



 **PI Brilliant Bhd v Islah Mega Sdn Bhd [2024] MLJU 70**

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

SUMATHI MURUGIAH JC

ORIGINATING SUMMONS NO BA-24C-42-05 OF 2023

15 January 2024

*Marcus Hoo Can Jie (with Lim Tien Loong) (Lim & Chia) for the plaintiff.
Suronmani Krishnan (Hakem Arabi & Assoc) for the defendant.*

Sumathi Murugiah JC:

JUDGMENT

A. INTRODUCTION

[1] On November 2022, the Defendant had commenced Adjudication Proceedings pursuant to the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) against the Plaintiff. The Adjudicator, Ranjeeta Kaur, decided in favour of the Defendant in her Adjudication Decision dated 28.03.2023 (AD).

[2] As a result of the AD, the Plaintiff had filed this Originating Summons (OS) to set aside the AD, for a Stay of Execution of the AD and for a Fortuna Injunction. Subsequently, the Plaintiff filed an amended OS via an application in Enclosure 20 wherein the stay application was removed from the OS. The Plaintiff then filed a notice of application via Enclosure 21 for a Stay of Execution of the AD.

[3] Hence, the Plaintiff's applications are as follows:

- (i) The amended OS (Enclosure 20) was filed by the Plaintiff set aside the AD pursuant to s.15 of CIPAA 2012 and a Fortuna Injunction; and
- (ii) Enclosure 21 was filed by the Plaintiff for a Stay of Execution of the AD pursuant to s.16 of CIPAA 2012

[4] The parties agreed to having both Enclosure 20 and 21 heard together and for the decision of the same to be delivered together.

B. BRIEF BACKGROUND

[5] By way of a Letter of Award dated 5.12.2029 (LOA), the Plaintiff had appointed the Defendant as a sub-contractor to carry “Preliminaries Works, Piling Works, Villa Apartment 3 Tingkat, Pejabat Pengurusan dan Kemudahan, Ancillary Building, Mechanical Works, Electrical Works & Infrastructure” valued at RM9,520,000.00 for a project known as “CADANGAN PEMBANGUNAN RUMAH SELANGORKU YANG MENGANDUNGI 3 BLOK RUMAH SELANGORKU JENIS D APARTMENT “VILLA” (3 TINGKAT – 5 UNIT), 1 UNIT PENCAWANG ELEKTRIK JENIS PADAT, 1 UNIT KEBUK SAMPAH, 1 UNIT PONDOK PENGAWAL, 1 UNIT PEJABAT PENGURUSAN DAN KEMUDAHAN, 1 UNIT GELANGGANG PERMAINAN DAN 1 UNIT WAKAF” located at Shah Alam, Selangor Darul Ehsan. (“the Project”).

[6] Despite an extension of time to complete the Project was given from 2.3.2021 to 24.8.2021, the Defendant had failed to complete the works. In order to expedite the Defendant’s works so as to meet the completion date, the Plaintiff had assisted the Defendant in purchasing the required construction materials and advancing payments on the Defendant’s behalf.

[7] During the course of the construction, the Plaintiff had issued two (2) Certificates of Non-completion (CNC) dated 28.9.2020 and 3.9.2021 to the Defendant as a warning related to Liquidated Ascertained Damages (LAD) to be imposed if the delay in completion persist.

[8] Due to the financial constraint faced by the Defendant which would lead to a further delay in completing the works, at a meeting held between them on 12.10.2021, both parties agreed to mutually terminate the LOA so as to save the Project. Consequently, the Plaintiff had issued a Certificate of Final Payment Claims to the Defendant for the sum of negative RM995,525.21. This amount was calculated after taking into consideration the sums still owed by the Defendant to the Plaintiff including the LAD, Debit Notes etc.

[9] The Plaintiff had incurred further LAD due to an obstruction caused by the crane operator appointed by the Defendant which had caused for work to stop at the site. The LAD was for a total of 16 days amounting to RM42,000.00 i.e between 10.11.2021 to 25.11.2021.

[10] On 29.4.2022, the Defendant served a Payment Claim against the Plaintiff for a sum of RM1,702,157.72 for the followings:

- i. Final claim of RM197,362.33;
- ii. Damages due to wrongful termination amounting to RM894,828.15;
- iii. Rent of equipment amounting to RM191,987.64;
- iv. Loss due to Stop Work Order (January to July 2020) amounting to RM101,679.60;
- v. Transportation of workers costs amounting to RM60,000.00;
- vi. Costs of lost items; and
- vii. Interest at a rate of 5% from the period of cease of payment till the full settlement (including legal costs).

