Front Row Investment Holdings (Singapore) Pte Ltd *v* Daimler South East Asia Pte Ltd [2010] SGHC 80

Case Number	: Originating Summons No 1126 of 2009
Decision Date	: 15 March 2010
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Sundaresh Menon SC and Tammy Low (Rajah & Tann LLP)for the plaintiff; Ravindran Chelliah and Sally Kiang (Chelliah & Kiang) for the defendant.
Parties	: Front Row Investment Holdings (Singapore) Pte Ltd — Daimler South East Asia Pte Ltd

Arbitration – Recourse against award – Award under Arbitration Act

15 March 2010

Andrew Ang J:

Introduction

1 This was an application by Front Row Investment Holdings (Singapore) Pte Ltd ("Front Row") for an order to set aside part of an award dated 3 July 2009 ("the Award") of the arbitrator ("the Arbitrator") in an arbitration involving Daimler South East Asia Pte Ltd ("Daimler") as claimant, and Front Row as respondent. The part of the Award sought to be set aside was in respect of Front Row's counterclaim.

2 The ground upon which the application was founded was that the Arbitrator had breached the rule of natural justice expressed in the Latin maxim *audi alteram partem*. In particular, the Arbitrator had inexplicably concluded that Front Row relied upon only one of three misrepresentations when there was no basis on which he could have concluded that Front Row had abandoned reliance on the rest.

3 Section 48(1)(*a*)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") provides that an arbitral award may be set aside by the High Court if:

> a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; …

The threshold which an applicant under s 48(1)(*a*)(vii) has to surmount is high. It is particularly so in the present case, given the undoubted calibre and experience of the Arbitrator. Nevertheless, after hearing the parties' submissions and in the absence of any serious attempt by Daimler's counsel to explain away the Arbitrator's apparent misapprehension, I allowed Front Row's application. I now give my reasons.

Background

The parties

4 Front Row is a company incorporated in Singapore. It was set up specifically for a joint venture with Daimler. Daimler is also a company incorporated in Singapore. It was previously known as DaimlerChrysler South East Asia Ltd.

The facts

5 Front Row and Daimler were parties to an agreement dated 15 September 2005 ("the Agreement") by which they agreed jointly to organise and run a series of races across South East Asia using 35 specially built light-weight Mercedes-AMG SLK 55 cars. This series of races was to be called the "Asian Cup Series". Under the Agreement, Front Row was responsible for financing the venture whilst Daimler was responsible for organising the Asian Cup Series. As part of Daimler's obligation to organise the Asian Cup Series, it was to second one of its employees, Mr Thomas Buehler ("Buehler"), to Front Row to act as its general manager.

6 The background to and terms of the joint venture were reflected in two key documents:

(a) A pre-contractual powerpoint presentation titled "Daimler Chrysler Project Asian Cup", dated 6 July 2005, which Buehler sent to Front Row's chief executive officer, Mr Daniel Prager ("Prager"), on 26 July 2005. This presentation was a "Concept/Feasibility Study" of the joint venture; and

(b) The Agreement, the key terms of which included the following paragraphs [note: 1]:

> 4. The first activity will be the *AMG-Mercedes South East Asian Cup Series* (hereinafter referred to as "South East Asian Cup Series". … in which it is envisioned that *the partnership would organise up to 20 races per year for two years. Each race weekend would hold two races at the elected location*. …
>
> 5. It is agreed that *Front Row will be the legal entity used to conduct the South East Asian Cup Series*. …
>
> 6. It is agreed that *Front Row or related companies will provide all financing* for the venture *including the initial purchase of the 35 SLK 55 specially prepared event cars … Front Row will also purchase 2 new Mercedes AMG E55 cars* from a related company at cost price. These cars to be used exclusively for promotional and day to day business of running the South East Asian Cup Series. *As with the SLK 55s they will be sold at the end of the two year Series*.
>
> …
>
> 8. [*Daimler*] *will cross-invoice Front Row in respect of Thomas Buehler's salary package* and *Thomas Buehler will devote regularly 100% of his time and effort to the running and organisation of the Asian Cup Series*. …
>
> 9. It is further agreed that [*Daimler*] *will not be required to introduce any financing for this venture* and that all the financial risk will be absorbed by Front Row. …
>
> …
>
> 10. … It is anticipated that the 35 SLK's will be sold at the end of the two year period say April 2008 at between 30,000€ and 40,000€ each, the 2 E55 to be sold at market value.

…

13. *All branding, promotion will be conducted exclusively by [Daimler]*. [*Daimler's*] interest will be handled on a day to day basis by Thomas Buehler and Wolfgang Huppenbauer. The main board of Front Row will NOT discuss any [Asian Cup] matters. …

[emphasis added]

7 From the foregoing, it is clear that Front Row's obligations under the Agreement were to:

(a) purchase the cars as specified by Daimler and manufactured by Mercedes-AMG GmbH, a company related to Daimler; and

(b) provide the working capital required to fund the running of the Asian Cup Series.

On the other hand, Daimler's obligations under the same were to:

(a) organise, brand and promote the Asian Cup Series;

(b) organise up to 20 races per year for two years with each race weekend holding two races; and

(c) ensure that Buehler will devote 100% of his time and effort to the running and organisation of the Asian Cup Series.

The Agreement also provided that all disputes between Front Row and Daimler arising out of or in connection with the Agreement should be settled in Singapore by a single arbitrator applying the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the ICC Rules").

8 Front Row duly purchased the said 35 SLK 55 cars which were specially built for the racing series. However, according to Front Row, Daimler failed to keep its side of the bargain. There was practically no organisation, branding or promotion on Daimler's part. Daimler only organised three races and none of the races had sufficient participation. The number of participants fell steadily from 15 in the first race, which was half the expected number, to six in the second, and five in the third. In respect of the three failed races, Front Row suffered a total loss of $40,586.53.

9 According to Front Row, following the failure of the third race, it became apparent to Front Row that the Asian Cup Series was not going to be a success. Consequently, Front Row's director and shareholder, Mr Yeo Wee Koon ("Yeo"), tried to make the best of the situation by suggesting that Front Row stage a supporting event for the A1 Grand Prix in March 2007 using the SLK 55 cars. However, he was informed by Mercedes-AMG via a letter on 27 March 2007 ("the Letter") that that was not possible as the SLK 55 cars had not been made for actual racing. They had been developed only for use in "driving training programmes … which [did] not involve the cars competing against each other".

