

Construction Law Digest

A SOCIETY OF CONSTRUCTION LAW,
MALAYSIA NEWSLETTER

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MESSAGE FROM THE EDITORS

Thank you for reading our CONSTRUCTION LAW DIGEST.

This is the first issue of the Construction Law Digest for the year 2012. The inaugural issue of the Construction Law Digest was successfully launched at the end of December 2011.

It is extremely gratifying to know that the feedback from our readers have thus far been very positive. Some have even indicated that they would be happy to contribute their work to the Construction Law Digest. It was rather unfortunate that, due to space constraints, there were some interesting articles and case notes that could not be included in this issue. However, we will ensure that they are published in the next issue of the Construction Law Digest. We would like to sincerely thank all of our contributors for their support to this Digest.

In this issue, there is an interesting and informative article on dispute resolution for the construction industry in Malaysia written by Mr. Sundra Rajoo who is the Director of the Kuala Lumpur Regional Centre for Arbitration, and also the first President of the Society of Construction Law Malaysia. In this article, he provides instructive insights into the development and transformation of the dispute resolution framework in the context of the construction industry in Malaysia. Another interesting article to read is "Construction Industry Payment and Adjudication Bill 2011 - Will the Bill improve cash flow in Malaysia?" written by our immediate past President, Mr Wilfred Abraham & Suhanthi Sivanesan.

We also feature in this issue an article by Mr. Shannon Rajan on the recent developments on the law governing injunctions on performance bonds, and a case commentary on two Singapore High Court decisions in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd*, and *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] SGHC 162; [2011] SGHC 163. In addition, there are two interesting articles, one on administration of construction and engineering projects using an internet-based system called C-COM by Mike McIver and the other by William Kennedy who provides useful suggestions that help to minimise the risks of time and cost overruns in construction projects.

Finally, we have included in this Digest a case report, with a commentary, on the landmark Malaysia Court of Appeal case of *Qimonda Malaysia Sdn Bhd (In Liquidation) v Sediabena Sdn Bhd and Another* concerning the status of the retention monies retained by the employer after its liquidation.

We hope that our readers will find the articles and case notes in this issue of the Construction Law Digest useful and informative. Happy reading.

Lam Wai Loon & Thayananthan Baskaran
Editors



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MALAYSIA

THE SOCIETY OF CONSTRUCTION LAW, MALAYSIA

proudly announces the introduction of the

Vincent Powell-Smith Prize Essay Writing Competition

Modelled along the highly acclaimed Hudson Prize,
this competition is for essays on subject matters related to
Construction law of MALAYSIA

Papers Submission Deadline : 31st July 2012, Thursday, at 5.00 pm

1st Prize : RM5,000 and a trophy
2nd Prize : RM2,000 and a trophy

(Commendations may also be awarded)

with winning entries to be published by SCL Malaysia

**The Society of Construction Law Malaysia offers the Vincent Powell-Smith Prize annually for the best essay submitted in the field of construction law. It is named after Professor Vincent Powell-Smith in Recognition for his contribution to the study and practise of construction law in Malaysia.

For further details relating to this competition, please contact Mr Lam Wai Loon via email: lam@skrine.com
or Mr Thayanathan Baskaran via email: thaya@zulrafique.com.my



Sundra Rajoo
Director
Kuala Lumpur Regional Centre for Arbitration

DISPUTE RESOLUTION FOR THE CONSTRUCTION INDUSTRY IN MALAYSIA

OVERVIEW OF CONSTRUCTION INDUSTRY IN MALAYSIA

The year 2012 will mark a very high growth in the construction industry. The industry is expected to grow at the rate of 7%, higher than any other industry and will contribute extensively to the overall GDP of the country at the target rate between 5.5 to 6.0%.¹

The government of Malaysia is cautious with the impact to the economy resulting from the rise in inflationary percentages due to the increase in commodity prices and European debt crisis. In its budget plans for the year 2012, the government had incorporated “stimulus package” with substantial allocation for the construction industry and introduced a number of incentives to attract foreign investors.

A number of major construction projects such as the RM40bil MRT Project have been approved. This project itself is set to increase the property value and encourage

development along the proposed MRT Lines. Other infrastructure projects includes the Gemas-Johor Bahru double track rail project, new highways (Lebuhraya Pantai Timur Jabor-Kuala Terengganu; Lebuhraya Pantai Barat Banting-Taiping, Segamat-Tangkak, Central Spine) creating greater accessibility and spur development in new areas.

INCREASED PARTICIPATION IN INTERNATIONAL CONSTRUCTION PROJECTS


Malaysian construction companies have started to move beyond the home grounds to working at global scale. There has been serious increase in participation in international construction projects. MARTRADE reported that Malaysian construction companies have an international project portfolio worth USD15bil mainly in infrastructure. Malaysian expertise in infrastructure building has been deployed in 73 projects across the Middle East, including landmark initiatives such as Burj Khalifa, Al Reem Island, Dubai Metro, Dubai Mall and

Meydan Race Course.² In India, CIDB reports that Malaysian companies have so far completed 51 construction projects worth USD2.33 bil in India. Out of which 21 projects valued at USD2.28bil are currently under various stages of implementation. Some of the examples include Scomi Engineering Bhd involvement in Monorail Project in Mumbai with RM2bil contract award, Ranhill Utilities Bhd partnered in a project to lease and build water treatment plants in West Bengal and IJM Corp Bhd participated in a major highway project worth RM500mil in Andhra Pradesh.

According to a recent report on the global construction market, it has been estimated that construction activity in the key developing markets in China, India, Asia Pacific, Middle East, Africa, parts of East Europe and South America will grow at a staggering 110% (representing over 55% of global construction activity) over the next 10 years. This will create a US\$7 trillion market between the developing economies.

¹ StarProperty.my Budget 2012 boost to property and construction sectors by Datuk Abdul Rahim Rahman, Oct 29,2011.

² StarBiz.Malaysia pushing for more Middle East construction projects, March 30,2010.



“In construction related disputes, arbitration stands out as a popular mode of alternative dispute resolution. It is not even considered as alternative nowadays, it has its unique features and effectiveness.”

Considering the massive growth of the industry in both the local and international front, Malaysia is equipped and is sensitive in making available swift and effective mechanism for dispute resolution and in dealing with the legal implications. This is certainly as necessary as the financial incentives and stimulus for economic growth. Liberalisation and opening up of services globally calls for attention to one of the major area pertaining to dispute resolution which is the recognition and enforcement of judgements and decisions made in countries other than the home countries. For this the New York Convention is considered as one of the best innovative invention, providing great solution to inter-nation business relationship and economic globalisation.

TRANSFORMATION IN THE MALAYSIAN DISPUTE RESOLUTION FRAMEWORK

We have seen transformation from the year 2010 in terms of the focus given and the increasing need to improve the platform and framework for alternative dispute resolution in Malaysia. There has been legislative change, extensive support and incentives to the Kuala Lumpur

Regional Centre for Arbitration for improvement of services and facilities and a welcoming change in the Judiciary’s attitude towards ADR.

In construction related disputes, arbitration stands out as a popular mode of alternative dispute resolution. It is not even considered as alternative nowadays, it has its unique features and effectiveness. It is extensively used in construction industry in Malaysia due to the use of standard forms in building contracts. The typical standard forms used provide for arbitration, for example the Public Works Department and Malaysian Institute of Architects forms for public and private sector works and the International Federation of Consulting Engineers (FIDIC) forms for International Projects.


Last year, the Malaysian Arbitration Act 2005 was amended by the Arbitration (Amendment) Act 2011 which came into operation 1st July 2011. This change was much awaited for and effectively resolved concerns caused by the drafting of the 2005 Act. With the amendment, it now allows the courts to stay proceedings and grant interim measures in respect of international arbitrations with a seat outside of Malaysia.

Further, an award made in an international arbitration with its seat in Malaysia would now be enforced by the Courts. The Amendment Act has also moved closer to the Model Law. The courts ability or power to intervene in arbitration is strictly limited to those areas covered under the act. This restricts the inherent jurisdiction of the courts and would ultimately reduce the uncertainty in case laws.

EVOLUTION OF THE MALAYSIAN JUDICIARY

The current attitude of the Malaysian Judiciary is towards giving effect to parties pre-agreed dispute resolution mechanism unless the courts finds that the agreement is null and void, inoperative or incapable of being performed. There are a number of recent cases where the courts maintain that it is mandatory to stay court proceedings when there is an arbitration agreement.

The courts take a more pro-enforcement stance of arbitral awards, very slow to interfere and recognise the benefits of ADR for settlement of disputes. New commercial courts have been introduced to improve the time taken by courts to hear a matter or



decide on interim reliefs. The courts system has improved tremendously and this we see as working hand in hand with other forms of alternative dispute resolution mechanism complementing the chain of a multi-tier dispute resolution process.

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION ('KLRCA')

KLRCA is the leading arbitral institution in Malaysia. We are an inter-governmental body under the auspices of Asian African Legal Consultative Organisation ('AALCO') situated at the heart of Kuala Lumpur, Malaysia. In the past 2 years, with the support from the stakeholders, AG Chambers, the Bar Council and Judiciary, KLRCA has managed to successfully mark its name in the global arbitration map. We have been at the forefront in encouraging international arbitrations to be held in Malaysia with numerous activities, hosting regional conferences and international road-shows. With the full support of stakeholders, KLRCA is able to provide a world-class service for resolution of dispute at very reasonable costs.

We have introduced a number of

rules such as the KLRCA Arbitration Rules 2010, Fast Track Arbitration Rules 2010, Mediation/Conciliation Rules 2011 and Islamic Banking and Financial Rules 2007.


KLRCA is the first centre to adopt the UNCITRAL Arbitration Rules 2010 in full with some modification. The Rules allow a great deal of flexibility in the conduct of arbitration proceedings, leaving wide discretion to the parties regarding the choice of arbitrators, place and the applicability of procedural rules. KLRCA also introduced Fast Track Rules to deal with disputes which are of smaller quantum and less complex. The Fast Track Rules as the name suggest, provides for the resolution of dispute within 140 days. It also allows for document only arbitration for a shorter duration of about 90 days.

KLRCA continuously reviews and revise the rules to ensure that current practices and advent in arbitration or other forms of dispute resolution mechanics are made available for use. The Fast Track Rules is revised in the first quarter of this year. The arbitration fees under the Fast Track Rules have been reduced to ensure that it is affordable and widely used. The Fast Track Rules is

extremely suitable to be applied for the construction industry especially for dispute relating to payment in the course of a project. Not only it provides a quick process but there is finality.

Speaking of payment disputes, despite the changes to the law, improvement to the courts system and having in place good services and facilities for arbitration, the construction industry still faces problems in the swift resolution of disputes relating to payment in the course of a project. Arbitration or litigation is usually a last option when parties are unable to resolve the dispute and is ready to terminate the contract. However in a typical construction project, disputes relating to payment commonly arise in the course of the works.

Another recent advent in Malaysia, forming an alternative not only to courts, but to arbitration as well, is the Statutory Adjudication. Malaysia is soon to follow the likes of the United Kingdom, Australia, New Zealand and Singapore. The Construction Industry Payment and Adjudication Bill 2011 (CIPA) having recently passed through a first reading in Parliament and is touted to be enacted in March 2012.



Payment default has been the main issue of dispute in the construction industry. Surveys were carried out by the construction industry itself, namely the Construction Industry Development Board (CIDB) and the Master Builders Association Malaysia (MBAM) to determine the root of the problem and all roads lead back to payment default. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have severely crippled the construction industry. Payment default triggers a domino effect in the construction industry affecting all the players. The main reason for this is because construction projects especially mega projects are stretched over long periods of time and involves a large sum of monetary payment per progress payment. Hence any delay or payment on condition would inadvertently have a huge impact on the construction project.

This form of dispute is not something new or related solely towards mega construction projects alone. Experience from other countries showed that the consequences of payment default can result in insolvencies. Several countries in the world namely the United Kingdom, several States

and Territories in Australia, New Zealand and Singapore have taken these problems to heart and have enacted specific legislation to deal with disputes of this nature in the construction industry. The United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996, Australia saw the advent of the Building and Construction Industry Security of Payment Act 1999 amended in 2022 (NSW), Building and Construction Industry Security of Payment Act 2002 (Qld), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payment) Act 2004 (NT), New Zealand enacted the Construction Contracts Act 2002 and Singapore ushered in the Building and Construction Industry Security of Payment Act 2004.

THE MALAYSIAN CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION BILL 2011

The Construction Industry Payment and Adjudication Bill 2011 (CIPA) had recently passed through a first reading in Parliament and is touted to be enacted in March 2012. The construction industry themselves have been pushing the government to enact this piece of legislation

since 2003 to address the cash flow problems plagued by the industry. The primary objective of the proposed Act is to address critical cash flow issues in the construction industry. It aims to remove the practice of conditional payments ('pay when paid' and 'pay if paid') and reduce payment default by establishing a cheaper, speedier system of dispute resolution in the form of adjudication. According to the provisions of CIPA every construction contract made in writing that relates to construction work carried out in Malaysia would be affected by the regime of adjudication. This would essentially mean that if you have entered into a construction contract and there is a problem with regards to payment, an adjudication process can be commenced either by you or against you. A construction contract can be a construction work contract and or a construction consultancy contract.

To this extent, the parties will be subjected to compulsory adjudication or statutory adjudication. This would mean that both parties will be brought into the adjudication process which is dictated by the provisions of CIPA. The provisions of CIPA does not however affect natural persons entering into a construction contract

“Of course, common sense would dictate that the adjudication process will be terminated if the dispute is decided by arbitration or the court before the adjudication decision can be made.”

in respect of a building wholly intended for his own occupation and is four storeys and below.

