Latest Development In Construction Law

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SCAN ME

Key issues from the recent decided cases

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- Whether an Architect is liable for negligence to the Main Contractor?
- Whether an Architect is precluded from claiming fees if the terms of appointment are in breach of the minimum fees set under Architect Act 1967 and Architects (Scale of Minimum Fees) Rules 1986 or the engagement is terminated?
- Whether a claim for damages upon termination of subcontract and LAD are adjudicatable claims under CIPAA?
- Whether the successful party in an adjudication can present a winding up petition without registering the award under S.28 of CIPAA?
- Whether actual damages need to be proved in a claim for LAD?
- Whether non-compliance with requirement to give prior notice is fatal to contractual claim which requires such notice to be given?
- What a principal needs to do to defend a claim for direct payment successfully under S.30 of CIPAA?
- Whether CIPAA is retrospective or prospective?

L3 Architects Sdn Bhd v PCP Construction Sdn Bhd

[2019] 1 LNS 1321

High Court (Kuala Lumpur)
Aliza Sulaiman JC

Brief Facts –

- Pursuant to a PAM Contract, the Employer appointed the Plaintiff (Respondent) as the Main Contractor of a project. The Defendant (Appellant) was the Architect named in the Conditions of the Contract.
- A dispute arose between the Main Contractor and the Employer in respect of non-payment of IPC 17R and 18. It was referred to adjudication and the adjudicator found in favour of the Main Contractor.
- The High Court however set aside part of the adjudication decision as the adjudicator had failed to consider the Employer's cross claim for set off (which included, inter alia, IPC 19, wherein a deduction of RM 750,000 for the costs of non-compliance works) was made on the basis that they were not set out in the payment response.
- The Main Contractor commenced a negligence action against the Architect at the Sessions Court.

Brief Facts –

- The Main Contractor pleaded that the Architect owed the following duties to the Main Contractor: -
  - the professional obligation and duty under the law towards the Plaintiff that all powers and responsibilities as the Architect, particularly in relation to the certification and issuance of the interim payment certificate has to be exercised in accordance, and consistent, with the terms of the PAM Contract; and
  - a duty of care in exercising its powers and responsibilities as an Architect because should the Defendant fail to do so, it is reasonably foreseeable that it will cause very serious loss to the Plaintiff

Brief Facts –

- The allegations against the Architect were as follows: -
  - negligence in certifying and issuing Interim Certificate No. 19 dated 15.12.2016 which is in contravention with the express terms of the PAM Contract;
  - negligence in certifying and issuing Interim Certificate No. 19 without exercising its own expertise and using its own valuation where the Defendant has merely relied on the valuation report prepared by AQS Services Sdn Bhd ('AQS') dated 18.1.2016 and then proceeded to certify that no payment shall be paid to the Plaintiff under Interim Certificate No. 19 and
  - wrongfully, negligently and/or with ill intention, by Interim Certificate No. 19, certified and allowed a deduction in the sum of RM750,000.00 allegedly for the cost of rectification works for the non-compliance works as proposed by Perunding Rekamaju Sdn Bhd ('PRSB') even though there is no documentary evidence to substantiate and support such deduction
- The Trial Judge allowed the Main Contractor's claim of RM 750,000. The Architect appealed to the High Court.

Issue –

On appeal to the High Court, the main issue raised is: -

- Whether a consultant architect appointed by an employer in a construction project owes a duty of care to the main contractor to ensure that the payment certification issued is accurate and valid?

Dicta – The High Court considered the following cases: -

- The UK Court of Appeal in *Pacific Associates Inc v Baxter [1989] 2 All ER 159* which held that the Court should be slow to superimpose an added duty of care upon a party when the relevant rights come under a contractual framework that provides for the same as follows: -

  "*Where an engineer was employed or retained by a person, such as a building owner, to oversee the work of a contractor in circumstances where the engineer was under a duty to the employer to exercise care and skill in overseeing the contractor's work and was liable to the employer if the employer was sued by the contractor for economic loss which the contractor had suffered as the result of the engineer's negligence and where there was no direct contractual relationship between the contractor and the engineer or any assumption by the engineer of direct responsibility to the contractor for economic loss caused to the latter, the engineer owed no duty of care directly to the contractor coterminous with the contractor's rights against the employer. Accordingly, since there was no direct contractual relationship between the contractor and the engineer and since the contractor was entitled under its contract with the employer to claim the additional payments for hard materials from the employer, the engineer owed no duty of care to the contractor*."

Dicta –

- The Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2008] 4 LRC 61* which dealt with facts similar to *Pacific Associates Inc & Anor v Baxter & Ors* and followed *Pacific Associates* as follows: -
  - the courts should be slow to superimpose an added duty of care in excess of the rights the contractor was content to acquire against the owner in those cases where the parties came under a contractual framework which provided for the compensation in the event of the failure of one of the parties involved
  - if the contractor required extra- contractual protection for the defaults of the engineer, it was open to the contractor to stipulate for it when contracting.
  - the position might have been different if the arbitration clause had not been included in the contract.

(cont.)

- there was no express or implied assumption of responsibility, emphasising that there was no approach or request by the contractor inviting the provision of a service or advice or information directly to the engineer. The engineer's relationship with the contractor arose from the engineer's contract of employment with the owner. It was to the owner that the engineer owed his contractual duty to use proper care. Since the contract provided for correction by arbitration, the engineer was not employed to exercise due care in the interest of the contractor, so he could not be regarded as assuming responsibility to the contractor.

