In the interests of fairness:
***Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] SGCA 66**

I. Executive Summary

In a payment dispute between a contractor and sub-contractor, the parties may submit their dispute for adjudication under the Building and Construction Industry Security Payment Act (Cap 30B, 2006 Rev Ed) ("**the Act**"). However, the adjudicator's decision may be set aside if, during the adjudication process, there is a breach of natural justice which causes prejudice to at least one of the parties. In *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] SGCA 66, the Court of Appeal ("**CA**") considered when a breach of natural justice would occur, and when would such a breach would be considered prejudicial.

Here, main contractor WCS Engineering Construction Pte Ltd ("**WCS**") engaged subcontractor Glaziers Engineering Pte Ltd ("**Glaziers**") to carry out certain works for a residential development, including the fabrication, supply and installation of shower screens. Unfortunately, some of the sliding doors in the shower screens shattered and caused injuries. WCS claimed that Glaziers was responsible for the problem and refused to pay for work already done under the subcontract; it also sought to charge Glaziers for the related medical claims and costs of remedial works. Glaziers applied to have its payment claim adjudicated under the Act.

The adjudicator allowed Glaziers' claim in full, without deduction for WCS's claimed costs. During the adjudication, neither party explicitly suggested a test or standard against which WCS's position ought to be assessed ("**standard of persuasion**"), and the adjudicator did not ask for submissions on this point. In his written adjudication determination, the adjudicator rejected WCS's claim to set off the costs it had incurred in connection with the shattering shower screens against the payment due to Glaziers, on the basis that WCS's claim was not made out "beyond reasonable doubt". WCS then applied to the High Court ("**HC**") to invalidate the adjudication decision, claiming that the adjudicator had breached the principles of natural justice. The HC ruled that the adjudicator indeed failed to comply with the principles of natural justice because he did not hear the parties' submissions on the applicable standard of persuasion, *ie.* there was no fair hearing. As the HC further decided that the breach of natural justice was material and caused WCS prejudice, it set aside the adjudication determination.

On appeal, however, the CA disagreed. It held that the parties were precluded from complaining of a breach of the fair hearing rule because they ought reasonably to have foreseen that the issue of the applicable standard of persuasion would arise, but nonetheless failed to make arguments on it. Therefore, it could not have been a breach for the adjudicator to have omitted to invite submissions from the parties on the same issue, as the issue was so obviously crucial to his determination that he was not obliged to highlight it the parties. In short: it was not a breach of the fair hearing rule, and hence natural justice principles, for a decision-maker to fail to invite submissions on an issue as fundamental and inherent in *every* legal dispute as that of the standard of persuasion or proof to be applied.

Even if there had been a breach of natural justice, the CA held that the breach did not cause WCS prejudice. WCS was required to show a ***prima facie* case** that Glaziers was liable for the shattering shower screens, *ie.* it had to first produce *sufficient evidence* to prove that Glaziers was liable. Since WCS showed no evidential basis for the back charge whatsoever, the adjudicator would not have made a different decision even if he had applied the appropriate standard of persuasion. In short: WCS could not have suffered prejudice because the outcome of the adjudication would still have been the same.

II. Material Facts

WCS was the main contractor for the construction of a residential development. It engaged Glaziers under a subcontract to carry out certain works for the development, including the fabrication, supply and installation of shower screens. Upon completion of its work, Glaziers issued its final progress claim under the subcontract. However, before payment was made, some of the sliding doors in the shower screens shattered, resulting in personal injuries in some instances. WCS alleged that the screens shattered because Glaziers used defective materials and workmanship. It also rejected Glaziers' final progress claim. Glaziers responded that the screens had been fabricated and installed according to drawings and specifications approved by WCS' consultants.

While Glaziers subsequently agreed to replace the shattered shower screens at its own cost, without admitting any fault, it refused to perform other remedial measures required by WCS unless WCS accepted that these measures would amount to a variation of the subcontract. Ultimately, WCS made other arrangements for the remedial work. It also reimbursed the medical expenses of the persons injured by the shattering shower screens. When Glaziers submitted its payment claim of around $200,000 for work done under the subcontract which remained unpaid, WCS sought to back charge (*ie.* set off) the costs WCS had incurred in relation to the shattered shower screens, including the remedial costs and medical expenses. According to WCS, taking all alleged deductions into account, Glaziers in fact owed WCS about $3,000. Glaziers contested this, and subsequently applied to have its payment claim adjudicated under the Act.

Adjudication. Glaziers claimed that WCS had not produced sufficient evidence to establish Glazier's liability for the shattering shower screens, and that WCS had not provided sufficient explanation for withholding the payment and for back charging for the costs of remedial work which were outside the scope of the subcontract. Glaziers thus argued that WCS had failed to meet the necessary standard of persuasion. WCS, however, argued that Glaziers had not installed the screens in accordance with the approved drawings, and that it had given sufficient evidence and details on the back charge. However, neither party actually addressed the adjudicator on the *specific* test or standard to be applied to assess if WCS had met the necessary standard of persuasion. The adjudicator also did not invite the parties to address this issue.