10 Shortly after Front Row received the Letter, Buehler stopped working for Front Row. In June 2008, Front Row attempted to sell the cars back to Mercedes-AMG but without success. Front Row was also unable to find any buyer for the cars as they were usable neither on normal roads nor as race cars.

11 On 22 February 2008, Daimler commenced arbitration proceedings against Front Row, claiming

$610,506.06 from Front Row for the sums invoiced as Buehler's salary under the Agreement ("the Arbitration"). In the Arbitration, Front Row denied liability for the same and asserted, as set out in the Terms of Reference, that Daimler:

> … [had] not fulfilled its contractual duties; specifically its duties to *organize [sic], brand and promote the AMG-Mercedes South East Asia Cup Series*; failed to make any or any reasonable efforts to organise up to 20 races per year for two years with each race weekend holding two races and failed to ensure that Thomas Buehler devoted 100% of his time and effort to the running and organisation of the Asian Cup Series. [emphasis added]

12 Front Row also brought the counterclaim, based on misrepresentation, against Daimler contending that:

> … in order to induce [Front Row] to enter into the Agreement [Daimler] had promised and/or represented and/or is legally responsible for the *representations that* the SLK AMG cars were appropriate for, had been specially designed and adapted and would be permitted for use in non professional racing to be conducted under the South East Asian Cup Series competitive events, and that *20 races would be organised as the AMG-Mercedes South East Asian Cup Series. Contrary to their promise and/or representation, [Daimler] organised only 3 races* and the SLK AMG cars were not appropriate for racing or competitive events. Alternatively, [Daimler was] legally responsible for the consequences of the representations that were false and negligently made and induced [Front Row] to enter into the Agreement. [emphasis added]

13 Both Daimler's claim and Front Row's counterclaim were dismissed by the Arbitrator. In respect of the latter, the Arbitrator noted at para 33 of the Award that Front Row had formulated its counterclaim in the following manner, which he adopted: Whether [Front Row] was induced to enter into the Agreement by one or more representations made by or on behalf of [Daimler].

14 The Arbitrator then found, at paras 55 and 56 of the Award, that by the time Front Row's case closed, its case had narrowed to just one representation, which was that:

> 55. … the event cars could be used for racing, and that this misrepresentation turned out to be false when Mercedes indicated that 'actual racing' was not permitted.
>
> 56. *[Front Row] had* ***ceased to rely*** *on a number of the points pleaded*, in particular on *[Daimler's]* ***alleged failure to organise 20 races*** or the absence of FIA homologation for the event cars. *Thus, having asserted that it was induced to enter into the Agreement by reason of* ***several misrepresentations*** *, [Front Row] ended up asserting inducement from a* ***single*** *alleged misrepresentation*.
>
> [emphasis added in italics and bold italics]

15 Following his finding that Front Row's case of misrepresentation had narrowed to just one representation, he took the view, at para 61 of the Award, that the "race-worthiness" of the SLK 55 cars was the "key question" in the arbitration before him:

> *The key question was ultimately whether the letter from Mercedes was directed at a departure from the Series, or effectively prohibited what had gone on before*. …

16 The answer to this question was dependent on the meaning and effect of the Letter. The Arbitrator found, at para 67 of the Award, that Mercedes had only indicated that professional racing

(*ie*, the type of racing which required the racing cars to have FIA homologation) and not *all* racing (including the type which had taken place in the three races organised as part of the Asian Cup Series) was prohibited. Since Daimler's representation to Front Row was only that the SLK 55 cars could be used for some form of racing, and not any "professional racing", the Arbitrator found that Daimler had not been shown to have induced Front Row to enter into the Agreement by any false representation. Accordingly, Front Row failed in its counterclaim.

17 Dissatisfied with the outcome of the arbitration, Front Row filed this originating summons on 1 October 2009 and prayed for the following orders, *inter alia*:

(a) that the part of the Award dealing with Front Row's counterclaim be set aside as a whole or to the extent as may be determined by this court; and

(b) that that part of the Award so set aside be tried afresh by a newly appointed Arbitrator.

18 Front Row did not challenge the merits of the Arbitrator's decision concerning the race-worthiness of the SLK 55 cars as that course of action was not open to it. Instead, Front Row based its application to this court on the Arbitrator's finding that in the end Front Row was asserting inducement from a *single* misrepresentation. It said that the question whether the Letter was directed at a departure from the Asian Cup Series or effectively prohibited what had gone on in the three previous races was *not* the only question which had been placed before the Arbitrator for his determination. According to Front Row, it had not abandoned the ground in the counterclaim, that it had relied on Daimler's representation, *inter alia*, that the latter would organise, brand and promote the Asian Cup Series. Accordingly, in reaching his decision under the erroneous impression that Front Row had abandoned such ground, the Arbitrator had breached a principle of natural justice as he would then not have considered the merits of Front Row's submissions and arguments made in relation thereto.

19 As stated earlier, Daimler did not make any serious attempt to explain away the Arbitrator's apparent misapprehension. Dr Rudiger Friedrich Ackermann ("Dr Ackermann"), Daimler's attorney before the Arbitrator, tried to defend the Arbitrator's finding by pointing to oral submissions made by Front Row's counsel which had focused entirely on the Letter (see Dr Ackermann's affidavit filed on 26 October 2009, at paras 34 and 57). However, it was explained by Ms Sunita Sonya Parhar, Front Row's solicitor before the Arbitrator that the oral submissions focused entirely on the Letter only because Front Row was addressing specific questions which the Arbitrator had posed to both parties during the oral hearing held on 20 February 2009 (see paras 5 to 9 of Ms Sunita Sonya Parhar's affidavit filed on 9 November 2009). To that explanation there was no effective rebuttal. Before me, Daimler's counsel made no further mention of this argument. Neither did Daimler's counsel challenge Front Row's legal submissions on the effect of the Arbitrator's failure to consider Front Row's submissions with regard to the representations which the Arbitrator concluded had been abandoned. His counter, rather, was that the representations alleged to have been made in fact formed no part of Front Row's claim under misrepresentation. This will be dealt with in greater detail below.