[11] No Payment Response was made by the Plaintiff to the Payment Claim served by the Defendant.

C. ADJUDICATION PROCEEDINGS

[12] The Defendant initiated adjudication proceedings against the Plaintiff by issuing a Notice of

Adjudication dated 3.6.2022 and an Adjudication Claim was served on 16.11.2022 to the Plaintiff.

[13] In the Adjudication Claim served by the Plaintiff, the following claims were made:

- i. Final claim of RM197,362.33;
- ii. Claim for loss and damages in the sum of RM894,828.15;
- iii. Rental fee for the Claimant's equipment left on site amounting to RM210,000.00;
- iv. Expenditure losses for June-August 2021 amounting to RM191,987.64;
- v. Expenditure losses for June-August 2021 amounting to RM101,679.60;
- vi. Costs of worker transportation in the sum of RM60,000.00;
- vii. Costs of items lost due to the default by the Respondent;
- viii. Interest at a rate of 5% from the period of cease of payment till the full settlement; and
- ix. All cost incurred (including legal costs incurred).

[14] The Plaintiff had raised three (3) Preliminary Objections (3 POs) as follows:

- i. The claims and reliefs sought by the Defendant was not within the jurisdiction of CIPAA (1st PO);
- ii. The Adjudication Claim was filed out of time without the consent from the Plaintiff and or the Adjudicator and that the Defendant had filed two (2) different versions of the Adjudication Claims on 16.11.2022. The first version of the Adjudication Claim which was filed at 4.50 pm was without any supporting documents and the second version of the Adjudication Claim which was filed at 6.35 pm contained claims and contents which were different to the first Adjudication Claim without the consent by the Plaintiff and or the Adjudicator (2nd PO); and
- iii. The Payment Claim dated 28.4.2022 prepared by the Defendant was not in accordance to s.5(2) of CIPAA 2012 (3rd PO).

[15] The Plaintiff had also via its Adjudication Response, made counterclaims as follows:

- i. LAD amounting to RM451,500.00;
- ii. Damages due to KAP Global Enterprise's crane which had blocked the site entrance amounting to RM42,000.00;
- iii. Legal costs of RM50,000.00
- iv. Interest calculated at 5% per annum; and
- v. Other relieves deemed fair and equitable by the learned Adjudicator.

[16] Upon conclusion of the adjudication proceedings, the Adjudicator had delivered her decision in favour of the Defendant via her AD dated 28.3.2023 as follows:

" 20.2 I determine that:

- i. The Respondent shall pay to the Claimant the amount of RM1,092,190.48 (Ringgit Malaysia one million ninety-two thousand one hundred and ninety and cents forty-eight only).

- ii. Pursuant to Section 25(o) of the CIPAA 2012, the Respondent shall pay to the Claimant interests calculated at the rate of 5% per annum on RM1,092,190.48 (Ringgit Malaysia one million ninety-two thousand one hundred and ninety and cents forty- eight only) as detailed in paragraph 19.3.2 above from the due date of the payment until this amount is paid in full.
- iii. Costs of Adjudication Proceedings to be borne by the Respondent amounting to RM67,919.62 (Ringgit Malaysia sixty- seven thousand nine hundred and nineteen and cents sixty-two only) and this amount shall be paid by the Respondent to the Claimant.
- iv. The above amounts as laid out in paragraph 20.2 herein shall be paid on or before 11 April 2023 and in one lump sum and henceforth Tuesday, 11 April 2023 will be called the due date for payment of the said amounts.”

[17] Being dissatisfied with my decision, a Notice of Appeal has been filed by the Defendant.

D. OBJECT CIPAA 2012

[18] CIPAA 2012 is a creature of the legislation intended to facilitate speedy and regular payments in the construction industry. As cash flow is the utmost important factor in the construction industry, CIPAA provides interim measures to disputing parties to solve payment issues expeditiously so as not to jeopardise the continuance of the construction contract entered into by them. (see *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] 8 CLJ 433; [2019] 5 AMR 516 **FC** *Bertam Development Sdn Bhd v. R&C Cergas Teguh Sdn Bhd* [2017] 1 LNS 2228)

E. ISSUES

[19] As all the 3 POs were dismissed by the Adjudicator and the Adjudicator had proceeded to make her decision in favour of the claims made by the Defendant, the Plaintiff has applied through this suit to set aside the AD pursuant to s.15 (b), (c) and (d) of CIPAA 2012 against the AD.

