Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd
[2002] SGHC 223

Case Number : OM 600013/2002

Decision Date : 21 September 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : VK Rajah SC and Simon Cheong (Rajah & Tann) for the applicants; Wong Meng Meng SC, Andre Maniam and Elly Tham (Wong Partnership) for the respondents

Parties : Koh Bros Building and Civil Engineering Contractor Pte Ltd — Scotts Development (Saraca) Pte Ltd

Arbitration – Conduct of arbitration – Misconduct of arbitrator – Application to remove arbitrator – Test for determining arbitrator's misconduct – s 17(1) Arbitration Act (Cap 10)

Arbitration – Conduct of arbitration – Misconduct of arbitrator – Arbitrator basing decision on point not agreed on by parties -Arbitrator failing to give applicants chance to make submissions on that point – Whether misconduct and breach of natural justice exist

Arbitration – Conduct of arbitration – Removal of arbitrator on grounds of misconduct -Basic duty of arbitrator – Whether breach of duty by arbitrator – Whether to remove arbitrator

Words and Phrases – "Misconduct" – s 17(1) Arbitration Act (Cap 10)

Judgment

GROUNDS OF DECISION ***Cur Adv Vult***

1. I have before me an originating motion filed by Koh Brothers Building & Civil Engineering Contractor Pte Ltd ('the contractors') for an order that Mr John Chung be removed as Arbitrator in an arbitration between the contractors and Scotts Development (Saraca) Pte Ltd ('the developers'). The application is made pursuant to s 17(1) of the Arbitration Act (Cap 10) ('the Act') on the ground that the Arbitrator has misconducted himself and/or the arbitration proceedings. It is opposed by the developers but the arbitrator himself has taken no part in the proceedings.

The works and the claims

2. In September 1995, the developers engaged the contractors to construct a housing project at Saraca Road/Begonia Road, Singapore ('the works'). The contract price was $17,861,724.20 as adjusted in accordance with the contract; the contract period was 50 weeks; the original completion date was 18 October 1996 and liquidated damages were payable at $8,000 per day of delay.

3. The works were not completed on time. As such, on 21 October 1996, the architect issued a Delay Certificate (the 'Original Delay Certificate') in accordance with clause 23 of the contract. This started the clock running for the payment of liquidated damages from 18 October 1996 up to the completion of the works. Thereafter, on three separate occasions, the architect granted extensions of time, totalling 130 days in all, successively extending the completion date.

4. Three Termination of Delay Certificates were issued by the architect to effect the grants of extension of time and three Further Delay Certificates were also issued as the works remained incomplete by the respective extended contract completion dates. By his successive grants of extensions of time, the architect reduced the contractors' liability for liquidated damages by some $1,040,000.

5. In the course of the works, the architect also issued various certificates for payment in favour of the contractors. The developers paid all of these certified sums save for a sum of $1,729,561.80 which they withheld on account of the liquidated damages that had accrued pursuant to the Delay Certificates.

6. On the face of the architect's certificates as they currently stand, the developers owe the contractors $1,729,561.80 as payment for works done and the contractors in turn owe the developers $4,511,456.68 for liquidated damages up to 4 November 1998.

Recovery proceedings – initial steps

7. The contractors disputed the developers' deduction of $1,729,561.80 and sought to recover that amount. In February 1999, they commenced High Court Suit No. 284 of 1999. In this action, they sought a declaration that the Original Delay Certificate, the first two Termination of Delay Certificates and the first two Further Delay Certificates were invalid and that the deduction of liquidated damages by the developers based on those delay certificates was also invalid. They claimed the deducted sum of $1,729,561.80. The contractors applied for summary judgment on their claim and the developers applied for the proceedings to be stayed pending arbitration. The developers also resisted the summary judgment application on the basis that all certificates issued were valid and the sum of $1,729,561.80 had been properly deducted.

8. The Assistant Registrar granted an order in terms of the contractors' summary judgment application. The developers appealed successfully and the Judge set aside the judgment and stayed further proceedings in the action pending arbitration.