The adjudicator decided in favour of Glaziers and disallowed the back charging, because WCS had failed to prove its claim "beyond reasonable doubt". For instance, while WCS claimed that the screens had shattered due to an inadequate buffer between the sliding door and the wall, there was no evidence of any guidelines or codes requiring such a buffer. And WCS had provided no expert evidence or specialist report on this point, or indeed regarding Glaziers' responsibility at all for the shattering screens. There was also no evidence of WCS' specifications for Glaziers (and no evidence that Glaziers had failed to comply with such). A screen had also shattered in one unit even after remedial works were conducted, casting doubt on the efficacy of such measures – which WCS was seeking to back charge to Glaziers. As such, he concluded that Glaziers was entitled to receive substantially the whole of its payment claim, subject to some minor deductions.

High Court. WCS then commenced proceedings in the HC to set aside the adjudication decision. The HC agreed with WCS that the adjudicator had breached the rules of natural justice, as he had failed to hear from both parties on an issue – the applicable standard of persuasion – which would be crucial to his decision. This was so even if the parties were agreed on that issue; in this case the parties agreed before the HC that the applicable standard of persuasion was that of a *prima facie* case (producing *sufficient evidence* to support one's case).

The HC also held that this breach was "material" (*ie.* important) because there was a clear causal connection between the breach and the eventual decision: the adjudicator had rejected WCS' case precisely because of the doubts which he harboured, which were based on the standard of persuasion he used. Furthermore, the HC found that the adjudicator's breach had caused WCS prejudice. If the adjudicator had heard from both parties on the applicable standard of persuasion, he would likely have accepted the parties' common position that the standard of persuasion was that of a *prima facie* case. WCS did not have to show that a different standard of persuasion would actually have led to a different outcome of adjudication; it was sufficient for it to show that a different standard could reasonably have made a difference to the outcome. Further, if the adjudicator had accepted that the applicable standard was that of a *prima facie* case, he could reasonably have reached a different determination.

III. Issues on Appeal

A party challenging an adjudication award based on breach of natural justice must: (a) identify which rule of natural justice was breached; (b) how it was breached; (c) how the breach was connected to the making of the award; and (d) how the breach prejudiced its rights. As the rule of natural justice allegedly breached was the fair hearing rule, the CA decided whether the fair hearing rule was breached, and subsequently whether such breach (if any) caused prejudice.

A. Whether the fair hearing rule was breached

The correct standard for a payment claim under the Act is that of a *prima facie* case that the claim is supported by the facts. However, the adjudicator used a standard of "beyond reasonable doubt". Thus, the CA first addressed whether the adjudicator applied the correct standard, or if it applied the standard of "beyond reasonable doubt" in the way that a legally-trained individual would understand that standard. Second, assuming that the adjudicator did apply the incorrect standard, the CA considered whether it was a breach of the fair hearing rule.

(i) Standard of persuasion actually applied

The CA noted that as a general rule, courts should not nit-pick at adjudication awards. Rather, they should read and interpret adjudication determinations more generously in light of the roughshod but quick species of justice provided for by the Act, bearing in mind that an adjudicator is required to render his decision within a fairly short timeframe. Moreover, adjudicators (who are often commercially-minded individuals who have a special familiarity with the construction industry or some particular technical expertise) do not always have prior legal training. In this case, the adjudicator was also not a legally-trained person. Thus, the adjudication determination, including the adjudicator's use of the term "beyond reasonable doubt" which is more commonly used in criminal cases, must be read in that light.

The CA decided that despite the adjudicator's use of the term "beyond reasonable doubt" in his written determination, it was doubtful that he intended to use it in the same way as a lawyer or a judge. On balance, it was more likely that the adjudicator used the term to mean that he needed to be satisfied that there was a basis for WCS' back charge, and that he would not be so satisfied if he entertained reasonable concerns or doubts. In other words, the adjudicator simply used the term to express his views about the insufficiency of the evidence to support WCS' claimed entitlement to the back charge.

(ii) No breach of fair hearing rule

The CA noted that it is a breach of the fair hearing rule, and hence a breach of natural justice, for an adjudicator to determine a dispute on a point that the parties never had an opportunity to address. However, in articulating the type of unfairness which this principle is designed to address, the courts often use terms which suggest that a decision is unfair because it catches the

parties by *surprise*. And while a surprising or unforeseen outcome may indicate a breach of the fair hearing rule, it is not conclusive. A surprising outcome may be the product of several types of situations, some of which may not involve any breach of natural justice at all. The true question is whether the parties have been deprived of a fair (*ie*. reasonable) opportunity to be heard. A fair and reasonable opportunity of being heard *may or may not* require a decision-maker to take the overt step of inviting submissions from the parties on a given issue. The CA illustrated the above propositions by discussing three distinct types of proceedings which may result in surprising outcomes.

