

JUDGMENT Express

Econpile (M) Sdn Bhd
[2024] 4 MLRA v. ASM Development (KL) Sdn Bhd & Another Appeal

1

ECONPILE (M) SDN BHD v. ASM DEVELOPMENT (KL) SDN BHD & ANOTHER APPEAL

Federal Court, Putrajaya
Abdul Rahman Sebli CJSS, Zabariah Mohd Yusof, Hasnah Mohammed
Hashim FCJJ
[Civil Appeal Nos: 02(f)-2-01-2023(W) & 02(f)-34-05-2023(W)]
21 March 2024

Construction Law: *Adjudication — Stay of adjudication decision — Application for stay under s 16 of Construction Industry Payment and Adjudication Act 2012 — Whether existence of a valid enforcement order made pursuant to s 28 of Act precluded making of an order for stay pursuant to s 16(1) of Act — Purpose, object and intent of Act — Rules of statutory construction and analysis of previous Courts’ decisions — Principles enunciated in View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd*

These appeals raised questions of significance relating to an application for a stay under s 16 of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). Econpile (M) Sdn Bhd (“Econpile”) was the appellant in the first appeal, while the appellant in the second appeal was ASM Development (KL) Sdn Bhd (“ASM”). In the first appeal, the questions for determination were: (1) whether an adjudication decision, after having been enforced pursuant to s 28 of the CIPAA as an Order of the Court, could be stayed pursuant to s 16(1)(b) of the CIPAA; and (2) whether the Court of Appeal in so deciding to allow the stay application pursuant to s 16(1)(b) of the CIPAA had overruled, disagreed with or gone beyond the *ratio decidendi* of the Federal Court’s decision in *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd*. Econpile had obtained two adjudication decisions in its favour against ASM. It applied to the High Court to enforce both adjudication decisions, while ASM applied to stay the first adjudication decision and set aside the second adjudication decision. The High Court dismissed ASM’s applications and allowed Econpile’s application; ASM then filed three appeals to the Court of Appeal. The Court of Appeal dismissed two appeals but allowed one, thus setting aside the High Court Order and granting the stay of the adjudication decisions even after an enforcement order under s 28 of the CIPAA had been granted. Hence, the present appeals by both parties in which the main focus for determination was whether the existence of a valid enforcement order made pursuant to s 28 of the CIPAA precluded the making of an order pursuant to s 16(1) of the CIPAA.



Held (allowing the first appeal; dismissing the second appeal):

(1) The CIPAA was a legislation crafted to address issues common in the construction industry, in particular, relating to cash flow problems for the unpaid party and only as temporary finality to the payment claims. It was not the end of the end. It was designed with the ultimate aim to assist the parties in construction disputes to be paid expeditiously for the work which they had carried out and for adjudication proceedings for payment claims that were due and payable before the determination of the contract. Section 16 of the CIPAA expressly stipulated that a party in an adjudication dispute might apply to the High Court for a stay of an adjudication decision in the following circumstances: (a) if an application to set aside the adjudication decision under s 15 of the CIPAA had been made; or (b) if the subject matter of the adjudication decision was pending final determination by arbitration or the Court. Therefore, under the statutory framework of the CIPAA, an adjudication decision could only be set aside in very rare circumstances to give effect to the provisional resolution of payment disputes in construction contracts. In the present appeals, both the adjudication decisions were not set aside and remained intact. Thus, in the absence of any error by the adjudicator, the High Court had correctly granted an enforcement order. (paras 42-44)

(2) The established case authorities resonated that in the construction and interpretation of a statute, the intent and object of the legislation was an important factor which the Court could not ignore. Therefore, the correct approach under the CIPAA was to uphold an adjudicator's decision unless there were issues relating to jurisdiction or there had been a serious breach of natural justice. The adjudicators' decisions were binding on the parties until reversed by a Court. Thus, the only defence to enforceability was if the findings offended the principles of natural justice or if the adjudicator lacked jurisdiction and, on that basis, the decision was set aside. In respect of the provisions under the CIPAA to set aside an adjudication decision and to enforce the adjudication decision, there was no ambiguity. There was no provision for a stay of an adjudication decision after an enforcement order was given. Applying the principles of interpretation of statutes, in the absence of a specific provision, the Court was not statutorily empowered to grant a stay if the adjudication decision was not set aside. To do so would be incongruent to the intent and purpose of the CIPAA. Guided by the rules of statutory construction and analysis of previous Courts' decisions, by interpreting the CIPAA in the manner it had done, the Court of Appeal had acted in excess of its jurisdiction under the CIPAA by granting the stay when the adjudication decisions remained intact and had not been set aside. The parties to the adjudication had no option but to comply with the orders of the adjudication decisions unless, and only unless, it had been set aside under s 16 of the CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of the CIPAA. (paras 47-49)