The issues

20 In order to establish that a breach of natural justice had occurred such that the Award may be set aside, Front Row had to satisfy the test set out by Choo Han Teck J in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 and affirmed by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*"). At [29] of *Soh Beng Tee*, the Court of Appeal said:

It has been rightly held in *John Holland Pty Ltd v Toyo Engineering Corp (Japan) [2001] 1 SLR(R) 443* ('*John Holland*'), at [18], that a party challenging an arbitration award as having contravened the rules of natural justice must establish: ***(a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights*** . … [emphasis added in bold italics]

21 In summary, the outcome of Front Row's application turned on five issues:

(a) Whether Front Row had, in its counterclaim against Daimler, pleaded Daimler's representation that it would support Front Row in organising, branding and promoting the Asian Cup Series and, in particular, that it would organise 20 races over ten weekends per annum with 30 cars;

(b) Whether, in the course of the arbitration proceedings, Front Row had ceased to rely on the same;

(c) Whether the Arbitrator's failure to consider the same amounted to a breach of a principle of natural justice. (This involved a consideration of two sub-issues, namely, (i) which principle of natural justice had been breached; and (ii) how the Arbitrator breached this principle);

(d) Whether the Arbitrator's breach was connected to the making of the Award; and

(e) Whether the Arbitrator's breach prejudiced Front Row's rights.

The alleged representations

22 At para 22 of its submissions before this court, Front Row relied on Yeo's affidavit which stated that the decision to enter into the joint venture with Daimler was founded, *inter alia*, on three main representations Daimler made in the Concept/Feasibility Study and the Agreement. Paragraph 76 of Yeo's affidavit provided as follows:

a. First, that the Asian Cup Series was to be a *race* series;

b. Second, that the 35 specially prepared event cars had been specially developed, adapted and were appropriate for and would be used in the races conducted under the Asian Cup Series; and

c. Third, that Daimler would give [Front Row] its full backing and support in marketing, promoting and organising the Asian Cup Series, and in particular, that it would organise 20 races over 10 weekends per annum with 30 cars ['the Representation'].

[emphasis added]

The only representation relevant for our consideration is that referred to in sub-para (c) (hereafter referred to as "the Representation"). Although the Representation was described by Yeo in terms set out in sub-para (c) above, references in the ReRe-Amended Answer and Counterclaim to her Representation were more specifically to the latter part of the Representation, *viz*, the organisation of 20 races. However, references to the Representation as a whole were subsequently made in Front Row's opening and closing submissions.

Front Row's counterclaim against Daimler was founded, inter alia, on the Representation

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23 Daimler argued that the Representation did not form part of Front Row's claim for misrepresentation at all. It relied on paras 11 to 13 and 24 of Front Row's ReRe-Amended Answer and Counterclaim for its contention that there was no allegation by Front Row that Daimler had made the Representation; the requirement that Daimler organise, brand and promote the Asian Cup Series only appeared in relation to Front Row's defence for its alleged breach of the Agreement (see [11] above); it did not form any part of its counterclaim.

24 It must be said that the ReRe-Amended Answer and Counterclaim could have been better drafted. Nevertheless, on a close scrutiny of the ReRe-Amended Answer and Counterclaim, I was of the view that Daimler's argument was not tenable. The pleadings in the Answer in paras 10 to 13, which are set out below, clearly included the Representation:

> 10. In the course of the pre-contract negotiations that culminated in the Agreement, the Claimants submitted to the Respondents a concept/feasibility study prepared by or on behalf of the Claimants entitled 'Daimler Chrysler Project Asian Cup' that provided an overview of the proposed Race Series.
>
> …
>
> Further, Mr Domingos Piedade, **Wolfgang Huppenbaur and Thomas Buehler** acting for and on behalf of the Claimants and Mercedes Benz AMG GmbH met with representatives of the Respondents, specifically, Mr K. P. Yeo and/or Mr Jack Yeo:
>
> (a) In June or July 2004, at the office of Mercedes Benz AMG GmbH;
>
> (b) In September 2004 **both** at **and after** the Shanghai Grand Prix;
>
> (c) In July 2005 prior to the finalisation of the Agreement;
>
> (d) On a number of further occasions in between June or July 2004 and July 2005.
>
> *On each occasion but specifically in July 2005, in the presentation entitled 'Project Asian Cup', the Claimants made the representations identified in the Counterclaim* .
>
> 11. *In order to induce the Respondents to enter into the Agreement, the Claimants made and/or are legally responsible for the consequences of the following representations* in the said concept/feasibility study and at the meeting(s) identified above:
>
> (a) *The Claimants would organise 20 races over 10 weekends per annum with 30 cars;*
>
> (b) The cars being sold to the Respondents were event cars which had been ~~would be~~ specially designed and adapted Mercedes-Benz SLK light AMG;
>
> (c) The specially designed and adapted cars were~~Mercedes Benz SLK light AMG would be~~ appropriate ~~for~~ and would be permitted for ~~and~~ use~~d for~~ in races and racing to be conducted under the South East Asian Cup Series;
>
> (d) There would be a chance of incorporating the South East Asian Cup Series into the new F1 contract with Allsport.
>
> 12. *The Respondents were thereby and in reliance on the representations made by the Claimants, induced to enter into the Agreement*.
>
> 13. *In reliance of the representations made by the Claimants and in performance of their obligations under the Agreement, the Respondents*:

(a) purchased the requisite 35 specially-prepared SLK 55 AMGs (the 'Vehicles') from the Claimants' related entity, Mercedes-AMG GmbH, at the aggregate price of €3,168,900.00 and transported them to Singapore;

(b) purchase the requisite 2 E55 AMGs;

(c) incurred fees for warehousing the 35 SLK 55s;

(d) leased and renovated premises to house the cars and parts and leased the existing workshop facilities and administration offices;

(e) purchased spare parts for the 35 SLK 55 cars;

(f) purchased insurance for the races;

(g) expanded costs on marketing;

(h) paid the cost involved in organising 3 races in 2006;

(i) paid the expenses of Thomas Buehler;

(j) employed Joseph Tan Lay Jun to work specifically on the South East Asian Cup Series;

(k) paid for the 35 SLK 55 cars to be inspected and certified as off-road race cars.

