

CIDB

CONSTRUCTION LAW REPORT 2015

CIDB
MALAYSIA





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2015



CIDB **CONSTRUCTION** **LAW REPORT** **2015**

Construction Industry Development Board Malaysia

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Kuala Lumpur, Malaysia

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◀ PUBLISHER'S NOTE ▶

As part of the Construction Industry Development Board's (CIDB) ongoing efforts to develop the construction industry in Malaysia, we are pleased to present this latest volume of construction related cases containing case summaries derived from High Court, Court of Appeal and Federal Court decisions from January 2015 to December 2015.

All efforts have been made to make the work as complete, accurate and up-to-date as possible and pursuant to this objective the following have been included:

- (1) Summary of construction cases decided by Malaysian Courts.
- (2) Commentary on twenty cases written by commentators with vast experience in construction law.
- (3) 2015 Statistics on construction industry (*calibrated as at April 2016*).
- (4) 2015 Statistics on construction law cases (*calibrated as at January 2016*).
- (5) Subject Index.

This volume is intended to provide insights on the current status of construction law in the country to all industry stakeholders such as engineers, architects, surveyors, contractors, developer, etc. It is also meant to assist them in arriving at informed decisions when conducting their day-to-day affairs.

While every effort has been taken to include all construction related cases, some cases may have been inadvertently omitted. The readers are, therefore, encouraged to conduct further research if and when circumstances peculiar to their situations arise.

We would like to take this opportunity to thank the commentators and the courts for expending their time and energy in contributing to the publication of this volume.

June 2016



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STATISTICS ON CONSTRUCTION INDUSTRY

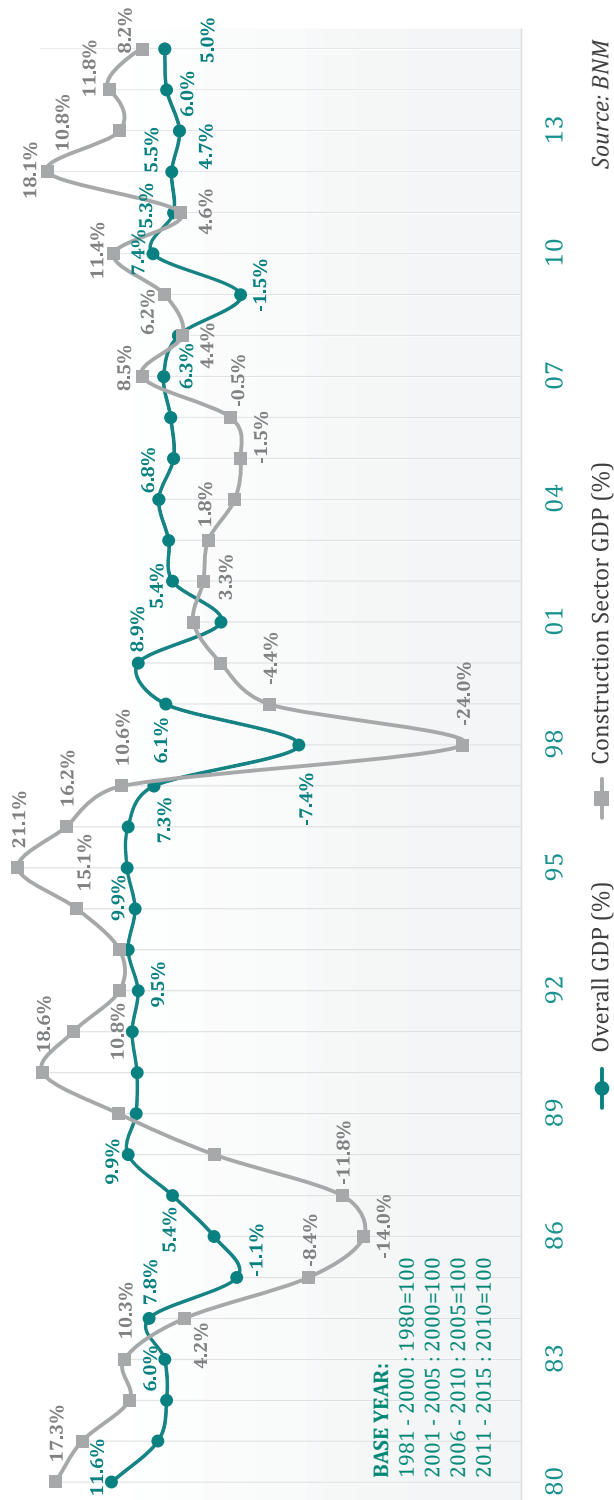


Figure 2

The graph shows an upward trend for the construction sector against the national GDP, replicating the growth trend between the years 1989 and 1994, as well as the period between 2008 and 2010. This clearly indicates promising growth for the sector in tandem with continuous economic growth.

► Volume of Projects for 2014 & 2015 by States

Number of Projects for 2014 & 2015 by States

	2014	2015
Johor	1,340	1,110
Selangor	1,588	1,472
Wilayah Persekutuan	806	637
Sabah	394	381
Sarawak	489	509
Negeri Sembilan	461	442
Perak	594	451
Pulau Pinang	547	507
Pahang	581	481
Terengganu	271	273
Melaka	321	275
Kedah	276	295
Kelantan	143	139
Perlis	42	41

Source: CIDB MALAYSIA

Figure 3

Activity and volume of projects in the construction sector continues to be driven by Selangor in 2015. The trend of Johor closely trailing behind Selangor in 2014, is seen in 2015 where the state again retains the 2nd position as the state with most volume next to Selangor's lead for 2015.

Project Value (RM billion) for 2014 & 2015 by States

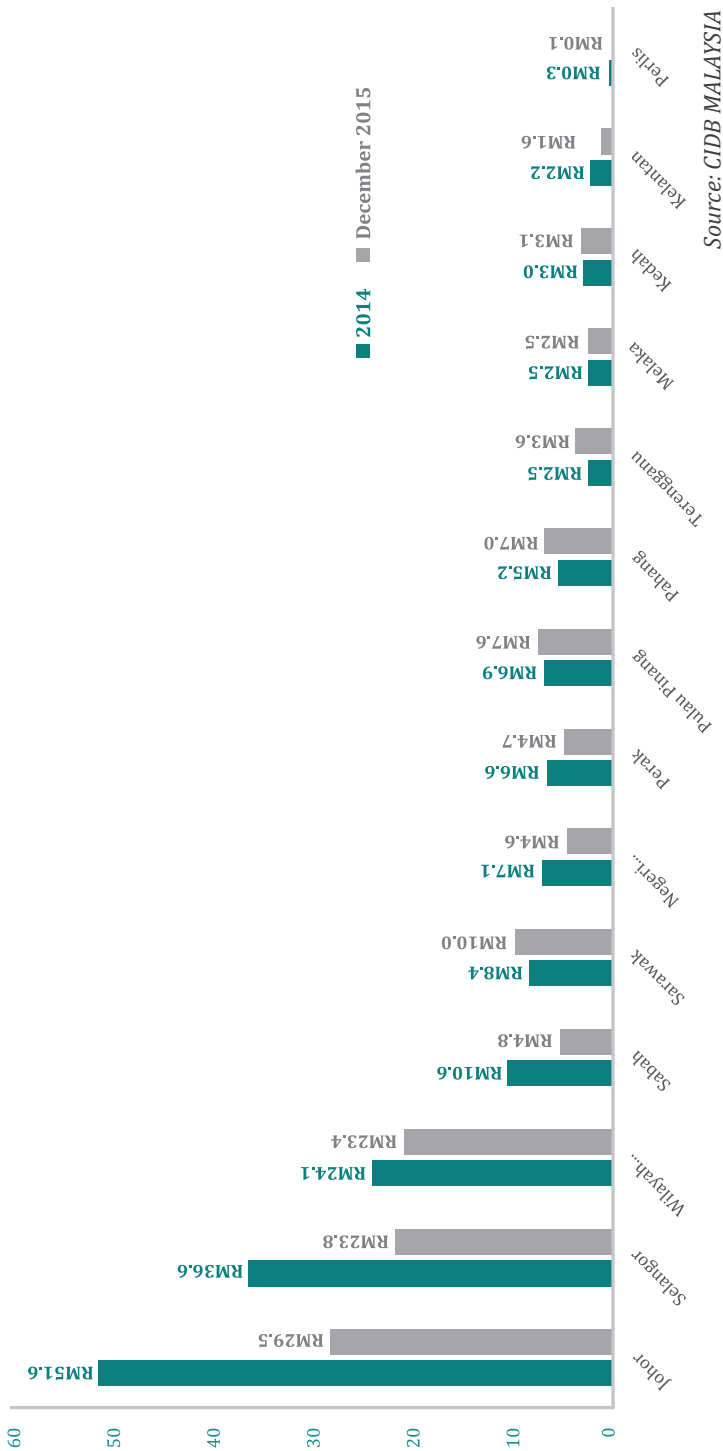


Figure 4

Johor continues to lead with total value of RM29.5 billion worth of business in the construction sector being conducted in 2015. An upward trend in value increase is seen in Sarawak, Pulau Pinang, Pahang and Terengganu. This indicate growth opportunities in construction sector taking effect in these states.

► Volume of Public & Private Projects

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Public Sector	1,666	2,958	2,707	3,014	1,878	1,954	2,001	1,971	1,764	1,769
Private Sector	4,258	4,427	3,815	4,025	5,424	5,771	5,997	6,228	6,175	5,244
Total	5,924	7,385	6,522	7,039	7,302	7,725	7,998	8,199	7,939	7,013

Source: CIDB MALAYSIA

Figure 5

The private sector has consistently taken a larger share of the construction market volume, peaking in 2013 with 6,228 projects while the public sector retained a steady share of volume with highest peak in 2009 with 3,014 projects. The volume undertaken by public sector in 2015 stands close to 2014 volume, leveling at 1,769.

Project Value (RM billion) for 2014 & 2015 by Public & Private Sectors

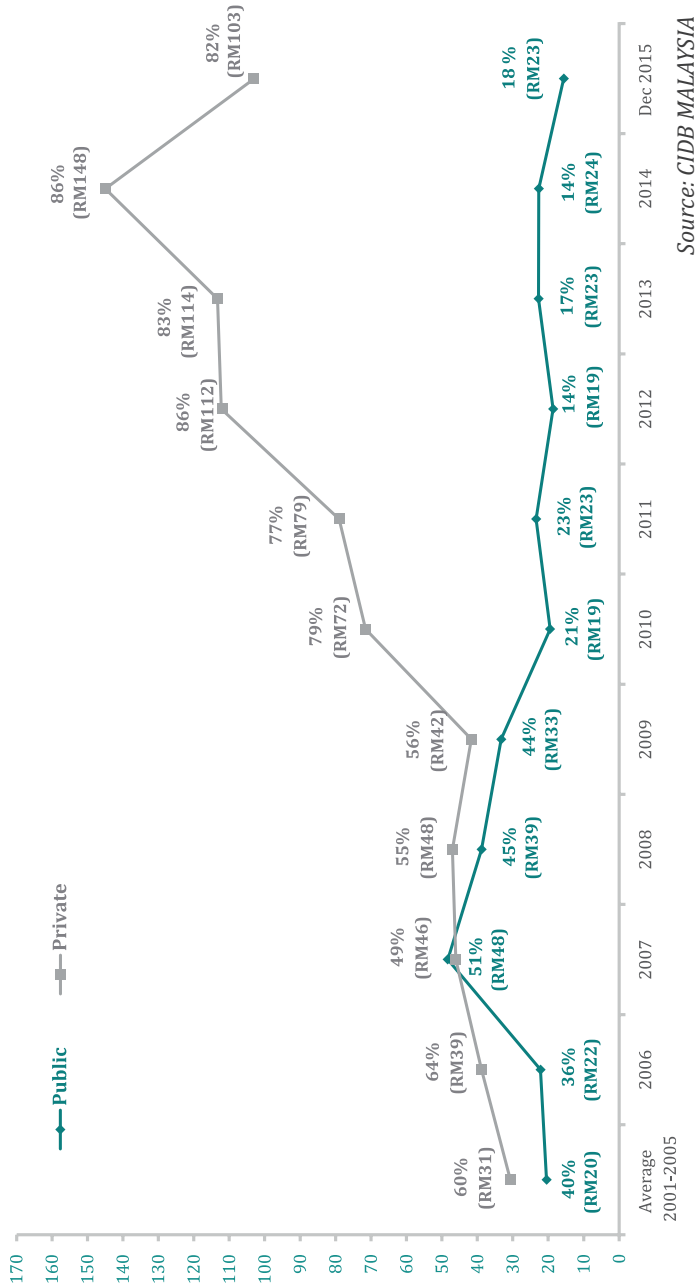
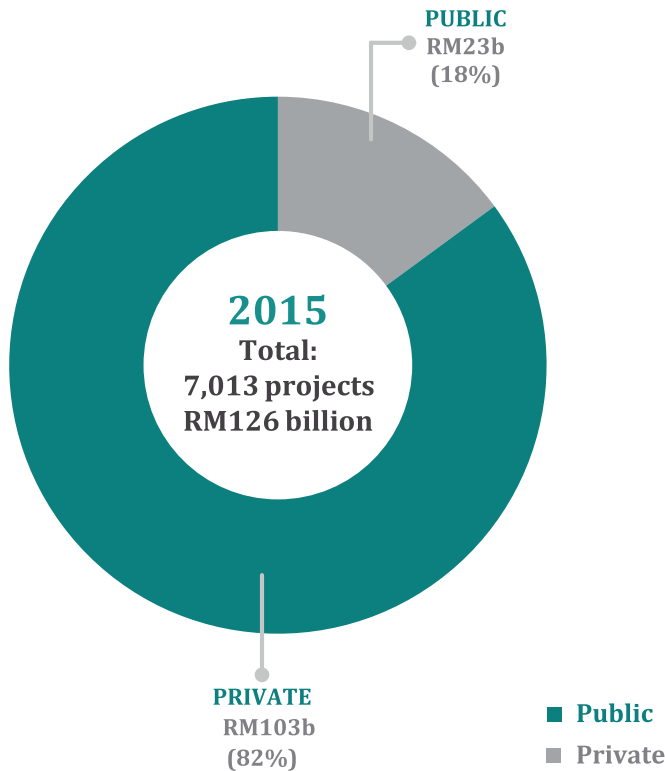


Figure 6

The public sector retained a steady share of project value with indication of slight downward trend. The private sector spiked in 2014 with a total project value of RM148 billion. In 2015 the private sector loses significant value against 2014 figures yet took 82% stake in total sector of projects.

Project Volume and Value (RM billion) for 2015 by Sector



Source: CIDB MALAYSIA

Figure 7
The private sector is seen taking the lion's share at 82% of sector in 2015 with total project value of RM103 billion. The private sector was kept busy with 5,244 projects whereas the public sector continued its support and stimulus of the construction industry by undertaking 18% of the share, valued at RM23 billion.

► Volume of Projects by Categories

	Average 2001-2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Residential	1,624	1,732	1,865	1,486	1,701	2,131	2,253	2,307	2,365	2,390	2,010
Non Residential	1,373	2,060	2,345	2,199	2,090	2,563	2,661	2,884	3,075	2,874	2,602
Social Amenities	837	596	1,381	1,258	1,505	857	820	918	731	693	641
Infrastructure	1,308	1,536	1,794	1,579	1,743	1,751	1,991	1,889	2,028	1,982	1,760
Total	5,142	5,924	7,385	6,522	7,039	7,302	7,725	7,998	8,199	7,939	7,013

Source: CIDB MALAYSIA

Figure 8

In 2015, the highest volume is seen in non-residential category, followed by residential and infrastructure with social amenities coming in as the category with least volume. Notably this reflects the overall trend since 2006.

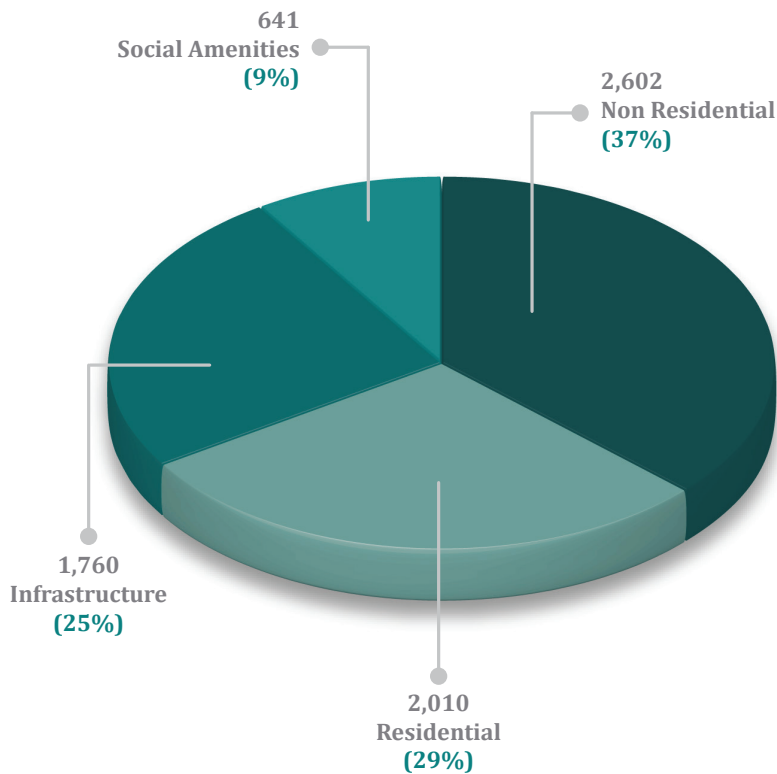
Project Value (RM billion) by Categories



Figure 9

2014 represented the highest value in projects totaling RM172 billion, 48% of which belonged to non-residential category. In 2015, residential and non-residential categories almost leveled with 38% and 37% share of total project value of RM126 billion. This changes the trend with residential projects leading in category for the first time since 2001.

Project Volume for 2015 by Category



Source: CIDB Malaysia

Figure 10
Non-residential projects led in volume for 2015 with 2,602 projects.

► Volume of Projects By Local & Foreign Contractors

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Local Contractors	5,850	7,291	6,447	6,987	7,192	7,600	7,844	8,062	7,752	6,872
Foreign Contractors	74	94	75	52	110	125	154	137	187	141
Total	5,924	7,385	6,522	7,039	7,302	7,725	7,998	8,199	7,939	7,013

Source: CIDB MALAYSIA

Figure 10.1

The volume of projects undertaken by foreign contractors has seen a steady sustainable growth since 2006 in tandem with the overall growth of the construction industry and volume of projects.

Contractors' Registration by Grades and States for 2015

	Total Registered Contractors	Registered Contractors by Grade						
		G1	G2	G3	G4	G5	G6	G7
Johor	6,901	2,896	1,471	1,178	349	417	128	462
Kedah	3,620	2,096	678	340	120	132	52	202
Kelantan	3,428	2,043	739	233	99	117	59	138
Melaka	2,243	1,051	431	327	124	121	45	144
Negeri Sembilan	3,353	1,834	722	357	125	149	49	117
Pahang	4,008	2,235	792	404	200	168	61	148
Perak	4,715	2,570	860	555	208	247	88	187
Perlis	1,157	866	161	50	17	27	5	31
Pulau Pinang	3,575	1,327	575	698	210	261	108	396
Sabah	10,496	7,095	1,693	757	172	200	89	490
Sarawak	4,607	2,238	934	472	176	204	90	493
Selangor	11,822	3,912	1,810	2,181	794	1,255	363	1,507
Terengganu	4,075	2,332	761	311	173	204	94	200
Wilayah Persekutuan	7,799	1,573	780	1,512	641	1,244	358	1,691
Total	71,799	34,068	12,407	9,375	3,408	4,746	1,589	6,206

Source: CIDB Malaysia

Figure 10.2

Selangor and Sabah recorded the highest number of registered contractors, followed by Wilayah Persekutuan Kuala Lumpur. The highest recorded registration by Grade was for G1 followed by G2 in 2015.



STATISTICS ON CONSTRUCTION CASES



► Federal Court

Statistics on Construction Cases at Federal Court for 2015

Balance of Cases from 2014	2015		
	Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
2	2	1	3

Source: Malaysian Judiciary

Figure 11

Only 2 cases came up to Federal Court in 2015 which is a positive indication of construction case resolutions below the Apex court level.

► Court of Appeal

Statistics on Construction Cases at Court of Appeal for 2015

Balance of Cases from 2014	2015		
	Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
20	69	45	44

Source: Malaysian Judiciary

Figure 12

51% or 45 construction cases at the Court of Appeal was disposed in 2015, inclusive of cases brought forward from 2014.

► High Court

Statistics on Construction Cases at High Court for 2015 by States

	Balance of Cases from 2014	2015		
		Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
Johor	4	8	5	7
Kedah	-	-	-	-
Kelantan	-	1	1	-
Melaka	-	-	-	-
Negeri Sembilan	-	-	-	-
Pahang	-	5	2	3
Pulau Pinang	13	3	11	5
Perak	-	-	-	-
Perlis	-	-	-	-
Selangor	26	47	39	34
Terengganu	-	1	-	1
Sabah	1	17	16	2
Sarawak	4	40	40	4
Wilayah Persekutuan	58	164	152	70
TOTAL	118	286	266	138

Source: Malaysian Judiciary

Figure 13

65% or 266 construction cases at the High Courts were disposed in 2015, inclusive of cases brought forward from 2014. East Malaysia states together with Wilayah Persekutuan and Selangor recorded the highest number of new cases and equally with strong numbers of disposed cases.

Construction High Court

Statistics on Construction Cases at Construction High Court (Selangor & Wilayah Persekutuan) for 2015

	Balance of Cases from 2014	2015		
		Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
Selangor	26	47	39	34
Wilayah Persekutuan	58	164	152	70
TOTAL	84	211	191	104

Source: Malaysian Judiciary

Figure 13.1

The specialist Construction High Courts (C Code) set up in Selangor and Wilayah Persekutuan improved performance of the overall disposal and resolution of construction cases.

Statistics on Construction Cases at High Court, Shah Alam, Selangor (C Code) for 2015

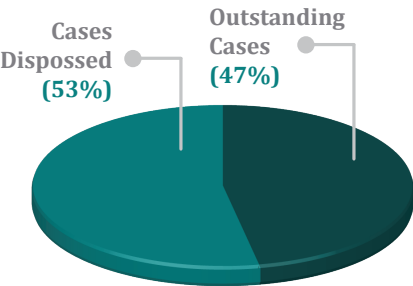


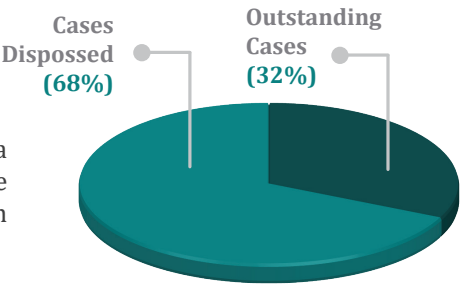
Figure 13.2

The Construction Court in Shah Alam, Selangor recorded an encouraging 53% case disposal in 2015 with 47% cases outstanding.

Statistics on Construction Cases at High Court, Kuala Lumpur, WP (C Code) for 2015

Figure 13.3

The Construction Court in Kuala Lumpur, WP recorded a positive performance of 68% case disposal in 2015 with 32% cases outstanding.



Source: Malaysian Judiciary

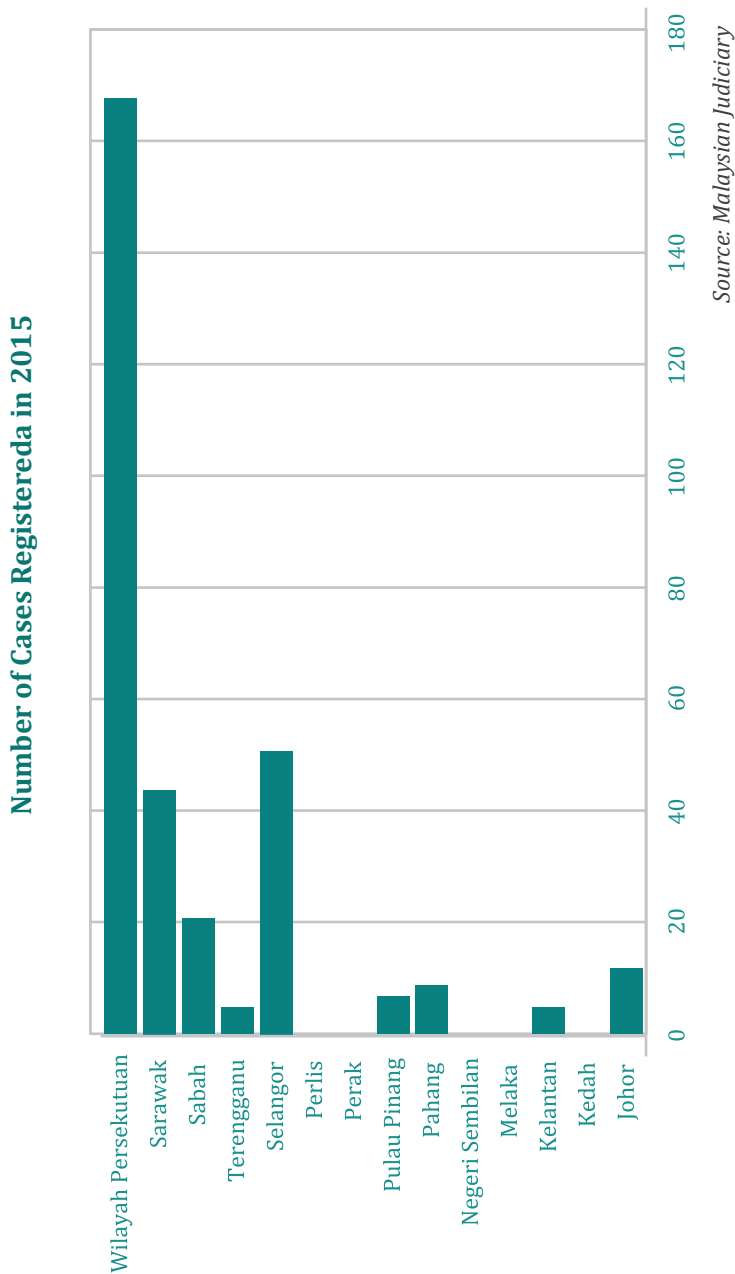


Figure 14 Wilayah Persekutuan Kuala Lumpur, Selangor and Sarawak are the top 3 states with highest number of registered cases in High Court for 2015 while 5 other states did not have any cases registered, namely – Kedah, Melaka, Negeri Sembilan, Perak and Perlis.

► Sessions Court

Statistics on Construction Cases at Sessions Court for 2015 by States

	Balance of Cases from 2014	2015		
		Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
Johor	9	11	17	3
Kedah	5	1	4	2
Kelantan	9	9	15	3
Melaka	8	1	6	3
Negeri Sembilan	4	6	6	4
Pahang	5	21	13	13
Pulau Pinang	8	8	10	6
Perak	6	9	12	3
Perlis	2	-	2	-
Selangor	13	19	22	10
Terengganu	6	4	5	5
Sabah	3	10	5	8
Sarawak	10	12	19	3
Wilayah Persekutuan	27	147	117	57
TOTAL	115	258	253	120

Source: Malaysian Judiciary

Figure 15

68% or 253 construction cases at the Sessions Courts were disposed in 2015, inclusive of cases brought forward from 2014. Wilayah Persekutuan, Pahang and Selangor recorded the highest number of new cases. Wilayah Persekutuan, Selangor and Sarawak led in numbers of disposed cases.

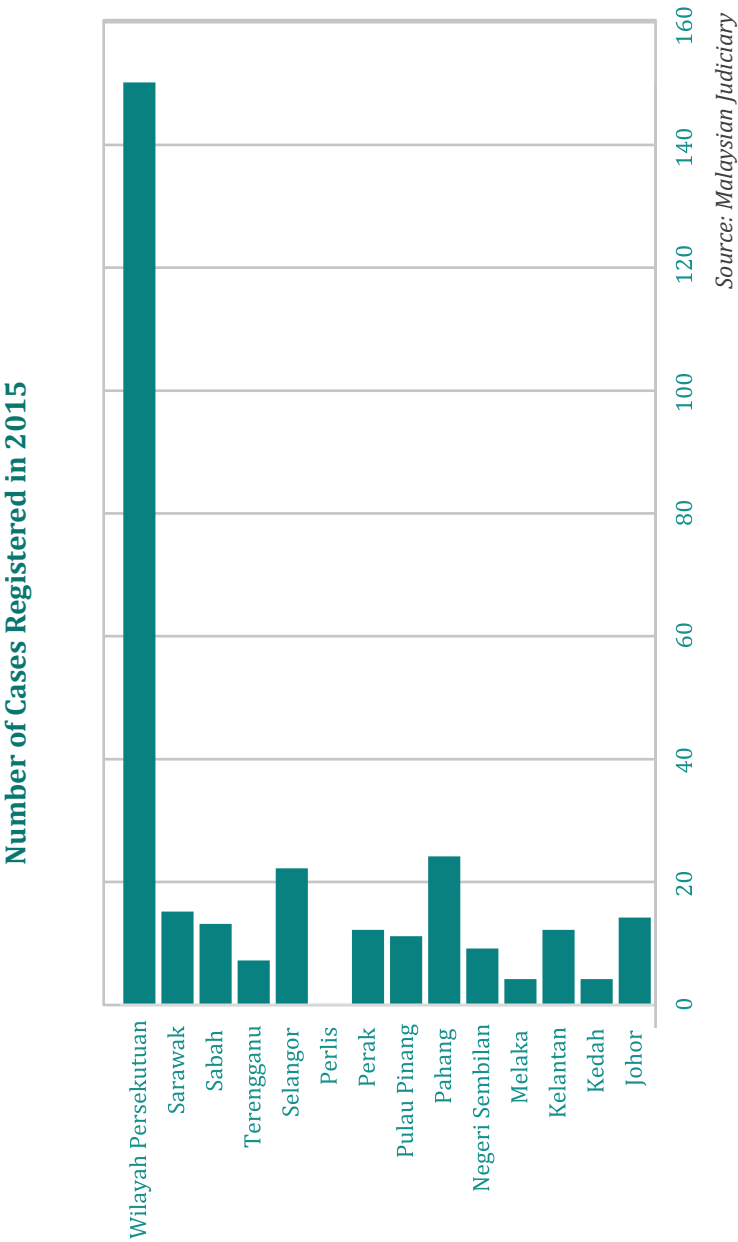


Figure 16 Wilayah Persekutuan Kuala Lumpur, Pahang and Selangor are the top 3 states with highest number of registered cases in Sessions Court for 2015 while Perlis did not have any cases registered.

► **Magistrates’ Court**

Statistics on Construction Cases at Magistrates Court for 2015 by States

	Balance of Cases from 2014	2015		
		Total Number of Cases Registered	Total Number of Cases Disposed	Total Number of Cases Outstanding
Johor	1	10	10	1
Kedah	-	1	1	-
Kelantan	1	1	2	-
Melaka	8	7	8	7
Negeri Sembilan	3	-	3	-
Pahang	4	11	11	4
Pulau Pinang	1	2	1	2
Perak	24	15	39	-
Perlis	1	-	1	-
Selangor	12	30	30	12
Terengganu	-	10	9	1
Sabah	2	2	4	-
Sarawak	10	48	23	35
Wilayah Persekutuan	9	27	16	20
TOTAL	76	164	158	82

Source: Malaysian Judiciary

Figure 17

66% or 158 construction cases at the Magistrates’ Courts were disposed in 2015, inclusive of cases brought forward from 2014. Sarawak, Selangor and Wilayah Persekutuan recorded the highest number of new cases. Northern states recorded 100% case disposal, including Kelantan, Negeri Sembilan and Sabah whereas Johor recorded 91% and Terengganu 90%.

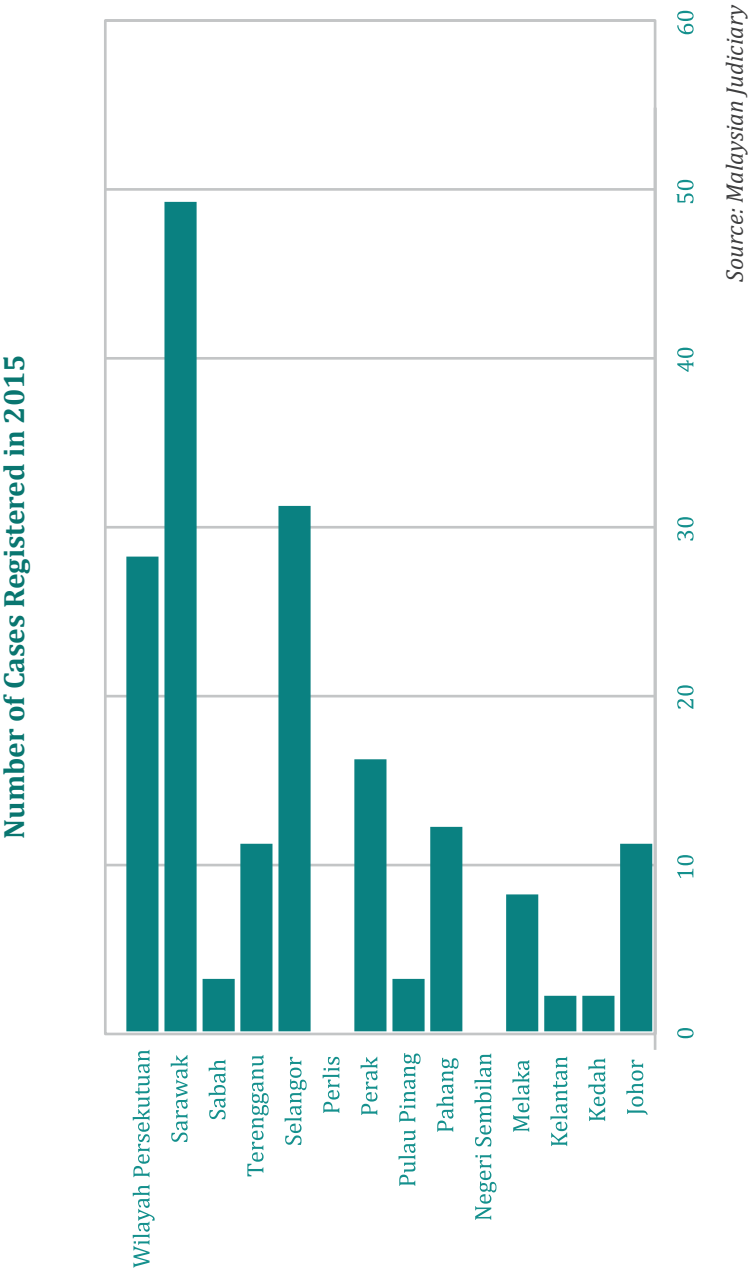
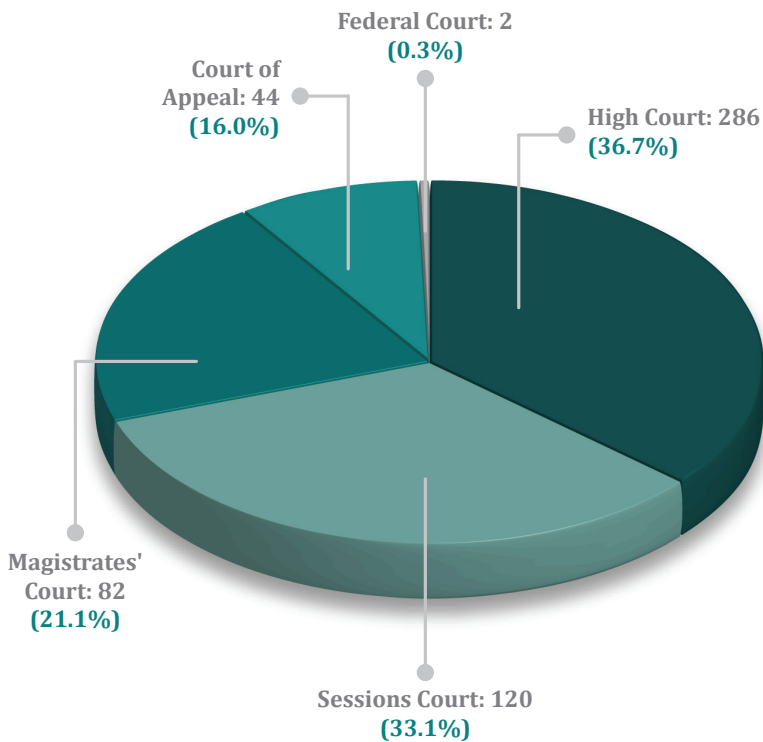


Figure 18 Sarawak, Selangor and Wilayah Persekutuan Kuala Lumpur are the top 3 states with highest number of registered cases in Magistrates' Court for 2015 while Perlis and Negeri Sembilan did not have any cases registered.

► An Overview: Malaysian Courts

Statistics on Construction Cases at Malaysian Courts for 2015

Number of Cases Registered



Source: Malaysian Judiciary

Figure 19

Sessions Court and High Court were almost balanced in percentage of cases registered with only 8.9% and 0.3% cases registered at Court of Appeal and Federal Court in 2015 respectively.

Number of Cases Disposed

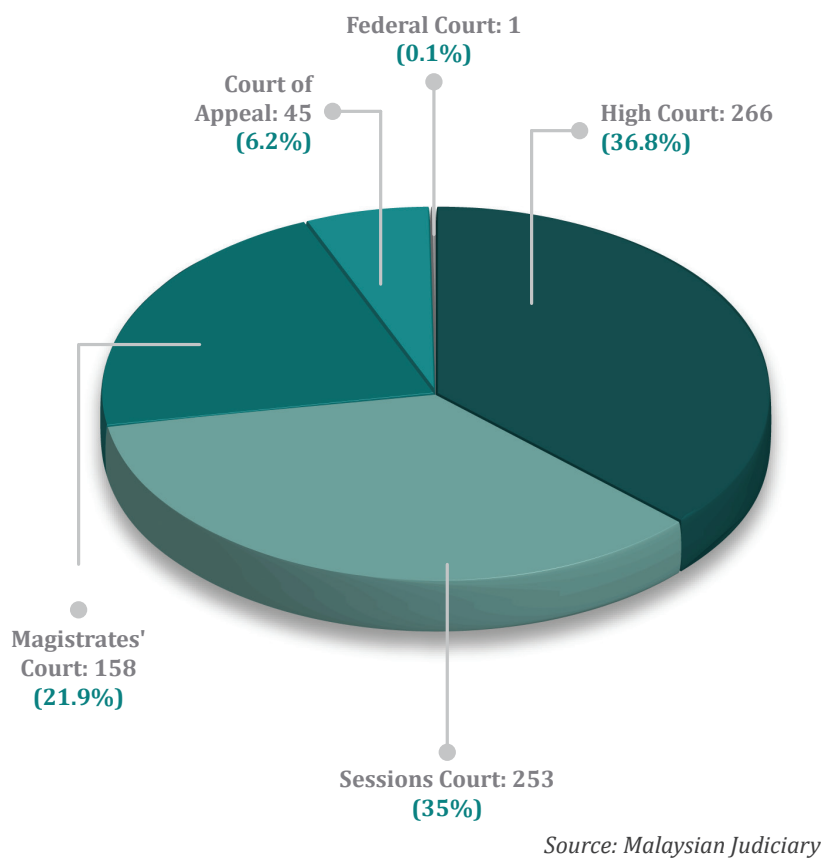


Figure 20
Pie chart displays the percentage of construction cases disposed at the Malaysian Courts in 2015. Sessions Court and High Court are almost balanced with 35% and 36.8% of cases disposed respectively.

Number of Cases Outstanding

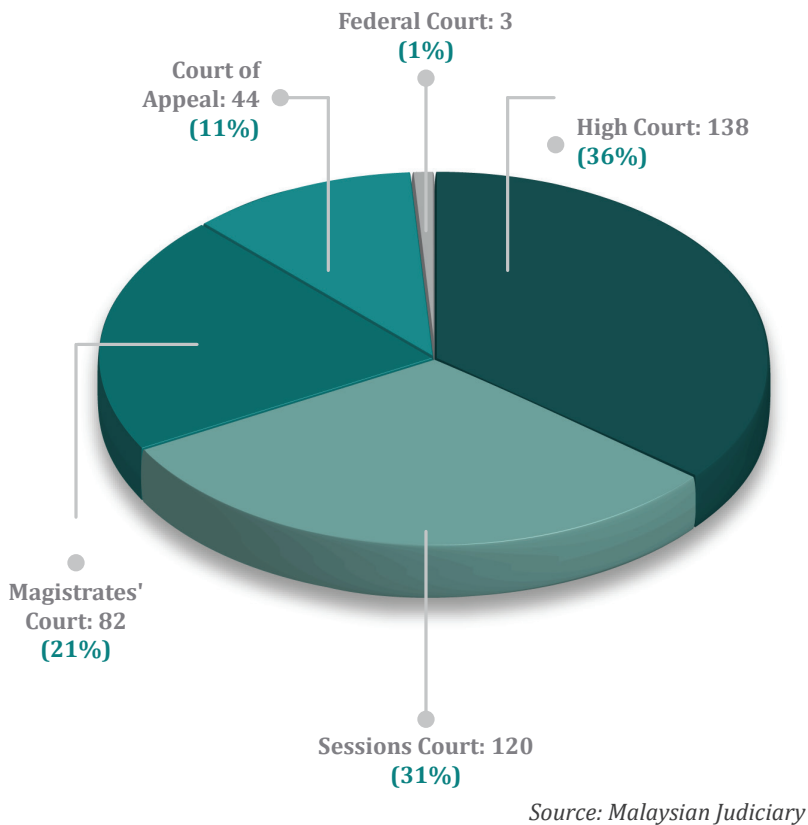


Figure 21
High Courts top the percentage of cases outstanding in 2015 at 36%, followed by Sessions Courts at 31%.

**CASE SUMMARY
WITH COMMENTARY**

Au Kean Hoe v Persatuan Penduduk D’Villa Equestrian

FEDERAL COURT, PUTRAJAYA
CIVIL APPEAL NO: 02(f)-50-08/2013(B)
ZULKEFLI AHMAD MAKINUDIN CJ, ABDULL HAMID EMBONG FCJ, AHMAD
MAAROP FCJ, ZAINON ALI FCJ, RAMLY ALI FCJ
19 MARCH 2015

[2016] 1 CIDB-CLR 31

The Appellant and his wife purchased a house in a guarded, gated housing estate (“the housing estate”) in 2006. When the Appellant and his wife moved into the estate in January 2007, the Developer of the housing estate had already installed in the estate, boom gates and a security guardhouse. The Developer was responsible for the security and maintenance including the boom gates and the guard-house until December 2007. From January 2008, the residents of the housing estate were required to pay monthly charges for the security and maintenance. In July 2007, the residents agreed that those who refused to pay the security and maintenance charges would not enjoy the facilities provided by the guards at the boom gates or other security facilities. The Appellant joined the estate’s Resident’s Association (“RA”) and became its Treasurer from May 2009 to March 2010. During this period, the Appellant raised no objections to the boom gates. The Appellant left as member of the RA in August 2010 and stopped paying the maintenance and security charges. On 25 October 2011, the Respondent issued a circular signed by the Chairman of the RA notifying the residents of the estate that those who had not paid the security and maintenance charges would have to personally open the boom gates without any assistance from the security guards when entering the estate. The Appellant, dissatisfied with the circular, lodged a police report and an online complaint with the local authority (“MBPJ”). The Appellant thereafter sued the Respondent on the grounds of *inter alia*, nuisance and that the boom gates and guardhouse were illegal structures that amounted to obstructions in law and ought to be demolished. The Respondent counterclaimed for arrears of security and maintenance charges and for an injunction restraining the Appellant from harassing the Respondent and the security guards at the guardhouse. The High Court dismissed the Appellant’s action and allowed the Respondent’s counterclaim in part by issuing the injunction restraining the Appellant from harassing the Respondent and the security guards. The Court of Appeal affirmed the High Court’s decision and the Appellant appealed to the Federal Court. In the appeal, counsel contended *inter alia*, that the erecting of a guard house and a boom gate across a public road in a residential area amounted to an obstruction within the meaning of s 46(1)(a) of the Street, Drainage and Building Act 1974 (“SDBA”) and that both the High Court and the Court of Appeal failed to consider the application and implication of s 46(1)(a)

of the SDBA. The Federal Court was of the view that the principal issue to be decided was whether the guard-house and the boom gates were constructed with the approval of the local authority, ie, MBPJ.

Held, dismissing the appeal:

- (1) Section 46(1)(a) of the SDBA had no application where the local authority had given approval for the so-called obstruction complained of. Section 46(1)(a) of the SDBA must be read with s 46(3) of the SDBA that empowered the local authority to remove an obstruction.
- (2) The developer as predecessor to the Respondent had obtained approval from the MBPJ under the Town and Country Planning Act 1976 ("TCPA") for the construction of the guard-house, by the approval of the layout plan. Further, there could be no dispute over the authority of the MBPJ to issue the Guidelines for Guarded Communities and give approval in accordance therewith. Under the SDBA, the local authority had full supervisory authority over all buildings, both at the pre-construction and post-construction stage. By s 70(3) of the SDBA the local authority was the approving authority for the erection of any building. MBPJ was thus the rightful authority for the approval of the guard house and the boom gates as "buildings" under the SDBA.
- (3) The Local Government Act 1976 ("LGA") empowered the local authority to do all things necessary for or conducive to the public safety, health and convenience. It could not be disputed that guarded communities are schemes implemented to improve public safety and security in defined residential areas.
- (4) The guard house and boom gates were duly authorized structures under the TCPA, the SDBA and the LGA and cannot therefore in law be an obstruction under s 46(1)(a) of the SDBA. The MBPJ as the relevant local authority was fully empowered to approve the construction of buildings which could be in the nature of a guard house with boom gates.
- (5) Regulated access to a defined area was not an obstruction in law especially if it was for security purposes. It would be so only if one was denied access to a public place. It was not a barricade that was placed across a public road that denied access altogether to all who wished to enter. In the instant case, the Appellant did not complain that he or his family were prohibited from access at all or that the boom gates were a barricade against him or his family. The Appellant's complaint was really a complaint of inconvenience and not of obstruction.
- (6) At common law, both actionable obstruction or actionable private nuisance were not available for inconvenience. It was a matter of degree at all times and the conduct had to be unreasonable conduct in the circumstances of

the case for it to be actionable. The underlying rule was a recognition that individuals live within a community and it was always the balancing of the individuals' inconvenience against the communities' interest that was of paramount concern. In the instant case, both the High Court and the Court of Appeal had correctly concluded that the Appellant's inconvenience was not an actionable nuisance by the presence of the guard house and the boom gates.

COMMENTARY

by *Lam Wai Loon*

Partner at Harold & Lam Partnership

Gated and Guarded Housing Estate

Introduction

In this case, the Appellant's claim was dismissed by the High Court and the Respondent's counterclaim was allowed in part wherein the High Court issued an order restraining the Appellant from harassing the Respondent and the security guards. The Court of Appeal affirmed the decision of the High Court and accordingly dismissed the Appellant's appeal.

The Appellant obtained leave to appeal to the Federal Court on the following questions of law:

- (1) Whether the erection of a guard house and a boom gate across a public road in a residential area amounted to an obstruction within the meaning of s 46(1)(a) of the Street, Drainage and Building Act 1974 ("SDBA"); and
- (2) Whether a local government was empowered to authorize or otherwise approve an obstruction within the meaning of s 46(1)(a) of the SDBA.

The Federal Court answered Question 1 in the negative and Question 2 in the affirmative, and dismissed the appeal.

Lessons learnt from the case

The Appellant sought to rely on s 46(1) of the SDBA in contending that the boom gates erected at the housing area were illegal as they constituted an obstruction over a public road. The Federal Court however rightly pointed out that s 46(1) of the SDBA would not apply

where the local authority had given approval for the construction that was being complained of. See *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Sdn Bhd & Other Appeals* [2009] 1 CLJ 329. In the present case, MBPJ had given approval sometime in the year 2002 for the construction of the boom gates and the guard house.

MBPJ had granted approval to the Respondent based on the layout plan submitted by the Developer of the housing estate for the development. This was in accordance to the relevant provisions of the Town and Country Planning Act 1976 ("TCPA"). The TCPA expressly provided that the local authority was the relevant planning authority for any local area (see s 5). In the circumstances, MBPJ clearly had authority to provide approval for the construction of the boom gates and guard house at the housing estate. Furthermore, MPBJ was also empowered under the Local Government Act 1976 to do all things necessary for the purposes of public safety, health and convenience (see s 101(v)) and the erection of boom gates and a guard house at a housing estate clearly fell within that category.

Given that MPBJ as the local authority had given approval for the construction of boom gates and a guard house at the housing estate for security purposes, the Federal Court enunciated that such construction did not constitute an obstruction in law. A regulated access to a defined area for security purposes cannot be construed as an obstruction as it does not deny access altogether to those who wish to enter the housing estate.

As argued by the Counsel for the Respondent, it was apparent that the Appellant's action against the Respondent was in actual fact an issue of inconvenience as opposed to obstruction. In this regard, the Federal Court pointed out that balancing an individual's inconvenience against the communities' interest was of paramount concern (see *George Philip & Ors v Subbammal & Ors* AIR 1957 Tra-Co. 281) and based on this, the Federal Court ruled that the presence of the boom gates and the guard house at the housing estate did not constitute an actionable nuisance.

Suggested best practices to be adopted

It is important to note that the Federal Court's decision which decided that there was no actionable nuisance is predicated upon the fact that the boom gates and the guard house were built to regulate access by individuals to a housing estate for security purposes. The Courts would have decided differently if the complainant was prevented or hindered from entering his residence on the ground that he had failed to pay the monthly security service fees. Further, although the Courts found that the local authority had the power to authorise the erection of a

guardhouse and boom gates, it would be prudent for the developer of a housing estate, particularly one which was not an approved gated and guarded housing development under the Strata Titles (Amendment) Act 2007, to ensure that the construction of such structures in the housing estate were already set out in the layout plan for the development and approved by the relevant local authority, if such security features were intended to be incorporated into the housing scheme; and to incorporate into the Sales and Purchase Agreement a term that the owners of the properties consent to the scheme and the relevant rules governing the security scheme are binding on the residents of the housing estate.

Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corporation & Ors

FEDERAL COURT, PUTRAJAYA
CIVIL APPEAL NO: W-01(f)-44-10/2013 (W)
ZULKEFLI AHMAD MAKINUDIN, CJ, SURIYADI HALIM OMAR FCJ, HASAN LAH
FCJ, ABU SAMAH NORDIN FCJ, ZAHARAH IBRAHIM FCJ
26 OCTOBER 2015

[2016] 1 CIDB-CLR 36

The Appellant was a statutory body established under the Construction Industry Development Board Act 1994 (“the Act”). The Appellant was authorised under s 34(2) of the Act to impose on every registered contractor a levy of a quarter per centum of the contract sum. This imposition, however, could occur only before any construction work with a contract sum above RM500,000 was commenced. Under regulation 6(1) of the Construction Industry (Collection of Levy) Regulations 1996 (“1996 Regulations”), the Appellant held the authority to determine the contract sum for construction works and in so determining certain considerations had to be taken into account. The Respondent is a registered contractor under the Act, composed of a consortium purely for this project and executed among themselves a Consortium Agreement to cater for their internal arrangement. A letter of award (“the LA”) was presented to the Respondent in 1999 for a contract worth \$1,481,254,000 plus €59,640,000. The following year, another contract constituting the formal construction agreement (“EPCC Contract”) was executed between the Respondent and Petronas Malaysia Liquid Natural Gas Tiga Sdn Bhd (“Owner”). By a notification of imposition of levy, the Appellant imposed a levy on the Respondent. The sum was disputed by the Respondent, arguing for a far lower one (arrived at by disregarding sums attributed to the ‘offshore works’ and the ‘non-construction works’), which the Respondent then paid instead of the original sum. The Appellant then brought the matter of the outstanding sum to the High Court. Matters addressed in the High Court were thus: (i) whether a levy could be imposed under the Act on construction works undertaken outside Malaysia; and (ii) whether construction works under the Act include non-construction works such as engineering, procurement, supervision, management and other ancillary services. Upon the High Court ruling that the Appellant had misconstrued the Act, together with the relevant documents, causing it to levy an incorrect amount under the 1996 Regulations, the Appellant then unsuccessfully appealed to the Court of Appeal. Subsequently, the Appellant obtained leave from the Federal Court on the following questions of law: (i) whether the Appellant had misconstrued the Act and the relevant documents and thus imposed an incorrect levy amount; and (ii) whether the Appellant was entitled to interest even though the Act did not provide for interest and if so, how the interest was to be calculated. The Appellant submitted that the levy was imposable under the Act on a

registered contractor for construction works where the contract sum exceeded RM 500,000.00. It also submitted that the Respondent was a registered contractor, based on its certificate of registration and that the contract sum in this case indeed exceeded the required amount. The Appellant made it clear that the EPCC Contract was a single purpose turnkey contract, subject to fixed pricing, hence indivisible. It also ventilated that the contract sum constituted the cost of all resources (including the onshore and offshore portion) and as the resources were components of the construction works, they were subject to levy imposition. It was furthermore submitted that the contract was a comprehensive one which included both construction and non-construction components, all of which fell under the category of "work". Since only the design work and procurement of materials were done offshore, to be brought into Malaysia eventually for the contract works, these circumstances created enough of a tax presence within Malaysia, thus making the levy a Malaysian one as opposed to an extra-territorial one. The Respondent contended that its consortium was not a single legal entity, but a group of companies collaborating to work on a single contract. It also submitted that the levy imposed should include only construction work, and exclude work of a non-construction nature. Applying the *noscitur a sociis* principle, the Respondent submitted that the definition of "construction works" in s 2 of the Act must be read harmoniously, and as parts of an integral whole, and as being interdependent and to this end the Court ought to take into account the words or phrases preceding the words which were being interpreted. The Respondent relied on s 1(2) which stated that application of the Act was restricted to Malaysia, thus preventing the Appellant from imposing any levy for work done extra-territorially. The Federal Court was of the view that the dispute centered on the construction of the Act's provision, the 1996 Regulations and the interpretation of the LA, the EPCC Contract and the Consortium Agreement.

Held, allowing the Appellant's appeal with costs:

- (1) The levy was created under the Act. It was now well established that taxing statutes like all other statutes must be given a purposive interpretation to fulfill the objective of the statute, unless the circumstances demand otherwise. A purposive and practical approach would assist and fulfill the task of the Appellant, together with the levy mechanism to manage, develop and regulate the construction industry, tremendously.
- (2) Under a lump sum contract, a lump sum contract price was agreed upon by parties before the works begin. It is a single whole construction contract as opposed to a divisible contract. In the instant case, upon scrutinizing the letter of award, the EPCC Contract and the Consortium Agreement, it was obvious from the letter of award that the contract awarded to the consortium was a "fixed non-escalating lump sum Contract Price", ie, the contract price could not be split up.

- (3) The issue of the lump sum contract was connected to the submission of the Appellant that this was a turnkey project. In the instant case, the Court found that the contract entered into by the Owner and the Respondent was a turnkey contract as the facts fell squarely under the type of contract where it was singular in purpose and at a fixed price. Since the contract was a lump sum turnkey contract and hence not divisible, the Court rejected the Respondent's submission that the levy under s 34 of the Act was restricted to construction works, which excluded non-construction works such as engineering, procurement, supervision, management, and other ancillary services.
- (4) The importation and reference of the whole contract sum into Article 8.1 of the EPCC Contract by the explicit factoring of the levy into the contract price convinced the Court that the parties expected offshore transactions and non-construction works to take place. And clearly levy was expected to be imposed on the Respondents. If the Respondent were to be freed of the impossible levies for the offshore contracts and non-construction works, the EPCC Contract would have made the Respondent liable only to the contract price minus the expenditure of offshore and non-construction components. Therefore, not only did Article 8.1 confirm the Appellant's argument that this was an indivisible contract but the Respondent also anticipated to be levied for the off-shore and non-construction works component.
- (5) Having perused s 2 of the Act in relation to the meaning of the word "construction works", the Court placed their reliance on the word "includes", rather than alluding to the principle of "*noscitur a sociis*". Going by the natural meaning, of that word, the Court was satisfied that the engineering design procurement works, that form part of the "construction works", include all "integral and preparatory" work that would lead to a successful performance of the contract. No construction works may be carried out satisfactorily without the requisite design, drawings, supervision or planning preceding it.
- (6) Although a contractual transaction may involve a series of transactions, it may nevertheless be a single transaction for levy purposes. Thus, the EPCC Contract looked at as a whole was viewed as a single transaction.
- (7) In the circumstances of the case, as the commercial transaction was undertaken through the Respondent (Contractor), a tax presence was created within Malaysia to enable a levy to be imposed. The levy on the contract sum was to be paid to the Respondent, not to individual Consortium members.
- (8) The Appellant had not construed the Act and the relevant documents wrongly or had imposed an incorrect levy amount on the Respondent.

COMMENTARY

by Assoc. Prof. Dr. Sharifah Zubaidah Syed Abdul Kader
Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

Levy and Determination of Contract Sum

Introduction

This case involves the interpretation of section 34(2) of the Construction Industry Development Board Act 1994 ("the Act") authorizing the Lembaga Pembangunan Industri Pembinaan Malaysia ("the Appellant") to impose on every registered contractor a levy of a quarter percentum of the contract sum before any construction work with a contract sum of RM500,000 is commenced. The authority to determine the contract sum for the construction works is derived from regulation 6(1) of the Construction Industry (Collection of Levy Regulations 1996) ("the Regulations").

The Respondent who is a registered contractor under the Act entered into a consortium which was awarded a contract valued at \$1,482,254,000 plus €59,640,000. A formal construction agreement ("EPCC Contract") was executed between the Respondent and Petronas Malaysia Liquid Natural Gas Tiga Sdn Bhd ("the Owner"). The levy amount imposed by the Appellant on the Respondent was disputed by the Respondent who paid a lower amount based on their contention that a lower levy should be given as the contract sum included "offshore works" and "non construction works". The Appellant claimed for the outstanding sum of the levy from the Respondent at the High Court where it was ruled that the Appellant had misconstrued the Act and the levy imposed was incorrect under the Regulations. The Appellant's appeal to the Court of Appeal was unsuccessful and the matter was then brought to the Federal Court on the following questions of law:

- (1) Whether the Appellant had misconstrued the Act and the relevant documents and thus imposed an incorrect levy amount;
- (2) Whether the Appellant was entitled to interest even though the Act did not provide for interest, and if so, how the interest was to be calculated.

The Federal Court allowed the appeal and held that the contract in this case was a lump sum "turnkey" contract which was singular in purpose and for a fixed price and therefore the Appellant had not imposed an incorrect levy on the Respondent.

Lessons learnt from the case

- (a) The Courts are inclined to use the purposive and practical approaches in interpreting a statute relating to tax. In this regard, the context and scheme of the relevant Act as a whole and its purpose should be regarded.
- (b) The amount of levy calculated by the Appellant should be based on the contract sum. In a lump sum/turnkey contract, the contract sum is not divisible. Therefore the Respondent's contention that s 34 of the Act is restricted to construction works to the exclusion of non-construction works (eg. Procurement, supervision, ancillary services etc.) is wrong. Offshore and non-construction works in a lump sum/turnkey contract is not divisible and its charges form part of the contract sum.
- (c) "Noscitur a sociis" principle does not come into play in this case. The word 'includes' in s 2 of the Act is generally used to encompass words or phrases in a statute. This would mean that the word 'includes' such as in this case is a word of extension and not of definition.
- (d) Where the project owner does not participate in the consortium agreement signed among the contractors, the court is inclined to treat that the owner is not concerned with regard to the internal arrangement between the contractors.
- (e) The court will look at facts of the case in deciding whether a series of transactions should be treated as a single transaction for purposes of levy.
- (f) Extra-territoriality does not apply when work done offshore was eventually brought into Malaysia thus creating a sufficient tax presence. This is especially so when a commercial transaction is undertaken by a local contractor for a project in Malaysia. Payment of the contract sum to the contractor's account in Malaysia and not to individual consortium members strengthens this point.

Suggested best practices to be adopted

Contractors need to ascertain whether their contract amount is divisible or indivisible. In the case of a divisible contract amount, where the contract amount is payable according to stages of completion of work, levy under the Act can be avoided if it is below the threshold of RM500,000. In the case of an indivisible contract amount, levy would be imposed on the total contract sum.

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor

FEDERAL COURT, PUTRAJAYA

APPEAL NO: 02(f)-4-02 OF 2013 (P)

ARIFIN ZAKARIA CJ (Malaya), RICHARD MALANJUM CJ (Sabah and Sarawak),

SURIYADI HALIM OMAR FCJ,

AHMAD MAAROP FCJ, ZAINUN ALI FCJ

2 JULY 2015

[2016] 1 CIDB-CLR 41

The Appellants had purchased industrial building units in an industrial building project ("the Project"). They had signed their respective Sales and Purchase Agreements ("SPAs") with the Developer. Vacant possession of the building units was to be delivered within 24 months' from the date of approval of the Building Plan. The Developer appointed the Respondents as the project architects. On 20 December 1994, the local authority - Majlis Perbandaran Seberang Perai ("MPSP") approved the original layout plan, but imposed a condition that the Department of Environment's ("DOE's") requirements had to be complied with. The DOE made it mandatory for the Developer to build a toxic waste-water treatment plant known as the Central Effluent Industrial Treatment System ("CEITS") for treatment of hazardous and toxic waste. The DOE required the CEITS to be designed by a specialist licensed by the DOE and built according to certain specifications. The CEITS had also to be first functioning and operational to the DOE's satisfaction before the certificate of fitness for occupation ("CFO") for the project could be issued. However, there was a delay of 8 years in the completion of the industrial building due to an amendment to the original layout plan and delay in obtaining the CFO. On 27 February 2003, the Appellants filed an action for negligence *inter alia* against the Respondents for financial loss suffered due to late delivery of vacant possession of their industrial units. It was the Appellants' case against the Respondents that as the project architect, the latter had acted negligently in the preparation of the original layout plan resulting in its amendment, in the supervision of the works and in the certification of completed works, thereby causing a delay of 8 years for the completion of the industrial buildings. The High Court found the Respondents liable for the delay in the completion of the Project and apportioned liability at 50% against them. The Judge concluded that the Respondent owed a duty of care to the Appellants for proper inspection and/or supervision or omission of the work at the site and that there was breach of such duty that contributed to the delay in the issuance of the CFO. On appeal, the Court of Appeal reversed the High Court's decision and dismissed the claim largely on policy grounds. The Appellants appealed to the Federal Court.

Held, dismissing the appeal with costs:

- (1) In the absence of any contract, an architect rendering his professional service in a construction project can be made liable for negligence if the damage and injury suffered by the purchasers was caused by his act or omission within the scope of duty of care of the architect. Such a duty can be owed to third parties with whom the architect has no contract.
- (2) In the instant case, the construction of the CEITS was not the responsibility of the Respondents. Clause 14.02 and the Sixth Schedule of the SPAs specifically imposed on the Developer a duty to build the CEITS for treatment of hazardous and toxic waste according to specifications required by the DOE and the statutory provisions. The CEITS was designed by a specialist licensed by the DOE and subsequently constructed by the Developer. The Respondents need not assume responsibility for the delay involved in obtaining the approval for the CFO when the CEITS was not functioning in accordance with the requirements set out by the DOE, since this was not within the scope of the Respondents' professional work.
- (3) In the instant case, the requirements of reasonable foreseeability had not been satisfied. As the architect for the project, the layout plan was prepared and submitted in accordance with the instructions received by the Respondents from the Developer. The Respondents were mainly responsible for the design and safety of the industrial buildings and compliance of the relevant laws. In the circumstances it would not be reasonable to impose a duty on the Respondents to go into a detailed inquiry of the Developer's obligations. These were matters that were exclusively within the Developer's scope of duty.
- (4) Applying the standards of the reasonable man, the Respondents could not have foreseen any liability for consequential financial loss to the Appellants arising from their action in submitting the original layout plan and amending the same leading to the undue delay in completing the building and the issuance of the CFO. For this reason alone, the Appellants' claim against the Respondents for pure economic loss on the grounds of late delivery of vacant possession of their building units had to fail.
- (5) The Federal Court would answer questions 1–3 posed in the appeal in the following manner: (i) the architect in a construction project does not owe a duty of care to purchasers apart from his duty in contract or tort to the developer; (ii) the architect's liability in tort to purchasers does not arise on the basis that they fell within the range of persons who were reasonably foreseeable as likely to be injured by his lack of skill or diligence. In the instant case, the Appellants' claims did not fall within the scope of work of the Respondents. The Appellants also failed to establish proximity of relationship between the parties to give rise to a duty of care. In view of the terms of the SPAs between the Appellants and the Developer and the specific remedy provided therein, the Appellants' claims had to fail;

(iii) in the instant case, the purchasers' only remedy in law was to sue the developer.

- (6) The preferred test for determining a duty of care is the three-fold test. The requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. In establishing the sufficient proximity ingredient, the Court has to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. A more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.
- (7) In the instant appeal, the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly defined the rights and liabilities of parties and their relative bargaining positions. There could be no action against the architect if the remedy asked for was specifically provided for in the contract. Otherwise, it would have the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, a claim for negligence must be brought within the scope of duty of care. The recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Some measure of public policy must be considered though it should not be the sole determinant of liability. It is against public policy to impose on architects a duty to deliver vacant possession of buildings within the Developer's contractual period. This would only serve to compromise or even impede their professional duty in ensuring that the building laws are observed and that the structure of the building is safe.
- (8) It would not be fair, just and reasonable to impose on architects a duty of care for a responsibility that they had not assumed or one that was not within their professional scope of duty. The Appellants' claims did not fall within the scope of work of the Respondents. Applying the standards of the reasonable man, the Respondents could not have foreseen any liability for consequential financial loss to the Appellants when there was delay in the completion of the building and the issuance of the CFO. For this reason alone, the Appellants' claim against the Respondents for pure economic loss on grounds of late delivery of vacant possession of their building units had to fail.
- (9) Claims for pure economic loss in negligence cases must always be brought within the scope of duty of care. The court should exercise caution when

determining the existence of a duty of care and allowing claims for pure economic loss. In determining the existence of a duty of care in such cases, much would depend on the facts and circumstances of each case.

COMMENTARY

by *Tan Swee Im*

Principal at Tan Swee Im, PY Hoh & Tai

Architect's Liability for Negligence against Third Party

Introduction

The case provides guidance on whether Architects may be liable for negligence against third parties with whom they are not in a contractual relationship.

This project in question is a special industrial project intended to cater for industries that were likely to produce and discharge environmentally hazardous substances and which may pose environmental risks to living organisms as defined in the Environmental Quality Act 1974 ("EQA").

This case focuses on the practical problems in the law of negligence with regard to the general and consequential issues relating to the duty of care owed by the Architect to the purchasers against damages being pure economic loss, not linked to any personal injury or structural defects or damage to the property.

There were 50 appellants in this appeal, who were the purchasers of units of industrial buildings in the project. They had entered into Sale and Purchase agreements with the developer who subsequently became insolvent. Delivery of vacant possession of the units was delayed by some 8 years arising from two main events - amendment of the original layout plan and delay in obtaining the certificates of fitness for occupation.

The purchasers' case against the architect was that he had acted negligently in the preparation of the original layout plan resulting in its amendment, in the supervision of the works and in the certification of completed works. This led to a delay of 8 years for the completion of the units.

The claims were purely for economic loss, not linked to any personal injury or structural defects or damage to the units.

In the High Court, the architect was held liable but liability was apportioned at 50%. In the Court of Appeal, the High Court decision was reversed but largely on the grounds of policy. The matter then went on appeal to the Federal Court.

The Federal Court decided that an architect may be liable for negligence against a third party in tort for breach of duty of care. However the architect shall only be liable for negligence if the damage and injury suffered by the purchasers was caused by his act or omission within his scope of duty of care as the architect.

Therefore an architect may owe a duty of care in tort to third parties with whom he has no contract, as regards the sufficiency of his design and supervisory work. Such duty is owed to anyone whom it could reasonably have been expected might be injured as a result of his negligence.

However whether such duty of care arises will depend on a three fold test of foreseeability, proximity and policy, and this is reliant on the circumstances of each case. And where it involves pure economic loss then a more restricted approach is preferred.