(3) For the foregoing reasons, in the first appeal, Question 1 was answered in the negative, that is, an adjudication decision after having been enforced pursuant to s 28 of the CIPAA as an Order of the Court could not be stayed pursuant to s 16(1)(b) of the CIPAA. Question 2 was answered in the affirmative. It must be reiterated that the principles enunciated in *View Esteem (supra)* must be followed in an application for a stay of an adjudication decision pursuant to s 16 of the CIPAA if an application to set aside the adjudication decision under s 15 of the CIPAA had been made, or the subject matter of the adjudication decision was pending final determination by arbitration or the Court. In a construction dispute under the CIPAA, the Court must at all times consider all factors and issues subject to the provisions of the CIPAA. With the reasons given above, it was unnecessary to answer the questions posed in the second appeal. Based on the aforementioned reasons and in the light of the settled principles, there were merits in the issues raised by Econpile. (paras 50-53)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] MLRAU 499 (refd)

ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd [2023] 5 MLRA 515 (refd)

Hong Leong Bank Berhad v. Khairulnizam bin Jamaludin [2016] 4 MLRA 603 (folld)

Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 1 MLRA 207 (refd)

IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd [2020] 5 MLRA 515 (refd)

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 5 MLRA 584 (refd)

Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Ors And Another Appeal [2018] MLRAU 482 (refd)

Tan Kah Fatt & Anor v. Tan Ying [2023] 2 MLRA 525 (folld)

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2018] 1 MLRA 460 (folld)

Legislation referred to:

Companies Act 2016, s 466(1)

Construction Industry Payment and Adjudication Act 2012, ss 12, 15, 16(1) (a), (b), (2), 28

Interpretation Acts 1948 and 1967, s 17A

Counsel:

Civil Appeal No: 02(f)-2-01-2023(W)

For the appellant: Malik Imtiaz Sarwar (Arthur Wang Ming Way, Lam Wai Loon, Serene Hiew Mun Yi, Pan Yan Teng & Lim Ren Wei with him); M/s Harold & Lam Partnership

For the respondent: Cyrus Das (Edwin Lim & Ng Sim Hong with him); M/s Edwin Lim & Suren



Civil Appeal No: 02(f)-34-05-2023(W)

For the appellant: Cyrus Das (Edwin Lim & Ng Sim Hong with him); M/s Edwin Lim & Suren

For the respondent: Malik Imtiaz Sarwar (Arthur Wang Ming Way, Lam Wai Loon, Serene Hiew Mun Yi, Pan Yan Teng & Lim Ren Wei with him); M/s Harold & Lam Partnership

JUDGMENT**Hasnah Mohammed Hashim FCJ:**

[1] The appeals before us raised questions of significance relating to an application for a stay under s 16 of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) in particular whether a stay can be granted under s 16(1)(b) CIPAA after the adjudication decision is enforced under s 28 CIPAA as an Order of the Court.

[2] In Appeal No. 02(f)-2-01/2023 (W), the questions for this Court's determination are as follows:

Question 1

Whether an adjudication decision, after having been enforced pursuant to s 28 of CIPAA 2012 as an Order of the Court can be stayed pursuant to s 16(1)(b) of the CIPAA 2012.

Question 2

Whether the Court of Appeal in so deciding to allow the stay application pursuant to s 16(1)(b) CIPAA 2012 has overruled or disagreed, or gone beyond the *ratio decidendi* of the Federal Court decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Sdn Bhd* [2018] 1 MLRA 460.

[3] The questions of law in Appeal No. 02(f)-34-05/2023(W) are as follows:

- (1) Is the 'financial capacity to repay' test the determinative criteria in considering an application for stay pursuant to s 16 of the Construction Industry Payment And Adjudication Act ("CIPAA"), in view of the liberalised interpretation on the ground of "justice of the case" by the Federal Court in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2018] 1 MLRA 460; in light of the conflicting decisions by the Court of Appeal in *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd And Other Appeals* [2023] 1 MLRA 646 and *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd* [2023] 5 MLRA 515 [Civil Appeal No. W-02(C)(A)-443-03/2021]?



- (2) In a construction dispute where more than one CIPAA claim/award is made in respect of the same construction contract, subject matter, issues and parties, and the Court has upon a wholesome assessment of all factors affecting the same construction contract, subject matter, issues and parties, granted a statutory stay of the first CIPAA adjudication decision pursuant to s 16 of the CIPAA, can a Court hearing an application for stay of a subsequent adjudication decision (arising out the same construction contract, subject matter, issues and parties) refuse the statutory stay?
- (3) If the above question is answered in the affirmative, is the subsequent Court entitled to refuse the grant of a statutory stay by arriving at contradictory conclusions in the assessment of the same factors affecting the same construction contract, subject matter, issues and parties?