Dicta –

- The duty to act fairly and impartially was owed only to the employer
- The contractor had its rights adequately protected by the contract with the owner and, had it thought the protection inadequate, it was at liberty to insist on a tripartite contract. The parties having sought to regulate their relationships by contract, the law should be very cautious before grafting onto the contractual relationship what might be terms of a parasitic duty unnecessary for the parties' protection. In Russell LJ's view, while the requirement of foreseeability and proximity might be satisfied, it was not just and reasonable that there should be imposed on the engineer a duty which the contractor chose not to make a contractual one because, inter alia, the arbitration clause provided an adequate remedy in the event of under-certification

Dicta –

- Malaysian Court of Appeal Decision in *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products [2017] 6 CLJ 129* which held as follows: -
  - "... tortious duty should not be introduced into the arena of contract where the parties could, if they wished, have stipulated such a duty by agreement but had not done so."
  - The COA adopted the House of Lords view in *Henderson* that "*the issue in the Tai Hing case was whether a tortious duty of care could be established which was more extensive than that provided for under the relevant contract. After considering the position in various jurisdictions, the House of Lords accepted that there can be in certain circumstances concurrent liability in tort and contract*."
  - *"the House of Lords also accepted that <u>such a concurrent duty in tort will not be imposed in cases where the 'tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded</u>' (per Lord Goff at p 194). Put slightly differently, the tortious duty of care must not be inconsistent with the relationship structure created by the contract which the parties had entered"*

Dicta –

The Learned High Court Judge held: -

- the factual matrix in this appeal is similar to the facts in Pacific Associates and Spandeck Engineering as compared to Arenson because this appeal concerns a construction contract involving a tri-partite relationship between the employer- contractor- professional contract administrator and alleged negligence on the part of the contract administrator causing loss to the contractor for undercertification of works rather than a scenario involving an evaluation and sale of shares.
- In view of the inclusion of Clause 34 in the PAM Contract, I am inclined to find that there is an adequate machinery under the PAM Contract for the Plaintiff to pursue grievances, including relating to wrongful certification, against the Employer. Furthermore, the Federal Court in Lok Kok Beng had alluded to the need to adhere to contractual terms, and architects like the Defendant in the instant case, ought not to be liable for claims for pure economic loss in negligence where a contractual matrix exists between the Employer and the Plaintiff by way of the PAM Contract which has clearly defined the rights and liabilities of the parties concerned.

Dicta – (Con't)

- This court is of the view that the same approach as in Pacific Associates ought to be followed. It is not reasonable to impose a duty of care on the Defendant in light of the factual matrix in this case since this would cut across, and be inconsistent with, the structure of relationships as governed by the contracts entered into between the Employer and the Plaintiff; and between the Employer and the Defendant.

Dicta –

- Nevertheless, the High Court held that there are exceptions to the rule in *Pacific Associates* as mentioned by Ir Harbans Singh KS' book "*Engineering and Construction Contracts Management: Commencement and Administration*" as follows: -
  - *"As to whether the contract administrator can face a similar cause of action in negligence by the contractor, the present weight of authorities point to such action as being unsustainable (see Pacific Associates Inc v. Baxter [1989] 2 ALL ER 159). However, this may presumably be subject to the following exceptions: -*
    - *where there is fraud and/or collusion with the employer;*
    - *where the contract administrator deliberately misapplies the contract: John Mowlem & Co Plc v Eagle Star Insurance Co Ltd (1992) 62 the BLR 126; and/or*
    - *for negligent mis-statements on the 'Hedley Byrne' principle: Day v. Ost (1972) 2 NZLR 385.".*"

Dicta – The High Court also discussed other situations where the contract administrator such as the architect may be liable: -

- Vis-à-vis the Employer as explained in Construction Law In Malaysia as follows: -

  "The employer primarily engages the contract administrator to issue certificates of progress payment or completion, which are generally related to the employer's duty to pay the contractor for work performed. The contractor administrator may be supported in this role by the quantity surveyor and other consultants. The neglect and/or failure by the latter to approve and issue progress and final payment certificates may result in the employer being taken to adjudication under the Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012) or even arbitration. The employer, who is forced to make payments together with the costs of such proceedings, may then try to recover damages from the contract administrator and the relevant consultants if the certification was not done on time or done negligently."

- Vis-à-vis Purchaser as held in *Chin Sin Motor Works Sdn Bhd & Anorv Arosa Development Sdn Bhd & Anor [1992] 1 CLJ 102* which have extended the contract administrator's liability by holding that a certifying architect owed a duty of care to the purchaser and also the purchaser's bank who advanced money upon the certificates.

Dicta – (Con't)

- Vis-à-vis the Contractor arising from what the professional says or does before a contract is entered such as negligent misstatement in preparing tender documents in Canadian Supreme Court in *Edgeworth Constructions Ltd v ND Lea & Associates Ltd (1993) 107 DLR (4th) 169*

Dicta –

Furthermore, the High Court held: -

- Even if a duty of care existed, the Respondent had not suffered any losses as adjudication decisions [between the Respondent and Developer which had been set aside earlier] are of temporary finality.
- Unless and until such a claim is pursued and dismissed in a final dispute resolution forum on the ground that there was a wrongful under-certification by the Appellant, the Respondent had not suffered a loss.
- Moreover, IPC 19 is also an interim certificate only.
- This High Court Judgment is upheld by the Court of Appeal in Civil Appeal No.: W-04(C)(W)-347-06/2019

Hardie Development Sdn Bhd v David Shen I-Tan

[2020] MLJU 1103

High Court (Kota Kinabalu)
Wong Siong Tung, JC

Brief Facts –

- The Employer appointed the Architect to provide supplementary services for Land Use Planning, basic services for Development Planning, Building Planning, Contract Documentation and Contract Implementation Phase.
- The professional fees payable to the Architect is as follows: -
  - RM 220,500.00 in respect of services for Land Use Planning;
  - 2.5% of the overall construction costs. For basic services.
- The Architect issued an invoice to the Employer after initial services were completed.
- After negotiation, the parties came to an agreement on the agreed amount of professional fees to be paid by way of instalment.
- Subsequently, the Employer requested the Architect to issue a letter of release so that the Employer's Architect could take over the job from the Architect for the completion of the said Project. The Architect refused to issue the letter of release until the Employer fully paid all the outstanding balance of professional fees and reimbursement.

Brief Facts –

- The Employer sued the Architect for damages for failure on the part of the Defendant to produce architectural drawings, for declaration that the Defendant's services had been terminated and for an order to require the Defendant to issue the letter of release.
- The Architect in return countersued the Employer for "*outstanding fees, damages for premature termination of his services*".
- However, both suits were referred to arbitration instead.
- The Arbitrator decided that the Employer had unlawfully terminated the Architect's services and that the Architect's service contract is not void for illegality by reason of breach of Architects (Scale of Minimum Fees) Rules 1986.
- The Employer applied to the High Court to challenge the Arbitrator's award.