In the present case, it was found on the facts that it would not be fair, just and reasonable to impose on architects a duty of care for a responsibility which they had not assumed or one which was not within their professional scope of duty. In the case of the amendment of the layout plan, the requirement of reasonable foreseeability had not been satisfied as although the original layout plan and subsequent amendments were made in the course of the architect's professional work, the layout plan had been prepared and submitted in accordance with the instructions received from the developer. The developer's assumption that they would be able to obtain the consent of all owners of the neighbouring lots but subsequently failed to do so, are matters exclusively within the developer's scope of duty. Thus applying the standards of the reasonable man, the architect could not have foreseen any liability for consequential financial loss to the purchasers when there was delay in the completion of the building and the issuance of the Certificate of Fitness for Occupation arising therefrom.

Lessons learnt from the case

Architects may be liable for negligence against third parties with whom they have no contract. Such liability extends to pure economic loss, not linked to any personal injury or structural defects or damage. Even in the absence of any contract, an architect rendering his professional service in a construction project can be made liable for negligence if

the damage and injury suffered by the purchasers were caused by his act or omission within the scope of duty of care of the architect. Despite the rights of the purchasers being largely governed by the contracts entered into with the developer, tortious liability arises from a wrongful act where the common law imposes a duty to take reasonable care.

Therefore liability in negligence extends beyond the contractual obligations.

Suggested best practices to be adopted

An architect may be liable for negligence against a third party with whom he has no contract, and therefore by extension, so can other consultants. It is a reminder and warning bell to consultants that they must discharge their duties and obligations properly or risk being liable to the party they are in contract with (usually the developer) and in addition, to anyone whom it could reasonably have been expected might be injured as a result of his negligence. Consultants are also well advised to be careful to determine with certainty as to what their scope of work is, and to keep within that scope. Further, consultants would be well advised to ensure adequate professional indemnity insurance cover for the services rendered.

Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia & Anor

COURT OF APPEAL, PUTRAJAYA
CIVIL APPEAL NO: A-01-16-01/2013
MOHD ZAWAWI SALLEH JCA, VERNON ONG LAM KIAT JCA, ABDUL RAHMAN
SEBLI JCA
2 JULY 2015

[2016] 1 CIDB-CLR 47

The Plaintiff operated a brick-producing factory. Pursuant to a supply of electricity contract (“the Contract”), the Second Defendant (“Tenaga”) supplied electricity to the Plaintiff. Before execution of the Contract, Tenaga required the Plaintiff to construct a power substation. The substation housed the Plaintiff’s switch gear and relay systems, which functioned as a protection system against internal fault. On or about 13 October 1997, the Jabatan Kerja Raya (“JKR”), under the control of the First Defendant, embarked on constructing a rest and recreation area (“the Project”) on the Ipoh–Kuala Lumpur highway (“the Project Site”). The First Defendant wrote three (3) letters to Tenaga requesting all electricity cables along the Project site be removed so that construction could be carried out at the Project Site without hindrance or interruption. There was no evidence that Tenaga proceeded to take the necessary steps to comply with the requests made by the First Defendant. In any event, the First Defendant failed to follow-up with Tenaga on the matter. On 5 August 1998, the First Defendant’s Contractor, whilst carrying out works on the Project Site, struck an 11kV underground cable belonging to Tenaga. The cable was damaged and interrupted the supply of electricity to the Plaintiff’s factory. The operations in the Plaintiff’s factory ceased and the Plaintiff’s equipment was damaged. The Plaintiff commenced an action against the First Defendant and Tenaga for damages for negligence and breach of contract. The High Court dismissed the Plaintiff’s claim for damages and the Plaintiff appealed to the Court of Appeal.

Held, allowing the appeal with costs:

- (1) On the uncontroverted facts, the Contractor was negligent in damaging the Cable. The Contractor ought reasonably to have foreseen that, if it damaged the Cable, the supply of electricity to the factory would likely to be interfered with and the Plaintiff, would likely suffer loss and damages, including injury to its property.
- (2) The Judicial Commissioner (“JC”) failed to consider whether the Defendants owed the Plaintiff a duty of care in the first place. Apart from the element of the foreseeability of damage, it was also necessary to consider: (i) the question of ‘proximity’ or ‘neighbourhood’ between the

parties, and (ii) the question of whether it was fair, just and reasonable to impose a duty of care in the circumstances. In the circumstances of the instant case, the damage was foreseeable. The First Defendant's witness ("DW1") confirmed the fact that the First Defendant had control over the supervision of the Project works. DW1 said that JKR was the sole party responsible for the supervision of the Project works. Further, JKR had requested Tenaga to relocate the Cable on the Project site so that the cable would not interfere with the Project works.

- (3) A non-delegable duty of care is an exception to the rule that an employer is not liable for the negligence of an independent contractor. In the instant case, the First Defendant owed a non-delegable duty of care to ensure that the Project works done would not injure third parties. In the discharge of that duty, the First Defendant was obliged to take all necessary precautions; in the context of the present case, to obtain sufficient information on the Project site and the potential hazards such as the existence of underground cables. Further, subsections 7(2) and (3) of the Government Proceedings Act 1956 allowed a claim to be brought against the First defendant for negligence.
- (4) It must have been within the contemplation of Tenaga that under the Contract, the Plaintiff was reliant on Tenaga for a consistent supply of electricity to its factory for the purposes of manufacturing bricks. Tenaga had been notified by JKR that the Project works would be carried out on the Project site. Three (3) letters had been sent by JKR to Tenaga asking them to remove and/ or to relocate the electrical cables and or poles in the vicinity of the Project site. There was no evidence to indicate whether having been notified of the same, Tenaga took any action to comply with JKR's requests. It was thus reasonably foreseeable that the Project works could cause damage to the Cables belonging to Tenaga and that any corresponding damage flowing therefrom was also reasonably foreseeable.
- (5) Due to the nature of the Contract and bearing in mind the dangerous nature of electricity, great care must be taken when dealing with electricity and a higher standard of care is expected of those controlling electricity.
- (6) Apart from the field of law, the Court itself had no other expertise. Thus in cases involving technical, scientific or medical issues which required specialized knowledge, the Court frequently had to rely on the evidence of experts. This was a case in which the Court had no expertise and thus the evidence of an expert was called for to assist the Court in arriving at a correct decision. The key issues in the instant case were highly technical and required experts with proper qualifications, in-depth and specialised knowledge and experience in the field of electrical power installations, power equipment reliability condition assessment, electrical system disturbance/faulty investigation, system protection coordination analysis

and investigation and analysis of power equipment breakdown and preventive measures.

- (7) It is the primary duty of an expert to assist the Court in arriving at the right decision; even if he compromises the case of the party who called him and who is paying for his services. This duty overrides any obligation to the party from whom the expert has received instructions or by whom he is paid. The evidence of an expert should not only be independent but should also be seen to be independent. The opinions of experts are relevant facts only insofar as they can assist the Court in forming an opinion upon the issues in the case. As an independent aid to the court, it is essential that an expert witness possesses and retains a standard of absolute personal integrity.
- (8) Before the court can accept the testimony of an expert, the competency of the expert must be established. When expert opinions are in conflict with one another, the court is obliged to assess the evidence and accept if necessary the most reliable parts in forming its decision. In that process the court may put relevant questions to the expert for the purposes of clarification or eliciting further information.
- (9) In the instant case, the trial Judge had referred to the evidence of experts PW8 for the Plaintiff and DW5 and DW7 for the Defendants. The evidence of PW4 - an expert for the Plaintiff - was not referred to by the trial Judge. Further, there was nothing in the Grounds of Judgment to indicate that the JC had preferred the evidence of the Defendant's experts and if so, the reasons therefor. The JC had erred in failing to conduct any assessment of the conflicting evidence of the experts.
- (10) The Court of Appeal would not agree with Tenaga's contention that the Plaintiff's evidence was inconsistent with its (Plaintiff's) pleaded case that the incident caused a power shortage and/or power surge and/or massive voltage surge at the Plaintiff's premises. The Plaintiffs' experts' view that the severe voltage transient was identified as the cause of the surge actually supported the Plaintiff's case that the incident caused a power surge to occur at the Plaintiff's premises. Had the JC evaluated the competing views, the JC would have found there to be reason to discount the opinion of DW5 for the Defendants. DW5 was not an independent expert as he had received a monetary grant from Tenaga and had been appointed a consultant for the TNB Research Team. Further, DW7 for the Defendants was not an independent or reliable witness and DW7's opinion was not uninfluenced by the exigencies of litigation. DW7's evidence ought to have been discounted. On the other hand the Plaintiff's experts' evidence did not shift under cross-examination, nor were their views discredited. The views of the Plaintiff's experts ought to have been accepted as they were wholly plausible having regard to all the circumstances.

- (11) Apart from the Tenaga's failure to act on the 3 letters from the First Defendant for the removal of the cables in the Project Site, it was evident that Tenaga had also failed to maintain a visible cable marker. The only marker according to DW2 was a slab marker that was underground and it was to protect the cable. If piling work was carried out (and not digging works), the workers would not know that there was a slab marker in that area. As such, Tenaga ought to have informed the JKR of the position of the cable without any specific request.
- (12) On a balance of probabilities, the incident led to a surge and not an under-voltage as contended by Tenaga. It (Tenaga) had also failed to put in place a protection scheme to protect it's users against a surge. Had there been a surge protection scheme put in place, it was probable that damage would not have been caused to the Plaintiff's equipment.
- (13) The Plaintiff in the instant case had in place a protective system to protect against under-voltage, which was a mandatory requirement. As such, the question of whether the Plaintiff was contributorily negligent did not arise.

COMMENTARY

by *Rodney Martin*
Managing Director
Charlton Martin Consultants Sdn Bhd

Duty of Care Associated with Relocation of Utility Supplies

Introduction

The Plaintiff, Batu Kemas Industri Sdn Bhd ("Batu Kemas") operated a factory in Tanjong Malim producing bricks. The factory was served by an 11kV electricity supply provided by the Second Defendant, Tenaga Nasional Berhad ("TNB"). All was well until one day a contractor engaged by Jabatan Kerja Raya ("JKR"), under the control of the First Defendant, Kerajaan Malaysia, to construct a rest and recreation area along the Ipoh to Kuala Lumpur highway ("the Project"), struck the 11kV underground cable belonging to TNB causing damage to the cable.

As a result of the damage to the cable, the electricity supply to the Batu Kemas factory was interrupted causing operations in the factory to cease and equipment to be damaged as a result of a surge consequent upon the damage caused to the cable.

Batu Kemas commenced an action in the High Court against Kerajaan Malaysia and TNB for damages for negligence and breach of contract which was dismissed. The High Court dismissed the action on three main grounds:

- (1) Batu Kemas provided no evidence that it had a protection system in place to protect its machines;
- (2) There was no duty of care and breach of duty by TNB;
- (3) Even if such a breach of duty did exist, Batu Kemas's contributory negligence was absolute.

Batu Kemas then appealed this decision in the Court of Appeal. There was no question on the facts that the contractor who damaged the cable was negligent in doing so. The contractor ought to have foreseen that if it damaged the cable, the likely interruption of electricity supply to the factory would result in Batu Kemas likely suffering loss and damage.

The Court of Appeal examined whether the Defendants owed the Plaintiff a duty of care in the first place. Apart from need for foreseeability, the question of proximity arose as well as whether it was fair and reasonable to impose a duty of care in the circumstances.

The Court of Appeal decided the damage was indeed foreseeable. Not only did JKR have sole control over the supervision of the Project works, they had actually requested that TNB relocate the cable on the Project site to avoid interfering with the Project works. Although three letters had been sent by JKR to TNB requesting that they remove or relocate the cable, there was no evidence of any action in this regard having been taken by TNB. It was thus reasonably foreseeable that the Project works could cause damage to the cable belonging to TNB and that any corresponding damage flowing therefrom such as that suffered by TNB's customer, Batu Kemas, was also reasonably foreseeable.

Due to the dangerous nature of electricity, great care must be taken when dealing with electricity and a higher standard of care is expected of those controlling it such as TNB.

As for the other Defendant, Kerajaan Malaysia, there is a general rule that an employer is not liable for the negligence of an independent contractor. However there are often exceptions to any rule and one such exception applied here. A non-delegable duty of care is an exception to the rule that the employer is not liable for the negligence of an independent contractor. In this case Kerajaan Malaysia had to discharge

this duty by taking all necessary precautions such as obtaining sufficient information on the Project site and the potential hazards such as the existence of underground cables or other utility services.

Apart from TNB's failure to act on the 3 letters from JKR requesting the relocation or removal of the cables from the Project site, it was evident that TNB had also failed to maintain a visible cable marker. TNB had an obligation to inform JKR of the position of the cable without any specific request.

Batu Kemas had in place a protection system for its equipment to protect against under-voltage, which was a mandatory requirement. As such the question of whether Batu Kemas' claim failed due to contributory negligence did not arise.

Lessons learnt from the case

The execution of construction work brings with it a high degree of risk due to the nature of the enterprise. This risk is more pronounced when work is being executed in the ground where utility services or artificial obstructions may be present. Great care must be taken by those responsible for maintaining utility supplies as well as those with the responsibility for supervising the execution of construction work upon any site, to ensure systems are in place to minimise damage to existing utility services and consequent loss arising therefrom. This judgement demonstrates the special non-delegable duty of care which is owed by those in control of the supply of utility services and those supervising any construction activity which may cause damage to the said utility services if not adequately supervised.

Suggested best practices to be adopted

Those responsible for arranging any kind of construction work to be undertaken on their behalf relating to development work or any other purpose must be mindful of the fact that existing utility services may well need to be relocated to accommodate such construction work. A duty of care arises to ensure such relocation is undertaken without loss or damage to the utilities or persons or property. There is also an obligation on the part of the utility providers to ensure adequate identification of underground utility services is provided to minimise the possibility of loss or damage arising. From the outset of any construction work, priority must be put on activities associated with undertaking relocation work, with adequate resources being deployed to ensure the duty of care is met.

Brunsfeld Project Management Sdn Bhd v Ingeniur Bersekutu Consulting Engineers

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: W-02(C)(A)-1786-10/2014

LIM YEE LAN JCA, VARGHESE GEORGE VARUGHESE JCA, IDRUS HARUN JCA
10 AUGUST 2015

[2016] 1 CIDB-CLR 53

Sometime in 2009, the Appellant requested the Respondent to provide civil and structural engineering design and consultancy services (“the services agreement”) for a commercial development construction project (“the project”). The services agreement was oral in nature. There was no formal written agreement. No appointment letter was issued to the Respondent. Subsequently, the Respondent’s service was terminated. The Respondent disputed the termination. The dispute was referred to arbitration. The Arbitrator *inter alia*, found: (i) that the termination of the Respondent’s services was not mutual and not justified; (ii) the professional services provided by the Respondent were adequate within the professional standard of a civil and structural consulting engineer and/or fit for their intended purpose; and (iii) that the reasonable fee percentage for the Respondent’s services was 1.25% of the total cost of construction. The Appellant was dissatisfied and challenged the award to set it aside or vary it pursuant to ss 37(1)(b) and 42(1) of the Arbitration Act 2005 (“the Act”). The High Court dismissed the Appellant’s challenge and it appealed to the Court of Appeal. Although numerous grounds were advanced, the Appellant’s written and oral submissions turned on and was restricted to only that part of the award that had fixed the Respondent’s fees entitlement at 1.25 % of the total project costs. Thus, the question before the Court of Appeal was essentially whether the award of 1.25% of the total construction costs in favour of the Respondent as its professional fee was correct or whether the Arbitrator ought to have held that the Respondent was only entitled to claim from the Appellant by applying the *quantum meruit* principle.

Held, dismissing the appeal with costs:

- (1) To succeed under sub-paragraph (1)(b)(ii) of s 37 of the Act, the Appellant had to show that the award was in conflict with the public policy of Malaysia. But while the law recognizes the power of the Court to set aside an award contrary to the public policy of Malaysia, it was difficult to fathom the meaning of public policy in the sense the term is used in the section and in the context of arbitration. It was significant to mention that s 37(2) of the Act, provides for two circumstances under which an award would be in conflict with the public policy of Malaysia. However, those circumstances were not exhaustive as the introductory words to

s 37(2) of the Act are formulated in such a way that these limitations do not affect the generality of sub-paragraph (1)(b)(ii) of s 37. What can be properly characterized as public policy under sub-paragraph (1)(b)(ii) of s 37 of the Act is thus wide and open to interpretation by the Court. In the instant appeal, it was plain that the Appellant was relying on sub-paragraphs (2)(b)(i) and (ii) of s 37 when it alleged that a breach of the rules of natural justice had occurred during the arbitral proceedings and / or in connection with the making of the award.

- (2) The provisions of s 42(1) of the Act when properly construed suggest that only a question of law may be referred to the High Court. No questions of fact are allowed. This limitation is in consonance with a long established legal principle in arbitration that the arbitrators are the masters of the facts thus recognising that their findings of fact are conclusive. The law as formulated in s 42(1) of the Act has also imposed a further restriction. The question of law which may be referred to the High Court should arise out of or be within the narrow confine of an award itself. It thus precludes a question of law which arises out of the arbitration.
- (3) While only a question of law is allowed to be referred under the Act, the addition of sub-section (1A) by the Arbitration (Amendment) Act 2011 (Act A1395) to s 42 has set a further limit within which the question of law may be referred. Sub-section (1A) to s 42 of the Act, construed in the context of sub-section (1), has made it mandatory for the High Court to dismiss a reference of the question of law if such question does not substantially affect the rights of one or more of the parties. Thus, it is abundantly clear that for a reference under s 42(1) to succeed, the party referring the question of law must satisfy the Court that the determination of such question will substantially affect his rights.
- (4) The very purpose parties conclude an arbitration agreement is because they do not wish to litigate in the Court. This purpose, can produce the desired result only if the parties also agree to be bound by the decision of the Arbitrator and refrain from subsequently approaching the Court to obtain hair-splitting decisions. The legislative scheme of the Act on its part ensures that this purpose is possible of fulfilment and obviates the necessity of approaching the Court when the exercise of judicial powers of the Court is strictly monitored and circumscribed under s 8 thereof which almost prohibits its intervention in matters governed by the Act except where so provided therein. The Arbitrators being the masters of the fact, it is irrelevant whether the Court considers those findings of fact to be right or wrong. The Court too is not seised of jurisdiction to remit or set aside the award of an arbitrator even if the Arbitrator has committed an error of law if such error does not vitiate the whole award.
- (5) In the instant appeal, the Judge had clearly stated that the application was based on two broad grounds under ss 42(1) and 37(1)(b)(ii) of the Act.

At no time and nowhere in the grounds of judgment did the Judge say that the Appellant's claim was premised solely on s 37(1)(b)(ii) of the Act. Such argument of the Appellant was wholly devoid of merit and must be rejected.

- (6) The determination of fee percentage of 1.25% of the total construction costs as being reasonable was without any doubt a finding of fact made by the Arbitrator after he had carefully considered the evidence adduced. The figure was not one that was plucked from the air. It was in fact arrived at after due consideration of what would be a reasonable percentage of fee. It cannot be denied that the arbitrator in his award had found that there was no agreement reached between the parties with regard to the percentage of fee.
- (7) The fee percentage awarded by the Arbitrator was not arbitrary and was not without any basis. The Arbitrator had observed that the four fee proposals had fee quantum and stages of payment of fee different from the Scale of Fees. The Respondent's fee proposal was a fixed percentage based on the cost of construction. The Arbitrator, as clearly demonstrated in the award, found that the Scale of Fees was not normally adhered to, it merely provided guidelines and was not mandatory. He added that consulting engineer would normally submit a fee, scope of services and schedule of fee payment proposal for the client's consideration. It would then be followed by a process of negotiation and several factors would affect such negotiation. Having found that the Respondent's fee proposals did not run foul of the law and the Respondent was not bound to follow the Scale of Fees, the Arbitrator decided that the Respondent's proposed fee percentages were within the range of fee charged by most practising consulting engineers.
- (8) There was a difference between not being bound by the Scale of Fees and using the various stages of work for the computation of fees for the Respondent's services. It was abundantly clear that the Arbitrator did not contradict his own findings. Having found that the Appellant was liable to pay the Respondent for its services, the Arbitrator had correctly exercised his discretion in assessing the fees payable to the Respondent in the manner he did. Accordingly, the Judge was correct when Her Ladyship held that there was no error of law in the Arbitrator using Part A and Part B paragraph 3 of the Scale of Fees to determine the stages of service and stages of payment of fee. Even if there was, on the authority of the Court of Appeal's decision in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd*, the error if any, did not vitiate the whole award. Accordingly the Court was not seised of jurisdiction to set aside or remit the award of the Arbitrator.
- (9) The questions raised by the Appellant were essentially questions of fact. The Judge was correct in not interfering with the Arbitrator's award

based on unqualified findings of fact. To do otherwise would go to the root of the settled arbitral principle that the Arbitrators are the master of the facts. The Judge was also correct in her finding that the Arbitrator did not commit any error of law when he determined that the appropriate reasonable fee percentage would be 1.25% of the total construction costs. The Arbitrator in our view had full discretion and he had exercised that discretion correctly.

- (10) The Appellant had submitted a bundle of drawings which was for all intents and purposes treating the reference on questions of law as an appeal to the High Court. The Appellant was in effect asking the High Court to have another look at the documents and second-guess the Arbitrator's decision. This was clearly a reference of a question of fact which fell outside the scope of s 42 of the Act and which the High Court was undoubtedly incompetent to do so. The Court therefore had to resist substituting its views for that of the arbitral tribunal's which the parties had already freely chosen to determine their dispute in the first place.
- (11) There was no evidence in the instant application that the questions referred to the High Court had fulfilled the mandatory statutory requirement of subsection (1A) to s 42 of the Act. Neither did the written submission of counsel for the Appellant deal with the mandatory statutory requirement. The questions, if they were indeed questions of law, merely affected the Appellant's right in not being able to pay a measly sum for the professional services rendered by the Respondent. It certainly was not a question of law which the Court was persuaded or convinced to hold as one that had substantially, significantly or considerably affected the Appellant's right.
- (12) The questions referred to the Court for determination which the Appellant perceived as questions of law were indeed the Appellant's empty rhetoric which was intended to camouflage its real intention when it chose to come to the Court which was to have a second bite of the cherry so that the matter could be relitigated before the Court. To allow the Appellant to do so would be contrary to the law which was firmly established through several judicial pronouncements by the Court. There was no room for any doubt that the Arbitrator did not commit any error in applying the correct formula to fix the rate of fee in his award and such award was not perverse. The question of applying the *quantum meruit* principle therefore did not arise. Under the circumstances, no order ought to be given, pursuant to ss 37 and 42 of the Act for the award to be set aside or remitted back to the arbitrator for re-arbitration by applying the *quantum meruit* principle.

COMMENTARY

by *Ir. Harbans Singh K.S*
Arbitrator/Adjudicator
HSKS Dispute Resolution Chambers

Arbitration

Introduction

This is a Court of Appeal case which involves an appeal relating to a High Court's judgment dismissing the Appellant's (a project development and management company) challenge to set aside an arbitration award in favour of the Respondent (a Consultancy firm providing Civil and Structural Consultancy Services). The challenge in the High Court at first instance was premised on ss 37(1)(b) and 42(1) of the Arbitration Act 2005 (hereinafter referred to as 'the Act'). In dismissing the challenge, the High Court judge found, *inter alia*, that:

- (1) there was no error of law shown which necessitated the Court to set aside the award;
- (2) there was no conflict of public policy shown; and
- (3) the arbitrator, having held that there was no agreement on the fee percentage and the Scale of Fees did not apply, did not commit any error of law when he held that the fee percentage would be 1.25 percent of the total construction contract.

In pursuing its appeal in the Court of Appeal, the Appellant specified 24 grounds of appeal in the memorandum of appeal. However, the Appellant's written and oral submissions were confined/restricted to only that part of the award that had fixed the Respondent's fees entitlement at 1.25 percent of the total construction cost.

The appellant also submitted, *inter alia*, that the questions of law sought for determination in the High Court fell within section 42(1) of the Act but the High Court Judge had committed errors of law by claiming that the appellant's application was solely premised on section 37(1) of the Act when in fact the appellant was seeking a determination on questions of law pursuant to section 42(1) of the Act.

The Respondent's immediate rejoinder to this contention was that the Appellant was treating the questions raised in the application as a question of law while the matter was actually and undoubtedly a reference in the nature of a question of fact.

Thus, the core question/issue for the Court of Appeal's determination was essentially whether the award of 1.25 percent of the total construction costs in favour of the Respondent as its Professional Fees was correct, or whether the Arbitrator ought to have held that the Respondent was only entitled to claim from the Appellant by applying the *quantum meruit* principle.

Issues arising from the case

In dismissing the appeal with costs, the Court of Appeal not only addressed the core question/issue that was put to it for determination but also incidental issues/matters that led to its said decision. The Court of Appeal's said judgment is very comprehensive and clearly sets out answers and/or precedents that have to be adhered to in cases involving challenges to an arbitration award within the ambit of the law, in particular, the Act. Of particular interest are the following principal pronouncements of the Court Appeal.

(a) Challenges premised on conflict of award with public policy pursuant to section 37(1)(b)(ii) of the Act.

The Court of Appeal whilst recognizing the power of the court to set aside an award contrary to the *public policy* of Malaysia, held that it was difficult to fathom the meaning of *public policy* in the sense the term was used in the section and in the context of arbitration. The court went on to mention that although s 37(2) of the Act provides for two circumstances under which an award could be in conflict with the *public policy* of Malaysia, however those circumstances were not exhaustive as the introductory words to s 37(2) are formulated in such a way that these limitations do not affect the generality of s 37(1)(b)(ii). Accordingly, what can be properly characterized as *public policy* in this said latter provision is thus wide and open to interpretation by the courts. In the instant appeal, the court was of the view that the Appellant was relying on s 37(2)(b)(i) & (ii) of the Act when it alleged that a breach of natural justice had occurred during the arbitral proceedings and/or in connection with the ruling of the award.

(b) Effect/construction of section 42(1) of the Act.

The proper construction of s 42(1) restricted only a question of law and not questions of fact to be referred to the High Court since the law recognized that arbitrators are masters of the facts and therefore their findings in relation thereto are conclusive. Furthermore, the question of law that is permitted to be referred to the High Court should arise out of, or be within the narrow confines of the award itself and not one which arises out of the arbitration.

(c) Effect of addition of subsection (1A) to section 42 of the Act by the Arbitration (Amendment) Act 2011.

The Court of Appeal held that subsection (1A) to s 42 of the Arbitration Act 2005 construed in the context of s 42(1) had made it mandatory for the High Court to dismiss a reference of the question of law if such a question did not substantially affect the rights of one or more parties.

(d) Purpose of Arbitration

The legislative scheme of the Act sets out and ensures that the very purpose of arbitration is met by upholding the parties' agreement to be bound by the decision of the arbitrator and restricting their rights to appeal on the said decision, save for narrow grounds as stipulated in the Act. The whole legislative scheme is 'arbitration friendly' and unless very serious breaches of the law e.g. errors vitiating the whole award, etc. occur, the courts are not permitted to interfere. The courts will also not interfere on questions of facts since the arbitrator is recognized as a master of facts. Neither will the courts interfere on questions which are referred to them being camouflaged as questions of law where they are in essence questions of fact so that the Appellant can re-litigate the matter and have a second bite at the cherry.

Lessons learnt from the case

There are a number of lessons that can be learnt from this case which deals with some frequently occurring concerns pertaining to dispute resolution procedures, in particular arbitration, plaguing the construction/engineering industry.

It should be appreciated that arbitration is a dispute resolution process that has evolved over the years to help expedite the determination of disputes outside the corridors of municipal courts. The said process arises out of an agreement by the parties to submit existing, or future disputes for determination by a private tribunal instead of a court of law. Such an agreement can be reached either before the crystallization of the dispute, or thereafter. In agreeing to adopt the said process, the parties are bound to accept the determination made by the arbitral tribunal who must act fairly and impartially. This is given legislative effect by the Arbitration Act 2005 in the Malaysian context; which Act also permits the enforcement of the arbitral tribunal's decision and restricts the intervention of the courts to certain distinct situations where public interests are at stake. The Court of Appeal in the instant case unequivocally and succinctly affirmed the said position in the following words:

"The very purpose parties conclude an arbitration agreement is because they do not wish to litigate in the Court. This ... can produce the desired result only if the parties also agree to be bound by the decision of the Arbitrator and refrain from subsequently approaching the Court to obtain hair-splitting decisions. The legislative scheme of the Act on its part ensures that this purpose is possible of fulfillment and obviates the necessity of approaching the Court when the exercise of judicial powers of the Court is strictly monitored and circumscribed under s 8 thereof which almost prohibits its intervention in matters governed by the Act except where so provided therein. The Arbitrators being masters of fact, it is irrelevant whether the Court considers those findings of fact to be right or wrong. The Court too is not seised of jurisdiction to remit or set aside the award of an Arbitrator even if the Arbitrator has committed an error of law if such error does not vitiate the whole award".

In essence therefore, for arbitration to work in practice and to achieve its intended purpose, it needs the support of not only the parties but also the legislature and the courts. The judgment in the instant case elucidates and reiterates in no uncertain terms the roles played by these bodies and also spells out the ambit of each. The judgment also empathetically underlines the contemporary approach that the courts will take for similar cases in that the courts will construe and give effect to the legislative intent as expressed in the Act itself so that the arbitration process is supported and given effect to by restricting spurious challenges and only upholding very serious transgressions of the law that go to the root of the arbitral tribunal's award. In making its said decision, the Court of Appeal has sent a very strong message especially to parties against who an award is made not to be dilatory and to refrain from attempting to have a second bite at the cherry by attempting to re-litigate matters that have been validly and properly determined by the arbitral tribunal.

Suggested best practices to be adopted

Parties to an engineering/construction contract must be firstly well versed on the options that are available to them to deal with disputes arising under their contract. For payment disputes they can statutorily adjudicate their disputes under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). For other disputes, they have the possibility of resorting to mediation/conciliation, contractual adjudication, litigation, or even arbitration. Should arbitration be selected to be the contractually preferred mode of dispute resolution, then the parties are statutorily required to give effect to it and be bound by the stipulations of the Arbitration Act 2005 as interpreted by the courts.

A good practice to adopt should arbitration be preferred, is to include a properly drafted arbitration clause in the contract; standard samples as recommended by KLRCA should serve as a useful template. Having agreed to arbitration, then the parties should endeavour to give full effect to it in order to ensure that the purpose of the arbitration process is achieved, in that:

- (i) Reference of disputes to arbitration is honoured and not revisited/challenged unnecessarily;
- (ii) The arbitral tribunal is appointed timeously;
- (iii) The arbitration proceedings are undertaken speedily and without incurring unnecessary costs;
- (iv) The arbitrator's award is duly honoured and not unduly challenged on spurious grounds either with the purpose of re-litigating the matter that had been decided or, as a dilatory tactic.

However, should valid grounds exist that satisfy section 37 and/or section 42 of the Arbitration Act 2005, then the party against who an award has been made can initiate the necessary recourse as permitted under the Act against the award.

There is a strong view currently held and advocated by critics in the legal fraternity and the construction industry that arbitration does not work in this country as it is slow, expensive and fraught with too many legal and dilatory impediments. This has come about by parties and the counsels as well as arbitrators turning the entire arbitration process into a court-like procedure, save for the absence of effective sanctions to expedite the process, reduce costs and adequately deal with dilatory/recalcitrant parties. It is therefore timely for the current "*conventional arbitration*" process to be replaced with a "*limited time, fast-track*" process as advocated by contemporary practice internationally and as encouraged by KLRCA (i.e. 120 Day, or 160 Day *Fast Track Arbitration*). This will certainly help restore arbitration to its initial objectives and thereby save its reputation as well as ensure that parties receive "*fine justice*" that was intended to be meted out in the first place relatively faster and cheaper as compared to the other dispute resolution methods used in this country (including the courts).

LYS Capital Holdings Sdn Bhd v Looi Ming Sim (t/a Alam Venture Enterprise)

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: A-02(NCVC)(W)-481-03/2014

ABDUL AZIZ AB RAHIM JCA, MAH WENG KWAI JCA AND DAVID WONG JCA
19 JANUARY 2015

[2016] 1 CIDB-CLR 62

The Appellant awarded a contract to the Respondent to construct several units of single-storey houses. The lump sum contract price was RM2,866,000 and the period for completion six months from the date of the notice to commence works. The Respondent commenced construction works and was paid the sum of RM91,347 in two progress payments with the understanding that the balance of payments due to the Respondent would be set-off against payments made by the Appellant to the supplier of building materials to the Respondent. The Appellant was dissatisfied with the delay in the progress of the construction works by the Respondent and proceeded to terminate the contract vide a notice of termination issued on 28 January 2011. The Respondent denied that there was any delay in the performance of the contract and averred that the termination of the contract by the Appellant was unlawful. The Respondent claimed the sum of RM306,544.84 made up of the balance of payments due and the cost of materials left on site. The Appellant filed a counterclaim alleging that part of the works completed by the Respondent was defective and the Appellant had to appoint another contractor - one Meng Seng Builders ("MSB") - to carry out remedial works. The sum claimed by the Appellant for the defective works done was RM70,686.36. The Appellant also complained that the Respondent had failed to complete the scope of works within time and the Appellant was thus compelled to appoint MSB to complete the Respondent's uncompleted works. The sum claimed by the Appellant for the construction of uncompleted works was RM974,400. The High Court held that of the total sum of RM286,600 owing being the value of works completed by the Respondent, the sum of RM91,347.50 had been paid directly to the Respondent and the sum of RM180,922.50 had been paid to the supplier thereby leaving a balance sum of RM14,330 only. The High Court thus allowed the Respondent's claim in part only, ie for the sum of RM14,330 being the balance amount owing by the Appellant. Although the High Court found that there were defective works and uncompleted works outstanding and that the Appellant had a valid cause of action, the Court dismissed the Appellant's counterclaim in its entirety solely on the ground that the Appellant had failed to prove that it had in fact paid the cost for remedial works and for completing the uncompleted works to MSB. The Appellant appealed against part of the said decision namely, against the order dismissing the counterclaim but not against the order to pay the sum of RM14,330 to the Respondent.

Held, allowing the appeal by the Appellant on the counterclaim with costs:

- (1) The High Court erred in finding that there was no evidence to show that MSB had been paid for its work for the following reasons: (a) it was not disputed by the Respondent that it had not completed the works as alleged by the Appellant; (b) it was not the pleaded case of the Respondent that the defective and uncompleted works were not attended to and completed by MSB; and (c) there was ample evidence adduced by the Appellant to prove that the defective works were remedied by MSB.
- (2) It was important to note that exh P3 - the quantity surveyor's report - an agreed document tendered by the Respondent clearly showed that the Respondent had accepted the fact that it would cost the Appellant an additional sum of RM974,400 to carry out the uncompleted works. The Respondent could not now be seen to resile from this fact and concession. Once a document is agreed upon without qualification, the authenticity of the document and the contents stated therein are no longer in dispute. The Court of Appeal was satisfied on a balance of probabilities that the defective and uncompleted works were in fact carried out by MSB, and was also equally satisfied with the reasonable conclusion that the Appellant must have paid MSB the respective sums, although there was an absence of invoices, payment vouchers and the like to show that MSB had been paid.
- (3) When considering the evidence of SD1, SD2 and SD3 read together with the documentary evidence (the quantity surveyor's report (exh P3) the award of contract for the defective works (exh D10A and D10B) and the award of the contract for the uncompleted works (exh D11) and taken as a whole, there was sufficient evidence adduced by the Appellant to prove the counterclaim.
- (4) Unless there was an allegation of conspiracy to defraud the Respondent hatched between the Appellant and MSB - which most certainly was not the Respondent's pleaded case - it was impossible to see how MSB could or would have completed the project without having been paid. Commercial realty dictated that no contractor in his right mind would carry out any construction works at great cost without payment. In the instant case, counsel for the Respondent had conceded that the works had been completed before the conclusion of the trial before the High Court.
- (5) In the instant case, there was no issue of the Appellant contracting with a non-legal entity. In any event, the issue of "legal entity" was not pleaded by the Respondent and neither was it an agreed issue to be tried in the High Court. It was a non-issue for the Respondent and it was thus incorrect for the High Court to rely on it as a ground to hold that the Appellant had not proved its case on a balance of probabilities.

COMMENTARY

by *Tan Swee Im*

Principal at Tan Swee Im, PY Hoh & Tai

Liability for Loss

Introduction

The case provides guidance on when liability for loss arises.

The Appellant/developer had appointed the Respondent/contractor to construct 53 units of single storey terrace houses. There were disputes leading to the termination of the Respondent/contractor. The Respondent/contractor claimed for wrongful termination and balance of payments due and the cost of materials left on site. The Appellant/developer counterclaimed for cost of rectifying defective work and completion of outstanding work by a replacement contractor.

The High Court had held that the termination by the Appellant/developer was lawful, but dismissed the Appellant/developer's counterclaim on the ground that the Appellant/ developer had failed to prove that it had in fact paid the cost for remedial works and for completing the uncompleted works. This is despite the Court having accepted that there were defective works and uncompleted works outstanding.

The Court of Appeal allowed the Appellant/developer's appeal against the decision of the High Court and held that:

- (1) there was ample evidence adduced by the Appellant/ developer to prove that the defective works had been carried out by the replacement contractor;
- (2) there was equally ample evidence adduced by the Appellant/ developer to prove that the uncompleted works had been carried out and completed;
- (3) being satisfied on a balance of probabilities that the defective and uncompleted works were in fact carried out, they were equally satisfied with the reasonable conclusion that the Appellant/ developer must have paid for the same, although there was an absence of invoices, payment vouchers and the like to show payment had been made;
- (4) once the replacement contractor had carried out the works, it was incumbent on the Appellant/developer to pay. The liability of the

Appellant/developer to pay would arise immediately upon the replacement contractor completing its work;

- (5) as the Respondent/contractor was in breach of the contract it behoved the Respondent/contractor to reimburse the Appellant/developer the moment the Appellant/developer's liability arose, that is, when the replacement contractor had completed its work and not only after Appellant/developer had paid them;
- (6) where the liability of the Appellant/developer to pay the replacement contractor had not been discharged yet but it was clear that it would be, then the Appellant/developer could sue the Respondent/contractor for recovery. It was not open to the Respondent/contractor to argue that the Appellant/developer could not sue to recover the loss in the absence of any evidence that the Appellant/developer had actually paid the replacement contractor to discharge its obligation;
- (7) in the final analysis, the finding of legal liability against the Respondent/contractor was enough to ground a claim for damages.

Lessons learnt from the case

There need not be proof of actual payment made in order to ground a claim for damages; the finding of legal liability having arisen is sufficient.

It is imperative to establish legal liability in the first place. Therefore the importance of sufficient evidence in order to establish liability on the balance of probabilities is very important.

Having established liability, there may be no need to prove actual payment made, only that payment will have to be made. However, as most of the dispute centred on whether payment had indeed been made and whether there was evidence to prove payment, it would be prudent to have made payment with proof of the same. If, however, payment has not been made, then there must be evidence that payment has to be made and will be made.

Suggested best practices to be adopted

'Documents, document, documents', is an often repeated phrase which arises in every dispute in the construction industry. Despite that, there remains a reluctance on parties to maintain proper records of all aspects of the project leading to repeated problems of insufficient evidence when disputes arise. Developers, consultants and contractors are again urged to maintain accurate records of compliance with contract provisions,

instructions, work carried out, cost incurred, payments made, real time progress of the project, etc.

Dispute resolution centres on the evidence that is put before the court or tribunal, and not necessarily on what actually took place. Without the evidence, there is no proof of what actually took place.

The court or tribunal will consider the evidence and apply the facts as gleaned from the evidence, against the contract provisions and the law. It is not a question of what a party considers to be fair, it is what the contract and law allows on the facts as proven.

There is already in place on most projects and in most organisations, a suite of required documents, from consultant's instructions to site diaries to payment vouchers. However these documents are often badly kept, or worded so generally as to lack the details required to establish a particular fact.

For example the recording in the site diary of a delay encountered without indication of the reason for the delay, does not evidence who is liable for that delay. Similarly such recording of delay encountered without the context of what other activities were ongoing at that time and what the impact of that delay is on the progress of the works to completion.

To that end, all parties should make it a priority to focus on the quality and adequacy of documents produced in the course of any project.

Taki Engineering Sdn Bhd v Dynasty Streams Sdn Bhd

COURT OF APPEAL, PUTRAJAYA
CIVIL APPELLATE NO: A-02-2227-12/2014
MOHD HISHAMUDIN BIN MOHD YUNUS JCA, DAVID WONG DAK WAH JCA,
VERNON ONG LAM KIAT JCA
13 OCTOBER 2015

[2016] 1 CIDB-CLR 67

The Appellant was appointed by the Respondent to construct a shophouse and hotel on a plot of land. A dispute arose concerning the consideration to be given and scope of work for the above. The Appellant's position was that there were two contracts in existence, one to build the shop house and the other to refurbish the same into a hotel. The Appellant further claimed that there were variation works commissioned by the Respondent that had been executed, but was not paid for accordingly. The Respondent's position was that there was only one contract, with the scope of work being to construct and refurbish the shophouse for a certain sum as stated in the letter of award dated 26 June 2007 ("LA"). The Appellant did not complete work on time, which resulted in the Respondent suffering losses. Mode of payment to the Appellant was based on interim certificates from one architect ("the architect") and one quantity surveyor. All certificates issued had been paid for by the Respondent. By letter in 2008, the Appellant sought to hand over the shophouse to the Respondent although no certificate of fitness had been issued. This was issued later, following an inspection by the relevant authority calling for compliance with certain standards. By letter in 2009, the Appellant sought to hand over the hotel complete with refurbishment works. The Respondent claimed that these works were not complete, forcing it to engage a third party contractor to finish the work. In light of this, the Respondent made a counterclaim against the Appellant for RM4,464,368.65. Issues addressed by the High Court were thus: (i) whether there were one or two contracts; (ii) whether the delay in construction was a result of the Respondent's delayed payment to Appellant; (iii) whether the Appellant had obtained an extension of time from the Respondent and was hence not liable to liquidated and ascertained damages ("LAD").

Held, dismissing the Appellant's appeal in respect of their main claim but allowing its appeal on the counterclaim with costs for the Respondent:

- (1) On the issue of whether there were one or two contracts, the Court found to be sound the trial judge's reasoning and reliance on trite law that where there is a written agreement, the parties are accordingly bound. Such a written agreement could not be varied by oral evidence, but only by mutual consent and in written forms.

- (2) Since the Court did not consider to be "perverse" or "plainly wrong" the finding of fact by the trial judge that the delay in construction was as a result of the Respondent's delayed payment to the Appellant, the Court agreed with the judge's finding that the Appellant's claims could not be proved.
- (3) The letter tendered in evidence plainly showed that the Respondent in fact granted an extension of time to the Appellant. The LAD could apply only from the new prescribed date of completion. The LAD clause did not apply in the instant case.
- (4) The defect liability period in the LA barred the Respondent from making a claim in relation to costs for remedial works should the Respondent refuse to avail of this obligation by the Appellant. Since there was no claim within the defect liability period, it only made sense to infer that the works were properly carried out and that any further work done was by the Respondent themselves. The High Court erred when it did not consider the fact that the Respondent by not calling the makers of the original receipts and invoices tendered in the trial court to confirm the contents of the same, had failed to discharge the burden of proof imposed on them and hence had failed to prove their claim.
- (5) As the LA already contained an LAD clause permitting the payment of "agreed damages" where there was a delay, it would be unfair to allow the Respondent to claim "double dip" in his claim for loss of profits. The Respondent did not adequately prove loss as no independent report on the occupancy of its hotel was tendered. Furthermore, any profit projection evidence would be subject to exigencies. This was for the Respondent to explain to the Court how it would or would not affect the projection of loss, which it failed to do.

COMMENTARY

by *Aniz Ahmad Amirudin*

Advocate & Solicitor (High Court of Malaya)

Partner at Cecil Abraham & Partners

Written Contracts, Liquidated Damages and Loss of Profits Claims

Introduction

The dispute involved Taki Engineering Sdn Bhd ("Taki") who was appointed by Dynasty Streams Sdn Bhd ("Dynasty") to construct a four storey shop house and hotel on a piece of land situated at Ulu Kinta, Ipoh.

The issue of which contract governed the parties was at dispute as Taki was of the view that there were two (2) contracts, one to build the shop house and the other to refurbish the same into a hotel amounting to about RM3,297,087.07 including variations.

Dynasty was of the view that there was only one contract for both the shop house and hotel based on a letter of award dated 26 June 2007 ("Letter of Award") for the sum of RM2,380,000.00. Dynasty also brought a counterclaim against Taki for liquidated damages, rectification works and loss of profits.

At the High Court, the issues for determination were whether:

- (1) there was one or two contracts;
- (2) the delay in construction was a result of Dynasty's delayed payment to Taki; and
- (3) Taki had obtained an extension of time and hence not liable to liquidated damages.

The High Court dismissed Taki's claim and allowed Dynasty's counterclaim as a result of which Taki appealed to the Court of Appeal.

On the issue of whether there were two contracts as alleged by Taki, it appears that Taki was unable to show any documentary evidence to indicate that there were and Dynasty was able to persuade the Court by showing that there was only one contract, i.e., the Letter of Award.

The Court of Appeal agreed with the High Court's finding and held that:

"The law is trite here and it is simply that where there is a written agreement, parties are bound by those written words and they cannot be changed or varied except with the consents of the contracting parties and in written forms. Oral evidence cannot vary written words."

On the issue of whether there was a delay of the works due to Dynasty's delay in making payments, the Court of Appeal emphasised that the Court will not disturb the finding of fact by the High Court unless it was either "perverse" or "plainly wrong". In this respect, the Court of Appeal did not see any reason to disturb the finding of the High Court in that the mode of payment by Dynasty was to be made only when the architect issued the certificate of completion and that the payments were duly paid based on the interim certificates.

On the appeal against Dynasty's counterclaim for liquidated damages, remedial works and loss of profits, the Court of Appeal was not persuaded and reversed the High Court's decision in this respect.

On Dynasty's claim for liquidated damages, the Court of Appeal found that Dynasty was not entitled to the same as it was clear that an extension of time was granted by Dynasty and that once an extension of time has been granted, the original date of completion becomes redundant.

On Dynasty's claim for the alleged defects, the Court of Appeal found that Dynasty was not entitled to the costs of the remedial works as amongst others, there was a defect liability period and Dynasty failed to take advantage of this and that the only natural inference was that the works were properly carried out.

More importantly, the Court of Appeal emphasised that Dynasty failed to prove their damages and that it was trite law that whoever wants to be awarded damages, he or she must prove it.

The Court of Appeal was also critical of the fact that the makers of the documents were not called to confirm the evidence, namely the original receipts and invoices tendered by Dynasty during trial and that even if there is no cross examination of admitted evidence, this does not *ipso facto* discharge the burden of proof. The Court of Appeal explained this to mean, "*the evidential value of any proof must acquire a certain standard before a court finds that the burden of proof has been discharged*".

In respect of Dynasty's claim on loss of profits, the Court of Appeal noted that there was already in existence a liquidated damages clause and to allow a further claim for loss of profits is like allowing Dynasty a "double dip" in its claim for damages. In any event, the Court of Appeal found that Dynasty had not proved their damages and their reliance appears to be solely from the witness statement of their own witness. The Court of Appeal held that the bare statements of the witness cannot be regarded as an adequate proof of loss and there must be an independent report. The Court of Appeal in referring to the decision of *State of Sabah v Suwiri Sdn Bhd* (2005) 4 CLJ 727 held that:

"...even if profit projection evidence is not challenged, it is not sufficient proof of loss as it is subject to other exigencies which must be explained to the Court how it would or would not affect the projection of loss. It is not the duty of Court to figure out what the loss should be, that duty lies squarely on the Respondent here."

In short, the Court of Appeal held that both Taki and Dynasty had failed to discharge their burden of proof and disallowed both their claims.

Lessons learnt from the case

The Court of Appeal's decision in *Taki Engineering Sdn Bhd v Dynasty Streams Sdn Bhd* (2015) highlights the importance of:

- (a) having written contracts in place as opposed to oral agreements which are not reflected in the concluded contract;
- (b) a party not being liable for liquidated damages if an extension of time has been granted;
- (c) a claim for loss of profits and a claim for liquidated damages may not be claimed separately; and
- (d) damages which a party will need to prove satisfactorily to the Court even if left unchallenged by the other side.

Suggested best practices to be adopted

The best practice will be in having a detailed written contract in place and agreed between the parties to avoid the issues faced by Taki. In fact it will be shocking to know how often in reality contractors actually commence and sometimes even complete the works pursuant to a simple letter of appointment, with the agreed formal contract, if any, is signed between the parties at a later date.

The employer will also need to be aware that their rights to impose liquidated damages will be affected in the event an extension of time is granted and that a separate claim for loss of profits will not be claimable if there is a claim for liquidated damages.

Allan Kinsey & Anor v Sunway Rahman Putra Sdn Bhd & Anor; Dekon Sdn Bhd (Third Party)

HIGH COURT, SHAH ALAM
SUIT NO: 22(NCVC)-971-2011
PRASAD SANDOSHAM ABRAHAM J
16 APRIL 2015

[2016] 1 CIDB-CLR 72

The Plaintiffs purchased a bungalow ("the property") built by the First Defendant. Prior to the Plaintiffs taking delivery of vacant possession of the property from the First Defendant, the Plaintiffs at a joint inspection with the First Defendant's representative, noticed and highlighted patent defects of the said property. In early 2006, the Plaintiffs discovered cracks in the bungalow and informed the First Defendant. The First Defendant arranged for the Second Defendant to do a site inspection. The Second Defendant prepared a report wherein the cracks were attributed, *inter alia*, to: poor workmanship, construction errors and movement of the reinforced concrete retaining wall ("RCRW") thereby causing subsidence of the ground at the affected areas. The cracks were repaired but they subsequently recurred. In March 2006, the Plaintiffs engaged a contractor to build an extension to their bungalow. New cracks developed. The Plaintiffs sued: (i) the First Defendant for breach of cl 14 of the principal agreement, to build the property in a good and workman like manner; and (ii) the Second Defendant for negligence in his roles, duties and responsibilities to the First Defendant.

Held, dismissing the Plaintiffs' claim:

- (1) The issue of the certificate of fitness of occupation points to compliance and satisfaction with cl. 14 ie, that the said property had been constructed in a good and workman manner in accordance with the description set out in the fourth schedule of the principal agreement and in accordance with plans approved.
- (2) The Plaintiffs' expert reports whilst dealing with the issue of cracks, did not focus on the First Defendant's obligations under cl. 14. Whilst the findings might be relevant in support of a plea for breach of duty, since the Plaintiffs rely by way of their pleadings on a breach of cl. 14 of the principal agreement, the report was of little assistance to the Plaintiffs. The First Defendant had complied with its contractual obligations under cl. 14 of the principal agreement.
- (3) Although the Plaintiffs had raised a plea of implied terms to be read into the principal agreement, they had failed to expressly plead particulars of the implied terms they were relying on.

- (4) If in the instant case, the officious bystander were to be asked whether terms ought to be implied in the principal agreement, the answer would be that so long as the property was built according to the building plans and specifications set out in the principal agreement and the certificate of fitness for occupation had been issued, there would be no need to imply terms into the principal agreement.
- (5) A plea of implied terms cannot be sustained in a statutory sale and purchase agreement. In the instant case, the certificate of practical completion had been issued which implied compliance with cl. 14 of the principal agreement. It followed that a plea for breach of the principal agreement could not be sustained.
- (6) The fact whether or not the Second Defendant had been negligent in his role, duties and responsibilities to the First Defendant had no bearing to the Plaintiffs' claim as no duty of care was owed by the Second Defendant in that regard. As to the Second Defendant's role as structural engineer to the Plaintiffs for the extension, the relief sought was an indemnity against any contribution ordered by the Court in respect of execution of works associated with the extension. Since the Court had dismissed the Plaintiffs' claim against both Defendants, no question of indemnity would arise in respect of contribution and the Plaintiffs' claim against the Second Defendant as pleaded should stand dismissed.

COMMENTARY

by *Wilfred Abraham*

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Partner, Head of the Arbitration & Alternative Dispute Resolution

Practice Group at Zul Rafique & Partners

Pleadings and Their Importance

Introduction

The Plaintiffs' case against the First Defendant is based on a breach of clause 14 of the agreement (the standard sale and purchase agreement). Further, the Plaintiffs sued the Second Defendant (the structural engineer) for breach of duty.

The judgment is centered mainly in the manner the Plaintiffs' case is pleaded, i.e. there was a breach of the Defendants' duty pursuant to clause 14. The judgment at paragraph 31, which is set out, takes the

view that compliance with clause 14 by the First Defendant and an issuance of the Certificate of Fitness by the authorities are indicative that the building was completed as required under clauses 14 and 25 of the agreement. See paragraphs 31 and 33 of the judgment below.

"[31] The issue of the certificate of fitness of occupation will point compliance and satisfaction of cl. 14 ie, that the said property had been constructed in a good and workman manner in accordance with the description set out in the fourth schedule of the principal agreement and in accordance with plan approved. And I refer to the case of *Pentadel Sdn Bhd v. TPPT Sdn Bhd* [2011] 1 LNS 1283, wherein Her Ladyship Hadhariah found at p. 6 of her judgment and I quote with approval:

"Under a construction contract, a certificate issued by the relevant authorities certifying the works had been completed is *prima facie* proof that that the works had been completed."

[33] The court is of the view that all the evidence and documents point to the irresistible conclusion that the said property had been constructed in a good and workmanlike manner in accordance with the relevant laws and regulations. The first defendant has delivered vacant possession of the said property with inter alia the support of a certificate signed by the first defendant's architect (see p. 38 bundle B2) certifying that the said property been duly constructed and completed in accordance with all relevant acts, by-laws and regulations and that all conditions imposed by the appropriate authority in respect of the issuance of the certificate of fitness for occupation had been duly complied with".¹

Issues arising in this case and lessons learnt

The issue that may be discerned from the judgment seems to be the manner in which the case was pleaded. See paragraph 26, which is set out.

"[26] The plaintiffs' claim against the first defendant is grounded on a breach of contract ie, a breach of cl. 14 of the principal agreement (see p. 21 of first defendant's core bundle) to build the said property in a good and workman like manner. In the amended statement of claim of the plaintiffs the particulars of breach have been set out under the principal agreement. Clause 14 of the principal agreement is set out as follows:

Materials and workmanship to conform to description

14. The said Building shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority as in the Schedule, which descriptions and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority. The Purchaser shall not be liable for the cost of such changes or deviations and in the event that the changes or deviations involve the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein or to damages, as the case may be. (*emphasis added*)".²

The Plaintiff could have pleaded the doctrine of *Res Ipsa* and the facts acknowledged that the damage occurred but there has been no challenge of the cause of it, at least from the facts set out in the judgment.

Clauses 14 and 21 seem to be merely regulatory and required for compliance for authority approval. It does not extend to when dealing with patent defects. These issues do not seem to have been dealt in the judgment. The fact that the decision states that in the event clause 14 is complied with, it is sufficient to absolve the developer, is also not quite agreeable. Furthermore, the fact that the wall is damaged and why it was so, must be considered when deciding the cause and effect.

However, this decision highlights the importance of pleadings and the importance of stressing the crucial issues – in this case what is "good workmanlike manner". The judgment only deals with this issue from a statutory position. However, this may be due to what was pleaded in this case.

The second issue in the case is the action against the structural engineer. The structural engineer does not owe a duty of care to the Plaintiffs. That would be a correct position in contract and there is no duty in tort. See paragraph 40 and those sentences underlined.

"[40] From the statement of claim, the crux of the plea against the second defendant is to be found in para. 5.1 of the statement of claim (see p. 42 of bundle A1) and the particulars of negligence have been set out. The fact whether or not the second defendant has been negligent in his role, duties and responsibilities to the first defendant have no bearing to the plaintiffs' claim as no duty of care

is owed by the second defendant in that regard. As to the second defendant's role as structural engineer to the plaintiffs for the extension, the relief sought is an indemnity against any contribution ordered by this court in respect of execution of works associated with the extension. Since this court has dismissed the plaintiffs' claim against both defendants, no question of indemnity arises in respect of contribution and the plaintiffs' claim against the second defendant as pleaded should stand dismissed (see p. 46 of bundle A1)."³

Again, it is a question of pleading and choosing the proper parties to bring an action against. The action against the structural engineer could not be sustained as there was no duty owed to the Plaintiffs either in contract or tort by the Second Defendant.

Suggested best practices to be adopted

The entire case revolved around the pleadings in the above case. The Court has to be bound by the relevant pleadings in each case. It is suggested pleadings should include all plausible avenues of claim in order to properly ventilate all relevant issues and enable the Courts to make a ruling on these issues.

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1. [2015] 4 CLJ 624 at 630 – 631.
 2. Ibid at 628 – 629.
 3. Ibid at 634.

Asal Bina Sdn Bhd v PKNS Engineering & Construction Bhd

HIGH COURT, SHAH ALAM
SUIT NO: 22C-15-07/2015
SEE MEE CHUN J
30 NOVEMBER 2015

[2016] 1 CIDB-CLR 77

By a letter of award dated 3 February 2000, the Defendant appointed the Plaintiff as sub-contractor to design and construct a health clinic and staff quarters (“the project”). The Plaintiff subsequently filed a claim dated 30 April 2015 against the Defendant for the sum of RM1,157,146.90 on work done in relation to the project. The Defendant applied to strike out the Plaintiff’s claim based on limitation. The only issue for the High Court’s determination was when time began to run. The Defendant contended it was from 19 August 2004 when the Plaintiff issued its demand on variation work (“VO”) or 27 June 2007 when it claimed for VO and other work done amounting to the above mentioned sum. The Plaintiff however contended it was from 17 December 2013 when it wrote to the Defendant for payment based on the statement of final account. It furthermore contended that the Defendant’s letter of 10 March 2010 constituted an acknowledgment of debt.

Held, dismissing the Defendant’s application

- (1) The letter dated 19 August 2004 was not a demand but a claim for the Defendant to process and ultimately make payment. The Plaintiff would not have known at that point what amount the Defendant would pay. It was only on 2 December 2013 when the Defendant wrote to its project Architect to approve RM22,988.93 and the Plaintiff disputed that payment amount by claiming the sum of RM1,157,146.90 that the cause of action arose. That was when the material facts had happened for Plaintiff to take action.
- (2) Sections 26(2) and 27 of the Limitation Act 1953 required an acknowledgment of debt to be in writing and signed by the person making the acknowledgment, and the acknowledgment must be to the person making the claim. Although the Defendant’s letter of 10 March 2010 did not specify the amount owed to the Plaintiff, it could still be considered as an acknowledgment of debt.
- (3) Since the cause of action accrued only when the Plaintiff wrote to the Defendant on 17 December 2013 for payment based on the statement of final account, limitation had not set in under s 6(1) of the Limitation

Act 1953. Even if there had been limitation on account of the cause of action arising on 19 August 2004 or 27 June 2007, there had been acknowledgment of debt by the Defendant by letter dated 10 March 2010.

COMMENTARY

by *Grace Xavier*
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Faculty of Law
University of Malaya

Limitation of time in Construction Claims

Introduction

The case concerned a claim for work done. The defendant had appointed the plaintiff as the sub-contractor for the project pursuant to a letter of award. The plaintiff had submitted further claims for variation work to the defendant after the issue of the Certificate of Practical Completion. The defendant sought to strike out the plaintiff's claim based on the fact that limitation had set in and also that the plaintiff had previously agreed to the amount of variation claims based on the assessment of the Quantity Surveyor ("QS"). Therefore the plaintiff was not entitled to claim further. The plaintiff however responded that the defendant had not objected to the variation work or the claim based on the QS's assessment. According to the plaintiff, the reason for the action was that the defendant had failed to pay on the statement of final account. The defendant countered this argument by stating that although the defendant had certified the value of the work done, the plaintiff had disputed the amount.

Issues arising from the case

The court considered the issue of limitation and when time starts to run. The defendant contended that time began to run from 19th August 2004 when the plaintiff had submitted its demand on variation work or in the alternative, on 27th June 2007 when the plaintiff claimed for variation work and other works. The plaintiff however contended that time began to run from 17th December 2013 when it wrote to the defendant for payment based on the statement of final account. The plaintiff also claimed that the defendant's letter of 10th March 2010 was an acknowledgement of the debt.

The Coram looked at section 6(1) of the Limitation Act 1953 ('the Act') and relevant cases. In arriving at the conclusion that a cause of action founded on contract accrues on the date of the breach, the court perused the correspondences relied upon by the plaintiff and defendant. After scrutinizing the various cases on limitation and cause of breach issues, the court concluded that that the defendant may have contributed to a delay in payment thereby resulting in the plaintiff writing to claim for the unpaid amount. The plaintiff had thus written to the defendant on 17th December 2013, requesting that payment was now overdue. Only at this point of time did time begin to run

Points to note/suggested best practices to be adopted

A judicious reading of the judgment shows that it might have arrived at a different decision as to when limitation begins to run. This stems from a slight observation on reading of the sentence in para 20 of the judgment "..... did not specify the amount owed it can still be considered as an acknowledgment of debt". The judge based this date of the said letter to come to a conclusion that this was sufficient acknowledgement of the debt and therefore only then did limitation set in. The learned judge relied on *Shinei Geotechnique (M) Sdn Bhd & Ors v Orix Credit (M) Sdn Bhd* [2014] 5 MLJ 478 in coming to the conclusion. With all due respect to the learned judge, using the principle in the said case, the issue in that case concerned a hire-purchase transaction where the hire-purchase company was suing the hirer and his guarantors for non-payment of the installments and the accrued interest. The material facts of that case are different from our case in question. The letter of 10th March 2010, written by the defendant, was to certify the price of the scope of work done by the plaintiff. Therefore the said letter may be said to be acknowledgement of debt as to the amount stated in the letter or any claim that was made by any party concerned. The claim of the plaintiff appears to be outside the amount stated in the scope of works. Therefore, there should be a clear acknowledgment of the claim by the plaintiff, in order to constitute acknowledgment under s 26(2) of the Act. The amount claimed by the plaintiff in the statement of claim on 30th April 2015 is for the sum of RM1,156,146.90, which it can safely be presumed, was over and above the amount stated in the letter of 10th March 2010. The defendant had on 2nd December 2013 approved RM22,988.93 and had disputed the amount claimed by the plaintiff. It was then that the cause of action arose. Based on the above discussion, therefore, there does not seem to have been a clear acknowledgement of debt if one were to go by a detailed and in depth evaluation of s 26(2).

CS Megah Builders Sdn Bhd v Teoh Chin Kee & Sons Realty Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-13-04 OF 2014
MARY LIM THIAM SUAN J
4 SEPTEMBER 2015

[2016] 1 CIDB-CLR 80

The Plaintiff claimed to have been appointed by the Defendant to conduct renovation work on four floors of a building belonging to the Defendant. This work was completed in seven months. Invoices were periodically issued by the Plaintiff to the Defendant, totaling RM2,308,111.00. Both parties later inspected the site upon completion of renovation work, with the Defendant showing satisfaction at the Plaintiff's work. The Defendant then paid the Plaintiff RM1,202,500.00 with an outstanding RM1,105,611.00 remaining unpaid. The Defendant denied liability on the ground that it had never employed the Plaintiff for renovation work, thus excluding the Defendant from the contract made between both parties for "upgrading work" of the building. It was claimed by the Defendant that it was merely a financier for a personal loan to Perfect Skyline, a company operating on the Defendant's premises ("Perfect Skyline"). It was said that the company's works were requested verbally, for upgrading works to be conducted only on one floor and that it had been fully paid for. The Defendant denied that the Plaintiff was asked to do work on other floors of the building, and that the Plaintiff had in fact not done so. For these reasons, the Defendant claimed that it was not liable to pay. Furthermore, the Defendant claimed that it had never received invoices from the Plaintiff, and that any reference made by the Plaintiff to these was falsified. The issues for the court are thus: (i) whether privity of contract existed between both parties; (ii) if so, the amount payable. It was suggested by the Defendant that one of the Plaintiff's witnesses ("PW1") was not competent to testify as he was an undischarged bankrupt. PW1's status was made known at the outset in his evidence in chief. The Plaintiff called two witnesses: PW1 (the Plaintiff's director) and PW2 (the Plaintiff's sub-contractor). PW1 testified that he had long frequented the nightclub in the building ("the club") and was introduced to one Dato Teoh who owned the club. Dato Teoh sought PW1's views on his renovation ideas for the club, and PW1 suggested that the Plaintiff be appointed to conduct the renovations, to which Dato Teoh agreed. This discussion was never put into writing, as PW1 claimed to have been good friends with Dato Teoh. On this basis, PW1 thought the Plaintiff would conduct the work and the Defendant would pay them. Furthermore, PW1 had previously conducted renovations for Dato Teoh without any written agreement. It is to be noted that two other persons were present at these discussions: namely, the Defendant's project manager and one another person. PW1 testified that work was done to all floors of the building. Photographs of the Plaintiff's work were tendered in evidence. This was confirmed by PW2,

whose testimony was consistent with that of PW1. PW1 further claimed that he never knew Perfect Skyline existed, and that the Plaintiff was never paid by this company for work done. The Defendant called a director of the Defendant, who was also the wife of Dato Teoh ("DW1"), who testified that it was Perfect Skyline and not the Defendant who had appointed the Plaintiff to conduct the works. She further testified that the Plaintiff had conducted work on all floors of the building, and had been fully paid. DW1 however testified that work on one of the floors was done earlier by another contractor. DW1 produced a development order from DBKL as proof. DW1 also testified that the photos taken of the Plaintiff's work were of another building. The Plaintiff claimed that an oral contract was made between the Plaintiff and Defendant. This was in reliance on the invoices and payments made, photographs taken and work done. The Defendant claimed that this work was done for another company, not the Defendant, who was merely the financier. The Defendant also claimed that the Plaintiff did work only on the floor where the club was located, instead of all floors as claimed by the Plaintiff.

Held, allowing the Plaintiff's claim:

- (1) The Defendant did not deny that a contract existed, but denied only that a contract was made between the Plaintiff and Defendant. It was the Defendant's case that the contract was made between the Plaintiff and Perfect Skyline. The Court did not accept this as there was no evidence of Perfect Skyline's involvement at the time of contracting.
- (2) The Defendant and Perfect Skyline were wholly separate entities. This was not affected by the fact that both companies shared common directors.
- (3) PW1 had never wavered in testifying that his dealings were always made with the Defendant, and had never indicated any knowledge in the existence of Perfect Skyline. No records existed to show that the Defendant informed the Plaintiff of such a company. This was strengthened by the fact that the Plaintiff issued invoices to the Defendant only, not to Perfect Skyline or anyone else. The Defendant had also never told the Plaintiff to issue these to anyone else.
- (4) Due to the nature of the relationship between the parties and the environment of mutual trust, the Court accepted that PW1 believed he was dealing with the Defendant at all times and that the Defendant would pay for the Plaintiff's work.
- (5) The fact that the Defendant continuously issued the Plaintiff payment for invoices issued to the Defendant only went to endorse the Plaintiff's case. Thus the Defendant could not deny privity of contract with the Plaintiff.
- (6) The Court dismissed the Defendant's claim that the Plaintiff could not possibly have renovated the building when upgrading works were

done recently. Closer examination showed that this upgrading involved partitioning only, whereas the Plaintiff had in fact carried out his renovation work. Furthermore, documents for these earlier upgrades did not include invoices and payments to prove that these upgrades were actually carried out.