The Factual Background

[4] To appreciate and understand the issues argued before us it is necessary to set out the material facts. By a Letter of Award dated 26 September 2016, ASM Development (KL) Sdn Bhd (ASM), the Plaintiff in the High Court appointed Econpile (M) Sdn Bhd (Econpile) as its main contractor to carry out Work Package 1: Diaphragm Wall, Contiguous Bored Pile, Earthworks, Piling Works And Basement Structure Works (Basement 2 to LG1) for a project known as “Cadangan Pembangunan Bercampur 69 Tingkat Yang Mengandungi 7 Blok Pangsapuri Servis (4214 Unit), iaitu: Blok A — 58 Tingkat (678 Unit), Blok B — 58 Tingkat (618 Unit), Blok C — 58 Tingkat (560 Unit), Blok D — 58 Tingkat (678 Unit), Blok E — 58 Tingkat (618 Unit), Biok G — 58 Tingkat (502 Unit), 8 Tingkat Podium Tempat Letak Kereta, 7 Tingkat Ruang Perniagaan (Aras 1 — 7), 1 Tingkat Aras Kemudahan (Aras 9), 4 Tingkat Tempat Letak Kereta (Aras LG1, Basement 2 & Basement 1) Di Atas Lot 36190, Mukim Petaling Kuala Lumpur” (the Project) for contract sum of RM280 million. Econpile commenced works and submitted 27 progress claims to ASM in respect of the works done. The progress claims were duly valued by the Project Quantity Surveyor, and endorsed by Arkitek L2CA Sdn Bhd, the Architect for the Project.

[5] ASM contended that Econpile failed to perform their work diligently according to the terms of the contract which resulted in delays and the completion of the Project even with the extended completion date of 7 April 2018.

[6] The Architect involved in the Project issued a Certificate of Non-Completion (CNC) dated 7 April 2018 to Econpile notifying of the imposition of the liquidated damages. Dispute arose between the parties resulting in Econpile commencing adjudication proceedings against the ASM claiming for the uncertified interim valuations No. 16 to 24 and alleged under-certification of interim valuation No 15. Partial payment was made for Interim Payment



Certificate No. 15, and no certificates were issued for progress claims No. 16 to 24. Econpile then initiated adjudication under the CIPAA to claim the sums under progress claims No. 16 to 24, as well as the under-certified sum under Interim Payment Certificate No. 15. ASM made a cross-claim.

[7] Econpile simultaneously commenced arbitration proceedings by way of a Notice of Arbitration dated 18 March 2019. ASM disputed the sums claimed in the said Notice and subsequently issued its Notice of Arbitration dated 17 May 2019.

[8] By the Adjudication Decision dated 21 June 2019 and a Supplementary Adjudication Decision dated 7 August 2019 (First Adjudication Decision), the Adjudicator decided that ASM was to pay Econpile RM59,767,269.32 (the adjudicated sum). Unfortunately, ASM failed to pay the said adjudicated sum which subsequently led to Econpile issuing a statutory demand pursuant to s 466(1) Companies Act 2016 on 25 June 2019. ASM then applied for a *Fortuna injunction* on 9 July 2019 to restrain Econpile from presenting a winding-up petition. The High Court granted the *Fortuna injunction* on 9 January 2020. Econpile appealed to the Court of Appeal in Civil Appeal No. W-02(NCC)(A)-192-02/2020. However, the appeal was subsequently withdrawn on 18 May 2022.

[9] Econpile filed a Notice of Application (Originating Summons No. WA-24C-113-07/2019) [[2020] MLRHU 899] (OS 113) to enforce the First Adjudication Decision pursuant to s 28 of the CIPAA (First Enforcement Application). ASM responded by filing two (2) applications as follows:

- (a) in O.S. No. WA-24C-118-07/2019 (OS 118) [[2023] MLRHU 939], an application to set aside the said Adjudication Decision under ss 15 (b) and (d) CIPAA on the basis that there has been a denial of natural justice and that the adjudicator has acted in excess of his jurisdiction (First Setting Aside Application); and
- (b) In O.S. No. WA-24C-173-09/2019 (OS 173) [[2020] MLRHU 899], an application to stay the Adjudication Decision pending the conclusion of the arbitration on the basis that there were clear and unequivocal errors in the Adjudication Decision as the parties have referred the disputes to Arbitration. ASM contended that there is a genuine and valid set-off in their counterclaim of RM276,581,893.96 against Econpile in the Arbitration proceeding, which exceeds the adjudicated amount of RM59,767,269.32 (First Stay Application).

[10] The High Court allowed the First Enforcement Application by Econpile on 29 November 2019 and ordered ASM to pay Econpile the Adjudicated Sum of RM59,767,269.32, legal fees of RM150,000.00 and adjudication cost amounting to RM203,924.40 (First Enforcement Order). At the same time, the High Court dismissed ASM's First Setting Aside Application and First Stay Application. Aggrieved with the decision of the High Court, ASM



then appealed to the Court of Appeal. On 26 April 2022 the Court of Appeal dismissed the appeal against the First Enforcement Order and the Setting Aside Application. However, on the same date the Court of Appeal granted ASM the First Stay Application. ASM did not seek leave to appeal against the Court of Appeal's decisions in respect of the First Enforcement Order and the First Setting Aside Application. On 3 January 2022, Econpile was granted leave to appeal against the decision of the Court of Appeal in the First Stay Application.