The purpose of adjudication is to hurry along cash flow and facilitate payment in the construction industry. Parties are free to opt for arbitration or court litigation to deal with the legal matters concerning the same. CIPA simply provides a statutory right for the parties to demand payment for work done and to create a simple process to ensure that a decision and payment is made. This of course is in the form of adjudication as a process. In fact, the parties can commence adjudication and concurrently arbitrate or litigate the matter as well. Of course, common sense would dictate that the adjudication process will be terminated if the dispute is decided by arbitration or the court before the adjudication decision can be made. If however, the adjudication decision comes first then it is a binding decision and payment must be made.

ADJUDICATION AS A MEANS OF DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

Although construction disputes can be solved by either going to court or arbitration, the parties are keen for an alternative form of dispute resolution. One that is contemporaneous, speedy and economical. In comes adjudication as a method of dispute resolution. Adjudication is a means of dispute resolution that allows a party (the claimant) who are owed monies under a construction contract to promptly obtain payment from the respondent, based on an assessment of the merits of the claim by an appropriately qualified and independent adjudicator. In short, adjudication describes the dispute resolution process for construction disputes. It is not possible to contract out of the Act. The adjudication process is prescribed by the proposed CIPA Act itself. Unlike arbitration or mediation, adjudication does not require the parties' agreement for the process to begin. As such, once either party

opts for adjudication it becomes a compulsory process wherein both parties are involved whether they agree to or not. In the United Kingdom, the adjudication process was described by Tony Bingham as “[A] dispute management process, which dramatically improves upon litigation performance and save huge resources in public money. The UK Courts are relieved of mass expenditure. The new system of Adjudication is cost effective and recommended world-wide. This machinery coupled with the new Payment Provisions has improved UK construction beyond all expectations... even the lawyers are delighted, though surprised at its success.”³

Adjudication is not a dispute resolution system that provides the adjudicator with the luxury of time to hear all the parties and listen to evidence in great detail akin to an arbitration or court trial. A list of powers granted to the adjudicator can be found in the Act.⁴ Some of the procedures adopted by the adjudicator, besides conducting a short trial would be to review the

³ Bingham T, Adjudication and Claim Settlement for the Construction Industry, Seminar, Kuching, Sarawak, 14 April 2001, < <http://www.nadr.co.uk/articles/published/AdjudicationConstructionBetterBuilding.pdf>>, (accessed on 30 Jan 2012)

⁴ Section 25 Powers of the adjudicator, CIPA 2011

“CIPA has recently passed the second reading and third reading, and the full impact of the proposed Act is yet to be known. Lessons from other countries seem to suggest that adjudication is an effective method and their construction industry has benefitted from it.”

construction contract and other documents⁵ to decide whether there is compliance with the standard of work required by that contract. The Evidence Act 1950 does not apply to adjudication proceedings under this Act.⁶ The adjudicator can also visit the construction site to investigate the dispute⁷. The adjudicator would then give a decision with the primary aim to alleviate cash flow problems between the disputing parties and to remove payment conditions⁸ such as ‘pay when paid’ and ‘pay if paid’.

Adjudication is a dispute resolution system that is intended to be simple and fast. The process as prescribed by the proposed CIPA Act is concise and the time accorded to the adjudicator to produce the written decision itself is forty five (45) days from the receipt of the adjudication reply or response unless the parties extend the time.⁹ The entire process promises an outcome within an approximate one hundred (100) day time frame from the day the payment claim is served until the decision is passed. This would ensure that the cash flow problems in the

construction industry can be dealt with swiftly.

Hence although the role of adjudication is limited to these circumstances as prescribed by the proposed Act, the adjudicator provides fast justice to the parties. Adjudicators are to always act independently, impartially and in a timely manner. The principles of natural justice are strictly followed and if there is any conflict of interest, the adjudicator should resign from office unless the parties agree otherwise.¹⁰

Statutory adjudication has the following characteristics -

1. It is a mandatory and statutory process that does not require the agreement of the parties’ to commence the process.
2. It offers a much faster process compared to arbitration and court litigation because the time frame is as prescribed by the proposed CIPA Act itself. It is the only form of dispute resolution that has a statutory time period in which the dispute must be

resolved in forty five (45) working days from the receipt of the adjudication reply or response.

3. It provides a binding decision on a payment dispute.
4. The parties can choose their own adjudicator or request for the Director of KLRCA to choose an adjudicator on their behalf.¹¹

In short the focus is primarily and steadfastly on removing cash flow problems in the construction industry by helping move things along by dispensing fast decisions on payment disputes alone. It was never meant to be a process that allows the parties the luxury to ventilate every single proposition in great detail unlike litigation in court or arbitration for that matter. A dispute referred to adjudication can, at the same time that the adjudication is taking place, also be referred to mediation, arbitration or litigation.¹² This does not bring the adjudication to an end or ‘affect it’.¹³ However, if another form of dispute resolution determines the matters first, the adjudicator must terminate the adjudication.¹⁴

⁵ Section 25(m) CIPA 2011

⁶ Section 12(9) Adjudication and decision, CIPA 2011

⁷ Section 25(h) CIPA 2011

⁸ Section 35 Prohibition of conditional payment, CIPA 2011

⁹ Section 12(2) Adjudication and decision, CIPA 2011

¹⁰ Section 24 Duties and obligations of the adjudicator, CIPA 2011

¹¹ Section 21 Appointment of adjudicator

¹² Section 37 Relationship between adjudication and other dispute resolution process

¹³ Section 37(2)

¹⁴ Section 37(3)

THE EFFECTIVENESS OF STATUTORY ADJUDICATION VIA CIPA 2011

Statutory adjudication is simply an adjudication process prescribed by statute. Parties who are compliant with their construction contract have no need to fear. However, parties who are non-compliant would now be subject to statutory adjudication as the aggrieved party will as mentioned above, trigger the adjudication process. The more pertinent question at this stage, is whether this new form of statutory adjudication is the key answer to solving disputes for the construction industry? CIPA has recently passed the second reading and third reading, and the full impact of the proposed Act is yet to be known. Lessons from other countries seem to suggest that adjudication is an effective method and their construction industry has benefitted from it. Literature from Australia, United Kingdom, New Zealand and Singapore has indicated a successful, swift and cost-effective resolution of disputes

in each relevant jurisdiction (Dancaster, 2008¹⁵; Uher & Brand 2008¹⁶; Kennedy-Grant, 2008¹⁷; and Chan, 2006¹⁸). In the UK, adjudication is now being used more extensively than anticipated (Kennedy, 2006). Claimants are satisfied to a high degree with the NSW adjudication scheme. In New Zealand, anecdotal evidence suggests that there has been a positive change in the culture of payment since the introduction of adjudication under the Construction Contracts Act 2002 (Kennedy-Grant, 2008¹⁹). Similarly in Singapore, adjudication as underpinned by the Building and Construction Industry Security of Payment Act 2005 has had a positive impact on the industry players' mindset towards payment (Teo, 2008²⁰).

Many believe that adjudication is a new layer to the methods of dispute resolution in Malaysia. It is definitely not a pre-condition to a court litigation, arbitration or mediation for that matter, nor does it prevent parties from using those

forms of dispute resolution means. For all intents and purposes it does not replace the existing dispute resolution systems but merely adds on to it. It provides the parties with another useful form of dispute resolution which promises to be fast, cheap and effective. It allows the aggrieved party to trigger the statutory adjudication process.

First and foremost, the Bill applies to every construction contract made in writing relating to construction work carried out wholly or partly within Malaysia including Government contracts.²¹ Construction contract includes construction work contracts and construction consultancy contracts. The Bill is wide ranging and covers inter alia, the oil and gas industry, petrochemical, telecommunication, utilities, infrastructure, supply contracts, project and management. However, only written contracts are subject to the provisions of CIPA 2011 which is a cause of concern as some parties may escape the clutches of CIPA especially if their work instructions

¹⁵ Dancaster, C. (2008). Construction Adjudication in the United Kingdom: Past, Present, and Future. *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 204-208.

¹⁶ Brand, M. C., & Uher, T. E. (2008). Review of the Performance of Security of Payment Legislation in New South Wales. RICS Construction and Building Research Conference 2008 (COBRA 2008). Dublin: Royal Institution of Chartered Surveyors (RICS).

¹⁷ Kennedy-Grant, T. (2008). Adjudication: The New Zealand Position. *Construction Law Journal*, 24 (5), 382-409.


¹⁸ Chan, P. C. (2006). Security of Payment Legislation - Case of a Blunt but Practical and

Equitable Remedy. *Journal of Professional Issues in Engineering Education and Practice*, 132 (3), 248-257.

¹⁹ Kennedy, P. (2006). Progress of Statutory Adjudication as a Means of Resolving Disputes in Construction in the United Kingdom. *Journal of Professional Issues in Engineering and Education Practice* , 132 (3), 236-247. p. 244.

²⁰ Teo, P. J. (2008). Adjudication: Singapore Perspective. *Journal of Professional Issues in Engineering Education and Practice* , 134 (2), 224-230.

²¹ Section 2 Application



are not properly documented in written format.

The Malaysian CIPA Bill enables either the unpaid party or a non-paying party to refer the dispute arising from a payment claim to adjudication.²² As such, this enables either party to bring an action in adjudication. Reference can be made to a research paper by M.E. Che Munaaim²³, where he stated that the key features of the effective operation of an adjudication regime is that firstly adjudication should be used to help the right vulnerable parties which are contractors, subcontractors, consultants and suppliers. Employers may also be equipped with the right to adjudication to enable them to claim ex-contractual claims. In other words, adjudication should be accessible to both parties to prevent a severe imbalance.

Understandably adjudication must be speedy however this does not mean that the entire system must be rushed. Compared to other jurisdictions in the world, which

have a basic 28 day turnaround time for adjudicators to submit a decision, CIPA allows for a 45 day period. Thus providing ample time for careful consideration is granted.

Other jurisdictions have express stipulations against contracting out, in New Zealand there is Section 12 of the Construction Contracts Act 2002 whereas in Singapore there is Section 36 of the Building and Construction Industry Security of Payment Act 2004. There is no similar provision in CIPA 2011 to prohibit a contracting out from the proposed Act. Nonetheless, on considering the spirit of CIPA 2011 and construing it as a whole, in particular Section 2 connoting the strict application, Section 35 on the prohibition of conditional payment and Section 40 which deals with the exemption exercised by the Minister, it appears to be little room is given for any attempt to contract out of CIPA. Perhaps the only avenue available to avoid the clutches of CIPA is by seeking an exemption from the Minister under Section 40 itself. The extent of this

exemption appears to be from all or any provisions of CIPA as such it is a very wide power which needs to be exercised sparingly.

The definition of payment under Section 4 includes any payment for work done for example a construction work, payment for services rendered for example consultancy service or work done or services rendered and stated in express terms of the contract including progress payment, final payment and variations. Payment for construction contracts outside the ambit of the definition in Section 4 or payment for work done or services rendered under implied terms, extra-contractual, common law, ex-gratia claims etc are not however included.

An effective and important provision in CIPA is the prohibition of conditional payment following Section 35. Any conditional payment provision in a construction contract in relation to payment under the construction contract is void. This is as mentioned earlier the “pay when paid” and “pay if paid” clauses. This

²² Section 7 (1) Right to refer dispute to adjudication

²³ Che Munaaim, Key Features to an Effective Adjudication Regime, AUBEA Conference, Melbourne July 2010, www.msdl.unimelb.edu.au/events/conferences/aubea2010/, (accessed 30 Jan 2012)

“The construction industry in Malaysia is seeing great transformation in its dispute resolution framework. Special attention is given to resolving the industry’s main problem relating to timely payment.”

reverses the judicial decisions in cases such as Pernas Otis Elevator CO Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd (2004)5 CLJ 34 and Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd & Ors (2010)3 MLJ 7, as such effectively curbing the pervasive unfair cash flow risk transfer practice prevalent in the construction industry.

KLRCA has been named the official adjudication authority in Malaysia by virtue of Part V of CIPA. As adjudication authority, KLRCA is responsible for the determination of the standard terms of appointment and fees of that adjudicator and the setting of the competency standard and the criteria required of an adjudicator in Malaysia. In setting the competency and criteria required for adjudicators in Malaysia, KLRCA has prepared an Adjudication Training Programme to enable proper certification for all future adjudicators. It is mandatory for all persons who are interested in providing adjudication services to partake in the programme. There are 2 sets of training programmes to be made available, first an Adjudication Training for the Legal Expert and second, an Adjudication Training for the Non Legal Expert. The Adjudication

Training Programme would consist of specific lectures on the workings of the proposed CIPA Act, specific lectures on key legal areas/key areas in construction matters, training on writing adjudication decisions and a written examination which includes the drafting of a mock adjudication decision. Those who have successfully completed the KLRCA Adjudication Training programme will be awarded with a Certificate of Adjudication and would be eligible to apply to join the panel of KLRCA Adjudicators. The criteria to be an adjudicator would include a relevant degree or diploma, a certain number of years’ experience in the building and construction industry and a Certificate of Adjudication from KLRCA. This would effectively ensure that the quality of adjudicators is of the highest standard possible.

KLRCA has also been tasked with providing administrative support for the conduct of adjudication and any functions as may be required for the efficient conduct of adjudication as prescribed by the proposed Act.