- (7) Based on the evidence showing invoices, quotations and claims between the Plaintiff and Defendant, the Court found that a contract in fact existed between both parties. These documents covered all floors claimed by the Plaintiff, and were partially paid for by the Defendant.
- (8) The Defendant suggested that the Plaintiff's claim was a sham under s 73A of the Evidence Act 1950 for tendering inadmissible evidence, as the documents do not contain signatures of the Defendant's project manager and the other person and are thus of dubious authenticity. The Court disagreed, as the authenticity of documents was never an issue among the parties. PW2 also produced strong evidence of being present on site when the work was being carried out. Moreover, it was found at trial that the documents were indeed signed by the Defendant's project manager. The Defendant then claimed that it's project manager was not authorised to approve and sign off claims on the Defendant's behalf. The Court found the Defendant's stand to be inconsistent and hardly credible. The Defendant could not cherry-pick on the validity of its representatives. The Defendant's project manager and the other person were present at the material time of contracting and this was never disputed.
- (9) The Court accepted the Plaintiff's proof and value of its work done. The value of this work was never challenged by the Defendant.
- (10) As regards payment vouchers, it was found that these were never signed by PW1. As far as the Plaintiff was concerned, he was paid by the Defendant and not Perfect Skyline. Furthermore, the Defendant showed satisfaction with the Plaintiff's work upon inspection and never protested on having the Defendant's name appear on the invoices. If the Defendant was merely a financier for Perfect Skyline, this should have been made evident at the time, which was not the case. Any dealings between the Defendant and Perfect Skyline were purely internal, and the Plaintiff should not be affected by this.
- (11) Undischarged bankrupts remain competent to testify and evidence was not rendered inadmissible by reason of bankruptcy, relying on the authority of *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* and *Bumimetro Construction Sdn Bhd v Lee Kok Hwa & Yap Kim Yoong*.
- (12) The Plaintiff had proved its case on a balance of probabilities. The Court was satisfied with the Plaintiff's oral evidence accompanied by contemporaneous evidence, showing that he contracted with the

Defendant at all times for the work for which he now claimed outstanding payment.

- (13) The Court allowed the claim of RM1,066,661.00 at the interest rate of 5% per annum. The Court further ordered the Defendant to pay the Plaintiff RM50,000.00 as costs.

COMMENTARY

by *Prof. Dr. Zuhairah Ariff Abd Ghadas*
Dean, Faculty of Law and International Relations
Universiti Sultan Zainal Abidin, Terengganu

Doctrine of Privity of Contract in Construction Contract

Introduction

This case involves a contractor (the Plaintiff) who claimed that they were appointed by the building owner (the Defendant) to carry out renovation works on the Defendant's building. The Plaintiff completed the renovation works within the prescribed contract period and issued an invoice with a total sum of RM2,308,111.00 (including several variation orders). The Defendant paid the Plaintiff RM1,202,500.00 which left a sum of RM1,105,611.00 as an outstanding payment. The Plaintiff demanded for the payment of the outstanding amount but the Defendant denied the liability on the ground that they never employed the Plaintiff for the renovation works and that they were merely the 'financier' providing a personal loan to a company known as 'Perfect Skyline' which was operating a nightclub and karaoke lounge known as 'Goldmine' at the Defendant's premises.

The Defendant also argued that the works were 'verbally requested' by Perfect Skyline and only involved upgrading works on the second floor. The Defendant claimed that payment which they made was for the upgrading works at second floor as it was not liable to pay for any other works as it had never requested the Plaintiff to do any work on the remaining floors of the Building. The Defendant also alleged that it never received the invoices referenced by the Plaintiff and that the claims were false.

The Plaintiff claimed that although there was no written agreement between them, there was an oral contract and that they had performed all the upgrading works on all four floors of the building.

The Court allowed the Plaintiff's claims as they had proved their case on a balance of probabilities. The Court was satisfied that there was a contract between the Plaintiff and Defendant by referring to the Plaintiff's oral evidence accompanied by contemporaneous evidence, showing that it had contracted with the Defendant at all times for the work for which it was claiming for the outstanding payment. The Court allowed the claim of RM1,066,661.00 at the interest rate of 5% per annum and ordered the Defendant to pay the Plaintiff RM50,000.00 as costs.

Issues arising from the case

The Court in this case looked into two issues:

- (1) whether there was privity of contract between the Plaintiff and the Defendant?; and
- (2) if there was a contract, what was the amount payable to the Plaintiff?

The main legal issue in this case was whether there was a contract between the Defendant and the Plaintiff. The Defendant claimed that they did not enter into the contract for renovation works with the Plaintiff as the verbal agreement for the works was between the Plaintiff and a third party (Perfect Skyline). However, there was clear evidence that all invoices for the works were issued by the Plaintiff to the Defendant and some of the claims had been paid by the Defendant.

This commentary focuses only on the first issue as it involves academic discussion on the application of the doctrine of privity of contract and the doctrine of consideration in construction contracts.

Lessons learnt from the case

Under the law of contract, doctrine of privity of contract decrees that only persons who are parties to a contract are entitled to take action to enforce terms of the contract. A third party to the contract or any person who are gaining benefit from the contract but not parties to the agreement (beneficiary) was not entitled to enforce the contract even if it caused him or her to be denied of the promised benefit. Authorities for the doctrine of privity are *Tweddle v Atkinson* (1861) 121 ER 762 and *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co* [1915] AC 847.

In *Tweddle's* case, the children of John Tweddle and William Guy were to be married. Both fathers made an agreement to each pay an amount of money to the groom (William Tweddle) and that William Tweddle had the right to sue either party if they did not fulfill their obligations. William Tweddle attempted to sue the executor of William Guy's will

(Atkinson). His claim failed. The Court held that a third party cannot acquire contract rights from a contract to which they were not party if they had not provided any consideration. As William Tweddle had provided no consideration, the judges found it unnecessary to consider whether or not a third party could acquire rights (in the rare scenario) if they did provide consideration.

In Dunlop's case, the Plaintiff was a tyre manufacturer who sold some tyres to Messrs Dew, a motor accessories agent. In the contract of sale it was stated that Dew must not sell the tyres below the list prices. However, they were allowed to offer discounts to genuine trade customers if the customer that they were selling to agreed to sell the tyres at not lower than the list price. Dew sold tyres to Selfridge and Co Ltd who then sold the tyres at below the list prices. Dunlop sued Selfridge for a breach of their obligation under the rule of a *jus quaesitum tertio* (third party right of action).

The House of Lords held that only a person who was party to a contract can sue upon it and Viscount Haldane (at p.853) highlighted the doctrine of privity by stating:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who was party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* [third party right of action] arising by way of contract".

In Malaysia, there is no provision in the Contracts Act 1950 which provides for the privity of contract rule. As such, it is not surprising to see the direct application of the common law principle of privity by the Courts.

In *Puncak Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601, Abdul Malik J (as he then was) explained the principle of privity and stated:

"The doctrine of privity of contract is well known. It provides only parties to a contract can enjoy the benefits of that contract or suffer the burdens of it. Consideration must flow or move from the promisee; a person cannot simply sue on a contract if the consideration is provided by another, even where the contract is made for his benefit."

In *Tsang Yee Kwan v Majlis Perbandaran Batu Pahat* [2011] 8 CLJ 3, the Court of Appeal restated the principles and held:

"It is trite law that only the parties to a contract incur rights and obligations under the contract. This is known as the privity rule... Thus, where a contract was made for the benefit of a third party, that third party has no rights under it."

Nonetheless, despite the direct application of the privity rule in Malaysia, it is important to look at s 2(d) of the Contracts Act 1950 which allows consideration to move from persons other than the promisor or the promisee. The Privy Council's decision in the hallmark case on privity of contract, *Kepong Prospecting Ltd & Ors v Schmidt* [1967] 1 LNS 67 PC, [1968] 1 MLJ 170, highlighted that the doctrine of privity of contract is distinct from the rule of consideration in Malaysia, which allows for consideration to move from the promisee, promisor or any other person (s 2(d) of the Contracts Act 1950). Lord Wilberforce in delivering the judgment stated (at p 174):

"The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at p 853 and *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at p 468. But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quaesitum tertio*. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue."

The Privy Council's decision in *Kepong Prospecting Ltd & Ors v Schmidt* emphasized that in the privity of contract principle, a person who is not a party to a contract has no right to sue on the contract and that the doctrine of privity of contract is distinct from the Malaysian contract

law principle that consideration can move from the promisee, promisor or any other person. The Privy Council clearly highlighted that, even though consideration may move from a third party under s 2(d) of the Contracts Act 1950, the position in Malaysia is that a third party still cannot enforce a contract.

The above discussion is important to highlight that in applying the doctrine of privity of contract in Malaysia, the Courts must be able to distinguish between the application of privity rule and/or s 2(d) which allows a third party to perform the consideration of a contract.

Suggested best practices to be adopted

The facts of this case highlighted **two scenarios** as regards privity of contract and consideration:

First Scenario: The initial agreement regarding the renovation works was between PW1 (one of the directors of Plaintiff) and Dato' Teoh (one of the directors of Perfect Skyline). Such circumstances highlighted that the parties to the verbal contract were the Plaintiff and Perfect Skyline (which was entered via their directors, *inter alia*, Dato Teoh). In this scenario, the Defendant was merely a third party who performed the consideration for the contract on behalf of Perfect Skyline. The consideration performed by the Defendant for Perfect Skyline were related to the renovation works, dealing with the invoices, claims and payment to the Plaintiff.

Second Scenario: Although the initial agreement was initiated by the Plaintiff (via PW1) and Perfect Skyline (via Dato' Teoh), the contract for the renovations works was between the Plaintiff as the contractor and the Defendant as the owner of the building. The Plaintiff and Defendant were privy to the verbal contract which was entered for the benefit of Perfect Skyline (third party). Perfect Skyline as a tenant of the building owned by the Defendant was merely the beneficiary of the contract and therefore could not be made liable under the contract.

It is observed that in cases involving construction/ renovation of buildings, where the employer/ client is normally the owner of the building, the second scenario is more appropriate to be applied due to the issue of ownership of the building and right to enter a contract in relation to the building. A tenant cannot enter a contract of renovation without written consent of the owner. As such, in this case, it was explicable why the Courts emphasized that privity of contract was between the Plaintiff and Defendant. There was no evidence which highlighted that Perfect Skyline requested any approval to do the

renovation works and that at all times it was the Defendant who directly dealt with the correspondences, claims and payment for the works.

However, if such an agreement did not involve construction works, for example the Plaintiff supplied furniture or musical instruments to Goldmine or they provided interior design services to Perfect Skyline and the Defendant paid for the invoices and claims, the first scenario is observed to be appropriate as there was clear evidence that a verbal agreement was made between the Plaintiff and Dato' Teoh and the Defendant was merely an entity who performed the consideration on behalf of Perfect Skyline.

As conclusion, in applying the common law principle of privity of contract in Malaysia, the Court must be clear that such application will not affect the principle of consideration under s 2(d) of Contracts Act 1950 which allows consideration to move from the promisor and the promisee. Such principle is not applicable under the English law which strictly requires the consideration to move only from the promisor and the promisee.

Cobrain Holdings Sdn Bhd v Expertise International A&I (M) Sdn Bhd & Ors

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-16-04/2015
MARY LIM J
29 MAY 2015

[2016] 1 CIDB-CLR 89

The Second Defendant awarded a contract to the First Defendant to develop a housing project. The First Defendant sub-contracted the project to the Plaintiff. The Plaintiff alleged that at all material times, the First Defendant represented to the Plaintiff that it had been appointed by the Second Defendant through a letter of appointment dated 19 November 2013 and that the letter of appointment was subject to the execution of a formal contract to be drawn up between the First Defendant and the Second Defendant. The First Defendant had apparently made consistent representations that the formal sub-contract between the First Defendant and the Plaintiff would be entered to simultaneously or shortly after the execution of the formal contract. Under the sub-contract, the First Defendant was said to have agreed that it “shall consult and involve the plaintiff at all times in the dealings and negotiations for the drafting, vetting and finalisation of the terms of the formal contract” and that the First Defendant “shall obtain the written approval of the plaintiff for the execution of the same”. The Plaintiff arranged for a bank guarantee (“BG”) to be issued in the First Defendant’s name in favour of the Second Defendant. The BG was required under the First Defendant’s letter of appointment with the Second Defendant. In return, the Plaintiff would be entitled to all payments by the Second Defendant to the First Defendant made under the formal contract without any claim and/or set-off whatsoever. At the end of 2014, the Plaintiff made several discoveries. First, it discovered that the First Defendant had been wound-up on 17 November 2014. Second, it discovered that despite the assurances and representations made by the First Defendant to the Plaintiff, the First Defendant had yet to enter into a formal contract with the Second Defendant. Third, the Plaintiff discovered that because of its insolvency, the Second Defendant had terminated the First Defendant’s appointment; and fourth, the Second Defendant was calling on the BG. The Plaintiff thus applied for an interim injunction to restrain the Second Defendant from receiving monies under the performance bond issued by the Bank. In support of its application, the Plaintiff advanced the following grounds. First, the Plaintiff alleged that there was unconscionable conduct on the part of the First and Second Defendants. The Plaintiff claimed that each of the representations made by the First Defendant was untrue and no attempts were ever made by the First Defendant to enter into any formal contract with the Second Defendant. The Plaintiff claimed there was also unconscionability in the Second Defendant’s call on the BG. The Plaintiff alleged that at all material

times, the Second Defendant knew that the BG was issued by the Plaintiff in the First Defendant's name and that the Second Defendant knew or was aware that any call it made on the BG would affect the Plaintiff financially. Second, the Plaintiff claimed that the BG was no longer good and unenforceable against the Plaintiff and/or the Bank as it was issued pursuant to the Plaintiff's letter of appointment. Since that letter had been terminated, the BG ought to be revoked and cancelled. Third, the Second Defendant was not entitled to call on the BG as no formal contract had been signed between the First Defendant and the Second Defendant and there were no provisions under the letter of award to allow the Second Defendant to call on the same. Fourth, the Second Defendant was not entitled to call on the BG because the First Defendant had been wound up and that the Second Defendant should be proving its debt with the Official Receiver and not calling on the BG.

Held, dismissing the application for an interim injunction (Encl 3) with costs but allowing the application for an *Erinford*-type injunction:

- (1) Bank guarantees are in substance and effect, performance bonds intended to secure performance of the underlying contract between the parties. The bank guarantees are intended to be honoured without fuss or question and upon presentation of documents as opposed to arguments or meeting some merit based threshold. Generally, the guarantees and performance bonds are irrevocable and on demand with unconditional contractual obligations. These guarantees enjoy a bias or (rebuttable) presumption in favour of construction which holds a performance bond to be conditioned upon documents rather than facts. A more restrained and strict exercise of discretion is advocated where injunctive reliefs are sought to prevent the demands or calls on such guarantees. The grant of any injunctive orders should be in the exceptional case and not as a matter of course. Where the application for injunctive relief is against the issuer or bank, it must be borne in mind that the bank guarantee or guarantee agreement is separate from the underlying contract between the parties. In such a case, the court should not examine the question of breach or otherwise of the underlying contract as the bank is obliged to pay the beneficiary without proof or conditions despite protests or objections from any party. Where the application is against the beneficiary or the party who called on the guarantee, the underlying contract will come under scrutiny for the purpose of establishing the existence or otherwise of cogent reasons or grounds for the injunction to apply.
- (2) At the interlocutory level and it appears that it is in order to strike a balance between commercial efficacy and the real, genuine cases, the case for an interim injunction restraining a call or the receipt of monies under the guarantee would require the plaintiff to satisfy the "seriously arguable and realistic inference test".

- (3) In the instant case, aside from the fact that the bank guarantee was to be honoured upon demand by the Second Defendant, as is the convention and practice in the construction industry, the undertaking or solemn promise to pay which rested on trustworthiness, must be honoured.
- (4) Although the Plaintiff contended that the call and realisation of the BG would run afoul of s 293 and s 298 of the Companies Act 1965 read with s 53 of the Bankruptcy Act 1967, the provisions of law relied upon were only concerned with the Bank and not the First Defendant. Further, the BG was a separate document of contract between the Bank and the Second Defendant. The Plaintiff was a stranger to those arrangements. The Plaintiff sought to restrain the Second Defendant's enforcement or reliance of the formal contract in the capacity of a stranger insofar as the contract was concerned. It was clearly not a contracting party to the formal contract, or even to the letter of appointment.
- (5) The instant application did not concern the contracting parties to the main contract or the sub-contract. The Plaintiff's primary complaint was not with its contracting party *ie*, the First Defendant. The Second Defendant was brought in on a case of conspiracy to do an unconscionable act; that act being to draw or enter into a formal contract without consulting the Plaintiff as the First Defendant was contractually obliged to do so under its terms of contract with the Plaintiff. There were no direct or express allegations that the Second Defendant knew of the terms and conditions of the sub-contract or that the Second Defendant was at least aware of the particular obligation. Hence, the Plaintiff had not met the high threshold of establishing a strong *prima facie* case of unconscionability for a grant of an interlocutory injunction, especially against the Second Defendant.
- (6) The High Court could not safely say that the facts alleged by the Plaintiff had made out a seriously arguable case that the only realistic inference was the existence of fraud, unconscionability and conspiracy in the terms alleged by the Plaintiff, such that an interlocutory injunction in the terms sought by the Plaintiff ought to be granted. Although there were concerns over some of the conduct, nothing of such a degree or extent as to "prick the conscience of a reasonable and sensible man" that a case of unconscionability had been made to warrant grant of injunction to prevent injustice.
- (7) While the application for an interim injunction to restrain a call on the BG or to receive the benefits under the BG ought to be dismissed, the court would always retain jurisdiction and power on the matter of stay or, in suitable cases, grant an *Erinford*-type of injunction. If there was no injunction ordered pending the appeal, the call made by the Second Defendant would have to be abided by and met by the Bank and the appeal would be rendered academic and nugatory. Therefore, in the interests of justice, there was greater urgency and reason to grant an *Erinford*-type injunction.

COMMENTARY

by Karen Ng Gek Suan

Partner at Azman, Davidson & Co

Performance Bond/Injunctive Relief

Introduction

This is a case where a sub-contractor (plaintiff) has provided a performance bond on behalf of the main contractor (first defendant) in favour of the Employer (second defendant) under a main contract, despite the sub-contractor not being a party to the main contract. As it turned out, the plaintiff sub-contractor subsequently discovered amongst others, that the main contractor had been wound up and premised on its insolvency, its appointment had been terminated by the Employer. The Employer subsequently called on the bond and the plaintiff sub-contractor sought an injunctive action to restrain the Employer from receiving the monies and the bank (third defendant) from paying the monies under the bond.

Lessons learnt from the Case

- (1) That the identity of the warring parties in court is the starting point in considering an injunctive action for a performance bond. Where the injunction is brought against the bank or issuer of an on-demand performance bond, the examination of the question of breach of the underlying contract is not examined and the bank or issuer is obliged to pay without proof or conditions. This is on the basis of the legal principle that a performance bond/guarantee is entirely separate from the underlying construction contract between the parties.
- (2) However, if the injunction is brought against the beneficiary/caller of the bond, the underlying contract will come under scrutiny by the Court for purpose of establishing any cogent grounds for an injunction to apply. Such grounds are restricted to fraud or unconscionability (*Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442, CA).
- (3) In establishing fraud or unconscionability, bare assertion will not suffice and the party alleging fraud and/or unconscionable conduct must provide manifest or strong evidence of some degree. In other words, one has to satisfy the threshold of a ***seriously arguable case*** that the only realistic inference is the existence of fraud or

unconscionability which would basically mean establishing a **strong prima facie** case, at least at the interlocutory stage.

- (4) In this connection, fraud or unconscionability should only be allowed with circumspection and where events or conduct are of such degree as to prick the conscience of a reasonable and sensible man. Whether or not such is made out is largely dependent on the facts of each case (*Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442, CA; *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 4 MLJ 1).
- (5) In the present case, the plaintiff sub-contractor attempted to establish a strong *prima facie* case of the existence of fraud, unconscionability, conspiracy between the Employer and the main contractor. It is to be noted that the plaintiff sub-contractor although naming the main contractor as the first defendant, did not proceed with the injunctive action against the main contractor. This had it consequences as the Court held that:
 - (a) the bond is a contract between the bank and the Employer and the plaintiff sub-contractor is a stranger to such contract. The plaintiff sub-contractor is also not a contracting party to the letter of appointment issued by the Employer to the main contractor. The fact that the plaintiff sub-contractor may have caused to arrange the bond to be in place does not detract from the fact that the plaintiff sub-contractor is a stranger to those contracts;
 - (b) the injunctive action brought by the plaintiff sub-contractor did not concern the contracting parties to the main contract or the sub-contract. The plaintiff sub-contractor did not proceed with the injunctive action against the main contractor but pursued a case against the Employer for alleged conspiracy to do an unconscionable act by entering into a formal contract with the main-contractor, without consulting the plaintiff sub-contractors required under the sub-contract (to which the Employer is not a party);
 - (c) on the totality of evidence and facts before the Court, the plaintiff had not met the high standards of establishing a strong *prima facie* case for a grant of interlocutory injunction. The evidence did not show that the Employer knew of the terms and conditions of the sub-contract or was at least aware of the obligation to consult the plaintiff sub-contractor, in order to

attempt any conspiracy as alleged. The plaintiff's arrangement remained as an arrangement solely with the main contractor and it is for the plaintiff sub-contractor to pursue this directly against the main contractor (which it did not). The Court held that there was nothing that '*prick the conscience of a reasonable and sensible man*' that a case of unconscionability has been made and that the injunction ought to be granted to prevent injustice;

- (d) as such, the injunctive action was dismissed. However, an Erinford injunction pending the hearing of the substantive case before the High Court or appeal to the Court of Appeal was granted.

Suggested best practices to be adopted

Typically, performance bonds are expressed for fixed periods and would come to an end upon crystallisation of certain events or stipulated time. Sometimes a performance bond provides for the release of the performance bond upon the occurrence of certain events. It is of good practice to include a term to the effect that the performance bond will be released upon the termination of the underlying contract whose performance it guarantees. Such practice, if it had been adopted, could have safeguarded the plaintiff sub-contractor's position and the ensuing legal battle in the above case.

Enmac Engineering Sdn Bhd v CRBC (M) Holdings Sdn Bhd

HIGH COURT, KUALA LUMPUR
SUIT NO: 22C-401-11/2014
SEE MEE CHUN J
4 MARCH 2015

[2016] 1 CIDB-CLR 95

The main contractor for a construction project (“the project”), Development Stride Sdn Bhd (“DSSB”) had sub-contracted the project work to the Defendant, who subsequently engaged the Plaintiff as a sub-contractor for Mechanical & Electrical (M&E) work for the project pursuant to a M&E sub-contract dated 31 December 2007. DSSB was subsequently wound up resulting in the employer of the project, Pembinaan BLT Sdn Bhd (“PBLT”), terminating the main contract and all sub-contracts there under. The Plaintiff brought a claim against the Defendant for outstanding payment on the M&E work done. The Defendant counterclaimed for Liquidated and Ascertained Damages (“LAD”). It was an agreed fact that the Defendant had paid the Plaintiff RM3,704,269.92. The Plaintiff’s claim was premised on its totaled invoiced amount of RM5,562,727.97 plus a 10 % retention sum, minus what had been already paid by the Defendant thereby leaving an amount of RM2,467,650.02 as due and payable. The Defendant contended that it was only obliged to pay on monies certified and received and the total value of works certified was only RM4,450,027.57.

Held, allowing the Plaintiff’s claim for a lesser sum with costs and dismissing the Defendant’s counterclaim

- (1) The Defendant was only required to pay the Plaintiff the sum which had been valued and certified by PBLT and such sum had already been paid to the Defendant by PBLT. The evidence showed that the Defendant had issued sub-contractor certificates to the Plaintiff up to July 2009 whereas the certification by PBLT, which included that of M&E work, was until August 2009. The Court found that based on the Defendant’s certificate of payment, the total payable to the Plaintiff minus the retention sum and payment previously made was RM353,536.32. The retention sum had been minus off as cl 9.3 of the M&E sub-contract provided its release was subject to a Certificate of Practical Completion and Certificate of Making Good Defects for which there was none in this case.
- (2) The minutes of meetings relied on by the Plaintiff, which stated that the “M&E portion had been certified and paid up to 90–95%”, could not support the Plaintiff’s contention that the Defendant had been paid up to 95% for the M&E work. This was because the minutes were not

required to be confirmed by the Defendant as evident from the fact that only confirmation by PBLT and acknowledgment by DSSB were required. Furthermore the Defendant had written to the Plaintiff denying, *inter alia*, it had received 95% payment from DSSB/PBLT.

- (3) As to whether there had been delay by the Plaintiff, there were no documents to show that the Plaintiff had applied for any Extension of Time ("EOT"). Clause 8 of M&E sub-contract was clear that if the Plaintiff did not apply for EOT it was deemed that no EOT was required. In the absence of an application for EOT by Plaintiff and the clear language of cl 8 there was no EOT granted to the Plaintiff.
- (4) The evidence showed that no LAD had been claimed by PBLT and there was no LAD on the M&E work. Hence it could not be said that the Defendant had suffered any losses arising from any delay entitling it to claim LAD.

COMMENTARY

by *Lam Wai Loon*

Partner at Harold & Lam Partnership

Construction Law: Conditions Precedent to Entitlement to Work Done and Extension of Time

Introduction

In this case, the Plaintiff was a sub-sub-contractor, and the Defendant was a sub-contractor. The Plaintiff's claim against the Defendant was for the balance payment to the sum of RM2,457,650.02 which the Plaintiff contended was due and owing by the Defendant pursuant to the invoice submitted by the Plaintiff to the Defendant for the M&E works. This sum of RM2,467,650.02 also included the refund of the retention monies. The Defendant had a counterclaim against the Plaintiff for Liquidated and Ascertained Damages ("LAD").

In determining the Plaintiff's claim against the Defendant, the Court relied on cl 9.1 of the M&E Sub-Contract which expressly stated that payment must be verified and valued by the Employer. The Court held that the Plaintiff was only entitled to payment in the sum of RM353,536.32 pursuant to the verification and valuation carried out by the Employer for the M&E works carried out. In respect of the claim for the refund of retention monies, the Court held that cl 9.3 of the sub-contract expressly provided for the release of the retention monies

only upon the issuance of the certificate of making good defects which had not been issued in this case. As such, the Plaintiff was not entitled to the refund of retention monies.

In determining the Defendant's counterclaim, the Court referred to cl 8 of the M&E Sub-Contract which stated that in the event the completion of works was likely to be delayed by the Plaintiff, the Plaintiff shall make an application for an extension of time ("EOT"). However, in the present case the Plaintiff had not made any application for an EOT and therefore the Defendant's contention that the Plaintiff had delayed the works was devoid of merits.

Further, the Court held that despite the fact that the Employer had granted the Main Contractor an EOT, there was no evidence to suggest that the EOT was given due to the Plaintiff's failure to complete the works within the agreed time period. In the circumstances, the Defendant's counterclaim against the Plaintiff for LAD was dismissed by Court. In addition, the Court also held that the Defendant had also failed to prove that it had suffered losses due to alleged delay by the Plaintiff.

Lessons learnt from the case

In this case, the Learned High Court Judge took a strict approach in the determination of the issues of liability of parties under the M&E Sub-Contract.

Firstly, in respect of the Plaintiff's claim, the High Court held that the Defendant was only required to pay the Plaintiff the sum which had been valued and certified by the Employer and paid by the Employer to the Defendant, as per the express term of the M&E Sub-Contract. This express term of the M&E Sub-Contract is a species of a conditional payment provision. However, with the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") having come into force, it is likely that this term of contract would not be enforced by the Courts now as s 35 of CIPAA specifically provides that such conditional payment provision is deemed to be void. In this instant case, CIPAA did not apply because the Plaintiff had already commenced the action in the High Court before CIPAA came into operation. Pursuant to s 41 of CIPAA, the Act would not affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of the Act.

Secondly, in respect of the issue of the Plaintiff's entitlement to extension of time, the High Court upheld the contractual provision which provided that the Plaintiff shall not be entitled to an EOT if the Plaintiff had failed to make an application for an EOT pursuant to the provision.

As the Plaintiff did not make any application for an EOT pursuant to the said provision, the High Court held that the Plaintiff was therefore not entitled to any EOT. The Learned High Court Judge found that the terms setting out the condition precedent of making an application for an entitlement to EOT were clear and valid. A related issue is the Defendant's entitlement to LAD given that the Plaintiff was held not to be entitled to an EOT. In this case, the Learned High Court Judge held that there was no evidence to show that the Defendant had suffered any actual loss arising from the delay, and therefore, the Defendant was not entitled to deduct any LAD from the monies due to the Plaintiff.

Suggested best practices to be adopted

In many respects, this case does not really break any new ground. The principles relating to contractual interpretation each draw upon established case law and precedents. This case shows that the Courts are prepared to take a strict approach to contract interpretation and enforce conditions precedent to entitlement to claims for work done and EOT. Particularly with the EOT clause, the Defendant could have used much more contractor-friendly conditions of contract, or perhaps, a construction contract without the conditions precedent attached to the contractor's (in this case the Plaintiff's) entitlement to EOT which are commonly found in standard forms of contract these days.

Global Upline Sdn Bhd v Kerajaan Malaysia

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 21C-2-05/2013
DATO' MARY LIM THIAM SUAN J
30 OCTOBER 2015

[2016] 1 CIDB-CLR 99

The Plaintiff was contracted by the Defendant on 1 August 2008 to carry out only one package, ie Package 2, of an airport upgrading project. Package 2 involved the Airside Infrastructure, Air Traffic Control Tower and New Low Cost Carrier Terminal ("the Works"). The Plaintiff's contract with the Defendant, *inter alia*, required the contract to be read together with various other documents, collectively known as the Principal Agreement ("PA"). Under the terms of the PA, the Plaintiff was required to furnish a performance bond. The Defendant engaged KLIA Consultancy Services Sdn Bhd ("KLIACS") as its representative for the purposes of administering the Principal Agreement/Works. A portion of the new extended runway 02 was to be constructed offshore and this involved reclamation works which required the approval of the Environmental Protection Department of Sabah ("EPD") and was eventually given by it subject to certain conditions. However, issues arose in relation to the construction of the runway and the Plaintiff proposed an alternative method of construction, which was approved by the EPD. A Supplementary Agreement ("SA") was subsequently executed between the Plaintiff and EPD under which the Works were now divided into three sections, ie, Sections 1, 2 and 3. Different completion dates, and different rates of LAD were imposed in the event of any delay in the completion of any of these Sections. By letter dated 27 April 2012, the Defendant informed the Plaintiff that Liquidated and Ascertained Damages ("LAD") would be imposed if the Section 1 Works were not completed by the contractually agreed date of 30 April 2012. On 23 May 2012, the Plaintiff applied to the Defendant for the issuance of the Certificate of Practical Completion ("CPC") for the Section 1 Works claiming substantial completion and for the performance bond to be reduced by 50%. However, the Defendant instead issued a Certificate of Non-Completion ("CNC") on 25 May 2012 in respect of that Works and imposed LAD. By letter dated 7 June 2012, the Plaintiff terminated the contract and ceased all further works. The Defendant too subsequently terminated the contract, called on the performance bond and imposed LAD in respect of both Sections 1 and 2 Works from 1 May 2012 to 31 December 2012. The Plaintiff sought declaratory orders and damages including a sum of RM36 million, being the amount of the performance bond that ought to have been released. It alleged that the Defendant had agreed to issue the CPC but the decision had been retracted on bad faith. The Plaintiff also required that the Defendant reimburse it for the costs of the Environment Impact Assessment ("EIA") reports and Supplementary EIA for the proposed

sea reclamation. The Defendant claimed that the Plaintiff was not entitled to the issuance of the CPC because the Plaintiff was itself in breach when it failed to complete Section 1 Works on the contractually agreed date and rejected the claim for reimbursement on the basis that such expenses were to be borne by the Plaintiff under the terms of the Principal Agreement. The Defendant also counterclaimed for LAD. The two issues for determination were: (1) did the Plaintiff achieve practical or substantial completion of Section 1 Works on 30 April 2012; and (2) who ought to bear the costs for the Environment Impact Assessment (“EIA”) reports set out in the Plaintiff’s Statement of Claim.

Held, Plaintiff’s claim allowed in part with costs and Defendant’s counterclaim dismissed

- (1) The issuance of CPC was not tied up with the completion of all three Sections of Works but only with Section 1 Works. Furthermore, from the oral and documentary evidence adduced, as well as from the submissions of both parties, it was clear that the parties intended a full conditional CPC to be issued when the whole of Section 1 Works, that is, “The whole of the Works (excluding Section 2 Works and Section 3 Works ...)”, was completed; even if Section 2 and 3 have not even been completed or started. This necessarily meant that Section 1 Works were paramount and represented effectively the whole of the Works under the project leaving the Works in Section 2 and Section 3 as minor works. Being minor works, the Section 2 and Section 3 works did not impact on the issue of CPC.
- (2) The test of completion is of substantiality or practicality. The Plaintiff bore the burden of proving that it had achieved substantial or practical completion within the meaning of cl 43 of the PA to warrant the issuance of the CPC under cl 48.2. Although the percentage of completion is helpful, it is by no means conclusive. Whether practical or substantial completion had been achieved in any given set of facts depended on the true construction of the Principal Agreement and the SA.
- (3) If the Plaintiff’s performance or completion of Section 1 Works was not so different from that which it had contracted or promised to perform or complete, then the Works must be said to have been substantially or practically completed. If the performance or completion was very different, but it was found that that which the Plaintiff had not performed or completed was so minor a character such that the use of the completed works was not impeded or impeded in any material respect; then, the Plaintiff would nevertheless be found to have substantially or practically completed the Section 1 Works.
- (4) In the instant case, the Court found PW2’s (the Plaintiff’s Contract Manager cum Quantity Surveyor) explanations as to the detailed progress of works, and in particular that the percentages achieved by the Plaintiff represent substantial completion, satisfactory. In fact, this could also be

inferred from the Defendant's own conduct. Although the Defendant's first letter of 25 May 2012 to the Plaintiff enclosing the CNC had a list of outstanding matters, the Defendant had narrowed the list down to two items by its letter of 28 May 2012, sent just three days later. In the instant case the Court was shown quite adequately on a balance of probabilities that the relevant levels of completion of the works to the airport were at the levels as testified by the Plaintiff. Therefore, the Court found and accepted the Plaintiff's claim that the list of outstanding works in both of the Defendant's letters were not conclusive of the status of the Plaintiff's work; that in fact the Plaintiff had achieved the levels of completion that it claimed. Most materially, the Court was satisfied that the Section 1 Works were substantially and practically completed because the airport re-opened to full 24-hour operations on an unrestricted basis, approved by the relevant authorities.

- (5) The fact that the airport operated on an unrestricted 24-hour basis meant that any of the works itemised in the CNC and in the subsequent letter of 28 May 2012, if relevant for Section 1, and not for Section 2 or Section 3 as explained by PW1 (ie the Plaintiff's Deputy Managing Director) and PW2, were only minor works. Such outstanding minor works did not render the other Works which had been completed, not substantially completed. The Plaintiff had proved its case on the law and on the facts. The Plaintiff had indeed achieved substantial completion of Section 1 Works on 30 April 2012 to merit the issue of CPC and the consequential release of 50% of the performance bond that it had put up initially. That being the case, the Defendant was in breach of the PA by failing to issue the CPC. Consequently, the Defendant had no right to impose any LAD for the Section 1 Works.
- (6) The Defendant was entitled to make the call on the performance bond as it was to offset the LAD. Although there was an agreed term on performance bond under cl 10 of the PA, the loss still had to be proved (*Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374), which the Defendant failed to do. Hence, the Defendant was not entitled to the LAD.
- (7) The method of construction was entirely the Plaintiff's and therefore it bore the responsibility as far as the related costs were concerned. It did not matter if the Defendant was ultimately the project proponent as the parties had agreed on the scope of works; and that the Plaintiff was responsible for both designing and building the contracted Works. The Plaintiff was appointed on that basis. While KLIACS may be supervising and approving the Plaintiff's work, that did not detract from the fact that the contractual arrangements between the parties was that it is for the Plaintiff to ensure that all laws are met. In so doing, the related costs are therefore to be borne by the Plaintiff.

COMMENTARY

by *Tan Sri Dato' Cecil Abraham*

Senior Partner at Cecil Abraham & Partners

Practical or Substantial Completion

Introduction

The dispute involved Global Upline Sdn Bhd ("GUSB") who was appointed by the Government of Malaysia ("Government") to carry out works involving Airside Infrastructure, Air Traffic Control Tower and New Low Cost Carrier Terminal ("the Works") in respect of the upgrading of the Kota Kinabalu International Airport.

The Works were divided into three sections, namely Section 1, Section 2 and Section 3 with different completion dates and different rates of Liquidated and Ascertained Damages ("LAD") imposed in the event of any delay in completion of any of the said sections.

GUSB requested the Government to issue the Certificate of Practical Completion ("CPC") and the release of half of the performance bond claiming that it had achieved substantial completion of Section 1.

The Government disagreed contending that GUSB ought to have completed the whole works of Section 1 before it can claim the CPC and instead issued a Certificate of Non-Completion ("CNC") followed by the imposition of LAD. Thereafter the Government terminated the contract and made a call on the performance bond.

GUSB disagreed that a full completion of the works is required before the CPC is issued and as a result of the Government's wrongful termination, GUSB argued that it was discharged from its further obligations under the contract and commenced legal action against the Government seeking declaratory orders and damages including the sum of the performance bond that ought to have been released.

The main issue for trial was whether GUSB had achieved practical or substantial completion of the Section 1 Works by 30.4.2012 as provided for in the contract. In order to determine this issue, the Judge considered the exact scope of GUSB's works and the parties' agreement on what GUSB had to complete by 30.4.2012.

The Court meticulously went through the contract to ascertain on what was meant by practically or substantially completed and the

oral evidence tendered in Court and held that GUSB had sufficiently proved that it had substantially completed the Works by the due date of completion of 30.4.2012. The Court also found that what remained in respect of the Works were either minor and/or was related to the Section 2 and 3 Works and held:

"...it is evident from both the terms of the Principal Agreement and the Defendant's conduct that the parties themselves do not require total or full completion before CPC may be issued. There is no need for literally the whole of the Works to be completed. All that is required is a substantial or practical completion of Section 1 Works."

As it's normally the case where a contractor will state the percentage to show that substantial works has been completed, the Court laid out the test for completion to be one of substantiality or practicality and stated that *"...although the percentage of completion is helpful, it is by no means conclusive. It is however a good start. Whether practical or substantial completion has been achieved in any given set of facts depends on the true construction of the Principal Agreement and the SA."*

The Court went on to explain that it is a matter of degree and not exactness and that even if GUSB's performance or completion of Section 1 Works is different from what it contracted to perform or complete but if it is found that the portion not performed or completed is minor such that the use of the completed works is not impeded in any material respect, then GUSB must nevertheless be found to have substantially or practically completed the Section 1 Works.

What was interesting to note is that even though it was found that the Government was wrong in not issuing the CPC and half of the performance bond, it was found that GUSB was under a continuous obligation to carry on the works to completion (the Section 2 and 3 Works) even though they were in disagreement on the status of completion of Section 1 Works.

In these circumstances, the Court held that the Government was entitled to make the call on the performance bond to offset the LAD for the Section 2 Works. However, the Government was not able to succeed on this as they did not provide any evidence to prove its losses.

In any event it should be noted that the Court ordered half of the performance bond together with interest to be returned to GUSB which ought to have been released earlier if the Government had issued the CPC.

Lessons learnt from the case

The decision highlights the importance that total or full completion of the works will not be necessary for the issuance of the Certificate of Practical Completion and neither does it entitle a contractor to discharge its obligations owing to the non-issuance of the said certificate.

What will matter for determination by a Court or in an arbitration proceeding will be whether the work is substantially or practically completed by looking at the contract and the evidence.

The test that will be used will be one of matter of degree and not exactness and although a percentage of completion will be a good indicator, the facts will depend on the interpretation of the contract on what parties had intended for a practical or substantial completion of the works.

Further, remaining works will not deter a certificate of practical completion being issued as long as the remaining works are of a minor nature and does not impede the works as a whole.

Suggested best practices to be adopted

In order to avoid any disputes on what constitutes as a practical or substantial completion in a construction contract, parties will need to be mindful when drafting such contracts to be as detailed as possible.

The best practice to be adopted is to list down the main works, perhaps in the form of an appendix or schedule to the contract, which will help define what constitutes practical or substantial completion of the works to entitle the contractor to be issued with a certificate of practical completion.

Homewest Sdn Bhd v Vision Returns Sdn Bhd

HIGH COURT, SHAH ALAM
SUIT NO: 22C-23-11/2014
SEE MEE CHUN J
2 JULY 2015

[2016] 1 CIDB-CLR 105

The Defendant had appointed the Plaintiff as contractor to carry out civil and structural work for a housing project ("the Project") through a Letter of Award ("LA") dated 24 December 2010. The Plaintiff claimed the Defendant wrongly terminated the contract and claimed against the Defendant for work done and for release of the retention sum under the progress claims. Clause 3.2 of the LA provided three ways in which the contract would commence: (i) through the Defendant's instructions to commence; (ii) through any period prescribed by the Defendant from 1 June 2011; and (iii) by the Plaintiff's possession of the site. The Defendant contended the contract had expired and was not extended. According to the Defendant, the contract commenced on 1 June 2012 when the Plaintiff commenced piling works at the Project site. The Defendant pleaded in its defence that the contract expired on 31 May 2013. In an additional submission filed on 1 April 2015, the Defendant submitted that the contract was lawfully terminated by the Defendant upon the Plaintiff's failure to complete the work or proceed with due diligence. The Defendant also contended that it was not liable for payments in respect of progress claims No 6-7 issued by the Plaintiff as its architect had not certified the payments. The Defendant counterclaimed *inter alia*, for damages suffered as a result of appointing a new contractor to take over.

Held, allowing the Plaintiff's claim and dismissing the Defendant's counterclaim with costs:

- (1) The Defendant's contention that the contract had commenced on 1 June 2012 when the Plaintiff commenced piling works on the Project site was not supported by any evidence. From the Defendant's letter dated 4 April 2012 to the Plaintiff that it could commence work on the site once the Defendant had received the Plaintiff's insurance policies, which the Defendant received on 9 October 2012, showed that the contract would have commenced the earliest on 9 October 2012. The Defendant's additional submission dated 1 April 2015 that the contract was lawfully determined by the Defendant upon the Plaintiff's failure to complete the work or proceed with due diligence, could not be accepted as this was never pleaded. The Defendant's statement that the Plaintiff had stopped working on the site since 23 April 2013 was not in specific reference to the determination of contract due to the failure to complete or proceed

with due diligence. In the instant case, the contract had not expired at 31 May 2013 and was thus wrongly terminated.

- (2) It was not disputed that the Defendant and the architect had received progress claims no 6–7 and that the architect had not certified them. The architect's evidence for not approving progress claims no 6–7 was due to the absence of consultant's reports to support the claims. This was more to do with an internal arrangement between the architect, Defendant and the consultants. In the instant case, the Plaintiff had complied with the requirements of cl 3.6 in submitting progress claims no 6–7 to the Defendant and the architect. Non-certification by the architect was not fatal to the Plaintiff's claim. The Plaintiff had also accounted for the percentage of work done in respect of progress claims 6–7. The High Court would thus allow the Plaintiff's claim for the retention sum under progress claims 1–7.
- (3) Concerning the Defendant's counterclaim, since the contract had not expired the issues raised on non-completion on time and stopping work were not relevant. There was also no evidence to establish the damages allegedly suffered by the Defendant.

COMMENTARY

by *Chew Chang Min*

Advocate and Solicitor (Malaya and Singapore)

Wrongful Termination and Expiry of Contract

Introduction

The disputes that lead to this litigation were not unique in the construction industry. The contractor, Homewest Sdn Bhd ("Homewest"), sued for outstanding payments. The employer, Vision Returns Sdn Bhd ("Vision"), counterclaimed for damages for engaging another contractor to complete Homewest's works after Vision terminated Homewest's contract for failure to complete the contract on time and for stopping work on site. The central issue in this case was whether Vision was entitled to terminate Homewest's contract. Since Vision alleged Homewest failed to complete on time, the determination of the commencement and completion dates for the contract was critical.

Lessons learnt from the case

The risk of wrongful termination

The outcome of this case highlights the legal and financial risk of wrongfully terminating a contract. Donaldson LJ cautioned in *The Hermosa* [1982] 1 Lloyd's Rep 570 at 572 that '*Dissolution of a contract upon the basis of renunciation is a drastic conclusion which should only be held to arise in clear cases of refusal to perform contractual obligations in a respect or respects going to the root of the contract*'. Vision advanced two reasons for terminating Homewest's contract. First, Homewest failed to complete the project within its duration. Secondly, Homewest stopped work on 23 April 2013.

Getting it right – the commencement and completion dates

From the judgment, Vision's first reason for termination was based on a misapprehension of the completion date. Vision alleged the contract commenced in May 2012 and was supposed to end on 31 May 2013.

Clause 3.2 of the Letter of Award provided that works will commence on receipt of Vision's instructions (to be completed within 12 months) or at such time as prescribed by Vision from 1 June 2011 or the date site possession is given.

By letter dated 4 April 2012, Vision informed Homewest it can commence work *after* Homewest sends its insurance for the works to Vision. Homewest sent the insurance on 9 October 2012. The Court held that the commencement date 'at the earliest' was on 9 October 2012. This was correct as Vision's own letter of award provided for works to commence at such time as prescribed by Vision from 1 June 2011. Vision's letter dated 4 April 2012 qualified as such a prescribed letter.

It can be seen that the dispute could have been better managed or avoided if Vision had reviewed the Letter of Award and looked back at its project file to determine what was the commencement and completion dates of the contract. Had Vision done so, it may not have taken the drastic step of issuing its letter alleging that Homewest failed to complete the project when the project completion date was still some 4 months away.

The need to ensure that site activities are consistent with the contractual position taken

At the trial, Vision sought to prove that the commencement date was 1 June 2012 because Homewest had commenced piling works on site. The Court rejected this contention as it was not supported by the evidence and Vision's records for the piling activity were inconclusive. Even if

Homewest did carry out some work in June 2012, the commencement date would still be 9 October 2012 because it was Vision itself who dictated the condition precedent to the commencement of work, that is, on receipt of Homewest's insurances.

Vision's argument that 1 June 2012 was the commencement date would have had more force if Vision had sent Homewest a letter in June 2012 stating that:

- (1) Homewest has commenced piling works with details of the areas where piling is carried out;
- (2) the works are deemed to have commenced;
- (3) the commencement date is June 2012 and the completion date is June 2013 (on the assumption that the completion is 12 months as per clause 3.2 of the letter of Award); and
- (4) its letter dated 4 April 2012 is superseded and works are deemed to have commenced since Homewest has site possession according to clause 3.2 of the Letter of Award.

Vision could then support this position by maintaining detailed records of Homewest's construction activities in June 2012, such as piling records, photographs, minutes of site meetings, inventory of machineries on site and Homewest's labour workforce on site.

Termination should be exercised in the clearest of cases

Vision's second reason for termination is grounded on Homewest's stoppage of work on 23 April 2013. The evidence to support this allegation is not set out in the judgment. However, any termination for this reason should be made carefully and in the clearest of cases. In *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, the Supreme Court held that there must be an absolute refusal to perform before the innocent party may treat itself as discharged. A mere refusal or omission to do something may not justify the other in repudiating the contract. The English Court of Appeal in *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1881-1882) L.R. 9 QBD held that '*the test is whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract*'.

Suggested best practices to be adopted

From this decision, employers and contractors alike should approach any termination of a contract with extreme caution. Any decision to terminate should involve a thorough investigation of the facts and the contractual position. The reasons for terminating should be listed and analysed against the contractual position with the benefit of legal advice. The contractual timelines should also be set out clearly from the beginning and updated through revised work programmes

as the work progresses. A procedure should be adopted where records of site activities and work carried out should be as detailed as possible (depending on the type of work and size of the project) and correspondences or notices issued should be monitored to ensure that they are not inconsistent with the events or activities on site.

MMC Engineering Group Bhd & Anor v Wayss & Freytag (Malaysia) Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C(ARB)-2-05/2013
MARY LIM THIAM SUAN J
11 MAY 2015

[2016] 1 CIDB-CLR 110

The Plaintiffs had entered into a contract with the Defendant for the construction of tunnel ("the Contract"). The parties however fell into dispute and they each terminated the Contract. The Defendant referred some outstanding claims it had and a further claim for losses and damages associated with the termination of the Contract to a Dispute Adjudication Board ("DAB"). The Plaintiffs also referred a claim to the DAB seeking to recover its losses and damages as well as the extra costs for completing the Works. The DAB subsequently issued its decision on liability for the Defendant's claim, largely in favour of the Defendant whereas it later rejected the Plaintiffs' claim and issued its decision on quantum in relation to the Defendant's claim. The Plaintiffs filed the requisite notices of dissatisfaction with the DAB's decisions. Both parties later commenced arbitration proceedings at the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). The matters were heard before the same Arbitral Tribunal. On 16 April 2013, the Tribunal issued the Second Interim Award, which was corrected and reissued as the Corrective Award on 30 May 2013 ("the Award"). The Plaintiffs applied under s 42 of the Arbitration Act 2005 ("the Act") read together with O 69 r 2(1)(h) and 6 of the Rules of Court 2012 to refer four questions of law said to have arisen in the Award. The Defendant opposed the application.

Held, dismissing the application with costs:

- (1) Section 42 of the Act is peculiar to the Malaysian arbitration scene. The recourse of referring questions of law to Court under s 42 of the Act is not unusual as other jurisdictions do similarly allow questions of law to be posed, but through an appeals mechanism.
- (2) The Court's jurisdiction under s 42 is discretionary, save for where the preconditions under subsection 42(1A) are not met. In order to properly invoke the discretion of the Court under s 42, an applicant will have to identify or formulate the questions of law to be determined; show how these questions of law arise out of or from the arbitral award; show how its rights are substantially affected by these questions of law; and set out the grounds upon which the reference is sought. These requirements must be met before the Court will even begin to address and determine

the questions of law presented. In a sense, these pre-qualifications and conditions are thresholds that any applicant must cross and cross successfully before s 42 is properly invoked.

- (3) In order for a proper invocation of the Court's powers under s 42, the question of law identified or presented must refer to a point of law in controversy which requires the opinion, resolution or determination of the Court. Such opinion or determination can only be arrived at after opposing views and arguments have been considered. The question will include an error of law that involves an incorrect interpretation of the applicable law but will not include any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.
- (4) The identified question of law must be a real and legitimate question of law and not a question of fact dressed up as a question of law. Arbitrators are the masters of the facts and their findings of fact are conclusive. The Courts must be constantly vigilant of the catalogue of challenges to arbitrators' findings of fact, ensuring that attempts to circumvent this rule by dressing up questions of fact as questions of law are carefully identified and firmly discouraged. It is irrelevant how obviously wrong the findings of facts are (except where it is truly beyond rational argument), or the scale of the financial consequences of the mistake of fact might be. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.
- (5) The questions before the Court must necessarily be questions of law which emanate from the award and not, from the arbitration or the arbitral proceedings. The questions of law now identified for determination of this Court cannot be the same or be re-hatched questions that the parties had already referred to arbitration in the first place. This is apparent from a reading of subsection 42(2) which is couched in mandatory language requiring the applicant or the Plaintiffs to identify the question of law to be determined, that is, to be determined by the Court in the present proceedings. This is regardless of the Court's powers to inter alia remit the award in whole or in part, together with the Court's determination on the question of law to the arbitral tribunal for reconsideration. The question of law cannot include the specific question that was posed for determination by the arbitral tribunal in the first instance. In that scenario, the question, albeit a question of law, remained one which the Court ought not to intervene and determine.
- (6) Although the Court's powers under s 42 is discretionary, this discretion is curtailed when one of the conditions for intervention of the Court is

not fulfilled, and that is where the Plaintiffs are unable to show how the question of law substantially affects the rights of one or more of the parties as mandated by subsection 42(1A).

- (7) It cannot be overlooked that the choice of the term 'refer' as opposed to 'appeal' is deliberate in as much as the manner in which the whole substantive provision is put together is entirely peculiar to Malaysia. It calls for amongst others, the restrictive and narrow approach. Unlike an appeal where there is already a decision on the question of law and the Court is asked to invoke its appellate powers in reviewing that decision, a reference of a question of law arising out of an award under s 42 does not have that same character or benefit, especially since the question of law now before the Court cannot be the same question that was posed before the Arbitral Tribunal in the first place.
- (8) The Court was unable to conclude that the Award merits intervention of the Court for the reasons submitted by the Plaintiffs. The Court in fact, agrees almost entirely with the submissions of the Defendant. The questions posed do not meet the requirements of s 42, be it under the existing test of the Award containing an error of law on its face as reflected by the questions posed; or that the reasoning process of the Arbitral Tribunal reveals errors of law which merit intervention of the Court.
- (9) In the face of unchallenged facts and findings of issues, it could not be said that the rights of the Plaintiffs were affected substantially, or at all. Real and genuine questions of law must at the same time, accommodate and be consistent with key findings of fact. When it cannot change or affect those other key findings, it can only be said that the questions do not affect the rights of the Plaintiffs in any way since the Plaintiffs' rights remain unaffected by those other unchallenged findings.
- (10) The Court agrees with the Defendant that the requirements of s 42 have not been satisfied for the reasons offered by the Defendant. As the test in s 42 is somewhat narrow and restrictive primarily because of the scheme of the whole Act (sections 8, 37, 38, 39 and 42), the Court must be convinced that this is a suitable case for intervention. The Court was not at all convinced.

COMMENTARY

by *T Kuhendran*

Partner at Zul Rafique & Partners

Section 42 of The Arbitration Act 2005

Introduction

The High Court in *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd* provided a detailed discussion on the interpretation of s 42 of the Arbitration Act 2005 (the "Act"). The Plaintiffs in the case were an unincorporated joint venture formed to carry out the Stormwater Management and Road Tunnel ("SMART") Project in Kuala Lumpur. They entered into a contract with the Defendants for the construction of the North Tunnel Drive section of the Project. The time for completion of the works was not met by the Plaintiffs and various Defendants claims were rejected. This led to both parties terminating the contract and referring their respective claims to an Arbitral Tribunal which allowed the Defendants claims and dismissed the Plaintiffs claims. The Plaintiffs applied under s 42 of the Act to refer to the High Court questions of law said to have arisen out of the Tribunal's award. The Defendant opposed the application.

Issues arising from the case

The main issue arising from the case surrounds the requirements and the application of s 42 of the Act.

The Court held that its jurisdiction under s 42 was discretionary save where the preconditions under subsection 42(1A) of the Act were not met i.e. where the Plaintiffs were unable to show how the question of law substantially affected the rights of the parties.

The Court then went on to consider the applicable test under s 42. The Plaintiffs relied on the "error of law on the face of the award" test applied in *Majlis Amanah Rakyat v Kausar Corporation* [2009] 1 LNS 1766 and several other decisions including the learned High Court judge's own previous decision. The Defendant urged the Court to discard that test as it was relevant only for challenges under the old arbitration regime and not for challenges under s 42. In its place, the Defendant advocated the "process of reasoning" test as provided in the English case of *The Chrysalis* [1983] 1 WLR 1469 which had found favour with another High Court case of *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2014] 1 AMR 253.

The learned High Court judge held that she was not bound by her own previous decision. However, the learned High Court judge then went on to consider whether there was any distinction between the terms "refer" appearing in s 42 and "appeal" as found in other arbitration legislation. Her ladyship held that the choice of the term "refer" as opposed to "appeal" was peculiar to Malaysia, which called for a restrictive and narrow approach as taken by her in her previous decision.

The Court also took into consideration the origins of s 42 and its relationship with ss 37 and 39 of the Act. The Court held that s 42 was narrower and was only available where it could be shown that the contents of the award yielded questions of law which needed the Court's determination whereas ss 37 and 39 allowed for challenges on grounds which were broader.

The Court then held that in deciding questions of law, it would examine to see if there was any error committed by the Arbitral Tribunal as gleaned from the award, in that, the Tribunal had got it so obviously wrong in law, or the question of law reflected a decision that could not be reasonably reached by any other tribunal such that the award warranted intervention by the Court.

The Court agreed with the Defendant that the requirements of s 42 had not been satisfied. The Court further held that as the test in s 42 was narrow and restrictive, the Court must be convinced that this was a suitable case for intervention. In this case the Court was not at all convinced.

The Court in coming to its decision embarked on a thorough examination of s 42 of the Act.

The learned High Court judge held that there was still room left for the continued application of the "error of law on the face of the award" test. According to her ladyship, the preponderance of the test led to deliberate legislative intervention in other jurisdictions unlike the case in Malaysia where there is no express provision in the Act on the removal of jurisdiction and power in respect of error of law on the face of the award.

In relation to the difference between the term "appeal" and "refer", the Court held that unlike an appeal where there was already a decision on the question of law and the Court is asked to review that decision, a reference of a question of law arising out of an award under s 42 did not have that same character or benefit.

When discussing the origins of s 42, the Court referred to the parties' submission that s 42 (which only applied to domestic arbitrations unless the parties have agreed otherwise) must have been intended to reflect the desirability of greater judicial intervention for domestic arbitrations as opposed to international arbitrations. Having stated that the Court also noted the different basis of recourse under s 42 as compared to ss 37 and 39 of the Act, the former being narrower and only available where it could be shown that the award raised questions of law which needed the Court's determination.

Based on all these factors the Court found favour with the "error of law on the face of the award" test.

Suggested best practices to be adopted

Although the Court found favour with the "error of law on the face of the award" test, it should be noted that the Court of Appeal in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 preferred the *Exceljade* position as opposed to the *Majlis Amanah Rakyat* case. However the issues raised in this case were not canvassed there. Perhaps an opportunity may arise for the apex court to provide some guidance soon. Pending that opportunity perhaps it is best if the guidance given by the Court of Appeal be followed.

Mega Amethyst Sdn Bhd v AP Land Development Sdn Bhd & Anor

HIGH COURT, IPOH
CIVIL SUIT NO: 22(NCVC)-57-06/2014
SM KOMATHY SUPPIAH JC
10 MARCH 2015

[2016] 1 CIDB-CLR 116

The First and Second Defendants entered into a joint-venture agreement (“the JVA”) for the development of a housing project (“the project”) in January 2011. Under the JVA, the Second Defendant undertook to apply to the State Authority for the alienation of land to it for the project, whereas the First Defendant undertook the development and construction of the project. The JVA provided *inter alia*, that all costs and expenditure in relation to the project was to be borne by the First Defendant, which also had to appoint the contractors and consultants for the project. By Letter of Award dated 22 June 2012, the First Defendant appointed the Plaintiff as the main contractor for the project. At the request of the First Defendant, the Plaintiff cleared the construction site and constructed a show house unit on the land for the official launch of the housing project. However, the project was aborted when the Second Defendant was unable to secure the alienation of the land. The Plaintiff then sued the Defendants for the following: (i) RM2.47m for pre-construction site clearance, show unit house and project launching expenses; (ii) RM2.235m as contractor’s fees; (iii) future loss of net profit of RM18.59m; and (iv) RM450,000 as advance paid to the First Defendant. The Second Defendant applied to strike out the Plaintiff’s action and the Plaintiff thereafter applied to amend its writ and statement of claim to introduce new causes of action against the Second Defendant. The Plaintiff’s amendments sought to: (a) attach liability against the Second Defendant on the basis of the letter of award in its capacity as the partner or principal of the First Defendant; (b) ground a claim under s 71 of the Contracts Act 1950 against the Second Defendant; and (c) establish a claim based on quantum meruit. The issues before the High Court were whether the Plaintiff’s action against the Second Defendant was unsustainable due to a lack of contractual privity between the Plaintiff and the Second Defendant; and whether the Plaintiff’s action could be saved by the amendments sought by the Plaintiff.

Held, allowing the Second Defendant’s application, striking out the action and dismissing the Plaintiff’s application for amendments with costs:

- (1) In the instant case, the Plaintiff’s claim against the Second Defendant was based on contract and was anchored on a breach of the Letter of Award. The parties to such agreement were the Plaintiff and the First Defendant.

There was no privity between the Plaintiff and the Second Defendant as it was not a signing party. The doctrine of privity precludes parties to a contract from imposing liabilities or obligations on third parties. The absence of privity was fatal to the Plaintiff's case. The principle laid down by the Federal Court in *Suwiri Sdn Bhd v Government of the State of Sabah* [2008] 1 MLJ 743 (FC) ("Suwiri"), provided the Second Defendant a complete answer to the claim brought against it. The fact that the Second Defendant had approved the layout plans, attended the official launch of the show unit and that the Letter of Award was entered into between the Plaintiff and the First Defendant for the benefit of the Second Defendant, could not and did not create a contractual relationship or a legal relationship that permitted the Plaintiff to sue the Second Defendant. The Second Defendant was a stranger to the contract between the Plaintiff and the First Defendant and could not incur liabilities under it.

- (2) The Plaintiff's only recourse was against the First Defendant. The exceptions to the doctrine of privity merely enabled a third party beneficiary to sue a contracting party, but did not permit a contracting party to enforce contractual terms against a third party who was not a party to the contract.
- (3) The general rule as to amendments is that the Court will allow such amendments that will cause no injustice to the other parties. However, an exception to the general rule is that amendments to plead causes which cannot succeed or have no reasonable prospect of success must not be permitted. In determining an amendment application, consideration ought to be given to the evidence that could reasonably be expected at trial.
- (4) There was an insurmountable obstacle in applying principles of agency and partnership to the facts of the instant case. The JVA expressly provided in cl 10.1 that nothing in the JVA should be construed as creating a partnership or any relationship between the parties unless otherwise stated. Clause 10.1 of the JVA did not allow the Plaintiff to succeed on the basis of the agency and/or partner exception.
- (5) The case of *Siow Wong Fatt v Susur Rotan Mining Limited and Anor* [1967] 2 MLJ 118 illustrates that a party can resort to s 71 of the Contracts Act 1950 only if the other party has benefitted from the act or the delivery. In the instant case, the foundation of the Plaintiff's case for restitution was based on the assertion that the works were performed on the Second Defendant's land. However, the State Authority had not alienated the land to the Second Defendant. Thus the amendment sought by the Plaintiff on the ground that the Second Defendant had benefitted from the works done on the land was without any factual foundation. The Courts would not allow amendments to plead cases that would not succeed.

- (6) The facts in the present case demonstrated that this was not a case where the contract between the Plaintiff and the Second Defendant had become unenforceable. On the contrary, there was no contract between them. Based on the principle that *quantum meruit* was a restitutionary remedy which would be granted only where justice required that the Plaintiff should receive payment from the Defendant for the services provided or goods supplied in a case where the contract pursuant to which it was provided or supplied is discovered to be unenforceable, the amendment sought, had no prospect of success.

COMMENTARY

by *Chan Yew Hoong*
Advocate & Solicitor
Messrs Azman Davidson & Co

The Rights and Liabilities of a Third Party

Introduction

This case raises an important issue not uncommonly faced by parties in the construction industry, namely the doctrine of privity of contract. It is a trite and general rule under the common law that a contract cannot confer rights or impose obligations arising under it on any person except the parties to it (refer to *Tsang Yee Kwan v Majlis Perbandaran Batu Pahat* [2011] 8 CLJ 913; and the Privy Council decision of *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170). However, as is the case in relation to all general rules, the doctrine of privity of contract is not invariable and is subjected to limited exceptions.

The exceptions accepted by the learned Judge in this case were:

- (1) *Principle of agency*. An agent is a person authorised by the Principal to act on its behalf to enter into legal relations with third parties. Therefore, the Principal is bound by the obligations and the benefits under a contract that is entered by its agent on its behalf with a third party (see *Koh Yen Bee v American International Assurance Company Ltd* [2000] 3 CLJ 28);
- (2) *Trust*. The beneficiaries to a trust can sue the party contracting with the trustee who entered into the contract on behalf of the beneficiary (see *ESPL(M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674);

- (3) The English Court of Appeal's decision in *Beswick v Beswick* [1966] Ch 538. The English Court of Appeal held that "... *Where a contract is made for the benefit of a third person, the third person may enforce it in the name of the contracting party or his executor or personal representative, or jointly with him, or, if he refuses to sue, by adding him as a defendant.*"

It is, however, unfortunate to note that the learned Judge had relied on the English Court of Appeal's decision as one of the exceptions to the doctrine of privity of contract. The English Court of Appeal's ratio had been overruled by the House of Lords on appeal (see *Beswick v Beswick* [1968] AC 58).

The Plaintiff raised two other arguments in this case to overcome the doctrine of privity of contract, namely s 71 of the Contracts Act 1950 and the principle of *quantum meruit*, but both arguments were rejected by the learned Judge. Claims under s 71 of the Contracts Act 1950 and *quantum meruit* are both restitutionary claims based on the principle of unjust enrichment, i.e. where one party is unjustly enriched at the expense of another party. The party who received or enjoyed the benefit of the non-gratuitous act of the innocent party is bound to compensate the innocent party the value of the non-gratuitous act. Therefore, strictly speaking, both s 71 of the Contracts Act 1950 and the principle of *quantum meruit* are not exceptions to the doctrine of privity of contract.

The other notable exception that was not discussed in this case is the principle of assignment. Under the common law, the benefits of a contract (but not burden) can be assigned by a party (the assignor) to the contract to a third party (the assignee). Section 4(3) of the Civil Law Act 1956 enables the assignee to sue the debtor directly provided that the assignment is absolute, the agreement made in writing and express notice of the assignment had been given to the debtor. Enforcement of assignments which do not fulfil the requirements of s 4(3) of the Civil Law Act 1956 requires the assignee to join the assignor as a party to the suit either as a co-plaintiff or co-defendant.

It is notable that in all exceptions to the doctrine of privity of contract, except the principle of agency,¹ the third party is allowed to take the benefit of the contract and bring an action against a principal party. It is rare, if at all, that a principal party is allowed to claim against a third party. In other words, a third party can, in the abovementioned exceptions (except for agency), take the benefits of the contract, but in no circumstances take the burden or liabilities of the contract.

Lessons learnt from the case

- (a) Pursuant to the doctrine of privity of contract, a party takes no rights nor liabilities under a contract that it is not a party to. However, the doctrine of privity of contract is subject to the exceptions as discussed above, whereby a third party can be conferred a benefit under a contract it is not a party to. On the contrary, except with regard to the principle of agency, it is unlikely that a third party can be sued under a contract which it is not a party to.
- (b) Therefore, if it is the intention of a principal party to bind a third party to the principal party's contract, an agreement must be separately entered between the principal party and the third party.

Suggested best practices to be adopted

- (i) In situations such as the contractor's in this case, a clear way to bind the 2nd Defendant (the third party) to the contract between the contractor and the 1st Defendant (the contracting party) is to obtain a collateral warranty and/or guarantee from the 2nd Defendant from the outset, guaranteeing the performance of the 1st Defendant and/or the 2nd Defendant itself. For example, to hold the 2nd Defendant liable, under the collateral warranty and/or guarantee, in the event the 1st Defendant and/or the 2nd Defendant failed to secure the alienation of the land.
- (ii) A collateral contract is a contract accompanying the main contract, entered into between a third party and one of the parties to the main contract. The classic case illustrating this is *Shanklin Pier v Detel Products Ltd* [1951] 2 KB 854. In *Shanklin Pier*, the claimant employed contractors to paint a pier and instructed the contractors to purchase the paint made by the defendants, upon the defendant's representation to the claimant that the paint would last for seven years. The paint only lasted for three months. The claimant was allowed its claim against the defendant although the claimant was not a party to the contract for the sale of the paint as it was between the contractors and the defendants. It was held that there was a collateral contract between the claimant and the defendant that the paint would last for seven years.
- (iii) However, it is also important to bear in mind that a collateral warranty, in essence being a contract between the warrantee and the warrantor, would require *consideration*² moving from both parties to the collateral warranty.