[20] The issues which have to be dealt with in relation to this application to set aside the AD are as follows:

- i. Whether the Adjudicator had acted in denial of natural justice against the Plaintiff pursuant to s.15 (b) CIPAA 2012?
- ii. Whether the Adjudicator had not acted independently or impartially pursuant to s.15 (c) CIPAA 2012?
- iii. Whether the Adjudicator had acted in excess of his jurisdiction pursuant s.15 (d) CIPAA 2012.

F. FINDINGS OF THE COURT

I. Whether the Adjudicator had acted in denial of natural justice against the Plaintiff pursuant to s.15 (b) CIPAA 2012?

[21] It is the Plaintiff's allegation that the Adjudicator had failed to properly or at all consider all the 3 POs raised by the Plaintiff as such the Adjudicator had acted in denial of natural justice against the Plaintiff.

[22] In the case of *MRCB Builders Sdn Bhd v. Wazam Ventures Sdn Bhd and another case* [2020] 1 LNS 891; [2020] MLJU 208, Wong Kian Kheong J (as he then was) held that it is

sufficient to dislodge a complaint of breach of natural justice if the Adjudicator had given just one reason to have arrived to his decision.

[23] The principle of natural justice that is said to have been denied here is the right to being heard, audi alteram partem. In an Adjudication Proceedings, the Adjudicator has the duty to accord procedural fairness to the parties during the course of the proceedings whereby the issues raised by both parties are to be considered and a decision is to be derived therefrom. In the case of *ACFM Engineering & Construction Sdn. Bhd. v. Esstar Vision Sdn Bhd & another appeal* [2016] 1 LNS 1522; [2016] MLJU 1776, the Court of Appeal held:

“[19] When one speaks of natural justice, it is nothing more than what we call the concept of “procedural fairness” which needs to be accorded to the parties in a dispute of a hearing.”

[24] In this case, upon perusing through the AD, it is clear that the Adjudicator had addressed all issues raised by the Plaintiff in the 3 POs and the defence put up by the Defendant for the same prior to coming to her conclusion. Therefore, the Plaintiff’s allegation that the Adjudicator had acted in breach of the natural justice is unsubstantiated.

[25] I refer to the case of *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn. Bhd.* [2015] 8 CLJ 728 where it was stated as follows:

“... Section 15 has provided limited grounds on which the decision of the Adjudicator may be set aside. Since an application under s.15 is not an appeal, the decision of the Adjudicator cannot be reviewed on merits.”

II. Whether the Adjudicator had not acted independently or impartially pursuant to s.15 (c) CIPAA 2012?

[26] An AD can be set aside if it can be established pursuant to s. 15(c) of CIPAA 2012 if the Plaintiff discharges its legal burden that the Adjudicator lacked independence or impartiality in conducting the adjudication proceedings and in delivering the AD.

[27] Even though they are generally used synonymously, ‘independence’ and ‘impartiality’ are concepts which have distinct differences. In the context of adjudication pursuant to s.15(c) of CIPAA 2012, lack of independence describes an adjudicator who has prior or existing relationships between himself and any one of the parties at the adjudication proceedings.

[28] In the book, *Construction Adjudication in Malaysia* by Lam Wai Loon and Ivan Y.F.Loo (Chapter 6 para 6.13), the following was stated in defining ‘impartiality’:

“As stated in *Mustill & Boyd Commercial Arbitration* (2nd Edition), ‘impartiality is the antonym of bias’.

Bias can come in many forms. As per Lord Phillips in *Re Medicaments and Related Classes of Goods* (No 2):

Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.”

[29] In this case, it is Plaintiff's contention that the fact that the Adjudicator had failed to consider the 3 POs raised by the Plaintiff in itself displays the Adjudicator's lack of independence or impartiality in assessing the issues before her.

[30] By the definitions of what constitute 'independence' and 'impartiality' as stated in the foregoing paragraphs, apart from the allegations made against the Adjudicator, the Plaintiff had not adduced any cogent evidence or had made any compelling legal submission justifying the Adjudicator's lack of independence or impartiality in arriving to her decision. As shown in the above paragraphs dealing with s.15(b) of CIPAA, it is seen that the Adjudicator had reasoned out every conclusion that she had reached in deliberating the issues brought before her.