The employers and those in the construction industry or related industry must be well prepared to handle the effects of the proposed

Act whether commencing an adjudication or defending themselves against an adjudication action. Certain sectors of the industry felt that more could have been done. Be that as it may, what is important is that the problems highlighted by the parties in the construction industry are being dealt with seriously.

CONCLUSION

The construction industry in Malaysia is seeing great transformation in its dispute resolution framework. Special attention is given to resolving the industry’s main problem relating to timely payment. An effective, swift and robust dispute resolution is a need of the hour in ensuring that the industry grows at a world class level.

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A CLOUD BASED SOLUTION FOR CONTRACT ADMINISTRATION

C-COM: THE CONTRACT ADMINISTRATION PLATFORM FOR CONSTRUCTION PROJECTS

A contract-integrated system specifically designed for construction and engineering projects is currently being introduced in Malaysia. The revolutionary, internet-based system can be specified in the particular conditions of contract and provides a real-time protocol for exchange and logging of contractual data between employers, project managers, contractors and subcontractors.

The system, called C-COM, is not a document management system - instead of requiring documents as input, the system is heavily forms driven - these online forms prompt users for relevant information and generate and transmit the appropriate documentation automatically. The intelligence required in order to generate such documentation is embedded in C-COM and has been developed by technology companies in conjunction with construction law experts.

C-COM's application in terms of construction disputes is invaluable due to the fact that a detailed record is kept of specific work that has been carried out on a daily basis as well as various daily conditions on a given project. This means that determining what has happened after the event is made easier and more efficient.

C-COM's key functionality can be explained within the context of the following processes:

Site Records

The C-COM Site Diary allows for direct online submission of independently configured site diaries for multiple locations, disciplines or subcontracts. A built-in approval system notifies users when their electronic signature is required and updates submitters when their site diaries are accepted or rejected.

Powerful reporting facilities allow immediate access to a variety of flexible reports with MS Excel export facilities so that search and filter of data is available at the click of a mouse. Weather records, plant and labour statistics, data and material delivery can be searched for and reported on from years of data input at almost instant retrieval speeds.

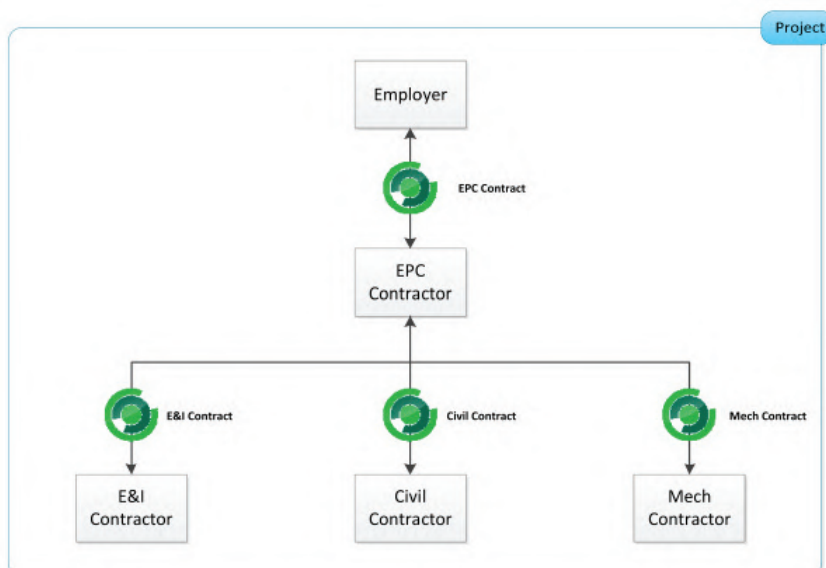



Fig 1: Example project implementation



The system features personalised triggers which users can setup to monitor and detect risk in the daily submitted site records. C-COM measures inputted data against thresholds and if the thresholds are exceeded, alerts are immediately sent to the relevant people via e-mail and/or SMS.

Risk Management

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ACTS OF PREVENTION AND TERMINATION: HOW DO THEY AFFECT THE CONTRACTUAL RIGHT TO LAD?

Serene Hiew discusses two recent landmark decisions of the Singapore High Court in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd and LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] SGHC 162; [2011] SGHC 163. These decisions are important in the construction industry, as stated by the Learned High Court Judge Judith Prakash in the Introduction of her first judgment which reads:

This case (Originating Summons 769 of 2010 (“OS 769”) is one of the two cross-appeals on several questions of law which arise out of an arbitral award. The other is Originating Summons 759 of 2010 (“OS 759”). Two of the issues raised in the appeals are of considerable importance in the construction industry, and, so far as I am aware, have not yet been expressly decided.

THE FACTUAL BACKGROUND

Topmost Industries Pte Ltd as the employer engaged LW Infrastructure Pte Ltd (“LW”) as its main contractor for the design and construction of an industrial building known as “LW

Technocentre” at 31, Toh Guan Road East, Singapore 608608 (“the Project”). LW in turn appointed Lim Chin San Contractors Pte Ltd (“LCS”) as its sub-contractor for the Project (except the mechanical and electrical works which were sub-contracted to one Luen Wah Electric Co (Pte) Ltd).

Pursuant to the sub-contract between LW and LCS, LCS was required to complete the sub-contract works by 2 August 2001. Both parties had subsequently agreed that an extension of some three months would be given to LCS. However, as of 12 May 2003, the works were still not completed. As a consequence, LW terminated the sub-contract. After termination, LW engaged various sub-contractors to complete the Project. The Temporary Occupation Permit for the Project was granted by the relevant authorities on 1 August 2003.

On 22 June 2004, LW commenced arbitration by serving a notice of arbitration on LCS. The arbitrator accepted the appointment on 9 November 2007 and issued his award on 29 June 2010. A supplementary award was issued on 15 July 2010 to correct typographical errors. In his award,

the arbitrator had made, inter alia, the following decisions which were relevant to the appeals:

- (i) although there were several instances where the LW had delayed the progress of the works, LCS had failed to prove that these incidents had caused a delay in the overall completion of the sub-contract works;
- (ii) LW’s contractual right to claim for liquidated damages against LCS which accrued prior, and after, the termination of the sub-contract had been extinguished after the termination of the sub-contract. LW’s claim for damages for delay would be by way of general damages;
- (iii) LW’s claim for liquidated damages had failed because LW had failed to prove the loss which was attributable to LCS’s breach of contract in the latter’s delay in completion of the works.

Subsequently, LW and LCS filed separate originating summons at the Singapore High Court seeking to appeal on questions of law arising out of the arbitral award.

ORIGINATING SUMMONS 769 OF 2010 (“OS 769”)

OS 769 was filed by LCS in the following questions of law:

- (a) where there were acts of prevention which caused delay in the progress of the works and which were not extendable under the sub-contract, whether it was necessary for LCS to have been prevented from completing the works by a prescribed date in order for time to be set at large (“the 1st question of law”);
- (b) where there were acts of prevention which caused delay in the progress of the works and which were not extendable under the sub-contract, whether LW was entitled to exercise its contractual right of termination under clause 27.1 of the sub-contract or if LW was so entitled, whether it could only do so by reference to a reasonable time for completion of the works (“the 2nd question of law”);
- (c) where there were acts of prevention which caused delay in the progress of the works and which were not extendable

under the sub-contract, whether LW was entitled to exercise its contractual right under clause 27.4 of the sub-contract to claim for costs incurred in engaging other contractors to carry out the works under the sub-contract (“the 3rd question of law”).

With regard to the 1st question of law, the Learned High Court Judge Judith Prakash answered the question in the affirmative, and decided that it was necessary for LCS to have been prevented from completing the works in order for time to be set at large. The learned judge made a distinction between a delay event by the employer which only delayed the progress of the works and one which delayed the completion of the works, and held that it was the latter which constituted an act of prevention which set time at large. However, the learned judge confirmed that, if a contract provided that the date of completion would not set time at large even if the completion date of the works was delayed, then the court would uphold this bargain.

With regard to the 2nd and 3rd questions of law, as the Arbitrator did not have the opportunity of deciding the effect of time being set

at large on LW’s right to terminate the sub-contract given his decision that time was not set at large, the learned judge held that it would not be in a position to decide these questions.

In the circumstances, the learned judge dismissed LCS’s appeal.

ORIGINATING SUMMONS 759 OF 2010 (“OS 759”)

OS 759 was filed by LW in the following questions of law:

- (a) whether the contractual right of LW to claim for liquidated damages against LCS under the provisions of the sub-contract for delay to the completion of the works by LCS, which accrued prior to termination of the sub-contract, had been extinguished or rendered inapplicable following termination of the sub-contract (“the 1st question of law”);
- (b) whether the contractual right of LW to claim for liquidated damages against LCS under the provisions of the sub-contract for delay to the completion of the works by LCS, which accrued prior to termination

“The Learned High Court Judge Judith Prakash answered the question in the affirmative, and decided that it was necessary for LCS to have been prevented from completing the works in order for time to be set at large.”

of the sub-contract, had been extinguished or rendered inapplicable following completion of the works by others after termination of the sub-contract (“the 2nd question of law”);

- (c) whether, in a claim for liquidated damages incurred or suffered by LW prior to the termination of the sub-contract for delay in completion by LCS, LW was required to prove the extent of damages incurred or suffered and attributable to LCS’s breach of contract arising out of their delay in completing the works (“the 3rd question of law”).

With regard to the 1st question of law, whilst LW agreed with the Arbitrator’s decision that all future obligations under the sub-contract ceased upon termination so that no claim for liquidated damages which accrued after termination may be made, LW submitted that the Arbitrator was wrong in holding that LW’s contractual right to claim for liquidated damages which accrued prior to the termination had also been extinguished upon the termination of the sub-contract. In allowing the appeal,

the learned judge held that it is a well established principle that the termination of a contract does not affect the right rights which have accrued prior to termination, and as such, LW’s contractual right to claim for liquidated damages which accrued prior to the termination remained intact.

In respect of the contractual right to claim for liquidated damages after the termination, the learned judge confirmed that no claim to liquidated damages could be brought in respect of the period after the termination of the sub-contract. The learned judge went on to hold, by way of obiter, that even if there were acts of prevention which delayed the overall completion of the works, there would still be entitlement to claim for liquidated damages under the contract which accrued before the date of such acts of prevention actually occurred. In this case, the Arbitrator had decided that there was no act of prevention which delayed the overall completion of the works.

With regard to the 2nd question of law, the learned judge held that, in the absence of any express provision stipulating to the contrary, the events which occurred after the termination should not affect

the ability of LW to claim for liquidated damages under the sub-contract which accrued prior to the termination. Following the conclusion made in respect of the 1st question of law, the learned judge allowed LW’s appeal on this question of law.

With regard to the 3rd question of law, the learned judge took the view that the arbitrator had not decided the issue of damages on the basis of LW’s contractual right to claim for liquidated damages under the sub-contract but of LW’s right to general damages under the common law. The learned judge held that, therefore, it was not brought against a question of law arising out of an award and dismissed LW’s appeal in respect of the 3rd question of law.

Given that LW’s appeal on the 1st and 2nd questions of law was allowed, the learned judge took the view that the question of remedies had to be considered, and hence, remitted the award to the Arbitrator for reconsideration on the issue of whether LW was entitled to liquidated damages between 5 November 2002 and 12 May 2003, i.e. the period between the extended completion date to the date of termination.

SIGNIFICANCE OF THESE DECISIONS

The cases of *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* and *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] SGHC 162; [2011] SGHC 163 are significant in that the learned Singapore High Court Judge Judith Prakash confirmed two very important principles of construction law, first, only acts of prevention by the employer which affect the overall completion of the works, not merely the progress of the works, will set time at large, and secondly, in the absence of any contractual provision stipulating to the contrary, the employer's contractual right to claim for liquidated damages under a contract which have accrued prior to termination of the contract is not extinguished by termination of the contract.

The decisions of *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* would be instructive to the Malaysian courts when approaching the same issues. However, it should be noted that, under the Malaysian law, the contractual right to liquidated damages in the sum as agreed under

a contract is not automatic. In the Federal Court decision of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, it was held that, pursuant to Section 75 of the Malaysian Contracts Act 1950, notwithstanding the stipulated liquidated damages entitlement under the contract, no damages would be awarded to the employer if it failed to prove actual loss suffered as a result of the delay caused by the contractor's breach of contract, unless the employer could show to the satisfaction of the court that the losses suffered by it were such that it would be impossible for the court to assess.

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EXPERT WITNESS IMMUNITY IS ABOLISHED!

Jones v Kaney [2011] UKSC 13; [2011] 13 Con LR 1.

In Jones v Kaney, the UK Supreme Court by a majority decision of 5-2 abolished the general immunity afforded to expert witnesses from suits by clients that had been in place for more than 400 hundred years (see Cutler v Dixon (1585) 4 Co Rep 14b). The reasons for the abolishment are essentially as follows:

- (1) A barrister's immunity from suit has already been abolished (see Arthur JS Hall & Co (a firm) v Simons [2002] 1 AC 615). As the arguments for barrister's immunity and expert witness immunity are similar, the expert witness immunity should equally be abolished;
- (2) In the past, an analogy has been drawn between the immunities enjoyed by those who participate in court proceedings and the immunity granted towards a paid expert witness. It has been said that a similar immunity against proceedings for negligence is necessary to enable experts to fulfil their duty to the court properly, particularly in relation to statements made out of court in the course of preparing evidence to be given in court. However, the Supreme Court (majority decision) took the view that, since the removal of a barrister's immunity had not resulted in any diminution of the barrister's readiness to perform that duty, 'it would be quite wrong to perpetuate the immunity of expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty' (Lord Phillips, at page 57). The Supreme Court, however, made it clear that the abolishment did not extend to the absolute privilege that they enjoy in respect of claims in defamation. ⚖️



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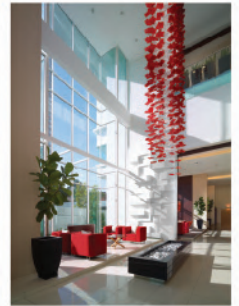
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UNCONSCIONABILITY: IS IT A GROUND FOR AN INJUNCTION ON PERFORMANCE BOND?

