

CIPAA: court has no discretion to set aside adjudicator's costs order

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Introduction

The Construction Industry Payment Adjudication Act 2012 (CIPAA) was enacted to alleviate payment problems in the construction industry by allowing any payment dispute to be resolved speedily through adjudication. However, the losing party may opt to set aside or stay an adjudication decision pursuant to Sections 15 and 16 of the CIPAA. On the other hand, the winning party may enforce the adjudication decision or make a demand for direct payment from the principal in court pursuant to Sections 28 and 30 of the CIPAA respectively.

In the recent high court case of *Multazam Development Sdn Bhd v Felda Global Ventures Plantations (M) Sdn Bhd*,⁽¹⁾ a dilemma arose as to whether the costs determined by the adjudicator in withdrawing adjudication proceedings could be challenged in court.

Facts

In 2018 Multazam Development Sdn Bhd (the plaintiff) commenced adjudication proceedings against Felda Global Ventures Plantations (M) Sdn Bhd (the defendant) for an outstanding sum of RM5,648,688.08 when the defendant terminated the contract between the parties. When the proceeding was in progress and an adjudicator had been appointed, the plaintiff sent a notice to withdraw the adjudication proceedings. At that time, the plaintiff's adjudication claim and the defendant's adjudication response had been submitted to the adjudicator. Consequently, since there was no mutual agreement between the parties on the bearing or sharing of costs incurred due to the withdrawal, the adjudicator made an order stating as follows:

- The plaintiff had to bear the withdrawal costs of RM23,100, comprising the adjudicator's fee and the Asian International Arbitration Centre's (AIAC's) administrative fees, including 6% sales and services tax.
- The AIAC had to fully refund the defendant for its share of the advance security deposit.
- The plaintiff had to pay the defendant the legal costs amounting to RM78,324.15 by 20 May 2019.

Dissatisfied, the plaintiff subsequently appealed to the adjudicator on the grounds that the order was excessive, unreasonable and wholly prejudicial to the plaintiff. The adjudicator rejected the appeal.

The defendant served on the plaintiff a winding-up notice pursuant to Sections 456 and 466 of the Companies Act 2016 on the grounds that the plaintiff had failed, neglected or refused to pay the legal costs ordered by the adjudicator. As such, the plaintiff first made an application to, among others things, set aside the order made by the adjudicator and obtain an injunction to restrain the defendant from winding up the plaintiff. The court, among other things:

- held that the adjudicator's order was not an adjudication order which could be set aside pursuant to the CIPAA;
- remitted the issue on legal costs to be borne by the plaintiff to the adjudicator, who was ordered to discuss the matter with the director of the AIAC and to consider the plaintiff's submissions on the legal costs in determining their amount;⁽²⁾ and
- prevented the defendant from presenting any petition to the court pursuant to Sections 465 and 466 of the Companies Act, pending the issuance of a revised order by the adjudicator.

The adjudicator acted accordingly and reaffirmed his previous order as his revised order. The adjudicator also

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elaborated that pursuant to Section 17(2) of the CIPAA, the claimant (the plaintiff in the present case) must bear the costs of withdrawing the adjudication proceedings since withdrawal had occurred after the issuance of the adjudication response by the defendant. Aggrieved, the plaintiff sought a declaration that the revised order was erroneous and to be set aside.

Issue

The issues in this case was whether the plaintiff was entitled to challenge the costs awarded by the adjudicator as a result of withdrawing the adjudication proceedings under the CIPAA.

Decision

The high court judge dismissed the application to set aside the revised order on the ground that there is no provision in the CIPAA which empowers the court to consider an appeal or set aside the costs ordered by an adjudicator. Therefore, the court could not intervene in this application because it was not within its power or jurisdiction to do so under the CIPAA.

Further, relying on *BM City Realty Construction Sdn Bhd v Merger Insight (M) Sdn Bhd*,⁽³⁾ the high court was of the view that the adjudicator had the discretion to decide the legal costs by considering all of the relevant circumstances. As such, the imposition of RM78,324.15 was reasonable considering that the withdrawal had been made during the adjudication response stage.

Comment

The high court's decision serves as a reminder for future cases that parties should not initiate adjudication proceedings without considering other circumstances (eg, the merits of the case or the possibility of a settlement before the conclusion of the adjudication proceedings).

Notably, a higher legal cost will be imposed on a party which whiles away an adjudicator's and the other party's time, as seen in *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd*.⁽⁴⁾

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Endnotes

(1) *Multazam Development Sdn Bhd v Felda Global Ventures Plantations (M) Sdn Bhd* [2020] MLJU 606.

(2) Rule 9(5A) of the AIAC's Adjudication Rules and Procedure.

(3) *BM City Realty Construction Sdn Bhd v Merger Insight (M) Sdn Bhd* [2016] 1 LNS 1096.

(4) *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd* [2020] 1 LNS 187.

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