[11] Econpile initiated a further adjudication proceeding in respect of progress claims No 25 to 27. On 17 September 2019, the Adjudicator decided that ASM pay Econpile the sum of RM5,959,024.99 (Second Adjudication Decision). However, ASM failed to make payment of the said adjudicated sum to Econpile.

[12] Econpile applied to enforce the Second Adjudication Decision pursuant to s 28 of CIPAA which was allowed by the High Court on 28 October 2020 (Second Enforcement Order). ASM had filed an application to set aside the Second Adjudication Decision (Second Setting Aside Application) which was dismissed by the High Court on the same date. On 4 February 2021, ASM's application to stay the Second Adjudication Decision was dismissed by the High Court (Second Stay Application). ASM then appealed to the Court of Appeal against both decisions of the High Court dated 28 October 2020 and 4 February 2021. On 28 October 2022, the Court of Appeal dismissed ASM's appeal against the Second Enforcement Order and the Second Setting Aside Application. ASM did not seek leave to appeal against these Court of Appeal's decisions. However, on 25 November 2022 a different panel of the Court of Appeal dismissed ASM's appeal against the Second Stay Application.

The High Court

[13] There are two High Court decisions on appeal relating to the stay of the First Adjudication Decision and the Second Adjudication Decision (collectively referred to as 'the Adjudication Decision').

[14] In respect of the First Adjudication Decision (Appeal No. 02(f)-2-01/2023(W)) three applications were heard together before the High Court, OS 113, OS 118 and OS 173.

[15] The High Court dismissed ASM's applications for stay and allowed Econpile's application to enforce the First Adjudication Decision. The High Court concluded that there was no basis to warrant a stay of the First Adjudication Decision. The fact that ASM has a claim which exceeds Econpile's payment claim pending in arbitration cannot be regarded as being a special circumstance unless it can be shown that there is a real danger that Econpile would not be able to pay ASM, which ASM failed to do so.



[16] The learned High Court Judge found that there were no clear and unequivocal errors on the part of the learned Adjudicator in arriving at the said First Adjudication Decision. The High Court was of the opinion that ASM failed to adduce sufficient evidence to persuade the High Court to grant an order for a stay of the said First Adjudication Decision. Further, ASM has not provided cogent reasons why a stay is warranted to meet the justice of the case or that the discretion ought to be exercised in ASM's favour. The High Court concluded that this case falls within the category of cases where the dissatisfied party in an adjudication decision ought to be made to pay the adjudicated amount that is due first while the dispute at hand is resolved in another forum, in this instance, the pending arbitration.

[17] In Originating Summons No. WA-24C-252-11/2019 [[2021] MLRHU 336] which relates to the Second Adjudication Decision (Appeal No. 02(f)-34-05/2023(W)) before a different High Court, the Judge on 28 October 2020 had also dismissed ASM's setting aside application and allowed Econpile enforcement application.

[18] The High Court Judge found that since both parties are in concurrence that arbitration proceedings are on-going in respect of the dispute ASM has surmounted the stay threshold requirement as provided under s 16(1)(b) CIPAA. There are neither instances of disregarding nor wrong interpretation of statute or misreading and/or application of case authorities that resulted in the Adjudication Decision as being erroneous and there are no unequivocal errors to justify the stay.

The Court of Appeal

[19] In relation to the High Court decision dated 29 November 2019, there are three appeals filed at the Court of Appeal:

- (i) W-02(C)(A)-2363-12/2019 (2363) [[2023] 1 MLRA 646] which is ASM's appeal against the dismissal of ASM's First Setting Aside Application to set aside the First Adjudication Decision pursuant to s 15 of the CIPAA 2012;
- (ii) W-02(C)(A)-2364-12/2019 (2364) [[2023] 1 MLRA 646] is ASM's appeal against the decision of the High Court in allowing Econpile's Enforcement Application to enforce the First Adjudication Decision pursuant to s 28 CIPAA 2012; and
- (iii) W-02(C)(A)-2365-12/2019 (2365) [[2023] 1 MLRA 646] is ASM's appeal against the dismissal of ASM's First Stay Application to stay the First Adjudication Decision pursuant to s 16 CIPAA 2012.

[20] On 26 April 2022 the Court of Appeal unanimously dismissed Appeals 2363 and 2364 with costs of RM10,000.00 for each appeal subject to allocator. The Court of Appeal allowed Appeal 2365, thus setting aside the High Court



Order dated 29 November 2019 and granted the stay of the Adjudication Decision even after an enforcement order under s 28 CIPAA has been granted.

