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CIPAA: clash of stay applications and enforcement orders

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Introduction

Once a successful party obtains an adjudication decision under the Construction Industry Payment and Adjudication Act (CIPAA) 2012, the next course of action is usually to enforce the adjudication decision pursuant to section 28 of the CIPAA (enforcement order). Meanwhile, the losing party will often attempt to set aside or stay the adjudication decision under sections 15 or 16 of the CIPAA.

However, what if an application to stay is made after an enforcement order is granted against the adjudication decision and the application to set aside the adjudication decision is dismissed? The court was faced with this scenario in the recent case of *MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd* [(2021) MLJU 1061].

Facts

In a web of litigation proceedings that involved the various construction parties of a highway construction project, the focus of this particular case was the subcontractor MKP Builders Sdn Bhd and their appointed subcontractor for bored piling works, PC Geotechnic Sdn Bhd (PCG).

Following an adjudication decision granted in favour of PCG on 12 December 2019, PCG sought an enforcement order, while MKP sought to set aside the order pursuant to section 15 of the CIPAA. On 14 August 2020 the high court decided that the enforcement order was granted and the setting aside application was dismissed. MKP appealed this decision to the Court of Appeal and PCG presented a winding-up petition premised on the aforementioned adjudication decision.

MKP sought a stay of the enforcement order pending the disposal of the *Shah Alam* civil suit [BA-22C-37-09/2020], which had been filed by MKP against PCG.

Notwithstanding the preliminary objections raised, the main issue before the high court was whether it had the power under section 16(1)(b) of the CIPAA to stay the PCG-MKP adjudication decision, which had been granted enforcement status. If so, this raised the following questions:

- Was MKP barred due to the estoppel principle from filing a stay application when MKP could have made the application when the enforcement and setting aside applications were heard and decided together?
- Was PCG's winding-up petition a ground to allow the stay application?

Decision

Staying enforcement

Section 16(1) of the CIPAA allows a party to apply to the high court for a stay of an adjudication decision in two circumstances:

- when an application to set aside the adjudication decision has been made (section 16(1)(a) of the CIPAA); or
- when the subject matter of the adjudication decision is pending final determination by arbitration or the courts (section 16(1)(b) of the CIPAA).

However, what if an enforcement order has been granted against the adjudication decision?

The Court held that once an enforcement order has been granted, the courts cannot subsequently stay the execution of the adjudication decision pending the outcome of litigation or arbitration between the parties. To grant a stay application pursuant to section 16(1)(b) of the CIPAA while an enforcement order exists would result in two apparently conflicting orders. As such, a stay order can be made only before an adjudication decision is enforced.

Having said this, a party may, while appealing against an enforcement order, seek to stay the execution of an enforcement order under section 73 of the Courts of Judicature Act 1964 and rule 13 of the Rules of the Court of Appeal 1994.

In coming to its interpretation of sections 16(1)(b) and 28 of the CIPAA, the Court considered the objective of the CIPAA as well as the fact that no prejudice had been suffered. Adjudication decisions are only temporarily final as they are subject to final determination through litigation or arbitration (section 13(c) of the CIPAA).

Barred by estoppel

As MKP's setting aside application was dismissed while the enforcement order was granted in favour of PCG, the high court held that it would be in the interest of justice that the principle of estoppel should be invoked against MKP.

Further, the Court took into consideration that when the applications for enforcement and setting aside had first been heard, MKP's counsel had informed the Court that no instruction had been given to file a stay application.

Reliance on winding-up petition

Throughout MKP's supporting affidavit, it never announced PCG's winding-up petition as a ground in support of the stay application. Order

69A, rule 4 of the Rules of Court 2012 provides that a stay application must be supported by an affidavit which must, among other things, state the grounds on which the adjudication decision should be stayed.

The high court held that as the mandatory term of "must" was used in Order 69A, rule 4 of the Rules of Court 2012, any reasons relied upon to support the stay application must have been stated in the supporting affidavit. If a party could rely on reasons not stated in the supporting affidavit, it would be unjust as the opposing party would be deprived of an opportunity to respond to said reason. As such, MKP's reliance on the PCG's winding-up petition was disregarded.

Even if PCG's winding-up petition could be a ground to support the stay application, the Court took the position that it could not accept such a ground as it was PCG's right to wind-up MKP based on the adjudication decision, pursuant to sections 464(1)(b) and 465(1)(e) of the Companies Act 2016. This was even more pertinent given that an enforcement order had been obtained and the setting aside order had been dismissed

Further, the high court held that as MKP could not apply for a Fortuna Injunction and therefore could not restrain PCG from presenting a winding-up petition, it could not allow the same to be a ground in support of a stay application.

Comment

This case serves as a caution to parties that intend to seek a stay of an adjudication decision to take prompt action before an enforcement order is made. Based on this case, the courts are unlikely to allow a stay of the adjudication decision under section 16 of the CIPAA after an enforcement order has been granted. The only available recourse then is to seek a stay of the execution of the enforcement order.

The high court found that dismissing the application to set aside the adjudication decision and its enforcement created an estoppel against the stay application. While it was not specified which of these orders gave rise to the issue estoppel, it should not be the former. A setting aside application is grounded on a different test from the stay application. For instance, a stay may be granted where a clear error is demonstrated,⁽¹⁾ but that clear error in itself is not a ground for a setting aside. Thus, even if a setting aside application is dismissed, a party cannot be precluded by issue estoppel from pursuing the stay.

Further, it is unclear if it was argued before the high court in this case whether an enforcement order converts the adjudication decision into a judgment or court order, since section 28 of the CIPAA provides only for "an order to enforce the adjudication decision as if it is a judgment or order of the High Court".

Parties should also note the mandatory requirements under order 69A, rule 4 of the Rules of Court to ensure that all relevant grounds relied upon are expressly stated in the supporting affidavit. Failing this, the courts will not entertain any such unannounced grounds and parties may find themselves with a disadvantaged stay application.

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Endnotes

(1) For an example, please see the Federal Court's decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2019] 5 CLJ 479.