Issues –

- Whether an Architect is allowed to charge professional fees less than the prescribed minimum fees set by the Architect's Act 1967, the Architect's Rules 1973 and the Architects (Scale of Minimum Fees) Rules 1986?
- If the answer is in the negative, does the engagement of the Architect become void and enforceable for illegality?

Dicta –

The High Court decided as follows: -

- The use of the word "shall" in a provision in a legislation is generally to be interpreted that the requirement is mandatory or imperative. But as to the consequence that follows from no compliance, the use of the word "shall" is not conclusive that any transaction that fails to comply with the requirement would be illegal, null and void.
- Thus, the issue cannot be decided merely on the fact that the word "shall" has been used in respect of the requirement of the charging of minimum fees by an architect.
- There is no provision whether in the Architect (Scale of Minimum Fees) Rules 1986 and the Architect Rules 1996 on the consequences or effects on the architect's service contract with his/her client for any non observance, contravention or breach of the provisions thereunder.
- Non-compliance with the provisions under the Architect (Scale of Minimum Fees) Rules 1986 is not specifically made an offence under section 33 of the Architect Act, 1967.
- However, there is no provision under the Architect Act, 2017 and the Architect Rules 1996 to make an architect's service contract his/her client void in the event of any contravention or breach of the Architect (Scale of Minimum Fees) Rules 1986.

Dicta –

- There is also no such provision in the Architect Act, 1967 and the Architect Rules 1996 that disentitled an architect properly registered or a sole proprietorship, partnership or body corporate properly registered for architectural consultancy practice, to recover their fees, charges, remuneration or consideration for services rendered for breach or contravention of any rules or provisions under the Architect Rules 1996 and the Architect (Scale of Minimum Fees) Rules 1986, particularly the non observance, contravention of breach of the rules relating to the minimum fees.
- Even when the Disciplinary Committee suspended the registration or cancelled registration of the architectural consultancy practice of a sole proprietorship, partnership or body corporate under section 17A(5)(cc) and (dd) of the Architect Act, 1967, section 17A(7) specifically provided that they shall be entitled to recover in any court any fee, charge, remuneration or other form of consideration for architectural consultancy services rendered by them prior to the date of receipt of the written notice from the Disciplinary Committee suspending or cancelling the registration of their architectural consultancy practice.

Dicta –

- In my judgment, it is reasonable construction that the legislature did not intend that architect registered under the Architect Act, 1967 and permitted to carry out architectural consultancy service should be deprived of his/her right from recovering his/her fees from his/her client for architectural consultancy services rendered under the service contract with his/her client merely because he/she has charged a lower fee than minimum fees as prescribed by the Architect (Scale of Minimum Fees) Rules 1986, even though, the architect can be subject to disciplinary action and prosecution for an offence under the Architect Act, 1967.
- It is cannot be that the duty to be paid the fees in accordance with Rule 10 (4) to (6) of the Architect (Scale of Minimum Fees) Rules 1986 should be imposed upon an architect instead of his/her client for whom the architect rendered his service.
- If that was so, the client could easily cause a breach of the rules to be committed by an architect by simply refusing or withholding payment of the architect's fees. The results would be absurd. In such circumstances, it would be a travesty of justice and of all fairness to say that such a breach would nullify the architect's service contract with his client and worse still, to exonerate the client to pay the architect his fees.

Dicta –

- It is more sensible that Rule 10 (4) to (6) of the Architect (Scale of Minimum Fees) Rules 1986 confer an architect a right, if at all, to be paid his/her fees with a corresponding duty impose upon his/her client to pay the architect such fees.
- It appears to me that these provisions are also directed against any third parties dealing with the architect.
- The provisions seem to ensure not only that a client is not charged exorbitantly but also that the architect is adequately, reasonably and properly paid for the services he/she rendered.
- These provisions under the Architect (Scale of Minimum Fees) Rules 1986 are certainly binding on an architect. But they do not confer a separate cause of action on a client against architect for any non observance, contravention or breach by an architect thereof unless incorporated in their contract.
- To nullify an architect's service contract with his/her client and to deny the architect of his/her fees, charges or remunerations for the services rendered for mere breach of the rules and provisions relating to the minimum fees under the Architect (Scale of Minimum Fees) Rules 1986 would not serve the purpose or object of these rules and provisions and also the Architect Act, 1967.

Dicta

- For the reasons as stated before, the High Court held that charging of professional fees by Defendant less or lower than the minimum fees as prescribed by and in breach of the Architects (Scale of Minimum Fees) Rules 1986 does not render the architect's service contract or contract of engagement with his/her client void or unenforceable so as to deprive the architect of any right to recover his/her fees or remuneration.

Matrix Concepts (Central) Sdn Bhd v Ar Lim Yoke Tiang
[2018] MLJU 1548

High Court (Kuala Lumpur)
Lee Swee Seng J

Brief Facts –

- The Developer bought a piece of development land from IRDK wherein the Defendant was the Architect.
- Subsequent to the purchase, the Developer appointed the Architect.
- Pursuant to the letter of appointment, Clause 11 of the LOA allowed the Developer to unilaterally terminate their contract with the Architect by giving a 30-day Notice and 7 days thereafter the Architect is to issue his Letter of Release to the Developer to enable them to proceed with the project delay. The clause also mentioned upon termination the remuneration of the Architect shall be computed without any delay based on the schedule of work in progress at the site.
- Clause 13 of the LOA also provided that upon termination the Architect shall deliver the relevant documents including specifications and computations ("the Documents") to the Developer within 14 days.

Brief Facts –

- Upon being terminated by the Developer on 2.11.2016, the Architect issued two invoices to the Developer as follows: -
  - RM 2,843,342.12 being outstanding fees previously owed by IRDK;
  - RM 342,347.48 for additional work done (after taking into consideration of RM 880,000 paid by the Developer to the Architect)
- The Developer disputed the sums invoiced.
- The Architect refused to issue the Letter of Release and threatened to withdraw the approved Drawings and Plants with the local authority.
- The Developer sued the Architect and applied to Court for an injunction to compel the delivery of the Documents and the issuance of the Letter of Release.