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1. In agency, the agent enters into a contract with the third party on behalf of its principal. The contract is made between the third party and the principal, and not the agent. Therefore, on the contrary, the agent in its personal capacity takes no burden and benefit under the contract.
 2. Consideration is defined in Section 2(d) of the Contracts Act 1950 as follows: "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

**Pembinaan Teris Sepakat Sdn Bhd v Kumpulan
Ikram Sdn Bhd & Anor; Mohd Rozi Salleh & Anor
(Third Party)**

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22-1519-2009
LIM CHONG FONG JC
30 MARCH 2015

[2016] 1 CIDB-CLR 122

In 2003, the Malaysian Public Works Department ("the Employer") awarded a road construction/upgrading contract ("the Project") to the Plaintiff. With the Employer's approval, the Plaintiff appointed the First and Second Defendants to undertake soil investigation works ("SI works") for the Project. The Plaintiff also appointed the Third Party as the consultant engineer for the project. On 20 October 2003, the First Defendant submitted a soil investigation report ("first SI report") to the Plaintiff who handed the SI report to the Third Party who in turn forwarded a copy of the same to the Employer for its approval. On the Employer's approval of the SI report and other test reports, the Third Party in reliance thereof, designed the Project. The design was presented to the Employer for approval and on its approval, the design was handed back to the Plaintiff for construction. During construction of the project, a massive road embankment fill failure occurred on 11 June 2007. Consequent to the failure, both the Plaintiff and the Third Party produced two separate reports that were respectively brought to the attention of the Employer. The Employer thereafter instructed the Plaintiff to appoint the First Defendant to carry out confirmatory soil investigation at the failure location. The First Defendant carried out the confirmatory soil investigation and submitted a report ("second SI report") to the Plaintiff. The Third Party also submitted a report detailing recommended remedial measures to the Employer for approval. The Employer however neither approved nor accepted the proposed remedial measures and instead terminated the construction contract awarded to the Plaintiff due to poor project work progress. The Plaintiff analysed all the soil investigation reports and concluded that the Defendants' first SI report was inaccurate/erroneous by reason of a certain non disclosure in exploratory borehole BH-B4. The Plaintiff commenced the instant action against the Defendants to claim for all loss and damage suffered arising from the termination of the contract. The Defendants in turn enjoined the Third Party for indemnity and/or contribution. The Plaintiff argued that the Defendants were duty bound in contract and tort to exercise reasonable care, skill and diligence in the carrying out of the project soil investigation work. The Plaintiff also claimed that the Defendants were in breach of contract and/or negligent in the production of the inaccurate/erroneous first SI report that was relied upon by the Plaintiff in the design of the project work. The issues that arose for the High Court's determination

were: (i) the legal relationship and duties assumed by the respective parties; (ii) the role of the Second Defendant, (iii) the accuracy or correctness of the first SI report; (iv) the cause of the road fill embankment failure; and (v) the resultant consequences.

Held, dismissing the Plaintiff's claim with costs and dismissing the Defendants' claim against the Third Party:

- (1) The nature of the contractual relationship between the Plaintiff and the First and/or Second Defendants was that of a design and build/turnkey contractor and specialist soil investigation subcontractor. The letter of appointment of the Defendants was rudimentary with no detailed express terms mentioned therein. Thus, the contract must be construed in the light of the usual implied terms applicable to a normal construction contract, that is to say the contractor was obliged to: (i) supply materials that are of good quality and reasonably fit for the purpose for which they would be used; and (ii) work in a workmanlike manner using all proper skill and care.
- (2) There was deemed reliance by the Plaintiff on the care and skill of the Defendants in the performance of their obligations required under the construction contract. The requirements must be those as specified such as the Employer's need statement and the direction of the Third Party as the agent of the Plaintiff. Therefore, the Defendants owed the Plaintiff the tortious duty of care to use reasonable skill and care besides the contractual obligation to work in a workmanlike manner using all proper skill and care.
- (3) Although there was the Board of Engineers Circular No. 4 of 2005 that required the consulting engineer to take responsibility for sub-surface investigation, it appears from the literal reading of the circular that it came into force only in 2005. In any event, the terms of engagement of the Third Party by the Plaintiff as provided in the Board of Engineers Malaysia Scale of Fees (1998) that were applicable at the material time, did not prescribe mandatory supervision of sub-surface investigation on the part of the Third Party. In the premises, there was *prima facie* no duty owed by the Third Party to supervise the Defendants carrying out of the SI works.
- (4) The first SI report was sent by the cover letter dated 23 December 2003 of the First Defendant. The cover page and the authentication of the factual test page of the first SI report however indicated that it was prepared in the name of the Second Defendant. At the trial, DW3 (a director of the First Defendant) testified that the reference to the Second Defendant in the report was a slip and that was neither challenged by the Plaintiff nor the Third Party. In fact, the invoices for the soil investigation work done were sent by the First Defendant and paid accordingly by the Plaintiff. In the circumstances, the contracting party was the first and not the second

defendant *vis a vis* the Plaintiff. In other words, the Second Defendant did not play any role in the project.

- (5) The mere comparison of bore logs was inconclusive and hence inadequate to blame the First Defendant that the impugned borehole BH-B4 was in fact done inaccurately or erroneously. The location of borehole BH-B4 as carried out by the First Defendant was neither wrong nor in breach of the instruction of the Third Party at that material time. The explanation of DW2 (the expert witness of the Defendants) that since the borehole was done on the road shoulder of the existing old road constructed 20 years earlier, it was therefore likely to be dissimilar with those post failure boreholes carried out on virgin river bank ground or recently constructed embankment, was satisfactory. It was improbable that the First Defendant actually carried out several exploratory boreholes but concocted several others. In the premises, borehole BH-B4 as contained in the first SI report was neither inaccurate nor erroneous as alleged by the Plaintiff.
- (6) It was plain to the High Court on the balance of probabilities that the cause of the rotational slope failure of the road embankment fill was design inadequacy and the High Court would thus hold accordingly. Since the Third Party was responsible for the design, the fault must lie on the Third Party. The Third Party whilst undertaking the design relied on the 2003 bore logs particularly BH-B4. The First Defendant would have contributed to the fault if the bore logs were inaccurate and/or erroneous but that was not the case. As pointed out by DW2, the fill embankment design of the Third Party in reliance thereon was in any event inherently at risk of failure. It was consequently unsurprising that the failure occurred when even weaker soil was actually encountered at the project site. The First Defendant was thus wholly exonerated of fault in the instant case.
- (7) The Third Party was the agent of the Plaintiff in a design and build/turnkey contracting arrangement. Since the cause of the road fill embankment failure had been found to be due to inadequate design and hence the fault of the Third Party, it followed that the Plaintiff as the principal had to assume and absorb the consequences. The Plaintiff's case against the Defendants had to fail. The Defendants were neither in breach of contract nor negligent. It was thus, not necessary for the High Court to determine further into the damages aspect of the Plaintiff's claim.

COMMENTARY

by *Assoc. Prof. Dr. Umar A. Oseni*

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Privity of Contract

Introduction

In what may be described as a moderately complex construction contract awarded by the Malaysian Public Works Department, a number of contractual relationships were established which has further complicated the legal relationship and contractual obligations of the parties involved. The decision in this case was an attempt to reconsider the underlying principles relating to the "privity of contract" rule, duty of care, legal relationship and duties assumed among parties in a contract, and the resultant consequences of the multi-faceted legal relationships.

The background facts of the case relate to an award of a road construction/upgrading contract made by the Malaysian Public Works Department (employer) to the plaintiff in 2003. The plaintiff subsequently appointed the first and second defendants to specifically undertake the soil investigation works (first SI) and obtained the approval of the employer for the appointment. The plaintiff also appointed the third party as the consultant engineer for the project which was also approved by the employer. The first SI report was submitted to the plaintiff on 20 October 2003 by the first defendant. The plaintiff thereafter forwarded the SI report to the third party who later sent a copy of the report to the employer for approval. After the approval of the first SI report as well as other related test reports, the project was designed by the third party. After the design was finalised, it was presented to the employer for its approval and upon receiving the approval, the design was forwarded to the plaintiff for construction. While the construction was in progress, there was a massive road embankment fill failure on 11 June 2007 which caused a major setback to the entire construction project.

As a result, there arose a need to conduct further confirmatory soil investigation to determine the cause of the embankment fill failure. This led two separate reports produced in July 2007 by the plaintiff and the third party respectively. The two reports were submitted to the employer who in turn informed the plaintiff, after an all-stakeholder meeting held on 4 September 2007, to appoint the first defendant to carry out a confirmatory soil investigation at the location of the massive

embankment fill failure. The first defendant carried out the investigation and submitted a report (second SI report) to the plaintiff. As a further measure to manage the budding dispute, the third party submitted a report which detailed a number of remedial measures for the approval of the employer. In spite of the report on the remedial measures, the employer terminated the construction contract with the plaintiff as a result of poor project work progress.

Consequently, the plaintiff had to analyse all the SI reports which led to the conclusion that the first SI report was inaccurate and erroneous. The plaintiff therefore commenced proceedings against the defendants at the High Court where it claimed for all loss and damage suffered which arose as a result of the termination of the construction contract. As a risk mitigation measure, the defendants joined the third party in the action for indemnity and contribution. Besides the inaccurate and erroneous first SI report, the plaintiff also argued that the defendants owed him a contractual duty and duty of care to ensure that reasonable care, skill and diligence as required by law were exercised in carrying out the SI project. As a result, the following five important issues arose for the determination of the Court: (1) the legal relationship and duties assumed by the respective parties (*Held*: third party had no duty to supervise the defendants); (2) the role of the Second Defendant (*Held*: not a contracting party in the construction contract) (3) the accuracy or correctness of the first SI report (*Held*: neither inaccurate nor erroneous); (4) the cause of the road fill embankment failure (*Held*: design inadequacy and the resultant fault lies on the third party); and (5) the resultant consequences (*Held*: third party was the agent of the plaintiff, and thus the plaintiff must assume and absorb the consequences as the principal).

Lessons learnt from the case

There are three important lessons to learn from the case.

(a) *Revisiting the doctrine of "Privity of Contract" in complex construction contracts*

The whole case revolves around the rights and obligations of the parties in the construction contracts. There is no doubt that there were multiple contracts and some of the parties, even though had relationships with some contracts, were not privy to such contracts. Such contractual uncertainties led to legal complexities as to the legal relationship and duties of all the parties involved in the construction project. In applying the "privity of contract" rule, the court clearly sets out the non-contentious issue of the relationship

between the parties where "the privity of contract is between the plaintiff and the first and/or second defendants and the plaintiff and the third party in respect of the SI works and engineering design respectively" The third party was merely acting as the agent of the plaintiff. The question then arises: how do we articulate the legal relationship between the defendants and the third party, as well as the relationship between the Malaysian Public Works Department and the third party? Obviously, there were contractual dealings between them but *stricto sensu* there was no privity of contract in their relationship except where the third party acted as an agent of the plaintiff.

The legal complexities encountered in this case with specific reference to the rights of the third party would have been easily resolved if the "privity of contract" rule had been reformed as effected in the United Kingdom with the enactment of the Contracts (Rights of Third Parties) Act 1999 (c. 31), Contracts (Rights of Third Parties) Act (Act 39 of 2001) of Singapore, and the Contracts (Rights of Third Parties) Ordinance (c. 623) 2015 of Hong Kong which came into force on 1 January 2016. In these three jurisdictions, until fairly recently, a party who is not a party to a contract could not enforce any right or be obliged to discharge an obligation under the contract.

The current position of law in Malaysia is well articulated in *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd* [2009] 2 MLJ 102 at 119, where Abdul Malik Ishak JCA of the Court of Appeal observed that: "Our Contracts Act 1950 (Act 136) has no express provision pertaining to the doctrine of privity of contract. In fact, the [common law] doctrine still applies in Malaysia." Moving forward, Malaysian courts need to break away from the shackles of the common law doctrine of privity of contract. This can only be achieved through legislative reforms as effected in the United Kingdom, Singapore, and Hong Kong.

(b) *The nature of duty of care*

With specific reference to the duty of care required of a professional man, 'the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract and is therefore actionable in tort' (*Esso Petroleum Co Ltd v Mardon* [1976] QB 801 CA, Lord Denning MR held at p. 819). This is reflected in the deemed reliance of the plaintiff on the care and skills of the defendant as required under this kind of contract. It is pertinent to note that the initial problem encountered in ascertaining the legal relationship among the parties involved, is to some extent, extended to the nature of duty of care, particularly between the third party (acting as an

agent of the plaintiff) and the defendants. The court has rightly articulated the position of the law as to the nature of duty owed by the third party to supervise the defendants while carrying out the SI investigation project. The Board of Engineers Circular No. 4 of 2005 that required the consulting engineer to take responsibility for sub-surface investigation could not have a retrospective effect and hence, the third party owed no duty of care whatsoever to supervise the defendants' work.

(c) *Proper drafting to identify the parties involved*

One of the contentious issues addressed in the case is the status and role of the second defendant. While the second defendant was joined as a party which the plaintiff seemed to have contracted with, it was later obvious that the second defendant, even though was a party at the initial stage, did not play any role in the preparation of the contentious soil investigation report. Even though the defendants are related private limited companies that undertake the same works – soil investigation – they were appointed and their appointment was subsequently approved. From the available facts, it was not clear whether the appointment was that of the first and/or second defendant even though it was established that the second defendant is a subsidiary company of the first defendant. What was revealed during the proceedings is that the plaintiff's appointment letter was addressed to "Ikram", a name which appears in both the registered official names of both the first and second defendants. While the appointment of the first defendant was not contentious, the court determined that the role and status of the second defendant was a major issue. The court relied on a number of related facts which include the letter issued by the third party specifically addressed to the first defendant, the name in the cover letter for the first SI report, and invoices of the first SI work sent by the first defendant and paid to it. It is pertinent to note that though the role of the second defendant was raised for determination by the court, there was further evidence that reference to the second defendant in the SI report was a slip – a fact which was not challenged by any of the parties. It would have been interesting to see the decision of the court if either the plaintiff or the third party had challenged such evidence. To avoid this kind of situation, if a lawyer has been involved in drafting the agreements, such a lawyer is required by standard professional practice to adequately research the law before giving advice to the client or drafting the agreement properly as required in *Gibb v Jivan* [1996] O.J. No. 1370 (S.C.J. (Gen. Div.)].

Suggested best practices to be adopted

From the facts of the case and the position of the court on the issues raised, it is thus clear that when it comes to third party rights and obligations under a contract or related contracts, parties must get things right from the contract stage in terms of careful drafting. When the law applicable to third party rights has not been reformed to address current challenges in the construction industry that were hitherto considered not necessary, the onus therefore lies on the parties to ensure careful drafting which will not only address third party rights and the legal implications of such rights in a construction contract but will also predict how the court will construe related terms in the contract.

Finally, one cannot rule out the overarching necessity of introducing legislative reforms in the contracts law of Malaysia through the consideration and recognition of third party rights. With the Contracts (Rights of Third Parties) Act 1999 (c. 31) of the United Kingdom, Contracts (Rights of Third Parties) Act (Act 39 of 2001) of Singapore, and Contracts (Rights of Third Parties) Ordinance (c. 623) 2015 of Hong Kong, one would ordinarily expect the Malaysian Parliament to enact the Malaysian version of such law to ensure that construction contracts, which ordinarily involve multi-parties and contracts, are consistent with modern realities in advanced jurisdictions.

**Perbadanan Kemajuan Negeri Selangor v
PCM Bina Sdn Bhd & Ors; Astaka Intan Sdn Bhd
(Third Party)**

HIGH COURT MALAYA, SHAH ALAM
CIVIL SUIT NO: 22 (NCVC)-1392-11/2012
ROZANA ALI YUSOFF JC
20 APRIL 2015

[2016] 1 CIDB-CLR 130

The Plaintiff owned some land ("the Land") and through a Privatisation Agreement ("PA") engaged the First Defendant as a developer for a housing project on the Land. Under the PA, the First Defendant agreed to indemnify the Plaintiff for *inter alia*, any damages, expenses or proceedings. The Second and Third Defendants entered into a Guarantee Agreement ("GA") as guarantors for the First Defendant. The First Defendant constructed the houses and the Plaintiff sold the houses. Subsequently, the Plaintiff received complaints of damage from homeowners. The First Defendant refused to carry out rectification works as requested by the Plaintiff, causing the Plaintiff to carry out such works. The Plaintiff sued the First Defendant under the indemnity for loss and damages in respect of the rectification works. Pursuant to the GA, the Plaintiff also sued the Second and Third Defendants as guarantors of the First Defendant. The Plaintiff alleged *inter alia* that the houses were damaged due to soil settlement and that the First Defendant was responsible for such settlement due to the First Defendant's improper soil treatment or investigations. The issues for the High Court were: (i) whether the First Defendant was responsible for the soil settlement; (ii) whether the Plaintiff was entitled to the damages and compensation as claimed; (iii) whether the Second and Third Defendants were truly guarantors for the First Defendant; and (iv) whether the GA included damages due to the soil settlement.

Held, allowing the Plaintiff's claim with costs:

- (1) It was not a disputed fact that the First Defendant was a party to the PA and that the Second and Third Defendants were the directors of the First Defendant. The Plaintiff and the First Defendant, having signed the PA, were bound by the terms and conditions in the PA. Further, pursuant to Art 17.1(b) of the PA, the First Defendant had agreed to provide indemnity against any damages to the Plaintiff. In such a case the first Defendant was to indemnify the Plaintiff from loss caused to the Plaintiff arising from its (First Defendant's) conduct.
- (2) In the instant case, the Plaintiff had failed to discharge the burden of proof under s 103 of the Evidence Act 1950 that it had performed the soil

treatment test. Thus, the Court would find the First Defendant responsible and that it had failed to conduct the soil treatment.

- (3) The Court would accept the expert evidence of the Plaintiff's expert witness that no soil treatment at the affected area had been carried out before commencement of the development. The First Defendant had not or had failed to challenge PW3 (Plaintiff's expert witness) in cross-examination or produce its own expert witnesses or tender independent expert opinion to disprove or rebut PW3's evidence. The First Defendant had not adduced any sufficient evidence to challenge the Plaintiff's expert evidence and the Court would thus accept the evidence of the Plaintiff's expert witness.
- (4) The First Defendant had also given undertakings to rectify and carry out remedial works resulting from the damage caused in the affected area and this was consistent with art 17(1)(b) of the PA. The Court was unable to agree with the First Defendant that such undertaking was on the basis of goodwill and purely based on Corporate Social Responsibility because the First Defendant's various correspondences had shown an undertaking to indemnify the Plaintiff by carrying out remedial works at the affected area.
- (5) On the evidence, the Second and Third Defendants were the guarantors for the First Defendant in relation to the affected area.
- (6) On the balance of probabilities, the Plaintiff had proven that it was entitled to be indemnified by the First Defendant for any damage, expenses, liabilities, losses, claims or proceedings as per the PA. Further, based on the GA, the Second and Third Defendants being the guarantors of the First Defendant, were to indemnify the Plaintiff from or against any expenses with regard to damage or liabilities arising from the PA.

COMMENTARY

by *Ir. Oon Chee Kheng*
Advocate and Solicitor
Arbitrator/Adjudicator (KLRCAs)
Mediator (CIDB)

Contract Documents, Soil Investigation and Treatment

Introduction

Perbadanan Kemajuan Negeri Selangor ("PKNS") had by way of a privatisation agreement ("the Agreement") appointed PCM Bina Sdn Bhd ("PCM") as a turnkey developer for a housing project ("the Project").

Due to soil settlement in the area of the Project, the houses constructed by PCM and sold by PKNS suffered damages and PCM refused to rectify the damages when requested to do so by PKNS.

Under the Agreement, PCM was required, like most construction contracts, to indemnify PKNS for any damages, expenses and proceedings etc brought upon PKNS by third parties. The other two defendants to this suit were directors of PCM who had earlier signed as guarantors for PCM. PCM had also brought in a third party ("the Third Party") to the suit and claimed that it was entitled to be indemnified by the Third Party to this suit. The case thus concerned the legal action by PKNS against PCM for the indemnity provided by PCM for losses and damages in respect of the rectification works. PKNS also sued the other two defendants as guarantors for PCM. The Third Party brought in by PCM failed to be present at the trial to defend itself.

It was contended by PKNS that the settlement that led to the damaged houses which in turn led to the requirement of rectification works was caused by lack of prior soil investigation and improper soil treatment works undertaken by PCM.

The learned judge had made a factual finding that there was settlement and this settlement had caused the damages to the houses constructed by PCM and which houses were later sold by PKNS to purchasers. Legal actions were taken by the house purchasers against PKNS which led to PKNS invoking the indemnity provision in the Agreement against PCM.

PCM had during the trial of this suit contended that it had performed proper soil treatment and reports of such treatment works were submitted to and approved by PKNS and Majlis Perbandaran Shah Alam

("MBSA") as required under the Agreement. PCM further contended that it had procured the required Certificate of Fitness and Occupation ("CFO") from MBSA.

PKNS however contended that PCM had failed to conduct soil treatment before constructing the affected houses, and no evidence was led by PCM to prove that it had carried out the soil treatment as alleged by PCM. PKNS had also adduced expert evidence from an engineer as an expert witness. Evidence from the structural engineer adduced during trial also suggested that the ground slab of the houses were wrongly constructed and could not cater for the situation of the settled ground in the area of the Project.

The learned judge accepted the expert evidence of the engineer as the evidence was unchallenged and PCM also did not adduce its own expert evidence to counter that adduced by PKNS's expert. The learned judge thus made a finding that PKNS was entitled to be indemnified by PCM for the damages, expenses, liabilities, losses and claims that it had suffered. The learned judge also found that the second and third defendants being guarantors to PCM was to indemnify PKNS from such losses etc.

The learned judge refused to accept PCM's argument that it could not have been liable for the damages since it had, *inter alia*, procured the CFO. The learned judge quoted the judgment of Ramly Ali JC (as Ramly Ali FCJ then was) in *KC Chan Brothers Development Sdn Bhd v Tan Kon Seng* [2001] 6 MLJ 636 that the CFO was a document which:

"was issued by the relevant authority ... is to certify that the house in question is deemed fit for occupation. It is issued upon completion of the house by the developer and after the relevant authority is satisfied that the relevant provisions of the Uniform Building By Laws 1984 (GN5178/85) ("UBBL") have been complied with. The UBBL sets the minimum standards and specifications for the houses in question. However, the sale and purchase agreements together with the approved building plan are separate documents."

The judge however refused to award to PKNS the claimed amount of RM 6,385,000.00 as this amount was only an estimate and there was no evidence of actual loss to substantiate this claimed amount.

The learned judge did however consider that evidence was adduced that showed damages indeed existed in the houses which required rectification works and PKNS was entitled to be indemnified. The learned judge thus ordered that the damages be assessed. The judge

also found that the Third Party was liable to and to indemnify PCM for the judgment sum and the legal costs ordered.

Lessons learnt from the case

The case has given rise to a myriad of interesting issues frequently encountered during construction operations. The legality and implications of various documents frequently encountered in construction contracts such as indemnity clauses in contracts, guarantees, certificate of fitness for occupation (now certificate of completion and compliance) and others, the importance of which was frequently downplayed or ignored, were also clarified. The case also highlighted the importance of proper soil investigation and soil treatment works to the construction process, which is something that ought not to be cavalierly undertaken. The involvement of competent technical personnel, as was highlighted in the case, was crucial in securing a favourable decision in this case for PKNS.

Suggested best practice to be adopted

The case is a reminder that one should not treat lightly the importance of proper site investigation and if required soil treatment works. The financial consequences that ensue for any undesirable problems that may surface later on can be disastrous, and it is fortunate that the less than desirable soil treatment as evident in this case did not result in any deaths or injuries.

The case also highlights that all parties to construction contracts must fully grasp the importance and implications of the documents which they sign, and the learned judge has placed importance on the fact that the Agreement was signed and thus was binding between the parties.

The involvement of competent technical personnel cannot be stressed too strongly. One cannot escape liability by merely giving general statements. PKNS succeeded in this case by furnishing expert evidence from engineers; the un-contradicted evidence from this engineering witness convinced the learned judge as to the liability of PCM for the settlement.

Finally, the case also highlights the all-important and trite principle that if you want to claim, you must prove, and you must prove both your entitlement and the quantum of that entitlement.

Stecon Sdn Bhd v Eco Tower Sdn Bhd

HIGH COURT, KUALA LUMPUR
SUIT NO: 22C-61-12/2013
SEE MEE CHUN J
12 MARCH 2015

[2016] 1 CIDB-CLR 135

The Defendant was employed as the main contractor for works related to a steel pipeline for a power plant. The works involved two parts. The first part concerned the installation, testing and commissioning of fabricated steel pipes. The second part concerned the civil work, involving the earth-work, temporary sheet piling works and reinforced concrete saddles. It was subcontracted to the Plaintiff by the Defendant vide revised Purchase Order ("PO") dated 18 April 2013 (CBD 1 329-348) ("the subcontract"). The Plaintiff claimed that there were fundamental breaches and/or repudiation of the subcontract by the Defendant. The Plaintiff claimed there were acts of prevention and/or hindrance by the Defendant, such as a delay in providing RFC drawings and instructions, dictating Plaintiff's casting sequence of saddles, non-issuance of POs for variation work, not making payments for the change of machineries required for the variation work; deletion of sheet piling work; non-payment of progress claims and wrongful takeover of work. The Plaintiff accepted the Defendant's repudiation on 3 October 2013 thereby terminating the subcontract and claimed for outstanding sums due, performance bond and loss of profits. At all material times, the Plaintiff was not registered with the Construction Industry Development Board ("CIDB").

Held, allowing the Plaintiff's claim with costs:

- (1) Section 25 of the Lembaga Pembangunan Industri Pembinaan Malaysia 1994 ("CIDB Act") read with s 29 of the CIDB Act are not intended to prohibit contracts but to punish those who contravene the law. This is made clear by the provision of penal consequences and nothing more. The CIDB Act does not govern the legality of contracts but the regulation of contractors by way of penal sanctions. In the instant case, the subcontract was not void by reason of the Plaintiff's non-registration with CIDB.
- (2) The subcontract in the instant case was a lump sum contract and not a re-measurement contract. There was no term in the subcontract as in the main contract which stated it was based on provisional quantities and subject to re-measurement.
- (3) The deletion of sheet piling by the Defendant despite there being no such power to do so constituted a fundamental breach of the subcontract. It was not relevant that at the time of deletion no work had been commenced.

- (4) The change in height limitation and pipe length which required a change in crane was a variation in that the Plaintiff was now to perform its work in a manner different to that originally indicated. Given the Court's finding that the subcontract was a lump sum contract and there was no variation clause in the subcontract, the Plaintiff was within its right to ask for a PO as without it the Plaintiff was not required to comply with the varied work. The failure to issue a PO was itself not however a fundamental breach.
- (5) The Defendant's failure to pay on the progress claims amounted to a fundamental breach. Non-payment by the owner (employer) of the contractor sums of money owing may constitute repudiatory conduct and that repeated failure to pay money when it is due may constitute repudiation. So too in the instant case of the Defendant failing to pay on the progress claims.
- (6) The delay in RFC drawings, supply of anchor bolts and the failure to issue PO were in themselves not fundamental breaches. However, all these breaches taken collectively and along with the fundamental breach of deletion of sheet piling work and failure to pay as per progress claims, would go towards the Plaintiff's acceptance of the Defendant's repudiation of the subcontract. Under the circumstances, the Defendant had shown an intention not to be bound by the breaches with the net result that the Plaintiff could regard itself as discharged from the subcontract.
- (7) The claim for the refund of moneys overpaid to the Plaintiff was dismissed as the terms of payment did not require the Plaintiff to be paid only when the Defendant was fully paid. The claim on additional costs and expenses on the Plaintiff's termination was dismissed as it was the Court's finding that the Defendant had shown an intention not to be bound thereby resulting in the Plaintiff discharging itself from the subcontract.

COMMENTARY

by *Datuk Professor Sundra Rajoo*

Director, Kuala Lumpur Regional Centre for Arbitration (KLRC)

Boosting a Prompt Payment Culture in Malaysia

Introduction

The Plaintiff was appointed as the sub-contractor by the Defendant for civil work including earth work, temporary sheet piling works and reinforced concrete saddles in a power plant project. The Defendant was the main contractor in the project. It was undisputed that both the Plaintiff and the Defendant were not registered with the CIDB.

Issues arising from the case

The first issue to be decided was whether the sub-contract could be enforced by reason of non-registration of the Plaintiff with the CIDB. It was argued by the Defendant that since the Plaintiff was not registered with the CIDB, the sub-contract entered into between the parties ought to be declared void and unenforceable.

The Court analysed the intention of the Parliament in enacting s 25 of the CIDB Act 1994 which provides for registration of contractors and s 29 which provides for a penalty for non-registration. The Court also looked at s 30 which provides for a stop work notice that may be issued to the unregistered contractor.

Reading the above three sections together and analysing precedents from the higher Courts, the High Court held that due to the provision of the penalty, it was clear that the intention of the Parliament was not to prohibit such contracts but only to regulate contractors by way of penal sanctions.

The Court then proceeded to decide on the substantive issue of the case which was whether there was fundamental breach of the sub-contract by the Defendant. The major issues and the Court's findings on them are briefly described below.

- (1) On the issue of deletion of sheet piling works from the Plaintiff's scope of works, the Court ruled that in a lump sum contract (and not re-measurement), there is no power granted to the main contractor to omit part of the sub-contractor's work. In this case, the deletion by the Defendant of the sheet piling works despite

there being no such power to do so constituted a fundamental breach of the sub-contract. The Court stated that it was irrelevant that at the time of deletion, no work had been commenced by the Plaintiff.

- (2) On the issue of change in height limitation and pipe length, the Court held that such a change would constitute a variation as the Plaintiff would be required to perform its work in a manner different to that originally indicated. The Court held that the Plaintiff was within its right to ask for a Purchase Order ("PO").
- (3) On the issue of failure of the Defendant to pay the progress claims, the Defendant had explained that the payment would only be due to the Plaintiff when the Defendant itself would be paid by its employer. Relying on the decision of the Federal Court in *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 7 CLJ 1, the Court opined that the only thing contingent in this clause was the time for payment and not the obligation of payment. The Court held that non-payment was a fundamental breach of the sub-contract by the Defendant.

The High Court ruled that from the combination of all breaches of the Defendant, the Defendant had shown an intention to not be bound by the breaches with the net result that the Plaintiff could validly regard itself as discharged from the sub-contract.

Lessons learnt from the case and best practices to be adopted

A number of valuable lessons may be learnt by an analysis of this judgment.

The difference between a lump sum contract and a re-measurement contract can be observed. The decision establishes that there may be no deletion from the scope of works in a lump sum contract. The rationale remains to protect the interests of the sub-contractor. A sub-contractor that is ready and willing to complete its entire original scope, is entitled to receive its entire remuneration as agreed in the sub-contract even though no works pertaining to the deletion had been commenced by the sub-contractor at that time. The principle is also applicable in the case of variations. Should there be reasonable grounds to establish variation, the contractor can rightfully ask for a PO to be issued.

The reliance of the Court on the judgment of the Federal Court in *Globe Engineering* is heartening. The principle expounded in the judgment inculcates a prompt payment culture within the construction industry in Malaysia. The Federal Court's ratio that back-to-back clauses only

make the time of payment and not the obligation of payment contingent, until expressly provided for, gives assurance to the sub-contractor that the payments will be duly made upon proper certification of the claims. It is to be noted that the Construction Industry Payment & Adjudication Act 2012 ("CIPAA") s 35 provides that any conditional payment clause in a construction contract, which includes pay-when-paid and pay-if-paid clauses, is void.

The stands taken by the courts on conditional payment clauses and s 35 of the CIPAA means that parties can no longer rely on such clauses to withhold payment from their contractors. The only exception to this rule is when there is a clear and unambiguous provision to this effect. All of these measures have been taken for the main purpose of enabling cash flow to enable a construction project to be completed smoothly. As such, the best practice would undoubtedly be to effect payment to the contractors as per the payment schedule agreed.

Lastly, a relevant take away from this judgment is that a series of breaches of the sub-contract by one party, even if all of the breaches were not by themselves fundamental breaches, may be taken to validate the sub-contractor's discharge from the sub-contract. In this case, the High Court held that the series of breaches by the Defendant showed its intention of not being bound by the sub-contract.

From the discussion above, we can see that many practical lessons may be learnt by parties while fulfilling their obligations under a sub-contract. The courts are strictly enforcing and encouraging a prompt payment culture in the construction industry in Malaysia. These measures will ably support the booming construction industry that is set to exponentially grow.

WRP Asia Pacific Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd & Other Case

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NOS: 24C-17-05/2015 & 24C-8-04/2015
MARY LIM THIAM SUAN J
12 OCTOBER 2015

[2016] 1 CIDB-CLR 140

The Defendant was appointed by the Plaintiff to make and design steel structures at two factories. Conflict arose between the parties over revisions to the roof design at one of the sites. The Defendant refused to proceed with the revisions as it felt the integrity of the structure would be affected. The Plaintiff also had not paid the Defendant its final progress claim. As a result, the Defendant suspended work and issued letters of demand and subsequently a payment claim under s 5 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The Plaintiff did not respond but was deemed to have disputed the Defendant's claims under s 6(4) of the CIPAA. The Defendant subsequently brought an Adjudication Claim against the Plaintiff, to which the Plaintiff filed its Adjudication Response denying the sum claimed by the Defendant. The Defendant, in its Adjudication Reply, revised its claim. The Adjudicator allowed the Defendant's claim. Clarification was sought by the Plaintiff, but the Adjudicator refused to provide it. The Plaintiff thus applied to set aside the adjudication decision under s 15 of the CIPAA. The grounds relied on by the Plaintiff were, *inter alia*,: (i) there was breach of natural justice as the Plaintiff had no opportunity to respond to the Defendant's Adjudication Reply and that there existed unilateral communication between the Defendant and Adjudicator; (ii) the Adjudicator was neither experienced nor qualified and was thus incompetent; (iii) the Adjudicator acted beyond its jurisdiction. The Defendant, meanwhile, sought to enforce the adjudication decision under s 28 of the CIPAA. Extensive arguments were raised by both parties on the question of jurisdictional challenge; whether the jurisdiction of the Adjudicator may be raised. If so, at which stage of the adjudication proceedings must the challenge be made; and whether the principle of waiver and estoppel operate to deprive a subsequent challenge if there was no earlier challenge.

Held, allowing the Plaintiff's claim and setting aside the Adjudicator's decision:

- (1) The Adjudicator's powers to take inquisitorial initiatives to ascertain the facts and the law required for the decision may involve the Adjudicator communicating with any one of the involved parties, unilaterally. There was nothing wrong with that. If that was required so that the Adjudicator can reach his decision, s 25 of the CIPAA allowed him those powers. But, there was a rider or condition that is worked into that, i.e. when

the Adjudicator does communicate with anyone side, he was not only expected to, he was under a duty to make known to the other side, his communication to the first party. While it is true and really a matter of logistics and common sense that the precise and every detail may not be completely recanted to the other side, the general purpose and broad details of the communication must nevertheless be made known to the other side; with the other side being offered similar opportunity to respond.

- (2) In the instant case, the Adjudicator's very act of contacting the Defendant and the purpose of such contact must be made known to the Plaintiff. The Adjudicator, however, made no effort to inform the Plaintiff; he was in fact of the opinion that he was entitled to unilaterally contact the Defendant without informing the Plaintiff of his contact. The Adjudicator was obliged under the rules of natural justice to offer the Plaintiff an opportunity to respond. As he did not, he was in breach of the rules of natural justice. More significantly, the Adjudicator's contact with the Defendant was in relation to a document (i.e. Schedule 2.3 of the Defendant's Adjudication Reply) which formed his decision.
- (3) The KLRCA had informed the Plaintiff that pursuant to reg 4 of the CIPAA Regulations 2014, the Adjudicator "has fulfilled the competency standard and criteria of an Adjudicator". KLRCA further advised the Plaintiff that the "Adjudicator has working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognised by the KLRCA". The Court accepted that KLRCA must be taken to have seen fit to recognise this Adjudicator's working experience in what must be "other fields". Although it was not immediately apparent what that working experience was, or whether a person with the qualifications such as that held by this Adjudicator was enough, this Adjudicator had nevertheless attended the requisite course and training; and was a holder of a Certificate of Adjudication from KLRCA. In that sense, this Adjudicator was said to have met the competency standard and criteria to be an Adjudicator under CIPAA 2012.
- (4) Under s 27(3) of the CIPAA, where the parties raise issues of jurisdiction, the Adjudicator would not be obliged to decide on such issues but may instead proceed with the adjudication. In such circumstances, the party raising the issue had the right to raise this same issue later under ss 15 or 28. Since the law already reserved such a party that right, it stood to reason that the doctrine of waiver did not *ipso facto* apply. There must be strong cogent and persuasive circumstances to persuade the Court to consider otherwise.
- (5) The High Court observed that with the exacting timelines that the Adjudicator had to keep, a challenge of the jurisdiction of the Adjudicator in the sense of his competency was not lost or waived just because it was

not taken during the adjudication proceedings; or because the complaining party participated in the adjudication proceedings. In the present case, the competency of the Adjudicator was really about his qualification as an Adjudicator. However, asking for an Adjudicator's qualifications was not standard practice, and there should be a minimal level of trust in the Adjudicator's ability in order for the system to work. Furthermore, the Adjudicator was registered with the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

COMMENTARY

by *Sr Dr. Noushad Ali Naseem Ameer Ali*

Past President, Royal Institution of Surveyors Malaysia

Adjudication

Introduction

WRP Asia Pacific Sdn Bhd ("WRP") engaged NS Bluescope Lysaght Malaysia Sdn Bhd ("Bluescope") to design and construct some structural steelwork under a construction contract. Disputes on payment crystallised and were referred to adjudication under the Malaysian Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). In the adjudication, Bluescope was the claimant and WRP the respondent. The adjudicator decided in the claimant's (Bluescope's) favour and ordered the respondent (WRP) to pay RM3,495,268.84 together with interests and costs in his adjudication decision dated 9 March 2015.

Two court cases were subsequently filed but were heard together. In the first case Bluescope sought to enforce the adjudication decision under section 28 of CIPAA while in the other case WRP sought to set aside the same adjudication decision under section 15 of CIPAA. As the enforcement of the adjudication decision depended on the outcome of the application to set aside, the parties agreed for the application to set aside to be heard first.

This case is an important case as unlike most cases, the judge (in a 73-page judgment) decided to set aside an adjudicator's decision. Challenges to adjudicators' decisions (or arbitrators' awards) are not taken lightly in most jurisdictions.

Lessons learnt from the case

The case involved three main issues relating to an attempt to set aside an adjudicator's decision:

- (1) The adjudicator allegedly acting beyond his jurisdiction and the question of timing of when jurisdictional challenges may be raised.
- (2) The relatively uncommon but nevertheless important issue on adjudicators' competency and KLRC's role in setting competency standards for adjudicators.
- (3) Allegations of breach of natural justice.

Challenging the adjudicator's jurisdiction

In most jurisdictions that have introduced similar legislation with adjudication, jurisdictional challenge is one of the more common grounds of challenges in court. However these are not taken lightly. Mary Lim J herself referred to her earlier judgment on a matter challenging adjudicators' decisions which related to adjudicators' giving reasons in their decisions: *'The Courts must exercise considerable restraint when invited to set aside an adjudication decision reached in very exacting circumstances and conditions. So much so that I believe it will only be in the rare and extreme circumstances that the reasons, brief or otherwise is found wanting.'*

The parties in this case argued extensively on the question of jurisdictional challenge, including the question of at which stage of the adjudication proceedings the challenge must be made and whether the principles of waiver and estoppel would operate if the challenge was not made at the appropriate times.

Section 27(3) of CIPAA clearly provides that notwithstanding a jurisdictional challenge, *'the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of the parties to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).'*

Mary Lim J's decision was made after an extensive consideration of numerous cases on the question of timing of a jurisdictional challenge spread over more than 20 pages of the judgment. Her Ladyship decided, given the tight time frames of adjudication and the provision of s 27(3) of CIPAA, the doctrine of waiver and estoppel would be an exception and would generally not operate in the case of CIPAA just because the jurisdictional challenge was not taken during the adjudication proceedings or because the complaining party participated in the adjudication proceedings. Unlike some other jurisdictions that may provide for the adjudicators to make determinations on their own jurisdictions, the provision in CIPAA is clear - the adjudicator may proceed with the adjudication without making any determination on

jurisdictions. That is what Mary Lim J decided on the question of ***timing of jurisdictional challenges***. The training materials provided by KLRCA also clearly state this. This should be taken as trite law.

Somewhat lacking in the judgment though is an equally detailed consideration of facts on the question of whether the adjudicator had exceeded his ***jurisdiction in respect of the subject matter of the adjudication***. The core of Mary Lim J's decision was that s 27(1) restricts the adjudicator's jurisdiction to matters found in s 5 (payment claim) and s 6 (payment response) and not from the adjudication claim, adjudication response, or adjudication reply. This is also clearly what the KLRCA adjudicator training materials provide.

A couple of paragraphs (ie paragraphs 120 and 121) towards the end of the judgment effectively states that counsel for WRP contended that the adjudicator had made a decision based on matters found in the adjudication reply. Mary Lim J then stated that upon perusal it was clear to her the adjudicator had relied upon matters not found in the payment claim. She went on to decide that this was contrary to the provisions of s 27(1) and that the adjudicator had both exceeded his jurisdiction and breached the rules of natural justice. While the timing of jurisdictional challenges and issues around the breach of natural justice is extensively analysed, only those two paragraphs deal with the subject matter of the jurisdictional challenge.

Challenging the adjudicator's competency

Mary Lim J considered this aspect of the case in some depth. WRP's contention was that the adjudicator did not possess the experience and qualifications necessary and was therefore incompetent and did not meet the competency standard prescribed under CIPAA and the Regulations made under it. The standards prescribed in the Regulations were for the adjudicator to have "*working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognised by the KLRCA.*" Various aspects of the competency standards were argued and Mary Lim J decided:

- (a) The words "*the competency standard and criteria of an adjudicator are as follows*" is to be read as meaning the standards listed are mandatory.

On plain reading of the words this is a sensible and logical interpretation.

- (b) "*Working experience*" is interpreted as requiring experience of a ***practical*** kind, and that teaching a subject as the adjudicator did – teaching law at a University – is different from "*working the subject or working in or with the subject.*"

In addition to the absence of evidencing "practical" experience in the building and construction industry, it probably did not help that the evidence presented on the subjects taught by the adjudicator were not in the areas of construction law, construction contracts, contract administration, adjudication, or other technical subjects relating to the construction industry.

- (c) *"... Adjudicators exist to determine or adjudicate or [sic] payment disputes arising out of construction contracts."* Mary Lim J then stated construction contracts here refer to written contracts performed wholly or partially in Malaysia. She went on to emphasise that *"it is absolutely vital that Adjudicators have local bearings and be familiar with local conditions or nuances when adjudicating on payment disputes speedily but efficiently."*

Having said all these, Mary Lim J then also acknowledged that sub-regulation 4(a) of the CIPAA Regulations allows the same period of working experience to be in *"any other fields recognised by the KLRCA."* While recommending that KLRCA make clear what these "other fields" are through publication in the Government Gazette, her Ladyship also decided that the recognition of these *"other fields"* is best left to the judgment of KLRCA – being the body charged with the authority on adjudication matters under section 32 of CIPAA. These matters include setting the competency standards and criteria of an adjudicator. In this case, evidence was also provided that KLRCA itself confirmed that the adjudicator *"has working experience of at least seven years in the building and construction industry in Malaysia or any other field recognized by the KLRCA"* and that the adjudicator was a holder of a Certificate in Adjudication issued by KLRCA. As such and as KLRCA had seen fit to appoint the adjudicator in question, Mary Lim J said *"the Court accepts that the Adjudicator in question has indeed met the standards and criteria set by KLRCA"* and rejected the ground of complaint of the adjudicator not meeting the competency standards.

Breach of natural justice

Mary Lim J also considered this issue at great length. The lengthy consideration was appropriate as this was the issue that primarily led her Ladyship to make the judgment to set aside the adjudicator's decision in this case.

Among the key points to be noted are:

- (i) A re-affirmation of the well-established common law principles of the rules of natural justice. CIPAA also expressly provides this in s 15(b) where an aggrieved party may apply to the High Court to set aside an adjudication decision if there has been a "denial of

natural justice". These are traditionally expressed in the maxims (a) "*nemo iudex in causa sua*" or the need for impartiality and that no one appointed to determine a dispute should have any bias or personal interest in the outcome of the dispute and, of particular importance in this case, (b) "*audi alteram partem*" or both parties must be given a fair opportunity to present their cases. Justice must not only be done but be seen to be done.

- (ii) Section 25 of CIPAA does confer extensive powers to the adjudicators such as the power to draw on their own knowledge and expertise and, of particular relevance to this case, the power to "*inquisitorially take the initiative to ascertain the facts and the law required for the decision*". Mary Lim J held that this may involve the adjudicator communicating with **one** of the parties and that there is nothing wrong with that, but emphasised that there is a rider or condition to doing this. That is, when an adjudicator communicates with one party, the adjudicator is not only expected but also under a duty to make known to the other side what was communicated, and must give the other party an opportunity to respond. Failing to do so is a breach of the rules of natural justice.

In this case Mary Lim J found the adjudicator had **twice** made unilateral communications with Bluescope – the claimant in the adjudication. Once by a telephone call and the other by text message using "Whatsapp". To make matters worse her Ladyship found that the adjudicator was of the opinion that he was entitled to unilaterally contact one party without informing the other of the contact under the powers conferred to adjudicators under s 25(i) and he did not ever have the intention to do so. Added to all this, the unilateral communication that the adjudicator had made to Bluescope was regarding a document that the adjudicator's decision was based on.

Mary Lim J decided these tantamount to breach of natural justice and that the decision must be set aside. Her Ladyship desired to set the appropriate standards on such matters. As her Ladyship herself said "*it is early days yet and the right discipline should be emplaced*" and allowing the '*adjudication decision to remain where there has been a clear denial of the rules of natural justice*' would "*send a wrong message and signal to the industry.*"

Suggested best practices to be adopted

The decision by Mary Lim J gives direction to the industry on certain practices. This case is also a reminder for the need to continuously improve oneself and adopt better practices. These include:

- (A) It is important for adjudicators to remember that their jurisdiction is limited to matters found in the payment claim and payment response and not from the adjudication claim or adjudication response. This should be trite practice by now.
- (B) KLRCA already has a high level of world class adjudicator training course when compared to other jurisdictions. This must be maintained and continually enhanced to ensure all adjudicators are trained to high levels of competence. As there are now enough adjudicators on the KLRCA panel there is no longer any need to exempt future adjudicators from having to attend and sit and pass examinations during the training courses. It must be mandatory for all of them to pass all components of the examinations and assessments. And when appointing adjudicators, KLRCA must ensure adjudicators are appropriately suited to the nature of the dispute.
- (C) Adjudicators may use the inquisitorial powers provided under CIPAA, but they must be very cautious that they do not breach the rules of natural justice. While Mary Lim J did not object to unilateral communication per se on condition the other party is informed of the communication, it would be better practice to ***avoid any kind of unilateral communication.***

One way forward to avoid any kind of unilateral or non-concurrent communication is to adopt e-adjudication. A web-based model such as that currently being developed at Massey University in Auckland, New Zealand for universal application world-wide enables parties to fully conduct adjudication through the web. The model has good security features, allows all communication to be done simultaneously to all parties (thus avoiding unilateral or non-concurrent communication), and allows the adjudicator to track what documents the parties have submitted or viewed. This can avoid parties denying having received or not viewing documents submitted in the adjudication. Higher-level features include the ability for the adjudicator to track IP addresses world-wide in cases where the parties may allege or claim that they were not able to view or access documents.

The standards and bar for adjudicators' competency must continually be maintained at high levels and adjudicators must keep abreast of the latest developments. This may come at a price, but as Mary Lim J said '*it is early days yet and the right discipline should be emplaced*'.



CASE SUMMARY

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor

FEDERAL COURT, PUTRAJAYA
CIVIL APPEAL NO: 02(f)-83-12/2013 (W)
RAUS SHARIF PCA, ZULKEFLI AHMAD MAKINUDIN CJ (Malaya),
RICHARD MALANJUM CJ (Sabah and Sarawak),
ABDULL HAMID EMBONG FCJ, JEFFREY TAN FCJ
27 OCTOBER 2015

[2016] 1 CIDB-CLR 151

The Plaintiff claimed that it had been invited by the Defendants to jointly participate with them in a Joint Venture to submit a tender for a construction Project ("the Project"). The Plaintiff dealt with the Defendants through Ng Kai Wai and Yip Kok Weng. The Plaintiff alleged that it was understood that the Plaintiff would be awarded certain sub-sub contract works in the Project. However, such agreement would be void if the First Defendant failed to secure the main sub-contract works in the Project. The Second and Third Defendants had also formed a separate Joint-Venture - the AAY-MMN JV - without the Plaintiff's participation, to tender for the Project. The AAY-MMN JV was successful in its bid. The Plaintiff sued the Defendants in the High Court for *inter alia*, failing or refusing to award the Plaintiff the works. The High Court dismissed the Plaintiff's case and the decision was affirmed on appeal to the Court of Appeal. In the Federal Court, the Plaintiff urged the Federal Court to lift the veil of incorporation of the Defendants, contending that although the First Defendant was not awarded the main sub-contract works, it had performed the works for the Second Defendant thus circumventing its contractual obligations to the Plaintiff. According to the Plaintiff's counsel, the main question was whether in reality the group of companies' functioned as a single economic unit and that their separate legal character was not a reality.

Held, dismissing the appeal with costs:

- (1) The thrust of the Plaintiff's claim against the Defendants was that there was a Joint Venture as evidenced by a pre-tender Agreement. However, the alleged JV did not exist and the actual claim of the Plaintiff was merely premised on the Pre-Tender Agreement.
- (2) The allegations pleaded by the Plaintiff were not sufficient as a plea for fraud or equitable fraud or to indicate special circumstances upon which on evidence adduced would justify the lifting of the corporate veil of the Defendants. The Plaintiff had not adduced any evidence of fraud, actual or equitable or of any special circumstances that would have justified the lifting of the veil of incorporation of the Defendants.

- (3) While it was pleaded that the Defendants were "part of a group of companies managed and/or controlled by the Yip family with common/connected officers and shareholders", there was no further assertion or claim arising therefrom in the way as submitted before the Federal Court. There was also no allegation in the Amended Statement of Claim that the Plaintiff was not awarded the sub-sub contract works as a result of manipulation or the abuse of the "single" entity of the Defendants. Thus, based on pleadings alone the Plaintiff had no basis to seek for the lifting of the corporate veil of the Defendants or to insist that there was an abuse by the Defendants of the concept of corporate separate entities.

Juara Serata Sdn Bhd v Alfarich Sdn Bhd

FEDERAL COURT, PUTRAJAYA
CIVIL APPEAL NO: 02(f)-42-07-2013(Q)
RAUS SHARIF PCA, AHMAD MAAROP FCJ, MOHAMAD APANDI HJ ALI FCJ,
RAMLY ALI FCJ, AZAHAR MOHAMED FCJ
8 SEPTEMBER 2015

[2016] 1 CIDB-CLR 153

The Appellant appointed the Respondent to build and complete a training camp site according to specific requirements ("the agreement"). The agreement stipulated that the Appellant as employer was to pay the Respondent RM4,950,000.00 as consideration once it was certified by the Client that the work was properly completed. An architect ("AR") was appointed by the Respondent to design the site as required in the agreement. The AR subsequently certified the construction as practically completed, and this was accepted by the Appellant. Prior to this acceptance, however, a site inspection was conducted by the AR in the presence of representatives from both the Appellant and Respondent. Though it was confirmed that the work was fully completed, numerous defects in construction were discovered. Subsequently, the AR issued an interim payment certificate ("the certificate") for the amount of RM1,202,500.00. This was for work completed up till that point. Under the agreement, the AR was authorised to issue an interim certificate within seven days of being notified that the work was completed. The certificate was to state the sum entitled to the Respondent, based on the opinion of AR. In the present case, the certificate was issued after the defects liability period had expired. The Appellant contended that the Respondent had not completed the work according to the agreement, and that the AR's guarantee of the work being practically completed was unacceptable. As such, the Appellant refused to pay the amount in the certificate. Proceedings were initiated by the Respondent in the High Court for both this sum and for additional work done. The Appellant made a counterclaim for special damages, ie for expenditure on repairing the defective works. The High Court allowed the Respondent's claim on the certificate, but not on the claim for additional work. The Appellant's counterclaim was refused. It was found by the trial judge that (i) the AR did not perceive any dissatisfaction from the Appellant on the work, as the Appellant did not refer the matter to arbitration which was required under cl 17 of the agreement. The Appellant's reasons for non-payment could not succeed under cl 16, as any existing dispute had not been brought before the AR; (ii) since there was no written instruction from either Appellant or the AR to the Respondent with regard to defective work, the Appellant's counterclaim held no ground as the agreement required the AR to issue a certificate of non-completion, which he did not. This decision was upheld by the Court of Appeal, as the Appellant failed to adhere to cl 17 of the agreement in using arbitration as recourse in the event of a dispute on certification. Arbitration was a contractual instrument for dispute resolution agreed upon by both parties.

The Appellant was therefore bound by these terms. Any challenge as to the validity of the certificate should have been brought to arbitration as specified in the agreement. Thus, the question before the Federal Court was whether the High Court and Court of Appeal had erred in interpreting the agreement.

Held, dismissing the appeal with costs:

- (1) The lower courts had not erred in finding that the parties were bound by the procedure for dispute resolution, as specified in cll 16 and 17 of the agreement. This provided for a two-tier dispute resolution method, requiring the parties to first bring their dispute to the AR and ultimately refer the matter to arbitration only if a decision was not made by the AR within 14 days or if either party was aggrieved by the decision. A combined reading of both cll 16 and 17 of the agreement allowed the AR's decision to take full and binding effect on both parties, should the aggrieved party fail to refer the AR's decision to arbitration within the stipulated timeframe.
- (2) Injustice would arise if the Appellant were permitted to abandon the terms of the agreement and benefit from its own failure to refer the dispute over the AR's decision to arbitration, as required in cll 16 and 17 of the agreement.
- (3) The Courts below merely prevented the parties resiling from the agreement. Clauses 16 and 17 evidently laid out the procedure for dispute resolution within a set timeframe.
- (4) The question of whether the interim certificate was valid and enforceable is irrelevant. The present case was very much based on fundamental principles of contract law, which call for parties to honour their respective sides in a mutual agreement.
- (5) On the point of whether the Courts below had interpreted cll 16 and 17 of the agreement in a manner that deprived the Appellant of having his dispute heard in court, and as to whether these clauses contravened s 29 of the Contracts Act 1950, these concerns were considered to be unfounded. The two-tier dispute resolution instrument in cll 16 and 17 neither confined nor displaced the jurisdiction of the Court.
- (6) The Appellant's counterclaim for expenditure in remedying defective works was refused in the absence of written instructions to the Respondent. This was entirely justifiable as it was an essential step under cl 7.2 of the agreement and thus the High Court's finding was upheld.
- (7) Here the crux of the matter is whether the parties breached the terms of their agreement. The Appellant clearly had not adhered to the dispute resolution instrument provided in cll 16 and 17, ie to refer its dispute

over the AR's decision to arbitration within the specified timeframe in the agreement to which it was bound. This resulted in the AR's decision taking full and binding effect over both parties. As such, it would be unfair for the Appellant to resile from these terms.

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: W-02-1480-09/2014

MOHD ZAWAWI SALLEH JCA, HAMID SULTAN ABU BACKER, JCA BADARIAH

SAHAMID JCA

27 NOVEMBER 2015

[2016] 1 CIDB-CLR 156

The Jabatan Kerja Raya (“JKR”) appointed the First Defendant as main contractor in respect of a construction project (“the Project”). The Second Defendant as director of the First Defendant, appointed the Plaintiff as sub-contractor. The Plaintiff commenced works and submitted Progress Claims Nos 1 and 2 dated 30 April 2004 and 15 May 2004 respectively, for the amount of RM857,053.45 and a retention sum of RM45, 108.08. The Second Defendant assured the Plaintiff that the Progress Claims would be paid upon payment by JKR. JKR released payments but no payment was made to the Plaintiff in respect of its Progress Claims. The Plaintiff thus sued the Defendants in the High Court for the sum of RM857,053.45, being the value of the contract works and the retention sum of RM45,108.08. The Plaintiff also alleged that the Second Defendant and the Third Defendant (who was also a director of the First Defendant) had acted fraudulently. The High Court held that the action was not statute-barred but only awarded a sum of RM200,000.00 pursuant to s 71 of the Contracts Act 1950 and furthermore that based on the evidence available, there was insufficient evidence to establish that the Second and the Third Defendants had acted fraudulently or with intention to defraud the Plaintiff. The Defendants appealed against the decision of the High Court allowing the claim for RM200,000 whereas the Plaintiff appealed against the quantum of RM200,000 awarded and the dismissal of the claim against the Second and Third Defendants.

Held, allowing the Defendant’s appeal but dismissing the Plaintiff’s appeal:

- (1) The Plaintiff’s cause of action for breach of contract occurred on 17 May 2004 ie, the date of the 2nd progress claim submitted to the First Defendant. The First Defendant was under a positive obligation to pay the Plaintiff the amount stated in the 2nd progress claim and failure to do so would trigger a cause of action by the Plaintiff and the statute of limitation began to run from that date. Since the writ of summons was filed on 20 May 2010, the Plaintiff’s action was statute-barred by virtue of being filed after the expiration of the applicable six years limitation period.

- (2) It was undisputed that no payment certificate was ever issued by the First Defendant for the progress claim submitted to the First Defendant. The Plaintiff's submission that time began to run only from the date of the issuance to the Plaintiff of the payment certificate by the First Defendant was devoid of any substance.
- (3) The burden of proving each and every item of the progress claim was squarely on the Plaintiff who had to prove on a balance of probabilities.
- (4) There was no sufficient evidence to establish that the Second and Third Defendants had carried out the business with intent to defraud creditors or for fraudulent purpose. A mere failure to fulfill contractual obligation cannot support a claim in fraud. Rather, it was merely a breach of contract claim, which did not by itself constitute a claim in fraud.
- (5) Based on the evidence on the record, the Second and Third Defendants from the very beginning had decided not to pay the Plaintiff when they invited the Plaintiff to commence works at the site.
- (6) In the instant case, there was a binding contract between the Plaintiff and the First Defendant. Exhibit P1 (letter of offer) outlined the terms of the contract between the First Defendant and the Plaintiff, inter alia, the contract price for resuming and completing the remaining project work was RM3,031,151.80. The Plaintiff's claim for *quantum meruit* would not succeed since there was an existing contract between the parties.

Chain Cycle Sdn Bhd v Kerajaan Malaysia

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: W-01(C)(A)-379-09/2014

LIM YEE LAN JCA, VARGHESE GEORGE VARUGHESE JCA, IDRIS HARUN JCA

8 OCTOBER 2015

[2016] 1 CIDB-CLR 158

The Appellant and the Respondent had entered into a contract for the design, construction, completion, testing, commissioning and guarantee in respect of a solid waste treatment plant (“the Contract”) for a consideration of a lump sum of RM21,910,600, increased subsequently due to variations to RM28,397,042.53. This treatment plant was to employ a new technology called thermal oxidation process (“TOP”) that was proprietary to the Appellant. The Contract contained certain performance specifications for the treatment plant. The waste characteristics were also specified in the Contract, and had been determined by the Malaysian Institute of Nuclear Technology Research (“MINT”) — which had been appointed by the Respondent as the Respondent’s Project Management Consultant. At its first testing and commissioning in May 2003, the plant failed to meet the performance specifications stated in the Contract. Certain design modifications were made to the plant and the plant underwent a second testing and re-commissioning in May 2004 (“Re-commissioning”). The plant again failed to meet the performance specifications at the Re-commissioning. The Appellant declined to undertake further testing and commissioning due to disagreements over who ought to bear the costs of further testing. The Respondent thereafter terminated the Contract and gave notice of forfeiture of the Performance Bond. The matter was referred to Arbitration and the Arbitrator subsequently made a final award in the Respondent’s favour. Dissatisfied, the Appellant referred certain questions of law to the Court pursuant to s 42 of the Arbitration Act 2005 (“the Act”). The Appellant also sought for the award to be set aside pursuant to s 37 of the Act. The High Court declined to interfere with the Award, save for a variation downwards of the damages awarded to the Respondent. The Appellant appealed against the decision of the High Court. The Respondent cross-appealed against the part of the decision varying the damages awarded downwards. The Appellant’s contentions *inter alia*, were focused on the following areas: (i) the nature of the contract — the Appellant argued that since the Contract was a research and development project, it was not a Commercial contract and hence the “*Absalom*” exception was not applicable to delimit the scope of references to questions of law that could be brought under s 42 of the Act; (ii) the “condition precedent” as regards the characteristic of waste to be provided for the testing, had not been met and in any event, there had been substantial performance of the Contract by the Appellant. Thus, the termination of the Contract premised on improper ‘testing’ was invalid; and (iii) the Respondent had not established on evidence that it had indeed suffered “damages” and, therefore even if there

had been a breach of the Contract, the Arbitrator and the Judge ought only to have allowed “nominal” damages to the Respondent.

Held, dismissing the appeal but allowing the cross-appeal with costs:

- (1) The Court in determining a question of law under s 42 of the Act employs a 3-stage process or test. Once the Court dealing with a reference under s 42 of the Act had under stage 2 of the process taken the view that the arbitral tribunal had understood, stated and applied the correct law, the Court under stage 3, must consider further the range of possible correct answers open to the tribunal. If the answer preferred by the tribunal was well within such identified range, the Court answering the question of law before it would not intervene, although the Judge considering the question may be inclined to come to a different conclusion. This position was also consistent with the reasons why parties choose arbitration as the specific mode for their dispute resolution, namely: the underlying principles of “party autonomy”, finality and the binding nature of the arbitral decision to which the parties had freely consented.
- (2) Section 42(1A) of the Act imposes upon the Court an overriding consideration to ensure that unless the question of law substantially affects the rights of one or more of the parties, the Court is mandated to dismiss such reference.
- (3) The Court of Appeal was not convinced that the “*Absalom*” exception was confined to situations where the Court was called upon to deal with “errors of law on the face of the award” only. There was no valid reason why, in a situation under s 42 of the Act where “... any question of law arising out of an award” was before the Court, such an exception or limitation ought not to also apply. Such a restriction or limitation as the *Absalom* exception, was still necessary and relevant in a s 42 of the Act scenario. This was to ensure that the “reference on a question of law” under that provision was not turned into a wholesale ‘appeal’ against the arbitral tribunal’s decision or ruling. In the instant case, the Arbitrator had given due consideration to the relevant law before concluding that the Contract was a commercial contract between the parties.
- (4) Although the Judge had disagreed with the Arbitrator’s emphasis or reliance on the turnkey/design and build nature of the Contract, the Judge’s decision not to set aside or otherwise interfere with the Award was sustainable and justified. The Judge had addressed the question posed to the Court correctly from the perspective of the applicable legal principles as to what was or could have constituted the reasonable intention of the parties in the factual context of the matter. The conclusion reached was sound that there did not arise any “condition precedent” in the circumstances.

- (5) There was no error on the part of the Judge, or on the part of the Arbitrator, that on the facts that had been established in the Arbitration, the Respondent had a valid basis in law to invoke cl 53.1(iii) to terminate the Contract independent of cl 46. The argument of the Appellant that the right to terminate could not be availed of until testing and commissioning had been successfully met as per cl 46 could only invariably lead to a totally unreasonable scenario, where the Respondent would be held captive and tied down to the Contract for an indeterminate period of time while the Appellant could delay until the terms for testing met the performance specification. This could not have been the commercial intent behind the Contract.
- (6) The Court of Appeal was satisfied that the High Court Judge had satisfactorily analysed all related matters in the Award and the answer given by the Court to the question posed by the Appellant in relation to substantial performance, was not in error at all.
- (7) The determination of the quantum of damages by the Arbitrator was a determination of fact. The Arbitrator in coming to his determination had addressed his mind to the right principles of law. There was a range of possible measures of damage recognised and available in law open to the Arbitrator. The Arbitrator had applied the test of what would be a reasonable compensation in all the circumstances of the matter considering the particular complexity attached to the instant case, namely the fact that technology inherent in the TOP Plant exclusively belonged to the Appellant and rectification or replacement would prove to be difficult and costly.
- (8) By reducing the sum awarded as damages, the Judge, had stepped into the arena of the Arbitrator and had undertaken a reassessment, which he was not entitled to, unless there was in the first place a proper reference under s 42 of the Act. The Judge leaned on s 42(4)(b) of the Act as entitling him to do but the Court of Appeal could not agree to that. The power to 'vary' an award given there was clearly circumscribed by the opening words of the s 42 of the Act itself where it had been restricted to "...any question of law arising out of an award". The Arbitrator was the master of facts and the Court in exercising its powers under s 42 of the Act had to be wary to sieve out questions of fact "dressed up" as questions of law. There was merit in the cross-appeal of the Respondent that the Judge had misdirected himself when he interfered with and went on to reduce the award of damages determined by the Arbitrator. The amount of damages in the Award ordered in favour of the Respondent should accordingly be restored.

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: N-02-417-02/2013

MOHD HISHAMUDIN BIN MD YUNUS JCA; MOHD ZAWAWI BIN SALLEH JCA;

DATO' UMI KALTHUM BINTI ABDUL MAJID JCA

4 MARCH 2015

[2016] 1 CIDB-CLR 161

The Defendant was engaged by the Malaysian Government as the main contractor for a project to upgrade a polytechnic. By two (2) separate subcontracts, the Defendant engaged the Plaintiff as subcontractor to carry out: (1) a subcontract for earthworks ("earthworks subcontract") for RM15,755; and (2) a subcontract for the permanent and temporary site office ("site office subcontract") for RM185,000. The Plaintiff sued the Defendant and claimed *inter alia*: (a) in respect of the earthworks subcontract a sum of RM270,625.13 as value of earthworks done but not paid; and (b) in respect of the site office subcontract a sum of RM89,811.09 as value of works done but not paid. In the suit, the Defendant counterclaimed: (i) in respect of the earthworks subcontract, RM666,820 for completing the Plaintiff's works and clearing the debris allegedly dumped by the Plaintiff onto neighbouring land; and (ii) in respect of the site office subcontract, RM10,000 for clearing works done by a third party. The High Court dismissed the Plaintiff's claim but allowed the Defendant's counterclaim against the Plaintiff. The Plaintiff appealed to the Court of Appeal.

Held, allowing the Plaintiff's appeal with costs:

- (1) The High Court Judge erred when he totally dismissed the Plaintiff's claim and allowed the Defendant's counterclaim of RM10,000 in respect of the site office subcontract. The High Court Judge had misapprehended the pleadings and the evidence adduced, failed to appreciate and consider the evidence and had made an erroneous decision which was inconsistent with the contemporaneous, unchallenged documentary evidence and which also had contradicted the Defendant's own admission or concession.
- (2) This was a case where Appellate intervention was required. The Court of Appeal would set aside the Order of the High Court in respect of the Site Office subcontract and substitute it with the Order that the Defendant be required to pay the Plaintiff the sum of RM87,502.07 after taking into account the counterclaim of RM10,000.

- (3) The Plaintiff's claim under the earthworks subcontract ought to be allowed. The Defendant ought to pay the Plaintiff the sum of RM258,585.20 as being the unpaid balance value of earthworks executed by the Plaintiff under the earthworks subcontract. The High Court Judge had clearly erred when he dismissed the Plaintiff's claim under the earthworks subcontract.
- (4) The High Court Judge had failed to appreciate the facts as alluded to by the Plaintiff and in failing to do so, he had misdirected himself to such an extent as to find that the Defendant's counterclaim was valid and to have allowed it.
- (5) The High Court Judge further misdirected himself when he allowed the Defendant's counterclaim by awarding the gross amount of costs of getting another subcontractor to execute the so-called balance works as the alleged loss or damage whereas it should have been calculated differently.
- (6) Since the Plaintiff had completed the earthworks under the earthworks subcontract, and that the so-called balance works allegedly not done by the Plaintiff were different from that complained by the Defendant in terms of type, description, location and quantity, there could be no counterclaim under this head by the Defendant against the Plaintiff.
- (7) There was overwhelming evidence which pointed to the fact that the Plaintiff could not have transported all the earth out of the polytechnic site and dumped it on the adjoining land. The High Court here had failed to fully appreciate the evidence tendered in Court.

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd (No 2)

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: N-02(IM)-1111-06/2014

MOHD ARIFF MD YUSOF JCA, MOHD ZAWAWI SALLEH JCA, IDRUS HARUN JCA
1 OCTOBER 2015

[2016] 1 CIDB-CLR 163

The Appellant applied under Order 22A of the Rules of Court 2012 for an order for interim payment. The High Court dismissed the Appellant's application, prompting the Appellant to appeal to the Court of Appeal. The key issues for the Court's determination were whether: (i) the Appellant's application for interim payment was premature; and (ii) the circumstances of the appeal warranted an order for interim payment to be made.

