Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd [2005] SGHC 33

Case Number : OM 5/2004

Decision Date : 15 February 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : George Tan and Monica Neo (ChanTan LLC) for the applicant; Tan Liam Beng (Drew and Napier LLC) for the respondent

Parties : Permasteelisa Pacific Holdings Ltd — Hyundai Engineering and Construction Co Ltd

Arbitration – Award – Recourse against award – Appeal under Arbitration Act – Whether to grant leave to appeal on questions of law posed by defendant – Arbitration Act (Cap 10, 1985 Rev Ed)

Arbitration – Award – Recourse against award – Misconduct under Arbitration Act – Whether arbitration proceedings misconducted by arbitrator – Whether to set aside certain holdings in arbitrator's award – Whether to remit certain matters to arbitrator for reconsideration – Arbitration Act (Cap 10, 1985 Rev Ed)

15 February 2005 *Judgment reserved.*

Judith Prakash J:

Background

1 Hyundai Engineering & Construction Co Ltd ("Hyundai") was appointed by Golden Development Pte Ltd ("the Employer") as the main contractor for a construction project at Anthony Road/Peck Hay Road/Clemenceau Avenue ("the project"). Hyundai engaged Permasteelisa Pacific Holdings Limited ("PISA") as the nominated sub-contractor for the design, supply, delivery and installation of aluminium curtain-walling and glazing at the project. Disputes arose relating to the sub-contract works and the parties went to arbitration. PISA was dissatisfied with various aspects of the arbitration award ("the Award") and has therefore applied to the court for various reliefs. As the arbitration proceedings commenced prior to the enactment of the Arbitration Act 2001, this application is governed by the provisions of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the Act").

2 The parties' relationship is governed by a written sub-contract dated 14 August 1998 ("the sub-contract") that incorporates the Conditions of Sub-Contract (1980 Ed, 1990 Reprint) ("Sub-Contract Conditions") published by the Singapore Institute of Architects ("SIA") for use in conjunction with the main contract. The sub-contract stated that the commencement date of the sub-contract works would be 2 August 1997. It also stated that these works were to be completed in such stages as to enable Hyundai to complete the main contract works by 10 August 1999. Subsequently, the completion date was modified by a supplemental agreement.

3 Whether or not PISA completed the sub-contract works was one of the major matters in dispute in the arbitration. PISA's stand was that the sub-contract works were completed on or about 15 November 2000. Hyundai denied that the works were completed then, or at any time thereafter, as it alleged that the glass components of the curtain wall panels were, and remained, badly scratched. The parties disagreed on the criteria applicable in assessing whether the scratches were defects in the work or not.

4 By a letter dated 17 August 2001, PISA gave notice to Hyundai of its intention to refer the disputes to arbitration. The parties were unable to agree on the appointment of an arbitrator. So, on 19 December 2001, the President of the SIA appointed Mr Johnny Tan Cheng Hye ("the arbitrator") as the sole arbitrator to hear and determine the matter. The arbitrator subsequently issued directions providing for the conduct of the arbitration. Among other things, it was directed that:

(a) the rules applicable to the proceedings would be the Arbitration Rules of the SIA;

(b) the parties were to file and exchange lists of documents and conduct inspection of each other's documents; and

(c) the parties were to file agreed bundles of documents and also to file and exchange affidavits of evidence-in-chief of their witnesses.

The parties exchanged pleadings in accordance with the directions of the arbitrator and, in response to PISA's claim, Hyundai filed a counterclaim.

5 The arbitration hearing was conducted over 33 days during the period from 19 September 2002 to 16 May 2003. It was conducted according to formal procedures similar to those adopted during court hearings. The witnesses, who had filed their affidavits of evidence-in-chief, were called and examined. The agreed bundles contained documents that had been agreed with regard to authenticity only. Exhibits were formally tendered, marked and admitted through appropriate witnesses. After the hearing of the evidence concluded, the parties filed substantial written submissions.

6 The arbitrator delivered the Award on 31 January 2004. It was a lengthy award containing more than 500 paragraphs. In the final analysis, the arbitrator awarded Hyundai the sum of $1,489,126.82 being the amount of its counterclaim less the sum of PISA's claim. This sum was corrected by the arbitrator on 16 March 2004 to $1,463,481.55. In the meantime, on 19 February 2004, PISA filed these proceedings seeking the following reliefs:

(a) that the Award may be set aside pursuant to s 17 of the Act on the ground that the arbitrator had misconducted himself or the proceedings;

(b) further or in the alternative, that PISA be granted leave to appeal on various questions of law arising out of the Award;

(c) in the further alternative, that the matter be remitted to the arbitrator pursuant to s 16(1) of the Act with the court's opinion, judgment or direction; and

(d) in the further alternative, that the arbitrator may be ordered, pursuant to s 28(5) of the Act, to state reasons for the Award in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising out of the Award.

7 In arguments, PISA clarified that it was dissatisfied with the arbitrator's decision on two main groups of issues. These were:

(a) time-related issues – involving issues of completion, delays, extensions of time, liquidated damages, and PISA's claim for compensation for the period of delays for which it was granted extension of time; and

(b) work-related issues – the finding of $1,003,888.39 in favour of PISA without any award thereon, and the summary dismissal of variation claims, the claim for the costs of glass panes already replaced and the rejection of PISA's claim for replacement of original stayarms.

PISA pointed to various paragraphs of the Award and indicated which paragraphs, it thought, raised questions of law and which indicated misconduct by the arbitrator. I will consider PISA's complaints in turn after setting out, briefly, the applicable legal principles.

The law

8 The court's ability to supervise the conduct of arbitration proceedings and interfere with the outcome of those proceedings is limited. It is well established that the principle of party autonomy is to be given priority and that, even if a judge would have come to a different conclusion from that of the arbitrator, that is not, in itself, a reason to set aside the award or allow an appeal to be brought against it. The court may, however, under s 16(1) of the Act remit matters arising in the arbitration to the arbitrator for reconsideration. Further, under s 17(2) of the Act, where the arbitrator has misconducted himself or the proceedings, the court may set aside the award. A finding that the arbitration has been misconducted does not imply any moral turpitude on the part of the arbitrator. As *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) ("*Halsbury's*") para 20.127 indicates, in arbitration, "misconduct" denotes irregularity, such as failing to observe the rules of natural justice or taking steps that amount to a procedural mishap, like examining one party in the absence of the other or questioning a party and basing part of the award on the answers given, even though the agreement of the parties had been to make an award based on documents only. *Halsbury's* also points out that "[n]ot all procedural irregularity warrants a finding of misconduct – the failure must have caused a miscarriage of justice".

9 As regards leave to appeal to the court under s 28 of the Act, the principles to be applied are well known. They emanate from *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 ("*The Nema*") and the Court of Appeal decision of *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609, and have been further clarified in the recent Court of Appeal decision of *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494 ("the *Northern Elevator* case"). The first point to be made is that, as stated in s 28(1) of the Act, the court cannot set aside an award because there has been an error of law on the face of the award. Nor does an error of law give rise to a right of appeal. It is only when there is a question of law that arises from the award that leave to appeal is permissible. In the *Northern Elevator* case, the Court of Appeal (*per* Choo Han Teck J at [19]) held:

> [A] "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

This holding was an endorsement of the statement of the law by G P Selvam JC in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 at [7]:

> A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. [emphasis added]

By reason of the foregoing authorities, it would seem that, in Singapore, the view of Robert Goff J in *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1981] 2 Lloyd's Rep 489 that it does not follow that "simply because there is no dispute as to the general law, the application of the law to the facts cannot itself raise a question of law" (at 492) has been rejected.