[31] At this juncture, I refer to the High Court case of *Teguh Wiramas Sdn Bhd v. Thien Seng Chan Sdn Bhd* [2017] 1 LNS 619; [2017] 4 AMR 501 where Lee Swee Seng J (as he then was) held as follows:

" [39] There is also no basis for the Respondent to allege that the Adjudicator had failed to act independently and impartially. The fact that the Adjudicator did not agree with the Respondent's position on the law is no proof that he had failed to act independently and impartially. Such an allegation should not be launched without some evidence pointing inexorably to a lack of independence or impartiality in the hearing and the delivery of the Adjudication Decision."

[32] Therefore, not being the party who the Adjudicator was in favour of cannot constitute as evidence to this assertion made against the Adjudicator. As such, I am not convinced that the Plaintiff has discharged the burden of proving the allegation made against the Adjudicator under this limb.

III. Whether the Adjudicator had acted in excess of her jurisdiction pursuant s.15 (d) CIPAA 2012?

[33] s.27 of CIPAA 2012 draws out the boundaries in terms of the jurisdiction in which the Adjudicator can conduct the adjudication proceedings. s.27(3) of CIPAA particularly gives the Adjudicator the discretion to proceed and complete the adjudication proceedings notwithstanding any jurisdiction challenge, without prejudice to the rights under s.15 and s.28 accordingly.

[34] An AD is commonly applied to be set aside in reliance of s.15(d), as such the case of *Terminal Perintis Sdn. Bhd. v Tan Ngee Hong Construction Sdn. Bhd. and another* [2017] 1 LNS 177; [2017] MLJU had laid down the classification in terms of 'jurisdiction'. Lee Swee Seng J (as his he then was) classified 'jurisdiction' in 3 categories ie. core jurisdiction, competence jurisdiction and contingent jurisdiction.

[35] In this case, the jurisdiction challenge is on the contingent jurisdiction as stated in the *Terminal Perintis Sdn. Bhd. v Tan Ngee Hong Construction Sdn. Bhd. and another* (supra):

" there must be further compliance with the requirements of the Act as in that the dispute must be one falling within the matters raised in the Payment Claim and the Payment Response as provided for under section 27(1) CIPAA. In that example the word "jurisdiction" is used in the sense of the scope of the dispute that is before the Adjudicator for decision. So, for example an Adjudicator may not be able to decide on the defence of set-off arising out of costs of rectifying defective works if this has not been raised in the Payment Response. If he so decides, then this Court may set it aside as been made in excess of jurisdiction."

[36] Here, the 2nd and 3rd POs are on irregular service of the Adjudication Claim by the Defendant and on non-compliance to s.5(2) of CIPAA 2012 respectively. In its 2nd PO, it is the Plaintiff's contention that the Defendant had served the Adjudication Claim in 2 different versions and that it was also served out of time without the consent of the Plaintiff and or the Adjudicator.

[37] On this issue, the Defendant had explained that the 2 Adjudication Claims are not different to one another except there is a missing page in the 1st Adjudication Claim which was corrected in the 2nd Adjudication Claim. It was also explained that the reason the 1st Adjudication Claim was filed without the supporting documents because the supporting documents were voluminous and as such, the Adjudication Claim was emailed first whilst the supporting documents were copied with the intention to be sent to the Plaintiff.

[38] As for the 3rd PO, it is the Plaintiff's contention that the Defendant had not complied with s.5(2) of CIPAA 2012 as the claims made therein was not supported by any documents. In this regard, the Defendant had invoked s.26(1) of CIPAA 2012 wherein it expressly provides that the non-compliance by the parties with the provisions of CIPAA 2012, whether in respect of time limit, form or content or in any other respect, shall be treated as irregularity and shall not invalidate the power of the adjudicator to adjudicate the dispute nor nullify the adjudication proceedings.

[39] The Adjudicator in this case, had applied s.26(1) of CIPAA 2012 on both the 2nd PO and the 3rd PO of the Plaintiff and accepted the service of the adjudication claim and the non-compliance of s.5(2) of CIPAA 2012 as irregularity which can be pardonable and correctable and had proceeded with the adjudication proceedings.