[21] However, in respect of the High Court decision dated 4 February 2021 that decided the Second Stay Application, a different panel of the Court of Appeal affirmed the High Court decision that had dismissed the application for stay. This is the Appeal No. 02(f)-34-05/2023(W). The Court of Appeal through the grounds of judgment of Abu Bakar Jais, JCA (as he then was) said:

[47] The cases above, demonstrate that it is quite a task for an applicant in his application for a stay of the adjudication decision. Although there can be no doubt the stay of an adjudication decision can be allowed, the cases highlighted above laid down serious requirements for the same to succeed. These conditions can be summarised as follows:

- (a) there are only two grounds to support the application of a stay of the adjudication decision;
- (b) the two grounds as explained, must be stringently complied;
- (c) In respect of the first ground, there must not be just a simple error but clear error on the part of the adjudicator in respect of his adjudication decision;
- (d) the clear error must be grave to prick the conscience of the Court hearing the application to stay the adjudication decision;
- (e) the adjudicator's decision must be upheld even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of evidence before him and;
- (f) the Court is not to look into or review the merits of the case or to decide the facts of the case

[22] Based on the financial documents before it the Court of Appeal concluded that Econpile is in a healthy financial position and will be able to pay ASM in the event ASM is successful in the arbitration. Further, the adjudicator had not made clear errors in his adjudication decision.

Legislative Framework

[23] Before addressing the various questions raised it is necessary to consider the relevant statutory provisions which are in issue in this appeal before us.

[24] CIPAA is a legislation designed to ensure regular and timely payment as well as promote a speedy and cost-effective dispute resolution mechanism for disputes through adjudication involving payment in the construction industry. It advocates a system of pay first and settle dispute later.

[25] Section 12 CIPAA sets out the procedure that must be complied with in an adjudication:



- (1) The adjudicator shall conduct the adjudication in the manner the adjudicator considers appropriate within the powers provided under s 25.
- (2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within-
 - (a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
 - (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
 - (c) such further time as agreed to by the parties.
- (3) An adjudication decision which is not made within the period specified in subsection (2) is void.
- (4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.
- (5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.
- (6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.
- (7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's initiative or at the request of any party.
- (8) The enforcement of the adjudication decision shall not be affected in anyway by a request for correction under subsection (7) and any correction made is deemed to take effect from the date of the original adjudication decision.
- (9) The Evidence Act 1950 [Act 56] shall not apply to adjudication proceedings under this Act.

[26] Once an adjudication decision is pronounced an aggrieved party may apply to set aside an adjudication decision under s 15 CIPAA on the following grounds:

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially; or
- (d) the adjudicator has acted in excess of his jurisdiction.



[27] Under CIPAA a party may apply to the High Court under s 16(1) CIPAA for a stay of an adjudication decision in the following circumstances:

- (a) an application to set aside the adjudication decision under s 15 has been made; or
- (b) the subject matter of the adjudication decision is pending final determination by arbitration or the Court.

[28] Section 16(2) CIPAA empowers the High Court to grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[29] Section 28 CIPAA provides that a party to the adjudication process may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court. The said section reads as follows:

- (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
- (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
- (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

Analysis And Determination

[30] The main focus for determination is whether the existence of a valid enforcement order made pursuant to s 28 CIPAA precluded the making of an order pursuant to s 16(1) of the same Act.

[31] The Court of Appeal in Appeal 2365 allowed the stay application and granted an order pursuant to s 16(b) CIPAA. In granting the stay after an enforcement order has been granted, the Court of Appeal reasoned that since there are no express prohibitions in CIPAA prohibiting otherwise the Court is empowered to grant a stay. The Court of Appeal opined that as long as the threshold under s 16 CIPAA is met and supported with cogent evidence that there are special circumstances justifying the granting of a stay, an application for a stay can be considered and granted. In its grounds of judgment, the Court of Appeal further explained that an order for enforcement obtained pursuant to s 28 CIPAA merely permits the adjudication decision to be enforced as a judgment of the Court but is not a judgment in itself. A stay can be granted provided the threshold under s 16 CIPAA is satisfied. The Court of Appeal further clarified that in any event, an adjudication decision is not merged into a judgment if an enforcement application is allowed under s 28 CIPAA since an order obtained merely permits the adjudication decision to be enforced as a judgment of the Court but is not a judgment in itself.



[32] The Court of Appeal explained that to be deserving of a stay, the appellant, in this case, ASM, must satisfy the requirements set out in s 16(1)(a) and (b) CIPAA supported with cogent evidence that there are special circumstances justifying the granting of a stay of the adjudication decisions even after an enforcement order has been granted, in its judgment, the Court of Appeal explained the reasons for its decision:

[23] It is useful to observe that despite the enforcement order on the adjudication decision (which decision of the High Court we have affirmed on appeal) this is no objection to the granting of a stay on the same adjudication decision. **There are no express prohibitions in the CIPAA stating that stay applications cannot be allowed after the enforcement order has been granted.**

[24] We thus reiterate that requests for stay can be made, and granted, provided the threshold under s 16 is satisfied, and also that in any event an adjudication decision is not merged into a judgment if an enforcement application is allowed under s 28 of the CIPAA, since an order obtained pursuant to s 28 of the CIPAA merely permits the adjudication decision to be enforced as a judgment of the Court but is not a judgment in itself (see *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] MLRHU 654).

[25] As such, in order to be deserving of a stay, the appellant must satisfy the requirements set out in s 16(1)(a) and (b) of the CIPAA and to show with cogent evidence that there are special circumstances which justify the granting of a stay of the said adjudication decision.