10 As discussed in *The Nema,* there are two types of questions of law that can arise from an arbitration award. The first is a question relating to the proper construction of a contract, because English law (and thus Singapore law too) regards the interpretation of a written document as being a question of law rather than a question of fact. When such a question arises, how the court approaches it depends on whether the contract is a "one-off" contract or a standard-form contract. In the first case, leave to appeal will only be given if it is apparent upon a perusal of the reasoned award that the meaning ascribed to the clause by the arbitrator is obviously wrong. In the other case, leave will be given only if the judge considers that first, the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of Singapore commercial law, and second, that a strong *prima facie* case has been made out that the arbitrator has been wrong in his construction. However, even in this latter situation, when the events to which the standard clause falls to be applied are themselves "one-off" events, stricter criteria must be applied along the same line as those appropriate to "one-off" clauses: see Lord Diplock in *The Nema* at 742–743.

11 The other type of question of law that may arise is the kind that requires the arbitrator to determine whether the facts proved in evidence before him lead to a particular legal conclusion. It can be a pure question of law or a mixed question of fact and law. An example of this type of question of law arose in *The Nema* itself, where the arbitrator had to decide whether the charterparty between the parties had been frustrated. As Lord Diplock stated (at 738), the question of frustration is never a pure question of fact, but involves a conclusion of law as to whether the frustrating event or series of events has made the performance of the contract a thing that is radically different from that which was undertaken by the contract. Lord Diplock went on to hold (at 744) that where the second type of question of law arises, the judge deciding whether to give leave to appeal against the arbitrator's decision should not ask himself whether he agrees with the decision reached by the arbitrator, but rather, whether it appears upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach. This will be the normal approach, and only if there is a situation where the events involved are not "one-off" events but events of a general character that affect similar transactions between many other parties engaged in the same kind of commercial activity, will the judge be justified in taking a different approach.

12 Distinguishing between questions of law and questions of fact may not always be straightforward. As pointed out in D Rhidian Thomas, *The Law and Practice Relating to Appeals from Arbitration Awards* (Lloyd's of London Press Ltd, 1994) at para 3.2.6:

> A question may, however, remain one of fact notwithstanding that it arises in the context of legal criteria and therefore cannot in strictness be described as one of the pure fact. Such questions arise when what is in issue is the application of evaluated facts to an abstract legal proposition. What is a partnership is a question of law with the legal concept defined by the Partnership Act 1890, section 1. But whether a particular relationship amounts to a partnership is characterised as a question of fact.

13 Finally, even if the questions of law raised by PISA meet the tests set out above, the court cannot give leave to appeal unless it considers that the determination of the question of law concerned could substantially affect the rights of one or more to the arbitration agreement (s 28(4)

of the Act). Thus, the questions of law must have a substantial impact on the rights of at least one of the parties in order for leave to be given.

The issues in the present case

The sub-contract completion certificate

14 In the arbitration proceedings, PISA sought a declaration that it was entitled to the issuance of a sub-contract completion certificate certifying that the sub-contract works had been completed on 15 November 2000 or such other date as the tribunal deemed fit. The architect had not issued any such certificate and the issue was whether he should have done so. The determination of this issue involved a matter of contractual construction.

15 Clause 11.3 of the Sub-Contract Conditions deals with the issue of the sub-contract completion certificate in the following manner:

> The Sub-Contract Completion certificate shall be issued by the Architect when the Sub-Contract Works appear to be complete in all respects in accordance with the requirements of this Sub-Contract, but may, in accordance with clause 24 of the Main Contract Conditions, be issued notwithstanding minor outstanding works which the Sub-Contractor will undertake in writing to complete within such time as may be agreed upon and such terms as may be agreed.

It thus incorporates cl 24(5) of the conditions in the main contract ("Main Contract Conditions"). The relevant portion of this reads:

> Provided that, without prejudice to the Architect's powers under clause 26(3) of the Conditions, *if any minor works are outstanding which can be completed following the removal of the Contractor's site organisation and all major plant or equipment, and without unreasonable disturbance of the Employer's full enjoyment and occupation of the property,* then upon the Contractor undertaking in writing to complete such outstanding work within such time or times as may be stipulated by the Architect, the Architect may (but shall not be bound to) issue a Completion Certificate, which shall record such outstanding work by way of a schedule attached to the certificate, together with the terms of the agreement with the Contractor for its completion, including any agreement as to withholding and subsequently releasing any part of the Retention Monies otherwise payable on the issue of the certificate in accordance with clause 31(7) of these Conditions. [emphasis mine]

16 The basic argument made on behalf of Hyundai before the arbitrator was that the architect had not been obliged to issue a sub-contract completion certificate because PISA's work was incomplete in that many of the glass panels it had installed were badly scratched and, therefore, defective. PISA admitted that there were some defective glass panels, but contended that the number of these was far smaller than was alleged by Hyundai and that the rectification of these defective panels constituted "minor works" that could be carried out subsequently in accordance with the provisions of cl 24(5) of the Main Contract Conditions, and therefore there was no hindrance to the issue of the sub-contract completion certificate.

17 On this issue, the arbitrator held:

> 367. In paragraph 471 of the Claimants' [PISA's] Closing Submission, the Claimants appeared to question the applicability of Clause 24(5). They said that the sub-contract conditions did not contain a clause dealing with outstanding work. I disagree with the Claimants' submission.

Clause 11.3 of the Sub-Contract Conditions clearly makes reference to Clause 24, which must include Clause 24(5). Clause 24(5) reads as follows:

…

368. Firstly, the words "*may (but shall not be bound to) issue a Completion Certificate*" reinforces the discretionary provision of Clause 11.3 of the Sub-Contract Conditions. It is [*sic*] makes it clear that even if the Contractor undertakes in writing to complete such outstanding work within such time or times as may be stipulated by the Architect, the Architect still has the discretion to issue or not issue the Completion Certificate.

369. Secondly, in considering whether the Architect should have exercised his discretion under the Clause 11.3 of the Sub-Contract and Clause 24(5) of the Main Contract, I have considered the following:

369.1 Are the remaining works outstanding works or defective works?

… I believe the key to Clause 24(5) is whether the outstanding works (whether they are works that had never been done or works that had been done but found defective and not rectified) are minor or major.

369.2 Are the outstanding works minor? Clause 24(5) deemed the outstanding works to be minor when the works "*can be completed following the removal of the Contractor's site organisation and all major plant or equipment, and without unreasonable disturbance of the Employer's full enjoyment and occupation of the property*". This would be the test against which the Architect must decide whether to exercise his discretion to issue a Completion Certificate. In this instance, even when using the viewing distance of 3m criteria for scratched glass, there were 2,932 pieces or 2,117 [m²] of glass panels to be replaced. This in my opinion cannot be considered minor. The Claimants argued that the Respondents [Hyundai] themselves admitted that the glass could be replaced independently of the other works. However just because the work can be carried out independent of other works does not necessarily make it a minor work. For example, a contractor may cast concrete at level 9 of a building independent of the bricklayers laying bricks at level 5 of the same building, but certainly the concreting works cannot be considered minor.

369.3 Written undertaking. Before the Architect exercise his discretion to issue the Sub-Contract Completion Certificate, the Claimants were required by the contract to provide an "*undertaking in writing to complete such outstanding work within such time or times as may be stipulated by the Architect*". In this case, the Claimants not only did not issue such a written undertaking but also in fact, disputed the Architect's decision on the rejected scratched glass. Albeit the Architect had used the arbitrary viewing distance to determine the acceptability of the scratched glass, the Claimants could have given an undertaking on [*sic*] to rectify those with scratches at a viewing distance of 3.3m or undertake to rectify those identified by the Architect and reserve their rights to claim at this arbitration. This the Claimants did not do. What the Claimants did instead was to only replace those which their own expert, Mr Wong Chung Wan had identified and even of this list the Claimants only replaced 473 pieces out of the 847 pieces identified by Mr Wong between February 2002 and June 2002 as confirmed by Roger Tan. The Architect had every reason not to issue the Sub-Contract Completion Certificate, as there was every reason for him to doubt whether the Claimants would replace the scratched glass once the Sub-Contract Completion Certificate was issued. Even if the Claimants disagreed with the Architect's criteria for scratched glass, the Claimants should have proceeded to replace the

scratched glass and reserved their rights to claim for the costs of such replacement in this arbitration.

