 2016
Vinodh Coomaraswamy J
7 July 2016

7 March 2017

Vinodh Coomaraswamy J:

Introduction

1 This is an application by Metropole Private Limited ("Metropole") to set aside an adjudication determination dated 1 April 2016 on a number of grounds.[1] The respondent is Designshop Pte Ltd ("DPL").

2 I have rejected each of Metropole's grounds and dismissed the application. Metropole has appealed to the Court of Appeal. I therefore now give my reasons.

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[1] Originating Summons (15 April 2016).

Background facts

The parties' contract

3 In June 2009, Metropole engaged Designshop.Architects LLP ("the LLP") to provide architectural services in relation to a project to carry out additions and alternations to seven shophouses at Sims Avenue.[2] Mr Lim Hong Kian ("Lim"), Ms Joy Chew Chia Pow ("Chew") and Ms Yeo Pei Shan were partners of the LLP.

4 Metropole and the LLP contracted on the terms set out in the Singapore Institute of Architects' standard form Conditions of Appointment and Architects Services and Mode of Payment ("the SIA terms").[3] Lim was the "qualified person" designated for the project for the purposes of the Building Control Act (Cap 29, 1999 Rev Ed) ("the BCA"). He was also the architect in charge of and responsible for the project.[4]

5 The parties' contract divided the work which the LLP was to undertake in the project into stages identified by letters of the alphabet. The contract also stipulated the fee for each stage, expressed as a percentage of the fees for basic services, or the "Construction Cost". Clause 2.3(3) of the parties' contract – identical to cl 2.3(3) of the SIA terms[5] – obliged Metropole, upon termination of the contract, to pay the LLP a minimum of two-thirds of the fee for a particular stage of work if the LLP had carried out any work at all for that

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2 Respondent's submissions (5 July 2016) at paragraphs 3-4; Affidavit of Joy Chew (27 May 2016) at paragraph 5.

3 Respondent's submissions (5 July 2016) at paragraph 3; Applicant's BOD (15 April 2016) at pages 34-64.

4 Respondent's submissions (5 July 2016) at paragraph 8.

5 Applicant's BOD (15 April 2016) at page 67.

stage, even in part.[6] To be precise, the clause provides that even if DPL renders only partial services for a particular stage, DPL shall nonetheless be "entitled to charge commensurate with the service provided but not less than two-third (2/3) of the fee for the incomplete stage".[7]

6 In January 2012, the three partners of the LLP decided to incorporate their architectural practice using DPL as the corporate vehicle. They applied to and obtained the necessary approval from the Board of Architects. DPL then took over the performance of all ongoing projects handled by the LLP, including Metropole's project.[8] Lim remained the designated "qualified person" and the architect in charge of and responsible for the project.

7 In January 2016, Lim left DPL.[9] It was not an amicable parting. The day after Lim left DPL, Metropole instructed DPL in writing that DPL was not to take any further steps or actions or incur any further costs or disbursements for the project. It also gave notice to DPL on 11 February 2016 terminating the parties' contract.[10]

The payment claim

8 On 17 February 2016, DPL issued and served on Metropole a payment claim in the sum of $453,948.43.[11] The payment claim set out a breakdown of this sum. The sum included fees for the stages of work which DPL believed

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6 Applicant's BOD (15 April 2016) at page 54.

7 Applicant's BOD (15 April 2016) at page 54.

8 Respondent's submissions (5 July 2016) at paragraph 6.

9 Applicant's BOD (15 April 2016) at page 96.

10 Applicant's BOD (15 April 2016) at page 87, paragraph 3.

11 Applicant's BOD (15 April 2016) at pages 66-67.

were completed (*ie*, stages A to D and I to K) and disbursements which DPL had incurred on Metropole's behalf such as lithography charges incurred in the tender exercise.[12] The sum also included DPL's claim for fees under cl 2.3(3) (see [5] above) for certain stages of work which were not complete (*ie*, stages E to H and M to N).[13] The fee claimed for each of these stages was calculated by reference to a contract sum of $7,116,500 being the "Construction cost based on the lowest tender".

9 On 24 February 2016, Metropole served on DPL its payment response.[14] In it, Metropole disputed DPL's claim of $453,948.43 and, in particular, disputed DPL's entitlement to rely on cl 2.3(3). Metropole's position was that that clause entitled DPL to two-thirds of the fee for a particular stage only if DPL had rendered *some* services for that stage, but not if DPL had rendered no services at all for that stage.[15] The payment response nevertheless acknowledged that DPL was entitled to the following:[16]

> (a) A sum of $187,891.41 due under unpaid invoices issued by DPL for work carried out under the contract;
>
> (b) A sum of $3,291.18, being the late interest charges payable on unpaid invoices;
>
> (c) A sum of $14,655.00 for lithography charges, being disbursements incurred by DPL and not yet invoiced; and

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[12] Applicant's BOD (15 April 2016) at pages 66-67.

[13] Applicant's BOD (15 April 2016) at page 67; Applicant's 3 BOD (15 April 2016) at page 1391.

[14] Applicant's BOD (15 April 2016) at pages 87-93.

[15] Applicant's BOD (15 April 2016) at pages 87-88, paragraph 4 and 4(c).

[16] Applicant's BOD (15 April 2016) at pages 88-89, paragraph 4(a)-(d).

(d) Two-thirds of the fees stipulated for stages F and G of the parties' contract, given that DPL had rendered *some* services for those stages.

10 The payment response also asserted Metropole's belief that it had contracted personally with Lim and not with DPL.[17] It noted that Lim left DPL in January 2016 and stated that the contract was then only at the stage of tender evaluation.[18] It added that "[n]o tender [had] been awarded to any contractors, no submission [had] been made yet for Building Plan clearance and it [had] not reached [the] stage for Building Plan approval submission."[19]

11 On 3 March 2016, DPL responded by letter to Metropole's payment response and set out its position on the issues raised.[20] DPL claimed *inter alia* that Metropole was aware that DPL had taken over performance of the parties' contract from the LLP and had consented to it by conduct.[21] DPL stated that a new qualified person was designated and that it had informed Metropole of this in an email dated 8 January 2016.[22] DPL also listed the additional services it had rendered and claimed that it was entitled to additional fees for those services.[23]

12 Metropole did not respond to DPL's letter dated 3 March 2016.

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17 Applicant's BOD (15 April 2016) at page 87, paragraph 3.

18 Applicant's BOD (15 April 2016) at page 87, paragraph 3.

19 Applicant's BOD (15 April 2016) at page 87, paragraph 3.

20 Applicant's BOD (15 April 2016) at pages 96-97.

21 Respondent's submissions (5 July 2016) at paragraph 9; Applicant's BOD (15 April 2016) at page 96, paragraph 2(c).

22 Applicant's BOD (15 April 2016) at page 96, paragraph 2(e).

23 Applicant's BOD (15 April 2016) at page 97.

13 On 7 March 2016, DPL gave notice to Metropole under s 12(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). The notice claimed a reduced sum of $262,765.85.[24] The reduction had come about because Metropole had, after receiving DPL's payment claim, paid DPL $191,182.59.[25]

The adjudication

14 On 9 March 2016, DPL made its adjudication application.[26]

15 On 17 March 2016, Metropole lodged its adjudication response. The issues which the adjudication response raised included the following:

(a) Metropole entered into a contract with Lim, not with the LLP or with DPL. The relationship between Metropole and DPL was therefore not governed by the contract and the contract therefore did not apply to the works carried out by DPL for the project;[27]

(b) Even if there was a contract between Metropole and DPL, there was no written contract as required by to s 4 of the Act. DPL was therefore not entitled to make an adjudication application;[28]

(c) The payment claim was invalid because it did not comply with s 10(3)(*b*) of the Act and reg 5(2)(*c*) of the Building and Construction

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[24] Applicant's BOD (15 April 2016) at pages 112-113.

[25] Applicant's BOD (15 April 2016) at pages 110 and 113.

[26] Applicant's BOD (15 April 2016) at page 4, paragraph 1.

[27] Respondent's submissions (5 July 2016) at paragraph 14(a); Applicant's 2 BOD (15 April 2016) at pages 609 and 611.

[28] Respondent's submissions (5 July 2016) at paragraph 14(b); Applicant's 2 BOD (15 April 2016) at page 623.

Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"). DPL had failed to provide sufficient detail to provide a reasoned basis for its claim and the merits of the claim were not evident from the payment claim;[29] and

(d) DPL had adduced and was seeking to rely on fraudulent documents to support its claims. The fraudulent documents were created by Chew or on her instructions. Metropole also attached a statutory declaration filed by Lim and police reports made by Lim and Tan May Hua Linda ("Linda Tan"), who is a director of Metropole.[30]

16 An adjudication conference took place on 29 March 2016. The parties presented their cases to the adjudicator.[31] He issued his determination on 1 April 2016.[32] The determination may be summarised as follows:

(a) He allowed DPL's claims for lithography charges. Metropole did not dispute this claim in its payment response and was therefore barred by s 15(3) of the Act from now advancing on any reasons for withholding payment of this claim.[33] Quite apart from that, he also found on the merits that DPL was entitled to recover this disbursement.[34]

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[29] Respondent's submissions (5 July 2016) at paragraph 14(c); Applicant's 2 BOD (15 April 2016) at pages 648 and 650, paragraphs 150 and 162.

[30] Respondent's submissions (5 July 2016) at paragraph 14(d); Applicant's 2 BOD (15 April 2016) at pages 652 and 653.

[31] Respondent's submissions (5 July 2016) at paragraph 14(e).

[32] Respondent's submissions (5 July 2016) at paragraph 15.

[33] Applicant's 3 BOD (15 April 2016) at Tab 8, pages 14-15.

[34] Applicant's 3 BOD (15 April 2016) at Tab 8, pages 14-15.

(b) He allowed DPL's claims for stages F and G of the contract. Again, Metropole did not dispute these claims in the payment response and was therefore subject to the s 15(3) bar.[35] Quite apart from that, DPL was entitled to not less than two-thirds of the stipulated fee that would have been payable if the incomplete stage of work had been completed pursuant to cl 2.3(3) of the contract.[36]

(c) He allowed DPL's claims for stages E and H of the contract. DPL had commenced but not completed work on these stages. It was therefore entitled to not less than two-thirds of the stipulated fee due for these stages pursuant to cl 2.3(3).[37]

(d) He denied DPL's claims for two-thirds of the stipulated fee for stages L, M, and N. He found that DPL had not commenced any work on these three stages at all. Clause 2.3(3) did not allow DPL to make a blanket claim for two-thirds of the stipulated fee for every stage in the contract, irrespective of whether any work had commenced.[38]

17 On 15 April 2016, Metropole applied to set aside the adjudication determination.[39]

The events of 31 March 2016

18 I move back in the chronology to examine the events of 31 March 2016, as they are of particular importance. This date was two days after the

[35] Applicant's 3 BOD (15 April 2016) at Tab 8, pages 14-15.

[36] Applicant's 3 BOD (15 April 2016) at Tab 8, pages 14-15.

[37] Applicant's 3 BOD (15 April 2016) at Tab 8, page 16.

[38] Applicant's 3 BOD (15 April 2016) at Tab 8, page 17.

[39] Originating Summons (15 April 2016).

adjudication conference and one day before the adjudicator was obliged to issue his determination.

19 At about 10.20am on 31 March 2016, the adjudicator telephoned DPL's solicitors to ask two questions.[40] First, the adjudicator asked whether DPL had issued a second tender evaluation report. Second, the adjudicator asked how DPL had derived the "Construction Cost" of $7,116,500 as stated in the payment claim, if there was no second tender evaluation report. He asked DPL to respond to the two questions by email copied to Metropole.

20 The cause of the adjudicator's confusion was that the first tender evaluation report indicated that the lowest quotation then available,[41] submitted by Poplar Construction Pte Ltd ("Poplar"), was for a sum of $7,318,000,[42] and not for the sum of $7,116,500 which had been common ground between the parties in the adjudication.

21 DPL's solicitors set out and answered the adjudicator's two questions by an email sent to the adjudicator at 12.36 pm the same day, copied to Metropole's solicitors.[43]

22 Metropole's solicitors took the position that the adjudicator's private communication with DPL's solicitors had occasioned a breach of the rules of natural justice.[44] They sent an email to DPL and to the adjudicator at 1.58 pm the same day to that effect.

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[40] Applicant's submissions (5 July 2016) at paragraph 1.

[41] Applicant's 3 BOD (15 April 2016) at Tab 8, paragraph 26.

[42] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 40 (Exhibit LT-2).

[43] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 40 (Exhibit LT-2).

[44] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 93 (Exhibit LT-3).

23 The adjudicator responded to both parties by email at 6.01pm that day.[45] He explained that he had contacted DPL's solicitors purely in the interests of time, as his adjudication determination was due the next day. He had initiated the contact by telephone rather than emailing DPL's solicitors, with a copy to Metropole's solicitors, because he did not have access to his email that morning. He had nevertheless asked DPL to answer the questions by email with a copy to Metropole's solicitors. The adjudicator explained that he had attempted to call Metropole's solicitors but could not reach them. He assured Metropole's solicitors that it was not his intention to exclude them from his communication with DPL on his two questions.[46]

The issues

24 The parties' submission have raised the following issues:

(a) Whether the adjudicator breached the rules of natural justice and if so, whether the breach was sufficiently material to warrant setting aside the adjudication determination; and

(b) Whether the adjudicator acted in excess of his jurisdiction.

25 In my view, Metropole is unable to establish that any of these two grounds are satisfied. I have therefore dismissed its application to set aside the adjudication award. I will discuss each issue in turn.

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[45] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 97 (Exhibit LT-3).

[46] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 97 (Exhibit LT-4).

Breach of natural justice

26 Metropole argues that the adjudicator breached the rules of natural justice because he (i) communicated privately with DPL's solicitors on 31 March 2016; and (ii) disregarded some of Metropole's defences without considering their merits or without making any *bona fide* effort to understand them.

Unilateral communication with DPL's solicitors

27 Metropole submits that the adjudicator breached the rules of natural justice on 31 March 2016 when he contacted only DPL's solicitors to ask the two questions and when he accepted DPL's solicitors' answer to those questions without hearing from Metropole. The adjudicator therefore breached (1) the rule of impartiality and (2) the fair hearing rule. An adjudicator has an express statutory obligation to comply with both these rules under s 16(3)(*c*) of the Act[47] (see also *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [49]).[48]

The rule of impartiality

(1) Metropole's submissions

28 Metropole submits that the adjudicator breached the rule of impartiality because he displayed apparent bias.[49]

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[47] Applicant's submissions (5 July 2016) at paragraphs 27 and 110.

[48] Applicant's 1 BOA at Tab B5.

[49] Applicant's submissions (5 July 2016) at paragraph 43.

29 According to Metropole, the decision of a "judicial or quasi-judicial body will be set aside if there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased" (*Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar Alan*") at [91]). The "reasonable suspicion" test, however, was met if the court was satisfied that a reasonable number of the public could harbour a reasonable suspicion of bias even though the court itself thought there was no real danger of this on the facts (*Re Shankar Alan* at [75]).

30 Metropole argues that the mere fact that private communications have taken place between an adjudicator and a party to an adjudication is sufficient to warrant setting aside the determination on the basis of apparent bias (*Re Singh Kalpanath* [1992] 1 SLR(R) 595at [90]). The court should not look into whether those representations actually caused prejudice (*Re Singh Kalpanath* at [90]).

31 According to Metropole, the adjudicator's conduct showed that he was not disinterested and unbiased.[50] He had a reputational and possibly a monetary interest in ensuring that the adjudication determination was submitted within the statutory timeline, expiring on 1 April 2016. He therefore failed to give Metropole any notice of his questions and failed to afford Metropole an opportunity to be heard on the answer to those questions.[51]

32 The adjudicator contacted DPL's solicitors the day before the adjudication determination was due. He also responded to the email sent by

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[50] Applicant's submissions (5 July 2016) at paragraph 35.

[51] Applicant's submissions (5 July 2016) at paragraph 35.