[Emphasis Added]

[33] With respect, we do not agree. The Court of Appeal in Appeal 2365 opined that since there is no express provision in CIPAA prohibiting the granting of stay after the enforcement order has been granted, an application for stay can be considered and granted. The reasons of the Court of Appeal are seriously flawed.

[34] The Hansard is a useful tool to understand and appreciate the intention of the Parliament in legislating laws. The intention of the Parliament in legislating CIPAA is explained in the Hansard Bil. 7 Dated 7 May 2012 as follows:

“...Buat masa ini, mekanisme yang diguna pakai bagi menyelesaikan pertikaian pembayaran adalah melalui tindakan Mahkamah dan prosiding timbang tara. Walau bagaimanapun, proses perbicaraan kes di Mahkamah lazimnya mengambil masa yang lama manakala prosiding timbang tara melibatkan kos yang tinggi. Prosiding timbang tara hanya boleh dimulakan dengan persetujuan pihak-pihak terlibat. Pada lazimnya perjanjian bertulis akan memperuntukkan bahawa timbang tara boleh dimulakan selepas kerja pembinaan siap atau kontrak ditamatkan. Tempoh masa yang lama dan kos prosiding yang tinggi adalah faktor utama yang mengekang kepada pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah dan timbang tara.

Rang Undang-undang Pembayaran dan Adjudikasi Industri Pembinaan 2012 memberi satu opsyen kepada pihak-pihak terlibat menyelesaikan pertikaian



dengan kos yang rendah dan cepat. Oleh yang demikian Jemaah Menteri dalam mesyuaratnya pada 15 Julai 2009 telah bersetuju agar suatu akta khusus digubal bagi menangani pembayaran dan membantu pihak-pihak dalam industri pembinaan untuk menyelesaikan pertikaian pembayaran.

[Emphasis Added]

[35] Section 17A of the Interpretation Acts 1948 and 1967 provides that in interpreting an Act, the construction promoting the purpose or object of the legislation shall be preferred:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[36] The Federal Court in *Hong Leong Bank Berhad v. Khairulnizam bin Jamaludin* [2016] 4 MLRA 603 laid down the basic principles to apply when interpreting statutes:

[29] In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. The duty of the Court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. Where the language used is clear and unambiguous, it is not the function of the Court to re-write the statute in a way which it considers reasonable. In *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 MLRA 407 at 408-409, the Federal Court said:

It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.

It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed, per Bayley J. in *R v. Ramsgate (Inhabitants)*.

[30] In *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 MLRA 547 the Federal Court had this to say at pp 554-555:

Section 17A of the Interpretation Act provides that:

A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

On the proper application of the provision of the said s 17 A of the Interpretation Act we would refer to the case of *All Malayan Staff Union v. Rajasegaran & Ors* [2006] 1 MELR 44; [2006] 2 MLRA 61 wherein the Court had laid down the principles, *inter alia*, as follows:



In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:

- (1) **Legislation is always to be understood first in accordance with its plain meaning;**
- (2) **Where the plain meaning is in doubt the Court will start the process of construction by attempting to discover from the provisions enacted, the broad purpose of the legislation;**
- (3) **Where a particular reading advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the Courts will be prepared to adopt that reading.**
- (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

[37] David Wong Dak Wah, JCA as he then was, in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] MLRAU 499 explained the philosophy underlying CIPAA:

[15].... Prior to the introduction of CIPAA 2012, claims by subcontractors against the main contractors were not able to be resolved in a speedy and economical manner. The only redress was to launch a suit in Court and then apply for summary judgments with the hope that the Courts would grant such summary judgments. Such applications invariably have difficulties as the threshold for such application to succeed is quite high as the subcontractor has to show that there are no triable issues for the Court to adjudicate or in short, the defence of the contractor has no merit at all. It cannot be disputed that this sort of litigation has given rise to financial hardship to the subcontractors so much so that some had lost all the benefits of the subcontracts. It also cannot be disputed that the contractors have taken advantage of the intricacies of the judicial system by withholding payments without valid reasons.

[16] To overcome the aforesaid shortcomings and with the aim of making the construction industry a fair playing field for the players, Parliament in various Commonwealth countries saw it fit to introduce an adjudication regime in which interim claims made by subcontractors can be dealt with by appointed adjudicators in a speedy and economical manner. The benefit of such regime is plain and obvious in that claims of subcontractors, being the lifeline of their survival, must not be delayed without valid reasons by the contractors. In short, the unnecessary stoppage of money flow would be avoided.

[38] The long title of CIPAA states that the process as provided under the Act is “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.”