Issues –

- Whether there was a breach by the Architect of the Letter of Appointment dated 25.5.2015 and in particular Clauses 11 and 13 in the Architect refusing to issue the Letter of Release and deliver the Documents to the Developer?
- Whether the Architect can claim against the Developer the sum of RM 2,843,342.12 being the balance of the Architect's fees for work done by the Architect for IRDK before the Sale and Purchase Agreement between the Developer and IRDK was entered?
- Whether the Architect is entitled to claim for the additional work done?
- Whether the Architect's agreement to charge based on a lower scale of fees than that prescribed under the Architects (Scale of Minimum Fees) Rules 2010 is enforceable?

Dicta
For Issue 1

The High Court held as follows: -

- Whilst the two Clauses in the Letter of Appointment do clearly state that the Architect shall issue Letter of Release to the Developer within 7 days upon termination pursuant to Clause 11 and the Architect shall also deliver the Documents to the Developer within 14 days upon termination pursuant to Clause 13, the question is whether that obligation of the Architect is nevertheless qualified by the Architects Rules 1996.
- The Court does not think that Clauses 11 and 13 require the issuance of the Letter of Release and the delivery up of the Documents to the Developer upon the expiry of the requisite dates without the need for the Developer to pay the Architect the outstanding fees due.

Dicta
For Issue 1

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- In the absence of a clear and unequivocal exclusion of the relevant provisions of the Architects Rules 1996, the Court agree with the Architect that Rule 19 and Rule 22 of the Conditions of Engagement of an Architect, Part One, Third Schedule to the Architect Rules 1996, would apply for they provide as follows:

  Appointment of another Architect.

  19. In the event that the Memorandum of Agreement between the Architect and the client is terminated for a reason not due to the fault of either party, the Architect shall, subject to the rights of either party in respect of antecedent breaches of the Memorandum of Agreement between the two parties, charge the balance of fees for architectural consultancy services rendered up to the stage of termination together with all reimbursable charges, and after the full settlement of all fees and charges due from the client, the Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Architect to continue with the project provided that the requirement of a letter of release may be waived at the discretion of the Board.

  Delivery of documents upon termination

  Upon the termination of the Memorandum of Agreement between the Architect and the client and the full settlement of all dues or upon the receipt of an acceptable guarantee of payment, the Architect shall deliver to the client copies of drawings, specifications and other documents relating to the project that are in the possession of the Architect

Dicta
For Issue 1

- The Court does not see a conflict between Clause 11 and Rules 19 and 22 of the Conditions of Engagement of an Architect, Part One, Third Schedule to the Architect Rules 1996. It is not expressly provided for that the Letter of Release and the delivery of the Documents are to be made irrespective of the outstanding fees not been paid.
- Generally where there are fees outstanding, and this may be disputed at that stage, the the Architect would have a right to hold on to the issuance of the Letter of Release and the delivery of the Documents until the fees are paid or that an acceptable guarantee for payment of the fees is given.
- The fear that the client may be held to ransom is addressed in Rule 19 itself where it is provided that the Board of Architects may waive the requirement of a Letter of Release in accordance with General Circular No. 2/2007[1] issued by the Board of Architects which provides the Guidelines on Letter of Release
- There is an elaborate procedure for Mediation and Arbitration too in the event of any dispute between the Architect and the Client as provided in Rule 23 and 24
- If it should later be held that the fees are not due and payable then the Client may have a cause of action for wrongful withholding of the Letter of Release and the delivery of the Documents

1. Note: - Paragraph 5.2 provides that Board of Architect may act as stakeholder of disputed fees pending resolution of the dispute in arbitration or court.

Dicta
For Issue 2

- As the services of the Architect for the Project had been terminated by IRDK as confirmed by DW 3, one would have expected all outstanding professional fees of the consultants for the Project to have been sorted out or at least agreed in writing in the SPA or some contemporaneous correspondence or documents. No clear evidence of that had been produced.
- At the very least one would have expected this to be found in the Letter of Appointment if indeed there is the amount of RM2,843,342.12 still outstanding which the Developer had agreed with IRDK to pay the Architect. However the Letter of Appointment only referred to the sum of RM1,100,000.00 paid by the Developer to IRDK which had been taken into account in the new fees structure agreed by the Architect.
- The Court held that if the Architect had agreed to look to the Developer for the payment of his balance fees of RM2,843,342.12 and to release IRDK of this balance sum outstanding, there would have been something in writing to that effect. The fact that there is no mention and only a mention of the sum of RM1,100,000.00 is both telling and troubling. There is some merits in the argument of the Developer that this is a fit case where oral evidence should not be introduced to vary the written terms in the Letter of Appointment with respect to agreed fees and the stage payment under section 91 and 92 of the Evidence Act 1950.
- The Developer is thus not liable to the Architect to pay this sum claimed of RM2,843,342.12

Dicta
For Issue 3

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- Clause 4.5 of the Letter of Appointment is clear in that the agreed professional fees shall be inclusive of design amendment and submission for approval to increase the Project density of not more than 110 units per acre
- The Architect is bound by the LOA that any increase in the original density of 80 units per acre up to 110 units per acre upon the Developer's instruction would not attract any further charges on his fees.
- However, the Developer instructed revision to be done where the density has been increased to 120 units per acre.
- Therefore, even though there was no submission made to the Authorities, there is no justification for not paying the Architect for the additional work done because it require a massive change in the drawings from 2 towers to 3 towers with the structures now standing on a different plinth.
- As such, the Developer is liable to pay RM 342,347.48 to the Architect.
- The Architect was therefore justified in not issuing the Letter of Release and the delivery of the Documents until his reasonable fees had been paid.

