IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 269

Originating Summons No 470 of 2020 and Summons No 2004 of 2020

Between

CHH

… *Plaintiff*

And

CHI

… *Defendant*

JUDGMENT

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

TABLE OF CONTENTS

INTRODUCTION **1**

FACTUAL BACKGROUND **2**

THE SUBCONTRACT 2

THE ARBITRATION 3

THE AWARD 3

THE SETTING-ASIDE APPLICATION **4**

SHOULD THE COURT SET ASIDE THE ARBITRATOR'S FINDING THAT THE STONES COMPLIED WITH THE ACCEPTANCE CRITERIA, AND SHOULD NOT HAVE BEEN REJECTED? 4

Did the arbitrator's findings about the stone inspector go beyond the submission to arbitration, or breach natural justice? *7*

Did the arbitrator's findings as to reliance on photographs go beyond the scope of the submission to arbitration? *10*

If grounds for setting aside are made out, should the court nevertheless decline to set aside the Award (or any part of it)? *16*

SHOULD THE SUMS AWARDED BY THE ARBITRATOR (OR ANY PART THEREOF) BE SET ASIDE, BECAUSE THE ARBITRATOR AWARDED RETENTION MONIES TWICE OVER? 20

CONFIDENTIALITY **23**

CONCLUSION **25**

CHH
v
CHI

[2020] SGHC 269

High Court — Originating Summons No 470 of 2020 and Summons No 2004 of 2020
Andre Maniam JC
27 July, 2 October, 13, 27 November 2020

21 December 2020 Judgment reserved.

Andre Maniam JC:

Introduction

1 If an arbitration award goes against facts that are common ground between the parties, has the arbitrator exceeded the scope of submission to arbitration, or breached natural justice? Or has he merely made a mistake which the court cannot intervene to correct?

2 This application was made under s 48 of the Arbitration Act (Cap 10, 2002 Rev Ed) (the "AA") to set aside parts of the Final Award (the "Award") dated 21 November 2019 and the Addendum thereto dated 18 February 2020 in an International Chamber of Commerce ("ICC") arbitration (the "Arbitration"). I shall refer to the parties by their designations in the Arbitration, *ie*, the plaintiff as the Respondent, and the defendant as the Claimant.

3 The Respondent contends that:

(a) the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; and

(b) a breach of the rules of natural justice occurred in connection with the making of the Award by which the rights of any party (*ie*, the Respondent) have been prejudiced.[1]

4 The Claimant did not seek to defend the *correctness* of the arbitrator's decision. Indeed, the Claimant acknowledged that the arbitrator *had* made mistakes; but it contended that the arbitrator's decisions were within the scope of the submission to arbitration, and there was no breach of natural justice: therefore, the court could not intervene to correct the said mistakes.

Factual background

The Subcontract

5 The Respondent was the main contractor for a construction project. The Claimant was a subcontractor under a "Design, Supply and Installation of Stone And Tile Sub-Contract" (the "Subcontract"). The Subcontract Works included the supply and installation of two types of marble – Statuario stones ("S Stones") and Statuario Venato stones ("SV Stones"). The Subcontract terms made provision for a quality assurance and quality control ("QA/QC") process for stone selection. A stone inspector was appointed, stone inspections took

[1] Affidavit of the Respondent's Mr [Z] dated 15 May 2020.

place, and Acceptance Criteria were formulated (see paras 127–132 of the Award).

6 In the course of the project, the architect and/or the Respondent rejected all the S Stones and most of the SV Stones which the Claimant had supplied. The Claimant disputed the rejection of the stones.

The Arbitration

7 The Claimant commenced arbitration under the ICC Rules 2017 (the "ICC Rules"), seeking further payment from the Respondent.

8 Pursuant to a decision by the ICC, the Arbitration proceeded only as to the Claimant's claims. The Respondent's cross-claims are being pursued in a second arbitration, which is still underway.

The Award

9 The arbitrator accepted that "[a]ll stones must comply with the Subcontract Specifications, and Acceptance Criteria" (para 258 of the Award). He then considered the issue: "Did the stones comply with the Acceptance Criteria?" at paras 282–291 of the Award.

10 The arbitrator decided at para 291 of the Award that "the S and SV Stones supplied by the Claimant on this Subcontract met the Acceptance Criteria, and should not have been rejected".