[emphasis in original in bold and underlined; emphasis added in italics]

At para 26 of the same, Front Row had averred (albeit with reference to the Agreement) that Daimler's obligations under the Agreement were precisely to organise and promote the Asian Cup Series, as mentioned at [7] above:

> … contrary to [Daimler's] obligations, assurances and assertions under the Agreement, [Daimlers] failed to make any or any reasonable efforts to organise up to 20 races per year for two years with each race weekend holding two races … [emphasis in original]

25 Further, at para 28 of the ReRe-Amended Answer and Counterclaim, under the heading "Counterclaim", Front Row pleaded:

> By way of Counterclaim, [Front Row] *repeat*[*s*] *paragraphs 1 to 26 above*. [emphasis added]

It then stated explicitly in the next paragraph that Daimler's misrepresentations and breaches of the Agreement were the cause of its loss, and thus the basis of its counterclaim. Paragraph 29 averred as follows:

> [Front Row avers] that *by reason of [Daimler's] misrepresentations* and breach of the Agreement *in not performing their obligations and not promoting, organizing* [*sic*]*, initiating, staging or otherwise bringing about the AMG-Mercedes South East Asian Cup Series*, [Front Row has] suffered loss. [emphasis added]

26 Whilst it might be argued that the words "in not performing their obligations and not promoting, organizing, initiating, staging or otherwise bringing about the AMG-Mercedes South East Asian Cup Series" were in amplification of the breach of the Agreement rather than in reference to Daimler's misrepresentation, it could be inferred from paras 28 and 29 of the ReRe-Amended Answer and Counterclaim that Front Row not only regarded Daimler's breach of obligation to organise, brand and

promote the Asian Cup Series as a defence against Daimler's claim for breach of the Agreement; it also treated Daimler's misrepresentation as to its intention to undertake particular actions (in particular to organise and promote the Asian Cup Series) as a ground for its counterclaim. Why else would Front Row repeat paras 1 to 26 under the counterclaim? I was also guided by the Terms of Reference agreed upon by both parties and by Front Row's opening and closing submissions during the arbitration proceedings. The Terms of Reference provided at page 4 that:

> ... [Daimler] in order to induce [Front Row] to enter into the Agreement had promised and/or represented and/or is *legally responsible for the representations that … 20 races would be organised as the AMG-Mercedes South East Asian Cup Series. Contrary to their promise and/or representation*, [*Daimler*] *organised only 3 races* and the SLK AMG cars were not appropriate for racing or competitive events. Alternatively, [Daimler was] legally responsible for the consequences of the representations that were false and negligently made and induced [Front Row] to enter into the Agreement. [emphasis added]

27 Front Row's outline opening submissions were also replete with references to the promotion and organisation of the Cup Series (see paras 1, 9 and 10). At para 14.a of the same, Front Row explicitly stated that two sets of disputes had arisen between itself and Daimler, the first being in relation to the question:

> *whether [Daimler] induced [Front Row] to enter into the Agreement* specifically by virtue of *misrepresentations* that:
>
> > i. [Daimler] would be organising and promoting a Cup Series which involved at its core a series of up to 20 races over 10 week-ends over a two year period for gentleman racing; …
>
> [emphasis added]

This was reiterated at para 15 of the same:

> [Front Row] further addresses the same issues as set out in 14.a. above as contractual breach *as well as misrepresentation*. [emphasis added]

Later at para 78 of the same, Front Row emphasised that the fundamental basis of its claim in misrepresentation lay in the representations made by Daimler to Front Row, which were eventually found in the Concept/Feasibility Study and the Agreement:

> 78. The fundamental basis of [Front Row's] claim in misrepresentation has already been outlined above. Nevertheless in relation to each of these elements it is convenient to refer to the guiding legal principles.
>
> > a. The representations relied upon by [Front Row] in its Re Amended Defence and Counterclaim at paragraphs 10 and 11 are largely founded in the written presentation referred to above and in many cases reconfirmed in the Agreement itself. … [Front Row] in particular relies upon:
> >
> > > i. the representation made as to the core concept of the Cup Series; namely *a series of gentleman races to be held at grand prix tracks on up to 10 race week-ends with two races per week end*; …
>
> [emphasis added]

28 In its written closing submissions, Front Row then reiterated its position that Daimler had made representations that it would organise, brand and promote the Asian Cup Series. Under the heading "Brief Summary of the Story", Front Row submitted that:

> 10. Daimler together with Front Row would *organise* and *Daimler would promote a race series which consisted of up to 10 race week-ends with two races per week-end. … Daimler further represented and undertook that it would promote the South East Asian Cup Series from its existing customer database*.
>
> …
>
> 12. Jack Yeo relied upon the representations and the core concept of the Series as explained to him. As far as he was concerned it was key that the South East Asia [*sic*] Cup Series was a race series and *would be promoted by Daimler through its customer base*. The combination to him was key to the financial sense of the Agreement.
>
> …
>
> 15. … there is no evidence at all that Daimler kept their side of the bargain *by promoting the series with its customer base*.
>
> [emphasis added]

Subsequently, under the heading "Issue A – Misrepresentation" of Front Row's written closing submissions, Front Row repeated the representations which it relied on:

> (**a**) **Representations of Fact Made to Front Row"**
>
> …
>
> 24. The key representations are found in this document [*ie* the pre-contractual Concept/Feasibility Study]. [Daimler] was presenting the core concept; namely that Daimler would be *organising and promoting a race series with specially adapted AMG SLK 55 race cars* which would then be used in the races:
>
> …
>
> g. Daimler would provide marketing support through its extensive network of dealers in South East Asia and its market performance *centres*. …
>
> …
>
> (**c**) **Inducement**
>
> 50. Mr Yeo was induced to enter into the Agreement on the strength of [Daimler's] representations. Mr Yeo's evidence is that if it was not for the core representations that … [Daimler] would *support and promote the race series through Daimler's customer base he would not have entered into the Agreement*. …
>
> …

(**e**) **Front Row Has Suffered Loss as a Result**

…

97. … Daimler has on more than one occasion stressed that under the Agreement Front Row assumed the risk of an insufficient number of participants. There was indeed an insufficient number of participants. But this was *in relation to an Agreement procured by a misrepresentation as to the nature of the bargain* – it was missold to Front Row as a race series which would then be *promoted by Daimler with its customer base*. Front Row is entitled to the return of the monies expended under a contract induced by misrepresentation. Daimler essentially bears this financial risk in the event that it turns out that Daimler *procured the Agreement by a misrepresentation*.