INTRODUCTION

In the landmark case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1996] 1 MLJ 149 (*“Esso Petroleum”*), the Supreme Court made a distinction between an interlocutory injunction to restrain the bank from making payment on an unconditional performance bond, and an interlocutory injunction to restrain the beneficiary from calling on, or receiving money under the performance bond. In the former case, the Supreme Court took the view that the applicant could only do so if there was clear evidence of fraud on the part of the beneficiary which came to the knowledge of the bank. Whereas in the latter case, it was held that, apart from the fraud test, the Court could apply the principles laid down in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 (also known as the ‘balance of convenience’ test) in determining whether or not to grant an injunction.

However, *Esso Petroleum* did not deal with the question as to whether unconscionability could be a ground for such an injunction. There are differences between the ‘balance of convenience’ test and the


unconscionability test. Generally, on the ‘balance of convenience’ test, the Court would consider the resulting harm likely to be suffered by the parties from the grant or refusal of the interlocutory injunction, and where the justice of the case lies for the period between the date of application and the hearing proper of the application. However, on the unconscionability test, the Court will not look at the competing hardships likely to be suffered by the parties as a result of the grant or refusal of the injunction, but rather at the events prior to the filing of the application, and in particular, the antecedent events leading to the call on the performance bond to see if the call made by the beneficiary was unconscionable.

Decided cases after *Esso Petroleum*, such as *Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd & Ors* [1996] 1 MLJ 425, *The Radio & General Trading Co Sdn Bhd v Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346 and *Elcorp Resources Sdn Bhd & Anor v Perbadanan Putrajaya & Anor* [1999] 1 CLJ 558, reveal that the courts have applied the unconscionability test in an application for an injunction to restrain the beneficiary from calling on or receiving money

under the performance bond.

However, in the year 2000, in the case of *LEC Contractors (M) Sdn. Bhd. (formerly known as Lotteworld Engineering & Construction Sdn. Bhd.) v. Castle Inn Sdn. Bhd. & Anor* [2000] 3 MLJ 339 (*“LEC Contractors”*), the Court of Appeal held that, the fraud test was the only test that the Court had to consider in such an application, and that the ‘balance of convenience’ test was not applicable. The Court of Appeal further held that *‘bad faith or unconscionable conduct by itself is not fraud’*. In this case, the Court of Appeal applied the fraud test, and dismissed the appeal against the decision of the High Court in refusing to grant an injunction to restrain the beneficiary from making a call on the performance bond.

The Court of Appeal decision in *LEC Contractors* is difficult to reconcile with the Supreme Court decision in *Esso Petroleum*. The ruling by the Court of Appeal in *LEC Contractors* has led to conflicting decisions being made by the Courts in applications for an injunction to restrain a beneficiary from calling on or receiving money under a performance bond, where some cases are seen to follow the



Supreme Court decision in *Esso Petroleum* and the others follow the narrower approach in *LEC Contractors*. It is instructive to note, however, that insofar as the principle governing injunctions to restrain the bank from making payment under a performance bond is concerned, it is settled in that the only test applicable is the fraud test. The inconsistency lies in the applicable principles relating to an injunction to restrain a beneficiary from calling on or receiving money under a performance bond.

This issue of these inconsistent appellate decisions was subsequently dealt with by the High Court in the case of *Pasukhas Construction Sdn Bhd & Anor v MTM Millenium Holdings Sdn Bhd & Anor* [2009] 6 CLJ 480 (“*Pasukhas*”) whereby the Learned High Court Judge Hishamudin Mohd Yunus J (now Justice of the Court of Appeal) held that, the ruling by the Court of Appeal in *LEC Contractors* was not consistent with the Supreme Court in *Esso Petroleum*, and applying the principles of *stare decisis*, the decision

of the Supreme Court should be followed as it was a ruling of the apex court. The Learned High Court Judge went on to hold that it would not apply the unconscionability test as it was not part of the Malaysian jurisprudence in this area of the law.

It was thought that the decision in *Pasukhas* has put to rest the confusion brought about by the inconsistent decisions in *LEC Contractors* and *Esso Petroleum*, and the question of whether unconscionability is a ground for an injunction to restrain a beneficiary from calling on, or receiving money under a performance bond. However, this is not so. Recently, Varghese George JC¹ and Ramly Ali JCA have given their decisions to the effect that unconscionability is recognised as a ground for an injunction to restrain the beneficiary from calling on or receiving money under a performance bond.

This article will examine the recent Court of Appeal cases of *Malaysian Refining Company Sdn. Bhd. v Sumatec Engineering and*

Construction Sdn. Bhd. [2011] 7 CLJ 21 and *Kejuruteraan Bintai Kidenko Sdn. Bhd. v Nam Fatt Construction Sdn. Bhd. & Anor* [2011] 7 CLJ 442 to obtain an insight of the development of the law on injunctions relating to performance bonds in Malaysia.

MALAYSIAN REFINING COMPANY SDN. BHD. v SUMATEC ENGINEERING AND CONSTRUCTION SDN. BHD.

The appellant awarded the respondent a design and build contract for the sum of RM47,846,688.00. The respondent provided the appellant a performance bond of RM4,784,668.80 for the due performance of the contract. During the currency of the contract, disputes arose between the parties *inter alia* that the appellant had reduced the scope of the respondent’s works, which were valued at approximately RM13 million, by removing certain aspects of the works from the original scope of works.

¹ Varghese George JC recognised and applied the test of unconscionability in *MMN Bina Sdn. Bhd. v Felda Properties Sdn. Bhd.* [2011] 2 CLJ 100 (HC) and *Tidalmarine Engineering Sdn. Bhd. v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia Cawangan Terengganu)* [2011] 2 MLJ 400 (HC).

The respondent duly completed the works and the appellant confirmed the same by the issuance of a provisional acceptance certificate. The appellant then made a claim for back charges without any notice of defects being given to the respondent to rectify such defects. The respondent contended that the appellant's action disregarded the terms of the contract. The appellant proceeded to demand payment of the performance bond. The respondent applied for an injunction to restrain the appellant from calling on the performance bond. The respondent obtained an *ex parte* injunction and thereafter the appellant applied to set aside the *ex parte* Order. At the inter partes hearing, the High Court allowed the respondent's application for an injunction and dismissed the appellant's application to set aside the *ex parte* Order. The respondent contended that the appellant's call on the performance bond was unconscionable conduct on its part.

The High Court *inter alia* held that "*unconscionability*" can be a ground for the court's intervention to restrain the making of payment under the performance bond and there was sufficient evidence to establish the same. The High Court Judge noted that the Malaysian

courts accepted in principle that "*unconscionability*" should be recognised in law as a separate ground for seeking injunctive relief in the context of a demand on an unconditional performance bond;² however, the "*unconscionability*" test is limited by the statement found in *LEC Contractors*:-

"First of all we wish to point out that the authorities we have referred above clearly indicated that in order to justify any injunction to stop payment there must be clear evidence of fraud on the part of the first defendant which comes to the knowledge of the second defendant. Bad faith or unconscionable conduct by itself is not fraud."


The High Court Judge distinguished the case of *LEC Contractors* and held that there was no justification in principle or policy why the Court should not assist a party who approached the Court for intervention on the grounds of "*unconscionability*" or mala fide acts on the part of the beneficiary, which if refused, could result in similar or more damage and loss to an aggrieved party in a fraud context.

The Court of Appeal, without commenting on the High

Court Judge's findings and *LEC Contractors* at all, held that even if "*unconscionability*" principle was applicable, the respondent must establish a strong prima facie case but not necessarily beyond reasonable doubt for the existence of unconscionability by placing before the courts manifest or strong evidence of source degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. The Court of Appeal further held that the "additional ground of "*unconscionability*" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man."

KEJURUTERAAN BINTAI KINDENKO SDN. BHD. v NAM FATT CONSTRUCTION SDN. BHD. & ANOR

The appellant was appointed by the 1st respondent to carry out mechanical and electrical subcontract works for the integrated customs, immigration and quarantine complex in Johor Bahru. The parties entered into a contract for the said works to which the appellant obtained 2 bank guarantees in favour of the 1st respondent for



the due performance of the works. Differences arose between the parties and the appellant filed an action and an application for interlocutory injunction to restrain the 1st defendant from making a demand on the 2 guarantees. Despite the filing of the application, the 1st respondent called on both guarantees.

The appellant contended in the High Court that it had fully performed its obligations under the underlying contract as evidenced by the Certificate of Practical Completion. It was alleged that the 1st respondent acted unconscionably in calling on the guarantees as it had not fulfilled the condition precedent under clause 24(c) of the contract whereby a certificate had to be issued by the 1st respondent's employer to say the appellant had breached the contract before a call on the guarantees could be made. The 1st respondent argued that the guarantees were unconditional performance bonds which the 2nd defendant was obliged to pay forthwith regardless of any contractual disputes between parties.

The High Court held that it was bound by the Court of Appeal's decision in *LEC Contractors* even though it expressed a preference for the "unconscionable" test. Accordingly, it dismissed the appellant's action and application for injunction as there was no issue of fraud.

The Court of Appeal held that in any application for injunctive relief, the court must first determine whether it is to restrain the issuer from making payment on the performance bond to the beneficiary or to restrain the beneficiary from making a call or demand on the performance bond.

The Court of Appeal held that if the performance bond is unconditional, it is independent of any primary contract between the parties and it is not open to the court to enquire into any breach of the primary contract and the issuer is obliged to pay the beneficiary without any proof or condition and notwithstanding any contestation or protest from any party. The only

exception to this rule is on the ground of fraud of which the issuer has notice. The fraud must be on the performance bond itself and not other documents (*Esso Petroleum* and *LEC Contractors* applied).

The Court of Appeal held that both *Esso Petroleum* and *LEC Contractors* specifically referred to an injunction to restrain an issuer from making payment on an unconditional performance bond but not an injunction to restrain the beneficiary from making a demand or call on the performance bond. The Court of Appeal agreed with Varghese George JC's observations in *Sumatec Engineering and Construction Sdn. Bhd. v Malaysian Refining Company Sdn. Bhd.*³ and *Tidalmarine Engineering Sdn. Bhd. v Kerajaan Malaysia*⁴ and held that the statement by Mokhtar Sidin JCA that "Bad faith or unconscionable conduct by itself is not fraud" in *LEC Contractors* had been misinterpreted to mean that "unconscionability" is not a distinct ground for court's intervention. The court's focus there was on what did or did not

² See grounds of judgment of *Sumatec Engineering and Construction Sd. Bhd. v Malaysian Refining Company Sdn. Bhd.* [2010] 1 LNS 1355.

³ *Ibid.*

⁴ [2010] 1 LNS 1361.

constitute fraud and whether fraud had been pleaded or proved.

The Court of Appeal also referred to *Satriadesa Corporation Sdn. Bhd. v Tenaga Nasional Berhad*,⁵ where Prasad Sandosham Abraham JC granted an interlocutory injunction to restrain a claim or demand on a performance bond made by the beneficiary on the ground of unconscionable conduct on its part in rushing to make a call shortly after the said performance bond had been renewed at its request. The Learned Judicial Commissioner followed the Court of Appeal case of *Eliau and Rabbath (trading as Eliau and Rabbath v Matsas and Matsas); JD McLaren and Company Ltd and Midland Bank Ltd*⁶ and held that the interest of justice called for the court's intervention to grant an injunction to prevent what might be irretrievable injustice, even where fraud was not pleaded. Although the Court of Appeal gave a neutral treatment towards the High Court's application of "irretrievable injustice", that principle may well be the exceptional rather than the

norm in the context of performance bonds.

CONCLUSION

The two recent cases clearly demonstrate the judicial will to recognise "unconscionability" as a separate and distinct ground to restrain a beneficiary from making a call on or receiving money under a performance bond.

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Editorial Note:

In the recent English decision of Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC), it was held that, fraud was not the only ground for an injunction, although the Court agreed that the principles applicable to an application for an injunction to restrain the bank from paying out the monies and to restrain the beneficiary from seeking payment under a bond are the same. The Learned Judge held that American Cynamid guidelines were applicable to such applications, but the 'serious issues to be tried' threshold is higher than the one applicable to other cases. Although the Malaysian position differs from that in England in this area of the law, it is interesting to note from this case that it is perhaps a sign of a shift away from the traditionally rigid criterion for an injunction in bond cases, namely fraud, adopted by the English Courts. (see Edward Owen Engineering v. Barclays Bank International [1978] QB 159 and IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank [1990] 2 Lloyd's Rep 496.)

⁵ [2010] 4 CLJ 877.

⁶ Lloyd's LR 2 [1966] 495. Roskill LJ in *Howe Richardson Scale Co. Ltd v Polimex-Cekop* [1978] 1 Lloyd's Rep 161 described the case as "a very special case."



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Construction Industry Payment and Adjudication Bill 2011 - Will the Bill improve cash flow in Malaysia?