9. On 5 April 2000, the contractors gave notice of arbitration. In May 2000, Mr John Chung (whom the contractors had nominated) was appointed as arbitrator. In the arbitration proceedings, the contractors are claiming, amongst other things, additional time to complete the works, damages for loss and expense arising from delays in the works (for which the contractors are alleging the developers and/or their agents were responsible) and outstanding payments for the works. The amounts claimed include the amount of $1,729,561.80 certified due by the architect but withheld on the basis of the Delay Certificates issued.

Initial proceedings in the arbitration

10. On 21 July 2000, the arbitrator gave directions for the filing of pleadings by the parties. At that time, the contractors were represented by Messrs Rajah & Tann whilst the developers were represented by Messrs Wong Tan & Molly Lim. The contractors duly filed their points of claim.

11. Some time thereafter, the developers changed lawyers and appointed Messrs Wong Partnership as their new solicitors. On 11 April 2001, the developers' points of defence and counterclaim were filed on their behalf by their new solicitors. On reading the points of defence and counterclaim, the contractors took the view that the developers had changed their position on the validity of the Termination of Delay Certificates and the Further Delay Certificates and were thus no longer entitled to set off their liquidated damages claim against the entire sum claimed by the applicants.

12. On 29 June 2001, the contractors made an application to the arbitrator requesting that certain issues be tried as preliminary issues. Eight issues were put forward for consideration to be tried as preliminary issues and they covered a variety of matters. The developers objected to having the preliminary issues tried.

13. A hearing took place on 13 August 2001 for the arbitrator to determine whether he should hear the preliminary issues. The developers objected to various matters being tried as preliminary issues on the basis that the same were not fit for summary determination. They contended that the issues relied on a host of disputed or assumed facts and if the actual facts found were different, the preliminary determination would be rendered nugatory.

14. On 24 August 2001, the arbitrator informed parties that he had decided, after due consideration, not to hear the preliminary issues as he was not convinced that to do so would result in a substantial saving of time and costs.

Application for interim award

15. The contractors were not happy with this decision because it meant that it would be some time before the arbitration proper would be held. In the meantime, they would continue to be held out of receipt of $1,729,561.80 on the basis of Further Delay Certificates which

certificates they believed the contractors had now admitted to be invalid. The contractors found this situation to be unacceptable.

16. On 17 October 2001, therefore, the contractors applied for an interim award in the sum of $1,729,561.80. According to the contractors, the application was made pursuant to the terms of the contract that provide that payment certificates should be given full effect by way of summary judgment or interim award (namely clauses 31(11) and 37(3)(h) of the SIA Conditions) and on the basis that the developers' change of position in relation to the validity of the Termination and Further Delay Certificates reopened the whole issue of whether the developers had a valid right of set off to justify non-payment of the Certificates of Payment.

17. In correspondence, the employers raised preliminary objections to the application for interim award by arguing that the principle of *res judicata* applied in that:

> (1) the application for interim award was precluded from being heard by virtue of the application for summary judgment for similar relief having been heard in the High Court suit and a stay of proceedings having been ordered;
>
> (2) the contractors were effectively asking the arbitration to consider issues which the arbitrator had, by his decision in respect of the application for a hearing of preliminary issues, already decided not to hear.

They also made certain arguments relating to the substance of the contractors' application.

18. Following further correspondence between the solicitors for the respective parties and the arbitrator to clarify the purpose of the proposed hearing, the arbitrator agreed to hear the employers' preliminary objections before deciding whether to hear the contractors' application. In his letter of 9 November 2001, the arbitrator stated: 'I will hear the [employers'] objections to the [contractors'] application first before deciding whether to hear the [contractors'] application, which I will fix on another day'.

Hearing on 4 January 2002

19. The hearing referred to in the letter of 9 November 2001 eventually took place on 4 January 2002. It was attended by the parties and their respective solicitors and lasted about 3 hours. The employers' counsel, Mr Wong Meng Meng, SC, submitted first, followed by the contractors' counsel, Mr Sundaresh Menon. Mr Wong then replied. Mr Menon then sought to, and did, make further submissions. The arbitrator afforded Mr Menon this opportunity despite objections by Mr Wong.