[39] In *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 5 MLRA 584 the Federal Court articulated through the judgment of Zawawi Salleh, FCJ that CIPAA is enacted by Parliament to provide a faster and cheaper resolution forum through the process adjudication. CIPAA was drafted with the said specific intent. The Court's primary duty under CIPAA must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator:

[55] We have also perused and scrutinised the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling CIPAA Bill. We have no hesitation in agreeing and endorsing the interpretation expounded by the High Court and the majority, it is clear from the materials mentioned above that the primary objective of CIPAA 2012 is to alleviate cash flow issues by providing an effective and economical mechanism. The Courts are consistent in the finding that CIPAA 2012 is intended to alleviate cash flow issue. Therefore, the mischief that CIPAA 2012 intends to cure is none other than the cash flow in the construction industry through effective and economical mechanism; for deciding otherwise would run counter to the legislative purpose of creating an expedited adjudication process.

[40] David Wong (JCA), as His Lordship then was, in *IRDK Venture Sdn Bhd v. Econpile (M) Sdn Bhd* [2020] 5 MLRA 515 observed:

The intention and objective of CIPAA is very clear. It was specifically enacted to address issues in the construction industry such as to alleviate cash flow problems for the unpaid party and to give a temporary finality to the payment claims. The Act was designed to assist the parties to be paid speedily for the work which they had carried out and for adjudication proceedings for payment claims that is due and payable before the determination of the contract.

[41] The Federal Court encapsulated the principles governing stay applications under the CIPAA through the judgment of Zulkefli Ahmad Makinudin, PCA in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2018] 1 MLRA 460:

[76] The High Court in the present case held that an application under s 16 of CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating "to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes".

[77] The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the Courts in England, Australia and Singapore. The Court placed much emphasis on the decision of the Singapore Court of Appeal in *WY Steel Construction Pte Ltd*.

[78] The Court of Appeal in the present case adopted a similar approach. It said that unless there was "overwhelming evidence" that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.



[79] We are of the view that such a stringent test is not justified under CIPAA because s 16 of CIPAA itself contains no such limiting requirement or intent. Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the Court to find a suitable middle ground in cases where there has been clear and unequivocal errors.

[80] It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part. It can be seen as follows:

- (a) In England, statutory adjudication is governed by the HGCR Act and the Scheme and the Arbitration Act 1996. Under reg 24 of the Scheme an order of the adjudicator may be enforced by reference to s 42 of the UK Arbitration Act. At the application for enforcement, the responding party may seek to resist the enforcement on the grounds of want of jurisdiction of the adjudicator or a breach of natural justice.
- (b) In Australia, different States have different statutory adjudication schemes, in the State of Victoria in Australia where there is a failure to respond to a payment claim, the claiming party must apply for leave to enter judgment at which point a Court can review the claim. There is a provision for a Court-based review of the adjudicator's decision. Apart from that, judicial review or *certiorari* is available to challenge any adjudication decision. This includes challenging an adjudication decision by using *Wednesbury* unreasonableness. Importantly, Victoria, Australia, provides for an automatic stay after an adjudication decision, on the launching of arbitration to challenge the award subject to security being provided by the responding party.
- (c) In New Zealand, the scheme is again different under the Construction Contracts Act 2002. Here the claiming party is entitled to seek statutory adjudication on progress payment. Those progress payments are statutorily defined under s 17 of the Act to include an accounting of defective works and liquidated ascertained damages. Once an adjudication decision is delivered, s 73 of the Act sets out the steps for applying to Court for judgment for enforcement of the award. This is apart from the right of the responding party to seek judicial review against the award.
- (d) In Singapore, there is a specific provision under s 18 of the Singapore Act 2006 which allows for review of adjudication awards. It is after the review process concludes that the claiming party must then apply to Court for an order of enforcement.

[81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting



the statutory power of stay in Malaysia simply on the financial status of the other party. CIPAA contains no such restriction.

[82] We are in agreement with the contention of the appellant that a more liberal reading of s 16 of CIPAA would allow some degree of flexibility to the Courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However, to restrict the application of s 16 of CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

[42] CIPAA is a legislation crafted to address issues common in the construction industry in particular relating to cash flow problems for the unpaid party and only as temporary finality to the payment claims. It is not the end of the end. The Act was designed with the ultimate aim to assist the parties in construction dispute to be paid expeditiously for the work which they had carried out and for adjudication proceedings for payment claims that are due and payable before the determination of the contract.

[43] Section 16 CIPAA expressly stipulates that a party in an adjudication dispute may apply to the High Court for a stay of an adjudication decision in the following circumstances:

- (a) if an application to set aside the adjudication decision under s 15 has been made; or
- (b) if the subject matter of the adjudication decision is pending final determination by arbitration or the Court.

[44] Therefore, under the statutory framework of CIPAA, an adjudication decision can only be set aside in very rare circumstances to give effect to the provisional resolution of payment disputes in construction contracts. In the appeals before us, both the Adjudication Decision were not set aside and remain intact. Thus, in the absence of any error by the adjudicator the High Court had correctly granted an Enforcement order.

[45] In addressing the issue of enforcement of the adjudication decision, the Court of Appeal in *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 1 MLRA 207, observed that s 28 CIPAA vests the High Court with discretionary powers, however, an applicant is not required to show that there are no grounds for setting aside the adjudication decision under s 15 of the same Act. If there is an adjudication decision the applicant only needs to satisfy the High Court that the adjudication decision was made in the applicant's favour and that there had been a failure by the respondent to pay the adjudicated sum by the date specified in the adjudication decision. That is all that is required by the statute.