Dicta
For Issue 4

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- *"To say that any contract on professional fees of an Architect which is lower than the prescribed fees under the Architects (Scale of Minimum Fees) Rules 2010 would be null and void and unenforceable would be to throw the baby out together with the bath water! Whether or not a contract not in accordance with any professional rules is null and void under section 24 of the Contracts Act 1950 would depend on the words employed in the relevant rules"*
- *"Surely the intent of the legislature and in this case the Board of Architects cannot be that of rendering the contract on fees to be void altogether for an agreement lower than the Architects (Scale of Minimum Fees) Rules 2010. To begin with there is no prohibition on the client from agreeing to a lower fee structure and there is no criminal sanction attached to either the client or the Architect for noncompliance where Fees is concerned"*
- *"Clearly, the Architects (Scale of Minimum Fees) Rules 2010 is binding only on the Architects and not the client where fees is concerned. Indeed all the General Circulars issued by the Board of Architects mentioned the binding effect of the Architects (Scale of Minimum Fees) Rules 2010 on all professional architects only but not on the third party, i.e. the developer and client"*
- *"For the reasons given above the stand of the Defendant that the agreement on a reduced fee is not valid and enforceable and that the scale as prescribed and provided for under the Architects (Scale of Minimum Fees) Rules 2010 prevails cannot be supported and sustained "*

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Anor
[2020] 6 MLJ 224

Federal Court
Zawawi Salleh FJC (delivering judgment of the Court)

Brief Facts –

- The Employer appointed the Respondent as the project Architect.
- The Employer subsequently terminated the Architect's service.
- A dispute arose as to the amount to the professional fees for work done.
- The Architect initiated adjudication against the Employer and obtained an amount in favour of him in respect of his claim for professional fees for work done.
- The Employer applied to the High Court to set aside the adjudication decision.

Issues –

- Whether the Architect is entitled to professional fees for work done even though he has been terminated?
- Whether the adjudicator has jurisdiction to decide on a claim for professional fees when the contract has been terminated and the claim was for sums for work finally done?
- Whether a claim for architect's fee can be resolved only through r.21 of the 4th Schedule to the Architect Rules 1973 and is not adjudicatable under CIPAA?

Dicta
Issue 1

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- Clause 6 of the construction contract provides as follows:

  Abandonment and termination

  By mutual consent, either party may terminate this appointment by serving to the other party a sixty (60) day's notice of termination. In the event of such termination or the Client aborts or abandons the Project, the Client shall pay the Architect in accordance with the Schedule/Mode of Payment, as outlined under item (3) above up to the point of termination. Such fees may be apportioned, if necessary, in accordance with the services rendered under a particular stage of service at the point of termination.
- Clause 6 of the Contract expressly contemplated payment being made after the contract has been terminated as it set out the mechanism for the parties to value works done up to the date of determination.
- This equates the general law of contract situation where the parties' past rights and obligations prior to the termination were not affected by the termination and therefore the Employer was not relieved from its obligation to pay the Architect.
- The right to payment survived the termination.

Dicta – *Issue 2*

- No reason to confine CIPAA claims to "*interim claims*" only.
- The CIPAA 2012 did not mention the words 'interim claim' or 'final claim'
- A broader view in understanding s 5 of the CIPAA 2012 is supported by Datuk Professor Sundra Rajoo in 'A Practical Guide to Statutory Adjudication in Malaysia', which was published by KLRCA, wherein the learned author said: -

> Payment: Under CIPAA, the unpaid party is only allowed to refer a 'payment' dispute to adjudication. Section 4 defines payment to mean 'payment for work done or services rendered under the express terms of a construction contract'. As such, the definition excludes reference of extra — contractual claims, such as tortious claims or general damages arising from breaches of contract. Unlike the statutory adjudication regime in the United Kingdom which allows all disputes arose under a construction contract to be adjudicated upon, the scope of application of CIPAA is restrictive to payment disputes under a construction contract. However, the parties may expand the scope of reference of the adjudication to matters other than 'payment' disputes.
>
> 'Payment' in this context refers to payment for 'construction work' done and 'consultancy services' rendered arising 'under the express terms' of the construction contract.
>
> Falling under this category are progress payments, whatever their form and frequency of disbursement (ie monthly, stage payment, advance payment, etc), final payment, etc. It should also cover items of payment such as for varied work or changes, diminution in value, prime cost sums, preliminaries, cost adjustments, provisional sums, contingent sums, retention sums etc. so long as these are expressly provided for under the construction contract in question.

Dicta
Issue 3

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- The right to statutory adjudication cannot be circumvented by arbitration agreement and they can be proceeded concurrently under S.37 of the CIPAA.
- There was nothing to stop the CIPAA 2012 from applying to the case at hand and there was no need to see adjudication and arbitration to be mutually exclusive to each other.

Hiform (M) Sdn Bhd v Pembinaan Bukit Timah Sdn Bhd & Anor

[2020] MLJU 2452

High Court (Kuala Lumpur)
Lim Chong Fong J

Brief Facts –

- The Defendant, as the Main Contractor appointed the Plaintiff as its Subcontractor.
- Dispute arose between the parties in respect of the project's progress. Subsequently, the Subcontractor withdrew from the Project and the Main Contractor took over its execution until completion.
- The Main Contractor initiated adjudication against the Sub Contractor to claim for: -
  - Labour costs for rectification and/or completion of the works;
  - Material costs for rectification and/or completion of the works; and
  - Liquidated damages, interest and costs.
- The adjudicator determined that she had jurisdiction and ordered the Sub Contract to pay RM 14,990,503.60 to the Main Contractor being LAD and additional costs of rectification and completion of the project.
- The Sub Contractor applied to the High Court to set aside the adjudication decision on the ground that the adjudication has no jurisdiction as the Clause is not within the definition of payment claim as defined under CIPAA.

Issues –

- Whether the Main Contractor's claims for additional costs and LAD qualify as payment claims under CIPAA?