11 The arbitrator awarded the following reliefs to the Claimant in section O of the Award:

> I. The stones supplied by the Claimant were compliant with the Subcontract, and it was wrongful for the Respondent/Architect to reject them.
>
> …
>
> V. The Claimant is entitled to the outstanding balance of the Subcontract Price in the amount of SGD 3,437,113.13.
>
> VI. The Claimant is entitled to the first half of the retention monies of SGD 248,450.
>
> VII. The Claimant is entitled to GST of 7% on the amounts awarded in V. and VI. Above.
>
> VIII. The Claimant is entitled to interest at 5.33% per annum on the amounts awarded in V. and VI., plus 7% GST for each, from 13 November 2016 for V. and 13 October 2016 for VI., until the date of the final award in [the second arbitration].
>
> …

The setting-aside application

12 There are two aspects to the Respondent's setting-aside application.

13 *First*, the Respondent seeks to set aside the arbitrator's finding that the stones complied with the Acceptance Criteria and should not have been rejected.

14 *Second*, the Respondent contends that the Claimant was awarded retention monies twice over – the Respondent thus seeks to set aside the amounts awarded to the Claimant.

15 I address these in turn.

Should the court set aside the arbitrator's finding that the stones complied with the Acceptance Criteria, and should not have been rejected?

16 The Respondent contends that:

(a) the arbitrator decided on a matter that had not been submitted for his decision, in finding that the architect "should have relied on the Stone Inspector (unless it can be plainly demonstrated he was wrong)" in deciding whether the stones complied with the Acceptance Criteria (at para 291(c) of the Award); and

(b) the arbitrator decided that the architect had relied on photographs in rejecting the stones, and that the Respondent's expert too had relied on photographs; whereas it was common ground that the architect had in fact seen all the rejected stones on site, and that the Respondent's expert had seen the S Stones at the Claimant's warehouse.

17 Paragraph 291 of the Award is central to this aspect of the setting-aside application. It reads, in full:

> **Sole Arbitrator Finding on whether the stones were compliant with the Subcontract**
>
> 291. The Sole Arbitrator concludes for the reasons set out below, that the S and SV Stones supplied by the Claimant on this Subcontract met the Acceptance Criteria, and should not have been rejected:
>
> (a) The stones are from natural material, and as Mr [B] [*ie*, the Claimant's expert] advised, have aesthetic unpredictability. Therefore it is important to set specific control limits in the Acceptance Criteria to achieve consistency, and the QA/QC procedure of inspections at the quarry, the factory, Dry Lays and before shipping, were very important. The Stone Inspector played the key role in this QA/QC process. The Sole Arbitrator agrees with Mr [B] that the aesthetic criteria adopted were restrictive and ambiguous, given the random nature of the stones. There should have been more quantification of the number and types of features which were acceptable or not acceptable, and it was not clear enough what colour or veining was not acceptable.
>
> (b) In the Acceptance Criteria, photographs are used to specify what is acceptable and what is not acceptable.

Whilst the Stone Inspector inspected the actual stones at various times before installations, the Architect and the Respondent chose not to attend most of the Dry Lays in Singapore, and relied on the photographs taken at Dry Lays, as did the experts. The Sole Arbitrator agrees with Mr [B] that reliance on photographs is problematic as photographs have different lighting conditions (refer to paragraph 286 above). This could lead to wrong conclusions as to satisfying the Acceptance Criteria.

(c) Both Stone Inspectors were world experts in marble stones as can be seen from their CVs. They were appointed by the Claimant, and approved by the Respondent, but reported to the Architect. They also inspected the stones at various stages of the QA/QC process, and approved them (with limited acceptance), and then sent a report to the Architect. The Respondent made some criticisms of the stone experts, but the Sole Arbitrator did not find these convincing. The Sole Arbitrator has no hesitation accepting the Stone Inspector's conclusions that the stones met the Acceptance Criteria, rather than the Architect, who is not an expert in marble stones, and who should have relied on the Stone Inspector (unless it can be plainly demonstrated he was wrong). The Sole Arbitrator also considers that it was stubborn and obstinate for the Architect to have refused to attend Dry Lays in Singapore. Technically, it made no difference, where the Dry Lays took place, unless stones were rejected requiring replacement. In the event, the Stone Inspector approved almost all stones after Dry Lays. The Sole Arbitrator has more sympathy for the Respondent for non-attendance as it did not want to jeopardise relations with the Architect. The Architect's rejections on subjective aesthetic grounds, often after installation, caused difficulties and delays (more on this when EOT is dealt with later in this Award). The Sole Arbitrator agrees with Mr [B] that rejection after installation should only have been for workmanship issues, and this was never alleged in this arbitration.