18 In its originating motion, PISA pleaded that by reason of the cited paragraphs of the Award, it should be given leave to appeal on three questions as to the true interpretation of cl 24(5) of the Main Contract Conditions read with cl 11.3 of the Sub-Contract Conditions. The first of these questions was whether on such true interpretation, the architect ought to make a judicial, reasoned or considered evaluation or decision in the exercise of his discretion whether to issue a completion certificate. I can deal with this question shortly. This in my view is not a question of law that arises out of the Award. Looking at the terms of cl 11.3 of the Sub-Contract Conditions and those of cl 24(5) of the Main Contract Conditions and the role of the architect under those conditions, it is clear to me that the architect must exercise the discretion given to him by those clauses in a reasoned manner, *ie*, after considering the circumstances and evaluating the situation. The arbitrator did not say anything that indicated that he took a contrary view of the ambit of the architect's discretion. In fact, what he did in para 369 of the Award was to consider whether there were reasons which justified the manner in which the architect exercised his discretion. He must therefore have been of the view that whilst there was a residual discretion in the architect, this discretion had to be exercised on rational grounds.

19 The second question related to the language in cl 24(5) of the Main Contract Conditions, which I have italicised in my quotation of that clause in [15] above. PISA's question was whether:

> in considering and evaluating whether any outstanding or defective works are minor (so as to decide whether to issue a completion certificate), the said works ought to be considered and evaluated in terms of or according to whether the outstanding or defective works can be completed (a) following the removal of the Contractor's site organisation and all major plant or equipment and (b) without unreasonable disturbance of the Employer's (or the main contractor's) full enjoyment and occupation of the property.

For the purpose of this analysis, I will use PISA's language and refer to the requirements stated in the clause as "conditions (a) and (b)", though, of course, in the clause itself they are not so differentiated.

20 The reason for this second question is that in para 369.2 of the Award, the arbitrator, while stating that the test of whether the works were minor or not was whether conditions (a) and (b) were met, held further down in the same paragraph that the works were not minor simply on the basis that the amount of defective work that existed was substantial. He did not go on to consider whether conditions (a) and (b) had been met. Therefore, the arbitrator said one thing in one part of para 369.2 but did another, as evidenced in another part of para 369.2. The effect of his interpretation of cl 24(5) was that it required the architect to first determine whether the outstanding or defective works were minor and thereafter ascertain whether conditions (a) and (b) would be met in respect of such minor works. Since the arbitrator himself considered that the outstanding works in this case were not minor, he did not go on to apply conditions (a) and (b).

21 Clause 24(5) is a clause in a standard-form construction contract. Therefore, the test applicable to whether a question of law on the interpretation of the italicised portion is appropriate is whether there is a strong *prima facie* case that the interpretation, in fact, given by the arbitrator to that portion is wrong. Applying this test, I cannot hold that there is such a strong *prima facie* case. In my provisional view, the correct interpretation of the wording in question is that it specifies three conditions that have to exist for the architect to consider issuing a completion certificate under cl 24(5). The first is that the outstanding or defective work must be minor. This is a question of fact

for the architect to determine in the circumstances of the project and the sub-contract works. Once there was a dispute over whether the outstanding works were indeed minor and the matter went to arbitration, it became a question of fact for the arbitrator to determine if, in the circumstances of the sub-contract works, the number of glass panels that he found to be scratched and defective amounted to minor defective works or not. The court cannot upset the arbitrator's findings of fact even if they are erroneous.

22 The second matter to be considered by the architect is whether condition (a) can be met and the third is whether condition (b) can be met. I think that the interpretation that PISA sought to give to the wording in question is strained. It submitted that as long as conditions (a) and (b) could be met in respect of the outstanding work, then whatever that work was, it would have to be considered "minor works" for the purpose of the clause. The arbitrator did not consider that to be the case. He is an architect and experienced in the industry and whilst the example he gave to illustrate his view may be open to question, one ill-chosen illustration does not make him wrong. If it had been intended by the drafters of the clause that fulfilment of conditions (a) and (b) would make outstanding works minor, the clause would have been differently worded. It is significant that the first few words of the language in question read "if any minor works are outstanding", with the word "minor" qualifying "works". If PISA's interpretation were correct, the word "minor" would be redundant since the statement of the two conditions to be met would be a sufficient description of the situation in which there is a possibility of the issue of a completion certificate notwithstanding the existence of outstanding works. I therefore consider that, probably, on the true interpretation of the clause, the outstanding works not only have to meet conditions (a) and (b), but also have to be works that can otherwise be considered "minor".

23 The third question on which PISA wanted leave to appeal was whether a written undertaking from PISA was a separate and additional pre-requisite to the architect exercising his discretion to issue the sub-contract completion certificate. In view of my conclusion on the second question of law relating to cl 24(5), there is no point in giving leave to appeal on this third question as, whatever the answer to the question may be, it will not have a substantial effect on the rights of the parties.

24 In its Reply Submissions, PISA reformulated the questions of law on this issue that it wished to have leave to appeal on. I do not need to deal with the reformulated questions in detail. Whilst I accept that the court (not the applicant) may reformulate questions raised in the application in order to specify the issues arising more clearly, in this case, the reformulation suggested did not solve the problems that PISA faced. Firstly, the first reformulated question dealt with the ambit of the architect's discretion and with the true interpretation of the criteria mentioned in the italicised portion of cl 24(5) and I have dealt with those matters already. Next, the second reformulated question was the same question as that dealt with in [22] above. Finally, consideration of the third reformulated question will not have a substantial effect on the rights of the parties for the reason stated in [23] above. Therefore, PISA's application in respect of this first set of questions of law must fail.

Liquidated damages claimed by Hyundai

25 One of the claims made by Hyundai in its counterclaim was for loss and damage suffered by it as a result of the failure on the part of PISA to complete its sub-contract works on the agreed revised completion date. In para 38 of its Amended Points of Defence and Counterclaim, Hyundai particularised such loss and damage as comprising three items. The third of these items was described as "Liquidated Damages imposed by the Employers on [Hyundai] amounting to $4,760,000 (up to 19 April 2002 and still accruing), being liquidated damages at the rate of $20,000.00 per day from 24 August 2001".

26 The arbitrator dealt with the above claim and PISA's submissions on the same in paras 435 to 437 of the Award as follows:

> 435. The Claimants submitted that the Respondents have not suffered any loss. It is the Claimants' case that the Employer had not actually imposed liquidated damages. They submitted that it was for the Respondents to prove that liquidated damages had been deducted and that it was up to the Respondents to call the Employer's representative to give evidence on the same. They pointed to the Architect's evidence that the Employer had no intention to recover liquidated damages.
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> 436. The Respondents said there was no need to call the Employers to give any evidence as letters from the Employers clearly showed that the Employer imposed liquidated damages on the Respondents. They referred to letters from the Employers dated 24 December 2001, 11 March 2002, 8 November 2002 and 17 February 2003 shown at 180AB73236 – 73240. From those letters, they said it is clear that the Employers have already imposed liquidated damages.
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> *".. Further, pursuant to Clause 24(2) of the Conditions of Contract, we are entitled to impose liquidated damages on you amounting to S$10,120,000.00 for the period of delay from 1 August 2001 to 14 January 2003 (i.e. 506 days at S$20,000.00/day). As of to-date, we have deducted liquidated damages amounting to S$3,638,810.32 and the outstanding liquidated damages imposable on you is S$6,481,189.68. Hence, the balance amount of S$940,703.50 under the Interim Certificate No. 58 after making the deductions mentioned above shall be deducted as part of the liquidated damages."*
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> 437. Referring to the last letter dated 17 February 2003, I find that the liquidated damages had accrued to the sum of S$10,120,000.00 as at 14 January 2003, and the Employer had deducted from the [Respondents'] Interim Certificate Payments the total sum of S$4,579,513.82 (the sum of S$3,638,810.32 plus the sum of S$940,703.50). The Respondents said that the Architects had already confirmed on the stand that if nothing comes out of the negotiations, the liquidated damages would be imposed.
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> …
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> 440. It is clear that deducting liquidated damages is at the discretion of the Employer. So far the Employer had deducted the sum of S$4,579,513.82. When the Employer said in their letter that they were entitled to impose liquidated damages amounting to S$10,120,000.00, they were merely stating their discretionary rights under the Contract. Hence, the Respondents should only be entitled to recover the damages actually suffered. To permit recovery of damages not yet suffered would not be fair to the Claimants for if Employer waived their rights to the liquidated damages, the Respondent would stand to benefit.