Held, allowing the Appellant's appeal in part with costs:

- (1) The Court of Appeal could not agree with the Respondent's submission that the Appellant's application for an interim payment was premature on the basis that it was only upon assessment that the Court could determine what sum could properly be due to the Appellant. Interim payment is payment paid to a Plaintiff on account of final damages, before the assessment of damages has been completed. Interim payment is paid primarily to overcome financial difficulties that a Plaintiff might experience pending final assessment.
- (2) An interim payment of damages may be made in accordance with Order 22A of the Rules of Court 2012. Rule 3(c) allows interim payment of damages even though liability is still in question. Order 22A does not restrict interim payment of damages to any type of action. Interim payments can be ordered in actions other than personal injury cases. There are strong policy grounds for the Courts to order interim payments in an appropriate case. It is in the interests of the administration of justice and of the Plaintiffs that Defendants be encouraged to make early voluntary interim payments so as to alleviate financial hardship on the part of the Plaintiffs.
- (3) In the instant appeal, there was no need for the Court to consider any question of potential liability as it was simply not an issue. The judgment on liability had been awarded in favour of the Appellant. The application for interim payment was thus not premature.

- (4) The Plaintiff is not required to demonstrate real hardship in an application for interim payment. The Plaintiff is not required to demonstrate any particular need beyond the general need to be paid his damages as soon as possible and the court should not, when considering to order such a payment, investigate how the money is to be used. In the instant appeal, the Appellant had shown hardship in the circumstances.'
- (5) Rule 3 of Order 22A of the Rules of Court 2012 provides that the Court may order the Defendant to make an interim payment of such an amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court is likely to be recovered by the Plaintiff. The factors to be taken in determining "a reasonable proportion of the damages" are factual based. On an application for interim payment, the Court is primarily focused on ensuring that the Plaintiff is not kept out of the damages to which he or she is entitled, without incurring a real-risk of over-compensating a Plaintiff or prejudging matters that are properly within the province of the trial Judge. In the instant case, the Appellant had proved that it would obtain judgment for substantial damages against the Respondent.
- (6) Interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve.

**Malaysian Building Society Bhd v
Manzer Medical Sdn Bhd**

COURT OF APPEAL, PUTRAJAYA
CIVIL APPEAL NO: W-02-1026-2011
ZAHARAH IBRAHIM JCA, MOHD ARIFF MD YUSOF JCA, VARGHESE GEORGE
VARUGHESE JCA
8 SEPTEMBER 2015

[2016] 1 CIDB-CLR 165

Manzer Medical Sdn Bhd (“Manzer”) was incorporated for the purpose of constructing a hospital. The hospital was to be built on several lots of land (“the Land”), the purchase of which was partly financed by a term loan of RM3m granted by Malaysia Building Society Bhd (“MBSB”). Manzer was also granted a bridging loan facility (“BLF”) of RM26.8m for the construction of the hospital. This was communicated to Manzer by a Letter of Offer dated 2 July 1997. Under the terms of the BLF Agreement the BLF was to be progressively disbursed according to the procedure specified in the BLF Agreement. Disbursement was to be made after 3 clear business days upon receipt of a drawdown notice from Manzer. The form of the drawdown notice was prescribed in the BLF Agreement. According to Manzer, MBSB delayed in disbursing the amounts claimed through its drawdown notices such that only a total of RM 3,116,237.10 was disbursed from the total BLF amount. Subsequently, MBSB itself filed a writ of summons claiming for the repayment of the amount released under the BLF Agreement and the term loan, against Manzer and SD1 as borrower and guarantor, respectively. Manzer, which was by then wound up, obtained sanction from the liquidator to file its defence and counterclaim against MBSB’s writ. In the High Court, the Judge found that except for the 1st and 3rd progress payments, MBSB’s claim that there was no delay in payment was a mere denial. The Judge also found that MBSB’s claims that Manzer had failed to comply with certain pre-conditions for the drawdown notices were mere afterthoughts. Consequently, the trial Judge found that MBSB was liable to pay damages for losses incurred by Manzer as a result of MBSB’s breach. MBSB appealed to the Court of Appeal against the High Court’s decision. The sole issue before the Court of Appeal was whether MBSB had breached the BLF Agreement due to its delay in disbursing the amounts in the disputed drawdown notices.

Held, allowing the appeal with costs:

- (1) In respect of the delay concerning Drawdown Notice No 2, the approval of the application for the Land conversion was a condition precedent for the drawdown of the BLF. MBSB had paid the amount on 8 May 1998 after having received a letter dated 29 March 1998 confirming the approval. The trial Judge had failed to consider such condition precedent.

With regard to Drawdown Notice No 4, the delay was not inordinate in the circumstances.

- (2) Given the circumstances of the case, MBSB's conduct in holding back the release of the amount claimed by the Drawdown Notice No 5 was certainly reasonable.
- (3) With regard to Drawdown Notice 6, MBSB was well within its rights under the BLF Agreement to withhold further disbursement of the BLF.
- (4) In the instant case, there was insufficient judicial appreciation of the evidence warranting appellate intervention.

Tanjung Teras Sdn Bhd v Kerajaan Malaysia

COURT OF APPEAL, PUTRAJAYA

CIVIL APPEAL NO: W-01-134-04-2013

ABDUL WAHAB PATAIL JCA, LINTON ALBERT JCA, LIM YEE LAN JCA

18 MAY 2015

[2016] 1 CIDB-CLR 167

The Plaintiff entered into a sale and purchase agreement (“Agreement”) with one Jeram Permata (“JP”) for the sale of a piece of land and the construction thereon of apartments for a consideration of RM50,548,000 (“the Project”). JP appointed the Defendant as its sub-contractor for certain works under the Project. JP delayed in completing the Project and the Plaintiff terminated the Agreement. The Defendant however refused to leave the Project site upon the termination, prompting the Plaintiff to issue an Originating Summons (“OS”) against the Defendant for various declaratory relief. The Defendant opposed the Plaintiff’s OS on the basis that there were many disputes of fact which could only be resolved through hearing the oral evidence of witnesses under a writ. The Defendant affirmed that it intended to counterclaim against the Plaintiff for work done under the subcontract. The High Court granted an order in terms of the Plaintiff’s OS and ordered the Defendant and its workers to vacate the Project site. The High Court also ordered the Defendant’s counterclaim for a sum of RM3,009,254.23 certified by JP’s architect under three interim certificates, go for trial. The High Court subsequently dismissed the Defendant’s counterclaim. The High Court held that although the Defendant’s counterclaim was a claim based on s 71 of the Contracts Act 1950, yet the Defendant had failed to fulfill the second and fourth conditions identified in the Privy Council decision of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118. The Defendant thus appealed to the Court of Appeal.

Held, allowing the Defendant’s appeal with costs:

- (1) Section 71 is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages. Liability under s 71 is not based on any existing contract between the parties. Rather, it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party. In the instant case, the learned Senior Federal Counsel’s submission that there was no obligation on the part of the Plaintiff to pay the Defendant for work done because there was no privity of contract between the parties, did not hold any water.

- (2) The High Court had rightly pointed out that in a claim under s 71, the four conditions as set out in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118 have to be established. However, the Judge had erred in concluding that the second and fourth conditions had not been met by the Defendant.
- (3) In the instant case, the facts were that: (a) the project was built for and on behalf of the Plaintiff to be used as the staff quarters; (b) the project was undertaken by JP for the Plaintiff under the Agreement for which JP had expected to be paid under the agreement; (c) the super structure work was part of the works under the Project; (d) JP had appointed the Defendant as its sub-contractor to construct the super structure work; (e) the Defendant had certainly expected to be paid for the super structure work by JP on a back-to-back basis. Having regard to the juristic basis behind s 71 which was premised on the equitable principle of restitution, good conscience and prevention of unjust enrichment, as a matter of fact, at the time the super structure work was done by the Defendant, it was done for the Plaintiff as the ultimate owner of the Project and the Plaintiff was the direct beneficiary of the project. The Defendant had intended to be paid for carrying out the works. The fact that the Defendant would receive payment from JP and not the Plaintiff did not alter the fact that the Defendant never intended the work to be done gratuitously. The second condition ought to have been found in favour of the Defendant.
- (4) The High Court Judge had erred in holding that as the whole project was not completed and the Plaintiff had to appoint a new contractor to complete the project, the Plaintiff had not benefited from the Defendant's work. The Defendant was only appointed as a sub-contractor to construct the super structure work while the construction of the entire project was the responsibility of JP.
- (5) The Plaintiff could not deny that it had benefited from the super structure work done by the Defendant. It would therefore be unjust for the Plaintiff to refuse to pay any compensation to the Defendant for the value of the super structure work done by the Defendant. In the instant case, the Defendant had successfully proven, on a balance of probabilities, its claim under s 71 of the Contracts Act 1950.
- (6) A sum certified for interim payment based on contractual terms cannot form the basis of calculation of compensation based on *quantum meruit* in a claim under s 71 of the Contracts Act. However, in the instant case, the Defendant had adduced evidence - which was not seriously challenged by the Plaintiff - that the sum of RM1,241,022.56 certified by JP's architect in the interim certificates was not plucked from the air but was in fact prepared and quantified professionally and ought to be accepted as the value of work done by the Defendant on a quantum meruit basis.

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NOS: 24C-13-05/2015 & 24C-20-06/2015
MARY LIM THIAM SUAN J
21 JULY 2015

[2016] 1 CIDB-CLR 169

The Plaintiff (ACFM) had appointed the Defendant (Esstar) as sub-contractor in a construction project ("the Project"). A payment dispute arose between the parties and the dispute was referred to adjudication under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). On 22 January 2015, the Adjudicator issued a decision in favour of Esstar. ACFM applied to set aside the adjudication under s 15 of CIPAA whereas Esstar applied by separate process under s 28 of CIPAA to enforce the adjudication decision. ACFM claimed under s 15(b) of CIPAA that the decision had to be set aside because there had been a denial of natural justice, in that Esstar's claim was ambiguous and that it had failed to lead evidence to support its claim.

Held, dismissing the Plaintiff's application to set aside the decision but allowing the Defendant's application to enforce the decision with costs:

- (1) In the intitlement of its Originating Summons, ACFM had sought to invoke O 55A and O 7 of the Rules of Court 2012 for the purpose of setting aside the adjudication decision. References were also made to an "appeal". However, for the setting aside of an adjudication decision under CIPAA 2012, O 55A of the Rules of Court 2012 was not the appropriate source of jurisdiction. The Court's jurisdiction was to be found under CIPAA 2012 itself which was the specific legislation enacted to provide for adjudication of payment disputes arising in construction contracts. Section 15 of CIPAA specifically conferred power on the Court to set aside an adjudication decision. When hearing an application to set aside the adjudication decision, the Court does not sit in exercise of its appellate jurisdiction. In the instant case, ACFM's application could not be as an appeal against the adjudication decision.
- (2) Section 15 of CIPAA does not provide for the time within which a setting aside application may be made to the Court. Presumably and logically, this must be before the adjudication decision was enforced under s 28 of CIPAA. It would be ideal, of course, if any application to set aside the adjudication decision was made promptly, or within reasonable time from when it was delivered.

- (3) The key twin features of speed or swiftness and the provisional binding nature of the adjudication decision must always be in the forefront of any consideration when determining whether an adjudication decision reached under those conditions and circumstances ought to be set aside. These twin elements work to make adjudication an effective mechanism for provisional resolution of payment disputes in construction contracts.
- (4) In relation to payment disputes, CIPAA 2012 *inter alia* provided for how to initiate payment claims into adjudication claims; the response to such claims; the adjudication process and adjudication proceedings; the appointment of the Adjudicator; the Adjudicator's powers, and the requisite constituents of an adjudication decision; just to name a few. Specifically, in relation to adjudication and the adjudication decision, there was s 12. Subsection 12(1) provided that the adjudicator was to conduct the adjudication in the manner as the adjudicator considered appropriate within the powers provided under s 25. The adjudicator was conferred discretion as to how the adjudication was to be conducted. To assist the adjudicator in carrying out that responsibility, the adjudicator was endowed with certain unusual and arguably extensive powers which one did not often see spelt out in other legislations. There was no equivalent provision in, say, the Arbitration Act 2005.
- (5) It is for the adjudicator to deal with how the adjudication proceedings were to proceed. This could include the calling of meetings and whether there would be hearings including oral hearings where witnesses may or may not be called. The adjudicator had the power under s 25 of CIPAA to even limit the time for hearing. In the matter of documents, the adjudicator had the power to give directions on the discovery, submission and production of any documents. The adjudicator may also make site visits, inspect goods and materials relating to the dispute and even open up any work that had been done. There was of course, the power in relation to relevant certificates issued: the adjudicator had the power to review and revise these certificates.
- (6) The presence of s 12(3) of CIPAA underscored the importance of speed in the whole adjudication mechanism. If the time periods specified are not met, any adjudication decision made would be void and have no effect.
- (7) It was not simply any breach or denial which would forestall the enforceability of the adjudication decision or be a ground for setting aside that decision. The breach must be "either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant"; it must be material. The adjudication scheme under CIPAA 2012 was not materially different from UK's Housing Grants, Construction and Regeneration Act 1996 [Chapter 53], certainly not in object and purpose. It would be fair to also describe the adjudication mechanism under CIPAA 2012 as the "rough nature of the process" and the "provisional nature of the decision", to justify the adoption of such an approach.

- (8) The approach to be adopted here in respect of CIPAA 2012 and the adjudication decision should, to a large extent, be no different to those of other adjudication jurisdictions; certainly not to any mentionable degree. The whole scheme of adjudication in Malaysia was swift resolution of payment disputes in construction contracts. Speed was absolutely vital to the success of the mechanism which was installed as a new forum for such disputes. Without speed, the whole purpose or object of freeing cash flow problems that stall construction contracts would not be met. Worse, it may just undermine the intentions of Parliament.
- (9) ACFM's invitation to the Court to rehear and retry the dispute was not the correct approach. Section 15 of CIPAA provided only four (4) grounds upon which the adjudication decision may be set aside. The High Court could not rewrite that jurisdiction. The High Court should not re-evaluate the adjudication decision.
- (10) The whole of the adjudication decision must be read as a single decision. If one chose to read only bits and pieces, there was bound to be "inconsistency". That should never be the case. The adjudication decision must be read in toto; it was not to be subjected to the strict dictates that one would otherwise encounter in the case of Court judgments. The decision in the instant case, certainly met the litmus test of satisfying the fundamental requirements of s 12 of CIPAA. It was reasoned, and if there were any shortcomings, they were immaterial and to be expected as part and parcel of the rough and fast nature of the mechanism. These shortcomings were not fatal as they may be rectified by the parties themselves through various available options such as arbitration or litigation. But, until then, the adjudication decision must bind the parties provisionally in the interim period until they themselves decide which option they wish to adopt.
- (11) When faced with a situation where it was unhappy with the decision, such party would just have to pay up because that was what was provided in any event in s 13 of the Act. Alternatively, the parties could settle the subject matter of the decision by written agreement between themselves. The other option was to commence legal or arbitration proceedings in order to establish the true position of the parties' respective claims.

Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd & Anor

HIGH COURT, KUALA LUMPUR
ORINATING SUMMONS NOS: 24C (ARB)-11-03/2015 &
24C (ARB)-19-04/2015
MARY LIM THIAM SUAN
10 JUNE 2015

[2016] 1 CIDB-CLR 172

The Defendant had appointed the Plaintiff to extend its warehouse. The Defendant later terminated the contract. The Plaintiff challenged the termination and the dispute was referred to arbitration. The Arbitral Tribunal ("the Tribunal") decided that the contract was lawfully terminated and also allowed the Defendant's counterclaim. The Tribunal inter alia, awarded the Defendant a sum of RM312,564.24 as "additional costs incurred to complete the remaining 30% of the works". The Plaintiff complained that the specific issue of inflation when calculating the Defendant's additional costs was where the Tribunal had gone wrong quite aside from its other contention that the Tribunal had awarded on an unpleaded and unclaimed matter. The Tribunal was said to have gone wrong by dealing with a matter or issue which the Plaintiff claimed was not brought up by the parties, that the parties were not alerted to and invited to address, that the Award contained decisions on matters beyond the scope of the submission to arbitration which contravened subparagraphs 37(1)(a)(v) and 37(1)(b) of the Arbitration Act 2005 ("the Act") and raised questions of law under s 42 of the Act.

Held, allowing the Plaintiff's application with costs:

- (1) The cause papers had not properly intitled the relevant provisions of the Act relied upon by the Plaintiff. There ought to be stricter detailed setting out of the particular grounds of challenge. Subparagraph 37(1)(a)(iv) of the Act was not properly invoked in the instant case as the Plaintiff was seeking to set aside only a part of the Award. Subparagraph 37(1)(b)(ii) of the Act could not be invoked because again, it would lead to the setting aside of the whole Award and not just the part complained of. The Plaintiff could not choose or cherry pick. Its challenge must also be seen against those parts which were not challenged or complained of. The Plaintiff was only asking for certain parts of the Award to be set aside and not the whole Award, which was what subparagraph 37(1)(b)(ii) of the Act was about.
- (2) In the instant case, the complaint was that there was a breach of natural justice during the arbitral proceedings or in connection with the making

of the Award when the Arbitral Tribunal dealt with the factor of inflation without first inviting the parties to submit or address on the factor. If indeed such an allegation was true, then it would be the whole Award which would be tainted and not just that part identified by the complainant. The provisions of s 37 do not appear to allow the Court to sever as it may in cases of allegations of violations of subparagraph 37(1)(a)(iv). Mindful of the limited powers of intervention of the Court, a restrictive approach ought to be adopted and applied.

- (3) The tribunal should not base its decision on matters that the parties had not submitted on. Any conclusion or finding reached had to be based on evidence placed before the Tribunal. In the instant case, it was significant to note that the Tribunal had already agreed with the Plaintiff on the lack of evidence or proof of the Defendant's counterclaim for additional costs to complete the contract.
- (4) Both parties agreed that the fact and factor of inflation was never addressed by the parties nor were the parties invited to do so. The parties did not address the Tribunal on the factor of inflation and what would be a fair amount to "support" Petronas' counterclaim. The parties only learnt about this matter for the first time from the Award itself.
- (5) As the counterclaim was essentially a loss and expense claim, there must at the very least be some evidence before the Tribunal could come to the decision on the counterclaim.
- (6) The Tribunal proceeded to assess a "fair amount incurred by the Respondent" (ie the Defendant). It did this by computing and thereby indirectly proving the Defendant's counterclaim. This was where the Tribunal had exceeded its jurisdiction. The Tribunal ought to have invited parties to address or make further submissions first before it proceeded to consider and make this particular item of award.
- (7) The Court was satisfied that the Plaintiff had established more than sufficient proof on a balance of probabilities of the existence of such decision within the meaning and operation of subparagraph 37(1)(a)(v) of the Act which warranted the setting aside of that part of the Award. In fact, the award may even be manifestly unlawful and unconscionable.
- (8) Since the award contained a decision on the matter of the inflation or even a decision on the matter of an assessment of a fair amount incurred by the Respondent when there was a failure to prove the amount incurred in the first place, the decision was certainly beyond the scope of submission to arbitration by the parties. In such circumstances, the application came within subparagraph 37(1)(a)(v). Accordingly, that part of the Award had to be set aside. With this determination in the instant case, there was in fact no necessity for the Court to address the application under s 42.

**Ambang Industri Sdn Bhd v
Yasmin Engineering (M) Sdn Bhd; Ahmad Zaki Sdn
Bhd (Pihak Ketiga)**

HIGH COURT, ALOR SETAR, KEDAH
CIVIL SUIT NO: 22 (NCVC)-164-06/2012
ABU BAKAR KATAR PK
20 APRIL 2015

[2016] 1 CIDB-CLR 174

Through a letter of offer issued by the Defendant, the Plaintiff was appointed to carry out water works (“the works”) that formed part of a project to upgrade a road. In carrying out the works, the Plaintiff was the sub-contractor and the Defendant was the main contractor, who had obtained the offer to carry out the works from one Ahmad Zaki Resources Bhd (“AZRB”). This was based on a main agreement between AZRB and Jabatan Kerja Raya (“JKR”). The Plaintiff completed the works and the Defendant paid the Plaintiff but left an outstanding sum remaining. The Plaintiff sought to recover, *inter alia*, this outstanding sum and also a retention sum from the Defendant. The Defendant disputed the Plaintiff’s claims and filed a counterclaim and enjoined AZRB as a third party. AZRB disputed the Defendant’s claim and filed a counterclaim (which was subsequently amended) against the Defendant for breach of contract and sought compensation. Issues for the High Court’s Court determination were: (a) whether the Plaintiff proved its claim against the Defendant; (b) whether the Defendant could rely on the principle of “pay when paid/back-to-back basis” in paying the amount claimed by the Plaintiff; and (c) whether the Defendant successfully proved its counterclaim against the Plaintiff.

Held, dismissing the Plaintiff’s claim and the Defendant’s counterclaim and allowing the third party’s claim with costs:

- (1) Though the Court found through the evidence tendered that the Plaintiff had proved its claim against the Defendant, the Court supported the Defendant’s argument that the Plaintiff was bound to the principle of “pay when paid/back-to-back basis” and also to a clause in the subcontract, i.e. cl 9 (terms of payment clause).
- (2) The Defendant claimed to have suffered losses as a result of the Plaintiff’s breach of contract and advanced various reasons for so claiming. However, the Court dismissed the Defendant’s counterclaim against the Plaintiff with costs.
- (3) The Defendant’s claim against AZRB was based on the following: (i) late payment to the Defendant by AZRB; (ii) payment of a sum to the

Defendant to complete the water works; (iii) AZRB's failure to make progress payment which resulted in the Plaintiff facing a shortage of funds to complete the works and thus affected its efficacy; (iv) the Defendant's indemnity claim against AZRB. The Defendant however failed to plead the above mentioned points. Therefore, following the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770, the Defendant's failure to do so amounted to an acceptance of facts by the Defendant. However, the Court nevertheless examined the above points.

- (4) The Court accepted AZRB's arguments that the issue of its late progress payments to the Defendant ought to be ignored as this was not in the Defendant's pleaded case, nor did the Defendant advance any witnesses during the trial to support its claim of late payment by AZRB or cross-examine AZRB's witnesses regarding this claim.
- (5) Based on the agreement between the Defendant and AZRB, the former was to complete the works subsequent to the latter paying the former a specified amount. However, even subsequent to payment being made, the Defendant still failed to perform its obligations.
- (6) In relation to the third party's (AZRB's) supposed failure to pay the progress claims which resulted in the Plaintiff facing shortage of funds for the work, the Court found no privity of contract between the Plaintiff and AZRB as the latter had awarded the contract to the Defendant to complete the works. Since there was no privity, any progress payments from AZRB directly to the Plaintiff had to first obtain the Defendant's consent. The Defendant could not blame AZRB for the Plaintiff's failure to complete the works by stating that the failure was owing to AZRB's delay in making payment, as the delay was actually due to the Defendant's own opposition to direct payment being made by AZRB to the Plaintiff.
- (7) Since the Defendant failed to raise an indemnity claim against AZRB in its pleadings, nor did it advance any evidence throughout the trial in relation to this indemnity claim, the Court rejected the Defendant's claim for indemnity. In relation to AZRB's counterclaim against the Defendant for liquidated and ascertained damages ("LAD") based on cl 15 in a letter of award dated 7 August 2006, the Court found that there existed no contract between the Defendant and AZRB based on this letter of award as the Defendant had failed to sign the letter. If signed, it would have evidenced the Defendant's intention to accept the terms and conditions contained therein. However, the Court granted AZRB's alternative claim against the Defendant for liquidated and ascertained damages imposed by JKR on AZRB.

Asal Bina Sdn Bhd v PKNS Engineering & Construction Bhd

HIGH COURT, SHAH ALAM
SUIT NO: 22C-10-04/2015
SEE MEE CHUN J
30 NOVEMBER 2015

[2016] 1 CIDB-CLR 176

By a letter of award dated 26 January 2008, the Defendant appointed the Plaintiff as sub-contractor to construct and test an integration quarters in a hospital ("the project"). The Plaintiff subsequently filed a claim dated 30 April 2015 against the Defendant for the sum of RM2,033,173.15 on work done in relation to the project. The Defendant applied to strike out the Plaintiff's claim based on limitation. The only issue for the High Court's determination was when time began to run. The Defendant contended it was from 30 April 2009 when the Plaintiff issued its demand for final payment. The Plaintiff however contended it was from 11 March 2010 when it disputed the Defendant's statement of final account.

Held, dismissing the Defendant's application:

It is a trite that a cause of action founded on contract accrues on date of breach (*Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 1 CLJ 207). The letter dated 30 April 2009 was not a demand but a claim for the Defendant to process and ultimately make payment. At that point the Plaintiff would not have known what amount the Defendant would pay. It was only after the Defendant had issued the statement of final account dated 9 March 2010 and the Plaintiff disputed it on 11 March 2010 that the cause of action arose. That was when the material facts had happened for Plaintiff to take action. Since the cause of action only accrued when the statement of final account was issued and disputed by Plaintiff on 11 March 2010, limitation had not set in under s 6(1) of the Limitation Act 1953.

**Bauer (Malaysia) Sdn Bhd v
Hundred Vision Construction Sdn Bhd**

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C-18-05/2015
DATO' MARY LIM THIAM SUAN J
1 DECEMBER 2015

[2016] 1 CIDB-CLR 177

The Defendant was the main contractor of a development project ("the project"), in which Bakti Dinamik Sdn Bhd ("Bakti") was the Employer. The Defendant appointed the Plaintiff as the subcontractor for earthwork, reinforced concrete drain diversions, etc for the project ("the subcontract"). Pursuant to the subcontract, the Plaintiff issued a performance bond on 24 October 2013. In November 2013, one of the neighbours to the project, Wagner Piano Sdn Bhd ("Wagner"), claimed that there were defects in its premises which it alleged was due to ongoing work on the site of the project. The Plaintiff channeled Wagner's complaints to the project consultants, who issued instructions to the Plaintiff to implement instrumentation for monitoring and remedial works. In 2014, Wagner sued Bakti, the Plaintiff and the Defendant for, *inter alia*, breach of duty of care and sought an injunction restraining the commencement and/or continuation with any works in relation to the project. The action was, however, eventually settled and the suit withdrawn. On 19 May 2015, the Defendant called on the performance bond, citing the three following grounds in its letter to the bank: (i) that the Plaintiff failed to complete the works within the stipulated time; (ii) failed to attend or remedy the damage to the Third Party's (ie in this case Wagner's) properties completely; and (iii) failed to submit all warranties in respect of materials and use and Form G towards obtaining the Certificate of Completion and Compliance. The Plaintiff applied for an interim injunction under s 11(1)(h) of the Arbitration Act 2005 ("the Act") to restrain the Defendant from making a further call and/or receiving the monies secured by the abovementioned performance bond for the amount of RM1,498,815.00 issued by the bank in favour of the Defendant pending resolution of the adjudication and/or arbitration between the parties (Encl 5). The Plaintiff contended that the injunction to restrain payment out of a performance bond ought to be granted notwithstanding that the bond was an on demand bond because it had raised a seriously arguable case that the only realistic inference from the Defendant's call on the bond was the presence of unconscionable conduct on the Defendant's part. Furthermore, when the Defendant called on the bond two weeks before its due expiration on 19 May 2015, the Plaintiff by then had already achieved practical completion of its work as evidenced by the Certificate of Practical Completion ("CPC") issued by the Architect. The Plaintiff claimed that the call appeared linked to its refusal to bear part of the costs of remedial works to Wagner's premises as proposed by the Bakti.

The Defendant argued that the unconscionability question should not arise in a commercial transaction to defeat that which had been contractually agreed upon between the parties at the outset. It claimed that a situation where there was an assertion of breach and a call - albeit one that was contested by the parties, was “precisely the situation that the call on the Bond was envisaged”. In such situation, the dispute’s referred to arbitration and the Defendant’s permitted to call upon the bond. The Defendant therefore contended that it made the call because of the “contractual safeguard” which it would otherwise have lost.

Held, Plaintiff’s application allowed with costs

- (1) In the instant case, arbitral proceedings were yet to commence. However, it was the Court’s view that s 11 of the Act vested the Court with the power to grant any of the interim measures set out in s 11 paragraphs (a)–(h) whether “before or during the arbitral proceedings”. This meant that the application for any interim measures in the above mentioned paragraphs may properly be made even though the arbitral proceedings have yet to be set in motion.
- (2) Where the performance bond is an on demand bond such as the instant bond, the bank simply gets on with the business of meeting its commercial obligation as set out in the performance bond. Be that as it may, an injunction may nevertheless be issued to restrain even the bank from meeting the call. That, however, was only in limited circumstances and that was where it’s shown that there was fraud that the bank was aware of; or there was unconscionable conduct on the part of the bank. Otherwise, the bank pays up.
- (3) As between the contracting parties, it was always open to the contracting parties to examine if the agreed conditions and circumstances for making such a call have been satisfied. These conditions were not only to be found in the performance bond; but in the underlying contract between the parties. In the instant case, that would be the letter of award, the subcontract or conditions of the subcontract, and the performance bond. Therefore, to say that injunctions can never be granted to prevent the call would not be quite correct.
- (4) The clear stand of the Court was that while recognizing that calls on performance bonds ought not to be restrained, injunctive orders may still be granted by the Court to restrain the call or receipt of the monies payable under such arrangements where the applicant can show fraud or unconscionable conduct (see *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd* [2011] 7 CLJ 442, 460).
- (5) In the present case, the performance bond agreement was clearly held out to be “supplemental to” the subcontract. In as much as the Defendant

expected to be paid without protest as the performance bond was an on demand bond, the Plaintiff was equally said to expect the call to be entirely within the terms agreed under both the bond and the subcontract. Hence, while it was true that a call on a bond may generally not be restrained, it was equally true that the reasons for the call may be examined where the allegation was that the reasons were not true; and that there had been fraud or unconscionability in the call in the first place. Further, although this was an on demand bond for the Bank was required to pay up or release the amount demanded (subject to the financial limit of the bond itself) despite protestations from the Plaintiff or from any third party, where the parties were before the Court on a question of whether an interim injunction should be issued to restrain any payment or release on the performance bond pending arbitration; the Court had to nevertheless consider the issue of whether the call was warranted in the first place.

- (6) When all three grounds relied on by the Defendant were examined, the entire basis for the Defendant's call was questionable. Given that the Plaintiff had completed the subcontract works with the issuance of the CPC held up as testament of its successful completion of the subcontract works; that there was no Certificate of Non-Completion issued; that there were no complaints from the Defendant; that remedial works had been done and were ongoing during the Defect Liability Period; that Wagner's action had been withdrawn without any of the parties reserving their right to claim from the Plaintiff; that the warranties and Form G were not required at that point in time; the only reasonable inference that can be drawn of a call made two weeks before it expired; was one of unconscionability.
- (7) The Defendant furthermore did not raise any issue with the Plaintiff's works nor did it reserve its rights to claim any costs or issue any demand against the Plaintiff in respect of the rectification works and other incidental costs involved in the suit brought by Wagner.
- (8) From the evidence and submissions, the Court was satisfied that the Plaintiff had made more than a convincing case of the existence of a seriously arguable case that there were present elements of unconscionability that questioned the real purport of the call. The Defendant's call on 19 May 2015 was really because of the time constraints presented when the expiry date of the bond loomed and the Defendant made a judgment call to liquidate the performance bond as part of its contractual safeguards which if the bond lapsed, may have been lost to the Defendant. This was the real reason behind the call and not, those set out in the letter to the bank. The circumstances of the call therefore pricked the conscience of the reasonable and sensible person and the only reasonable inference was that the call was completely unwarranted and the reasons given by the Defendant were not true.

**Bina Puri Construction Sdn Bhd v
Hing Nyit Enterprise Sdn Bhd**

HIGH COURT (SABAH & SARAWAK), KOTA KINABALU
CIVIL CASE NO: BKI-24-2/1-2015
RAVINTHRAN PARAMAGURU J
23 FEBRUARY 2015

[2016] 1 CIDB-CLR 180

The Applicant was the main contractor in respect of a construction project. It awarded certain sub-contracted works to the Respondent. The Respondent subsequently filed a civil suit in the High Court, seeking *inter alia*, the return of scaffolding at the Applicant's worksite which the Applicant prevented the Respondent from removing. The Applicant filed a Defence and Counterclaim in the civil suit claiming a much larger sum, allegedly due to the Applicant because of overpayment. The Respondent later filed an Adjudication Claim under s 9 of the Construction Industry Payment Adjudication Act 2012 ("CIPAA"). The Adjudicator granted the claim and the Applicant applied to the High Court to stay the Adjudication Decision under s 16 of CIPAA. The application was made on the ground that the Applicant had a pending Counterclaim against the Respondent in the civil suit filed by the Respondent.

Held, dismissing the application with costs:

- (1) An application for stay of an Adjudication Decision under s 16 of CIPAA is *sui generis* (of its own kind). It must be considered against the scheme and purpose of CIPAA. The discretion under s 16 must not be exercised in the same manner as ordinary applications for stay of execution or stay of proceedings, as it may defeat the objective of Parliament in promulgating CIPAA in the first place. The basic aim of CIPAA is to provide a statutory adjudication mechanism whereby the CIPAA Adjudicator speedily settles a disputed *interim* certificate. However, whatever decision made by the Adjudicator is in the nature of an *interim* decision pending final certification or culmination of arbitration or court proceedings in the event of dispute. Nonetheless, CIPAA has provided for the enforcement of the Adjudication Decision so that lack of "cash flow" does not adversely affect the construction industry as a whole.
- (2) Under s 16 of CIPAA, a stay of an Adjudication Decision need not be automatically granted on the ground that an application to set it aside had been made to the court or on the ground the subject matter of the said decision is pending final decision in arbitration or court proceedings. The use of the permissive "may" in s 16 means that the court is vested with a discretionary jurisdiction in considering an application for stay of

the Adjudication Decision. This discretion must be exercised sparingly in clear cut cases. Otherwise an Adjudication Decision would be effectively frustrated and rendered academic.

- (3) In the instant case, the issue was whether the subject matter of the Adjudication Decision was pending in court. In September 2014, the Respondent took steps under CIPAA to compel payment under *interim* certificates. A month earlier, the Respondent had filed a suit against the Applicant to recover the scaffolding that they had paid for from the worksite. Only incidentally, in the defence to the instant action, the Applicant claimed that it had overpaid the Respondent which claim was challenged by the Respondent. Meanwhile, the CIPAA Adjudicator had decided in favour of the Respondent in respect of its claim under the *interim* payment certificates. Therefore, if the instant stay application was granted, it would mean that an overpayment allegation which was brought tangentially in a suit which was not directly related to the dispute over the draft final certificate, would stifle and defeat the statutory adjudication process that was availed by the Respondent. In the premises, the discretion under limb (b) of s 16(1) should not be exercised to grant a stay of the Adjudication Decision.
- (4) In the instant application, the Applicant's reliance on limb (a) to s 16(1) of CIPAA was flawed for two reasons. Firstly, at the date of the instant application the Applicant had not applied to set aside the Adjudication Decision - which appeared to be a pre-condition for setting aside under s 16(1)(a) of CIPAA. Secondly, an application under s 15 to set aside an Adjudication Decision can only be made on very limited grounds. In the instant case, there was no good reason why the discretionary jurisdiction under s 16 of CIPAA to stay an Adjudication Decision should be exercised.

**Bina Puri Construction Sdn Bhd v
Hing Nyit Enterprise Sdn Bhd**

HIGH COURT (SABAH & SARAWAK), KOTA KINABALU
CIVIL CASE NO: BKI-24-6/1-2015
RAVINTHRAN PARAMAGURU J
8 JUNE 2015

[2016] 1 CIDB-CLR 182

The Applicant was the main contractor in respect of a construction project. It awarded certain sub-contracted works to the Respondent. Disputes subsequently arose between the parties over interim payment claims. The Respondent served a "Payment Claim" under s 5 of the Construction Industry Payment Adjudication Act 2012 ("CIPAA") upon the Applicant. The Applicant did not file a "Payment Response" disputing the amount claimed as a result of which the entire amount claimed by the Respondent was deemed disputed under s 6(4) of CIPAA. The Respondent later served its Amended Adjudication Claim upon the Applicant. In its claim, the Respondent claimed a sum of RM4,370,000 for work done up to 6 June 2014. The Respondent claimed payment on Interim Claims No. 29, 30, 31, 32 and the Penultimate Claim due from February 2014 to June 2014. The Respondent also claimed other payments due from the Applicant. Although the Applicant did not file a Payment Response, it filed an Adjudication Response that the interim amounts claimed by the Respondent in Interim Claims 29, 30, 31 and 32 were subject to a Final Certificate and that the Interim Claims may be adjusted. The Applicant disputed the Respondent's claim of RM4,370,000 for Interim Claims 29, 30, 31, 32 and the Penultimate Claim. The Applicant stated that the Final Draft Certificate showed overpayment to the Respondent in the sum of RM13,544,690.45 at 23 July 2014. The Respondent referred to an ongoing civil suit in the High Court between the parties where the Applicant had counterclaimed for the sum of RM13,544,690.45 that was overpaid. The Respondent prayed for the Amendment Adjudication Claim to be dismissed and counterclaimed the sum of RM13,544,690.45 with interest at 8% per annum. The Adjudicator held that as the civil suit had not been decided it would not affect the Adjudication proceedings. In response to the Applicant's counterclaim raised only in the Adjudication Response, the Adjudicator said that since the Applicant did not serve any Payment Claim, it could not be conferred the status of "unpaid party" or "non-paying" party under the CIPAA. The Adjudicator then held that he had no jurisdiction to decide the counterclaim of the Applicant. The Adjudicator allowed the Respondent's claims. The Applicant applied to the High Court to set aside the Adjudication Decision under limbs (b) and (d) of s 15 of CIPAA. These grounds related to a denial of natural justice to the Applicant and an excess of jurisdiction on the part of the Adjudicator. The Applicant also raised issues concerning the due date of the Respondent's claim and that the Payment Claim was premature because there was no certification.

Held, dismissing the application with costs:

- (1) Under CIPAA, there is no right of appeal against the decision of the Adjudicator which is interim in nature or of temporary finality only. Section 15 of CIPAA 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 the merits. In the instant case, the Applicant has relied on the ground of breach of natural justice and excess of jurisdiction to set aside the decision of the Adjudicator. In the premises, the criticism of the Adjudication Decision by the Applicant had to clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. Otherwise, the instant proceeding would be converted to a full blown appeal or a rehearing of the adjudication process.
- (2) The High Court would disagree that the Adjudication Decision was tainted with “excess of jurisdiction” merely because the Adjudicator refused to decide on the counterclaim raised by the Applicant in the Adjudication Response. In the instant case, s 27 of CIPAA clearly circumscribed the jurisdiction of the Adjudicator. In the instant case, the dispute raised in the Payment Claim was in respect of the payments allegedly due under the Interim Claims. The Applicant did not file a Payment Response to raise the issue of its counterclaim of RM13,544,690.45. Neither did the parties execute an agreement pursuant to s 27(2) of CIPAA to extend the jurisdiction of the Adjudicator to enable him to decide the counterclaim of the Applicant. Thus, the Adjudicator could not be faulted for holding that he had no jurisdiction to decide the counterclaim of the Applicant that was raised belatedly in the Adjudication Response. The limits of the jurisdiction of the Adjudicator were governed by law, ie s 27 of CIPAA. There could be no breach of natural justice if the Adjudication had referred to the correct law to properly direct himself as to what he could or could not do. In any event, although the Adjudicator declined to decide the counterclaim of the Applicant that was only raised in the Adjudication Response, he considered the overpayment defence which was related to the counterclaim of the Applicant.
- (3) In the instant case, there was no ground to hold that the Adjudicator gave little attention to the overpayment defence, to the extent that it resulted in a breach of natural justice or excess of jurisdiction. The Adjudicator had considered the affidavit evidence and written submissions in respect of the overpayment defence. He was not persuaded on a balance of probabilities that the defence succeeded. On the other hand, he was satisfied that the Respondent had proved its claim for interim payments for work done. In the premises, it could not be said that there was a breach of natural justice or that the Adjudicator had committed an excess of jurisdiction.

- (4) The argument of the Applicant in respect of the due date of the claim was without merit since it was never raised before the Adjudicator. Thus, the Applicant should not be permitted to raise it now. In any event, the entire amount stated of RM4,370,000 stated in the Payment Claim was due by the time the Notice of Adjudication was issued.
- (5) The lack of certification of progress or interim claim was not a bar to the adjudication process. Section 5 of CIPAA does not require the existence of certified progress or interim claim before a Payment Claim can be issued. Section 25(n) of CIPAA states that the Adjudicator has power to “decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter”. Under s 25(m), the Adjudicator is also empowered to “review and revise any certificate issued or to be issued”. Thus, even if the contractual agreement between the parties provides for issuance of a certified interim or progress claim, the absence of certification cannot deprive the unpaid party from availing the adjudication process. Furthermore, in the instant case, the Adjudicator, in paragraph 80 of his decision, invoked his power to “review and revise” under s 25(m) to assess the work done by the Respondent. He was entitled to do so although the Applicant issued no certificate as s 25(m) covers cases where a certificate “is to be issued” or in other words covers cases where no certificate was actually issued.

CB Land Sdn Bhd v Syarikat Perumahan Negara Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-34-06-2014
MARY LIM THIAM SUAN J
30 JUNE 2015

[2016] 1 CIDB-CLR 185

The Defendant had appointed the Plaintiff to design and build houses in a mixed-development housing project ("Project"). The parties were bound and related to each other on the basis of the following documents: (i) a development agreement dated 2 March 2007 ("DA"); (ii) a letter of acceptance dated 13 July 2007 ("LOA"); and (iii) general conditions of contract ("GCC"). The completion date of the Project was to be 5 August 2010. The date was however extended twice on application by the Plaintiff. The Project was satisfactorily completed on 16 May 2012 and on 22 May 2012, the local authority issued the Certificate of Fitness for Occupation ("CFO"). The Defendant delivered vacant possession of the various units to the respective purchasers on 25 June 2012. At the same time the Defendant paid a sum of RM1,987,836.09 as late delivery charges to the affected purchasers. The Defendant sought to be indemnified by the Plaintiff for the late delivery charges ("LAD") pursuant to cl 10.12 of the DA. The Defendant further claimed that *vide* letter dated 6 December 2012 the Plaintiff agreed to indemnify the Defendant under cl 10.12 of the DA for the LAD amounting to RM1,987,836.09 that the Defendant paid to the respective purchasers. The single issue for the High Court's determination was whether the Plaintiff had to indemnify the Defendant for the LAD of RM1,987,836.09. The Plaintiff claimed that it was under no obligation to indemnify the Defendant. Any delay encountered in the course of the execution and progress of the works had been accounted for; and any right to be indemnified had been waived. That waiver was in no way altered by the Plaintiff's letter of 6 December 2012. The Plaintiff claimed a careful reading of the letters indicated that the Plaintiff had always maintained that it was not liable for any LAD; that in fact there would be no LAD imposed; that the claim was now *mala fides*; that the undertaking was conditional and/or subject to the terms of the contract as a whole; and that there was no concluded or finalised agreement between the parties. The Plaintiff also pleaded in the alternative that even if the Plaintiff's letter of 6 December 2012 amounted to an undertaking, it was procured under duress. The Plaintiff also alleged that the Defendant had agreed that no LAD would be imposed when the extensions were granted. In any case, since the Defendant was the cause of the delay in completion, the right to enforce the right was not available.

Held, allowing the claim with costs:

- (1) The Court had to reject the Plaintiff's contention that there had been an agreement between the parties on the matter of late delivery charges liable to be paid to the house purchasers. The evidence revealed that the parties were still in discussion over the issue. In fact, the parties remained in discussion long after the completion of the project. However, this did not mean that the Defendant was entitled to the sum of RM1,987,836.09 which was presently retained by the Defendant. That, would depend on the construction of cl 10.12 of the DA.
- (2) By its conduct, the Defendant had to be taken to have agreed and accepted that the completion date of the DA had in fact and in reality been extended by virtue of the extension. Although the extension was made in the sense of the paper work and the formality to have been one under the GCC, for all intents and purpose, it was also under the DA. There could not be an extension of the completion date for the purpose of the GCC; but none for the purpose of the DA. That distinction and separation was artificial, unreasonable and improper given that the parties had always intended the DA and the GCC (together with the LOA) to be read as a single document. The reading could not be of any meaning or value if it is not carried into effect or application. Hence, that when the Defendant agreed to extend time, the very fact that it alluded to cl 10.12 indicated that the Defendant was well-aware of the operation of the terms and conditions of the DA. The Defendant's reference to cl 10.12 of the DA inferred that the term and conditions of the DA were also under consideration. That would and must include an extension of time under the DA. Hence, the Defendant had in effect waived all rights to damages, including the LAD.
- (3) Contracts of indemnity are not contracts of strict or absolute liability. The agreement or promise to pay or indemnify is not unconditional. It is conditional on the loss suffered and for which the indemnity is sought must be a loss which is caused to the promisee by the conduct of the promisor himself, or by the conduct of any other person. Implicit in this condition is that the loss suffered cannot be that which is caused by the promisee or the Defendant. If that was the case, the right to be indemnified simply would not arise.
- (4) The defendant was seeking to enforce a specific right to be indemnified under the DA. In order to be so entitled, the Defendant would have to prove that the loss for which it was claiming was not caused by its own conduct but by that of the Plaintiff; or by some third party. It is only in those two circumstances that the defendant will be entitled to enforce its right of indemnity. To realise that right to be indemnified, the Defendant had still to prove its claim. The fact of payment to the purchasers in late delivery charges is merely evidence of payment to some claims; the question of culpability or liability to pay must still be proved. The High Court did not

agree that all that the Defendant needed to do was to show payment. The Defendant had to still prove that there was delay in completion and that it had not caused that delay; or that the delay was in no way attributable to the Defendant.

- (5) It was clear from the certificates issued by the Defendant that the reasons for the delay in completion were not occasioned by the Plaintiff, but in fact by the Defendant. This was in fact admitted by DW1 (the Defendant's senior legal executive). Even in the case where the delay was relation to the local authorities, the contractual provisions recognised and accepted that where the Plaintiff had done all that was practical on its part, the extensions of time under cl 45.1(e) and (f) may be granted. On the facts of this case, this was why the Defendant granted the time extensions sought by the Plaintiff. It was the court's findings and determination that the Defendant could not now turn round and rely on the indemnity promise. Given that both the extensions of time were by virtue of cls 45.1(e) and (f), where in the case of (e) it referred to the Defendant being in delay in respect of the necessary instructions, decisions and the like; and in the case of (f), it referred to the delay in receiving the necessary approvals and where the Plaintiff had taken all practicable steps to avoid or reduce such delays; and more importantly, the Defendant has accepted these reasons, it was not available to the Defendant, in such circumstances, to enforce the right to be indemnified in cl 10.12.
- (6) The Court was satisfied that the Plaintiff had shown that the delay was not due to its fault or that it was in any way to blame. In such a case, the Defendant was not entitled to invoke and enforce cl 10.12 of the DA. This clause read with s 77 of the Contracts Act 1950 was intended to apply where the Plaintiff was at fault and not otherwise. If that were not the case, a Defendant could simply delay delivery of possession to the purchasers for whatever reason even if the Plaintiff had delivered by the original date of completion; and yet have to pay for such late delivery charges. The DA must be read together with the GCC. Once read as a whole, it would be seen that the Defendant's right to be indemnified was subject to the existence of a delay. Since time for completion had been extended, the right to be indemnified was no longer available. More so, where the delay was caused by the Defendant, the party who demanded to be indemnified. On a true interpretation of cl 10.12 of the DA, the right to be indemnified was dependent on the Plaintiff being the cause of the delay which led to the imposition and payment of the late delivery charges. The Plaintiff was not the cause. The Defendant was. The Plaintiff was therefore not obliged to indemnify the Defendant for the late delivery charges that the Defendant had paid to the house purchasers.
- (7) The Plaintiff's allegation of duress was unsustainable from a point of plea. The allegation of duress was a specific plea and it had the legal effect of negating consent or admission. That being the case, before that legal defence was available, the material facts and circumstances and how it operated or affected the Plaintiff so as to negate or vitiate consent or

admission must be specifically pleaded. Order 18 r 12 of the Rules of Court 2012, required sufficient particulars to be provided. The court disagreed with counsel for the Plaintiff that the Plaintiff was not required to plead the requisite details. The court found the plea of duress lacking in material particulars. All that the plaintiff had pleaded was to say that it was given under duress in relation to the payment of the penultimate certificate and the call on the bond.

- (8) In relation to the letter of undertaking, after having evaluated the correspondence carefully, the High Court did not find that there had been agreements which were unequivocal and of the meaning suggested by the Defendant. The trail of documentary contemporaneous evidence together with the numerous meetings between the parties showed quite clearly that contrary to the Defendant's assertions, the parties had in fact, not reached any consensus on the matter of late payment or late delivery charges to the house purchasers. The Plaintiff's responses were always guarded and not unequivocal. In fact, there was no agreement. With no agreement, there could be no admission, no reliance and no issue of estoppel. There was certainly no acknowledgement on the part of the Plaintiff in the terms suggested by the Defendant.

CLLS Power System Sdn Bhd v Sara-Timur Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-65-11/2014
MARY LIM THIAM SUAN J
22 JANUARY 2015

[2016] 1 CIDB-CLR 189

The Defendant was engaged as the main contractor of a building project ("the project"). By a Letter of Award dated 1 November 2011, the Defendant appointed the Plaintiff as a nominated subcontractor to *inter alia*, install and maintain gensets for the project for the sum of RM20.5m. On 16 December 2011, the Defendant paid a sum of RM2m to the Plaintiff as down-payment under the contract. The Plaintiff claimed that it had carried out works under the contract and had submitted a total of 28 progress claims to the project's Mechanical & Electrical Engineer and the Architect, for certification of the value of work done. These 28 progress claims totaled a sum of RM14,644,647.95. The Defendant made a partial payment of RM550,000 leaving a balance of RM13,786,972.15 as the amount outstanding. The Plaintiff subsequently filed a claim in Court for the balance sum. The Defendant filed an application for a declaration that pursuant to O 12 r 10(1)(g) of the Rules of Court 2012, the Court did not have any jurisdiction over the Defendant in respect of the subject matter of the claim or relief sought by the Plaintiff. The Defendant also sought a stay of proceedings under s 10 of the Arbitration Act 2005, claiming that the subject matter of the Plaintiff's claim fell within an arbitration clause. It was the Defendant's case that the arbitration clause found in cl 29.1 of the PAM Sub-Contract 2006 had been incorporated into the contract between the parties because of cl 5 of the Letter of Award, which provided *inter alia*: "...the form of contract adopted for this Nominated Sub-Contract shall be based on PAM Conditions of Sub-Contract together with the tender documents and the terms and conditions stipulated herein this Letter of Intent." The Plaintiff contended that the arbitration clause found in cl 29.1 of the PAM Sub-Contract 2006 had not been incorporated into the contract because of the clear language of the Letter of Award. The Plaintiff pointed out that cl 5 of the Letter of Award also provided: "Until such time the formal Contract documents are prepared and executed your tender together with the duly signed copy of this Letter shall constitute a binding contract between both parties". The Plaintiff opposed the Defendant's application on the basis: (a) there was no arbitration agreement; (b) even if there was an arbitration agreement or clause, the subject matter of the claim did not fall within the arbitration agreement; and (c) the Defendant had taken steps in the proceedings disentitling the Defendant from seeking an order for stay.

Held, dismissing the application with costs:

- (1) The first order sought by the Defendant - in relation to the declaration that the Court did not have any jurisdiction in respect of the subject matter of the claim - was a non-starter. The Court's jurisdiction in arbitration and arbitration related matters is never ousted, even by the presence of any clear agreement to arbitrate.
- (2) That the Court stays proceedings brought before it does not in any way suggest that there is want of jurisdiction on the part of the Court. The reason why any Court would stay the proceedings in Court goes back to the Court's recognition of the parties' contractual choice of forum for the resolution of disputes between them. When the Court stays the proceedings in Court and refers the parties to arbitration, the Court is simply giving effect to the terms contractually agreed between the parties. It is not for want of jurisdiction. The Courts always retains jurisdiction. It merely declines to hear and determine the dispute where there is a valid arbitration clause or agreement stipulating the parties' intention to resolve their disputes arising under the contractual arrangements by some other preferred mode, that is, by arbitration.
- (3) For s 10 of the Arbitration Act 2005 to properly operate, there must be an agreement to arbitrate or an arbitration agreement between the parties. Generally, this can be found amongst the substantive terms and conditions in the underlying contract between the parties. In the instant case, the existence of the arbitration agreement itself was hotly contested.
- (4) An arbitration agreement can be incorporated by way of reference into another agreement pursuant to s 9 of the Arbitration Act 2005. Section 9 allows for the arbitration agreement located in a different document to be incorporated by reference. The primary distinguishing feature of an arbitration agreement is that it must be "in writing". That "writing" however can be in any document, exchange of correspondence or pleadings. That written arbitration agreement need not necessarily be found in the same contract containing the terms and conditions of the contract, be it for work, sale or services. It may be located elsewhere. However, for the arbitration clause or agreement to operate, it needs to form part and parcel of the underlying contract. In order to form part and parcel of the underlying contract, the arbitration clause or agreement, found elsewhere, may be incorporated into the underlying contract by some reference.
- (5) The High Court would agree with the Plaintiff that there was actually no arbitration agreement or clause in the instant case. The Court could not ignore the clear intention of the parties as evinced from the final clause - cl 5. A plain reading of that final clause in the Letter of Award showed that the formal contract which would follow or adopt the terms and

conditions of the PAM Sub-Contract 2006 was not to take effect until and unless the formal contract was drawn up. This was not to say that there was no binding contract between the parties until a formal contract was drawn up or prepared and executed. It was the case of until the formal contract was prepared and executed, the binding contract, and thereby the terms and conditions of contract, were to be found in the Letter of Award. The parties had clearly intended that a formal contract be prepared and executed. That formal contract would subscribe to or adopt the PAM Conditions of Sub-Contract or the Agreement and Conditions of PAM Sub-Contract 2006. Until that, the binding contract between the parties was to be found in the Plaintiff's "tender together with the duly signed copy of this Letter". This final term in the letter of award took away any construction and conclusion that the reference to the PAM Conditions of Sub-Contract in clause 5 as rendering those Conditions as part of the terms and conditions of the Letter of Award.

- (6) The Court was not prepared to stretch the meaning and application of s 9(5) of the Arbitration Act 2005 to include an instance where the mere reference to PAM Conditions of Sub-Contract in clause 5 was sufficient to incorporate the PAM Conditions of Sub-Contract and thereby the arbitration clause in clause 29.1 as part of the conditions of contract between the parties before the Court. To do that would run counter to the clear intention of the parties and certainly, not in the face of the final term of the Letter of Award.
- (7) The Defendant ought to be denied a stay because it had taken an unreserved and unqualified step in the proceedings. The step was taken by the Defendant prior to and other than the application for stay under scrutiny. The Defendant had taken the unreserved and unqualified step of serving a "Notice To Produce Documents Referred To in Pleadings dated 4 December 2014 issued pursuant to O 24 r 10 of the Rules of Court 2012". It was thus no longer open to the Defendant to seek an order for stay under s 10 of the Arbitration Act 2005. The Defendant having utilised the process of Court as found under the Rules of Court 2012 had to be regarded as having taken a step other than a step of filing for a stay and thus an order under s 10 of the Arbitration Act 2005 was no longer available as of right.

CLLS Power System Sdn Bhd (No 2) v Sara Timur Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-65-11-2014
MARY LIM THIAM SUAN J
3 MARCH 2015

[2016] 1 CIDB-CLR 192

The Defendant was the main contractor for the construction of a data centre. It appointed the Plaintiff by letter dated 1 November 2011 as a nominated sub-contractor to supply, deliver, install, test, commission and maintain genset. The contract was for the sum of RM20.5 million and around 16 December 2011, the Defendant paid the Plaintiff a sum of RM2m as down-payment. The Plaintiff completed the works and both the electrical engineer and architect for the project certified the value of the Plaintiff's works. Notwithstanding the down-payment and a subsequent payment of RM550,000 the Plaintiff filed a civil claim to recover a balance of RM13,786,972.15 as due and owing to the Plaintiff. The Defendant filed its defence and the Plaintiff applied for summary judgment. The Defendant claimed that the payment of the contract sum of RM20.5 million would be in the following stages: namely, 10% as down payment; 70% upon delivery of all the materials to site before installation; 15% after installation; and 5% after testing and commissioning. It was the Defendant's case that the Plaintiff who was supposed to complete the work by 22 February 2012 had failed and/or neglected to complete the work by that agreed completion date; or at all. The Defendant further alleged: (i) the Plaintiff was not entitled to make any progress claim or offsite claim - it was the Defendant's contention that the Plaintiff could only claim for the second stage of payment, that is, the 70% of the contract price after all the required materials had been delivered to the site; (ii) the Plaintiff had failed to deliver all the gensets and material and thus was not entitled to make a claim for the second stage of payment; (iii) only the Defendant could certify the value of the work done and the certificates issued by the engineer and architect were not binding on the Defendant and were ambiguous and/or wrong; (iv) in respect of the payment of RM550,000, the Defendant claimed that this payment was made "merely to comfort the Plaintiff", as the Plaintiff had at that time delivered some - but not all - materials to the site. Such payment therefore could not be treated as an admission or a waiver of the Defendant's rights.

Held, allowing the Plaintiff's application and entering judgment for the Plaintiff with costs:

- (1) The Plaintiff's application for summary judgment was properly before the Court having complied with all procedural requirements as set out

in *Cempaka Finance Bhd v Ho Lai Ying* [2006] 3 CLJ 544. A *prima facie* case had been established by the Plaintiff and the Defendant's burden of showing why an order for summary judgment ought not to be entered against the Defendant had not been discharged. The Defendant had failed to raise any issue meriting trial. The Court was also satisfied that this was a case eminently suitable for the entry of judgment summarily, and that there was no need for the hearing of *viva voce* evidence in any of the respects raised by the Defendant. The sum claimed by the Plaintiff was indeed due and owing by the Defendant.

- (2) Not only did the Defendant keep quiet, it made three payments totaling RM550,000. Each time the Defendant paid, it did so without complaint, without hesitation; with no conditions, no protest and no reservation. Having kept quiet and having "lulled" the Plaintiff into the belief that the debt was not disputed, it did not now "lie in the mouth" of the Defendant to claim otherwise.
- (3) The unhesitating and unequivocal payments totaling RM550,000 confirmed the Plaintiff's contention that the Defendant had, by its actions and conduct, admitted the existence of the debt owing to the Plaintiff. Not only did the Defendant admit the existence of the debt due to the Plaintiff, it partially paid off that debt through payments which were both unconditional and unreserved. Such actions and conduct could only reflect what the Plaintiff claimed: that the Defendant had admitted to its claim; and that the matters raised were but mere afterthoughts - raised long after payments had been made. The Defendant's actions spoke volumes and the Court should not turn a deaf ear to the clear implications of those actions, that the Defendant had no quarrel with the Plaintiff's demand for payment of a debt then as it now sought to do, after the claim was filed. The Defendant's course of action or conduct, illustrated admission as opposed to payments merely to comfort the Plaintiff.
- (4) Having examined the relevant provisions of the contract and other related documents, the High Court disagreed that payment of the contract sum of RM20.5 million was in stages. The works awarded to the Plaintiff was a contract to "supply, deliver, install, test, commission, and maintain" a system provided by the Plaintiff, for a fixed lump sum amount of RM20.5 million.
- (5) There was no provision or agreed term in the contract to the effect that the certificates issued by the Engineer and Architect were not binding on the Defendant. In the instant case, there were no issues raised by the Defendant that were either real bona fide issues or issues of merit.

Capital Habitat Builder Sdn Bhd v Pesona Metro Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-53-11/2013
DATO' MARY LIM THIAM SUAN J
3 NOVEMBER 2015

[2016] 1 CIDB-CLR 194

The Defendant was the main contractor responsible for structural works in a condominium construction project ("the project"). The Defendant subcontracted certain works related to the project to the Plaintiff *vide* letter of acceptance dated 12 March 2012 ("the subcontract"). Under the letter of acceptance, the Plaintiff was required to take possession of the site on 12 March 2012 and to complete the subcontract by 19 November 2012. The Plaintiff claimed that it had been orally instructed by the Defendant's representative to carry out variation and/or additional works to the value of RM2,302,493.10; and 26 variation orders ("VOs") were cited in support. Following such works, the Plaintiff made interim or Progress Claim No. 16. The Defendant then issued a draft interim payment certificate in respect of this interim claim on 12 August 2013, wherein the Plaintiff was back-charged a sum for labour, which it disputed. The Plaintiff subsequently issued Progress Claim No. 17 for the sum of RM2,315,045.00. The Plaintiff stated that both progress claims were not paid by the Defendant within the agreed time period of 30 days from the date of presentation of the claims and the Defendant was consequently in breach of the terms of the subcontract. The Plaintiff's claim in the instant case was for that sum in Progress Claim No.17, which was subsequently amended to RM2,319,624.49. Alternatively, it claimed that it ought to be paid on a *quantum meruit* basis for the original and variation works that it had completed. The Defendant contended that the Plaintiff's VO claims were improper as they lacked supporting documents and the subcontract required joint inspections to be made before payments could be approved. It counterclaimed for a sum as back-charges for materials, labour and penalties. It also claimed for liquidated and ascertained damages ("LAD") for the Plaintiff's alleged delay in the completion of the subcontract works by some eight (8) months from the contractual completion date of 19 November 2012. The Plaintiff however argued that Progress Claims Nos. 16 and 17 were supported with documentation; that the Defendant refused to carry out joint inspections and the Defendant had acknowledged and admitted to the Plaintiff's variation work *vide* draft certificate of payment in email dated 12 August 2013. It furthermore refuted owing the Defendant charges for labour on the basis that there was, *inter alia*, no agreement and argued that the Defendant was not entitled to the LAD claim as the delay in completion was caused by the Defendant itself when the Defendant delayed in handing over possession of the relevant floors or project areas to the Plaintiff. The four (4) issues for

determination were: (i) whether the Plaintiff was instructed to carry out the variation works by the Defendant?; (ii) alternatively, whether the Plaintiff was entitled to claim for variation works on a *quantum meruit* basis?; (iii) whether there was a delay in handing over a duly completed structure for the Plaintiff to start work at the relevant time?; and (iv) whether the Defendant was entitled to claim for back-charges from the Plaintiff?

Held, Plaintiff's claim allowed with costs and Defendant's counterclaim dismissed

- (1) Any instructions from the Defendant to the Plaintiff to do the additional or variation works were almost all verbal; but they were no less instructions from the Defendant and the Plaintiff was contractually obliged to carry out such instructions; regardless the form it was given. Of relevance was the fact that the subcontract did not require orders for variation work to be in any particular form. It certainly did not require such orders to be in writing. Clause 15 merely provided for the possibility of variation work to be done.
- (2) Clauses 12 and 16 of the subcontract dealt with the preparation and submission of a final account and payment. Although these terms required the Plaintiff to submit with "all particulars, details or information in support thereof for verification", this was not the same as saying that the instructions must be in writing.
- (3) The want of written instruction had never been an issue for the Defendant. The fact that the Defendant had already approved and admitted a substantial number of VOs as shown in the pleadings and at the trial, indicated quite clearly that the lack of written instruction was actually not an impeding factor. Therefore, the absence of written instructions on the VO works did not have any material bearing or effect on the Plaintiff's claims. There were clear oral instructions given by the Defendant for all the works which underpin Progress Claims 16 and 17. The parties had a good practical working relationship where form was not the criteria at all before the Defendant would pay against the claims made by the Plaintiff.
- (4) Oral instructions had furthermore been accepted by the parties as a reality, and that being practical, was the manner in which the parties instructed and operated. From the evidence adduced by both sides, the Court was amply satisfied that the Plaintiff was definitely instructed by the Defendant to carry out the additional or variation works which were the subject of the present claim.
- (5) The Court did not find it necessary to determine the second question on *quantum meruit* since the Court found for the Plaintiff by virtue of the first question.

- (6) The Court was satisfied that the Plaintiff had in fact proved its claim. There was sufficient evidence before the Court to prove the amount and value of the work done in all 26 VOs. The Defendant was invited to conduct joint inspections but the Defendant had put such inspections off or had thought them unnecessary and it therefore cannot now complain.
- (7) The “normal construction practice” envisaged that the Plaintiff commence its subcontracted works approximately 30 days after the casting work had been completed by the Defendant. This meant that although the Plaintiff took site possession on 12 March 2012, it could not get on with its work because the areas for the Plaintiff to work were simply not available save for some parts of the building. These were the only areas handed over to the Plaintiff to start work as these were the only areas which had been erected. The Defendant was therefore guilty of being in delay in handing over the site for the Plaintiff to carry out its works. As the party at fault, the Defendant was not entitled to impose any LAD – see *Poh Geok Sing v HB Enterprise Sdn Bhd* [2006] 1 MLJ 617; *Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal)* [2008] 4 MLJ 839.
- (8) There were no agreements for the Defendant to back-charge labour costs to the Plaintiff. The Plaintiff had trusted in the accuracy of the information provided in the certified payments since the Defendant was the party who had the proper and full records of the materials supplied by them to the Plaintiff. The Plaintiff had paid the sums back-charged on the understanding that the sums imposed were for the contractually agreed item of materials. It was not, and, it was never intended to be for the item of labour, which it had never been consulted at the material time; nor did it ever agree to the same. Furthermore, the Defendant never back-charged for labour in any of the earlier progress claims (nos. 1 to 15) and the related payment certificates. All certifications were for materials only, as agreed.

**Casa Tenaga Sdn Bhd v
Efektik Sempurna Sdn Bhd & Anor**

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22C-12-05/2014
SEE MEE CHUN J
4 JUNE 2015

[2016] 1 CIDB-CLR 197

D2 was the main contractor in respect of a construction project. It appointed D1 as its contractor. D1 thereafter appointed the Plaintiff as its sub-contractor in respect of Mechanical and Electrical Works (“M&E work”) for a contract sum of RM7,187,900. The Plaintiff commenced a civil action to claim a balance sum of RM1,135,826.38, variation work, release of the retention sum, and refund of unauthorized deductions.

Held, allowing the Plaintiff’s claim with costs:

- (1) The Plaintiff had proved the balance contract sum due to it was RM1,135,826.38. In respect of the additional work, the Plaintiff had proved that the work was instructed by D1 through its agent, Mega Jati Consult Sdn Bhd. D1 had admitted to ordering the additional work and it had failed to prove its allegation that the work had not been completed.
- (2) As there was still a claim for the balance sum due, it would not be possible for the Plaintiff to issue a declaration that there was no outstanding claim as for all intents and purposes there was an outstanding claim. On the declaration to state defects had been rectified and to be confirmed by consultant, there was no notice issued to the Plaintiff to rectify the defects. Although the requirements of warranty and declaration had not been complied with, the fact of issuance of the CPC and expiry of the Defects Liability Period (DLP) would render the non-compliance not fatal to the claim for its release.
- (3) The claim for the unauthorized deductions had been explained and had not been refuted by the Defendant. The claim thus ought to be allowed.
- (4) As there was no document on defects and notice to rectify defects it would appear that there were no defects. The allegation of defective work was thus not proven and the cost of rectifying defects ought not to have been deducted from the valuation for interim certificate no. 25.
- (5) The Plaintiff’s claim for the balance sum of RM1,135,826.38, variation work of RM634,914.72, retention sum of RM359,395.00, unauthorized

deduction of RM77,634.16 and interest of 5% from date of writ to date of final settlement ought to be allowed. The Defendant's counterclaim ought to be dismissed.

Eastern Access Sdn Bhd v Syarikat Tanah dan Harta Sdn Bhd & 2 Ors

HIGH COURT, SHAH ALAM
ORIGINATING SUMMONS NO: 24C(ARB)-5-09/2014
SEE MEE CHUN J
6 APRIL 2015

[2016] 1 CIDB-CLR 199

The Plaintiff had entered into a Privatization agreement (“PA”) with the First Defendant (“D1”) and the Third Defendant (Kerajaan Malaysia — “D3”), wherein D3 was to privatize the development of a project for the police (“the project”). The PA was afterwards terminated by D3 through the Second Defendant’s (Kementerian Dalam Negeri — “D2”) notice of termination for, *inter alia*, progress of work not being in accordance with the PA. Arbitration proceedings were subsequently commenced by the Plaintiff but were adjourned pending settlement. D2 and D3 contended that there was a letter of settlement dated 30 May 2012, where the Plaintiff had agreed to a payment of RM16,638,339.50 and to withdraw its pending claim against D3. Accordingly, they contended, the arbitration proceedings initiated by the Plaintiff had been concluded by the settlement and the Plaintiff ought to withdraw its claim as agreed. If the settlement was less than its claim, the Plaintiff ought to have proceeded with the arbitration. The instant application was the Plaintiff’s application (Encl 1) for a declaration that: (i) clauses in the PA which related to dispute resolution committee, reference to arbitration and arbitration between the Plaintiffs and Defendants were still in force; (ii) disputes between Plaintiff and Defendants relating to the termination of the PA had not been concluded and decided by arbitration proceedings; and (iii) the aforesaid disputes be referred to and decided by arbitration. D1’s earlier application (Encl 13) to strike out the Plaintiff’s Originating Summons was allowed by this Court on 30 January 2015.