Metropole's solicitors at 6.01 pm that day, after office hours. In the email, he merely defended his position and did not invite submissions from Metropole on his two questions. Metropole argues that the adjudicator sought by this email to sweep his breach of natural justice under the carpet and present a façade that the adjudication determination was procedurally sound. That is because his adjudication fee would not be paid if the adjudication determination were invalid.[52]

33 Although DPL claims that its solicitors' conversation with the adjudicator was short and that only the adjudicator did no more of substance than to ask his two questions, the adjudicator's conduct in communicating privately with DPL means that Metropole has no way of knowing for itself the length and the content of the conversation.[53]

34 Further, the adjudicator failed to invite Metropole to answer his two questions before accepting and acting on DPL's answers to them. Metropole could not have taken it upon itself to answer the adjudicator's questions, even after it knew what those questions were, for two reasons. First, s 17(3)(*g*) of the Act places on the adjudicator a duty to elicit answers from Metropole. The adjudicator's failure to do so indicates that he was either actually biased or apparently biased.[54] Second, if Metropole had taken it upon itself to answer the questions, this may have created a waiver or raised an estoppel against Metropole (*Paice and another v MJ Harding (trading as MJ Harding Contractors)* [2015] EWHC 661 (TCC) ("*Paice*") at [55], *Farrelly (M&E)*

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[52] Applicant's submissions (5 July 2016) at pages 9-10.

[53] Applicant's submissions (5 July 2016) at paragraph 107.

[54] Applicant's submissions (5 July 2016) at paragraph 86.

Building Services Ltd v Byrne Brothers (Formwork) Ltd [2013] EWHC 1186 (TCC) ("*Farrelly*") at [27] – [29]).

35 Metropole argues that if the adjudicator had asked it for its response to his two questions and to DPL's answers to them, it would have submitted that the "Construction Cost" of $7,116,500 included a contingency sum of $500,000, which ought to be excluded for the purposes of calculating the staged fees payable under the parties' contact, or two-thirds of those fees payable under cl 2.3(3) of the contract.[55] That figure, $6,616,500, was the figure shown in the document which DPL itself attached to its email answering the adjudicator's questions and which was titled "QS's Comparative Analysis No. 3".

(2) DPL's submissions

36 DPL's position is that the adjudicator did not commit any breach of the rules of natural justice.[56] The mere fact that the adjudicator made a phone call to DPL's solicitors did not amount to a breach of natural justice. The adjudicator has the discretion under s 17(3) of the Act to seek clarification from either party. The adjudicator also expressly directed DPL's solicitors to answer the adjudicator's two questions by email and to copy Metropole's solicitors on that email.

37 In any case, the adjudicator's questions related only to the contract sum. Metropole had never taken the position that the contract sum was anything other than $7,116,500 at any time in the course of the adjudication, whether in its payment response, in its adjudication response or at the

[55] Applicant's submissions (5 July 2016) at page 25 at paragraphs 97-102.

[56] Respondent's submissions (5 July 2016) at paragraph 19(a).

adjudication conference.[57] QS's Comparative Analysis No. 3 (see [35] above) merely sets out how the sum of $7,116,500 was derived and has no bearing on how the contract sum should be calculated for the purposes of cl 2.3(3). If Metropole had wanted to raise this issue, it had had this document in its possession since 17 November 2015, well before DPL served the payment claim on Metropole (on 17 February 2016) and well before Metropole served its payment response (on 24 February 2016) and adjudication response (on 17 March 2016). Despite this, Metropole accepted throughout the adjudication that the contract sum was $7,116,500 as stated in DPL's payment claim.

38 DPL submits that the adjudicator's only obligation arising from the telephone call to DPL's solicitors was to afford Metropole an opportunity to respond to the adjudicator's two questions and to DPL's response to them. Metropole had this opportunity. At no time did the adjudicator prevent Metropole from responding to the email. It is Metropole who chose not to respond to DPL's email despite having had the opportunity to do so and the time to do so between 12.36 pm on 31 March 2016 and the issuance of the determination.[58] For these reasons, DPL submits that the allegation of bias must fail.

The fair hearing rule

39 Metropole also submits that the adjudicator breached the fair hearing rule, otherwise known as the *audi alteram partem* rule. The rule requires that parties be given adequate notice of the case to be met and a reasonable opportunity to be heard on it.[59] Each party must be given a fair hearing and a

[57] Respondent's submissions (5 July 2016) at paragraph 27(c).

[58] Respondent's submissions (5 July 2016) at paragraph 42.

[59] Applicant's submissions (5 July 2016) at paragraph 110.

fair opportunity to present its case (*SEF Construction* at [49]). Where an adjudicator communicates with just one party, the absent party must be told the substance of what has been said and afforded an opportunity to comment upon it" (*Dean and Dyball Construction Limited v Kenneth Grubb Associates Ltd* [2003] EWHC 2465 (TCC) ("*Dean and Dyball*") at [52]).[60]

40 Further, the adjudicator should have invited Metropole to answer his questions and to respond to DPL's answers to them. But he did not, accepting that his questions had been adequately answered after hearing from only one side.[61] In his email, he merely sought to reassure Metropole that he did not intend to keep Metropole out of the loop of his query,[62] not to seek its substantive response to his questions.

The materiality of the breach

(1) Metropole's submissions

41 Metropole takes the view that there is no need to show that the breach of the rule of impartiality was material or caused prejudice before the adjudication determination can be set aside.[63] It nonetheless submits that the breaches of natural justice were material as they could reasonably have affected the adjudicator's determination.

42 Metropole submits that the test for prejudice as applied in the context of arbitration is also applicable to adjudication under the Act. It cites the test laid down in *AMZ v AXX* [2016] 1 SLR 549 for setting aside an arbitral award

[60] Applicant's submissions (5 July 2016) at paragraph 113.

[61] Applicant's submissions (5 July 2016) at paragraph 20.

[62] Applicant's submissions (5 July 2016) at paragraph 11.

[63] Applicant's submissions (5 July 2016) at paragraph 64.

for a breach of the rules of natural justice under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). In *AMZ v AXX*, I held at [103] that the test in arbitration as set out by the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 is "whether the tribunal could reasonably have arrived at a different result if not for [the] breach". There is no requirement that the material must necessarily lead to a different result. What matters is that a different result could reasonably have been reached.

43 Metropole submits that the adjudicator's two questions touched quite clearly on the merits of the dispute before him. It was not an administrative or clerical request.[64] He asked how the contract sum was derived. The contract sum forms the basis of assessing the quantum of DPL's claim. He took the construction sum explicitly into account in his adjudication determination at [26].[65] His questions went to the root of the matter, which was the amount of money which the adjudicator should determine Metropole was to pay DPL.[66] Metropole argues that if it had been given the opportunity to respond to DPL's answers, it would have argued that the contingency sum should be excluded in calculating the contract sum for the purposes of cl 2.3(3). The sum of $6,616,500 was therefore another possible figure that the adjudicator *could* have adopted as the contract sum. This *could* in turn have affected the adjudicator's determination of the sums which Metropole was to pay to DPL.[67]

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64 Applicant's submissions (5 July 2016) at paragraph 16.

65 Applicant's submissions (5 July 2016) at paragraph 25.

66 Applicant's submissions (5 July 2016) at paragraph 96.

67 Applicant's submissions (5 July 2016) at paragraph 97.

(2) DPL's submissions

44 DPL's response is that any breach of natural justice was not material to the outcome of the determination.[68] When the adjudicator asked his two questions of Metropole on 31 March 2016, whether the contract sum was $7,116,500 or some other figure was not a live issue between the parties.[69] The payment claim took the contract sum as $7,116,500 being the "Construction cost based on the lowest tender".[70] Metropole did not dispute this figure in its payment response or in its adjudication response.[71] The sum of $7,116,500 was known to Metropole from as early as 17 November 2015, by an email sent by the project's quantity surveyor copied to Linda Tan.[72] In that email, Poplar's quotation of $7,116,500 was expressly mentioned in an attachment detailing the summary of the tenders received for the project.[73] Metropole's argument is therefore no more than an afterthought, raised for the first time for purely tactical purposes in this setting aside application.

The court's decision

(1) The rule of impartiality

45 Section 16(3) of the Act obliges an adjudicator to act in accordance with the rules of natural justice:

> "an adjudicator shall –

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68 NE (7 July 2016) at pages 38-39.

69 NE (7 July 2016) at page 37.

70 NE (7 July 2016) at page 37.

71 NE (7 July 2016) at page 37.

72 NE (7 July 2016) at pages 37-38.

73 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 86 (Exhibit LT-2).