INTRODUCTION

Malaysia stands out as one of the last remaining common law jurisdictions without an adjudication legislation. Statutory Adjudication has long been introduced in the United Kingdom, certain states in Australia, New Zealand, and Singapore to address issues on payment and as a quick dispute resolution mechanism for the construction industry. Malaysia has now joined the club with the Construction Industry Payment and Adjudication Bill 2011 (the CIPA Bill) moving through Parliament and should receive Royal Assent in due course. The effective date of the legislation has yet to be announced. The legislation has received support from some quarters but the uncertainty is still there, as with any new legislation. The objective of the legislation is to improve cash flow to the contractors and to ensure that those whom have undertaken construction contracts have enough capital to embark on projects. The CIPA Bill is expected in laying down the basic payment provisions of the construction contracts and for providing a scheme of adjudication for parties

to obtain a quick, interim decision in a payment dispute. As can be seen from the table, the CIPA Bill is silent on whether parties could contract out of the CIPA Bill. However, Section 40 of the CIPA Bill allows the minister to exempt any person or class of persons or any contract, matter or transaction from all or any provisions of the CIPA Bill.

SCOPE OF THE CIPA BILL

The legislation should apply to all construction contracts made in writing that relates to construction work carried out wholly or partly within the territory of Malaysia. Both the government and the private sector are bound by the CIPA Bill. The legislation does not apply to proposed residential properties, which are constructed for one's own use and shall not exceed 4-storey high. In the United Kingdom, the Local Democracy, Economic Development and Construction Act 2009 (the LDEDCA) came into effect on 1st October 2011, the aim being to iron out some of the issues that have arisen pursuant to the Housing Grants, Construction and Regeneration Act 1996 (the HGCRA). The LDEDCA had repealed the requirement for

contracts in writing and this may likely increase the disputes referred to adjudication in the United Kingdom.

The proposed legislation in Malaysia defines "construction work" in a wide ambit and covers, among others, the building industry, the oil and gas industry, the petrochemical industry, telecommunication, utilities, infrastructure, supply contracts and consultancy contracts. The United Kingdom and the Singapore legislations, in this context, seem to have excluded the oil and gas and petrochemical sector. The meaning of "construction work" in Singapore's Building and Construction Industry Security of Payment Act 2004 follows closely to the meaning of "construction operations" in Section 105 of the HGCRA, with the exception that supply contracts are not included within the meaning of "construction operations" in the HGCRA.

OTHER FEATURES OF THE LEGISLATION

The legislation, under Section 35, prohibits the practice of pay-when-paid and conditional payments. The practise has been quite popular in Malaysia and has led to great hardships to contractors. The

United Kingdom and Singapore have both outlawed this practice. All work done and all services rendered must be paid upon the work being done and the services being rendered. All contractors must beef up their financial capacity to pay subcontractors in a timely manner even if they are not paid by their employer. This will make case such as in *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd & Ors* [2010] 3 MLJ 7, CA, redundant and not good law anymore.

The legislation will provide a default mechanism that establishes a payment process and timeframes for contracts that do not stipulate appropriate payment terms. The CIPA Bill, under Section 36, provides that the frequency of progress payment for construction work and construction consultancy services would be monthly and for supply contracts, it would be upon the delivery of supply. The due date for payment for all the above contracts would be thirty calendar days from receipt of an invoice.

It cannot be disputed that adjudication costs are a major consideration in deciding whether or not to commence adjudication proceedings. The proposed Section

18 envisages that the adjudicator shall have the power, amongst others, to order the adjudication costs to follow the event and to fix the quantum of costs. It has to be noted that the HGCRA is silent on the adjudicator's power to make orders for adjudication costs. The objective of this Section is to allow smaller construction companies to pursue their claims without having to spend too much money in the process.


It is also provided under the legislation that the power of an adjudicator to order costs shall prevail over any agreement made by the parties prior to the commencement of the adjudication proceedings by which one party agrees to pay the other party's costs or bear the adjudicator's fees and expenses. One might ask for the rationale behind this clause. It is thought that this is due to the history behind the costs allocation clauses in the United Kingdom, which were known as the 'Tolent clauses' after the case of *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL 1662, in which the court upheld such contractual provision and held that it should not interfere with the contract as parties freely negotiated them. However, the case of *Yuanda (UK) Co Ltd v WW Gear Construction*

Limited [2010] EWHC 720 (TCC) reverses this position whereby the court held that 'Tolent' clauses were contrary to the HGCRA as they discourage parties from exercising their right to adjudicate. However, LDEDCA by inserting Section 108A into the HGCRA, is attempting to remedy the situation by requiring the costs payable.

RECOVERY OF PAYMENT ON ADJUDICATED SUM

Adjudicators are as per the proposed Section 12 required to decide a dispute within 45 days from service of a response to the adjudication claim. We are of the view that the time limits proposed are very ambitious and the parties and adjudicators and parties will have some difficulty observing such tight deadlines. The CIPA Bill also seeks to provide remedies for the recovery of payment upon the conclusion of the adjudication process in addition to other remedies such as a right to reduce the rate of work progress or to suspend work under Section 29 of the CIPA Bill or even to secure direct payment from the principal under Section 30 of the CIPA Bill.

That being so, the party aggrieved may also apply to the High Court



under Section 15 of the CIPA Bill to set aside the adjudicated decision on various grounds set out in the CIPA Bill or stay the adjudication decision under Section 16 of the CIPA Bill pending the application to set aside. The grounds for application for stay arise when an application to set aside the adjudication decision has been made or the subject matter of adjudication decision is pending final determination by court or arbitration. This raises an important question on whether the purpose of the CIPA Bill will be defeated where on one hand parties are allowed to concurrently refer a dispute to adjudication, arbitration or the court under the proposed Section 37 of the CIPA Bill and on another hand a party may apply to stay an adjudication decision if the subject matter of the adjudication decision is pending final determination by arbitration or the court under Section 16(1) (b). This will lead to the losing party avoiding the adjudicated decision. The options available to the High Court would be either to grant the stay, or order whole or part of the adjudicated amount to be deposited with Kuala Lumpur Regional Centre for Arbitration (KLRCA) or make any other orders it thinks fit. It will be interesting to see the attitude of

the High Court towards adjudication decisions.


ANTICIPATED DIFFICULTIES

There is some concern over the application of the CIPA Bill, which is confined to payment disputes only. It is provided in Section 7 of the CIPA Bill that an unpaid party or non-paying party may refer a dispute arising from a payment claim to adjudication. The CIPA Bill, in this sense, did not follow the HGCRA, which covers all disputes and not restricted to disputes on issues of payment only whereas in Singapore, the right to commence adjudication only accrues if the claimant is unpaid of the response amount which he has accepted. Many disputes are invariably linked. A claim can be in the form of assertion of right by one party as can be seen in the case of *David & Teresa Bothma DAB Builders v Mayhaven Healthcare Limited* [2007] EWCA Civ 527, where the contractor sought a number of remedies, inter alia, for the adjudicator to make a finding of fact over the date for completion of the contract. However, it is provided for in the CIPA Bill under Section 27(2) that parties to an agreement may extend the adjudicator's jurisdiction to decide on any

other matter that is not within the adjudicator's jurisdiction.

Section 108 (1) of the HGCRA simply state a party has the right to refer a dispute arising under a construction contract and the term 'dispute' includes "any difference". The interpretation of the word "dispute" had invariably resulted in various case laws which have raised the issue of an adjudicator acting outside his jurisdiction on the basis of there being no dispute. The case of *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC), is one authority on how and when a dispute can arise and laid down seven propositions in relation to the interpretation of the word 'dispute'. It is expected that issue on the interpretation of the word 'dispute' may arise under the CIPA Bill arising from a payment claim.

There is also the issue of the CIPA Bill envisaging that an unpaid party or non-paying party may refer only one dispute at a time arising from a payment claim to adjudication although the CIPA Bill provides for consolidation of adjudication proceedings. Similarly in the United Kingdom, the HGCRA envisages that only one dispute will be referred



to an adjudicator at one time as Section 108(1) refers to a “dispute” and not to “disputes”. Sometimes a party may be referring a number of disputes to the adjudicator. If they all relate to what sum may be due, there is only one dispute. This view was confirmed in *Fastrack Contractors Limited v Morrison Construction Limited* [2000] EWHC Technology 177 and *David & Teresa Bothma DAB Builders v Mayhaven Healthcare Limited* [2007] EWCA Civ 527. And, recently in the case of *Witney Town Council v Beam Construction Ltd* [2011] EWHC 2332 (TCC), it was held that a dispute can comprise a single issue or any number of issues within it. Whether or not there are one or more disputes is a question of fact.

It is hoped that, if ever, there is a confusion over the ‘multiple disputes’ issue for adjudication in Malaysia, the above cases will provide as useful guidance as to whether or not dispute referred for adjudication under the CIPA Bill constitutes one or more disputes. Perhaps, the referring parties shall set out expressly in the notice of adjudication the various ‘nexus’ between the various disputes sought and it would certainly be prudent for adjudicators deciding under the

CIPA Bill to clearly address in their decision that there was a sufficient nexus among the various issues referred for adjudication as otherwise the decision could be opened for challenge for want of jurisdiction.

ADJUDICATION AUTHORITY

The CIPA Bill includes for the entire adjudication process to be administered and managed by the KLRCA. The KLRCA will be responsible to the setting of the competency standard and the criteria required of an adjudicator, the determination of the standard terms of appointment of an adjudicator and the fees and to provide administrative support for the conduct of adjudication. The KLRCA has prepared an Adjudication Training Programme to enable proper certification for all future adjudicators. It is mandatory for all persons who are interested in providing adjudication services to enrol in the programme. Those who have successfully completed the KLRCA Adjudication Training programme will be awarded with a Certificate of Adjudication. The criteria for adjudicators would be amongst others, a relevant degree or diploma in the related field, 10 years working experience in, or relating

to, the building and construction industry in Malaysia and successful completion of the KLRCA Adjudication Training Programme. The proposed legislation, however, does allow for the parties to appoint any person to adjudicate a dispute by consensus.

CONCLUSION

The proposed legislation is the starting point for a quick resolution for unpaid claims in the industry. However, not all have readily welcomed this legislation. There are various concerns still amongst Employers, in particular, that they would have many claims, to contend with. There have been suggestions that some parties will apply to the Minister in charge to exempt themselves from complying with the legislation. We will have to wait and see if it does come to pass. However, for construction disputes, this is a new era as it is not in the nature of those in the industry to commence recovery claims whilst the project is on-going. Hence, it will be interesting to see if this proposed legislation achieves its full potential. We are of the view that with the passage of time, the industry will accept it and it will achieve its intended purpose.

BRIEF COMPARISON BETWEEN THE LEGISLATION IN ENGLAND, SINGAPORE AND MALAYSIA

Features	Malaysia-Construction Industry Payment and Adjudication Act 2012 (CIPAA)	Singapore -Building and Construction Industry Security of Payment Act 2004	England- Housing Grants Regeneration and Construction Act 1996 (HGCRA 1996)
Sectors that are covered	Construction Contract - construction work contract or construction consultancy contract. Very wide covering also oil and gas industry, petrochemical industry, telecommunication, utilities, infrastructure, supply contracts, project management, etc (Section 4).	Construction Contract- construction work contract or supply of goods or services. Not so wide as it excludes oil and gas, chemical (Section 3).	Construction operations. It also includes contracts for professional services in relation to construction operations. Not so wide as it excludes oil and gas, chemical, supply contracts, etc (Section 104 and Section 105).
Construction Agreement	Agreement must be in writing (Section 2).	Agreement must be in writing (Section 4).	Agreement need not be in writing (Repealed Section 107).
Disputes that are covered	Only payment disputes (Section 7).	Only payment disputes (Section 12).	Any disputes (Section 108).
Timeline for Adjudication Decision	45 Days (Section 12).	7 Days if Respondent failed to make payment response/ adjudication response and 14 Days in any other case (Section 17).	28 days (subject to any agreed 14 days extension) (Section 108).
Costs of adjudication proceedings	Adjudicator is empowered to order costs (Section 18).	Adjudicator is empowered to order costs (Section 30).	Adjudicator not empowered to order costs unless the contractual provision provides for it (Section 108A).

Features	Malaysia-Construction Industry Payment and Adjudication Act 2012 (CIPAA)	Singapore -Building and Construction Industry Security of Payment Act 2004	England- Housing Grants Regeneration and Construction Act 1996 (HGCRA 1996)
Contracting out provisions	No express provision.	Expressly prohibits contracting out (Section 36).	The Act contains a number of mandatory provisions which must be provided in every construction contract. If the contract does not comply with the mandatory provisions or if they are inconsistent, the Scheme for Construction Contracts will apply. (Section 108).
Conditional Payment Clause	Prohibits conditional payment (Section 35).	Prohibits conditional payment (Section 9).	Prohibits conditional payment (Section 113).
Stay Provisions	May apply for stay of adjudication decision (Section 16).	No express provision.	No express provision.
Adjudication Authority	The Kuala Lumpur Regional Centre for Arbitration (Section 32).	The Singapore Mediation Centre (Section 28).	There are many of them around and parties are free to approach them, such as the Association of Independent Construction Adjudicators (AICA), the Technology and Construction Solicitors Association (“TeCSA”), etc.



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MEP DESIGN AT TENDER STAGE - TIME FOR A CHANGE?

Have you ever seen working drawings for structural concrete or for the finishings? NO?

Why is it then, that under a 'fully designed' contract, the MEP (Mechanical, Electrical and Plumbing) subcontractor has to produce a whole new set of drawings for approval before he can start installation?

Here is another question. Why does virtually every specification document sent out to tender for the MEP works have a clause in it which says something along the lines of "If there is a discrepancy between any or all of the documents, you are deemed to have allowed for putting it right, at no cost to the Client".