[emphasis added in italics]

29 Considering Front Row's ReRe-Amended Answer and Counterclaim and its opening and closing submissions in their totality, it was clear to me that Front Row's claim for misrepresentation was founded on the Representation, *inter alia*. Indeed, the Arbitrator himself referred to the Representation in the Award, albeit in the context of finding that Front Row had ceased to rely on this representation in its case of misrepresentation against Daimler. Under the heading "Misrepresentation Issue" at para 56 of the Award, the Arbitrator said:

> [Front Row] had ceased to rely on a number of points pleaded, in particular on [Daimler's] alleged failure to organise 20 races … Thus, having asserted that it was induced to enter into the Agreement by reason of several misrepresentations, the Respondent ended up asserting inducement from a single alleged misrepresentation.

From para 56 of the Award, it can be seen that the Arbitrator accepted that Front Row did plead that Daimler had represented that it would organise 20 races, that this representation was one of the grounds which Front Row had relied upon in its claim for misrepresentation, and that Front Row had ceased to rely on the same. Also, I noted that this representation that Daimler would organise 20 races was part of what organising, branding and promoting entailed. What the Arbitrator dealt with in the Award was more the specific than the general. Accordingly, I was of the view that Daimler could not argue that the Representation did not form any part of Front Row's counterclaim and was relied upon only in Front Row's defence against Daimler's claim for Buehler's salary.

The arbitrator breached a fundamental principle of natural justice which requires him to give parties a fair hearing

30 Section 48(1)(*a*)(vii) of the Act provides that the High Court may set aside an arbitral award where:

> a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

There are two fundamental principles of natural justice. These are reflected in the maxims *nemo judex in causa sua* and *audi alteram parterm*, which were explained by the Court of Appeal in *Soh Beng Tee* (at [20] *supra*) at [43]:

> In *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396, Marks J helpfully distilled the essence of the two pillars of natural justice in

the following terms:

> The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – the *nemo judex in causa sua*. ***The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – audi alteram partem*** *. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done;* (Lord Hewart, C.J. in *R. v Sussex Justices; ex parte McCarthy*, [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233). ***Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties*** .
>
> [emphasis in original in italics; emphasis added in bold italics]

31 In *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, the Court of Appeal held that a court or tribunal would be in breach of natural justice if it decided a case on a basis not raised or contemplated by the parties, since the affected party would have been deprived of its opportunity to be heard or to address the issues upon which the case was decided: at [30]. The corollary is plainly also true – that a court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on the issues (without considering the merits thereof). Otherwise, the requirement to comply with the maxim *audi alteram partem* would be hollow and futile, satisfied by the mere formality of allowing a party to say whatever it wanted without the tribunal having to address or even understand and consider whatever had been said.

32 As the Court of Appeal noted in *Soh Beng Tee* ([20] *supra*) at [65(a)]:

> Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. …

33 This principle is reflected in the decision of the High Court in *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063 at [47], namely, that the basic duty of an arbitrator is to listen to both sides of the argument and give each side an opportunity to submit on all relevant points.

34 In that case, the applicant contractors had applied to the arbitrator for an interim award of the sum claimed. The developers objected on the ground of *res judicata* and the arbitrator agreed to hear their preliminary objections on that ground to the application for an interim award. At the hearing, the developer's counsel objected additionally to the application for an interim award on the basis that the matter was not an appropriate one for summary disposal. Counsel for the contractors quite rightly did not address the additional ground at the hearing but focussed on the issue of *res judicata* since that had been the only issue for which the hearing had been convened. However, the arbitrator evidently agreed with the submissions of the developer's counsel on the latter ground for, after the hearing, the arbitrator wrote to the parties to notify them that he did not consider it appropriate to hear the application for an interim award. The contractor filed a motion to remove the arbitrator on the basis of his misconduct pursuant to s 17(1) of the Arbitration Act (Cap 10, 1985 Ed) (since repealed).

35 Judith Prakash J agreed (at [44]) with the submission that the arbitrator had acted inappropriately because he:

> … came to a decision on a point without giving the contractors the opportunity of putting forward submissions and evidence on that point.

Prakash J ruled (at [45]) that there had been a breach of natural justice because the arbitrator had:

> (a) gone beyond the boundaries of the reference he had stipulated for the hearing on the application for an interim award;
>
> (b) failed to indicate clearly during the course of the hearing that he was considering making a decision on the basis of the submission on the additional ground which had not been addressed by the contractors; and
>
> (c) failed to afford parties an opportunity to address him on the facts of the case so that he could consider them in determining whether the issues could be dealt with summarily.

The failure to allow a party to address the tribunal on a key issue is the corollary to allowing the submission but then ignoring it altogether whether deliberately or otherwise. In both cases, the mischief is precisely the same: a party is denied the opportunity to address its position to the judicial mind. As Front Row's counsel posed rhetorically at para 37 of its submissions:

> If the award of an arbitrator who admittedly fails to consider a vital argument is nonetheless immune from challenge, then is it equally immaterial that he was so wholly distracted that he did not register the argument at all and failed to consider it because he did not know it had been made? Is it equally immune from challenge if he absents himself altogether from the hearing but asks counsel to send him a recording of the argument and then fails to listen to it?

That this cannot be right is demonstrated by a line of Australian cases in which the courts have considered the duty of an arbitrator or adjudicator in similar circumstances. These cases deal with applications by the plaintiffs seeking to impugn the determination by adjudicators of claims arising under the New South Wales Building and Construction Industry Security of Payment Act 1999 ("the NSW SOP Act"). Section 22 of the NSW SOP Act deals with the contents of a determination and s 22(2) sets out the matters to which an adjudicator must have regard when reaching his decision on the application. These include, *inter alia*, all the submissions made by the claimant and respondent in support of their respective cases. Section 22(2) provides:

> In determining an adjudication application, the adjudicator is to consider the following matters only:
>
> (a) the provisions of this Act,
>
> (b) the provisions of the construction contract from which the application arose,
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

36 The first of the Australian line of cases, *Timwin Construction v Façade Innovations* [2005] NSWSC 548 ("*Timwin*") concerned the adjudicator's failure to consider a reason given by the plaintiff, Timwin, for withholding certain payments to Façade. Timwin had advanced three reasons for resisting Façade's claim. The adjudicator said that one of the reasons given by Timwin did not "make sense" and emphasised his difficulty in understanding the reason, using the words "whatever that means" in relation to Timwin's explanation of that reason (see [14]) of Timwin. Façade had, however, addressed and rebutted that particular reason in its submissions. McDougall J was of the view that if the adjudicator was seeking to understand Timwin's explanations, he would have referred to Façade's apparent understanding and rebuttal. As he did not attempt to understand and address the issues before him, he had denied Timwin natural justice. McDougall J's remarks bear repetition:

> 19 In *Brodyn* at para [55], Hodgson JA summarised the basis on which the Courts might intervene as follows:
>
> > '. . . the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid determination … What was intended to be essential was compliance with the basic requirements … a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power … and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a valid determination.'
>
> …
>
> 37 ... *Insofar as one can gather from reading the determination, he appears not to have read the submissions at all*. He certainly does not indicate that he has gained any enlightenment as to the argument in relation to variations from Façade's submissions. …
>
> 38 There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in *Brodyn*. Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, *there must be an effort to understand and deal with the issues in the discharge of the statutory function* …
>
> …
>
> 41 In the present case, I think that an available, and better, inference is that *the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained*. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.
>
> 42 It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, [he did so] in the context of dismissing them … Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that *the adjudicator did not have*

regard to, or consider, the relevant submissions.

…

44 *I will note that Timwin did not put its case on the basis of denial of natural justice, but it would follow from what I have said that, in disregarding Timwin's submissions for the reason that he gave, the adjudicator denied it natural justice*.

[emphasis added]

37 A clear principle that can be drawn from *Timwin* is that there will be a breach of natural justice when the arbitrator disregards the submissions made by a party during the hearing, or has regard to them but does not really try to understand them and so fails to deal with the matter in dispute.

38 In *Lanskey v Noxequin* [2005] NSWSC 963 ("*Lanskey*"), the adjudicator had incorrectly described Lanskey's defences to Noxequin's claim for payment as set offs when in fact some of Lanskey's defences were to the effect that some work had not been done at all and, as a result, Noxequin had not completed the work as a whole. This was material because the claim was for final payment and release of the retention sum. The court held that the adjudicator's failure to properly consider the submission as to whether the work had been done at all amounted to a failure to accord Lanskey natural justice as required under s 22 of the NSW SOP Act. The court held the adjudication determination to be void, setting it aside. It reasoned at [15] of its judgment that:

> The course adopted by the Adjudicator when he described all the plaintiff's claims as set offs, avoided the necessity for him to consider the very detailed documents and submissions of the plaintiff that dealt with the 69 items. *Plainly on the face of the documents there was a real question about incomplete work that the Adjudicator has not considered because of the way in which he dealt with the claims as set offs. It is clear therefore that he has not considered the plaintiff submissions in this respect and this is apparent on the face of his reasons. Having regard to his obligations to consider of the submissions under section 22 of the Act this failure means that the plaintiff has not been accorded natural justice*. [emphasis added]

39 It was submitted on behalf of Front Row that although *Lanskey* was decided on the basis of certain statutory provisions, the same reasoning can be applied in the present case since it is not just a requirement of statute but rather one which is also enshrined in the common law, that an arbitrator fairly consider the issues before him. I agree and would also note that ultimately the court held that Lanskey had not been accorded natural justice. The propositions which Front Row's counsel submitted (and I agree) may be distilled from *Lanskey* are that, first, a tribunal has at least to consider all issues that have been raised by parties. Secondly, the court will look at the face of the documents and the tribunal's decision to determine whether the tribunal has in fact fulfilled its duty to apply its mind to the issues placed by the parties before it and considered the arguments raised.

40 In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 ("*Trysams*"), Trysams had first relied on a report to show that some tiles were defective, thus justifying retention of payment. The adjudicator held that Club Constructions had not had the opportunity to consider the report at the time of the application for adjudication and so disregarded it. Trysams submitted that the report should have been considered by the adjudicator and that his failure to consider the report was a breach of natural justice. The court accepted that it was so. At [49], [60] and [61], the court held as follows:

> 49. In my view, the report was either part of a submission or relevant documentation in support

of a submission "duly made" by the plaintiff in support of the schedule.

…

60. The report contained information of critical importance to the plaintiff in establishing its reasons for withholding payment.

61. Despite the interim nature of an adjudication, natural justice nevertheless clearly required the adjudicator to consider the report unless (even if erroneously) he determined that it was, or was part of, a submission not duly made. In this case, he made no such determination. This amounted to a substantial failure to afford natural justice which worked practical injustice on the plaintiff and rendered the whole adjudication void.

41 Trysams had also put in a counterclaim for liquidated damages. The adjudicator stated that Trysams had not given him sufficient information to enable him to assess liquidated damages, as Trysams had not advised him of the date of practical completion of the units. As such, he made no finding on that issue.

42 Counsel for Club Constructions readily conceded before Hammerschlag J that the adjudicator had been provided with sufficient information for him to have assessed liquidated damages. However, he submitted that in determining that Trysams had provided insufficient information to assess any liquidated damages, the adjudicator had simply made an "unfortunate mistake" in failing to consider the submission which, he submitted, was insufficient to make the adjudication void.

43 The court found that the adjudicator had been provided with sufficient information to have assessed liquidated damages as, on the face of the adjudicator's written decision, Trysams *had* advised its determination of the date of practical completion and, moreover, the adjudicator made reference to this date in his own decision. As such, the court held as follows:

83. In my view, the mistake was not one of the quality submitted on behalf of the first defendant. The adjudicator, in the face of his own findings, simply did not proceed to adjudicate the plaintiff's claim for liquidated damages as the Act required him to do. Having regard to his own findings, it is not open to conclude that he made a conscientious, but mistaken, assessment of that claim. *What he did was to fail to adjudicate a claim on material which he clearly must have known was before him*.

84. That the adjudicator's failure worked substantial practical injustice on the plaintiff is self-evident from the fact that there was no ready answer to the claim.

85. It is open to articulate what the adjudicator did as both a failure, bona fide, to attempt to exercise the relevant power with respect to the liquidated damages claim, *and a failure to afford the level of natural justice required by the Act to be given to the plaintiff. Either way, his error rendered the whole determination void*.

[emphasis added]

44 All three Australian cases were recently considered by Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2009] SGHC 257 ("*SEF Construction*"). In *SEF Construction*, the defendant, Skoy, sought payment from the plaintiff, SEF, under a building contract by bringing an adjudication application under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). The adjudicator determined that SEF was to pay Skoy a certain sum of money.