> (*a*) act independently, impartially and in a timely manner;
>
> (*b*) avoid incurring unnecessary expense; and
>
> (*c*) comply with the principles of natural justice."

46 It can be seen that an adjudicator comes under a statutory obligation to act impartiality under two provisions of s 16(3). First, that obligation is set out expressly in s 16(3)(*a*). Second, that obligation is implicit in his wider obligation to comply with the principles of natural justice under s 16(3)(*c*). But there is no need to analyse these separate statutory obligations separately. The content of the obligation to act impartially under s 16(3)(*a*) is no different from the content of the obligation to act impartially in complying with the principles of natural justice under s 16(3)(*c*). An adjudicator who breaches one also breaches the other (*SEF Construction* at [49]).

47 The test for apparent bias in Singapore law was set out by Sundaresh Menon JC (as the Chief Justice then was) in *Re Shankar Alan*. The test is whether there are circumstances which would give rise to a reasonable suspicion that the decision-maker was biased in a fair-minded, reasonable person with knowledge of the relevant facts (at [91]).

48 The mere fact that a decision-maker communicates with one party to the proceedings does not lead, by itself, to the conclusion that he has failed to act impartially. In *Re Singh Kalpanath*, the High Court recognised the existence of the principle that "a decision-maker should not have contact with any party to the proceedings". The High Court relied on *R v Magistrates Court at Lilydale, ex p Ciccone* [1973] VR 122 to illustrate the principle:

> 88 In *R v Magistrates Court at Lilydale, ex p Ciccone* [1973] VR 122, the court held that there was an appearance of bias where the magistrate accepted a lift to and from a view in a car in which counsel for one side and a witness were also

> passengers. McInerney J, at 27, described the responsibility of a judge as follows:
>
> > The sound instinct of the legal profession – judges and practitioners alike – has always been that, *save in the most exceptional cases*, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and *neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.*
>
> [emphasis added]

49 Communication or association by an adjudicator with one party in the absence of the other party is always to be avoided and is always undesirable. It is always to be deprecated by the court. It may even be said that it always, or almost always, gives rise to a suspicion of bias. It does not always, however, give rise to a *reasonable* suspicion of bias within the meaning of *Re Shankar Alan*. Whether it does will depend on the facts of each case.

50 I find that the adjudicator did not breach the rule of impartiality when he communicated privately with DPL. He did not act in such a way as to expose himself to a *reasonable* suspicion of bias in favour of DPL or against Metropole. I note that the adjudicator asked DPL's solicitors to copy their email answering his two questions to Metropole's solicitors, as they duly did.[74] I also have no basis to disbelieve the adjudicator's evidence that he had tried to call Metropole's solicitors to inform them of his conversation with DPL's

[74] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 40 (Exhibit LT-2).

solicitors but was unable to reach them. Knowledge of these relevant and critical facts must be imputed to the fair-minded and reasonable person in this case.

51 Although the adjudicator did not expressly ask Metropole for its response to his two questions or to DPL's answers to his questions, I cannot find from that a reasonable suspicion of bias against Metropole, *ie* that he would have rejected any response which Metropole might have taken upon itself to offer or any request by Metropole for an opportunity to do so. The fact that the adjudicator asked DPL's solicitors to copy Metropole's solicitors suggests quite the contrary. It suggests that he was open to the possibility that Metropole may take it upon itself to make submissions in response to DPL's answers or, at the very least, ask him for an opportunity to do so.

52 Metropole argues that s 17(3)(*g*) of the Act places on the adjudicator a duty to direct Metropole to respond. I disagree. Section 17(3)(*g*) provides that an adjudicator shall have regard to "the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication". This does not mean that parties can make no submissions and furnish no responses that the adjudicator has not requested. That is not the practice. The antecedent for the phrase "at the request of the adjudicator" in this context is only "any other information or document". In fact, s 17(3)(*g*) of the Act in my view would have operated to require the adjudicator to consider any response Metropole might have made to DPL's email of 31 March 2016. Metropole might have more of an argument on apparent bias if it had asked for an opportunity to respond to DPL's email but was denied it by the adjudicator, or if Metropole had actually responded to it and the adjudicator refused to take the response into account. But that is not what happened.

53 Metropole argues that it did not respond to DPL's email of 31 March 2016 because it could have been estopped from relying on a breach of the rules of natural justice if it had done so. The authorities cited by Metropole do not support this position. For there to be a waiver, there must be a "clear and unequivocal act" by a party which shows that it does not intend to rely on a ground for a natural justice challenge available to it (*Paice* at [55]). In *Farrelly*, the English High Court held at [31] that the fact that "the party asserting a breach of the rules of natural justice does nothing but continues with the adjudication" does not prevent that party from relying on the breach to resist enforcement. This principle would apply to the present case. Even if Metropole had responded to DPL's email of 31 March 2016, it would nonetheless have been able to rely on the natural justice arguments it makes before me now. Also, Metropole's fear that a response to DPL's email would be construed as a waiver could easily have been addressed by Metropole expressly reserving its right in any response nevertheless to rely on the adjudicator's breach of natural justice as a ground for setting aside the determination.

54 Metropole also argues that the adjudicator failed to act impartially because he was driven by his own pecuniary interest. The argument is that adjudicator was not concerned with Metropole's response because he was more concerned with meeting his statutory deadline to issue his adjudication determination in order to earn his adjudication fee.[75]

55 I reject this argument. The Act imposes tight deadlines on the parties and the adjudicator to establish a "fast and low cost adjudication system to resolve payment disputes" (*Singapore Parliamentary Debates*, *Official Report*

[75] Applicant's submissions (5 July 2016) at paragraph 20.

(16 November 2004) vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development)). There is thus a statutory intent that an adjudicator should work quickly. Section 31 of the Act further incentivises an adjudicators to issue his determinations in time because he will not be entitled to remuneration unless he meets the deadline. The framework of the Act therefore anticipates – and indeed expressly creates in order to advance the purposes of the Act – the adjudicator's pecuniary interest which Metropole now complains of.

56 Metropole has absolutely no basis for suggesting that the adjudicator prioritised his pecuniary interest in earning his fee over his duty to arrive at a fair and impartial determination of the payment claim dispute before him. The adjudicator's conduct did not evince an intention to disregard any submissions Metropole may have advanced in order to meet his deadline. Neither does the adjudicator's failure expressly to ask Metropole for a response lead a fair-minded and reasonable man to such a conclusion. Metropole's argument that the adjudicator was driven by his self-interest in rendering his adjudication determination is entirely speculative. I therefore cannot find that the adjudicator failed to act impartially in rendering his adjudication determination.

(2) The fair hearing rule and the materiality of the breach

57 The *audi alteram partem* rule requires the adjudicator to receive both parties' submissions and consider them (*AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*") at [25]).

58 In the English case of *Dean and Dyball*, a claimant sought to enforce an adjudication decision against a respondent by summary judgment. The respondent argued that the adjudicator had breached the rules of natural justice when he conducted separate interviews with the parties and their respective experts. Judge Richard Seymour QC held at [50] that while "there was no reason in law why an adjudicator should not have telephone conversation with one party to an adjudication on his own", great caution must be exercised. He added at [52] that "if an adjudicator receives a communication about a matter of significance to the substance of the adjudication from one party alone in the absence of the other, he should inform the absent party of the substance of the communication so as to give that party an opportunity to deal with it if it wishes". Insofar as the party who did not provide the information is concerned, "what is important is that it should be aware of the perception of the tribunal of what it has been told and the potential significance of that information from the tribunal's point of view" (at [52]).

59 I find that the adjudicator breached the *audi alteram partem* rule when he communicated privately with DPL's solicitors. The adjudicator had a telephone conversation with DPL's solicitors in the absence of Metropole's solicitors. That should not have happened. Once it happened, it was incumbent on the adjudicator *himself* to convey to Metropole the substance of the conversation so that Metropole could be aware from the adjudicator the potential significance of that conversation to his determination. This he failed to do. Instead, he relied on DPL's solicitors to copy their email of 31 March 2016 to Metropole's solicitors. His only response to the parties came at 6.01 pm by email. Even in that email, he did not inform Metropole of the contents of his conversation with DPL's solicitors.[76] Metropole therefore had no way of

[76] 1st Affidavit of Tan May Hua Linda (15 April 2016) at page 97 (Exhibit LT-4).

knowing what the adjudicator's perception of the information he received was. Metropole cannot reasonably be expected to rely on its opponent's own summary of the telephone conversation. There may have been matters which, without any intention on the part of DPL's solicitors to mislead, were not recorded in sufficient detail or from which the nuance or emphasis was not clearly articulated in DPL's email.