Dicta –

- *"I find and hold that the proper and purposive construction of ss. 4 and 5 of the CIPAA on permissible payment and thus adjudicatable payment claim only encapsulates debt or damages for unpaid work done and/or services rendered under the express terms of the construction contract which form part and parcel of the consideration (see 2(d) Contracts Act 1950) payable thereunder."*
- *"However, unpaid debt or damages which arose from breach of the contract is not encapsulated notwithstanding that it may also have been expressly provided for in the construction contract. The crucial and pivotal distinction is therefore the predominant source of the claim, to wit; consideration versus breach of the construction contract. It does not matter whether the unpaid or non paying party is above the other in the construction pyramidal contracting structure."*
- *"On the facts here, I find that PBT's claims for its rectification and/or additional completion costs are damages which flowed directly from Hiform's alleged repudiatory breach of contract. Furthermore, PBT's claim for liquidated damages is undoubtedly delay damages which flowed from Hiform's breach of contract for alleged late completion of the Project. They do not, in other words, form part of the consideration of the contract to carry out the Project work."*
- "The Adjudicator had acted in excess of jurisdiction because she lacked the requisite core jurisdiction when she found for PBT in respect of its claims in her Decision"

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd
[2019] 3 MLJ 244

Court of Appeal (Putrajaya)
Abang Iskandar JCA (delivering judgment of the Court)

Brief Facts –

- The Respondent obtained an adjudication decision against the Appellant for the certified sum of RM 16,439,628.24.
- The Respondent served a statutory notice of demand and the Appellant did not pay the adjudicated sum.
- The Respondent presented a winding up petition against the Appellant.
- The High Court granted the winding up order as applied by the Respondent.
- The Appellant appealed to the Court of Appeal.

Issues –

- Whether a statutory notice for winding up based on a non-registered Adjudication Decision is defective/premature?

Dicta –

- *"The language employed under s 28 of the CIPAA, does not convey such an interpretation, in the sense that the decision of the adjudicator must be registered with the High Court before a statutory notice under ss 465(1)(e) and (h) of the Companies Act 2016 could be issued. Rather, it was our view that for the purpose of issuing a notice to wind-up a company pursuant to s 465(1)(e) and (h) of the Companies Act 2016, it is not a mandatory requirement that there must be a judgment entered in favour of the respondent petitioner for the amount that was being claimed and pursued against the appellant debtor for payment of the same."*
- The law is that an unpaid creditor has a right to file a winding up petition against the debtor company.
- *"That adjudication decision in favour of the respondent petitioner had thereby evinced the fact that an amount as stated in the said adjudication decision was due and owing to the respondent from the appellant. There was no application by the appellant to set aside the said adjudication decision. In the premises, we were of the view that such an adjudication decision was good and proper as a basis upon which a winding up petition notice against the appellant may be filed for a debt in the amount, as stated in the said adjudication decision against the appellant."*
- For the purpose of statutory notice for winding up, it is no mandatory for an adjudication decision be registered with the High Court.

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd

[2019] 6 MLJ 15

Federal Court
Richard Malanjum CJ

Brief Facts –

- The Appellant was the owner of a piece of land with plant and machinery. Subsequently, it was wound up.
- The properties were put up for sale by way of open tender exercise. Prior to this, the Respondent offered to purchase the properties at RM 90 millions and offered an initial earnest deposit of RM 1 million which is paid to the Appellant.
- The acceptance of the Respondent's offer was subject to a term that SPA must be executed within 30 days, failing which the earnest deposit would be forfeited as LAD and not by way of penalty.
- The Respondent was given 4 extensions of times before the Appellant terminated the sale. In the meantime, the Respondent had paid RM 3.04 million as earnest deposit and interest.
- Subsequent to the termination, the earnest deposit and interest paid were forfeited.
- At the High Court, it was held that the forfeiture of all the deposits were valid and there was no need to prove loss or damages.
- The Court of Appeal however held that the Appellant was only entitled to forfeit the first RM 1 million deposit but not the subsequent RM 2 million deposit as there was no evidence of loss and damages based on the principle in *Selva Kumar* and *Johor Coastal*.

Issues –

- Whether there is a necessity to prove actual loss / damages where the innocent party seeks to enforce a damages clause under S.75 of Contracts Act 1950?

Dicta –

- There is no necessity for proof of actual loss and damage where the innocent party seeks to enforce a damages clause under Section 75 of the Contracts Act 1950 although evidence of such loss is a useful starting point.
- The proof of actual loss is not the sole conclusive determinant of reasonable compensation.
- "Legitimate interest" and "proportionality" are relevant factors in determining "reasonable compensation" as stipulated in Section 75 of Contract Act 1950.
- The initial burden of proof lies on the party seeking to enforce a damages clause under Section 75 of the Act to adduce evidence showing that: -
  - There was a breach of contract and
  - The contract contains a clause specifying a sum to be paid upon breach
- The burden of proof of disputing "reasonable compensation" lies on the defaulting party to show that the damages clause is unreasonable or to demonstrate what comprises a reasonable compensation.
- The innocent party cannot receive amount more than LAD stated in the contract.
- This is a departure from the previous decisions in Selva Kumar [1995] and Johor Coastal Development Sdn Bhd [2009] 4 CLJ 569
- The Court upheld the Appellant's forfeiture.

MS Elevator Engineering Sdn Bhd v Jasmurni Construction Sdn Bhd & Anor

[2019] 5 MLJ 209

Court of Appeal
Stephen Chung JCA

Brief Facts –

- The Defendant was the Main Contractor and the Plaintiff was the Nominated Sub Contractor for lifts pursuant to PAM Sub Contract 2006.
- Based on the NSC 3rd Work Program, the NSC was to complete the Sub Contract Works on 30.5.2015.
- The NSC however only obtained PMA certification for all the lifts on 16.2.2016. the NSC did not apply for any EOTs.
- The Architect issued CPC certifying that the Works were practically completed on 29.2.2016.
- The Employer deducted LAD of RM 3,910,000.00 from the Main Contractor which was negotiated and arbitrary figure.
- At the High Court, NSC claimed for the sum of RM 1,235,670.74 based on the Statement of Final Account signed by the Architect, Employer, Plaintiff and Defendant.
- The Main Contractor counter-claimed for LAD of RM 3,910,000.00.
- The High Court allowed NSC's claim and allowed the Main Contractor's counter claim to the extent of RM 977,500 calculated from the day complaints against NSC ceased on 23.9.2015 until PMA licence was obtained on 16.2.2016.