27 PISA originally asked for two different types of relief in respect of the above passages. First, it asserted that four questions of law arose from the same and asked to be given leave to appeal on the same. Its second stand was that the arbitrator had misconducted himself and/or the proceedings in relation to this issue and that part of the Award should be set aside. On the second day of arguments, when PISA submitted its Reply Submissions, it dropped the request for leave to appeal and maintained only its contention that the arbitration had been misconducted on this point. I will therefore deal with that point alone.

28 PISA submitted that it was clear from the way in which Hyundai had pleaded its counterclaim on this point that it was not claiming liquidated damages for delay *per se*. Rather, Hyundai was

claiming as general damages the liquidated damages which it said it was liable to pay the Employer, amounting to $4.76m up to 19 April 2002. General damages must be proved. PISA's point in the arbitration was that Hyundai had not suffered any loss as it had not proved that it had been made to pay any liquidated damages to the Employer. Hyundai had the onus of proving such loss but it did not call anyone from the Employer's staff to testify that the sum of $4.76m had been deducted from payments due to Hyundai. The arbitrator had gone wrong in relying on letters from the Employer as the basis for his finding that the Employer had recovered liquidated damages from Hyundai. In the absence of any testimony from the Employer, the Employer's letters ought not to be regarded as proof of anything.

29 The arbitrator's reliance on the Employer's letters was not, PISA alleged, based on agreed procedure. The procedure agreed upon in the arbitration was that the documents forming part of the agreed bundle were only agreed as to authenticity and not as to their contents. As a matter of agreed procedure, the contents of the documents had to be proved and testified to by the relevant witness. The arbitrator should have, PISA submitted, as a matter of the agreed procedure (as opposed to matters of principle), applied the rules of evidence requiring proof of the contents of the documents. As the arbitrator had not done so, his finding that Hyundai had suffered loss by reason of the Employer's deduction of liquidated damages and the Award based on that ground had to be set aside. The setting aside should be accompanied by a direction that the arbitrator should find that Hyundai had suffered no loss in the form of liquidated damages under the main contract with the Employer.

30 In considering the arguments put forward by PISA, I note first that whether Hyundai had suffered loss due to delay on the part of PISA and what the amount of such loss was, were pure questions of fact to be decided by the arbitrator on the basis of the evidence. Where questions of fact are concerned, an arbitrator's finding of fact is conclusive. The parties cannot run away from that rule by alleging that the findings of fact are inconsistent or constitute a serious irregularity, or that there is insufficient evidence to support the findings in question: see *Russell on Arbitration* (Sweet & Maxwell Limited, 22nd Ed, 2003) at para 8-058. On the evidence, the arbitrator here found that Hyundai had suffered loss amounting to $4.76m on account of PISA's delay. He was careful to distinguish between the loss already incurred and paid and that which might be levied in the future. He did not make an award in respect of sums that he considered the Employer had not already taken from Hyundai.

31 Whilst PISA's argument is dressed up as a contention of misconduct of the arbitration, its basis is that the arbitrator relied on inadmissible evidence. PISA is therefore saying that the arbitrator came to a finding on insufficient evidence. PISA is not entitled to make such an argument. Even if a finding of fact has been made on insufficient evidence, coming to such a finding is not misconduct on the part of the arbitrator himself or a way of misconducting the arbitration.

32 As for the agreed procedure, this must be looked at in the context of the law applicable to arbitration proceedings. The Evidence Act (Cap 97, 1997 Rev Ed), which contains the rules governing the admission of evidence during court proceedings, provides specifically (in ss 2 and 170) that none of its provisions apply to arbitration proceedings with the sole exception of the sections relating to bankers' books. Thus, in arbitration proceedings, generally, the law of hearsay and the manner of proving the truth of written statements as set down in the Evidence Act, are not applicable. In the present case, in relation to documents to be used as evidence, the procedure for the arbitration as contained in the arbitrator's directions was simply that the parties were to file an agreed bundle of documents. The arbitrator did not direct that the rules of hearsay would apply to the evidence sought to be admitted in the proceedings. The parties agreed that the documents in the agreed bundle were agreed as to authenticity but not as to contents. That agreement meant that the makers of the

documents did not need to be called but it did not mean that the contents of the documents were totally unreliable and not to be regarded by the arbitrator as evidence at all in the absence of testimony from the maker. Since the parties did not agree to the truth of the contents of the documents, they were permitted, both in evidence and in submissions, to challenge the truth of any statement that appeared in any document. That was all. The arbitrator was not bound to disregard any document which any party criticised as being untrue. He still had the ability to deal judicially with such a document by weighing the evidence and considering the parties' arguments in making his decision as to whether the contents of the same should be accepted as true or not. That was his function as the finder of fact.

33 In my judgment, the arbitrator did not misconduct himself or the arbitration when he relied on the contents of documents in evidence to make certain findings. There was nothing in the agreed procedure that was disregarded in such a way as to amount to misconduct by the arbitrator.

Whether PISA's delay caused or contributed to Hyundai's delay

34 In para 371 of the Award, the arbitrator found that the architect was right not to have issued the sub-contract completion certificate. At para 424, he held that the sub-contract works would remain incomplete until PISA had replaced all the scratched glass panels and that PISA was not entitled to any further extension of time. Between paras 427 and 434, the arbitrator dealt with Hyundai's claim that as it was liable to the Employer for liquidated damages at $20,000 per day from 26 August 2002, due to the non-issue of the main contract completion certificate, PISA was, in turn, liable for this loss suffered by Hyundai. The main issue considered by the arbitrator in this portion of the Award was, bearing in mind that other sub-contractors had also failed to complete their sub-contract works on time, how the liquidated damages imposed by the Employer on Hyundai should be apportioned between PISA and the other sub-contractors. The arbitrator concluded that PISA's portion of such liquidated damages imposed at the time interim certificate no 57 was issued, was 35.05% of the accumulated liquidated damages.

35 PISA's complaint was that in holding it liable to liquidated damages for delay and proceeding to apportion the said damages, the arbitrator had ignored the fundamental principle of law that a breach must be found to have caused the loss before an award of damages can be made. It submitted that the arbitrator should first have considered whether PISA's delay in completing its sub-contract works had caused or contributed to delays in the main contract works. The arbitrator had not considered it necessary to do this but had proceeded to immediately assess the quantum of Hyundai's claim for damages for PISA's delay. He had equated delays in the sub-contract works with delays in the main contract works. Alternatively, he had assumed that delays in PISA's sub-contract works had automatically led or contributed to the delays in the main contract works.

36 In the originating motion, PISA stated that the following questions arose from the said conduct and findings of the arbitrator:

(a) Whether it is necessary to show that PISA's delay had caused or contributed to Hyundai's delay or damage, or whether it was enough to show that PISA was responsible for delaying its own sub-contract works; and

(b) Whether it was incumbent on Hyundai to show a rational apportionment of the liquidated damages attributable to the delay on the part of PISA.