(d) The Sole Arbitrator does not accept Mr [R]'s [*ie*, the Respondent's expert's] opinion that the stones inspected on the First Stone Review were not S or SV Stones, or the stones inspected on the Second Stone Review were poorer quality S or SV stones, or similar stone from a different quarry. This has never been alleged previously by anyone on the Project until his Report. Further, Mr [B], unlike Mr [R], carried out a petrographic

> examination of samples provided by the Claimant, and concluded they were S and SV Stones of Carrara marble, and exhibited typical features. The Sole Arbitrator accepts Mr [B]'s conclusions.
>
> (e) The Sole Arbitrator agrees with Mr [B] that there was no valid reason for rejections of the S and SV stones on this Project. The Sole Arbitrator has carefully looked at the photographs in the Acceptance Criteria (First and Second Stone Review Reports), and compared those with the Dry Lay photographs, and disagrees with Mr [R] that they do not comply. The Sole Arbitrator also agrees with Mr [B]'s criticism of the Architect's rejections (refer to paragraph 287 above). Visual examination to evaluate aesthetics is subjective, it is agreed, and when photographs are relied upon lighting conditions are problematical. At the end of the day there is no substitute for inspection at the quarry, factor, Dry Lays, and before shipping (if fabrication and Dry Lays are in Italy). The Stone Inspector's approvals have considerably more weight than the Architect's objections, as not only were they world experts in marble, but they inspected at source in Italy, or at Singapore Dry Lays. When compliance with the Acceptance Criteria is finally balanced, the Sole Arbitrator gives the benefit of doubt to the Claimant, due to the Architect's, and to a lesser extent the Respondent's, refusal to inspect at source, or during Dry Lays in Singapore, the poorly drafted Subcontract Specifications, and unreliable photographs. Therefore, the Respondent is not entitled to a declaration that the stones supplied did [*sic*] meet the Subcontract requirements. On the preponderance of evidence, they did.

Did the arbitrator's findings about the stone inspector go beyond the submission to arbitration, or breach natural justice?

18 The Respondent says that it was never put in issue that the stone inspector's views should contractually take precedence over those of the architect: thus the arbitrator should not have decided in para 291(c) of the Award that the architect "should have relied on the Stone Inspector (unless it can be plainly demonstrated he was wrong)" (the "Stone Inspector Finding").

19 At para 221 of the Award, the arbitrator noted that the stone inspector's scope of works included:

> (a) "[a]ssist[ing] the Architect in the range selection and determination of the range for each selected stone, which will then form the basis of QA/QC inspections during the fabrication stage" (at para 221A(vii)); and
>
> (b) "[p]roviding weekly report to the Architect with details of the production status, stone suitability/selection, dry lays, shipment etc." (at para 221B(iii)).

20 The Claimant accepted that the stone inspector reported to the architect, that it was for the architect to approve the dry lay reports, and that the stone inspector did not give the Claimant the approval to install the stones (see the transcript extract at para 277 of the Award).

21 The arbitrator too accepted that the stone inspector reported to the architect (para 291(c) of the Award), and that "for stone selection, it is clear that the Subcontract Specifications require the Architect's approval" (para 277 of the Award; also see paras 218 and 219). At para 279 of the Award, the arbitrator said:

> Whilst according to Clause 3.3 of the GC (refer to paragraph 204 above), the GC have priority over the Subcontract Specifications, it is accepted by the Claimant that for stones it requires the Architect's approval. Accordingly, the Sole Arbitrator finds the Architect could give instructions to the Claimant about compliance with the Subcontract Specifications and Acceptance Criteria …

22 At para 274 of the Award, the arbitrator commented on the interplay between the stone inspector's approval and the architect's approval:

> … The Sole Arbitrator is not persuaded it makes much difference where Dry Lays take place, and the Stone Inspector has had the primary obligation to check that the stones meet the Acceptance Criteria and this can be done in Singapore as well as Italy (but he has to get the Architect's final approval). It does not matter in which country the laying out of stones at Dry Lays to check aesthetics and compliance with the Acceptance Criteria takes place … At the end of the day it is a matter of aesthetics, and the Stone Inspector either approves and disapproves the stones, whether the Dry Lays took place in Italy or Singapore. The Architect rejected stones not having attended the Dry Lays in Singapore, at times retracting previous approvals, and usually after installation … In any event, the Stone Inspector did not reject the stones be [*sic*] inspected (with the exception of a few shipped from Italy, but this was inspection prior to shipping not at Dry Lay stage, and also on 28 August 2015).

