

ADJUDICATION – Adjudication claim – Adjudication decision to be arbitrated – Enforcement of adjudication decision – Statutory demand based on adjudication decision – Presentation and filing of winding up petition – Application for injunction before High Court – Whether an injunction can be granted to restrain presentation of winding up petition - Construction Industry Payment and Adjudication Act 2012 – section 28

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd

[Originating Summons No. WA-24NCC-363-07/2019], High Court

BACKGROUND The Defendant, a piling contractor was appointed by the Plaintiff, a developer for a project through a letter of award where the Agreement and Conditions of PAM Contract 2016 is applicable. Disputes arose when the Defendant made a claim for approximately RM74 million under the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA**”) against the Plaintiff (“**Claim in Adjudication**”). The Defendant alleged in the adjudication proceedings that there are unpaid progress claims inclusive of some uncertified claims and undervaluation of works done. The Plaintiff denied the allegations and contended that it had counterclaims and set-offs against the Defendant with a sum exceeding the amounts claimed by the Defendant.

When the adjudication proceedings were on foot, the parties issued their respectively notices of arbitration against each other where the Claim in Adjudication forms part of the disputes in the arbitration proceedings. The adjudicator eventually decided in favour of the Defendant (“**Adjudication Decision**”) and a statutory demand for payment based on the Adjudication Decision was served on the Plaintiff by the Defendant. The Defendant further stated that winding up proceedings would ensue if payment is not received within the timeline given. However, the Adjudication Decision was corrected by the adjudicator subsequently, but such correction was not reflected in the statutory demand. Aggrieved, the Plaintiff applied to the High Court for a *Fortuna* injunction to restrain the Defendant from presenting the winding up petition. Hence, the suit before the High Court. Prior to the hearing, the Plaintiff failed to set aside the corrected Adjudication Decision and the Defendant obtained an order to enforce such decision. Up to the time of hearing before the High Court, no execution proceedings had been taken and no payment was made.

ISSUE Whether a *Fortuna* injunction to restrain the Defendant from presenting a winding up petition against the Plaintiff based on the Adjudication Decision ought to be granted.

DECISION In granting the *Fortuna* injunction, the High Court held that the Adjudication Decision, which formed the basis for the statutory demand, is disputed by the Plaintiff in arbitration coupled with cross-claims exceeding the amount allowed in the Adjudication Decision.

The High Court judge granted the injunction on, *inter alia*, the following grounds:

- (a) Notwithstanding the nature of an adjudication decision which is “temporarily final” or provisionally final (pursuant to s. 13 of CIPAA), such decision is still binding until set aside in court or in arbitration. It does not preclude the winning party from enforcing the adjudication decision.
- (b) An adjudication decision may be enforced in accordance with Order 45 of the Rules of Court 2012 *as if* it is a judgment of the court pursuant to s.28(1) of the CIPAA. This means that CIPAA does not envisage that an adjudication decision should be converted and be enforced as a judgment of court.
- (c) While an adjudication decision may form the basis for a statutory demand, an injunction may be issued to restrain the presentation of a winding up petition, provided that the adjudication decision is disputed on substantial grounds; or due to the existence of a genuine cross-claim, counterclaim or set off against the petitioner for a greater amount than the adjudicated sum.