

A Contractor's Claims in Adjudication against the Sub-Contractor

When a contractor takes over the sub-contractor's works, can the contractor make a claim in adjudication against the sub-contractor? Scenarios as such are not uncommon as contractors may be obliged take over the sub-contractor's works when the sub-contractor can no longer proceed with its work, refuses to carry out rectification works, or worst, abandons the project altogether.

Contractors who find themselves in such circumstances and wish to make a claim against the sub-contractors by way of an adjudication under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") should be wary of the recent High Court case, *Hiform (M) Sdn Bhd v Pembinaan Bukit Timah Sdn Bhd and another case*¹.

Brief Facts

Pembinaan Bukit Timah Sdn Bhd ("PBT") had been appointed by the Main Contractor to carry out and complete a construction project in Putrajaya ("Project"). Thereafter, PBT appointed Hiform (M) Sdn Bhd ("Hiform") by a letter of award dated 8.1.2015 ("Contract") as its sub-contractor to supply labour, materials and all machineries and equipment and tools for the execution and completion of reinforced concrete works for the Project ("Works").

However, disputes arose between the parties in respect of the progress of the Project during the course of execution of the Project, this in turn led to Hiform withdrawing itself from the Project and PBT taking over the execution of the Project until completion.

Adjudication

On 7 Oct 2019, PBT issued its payment claim pursuant to CIPAA but no payment response was received from Hiform. Thereafter, on 24 Dec 2019, PBT commenced adjudication proceedings against Hiform. In its adjudication claim, PBT claimed as follows:

- (a) Labour costs for rectification and/or completion of the Works;
- (b) Material costs for rectification and/or completion of the Works; and
- (c) Liquidated damages, besides interest and costs.

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The Adjudicator, subsequent to reviewing the parties' respective submissions, had determined that she had jurisdiction to determine the dispute before her and that Hiform was to pay PBT a sum of RM14,990,503.60 which consists of liquidated damages and additional costs. Dissatisfied with the adjudication decision, Hiform applied to set aside the decision at the High Court. By reason of non-payment of the adjudicated sum, PBT also applied to enforce the decision.

Did the Adjudicator have Jurisdiction?

At the High Court, Hiform contended that PBT's claims do not fall within the definition of "payment" under CIPAA as PBT's claims are for rectification and completion of the Project as well as liquidated damages which essentially flowed from Hiform's breach of the Contract.

PBT however argued that its claims are contractual claims which are expressly provided for in the Contract. Further, PBT contended that:

- (a) Contractors are not restricted to pursue adjudication against a sub-contractor under the CIPAA;
- (b) CIPAA does not distinguish between the party appointing or the party appointed under the construction contract as the unpaid party and non-paying party respectively;
- (c) PBT is clearly the unpaid party because PBT has not been paid in whole or in part under the Contract and Hiform is clearly the non-paying party as Hiform is against whom the payment claim has been made; and
- (d) PBT's claim is for payment for work done and services rendered under the express terms of the Contract.

High Court's Decision

Having analysed the various case authorities and abiding by the principles of statutory of interpretation, the High Court Judge in setting aside the Adjudication Decision, held that the source of the claim is what determines whether the claim is one that is covered for under CIPAA and that the construction pyramidal contracting structure would not matter.

Whilst debt 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 would be covered for under Sections 4 and 5 of CIPAA, unpaid debt or damages which arose from a breach of the contract would not be provided for.

As PBT's claims arose from Hiform's alleged repudiatory breach of contract, the claims do not form part of the consideration of the contract to carry out the works for the Project.

The High Court further noted and clarified that:

- (a) Had PBT, with Hiform's consent or request, supplied materials and/or labour to Hiform during its execution of the Project but has been unpaid for the same by Hiform, the unpaid debt would be claimable under CIPAA.
- (b) Debt or damages incurred as the result of breach of contract would be a valid adjudicable cross claim of defence of contractual or equitable set off in an adjudication proceeding albeit it cannot be an adjudicable claim.

Comments

The High Court has given further clarity that CIPAA is not the proper avenue for claims for damages from a breach of contract. However, one would be allowed to raise such claims as a cross-claim of defence or set-off against a Claimant's claim.

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The position stated herein is as at the date of publication on 9 March 2021.*