60 Metropole submits that if the adjudicator had asked Metropole to answer his two questions or to comment on DPL's answers, it would have told the adjudicator to exclude the contingency sum of $500,000 from the total of $7,116,500. Metropole submits that it was entitled to do so despite not having addressed this reason for withholding payment in its payment response.[77] That is because it was a patent error to include the sum of $500,000 in the calculation of the contract sum.[78] A respondent is entitled to raise patent errors on the face of the material before the adjudicator even if those errors were not raised in the payment response (*W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [51]).[79] Metropole argues that it would be reasonably clear to any adjudicator that the contingency sum would never come into play because the contract has been terminated.[80]

61 In my view, there was no patent error. At [97] of *APV Sdn Bhd v APW Pte Ltd* [2013] SGSOP 24 ("*APV*"), the adjudicator explained that the approach under *W Y Steel* requires him to "examine the documents exhibited in the [a]djudication [a]pplication to see if there is any obvious contradiction

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77 NE (7 July 2016) at pages 17-18.

78 NE (7 July 2016) at page 18.

79 Applicant's submissions (5 July 2016) at paragraph 224.

80 NE (7 July 2016) at page 18.

between the said documents and the [p]ayment [c]laim." He added that he looks for "what appears to be an obvious discrepancy between the [c]ontract documents and the … items of claim in the [p]ayment [c]laim". I agree that the search for patent error must be so limited. And following this approach, it becomes apparent that what Metropole seeks to raise is not a discrepancy between documents. It is instead an argument that Metropole seeks to make to further its case, despite not having raised it in its payment response. Hence, even if the adjudicator had asked Metropole for its views (which he did not), Metropole would not be entitled to submit that the contingency sum of $500,000 should be omitted from the construction cost of $7,116,500 to arrive at the contract sum.

62 Having found that the adjudicator acted in breach of natural justice, I turn to the issue of materiality and prejudice. In my view, the breach was not sufficiently material as to cause prejudice to Metropole.

63 The High Court recognised in *Aik Heng Contracts and Services Pte Ltd v Deshin Engineering & Construction Pte Ltd* [2015] SGHC 293 ("*Aik Heng*") at [24] that not all breaches of natural justice warrant the setting aside of an adjudication determination. There must be a material breach of natural justice.

64 I note that unlike s 24(*b*) of the IAA and s 48(1)(*a*)(vii) of the Arbitration Act (Cap 10 2002 Rev Ed) ("AA"), there is nothing s 16(3)(*c*) of the Act – or indeed elsewhere in the Act – which expressly requires a breach of natural justice to occasion prejudice before an adjudication determination can be set aside.

65 In my view, the analogy with arbitration is flawed. I say that for two reasons.

66 First, the power to set aside an arbitration award is a statutory power. It is established and regulated entirely by statute. The power to set aside an adjudication determination, on the other hand, is not a statutory power. It is an aspect of the High Court's supervisory jurisdiction over inferior tribunals at common law: Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 19.9. The Act does not expressly require a breach of natural justice to occasion prejudice before an adjudication determination can be set aside simply because the Act does not create the power to set aside an adjudication determination or define the grounds which have to be established in order to do so. So the place to look for a rule which requires a breach of natural justice to be material or to occasion prejudice in order to justify setting aside an adjudication determination is the common law and not the Act.

67 Second, an arbitrator's award has full finality. An adjudicator's determination has only temporary finality. Despite a prior adjudication, the parties remain entirely free to go on to resolve their disputes with full finality (see *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] 3 SLR 575 at [70] and *W Y Steel* at [22]). That is why there is the latitude on an application to set aside an adjudication determination to assess the consequences of a breach of natural justice in the context of the provisional nature of a determination and the need for speedy disposition of adjudications proceedings (*Aik Heng* at [27]). That, to my mind, means that a court hearing an application to set aside an adjudication determination for a breach of the rules of natural justice has less reason to intervene in adjudication than in arbitration, not more. If an adjudicator reaches a

determination on a dispute in breach of the rules of natural justice, and even if that breach could have affected the outcome of the determination, the aggrieved party will nevertheless have occasion in the future to have that dispute resolved with full finality and in compliance with the rules of natural justice. There is even less reason for the court to intervene if the breach of natural justice is immaterial to the outcome of the adjudication or has occasioned the aggrieved party no prejudice. This approach finds support in adjudication cases from England and New South Wales (see for example, *Balfour Beatty Construction Ltd v Lambeth Borough Council* [2002] EWHC 597 at [29] and *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 at [55]).

68 I consider the adjudicator's breach in this case to have been wholly immaterial. Metropole never alleged that the sum of $7,116,500 was not the correct base figure for computing DPL's entitlement to staged fees. DPL's payment claim clearly states that the "Construction Cost (based on the lowest tender received from Poplar Construction Pte Ltd)" is $7,116,500.[81] Metropole did not dispute this figure in its payment response or its adjudication response. This is despite Metropole having had the opportunity to review all of the documents attached to the adjudication application. That would have included the quotation submitted by Poplar for the sum of $7,116,500.[82] In fact, the figure of $7,116,500 was made known to Metropole from as early as 17 November 2015. Yet, Metropole chose not to raise any issue with the figure at any time in the adjudication proceedings.

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[81] Applicant's BOD (15 April 2016) at page 66.

[82] Applicant's BOD (15 April 2016) at pages 3, 15 and 78.

69 Further, the adjudicator's question pertained not to *correctness* of the figure (*i.e*, $7,116,500) but to its *origin*. It is understandable why: the correctness of the figure was never in issue. Had the correctness of the figure been in issue, the unilateral communication may well have been material. The figure went directly towards calculating the money that DPL was entitled to for the work done (see adjudication determination at [26]). But that is purely hypothetical. That is not what happened here.

70 Therefore, I am of the view that the adjudicator's breach of the *audi alteram partem* rule was not sufficiently material so as to cause any prejudice whatsoever to Metropole. It is insufficient to warrant setting aside the adjudication determination.

Disregarding Metropole's defences

The parties' submissions

71 Metropole also argues that the adjudicator breached the rules of natural justice (in particular, the fair hearing rule)[83] because he disregarded some of the defences which Metropole raised in its adjudication response without considering the merits thereof or making an effort to understand them (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") at [31]).

72 The following is a list of the defences in the adjudication response that the adjudicator allegedly failed to consider (collectively, "the Defences"):[84]

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[83] Applicant's submissions (5 July 2016) at paragraph 213.

[84] Applicant's submissions (5 July 2016) at paragraphs 197, 219-220.

(a) Clause 2.3(3) of the contract violates s 5 of the Act and is thus void pursuant to s 36 of the Act. The adjudicator did not address this defence in the adjudication determination ("the First Defence").

(b) If Clause 2.3(3) of the contract is void and if DPL relies on s 7(1)(*b*) of the Act to value work done, the parties had contracted for payment on a milestone basis. Hence, DPL's entitlement to payment is contingent on achieving milestones. The adjudicator did not address this defence because he found at [39] of the adjudication determination that this reason for withholding payment was not found in the payment response and was barred by s 15(3) of the Act. The adjudicator therefore wrongly fettered his jurisdiction ("the Second Defence").

(c) There was no contract in writing and even if there was, the terms of the contract were not incorporated into the contract between DPL and Metropole. Although the adjudicator found that there was a written contract between DPL and Metropole, he did not make a finding that all of the terms of the contract between the LLP and Metropole flowed into the written contract between DPL and Metropole ("the Third Defence").

(d) The payment claim failed to comply with reg 5(2)(*c*) of the Regulations and the adjudication application should be dismissed on this basis. The adjudicator did not mention reg 5(2)(*c*) in his adjudication determination at all ("the Fourth Defence").

(e) DPL included documents in its adjudication application which were *prima facie* fraudulent. The adjudicator did not mention this issue in his adjudication determination at all ("the Fifth Defence").