20. Mr Wong made oral submissions. He also put in an eight page written submission. The first four paragraphs of this document read:

> 'I. INTRODUCTION
>
> 1. The Claimants [ie the contractors] have applied for an interim award for the principal sum of $1,729,561.80, being the liquidated damages deducted by the Respondents [ie the employers].
>
> 2. The Respondents' preliminary objections are that the application is barred by res judicata/issue estoppel and it amounts to a collateral attack on the earlier decision of the Arbitrator on 24 August 2001 when you disallowed the Claimants' application for preliminary issues to be decided.
>
> 3. Alternatively, the Respondents say that the issues in the present application are not appropriate for summary disposal.
>
> 4. Even if the Claimants surmount the res judicata/issue estoppel/ collateral attack hurdle, the Respondents say the application should be dismissed on the merits. This will, of course, be dealt with in a separate hearing if the Arbitrator decides to

> hear the Claimants' application, and the Respondents reserve the right to file further affidavits dealing with the substantive matters raised in the Claimants' application and affidavit.'

21. According to Ms Elly Tham, one of the solicitors for the developers, Mr Wong's oral submissions focussed more on the point that the issues were not suitable for summary determination while a large part of Mr Menon's oral submissions dealt with the issue of *res judicata*. Mr Menon also put in written submissions and in this document counsel dealt with the two issues raised by the employers' solicitors in their correspondence. The written submissions also stated that for the purpose of the hearing the contractors would address only those issues and would not address the merits of their intended application.

22. According to Ms Tham, having said that, Mr Menon did submit on the point of suitability of the matters for summary disposal and did so by citing two relevant cases which had been referred to by Mr Wong. He submitted that the issues of waiver and validity of Delay Certificates could and should be the object of summary proceedings. Mr Menon also submitted that whether these two cases were straightforward as contended by Mr Wong should be dealt with when the interim award application proper came to be heard.

23. The hearing took place on a Friday. On Monday, 7 January, counsel for the contractors sent the arbitrator a letter. The purpose of this letter was to set out what were described as 'some of the key points made by Mr Menon in his closing oral remarks' so that the same would be on record. In this letter, the arbitrator was reminded that the hearing had been solely on the developers' objections to the contractors' application being heard. It also stated that all submissions put forward on the suitability or otherwise of the case for summary disposal 'necessarily entail an incursion *(sic)* into the merits – something we have not been able to address you on as yet'.

The arbitrator's decision and its consequences

24. On 8 January 2002, the arbitrator notified the parties that he did not consider it appropriate to hear the application for an interim award. His letter stated:

> 'Having considered the matter, I am of the view that it would not be appropriate at this juncture to hear the application for an Interim Award. The Claimants' application is premised on the Respondents' position, as set out in the Points of Defence and Counterclaim, that the architect should not have issued the Termination of Delay Certificates and the Further Delay Certificates. To succeed in their application for an Interim Award for the release of monies alleged to have been wrongfully deducted by the Claimants pursuant to the Delay Certificates dated 21 October 1996, the Claimants would have to challenge the validity of the said Delay Certificates. The validity of the Delay Certificate, together with the Claimants' entitlement to any extensions of time are the main issues in the arbitration. To determine the validity of the Delay Certificate, I would have to hear the evidence of all the facts and circumstances leading to its issue. As such, the ruling I would have to make must necessarily be final and not interim in nature. An Interim Award on the validity of the Delay Certificate must in fact be the Final Award. The validity of the Delay Certificate should therefore be determined at the full arbitration hearing.'

25. The contractors were, as they expressed it, astonished by the arbitrator's decision not to hear their application and especially the reasoning underlying that decision. Their lawyers were not, however, so shocked as to be rendered incapable of speech and they immediately proceeded to write a lengthy letter to the arbitrator to persuade him to change his mind. They gave him the reasons why they thought that he had seriously erred in his decision and invited him to reconsider his ruling. The employers' solicitors then wrote to the arbitrator and supported his decision. The contractors' solicitors responded by a letter which in their view refuted all the allegations made by the employers' solicitors.