Situation One*: The parties have addressed the question which the adjudicator posed as a decisive issue, but the adjudicator answered that question in a way so far removed from any position the parties adopted that neither of them could have contemplated the result*. One instance would be where the issue was the governing law of a deed, and both parties addressed it, one by suggesting Singapore law and the other by suggesting Chinese law. However, neither party suggested or contemplated what the judge eventually decided, which was that the governing law was US law. In this case, the parties would have been deprived of their right to be heard on a decisive issue, because they had no opportunity to raise arguments as to why US law was inapplicable, or why US law also supported their interpretation of the deed. Natural justice would thus require that the judge invite the parties to make submissions on whether US law was the governing law, and if so, the applicable principles.

Situation Two*: The parties have not addressed the very question which the decision-maker has posed as being a decisive issue, because they did not know and could not reasonably have expected that it would be an issue at all*. One instance would be where the issue was whether a particular port where a ship had docked was unsafe for the vessel, and the parties argued that the decisive matter was whether there was sufficient water in the port for the ship to dock safely. The arbitrators, however, decided that the port was unsafe because the turning area was unduly restrictive for the vessel, even though this matter had not been raised in the pleadings. In this case, the parties did not have a fair opportunity to be heard on the issue of the adequacy of the turning area for the vessel. They had no opportunity to adduce evidence or address the arbitrator because they were unaware that the adequacy of the turning area was an issue at all, and they did not have a fair opportunity because they objectively could not have reasonably foreseen that it was a live issue. In such situations, the arbitrator would be in breach of natural justice unless he has taken the step of inviting submissions on that issue.

Situation Three*: The parties have omitted to address a particular issue even though they could reasonably have foreseen that the issue would form part of the court's decision.* It does not matter whether the parties chose not to address the issue because they failed to apply their minds to it, or failed to appreciate its significance, or each assumed that the adjudicator would adopt their position on that issue. Regardless, this type of decision cannot be set aside on the basis of breach of natural justice because if the parties could reasonably have foreseen that the issue would arise, and if they choose not to address that issue, they cannot complain that they have been deprived of a fair hearing.

The CA found that the present case fell under this third situation. In fact, it was a "gross understatement" to say that the parties could reasonably foresee that the issue of the standard of persuasion would arise, or that the issue was reasonably connected to their arguments. The standard of persuasion was so integral and crucial to the adjudicator's very task of determining the dispute, that there was no way he could have decided the dispute without also deciding on the standard to be applied. In an adversarial decision-making process, the decision-maker must assess the evidence against some standard of proof or persuasion.

Therefore, the parties may well have been surprised by the adjudicator's view as to the applicable standard, but they could not have been surprised that he had to form a view on this very point. As such, it could not have been a breach for the adjudicator to have omitted to invite submissions from the parties as to the applicable standard of persuasion.

Moreover, the parties did debate the sufficiency of the evidence. Glaziers had consistently argued that WCS did not have evidence to prove that the shattering shower screens were Glazier's fault. The parties also argued over the sufficiency of WCS' explanations and the details which it furnished to support its computation of the back charge. And Glaziers expressly argued that WCS failed to meet its burden of persuasion. Thus, the parties must have or ought to have realised that the adjudicator would need to choose which of their submissions he would accept. This process would necessarily involve him applying some standard of persuasion. The parties nevertheless chose not to address the adjudicator on the applicable standard, either because it never crossed their minds, or they assumed that the answer was clear and obvious. The parties could not then complain that the adjudicator applied the incorrect standard.

B. Whether the breach (if any) resulted in prejudice to WCS

Even if there had been a breach of natural justice, the CA found that the breach did not cause prejudice to WCS. The appropriate test for prejudice is whether the decision-maker could reasonably have come to a different decision if it were not for such breach.

The CA found that if the adjudicator had invited the parties to address the issue regarding the standard of persuasion, they would have agreed that the applicable standard of persuasion was that of a *prima facie* case. However, even if the adjudicator had accepted this and applied such a standard, he could not reasonably have come to a different decision. This was because he saw *no evidential basis* for WCS's back charge. He had highlighted multiple reasons as to why he was doubtful about WCS' case. For example, he could not conclude that the panels supplied by Glaziers did not meet WCS' specifications, because he did not even know what the specifications were. He was not convinced that WCS had correctly identified the inadequate buffer between the sliding door and the wall as the true cause of the shattering shower screens, as there was no expert evidence or specialist report in this regard. He was also doubtful about the efficacy of the remedial measures which WCS had taken and sought to back charge. Thus, even assuming that there had been a breach of natural justice, it had not caused WCS to suffer any prejudice.

IV. Legal implications

The CA noted the recent trend of litigants seeking to set aside adjudication determinations for breach of natural justice. This decision provides guidance on how the courts will decide when a breach of natural justice has occurred, based on breach of the fair hearing rule. However, while the CA held that parties are precluded from complaining of a breach of the fair hearing rule when they ought reasonably to have foreseen that an issue would arise, it is not clear whether the test for such "reasonable foreseeability" is an objective or a subjective one. Regardless, in light of the high threshold set by the CA for finding a breach of natural justice, parties should put their best case forward by considering and addressing *every* possible contentious point.

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