37 The law on these issues, as PISA's own submissions show, is settled. PISA cited five authorities for the proposition that a breach must be found to have caused the loss before an award

of damages can be made. It cited *L & M Airconditioning & Refrigeration (Pte) Ltd v SA Shee & Co (Pte) Ltd* [1993] 3 SLR 482 ("*L & M Airconditioning*") for the proposition that, in relation to claims by a main contractor against the sub-contractor, the sub-contractor can be made liable for the liquidated damages that the main contractor has been made to pay the employer, if that sub-contractor has caused or contributed to the delay. Thus, as far as the proposed first question of law is concerned, it is clear that it is not a question of law that arises from the face of the award. It is a settled principle and not one that is in dispute between the parties and no leave can be given to appeal on this question.

38 The same position applies in regard to the second proposed question of law. *L & M Airconditioning* is authority for the principle that if a sub-contractor is not the sole cause of the delay but only a contributor to it, it is incumbent on the main contractor to adduce adequate evidence to show the proper basis for apportioning the liquidated damages attributable to the delay on the part of that sub-contractor. Further, if the contractor cannot show a rational apportionment, the court may award only nominal damages. Finally, as held in *Goh Kian Swee v Keng Seng Builders (Pte) Ltd* [1992] SGHC 26, the claim for damages may be disallowed entirely if the main contractor cannot identify what part of the delay was caused by or attributable to the sub-contractor. Thus, there is no question of law in controversy on which leave to appeal needs to be given.

39 PISA's alternative argument in relation to this part of the Award was that the arbitrator, in refusing or failing to consider whether PISA's delay had caused or contributed to Hyundai's damage, was clearly wrong and therefore had misconducted himself or the proceedings. PISA asked for the portion of the Award on the liquidated damages to be set aside and remitted to the arbitrator for his reconsideration. I cannot accept this submission. Whilst the arbitrator did not expressly state that PISA's delay had contributed to Hyundai's damage, it is obvious from his award that he considered this to be the case. He in fact assumed that PISA's delay had contributed to Hyundai's delay (since, as he stated in para 430 of the Award, he considered that PISA's outstanding works were major works and without them being completed, the architect would not certify completion). He did not, however, set out the reasoning that supported his conclusion. In omitting to do this, the arbitrator erred because, as stated above, it is established law that a sub-contractor whose works are delayed can only be made to pay damages for such delay if it is shown that his delay caused the loss claimed by the main contractor. The arbitrator, before going on to decide on the apportionment of loss, should have made a finding as to the extent to which Hyundai's delay arose from PISA's delay and given his reasons for this finding. I therefore remit the matter to the arbitrator for him to set out his reasons and finding in relation to this matter.

The manner of apportionment of the liquidated damages

40 As noted in [34] above, the arbitrator found that PISA's share of the accumulated liquidated damages levied on Hyundai by the Employer was 35.05%. PISA's complaint was that in coming to this apportionment, the arbitrator had relied on evidence that was not adduced at the arbitration and he had therefore misconducted the arbitration.

41 The relevant paragraphs of the Award read:

> 429. The assessment of the Claimants' liability for the delay was given in Kim's [Hyundai's employee] affidavits which briefly can be explained as follows:
>
> 429.1 The Respondents first evaluated the value of the outstanding works of all the sub-contractors for the month;

429.2 The Respondents then evaluated the value of the outstanding works of the Claimants for the same month;

429.3 The respondents next computed the proportion of the value [of the] Claimants' outstanding works against the value of the outstanding works of all sub-contractors and applied this to the accrued [liquidated] damages for that month; and

429.4 The same method of apportionment was adopted for subsequent months and where the Architect had allowed further extension of time, these extensions were factored into the apportionment.

…

432. The Claimants' objections can be summarised as arising from inaccuracies and lack of independence of the outstanding balance computed by the Respondents and the non-apportionment for the Respondents' default in their site co-ordination. …

433. I had questioned this method of apportionment during the hearing and the Respondents had demonstrated to me that with this method of apportionment, the damages recovered would not exceed the damages suffered and that such apportionment is actually in the favour of the Claimants. *I now accept the method of apportionment using the Architect's Interim Certificates as the most equitable method*. However, adjustments would have to be made to the amount certified as outstanding works as the Quantity Surveyor had used the 1m viewing distance criteria in valuing rejected works. In this arbitration, that viewing distance has been determined to be 3.3m, and based on that viewing distance the amount to be deducted for rejected glass had been determined to be S$597,484.33.

434. With that adjustment, corresponding adjustments would have to be made to Annex 2 of the Respondents' Reply Submission and I have reflected those adjustments in Annex A to this Award. Based on the Respondents' apportionment method, the Claimants' portion of the Liquidated Damages imposed as at the Interim Certificate No. 57 is 35.05% of the accumulated liquidated damages.

[emphasis added]

42 From the above, it is apparent that in arriving at the proportion of 35.05%, the arbitrator received and accepted Hyundai's evidence on the apportionment of liquidated damages presented in Annex 2 of Hyundai's Reply Submission submitted to him. PISA's submission before me was that in doing so the arbitrator had misconducted the arbitration because this evidence relating to apportionment of the liquidated damages was not adduced in evidence during the hearing. It was only introduced in Hyundai's Reply Submissions after the evidence on apportionment that Hyundai had adduced at the hearing had been discredited and shown to be illogical and seriously flawed. PISA said that it was not given any opportunity to challenge or rebut the evidence contained in Annex 2 of Hyundai's Reply Submission since this went in only after the hearing had ended.

43 Various authorities were cited by PISA in support of its submission on misconduct. In *Modern Engineering (Bristol) Ltd v C Miskin & Sons Ltd* [1981] 1 Lloyd's Rep 135, it was held that making an award before one party's submissions on a point had been heard was equivalent to hearing evidence in the absence of a party. A more relevant fact situation occurred in *Mooney v Henry Boot Construction Ltd* (1995) 53 Con LR 120. There, it was contended that the arbitrator had made his valuations without adopting what had been agreed between the parties in the original pleadings or in

the amended Scott Schedule. It was held that the arbitrator had failed to give Henry Boot any proper opportunity of dealing with the method he adopted to assess the disputed items in the Scott Schedule. Finally, in *Montrose Canned Foods, Ltd v Eric Wells (Merchants), Ltd* [1965] 1 Lloyd's Rep 597, it was held that an arbitrator should not make findings based on the evidence of one party that had not been seen by the other.

44 Hyundai did not agree that the arbitrator had relied on evidence that had not been adduced at the arbitration. It argued that the arbitrator's final apportionment had been based on the architect's interim certificates which had been tendered in evidence and upon which oral testimony had been taken. Hyundai's employee, Mr Kim Yong Sik ("Mr Kim"), who had given evidence in the arbitration, made an affidavit in these proceedings. He said there that Annex 2 of Hyundai's Reply Submission was not "evidence" *per se* but a computation based on evidence that had already been tendered in the arbitration proceedings, namely certificate nos 51 to 57 issued by the architect. He averred that Annex 2 was not evidence but submissions based on evidence. He also said that the computation set out in Annex 2 was made to address allegations by PISA that the earlier computation presented by Hyundai in the arbitration, as set out in Mr Kim's affidavit of evidence-in-chief, was not in accordance with the architect's certificates. The new computation had been worked out on the basis of the certificates mentioned. He asserted that it was legitimate for Hyundai to offer an alternative method of apportionment to deal with the complaints made by PISA in its closing submissions. In his view, the purpose of reply submissions was to address points that had been raised in the opposing party's previous submissions.

45 The complaint that PISA has made regarding the method that the arbitrator chose for the apportionment of damages is well-founded. It is clear from Mr Kim's affidavit that the method of computation that Hyundai presented during the arbitration proceedings was not the method of computation chosen by the arbitrator. The arbitrator chose to adopt a method of computation that had been put forward in the closing submissions because Hyundai had realised the difficulties with its original method of computation. Whilst, as a matter of fact, it is correct to state that the evidence on which the new method of computation was based had been adduced in evidence, that does not mean that the method of computation itself had been fairly presented during the arbitration. Since the new method appeared only in Hyundai's Reply Submission, PISA did not have the opportunity to deal with it, either by adducing relevant evidence or by making proper submissions. In my view, the arbitrator misconducted himself by adopting a method of computation which PISA had not had an opportunity to deal with.