23 The Respondent contends that the Stone Inspector Finding went against the contractual scheme that final approval rested with the architect, not the stone inspector – a point accepted by the Claimant, and indeed by the arbitrator himself.

24 I do not, however, read the Stone Inspector Finding as subordinating the architect's approval to that of the stone inspector. To the contrary, it is consistent with the contractual scheme where the stone inspector reported to the architect, and it was then for the architect to decide whether to rely on the stone inspector's view, or to take a contrary position. In para 291(c) of the Award, the arbitrator was not deciding what the contractual framework was (which was not in issue); he was deciding whether the stones complied with the Acceptance Criteria (which *was* in issue), and on that he accepted the stone inspector's conclusion that the stones did comply, notwithstanding the architect's rejection of them.

25 The arbitrator reasoned that the architect should have relied on the stone inspector (unless it can be plainly demonstrated he was wrong), because both

stone inspectors were world experts in marble stones, whereas the architect was not. Contractually, it was for the architect to decide whether to approve or reject the stones, but if he rejected the stones that decision would be open to challenge by the Claimant, who could then point to the stone inspector's approval to support its contention that the stones *had* met the Acceptance Criteria. That is what happened here.

26 In the Arbitration, the Claimant had not made an argument in terms identical to the Stone Inspector Finding, but that did not mean that the arbitrator had exceeded the scope of the submission to arbitration, or that there had been a breach of natural justice. Whether the stones complied with the Acceptance Criteria was an issue in the Arbitration, and the parties had put forward opposing contentions on it. In that regard, the Claimant challenged the architect's rejection of the stones, and relied on the stone inspector's approval of them. It was thus open to the arbitrator to make the Stone Inspector Finding, as part and parcel of him preferring the stone inspector's views to those of the architect.

27 In any event, as I elaborate below at [46]–[47], the arbitrator had other reasons for finding that the stones complied with the Subcontract. Merely setting aside the Stone Inspector Finding would not affect the arbitrator's conclusion that the stones complied with the Acceptance Criteria, unless the Respondent could undermine those other reasons as well.

Did the arbitrator's findings as to reliance on photographs go beyond the scope of the submission to arbitration?

28 It was common ground that the architect had physically inspected all the stones that were rejected. He attended all four of the dry lays of the S Stones in Singapore (where stones are laid out before installation, to show what they

would look like when installed). He also inspected the SV Stones on site, at least after those were installed, if not before.

29 The Respondent complains that the arbitrator went against this agreed factual position, in emphasising the architect's reliance on photographs (in extracts such as the following in paras 291(b), 291(c) and 291(e) of the Award):

> (a) "Whilst the Stone Inspector inspected the actual stones at various times before installations, the Architect and the Respondent chose not to attend most of the Dry Lays in Singapore, and relied on the photographs taken at Dry Lays, as did the experts."
>
> (b) "… it was stubborn and obstinate for the Architect to have refused to attend Dry Lays in Singapore."
>
> (c) "The Sole Arbitrator also agrees with Mr [B]'s [*ie*, the Claimant's expert's] criticism of the Architect's rejections … when photographs are relied upon lighting conditions are problematical."
>
> (d) "The Stone Inspector's approvals have considerably more weight than the Architect's objections, as not only were they world experts in marble, but they inspected at source in Italy, or at Singapore Dry Lays."
>
> (e) "When compliance with the Acceptance Criteria is finally balanced, the Sole Arbitrator gives the benefit of doubt to the Claimant, due to the Architect's, and to a lesser extent the Respondent's, refusal to inspect at source, or during Dry Lays in Singapore, the poorly drafted Subcontract Specifications, and unreliable photographs."

30 The respondent goes as far as to submit that the arbitrator found that the architect had relied *solely* on photographs. I cannot, however, conclude from reading the Award that the arbitrator thought the architect never saw the rejected stones at all. In the first place, the arbitrator did not say that the architect had relied *solely* on photographs. In para 291(b) of the Award, the arbitrator said the architect chose not to attend "most" (not all) of the dry lays in Singapore. He expressly found that the architect had attended the dry lay of the S Stones on 27 January 2016 (see para 163 of the Award, and para 265 of the Award as corrected by para 5.10 of the Addendum).