Dicta –

- The Court of Appeal upheld the High Court's decision.
- With regards to the Main Contractor's counter-claim for LAD, the Court of Appeal had, by applying *Cubic Electronics,* held that "*the burden was on the defaulting party to show that the damages clause including the sum stated was unreasonable*" and the sub contractor did not after entering into the sub contract "*complain that the LAD clause or that the sum specified therein was illegal or unfair or unreasonable*".
- The Court of Appeal held that "*the court is entitled to adopt a common sense approach in assessing damages for delay in completion of works when the main contractor is unable to specify the number of days of delay solely caused by the subcontractor and further when the main contractor was unable to produce any other proof of reasonable loss or compensation that it was entitled to*."

Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd

[2021] 2 CLJ 173

Court of Appeal
S Nantha Balan JCA

Brief Facts –

- A dispute arose between the Appellant and the Respondent out of a building contract based on the PAM Contract and the dispute was referred to Arbitration.
- Pursuant to Art. 21.3 of PAM Rules, it is provided that the Arbitrator shall deliver its award not later than three months from the receipt of the last closing statement of the parties. Art. 21.3 further provides that *"such time frame for delivery of the award may be extended by notification to the parties."*
- The President of PAM then appointed the sole Arbitrator.
- Pursuant to Clause 34.3 of the Conditions of Contract, the Arbitrator is required to conduct the arbitration in accordance with the provisions of the Arbitration Act and the PAM Rules.
- At all material times, the Arbitrator did not notify the parties to extend the timeframe for the delivery of arbitral award. The award was delivered after the deadline.
- Neither did the parties object to the late delivery of award. The first objection was raised by the Respondent about two weeks after the delivery of the award.
- Subsequently, the Respondent applied to set aside the award under S.37(1)(a)(vi) of Arbitration Act 2005 due to late delivery of award.

Issues –

- Whether the timeline for delivery of an arbitration award which is stipulated in the rules of arbitration is a procedural provision or jurisdictional?
- If the timeline is determined to be jurisdictional, whether there could be any waiver?
- Whether the arbitrator ceased to have the mandate and exceeded his jurisdiction by delivering the original award in breach of the timeline which was stipulated in the rules of arbitration?

Dicta –

- By applying the logic of the principle in *Wong Kin Hoong & Anor v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193,* the court "*does not agree that mere presence of an in-built contractual mechanism per art. 21.3 of the PAM Rules, which enables the arbitrator to unilaterally extend time derogates from the arbitrator's duty to deliver the award within the time period as prescribed in art. 21.3 and which necessarily and fundamentally affects the arbitrator's mandate and therefore, his jurisdiction*."
- The timeline in art. 21.3 is a mandate to the arbitrator that he is to deliver the award by a certain date and if requires more time, then he has to extend time by notifying the parties. The arbitrator's mandate is not a matter of mere procedure. Rather, the arbitrator's jurisdiction springs from his mandate. Once the mandate ceases, then the jurisdiction also ceased.
- Thus, so long as the timeline for delivery of the award has passed and time (for delivery of the award) has not been extended as per the rules of arbitration, then the arbitrator's authority, mandate and jurisdiction would have ceased.
- In such circumstances, art. 21.3 is no longer at play and what the arbitrator must then do is to procure the consent of the parties to resurrect his mandate and jurisdiction. And if one or both parties do not consent, then the arbitrator's only option would be to apply to the High Court for time to be extended
- Whilst generally there can be a waiver of the matters or content of what is deliberated or what transpires in the arbitration proceedings, there can be no waiver on the part of the parties to the arbitration with respect to the cessation of the arbitrator's mandate and jurisdiction in relation to the obligation to deliver the award on time or within an extended period. Hence, the Respondent's silence or inaction prior to the original award being issued is irrelevant.

Sunissa Sdn Bhd v Kerajaan Malaysia & Anor

WA-21C-7-10/2018

High Court (KL)
Lee Swee Seng, J

Brief Facts –

- Government of Malaysia and JKR (Employers) appointed the Plaintiff as Contractor to construct a new 10 storey Court Building in Kuantan which adopted the PWD 03/203A (Rev 2007).
- The Contractor had completed the work within the extended time (4 EOTs) and had been issued the Certificate of Practical Completion.
- The Contractor claimed RM 11,937,057.33 for 'loss and expense' arising out of delays which were not due to the Contractor for which 4 EOTs were granted by the Employers.
- The Employers rejected the claim on the basis that the Contractor failed to observe and comply with the requirement of prior notice for 'loss and expenses claim' (Clause 44.1 of PWD 203/203A (Rev. 2007).

Relevant contractual clauses –

- Clause 44.1: -

  If at any time during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under Clause 43.1 (c), (d), (e), (f) and (i), and the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within thirty (30) days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to Clause 44.2 hereof.

Relevant contractual clauses –

- Clause 44.2: -

  As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of all claims for direct loss or expense under Clause 44.1 together with all supporting documents, vouchers, explanations and calculations which may be necessary to enable the direct loss or expense to be ascertained by the S.O.. The amount of such direct loss and expense ascertained by the S.O. shall be added to the Contract Sum
- Clause 44.3: -

  If the Contractor fails to comply with Clauses 44.1 and 44.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim

Issues –

- Whether the Contractor's claim for 'loss and expense' is reasonably contemplated and governed by Clause 44.1?
- As regards to the claims for loss and expenses that "*beyond reasonable* contemplation" governed by Clause 44.1, whether prior notice requirement is a condition precedent?
- Whether such condition precedent is an infringement of S.29 of Contracts Act?

Dicta
Issue 1

–

- Clause 44.1 is only applicable to a claim for loss and expense which is not reasonably contemplated.
- A claim for 'loss and expense' which is within "*that reasonably contemplated*" is not governed under Clause 44.1 and the issue of notice requirement does not arise at all.
- Loss and expense claim arising out of factors not due to contractor's fault such as "*change of decision and drawing, variation instructed by the S.O., suspension of works by the Employer and delay on the part of NSC to perform their work*" are loss and expense claims which are "*within that reasonably contemplated*".
- The High Court held that the S.O being professionally qualified is expected to know that if additional time is required arising out of fresh variation works, the contract would incur extra cost.
- The High Court therefore allowed the loss and expense claims reasonably contemplated which are the recurring items in the Preliminaries.