Held, dismissing the Plaintiff’s application for a declaration

- (1) The letter of settlement dated 30 May 2012 meant the dispute referred to arbitration had been settled amicably and in finality. The terms of the letter were clear in that Plaintiff had agreed to receive the specified amount, would not commence any Court proceedings or arbitration, would withdraw its claim against D3 in the ongoing arbitration proceedings and the withdrawal was to be a full and final settlement.
- (2) In the circumstances of the instant case there no longer existed any issue between the Plaintiff and D2 and D3 as the settlement had resolved all disputes between parties. What the Plaintiff ought to have done was to withdraw its arbitration proceedings in accordance with the settlement.

It ought not to have sought a declaration that the arbitration proceedings had not been concluded 2 years 4 months after the settlement.

- (3) The Plaintiff's allegation that the settlement amount failed to take into account its proposed settlement amount of RM42,733,794.66, pressure from its sub-contractors meant it had no alternative but to accept the settlement amount and that it had reserved its rights, was not accepted by the Court as it ran contrary to the settlement. If that was indeed the case, the Plaintiff could have continued arbitration proceedings.
- (4) The Plaintiff referred to s 10 of the Arbitration Act 2005 (stay of proceedings) and contended that what was needed to be decided was whether the matter before the Court was the subject of an arbitration agreement or otherwise. However, s 10 even by analogy did not apply as it dealt with a stay of court proceedings to refer to arbitration. The instant case was where parties had gone for arbitration and settled the matter.

Ehsan Bina Sdn Bhd v Kelang Lama Sdn Bhd & Anor

HIGH COURT MALAYA, KUALA LUMPUR
ORIGINATING SUMMONS NO 24C (ARB)-8-02/2015
MARY LIM THIAM SUAN
15 JUNE 2015

[2016] 1 CIDB-CLR 201

The First Defendant had appointed the Plaintiff as main contractor in respect of a construction project ("the project"). The Project had been completed but disputes relating to the non-payment of interim certificates and related matters arose. The disputes were referred to arbitration. Pending arbitration, the Plaintiff applied to freeze the assets of the First and Second Defendants. The Plaintiff claimed that the First Defendant's assets were held *inter alia* by the Second Defendant. The Plaintiff subsequently filed the current application - Encl 14 - under O 15 r 4 or 6(2)(b) of the Rules of Court 2012 to add *inter alia*, one Asthetik Property Group ("Asthetik") as a Defendant. The Plaintiff claimed that due to a restructuring exercise, the shares owned by the First Defendant in the Second Defendant had been transferred to Asthetik. If the application was allowed, the Plaintiff intended to freeze Asthetik's assets and restrain its dealing with the Second Defendant's shares. Asthetik claimed that its shares in the Second Defendant were its personal assets and not those of the First Defendant. Further, Asthetik contended that the reliefs sought were too wide and too oppressive, too remote and did not merely restrain Asthetik from dealing with the shares as alleged by the Plaintiff; but more. Asthetik claimed the present proceedings were invalid, an abuse of Court process and an afterthought.

Held, allowing the Plaintiff's claim with costs in the cause:

- (1) Order 15 of the Rules of Court 2012 empowered the Court to add any person as a party where it was just. That person was joined because that party's presence was necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. Order 15 rule 6(2)(b)(ii) specifically empowered the Court to join such person if the Court was of the opinion that it would be just and convenient to do so because there was a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter that needed to be determined.
- (2) In the instant case, it was just to add Asthetik as a Third Defendant to the proceedings and to allow also the relevant amendments in relation to Asthetik as shown in Annexure A. Asthetik owned the Second Defendant, at one time an asset of the First Defendant. What the Second Defendant

owned was another matter save that it was once the First Defendant's asset and now, no longer. The inclusion of Asthetik was necessary to ensure that all matters in dispute, which was the matter of whether a Mareva injunction ought to be granted and ought to be granted in relation to the assets of the First Defendant as identified by the Plaintiff. Given that the asset in the character of the Second Defendant was currently in the hands of Asthetik, it was not only just but proper and necessary that Asthetik be heard as to whether the orders sought by the Plaintiff may be given against Asthetik.

**Fan Soon Fatt (t/a Soon Fatt Engineering) v
Lee Sai Fong (t/a Fast Con Pipe Engineering)**

HIGH COURT, SHAH ALAM
SUIT NO: 22C-6-03/2015
SEE MEE CHUN J
4 DECEMBER 2015

[2016] 1 CIDB-CLR 203

The Defendant, by a Local Purchase Order ("LPO"), appointed the Plaintiff as its sub-contractor to execute certain works ("the works") for a university construction project ("the project"). The Defendant had originally been awarded the works for the project by one United Air Conditioning Sdn Bhd ("UAT"). An entity known as Ahmad Zaki Sdn Bhd ("AZSB") had been appointed by the ultimate employer of the project (JKR Cawangan Terengganu) to carry out the infrastructure work for the project. The Plaintiff brought a claim against the Defendant for balance due on original scope of work and insulation work; and variation work for the project. In respect of the claim for work done on the original scope of work and insulation work, the Plaintiff claimed there was a balance of RM208,207.00. This was based on a contract price of RM1.5m and RM137,207.00 and deducting the Defendant's payment of RM1.079 m and AZSB's payment of RM350,000.00 for certain X ray reports. In relation to variation work, the Plaintiff's claim was for variation work on fibre optics, night work for laying of pipes, additional valve chambers and pipe works and sand works amounting to RM1,181,718.00. The Defendant did not deny ordering the variation work except the night work and disputed the quantum. The Defendant also counterclaimed for overpayment, delay and rectification work and liquidated and ascertained damages ("LAD").

Held, dismissing the Plaintiff's claim in part and allowing the Defendant's counterclaim for a partial amount

- (1) The fact that payments for work done on the original scope of work and insulation work were made together did not make insulation work as part of the original scope. The Plaintiff therefore could not add in the sum of RM137,207.00, (i.e. for the insulation work done) to the contract sum of RM1.5m making it an overall contract sum of RM1,637,207.00.
- (2) Related to the issue of the contract sum of RM1.5 million was whether the contract was a lump sum contract or subject to re-measurement. The pleaded case was that the contract sum was subject to final measurement. Though the Plaintiff tried to establish during trial that it was a lump sum contract it was trite law that parties were bound by their pleadings. Furthermore, although the LPO did not state it was for a lump sum price

it was not explained why then the Plaintiff pleaded as he did and the fact of there being no amendment to reflect it was a lump sum. Based on the pleadings, the contract sum in the LPO was subject to re-measurement and the Defendant was entitled to deduct a sum of RM305,525.92 from the contract sum.

- (3) After deducting RM305,525.92 and RM350,000.00 (i.e. AZSB's payment) from the contract price of 1.5m, there was a sum of RM844,472.08 only due to the Plaintiff. However, as it was not disputed that the Defendant had already paid RM1.079m and the evidence showed that an amount of RM844,474.08 only was due, it followed there was no balance due to Plaintiff from the original scope of work and insulation work.
- (4) In respect of night work, there was no evidence of any such instruction given by the Defendant to the Plaintiff. The documents relied on by the Plaintiff purporting to be the proof he had to do the work according to instruction were never verified by the Defendant. The documents therefore did not represent proof of instruction on night work.
- (5) In relation to the other variation work, the Plaintiff had submitted documents to prove the amount claimed in the form of time sheets for fibre optic work and valve chamber work. However, the Court found that though the documents were unverified and could not be accepted by the Court as complete proof of the costs incurred by the Plaintiff, the work was indeed done. The Court therefore awarded nominal damages to the Plaintiff of RM116,183.28 after deducting the sum already paid to the Plaintiff for the sand works.
- (6) The only part of the Defendant's counterclaim allowed was the overpayment by the Defendant. What was due to the Plaintiff was RM844,474.08 and the overpayment by Defendant was RM1.079m–RM844,474.08=RM234,525.92

Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd & Another Case

HIGH COURT, KUALA LUMPUR
OS NO: 24C-10-04/2015
MARY LIM THIAM SUAN J
23 JUNE 2015

[2016] 1 CIDB-CLR 205

Forster Wheeler entered into a contract with Arkema to provide construction management services, equipment and material supply for a construction project. Foster Wheeler initiated adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”) in relation to payment disputes over two claims: for the sum of USD7,629,529.65 being payment for the supply of equipment and bulk material; and the sum of RM3,792,556.52 being payment for reimbursable construction management services. The adjudication proceeded and the adjudicator allowed Foster-Wheeler’s claim together with interest and costs on 10 April 2015. Arkema subsequently made several payments. The payments effectively settled the claim for the sum of USD7,629,529.65 leaving the sum of RM3,792,556.52 outstanding. Arkema filed an application to stay the enforcement of the adjudication decision under paragraph 16(1)(b) of CIPAA 2012. At the same time, Foster Wheeler filed an application for the enforcement of the adjudication decision under s 28 of CIPAA 2012. Arkema, in support of its application raised the following grounds: (i) there were merits in its *bona fides* claims in the arbitration; (ii) the adjudication decision contained material errors; (iii) Arkema would suffer prejudice that would outweigh any prejudice Forster-Wheeler would have to suffer; (iv) the justice of the case favoured an exercise of the Court’s discretion in granting a stay; (v) Forster-Wheeler had served another payment claim without any relevant documents and information thereby abusing the adjudication process as a means to exert undue and unfair pressure on Arkema. Arkema further relied upon s 16(1)(b) of CIPAA 2012 that stay ought to be granted because the “subject matter of the adjudication decision was pending final determination by arbitration”. Counsel for Forster-Wheeler in opposing Arkema’s application argued inter alia, that Arkema had not even met the threshold requirements under 16 of CIPAA 2012. Learned counsel contended that the arbitration had not even commenced in which case the subject matter of the adjudication could not be said to be pending final determination by arbitration. Thus, Foster Wheeler contended that the Court did not even have discretion to consider the merits of the application under subsection 16(2) of CIPAA 2012.

Held, dismissing Arkema’s application for stay but allowing Forster-Wheeler’s application for enforcement with costs:

- (1) The intent of Parliament in enacting specific legislation on adjudication such as the CIPAA 2012 - which was a speedy provisional determination of payment disputes, cannot be overstated. That intent must be recognised and given effect by enforcing the adjudication decision under s 28 where there was no application to set aside the adjudication decision under s 15; or where there was no stay sought or granted.
- (2) The “first and most elementary” rule in statutory interpretation was that provisions and the words used in the provisions under examination must be given their plain and ordinary meaning; in other words the natural meaning must be applied. The second rule was that the words, phrases and sentences found in the statute must be construed according to the rule of grammar.
- (3) The grant or refusal of stay under s 16 of CIPAA 2012 had no correlation with the broad policy of encouraging and recognising arbitration as the parties’ preferred choice in dispute resolution mechanisms; especially in a situation where the matter of stay was regulated as opposed to being left to the Court’s full discretion and the exercise of inherent jurisdiction. In the instant case, the Court was dealing with two dispute resolution mechanisms with quite different considerations at play. The most critical difference between them was its binding characteristic. While adjudication afforded temporary or provisional finality in resolutions of a particular type of dispute and that was a payment dispute as defined under the Act; arbitration enjoyed an element of permanency afforded principally by the contracting parties themselves. The arbitration award was final and it bound the contracting parties.
- (4) CIPAA 2012 had made provisions for the inter-relation or interfacing of the alternative dispute resolution mechanisms. CIPAA 2012 recognised that both of the alternatives (adjudication and arbitration) may be launched concurrently.
- (5) From the clear and express language of s 16(1) of CIPAA 2012, stay was only available in somewhat limited circumstances. It was only available where an application to set aside the adjudication decision under s15 had been filed; and where the subject matter of the adjudication decision was pending final determination by arbitration or the Court.
- (6) Although s 37(1) acknowledged the right to run arbitration proceedings concurrently with the adjudication process; such arbitration proceedings may well be initiated even after the adjudication decision. Regardless when the arbitration regime was initiated, the test or the relevant consideration was whether the arbitration was pending. So long as the arbitration was pending at the time the stay application was under consideration by the Court, the threshold requirement of s 16 was met.

- (7) There were two important elements in paragraph 16(1)(b) of the CIPAA 2012 in the context of arbitration. First, it implicitly recognised there was a final determinant of the subject matter in the adjudication and that included contractually agreed arbitration. Second, where there were such proceedings initiated, then the adjudication decision may be stayed on application pending the final determination by arbitration. There cannot be anything pending, be it through the arbitration or the Court, unless proceeding on the dispute, difference or claim had already been made, initiated or commenced.
- (8) In the context of a payment dispute or payment claim, the rationale and ethos of CIPAA 2012 are as expressed in *Uda Holdings and Subang Skypark Sdn Bhd*; that it was the speedy resolution of payment disputes that was the key. The resolution would allow either cashflow back into the progress of the works; or that parties can get on with their progress of works. Since speedy resolution and temporary finality were the twin central features of CIPAA 2012, it stood to reason that stay of any adjudication decision and the enforcement of such decisions should only be for and in limited circumstances - where the setting aside of the adjudication decision had already been filed in Court; or where the arbitration or Court proceedings had already been commenced. In the case of multitiered process, the twin objects of CIPAA 2012 may be diluted or worse, undermined if the right to apply for stay is available from the very first tier; compounded by generous timelines.
- (9) In the instant case, there were no reasons for the Court to consider going beyond the first primary and fundamental principle of interpretation. If the Court were to adopt the approach advocated by Arkema, it would do violence to the express language in paragraph 16(1)(b). Paragraph 16(1)(b) referred to the pendency of final determination not just by arbitration but by the Court. If the Court were to accede to Arkema's proposition, the construction would certainly do violence to the language in the case of the Court. The phrase "pending final determination by the Court" could mean nothing but what it said; that stay may be sought where there were already proceedings in Court or arbitration over the same subject matter as that raised in the adjudication. The phrase must be understood from the context in which it appeared. Since there was no arbitration pending, Arkema had not met the threshold requirement in subsection 16(1). The application for stay therefore fell on the preliminary threshold requirement. The Court did not have discretion to entertain the application.

Global Mix Sdn Bhd v Wong Brothers Building Construction Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-17-04/2014
DATO' MARY LIM THIAM SUAN J
22 SEPTEMBER 2015

[2016] 1 CIDB-CLR 208

The Defendant was appointed as the main contractor in a building construction project (“the main contract”) by one Kiara Resources Properties Sdn Bhd (“the employer”). The Defendant subcontracted certain works to the Plaintiff, namely to “design and build a concrete batching plant on-site cum supply and deliver ready-mixed concrete (“the subcontract”). The Plaintiff claimed that it supplied and delivered the same to which the Defendant had made part payments. The consultant engineer for the project was Jurutera Perunding Awam YS Sdn Bhd (“the Engineer”). Cracks appeared on the beams and slabs of floor of the building constructed using the concrete supplied by the Plaintiff and tests carried out on site showed inadequate concrete strength. The Engineer suspended all works at the project pending a comprehensive assessment on the overall integrity of the key structural elements in the project. The Plaintiff subsequently sued for a sum of RM2,567,525.00 claiming that it represented the sum outstanding from its contract with the Defendant to supply ready-mixed concrete. The Defendant however contended that the Plaintiff was to deliver reinforced concrete and not, ready-mixed concrete and that the concrete supplied failed to meet the particular specification concerning the designed characteristic strength, resulting in the failure of the structures constructed using it. The Defendant therefore counterclaimed for rectifications occasioned by such defective material. Owing to such rectification works, the Defendant claimed that it anticipated paying liquidated and ascertained damages (“LAD”) to the employer. Insofar as the strength of the constructed reinforced concrete structures was concerned, the Plaintiff denied liability for any loss of the Defendant’s and claimed that concrete placement was beyond its control. It contended that concreting works during construction were highly dependent on *in situ* conditions, procedure and workmanship during the placement of the ready-mixed concrete by the Defendant at the material time. As for the issue of LAD, the Plaintiff claimed that there was no delay on its part to warrant any payment and its responsibility and liability were limited to the supply and delivery of the ready-mixed concrete. The single issue for determination was whether the Plaintiff supplied and delivered ready-mixed concrete in accordance with the specifications as stated in the letter of acceptance/main contract. In answering this, it had to first be ascertained what was the subject matter of the contract between the parties and second, whether there were any relevant or applicable specifications, particularly, as to the designed characteristic strength.

A further matter addressed concerned the letters written by the Plaintiff post knowledge of the “failures” of the ready-mixed concrete (where the Plaintiff had apologized in relation to the ready-mixed concrete supplied and delivered to the Defendant) and whether these letters prohibited the Plaintiff from taking a contrary stand.

Held, allowing the Plaintiff’s claim with costs and dismissing the Defendant’s counterclaim

- (1) It appeared from the contents of the letter of acceptance dated 1 April 2013 that the parties were quite happy using several terms to describe the material which the batching plant was supposed to produce. These terms; “ready-mixed concrete”, “reinforced concrete”, “concrete” appeared throughout the subcontract, especially “ready-mixed concrete”. These terms were used fairly interchangeably without any reservation or concern that it would be misunderstood by the other party although it appeared that in the case of the term “reinforced concrete”, it was only used on one occasion. The conduct of the parties did not reveal any inhibition or confusion from such usage nor was there any single moment in the 5000 odd supply and deliveries made by the Plaintiff that the parties found themselves stumped by the different terms used because they were actually at cross-purposes.
- (2) The parties were fully aware that the concrete that was produced at the batching plant designed and set up by the Plaintiff was ready-mixed concrete. More important was that this ready-mixed concrete was not a single grade but various grades as set out in Appendix SR (ie the Schedule of Rates in the letter of acceptance) and in another subsequent letter of offer dated 1 August 2013. These grades were determined by the Engineer’s construction drawings or instructions. Furthermore, when the specifications were examined in greater detail, it was apparent that the terms “concrete”, “ready-mixed concrete” and “reinforced concrete” really refer to one and the same. It was the grade of the concrete that differed thereby giving the relevant concrete a different term.
- (3) Both parties conducted different tests in order to determine that factor or specification of “the designed characteristic strength”. The Plaintiff conducted slump tests and cube tests (for ready-mixed concrete) while the Defendant conducted load tests (for reinforced concrete). However, it was clear from all the documentary evidence which emanated primarily from the Defendant that the agreement between the parties was that the concrete or ready-mixed concrete supplied by the Plaintiff should meet the designed characteristic strengths as determined by cube tests at 28 days. This specific requirement could not extend to include the requirement that the load tests should also be met. Quite apart from the fact that there was no express inclusion of this requirement, this specification could not be implied because the subject matter of the subcontract

was the supply and delivery of the concrete or ready-mixed concrete. There was no evidence that the Plaintiff's scope of work extended beyond supply and delivery of the ready-mixed concrete to the project site. In the instant case, there was ample evidence before the Court that the concrete or ready-mixed concrete supplied and delivered by the Plaintiff met both the slump and cube tests. In the circumstances, the Court found that the Plaintiff had supplied and delivered ready-mixed concrete of the various grades ordered by the Defendant and that those supplies passed the requisite tests prescribed under the main contract. The Plaintiff was not in breach of the specifications under the subcontract read together with the main contract.

- (4) From the testimonies of PW1 (one of the Plaintiff's directors), DW1 (Defendant's Project Manager) and even DW2 (Defendant's Quantity Surveyor), it was readily concluded that the Plaintiff was in no way involved in the placement or use of the ready-mixed concrete that it had supplied. The Plaintiff merely produced the ready-mixed concrete and delivered it to the site. Upon delivery, the Defendant took over and used the ready-mixed concrete by placing it into the various structures or used it to construct the various structures.
- (5) From the tone of the letters exchanged, the Plaintiff's intent was to resolve the problem as opposed to an unequivocal admission of liability as suggested by the Defendant. There was therefore, no admission by the Plaintiff.
- (6) On the issue of the counterclaim, the Defendant had not proved that it had in fact incurred the losses claimed. There was no evidence that the Engineer had instructed on the rectification or remedial works as claimed; that the Defendant had procured the necessary quotations or had been invoiced for the various items of claims; and that it had paid against such invoices. In short, there was no evidence that the rectification works were carried out.
- (7) Furthermore, the remedial works done were due to the Defendant's own defective concreting works (ie the manner and workmanship of placing the ready-mixed concrete supplied) as opposed to the Plaintiff delivering defective ready-mixed concrete or ready-mixed concrete which did not meet the agreed specifications.
- (8) On the specific claim for LAD, there was no evidence shown that there was delay caused by the Plaintiff. Without such evidence, any imposition of LAD would be speculative. The right to impose such a remedy was dependent on proof of fault, that the Defendant itself is free from blame; and the proof of the actual loss (see the Federal Court's decision in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817).

**Golden Star (88) Construction Sdn Bhd v
M Balakrishnan VS Moorthy**

HIGH COURT, KUALA LUMPUR
CIVIL APPEAL NO: 12B (NCVC)-64-01/2014
NORAINI ABDUL RAHMAN J
13 FEBRUARY 2015

[2016] 1 CIDB-CLR 211

The Plaintiff and Defendant had entered into an agreement to construct a house. Under cl 30 of the agreement, the Defendant would make payment after the Architect had issued a Certificate. The Plaintiff claimed that the Defendant failed to make full payment on the Certificates and owed the Plaintiff a sum of RM59,575.53, which the Plaintiff claimed through a civil action in the Sessions Court. The Defendant however counterclaimed for damages as a result of rectification of defective works. The Sessions Court only partially allowed the Plaintiff's claim and the counterclaim. The Plaintiff appealed to the High Court.

Held, dismissing the appeal with costs:

- (1) From the evidence, the Defendant did not fully pay the amount as under Architect Certificate Nos 3 and 4. Hence the Plaintiff was entitled to the balance of RM59,575.53. The High Court also agreed with the Sessions Court's decision not to allow other payments since there were no certificates issued by the Architect for those payments as provided in the agreement.
- (2) There was evidence to show defects in the drainage system. As a result, the Defendant had to employ another Contractor to rectify the problem. Based on the evidence, the High Court agreed with the decision of the Sessions Court Judge to award partially the counterclaim.

Gulam Fatimah Munshi v Yang di-Pertua Majlis Perbandaran Kuala Kangsar & Ors

HIGH COURT, TAIPING
CIVIL SUIT NO: 21 (NCVC)-9-11/2014
MOHAMED ZAINI MAZLAN JC
28 JULY 2015

[2016] 1 CIDB-CLR 212

The Plaintiff was the occupant and beneficial owner of a house in Kuala Kangsar. She claimed that the First and Second Defendants had breached their statutory duties in approving a development plan submitted by the Third Defendant, who had constructed shop-houses next to the land adjoining her dwelling. The Plaintiff alleged that the construction of the shop-houses was done haphazardly, and that the end result had caused nuisance to her. The Plaintiff sued for some declaratory orders, injunction and damages against all three Defendants. The Plaintiff later applied to amend her Statement of Claim. The gist of the amendment sought was to add the phrase “suing for herself and as a trustee” and to add the fact that the Plaintiff was a trustee of the land concerned in the introductory paragraph of the statement of claim. The Plaintiff also sought to include the name of the Act that she claimed was breached by the First and Second Defendants, namely the Uniform Building By-Laws, 1984, Street Drainage and Building Act (Act 133). The Plaintiff’s solicitor had admitted in Court that due to his oversight, he had only discovered the Plaintiff was a registered trustee for the land that her house sat on subsequent to the filing of the action. The Third Defendant opposed the Plaintiff’s application and filed its own application to strike out the Plaintiff’s claim, alleging that the Plaintiff’s application was filed to delay its application to strike out the claim.

Held, allowing the Plaintiff’s application for amendment but dismissing the Third Defendant’s application to strike out the claim:

- (1) Nothing substantive was averred in the Third Defendant’s affidavit in opposition. It merely contained denials of what was stated in the Plaintiff’s affidavit.
- (2) An amendment required due to mistake, and even if made late, should be allowed, provided it does not cause injustice to the other party. O. 20 r. 5(3) and (4) of the Rules of Court 2012 stipulate that an amendment to correct the name of the party ought to be allowed, even if the amendment would lead to a substitution of a new party, or alter the capacity in which a party sues. The proviso is that, the court must be satisfied that the mistake sought to be corrected is a genuine mistake, and not misleading. In the instant case, the application was *bona fide*, and that the mistake as

admitted by the Plaintiff's solicitor was a genuine mistake. The solicitor had clearly admitted his error, and the High Court had no reasons to think otherwise. The Third Defendant had not provided an iota of evidence to support its allegation that the Plaintiff's application was not *bona fide*.

- (3) The amendments sought would lead to an accurate description of the capacity of the Plaintiff. There was no evidence that injustice would be caused to the Third Defendant by allowing the amendment. The Third Defendant's application to strike out was also heard and decided simultaneously with the application for amendment. The Third Defendant's allegation that the application was done to delay its application was therefore misplaced.

**Gunasegaran a/l S. Pallier v
Max Return Resources Sdn Bhd & Ors**

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22C-18-06/2014
SEE MEE CHUN J
5 JANUARY 2015

[2016] 1 CIDB-CLR 214

The Plaintiff's Statement of Claim provided that the Plaintiff was an individual trading under the name and style of Cahaya Bukti Trading ("Cahaya"). The letter of appointment which formed the basis of the claim was from the First Defendant to Cahaya. The proprietor of Cahaya was one Nirmala Devi a/p Gunasegran. The Defendants brought an application pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 ("the Rules") to strike out the Plaintiff's claim against them for lack of *locus standi*. The Plaintiff, in opposing the application, argued that Nirmala had given him the mandate to trade under the name and style of Cahaya and he denied any involvement in the transaction relating to the letter of appointment. The Plaintiff furthermore contended that the Defendants had never raised the issue of *locus standi* and had proceeded on the basis of having contracted with the Plaintiff.

Held, allowing the Defendants application for striking out the Plaintiff's claim

- (1) A perusal of the letter of appointment showed it to be from the First Defendant to Cahaya and they were therefore the parties to the contract pertaining to the claim. Though, in his statement of claim, the Plaintiff stated that he was the person trading under the name and style of Cahaya, the company search clearly showed it was Nirmala and not him who was the proprietor. Therefore the Plaintiff was not the individual trading under the name and style of Cahaya despite a letter from Nirmala mandating him to do so.
- (2) The letter of appointment furthermore showed the Plaintiff to have signed as General Manager of Cahaya. As the Plaintiff was not trading under the name and style of Cahaya, it followed he had no *locus standi* and thus no cause of action against the Defendants. Thus even if the Statement of Claim had pleaded and particularised fraud and negligence and disclosed a cause of action, the lack of legal capacity on the part of the Plaintiff necessarily meant that the Defendants striking out application should be allowed.

**Hasrat Idaman Sdn Bhd v
Mersing Construction Sdn Bhd**

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: S2-22-157-2007
MARY LIM THIAM SUAN J
1 APRIL 2015

[2016] 1 CIDB-CLR 215

DRB-HICOM as Contractor appointed one Azamme Sdn Bhd (“Azamme”) to carry out certain works in relation to a certain project. The works comprised two elements - the relocation of utilities work and the horizontal directional drilling works (“HDD works”). Azamme appointed the Defendant as Principal Subcontractor for the works. The Defendant thereafter appointed the Plaintiff as subcontractor only for the relocation of utilities work for a contract price of RM5,379,806.25. The Plaintiff claimed that it had completed the works and a joint measurement had been conducted by the consultants. That joint measurement was said to have verified the extent of the Plaintiff’s works. The Plaintiff had made progress claims *via* 115 claims certificates amounting to RM9,779,933.52. In its Re-Amended Statement of Claim, the Plaintiff pleaded that the Defendant had paid a total amount of RM7,331,103.76. With another sum of RM138,665.00 conceded by the Plaintiff as being appropriate to be deducted as contra, the balance due and outstanding was a sum of RM2,310,164.76. The Plaintiff filed the instant claim for that sum. The Defendant disputed the claim. The Defendant claimed that the Plaintiff had been duly paid - in fact overpaid - but the Defendant had decided against reclaiming the overpayment. It was the Defendant’s case that it never paid the Plaintiff according to the Plaintiff’s claims certificates. Because the Plaintiff’s works was subject to re-measurement, the Defendant paid against what was certified as having being re-measured. Fifteen (15) Interim certificates were issued showing the certified re-measurements. The Defendant had paid according to those Interim certificates. Since the two consultants did not certify any payments as due and owing to the Plaintiff, the Defendant claimed that there was nothing due to the Plaintiff. The Defendant claimed that even from the Plaintiff’s own reckoning, the Defendant had overpaid the Plaintiff. The agreed issues for determination were: (i) whether the additional works of RM2,310,164.76 was instructed by the Defendant; and (ii) how much of the construction works was to be measured and paid.

Held, dismissing the application:

- (1) In the construction industry, the scope of works agreed between the parties are generally referred to as the “original work”. The payment for such work may be subject to re-measurement for the final actual quantities as in the instant case, using the rates in the Bills of Quantities (BQ). Re-measured

works remain very much part of the original contract and is by no means variation work. On the other hand, any work which is instructed over and above the original works are referred to as “additional” or “variation works”. Before such works are done, the parties would have discussed and agreed on the applicable rates and other details in relation to such work. Following agreement between the parties, a proper instruction including a variation order (VO) is then issued for the subcontractor to commence such work. The VO forms the basis for any additional claim for work done.

- (2) In its claims, including progressive claims, a claimant, including the Plaintiff, would have demarcated and tabulated precisely what was being claimed, whether the relevant claim was for work done under the original works, additional or variation works; supporting all these claims with the necessary documents. The paying party, generally through an engineer, architect or quantity surveyor (or all three) would then evaluate the claims according to the terms and conditions of the contract before certifying the value of all works done, whether as original or additional/variation works.
- (3) In the instant case, it appeared that the Plaintiff had treated both the original and variation works as one and the same. Yet when submitting its claims, it distinctly separated the works done under the original works from works which it regarded as “variation” or “additional works”
- (4) It was important that the Plaintiff be able to show that the additional works were ordered by the Defendant failing which there could be no valid claim. The Court did not find any evidence in any form whatsoever of the work for which the Plaintiff was claiming was indeed work which was ordered or instructed by the Defendant. The evidence presented was messy and thoroughly confused; inconsistent with itself and the oral evidence presented in Court.
- (5) The Defendant produced evidence of the payment certificates which it had issued and which it abided by for payment to the Plaintiff. These payment certificates were based on certified re-measurements and they did not simply follow the Plaintiff’s claims certificates.
- (6) In the instant case, the Defendant did not and never did instruct the Plaintiff on any additional work. The Plaintiff’s work under the contract with the Defendant had been fully paid up and the issue of measurement or re-measurement did not arise. The Plaintiff had thus failed to discharge the burden of proving its case on a balance of probabilities.

**I.Z.A. Construction Co Sdn Bhd v
Intelek Edaran (M) Sdn Bhd**

HIGH COURT, SHAH ALAM
SUIT NO: 22(NCVC)-373-03/2012
SEE MEE CHUN J
22 JANUARY 2015

[2016] 1 CIDB-CLR 217

By a letter of award dated 6 January 2012 ("LA"), the Defendant appointed the Plaintiff as the contractor for a construction project. However, by letter dated 13 January 2012, the Defendant terminated the LA for the following reasons: (a) that the Plaintiff had not submitted the summary of tender/contract documents; and (b) had not paid the commitment fee of RM500,000.00. The Plaintiff brought a claim for: (i) deposits paid to its two sub-contractors and (ii) loss of profits. The primary issue in this case was whether the LA was validly terminated by the Defendant vide letter dated 13 January 2012.

Held, allowing the Plaintiff's claim in part with one third costs to be borne by Defendant

- (1) If the Plaintiff had agreed to a commitment fee this surely would have been reflected in the LA which was issued a day after a meeting held on 5 January 2012. Furthermore, the letter from the Defendant to the Plaintiff dated 9 January 2012 (where the Plaintiff had purportedly agreed to the commitment fee) had been accepted by a non employee of the Plaintiff's and in any event was a letter from the Defendant which did not amount to the Plaintiff having agreed to pay the commitment fee.
- (2) As to the summary of tender not having been submitted, this was not probable as it had been received by the Defendant's representative and if only the front page had been received as contended, the Defendant ought to have informed the Plaintiff accordingly but this was not done. Further, the amount stated in the summary of tender was the same as that in the LA. There had therefore been no breach by the Plaintiff entitling the Defendant to terminate the LA.
- (3) On the claim for deposits paid to the Plaintiff's two sub-contractors, cl 6 of the LA made it a requirement that the appointment of sub-contractors must be approved by the Defendant, but this had not been done.
- (4) On the claim for loss of profits, the Plaintiff had to prove its losses. The Court could not rely on what were essentially estimates by the Plaintiff's witness of the Plaintiff's loss of profits arising from a projection of its cash

inflows and outflows. As the amount of damages had not been proved, only nominal damages were awarded.

**Jong Kok Won (trading under the name Weide
Electrical Engineering) v
YTM Engineering & Construction Sdn Bhd**

HIGH COURT, SHAH ALAM
WRIT OF SUMMONS NO: 22C-10-10/2013
SEE MEE CHUN J
26 JANUARY 2015

[2016] 1 CIDB-CLR 219

By letter dated 1 September 2012, the Defendant appointed the Plaintiff as nominated works sub-contractor to supply goods and carry out electrical and telephone services (“the work”) for a construction project (“the project”). The appointment was accepted by the Plaintiff through a duly signed acknowledgement and confirmation. Work commenced on 1 September 2012 with the date of completion being 7 October 2014. By another letter dated 14 August 2013, the Defendant terminated the Plaintiff. The reasons for termination as per the letter were: (i) failure to proceed with due diligence after being required in writing to do so; (ii) failure to execute the works or perform other obligations in accordance with the contract; (iii) refusal or neglect to remove any defective materials or make good defective works after being directed to do so; and (iv) failure to pay workers salary several times and causing the workers to stop work and affecting the site progress. The Plaintiff brought a claim for a declaration that the termination was invalid and damages arising therefrom. The Defendant submitted that even if the defective work had been rectified this had ultimately led to delay. Time was the essence of the contract and the Plaintiff by its conduct had disabled himself from performing the contract, entitling the Defendant to terminate pursuant to s 40 of the Contracts Act 1950. The Defendant also counterclaimed on a joint and several guarantee and indemnity executed by Plaintiff on 24 October 2012. The primary issue was whether the Defendant’s termination of Plaintiff as its nominated sub-contractor was valid.

Held, allowing the Plaintiff’s claim for a declaration with costs and dismissing the Defendant’s counterclaim

- (1) With regard to the Plaintiff’s alleged failure to proceed with due diligence to execute works in accordance with the contract and to make good the defects, DW1’s (i.e. the Plaintiff’s supervisor) evidence on work not being in accordance with specifications was not supported by any documents as he had only verbally informed the Plaintiff and Defendant.
- (2) On the alleged failure to remove any defective materials, the evidence was that no penalty had been imposed, which indicated that there was no such failure by the Plaintiff.

- (3) The Plaintiff had shown he was unable to pay the workers due to the Defendant underpaying him on the progress claims. Furthermore, DW4's (i.e. the Defendant's Managing Director) evidence also pointed to the Defendant not having paid the amounts recommended.
- (4) Section 40 of the Contracts Act 1950 related to a situation "where a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety". The words "in its entirety" showed there must be complete refusal or disabling which was further evident from the marginal note "effect ... to perform wholly" and illustration (a). In the instant case there had been no complete refusal or disabling therefore s 40 did not apply. In the circumstances the termination by the Defendant was invalid as there had been no breach by Plaintiff.
- (5) Although PW3 (sole proprietor of Plaintiff) confirmed signing the guarantee it was also his evidence that he was not liable on the guarantee as the Defendant had breached the agreement and not the Plaintiff. As the Court found that the Defendant's termination was invalid, the guarantee was inapplicable.

**Jun Cheng Construction Sdn Bhd v
Shazalis Construction Utara (M) Sdn Bhd**

HIGH COURT, MALACCA
CIVIL SUIT NO: 22 (NCVC) 19-04-2014
DATUK ABDUL KARIM BIN ABDUL JALIL
14 SEPTEMBER 2015

[2016] 1 CIDB-CLR 221

The Plaintiff was a sub-contractor for the Defendant for a hospital project. The Defendant was the main contractor for the same project. The Plaintiff sought to claim RM3,130,163.38 from the Defendant as outstanding payment for work done. The Plaintiff also claimed that the Defendant unlawfully debited an unreasonably high sum from the Plaintiff's account for facility fees and interest rates, totaling RM445,878.73. The Defendant raised the following points in its statement: (i) that the Plaintiff failed to properly complete the work assigned by the Defendant, resulting in the Defendant receiving a warning from the Public Works Department ("JKR"); (ii) that as a result of the Plaintiff's unsatisfactory work, the Defendant suffered a penalty from JKR for being late; and (iii) owing to the Plaintiff's failure, JKR could not pay the Defendant thus rendering the Defendant unable to pay the Plaintiff. As regards the outstanding payment alleged by the Plaintiff, the Defendant claimed that the Plaintiff's details provided were inaccurate, that the two packages for the project presented by the Defendant to the Plaintiff were mingled by the Plaintiff in the outstanding payment, that the Plaintiff should prove the details of this outstanding amount, and that the Plaintiff had in fact allowed the Defendant to debit the Plaintiff's account via debit notices issued to the Defendant. The Court had three issues to address. First, whether the Defendant owed the Plaintiff as much as RM3,130,163.38 for the Plaintiff's work and services rendered as sub-contractor for the Defendant. Second, whether the Defendant ought to pay the Plaintiff the amount of RM445,878.73 that was unlawfully debited from the Plaintiff's account. Third, whether the Plaintiff completed the work according to the required contractual standards and obtained a certificate of practical completion. The Defendant was absent at trial.

Held, allowing the Plaintiff's claim with costs:

- (1) In relation to the first issue, no evidence was raised challenging the evidence put forth by the Plaintiff. The Court found on a balance of probabilities that there were accrued sums in the contract owed by the Defendant to the Plaintiff. As such, the Defendant ought to pay the Plaintiff RM3,130,163.38 for the Plaintiff's work and services rendered for the project.

- (2) In relation to the second issue, it was found that the Defendant had indeed unlawfully debited from the Plaintiff's account unreasonable fees and interest. As such, the Defendant ought to pay the Plaintiff the amount of RM445,878.73.
- (3) As regards the third issue, the Court found from documents in evidence that the Plaintiff adhered to the necessary contractual standards. Further documentary evidence showed that a certificate of practical completion was in fact issued by the Defendant's architect, thus certifying that the Plaintiff's work was complete.
- (4) Since the Defendant was absent during trial, the Court relied on established law that if the Defendant was duly informed of a hearing and failed to appear, the Plaintiff was to prove its case as it bore the burden of proof. In the instant case, the Plaintiff put forward its evidence and witnesses, which the Court heard and determined on its merits. The Defendant's absence meant that no evidence to the contrary was provided and that the statement of the Plaintiff's witness was not challenged. As such, the Court was satisfied that the Plaintiff had proved its case on a balance of probabilities.

Juta Rasmi (M) Sdn Bhd v Magilds Park Sdn Bhd

HIGH COURT, SHAH ALAM
SUIT NO: 22(NCVC)-216-04/2014
SEE MEE CHUN J
22 APRIL 2015

[2016] 1 CIDB-CLR 223

The Defendant was a developer for a drainage system and a two storey linked housing project ("the project"). The Plaintiff filed a claim against the Defendant for work done on a Letter of Acceptance dated 12 December 2012 ("LA") for execution, performance and other related works ("SPAN Drain Contract"). The Plaintiff had, however, earlier been wound up on 20 June 2012 and an Official Receiver appointed as Liquidator. A Stay Order was subsequently granted on 24 July 2013. However, the Plaintiff had not obtained the Official Receiver's consent prior to the LA. The Plaintiff contended that the Stay Order had been obtained on the basis of its debt having been paid in September 2012 prior to the LA; it had entered into the contract with the Defendant under the honest impression it was solvent, had performed its obligations and sent its two (2) progress claims; and it thus ought to be paid on *quantum meruit* and the Defendant would be unjustly enriched. The Defendant applied pursuant to O14A Rules of Court 2012 ("RC") to determine the following questions of law: (i) whether the LA for the SPAN Drain Contract entered into by Directors of the Plaintiff with the Defendant while the Plaintiff was a wound up company was void in law and unenforceable against Defendant; (ii) if yes, whether the Stay Order obtained by the Plaintiff had the effect of retrospectively validating the LA and; (iii) was the Plaintiff entitled to maintain its claim together with interest against the Defendant.

Held, allowing the Defendant's application

- (1) For O14A of RC to be invoked the material facts relating to the subject matter of the application must be undisputed or admitted. It was undisputed at the time of the SPAN Drain Contract that the Plaintiff had been wound up, no sanction from the Official Receiver had been obtained and a stay was only granted subsequently.
- (2) The Court, in finding that the LA for the SPAN Drain Contract was void in law and could not be enforced, referred to 'Construction Law in Malaysia' (Datuk Sundra Rajoo and Ir Harbans Singh KS) which stated at p 44: "... parties devoid of legal capacity to contract [are] those who have legal disqualifications to do so. Such persons include individuals who are either bankrupt and also companies which are in liquidation. ... by virtue of the same provisions of the Contracts Act 1950 as referred to before [i.e. s 11],

a contract entered into by such legally disqualified person would also be void". Furthermore, the cases of *American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 and *Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 CLJ 141 were also referred to by the Court.

- (3) The case of *Wong Wee Keong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313 which stated that transactions could be validated after a winding up order, had to be viewed in the factual matrix of that case which dealt with the disposal of property to purchasers. There it was found the purchasers had no knowledge of the winding up order. In the instant case the Defendant had stated that if it had known the Plaintiff was a wound up company it would not have awarded the LA to it.
- (4) A Stay Order only took effect from the date of pronouncement of the order and could not be backdated to the date of the winding up order (*American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506). A Stay Order did not wipe the winding up order out of existence but would only be operative from the date of the granting of the Stay Order. Therefore the Stay Order obtained by the Plaintiff on 24 July 2013 did not apply retrospectively.
- (5) Although the Plaintiff's first progress claim had been certified, when a contract or agreement was void, the whole terms in the contract were void and could not be enforced (*Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 CLJ 141). The Plaintiff's second progress claim had not been certified by the Defendant's architect, therefore the Plaintiff's right to payment had not arisen.
- (6) The Plaintiff's reliance on *quantum meruit* and ss 66 and 71 of the Contracts Act 1950 that it ought to be paid for work done was unsuccessful. Section 66 was premised on the term "discovered". The case of *Suu Lin Chong v Lee Yaw Seong* [1979] 2 MLJ 91 explained that term to be "something which the parties were not aware of at the time of making the agreement and which they gained sight of or detected only subsequently". In the instant case, the Plaintiff was aware as early as October 2012 when a letter was sent from Petitioner's lawyer to its lawyer on a proposed application for stay. As to "lawfully does anything" in s 71, the SPAN Drain Contract was unlawfully entered into. The Plaintiff's honest belief it was solvent when it entered into the SPAN Drain Contract or the debt having been paid in September 2012 was untenable as the stay granted applied prospectively.
- (7) "Unjust enrichment" is a restitutionary relief founded in equity. "A restitutionary claim will fail if it is against public policy to enforce it" ('Law of Restitution' (Goff & Jones)). To allow the Plaintiff's claim in the present case would be to defeat the purpose of winding up law and go against public policy.

Kejuruteraan Bintang Kindenko Sdn Bhd v Serdang Baru Properties Sdn Bhd & Ors

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22-1685-2008
GUNALAN MUNIANDY JC
30 SEPTEMBER 2015

[2016] 1 CIDB-CLR 225

The Plaintiff had been appointed by the First Defendant as its Turnkey Contractor in respect of a retail, commercial and residential development. Disputes arose between the Plaintiff and the First Defendants in connection with the works and the disputes were referred to arbitration for settlement. The Plaintiff's claim against the Second and Third Defendants were based on: (i) the tort of procuring breach of contract; (ii) tort of unlawful interference with contract; (iii) conspiracy; (iv) fraud; and (v) improper and undervaluation of the Plaintiff's work in respect of the contract between the Plaintiff and the First Defendant. Against the Fourth Defendant, the Plaintiff's cause of action was based on the contention that the Fourth Defendant, on instructions of the Second and Third Defendants, valued the works carried out by the Plaintiff in a sum way below the value of the works completed by the Plaintiff thereby breaching its duty of care to the Plaintiff. The Second, Third and Fourth Defendants were alleged to have acted together in conspiracy and fraud. Thus, the Plaintiff sought against the Defendants various declarations, damages based on breach of contract, fraud, conspiracy, interference with contract to induce breach, negligence and related reliefs.

Held, dismissing the claims with costs:

- (1) The legal burden of proving the case based on the pleaded claim lay throughout on the Plaintiff. Apart from that, the Plaintiff bore the evidential burden of introducing sufficient evidence to prove all the material and essential particulars of its claim as per the statement of claim. The Plaintiff had to make out a *prima facie* case on its pleadings before the onus shifted to the Defendants to establish their defence. In this context, the duty of the Plaintiff was to adduce all necessary and material evidence to prove the primary allegations of fact on which its cause of action was founded. The Plaintiff could not just rely on factual assertions in its pleadings, which do not constitute proof of the facts in issue, notwithstanding the absence of rebuttal evidence on these unproven facts.
- (2) As against the Second and Third Defendants, the Plaintiff had clearly failed to adduce credible evidence that was sufficient to establish on a *prima facie* basis the essential allegations against the Second and Third

Defendants which were the foundation of its claim, namely, conspiracy, fraud and/or the tort of interference with contract and inducing a breach of contract by the First Defendant. These were serious allegations in respect of which the Plaintiff bore a heavy burden to prove the vital elements of fraud, conspiracy, interference, etc. by the Second and Third Defendants. Hence, at the close of its case, the Plaintiff had totally failed to discharge its burden of proof in regard to its claim and therefore, the submission of the Second and Third Defendants that they had no case to answer ought to be upheld.

- (3) The claim based on fraud against the Fourth Defendant was misconceived and wholly unsustainable. From the evidence adduced, the facts and circumstances alluded to by the Plaintiff did not constitute any actual fraud in any recognised form by the Fourth Defendant in the sense of dishonestly of some sort or a wilful dishonest act. Whether fraud exists is a question of fact dependent upon the circumstances of each particular case. The relevant evidence in the instant case, fell far short of proving fraud against the Fourth Defendant beyond reasonable doubt.
- (4) From the overall evidence, it could only be concluded that the Fourth Defendant had executed his function and duties as the Consulting Quantity Surveyor strictly in accordance with his terms of appointment by the First Defendant and standard practice of the profession. No evidence at all was forthcoming from the Plaintiff to the contrary that could rebut DW1's (the Fourth Defendant's witness) evidence. The Plaintiff, thus, failed to satisfy the onus of proof that it bore.
- (5) There was not even an iota of evidence in the instant proceedings that could show that the Fourth Defendant had acted on the instructions of the Second and Third Defendants in matters relating to the valuation of work done and/or completed by the Plaintiff. Based on the undisputed facts and uncontradicted evidence, the central allegation against the Fourth Defendant that it had deliberately undervalued the works executed by the Plaintiff, in collusion with the Second and Third Defendants, way below their actual value and in doing so had acted fraudulently and negligently in breach of its obligation was wholly misconceived and devoid of any evidential basis.
- (6) In the instant case, the Architect was a crucial witness who ought to have been called to support the Plaintiff's pleaded claim, particularly as regards the serious allegation made against the Fourth Defendant. However, the Plaintiff did not give any plausible or reasonable explanation as to why the Architect was not named a Defendant in the instant suit nor why the Architect was not called as a witness to testify in the proceedings. The High Court would thus uphold the contention that for the Plaintiff's failure to call the Architect who was a material witness in the matter, an adverse inference under s 114(g), Evidence Act, 1950 should be invoked against the Plaintiff.

- (7) Upon considering the evidence of both parties, including the failure of the Plaintiff to call a crucial witness, ie the Architect who certified the work, it was crystal clear that the Plaintiff had failed to discharge the burden of proof of the allegation of fraud on the standard of proof and the other allegations on a balance of probabilities based on the pleaded particulars of the said torts.

Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 24C(ARB)-28-08-2015
MARY LIM THIAM SUAN J
19 NOVEMBER 2015.

[2016] 1 CIDB-CLR 228

The Plaintiff applied under s 37 of the Arbitration Act 2005 (“the Act”) to set aside an Arbitration Award but filed its application a day late. The last day for filing the application under s 37 was on 5 August 2015, whereas the application was filed on 6 August 2015. The Plaintiff thereafter sought an extension, contending that the one day delay in filing was due to counsel’s miscalculation of the time period; that it was a genuine mistake for which counsel apologized. In opposition, counsel for the Defendant submitted that the Court lacked jurisdiction or power to grant the extension that the Plaintiff sought; and that there was no basis for the exercise of discretion. The primary issue before the Court was whether on a proper reading of subsection 37(4), the Court had the discretion to extend the 90-day period for setting aside an Award.

Held, dismissing the Plaintiff’s applications with costs:

- (1) The use of the word “may” in subsection 37(4) is frequently used to connote the difference between the concept of mandatory and directory requirements. Sometimes - as in the instant case - the sentence construction does not permit the use of the word “shall” and the word “may” is then used. Such usage does not detract from the basic object or intention of the provision which is to require mandatory or strict compliance.
- (2) The significance of s 8 of the Act cannot be overstated. The Court’s intervention is only where it is so provided. The matters that may be referred to arbitration, matters concerning procedure and the conduct of arbitrations, the role of the arbitrators and the involvement of the Court are all matters governed by the Act. Where the provisions do not provide for the intervention of the Court, the Court ought to decline intervention even if the Court would treat the matter differently if the matter was a non-arbitration matter.
- (3) The provision in s 37(4) of the Act that an application to set aside the award “*may not be made after the expiry of ninety days from the date on which the party making the application had received the award*” is as good as saying that where an application is contemplated, it must be made before the 90-day time frame. Anything after that period must not be entertained.

- (4) With the clear express terms of s 8 of the Act, the Court could not read that there were retained powers to extend the time specified in subsection 37(4) when clearly there was none; save for the instances of correction of the Award under subsection 37(4); and where there were allegations of corruption or fraud under subsection 37(5). These were express provisions on the application or rather non-application of the provisions on time set out in the earlier part of subsection 37(4). Under subsection 37(4), time runs from a different point in time where it involves a corrective award; whereas under subsection 37(5), the time restrictions do not apply in the case of fraud or corruption. Where there were such express provisions, it was no longer proper to imply any power to extend time for any other reason, ground or circumstance, such as that presented in the instant case; regardless the length of the delay. This reading was consistent with the general approach to arbitration, that it is strict, unless expressly provided otherwise. Such reading lends certainty and confidence to arbitration and is part of the rationale behind the Court's support for arbitration.
- (5) Subsection 37(4) of the Act must be given a strict reading. That being so, it was irrelevant the length of delay, be it a day or 9 months; the identity of the applicant, a commercial concern or a government; or even the subject matter; so long as the parties have agreed to arbitrate. The only exceptions were within subsection 37(4) and subsection 37(5); and those exceptions were not presented in the instant case.
- (6) The High Court would agree with the Defendant that the grounds and total circumstances did not warrant the exercise of discretion in the Plaintiff's favour. Although the delay was one day, it was still delay. There was the earlier 90 days which had gone past with the Plaintiff not having done anything about the Award.

Kluang Health Care Sdn Bhd v Lee Yong Beng

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NOS: 24C(ARB)-6-01/2015 &
24C (ARB)-14-03/2015
MARY LIM THIAM SUAN J
10 SEPTEMBER 2015

[2016] 1 CIDB-CLR 230

The Applicant was the turnkey contractor in respect of a construction project ("the Project"). The Applicant appointed the Respondent to, inter alia, carry out structural and architectural works at the Project. Disputes arose between the parties and the Respondent brought a civil action against the Applicant. The civil action was stayed and the dispute referred to arbitration. After evaluating the oral and documentary evidence and the submissions made, the Arbitrator allowed the Respondent's claims but the quantum of the claims was based on the valuations of the Applicant. The Applicant's counterclaim was dismissed for lack of evidence. The Applicant was not satisfied with the Award and filed the present application to set aside the award pursuant to ss 37 and 42 of the Arbitration Act 2005 ("the Act"). The Applicant submitted that: (i) the award was against Malaysian public policy and it contained decisions on matters beyond the scope of the submission to arbitration; (ii) the award was erroneous as it did not accord with the evidence, the documents presented at the arbitration proceedings and the pleaded case before the arbitrator and some salient terms in sub-contracts had supposedly been ignored by the Arbitrator; and (iii) failure to give effect to the terms of the contract and/or disregard the terms of the contract would amount to the arbitrator exceeding his jurisdiction and acting outside the scope of his arbitral authority. The Respondent opposed the Applicant's application and instead filed its own application to recognise and enforce the award under s 38 of the Act.

Held, dismissing the application to set aside the Award but allowing the application to enforce the Award, with costs:

- (1) The complaints raised by the Applicant concerned findings of fact by the Arbitrator. The Applicant was not happy with the Arbitrator's findings; but as master of the facts, he was obliged to make such findings of fact in order to decide the issues and the claim as well as the counterclaim. The Court would not disturb findings of fact; and had no inclination to do so.
- (2) Section 8 of the Act clearly reminds the Court of a minimalistic approach when it comes to arbitration and arbitral awards. The Courts have been extremely mindful of such caution. The parties have made their choice for dispute resolution loud and clear; and the Court was merely giving effect

to that choice. The Court does not sit in an appellate capacity over the arbitral awards. The Applicant's complaints were a non-starter.

- (3) The Applicant was expected to prove the allegations made on a balance of probabilities in order that the discretion to set aside may be exercised in its favour. The burden remained with the Applicant throughout the application. Having examined the cause papers and having heard the submissions of learned counsel, the High Court did not find the burden discharged. The Applicant had not proved the matters complained of, in which case, the Court had to dismiss the application.
- (4) The Applicant had merely recanted its disagreement and allegations. The allegations were very general and vague. No evidence had been offered to substantiate or prove the allegations. The Applicant had not shown to any degree how the matters complained of did not fall within the terms of submission to arbitration; how the Arbitrator's decision on the matters complained of was beyond the scope of submission to arbitration; or even how the Award conflicted with the public policy of Malaysia. On the public policy ground, the Applicant had not even cared to identify which public policy was under consideration.
- (5) There was absolutely no allegation or evidence of any fraud, corruption or breach of natural justice which may be said to fall within the conflict with public policy of Malaysia ground. All that the Court heard was the Applicant's dissatisfaction with the manner in which the Arbitrator construed and interpreted the sub-contractual terms and obligations; that such construction and interpretation was apparently contrary to the clear terms of the subcontracts and read not in the Applicant's favour.
- (6) It was entirely within the purview of the Arbitrator to make his decision on the matters submitted to him. He had done so by examining the underlying sub-contracts, evaluated the evidence led by both sides, addressed the law and applied it to the facts presented before he made his conclusions. His conclusions were drawn after both sides were heard and such conclusions were supported by the evidence that he found relevant and of weight. Most important, his decisions on such matters were necessary since those were the very matters referred or submitted to him for determination.
- (7) The Award was originally sent to the parties around 24 November 2014. A Corrective Award was read out or published by the Arbitrator on 11 December 2014. The Applicant received a copy of the Corrective Award on 15 December 2014 though the Respondent received its copy on 12 December 2014. Accepting that the Applicant received the Corrective Award on 15 December 2014, the application to refer questions of law under s 42 of the Act had to be made within 42 days of the receipt of the Corrective Award. The application had therefore to be filed on or before

26 January 2015. The present application was filed on 30 January 2015. It was clearly filed out of time. The Court had to decline the application to extend time since there was no jurisdiction to extend time given the mandatory language in subsection 42(2) and the constraints in s 8 of the Act. There are no provisions within either s 42 or anywhere in the Act for the Court to consider such an application. With the reminder in s 8, the Court was disinclined to say that it had jurisdiction to extend time.

- (8) The requirements of s 38 of the Act had been met. The Respondent had before the Court the proper arbitration agreement through incorporation pursuant to s 9(5) of the Act. The Applicant had itself relied on the same arbitration agreement when it sought and was granted by the High Court, a stay of the Respondent's civil action and had the subject matter referred to arbitration. That course of action has culminated in the arbitration Award. The Applicant could not make any credible or convincing argument that there was no arbitration agreement in the instant case, bearing in mind the history and genesis of this arbitration Award. The Applicant could not reside and deny the existence of the arbitration agreement.

Kris Heavy Engineering & Construction Sdn Bhd v ABB Industrial Contracting Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO. S1-22-951-2002
ABDUL WAHAB PATAIL J
28 MAY 2015

[2016] 1 CIDB-CLR 233

The Defendant (“ABB”) was appointed the main contractor in respect of electrical works in a certain project (“the Project”). ABB thereafter appointed the Plaintiff (“KHEC”) as subcontractor. KHEC brought the instant claim for various reliefs against ABB consequent upon ABB’s termination of the subcontract, its refusal to pay progress claims. At the hearing, it appeared that the parties had failed to or were unable to disclose the nature of the evidence relied upon to support the assertions made. Further, due to the sheer volume of both technical and contractual documents filed, the Court suggested to both parties to appoint an expert who could assist the Court in the assessment of the documents.

Held, allowing the Plaintiff’s claim:

- (1) The Statement of Issues demonstrated that the decision of the Court would not only be founded on the application of law on findings of fact, but would require contractual management experience and technical expertise to appreciate the evidence and give the evidence their due weightage. Findings of fact upon lawyers’ arguments would be anybody’s guess and may be wholly unpredictable. The problem that the Court faced was that if the technical and contract foundations were not understood and the evidence adduced was not correctly appreciated, it would be wrongly concluded that the case was not proven.
- (2) In the instant case, the basic principles of pleadings were not adhered to. The Statement of Issues produced at trial clearly demonstrated that the parties themselves either did not or were unable to disclose the nature of the evidence relied upon to support the assertions made, or if the evidence was disclosed, it was likely that it had not been checked and verified. Both parties had almost equally failed. The claim and counter-claim should have been dismissed since as at the date fixed for trial, the case was not ready for trial, if not for the Court’s attempt to save the case for the parties.
- (3) In the instant case, the Court expert was appointed through the agreement of the parties and not through an order of Court.

- (4) ABB was not satisfied with the proof by KHEC. However, civil litigation was not proof to the subjective satisfaction of a Defendant, but an objective standard on the balance of probabilities. It remained difficult to conclude that there was in fact any manifest error on the part of the Court expert, or that KHEC had failed to prove its case upon a balance of probabilities. In the instant case, KHEC had proved its claim upon the balance of probabilities.

Kukdong Engineering & Construction Co Ltd v Bauer (M) Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C (ARB)-5-09-2013
SEE MEE CHUN J
5 AUGUST 2015

[2016] 1 CIDB-CLR 235

The Kukdong - a South Korean company - had appointed Bauer as sub-contractor in respect of certain piling works. Kukdong later terminated the sub-contract with Bauer due to disputes Kukdong had with the Employer. Bauer claimed in a civil suit against Kukdong for work done, which suit was stayed pending reference to arbitration. Kukdong later filed a petition in the South Korean court for a Rehabilitation Order and Managers and Trustees were appointed by the South Korean Court to manage Kukdong's affairs in a rehabilitation/repayment scheme. The Trustee/Manager later admitted a sum of RM6,624,245.36 of Bauer's claim in the scheme and Bauer became a recognized creditor of Kukdong for a sum of RM6,624,245.36. When the matter proceeded to arbitration in Malaysia, Kukdong applied to the High Court for the determination of a preliminary point of law pursuant to s 41(1)(a) of the Arbitration Act 2005 ("the Act") on the following questions of law: (1) given the status of rehabilitation proceedings in South Korea, was Bauer entitled to apply for an award in the arbitration for the same debt; and (2) whether the Arbitrator had jurisdiction or the mandate to grant an award over a debt which had been admitted and made subject to a rehabilitation scheme in a foreign jurisdiction by consent of the parties.

Held, answering both questions in the negative:

- (1) Although the rehabilitation proceedings took place in South Korea, Bauer had voluntarily participated in it mindful of the repayment scheme. As the rehabilitation scheme bound Bauer, it followed there was a settlement of the debt amount which was the subject matter of the arbitration. Bauer was thus estopped from continuing with the arbitration. There was thus a settlement of debt between Bauer and Kukdong. Under the circumstances question 1 ought to be answered in the negative.
- (2) In the instant case, there was a clear provision in s 41(1) of the Act which allowed an application to the Court for the determination of a preliminary point of law. Consent of the arbitrator had been obtained and for the reasons given in determining question 1 in the negative, question 2 also ought to be answered in the negative.

L & L Brothers Engineering Services v Tan Chang Yong Holding Sdn Bhd

HIGH COURT, JOHOR BAHRU
CIVIL SUIT NO: 22 (NCVC)-69-04/2014
TEO SAY ENG J
30 AUGUST 2015

[2016] 1 CIDB-CLR 236

The Plaintiff acted as project manager to the Defendant for consultancy service on a renovation project. The Plaintiff claimed, *inter alia*, that it had fulfilled its obligations pursuant to the agreements between both parties, and that the Defendant had failed to make the balance of payment. The Defendant contended in its defence that the Plaintiff's work had to be satisfactory and accompanied by relevant documents to be submitted to the Defendant. The Plaintiff failed to do so, which led the Defendant to engage a quantity surveyor to evaluate the work done. It was found by the Defendant that the value of work done amounted to less than the price stated by the Plaintiff. The Defendant also submitted that the Plaintiff was not a qualified person to execute the works stated in the two agreements, i.e. for: (a) Building Works/Renovation for the whole project for the sum of RM4.9m ("1st Agreement") and; (b) the Plaintiff's appointment as Project Manager that provided "Engineering Consultancy Services" for the whole project ("2nd Agreement"). It contended that these two agreements were illegal, void and unenforceable as they contravened the requirements of the Registration of Engineers Act 1967. The Court had to consider, *inter alia*, the following: (i) whether the Plaintiff had performed its obligations under the project; (ii) whether the Plaintiff had performed its obligations pursuant to the renovation costs and the variation order; (iii) whether the Plaintiff had handed over the completed premises to the Defendant according to relevant laws and agreements between both parties; (iv) whether the Plaintiff had successfully completed the work and had a right to claim for relief; and (v) whether the Plaintiff was a qualified person to execute the work.

Held, partially allowing the Plaintiff's claim:

- (1) The Plaintiff had established its claim through SP1 (the former General Manager of the Defendant company) and SP2 (sole proprietor of the Plaintiff) that the whole project was completed and was officially handed by SP2. It was further established through the evidence of SP1 that the project had been completed with all the necessary approvals obtained and he had sighted all the documents. The aforesaid testimony of SP1 which was unchallenged by the Defendant was sufficient to prove that the Plaintiff had fulfilled its obligations under the terms and conditions of the two agreements even though the alleged documents in support of

the claims were not produced and tendered in Court. The Defendant was therefore now estopped from challenging the Plaintiff's claim that the works done by the Plaintiff were not in accordance with the specifications and the said project was said to be overvalued by calling SD2 (Quantity Surveyor engaged by the Defendant) to evaluate the work done for the main building and interior work after a lapse of more than one year.

- (2) The Court deemed as being totally without merit the Defendant's submission that the sum claimed by the Plaintiff for variation works carried out should be rejected on, *inter alia*, the ground that the variation order did not relate to the 1st and 2nd Agreements. First, it had been established that the variation order was the additional works not in the main contracts requested by SP1 and secondly the company that was to carry out the variation works was the sub contractor employed by the Plaintiff. The Plaintiff was therefore entitled to claim for the said works against the Defendant.
- (3) Though the Defendant made it appear that the only reason they did not pay the balance payment of the project was that they were not supplied with documentary evidence (i.e. the drawings for all Mechanical & Electrical services) for verification of the works done, the Court found this to be an attempt to delay paying the balance payment under the agreements and to be without merit as: (a) SP1 told the Court that the building had passed its site inspection with all relevant approvals obtained and subsequent to that only it was officially handed over to him. The entire jobs were also satisfactorily completed; (b) SP1, who was also the son of the person who owned the Defendant company, was fully authorized to deal with the Plaintiff on behalf of the Defendant and his authority was never questioned by the Defendant. He was found to be a truthful witness who had testified impartially; (c) SP1's testimony, being unchallenged, meant that the Defendant was estopped from claiming that the Plaintiff failed to supply them with the necessary drawings for them to verify the value of the works done; (d) If the said drawings were not actually supplied or made available to the Defendant, they should not have waited for more than a year until it's new General Manager replaced SP1, to ask for the drawings.
- (4) In relation to the Plaintiff's right to claim for relief, the defence raised that there was an overlapping of claims was deemed to be misconceived by the Court. It was clear from the two letters of agreement (i.e. dated 2 January 2012 and 6 January 2012) that they cover two different scopes of services. If the two scopes of services had been overlapped, the Court believed that SP1 would not have agreed and approved the two agreements. As such, the Plaintiff was entitled to the reliefs claimed.

- (5) The Registration of Engineer Act 1967 was inapplicable to the facts of the instant case for the following reasons: (i) it was clear from a letter of appointment dated 17 October 2011 that the Plaintiff was appointed by SP1 as the main contractor/project manager for the refurbishment work for the said project and; (ii) as the main contractor, SP2 had to appoint qualified sub-contractors to carry out the relevant job scopes. As SP2 only coordinated the operations, the issue as to whether SP2 was a qualified person to carry out the project did not arise at all.
- (6) The Defendant was estopped from relying on the issue of illegality to deprive the Plaintiff of its claim. SP1 knew SP2 was a Civil and Structural engineer by profession and prior to being appointed as the project manager for the renovation project, the Plaintiff was already the Civil and Structural consultant for the Defendant. The Plaintiff had duly completed the works and handed the project back to the Defendant and it was accepted by the Defendant with full satisfaction and without any complaint. There was a lapse of 1.5 years before the institution of this proceeding against the Defendant and it was only then the issue of illegality was raised for the first time to defeat the Plaintiff's claim. The Defendant had accepted the Plaintiff as a qualified Civil and Structural engineer and had previously appointed the Plaintiff as its Civil and Structural Consultant and was satisfied with its works. The Plaintiff was also reappointed to do the renovation works of the hotel *vide* the two agreements signed. The project was completed with full satisfaction of the SP1 and would have been unjust to the Plaintiff if the issue of illegality to strike out the Plaintiff's claim was allowed since the Defendant had already enjoyed the benefits of the contracts and would be unjustly enriched if the Plaintiff's claims were to be struck off on the issue of illegality.

Leong Ah Kew & Ors v Prisma Suria Sdn Bhd

HIGH COURT, JOHOR BAHRU
CIVIL SUIT NO: 22(NCVC)-159-10-2014
MOHD NAZLAN GHAZALI JC
27 JULY 2015

[2016] 1 CIDB-CLR 239

The Testator was the registered owner of a piece of land (“the Land”) and had executed a Joint Venture Agreement (“the JVA”) with the Defendant for the development of a housing project on the Land (“the Project”). On the Testator’s death, ownership of the Land was transferred to the Plaintiffs. Pursuant to the terms of the JVA, the Plaintiffs were bound by the JVA. The Plaintiffs contended that the Defendant had breached cl 7 of the JVA for delay in construction of the Project. The Plaintiffs were thus entitled to terminate the JVA pursuant to cl 13(b) of the JVA. The Defendant however argued that the Plaintiffs had breached cl 5(e) of the JVA by failing to remove and evict squatters and to demolish factories and workshops on the Land. The Defendant thus counterclaimed for specific performance of the JVA. The main issue for the High Court’s determination was whether (i) having regard to the JVA, it was the contractual obligation of the Plaintiffs to evict all squatters from the said land (and demolish all buildings thereon) and if so, (ii) whether the obligation was in the nature of a condition precedent or otherwise a promise, the non-performance of which would disentitle the Plaintiffs to assert a breach of contract on the part of the Defendant in failing to commence construction work on the Land.