Have in mind that the designer has had possibly 2 years to design the works and the tenderer has maybe 8 weeks to find these discrepancies, notify the Client's team and price them.

MEP is approximately 30% of the cost of the average construction contract. To allow this major, and arguably, most important, package of works to proceed without full design, is placing the Client at a great financial risk.

An analysis of the final accounts on 8 construction contracts showed that on average the MEP was responsible

for over 50% of the total cost increase attributed to variations.

Most MEP contracts have a degree of "design completion" inherent in them. But why?

It just seems to be accepted practice in the industry for this to happen.

Does the same happen to the structure? Not at all.

If the contractor finds a problem with the structural drawings or specification, the structural engineer puts it right and a variation is issued, if required.

At tender stage, the extent of the design completion is not defined and so becomes a major area for dispute. When the MEP contractor asks for a variation the debate begins as to whether it should have been allowed for in the tender. Both sides will have their opinions, and they will both differ. The usual comment is that it is at the contractors' risk. But why should this be?

The one actually taking the risk, and paying for it, is the Client.

All manner of arguments can be advanced as to why the design

cannot be completed prior to tender, the usual ones include; differing possible choice of equipment suppliers; inability to co-ordinate with the structure and; allowing the contractor freedom to install in the manner he sees best. This is all very well, but surely there should be a complete, workable, functioning, co-ordinated design, that is fit for competitive tender?

That being so, then the Client team could easily evaluate the returned documents without the extended period that seems to be required for each and every tender to remove exclusions, carry out extended post-tender discussions and incorporate those suggestions that the tenderer has proposed.

Further sets of drawings are then issued almost as soon as a contract price has been agreed, under the guise of "construction issue". These become yet another fertile ground for dispute, disagreement and variation. Working drawings, as noted above, are still required, and has the design changed that much since the date of tender to actually warrant these new drawings? Surely the design should have been 'ready for construction' before being sent for tender?

The counter argument could be that the Client is not prepared to pay for a complete design, and anyway, the Fees are insufficient to allow the designer to undertake a full design.

The Client eventually ends up paying for the contractor to complete the design via an enhanced tender price, so why not pay the Consultant?


A further complication arises when the Client puts pressure on the design team to distribute the documents by a certain date. If this date is in advance of completion of the design, then the 'speed to

market' is a misconception as inevitably the tender period is then extended due to the amount of queries that arise.

Why not take a little longer with the documents and have them at a stage where queries are minimised?

Whatever the answer, the fact remains that going out for prices with an incomplete MEP design will cost the Client more money in the long run, as changes will invariably be more costly when priced as variations than when they are priced as part of a tender.

In order to minimise the risks of time and cost overruns, it is suggested that the following be implemented;

- Undertake an MEP risk assessment at tender stage
- Check for completeness of design
- Allow adequate time for tendering
- Ensure that documents are current and reflect the design intent. 

About the Writer

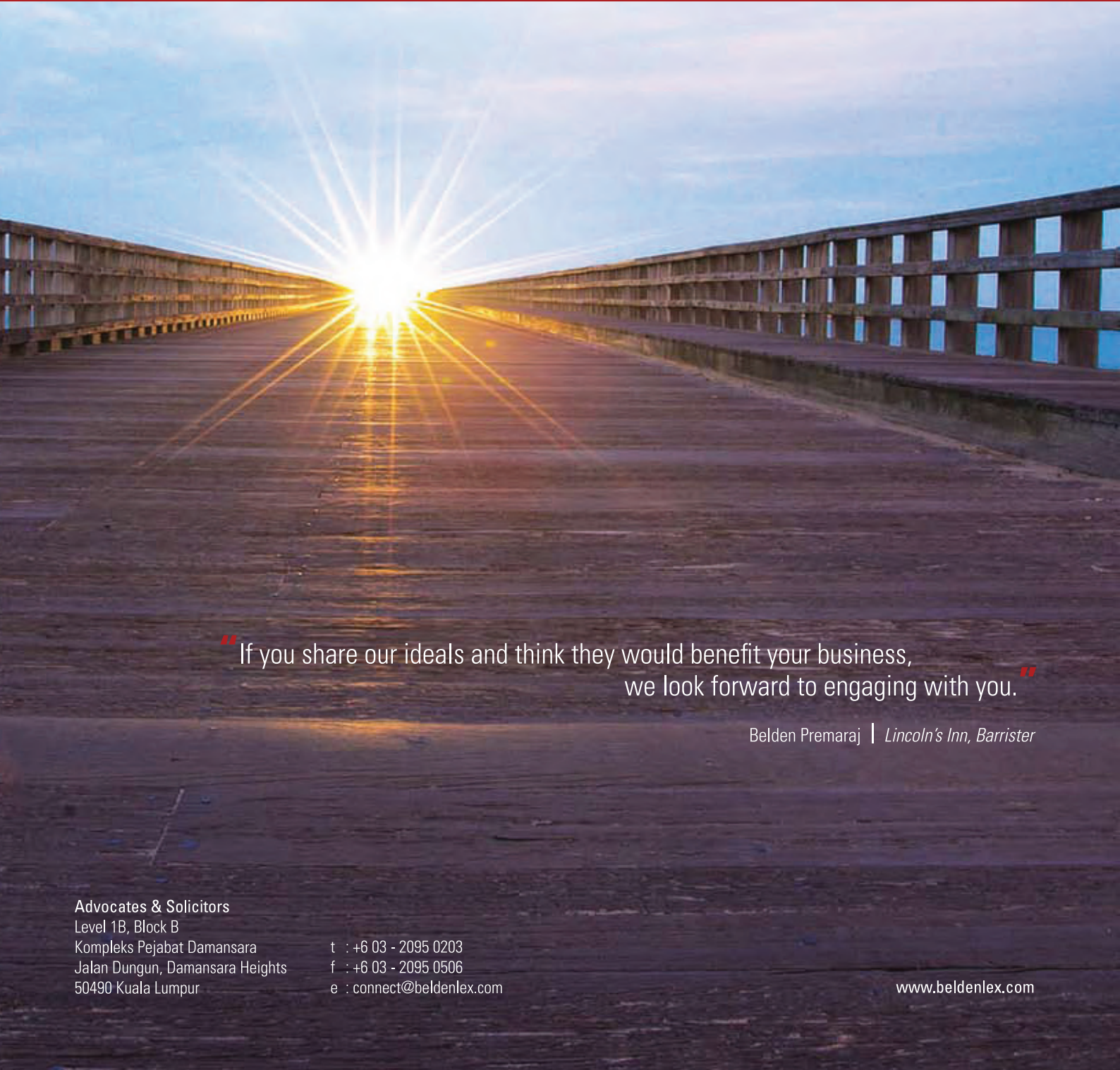
William Kennedy is a Chartered Quantity Surveyor and Fellow of the Royal Institution of Chartered Surveyors, a Project Manager, Fellow of the Chartered Management Institute and a Fellow of the Chartered Institute of Arbitrators. He also holds a Masters Degree in Project Management from the National University of Singapore where he was awarded the SISV Gold Medal.

William's experience covers over 35 years in the construction industry, the last twenty-five years of which have been spent predominantly in the Middle East and Asia Pacific on many significant Building, Oil and Gas, Civil Engineering, Transport, Industrial, Infrastructure and Shipbuilding commissions. He frequently prepares expert witness reports in construction and engineering disputes both for litigation and arbitration. He is a registered Adjudicator and has given several decisions leading to binding agreements between the parties.

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A wide-angle photograph of a long, empty concrete pier or walkway extending into the sea. The sun is low on the horizon, creating a bright starburst effect with long, golden rays that reflect on the wet pavement. The sky is a mix of blue and orange, suggesting a sunset or sunrise. The pier has a simple metal railing on both sides.

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COURT OF APPEAL OF MALAYSIA

(12 July 2011)

QIMONDA MALAYSIA SDN BHD (IN LIQUIDATION)

VS.

SEDIABENA SDN BHD & ANOTHER

Qimonda Malaysia Sdn Bhd (In Liquidation) vs. Sediabena Sdn Bhd & Another

COURT OF APPEAL OF MALAYSIA

12 July 2011

**QIMONDA MALAYSIA SDN BHD
(IN LIQUIDATION)**
VS.**SEDIABENA SDN BHD & ANOTHER**

**ZAIDUN ALI, JCA
RAMLY HJ ALI, JCA
ZAHARAH IBRAHIM, JCA**

Trust – Existence of – No written documents or clause on trust executed between parties – Claim for retention monies held by Appellant after the Appellant has been wound up – Retention monies were not separated from the Appellant’s common funds prior to winding up – Whether the retention monies were trust monies – Factors to consider

Winding Up – Whether retention monies formed part of the general assets of the Appellant – Preferential Treatment – Section 223 of the Companies Act 1965

Estoppel – Filed of proof of debt (Form 77) – Whether the Respondents were estopped from asserting that the retention monies were trust monies

By a contract dated 22 August 2007 (“the Contract”), Qimonda Malaysia Sdn Bhd (“the Appellant”) as the employer engaged Sediabena Sdn Bhd and APC Corporation Holdings Sdn Bhd (“the Respondents”) as the contractors for a project known as the “Design and Build For Qimonda Global Module House at Lot 1, Sultan Ismail International Airport, Johor”. The Contract incorporated the Singapore REDAS Design and Build Contract (“REDAS”).

Clause 22.1.3 of REDAS provided that the Appellant was entitled to retain 10% of the total certified amount for the work done and materials supplied by the Respondents under every Certificate of Payment issued by the Consulting Engineer, subject to a maximum amount of the retention monies being limited to RM6,127,884.50. Under Clause 23 of REDAS, one half of the retention sum was to be released after the issuance of the handing over certificate, subject to the employer’s right to withhold such amount as might be appropriate to reflect minor outstanding works still uncompleted at the time. As to the second half of the retention sum, it was to be released after the issuance of

the maintenance certificate or the certificate of statutory completion for the works, less any cost of completing any minor defects or loss in the value of the works.

The Respondents completed and handed over the works to the Appellant. Accordingly, the Consulting Engineer recommended the release of part of the retention monies to the Respondent. The Appellant did not release the retention monies to the Respondents as recommended. Soon thereafter, the Appellant declared voluntary liquidation. At the time of liquidation, the Appellant had not set aside the retention monies in a separate account but its general funds exceeded the total amount of the retention monies. It was not in issue that the Respondents had never requested the employer to appropriate and set aside the retention sum into a separate trust fund account.

The Respondents subsequently submitted a Proof of Debt to the liquidators in respect of the retention monies, but maintained its position that the retention monies were monies held in trust by the Appellant in favour of the Respondents. The Respondents requested the liquidators to release to them the retention monies. The liquidators refused on the grounds that the Contract did not provide that retention monies were trust monies, and that no separate funds were set aside in respect of the retention monies prior to the Appellant’s liquidation.

The Respondents then commenced an action in the High Court seeking an order declaring the retention monies as trust monies and compelling the liquidators to release the retention monies to the Respondents. The Appellant opposed the Respondents’ claim on the grounds that, first, there was no express provision in the Contract stipulating that the retention monies were trust monies; second, the retention monies were not set aside in a separate account as trust monies prior to the Appellant’s liquidation; and third, the Respondents were estopped from asserting that the retention monies were trust monies as they had filed a Proof of Debt, by which, the Respondents had effectively treated the retention monies as a debt.

The High Court allowed the Respondents’ claim. The Appellant appealed.

HELD by the Court of Appeal, dismissing the appeal, Per Ramli Ali (Judge of the Court of Appeal), delivering the judgment of the Court:-

(1) The retention monies were, by their nature and purpose, trust monies held by the Appellant for the Respondents. It is a common feature found in many construction contracts where a percentage of the amount certified in interim payments is to be deducted by the employer as retention monies. These retention monies are held by the employer in a building contract until all defects have been satisfactorily rectified by the

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contractor. In the event that the contractor fails to rectify the defects properly, these monies can be used towards the disbursements of expenses incurred by the employer in rectifying the defects. When the retention monies are actually retained by the employer for the rectification of defects, the property in the monies, even while they are being held by the employer, resides with the contractor. The remaining portion of the retention monies will usually be returned to the contractor on the expiry of the defects liability or maintenance period. (paras 11 & 12)

(2) A trust can be implied even where the agreement or contract itself does not contain an explicit provision that the retention monies be held on trust by the employer. In the present case, all the requisites of a valid trust had been present and the parties had manifested a clear intention to create a trust. The retention monies were held by the Appellant in its capacity as a fiduciary to the trust for the Respondents. The learned High Court judge was right in law, and in fact, in holding that the retention monies by their very nature and purpose were trust monies held by the Appellant as trustee for the Respondents. (paras 13, 18 & 19);

(3) Once it had been established that the retention monies were in fact trust monies, it did not matter whether the monies had not been set aside prior to liquidation. There was no requirement that the retention monies held by the Appellant had to be kept in a separate bank account. There was also no requirement that the Respondents should request for the monies to be kept in a separate bank account. The failure to separate the retention monies from the common funds of the Appellant prior to its liquidation could not, and had not, defeated the trust. (paras 20-22);

(4) The release of the retention monies where the Appellant had been under liquidation does not amount to preferential treatment under s. 223 of the Companies Act 1965 as the retention monies, being trust monies, do not belong to the Appellant in the first place. (paras 23 & 30);