31 In so far as the architect had rejected SV Stones after installation, the arbitrator stated at para 291(c) of the Award: "The Sole Arbitrator agrees with Mr [B] [*ie*, the Claimant's expert] that rejection after installation should only have been for workmanship issues, and this was never alleged in this arbitration." In view of that finding, the fact that the architect saw SV Stones on site *after* installation is of no avail to the Respondent.

32 The Respondent's complaint has greater force in relation to the S Stones, all of which the architect saw on site *before* installation, at four dry lays on 27 January 2016, 2 March 2016, 7 March 2016 and 18 March 2016.

33 The arbitrator found that the architect only attended the dry lay on 27 January 2016, and that he was absent from the three March 2016 dry lays (see paras 163 and 166 of the Award, and para 265 of the Award as corrected by para 5.10 of the Addendum). This went against what was common ground between the parties, *ie*, that the architect had attended all four dry lays of the S Stones:

(a) In the witness statement of the Claimant's Mr [S] in the Arbitration, he stated at para 136 that the architect had attended the dry lays on 2 March 2016 and 7 March 2016.

(b) The table exhibited at Tab 48 of Mr [S]'s witness statement records the architect's attendances on 2 March 2016 and 18 March 2016.

(c) Mr [S]'s reply witness statement refers to the architect's attendances on 7 March 2016 (at para 26) and on 18 March 2016 (at para 29).

34 After the Award was rendered, the Respondent served a request for correction and clarification to certain parts of the Award, including as to para 265 of the Award, on 20 December 2019. That was opposed by the Claimant on 17 January 2020. On 20 January 2020, the Respondent replied to say that it wished to respond with necessary clarifications, but that was not allowed by the arbitrator. In the event, the arbitrator issued the Addendum on 18 February 2020, correcting para 265 of the Award only to the extent of acknowledging that the architect *had* attended the dry lay on 27 January 2016 (consistent with para 163 of the Award).

35 In relation to the March 2016 dates, the arbitrator said at para 5.10(1) of the Addendum:

> 5.10 As to the Request to interpret paragraph 265 of the Final Award, and/or issue a correction:
>
> (1) Mr [S]'s evidence in the arbitration contradicted the Respondent's assertion that the Architect had attended the dry lays in Singapore on 2, 7, and 18 March 2016. The Sole Arbitrator accepted Mr [S]'s evidence.

36 Not only was this plainly wrong, it suggested that the arbitrator had not considered Mr [S]'s witness statement (or Tab 48 thereto) or his reply witness statement: those show that the architect *had* attended on 2 March 2016, 7 March 2016 and 18 March 2016.

37 At para 4.5 of the Addendum, the arbitrator said Tab 48 of Mr [S]'s witness statement "contradicts some of the allegations in paragraph 12 of the Request" (*ie*, the corrections the Respondent sought in relation to para 265 of the Award). He went on to say, "The Sole Arbitrator had considered all arguments raised by the parties on this issue before rendering the Final Award."

38 However, Tab 48 of Mr [S]'s witness statement records the architect's attendances on two of the three March 2016 dates, namely, 2 March 2016 and 18 March 2016 – the arbitrator evidently remained unaware of this, or he would have corrected para 265 accordingly. As for his remark that he had considered ***all*** *arguments* raised by the parties on this issue before rendering the Award, there had been ***no*** *arguments* on this for it was never in issue between the parties. The arbitrator simply proceeded on a factual basis contrary to what was common ground between the parties.

39 In this application, the Claimant did not seek to defend the correctness of the arbitrator's finding that the architect had been absent from the March 2016 dry lays. Its point was simply: the court could not correct the arbitrator's mistakes.

40 There was force in the Respondent's contention that the arbitrator had exceeded the scope of the submission to arbitration, when he found that the architect did not attend the March 2016 dry lays, although it was common

ground between the parties that the architect had: he was making a decision on a matter that had not been submitted for his decision in the Arbitration, because it was common ground between the parties.

41 As the architect's attendances at the March 2016 dry lays were not in dispute, the Respondent had no reason to anticipate that the arbitrator might find to the contrary. When that happened and the Respondent sought a correction, the Claimant incorrectly asserted that there *was* a dispute between the parties, and that Tab 48 of Mr [S]'s witness statement went against the corrections that the Respondent sought. The arbitrator then did not allow the Respondent a response.