73 Metropole submits that following the case of *Lanskey v Noxequin* [2005] NSWSC 963, the court should look at the face of the documents and the adjudicator's decision to determine whether the adjudicator has addressed his mind to the merits of the case before him.[85] An analysis of the adjudication determination, however, reveals that the adjudicator did not deal with any of the Defences. Metropole argues that because the adjudicator failed to mention the Defences in the adjudication determination, it shows that he deliberately chose not to deal with them.

74 Metropole further submits that the adjudicator misapplied s 15(3) of the Act when he refused to consider the issue of whether DPL's claim for two-thirds of the stipulated fee for certain stages was a staged payment issue or a milestone payment (*ie*, the Second Defence).[86] The adjudicator held that Metropole could not rely on this defence because it was not included in its payment response (see adjudication determination at [39] – [40]).[87] Metropole submits however that s 15(3) of the Act allows a respondent to challenge a payment claim even in the absence of a payment response as long as the respondent limits itself to raising patent errors on the face of material properly before the adjudicator (*W Y Steel* at [51]). This requires the adjudicator to examine if there was any obvious contradiction between the documents exhibited in the adjudication application and the payment claim (*APV* at [97]).[88]

75 In response, DPL submits that the fact that some matters are not found in the adjudication determination does not mean that the adjudicator ignored

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[85] Applicant's submissions (5 July 2016) at paragraph 202.

[86] Applicant's submissions (5 July 2016) at paragraphs 222, 240-1.

[87] Applicant's submissions (5 July 2016) at paragraph 240.

[88] Applicant's submissions (5 July 2016) at paragraph 231.

or wrongly excluded such matters from his consideration. An adjudicator need only set out in his reasons those matters which he sees as material (*SEF Construction* at [58]).[89] The fact that an adjudicator does not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to some submissions does not necessarily lead to the conclusion that he disregarded those submissions and is therefore in breach of the rules of natural justice (*SEF Construction* at [60]).[90] DPL further submits that the same position has also been adopted with respect to arbitration (*TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972; *BLB and another v BLC and others* [2013] 4 SLR 1169). Further, even if there was indeed a breach of natural justice, only material breaches justify setting aside an adjudication determination (*Aik Heng* at [24]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(f)]).[91]

The court's decision

76 It is true that the adjudicator in this case expressed his reasons elliptically. But in my view, he has not done so in a manner which invites an inference that he failed to engage *bona fide* with the arguments presented to him.[92] One must not forget that the purpose of the Act is a quick determination.

77 I agree with DPL that an adjudicator does not need to address every argument made by parties in order to afford that party natural justice. In *Front Row*, Andrew Ang J held at [45] that the adjudicator failed to accord Front

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89 Respondent's submissions (5 July 2016) at paragraphs 67-68.

90 Respondent's submissions (5 July 2016) at paragraph 72.

91 Respondent's submissions (5 July 2016) at paragraphs 94-95.

92 NE (7 July 2016) at page 51.

Row natural justice because he had "explicitly stated … that he was disregarding [Front Row's submissions]". Notably, Ang J recognised that there were situations where an adjudicator would not be in breach of natural justice although he did not explicitly address every single one of a party's submissions (at [45]):

> "…Her Honour found that there was no breach of natural justice in SEF Construction because the adjudicator clearly had regard to the submissions of parties and the material before him in arriving at his decision. In contrast, I could not make a similar finding in the present case. The Arbitrator had explicitly stated, at paras 55 and 56 of the Award, that he was disregarding the issue concerning Daimler's obligation to organise, brand and promote the Asian Cup Series because Front Row had ceased to rely on this issue. *This was not a case where he had had regard to Front Row's submissions on the issue but accidentally omitted to state his reasons for rejecting the same or had found the same to be so unconvincing as to render it unnecessary to explicitly state his findings on it* (*SEF Construction* at [60])."
>
> [emphasis added]

78 In *SEF Construction*, Judith Prakash J (as she then was) said at [60]:

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

> that SEF could have taken the opportunity to ask for a review adjudication once the Adjudication Determination had been issued and, if it had done so, SEF could have raised all the points before the review adjudicator that it had brought before the adjudicator.
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> [emphasis added]

79 These authorities establish that the fact that this adjudicator did not find it necessary to discuss his reasoning and explicitly state his conclusions in relation to the Defences does not inevitably lead to the conclusion that he did not have regard to those submissions at all. This is even more so in view of the tight timelines imposed by the Act, which reveal a statutory intention that the adjudicator should work quickly. This may militate against the standards of thoroughness and detail that are to be expected where no externally imposed time pressure applies (see *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152 at [15]). It would be entirely inimical to the quick and efficient adjudication of disputes to expect an adjudicator to go down every one of the losing party's rabbit holes in his adjudication determination.

80 In any event, the facts indicate that the adjudicator did expressly address the First, Second, and Third Defence.

81 With respect to the First Defence, the adjudicator recognised at [49] of the adjudication determination that Metropole "had argued that s 5 of the Act clearly stated that payment is only when work is carried out or when goods and services are supplied".

82 With respect to the Second Defence, the adjudicator found that Metropole was seeking to raise an additional reason for withholding payment which was not found in the payment response. He was therefore entitled – an indeed obliged – to disregard it by virtue of the bar in s 15(3) of the Act. It

cannot then be said that he had breached the rules of natural justice in failing to address the Second Defence (see *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 at [55], which was affirmed on appeal in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [23]).

83 Neither can it be said that the Second Defence does no more than raise a patent error. Metropole has not pointed me to any discrepancy in the documents before the adjudicator which would justify characterising the Second Defence as raising a patent error. It is like any other defence which Metropole sought to advance in favour of its case. The adjudicator was correct to apply the s 15(3) bar to it. This argument is therefore entirely without merit.

84 With respect to the Third Defence, the adjudicator may not have stated that all the SIA terms were incorporated in the contract but he made reference to Clause 2.3(3) of the contract and relied on it to compute the payment claim for the completed and uncompleted stages of the project (see adjudication determination at [29] – [51]). That is sufficient.

85 I note that the adjudicator did not expressly address the Fourth and Fifth Defence in the adjudication determination. But as I have mentioned, the mere failure to address issues in an adjudication determination explicitly, without more, is insufficient on its own to establish that there has been a breach of natural justice. Metropole has not provided further evidence to suggest that the adjudicator indeed disregarded its submissions in respect of these Defences.

86 I therefore find that there was no breach of natural justice sufficient to warrant setting aside the adjudication determination on this ground either.

Jurisdiction

87 Another ground which Metropole relies upon to set aside the adjudication determination is that of jurisdiction. Metropole submits that the adjudicator acted in excess of his jurisdiction because he (i) determined that monies were due from Metropole to DPL in respect of claims which did not fall within the Act.; (ii) failed to independently assess the work that DPL claimed to have done; and (iii) failed to determine whether a written contract existed between the parties and to identify the terms therein.

Breach of s 5 of the Act

The parties' submissions

88 Metropole argues that the adjudicator acted in excess of jurisdiction by determining that money was due from Metropole to DPL in respect of claims which did not fall within the Act.[93] In particular, the adjudicator breached s 5 of the Act by permitting DPL to rely on cl 2.3(3) to make its claims. Because s 5 of the Act is a legislatively important provision of the Act, the adjudication determination should be set aside as a result of the breach.[94]

89 According to Metropole, cl 2.3(3) is a clause which awards payment for work that is not yet carried out. The clause provides that DPL was entitled to a minimum of two-thirds of the stipulated fee for an uncompleted stage regardless of the amount of work done for that stage.[95] This, Metropole submits, offends s 5 of the Act, which provides that a person is entitled to a progress payment if he has actually "carried out" any construction work.[96]

[93] Applicant's submissions (5 July 2016) at paragraph 2.2.

[94] Applicant's submissions (5 July 2016) at paragraph 187.

[95] Applicant's submissions (5 July 2016) at paragraphs 151, 152 and 157.

Thus, under the Act, DPL is no entitled to recover sums for work not carried out.