26. On 14 January, the arbitrator advised parties that he had reconsidered the matter and decided that his ruling of 8 January would

stand.

27. The contractors and their solicitors took the view that there had been a breach of natural justice in that the arbitrator had decided on the merits of the application for an interim award when the hearing of 4 January had been for the purpose only of considering the preliminary objections to the application. At that stage, however, the contractors did not take out an application to remove the arbitrator. Instead, their solicitors wrote to the arbitrator on 16 January asking for a scheduled hearing for the giving of directions to be postponed while they considered how to proceed. They also asked for a copy of the arbitrator's notes of the 4th January hearing and that he clarify whether there were any particular reasons underlying his decision not to reverse his earlier ruling.

28. Over the next few days, more letters were sent by both parties to the arbitrator. On 21 January, the arbitrator informed the contractors' solicitors that his notes were for his own reference and he had no intention of disclosing them. He did not clarify his reasons for not reversing his decision. On 24 January, the contractors informed the arbitrator, through their solicitors, that they viewed his decision of 8 January 2002 and subsequent events as a serious breach of natural justice and had lost all confidence in his ability to conduct the proceeding in a 'transparent, fair and balanced manner'. They requested that he discharge himself as arbitrator. On 25 January, the arbitrator responded by advising both parties to continue with the reference.

29. The contractors then sought an opinion from a Queen's Counsel on the conduct of the arbitrator. The opinion they received on 6 February stated that the arbitrator's conduct had constituted misconduct. The contractors sent this opinion to the arbitrator and asked him again to discharge himself. The arbitrator replied that he intended to continue with the reference. This was not the end of the matter and both parties continued to bombard the arbitrator with letters.

30. On 25 February, the contractors informed the arbitrator that they intended to make an application to court to remove him under s17 of the Act. They asked the arbitrator whether he wished to be joined as a defendant or to otherwise participate in the proceedings. The arbitrator declined this invitation on the same day.

The law

31. There is no dispute on the law applicable to this application. It is founded on s 17 of the Act which states:

> '17. - (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him.'

There is no statutory definition of what constitutes 'misconduct' but this term has been discussed in many cases and academic texts and there is a clear understanding of what it means in relation to the behaviour of an arbitrator in respect of himself or the proceedings. It should be noted at once that to find misconduct on the part of the arbitrator does not of itself impute any slur on his character. Misconduct can be found in respect of the technical handling of the arbitration and need not be a matter of bias or prejudice or other disreputable action on the part of the arbitrator.

32. *Halsbury's Laws of England* (4th Ed Reissue) vol 2 in paragraph 694 states:

> 'Misconduct has been described as "such a mishandling of arbitration as its likely to amount to some substantial miscarriage of justice". Most cases depend as much upon the terms of reference and on the surrounding circumstances as upon the conduct of the arbitrator and it is therefore difficult to provide an exhaustive definition of the term.
>
> Where an arbitrator fails to comply with the terms, express or implied, of the arbitration agreement, that will amount to misconduct … in particular, it would be misconduct to act in a way which is, or appears to be, unfair. Misconduct committed in good faith is sometimes referred to as "technical misconduct", though all allegations of misconduct assert a breach of duty. It is not misconduct to make

an erroneous finding of law or fact.'

Further down in the same paragraph *Halsbury's* gives some instances where misconduct has been found to occur. These include, where, by his award the arbitrator purports to decide matters which have not in fact been included in the agreement of reference and where he has acted unfairly and in breach of the rules of natural justice. *Halsbury's Laws of Singapore,* vol 2 at paragraph 20.127 comments that the term 'misconduct' has been given a wide meaning and any mishandling of the arbitration, which may lead to some substantial miscarriage of justice may be misconduct. No actual bias or partiality need be shown as long as the court is satisfied from the conduct of the arbitrator, either by his words, his action or inaction or his handling of the proceedings, that he displayed a real likelihood that he might not be able to act judicially.