Held, dismissing the Plaintiff’s claim with costs but allowing the Defendant’s counterclaim:

- (1) In a case which turns, as in the instant case, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That was so even in the Court before which the concession was made; a fortiori in the Court to which an appeal from the judgment of the court was brought. The reason was that the construction of a written document was a question of law. It was for the judge to decide for himself what the law was, not to accept it from any or even all the parties to the suit; having so decided it was his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
- (2) The Plaintiffs, had given a clear undertaking and warranty not only to evict all squatters on the Land but also to demolish all buildings and

structures thereon. Clause 5(e) of the JVA was in plain and clear language, without ambiguity and must therefore mean what it clearly said.

- (3) In the instant case, cl 5(e) is clear and far from ambiguous. Nor was it necessary for additional terms to be implied into the same. The Plaintiffs had to evict and demolish. This they had not done, notwithstanding efforts taken thus far, which were at best only preliminary and precursory but in no uncertain terms still an unfulfilled contractual promise. What a reasonable person would have done in the circumstances would be to secure a court order for the eviction and demolition. As the Plaintiff had not instituted any proceeding to evict and demolish, they had not fulfilled their obligation under cl 5(e) of the JVA.
- (4) The JVA did not specifically identify cl. 5(e) of the JVA to be a condition precedent to cl. 7 of the JVA. However, a contract must always be construed as a whole. The clause may in law be a condition notwithstanding that it is referred to as a warranty in the contract. Given that vacant possession is commonly understood to be a pre-requisite to construction and land development activities, cl. 5(e) ought more rightfully to be deemed as a condition instead of a warranty. Therefore, the breach of cl. 5(e) of the JVA went to the root of the JVA.
- (5) The duty to evict the squatters and demolish the buildings in cl 5(e) in the JVA carried with it the implied term that the same be performed by the Plaintiff prior to the commencement of works by the Defendant. The tests of business efficacy and officious bystander were easily satisfied in the instant case. As the Plaintiffs had yet to perform its reciprocal promise in the form of its obligation under cl. 5(e) of the JVA, the Plaintiffs could not claim repudiation of the JVA nor claim damages on account of the non-performance of cl. 7 of the JVA by the Defendant. Further, the Plaintiffs' reliance on cl. 13(b) of the JVA as a ground for the termination of the JVA and forfeiture of the deposit could not be sustained. Section 13(b) of the JVA had no application to the Plaintiffs' action since the non-performance by the Defendant in relation to the obligation to complete construction of the housing scheme within the time stipulated in the JVA could be said to be directly due to the fault of the Plaintiffs.
- (6) To the extent that the Plaintiffs could be deemed to have prevented the performance by the Defendant by the Plaintiffs' non-performance, the JVA was voidable at the option of the Defendant who was entitled to repudiate the same, in addition to be entitled to compensation from the Plaintiffs.

**MMC Engineering Group Bhd & Anor v
Wayss & Freytag (Malaysia) Sdn Bhd & Anor**

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C(ARB)-3-07/2013
MARY LIM THIAM SUAN J
6 JULY 2015

[2016] 1 CIDB-CLR 241

Three cases were involved here, filed in relation to an Arbitration Award and Corrective Award (“the Award”), which arose out of an arbitration initiated by the contracting parties. In the First Case, MMC Engineering Group Bhd and Gamuda Bhd (the Plaintiffs), sought to challenge the Award under s 42 of the Arbitration Act 2005 (“the Act”). The Defendant was Wayss & Freytag (M) Sdn Bhd. In the Second Case, the same Plaintiffs sought to set aside the Award under ss 37(1)(b)(ii), 37(2)(a), 14(1) and (2); and 20 of the Act. The two Defendants here were, Wayss & Freytag (M) Sdn Bhd (“the First Defendant”) and Yusof Holmes (“the Second Defendant”), the latter being one of three members of the Arbitral Tribunal which made the Award against the Plaintiffs. There were two causes of action here, i.e. the first was against the Second Defendant for breach of its statutory duty of disclosure under s 14 of the Act, and the second was in relation to the Award of the Arbitral Tribunal which the Plaintiffs sought to set aside under s 37 of the Act on grounds of public policy alleging that the Second Defendant’s independence and impartiality were in doubt. The Plaintiff furthermore alleged that there was a breach of natural justice for which the Court must intervene using its powers under s 37(2)(b) as well as s 37(1)(b). The breach was alleged to have occurred during the arbitration and/or in connection with the making of the Award because the Arbitral Tribunal decided on grounds that the Plaintiffs were not given an opportunity to address in the arbitration proceedings. The Defendant submitted that any public policy challenge can only succeed if it met three requirements, i.e: (1) the Plaintiffs must identify and prove that there was in existence a particular rule of public policy that had been breached; (2) the Plaintiffs must establish a link between the breach of the rule of public policy in question and the making of the award under challenge; and (3) the Plaintiffs must show how the breach of that particular public policy had caused the Plaintiffs substantial prejudice in that if the breach had not occurred there was a reasonable chance that a different result in the Plaintiffs’ favour would have ensued in the arbitration proceedings. Interlocutory applications were also filed by the Defendants. The First Defendant applied to bifurcate the proceedings; and for an order of security of Award. The Second Defendant applied for a stay of proceedings pending two unresolved criminal proceedings against him arising from his conduct and actions in another arbitration (i.e. “the Penang Arbitration”). The Second Defendant also brought an application to strike out, stating in his affidavit that because this was a s 37 challenge of an award of the Arbitral Tribunal, he was an improper and unnecessary party. In

the Third Case, Wayss & Freytag (M) Sdn Bhd sought to recognise and enforce the Award and Corrective Award under s 38 of the Act. The Defendants here were MMC Engineering Group Bhd and Gamuda Bhd. The outcome of the Second and Third Cases depended on the challenge in the First Case. However, since the Court dismissed the application in the First Case, the outcome of the Third Case depended entirely on the decision in this Second Case.

Held, dismissing the Plaintiff's application with costs:

- (1) The Court has discretion as to whether civil proceedings should be stayed when there are concurrent civil and criminal proceedings against the same defendant for the same subject matter. It was not an absolute principle of law that where there are concurrent proceedings against a defendant, the defendant's right of silence in the criminal proceedings was carried into the civil proceedings and that the defendant was entitled in the civil action to be excused from taking any procedural step which in the ordinary course be necessary or desirable to take in furtherance of his defence to that civil action; even if that step or action would or might have the result of him disclosing in whole or in part his actual or likely defence in the criminal proceedings. The right of silence was not extended into the civil proceedings.
- (2) There must be a real and not merely potential notional danger that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings. The Second Defendant's application for stay did not disclose any evidence to support such a finding. It was also a matter of balancing of justice between the parties. In the instant case, there were no concurrent civil and criminal proceedings for the exercise of the Court's discretion to stay the present proceedings. Though the criminal proceedings involved the Second Defendant, they related to an entirely separate and different arbitration case and not to the subject matter before this Court, which was the Award rendered by the Arbitral Tribunal.
- (3) In an application for stay of proceedings, the interests of not only the applicant (i.e. the Second Defendant) or Plaintiffs were to be considered, but also that of the First Defendant's since its interests related to the recognition and enforcement of the Award. It had expectations and a right to have its case proceeded with expeditiously. The harm to the First Defendant of staying the proceedings outweighed the risk of harm to the Second Defendant. Since arbitration proceedings were meant to be a speedy and effective means of resolving disputes, it was unfair to expect the First Defendant to wait indefinitely to enforce the Award until the criminal proceedings against the Second Defendant was dealt with. Similarly, it was unfair to expect the Plaintiffs to wait indefinitely until their challenges against the Award were heard. Therefore the application for stay was dismissed.

- (4) Since the Second Defendant's application for stay of proceedings was dismissed, the First Defendant's application for security and bifurcation became irrelevant for determination and was thus struck out by the Court.
- (5) As a general rule, the members of the arbitral tribunal or the sole arbitrator are not included as parties to any challenge of their award. They are not, and they ought not to be enjoined. The issue whether this general principle was excepted where ss 37 and 14 of the Act were read together to form the basis or arguments of breach of public policy, was answered in the negative by this Court. This was regardless of how serious the allegations may be against one or even all members of the arbitral tribunal. Furthermore, it was not only unnecessary but inappropriate that any member of the arbitral tribunal be cited as a party to the challenge. The whole fabric and sanctity of the arbitral proceedings and the institution of arbitration may be compromised and undermined if that were the case.
- (6) Section 37 of the Act was clear in that its single purpose was the setting aside of the award. There was no other remedy or relief that may be sought or granted by the Court under it. Hence, there was simply no right of action under s 37 against any member of the arbitral tribunal, including the Second Defendant. The Second Defendant was accordingly disjoined from the s 37 challenge and his application for striking out was allowed. The Second Defendant was consequently referred to by his name.
- (7) The allegations against Mr Holmes conduct and character must have had some bearing on the Award. The "activity itself might be dishonest or alternatively, it might be an activity which was undertaken with an evil object in mind" but until and unless the Award and the character or conduct connect or are linked in the causal sense (i.e there was a causative link established between the fraud or corrupt conduct of a party and the award in the arbitration proceedings), it could not come within the intention of s 37.
- (8) All that had been shown by the Plaintiffs at the most was that Mr Holmes was a person of possibly bad character who was possibly unfit to sit as an arbitrator. The focus of the terms of sub-paragraph (1)(b)(ii) of s 37 and sub-paragraph (2) of s 37 of the Act was on the fairness and justice of the arbitration process; not on the character of personalities, including the arbitrators, involved in that process. Unless the Plaintiffs could show how the character ground can and has affected the rights of fairness and justice in an arbitration proceeding, it could not possibly be the subject of a public policy category.
- (9) It was impossible to formulate the character ground as a new ground of public policy. This was because it would be impossible to set any criteria to determine who can and who should not sit as an arbitrator. It would also be impossible to determine how far back one should go when examining

a person's character when determining whether he or she was fit to sit as an arbitrator.

- (10) In the instant case, the Plaintiffs had in no way explained how (save for certain submissions of its counsel) Mr Holmes' character or conduct in the Penang Arbitration was said to have resulted in any unfairness or injustice in the present arbitration. There was no averment or evidence to that effect. That being so, this character ground could not be said to have satisfied the substantial prejudice requirement.
- (11) The character ground could not be recognised as a new public policy category because it was not premised on the fairness and justice of outcomes in arbitration proceedings. The Court found no merit warranting a recognition of the circumstances in the instant case as formulating a new category of public policy; or even coming within the existing categories.
- (12) The Court disagreed with the Plaintiff's contention that Mr Holmes should have disclosed all matters (i.e. arising from matters complained of in the Penang Arbitration) that had a negative bearing on his character, regardless whether the matters in question had a bearing on his (Mr Holmes) impartiality or independence in the present arbitration between the parties. What any arbitrator would be required to disclose were those matters that may have a bearing on his impartiality and independence as required under s 14 of the Act. It could not be of the matters and to the extent or the matters suggested by the Plaintiffs.
- (13) Matters concerning the arbitrator's impartiality and independence must be determined by reference to the parties and issues in or to a particular arbitration. It was not enough if not unsafe, to accuse an arbitrator of bias, that he lacked impartiality or independence in one arbitration proceeding (i.e. the Penang Arbitration) as a basis for alleging bias and the like against that arbitrator in another arbitration proceeding (i.e. the one before the Court in the instant case). There was no explanation by the Plaintiff on how matters which Mr Holmes should have disclosed revealed a real danger that he could not deal impartially with the issues in the present arbitration between the parties.
- (14) Even accepting the Plaintiff's allegation that Mr Holmes had copied part of a particular submission of one of the parties in the present arbitration for use in his draft submission in the Penang arbitration, the Court in the instant case was of the view that this did not render Mr Holmes incapable of deciding the matters in issue in the present arbitration; and deciding them impartially and independently. In the circumstances, the Court did not find any of the complaints by the Plaintiffs on the character, conduct and deed or action of Mr Holmes as falling within the ambit of conflict with the public policy of Malaysia. There was therefore no legitimate basis to set aside the Award.

- (15) The Court found, *inter alia*, that as disclosed by the facts and evidenced in the terms of the Award, the Plaintiffs had seized every opportunity to make full and comprehensive legal arguments before the Arbitral Tribunal reached its Award. There was no room for any suggestion of prejudice of any sort or degree. The rules of natural justice, fair play and equal treatment were at all times, observed throughout the arbitration proceedings and in the Award.

Madujaya Enterprise Sdn Bhd v Kosbina Konsult (K) Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-25-05/2014
MARY LIM THIAM SUAN J
3 AUGUST 2015

[2016] 1 CIDB-CLR 246

The Plaintiff, Madujaya Enterprise Sdn Bhd (MJE) sought to recover from Kosbina Konsult Sdn Bhd (Kosbina) *inter alia* monies awarded in an arbitration claim against the Government of Malaysia. MJE claimed that Kosbina was awarded a contract (“the Main Contract”) by the Government of Malaysia to upgrade a highway. Kosbina thereafter appointed various sub-contractors. MJE was appointed under a Letter of Agreement dated 20 January 2005. However, by letter dated 21 February 2007, the Government of Malaysia terminated the Main Contract and consequently, MJE’s sub-contract was also terminated. MJE claimed that it had paid all legal and other fees to commence the arbitration proceedings against the Government of Malaysia. MJE further claimed that by reason of the mutual conduct of the parties, there existed a collateral contract between the parties wherein the claims of Kosbina as claimant in the arbitration would be divided between the parties in accordance with certain rates in the Letter of Agreement. When Kosbina was successful in the arbitration proceedings, MJE filed an action claiming various reliefs. However at trial MJE only maintained its claim for a sum awarded by the arbitrator in the proceedings, less 8% and legal costs. In its defence, Kosbina denied that the sub-contract was actually awarded to MJE. While the Letter of Agreement dated 20 January 2005 may have been prepared and sent to MJE, a copy of the duly executed and stamped Letter of Agreement was never returned to Kosbina. Kosbina claimed that on 5 May 2004, Kosbina had awarded certain works to one Danaukhas Holdings Sdn Bhd, which in turn appointed one Madujaya Development Sdn Bhd (MJD) to carry out the works on an *ad hoc* basis. Kosbina claimed that such appointment was only for ease of communication and ease of payment. Logistically, MJD dealt directly with Kosbina on the various issues arising from the construction works. Kosbina further claimed that many of its correspondences were with MJD and not MJE - the Plaintiff. Kosbina further denied the existence of any collateral contract. It claimed that it paid for the legal fees to the legal firm that it appointed to handle the matter relating to the arbitration; that the payment to the legal firm was for a legal opinion rendered by the firm to Kosbina; and that MJE was not a party to the arbitration and, that the Plaintiff, MJE did not participate in any manner whatsoever in those arbitration proceedings. The two (2) issues for the High Court’s determination were thus: (a) whether there was a valid and binding agreement between MJE and Kosbina; and (b) whether MJE’s claim was time-barred and whether there was a collateral agreement between MJE and Kosbina.

Held, dismissing the Plaintiff's claim with costs:

- (1) In order to establish the presence of a collateral contract, which is generally oral in nature, MJE had to show that there was a representation which was intended by Kosbina to be relied upon. That representation led to or induced the signing of the Letter of Agreement. That representation was collateral to the Main Contract and existed side by side or alongside that Main Contract. On the instant facts, the collateral contract appeared to have evolved sometime after the Letter of Agreement was made; and the Letter of Agreement was dated 20 January 2005. In fact, it evolved after the Letter of Agreement was terminated by virtue of the termination of the Main Contract. The termination was on 21 February 2007, long after the Letter of Agreement was made; in which case, clearly there could not be present any of the elements that the law on collateral contracts required.
- (2) Although there may be a valid and binding agreement in the form of the Letter of Agreement as found in exhibit P1, the Agreement was of no aid to MJE in maintaining its claim, since apart from the initial letter of offer, no work was done by the Plaintiff - MJE. The evidence was clear from both MJE and Kosbina that the works were indeed carried out by MJD and not the Plaintiff - MJE.
- (3) Although there may well have been the Letter of Agreement seen in exhibit P1, Kosbina went on to contract with MJD. Substantial undisputable evidence had been placed before the Court in this regard and the Court was satisfied that the whole scope of the Letter of Agreement was replaced by an entirely separate contract with MJD. Amongst the pieces of evidence that the Court found cogent were the payments issued to MJD, the correspondence exchanged between them in the course of the works; and the testimonies from witnesses called by both sides of the dealings between MJD and Kosbina. The existence of the odd letters to MJE were well accounted for and did not detract from the finding.
- (4) The Plaintiff, MJE was quite contented to operate under that arrangement between MJD and Kosbina and it displayed not a jolt of concern or whisper of protest or objection throughout the entire duration of the contractual works in the project; not even after it realized the state of its documentation with Kosbina. What else could be concluded from such conduct but that the original contract under the Letter of Agreement between MJE and Kosbina was no more, and the real contractual arrangements were now between MJD and Kosbina; and MJE was happy with that. It was too late; and it could not now complain.
- (5) The Letter of Agreement had also been abandoned by conduct of the parties. The overwhelming evidence credibly and firmly showed that

the Plaintiff, MJE had put an end to the Letter of Agreement. There was no signal from MJE, be it in the form of words or conduct, that it had acquiesced in its continuance. If it did decide or discuss anything about commencing arbitration against the Government, there were no details or evidence produced in Court with PW2 (MJE's Managing Director) not being able to recall; compounded by her attitude and demeanour and an air of nonchalance; neither of which lend any credibility to her claim. On the contrary, this indifference just about summed up MJE and PW2's whole approach to this case and claim - to throw the kitchen sink and see what it hit with no regard to the legal principles and the true facts.

- (6) In the instant case, although there was a contract found in the Letter of Agreement in exhibit P1 made with MJE, the parties never relied on exhibit P1 and the parties never performed under that agreement. The trail of evidence showed and confirmed that the works contract was between Kosbina and MJD. Payments for such works were also to the same company. There was therefore no basis for the Plaintiff - MJE to make its present claim. In the instant case, MJE had no actionable claim against Kosbina.
- (7) The issue of limitation or time-bar was only available if there was a proven, valid and binding agreement found in the Letter of Agreement. There was none in the instant case and thus there was actually no need to address the second issue of limitation.

**Magical Capital Sdn Bhd v
Sharikat Galian Razak Sdn Bhd**

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22(NCVC)-131-01/2013
SEE MEE CHUN J
31 MARCH 2015

[2016] 1 CIDB-CLR 249

The Defendant had appointed the Plaintiff as its subcontractor for a construction project. In the appointment letter (B1), the Plaintiff's scope of work was: (i) to excavate and remove unsuitable material from the site; (ii) to backfill with approved sand as instructed by the Project Manager (PM); and (iii) such other related and incidental works. In the appointment letter, the price of backfill was stated as RM22/m³. The Plaintiff contended it had completed the work for which the total volume of excavation and backfill was 43,733.50m³ which at the rate of RM22.00/m³ was RM962,137.00. After deducting RM355,053.77 which had been paid, the Plaintiff claimed the outstanding amount of RM607,083. The Defendant resisted the claim and denied there was any such instruction by the PM to replace the unsuitable materials. The Defendant claimed that the Plaintiff had not produced any documents as proof of work and neither had the Defendant verified any such document. The primary issue for the High Court was whether the Plaintiff had completed the work thereby entitling it to payment and whether there was any documentary evidence to support the volume of work for 43,733.50 m³. It was an agreed fact the price rate was RM22.00 per m³. The Defendant had also contended that the Plaintiff had admitted to stealing sand and had procured sand by illegal means and the Court thus ought not assist the Plaintiff.

Held, allowing the Plaintiff's action with costs:

- (1) The Plaintiff had the burden of proving its claim. Section 101 of the Evidence Act 1950 provides that whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove those facts exist. Section 103 of the Evidence Act 1950 in turn states the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. The Plaintiff therefore bore the burden of proving it completed the work and the volume involved. It was the court's finding that the Plaintiff had done so as evident from the totality of the evidence in the form of the appointment letter, progress claims no 2-9, hand over of site, report and measurement forms.

- (2) The Plaintiff's case was not based on the *ex turpi causa non oritur actio* principle where its illegal acts precluded it from pursuing a case such that the Court cannot lend its aid. *Lee Nyan Hon & Brothers v. Metro Charm S/B* [2009] 6 CLJ 626 did not apply as in that case the Plaintiff had been in breach of certain express covenants and had breached the law in failing to obtain building approval and licences to carry out entertainment business.

Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd & Another Case

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C (ARB)-10-07/2014
MARY LIM THIAM SUAN J
6 FEBRUARY 2015

[2016] 1 CIDB-CLR 251

Pursuant to a letter of award dated 25 September 2004 (“Main Contract”), the Plaintiff awarded Perembun a construction project (“the Project”) for a lump sum of RM56,361,730.40. Perembun and the Plaintiff then formed a joint venture agreement, creating an unincorporated joint venture company (“MPC-Perembun JV”) as the main contractors to work on the Project. MPC-Perembun JV subsequently awarded the Defendant a sub-contract on the Project for a lump sum of RM54,861,730.40. Conflict arose between the parties during the course of the works and the Defendant initiated arbitration proceedings against the Plaintiff and Perembun. The Defendant was awarded, *inter alia*, a sum of RM21,819,350.41 on 9 May 2014. Subsequently, a Corrective Arbitration Award (“Corrective Award”) dated 27 June 2014 of RM33,972,772.35 against the Plaintiff and Perembun was published on the ground that there was a miscalculation. The Plaintiff challenged two items of claim in the Corrective Award, i.e. (1) direct payments to the Defendant’s sub-contractors and (2) loss of profit. In the First Application, the Plaintiff challenged the award on the direct payments to sub-contractors under s 37 of the Arbitration Act 2005 [Act 646] (“the Act”), whereas the loss of profits was challenged under s 42 of the Act. The Defendant resisted this application and sought to recognize and enforce the award (“Second Application”). Both these applications relied on the same affidavits, and involved overlapping issues and the same parties. In relation to the direct payment to the Defendant’s sub-contractor, the Plaintiff contended that the validity of a letter of consent (where the Defendant had assented to payment being made directly to its sub-contractor) dated 1 September 2009, which the Arbitrator had found to be invalid for various reasons, *inter alia*, economic duress, was not an issue for the Arbitrator’s consideration. The Arbitrator had thus decided on a matter which was not submitted for his consideration and had clearly strayed outside his jurisdiction. As for the award for loss of profits, the Plaintiff contended that it was computed and awarded based on a wrong principle and that the method used to calculate this alleged loss of profits was erroneous and not countenanced in law.

Held, allowing the Plaintiff’s application in part with costs:

- (1) The Arbitrator does not and cannot be said to take jurisdiction from the submissions made. His jurisdiction stemmed from the appointment

and from the issues submitted for consideration. The submissions merely served to advocate a collated and correlated order of the oral and documentary evidence presented in relation to the pleaded case, and support those submissions and conclusions reached or drawn as being proper and in accord with principles of law as expounded in case authorities. The submissions could not expand or extend the limits of jurisdiction already prescribed and agreed at the commencement of the arbitration proceedings. To suggest otherwise would be to run the risk of causing havoc to arbitration and what the related proceedings signify.

- (2) In the instant case, the Court found that the issue of economic duress was not raised by the Defendant in response to the matter of direct payment to the sub-contractor but was actually raised in relation to the matter of interference by the Plaintiff on certain procurement contracts. The contents of the Award clearly illustrated that the Arbitrator had indeed exceeded his jurisdiction insofar as the matter of direct payments to the Defendant's sub-contractor was concerned. He had clearly mixed up his understanding of the facts and pleaded issues for his consideration. Since the Arbitrator took his jurisdiction from the parties' submission to arbitration, and that involved the letter of invocation of arbitration and the pleadings, the Plaintiff was right in its assertion that the Award in this regard contained a decision on a matter which was beyond the scope of submission to arbitration.
- (3) Applications for interventions by the Court, including a s 42 application, cannot be and are not, *carte blanche* exercises for the Court to revisit or review the evidence presented under any pretext. If the Court were to look at any evidence, it is only to that which the Arbitrator had identified and had set out in his award; and not what was presented at the arbitration proceedings. To do otherwise would be to run afoul of the fundamental principle that the arbitrators are the final arbiters of the facts.
- (4) In the instant case, it was unclear what principle was applied by the Arbitrator when allowing the claim for loss of profits. The Court found that since it would appear that the methodology or principle, if any, used by the Arbitrator was almost non-existent, the Plaintiff's argument that the "principle" applied was not one that was countenanced in law, was correct. Further, the lack of discussion or deliberations on the item of claim for loss of profits indirectly indicated and confirmed that there was no proper consideration of the relevant principles of law by the Arbitrator when making this item of award. The compensatory principles provide for a recovery premised on proof of such loss and these principles were not deployed by the Arbitrator.
- (5) Subsection 42(1A) was couched in very strong mandatory and directory terms; the Court would be obliged to dismiss the reference unless the Plaintiff showed that "the question of law substantially affected the rights

of one or more of the parties". There was no discretion given to the Court if there was no proof of how such rights are said to be affected. This provision must be strictly complied with before the reference under s 42 and the reliefs sought are available to the Plaintiff applicant. In the instant case, there was no such claim let alone even a claim or averment by the Plaintiff that any of its rights had been affected, substantially or at all, in the affidavit filed in support of this application.

Marshiva High Tech Sdn Bhd v Noxel Asia Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-59-10-2014
MARY LIM THIAM SUAN J
23 JULY 2015

[2016] 1 CIDB-CLR 254

The Defendant was the nominated sub-contractor for certain electrical works. The Defendant had in turn sub-contracted certain of those works to the Plaintiff through five (5) separate letters of award. The Plaintiff claimed that it did various works for which invoices were issued and partial payments made by the Defendant. Subsequently, the Defendant terminated all the contracts “rendering all the letters of award null and void”. No reasons were given in the letter of termination. The Plaintiff sued to recover an outstanding sum of RM999,914.50 being monies due for work done till the date of termination which the Plaintiff claimed was unlawful. The Defendant however denied that any monies were due and alleged that the contracts awarded to the Plaintiff were lump sum value contracts where payments were only due and payable upon the proper completion of the works in their entirety. Since the Plaintiff failed to complete the works in its entirety, the Defendant alleged that the Plaintiff was not entitled to make any claims whatsoever. The Defendant also claimed that apart from the fact that the Plaintiff had failed to complete the works in time, the Plaintiff had also abandoned the works. The Defendant claimed that it had to engage third parties to carry out rectification works and complete the works. Consequently, the Defendant counterclaimed a sum of RM1,999,303.06 for project labour and materials to complete the project. The Defendant also claimed a refund of the advances that it made to the Plaintiff from time to time which was for a sum of RM579,373. The High Court had to determine the following five (5) issues: (i) whether the contracts in the five (5) letters of award were lump sum contracts; (ii) whether the Plaintiff was entitled to payment even though the works had not been completed; (iii) whether the Plaintiff had completed the works in accordance with the purchase orders; (iv) whether the Plaintiff was liable to pay damages to the Defendant in the form of liquidated and ascertained damages and for costs of hiring a new contractor to complete the works; and (v) whether the payments received by the Plaintiff were advances or part payments for completed works and that the payments were to be refunded to the Defendant if the Plaintiff did not complete the works.

Held, allowing the Plaintiff’s claim with costs but dismissing the Defendant’s counterclaim with costs:

- (1) In its true sense, a “lump sum contract” is a contract to complete a whole or entire work for a lump sum. The liability to pay that sum only arises

when the entire work is completed in every detail. The entire contract is indivisible and the fulfillment of all the obligations under the contract is required before there is an obligation to pay. Parties who enter into such contracts generally do not contemplate any breach. Arguably, a party who has done work will not be entitled to any payment until and unless there is full completion; and this is regardless of the fact that that party may have expended time, labour and costs. Whether a contract is an entire lump sum contract is a matter of construction.

- (2) The five (5) contracts were not lump sum contracts of the understanding claimed by the Defendant. The contracts merely provided for the value or price of the relevant works under the particular letter of award; but the payments due would be for work done according to purchase orders and invoices. Each of the claims submitted was for work done as per purchase order and each claim was according to the progress of works. The payment was also for the same reasons. Since the five (5) contracts were not lump sum contracts, the Plaintiff was entitled to be paid even if the work had not been completed.
- (3) The Plaintiff had produced satisfactory evidence to the effect that it had completed the contracted works. Its evidence was also corroborated by the Defendant's own actions. In the instant case, the Plaintiff had completed the works as required under the relevant purchase orders and letters of award.
- (4) Since there were no defective works to begin with, and no outstanding defective work at the time of termination, there was actually no ground for termination. Further, the right to terminate for reason of delay did not even rise. Even if there was delay on the part of the Plaintiff, time was not of the essence of any of the five (5) contracts where a failure to complete by the agreed dates gave the Defendant the right to terminate all the contracts. If at all there was any delay, the only remedy would have resounded in damages and not in the concurrent right to terminate any or all of the five (5) contracts. Since the termination was invalid, the Defendant had no right to claim for liquidated and ascertained damages and for costs of completion by third parties.
- (5) The Plaintiff had proved its case on a balance of probabilities and was therefore entitled to and was allowed its claim as prayed in paragraphs 9 (iii) and (iv) of the Statement of Claim. As for the Defendant's Counterclaim, its claims had not been proved on a balance of probabilities.

Mudajaya Corporation Bhd v Leighton Contractors (M) Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C-5-02-2015
MARY LIM THIAM SUAN J
8 APRIL 2015

[2016] 1 CIDB-CLR 256

A consortium, comprising the Plaintiff and several other companies, was appointed the engineering, procurement and construction contract (“EPCC”) contractor in respect of the administration and development management of a project to build an electricity generating facility. The Plaintiff subcontracted certain works to the Defendant. Disputes arose between the parties and the Defendant invoked the provisions of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). The Plaintiff sought a declaratory order to the effect that the subcontract that it had entered into with the Defendant came within the terms of an exemption order that the Minister had issued by Gazette Notification PU (A) 104 of 2014, pursuant to his powers under s 40 of the CIPAA. The effect of the Plaintiff’s order would mean that any payment dispute between the Plaintiff and the Defendant could not be referred to adjudication under CIPAA. The Plaintiff contended that the exemption order completely exempted those government construction contracts as specified in the First Schedule from all the provisions of CIPAA. The government construction contracts specified in the First Schedule are those contracts for any construction works that relate to national security or security related facilities. The Plaintiff argued that that since the First Schedule had specifically included “power plants” within its meaning of “national security or security related” facilities, the subcontract in question, which was obviously related to the construction of a power plant, equally enjoyed that exemption. The Defendant disagreed contending that this was not a contract impacting national security and/or that in any event, the exemption order only applied if the government was a party to the contract. Since the government was not a party to the subcontract, the subcontract was not exempted in which case, the adjudication was perfectly valid and in order.

Held, dismissing the application:

- (1) There are two (2) basic principles of statutory interpretation that are relevant and applicable whether interpreting substantive or subsidiary legislation, including any orders issued under any substantive or subsidiary legislation. The first principle is that the legislation must be read as a whole; any specific provision must be read with or against the rest of the Act or in the case of any orders issued, such orders must be read against the substantive or parent Act. In so doing, the Court must strive to give a harmonious reading to the law enacted by Parliament,

and that would include any orders made by the relevant minister under that relevant law. In the instant case, the exemption order issued by the Minister contained two schedules. This would mean that the schedules had to be read together with the rest of the exemption order; and with the rest of or other substantive provisions of CIPAA.

- (2) The second principle of statutory interpretation is that legislation must be construed according to its plain meaning and understanding. However, when that plain meaning is in doubt, a purposive approach must be explored. A reading which would advance the intent and purpose for which the legislation was enacted in the first place ought to be adopted; provided of course such an approach does not strain or do violence to the language used in the legislation. This principle is encapsulated in s 17A of the Interpretation Acts of 1948 and 1967 (Act 388).
- (3) The CIPAA is a piece of legislation passed to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. This provision of remedies for recovering payment through *inter alia* adjudication which is the “speedy mechanism” envisaged under CIPAA for resolving disputes is a central feature of CIPAA.
- (4) The CIPAA applies to all written construction contracts relating to construction works which are carried out in Malaysia even though such works may only be carried out to some small extent in Malaysia’s territory. Thus, it may reasonably be concluded that construction contracts relating to the construction of power plants would come within the meaning of “construction contract” and “construction work” and the Act would apply to the contract and subcontracts in the instant case related to the construction of the “electricity generating facility” including the subcontract between the parties. Payment disputes that arise between the present parties could therefore be referred to adjudication under CIPAA. Even if the instant contract was made between private parties and any of the governments, the Act would still apply. In order to say otherwise, it must be shown either the contracting parties or the contract in question was exempted. Section 40 of CIPAA empowers the Minister to exempt any person or contract from the application of the Act.
- (5) Paragraph 2 of the Exemption Order exempts first and foremost “government construction contracts”. The term, “government construction contract” is however not defined whether in the Exemption Order or anywhere in the Act. It would be fair and reasonable to say that in order to be a “government construction contract”, the contract must first of all be a construction contract as defined under s 4 of CIPAA; and more important, it must be one where the government, whether Federal or State is a party.

- (6) The exemption in the instant case would apply only to particular and specific types of government construction contracts, as specified in the First and Second Schedules. Even in respect of such contracts, only those contracts which fulfill the elements in any of the categories of contracts mentioned in the First and Second Schedules that are exempted. In the case of the First Schedule government construction contracts, a full exemption; while in the case of the Second Schedule government construction contracts, a limited and prescribed conditional exemption. Such exemption, would be enjoyed by all involved along the contractual chain, regardless of the identity of the contracting party.
- (7) Bearing in mind the purpose of CIPAA, and that as a starting position it is intended to cover all construction contracts including those entered into by the government, a more strict and narrow interpretation ought to be applied when construing exemption provisions and exemption or exclusion orders; unless there are clear express terms to the contrary. This approach and these principles accord with s 17A of the Interpretation Acts 1948 and 1967 (Act 388) on interpreting legislations purposively. Exemption clauses or orders must be read narrowly and restrictively having regard to the purpose, object and intent of the underlying substantive law, which in the instant case was CIPAA. The object and intention of the law in question must always be at the forefront of discussion and any attempt at thwarting that intention should not be tolerated. In the face of clear express provisions on application as found in s 2 of CIPAA, it would take clear, decisive terms before the Court would say that the law, whether wholly or in part, would not apply.
- (8) In the instant case, the Court would conclude that what was intended to be exempted are construction contracts entered into by the government. Even then, it was not every construction contract but only those construction contracts that are either built on an urgent or emergency like conditions and circumstances; or that related to the construction of *inter alia*, national security or security related facilities including military camps, prisons, power plants and water treatment plants that are exempted.
- (9) In the absence of clear and explicit terms of exemption to the effect as asserted by the Plaintiff, it must be the case that the Act would apply to the construction contract in question and would continue to apply by virtue of s 2. Clear and unambiguous words had to be used to take the person or the contract out of the application of the Act. More so when there were the express terms in s 2 on the application and intent of application of CIPAA.

- (10) Parliament and the Minister must be taken to be fully aware that electricity and energy or power supply generation had been privatised or corporatised. Thus, the government was no longer constructing such facilities. Yet, 'power plants' were deliberately included in the Exemption Order. This inclusion was intentional and could not be ignored. Only those government construction contracts related to power plants would be exempted.

Ng Siok Meng v Plant & Offshore Technology Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-31-06/2014
MARY LIM THIAM SUAN J
26 MAY 2015

[2016] 1 CIDB-CLR 260

The Defendant had been appointed by one CMS Fertiliser Sdn Bhd (“CMS”) by agreement dated 30 December 2009 to construct two (2) compost and biogas plants. The agreement was mutually terminated pursuant to CMS’ letter dated 12 November 2010 and the Defendant’s letter dated 25 November 2010. The Defendant agreed to return a balance sum of RM2.27m to CMS, after deducting the sum of RM30,000.00 as expenses incurred by the Defendant. By letter dated 1 December 2010 from CMS to the Defendant, CMS stated that it would like to assign all amounts due by the Defendant to its equity holder, the Plaintiff. Also, by letter dated 10 December 2010 from the Defendant to the Plaintiff, the Defendant confirmed the Plaintiff’s agreement to allow the Defendant to hold the balance deposit sum of RM2.27m irrevocably for the Plaintiff pending confirmation of future jobs or purchase orders from other contractors to be procured by the Plaintiff. In such situation, the Defendant was to utilise the said sum towards the new job. The Plaintiff however, did not procure any new jobs and contended that the Defendant held the sum of RM2.27m in trust for him and the sum ought to be refunded. The Plaintiff thus sought a declaration to the effect that the Defendant was holding the sum of RM2.27m on trust for the Plaintiff and that the Defendant be ordered to return the same to the Plaintiff. The Defendant was wound up and in liquidation during the trial. The Defendant contended that the Plaintiff’s claim was misconceived in law and on the facts and that there was no trust. The balance sum was not earmarked and had become mixed with the Defendant’s assets and those assets had become generally available for settlement in liquidation. The issues for the High Court’s determination were: (i) whether pursuant to the letter dated 12 November 2010 from CMS to the Defendant and the letter dated 25 November 2010 from the Defendant to CMS, the Defendant’s agreement to return the RM2.27m constituted a trust in CMS’s favour; (ii) whether pursuant to the letter dated 12 November 2010 from CMS to the Defendant and the letter dated 25 November 2010 from the Defendant to CMS, the parties’ agreement that the Defendant hold the RM2.27m irrevocably for the Plaintiff on the terms as stated in the letter of 10 December 2010 constituted a trust in the Plaintiff’s favour; and (iii) whether from the period from 12 November 2010 to 10 December 2010 the Defendant had the balance deposit sum of RM2.27m in its name and account.

Held, allowing the Plaintiff's claim:

- (1) In answering the issue as to whether the Defendant held the sum of RM2.27m on trust for the Plaintiff, one needed to consider whether the elements of a trust had been established. The question of whether trusts may be created depended on the "circumstances concerning the relationship between the parties", regardless of the fact that the parties may be in a contractual commercial relationship; as was in the instant case. What was required in establishing the existence of a trust were that the elements of a trust must be met. The three certainties for a valid trust to be established were: (i) certainty of intention; (ii) certainty of subject matter in terms of corpus and the beneficial interest; and (iii) the certainty of the object of the trust. Absent of these certainties, even in a case where express words were used, the trust may either be non-existent or invalid.
- (2) Although no particular form of words were necessary to create an express trust, the use of express terms without doubt, would readily dispose of the troubling issue of the existence of a trust. More frequently than not, such a term is not used and that is where the Court may sometimes face difficulty in discerning the intention of the parties. The absence of express terms such as "holding on trust" does not *ipso facto* defeat the argument that there is a valid trust subsisting. The Court would need to examine the words used to determine if they were "mere words of hope, desire, confidence or entreaty, ie, they are not precatory words". The Court would have to determine if the words used were imperative in expressing or containing the intention of the parties.
- (3) In the instant case, it was certain what the corpus or trust property was and what the beneficial interest was. In other words, there was certainty that the trust property, if there was any created, was in the balance sum of RM2.27m; and there was certainty that the quantum of the beneficial interest was in the whole of that sum or trust property. As for the third certainty, the object of the trust was certain in that it was the Plaintiff. That was clear and unequivocal.
- (4) The certainties were met in the instant case, and the issues had to be answered in the Plaintiff's favour. This was not a routine transaction or relationship. There was no need for the physical existence of the monies.
- (5) In the instant case, it must be remembered that at the material time, the Defendant owed CMS and later the Plaintiff the balance sum of RM2.27m. Being unable to settle that sum, the Defendant proposed an arrangement whereby it would "hold" that sum for or pending a future event which was in itself certain. More importantly, that sum did not belong to the Defendant such as to form it's assets but it was CMS's money, and later the Plaintiff's. That being the case, the monies were not the Defendant's assets and were not available for distribution.

It made no difference that there were no special arrangements of separate accounts being opened for this sum. The trust was established vide letter dated 10 December 2012. This was well before the Defendant went into liquidation. The trust created in 2012 survived the liquidation with the sum of RM2.27m being not the Defendant's monies but that of the Plaintiff. If monies for this purpose was ever set aside, it would not amount to preferential payment under s 223 of the Companies Act 1965. These monies were trust monies and did not belong to the Defendant in the first place. These monies had to be returned to their rightful owner, the Plaintiff.

POSC TI Sdn Bhd v Kerajaan Negeri Terengganu; Pentadbir Tanah Besut

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-29-07/2015
DATO' MARY LIM THIAM SUAN J
26 NOVEMBER 2015

[2016] 1 CIDB-CLR 263

By a public private partnership agreement dated 10 May 2012, the First Defendant appointed the Plaintiff as the principal contractor to complete its project in Besut, Terengganu ("the said agreement"). The Plaintiff claimed that the First Defendant had agreed to grant the Plaintiff a 66 year lease over the relevant land to enable the Plaintiff to obtain the necessary financing for the project. Furthermore, it was agreed that the Plaintiff was only to pay nominal premium for the grant of such land. However, the Plaintiff contended that it encountered problems over the payment of premium before the grant of the lease could be issued to it, *inter alia*, the Second Defendant returning the Plaintiff's premium payments on the basis that it been directed by the First Defendant to withhold receipt of the payment of the premium. The grant of title was never issued and the First Defendant subsequently, by a letter of termination dated 30 June 2015, terminated its agreement with the Plaintiff. The Plaintiff then sued the two Defendants for, *inter alia*, wrongful termination of the agreement. The Defendants counterclaimed for various losses claimed to have been sustained as a result of the Plaintiff's delay in paying the premium. Subsequently, the Defendants, pursuant to O 57 r 1 of the Rules of Court 2012 ("the Rules"), filed the current application (Encl 19) to transfer this proceeding to the High Court at Kuala Terengganu. The Defendants argued that since everything that was related to the Plaintiff's cause of action, from when the said agreement was signed, acted upon, breached, arose in the State of Terengganu and witnesses and the documents relied on were all in that State and the Defendants were from that State, it would be more convenient for all concerned that the case be transferred to and heard at the High Court at Terengganu. There was also no prejudice caused to the Plaintiff if the order transferring the proceedings was made. The Plaintiff in opposing the application submitted that since the facts in dispute related to the letter of termination, the cause of action arose in Kuala Lumpur and that was the proper forum to hear the matter. Furthermore, its witnesses were all from around the Klang Valley.

Held, Defendants application for transfer allowed with costs

- (1) The exercise of the discretionary power under O 57 of the Rules to transfer proceedings must take into consideration the factors set out in O 57 r 4(A)-(E). It was evident from a proper reading of O 57 r 4, not any

one factor will prevail over the other. The Court was to weigh any or all the factors relied on in making a decision on whether the application to transfer ought to be acceded to.

- (2) The factors in O 57 r 4(B) and (C) had been satisfactorily met. The Defendants certainly resided in the State of Terengganu, the facts on which the whole proceedings were based, existed or were alleged to have occurred all took place within the territory of the State of Terengganu. While the ownership of the land was not in dispute, the project which was the subject matter of the said agreement was located in that State. The High Court sitting at Kuala Terengganu was indeed the more appropriate, suitable and more convenient Court to hear the instant case. The preponderance of facts clearly leaned in having the case heard at the High Court located at Kuala Terengganu.
- (3) On the matter of witnesses, it was not the convenience of the Plaintiff's witnesses but that of the Defendants' that would prevail and that the Court would take into regard. By looking at what had been presented before the Court, not only the witnesses but also the documents which had anything to do with the claim and the counterclaim all took place in the State of Terengganu.
- (4) The claim was not about the termination of the said agreement *simpliciter*, but about the various obligations of the parties under the said agreement. Most important, it was about the project to build in Besut, Terengganu; not in Kuala Lumpur or anywhere in its territory.
- (5) It was, furthermore, in the interests of justice that the case be transferred to and heard by the High Court sitting at Kuala Terengganu. There would be savings of time and costs if the case was heard there. The Court could not see any hardship or prejudice occasioned to the Plaintiff by such order of transfer.

PPEC (M) Sdn Bhd v REPC Services Sdn Bhd & Another Case

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-64-11/2014 & 22C-67-11/2014
MARY LIM THIAM SUAN J
29 APRIL 2015

[2016] 1 CIDB-CLR 265

The parties in both the instant cases were essentially the same. They had used their various subsidiaries to contract for different subcontract works in respect of the same project. In respect of the first action, the Plaintiff subcontractor claimed that the Defendant owed it a total of RM6,905,525.71 for the subcontracted works. In respect of the second action, the Plaintiff claimed the Defendant owed it a sum of RM1,317,902.57 for completed works. The Plaintiffs alleged that their common director - DPJ - met with TSH - the General Manager of both Defendants, to discuss the payment of outstanding sums due under several projects, including the instant project. DPJ had signed a "Full and Final Settlement for All Contract" ("settlement contract") where he apparently accepted a sum of RM1.5m as full and final settlement of outstanding sums due to the Plaintiffs and all other companies related to DPJ in respect of all contract work for the project. A cheque was issued to DPJ and the settlement contract manifested a written agreement by the parties to the effect that there would be no further claims against the Defendant or related parties in respect of the project, upon clearance of the cheque. DPJ claimed that he had signed the settlement contract under duress. He claimed that he was threatened by TSH that if he did not sign the settlement contract, he and the Plaintiffs would not receive any payment for all the projects the parties were involved in including the instant project and that they would not get any new projects from the Defendants or their related companies. The settlement contract was said to have been pre-prepared and that DPJ had signed it without referring it to the Plaintiffs' other directors and without procuring resolutions of the plaintiffs accepting that settlement proposal. The Plaintiffs claimed that they had financial hardships at the material time; funds were needed to keep projects running and that their reputation in the construction industry was at stake. Being concerned over these matters, DPJ, without free will, was forced to sign the settlement contract. DPJ subsequently made a police report on the incident, claiming that he was worried about the payment of the substantial balance sums and that he was worried about his safety and that of his family and the Plaintiffs. The present claims in both the instant cases were for the outstanding sums, with the Plaintiffs claiming that the RM1.5m was received as part payment of the outstanding sums. The Defendants denied the allegations and filed similar applications to strike out the respective claims under O 18 r 19(1)(a), (b) and/or (d) of the Rules of Court 2012.

At the hearing of the applications, the Defendants raised an issue concerning an irregularity in an affidavit filed by the Plaintiffs.

Held, dismissing both applications of the Defendants with costs:

- (1) Only the copy of the affidavit served on the Defendant was not proper in that it did not bear the required endorsement. The copy filed and with the Court was proper. With leave, the Court allowed the reliance on that affidavit as the lack of endorsement had been properly and adequately accounted for as a simple act of inadvertence. The Defendants were not in any way prejudiced nor did they face any difficulty by the oversight. In the interest of justice, the reliance was allowed.
- (2) The instant case was not an appropriate case for striking out. The principles set down in *Bandar Builders Sdn Bhd & Ors v United Malayaan Banking Corp Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 had not been met. Both the cases were not plain and obvious cases to be struck out.
- (3) The pleadings in both cases evinced reasonable causes of action. The success, strength or otherwise was not of concern at the instant time and certainly not at the instant interlocutory proceedings; unless it could instantly be said with near absolute certainty that the Plaintiffs' claims were bound to fail or were obviously unsustainable. The Court could not say so in all fairness, after examining the papers before the Court.
- (4) The central and critical issue of the validity of the settlement contract, whether it was in fact vitiated by duress including economic duress or a lack of free will as claimed by the respective Plaintiffs, was a valid, real and genuine issue. The cause of action was in contract and in order to vitiate and nullify, if at all, any or all the contents of the settlement contract, the circumstances surrounding and leading to the signing of that contract as well as the post conduct of the parties, would be highly relevant. Those facts and circumstances were heavily disputed in the pleadings as well as in the affidavits. What exactly transpired needed to be established; and that required findings of fact especially from the individuals involved. The very issues that founded the Plaintiffs' claims were necessarily fact driven and *viva voce* evidence was thereby required.
- (5) At the instant summary stage, the Court could not say that both the Plaintiffs' cases were clearly and obviously unsustainable; that both cases were vexatious, frivolous or scandalous; or that both cases abused the process of Court. Both the cases ought therefore to proceed to trial. The plea of duress in the instant case was sufficient and within the requirements of O 18 r 12 of the Rules of Court 2012. There were sufficient details and particularization of the allegation for the Defendants to attend to the claim. The Defendants had not been in any way incapacitated, encumbered or embarrassed from responding and had in effect, done so ably in their two Defences.

PVC Construction Sdn Bhd v Kluang Health Care Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-52-09/2014
DATO' MARY LIM THIAM SUAN J
15 SEPTEMBER 2015

[2016] 1 CIDB-CLR 267

The Plaintiff claimed that there were outstanding sums due under five (5) contracts in relation to certain works done by the Plaintiff for the Defendant. With regard to specifically the First contract, which was a contract for, *inter alia*, external and internal plastering and screed paving to the main hospital block, the Plaintiff claimed that after it carried out additional or variation works, the total value of works done was RM7,399,048.60, out of which the Defendant had only paid a sum of RM5,157,633.00 leaving a sum of RM2,241,415.60 as still due and outstanding. The Defendant argued that save for the particular position of the First contract, the statements of final account for the other four contracts showed that the Plaintiff had been paid in full and that there were no monies due under those contracts. However, in the case of this First contract, it was a contract for the provisional sum of RM6,334,916.12. The Defendant maintained that the total value of all five contracts was finally the sum of RM6,018,419.87, which after deducting various payments it had already made, left a final balance due from it of only RM27,387.27. The Defendant also sought to set off a sum of RM50,000.00 that was advanced to the Plaintiff's director by the Defendant's director. The Plaintiff subsequently amended its Statement of Claim to reflect that it had been paid in full for the Second to the Fifth contracts. In respect of the First contract, the Plaintiff now claimed that it had only been paid a sum of RM3,209,007.17 leaving a sum of RM4,190,041.43 as still due. The Defendant too amended its Defence but maintained that the only outstanding amount due to the Plaintiff was the sum of RM27,387.27, a sum due under the First contract. The two issues for determination were: (i) what was the amount owing to the Plaintiff? (ii) whether the Defendant was entitled to set off the sum of RM50,000.00 paid as an advance by the Defendant's director to the Plaintiff's director from any of the monies due from the Defendant to the Plaintiff?

Held, the Plaintiff's claim allowed only to the sum of RM27,387.27.

- (1) The First contract was undoubtedly a contract based on a provisional sum. Such a sum was clearly understood and agreed between the parties to be one that was liable to be changed as it had yet to be detailed and finalized. The sum stipulated in the contract was only provisional and represented an approximation of the value of the works finally done. This provisional sum was provided for the purpose of allowing for the tender

and contract formation process in order to complete in advance details which still required finalization (see *TH Universal Builders Sdn Bhd v Intraline Resources Sdn Bhd & Another Appeals* [2013] MLJU 1485).

- (2) As required under the terms of the contract, the Defendant had to measure the Plaintiff's work. The Defendant had measured and verified that the Plaintiff had only completed 70% of the works; and there was no evidence to suggest that that was erroneous. As this was a provisional sum contract, this meant that the value of the contract works had to be re-measured. There was no proof of work to the value as claimed by the Plaintiff. Since the Plaintiff's works needed to be verified first and they had been so verified by the Defendant with no evidence produced to the contrary except PW1's (ie a shareholder and director of the Plaintiff) calculations, and there was no evidence before the Court to show why such verification was erroneous, the Court accepted that the Defendant's verification was true of the state of works and completion of works. This included the claim for variation works.
- (3) Since the parties had agreed that the certificates of payment were final on the assessment of the value of the Plaintiff's works, the Plaintiff could not now renege. Its conduct in relation to the other four contracts (where the Plaintiff had accepted the final certificates issued by the Defendant for the Second to the Fifth contracts) contradicted the Plaintiff's stand that it took in relation to the First contract. In fact, the Court of Appeal's decision in *L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd* [2007] 8 CLJ 507, where it stated that "*a certificate of payment is in essence a statement of ascertained and verified fact which is to be accepted as a statement of truth at face value*", required the Plaintiff to accept the Defendant's certificate for the First contract. The Court was therefore not satisfied that the Plaintiff had discharged its burden of proving its case on a balance of probabilities. However, since the Defendant had admitted that a sum of RM27,387.27 was due to the Plaintiff, a judgment was entered by this Court on that sum.
- (4) Since the advance or loan of RM50,000.00 arose out of a private and personal arrangement between parties which were not before the Court, the Defendant was not entitled to set off this advance as these were personal arrangements between entities that were not the present claimants in Court. The Plaintiff's claim could not therefore be set off by the Defendant's claim for that payment. The set off was dismissed.

**Pasukhas Construction Sdn Bhd & Anor v
MTM Millenium Holdings Sdn Bhd**

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24NCC (ARB)-30-08/2012
LAU BEE LAN J
31 MAY 2015

[2016] 1 CIDB-CLR 269

The Defendant had engaged the Plaintiffs for the construction and completion of a project (“the project”). Disputes arose and the matter was referred to arbitration. The Arbitrator ruled in favour of the Plaintiffs. The Plaintiffs obtained an *ex parte* order on 10 September 2012 (“the Order”), under s 38 of the Arbitration Act 2005 (“the Act”) to enforce the Final Award (“the Award”). The Defendant applied to set aside the *ex parte* order pursuant to s 39 of the Act. The Defendant, in opposing the Order submitted to Court that: (i) the Order was irregular for failure to comply with O 69 r 8(2)(a) of the Rules of Court 2012 (“ROC”) in that the *ex parte* application failed to state the name and the usual or last known place of abode or business of the Defendant. Further, it did not contain a statement of the right to apply to set aside the Order under O 69 r 8(8) of the ROC (“the irregularity ground”); (ii) the Plaintiffs had acted *mala fides* in obtaining the Order; (iii) the Award was premised on an illegal contract; and (iv) the Award was in conflict with the public policy of Malaysia.

Held, dismissing the Defendant’s application to set aside the Order, with costs:

- (1) The High Court was inclined to accept the Plaintiffs’ argument that the consensus of the authorities suggested that a Court is more concerned “that the right of the parties in an action are not to be defeated by technical objection”.
- (2) The Defendant’s *mala fide* argument was irrelevant to the instant proceeding as it was not a ground for refusing recognition or enforcement of the Award. The Plaintiffs were not attempting to hide the existence of the Order. The Order had been disclosed to the Defendant by the Plaintiffs when they opposed the Defendant’s application to set aside the Award and in the Defendant’s application to restrain the Plaintiffs from presenting a winding up petition for its failure to pay the Award Sum. Further, the Defendant’s solicitor had agreed to the withholding of the service of the Order by the Plaintiffs’ solicitor.
- (3) The issue pursued by the Defendant that the Award was in conflict with the public policy of Malaysia in that it arose from a void and illegal contract, had been ventilated in earlier proceedings when the Defendant appealed

to the Court of Appeal against the High Court's refusal to set aside the Award. The Court of Appeal had there refused to disagree with the High Court's rationale and held *inter alia*, that from the Construction Industry Development Board Act 1994, it could not see any intention of Parliament to void agreements when the agreement did not comply with the Act or its regulations. Further, the Court of Appeal had decided in that appeal that to void any agreement by an Act of Parliament was a serious matter and unless there was a clear and unequivocal provision in existence, the Courts in the interest of ensuring certainty in trade and commerce, would not strike down agreements. Thus in the instant case, on the basis of *res judicata*, the Defendant would be estopped from raising the same issues again as it would be tantamount to an abuse of the process of the Court as the Defendant ought not to be given a "second bite of the cherry".

Pembinaan BLT Sdn Bhd v Debessa Development Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24(NCVC)-860-06/2015
AZIZUL AZMI ADNAN JC
23 SEPTEMBER 2015

[2016] 1 CIDB-CLR 271

The Plaintiff had appointed the Defendant as contractor in connection with a construction project. Disputes arose between the parties and the Defendant commenced arbitral proceedings. The Arbitrator published his Award on 31 March 2014 wherein he directed the Plaintiff: (i) to pay the amount of RM26,430,533.30 to the Defendant; (ii) to pay interest at the prescribed rate from 17 March 2011 until realization; and (iii) to pay the costs. The Plaintiff requested a correction of the Award, pursuant to s 35(1)(a) of the Arbitration Act 2005 ("the Act"), but the Arbitrator declined the Plaintiff's request for the correction. On 12 May 2014, the Plaintiff paid to the Defendant the amount of RM33,028,753.29, which was expressed to be payment for the principal sum of the award, together with interest up to 30 April 2014. Crucially, the letter enclosing the banker's cheque did not contain any reservation of rights. The Plaintiff acknowledged that the payment was made unconditionally. The Defendant accepted the payment through its solicitors and issued a receipt for the payment. The Plaintiff subsequently applied to set aside the Award on grounds that the Award: (a) dealt with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration; (b) contained arbitral decisions on matters outside the scope of the submission to arbitration; (c) conflicted with the public policy of Malaysia where a breach of natural justice occurred during the arbitral proceedings or in connection with the making of the award. The Defendant opposed the application, contending *inter alia*, that since the Plaintiff had requested the Arbitrator to correct his Award pursuant to s 35 of the Act, the Plaintiff had impliedly recognized and accepted the Award. Secondly, the Plaintiff's unconditional payment to the Defendant and the acceptance of such payment by the Defendant prevented the Plaintiff from applying to set aside the Award under s 37 of the Act. Furthermore, the Defendant contended that the Plaintiff's tender of payment on 12 May 2014 amounted to a request for a waiver of 12 days' interest for the period between 1 May 2014 and 12 May 2014, and this offer by the Plaintiff together with the Defendant's acceptance constituted a settlement agreement between them, which agreement superseded the arbitral award.

Held, dismissing the Plaintiff's application with costs:

- (1) A reading of the plain words of the Arbitration Act 2005 make clear that any application under s 35 of the Act does not preclude the award from being subsequently challenged under s 37. Section 37(4), which deals with the calculation of time to determine the period within which an application under s 37 may be made, clearly envisages that a s 37 application may be made after a s 35 request had been made.
- (2) The fact that the Plaintiff had made an unconditional, voluntary payment prevented it from challenging the Award, based on the principle of *estoppel per rem judicatam* and on the basis of the principle that litigation was not to be multiplied. The principle that "litigation is not [to] be multiplied" is simply another way of stating that there should be an end to litigation, which is the object of the principle of *estoppel per rem judicatam*.
- (3) Promissory estoppel or the principle of waiver would not apply to prevent the Plaintiff from applying to Court to set aside the arbitral Award. There was no evidence to show the existence of any detrimental reliance or change of position by the Defendant in reliance of the action by the Plaintiff.
- (4) The doctrine of accord and satisfaction did not of itself preclude the Plaintiff from applying to court to set aside the award. The application of the doctrine merely substituted the original rights of the parties with the rights under the Award. The key consideration was the fact of payment by the Plaintiff. The rights of the parties under the award were now spent with the unconditional payment by the Plaintiff under the award.
- (5) The compromise for the payment of interest merely amounted to a modification of the rights of the parties by agreement. Whether or not the terms of a settlement between the parties had the effect of superseding the award or merely modified its terms would depend on the intent of the parties, by reference to the accepted principles of construction of contract.
- (6) In the instant case, the agreement between the parties merely dealt with one of the terms of the award, relating to interest. There was no evidence that the parties had intended for the whole award to be supplanted by the terms of any agreement. The agreement between the parties for waiver of 12 days' interest did not, in the particular circumstance of this case, operate to supersede the award.

Perbadanan Kemajuan Negeri Selangor v Projek Lebuhraya Usahasama Berhad & 2 Ors

HIGH COURT, SHAH ALAM
SUIT NO: 22C-20-09/2014
SEE MEE CHUN J
2 JULY 2015

[2016] 1 CIDB-CLR 273

The Plaintiff (Perbadanan Kemajuan Negeri Selangor — “PKNS”) was the developer for a proposed mixed development (“the development”). Within this development was a construction of a cloverleaf interchange (“the interchange”) envisaged to be built over a highway. PKNS appointed the Second Defendant (“D2”) as the main infrastructure consultant and/or consultant engineer for the development. The highway was operated and maintained by the First Defendant (Projek Lebuhraya Usahasama Bhd — “PLUS”). PKNS also appointed the Third Defendant (B&I Builder Sdn Bhd — “B&I”) as the main contractor to carry out the construction and building works for the interchange. A Certificate of Practical Completion was subsequently issued by PKNS certifying that B&I had practically completed the interchange and PKNS thereafter took possession of the interchange. A Certificate of Completion was also issued by the Malaysia Highway Authority (“MHA”) on 23 March 2012. On or around 23 November 2012, PLUS commenced rectification work beneath the interchange (“rectification work”). However, on 28 February 2013, a section of the interchange collapsed (“the incident”). An independent consultant (“Nexus”) was jointly appointed by PKNS and PLUS to identify the cause of the incident and thereafter Nexus prepared its investigation report (“Nexus report”). PKNS claimed against, *inter alia*, B&I in both contract and tort, alleging breach of contractual obligations and duty of care. Furthermore, PLUS specifically counterclaimed against B&I relating to the construction of the interchange. PLUS contended that B&I would have foreseen PLUS would be exposed to danger and/or damage if the construction was not carried out properly and had therefore breached a duty of care and a statutory duty under s 71 of the Street, Drainage and Building Act 1974 (“the Act”) and by law 73 of the Uniform Building By Laws 1984 (“UBBL”). This case concerned B&I’s application under O18 R19 (b) and (d) of the Rules of Court 2012 to strike out PKNS’s claim and PLUS’s counterclaim on the grounds they disclose no cause of action and/or are scandalous, frivolous, vexatious and/or an abuse of the process of court.

Held, allowing B&I’s applications to strike out the claim and counterclaim

- (1) The *Sijil Kesempurnaan Pembinaan* (“SKP”) with the certifications by PKNS, MHA, Elite (the precursor to PLUS) and D2 and the release of the retention sum showed that B&I had performed its contractual obligations to PKNS’s satisfaction.

- (2) Although cl 49 in the contract between PKNS and B&I rendered any certificate issued as not conclusive, final or binding this was in relation to certificates issued under the contract. Although not conclusive, final or binding, such certificates when read together with PKNS certification in SKP meant PKNS took over responsibility for the interchange and necessarily meant that it was satisfied with B&I's work.
- (3) The claim in tort and assertions of breach raised by PKNS were mere allegations when considered in the light of the issuance of the certificates and SKP as they meant PKNS's satisfaction of the work done and in accordance with the contract drawings. This was more so when B&I was only required to construct as per design and specifications and was not involved in the design at all. Handover of the interchange was on 23 November 2009 and the collapse of the interchange was on 28 February 2013. In between no issue was ever raised by PKNS.
- (4) PKNS had relied on the Nexus report to support its claim. B&I's contention that the Nexus report ought to be disregarded was accepted by the Court. Nexus was appointed by PKNS and PLUS and the report was prepared based on physical inspection and "information and reports forwarded to Nexus by PLUS and PKNS". The report may thus not be independent. It was prepared in May 2014, 5 years after the handover and 1 year after the incident.
- (5) In the instant case, PKNS's claim was groundless as there could not be a breach of contract when the certificates and SKP had been issued and no breach in tort when what were raised were allegations and nothing more.
- (6) In so far as breach of statutory duty was concerned, s 71 of the Act dealt with the penalty for failure of building and could not be invoked to impose a duty on B&I vis-à-vis PLUS. By Law 73 of the UBBL dealt with foundations of a building and sub paragraph (2) stated that the requirements of by law 73 are satisfied if the foundations were contracted in accordance with relevant recommendations. Reliance on this begot the critical fact the specifications for the interchange including the foundations were provided for in the contract, drawings and specification and that B&I was not involved in design.
- (7) On the claim in tort the principles enunciated in *Murphy v Brentwood District Council* [1991] 1 A.C. 398 were accepted in that: "... the principle in *Donoghue v Stevenson* does indeed apply so as to place the builder of premises under a duty to take reasonable care to avoid injury through defects in the premises to the person or property of those of whom he should have in contemplation as likely to suffer such injury if care is not taken". However, in the instant case, although there was proximity of interchange to highway there still had to be breach of the duty of care.

- (8) There was no reasonable cause of action in tort and/or breach of statutory duty. The certificates and SKP had been issued and B&I had carried out its scope of work in accordance with drawings and/or instructions of D2. The counterclaim by PLUS was also groundless.

Perembun (M) Sdn Bhd v Bina BMK Sdn Bhd & Another Case

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NOS: 24C (ARB)-15-03/2015 &
24C (ARB)-15-10/2014
MARY LIM THIAM SUAN J
3 JUNE 2015

[2016] 1 CIDB-CLR 276

In the first case, Bina BMK sought to recognize and enforce a Corrective Arbitration Award dated 27 June 2014 against Magna Prima and Perembun. Perembun resisted the application. In the second case, Perembun sought to challenge the award under sections 36(2), 37 and 42 of the Arbitration Act 2005 (“the Act”) by way of Originating Summons. In response, Bina BMK applied to strike out the Originating Summons under O 18 r 19(1) and/or (d) of the Rules of Court 2012.

Held, dismissing Bina BMK’s application to strike out and dismissing Perembun’s applications to set aside the award under s 37 and to refuse recognition under s 39 of the Act:

- (1) An application to strike out the Originating Summons under Order 18 r 19(1) Rules of Court 2012 on the ground of limitation may be entertained where it is plainly clear that the matter is time-barred and unsustainable. The position in law is the same whether the application is to strike out a Writ of Summons or an Originating Summons; and whether the subject matter is a tort or civil action or, an arbitration award.
- (2) With regard to Bina BMK’s striking out application, Perembun’s challenge under s 42 of the Act was made out of time and it abandoned the specific challenge. With regard to Perembun’s challenge under s 37 of the Act, the challenge was not filed out of time. Although subsection 37(4) requires the application to set aside the award to be filed within 90 days from the date of the Award, the facts showed there was a request for a correction made under paragraph 35(1)(a). For the purpose of an application to set aside such a corrective award, subsection 37(4) provides that the application “may not be made after the expiry of ninety days from the date on which that request had been disposed of by the arbitral tribunal.” The language in subsection 37(4) is more directory and in the absence of any evidence to the contrary, and since subsection 35(4) provides for time to run from the date the award is received; likewise, time should run from when the request to correct is disposed of and the decision including a Corrective Award is received.

In the instant case, the application for the purpose of s 37 was filed within the 90 day period and it was properly before the Court. Accordingly, Bina BMK's application to strike out ought to be dismissed.

- (3) On its own and without more, a complaint of non-compliance or violation of subsection 36(2) was insufficient. What was required of Perembun is that it had to prove how a violation of subsection 36(2) came within any of the grounds found in subsection 37(1). If Perembun failed, then the whole application had to necessarily fall.
- (4) None of the allegations or complaints resonated in any of the grounds relied on. None of the grounds were proved, be it under s 37 or s 39 of the Act. These sections required Perembun to prove its charges. It had not.
- (5) The Award, including the computation and calculation by the Arbitrator when he made the corrections must be read as a whole. The Award should not ever be read in parts. It should be read, viewed and understood as a single award. In so doing, the Arbitrator had not exceeded the power given under s 35 when he made the corrections seen in the Corrective Award.

Pivot Engineering & Construction Sdn Bhd v Zamil Steel Building Vietnam Co Ltd.

HIGH COURT, JOHOR BAHRU
CIVIL SUIT NO: 22C-2-06/2004
TEO SAY ENG J
15 OCTOBER 2015

[2016] 1 CIDB-CLR 278

The instant application was the Plaintiff's application for summary judgment (Encl 13) against the Defendant for 2% commission claimed payable, pursuant to a Buildership Agreement signed by the Plaintiff and Defendant on the total value of contracts the Defendant procured from one Bahru Stainless Sdn Bhd ("BS") in respect of sales of the Defendant's Pre-Engineered Steel Buildings. By a sub-contract, the Defendant also appointed GTK Bhd to perform work that the Defendant had already contracted to perform for its customer, that is, BS. The Defendant's defence to the application was that no commission was payable to the Plaintiff under the Buildership Agreement for any product other than Pre-Engineered Steel Buildings including space frame structures and open web joists. The Defendant alleged that the product sold to BS was structural steel and thus no commission was due to the Plaintiff. The Defendant submitted that there were triable issues in the instant case and thus the case was not to be decided summarily. The only issue before the High Court was whether the products referred to in the Defendant's contract with BS came within the scope of the description of the products in the Buildership Agreement signed between the Plaintiff and the Defendant thereby entitling the Plaintiff to its commission.