42 The Respondent also argues that its expert had inspected the S Stones at the Claimant's warehouse, and so his opinion (at least in relation to the S Stones) were not based *solely* on photographs. The Respondent's expert had referred to his inspection of the S Stones in his expert report (see para 66(c)(iii) of the affidavit of the Respondent's Mr [Z] dated 15 May 2020, and paras 39–40 of Mr [S]'s affidavit dated 9 July 2020). Although the arbitrator stated in para 291(b) of the Award that the experts had relied on photographs, I cannot conclude thereby that the arbitrator thought they had relied *solely* on photographs.

43 I shall now consider whether setting-aside of the arbitrator's decision on the stones is warranted.

If grounds for setting aside are made out, should the court nevertheless decline to set aside the Award (or any part of it)?

44 The Respondent's setting-aside application is brought on two grounds: excess of jurisdiction, and breach of natural justice.

45 In so far as the Respondent relies on breach of natural justice, it needs to show that its rights have been prejudiced by that breach. That is expressly stipulated in s 48 of the AA, and in case law. The court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 stated at [86]:

> It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly.

This has been explained in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54] and [91]–[92] as: "whether as a result of the breach, the arbitrator was denied the benefit of [material that] … *could reasonably* have made a difference to the arbitrator" [emphasis added].

46 In the present case, the arbitrator's finding that the S Stones complied with the Acceptance Criteria and were wrongly rejected, was based on multiple reasons, including:

(a) the relative expertise of the stone inspector as compared to the architect (paras 291(c) and 291(e) of the Award);

(b) the arbitrator had looked at the photographs in the Acceptance Criteria and compared them with the dry lay photographs, and disagreed

with the Respondent's expert that they did not comply with the Acceptance Criteria (para 291(e) of the Award); and

(c) the arbitrator agreed with the Claimant's expert that there were no valid reasons for rejection of the S Stones, and with his criticisms of the architect's rejections (para 291(e) read with para 287 of the Award).

47 None of these reasons was dependent on the architect only attending one of the four dry lays of the S Stones. In relation to sub-para (a) above, I have already found that the arbitrator was entitled to prefer the stone inspector's views to those of the architect, given their relative expertise (see [18]–[27] above). Even if the arbitrator had appreciated that the architect *had* attended all four of the dry lays of the S Stones in Singapore, it would not reasonably have made a difference to his decision that the stone inspector's views were to be preferred. That is also the case with the reasons set out in sub-paras (b) and (c) of the preceding paragraph.

48 The Respondent, however, submits that as it is also relying on excess of jurisdiction, there is no need to show prejudice.

49 Section 48(1)(*a*)(iv) of the AA on excess of jurisdiction does not expressly require that the applicant prove that "the rights of any party have been prejudiced" thereby (a phrase found in s 48(1)(*a*)(vii) of the AA on breach of natural justice). Prejudice is not an express requirement for grounds other than breach of natural justice.

50 However, a court retains a discretion not to set aside an award even if one of the grounds for setting aside has been made out: *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [98]–

[100]. The court found that the tribunal had acted in excess of jurisdiction and also in breach of the rules of natural justice, and had caused real prejudice – accordingly, there was no basis for the court to invoke its residual discretion to refuse to set aside the award.

51 As a corollary, if there is no actual or real prejudice, the court might decline to set aside the award: see *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 ("*Coal & Oil*") at [48]–[52], and *Triulzi Cesare SLR v Xinyi Group (Glass) Co Ltd* [2014] 1 SLR 114 ("*Triulzi*") at [54].

52 The Respondent sought to confine *Coal & Oil* and *Triulzi* to the ground of breach of agreed procedure, but the proposition that the court has a discretion whether to set aside an award is not limited to that ground. This discretion was recognised in *CRW* where the court was considering excess of jurisdiction and breach of natural justice (the same grounds relied upon here).

53 The Respondent cited *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*Tornado*") at [60] for the proposition that no actual or real prejudice needed to be shown for an award to be set aside on the ground of excess of jurisdiction (although the court went on to find (at [61] and [67]–[71]) that there was actual or real prejudice in that case).

54 In *Tornado*, the tribunal made a finding that a certain clause had been breached when that was not in issue, and moreover the tribunal's interpretation of the clause was contrary to the parties' own interpretation of it. That, in turn, led to other findings in the award. Had the tribunal not exceeded its jurisdiction

and deprived the aggrieved party of the opportunity to be heard on the point, it could reasonably have arrived at a different result (see *Tornado* at [67]–[71]).