46 Accordingly, I set aside the holding in para 434 of the Award that PISA's portion of the liquidated damages imposed as reflected in interim certificate no 57 is 35.05% of the accumulated liquidated damages and I remit the matter to the arbitrator for his reconsideration. In that connection, I make the following directions:

(a) The arbitrator is to determine and assess the extent to which delay on the part of PISA has caused or contributed to the delay and completion of the project and the proportion of damages arising therefrom for which PISA is responsible;

(b) In determining the proportion of PISA's liability for delay caused to the overall completion of the project, the arbitrator shall disregard Hyundai's method of computation of liquidated damages in Annex 2 of Hyundai's Reply Submissions filed in the arbitration proceedings; and

(c) The arbitrator shall take such further evidence and ask for such further submissions as he deems fit in order to make an award in respect of the matters mentioned in sub-para (a) above.

The arbitrator's refusal to allow further claims for extension of time

47 The next objection to the Award raised by PISA relates to the arbitrator's holdings in para 424 of the Award. This reads:

> 424. The Claimants had also sought for further extension of time for various delaying events. I will have to disallow further claims of extension of time by the Claimants. The reasons for my decision are as follows:
>
> 424.1 The Architect had stated under cross-examination that in granting the extension of time for the Sub-Contract Completion Date to 31 July 2001, he had considered the breakdown of the grounds of delay against each and every delay event.
>
> 424.2 This extension of time was granted on 12 March 2002, long after all the delaying events had ceased to operate. Therefore the Architect would have considered all the delaying events which occurred prior to 12 March 2002 for which the Claimants had submitted their notice for extension of time.
>
> 424.3 Hence, in asking for further extension of time at this arbitration, the Claimants are in fact asking for a second bite of the cherry for which extension had already been considered and where appropriate granted by the Architect.
>
> 424.4 On the other hand, if Claimants were asking in this arbitration that I should grant extension for those delaying events for which the Architect had refused to grant any extension of time, then it is for the Claimants to identify which are the delaying [events] for which the application was refused. This they did not do. Neither did they challenge that the Architect's decision was wrong. In fact, they had asked that this Tribunal uphold the Architect's decision. Hence, I must assume that if they had compiled with the condition precedent and notified the Architect timely, the delaying factors would have been considered by the Architect. On the other hand if they had not notified the Architect even at the time of his granting the extension of time, then they had not complied with the condition precedent and the application now should be rejected.

48 The above holdings arose out of submissions made by PISA pursuant to paras 13 and 14 of its Re-Re-Amended Points of Reply & Defence to Amended Counterclaim. These paragraphs dealt with Hyundai's claim for damages for the period of delay after PISA stopped work and challenged the sub-contract delay certificate dated 12 March 2002 issued by the architect. The paragraphs read:

> 13. The Claimants had achieved overall completion of the Sub-Contract Works on 15 November 2000 and were accordingly, entitled to issue of the Sub-Contract Completion Certificate. The Claimants repeat paragraphs 13 to 18 of the Amended Points of Claim and paragraph 4 of their reply herein. As the Claimants have achieved overall completion of the Sub-Contract Works on 15 November 2000, there is no ground or reason for the Architect to issue the Sub-Contract Delay Certificate dated 12 March 2002. …
>
> 14. Further or in the alternative, the Claimants aver that, in issuing the Sub-Contract Delay Certificate dated 12 March 2002, the Architect has breached the Sub-Contract in that he has failed and/or neglected to consider those matters entitling the Claimants to an extension of time to the completion of the Sub-Contract Works in issuing the Sub-Contract Delay Certificate. The Claimants do not accept the period of extension of time granted by the Architect in the Sub-Contract Delay Certificate dated 12 March 2002. The Claimants will rely on the matters raised in

their Amended Points of Claim and the preceding paragraphs to justify their entitlement to an extension of time of a period longer than that granted by the Architect. The Claimants further aver that the Architect's decision and/or ruling on and/or refusal to grant extension of time is subject to review and/or revision under clause 14.2 of the Conditions of Sub-Contract read in conjunction with clause 37 of the Main Contract Conditions.

It can be seen from the above that PISA did not specify either the events that occurred after 31 July 2001 (the date to which time was extended by the architect) that entitled it to a further extension of time or the length of such extension. These items are not found in PISA's Amended Points of Claim either. Paragraphs 13 to 18 of this document set out PISA's position regarding completion of the sub-contract works on 15 November 2000 and the architect's failure to issue the sub-contract completion certificate. Paragraphs 19 and 20 aver that the delay in completing the sub-contract works was due to breaches of the sub-contract on the part of Hyundai and/or instructions given by the architect and Hyundai. There is nothing in the rest of the Amended Points of Claim that deals with extensions of time.

49 PISA complained that the arbitrator had refused or failed to review the architect's decision on extension of time and consider whether PISA was entitled to a longer extension of time than that granted by the architect, and he had therefore misconducted himself and/or the proceedings and/or had otherwise acted unfairly in the conduct of the arbitration. I do not see any merit in this complaint. PISA's pleadings have been quoted. Those pleadings do not state the period for which an extension of time should be granted. They do not give the grounds of such an extension of time. In the absence of such particulars, I do not see how the arbitrator could have considered whether PISA was entitled to a longer extension of time than that actually granted. As the arbitrator himself pointed out, even before him, PISA had not identified the delaying events.

50 PISA's second point on this holding was that it gave rise to two questions of law that PISA should be given leave to appeal on. These questions are:

(a) Whether PISA, having been granted an extension of time by the architect to 31 July 2001 and having asked for this extension of time to be affirmed at the arbitration, was precluded from asking for further extensions of time; and

(b) Whether it was necessary for PISA to identify to the arbitrator those delaying events in respect of which the application to the architect was refused.

51 As far as the first question is concerned, in so far as the arbitrator appears to have held in para 424.4 of the Award that because PISA wanted the tribunal to uphold the architect's extension of time to 31 July 2001 (this was in response to Hyundai's challenge to the same), it was not entitled to ask for a further extension, it appears to me that he was obviously wrong in law in so holding. Allowing an appeal on this question would not, in my view, however, substantially affect the rights of the parties since PISA had not properly pleaded its claim for an extension of time and therefore the arbitrator could not consider this claim. With regard to the second question, I do not consider that the arbitrator was obviously wrong or that he had reached a conclusion that no reasonable arbitrator could reach. PISA wanted the arbitrator to review the architect's decision. How could it expect the arbitrator to carry out that task, if it did not identify the events which it asserted the architect should have held to be delaying events? I see no reason to give leave to appeal on the two questions.

The correct viewing distance

52 This issue involved the method of determining whether the glass panels installed by PISA were defective or not. There was no doubt that many glass panels were scratched. Not all scratched panels were defective. The arbitrator found, at para 275 of the Award, that:

> 275. … glass panels with scratches visible when viewed at 3.3m should be rejected. Those where the scratches are not visible from 3.3m should be accepted as complying with the contract provisions.

He then went on to find that 2,392 panels were defective and should be replaced. He said:

> 276. I will base my assessment on the inspection carried out by the Resident Engineer at the direction of the Architect between the last two weeks of September 2002 and the first two weeks of October 2002. The results of those inspections are found in Agreed Bundle of Documents 179AB73122A to 179AB73122E. At the viewing distance of 3m, 2,932 pieces of scratched glass were required to be replaced.