(5) The Respondents were not estopped from claiming that the retention monies were trust monies after filing the proof of debt. From the sequence of events, the Respondents had at all material times clearly maintained its stand that the retention monies were trust monies. The Appellant could not say that they had been led to believe that the Respondents had given up its right to pursue the retention monies as trust monies. Further the Appellant's counsel had abandoned the argument on estoppel at submission stage in the High Court. Thus, the issue of estoppel raised by the Appellant had no merit and would be disregarded for the purpose of the appeal. (paras 31-35)

Case(s) referred to:

- ABB Transmission & Distributions Sdn Bhd v. Sri Antan Sdn Bhd & Anor* [2008] 10 CLJ 1 HC (refd)
FR Absalom Ltd v. Great Western Garden Village Society [1933] AC 592
Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 SC (refd)
Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd [2003] 4 CLJ 709 HC (refd)
Lee Kam Chun v. Sykt Kukuh Maju Sdn Bhd; Sykt Perumahan Pegawai Kerajaan Sdn Bhd (Garnishee) [1988] 1 CLJ 52; [1988] 1 CLJ (Rep) 711 HC (refd)
Merino ODD Sdn Bhd v. PECD Construction Sdn Bhd [2009] MLJU 671 (refd)
Rayack Construction Ltd v. Lampeter Meat Co Ltd [1979] 12 BLR 34 (not followed)
Re Kayford Ltd [1975] 1 All ER 604 (refd)
Syarikat Pembinaan Woh Heng Sdn Bhd v. Meda Property Services Sdn Bhd [2002] 1 LNS 49 HC (refd)

Legislation referred to:

Companies Act 1965, s. 223

Other source(s) referred to:

Chow Kok Fong, Law And Practice Of Construction Contracts, 3rd edn, p 344

For the Appellant : Sean Yeow; M/s Lee Hishammuddin, Allen & Gledhill;

For the Respondents : Leong Wai Hong, Lam Wai Loon & Tan Lai Yee; M/s Skrine

COMMENTARY

The decision in Qimonda is significant for the construction industry in Malaysia. It has enhanced a contractor's prospects of recovering retention monies in the event of the employer's liquidation as they enable a contractor, in appropriate circumstances, to recover the retention monies from the general funds of the employer. In coming to this decision, the Court of Appeal chose not to follow the long line of established cases in England for the proposition that the failure by a contractor to take steps to ensure that the retention monies are set aside in a separate account would result in the contractor losing its right to claim for their release in the event of the employer's liquidation.

The English principles in this area can be traced back to the Chancery Division Court case of Rayack

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Construction Ltd v Lampeter Meat Co Ltd [1979] 12 BLR 34 (“Rayack”) where it concerned an application by a contractor for, inter alia, an injunction to compel the employer to pay all retention monies into a separate account to be applied only in accordance with the trust provision in the building contract. In allowing the contractor’s application, the Chancery Court held that the trust provision in the building contract effectively imposed an obligation on the employer to appropriate and set aside any retention monies so retained by it. The Chancery Court also opined, obiter dicta, that the contractor’s beneficial interest in the retention monies could only subsist in a fund so appropriated and set aside, and that in the absence of such appropriation and setting aside, the contractor would run the risk of being ranked as an unsecured creditor with regard to the retention monies in the event of liquidation of the employer.

The dicta in Rayack were subsequently applied by the English Court of Appeal in *Wates Construction (London) Ltd v Franthom Property Ltd* [1991] 53 BLR 27 (“Wates Construction”) and *Mac-Jordan Construction Ltd v Brookmount Erostin Ltd (in receivership)* [1992] BCLC 350 (“Mac-Jordan”).

Unlike the English cases discussed above, there was no provision in the building contract in Qimonda which declared that the employer’s interest in the retention monies was fiduciary as trustee for the contractors. In spite of this, the High Court construed (and agreed by the Court of Appeal) the provision dealing with retention monies as evincing an intention of the parties to treat the retention monies as trust monies and accordingly, implied a trust with regard to the retention monies.

In coming to this conclusion, the High Court applied the Malaysian Supreme Court decision in *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd* and other appeals [1991] 1 MLJ 293 (“Geh Cheng Hooi”) which held that a trust can be imported into a commercial relationship in appropriate circumstances even where there was no express trust provision in the contract.

The Supreme Court in *Geh Cheng Hooi* had referred to *Re Kayford Ltd* [1975] 1 All ER 604 where Megarry J held that it is well settled that a trust can be created without the use of words like ‘trust’ or ‘confidence’ or similar expressions and that the question is whether in substance a sufficient intention to create a trust had been manifested. The Supreme Court also referred to Megarry J’s observation in *Re Kayford Ltd* that payment into a separate bank account is a useful, though by no means conclusive, indication of an intention to create a trust and that there is nothing to prevent a company from binding itself by a trust even if there are no effective banking arrangements.

In affirming the High Court decision, the Court of Appeal held that retention monies in construction contracts were, by their nature and purpose, trust monies. This is predicated upon the fact that the building contracts in this case recognised the retention monies as monies belonging to the contractors but were retained by the employer for the specific purpose stated in the contract. The Court of Appeal was of the view that if the retention monies were not applied for that purpose, the monies were to be returned to the contractors.

The recognition in Qimonda of retention sums under a construction contract as trust monies is not new and accords with the decisions of the Malaysian High Court in *Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd* (unreported), *Kumpulan Liziz Sdn Bhd v Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709, *ABB Transmission & Distribution Sdn Bhd v Sri Antan Sdn Bhd* [2008] 10 CLJ 1 and *Merino-O.D.D. Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671.

Both the High Court and the Court of Appeal in Qimonda declined to follow the English cases such as Rayack, Wates Construction and Mac-Jordan. Instead, the Malaysian Courts held that the contractors’ beneficial interest in the retention monies could survive the liquidation of the employer, irrespective of whether or not the monies have been appropriated and set aside in a separate bank account. The liquidators would then bear the burden to account for the monies, failing which, the amount up to the total retention monies in the general funds would belong to the trust concerned.

In adopting this position, the Courts in Qimonda followed *Geh Cheng Hooi* where the Supreme Court applied the long established principles laid down by the English Courts in *Re Hallet’s Estate* [1880] 13 Ch 696 which held that if money held by a person in a fiduciary character, though not a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and *Re Tilley’s Will Trust* [1967] Ch 1179 which held that if a trustee mixes trust assets with his own, the onus lies on the trustee to distinguish the separate assets, and to the extent that he fails to do so, they belong to the trust.

It is interesting to note that the tracing principles lay down in *Re Hallet’s Estate* and *Re Tilley’s Will Trust* were not referred to in Wates Construction and Mac-Jordan. It is possible that the English Court of Appeal in Wates Construction and Mac-Jordan may have come to a different decision had they considered those cases.

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JUDGMENT**RAMLY ALI JCA:****The Appeal**

[1] The present appeal before this court is against the decision of the learned High Court judge dated 22 April 2011 in allowing the respondents' application for a declaration that the retention sum held by the appellant under the relevant contract is held on trust by the appellant in favour of the respondents and granting injunctive reliefs as prayed with costs of RM25,000. The appellant was the defendant and the respondents were the plaintiffs at the court below.

Factual Background

[2] The parties have agreed to the following facts which are stated in the statement of agreed facts:

(a) the respondents and the appellant company entered into a contract dated 22 August 2007 for a project known as the 'Design and Build for Qimonda Global Module House Project at Senai, Johor' ("the contract");

(b) the 1st respondent was the design and build contractor of the said project to design, construct and maintain the Global Module House at Lot 1, Airport Logistic Park, Sultan Ismail International Airport, 81259 Johor ("the works"). The 1st respondent was the contractor for their part of the works (CSA Package) under the contract while the 2nd respondent was the nominated sub-contractor for their part of the works (MEP Package) under the contract;

(c) under cl. 22.1.3 of the contract, the retention monies were to be deducted for value of work already and actually done and materials supplied as certified in the payment certificates;

(d) pursuant to cl. 23.1 of the contract, the appellant company shall release one half of the retention monies to the respondent upon the issuance of the handing over certificate. Clause. 23.2 of the contract further states that the appellant company shall release the second half of the retention sum monies to the respondents upon the issuance of the maintenance certificate or after the issuance of the certificate of statutory completion for the works by the relevant authority, whichever is the later;

(e) to date, the retention monies of RM6,127,884.50 has not been paid by appellant company to the respondents;

(f) the Global Module House was handed over to the defendant company on 30 June 2008. A certificate of practical completion was also issued by the architect

on 17 July 2008. To date, the respondents have not obtained the certificate of statutory completion;

(g) the appellant company's records contain a copy of a letter from Advanced Engineering (Asia) Pte Ltd dated 10 February 2009 recommending the full release of the retention monies for MEP Package and 1st half retention monies for CSA Package in the sum of RM4,515,192.25;

(h) on 9 April 2009, the directors of the appellant company passed a board resolution and declared that the appellant company could not, by reason of its liabilities, continue its business. They decided to voluntarily wind up the appellant company. A provisional liquidator, Dato' Gan Ah Tee was appointed over the appellant company;

(i) a meeting of the members and the creditors of the appellant company was held on 23 April 2009 and Dato' Gan Ah Tee and Mok Chew Yin were jointly and severally appointed as the liquidators of the appellant company;

(j) the respondents have submitted their proof of debt in Form 77 to the appellant company on 14 September 2009;

(k) the defect liability period under the contract had expired on 30 June 2010; and

(l) prior to the liquidation of the appellant company, the respondents had never requested the appellant company to appropriate and set aside the retention sum into a separate trust fund account.

[3] The parties also have agreed on the following issues to be tried:

(a) whether the retention monies which had not been paid by the appellant company to the respondent under the contract amounting to RM6,127,884.50 are trust monies held by the appellant company in favour of respondents;

(b) whether the respondents are estopped from asserting that the retention monies are in fact trust monies due to their action of submitting the proof of debt via form 77 of the Companies Act, 1965 in relation to the said monies; and

(c) in the event this court finds that the said monies are trust monies held by the appellant company in favour of the respondents, whether the respondents at this stage of the liquidation process of the appellant company are entitled to be granted the reliefs prayed for by the respondents in the writ of summons filed herein.

[4] The relevant provisions in the contract for the purpose of the present case are cl. 22 (on progress payments) and cl. 23 (on the release of the retention monies).

[5] Clause 22.1 provides that the respondents as

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contractor were to submit an application for payment for progress payment to the appellant's representative supported by relevant documents which shall include the detailed monthly progress report and shall contain information on the value of the design in accordance with the schedule of fees as shown in the contract documents; the value of works executed (including variations) and materials and the amount to be deducted as retention monies. Clause 22.2 provides that within 21 days of the receipt of the application for progress payment the appellant's representative shall issue an interim payment certificate. Clause 22.4 of the contract provides that the appellant (as employer) shall pay the amount certified as due to the respondents (as contractor) in the interim payment certificate within the time period set out in Appendix 1 of the contract agreement from the date of receipt of such interim payment certificate subject to the employer's rights to deduct any sum or damages against the contractor under the contract. With regard to the deduction that the employer can make from the sum certified in the interim payment certificate, it includes the deduction for the retention monies as provided under cl. 22.1.3 of the contract.

[6] Clause 22.1.3 of the contract provides:

"an amount to be deducted as retention sum, calculated by reference to the percentage of retention as set out in appendix 1 in relation to the total of the amounts under clauses 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1. In this case the total amount of sum retained pursuant to the above clause is RM6,127,884.50".

[7] Clause 23 of the contract deals with the release of the retention monies. Clause 23.1 provides that after the issue of the handing over certificate the employer shall release one half of the retention monies to the contractor subject to the employer's right to withhold such amount as may be appropriate to reflect the minor outstanding works still uncompleted at the time of the issue of the handing over certificate. But the employer shall not be required to release the first half of the retention monies unless the contractor has submitted all the relevant drawings required to be submitted under the contract. Clause 23.2 of the contract provides that after the issue of the maintenance certificate or after the issue of the certificate of statutory completion for the works by the relevant authority whichever is the later, the employer shall release the second half of the retention monies to the contractor less any costs of completing any minor outstanding works or costs of rectification of defects or loss of value of works.

The Appellant's Contentions

[8] The appellant opposed the respondents' claim and

had taken the stand that the appellant is not obliged to release the retention monies upon its liquidation for the following reasons:

(a) there is no express provision in the contract stipulating that the retention monies are trust monies;

(b) the retention monies were not aside in a separate account as trust monies prior to the appellant's liquidation;

(c) the respondents did not request for the retention monies to be set aside in a separate account prior to the appellant's liquidation;

(d) after the appellant had gone into liquidation, the 1st respondent's representative (PW1) attended creditors meeting and was nominated to the committee of inspection; and

(e) the 1st respondent had filed a proof of debt in respect of the retention monies.

The Respondents' Contentions

[9] The respondents on the other hand, contended that:

(a) the retention monies are, by their nature and purpose, trust monies;

(b) the presence of an express trust clause in the contract is not a precondition to the creation of a trust; trust can be created by operation of law;

(c) the retention monies held by the appellant as trustee for the respondents must be held in its capacity as a fiduciary to the trust;

(d) there is no issue of preferential treatment if the retention monies are found to be trust monies because the retention monies do not belong to the appellant in the first place;

(e) the fact that the retention monies were not separated from the common funds of the appellant prior to its liquidation, did not change the fact that the retention monies are trust monies;

(f) the appellant's contention that the respondents are estopped from claiming that the retention monies are trust monies when the respondents filed the proof of debt vide Form 77 dated 11 September 2009, is an afterthought and non-issue; such contention was only raised after the defence was filed;

(g) the filing of the proof of debt by the respondents was done without prejudice to the respondents' right to claim for the retention monies as trust monies; and

(h) therefore the respondents are entitled to their claim herein.