Dicta
Issue 2

- The Court followed Federal Court's decision in Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd [2014] 7 CLJ 1 whereby a condition precedent clause must not be ambiguous and must be spelled out in clear and precise terms.
- The Court recognised that the Court must uphold the parties' agreement and give effect to the wordings of the clause even though the High Court expressed reservation as regards the practicality of giving such prior notice.
- Clause 44 is sufficient to constitute a condition precedent as it laid out the consequence of non-compliance, i.e. the Employer shall be discharged from any liability in connection with the claim.

Dicta
Issue 3

–

- The High Court dismissed the Contractor's contention that the condition precedent infringes S.29 of CA 1950 which render any agreement limiting the time within which he may enforce his rights under the agreement void.
- The High Court also dismissed the Contractor's contention that Clause 44.1 is unconscionable.
- The High Court held that there is nothing unconscionable at all, much less against public policy.
- The Contractor is at liberty to amend the terms if they are perceived to be unduly harsh or even unfair. The contractor is not obliged to tender for the Project nor agree to execute the PWD 203A standard form contract if it is not comfortable with the terms.
- In any event, the Employers were not unjustly enriched because the Employers were ordered to pay the Contractor for "loss and expense" claim which can be reasonably contemplated.

Comparative contractual clauses – PAM 2006

- Clause 24.1: -

  Where the regular progress of the Works or any section of the Works has been or is likely to be materially affected by any of the matters expressly referred to in Clause 24.3, and the Contractor has incurred or is likely to incur loss and/or expense which could not be reimbursed by a payment made under any other provision in the Contract, the Contractor may make a claim for such loss and/or expense provided always that: -

  24.1(a)

  the Contractor shall give written notice to the Architect of his intention to claim for such loss and/or expense together with an initial estimate of his claim duly supported with all necessary calculations. Such notice must be given within twenty eight (28) Days from the date of the AI, CAI or the start of the occurrence of the matters referred to in Clause 24.3, whichever is the earlier. The giving of such written notice shall be a conditional precedent to any entitlement to loss and/or expense that the Contractor may have under the Contract and/or Common Law; and…

PCOM Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor

[2020] 1 LNS 130

High Court (KL)
Lim Chong Fong, J

Brief Facts –

- The Sub-sub-contractor obtained an adjudication award against the Sub Contractor.
- The Sub Contractor failed to pay the adjudicated amount.
- The Sub-sub-contractor obtained a High Court order to enforce the Adjudication Decision and issued a notice pursuant to S.30 of CIPAA to the Main Contractor.
- The Main Contractor replied that there is no outstanding sum due to the Sub Contractor.
- The Sub-sub-contractor filed an application for direct payment of adjudicated amount from the Main Contractor.

S.30 of CIPAA – (1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

Dicta –

- The Main Contractor's failure to issue the written notice under S.30(2) of CIPAA to the Sub-Contractor is fatal to the defence that there is no monies due or owing from the Main Contractor to the Sub Contractor.
- In any event, the Main Contractor failed to discharge burden of proof under S.30(5) of CIPAA that there is no monies due or owing to the Sub Contractor.
- The Main Contractor's statement of account is unreliable and is of no evidential value in the absence of cogent substantiating documents in support thereof.
- Such statement of account is no different from "sheet of calculations" or "summary of accounts" which was nothing more than general conclusions.
- Reference was also made to *CT Indah* case which suggests that the principal cannot remain silent and is obliged to rebut at the first opportunity that there was no amount due or owing.

HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd & Ors

[2020] 1 LNS 526

High Court (KL)
Lim Chong Fong, J

Brief Facts –

- The Plaintiff obtained adjudication award against CTSB.
- CTSB failed to pay adjudicated amount.
- The Plaintiff demanded payment of the adjudicated amount from the Defendant (as principal of CTSB) under S.30(1) of CIPAA
- The Principal did not issue notice under S.30(2) of CIPAA.
- The Principal contended that no monies due to CTSB as there is net outstanding by CTSB to the Principal in the final account.

Dicta –

- S.30(5) of CIPAA refers to "money due <u>or</u> payable" and not "due and payable".
- As such, it is sufficient that there is an obligation or liability to pay upon it being properly claimed
- The Plaintiff may seek direct payment from the Principal in respect of any money due or payable and this is not limited to progress certificate issued by the Principal to CTSB.
- This will include any uncertified progress claims and release of retention money.
- No evidence that the Principal's final account has been accepted by CTSB. The Principal's final account per se cannot be relied upon in the absence of crucial supporting documents such as CTSB's progress claims and invoices to demonstrate its position on the Principal's final account.
- Adverse inference was drawn against the Principal because the Principal withheld the final claim by CTSB.

Jack-in-Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd
[2019] MLJU 1212

Federal Court
Idrus bin Harun FCJ, delivery the judgment of the Federal Court

Brief Facts –

- The Main Contractor appointed the Sub Contractor vide a letter of award dated 16.3.2011 for a development project.
- A dispute arose between the parties after the enforcement of CIPAA on 15.4.2014.
- The Sub Contractor initiated an adjudication against the Main Contractor and the Adjudicator held in favour of the Sub Contractor in which the Main Contractor was ordered to pay RM 906,034.00 to the Sub Contractor.

Issues –

- Whether CIPAA applies retrospectively to construction contract entered into before the enforcement of CIPAA?

Dicta –

- The provisions of the CIPAA undoubtedly affect the substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the respondent besides being an essential component of the rule of law.
- Consequently, the entire Act ought to be applied prospectively.
- Any interpretation that the CIPAA takes effect retrospectively inhibits the exercise of the Main Contractor's vested right in accordance with the bargain entered into between the parties. The outcome, as earlier indicated, is that both questions of law allowed by this Court at the leave stage must be answered in the negative.
- The entire adjudication proceedings including the adjudication decision are rendered void. The glaring conclusion which emerges is that the Sub Contractor is unsuccessful in all of their contentions.
- Absent any express intention by Parliament that the CIPAA is to be applied retrospectively, the CIPAA can only be applied prospectively.
- The adjudication decision therefore ought to be set aside.

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