53 PISA submitted that the arbitrator had misconducted himself in that he had gone against his own ruling that only glass panels that looked scratched from a distance of 3.3m were defective. He had relied on the Resident Engineer's report when the Resident Engineer had inspected the panels from a viewing distance of only 3m. PISA also complained it was wrong of the arbitrator to have accepted the Resident Engineer's inspection report as the Resident Engineer had not testified and, secondly, his report was considered unreliable and contradictory by other witnesses produced by Hyundai. There is no merit in these last two complaints as the Resident Engineer's report was one of the documents produced in the arbitration and the arbitrator was entitled to weigh all the evidence before him and decide which part of it to rely on.

54 The arbitrator's decision on questions of fact is final. It is not misconduct for an arbitrator to make an error of fact: see *The Law and Practice Relating to Appeals from Arbitration Awards* ([12] *supra*) at para 1.2.2.1.2. In this case, exactly how many panels were defective in that they did not meet the criteria for acceptable panels was a question of fact. The arbitrator found on the evidence that there were 2,932 defective panels. In so doing, he may have made a mistake of fact since those panels were inspected from a distance of 3m, and some of them may not have appeared scratched from a distance of 3.3m. However, an award cannot be set aside for an error of fact on the face of the record and since making an error of fact is not misconduct, the finding cannot be remitted back to the arbitrator for reconsideration.

Proper construction of the expression "fully, finally and properly completed and incorporated into the main contract works"

55 This is an issue of the construction of the contract. It concerns a term in the Letter of Award issued by Hyundai to PISA and therefore is a "one-off" question and not a question arising on a standard form. Clause 6.18 of the additional terms and conditions in the Letter of Award provides:

> 6.18 Temporary Protection of the Sub-Contract Works
>
> The Sub-Contractor [PISA] shall be responsible for protection and casing-up of the Sub-Contract Works until such works have been fully, finally and properly completed and incorporated into the Main Contract Works. … The Sub-Contractor shall take all reasonable precautions to ensure that his works shall not be damaged by surface/rain-water which might be present at the perimeter gap between the structure and the cladding system of the building. The Sub-Contractor shall properly seal up the gaps between the structure and the curtain wall at the building perimeter at

suitable vertical intervals of not more than every 5th floor to achieve temporary water tightness.

56 PISA's position at the arbitration was that the term "fully, finally and properly completed and incorporated into the Main Contract Works" merely meant that its responsibility under this clause continued until delivery and installation of its works in the main structure. Hyundai's position was that PISA's responsibility continued until the sub-contract completion certificate was issued. The arbitrator's construction of the clause was adverse to PISA. He held:

> 195. The contract provisions under the heading "Responsibilities of the Sub-Contractor" removes the ambiguity of when the Claimants' responsibility for protection of their works ceases. It clearly states that such responsibility for protection and casing up the sub-contract works remains until such works have been "properly **completed** and incorporated into the Main Contract Works". (emphasis added)
>
> 196. The phrase "fully, finally and properly completed and incorporated into the Main Contract Works' was also repeated in Clause 6.18 of the Letter of Acceptance under the heading "Temporary Protection of the Sub-Contract Works". It therefore suggests to me that the intention of the drafter must be that the mere incorporation of the Sub-Contract Works into the Main Contract Works is insufficient for the purpose of relieving the Claimants of their obligation to protect their works. That obligation remains until the incorporation of the works is deemed fully, finally completed and properly carried out.
>
> 197. I also note that the last paragraph of Annex A of the Letter of Acceptance, states the intention of the parties to the Sub-Contract with regards to what maybe considered to be "fully, finally and properly incorporated in the Works" which I reproduce below:
>
> > "For the sake of clarity works which the Sub-Contractor consider to be "fully, finally and properly incorporated in the Works" shall have no meaning unless the extent of the works, so deemed, are detailed in writing by the Architect."
>
> 198. What then is the responsibility of Respondents during the course of the works before the works is deemed "fully, finally and properly completed and incorporated into the Main Contract Works". This is found in Clause E (9) of the Sub-Contract Conditions which states that the Respondents are responsible for "securing the building and building works in such a manner that the Sub-Contract Works in progress are not subject to damage by construction activity such as falling debris or water seepage". Hence the Respondents' obligation is to secure the building and building works, while the Claimants' obligation is to protect the Sub-Contract Works.

57 Having perused the arbitrator's decision and his reasons for coming to the conclusion that the provision in question meant that PISA's responsibilities in relation to the protection of the sub-contract works continued until formal completion indicated by the issue of the architect's certificate, I cannot say that it appears to me that the meaning ascribed to the clause is obviously wrong. Indeed, it appears to me that the arbitrator's construction of the clause is a reasonable one in the light of the language used and the circumstances of the case which were duly considered by the arbitrator. Accordingly, I cannot grant PISA leave to appeal on a question of law relating to the proper construction of the clause.

Failure to make an award in respect of preliminaries

58 At para 372 of the Award, the arbitrator found that PISA was not entitled to the cost of additional preliminaries. He subsequently, however (at para 425), accepted the extension of time to

31 July 2001 granted by the architect under the sub-contract delay certificate dated 12 March 2002. PISA's complaint was that once the arbitrator had accepted the extension of time, he should have made an award for the costs of preliminaries incurred by PISA during the period from 31 December 1999 to 11 May 2000. In failing to make such an award, he had misconducted himself or the arbitration. In the alternative, PISA argued that the arbitrator's holding in para 372 of the Award that "if the Sub-Contract Works remained not complete, then [PISA] should not be entitled to any additional preliminaries cost as they would have to remain on site to complete the works in any event" raised the following question of law:

> Whether PISA was not entitled to be paid preliminaries or compensation as long as the Sub-Contract Works remained incomplete, without regard to whether PISA had been absolved of responsibility for the delay by an extension of time granted to it by the architect for the period in question.

59 Hyundai suggested that the reason for the arbitrator's decision not to grant preliminaries was that no loss had been proved by PISA since, even after the extended period was over, PISA had had to remain on site as its works had still not been completed and had remained incomplete even up to the date of the hearing. In other words, PISA would have to incur the preliminaries in any event given that there was also concurrent delay by PISA in respect of its rectification works, as the arbitrator had found in paras 348 and 349. In those paragraphs, the arbitrator referred to PISA's claim for additional preliminary costs incurred when it carried out various rectification works during the period from 1 August 2000 to 30 June 2002. He found that the main items of rectification work arose from PISA's own default and that it was not entitled to claim preliminary costs incurred in doing such rectification work. The arbitrator did not deal specifically with the period between 31 December 1999 and 11 May 2000.

60 The arbitrator should have dealt with the period in question. In not doing so, he misconducted the arbitration. I therefore remit the Award to the arbitrator for his consideration as to whether PISA has established, on the evidence before him, that it is entitled to additional preliminaries during the period between 31 December 1999 and 11 May 2000.

61 As for the question of law raised, I have some difficulty in understanding the language used by PISA. In view of my direction in [60] above, however, there is no need to deal with it.

Computational error in the Award

62 This heading relates to the issues set out in paras 85 and 86 of the Re-Amended Notice of Originating Motion. In view of the order that I have made remitting the question of apportionment to the arbitrator for reconsideration, these issues have been rendered irrelevant.

The finding that PISA is owed $1,003,888.39 for the balance of work done

63 PISA claimed in the arbitration that a sum of $1,078,630.024 was due to it as the unpaid balance of work done. In para 170 of the Award, the arbitrator held that the final balance due under the sub-contract was $1,003,888.39. Before me, PISA complained that the arbitrator did not then order that this sum or any part of it be paid to PISA, nor did he make an award in PISA's favour for this sum, subject to a set-off of the counterclaim raised by Hyundai. Instead, the arbitrator held:

> 514.6 On the matter of the Claimants' claim for balance unpaid [for] value of work done prayed in the Claimants' prayer 601(e), I find that by the further Interim Certificate No. 57 and the retention for the outstanding scratched glass remaining uncompleted, there are no sums due to

the Claimants and accordingly I dismiss the Claimants' claim.