33. The leading authority on this issue is the case of *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd* 15 BLR 82. Dealing with the facts of the case, Lord Denning MR stated (at p 95):

> 'I would not suggest – no one has suggested – that the arbitrator misconducted "himself". But what is said is that he misconducted the "proceedings". It is as plain as it can be that he misconducted the proceedings. He decided a case against the party without having heard the submissions in the case. He made a formal award against Modern Engineering without having heard counsel on their behalf. That is clearly a breach of natural justice.'

His Lordship then went on at p 96 to deal with the proper test which is to be applied in cases like this. He said:

> 'This does seem to me a most serious matter. The judge put this test to himself in his judgment: Are the circumstances such as to demonstrate that the arbitrator is not a fit and proper person to continue to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his conduct was such as to destroy the confidence of the parties, or either of them, in his ability to come to a fair and just conclusion.
>
> The question is whether the way he conducted himself in the case was such that the parties can no longer have confidence in him. It seems to me that if this arbitrator is allowed to continue with this arbitration one at least of the parties will have no confidence in him. He would feel that the issue has been prejudged against him. It is most undesirable that either party should go away from a judge or an arbitrator saying, "I have not had a fair hearing".'

34. Later authorities accepted the test in *Modern Engineering* and construed it as being an objective one. In *The Elissar* [1984] 2 LLR 84 the appropriate test was said to be: Do there exist grounds from which a reasonable person would think that there was a real likelihood that the arbitrator could not, or would not, fairly determine the relevant issue on the basis of the evidence and arguments to be adduced before him (per Ackner LJ at p 89).

The allegations of misconduct

35. In their written submissions, the contractors made four allegations of misconduct on the part of the arbitrator. When oral argument took place, however, their counsel agreed that the real issue was whether they could substantiate the first allegation of misconduct. I will, therefore, deal only with that allegation.

36. The allegation of misconduct which I have to decide is whether there was a breach of natural justice. This allegation comes in two parts. It is alleged that:

> (1) the arbitrator had effectively ruled against the contractors on the merits of their application for an interim award without affording the contractors an opportunity

to be heard on the merits and without the assistance of submissions and of any evidence by way of affidavits or otherwise; and

(2) the arbitrator had prejudged the matter by ruling that the matter was not fit for summary disposal when the only matter to be determined was whether to hear the contractors' application in the first place.

37. In deciding this issue, I must start on the basis that the arbitrator knew that the sole purpose of the hearing of 4 January 2002 was to consider whether the developers' preliminary objections to the contractors' application for an interim award were well founded. The correspondence between the arbitrator and the respective parties specified that this was the purpose of the hearing and that the merits of the contractors' application would not be considered on 4 January.

38. The contractors submitted that contrary to his declared intention to hear the employers' objections before deciding whether to hear the contractors' application, which he would fix on another day, the arbitrator on 8 January 2002 decided not to hear the contractors' application on grounds that went to the merits of the application rather than on the basis of the preliminary objections raised by the employers. They submitted that the arbitrator did this by ruling on the following premises:

(1) that in order to succeed in the intended application, the contractors would have to challenge the validity of the Delay Certificate dated 21 October 1996;

(2) that the validity of that Delay Certificate was one of the main issues in the arbitration;

(3) that to determine the validity of that Delay Certificate, he would have to hear evidence of all the facts and circumstances leading to its issue;

(4) that as such, the ruling he would have to make would necessarily be final and not interim in nature; and

(5) that an interim award on the validity of that Delay Certificate must in fact be the final award.

In effect, they submitted, the arbitrator made a ruling on the merits of the interim award application by prejudging the issues and not affording the contractors the right to be heard on any of the premises set out above. None of these issues, they said, were ever put by the arbitrator to the parties at the 4 January hearing and were only made apparent when the arbitrator delivered his decision four days later.