90 Metropole submits that cl 2.3(3) should instead be interpreted as a clause for damages for breach of contract, to compensate DPL for its loss of bargain in the form of the loss of the opportunity to complete the entire project and hence the loss of its entitlement to full fees for completed stages of work.[97] While a claimant's entitlement to payment under the Act is founded on the underlying contract, this entitlement is separate and distinct from his contractual entitlement to be paid (*Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ("*Tienrui Design*") at [30]). Metropole therefore submits that claims under cl 2.3(3) do not come within the Act. They can be dealt with only in separate dispute resolution proceedings which will determine DPL's claim with full finality.[98]

91 DPL takes the contrary position. It submits that cl 2.3(3) falls within the scope of the Act.[99] The clause in effect sets out the contractually agreed price to be paid by Metropole for partial services rendered by DPL for each stage.[100] In any case, the adjudicator had ample evidence and material before him to make the findings he did with respect to the fees payable (or not payable) by Metropole to DPL for each stage of the project.[101]

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[96] Applicant's submissions (5 July 2016) at paragraph 129.

[97] Applicant's submissions (5 July 2016) at paragraph 172.

[98] Applicant's submissions (5 July 2016) at paragraph 144.

[99] Respondent's submissions (5 July 2016) at paragraph 54.

[100] Respondent's submissions (5 July 2016) at paragraph 55.

[101] Respondent's submissions (5 July 2016) at paragraph 62.

The court's decision

92 I reject Metropole's submission that the adjudicator exceeded his jurisdiction by determining the claims or fees under cl 2.3(3) in breach of s 5 of the Act. The scheme of the Act does not contemplate that a contractor is entitled to payment only after *all* the work under the parties' contract is completed. Under s 5 of the Act, a party who carries out "*any* construction work or supplies *any* goods or services under a construction contract is entitled to progress payments" (*Tienrui Design* at [30]) [emphasis added]. Section 2 of the Act defines a "progress payment" as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract". This includes "a single or one-off payment" or a payment based on "an event or a date". This means that a contractor is entitled to payment for work done partially, as long as the event or date arises for such payment. It is then up to the parties to decide how much payment a contractor is entitled to following the event or date. I agree with DPL that by including cl 2.3(3) as part of their contract, the parties have chosen the conditions under which DPL will be remunerated for work done.[102] They have agreed that DPL will be entitled to payment of not less than two-thirds of the fee even if DPL "only renders partial services" (see cl 2.3(3)). Such a clause does not offend s 5 of the Act.

93 I also reject Metropole's submission that cl 2.3(3) should be interpreted as a clause for damages to compensate DPL for its loss of bargain. The express words of the clause do not refer to any breach of contract or loss that may be suffered by DPL. Instead, a plain reading of the clause suggests that it is a clause stipulating the conditions under which DPL is entitled to

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[102] Respondent's submissions (5 July 2016) at paragraph 55.

payment. In any case, the manner in which cl 2.3(3) should be interpreted is a matter that falls within the adjudicator's jurisdiction and is an aspect of the merits of his determination. The adjudicator has interpreted cl 2.3(3) to exclude claims for stages of work for which no work has commenced. He has also found that DPL commenced works for stages E and H but not for stages L, M, and N. He therefore did not allow DPL's claim for two-thirds of the fees for stages L, M, and N (see adjudication determination at [50]).

94 Although Metropole has made submissions with respect to the appropriate interpretation of cl 2.3(3), the court cannot and should not go into the merits of the adjudicator's interpretation of cl 2.3(3) or his findings on whether work had indeed commenced for each stage.

Failure to conduct independent assessment

The parties' submissions

95 Metropole argues that the adjudicator also committed a jurisdictional error by failing to assess independently the work DPL claims to have done.[103]

96 Metropole submits that an adjudicator has a duty to do so (*W Y Steel* at [52]).[104] This requires the adjudicator to assess the amount of work done and the value thereof (*SSC Plenty Road v Construction Engineering (Aust) Pty Ltd & Anor* [2015] VSC 631 ("*SSC Plenty Road*") at [76] and [78]; *Krongold Constructions (Aust) Pty Ltd v SR & RS Wales Pty Ltd* [2016] VSC 94 at [57] – [65]).[105] Metropole submits that a reading of the adjudication determination

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[103] Applicant's submissions (5 July 2016) at paragraph 266.

[104] Applicant's submissions (5 July 2016) at paragraph 267.1.

[105] Applicant's submissions (5 July 2016) at paragraphs 267.2 and 270.

reveals that the adjudicator did not assess the amount of work done in respect of stages E and H of the project.[106] According to Metropole, the adjudicator's decision that "the claimant had commenced on the works of [those] stages" was based on DPL's "belie[f] that all the documents and drawings necessary for submission to the relevant authorities had been prepared" (see adjudication determination at [44] – [45]).[107] It appears therefore that the adjudicator made his decision based on DPL's belief, without independently assessing whether DPL had actually commenced on the works for those stages.[108] He also did not make reference to any documents before him to support his finding.[109]

97 DPL disagrees and argues that Metropole's argument is not borne out by the evidence, which shows that DPL did render partial services in respect of stages E and H.[110] Ample evidence is adduced in the annexures to the adjudication application as well as its submissions before the adjudicator.[111] Metropole, on the other hand, argues that DPL's documents exhibited in the annexures do not substantiate DPL's claims.[112]

98 Although Metropole makes this argument, it acknowledges that it is not the role of the court, exercising its supervisory jurisdiction, to assess the amount of work done by DPL.[113] I agree. To do so would involve assessing the merits of the case that was before the adjudicator.

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[106] Respondent's submissions (5 July 2016) at paragraphs 272-281.

[107] Respondent's submissions (5 July 2016) at paragraphs 273-275.

[108] Respondent's submissions (5 July 2016) at paragraph 275.

[109] Respondent's submissions (5 July 2016) at paragraph 279.

[110] Respondent's submissions (5 July 2016) at paragraph 64.

[111] Respondent's submissions (5 July 2016) at paragraphs 59 and 64.

[112] Applicant's submissions (5 July 2016) at paragraphs 282-285.

[113] Applicant's submissions (5 July 2016) at paragraph 284.

The court's decision

99 It is an adjudicator's duty to assess independently whether work was done by a claimant so as to warrant payment in accordance with the parties' contractual agreement (see s 16(3)(*a*) and s 17(2) of the Act; *W Y Steel* at [52]). The adjudicator cannot simply take the claimant's word for it and fail to assess the merits of the claim (*W Y Steel* at [52]). Nonetheless, he is entitled to "readily find in favour of the claimant on the merits of the claim" (*Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 at [82]).

100 Metropole was unable to satisfy me that the adjudicator simply accepted DPL's case without assessing its merits. I note that the adjudicator did not give extensive reasons for his determination with respect to stages E and H of the project. Instead, he repeated DPL's submission that it believed that all the documents and drawings necessary to complete its obligations under these stages had been prepared (see adjudication determination at [44]). The adjudicator then concluded in the subsequent paragraph that "the claimant had commenced work for [those] stages". Metropole submits that this suggests that the adjudicator did not assess the merits of the claims for stages E and H. I disagree. The fact that the adjudicator articulated DPL's belief in [44] of the adjudication determination must necessarily mean that the adjudicator held the same view which led to his finding that work for those stages had commenced. It should not matter that he did not use the words "I find", or words to that effect, to indicate expressly that he had assessed the merits of the claim and was making an independent finding thereof. The adjudicator is entitled to readily find in favour of the claimant on the merits of his claim. He is also entitled to adopt DPL's arguments to justify his decision. I am therefore not satisfied that the adjudicator failed to independently assess the claims by DPL for work done.

Failure to determine existence of contract and terms therein

The parties' submissions

101 Metropole submits that the adjudicator also exceeded his jurisdiction[114] because he failed to determine if a written contract existed between Metropole and DPL and to identify the terms of that contract.[115]

102 Metropole argues that s 4(1) of the Act requires an adjudicator to determine the existence of a written contract between the parties. Section 4(1) expressly states that the Act "shall apply to any contract that is made in writing" and is a position that is supported by local authorities (*SEF Construction* at [45]; *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848 at [24]). To satisfy this requirement, all the relevant terms agreed must be recorded in writing (*RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270 at [19]).