55 In the present case, the arbitrator's mistake in finding that the architect only attended *one of the four* dry lays of the S Stones is not as material as, for example, his (hypothetical) finding that the architect had not attended *any* of those dry lays. Moreover, the arbitrator's mistake concerned only one of several grounds on which he based his decision that the stones complied with the Acceptance Criteria and were wrongly rejected. As stated above at [47], I find that the impugned reasons would *not* reasonably have made a difference to the arbitrator's decision on the issue of compliance with the Acceptance Criteria. As such, the Respondent did not suffer actual or real prejudice.

56 Moreover, s 48(1)(*a*)(iv) of the AA provides as follows:

> **48.**—(1) An award may be set aside by the Court —
>
> (*a*) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that —
>
> …
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, except that, *if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;*
>
> [emphasis added]

57 Even if the impugned reasons exceeded the arbitrator's jurisdiction, they can be separated from the other reasons for his finding that the stones complied with the Acceptance Criteria and were wrongly rejected. At most, only the

impugned reasons could be set aside; not the other reasons, and not the arbitrator's conclusion on the stones.

58 In the circumstances, I decline to set aside the arbitrator's finding that the stones complied with the Subcontract and were wrongly rejected.

Should the sums awarded by the arbitrator (or any part thereof) be set aside, because the arbitrator awarded retention monies twice over?

59 The contract sum was $11,578,000, and the Respondent was entitled to retain up to a total of 5% of that (*ie*, $578,900) as retention monies, to be released in accordance with the Subcontract terms, in two halves of $289,450 each.

60 In the Claimant's payment claim number 29 ("PC 29") submitted on 31 March 2017, the Claimant asserted that it had done work of a total value of $11,309,903.59 (the "Claimant's valuation"). There was a difference between that and the Subcontract Price due to a deduction of $268,096.41 for variations. PC 29 was exhibited to the Claimant's Request for Arbitration ("RFA") and referred to at paras 38 and 45 thereof.

61 PC 29 shows that the Claimant's valuation of $11,309,903.59 included the sum of $578,900 in retention monies. Thus, in PC 29, the Claimant deducted the sum of $578,900 from the sum of $11,309,903.59. The Claimant acknowledged that it had been paid $7,206,445.31, and the Claimant claimed payment of the balance from the Respondent. The Claimant also claimed the sum of $289,450 as the first half of the retention monies.

62 In the Respondent's payment response number 29 ("PR 29") issued on 21 April 2017 (also annexed to the Claimant's RFA), it noted that the Claimant's cumulative claim was for $11,309,903.59 in value of work, arrived at by deducting $268,096.41 for variations from the contract sum of $11,578,000, *ie*, as set out in PC 29. The Respondent valued the Claimant's work at $7,670,139.62 (the "Respondent's valuation") and deducted the retention monies of $578,900 from that.

63 PR 29 also shows that the Respondent considered it had overpaid the Claimant, even before the Claimant commenced this arbitration. The Respondent's valuation in PR 29 was $7,670,139.62, $115,205.69 less than its previous valuation of $7,785,345.31. Based on its previous valuation, the Respondent had paid the Claimant $7,206,445.31, whereas after deducting the retention monies of $578,900 from the Respondent's valuation of $7,670,139.62 in PR 29, the Claimant should only be paid $7,091,239.62. The difference between the $7,206,445.31 which the Respondent had paid, and the $7,091,239.62 which the Respondent was obliged to pay, is the same sum of $115,205.69 mentioned above. GST of 7% was then added to this sum of $115,205.69 to arrive at the response amount of $123,270.09, which the Respondent considered the Claimant should repay.

64 In the Arbitration, the Claimant claimed $3,639,763.97 (the difference between the Claimant's valuation of $11,309,903.59 and the Respondent's valuation of $7,670,139.62). In the event, the arbitrator arrived at a figure that was between the parties' respective positions: the arbitrator deducted $202,650.84 for non-installation of S Stones (see paras 343–349 of the Award) and awarded the Claimant a balance payment of $3,437,113.13 under Item V of section O of the Award, instead of the $3,639,763.97 the Claimant had claimed.