[46] This Court in *Tan Kah Fatt & Anor v. Tan Ying* [2023] 2 MLRA 525 explained that the Courts must favour a construction which promotes the purpose, object or intent of the legislation over a construction. It must not be



forgotten that even though adjudication under the scheme of CIPAA offers temporary finality to the resolution of the payment dispute, the subject matter of the adjudication decision can still be finally determined in arbitration or the Court. It offers the parties in the payment dispute to 'pay now talk later'. The door is not shut. The option is still open to the parties to refer to arbitration to finally resolve the issue. As David Wong Dak Wah CJSS in the decision of the Court of Appeal in *Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Ors And Another Appeal* [2018] MLRAU 482 explained:

[20]... This "temporary finality" nature serves only the purpose of keeping the cash flow going for the contractors so that they would not be held to ransom by recalcitrant employers.

[47] The authorities we have stated above resonated that in the construction and interpretation of a statute, the intent and object of the legislation is an important factor which the Court cannot ignore. Therefore, the correct approach under CIPAA is to uphold an adjudicator's decision unless there are issues relating to jurisdiction or there has been a serious breach of natural justice. The adjudicators' decisions are binding on the parties until reversed by a Court. Thus, the only defence to enforceability is if the findings offended the principle of natural justice or if the adjudicator lacked jurisdiction and, on that basis, the decision is set aside.

[48] In respect to the provisions under CIPAA to set aside an adjudication decision and to enforce the adjudication decision, we find no ambiguity. There is no provision for a stay of adjudication decision after an enforcement order is given. Applying the principles of interpretation of statutes as we have stated above, in the absence of a specific provision the Court is not statutorily empowered to grant a stay if the adjudication decision is not set aside. To do so would be incongruent to the intent and purpose of CIPAA.

[49] Guided by the rules of statutory construction, and analysis of previous Courts' decisions we are of the opinion that by interpreting CIPAA in the manner it had done, the Court of Appeal in Appeal No. 02(f)-2- 01/2023(W) had acted in excess of its jurisdiction under the Act by granting the stay when the Adjudication Decision remained intact and not set aside. The parties to the adjudication have no option but to comply with the orders of the adjudication decision unless and only unless it has been set aside under s 16 CIPAA. Any other construction and interpretation would defeat the purpose, object and intent of CIPAA.

[50] Having carefully considered the submissions of all parties we agreed with the decision of the High Courts. For the foregoing reasons, in Appeal No. 02(f)-2-01/2023(W), Question 1 is answered in the negative that is, an adjudication decision after having been enforced pursuant to s 28 CIPAA as an Order of the Court cannot be stayed pursuant to s 16(1)(b) CIPAA. Question 2 is answered in the affirmative.



[51] It must be reiterated that the principles enunciated by this Court in *View Esteem* must be followed in an application for a stay of an adjudication decision pursuant to s 16 CIPAA if an application to set aside the adjudication decision under s 15 of the same Act has been made or the subject matter of the adjudication decision is pending final determination by arbitration or the Court. In a construction dispute under CIPAA, the Court must at all times consider all factors and issues subject to the provisions of CIPAA.

[52] With the reasons we have given above, we find it unnecessary to answer the questions posed in Appeal No. 02(f)-34-05/2023(W).

Conclusion

[53] Based on the aforementioned reasons and in the light of the above settled principles, we found merits in the issues raised by the Appellant (Econpile).

[54] Therefore, having carefully considered the submissions of all parties and for all the reasons aforesaid we allowed the appeal in Appeal No. 02(f)-2-01/2023(W). We set aside the decision of the Court of Appeal and restored the decision of the High Court. In Appeal No. 02(f)-34-05/2023(W), we dismissed the appeal and affirmed the decision of the Court of Appeal and the High Court. A global cost of RM100,000.00 subject to allocator is to be paid to the Appellant in Appeal No. 02(f)-2-01/2023(W).





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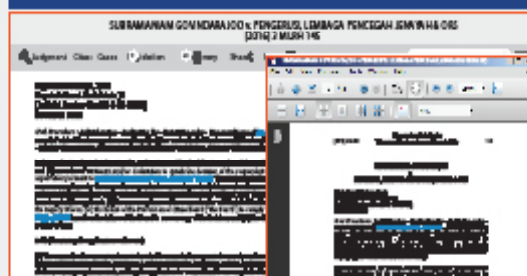


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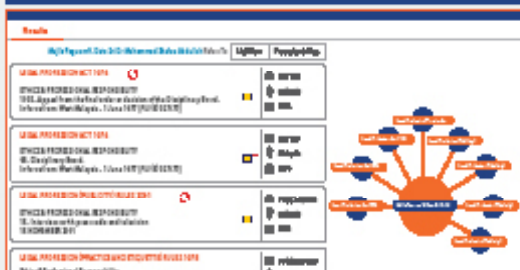
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