64 The arbitrator had made other findings in relation to interim certificate no 57. In para 171, he had noted that no payment fell due under para 170 as, under interim certificate no 57, the architect had retained the sum of $1,270,700 pending the completion of the sub-contract works. He had earlier, however (at paras 32 to 36), noted that a deduction of $1,245,710 had been incorporated into the sum certified in interim certificate no 57, and that of this amount, $1,200,300 had been deducted for scratched glass. He then held (at para 36) that $624,595.85 had been over-deducted from interim certificate no 57 and that an amount of $440,299.73 should be released to PISA under that certificate.

65 It appears on the face of the Award, therefore, that the arbitrator was plainly wrong in dismissing PISA's claim for the balance of $1,003,888.39 on the basis of a deduction made in interim certificate no 57, when his finding was that the deduction was not sustainable. In any case, the said certificate does not state in its face that a sum of $1,270,700 or any other sum can be retained or deducted and the arbitrator came to his conclusion on the amount deductible only after taking into account oral evidence which was extraneous to the certificate. As PISA submitted, Hyundai had not pleaded a right to retain the balance money payable to PISA until the defective works were rectified. This must have been because Hyundai was already holding back $875,000 as retention money and its right to do so was not in dispute or the subject of any claim in the arbitration. The arbitrator misconducted himself in not making an award in favour of PISA for the amount that he had found due to it, when there was no claim on the part of Hyundai to a right to continue to retain that sum. Such entitlement to deduction as Hyundai asserted (at paras 34.2 and 37 of the Amended Points of Defence) was a historical one, raised only to justify previous specific deductions in answer to PISA's claim for financing charges.

66 I therefore remit this portion of the Award back to the arbitrator with a direction that the arbitrator do make an award in favour of PISA for the sum of $1,003,888.39 or order that Hyundai do pay PISA the said sum.

The arbitrator's rejection of PISA's claim for variation works

67 This is another construction issue. PISA made a claim for $162,902.46 for variations. Under the provisions of the main contract, the architect was supposed to "classify" his orders as instructions or directions. The work that PISA claimed payment for was done pursuant to orders that the architect classified as "directions". If the work had been done pursuant to "instructions", PISA would have been entitled to the payment claimed. Hyundai rejected PISA's claim on the basis that it had not challenged the architect's classification of his orders within the period provided for in the main contract.

68 The relevant provisions of the sub-contract and the main contract are as follows:

(a) Sub-Contract Conditions:

> 5.1 The Sub-Contractor will comply with all directions and instructions of the Architect under the Main Contract in so far as they relate to the Sub-Contract Works. … In giving such directions or instructions the Architect shall, for the purposes of this Sub-Contract, be deemed to be the agent of the Contractor, but the Sub-Contractor be *(sic)* give immediate notice to the Contractor who shall comply with the procedural requirements for making claims referred to in paragraphs (b), (c), (d) and (e) of clause 37(3) of any other procedural requirements of the Main Contract Conditions, should the Sub-Contractor consider that any

direction instruction or action of the Architect relating to the Sub-Contract Works involves a variation or should otherwise entitle … the Sub-Contractor to additional payment under the terms of … this Sub-Contract.

(b) Main Contract Conditions:

1.(5) The choice by the Architect of the expression "direction" or "instruction" when giving an order to the Contractor shall not bind either the Contractor or the Employer before an arbitration or the Courts, save only that if after 28 days from receipt of an order expressed as a direction or of its written confirmation by or to the Architect, as the case may be, the Contractor has not disputed its classification as such in writing, or claimed extra payment or compensation for it in writing, or given notice of arbitration in regard to it, then the Contractor shall be conclusively deemed to have undertaken to comply with the direction without an increase in the Contract Sum or any additional payment or compensation. …

69 The arbitrator rejected PISA's claim. He held (at paras 54 and 56) that PISA had not challenged the architect's classification of his orders as directions in accordance with cl 1(5) of the Main Contract Conditions and was therefore not entitled to payment. He agreed with Hyundai that PISA was obliged to comply with the provisions of cll 1(1) and 1(5) of the Main Contract Conditions, failing which the arbitrator was precluded from reviewing the architect's decisions. In coming to this decision, the arbitrator did not consider the provisions of cl 5.1 of the Sub-Contract Conditions or how they interacted with cl 1(5) of the Main Contract Conditions.

70 The principle terms governing the relationship between Hyundai and PISA were contained in the sub-contract and the Sub-Contract Conditions and the Main Contract Conditions applied only to the extent that they were incorporated into the sub-contract. PISA submitted that since the sub-contract clearly provided for PISA, the sub-contractor, to give notice of its objection to Hyundai, the main contractor, who in turn had to comply with the requirements of the Main Contract Conditions, it was wrong for the arbitrator to hold that PISA was required to challenge the classification of orders directly to the architect. It asked for leave to appeal on the following question of law:

Whether it was necessary under the provisions of the Sub-Contract Conditions for a sub-contractor to object to the classification of the architect's instructions or directions before the arbitrator was entitled to review a claim made by the sub-contractor for variations.

71 This is not a "one-off" clause nor would it be a "one-off" event. In my judgment, there is a strong *prima facie* case that the arbitrator was wrong in his approach since he did not consider the provisions of the sub-contract at all in this connection. The determination of this question of law will substantially affect the rights of the parties in view of the quantum of PISA's claim. Further, in view of the number of contractors and sub-contractors who use the SIA Sub-Contract Conditions, a proper construction of this clause would add to the clarity and certainty of Singapore law. I therefore give PISA leave to appeal on this question of law.

Claim for cost of replacement of original stayarms

72 PISA made a claim in respect of the replacement of the original stayarms. By para 27.5 of its Amended Points of Defence and Counterclaim, Hyundai rejected that claim on the basis that the replacement had not been ordered as a variation but had been done pursuant to a direction by the architect to rectify defective work, as the stayarms supplied and installed by PISA were not in accordance with the approved type. Before this paragraph was amended, Hyundai had alleged that the original stayarms installed had been of insufficient strength and length but this averment was

deleted in the amended pleading.

73 The arbitrator rejected PISA's claim. He stated:

> 146. I accept that the stayarms and restrainers were within the scope of the Claimants' design and build obligations under the Sub-Contract. The original stayarms R2 and R3 were not able to perform the function of restricting the windows from being opened beyond 45° and the notches were easily bent and deformed even with normal usage when the windows were opened beyond the desired designed angle. I also find that the Claimants had not objected to the Architect's Directions 417 and 546 issued. Hence, I find that the Claimants are not entitled to a claim for this item of work.

74 The arbitrator was not entitled to reject PISA's claim on the basis that the original stayarms were of insufficient strength and incorrect length, as these deficiencies were not part of Hyundai's pleaded defence. He misconducted the arbitration in rejecting PISA's claim on that basis. The second reason for his rejection of the claim also has to be reconsidered for the reasons given in [70] above. I therefore set aside the award on this point and remit the matter to the arbitrator for further consideration after the appeal on the question of law has been disposed of.

PISA's claim for replacing scratched and/or wrongly rejected glass panels

75 In para 30 of its Amended Points of Claim, PISA averred that Hyundai had wrongly rejected certain glass panels and had instructed PISA to rectify these panels. By para 32, PISA averred it had carried out such instruction and thereby incurred expense in the amount of $2,543,484.95.

76 Before me, PISA complained that the arbitrator had not considered this claim in the Award and had thereby misconducted the arbitration. I agree that the arbitrator should have made findings as to how many, if any, glass panels were installed by PISA as replacements for wrongly-rejected panels, and what amount, if any, was due to it in respect thereof. I therefore remit this issue to him for his consideration and determination on the evidence before him.

Conclusion

77 I have made various decisions in this judgment. I would like parties to see me for the purpose of finalising the orders to be made hereon and also to address me on the question of costs.