SEF sought to set aside this adjudication determination. It contended that although it had relied on four grounds to contend that Skoy's adjudication application was invalid, the adjudicator had only dealt with two of those four grounds in giving his reasons for his determination. SEF therefore argued, first, (at [28] and [33]) that the adjudicator's failure to consider duly made submissions amounted to a breach of his duty to consider the same in good faith under s 17(3) of the SOP Act; and second, (at [31] and [48]) that in line with *Timwin, Lanskey* and *Trysams*, the adjudicator's failure to deal with the two issues amounted to a failure to exercise his powers under the SOP Act in good faith and constituted a breach of his duty to comply with the rules of natural justice as prescribed by s 16(3)(c) of the SOP Act. Prakash J found that it would be superfluous to import a duty to act in good faith from administrative law as s 16(3) of the SOP Act was clear about the manner in which the adjudicator had to conduct the arbitration, mandating that he acted independently, impartially and in a timely fashion. Nevertheless, she also said at [58] that: "[w]hat the Australians say in regard to good faith can be applied to the requirements of natural justice as well". Prakash J then turned to the question whether the adjudicator had breached the rules of natural justice. On the facts, she found that in arriving at his decision, the adjudicator did have regard to the respective submissions and material before him, even though he had omitted to state explicitly his reasons for rejecting the same. Accordingly, there was no breach of natural justice. The following passages from *SEF Construction* are instructive:

> 57 There can be no doubt that the letter of the *audi alteram partem* principle was observed in this case. The Adjudicator called for submissions from both parties so SEF had the opportunity to raise all the arguments that it wanted to in the submissions without any restriction. Then, it is obvious that the Adjudicator read both sets of submissions as if he had not, he would not have been able to explain in paragraph 20 the four grounds on which SEF contended that the Adjudication Application was invalid. ***The question that faces me is whether, notwithstanding this, the Adjudicator still flouted the rule because he did not expressly deal with the third and fourth arguments and explain why he was rejecting them (as he obviously did since if he thought they were valid arguments he would not have made the determination that the Adjudicated Amount was due to Skoy)*** .
>
> 58 Having given this question somewhat anxious consideration since affording natural justice is a fundamental requirement of the adjudication procedure, I have decided that the Adjudicator's failure to discuss the submissions in his Adjudication Determination was not a breach of natural justice. In coming to this conclusion I was fortified by the views of Dyson J and the AR quoted above (at [51]–[52]). I also found useful and practical guidance from the Australian cases, notwithstanding their references to good faith which is a concept that I have found not to be applicable in Singapore. ***What the Australians say in regard to good faith can be applied to the requirements of natural justice as well*** .
>
> 59 The following passage of the judgment of Palmer J in *Brookhollow Pty Ltd v. R&R Consultants Pty Ltd* [2006] NSWSC 1 was particularly useful:
>
> > 57 Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). *Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties*.

> 58 ***In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination*** . In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. *If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination*. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation. (Emphasis added)
>
> 60 In the present case, having studied the Adjudication Determination, I am satisfied that the Adjudicator did have regard to the submissions of the parties and their responses and the other material placed before him. The fact that he did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions since the Adjudicator took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings. Whatever may be the reason for the Adjudicator's omission in this respect, I do not consider that SEF was not afforded natural justice.
>
> [emphasis in original in italics; emphasis added in bold italics]

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

46 The conclusion which I ineluctably came to was that in failing to consider Front Row's submissions on the Representation, the Arbitrator failed to accord Front Row natural justice.

A causal nexus between the breach of natural justice and the making of the Award

47 Not only was I convinced that the Arbitrator's failure to consider the Representation amounted to a breach of natural justice, I was also convinced that this breach was causally linked to his decision to dismiss Front Row's counterclaim, thereby prejudicing Front Row's rights.

48 In *Soh Beng Tee* ([20] *supra*), applied by the High Court in subsequent cases such as *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 ("*Dongwoo*"), the Court of Appeal

stated at [73] that:

> … the breach complained of must occur 'in connection with the making of the award'. Therefore, even if there had been a breach of the rules of natural justice, a causal nexus must be established between the breach and the award made …

49 At para 67(i) of the Award, the Arbitrator specifically found that Daimler "did not properly or fully perform its obligation to promote the Series". This was his basis for concluding that Front Row had a defence to Daimler's claim for reimbursement of Buehler's salary package. Had he known that the ground of counterclaim based on the Representation was still extant, he could not have dismissed the counterclaim without giving that ground due consideration, taking into account, *inter alia*, Daimler's failure to organise the 20 races per year. I was therefore of the view that the breach of natural justice was sufficiently connected to the arbitrator's dismissal of Front Row's counterclaim.

The breach prejudiced Front Row's rights

50 Finally, the court may only intervene to set the Award aside where the Arbitrator's breach of natural justice prejudiced Front Row's rights. Once again, *Soh Beng Tee* ([20] *supra*) and *Dongwoo* ([48] *supra*) were instructive. In the former, the Court of Appeal held at [91] and [98] that:

> 91. … in Singapore, *an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach*. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. *There must be more than technical unfairness*. It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that *to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award*.
>
> …
>
> 98. … It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, *culminating in actual prejudice to a party*, that a remedy can or should be made available.
>
> [emphasis added]

51 In seeking to persuade the court that the Arbitrator's breach of natural justice prejudiced the rights of Front Row, the latter pitched its arguments too high (and, in my view, unnecessarily so). I set out below the key paragraphs from its written submissions:

> 65. When this Honourable Court juxtaposes the Arbitrator's finding on Daimler's claim with his finding on Front Row's counterclaim, it is plain to see the Arbitrator's finding that Front Row had dropped certain elements of its counterclaim, and in particular reliance on the representation that Daimler was to organise, brand and promote the Asian Cup Series, flies against all logic.