65 After the Award was issued, the Respondent asked the arbitrator to correct the sums awarded. The Respondent said that the Award was excessive to the extent of $115,205.69. The Respondent argued that the arbitrator had failed to deduct retention monies from what was awarded, and moreover had awarded retention monies twice over (by awarding the Claimant the first half of the retention monies of $289,450 under Item VI of section O of the Award (as amended by para 7.1 of the Addendum), on top of the balance payment awarded under Item V). The arbitrator declined to correct the Award in this respect.

66 As I noted above at [63], the so-called "excess" of $115,205.69 came about because the Respondent had paid the Claimant $7,206,445.31, rather than just $7,091,239.62 (the Respondent's valuation of $7,670,139.62, less $578,900 in retention monies). The "excess" of $115,205.69 does not arise from the arbitrator failing to deduct retention monies from the Claimant's claim of $3,639,763.97 (the difference between the Claimant's valuation and the Respondent's valuation) – no such deduction was required, as the sum claimed was simply the difference between the parties' respective valuations, each of which was already subject to deduction of retention monies.

67 Whatever the Claimant's claims in this arbitration, PR 29 shows that the Respondent considered that it had already overpaid the Claimant by $115,205.69 in relation to the value of work done. That did not come to the fore in this arbitration, perhaps because the Respondent's counterclaims became the subject of another arbitration.

68 The Respondent cannot however point to that overpayment of $115,205.69 as a basis to undermine the sums awarded by the arbitrator. The

arbitrator did not exceed his jurisdiction, nor breach natural justice, in awarding the sums which he awarded to the Claimant.

69 Whether the Respondent can recover the sum of $115,205.69 in the other arbitration is beyond the scope of this setting-aside application, and so I shall not comment on that.

70 In the circumstances, I do not set aside the sums awarded by the arbitrator in favour of the Claimant.

Confidentiality

71 The Respondent applied for sealing and redaction orders to preserve the confidentiality of the Arbitration. The Claimant contended that the Arbitration was not confidential, but it did not object to the court files being sealed from public inspection, and I made that order.

72 As requested by the Respondent, the setting-aside application was heard "otherwise than in open court" pursuant to s 56 of the AA, and this was not resisted by the Claimant.

73 It has been recognised that "as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration", and where Singapore is the seat of the arbitration, "confidentiality will apply as a substantive rule of arbitration law, not through the … AA, but from the common law" (*AAY v AAZ* [2011] 1 SLR 1093 ("*AAY*") at [55]).

74 It is, however, open to the parties to agree that their arbitration will not be confidential. The Claimant contended that this is precisely what happened when the parties agreed to arbitrate under the ICC Rules. The ICC Rules do not contain any express stipulation that arbitrations conducted thereunder are confidential. Instead, Art 22(3) of the ICC Rules on "Conduct of the Arbitration" provides that:

> Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

75 The Claimant's contention was that until and unless a party makes a request under Art 22(3) of the ICC Rules and the tribunal then makes orders concerning the confidentiality of the arbitration proceedings, an arbitration governed by the ICC Rules is not confidential even if seated in a jurisdiction like Singapore where, as a substantive rule of arbitration law, arbitrations are by default confidential.

76 I did not agree with the Claimant. The ICC Rules are neutral as to confidentiality – as such, they may be utilised in jurisdictions like Singapore and England where there is a general obligation of confidentiality, or in jurisdictions like Australia or the United States where the default position may be otherwise (see *AAY* at [54]–[55]). In a Singapore-seated arbitration like the present one, the parties' agreement to the ICC Rules does not displace the general obligation of confidentiality. The fact that Art 22(3) of the ICC Rules expressly allows a party to apply to the tribunal for confidentiality orders itself indicates that an agreement to arbitrate in accordance with the ICC Rules is not thereby an agreement to non-confidential arbitration.

77 As far as confidentiality is concerned, the ICC Rules are a blank slate; they do not whitewash the default legal position. In the circumstances, I also grant the redaction orders sought by the Respondent.

Conclusion

78 For the above reasons, I grant the Respondent's application for sealing and redaction, but I dismiss the Respondent's setting-aside application. I will hear the parties on costs and any consequential orders.

Andre Maniam
Judicial Commissioner

Nandakumar Ponniya Servai, Wong Tjen Wee, Jeunhsien Daniel Ho and Singh Kartik (Wong & Leow LLC) for the plaintiff;
Goh Phai Cheng SC (Goh Phai Cheng LLC) for the defendant.