39. The employers strongly contested that assertion. Mr Wong submitted that that the proper issue was canvassed before the arbitrator. He agreed that in his firm's correspondence only two issues had been stated as the basis of the developers' preliminary objections ie *res judicata*/issue estoppel and collateral attack. When it came to the hearing, however, his written submissions had detailed three issues. The third of these issues, the one that had not been contained in his letters, was whether the matter was an appropriate one for summary disposal and it was on this issue that the arbitrator decided the application. Mr Wong then went through the submissions he had made before the arbitrator and pointed out several paragraphs where arguments had been made about it being not appropriate to decide the issues in a summary way and where it had been made clear to the arbitrator that there were disputes of fact which could not be decided in summary proceedings.

40. Mr Wong agreed that the contractors had not had an opportunity to be heard on the full merits of the application. He asserted, however, that the arbitrator had not come to a decision on the full merits of the application. His decision had been on whether this was a suitable case for an interim application and, on that issue, the contractors had been heard. Mr Menon had submitted on whether it was appropriate at the hearing for the interim award to go into the issue of the validity or otherwise of the Original Delay Certificate. Mr Menon had put in his submissions on suitability in that he had cited and dealt with the cases of *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 and *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1992] 2 SLR 233 which were cases which had not been

referred to at all in Mr Wong's written submissions. Mr Menon's submission did not in any way deal with the validity of the Original Delay Certificate and why, on the facts, the contractors considered that certificate to be invalid. That was an argument left for the hearing on the merits.

41. Mr Wong also stated that when he had completed his submissions before the arbitrator, Mr Menon had gone ahead with his reply as contained in the written submissions given to the arbitrator. Mr Menon had not stated that the arguments raised by the developers were a surprise and that he needed to stand the matter down in order to deal with them. Instead, it was submitted, Mr Menon had dealt with Mr Wong's arguments in substance in his oral reply.

42. Having examined the written submissions which Mr Menon placed before the arbitrator and his letter of 7 January detailing his oral response to the arguments of Mr Wong, it is apparent that at the start of the hearing, the focus of the contractors was the preliminary objections raised by the employers. They did not go to the hearing of 4 January with the intention of dealing with the merits of their application and their submissions were tailored to dealing with the assertions of *res judicata* and collateral attack. The written submissions contain no reference to the merits of the application nor to the suitability of dealing in a summary application with the issues that it would be necessary to deal with in a hearing on merits. As for Mr Menon's oral reply to the suitability arguments introduced for the first time at the hearing by the employers, both the affidavit of Ms Elly Tham and the letter of 7 January show that, insofar as Mr Menon raised the *Tropicon* and *Lian Soon* cases in his reply to Mr Wong's submissions, they were brought forward for the purpose of showing that the arbitrator had a duty to scrutinise any attempt to deny payment due to the contractors under a valid payment certificate. These cases were not raised in the course of any detailed argument on the merits. Ms Tham agreed in her affidavit that the purpose of citing the two cases was to show that the arbitrator had a duty to hear the contractors' application for an interim award. It is clear that the aim of the contractors throughout was to overcome the hurdle of the preliminary objections so that the merits of their application could be heard on another day.

43. One of the points that Mr Wong put before me quite strongly, as can be seen from the foregoing paragraphs, is that Mr Menon did not object to the objection raised at the preliminary objections hearing that the matter was not one that was suitable for summary disposal. It appears from the evidence before me, however, that Mr Menon did raise such objections. In an affidavit filed in support of the contractors' application by one Mr Tan Hwa Peng, it was stated that during the hearing, in relation to the new submission that the matter was not suitable for summary disposal, Mr Menon responded by reminding the arbitrator that the purpose of the hearing was not to consider the merits of the application but whether the application ought to be heard in the first place. This point was repeated in the 7th January letter sent to the arbitrator before he delivered his decision.