103 Metropole argues that the adjudicator failed to determine whether a written contract exists between Metropole and DPL. It is crucial that the adjudicator do so because the SIA terms contains a non-assignment clause[116] and expressly excluded the operation of the Contract (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA").[117] The terms of Metropole's contract with the LLP do not therefore carry over to DPL. Further, the adjudicator expressly stated at [22] of the adjudication determination that

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[114] Applicant's submissions (5 July 2016) at paragraph 306; NE (7 July 2016) at pages 2-3.

[115] Applicant's submissions (5 July 2016) at paragraph 286.

[116] Applicant's BOD (15 April 2016) at page 49.

[117] Applicant's BOD (15 April 2016) at page 59.

"[t]here was no specific agreement where both parties had signed that might suggest that they have a contract in writing".[118]

104 Metropole further submits that an adjudicator's duty extends to identifying the specific terms in the parties' contract.[119] Metropole relies on the decision of *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80 ("*Northbuild*") in which the Supreme Court of Queensland held at [29] that "an adjudicator must identify the relevant terms of the contract upon which the claim is made". Metropole also cites the case of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237 ("*Laing O'Rourke*") in which the Supreme Court of Western Australia held at [219] that an adjudicator would fail to perform that task, and would misapprehend his statutory function, if he determines the merits of the payment dispute otherwise than by reference to the terms of the construction contract which are before him.

105 In particular, Metropole argues that the adjudicator did not make a finding as to whether the SIA terms had been incorporated into any contract between Metropole and DPL.[120] Neither did he state that any of the documents he listed at [22] of the adjudication determination contained any terms which governed the relationship between the parties.[121] According to Metropole, the adjudicator "simply assumed" that cl 2.3(3) of the SIA terms had been properly incorporated into the parties' contract.[122]

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[118] Applicant's submissions (5 July 2016) at paragraph 328.

[119] NE (7 July 2016) at page 4; Applicant's submissions (5 July 2016) at paragraph 304.

[120] Applicant's submissions (5 July 2016) at paragraph 321.

[121] Applicant's submissions (5 July 2016) at paragraph 329.

[122] Applicant's submissions (5 July 2016) at paragraph 327.

106 DPL submits, however, that the adjudicator was correct in finding that there was a "contract in writing" as required by s 4(1) of the Act.[123] For the purposes of the Act, the definition of what constitutes a "contract in writing" is very wide (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1122 (Cedric Foo Chee Keng, Minister of State for National Development)). It is sufficiently wide to cover oral contracts where some of the terms have been recorded in writing and some have not (s 4(4) of the Act; *Qingjian International (South Pacific) Group Development Co Pte Ltd v Capstone Engineering Pte Ltd* [2014] SGHCR 5 at [35]).

107 DPL submits that there was novation of the contract between the LLP and Metropole to DPL.[124] Novation can be implied from conduct (*Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1; *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2009] EWHC 3222 (TCC); *H & R Johnson Tiles Ltd & Anor v H & R Johnson (M) Bhd* [1998] 4 MLJ 13).[125] DPL explains that sometime in February or March 2012, it took over the performance of all ongoing projects handled by the LLP, including the project.[126] Metropole was aware of this and consented to it.[127] From February 2012 to January 2016, the Respondent performed all the services or work required for the project as well as various additional services at Metropole's request and without any disagreement from Metropole.[128] All the invoices and payment claims issued by DPL in relation to the project expressly

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[123] Respondent's submissions (5 July 2016) at paragraph 126.

[124] Respondent's submissions (5 July 2016) at paragraph 153.

[125] Respondent's submissions (5 July 2016) at paragraphs 141, 142 and 149.

[126] Respondent's submissions (5 July 2016) at paragraph 120.

[127] Respondent's submissions (5 July 2016) at paragraphs 121 and 152.

[128] Respondent's submissions (5 July 2016) at paragraph 122.

refer to the contract between the LLP and Metropole.[129] In fact, Metropole did not at any time prior to the adjudication response even suggest that that all the terms of that contract might not apply to the parties' relationship.[130]

108 For these reasons, DPL submits that the adjudicator did and was entitled to make a finding that the parties had entered into a contract in writing as required by s 4 of the Act. The adjudicator also found that the SIA terms, which applied to the LLP, also applied to DPL.

The court's decision

109 In my view, it is a jurisdictional requirement that the adjudicator's determination be based on a written contract. The court is therefore entitled to look into the merits of the adjudicator's decision in this respect.

110 I agree with the adjudicator's finding that a written contract existed between DPL and Metropole. This contract took the form of the contract between Metropole and the LLP. It can be inferred from Metropole's conduct that it impliedly consented to DPL taking over all of the LLP's rights and obligations under the contract and on precisely the same terms.

111 I disagree with Metropole's submission that the adjudicator failed to determine if a written contract existed between the parties. At [22] of the adjudication determination, the adjudicator explained that although "[t]here was no specific agreement where both parties had signed that might suggest they have a contract in writing", "there were numerous documents included in the adjudication application and also in the adjudication response that would

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[129] Respondent's submissions (5 July 2016) at paragraph 123.

[130] Respondent's submissions (5 July 2016) at paragraph 124.

satisfy the provisions in s4(3) of the Act for the parties to be treated as if they are parties to a contract in writing". Hence, not only did the adjudicator make a clear finding that a written contract existed between Metropole and DPL, he also went to the extent of asking himself the specific statutory question by setting out s 4(3) of the Act, which stipulates the situations in which "a contract shall be treated as being made in writing" (see also adjudication determination at [21]). In fact, Metropole appears to concede that the adjudicator did find that the parties had entered into a written contract. At paragraph 320 of its submissions dated 5 July 2016, Metropole acknowledges that the adjudicator found that "there was enough evidence before him for him to find a 'contract treated as being made in writing'".

112 Metropole argues that it is a jurisdictional requirement that the adjudicator identify the terms that govern the parties' agreement and that he failed to do so. Assuming that to be correct, I am of the view that the adjudicator did make a finding with respect to the terms that governed the contract between Metropole and DPL. He may not have expressly stated that the terms of the contract between DPL and Metropole are precisely the same as the terms of the contract between the LLP and Metropole; that is nonetheless implicit beyond doubt in his determination. The adjudicator found that the LLP's contract terms with Metropole carried over to DPL's contract with Metropole. This is seen from his reference to the regulatory authorities, *ie*, that DPL stepped into the shoes of the LLP. This necessarily means that the adjudicator rejected Metropole's argument that the SIA terms were not incorporated into DPL';s contract with Metropole.[131] It is not necessary for the adjudicator, who faces strict time constraints, to expressly state every finding he makes.

[131] NE (7 July 2016) at page 6.

113 Metropole argues that the adjudicator was not entitled to make such a finding because of the non-assignment clause in the SIA terms and the disapplication of the CRTPA.[132] In my view, it is within an adjudicator's jurisdiction to determine the terms that govern the parties' contract and to interpret these terms. What *Northbuild* and *Laing O'Rourke* suggest is that when an adjudicator does not apply the contract as he interprets it, but instead determines the claim upon some other basis, he acts outside his jurisdiction. In the present case, the adjudicator made his decision based on the SIA terms and not upon some other basis. Whether he found correctly that the SIA terms applied to the parties' contractual relationship, however, is an issue that goes to the merits of the adjudicator's decision. Even if he made an error, it was within his jurisdiction to do so.

114 For all these reasons, I find that there is no basis to suggest that the adjudicator exceeded his jurisdiction in determining the dispute between Metropole and DPL.

Conclusion

115 To conclude, I dismiss Metropole's application in its entirety. There are no grounds upon which to find that the adjudicator acted in excess of jurisdiction or breached a rule of natural justice that was sufficiently material as to cause Metropole prejudice and justify setting aside the adjudication determination.

116 Because Metropole's application has been dismissed, I order that Metropole shall pay the costs of and incidental to this application, such costs fixed at $11,000 plus reasonable disbursements to be taxed if not agreed.[133]

[132] NE (7 July 2016) at pages 2-4.

117 The Accountant General is also directed to release to DPL the sum of $111,807.12 which Metropole paid into court under s 27(5) of the Act together with all interest accrued thereon.

Vinodh Coomaraswamy
Judge

Tan Tian Luh and Tan Xian Ying (Chancery Law Corporation) for the applicant;
Samuel Chacko and Christopher Yeo (Legis Point LLC) for the respondent.

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[133] NE (7 July 2016) at page 51.