[40] As for the 1st PO, the objection was on the fact that issue pertaining to the termination of the contract was raised in the Payment Claim by the Defendant and it was the Plaintiff contention was that the adjudication proceedings was not the appropriate forum to resolve this issue. The Plaintiff had in its Adjudication Response argued that the issue of the termination of contract does not fall within the definition of "payment" as set out in s.4 of CIPAA 2012 and that the doctrine of forum non conveniens would apply where the competent jurisdiction to decide on the issue of termination of contract is the arbitration or the courts and not via adjudication.

[41] Here, the issue pertaining to the termination of the contract was raised in the Payment Claim by the Defendant, however, the Plaintiff had raised a preliminary objection via its letter dated 21.10.2022 against this issue being brought to adjudication (1st PO). The Plaintiff had in its Adjudication Response argued that the issue of the termination of contract does not fall within the definition of "payment" as set out in s.4 of CIPAA 2012 and that the doctrine of forum non conveniens would apply where the competent jurisdiction to decide on the issue of termination of contract is the arbitration or the courts and not via adjudication.

[42] The Plaintiff had referred to the case of *Alupanorama Metals Sdn Bhd & Anor v Okaya International (HK) Ltd & Anor* [2021] 11 MLJ 72 where Faizah Jamaluddin J held as follows:-

"[25] Peh Swee Chin SCJ (as he then was) in *American Express Bank* explained the origins and the principle of the doctrine of forum non conveniens as follows:

'The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, ... The main judgment in the *Spiliada*

was delivered by Lord Goff, who adopted the dictum of Lord Kinneer in *Sim v Robinow* [1892] 19 R (ct of Sess) 665, 668 as being the fundamental principle in regard to this doctrine ie that 'there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice.' Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed'."

[43] However, the Adjudicator had dealt with the POs and decided that she had the jurisdiction to proceed with the adjudication since the issue of termination of the contract was raised in the Payment Claim by the Defendant. The Adjudicator's decision had substantially been on her findings that the Defendant had been unilaterally terminated since the terms and conditions of the mutual termination was not complied by the Plaintiff and as such, the claims and reliefs sought by the Defendant arising from the termination was allowed by the Adjudicator.

[44] In accordance to s.4 of CIPAA, the interpretation of 'Payment' is as follows:

"Payment" means payment for work done or services tendered under the express terms of a construction Contract. "

[45] The FC in the case of *Martego Sdn. Bhd. v Arkitek Meor & Chew Sdn. Bhd. & Another* appeal (*supra*) had decided that :

" As long as they were payment claims relating to a construction contract, defined in S4 the CIPAA would apply..."

[46] As such, a claim for loss and damages arising from the termination of contract will certainly not fall within the meaning of "Payment" as given in s.4 of CIPAA 2012. Since it refers to payments unpaid by the non paying party, this would only mean that the request for payment for the work done or service rendered must have been relayed to the non- paying party before a claim can be made via a Payment Claim. By its definition, it cannot mean payments for work yet to be done or service yet to be rendered.

[47] In this case, even if I would to consider the final sum claimed by the Defendant being a sum of RM197,362.33 as payment as defined pursuant to s.4 of CIPAA, it is not stated anywhere in the Payment Claim that this sum had been requested from the Plaintiff by the Defendant prior to the commencement of the adjudication proceedings and the same was not paid by the Plaintiff. What was clearly stated in the Payment Claim was that the basis of this claim was for "Unlawful Termination of Contract" for loss and damages arising therefrom.

[48] Based on the foregoing, I conclude that as the Adjudicator derives her powers pursuant to s.25 of CIPAA 2012 and nothing in this section gives the Adjudicator the power to decide on a claim for loss and damages arising from the termination of contract. As such, the claims for loss and damages are certainly not within the jurisdiction of CIPAA 2012 as it is not payment for work done or services (s.4).

[49] Based on the foregoing, it is my considered view that the Defendant's claims made at the adjudication proceedings are to be brought to its resolution at arbitration or to the court as adjudication is not the proper forum to decide on issues pertaining to the termination of the contract and the claims arising therefrom.

[50] Therefore, the Plaintiff has successfully shown to this court that the Adjudicator had acted

in excess of her jurisdiction. Hence, I allow the Plaintiff's application to set aside the AD with costs of RM5,000.00 to be paid by the Defendant to the Plaintiff subject to allocatur fee.

[51] Having set aside the AD, the Plaintiff's application for a Fortuna Injunction and a Stay of Execution of the AD is no longer necessary, as such both these applications are dismissed accordingly.

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