Held, dismissing the application with costs:

- (1) In an application for summary judgment, the Plaintiff is only required to demonstrate that the Defendant has entered an appearance, the statement of claim has been duly served on the Defendant and the affidavit in support of the application satisfies the requirements of O 14 rule 2 of the Rules of court. Once the Plaintiff satisfies these requirements, the Plaintiff has established a *prima facie* case and is entitled to judgment. The burden then shifts to the Defendant to satisfy the Court that there is a triable issue and that consequently, judgment ought not to be entered summarily against him.
- (2) This was not a case that could be decided summarily as the Defendant had successfully raised a few triable issues which warranted the case to go for full trial. First, whether the contract between the Defendant and Bahru Stainless Sdn Bhd was a contract for Structural Steel or Pre-Engineered Steel Building would depend on a few contemporary documents which

required to be proved by calling witness. Secondly, whether “Structural Steel” was an element or part of “Pre-Engineered Buildings” or whether “Structural Steel” and “Pre-Engineered Buildings” were separate and distinct products of the Defendant was to be determined by calling witnesses at trial. Thirdly, whether a letter dated 17 November 2014 from BS, who was not a party to the instant suit, could be relied upon, had to be proved by calling the maker who had to be subjected to cross examination by the Defendant. Last but not least, it was also a triable issue whether the sub-contract with GTK Bhd was mistakenly titled as “Pre-Engineered Buildings”.

**Sigma Elevator (M) Sdn Bhd v Isyoda (M) Sdn Bhd;
Brampton Holdings Sdn Bhd (in receivership)
(Third Party)**

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22C-40-07/2014
DATO' MARY LIM THIAM SUAN J
1 DECEMBER 2015

[2016] 1 CIDB-CLR 280

The Defendant was appointed by Brampton Holdings Sdn Bhd ("Third Party") as the main turnkey design and building contractor in relation to a development project ("the project") and a formal agreement dated 11 December 2006 was drawn up to the same effect ("main contract"). The Defendant on 14 December 2006 subcontracted certain works in the project ("the subcontract") to the Plaintiff, who were elevator specialists. Unknown to the Third Party, the Defendant subsequently instructed the Plaintiff to carry out additional works. The Third Party, on 1 October 2010, took possession of most of the project. The defects liability period which commenced on 1 October 2010 expired on 30 March 2012. The Defendant and the Third Party also entered into two (2) Supplemental Agreements dated 15 June 2011 and subsequently a Settlement Agreement ("SA") dated 4 February 2013 which related to, *inter alia*, the matter of payments to the Plaintiff. The Plaintiff eventually sued for outstanding sums under the subcontract and for the additional works, claiming that it had completed the works under the subcontract but not been fully paid. The Defendant, though it did not dispute the balance sum for the additional works, refused to pay the balance under the subcontract, claiming, *inter alia*, that: (i) it was not obliged to pay the Plaintiff until it received payment from the Third Party; (ii) by a letter of release and waiver ("the letter"), the Plaintiff had agreed to release the Defendant from its obligations to pay the Plaintiff and had waived all sums due and owing by the Defendant under the subcontract. The Defendant also commenced Third Party proceedings and alleged that under the Supplemental Agreements, the Third Party had, *inter alia*, agreed to indemnify and release the Defendant from all liabilities arising under the subcontract. Furthermore, the Defendant relied on the letter where all three parties were said to have agreed to mutually vary both the main contract and the subcontract in that the Third Party would, *inter alia*, pay directly to the Plaintiff the balance amount of RM1,180,291.52. That variation was alleged to have been brought about by the SA in which the Third Party and the Defendant also agreed that the former will save the harmless latter from all claims made by the Plaintiff pursuant to the subcontract but limited to the balance sum. The Third Party denied all the Defendant's allegations arguing that the Supplemental Agreements were superseded by the SA. It also claimed that there were latent defects in the escalators installed by the Plaintiff and

counterclaimed against the Defendant for the rectification of the defects. The Defendant too counterclaimed against the Plaintiff alleging that the Plaintiff was responsible for the defects encountered by the Third Party, given that the relevant works were executed by the Plaintiff under the subcontract. The two (2) issues for determination were: (a) who was liable on an obligation to pay the outstanding subcontract sum of RM1,180,291.52 to the Plaintiff? And, whether the Defendant can rely on the indemnity provision in the SA (ie under cl 12) between the Defendant and the Third Party; (b) whether there were any defects in the escalator works carried out by the Plaintiff? And, if so, who was liable to rectify the defects?

Held, allowing the Plaintiff's claim with costs, dismissing the Defendant's Counterclaim, allowing the Defendant's Third Party Claim for indemnity with costs and dismissing the Third Party's Counterclaim.

- (1) The Court found that the Defendant's argument and reliance on the back to back clause (ie 'pay when paid' clause) and its argument that there was an agreement for direct payment by the Third Party to the Plaintiff under the SA, to be inconsistent with one another. Under the terms of the SA, the Defendant will never be paid by the Third Party for work done by the Plaintiff since the Third Party was to pay the Plaintiff directly, whereas the argument of a back to back agreement was that the Defendant will only pay the Plaintiff when it was paid by the Third Party.
- (2) Although the contents of the letter provided that the Defendant was to be released from all its obligations, it was equally clear that the letter was not signed by all parties. The Plaintiff required a tripartite agreement and that its requirement would be manifested in signatures of all three parties being affixed to the letter. In fact, the letter itself provided for the signatures of all three. In the circumstances, the letter was not enforceable as there was no conclusion or agreement on the matters set out in the letter. The subcontract therefore remained very much the governing contract between the Defendant and the Plaintiff.
- (3) The Defendant's agreement with the Third Party under the SA that the latter would pay the Plaintiff directly did not discharge the Defendant from its obligations to pay the Plaintiff for work done under the subcontract. This was because the Plaintiff was not a party to the arrangements under the SA. The Defendant therefore remained very much liable under the subcontract to pay the Plaintiff for work that the Plaintiff had completed.
- (4) For the Defendant to credibly argue that the right of indemnity had been triggered, the Plaintiff must first of all, claim from the Defendant. Without the Plaintiff claiming from the Defendant, the right to be indemnified just did not arise. This is how the parties had chosen to arrange their affairs; that the Defendant's rights against the Third Party was only in the nature of an indemnity. A claim by the Plaintiff was therefore required and the

Defendant was obliged to pay first before it can turn to the Third Party for indemnity. The Defendant's payment to the Plaintiff was necessary as it then reflected the Defendant's loss which the Third Party had promised to save by way of an indemnity.

- (5) Clause 11 of the SA (which obliged the Third Party to directly pay the Plaintiff, subject to the right to make any deductions necessary due to unrectified works) had to be read with, *inter alia*, cl 5 of the SA, which obliged the Defendant to take every effort to enforce rights and remedies under the subcontract for the Third Party's benefit. From the evidence presented, the Court was satisfied that the Defendant had taken every effort under cl 5 to enforce rights and remedies under the subcontract for the Third Party's benefit. The Defendant was seen getting the Plaintiff to remedy the defects complained of by the Third Party. Its efforts extended to and included filing a counterclaim against the Plaintiff. The Court therefore fully agreed that the Defendant was entitled to be indemnified by the Third Party. However, the Third Party was only obliged to indemnify the Defendant for the sum due under the subcontract, and not for the additional works.
- (6) Under cl 4 of the SA, the Defendant would be liable to the extent allowed under the main contract for all latent defects. S Rajoo and Harbans Singh KS in their book entitled '*Construction Law in Malaysia*' explained: "Patent defects are defects that can be discovered through reasonable inspection and testing ... On the other hand, latent defects cannot be discovered by either reasonable inspection or testing even by a reasonably careful person skilled in the works in question ... latent defects ... actually manifest themselves years after the completion of the works in question. Such latent defects therefore pose particular difficulties not only to the parties to the contract itself but also third parties such as designers, specialist suppliers and even the authorities".
- (7) In the instant case, the Court found that both defects (ie the step rollers and the step chain rollers defects; and the escalator landing defects) were not latent defects for the simple reason that these defects were indeed discovered or identified during the defects liability period, and drawn to the Defendant's and/or Plaintiff's attention. These defects had then been attended to and rectified. The Defendant's claim to be indemnified was thus allowed to the extent under the subcontract; and that is, that the Third Party was to indemnify the Defendant for the sum of RM1,180,291.52.

Southern Steel Berhad v Tenaga Nasional Berhad; UEM Construction Sdn Bhd (Third party)

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: S-22-746-2010
SITI KHADIJAH SH BADJENID JC
1 JUNE 2015

[2016] 1 CIDB-CLR 283

The Plaintiff was involved in steel manufacturing, while the Defendant was a company formed under the Electricity Supply Act 1990 (“the Act”). The Third Party (“UEM”) was appointed as a sub-contractor to execute and complete construction of an Uniramp. Pursuant to a written agreement, subject to the Act, between the Plaintiff and Defendant, the Defendant agreed to supply electricity to the Plaintiff for the operation of the Plaintiff’s steel manufacturing factories and ‘rolling mills’ on its premises. From 26 August 2008 to 1 September 2008, electricity supply was disrupted/halted to the Plaintiff’s premises, resulting in operations being disrupted and losses being suffered. The Plaintiff commenced the present claim against the Defendant for breach of contract arising from the Defendant’s failure and/or negligence in ensuring constant electricity supply to the Plaintiff’s premises. Alternatively, the Plaintiff also alleged that the Defendant, by breaching the duty of care owed to the Plaintiff, had caused the Plaintiff to suffer damages. The Defendant in turn enjoined UEM for indemnity. The Defendant contented that UEM had damaged the Defendant’s electrical cables on UEM’s construction site. Relying on the principle of *res ipsa loquitur*, the Defendant claimed that UEM had failed to take reasonable steps to detect the existence of the cables, conducted its construction work without ensuring safety standards, failed to take precautionary steps and to immediately inform the Defendant of the damage. UEM, while denying liability, claimed, *inter alia*, that it had discussed with the Defendant regarding protecting the cables while conducting piling work, conducted pressure tests, ascertained cable locations and carried out ground tests and its findings had been submitted to and accepted by the Defendant. The issues between the Plaintiff and the Defendant that arose for the Court’s determination were: (a) whether the Defendant had breached its contract negligently/carelessly when it failed to continuously supply electricity to the Plaintiff’s premises; (b) whether the Plaintiff suffered losses and whether the Defendant was liable to pay special and general damages; (c) whether the Defendant owed a duty of care to continuously supply electricity to the Plaintiff and whether it had breached this duty; (d) whether the Plaintiff suffered losses and whether the Defendant was liable to pay special and general damages. In relation to the Defendant and UEM, the issues for the Court’s determination were: (i) whether UEM had a legal or equitable obligation to indemnify the Defendant and whether the Defendant had a right to relief against UEM under the agreement; (ii) whether the Defendant could rely on

res ipsa loquitor against UEM; (iii) whether the material incident of damage to the cables occurred due to work on the Uniramp; (iv) whether the Defendant was entitled to obtain aggravated and exemplary damages from UEM; (v) whether the damages purportedly suffered by the Defendant were due to its own omission or its failure to ensure its cables were in good condition; (vi) whether UEM had done everything necessary to ensure safety of the cables; (vii) whether the Defendant had tested and approved of UEM's work methods; and (viii) whether the incident had occurred due to an unavoidable accident.

Held, allowing the Plaintiff's claim with costs and also allowing the Defendants' claim against UEM with costs:

- (1) The Plaintiff had entered into several agreements with the Defendant from 1991 for supply of large and consistent amounts of electricity. Since the Defendant had never supplied amounts below what was required, the Court found that the Defendant had not breached the terms of its' agreement with the Plaintiff.
- (2) It was not disputed that the damaged cables were the cause for the interruption in electricity supply. It was clear that the Plaintiff had suffered losses. Although the Defendant acknowledged this, the burden was on the Plaintiff to specifically prove all its losses, particularly in relation to the claim for special damages. However, the Plaintiff had failed to specifically prove its losses as required under the law.
- (3) There were three questions to be addressed on whether a duty of care was established. First, whether the damage suffered was reasonably foreseeable. Second, whether there was a relationship of proximity between the parties. Third, whether it was fair and reasonable for a duty of care to be owed. In the instant case as the Defendant knew of the cable locations; thus the damage to the cables and the loss faced by the Plaintiff could reasonably be foreseen by the Defendant and UEM. A relationship of proximity existed between the Plaintiff and Defendant as the Plaintiff was the Defendant's 'one in a million' customer, who required unusually large volumes of electricity and had monthly bills amounting to approximately RM16 mil. Unpaid monthly bills of this amount would hardly have been overlooked by the Defendant. Since the Plaintiff was a client who contributed towards a large proportion of the Defendant's income, it was thus fair and reasonable for the Defendant to owe the Plaintiff a duty of care to continuously and/or uninterruptedly supply electricity. The Court found on a balance of probabilities that this duty had been breached as the Defendant had failed to supply electricity from 26 August 2008 to 1 September 2008.
- (4) Though, the Plaintiff failed to provide a satisfactory explanation for its claims and losses, the Court was nevertheless satisfied from the evidence raised that the Plaintiff was directly affected by the power failure and consequently suffered losses.

- (5) UEM was liable to indemnify the Defendant for its contributory carelessness in damaging the cables. However, UEM was not liable to pay damages to the Defendant as the Defendant's electrical cables were already old and in a sensitive condition. Regardless of whether the Defendant's electrical cables had been damaged or otherwise, it was the Defendant's responsibility to replace cables in a sensitive condition.
- (6) Based on the facts of the instant case, the Court could not make an assumption that *prima facie* the situation would not have occurred but for UEM's carelessness. Furthermore, on the facts, it was shown that from the outset that UEM had no full control over the situation at the incident site. Besides the old and sensitive condition of the cables, the ground had also been damaged by heavy rainfall when UEM conducted its work there. Thus the Defendant could not rely on *res ipsa loquitor*.
- (7) The Court found that the incident would not have occurred if UEM had not commenced work on the Uniramp.
- (8) The Defendant was not entitled to obtain aggravated and exemplary damages from UEM as it was the Court's view that the situation and context of the instant case did not warrant UEM being liable to pay such damages. UEM had cooperated with the Defendant in its' efforts to prevent damage occurring while it's work was in progress.
- (9) It was found by the Court that UEM did not do everything necessary to ensure safety of the cables. On the facts, both UEM and the Defendant should have reviewed their work methods in view of the subsequent heavy rain that had made the ground wet and altered the situation compared to when it was dry. They had however not done so. They had both therefore neglected their responsibilities.
- (10) There was no evidence to indicate that the Defendant had reviewed and approved of UEM's work methods and safety steps.
- (11) Construction work continued in the same way despite the changed circumstances occasioned by heavy rainfall. The situation at hand could have been avoided if both the Defendant and UEM had planned accordingly for the change in circumstance. As such, the Court found that the Plaintiff had proved its case against the Defendant for losses. The Court also found that the Defendant had proved that UEM shared equal liability in causing the situation.

Sri Sekamat Enterprise Sdn Bhd v Kerajaan Malaysia & Anor

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO:24C-2-03/2014
SEE MEE CHUN J
25 AUGUST 2015

[2016] 1 CIDB-CLR 286

In 2002, the Defendants (“D1” and “D2”) entered into a privatization agreement. D2 was to develop a project on the project land for RM12.6 mil (“the project”). D1 was to facilitate the transfer of exchange land to D2 as consideration (“the land swap”). D2 appointed the Plaintiff by a letter of award (“LA”) as contractor for the project for the sum of RM9.5 mil. The Plaintiff delivered progress claims to D2, which were certified by a quantity surveyor and architect. Interim valuations were then issued (“the interim valuations”). In the meantime, no payment was issued by D2. In 2006, D1 terminated the privatization agreement. The Plaintiff was then appointed by D1 to take on work for the project for the sum of RM11.2 mil. In 2007, this work was completed and the Plaintiff was paid his due. Since the Plaintiff was not paid by D2 for work under the LA, the Plaintiff wrote to D1 for payment since the privatization payment was terminated and D2 had told D1 that it had not received payment from D1 for payment to the Plaintiff. The following year, D1 informed the Plaintiff that any payment made under the privatization agreement would be paid only to D2.

In a letter dated 3 April 2008 (“letter of assignment”), it was claimed that D2 had authorised D1 to make outstanding payments owed by D1 to D2 directly to the Plaintiff. An earlier Originating Summons (“OS”) filed against D1 to pay the amount of the interim valuations had informed the Plaintiff of an arbitration between D1 and D2, where it was decided that RM9.727 mil be paid by D1 due to the termination of the privatization agreement. It was also made known to the Plaintiff that the amount owed to him was included in the arbitrator award. D2 confirmed that it had been paid the RM9.727 mil, then filed an application to refer the arbitrator’s award on a point of law where the Plaintiff wished to intervene. Here, D1 took a contradictory stand declaring that the certified amount was not in fact considered by the arbitrator. The Plaintiff nevertheless insisted on its claim from D1. The earlier OS was withdrawn, leading to the present application. The Plaintiff’s case was based on the certified amount entitled to the Plaintiff from damages obtained by D2 from D1 and from the letter of assignment. D1 contended that the Plaintiff was not entitled to any damages that D2 may have obtained from D1 as the Plaintiff was not a party to the arbitration. Payments from the arbitrator’s award were made by D1 to D2, with none outstanding to the Plaintiff. The Court then considered whether the earlier letter of assignment was indeed an assignment.

Held, partially allowing the Plaintiff's claim:

- (1) Section 4(3) of the Civil Law Act 1956 ("the Act") lays down a guide for determining whether an assignment has been created. The criteria were thus: (i) that it must be for the purpose of a debt; (ii) made in writing by the assignor; (iii) notice in writing to the debtor and (iv) the language used must be absolute. D1 never challenged having knowledge of the letter, but only objected to its being used as an assignment for which D2 had not obtained consent.
- (2) Requirement (i) related to the interim valuation which was unchallenged by D2 as to its validity. A letter issued after the termination of the privatization agreement stated that D2 had never executed the land swap, and that a monetary consideration was in place. Requirement (ii) was not disputed as the assignment was properly issued by an officer of D2. As regards requirement (iii), D1 – the debtor in this case – never challenged the contents of the letter. Requirement (iv) was satisfied as the wording in the letter conveyed intention to form an absolute assignment. The Court found the letter to be a statutory assignment within the meaning of s 4(3) of the Act. Under this, D2 had authorised D1 to pay the Plaintiff any amount D1 owed D2. The arbitration award did not affect this, as the arbitration was between D1 and D2 after termination of the privatization agreement.
- (3) While D1 contended that it would be unjust to have to pay the Plaintiff after having paid D2 RM9.727 mil under the arbitrator's award, the Court found that D1's knowledge of the assignment rendered him liable to the Plaintiff. For this reason, the Court ordered D1 to pay the Plaintiff the certified amount.
- (4) The Court found no liability attached to D2, as the Plaintiff had at all times based its case on a statutory assignment.

Ssangyong Engineering & Construction Co Ltd v Tridant Engineering (M) Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NOS: 24C(ARB)-9-03/2015 &
24C (ARB)-24-06/2015
DATO' MARY LIM THIAM SUAN J
16 OCTOBER 2015

[2016] 1 CIDB-CLR 288

The Plaintiff was appointed by a company – Yetcome Investments Ltd (“the Employer”) – as the main contractor for a construction project (“the project”). The Defendant was the nominated sub-contractor appointed by the Employer to carry out installation services and works for the project. The Plaintiff and the Defendant subsequently entered into two sub-contracts in respect of those works [“the sub-contracts”]. By letters dated 3 April 2012 and 30 April 2012, the Defendant alleged that the Plaintiff owed the Defendant RM3,070,019.74 under various progress payment certificates. This was denied by the Plaintiff. In July 2012, the Defendant issued a Notice of Arbitration and stated the above mentioned allegation. The Plaintiff denied the claim on, *inter alia*, the ground the claim was time-barred. The Defendant claimed, *inter alia*, that reasonable time for purposes of limitation only accrued from the date reasonable steps had been taken by the Plaintiff to be paid by the Employer. The Arbitrator, in granting the Defendant’s claim found, *inter alia*, there was a postponement of the limitation period pursuant to subsection 26(2) of the Limitation Act 1953, which was occasioned by the Proof of Debt (“POD”) filed by the Plaintiff to a third party in respect of a debt owed by the Employer to the Plaintiff. That POD was a valid acknowledgment of the Defendant’s claim under ss 26 and 27 of the Limitation Act (“the LA”). Accordingly, the 6 year period lapsed only on 24 March 2015. Since the Notice of Arbitration was filed by the Defendant on 20 July 2012, it was filed well within the limitation period. In the first case before this High Court, the Plaintiff applied to set aside this arbitration award (“the Award”) under the Arbitration Act 2005 (“the Act”) s 37(1)(a)(iv) and (v); s 37(2)(b)(ii) and s 37(2)(b). Alternatively, it applied under s 42 of the Act to refer certain questions of law said to have arisen in the Award. They were: (i) whether there can be an acknowledgment of a sub-contractor’s claim by a main contractor pursuant to ss 26 and 27 of the LA in circumstances where a POD was filed by a main contractor for amounts due under certificates issued pursuant to the main contract between the main contractor and the Employer; (ii) whether there can be an acknowledgment of a claim pursuant to ss 26 and 27 of the LA in circumstances where an acknowledgment of a claim was made to a third party and not made to the person, or to an agent of the person; (iii) whether the Arbitrator had misapplied the principles of law in deciding that there was an acknowledgment of the Defendant’s claim on the part of the Plaintiff pursuant

to ss 26 and 27 of the LA. The Plaintiff's argument was that the application or otherwise of ss 26 and 27 of the LA was never submitted to arbitration. The Arbitrator was not and was never required to deal with whether the POD that the Plaintiff filed with the third party amounted to an acknowledgment within the meaning of s 27 such that there was a fresh accrual of action to sue the Plaintiff under s 26. Consequently, when the Award contained decisions on these matters, the Award should be set aside under s 37. Alternatively, it should be set aside under s 42 if the questions of law identified were answered in the Plaintiff's favour. The Defendant's argument was that this was a case of application of the law to the facts; and a case of the same questions of law that arose in the arbitral proceedings being reposed in this High Court proceedings; both of which do not meet the requirements of ss 37 and 42 of the Act. In the second case, the Defendant, under s 38 of the Act, applied to recognize the same Award as binding and to enforce the same as an order of the High Court. The single issue in the instant case was whether in dealing with the dispute under ss 26 and 27 of the LA and finally determining and allowing the Defendant's claim on the basis that the requirements of these provisions have been met, did the Award contain a decision on a matter beyond the scope of the submission to arbitration; or did the Award deal with a dispute which was not contemplated by or not falling within the terms of the submission to arbitration.

Held, Plaintiff's application to set aside the Award allowed with costs and dismissing the Defendant's application.

- (1) In the instant case the Court was concerned that the term "postponement" of limitation period was used in the case of acknowledgment. The term "postponement" is used only in two contexts, where the potential claimant or plaintiff is a person with incapacity where time is extended; or where there is fraud or mistake where time is postponed. It is only in these two scenarios that limitation period is properly addressed as being "extended" or "postponed". This is clear from a reading of ss 24 and 29 of the LA. Otherwise, time continues to run.
- (2) The Court found merit with the reasons advanced by the Plaintiff for claiming that the POD was not an acknowledgment of the Defendant's claim. These reasons were, *inter alia*, the POD was filed in respect of amounts due under the certificates issued under the main contract between the Employer and the Plaintiff. That main contract was a separate contract from the sub-contracts. Furthermore, the POD was not filed in respect of the sums due under the sub-contract but sums due under the main contract.
- (3) The Arbitrator had clearly overlooked the vital requirement that the written acknowledgement must be by the Plaintiff to the Defendant and no one else. Any third party or person merely steps into the shoes of these persons and must be the authorized representatives or agents of these same principal parties. That person or third party to whom the Plaintiff

filed the POD was not an agent of the Defendant's and could never be so construed even in the wildest and most liberal sense.

- (4) Since the record showed that the matter of acknowledgment under ss 26 and 27 of the LA only came up at the time of submissions in the arbitration, the Plaintiff's application to set aside the Award fell within the ground complained of by the Plaintiff, especially that the jurisdiction of the Arbitrator did not include or involve him dealing with the alternative ground (ie in relation to whether there had been a postponement of the limitation period pursuant to subsection 26(2)) or plea of acknowledgment. When the Arbitrator did so, he was certainly in excess of jurisdiction of the matters in dispute and referred to him for determination. There was a new difference between the dispute referred and the dispute that he was finally determining.
- (5) Although the sum stipulated in the POD may have included the Defendant's claim and while the Plaintiff's witness may have agreed that the Defendant's claim was included in the Plaintiff's claim with the Employer, that was a long way from being an acknowledgment within the operation of ss 26 and 27 of the LA such as to give a fresh lease or right of action.
- (6) What the Arbitrator did was to treat the matters identified as amounting to acknowledgment. The learned Arbitrator could not do that and was not entitled to do so to begin with. He had got the principles of law under ss 26 and 27 of the Limitation Act 1953 wrong. His interpretation and construction of these provisions were not only erroneous but not countenanced in law. In fact, by doing so the Arbitrator had exceeded his jurisdiction. Such decision had substantially affected the interests of the Plaintiff from a claim which should remain dismissed as was already initially decided by the Arbitrator to one which was allowed. Such a decision was clearly wrong.

Subang Skypark Sdn Bhd v Arcradius Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C(ARB)-17-03/2015
MARY LIM THIAM SUAN J
15 APRIL 2015

[2016] 1 CIDB-CLR 291

The Plaintiff had employed the Defendant to carry out renovation works at the Sultan Abdul Aziz Shah, Subang (“the works contract”). The Defendant’s last three claims under three certificates were certified by the architect and accepted by the Plaintiff, but remained unpaid. The Defendant served a payment claim in respect of the three certificates on the Plaintiff, pursuant to the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). The Plaintiff issued a payment response dated 26 June 2014 where it disputed the Defendant’s claim on the ground that the Plaintiff had a valid LAD claim against the Defendant for late completion of the works. A Certificate of Non-Completion dated 4 March 2010 was produced in support of the Plaintiff’s contention. In its Adjudication Claim (and later in its Adjudication Reply), aside from justifying its right to the sum claimed, the Defendant relied on cl 23.1 of the underlying contract to support its contention that the Plaintiff had no right of set-off available for the LAD claim. In a Corrected Adjudication Decision published on 26 February 2015, the Defendant’s claim was allowed whereas the Plaintiff’s cross-claim for the LAD was dismissed. The Defendant had also initiated arbitration proceedings concurrently, with the Plaintiff issuing a Cross Notice of Arbitration. The Defendant not only claimed for the same sum that was claimed in the adjudication claim, it was claimed on the same basis. The Defendant went on to challenge *inter alia* the Plaintiff’s Notice of Non-Completion, that it was the Plaintiff who was in delay; and that it was the Plaintiff who was in breach of the Works Contract. In its Defence and Counterclaim, the Plaintiff not only claimed for the LAD, it also alluded to deliberations between the parties which led to the parties agreeing “to forego their respective claims/potential claims against each other and to put this entire matter behind them”. The Plaintiff claimed that the reason why there was no payment of the three certificates was because the parties had supposedly reached some compromise when the Plaintiff had presented its own LAD claim on the Defendant. The parties had supposedly decided not to pursue their respective claims. Hence, the Defendant’s adjudication claim came as a surprise. The Plaintiff saw that as evidence of the Defendant reneging on its agreement. Consequently, the Plaintiff decided to pursue the LAD claim and the arbitration was fixed for hearing. The Defendant subsequently issued a notice under s 218 of the Companies Act 1965 to enforce the adjudication decision and collect on monies awarded to the Defendant. The Plaintiff thus applied for a stay of all enforcement or execution of proceedings in respect of the adjudication decision corrected and published

on 26 February 2015 until the final determination of arbitration proceedings between the parties under s 16(1)(b) of CIPAA and/or inherent powers of the Court pursuant to O 92 of the Rules of Court 2012 and/or pursuant to cl 35.4 of the works contract. The Plaintiff relied on cl 35.4; that because there was reference to arbitration, the adjudication decision was not final and binding and could not be enforced.

Held, dismissing the application:

- (1) Neither the Plaintiff nor Defendant referred the adjudication decision to arbitration. What was referred was the dispute between the parties on the claims and LAD. Clause 35.4 was only properly invoked where the adjudication decision was itself disputed; and then that dispute is referred to arbitration. Since that was not how the present arbitration was initiated, cl 35.4 was simply not engaged. The dispute which was before the arbitral tribunal was pursuant to cl 35.1 and cl 35.5.
- (2) From a reading of s 16 of CIPAA, it would appear that an application for a stay of the adjudication decision and thereby the enforcement of the adjudication decision may only be initiated in somewhat limited circumstances. First, where there is an application to set aside the adjudication decision under s 15; or second, where there are concurrent proceedings on the same subject matter before either arbitration or the Court.
- (3) Although s 16 of CIPAA refers to a stay of the adjudication decision, in effect it is a stay of the enforcement of the adjudication decision. Without such a stay, it would be open to the successful claimant to take the appropriate enforcement actions available as s 28 clearly provides that an adjudication decision may be enforced as if it is a judgment or order of the High Court.
- (4) Being in arbitration merely puts the Plaintiff's case as one within s 16 for consideration; or one which has crossed the threshold. The existence of concurrent proceedings merely prequalifies the Plaintiff for this application. At all times, the Court retains the discretion as to whether or not to grant a stay and that is obvious from the language and terms of s 16. In fact, subsection 16(2) vests the Court with discretion whether to grant the stay sought; whether to order the adjudicated amount or part of it to be deposited with the Director of KLRCA; or make any other order as the Court thinks fit. Upon overcoming the threshold set in subsection 16(1), the Plaintiff still has to show how the discretion is to be exercised in its favour.
- (5) In the exercise of discretion of whether to grant the stay or make an order for payment to the Director of KLRCA, the Court would have to weigh into play in a fairly extensive way, the object of CIPAA; and that it was for a speedy disposal of a payment dispute. This was regardless of the fact that this was a payment dispute that arose in the final days of the construction

contract, a point which the parties appear to have had no issue with and there was no challenge in this respect anyway. Having gone through the hoops of adjudication, there was now a decision in the Defendant's favour. The Court was of the view that the Defendant should not be deprived of the very benefit of why it resorted to adjudication in the first place; save if satisfactory reasons were present for a stay of that adjudication decision.

- (6) Stay should only be granted in exceptional circumstances; and such circumstances must necessarily refer to the financial status of the other party. The merits of the case before the arbitration or the Court; or even the chances of success in setting aside the adjudication decision are not relevant considerations. The grant of any stay would always weigh in the primary object of CIPAA 2012; that it was to ensure a speedy resolution of a payment dispute; that it was to inject much needed cashflow into the contractual arrangements between parties that saw progressive payments of claims as the recognised and accepted way of doing business in construction contracts. It would be futile to encourage parties to resort to adjudication and then deprive a successful claimant of its claim by staying the access to the cash simply because there was another proceeding of the nature described in subsection 16(1) which was pending. The whole concept of temporary finality would be lost and the object of the Act defeated if such was the consideration.

**Synergy Power Manufacturing Sdn Bhd v
Ketua Setiausaha Kementerian Kemajuan Luar
Bandar Dan Wilayah & Anor**

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 21C-1-03-2014
MARY LIM THIAM SUAN J
7 JANUARY 2015

[2016] 1 CIDB-CLR 294

The Plaintiff manufactured wind turbines and remote area power systems. The Plaintiff entered into a formal written contract with the Defendants to *inter alia*, install, test and commission a hybrid system in four (4) villages in Sabah and Sarawak. The contract comprised several other documents such as minutes of meetings and Terms of Reference (“TOR”) between the parties. The parties fell into dispute over the last leg of the execution of the contract in respect of the testing and commissioning of the system the Plaintiff had installed. The Plaintiff argued that it had passed all the necessary testing and commissioning and was entitled to the balance and retention sums remaining but the Defendants contended otherwise. The parties agreed to the disposal of the case upon the determination of the following question: whether the testing and commissioning which was conducted by the Plaintiff complied or fulfilled the requirements or terms and conditions of the TOR and terms of the said contract.

Held, dismissing the Plaintiff’s claim with costs:

- (1) Article 4 of the contract provided for the reading of several documents as comprising the contractual arrangements between the parties. The Court would therefore read and construe all the documents as a whole in order to understand the intention of the parties. The Court would also construe those documents “according to its sense and meaning as collected from the words used in it, which are to be understood in their plain and ordinary meaning”.
- (2) The various reports prepared by both parties showed that careful and controlled tests were conducted in the presence of both parties. The Reports also indicated that the Plaintiff’s hybrid system had failed. This was also the view of the Plaintiff’s own Consultant who in the various reports had used language that was extremely cautious, guarded and never unreserved or unequivocal.
- (3) The Plaintiff had failed to comply with the terms and conditions of the TOR and the said contract as it had failed the various tests carried out. The fact that the Plaintiff had to carry out so many tests is in itself evidence that the first of the tests had failed, requiring further tests.

- (4) It was apparent from the trail of correspondence exchanged between the parties that the matter of the testing and commissioning under the terms of the said contract remained unfulfilled. It was not enough that a system worked on papers, it had to work on the scale ordered. Hence, the requirement for testing and commissioning. With the abundance of records reflecting the numerous failures, most critical of which was that concerning the sources of energy, the conditions of the TOR and the said contract had simply not been met. In the instant case, the Plaintiff had not discharged its burden of proving its case on a balance of probabilities.

**Teik Huat Farming Sdn Bhd & Ors v
Megat Ahmad Shahrani Sdn Bhd & Ors**

HIGH COURT, IPOH
CIVIL SUIT NO: 22 (NCVC)-88-08-2014
SM KOMATHY SUPPIAH JC
10 SEPTEMBER 2015

[2016] 1 CIDB-CLR 296

The Plaintiffs, were prawn breeders whose farms were located along a river. The First Defendant, was a contractor appointed by the Second Defendant to construct a bridge. The First Defendant's sub-contractor was granted permission by the Drainage and Irrigation Department ("JPS") to erect a temporary bund ("the bund") across a river to facilitate the construction of the bridge, on the condition that the bund would not obstruct the natural flow of the river. The Third Defendant (the Government of Malaysia) was the Second Defendant's employer. A continuous and heavy rainfall caused the river to burst its banks and flood the Plaintiffs prawn farms, which were located upstream from the bund. The Plaintiffs commenced claims in negligence, nuisance and strict liability against the Defendants for damages for the losses they suffered owing to the flood. They alleged that the flood was due to the Defendants negligence in constructing the temporary bund, thereby blocking the free flow of water. Alternatively, it was pleaded that the culverts placed in the temporary bund were of inadequate capacity to provide a passage way for the flow of water, thereby causing the floods. There was serious conflict of expert evidence as to the cause of the flood. The Plaintiffs' expert claimed that the bund and the inadequate size of the culvert placed in the bund were the immediate causes for the flooding, while the Defendants' expert opined that it was due to exceptionally heavy rain and the occurrence of high tide in the river, downstream from the bund. Both however agreed that if the flood had covered the area downstream from the bund, it would indicate that the bund was not the cause for the flooding. The issues that arose for the High Court's determination were: (i) whether there was sufficient proximity between the Second and Third Defendants and the Plaintiffs for a duty of care to arise; (ii) whether the flooding was caused by the bund and/or culvert; (iii) whether the Defendants could rely on the defence of *volenti non fit injuria*; and (iv) damages to be awarded to the Plaintiffs if the answer to question (ii) above was affirmative and the answer to question (iii) above was negative.

Held, allowing the Plaintiffs claim with costs:

- (1) The First Defendant's work had been strictly supervised by the Second Defendant and the latter's resident engineer, who had the power to order the First Defendant to stop work. He had also calculated the size

of the culverts and confirmed that they were adequate to deal with heavy rainfall. There was therefore sufficient proximity between the Second and Third Defendants and the Plaintiffs so as to give rise to a duty of care.

- (2) The tidal readings negated the Defendant's allegation that the flood occurred during high tide. In the instant case, it was found that the area downstream from the bund did not flood. It was common ground that the culverts must have the capacity to carry heavy rainfall going into the river. However, the culverts failed to meet even the five-year annual rainfall intensity flood criteria as they were inadequate for containing daily rainfall. Evidence indicated that flooding would not have occurred had the river been left in its natural-state, i.e. without the restriction of the bund and its inadequately sized culvert. Evidence furthermore indicated that there was no exceptional rainfall as alleged by the Defendants.
- (3) It was claimed by the Defendants that the land used by the Plaintiffs for prawn farming had been designated for oil palm planting, which would not have been affected in the event of flooding. The Court found that the concept of *volenti non fit injuria* had no application to the facts of the instant case as the prawn farms had been operating for many years without incident, until the bund was constructed by the Defendants. The Plaintiffs had never consented to the creation of the bund but had opposed it. The evidence also demonstrated that the lands along the river were suitable for both oil palm planting and prawn farming. Furthermore, the maxim was never pleaded by the First Defendant as a defence and nor was it an agreed issue for trial.
- (4) The Plaintiffs claimed to have suffered, *inter alia*, a loss of profits, which was in essence a claim for the revenue that they would have earned if not for the flood. They contended that the expenses incurred in generating the revenue need not be deducted in determining the gross profit due to them. The Court, however, found this to be untenable, following the principle laid down in *Anglia Television Ltd v Reed* [1971] 3 All ER 690, which propounded that a Plaintiff can either claim for loss of profits or for wasted expenditure but he must elect between them, and cannot claim both. The Plaintiffs, furthermore in the instant case failed to discharge their burden of proving both the fact of damage and the amount of damage suffered. Therefore, the Court granted only nominal damages to the Plaintiffs.
- (5) The Court disallowed the Plaintiff's claim for exemplary damages, as construction of the bund was neither oppressive nor arbitrary or an unconstitutional action by the Government. Its purpose was to connect two villages for the convenience of residents in the area, not to cause hardship and inconvenience to the prawn breeders.

- (6) The Court found the bund to be a potential nuisance which became an actual and actionable nuisance by reason of the culvert placed in the bund not meeting even the five-year annual rainfall intensity flood criteria. It was inadequate to carry the rain water and diverted it on to the Plaintiffs' land.
- (7) The liability to pay damages under the Waters Act 1920 was one of strict liability. The First Defendant was liable to the Plaintiffs for the damage suffered by them as a result of the construction of the bund. Section 17 of the Act imposed liability on both the Second and Third Defendants, as the employer of the First Defendant, to pay for the damage occasioned by the negligence of the First Defendant.

UBA Urus Bina Asia Sdn Bhd v Quirk & Associates Sdn Bhd & Anor

HIGH COURT, KUALA LUMPUR
CIVIL APPEAL NO: 13C-1-11/2015
DATO' MARY LIM THIAM SUAN J
9 DECEMBER 2015

[2016] 1 CIDB-CLR 299

The Plaintiff was appointed by the First Defendant to carry out certain renovation and/or interior fit out works (“the works”) on the premises of the Second Defendant. The First Defendant was the Second Defendant’s consultant in relation to the works. The Plaintiff brought an action claiming outstanding monies from works done. The Second Defendant filed an application in the Sessions Court seeking, *inter alia*, an order for a stay of the proceedings in Court pursuant to s 10 of the Arbitration Act 2005 (“the Act”). The application was opposed by both the First Defendant and the Plaintiff. The Plaintiff subsequently withdrew its claim against the First Defendant. On 30 September 2015, the Court granted an order of stay with costs. On 13 October 2015, the Court directed that the Second Defendant: (i) refer the matter to arbitration; and (ii) file an affidavit at every upcoming case management to update the Court on the steps taken towards arbitrating the matter. On 5 November 2015, the Sessions Court ordered that the Second Defendant carry out the abovementioned directions within 7 days from the date of this order, failing which the Second Defendant would be presumed to have abandoned its right to refer to arbitration and would then have to file its defence. The Second Defendant subsequently requested the High Court to invoke its civil powers of revision under ss 32 and 35 of the Courts of Judicature Act 1964 to address the “miscarriage of justice” purportedly perpetrated by the Sessions Court. It argued that the Sessions Court’s directions would render the stay order nugatory in effect as: (a) the stay was not made conditional upon arbitration being on foot, proposed or brought; once the order had been perfected, the Defendant had nothing left to do; (b) the Sessions Court could only impose conditions at the time the order was made staying the proceedings; (c) once the stay order had been perfected, the Court was *functus officio*; (d) as the Court was *functus officio*, no further order could be made nor direction given. Furthermore the Second Defendant argued that any condition that it refer the matter to arbitration was invalid.

Held, all orders of the Sessions Court made after 30 September 2015 set aside

- (1) When an order for stay is granted under s 10 of the Act, it is not to say that the Court has no jurisdiction to hear the dispute in the first place for the Court has that jurisdiction. It, however, declines to do so only because it has chosen to give effect to the parties’ agreement to arbitrate

their disputes. Hence, the words “refer the parties to arbitration” under s 10(1). By that agreement to arbitrate, or the arbitration agreement, the parties have made their choice of forum resolution of dispute and that’s the basic concept behind party autonomy. In short, there is an agreement to arbitrate rather than agreement to litigate. When the Court grants an order of stay, the order is not dependent on arbitration or arbitration proceedings being afoot, proposed or brought; it is dependent on the very existence of an agreement to arbitrate.

- (2) In the present case, at the material time of making the order of stay, the Sessions Court did not deem it fit to impose any terms or conditions to the order. If the Court was of the view that conditions or terms should be imposed under subsection 10(2) of the Act, such terms or conditions should be imposed at the time the order of stay was granted. Once that order of stay under subsection 10(1) had been made, and the order had been sealed or perfected; there was nothing left before the Court. The Sessions Court was clearly *functus officio*. The Court should not concern itself nor should it need to concern itself with the mechanism or details of the procedure behind that reference to arbitration. That was left entirely to the parties.
- (3) Since, the order of stay of the Sessions Court dated 30 September 2015 was a complete order granted with no other terms except an order as to costs, the directions and decisions of the Court given subsequent to that date, especially on 5 November 2015, whether under subsection 10(2) of the Act or otherwise, were clearly wrong and invalid and were not appealable given that they did not form part of that order of 30 September.
- (4) The Sessions Court orders to the Second Defendant to refer the matter to arbitration failing which it would be taken as having abandoned its right to refer to arbitration and then to file a defence, were highly improper orders as the Court had ceased to have jurisdiction. Such subsequent orders had indeed worked substantial injustice to the Second Defendant. This was therefore an appropriate case for the High Court to exercise its revisionary powers and prevent substantial injustice. Once the order of the Court granted on 30 September 2015 was perfected, the Sessions Court was *functus officio*. The Sessions Court had no power to revisit its earlier order for any reason, especially for the purpose of changing the order that was properly made after hearing the parties.

View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd

HIGH COURT, KUALA LUMPUR
ORIGINATING SUMMONS NO: 24C-21-06/2015
DATO' MARY LIM THIAM SUAN J
11 SEPTEMBER 2015

[2016] 1 CIDB-CLR 301

View Esteem was a developer of a project to build service apartments (“the project”). It appointed Bina Puri to construct and complete the project *vide* letter of award dated 10 September 2009 (“the construction contract”). Disputes arose between the parties which resulted in Bina Puri filing a suit on 30 May 2012 (“the 405 Suit”) claiming a sum of RM12,860,689.02 under Interim Certificates Nos 23–26R issued by the Quantity Surveyor (“QS”) and certified by the Architect. Summary judgment was entered on a substantial part of that claim with the balance or a sum of RM4,050,919.15 under Certificate No. 26R ordered to be referred to arbitration. This decision of the High Court was affirmed on appeal. Subsequently, Bina Puri served a Payment Claim pursuant to s 5 of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) in respect of Progress Claim No 28 for the payment of a sum of RM23,842,507.28 together with interest. View Esteem disputed the claim, following which Bina Puri referred the dispute to adjudication. The Adjudicator allowed Bina Puri’s claim and awarded a total sum of RM15,459,856.06 with interest and costs. View Esteem had raised, *inter alia*, in the adjudication proceedings a jurisdictional challenge under s 41 of the CIPAA (“s 41 challenge”), which was dismissed by the Adjudicator. In the first case before the High Court, View Esteem sought, *inter alia*, an order that the adjudication proceedings be declared null and void for want of jurisdiction (“the s 41 challenge”). View Esteem submitted that since the two sets of claims in the two proceedings, ie Progress Claim No 28 (“PC 28”) under the adjudication proceedings and Progress Claims Nos 23 to 26R under the 405 Suit were “the same” or “nearly identical, s 41 of CIPAA operated to save the payment dispute in question from coming under the operation of the Act. In short, CIPAA 2012 was inapplicable to the payment dispute which was referred to adjudication and therefore the Adjudicator had no jurisdiction to hear the adjudication claim. In the second case, Bina Puri sought an order for enforcement of the adjudication decision under s 28 of the CIPAA (“the enforcement application”), whereas in the third case, View Esteem sought to set aside the adjudication decision under s 15 of the CIPAA, alternatively to stay the adjudication decision under s 16 (“setting aside and stay applications”). View Esteem submitted that there were serious errors in the adjudication decision related to Bina Puri’s jurisdictional challenge (the challenge was that three of the items/matters in the counterclaims and/or set-offs filed by View Esteem in its Adjudication Response were not raised or even referred to in its Payment Response) that warranted the intervention of the

Court. The Adjudicator had accepted Bina Puri's jurisdictional challenge and thereby excluded View Esteem's three additional matters from the adjudication proceedings. View Esteem thus contended that the Adjudicator had acted in excess of his jurisdiction by depriving View Esteem of its right to be heard on its claim to set-off or matters pertaining to it. The Adjudicator's decision was thereby alleged to have occasioned a breach of natural justice and should be set aside.

Held, dismissing View Esteem's applications with costs but allowing Bina Puri's application for enforcement

- (1) At the time of the 405 Suit, the matters or claims which formed the basis of the adjudication proceedings, which is PC 28, were not even in existence. Hence, there was no basis for View Esteem's complaint.
- (2) The intent behind s 41 of CIPAA was to preserve the law on payment disputes which are already pending in Court or arbitration; and not on all payment disputes. Since the two payment disputes were distinctly different, s 41 did not apply. The adjudication proceedings were not in respect of interim certificates Nos 23 to 26R. Put another way, the 405 Suit was not about PC 28.
- (3) Section 41 of the CIPAA, being a savings provision, sought to save those "proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act", from the operation of the Act. For those payment disputes which had been commenced in Court or arbitration, the old law will continue to apply or operate. Now, in order for the old law to continue to apply or operate, the proceedings which had been commenced must logically, still be pending completion. Otherwise, there would be no need for such a provision in the first place. In the instant case, the 405 Suit had already been completed with the order of summary judgment and an order of stay. In fact, even the appeal against the decision had also been disposed of. There was therefore nothing "pending" determination before the Court. Nothing had also been done in relation to the reference to arbitration, ie, that nothing has since been commenced. That being the case, there was nothing to bring s 41 into invocation.
- (4) View Esteem could easily have brought up the three additional responses or matters in its Payment Response; but it chose not to. Having exercised that option, it was not open to View Esteem to now complain.
- (5) The Court found no merit in View Esteem's arguments that the adjudication decision and interpretation was invalid by reason of paragraph 15(d) read together with paragraphs 15(b) and (c) of the CIPAA. The Adjudicator was perfectly entitled to have made the decision that he did. That was precisely what sub-s 27(1) of the CIPAA required of the Adjudicator.

- (6) It may be said that by virtue of subsection 27(1) of the CIPAA, the Payment Claim and the Payment Response was to adjudication what pleadings were to civil litigation. Parties were bound by their pleadings under the rules of procedure in civil litigation; in adjudication, those “pleadings” were to be found in the Payment Claim and the Payment Response; and not in the Adjudication Claim, Adjudication Response or the Adjudication Reply.
- (7) Not every instance of denial of natural justice or complaint of unequal treatment warrants intervention of the Court under s 15 of CIPAA. The breach or matter complained of must be material. Adjudication decisions are meant to be complied with and it is only in the plainest of cases where the Adjudicator has not decided the dispute referred or the manner in which he has set about determining the dispute is manifestly unfair and unjust that the Court should wade in to interfere. This was the right approach to adopt in relation to s 15.
- (8) An Adjudicator’s responsibility was to determine if the payment or adjudication claim before them was genuine and has basis; or whether the payment or adjudication response was more believable. Their task was, as expressed by the English Court of Appeal in *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWHC 778, “not to act as arbitrator or judge”. The Adjudicator did not have to get the “correct” or “right” answer. What the Adjudicator had to do was to give an answer within the time prescribed. That answer would be good for the interim period until the parties either accepted that answer as settling the dispute; or until an arbitration award or a Court judgment finally decided the matter. Pending that finality, the adjudication answer or decision was binding and must be complied with. In the instant case, applying these principles, the Court did not find View Esteem’s allegations to be of merit.
- (9) The Adjudicator in the instant case had methodically, systematically and carefully identified the issues raised by both parties, heard and evaluated the arguments, the evidence, the law; weighing each of them before he made his findings and drew his conclusions in measured tones. His considerations were also proper and mature. He may have appeared to treat hearsay inconsistently but it was not fatal since the Evidence Act 1950 [Act 56] did not apply to adjudication proceedings under the CIPAA as stated in subsection 12(9) of CIPAA. In any case, each issue took into account views and evidence led by both parties and the submissions made by both legal counsels. The issues identified and considered were highly appropriate to the dispute and the determination by the Adjudicator was well within his mandate and powers given by the parties under ss 5 and 6; read with s 12. Consequently, View Esteem’s application under s 15 was dismissed.

- (10) View Esteem's application to stay the enforcement of the adjudication decision on the basis that there was pending arbitration proceedings was found to be without merit by the Court and dismissed. To accede to View Esteem's application without more would have the likely effect of rendering meaningless the whole scheme of adjudication. Adjudication was intended to provide provisional finality to a payment dispute. It was provisional till the final determination of the payment dispute by arbitration together with other disputes that the parties have. If the mere initiation of the arbitration process was enough to warrant a grant a stay of the execution of the adjudication decision, it was more likely to be open to abuse for an unhappy party can simply issue a notice of arbitration and sit back and do nothing. Meanwhile, the cash flow problem would persist and the whole objective behind establishing the adjudication regime would be stymied or stupefied by tactical manoeuvres. There must be a real and convincing case for the Court's intervention. Stay should not be readily granted if the effect was to push a successful party in an adjudication *"over the financial precipice"*.
- (11) Since View Esteem's applications stood dismissed, Bina Puri's application for enforcement of the adjudication decision under s 28 of the CIPAA was accordingly allowed.

Wong Brothers' Building Construction v Taman Equine (M) Sdn Bhd & Ors

HIGH COURT, SHAH ALAM
CASE NO: 22C-10-05/2014
SEE MEE CHUN J
5 JUNE 2015

[2016] 1 CIDB-CLR 305

The First and Second Defendants appointed the Plaintiff as a contractor for the construction and completion of several projects. The Plaintiff claimed for the cost of the Second Project, which involved “building and improving” Lots 27 and 28. The Second Project was done based on the instructions of D3 - who was at the material time the director, executive chairman or “boss” of the First and Second Defendants - given to the Plaintiff sometime in 2004. Lots 27 and 28 were owned by the First Defendant but was used as the private residence of D3, in respect of which D3 was given a licence to “do whatever he wished” on the property, except to sell it. The Lots were surrendered back to the First Defendant upon D3’s resignation on 10 October 2008. The First and Second Defendants argued that the Second Project was a private arrangement between the Plaintiff and D3 for which a company named Subur Ehsan (“Subur”) owned by D3 ought to be liable. The main issue before the Court was whether the First and Second Defendants were liable to pay for the Second Project.

Held, allowing the Plaintiff’s claim with costs:

- (1) The standing of D3 in the company as one who managed and ran the companies, the decision maker and practically the “number one guy” was such that any instruction from him would amount to coming from the First and Second Defendants and binding on them. The fact of D3 being allowed to occupy Lots 27 and 28 by the First Defendant showed it to be used by D3 in his capacity as Chairman and director, more so when D3 surrendered Lots 27 and 28 back to the First Defendant upon his resignation on 10 October 2008.
- (2) The evidence showed that the First and Second Defendants were aware of D3’s instructions to the Plaintiff to renovate Lots 27 and 28 and they never objected to it. The First and Second Defendants had taken on the responsibility for payment and only objected in 2010 - a good 6 years after D3’s instruction in 2004 and after D3 had left the First and Second Defendants. The fact that the First and Second Defendants had not agreed to the claim by not recording it in their books was their internal procedure. DW2 (the Financial Controller) had confirmed the claims had been sent to the architect and QS (Quantity Surveyor).

- (3) The evidence showed it to be an appropriate case for the application of the rule in *Royal British Bank v. Turquand* [1843–60] All ER Rep 435 where outsiders dealing in good faith with a company are not affected by any irregularities which may take place in the management of the company. In the instant case, the Plaintiff had received instructions from D3 who was practically the “number one 1 guy” or at the very least of very high rank, such as the Chairman, director and person managing the companies. The First and Second Defendants knew of the renovations and never objected to the works until after D3 had ceased to be in the companies - and even then - 2 years after his resignation.
- (4) Although it was contended by the First and Second Defendants that Subur ought to be held liable as the Plaintiff had sent its claims to Subur, the evidence showed that the Plaintiff had sent letters to Subur on the First and Second Defendants’ instructions. The Plaintiff had in fact been sending its claims to the First Defendant, which was consistent with its position that the First and Second Defendants were liable. It was only when asked by Defendants to send the claim to Subur did it do so. The letters to Subur without more did not render Subur liable for the renovation work.

Wong Chin Chaw v Sri Melinger Sdn Bhd

HIGH COURT, KUALA LUMPUR
CIVIL SUIT NO: 22 (NCVC)-1019-09/2012
YEOH WEE SIAM J
16 OCTOBER 2015

[2016] 1 CIDB-CLR 307

In 2004, the Defendant appointed the Plaintiff as its civil and structural consulting engineer for a project ("the project"). The Plaintiff accepted in an agreement to work on four blocks of developments ("the first agreement"). An alternative proposal was suggested by the Defendant's main contractor, to which the Defendant agreed. A second agreement was then made between the Defendant and Plaintiff ("the second agreement"). Disputes took place between both parties during the period the Plaintiff executed these agreements. In 2007, the Defendant issued a letter for immediate termination of the Plaintiff's services for one of its development blocks, with both parties agreeing that the Plaintiff continue work on the remaining three blocks. In 2009, the Plaintiff resigned from its role as engineer for the project. The Defendant then appointed another engineer from Jurutera Perunding Bersama Sdn Bhd ("JPB") to conduct a review and inspection of the Plaintiff's work on a certain set of walls ("the walls"). In 2010, a final report declared that the Plaintiff had breached the agreement, after which the Defendant engaged a contractor to repair the walls. In 2011, the Defendant appointed Jurutera Perunding Majucipta Sdn Bhd ("PMC") to conduct a review and inspection for work done by the Plaintiff on roads and drains. PMC thereafter submitted an engineering report stating that the Plaintiff was in breach of the agreement. At the time of the Plaintiff's resignation, the Plaintiff had worked on one block of the said development ("Block A") and had obtained a certificate of fitness for occupation from Dewan Bandaraya Kuala Lumpur ("DBKL"). The Defendant had paid the Plaintiff RM332,262.98 to date, less than the sum originally agreed upon. The Plaintiff sought claims for the following: (i) the sum for his professional services in constructing Block A; (ii) the sum for his professional services in checking the alternative proposal; (iii) the sum for infrastructure work conducted on the remaining three blocks of the project; (iv) interest and costs. The Defendant made a counterclaim for the following: (i) the sum spent on rectification and materials testing of the walls, roads and drains; (ii) respective sums for the professional fees paid to JPB and PMC; (iii) the sum for the built survey; (iv) the sum of the advertisement fee for rectification work; (v) general damages; (vi) interest and costs. On the first day of trial, both parties requested a postponement. This was granted by the Court, as both parties agreed to record a consent order ("the consent order") for the appointment of a court expert of their choice, based on terms of reference made by both parties. Both agreed to be bound by the court expert's findings, and to subsequently settle the Plaintiff's claim and Defendant's counterclaim. The

court expert was to prepare a report advising the Court on disputes arising over the work conducted on the wall, roads and drains. He was also to advise the Court on liability and quantum where necessary. Thereafter, the court expert submitted a report ("the first report"), after which both parties called for him to be cross-examined for purposes of clarification. The court expert then submitted a revised report ("the revised report"). Both parties sought to recall the court expert for further clarification, but the court expert ultimately maintained his position in the revised report. As the consent order bound both parties to the court expert's findings, this meant that the revised report would facilitate their entering into a consent judgment. However, the Defendant strongly disputed the revised report on several points. The Court thus considered the issue in light of both reports by the court expert, accompanied by the submissions of both parties, as neither had called for additional witnesses to testify on their behalf. The Court was to determine the Plaintiff's claim and the Defendant's counterclaim. Where no legal issue arose, the court expert's findings would prevail. Where legal issues arose, the Court would make a decision together with the court expert's findings.

Held, allowing the Plaintiff's claim and partially allowing the Defendant's counterclaim:

- (1) As regards the Plaintiff's claim, no challenge was issued by the Defendant and no finding or recommendation was made by the court expert. The Plaintiff's claim is thus allowed.
- (2) As regards the Defendant's counterclaim, there are several heads of claim to address. In relation to rectification work done on the walls, the court expert noted that the contractor appointed by the Defendant was not reasonable in charging for its services. Costs for remedial works other than the necessary were also included. The Defendant can thus claim only a lesser amount from the Plaintiff under this head of claim.
- (3) In relation to rectification work done on the roads and drains, the court expert found the contractor's fees to be reasonable, with some deductions. While the Defendant brought a counterclaim against the Plaintiff only, the Court found it unjust for the Plaintiff to fully bear liability as it should be borne between Plaintiff and Architect. However, the Court made a decision in relation to only the Plaintiff and not the Architect, as the Defendant did not bring proceedings against the Architect. That should be a separate matter altogether.
- (4) As regards professional fees for the walls, the court expert was correct in not fully adhering to the scale of fees due to the nature of work in this case. The Defendant's claim on this head was unreasonably high and a recommended amount was prescribed by the court expert. This was to be paid by the Plaintiff to the Defendant.

- (5) As regards the testing fee, the Defendant's claim was overly extensive as the quality of concrete in question was in compliance. The claim was therefore not allowed.
- (6) As regards the professional consultancy fee, the Defendant claimed far more than it was entitled to. The court expert was of the opinion that the current amount was reasonable and the Court found no reason for the Defendant to dispute this.
- (7) As regards the materials testing fee, the court expert found this claim invalid as the said materials were extraneous and bore no relation to the crux of this dispute. The Defendant's claim on this point was thus not allowed.
- (8) As regards the built survey fee, the claim was allowed.
- (9) As regards the advertisement fee, the claim was allowed for the walls, but not for the roads and drains. The Plaintiff did not dispute this.
- (10) Upon consideration of all the Defendant's claims, the Court awarded general damages of RM25,000.00 to the Defendant for damage caused by the Plaintiff in the course of his work.
- (11) The Court forbade any costs for the Defendant against the Plaintiff. The consent order and minutes of trial showed that the bulk of costs were incurred by the Defendant's disputes over the court expert's reports. The authority of *Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors* is noted that an expert's decision is binding on the parties where that was what was mutually decided between them, and especially so where the expert's decision was made in accordance with the terms of the consent order. Such was the case here.
- (12) The Court found that the court expert had not made any erroneous assessments in the present case. The Defendant, however, evidently did not wish to be bound by the court expert's findings. Furthermore, the Defendant failed to abide by the terms of the consent order and the clarifications made during cross-examination with the court expert. As such, the Defendant should not be compensated with any costs for its counterclaim. The Court ordered the Defendant to pay the Plaintiff costs of RM10,000.00 with regard to its counterclaim.
- (13) Costs for the court expert should be borne equally by both parties.

X-treme Engineering Sdn Bhd v Initial-T Engineering Consultancy Sdn Bhd

HIGH COURT, SHAH ALAM
CIVIL SUIT NO: 22C-09-05/2014
SEE MEE CHUN J
30 SEPTEMBER 2015

[2016] 1 CIDB-CLR 310

The Plaintiff was a contractor appointed by a company ("Paragon") to design and build for a project. The Defendant was a firm of consulting engineers, which the Plaintiff engaged to prepare an alternative design plan. The original engineer for this project was a company named EDP ("EDP"). Two alternative design plans were made by the Defendant, in June ("the June endorsement plan") and in October ("the October endorsement plan"). The Plaintiff brought a claim for negligence against the Defendant, where the Plaintiff relied on *res ipsa loquitur*, claiming that the June endorsement plan was defective, thus creating the need for the October endorsement plan to be prepared, with a difference in piling load. The Defendant denied any defect in the June endorsement plan, explaining that the different piling load in the October endorsement plan was due to a change from non suspended lower floor to a suspended and additional mezzanine floor and other changes. The evidence of the expert witnesses called by both the Plaintiff and Defendant differed in relation to whether the increase of piling load in the October endorsement plan was justified. The Court had to consider, *inter alia*, whether: (1) the percentage of piling load attributed to the aforementioned changes amounted to negligence on the part of Defendant; (2) the Plaintiff required EDP's approval of the June endorsement plan before commencing construction work. The Defendant also counterclaimed for RM63,000,00 being the professional fees due and owing to the Defendant for services rendered.

Held, dismissing the Plaintiff's claim and allowing the Defendant's counterclaim with costs:

- (1) Though there was no written approval from EDP, the evidence showed that the Plaintiff was allowed to proceed with work and there was no instruction from Paragon to stop work nor objections in the form of letters. Furthermore, Paragon's senior clerk of work had also signed on the piling load test record. Hence by conduct, the Plaintiff was allowed to proceed with the work and the absence of EDP's written approval did not render it premature to determine if the June Endorsement Plan was defective.

- (2) In the instant case the evidence showed that the Defendant had prepared the June Endorsement Plan based on the design parameters of non suspended floor and no mezzanine floor. As a result of changes made which were not denied, there was an increase in piling load for which the court accepted the increase to be justified.
- (3) As expressed in *Scot v London and St Katherine Docks, res ipsa loquitur* could only apply where there was no evidence as to why or how the occurrence took place. In the instant case, evidence had been led and accepted that the Defendant was not negligent in preparing the June Endorsement Plan. On a balance of probability the Plaintiff had not proved that the June Endorsement Plan was defective thereby necessitating the October Endorsement Plan.
- (4) The approach in evaluating conflicting experts' evidence was to examine the scientific grounds and bases on which they rely (*Singapore Finance Ltd v Lim Kah Ngam (Spore) Pte Ltd*). The Court preferred the evidence of DW4 (the Defendant's expert witness) as his report was prepared and analysed in a scientific manner and thus more reliable and credible.
- (5) The delay in completing the piling plan was not attributable to the Defendant as the Plaintiff was the party which had delayed in reverting to the Defendant with the revised architectural plans.
- (6) The Court found that as the Plaintiff did not dispute the amount due or the work done by Defendant but that the Defendant had been negligent and the Plaintiff could set off the amount, it followed that the Defendant had proved it was entitled to the counterclaim.

Yinson Corporation Sdn Bhd & Anor v Ng Sin Chie; Hock Kheng Construction Sdn Bhd (Intervener)

HIGH COURT, PENANG
CIVIL SUIT NO: 22-807-2010
NORDIN HASSAN JC
3 MARCH 2015

[2016] 1 CIDB-CLR 312

In 2006, the First Plaintiff appointed the Defendant as Civil and Structure Consulting Engineer for a project to construct a single-storey office cum workshop ("the building") on the First Plaintiff's land. The Plaintiffs required the office-cum-workshop for their transportation and haulage business. The Defendant's scope of work as contained in an appointment letter dated 18 December 2006 ("D27") required the Defendant *inter alia*, to: (i) to design, prepare and submit building plan and civil and structure plans to the relevant authorities for approval and construction; and (ii) to conduct site supervision for the said project. The Defendant's professional fees was agreed by the parties at 3% of the total cost of the construction project plus 5% government service tax. A total sum of RM18,500 was paid by the Plaintiffs to the Defendant for his services. The construction works was completed on the 21 December 2007 and the Certificate of Practical Completion was issued on 2 January 2008. The 1-year defects liability period commenced on 22 December 2007. Between June and July 2008, the Plaintiffs discovered numerous defects to the said building and informed the Defendant several times about the defects through letters. The Defendant was also asked by the Plaintiffs to instruct the contractor to rectify the defects. A list identifying the areas that needed rectification was also given to the Defendant for his action. The defects were only cosmetically rectified as a short-term solution and did not solve the problems faced by the Plaintiffs due to the said defects. As the Defendant was unable to rectify the said defects and provide a solution for the problems faced by Plaintiffs, PW1, an engineering expert was engaged by the Plaintiffs to prepare a report with regards to the defects and to provide suggestion and solutions to solve the problems. The Plaintiffs sued the Defendant in both tort and contract, alleging negligence and breach of contract by the Defendant. The Defendant denied any negligence, submitted that the Plaintiffs had failed to prove damages and instead counterclaimed for payment of his balance fees outstanding.

Held, allowing the Plaintiffs' claim substantially but dismissing the counterclaim:

- (1) In the instant case, based on the evidence, it was implied into the agreement - D27 - that the Defendant would design the building which would fit the purpose for which it was required, ie in the instant case for the Plaintiff's business of transportation and haulage. The Defendant as

Civil and Structure Consulting Engineer for the project was expected to take reasonable care and skill in performance of his expertise.

- (2) The Plaintiff called expert witnesses - PW1 and PW3, but the Defendant called no expert witness. Where there is no rebutting expert evidence called, the Court should defer to the expert opinion unless the expert evidence is obviously indefensible. Where there are conflicting expert opinions, the judge is entitled to bring or bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case. In the instant case, the evidence was not indefensible and supported by relevant facts. As such PW1's evidence was accepted.
- (3) The Defendant had not taken any action to ascertain the condition of the soil at the said site. The Defendant carried out no soil investigation. However, the Defendant could not assume that the situation concerning the said project including its soil would be the same with other projects in the same vicinity. A proper and accurate analysis had to be carried out at the site of the said project. The failure to take into account the condition of the soil amounted to a breach of duty to use reasonable care and skill.
- (4) Based on all relevant evidence, the building of the said project was unsafe especially in a long term and not fit for its purpose. In the circumstances, the Defendant's building design was defective and had caused the defects to the said building in the instant case. The Defendant had failed to use reasonable care and skill when he designed the building plan.
- (5) The Defendant had not advised the Plaintiff to use pilings in the instant case. Even if he had done so, and the Plaintiffs had disagreed with his advice, the Defendant should have dissociated himself with the project or at least put his professional opinion in writing and warned the Plaintiff that they should bear the risks should there be any soil settlement.
- (6) On the balance of probabilities, the Plaintiffs had proved their case against the Defendant.
- (7) Concerning damages, the Plaintiffs claimed RM449,936 as rectification costs for the defects in the building. The Plaintiffs' expert witness had estimated rectification costs to be approximately RM450,000. In the absence of expert evidence to the contrary, the Court would accept the estimated costs and allow the sum of RM449,936 as claimed by the Plaintiff. The amount of RM804,124 claimed by the Plaintiffs as the amount paid by the First Plaintiff to Hock Kheng Construction Sdn Bhd for construction of the building ought to be rejected as the building had been completed and

occupied by the Plaintiffs. However a sum of RM150,000 was awarded to the Plaintiffs due to the defects in the buildings. The Plaintiffs' claim for RM8,903 to rectify the defects temporarily was allowed as it was proven by the documents. The claim for the return of RM185,00 paid to the Defendant as professional fees was rejected, as it was considered by the Court when awarding the damages of RM150,000.

The Construction Industry Development Board is proud to introduce CIDB Construction Law Report 2015 to all industry stakeholders. This publication is comprised of construction case laws decided in January 2015 to December 2015. These cases have been summarised and explained for the reader's ease of understanding. A selection of key cases come with commentaries written by industry experts and best practices have been introduced to improve the overall performance of the industry. The other important segment of this publication is the 2015 statistics analysing the growth of the construction sector over the years, taking into account economic and social factors. Statistics on construction cases are also included which provides an in-depth analysis on the number of 2015 cases registered, disposed of and still pending in court.