44. It is plain from the arbitrator's letter of 8 January 2002 that his decision not to hear the application for an interim award was based on his determination that such an application would involve ascertaining the validity of the Original Delay Certificate and that to do this he would have to hear evidence of all the facts and circumstances leading to its issue and would then make a final rather than an interim award. He was greatly concerned with the issue of the validity of that certificate and, without any submissions having been made to him on the point, concluded that a decision on that point would determine the whole arbitration. The arbitrator's decision not to hear the interim application thus did not relate in any way to the preliminary objections canvassed by the employers through their solicitors' letters in October 2001. The arbitrator had himself decided before 4 January 2002 that all he was going to rule on was whether on these arguments, the interim application ought to be heard in the first place. As a result, the contractors prepared submissions relating to these issues only. Naturally therefore, at the hearing, although the employers' arguments went beyond the agreed bases for the hearing, the contractors expressly refrained from addressing their argument on the suitability of the application for summary disposal as to do so would entail going into the merits. (By way of an aside, I note that the contractors repeatedly referred to not wanting to do anything that would constitute 'an incursion into the merits' and do wonder what sort of violent attack they were restraining themselves from launching.) Notwithstanding the contractors' clearly stated position, the arbitrator, without indicating in any way that he required full arguments on the merits or that he was contemplating deciding the preliminary objection hearing on the basis of the issue of suitability, proceeded to make a decision on the said basis. In my opinion, in so doing, the arbitrator misconducted the arbitration in that he came to a decision on a point without giving the contractors the opportunity of putting forward submissions and evidence on that point.

45. I agree with the submission made that the arbitrator acted inappropriately by:

> (1) going beyond his agreed reference for the hearing on 4 January even though the boundaries of that reference had been stipulated by him;

(2) by failing to clearly indicate during the course of the hearing and after listening to the new submission by the employers (and one that lay outside the original boundaries prescribed) that he was considering making a decision on the basis of that submission and consequently, by failing to call on the contractors to put forward their answers to that submission for his consideration; and

(3) by failing to afford the 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.

In the circumstances, I rule that there was a breach of natural justice in this case in the terms submitted by the contractors.

46. The next question is whether the arbitrator should be removed. As the cases make clear, the court is reluctant to remove an arbitrator because of the expense and delay that will be an inevitable consequence of such a removal. Thus, this action will not be taken unless it is determined that the conduct of the arbitrator was such as to make a reasonable person think that there was a real likelihood that the arbitrator could not or would not fairly determine the relevant issues in the arbitration. In this case, the contractors say that their confidence in the arbitrator has been destroyed not only because he decided a reference on points that were not before him but also because when they asked the arbitrator to reconsider his decision bearing in mind all the circumstances of the hearing, he had refused to do so.

47. Having considered the circumstances of the case, I have, reluctantly, concluded that the arbitrator must be removed as it appears that there is a real likelihood of him not being able to fairly determine the issues in the arbitration. The basic duty of an arbitrator, or any adjudicator for that matter, is to listen to both sides of the argument and give each side an opportunity to submit on all relevant points. In this case, the arbitrator cut short the process by telescoping the two separate parts of the interim application hearing into one and by determining the outcome of the first part of the application on the basis of issues that actually fell within the second part of the application without hearing full arguments on those issues from both sides. His breach of the basic duty cannot but give reason for doubting whether there can be a fair adjudication of the issues in this arbitration which remain outstanding.

Conclusion

48. There will be an order in terms of the motion. The contactors' costs shall be paid by the employers, as taxed or agreed.

49. There is one more thing that I must say. I found the conduct of the contractors and their solicitors in the aftermath of the arbitrator's decision of January 8 to be deeply disturbing. Whilst I can appreciate that they were upset to be shut out of having their application for an interim award heard on grounds they had not been given an opportunity to deal with, that did not justify their subsequent actions. One letter to the arbitrator asking him to reconsider was the polite and prudent course to take. Once he indicated that he was not inclined to do so that should have been the end of the correspondence with him. Instead several more letters were written and attached to one of them was the Queen's Counsel's opinion concluding that the arbitrator had misconducted himself. In this letter the solicitors for the contractors invited the arbitrator, for the second time, to discharge himself from his position. In my view, the correct course for the contractors to have adopted once the arbitrator had made his position clear, if they no longer wished him to conduct the arbitration, was to take out this application forthwith. They should not have harangued him or sought to influence his decision by blandishing counsel's opinion in his face. Their conduct leaves a strong impression of bullying and the arbitrator's dignified and restrained response in the face of such tactics can only be commended.

Sgs:

JUDITH PRAKASH

JUDGE

SINGAPORE