Findings Of The High Court

[10] In allowing the respondents' claim the learned

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High Court judge made inter alia the following findings:

(a) that the retention monies held by the appellant under the contract belong to the respondents and it is implied that the monies are held by the appellant on trust for the respondents and payable to the respondents if the appellant (as employer) does not make any claim on the monies in accordance with the terms of the contract;

(b) that the respondents are not estopped from asserting that the retention monies are trust monies although they had submitted the proof of debt in relation to the sums; this is because the respondents' representative (PW1) who attended the first creditors' meeting of the appellant (after its liquidation) had asserted that the retention monies are trust monies; and

(c) in view of the above findings, the respondents are entitled to be granted the reliefs prayed for in the writ of summons. Accordingly, the respondents' claim was allowed with costs fixed at RM25,000.

Findings Of This Court

[11] Clause 22 of the contract provides for the deduction or payment to be made for the retention monies; and cl. 23 provides for the release of the retention monies. It is a common feature found in many construction contracts where a percentage of the amount certified in interim payments is to be deducted by the employer as retention monies. These monies are held over by the employer until all defects have been satisfactorily rectified by the contractor. In the event that the contractor fails to rectify the defects properly, this amount can be used towards the disbursement of expenses incurred by the employer in rectifying the defects. The remaining portion of the monies is usually released on the expiry of the defects liability or maintenance period. (see: *Law And Practice Of Construction Contracts* by Chow Kok Fong, 3rd ed, at p. 344).

[12] There are a number of authorities to suggest that until such time when the retention monies are actually disbursed to the employer for the rectification of defects, the property in the monies, even while they are being held by the employer, reside with the contractor. On the terms of the relevant contract, while the employer may have recourse to the retention monies to meet claims against the contractor under the contract, the beneficial interest of the contractor in the retention monies remains. The employer's interest in the retention monies is "fiduciary" in nature, in the sense that the employer is the trustee for the contractor in respect of the monies in question. (see: *FR Absalom Ltd v. Great Western Garden Village Society* [1933] AC 592; and *Lee Kam Chun v. Sykt Kukuh Maju*

Sdn Bhd; Sykt Perumahan Pegawai Kerajaan Sdn Bhd (Garnishee) [1988] 1 CLJ 52; [1988] 1 CLJ (Rep) 711).

[13] In the present case the first question which arises for determination is whether a trust can be implied where the agreement or contract does not contain an explicit provision that the retention monies be held on trust by the employer.

[14] In *Re Kayford Ltd* [1975] 1 All ER 604, Megarry J had pointed out that it is well settled that a trust can be created without using the word "trust" or "confidence" or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

[15] The Supreme Court (comprised of Harun Hashim SCJ, Mohamed Yusof SCJ and Gunn Chit Tuan SCJ) in the case of *Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd* [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 had expressed the following:

"Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed."

[16] The court must consider the circumstances concerning the relationship between the parties. A trust (as in the case of *Geh Cheng Hooi* as well as in the present case) can be implied even where the agreements themselves do not contain an express clause as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties to create one. The court must look into the arrangements as to how the monies were deducted from the progress payments under the contract, held and treated by the parties. The court cannot reject the respondent's claim just because they did not choose to enter into an agreement with specific trust clause.

[17] The retention monies are monies already earned by the respondents (as contractor) for the works already done under the contract. These monies are part of the progress payments claimed and certified for payment to the respondents (as contractor) under cl. 22 of the contract concerned. Under cl. 22.1.3 of the said contract, the retentions monies are "calculated by reference to the percentage of retention as set out in Appendix 1 in relation to the total amounts under cls. 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1".

[18] The purpose of the deduction is to make provision for making good the defects only. If they are not applied for that purpose, it was understood that they would be returned to the contractor after the expiry of the defect liability period. The usage of the word "deduction" for the creation of the retention monies from the certified

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sum under cl. 22 of the contract further support the fact that the parties recognized that the retention monies are contractor's monies. All the requisites of a valid trust were present and the parties had manifested a clear intention to create a trust since from the outset, the whole purpose of what had been done had been to ensure that the monies remained in the beneficial ownership of the respondents; and a trust is the obvious means of achieving this. As such the retention monies held by the appellant (employer) do not belong to the appellant (employer).

[19] The learned High Court judge was right in law and in fact in holding that the retention monies by their very nature and purpose, are trust monies, held by the appellant as trustee for the respondents. The respondents are the beneficial owner of the said monies. The monies are held back by the appellant (as employer) only for a specific purpose, and not on the basis whether there was an express provision for trust. In the circumstances, the retention monies held by the appellant must be held in its capacity as a fiduciary to the trust for the respondents. (see: *ABB Transmission & Distributions Sdn Bhd v. Sri Antan Sdn Bhd & Anor* [2008] 10 CLJ 1 (HC) and *Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709).

[20] The appellant contended that the respondents are not entitled for an order to set aside or release of the retention monies, since no part of the retention monies had been set aside prior to the liquidation of the appellant. With respect the court cannot agree with the appellant on this point. The court is of the considered view that, once it is established that the retention monies are, in fact, trust monies, it matters not whether the monies were set aside prior to liquidation. The monies may have been mixed in the common fund of the appellant; but they can still be determined and traceable. On this issue, the court is in full agreement with the Supreme Court in the case of *Geh Cheng Hooi* (supra) where it was held:

The learned judge also held that money for the goods paid by a customer became trust money to be held in trust by the licensor. The money was also intended to be banked in a common fund and this did not have the effect of the money losing its character of being trust money. As such, it is traceable.

[21] There is no requirement that the retention monies held by the appellant must be kept in a separate bank account. It does not change the status of the said monies as trust monies held for the specific purpose. There is also no requirement that the respondents (as contractor) must request for the monies to be kept in a separate bank account. This point was made clear by Megarry J in *Re Kayford Ltd* (supra), where he said:

"Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to

create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements."

[22] Thus, the retention monies cannot form part of the general assets of the appellant. In an appropriate case, the court can still order for the preservation or release of the retention monies even after winding up proceedings have been presented against the appellant or the appellant is in the process of liquidation. The failure to separate the retention monies from the common funds of the appellant prior to the appellant's liquidation did not, and cannot defeat the trust. (See: *Re Kayford Ltd* (supra); *Syarikat Pembinaan Woh Heng Sdn Bhd v. Meda Property Services Sdn Bhd* [2002] 1 LNS 49 (S6-24-1169-2001) and *Merino ODD Sdn Bhd v. PECD Construction Sdn Bhd* [2009] MLJU 671).

[23] The setting aside, release or preservation of the retention monies where the appellant is under liquidation does not amount to a preferential payment under s. 223 of the Companies Act 1965 for the simple reason that the said monies are trust monies and do not belong to the appellant in the first place.

[24] On this issue, the court is in agreement with *Azmel Maamor J* in *Syarikat Pembinaan Woh Heng Sdn Bhd* (supra) where he said:

"Secondly, on the Defendant's argument that since there is currently winding-up proceedings against the Defendant this action taken by the Plaintiff for the preservation of the retention monies would tantamount to a preferential payment and as such would be prohibited by section 223 of the Companies Act 1965. In respect of this argument I fully agree with the submission of the counsel for the Plaintiff in that section 223 of the Companies Act 1965 is inapplicable because the retention monies do not belong to the Defendant at all. The retention monies are held on trust in a fiduciary capacity by the Defendant as the employer for the benefit of the Plaintiff who was the contractor. Hence this argument by the Defendant had no merits whatsoever."

[25] The appellant, relied on the English case of *Rayack Construction Ltd v. Lampeter Meat Co Ltd* [1979] 12 BLR 34, to support its contention that whether or not a trust was created of the retention monies is predicated upon whether or not the retention monies were set aside prior to liquidation. In that case (*Rayack Construction Ltd*) the court held that the express trust provision in the contract, without having set aside the funds in a separate account, is insufficient to safeguard the contractor's beneficial interest in the funds in the event the employer goes into liquidation.

[26] The above decision in *Rayack Construction Ltd* was not followed by the Malaysian court. The Malaysian

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Supreme Court in *Geh Cheng Hooi* (supra) affirmed the decision of the High Court where it was held that “money for the goods paid by a customer became trust money to be held in trust by the licensor; the money was also intended to be bank in a common fund and this did not have the effect of the money losing its character of being trust money, and as such, it is traceable”. This decision is a clear indication that the Malaysian apex court recognized the principle as decided in *Re Kayford Ltd* (supra) that payment into a separate bank account, is by no means conclusive indication of an intention to create a trust; and there is nothing to prevent the parties from binding themselves by a trust even if there are no effective banking arrangements. (The above decision was also followed in *Syarikat Pembinaan Woh Heng Sdn Bhd* (supra) and *Merino ODD Sdn Bhd* (supra)).

[27] The position in *Rayack* case also does not sit well with the case in *Re Kayford Ltd* (supra), where the Chancery Court decided that the monies obtained by the defendant company for goods not yet delivered to its customers were held in trust by the defendant company in favour of the customers, even after the liquidation of the defendant company; and the setting up of a separate fund was not a necessary condition for the creation of a trust. The decision in *Re Kayford Ltd* has been followed by the Malaysian courts.

[28] The English Court in the *Rayack Construction* case has imposed an extremely high obligation upon the contractors to safeguard the retention funds during the performance of the contract, and more often than not, the proposition does not reflect the commercial reality of the construction industry, particularly in the Malaysian context. The reported case laws in Malaysia would reveal that there were only a handful of cases where a contractor had actually applied for the preservation of the retention monies during the pendency of the contract, and was done so after the defendant had gone into liquidation. There could be many reasons why the fund was not set aside; the obvious ones being that the contractor would not want to jeopardize the commercial relationship of the parties when the contract was still subsisting; the contractors would not really apply their minds to taking such action to preserve the retention funds especially when the employer was paying monies under the payment certificates; and so on.

[29] The *Rayack Construction* case also failed to consider the fact that a trust, once created, would survive the company’s liquidation. This is obvious - the monies held in trust were not its monies in the first place, and the status of the trust does not change by virtue of the company’s liquidation. Once it is found that the retention monies are trust monies, the question of preferential treatment to the respondents does not arise as the monies

do not belong to the liquidation fund in the first place.

[30] Therefore with respect, the court agrees with the submission of the respondents’ counsel that the decision in *Rayack Construction* case should not be preferred in the present appeal.

[31] On the issue of estoppel, the appellant contended the respondents are estopped from claiming that the retention monies are trust monies when the respondents filed the proof of debt vide Form 77 dated 11 September 2009 with the liquidators of the appellant.

[32] The court agrees with the respondents’ counsel that the argument on estoppel is an afterthought, and was only raised after the defence was filed on 16 July 2010. The appellant did not at any material time, after the filing of the proof of debt raise at the issue of estoppel in any of its letters in reply to the respondents’ letters stating that the retention monies are trust monies. In any event, whether or not estoppel applies would depend on the facts and circumstances of each particular case. Different facts may lead to different conclusion.

[33] In the present case, it is clear from the sequence of events before, at the time and after the filing of the proof of debt that the first respondent has clearly maintained its stand that the retention monies are trust monies. During cross examination, SD1 (one of the joint liquidators) had also clearly agreed that he knew of the fact that the first respondent had not given up its claim that the retention monies are trust monies. Therefore, the appellant cannot be said to have been led to believe by the first respondent’s filing of the proof of debt that the first respondent has given up its right to pursue the retention monies as trust monies. The respondents’ witness, SP1, had also testified that the filing of the proof of debt was only a precautionary measure by the respondents to safeguard their position and was done without prejudice to the respondents’ right to claim for the retention monies as trust monies.

[34] The appellant’s counsel had in fact, during the stage of submission after full trial at the High Court, abandoned the argument on the issue of estoppel. This is reflected in the appellant’s written submissions filed at the High Court and the audio recording of the proceedings (p. 678-682 - Appeal Records).

[35] For the above reason, the court finds that the issue of estoppel raised by the appellant has no merit and must be disregarded for the purpose of the appeal.

Conclusion

[36] Based on the above considerations, the court makes the following findings:

- (a) the retention monies are by their nature and purpose, trust monies held by the appellant for the respondents for specific purpose ie, for payment on

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the costs incurred by the appellant to rectify defective works by the respondents or to complete the works left uncompleted by the respondents;

(b) the appellant's consulting engineer had issued a certificate of practical completion, and that no claim has been made for any rectification costs;

(c) the fact that the retention monies were not separated from the appellant's common fund prior to its liquidation did not change the status of the retention monies as trust monies;

(d) there is no issue of preferential treatment to the respondents if the retention monies are found to be trust monies because the monies do not belong to the appellant in the first place right from the outset when they were deducted from the progress payment due and payable to the respondents under cl. 22 of the contract;

(e) to allow the retention monies to become part of the general funds of the appellant would only result in the other creditors of the appellant being unjustly enriched;

(f) the filing of the proof of debt in form 77 by the respondents in the circumstances and the facts of the case herein, does not affect the respondents' right to claim for the retention monies as trust monies; and

(g) the respondents were therefore entitled to their claim for a declaration that the retention monies totalling RM6,127,884.50 are monies held in trust by the appellant for the respondents; for the release of the same by the appellant to the respondents as the beneficiaries of the retention monies.

[37] Therefore, the court unanimously dismisses the appeal with costs of RM20,000 to the respondents. The decision of the learned High Court judge is affirmed. Deposit to the respondents on account of costs.

Note:
The Appellant's application for leave to appeal to the Federal Court (the Malaysian apex court) was dismissed on 30 October 2011.

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