66. Daimler had claimed the reimbursement of Buehler's salary from Front Row. Front Row's defence was that it was not liable to Daimler because Daimler:

> … had not fulfilled its contractual duties: *specifically its duties to organise, brand and promote the Cup Series; failed to make any or any reasonable efforts to organise up to 20 races per year for two years with each race weekend holding 2 races* and failed to ensure that Thomas Buehler devoted 100% of his time and effort to the running and organisation of the Cup Series. (emphasis added. See 'YWK-9' at p 205)

67. Front Row's counterclaim against Daimler as was set out in the Terms of Reference at 'YWK-9' at p 205:

> *[Daimler] in order to induce [Front Row] to enter into the Agreement had promised and/or represented and/or is legally responsible for the representations that* the SLK AMG cars were appropriate for, had been specially designed and adapted and would be permitted for use in non professional racing to be conducted under the South East Asian Cup Series Competitive events, and that *20 races would be organised as the AMG-Mercedes South East Asian Cup Series. Contrary to their promise and/or representation, [Daimler] organised only 3 races* and the SLK AMG cars were not appropriate for racing or competitive events. Alternatively, [Daimler] was legally responsible for the consequences of the representations that were false and negligently made and induced [Front Row] to enter into the Agreement. (emphasis added)

68. In other words, at least a key limb of Front Row's defence to Daimler's claim was <u>*exactly the same*</u> as a key limb of Front Row's counterclaim against Daimler – that Daimler had failed to organise, brand and promote the Cup Series, specifically, failing to make reasonable efforts to organise up to 20 races per year for 2 years.

69. The Arbitrator dismissed Daimler's claim at [67] of the Award (page 73 of 'YWK-1'). He explained this at [66] of the Award ('YWK-1' at page 71) that:

> … the reimbursement of Buehler's salary package was tied to [Daimler's] proper performance of its obligation to conduct branding and promotion for the [Asian Cup] Series. *Indeed, [Daimler] had exclusive conduct of this matter. I agreed with [Front Row] that the failure to make direct use of [Daimler's] database of customers was likely to have had a serious impact on the success of the [Asian Cup] Series*. I agreed that in these circumstances [Front Row] had a defence to the claim for reimbursement of Buehler's salary package. (emphasis added)

70. In other words, the Arbitrator dismissed Daimler's claim *because he made an unequivocal finding that Daimler had not properly or fully performed its obligation to promote the Asian Cup Series*. As we have pointed out at [91] of Yeo's affidavit, the Arbitrator recognised and found that this particular representation made by Daimler, that it would undertake responsibility for the branding and promotion of the Asian Cup Series, had been breached, having regard to the fact that Daimler would also second Buehler to Front Row to take full responsibility for the organisation of the Asian Cup Series.

…

72. With all due respect, in this light, the Arbitrator's finding that Front Row could successfully rely on this representation as a defence to Daimler's claim but that Front Row had ceased to rely

on this same key representation by Daimler when bringing its counterclaim against Daimler, is utterly irrational. It does not make any sense that Front Row would have relied on this representation in its defence but abandoned it for the purpose of its own counterclaim. And indeed, there is nothing in the pleadings, transcripts or submissions which support the Arbitrator's conclusion that this representation was abandoned by Front Row. Given the Arbitrator's finding on Daimler's claim, namely that Front Row could successfully assert Daimler's failure to promote the series, it is clear beyond doubt that Front Row should and would have succeeded in its counterclaim if the Arbitrator had applied his mind to and considered Front Row's submissions on Daimler's failure to promote the series in respect of Front Row's counterclaim. …

[emphasis in original in italics; emphasis added underlined]

52 While it is true that a key limb of Front Row's defence was also a key limb in its counterclaim, *viz*, Daimler's failure "to organise, brand and promote the Cup Series, specifically, [its failure] to make reasonable efforts to organise up to 20 races per year for 2 years" (at para 68 of Front Row's written submissions), this was in itself insufficient for Front Row's counterclaim to succeed. Paragraph 65, read with para 68, of the written submissions mistakenly assumed that just because Daimler had failed to organise, brand and promote the Asian Cup Series, in particular, to organise 20 races per year for two years, Front Row's counterclaim had to succeed. This is not true. From my perusal of the Award, Daimler's claim for reimbursement of Buehler's salary was dismissed because it breached its contractual obligation to promote the Asian Cup Series (In this regard, Front Row's submission (at para 70 of its written submissions) that the Arbitrator had dismissed Daimler's claim for reimbursement of Buehler's salary because Daimler had breached its *representation* that it would undertake responsibility for the branding and promotion of the Asian Cup was erroneous). However, it does not inexorably follow from the breach of Daimler's contractual obligation that Front Row would have succeeded in its counterclaim based on misrepresentation. It has to be remembered that the alleged misrepresentation was as to Daimler's avowed intention to organise 20 races per year for the Asian Cup Series. It is not enough that Daimler failed to do so. It must be proved on a balance of probability that when Daimler made the Representation, it did not truly intend to carry out the avowed intention. Having said that, it was not necessary for Front Row to satisfy me that it *would* have succeeded in the counterclaim had the Arbitrator not mistakenly concluded that Front Row had dropped the issue with regard to the Representation (Indeed, it would be an unwarranted intrusion for this court to go into the merits of the counterclaim). It sufficed that the Arbitrator had failed to consider the issue because of his misapprehension that it had been dropped, provided such failure prejudiced the rights of Front Row in that the Arbitrator did not get round to considering whether Front Row's claim with respect to the Representation had been made out.

53 As I have concluded earlier, an arbitrator's failure to consider material arguments or submissions is a breach of natural justice. In the present case, the Arbitrator had dismissed Front Row's counterclaim without considering the grounds of its counterclaim in full because he was under the misapprehension that Front Row had abandoned its reliance on the Representation. Had he not been mistaken, he would have had to decide whether or not the Representation was false. A decision that there had been a misrepresentation in regard thereto would have resulted in an award in favour of Front Row, assuming the other ingredients for a successful claim (*viz*, "reliance" and "detriment") were satisfied. It was not for me to delve further into the question whether Front Row's reliance upon the Representation would have succeeded but for the arbitrator's misrepresentation. It sufficed that the Arbitrator failed to consider such a material ground. That alone was sufficient prejudice to Front Row.

Conclusion

54 In the result, I allowed Front Row's application and ordered that the part of the Award dealing with Front Row's counterclaim and with costs of the Arbitration be set aside as a whole. I further ordered that the part of the Award so set aside be tried afresh by a newly appointed arbitrator. Finally, I also ordered that the costs of and incidental to Front Row's application be paid by Daimler to Front Row.

[note: 1] In the absence of any pagination or numbering of paragraphs, I have taken the liberty of assigning paragraphs in the order in which they appear in the Agreement.