PJ MIDTOWN DEVELOPMENT SDN BHD v PEMBINAAN MITRAJAYA SDN BHD

CaseAnalysis
| **[2020] MLJU 1432**

PJ Midtown Development Sdn Bhd v Pembinaan Mitrajaya Sdn Bhd and another summons [2020] MLJU 1432

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

LIM CHONG FONG, J

ORIGINATING SUMMONS NO. WA-24C-178-09/2019 AND ORIGINATING SUMMONS NO. WA-24C-195-09/2019

17 August 2020

Sanjay Mohanasundram (Rutheran Sivagnanam and K. Gobinath with him) (R. Sivagnanam & Assoc.) for the Plaintiff in OS 1.
Kuhendran Thanapalasingham (Susan Tan Shu Shuen and Noor Sumaeya Sofea binti Shamsudin with him) (Zul Rafique & Partners) for the Defendant in OS 1.
Kuhendran Thanapalasingham (Susan Tan Shu Shuer and Noor Sumaeya Sofea binti Shamsudin with him) (Zul Rafique & Partners) for the Plaintiff in OS 2.
Sanjay Mohanasundram (Rutheran Sivagnanam and K. Gobinath with him) (R. Sivagnanam & Assoc.) for the Defendant in OS 2.

Lim Chong Fong J:

GROUNDS OF DECISIONIntroduction

[1]These are cross applications to set aside as well as to enforce an adjudication decision made pursuant to the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”).

[2]The Plaintiff in Originating Summons no. WA-24C-178-09/2019 (“OS 1”) and the Defendant in Originating Summons no. WA-24C-195-10/2019 (“OS 2”) is a private limited company involved in property development business.

[3]The Defendant in OS 1 and the Plaintiff in OS 2 is also a private limited company involved in building construction business.

[4]For easy reference, the parties will hereinafter be referred to as ***PJ Midtown*** and Mitrajaya respectively.

Background and Preliminaries

[5]By a letter of award dated 5 February 2016 (“Contract”), ***PJ Midtown*** appointed Mitrajaya as the main contractor to construct and complete the building and external works of the project described as “Cadangan Kompleks Pembangunan Bercampur Berstrata Yang Mengandungi 2 Blok Pangsapuri Perkhidmatan 22 Tingkat (702 Unit) Di Atas 9 Tingkat Podium Mengandungi: (1) 13 Unit Kedai Di Tingkat Lower Ground Floor; (2) 34 Unit Kedai Di Ground Floor; (3) 34 Unit Kedai Di Upper Ground Floor; (4) 15 Unit Pejabat Di Level 1; (5) 15 Unit Pejabat Di Level 2; (6) 56 Unit Pangsapuri Perkhidmatan Dan Tempat Letak Kereta Di Aras 3 Hingga 6; (7) 1 Tingkat Podium Bumbung Untuk Landskap/Kawasan Rekreasi (Dengan Kemudahan-Kemudahan Penduduk) Serta 1 Tingkat Lower Ground Dengan Medan Selera, Kedai Mampu Milik Dan Tempat Letak Kereta Dan 2 Tingkat Basemen Tempat Letak Kereta Di Lot 5, 24, 25, 26 & 27, Bandar Petaling Jaya, Selangor Darul Ehsan Untuk Tetuan ***PJ Midtown*** Development Sdn Bhd” (“Project”).

[6]The Contract incorporated the PAM Conditions of Contract (2006 edition (with quantities).

[7]There were disputes and differences that arose between the parties in respect of the construction of the Project including on extension of time for completion and imposition of liquidated and ascertained damages for late completion of the Project.

[8]As a result, ***PJ Midtown*** failed to pay Mitrajaya in respect of several interim certificates issued pursuant to the Contract.

[9]On 22 March 2019, Mitrajaya served its payment claim pursuant to the CIPAA on ***PJ Midtown***. By reason of ***PJ Midtown***'s failure to serve its payment response, Mitrajaya on 10 April 2019 issued its notice of adjudication pursuant to the CIPAA.

[10]Subsequently, ***PJ Midtown*** on 7 May 2019 served its payment response pursuant to the CIPAA on Mitrajaya.

[11]The Asian International Arbitration Centre accordingly appointed Sr. Isacc Sunder Rajan Packianathan ("Adjudicator") to adjudicate the aforesaid disputes and differences.

[12]After having considered the adjudication claim, adjudication response and adjudication reply submitted by the parties, the Adjudicator on 19 August 2019 made his adjudication decision ("Decision"). In his Decision, he directed as follows:

(a) The Respondent pay the Adjudicated sum of RM10,053,537.15 for Interim Certificate No. 28-33 to the Claimant as outstanding payment due within twenty-one (21) DAYS OF THE DATE HEREOF;

(b) Pursuant to Section 25(o) of CIPAA, the Respondent pay RM236,099.10 as late payment interest of 5% on the outstanding due to the Claimant from the due date in the Interim Payment Certificate No 28-33 up to 24 May 2019 within twenty-one (21) days of the date hereof;

(c) Pursuant to section 25(o) of the CIPAA, the Respondent further pay interest of 5% per annum for the overdue payments from 25 May 2019 until the date of this Adjudication Decision within twenty-one days of the date hereof;

(d) Pursuant to section 18(1) of the CIPAA, the Respondent pay the sum of RM27,271.28 as the cost of Adjudication within twenty-one (21) days of the date hereof;

(e) Pursuant to section 18(1) of the CIPAA, the Respondent pay the sum of RM25,000.00 as party to party costs to the Claimant within twenty-one (21) days of the date hereof.

[13]*PJ Midtown* is dissatisfied with the Decision and has therefore on 19 September 2019 commenced OS 1 to apply to set aside the Decision. Since ***PJ Midtown*** did not pay Mitrajaya as ordered by the Decision, Mitrajaya has therefore on 1 October 2019 commenced OS 2 to apply to enforce the Decision.

[14]The affidavits that were filed for purposes of OS 1 are as follows:

(i) ***PJ Midtown***'s affidavit in support affirmed by Ser Kwee Khim dated 18 September 2019;

(ii) Mitrajaya's affidavit in reply affirmed by Bibhuti Nath Jha dated 24 October 2019; and

(iii) ***PJ Midtown***'s affidavit in reply affirmed by Teh Chin Guan dated 20 November 2019.

[15]The affidavits that were filed for purposes of OS 2 are as follows:

(i) Mitrajaya's affidavit in support affirmed by Bibhuti Nath Jha dated 1 October 2019;

(ii) ***PJ Midtown***'s affidavit in reply affirmed by Teh Chin Guan dated 1 November 20202; and

(iii) Mitrajaya's affidavit in reply affirmed by Bibhuti Nath Jha dated 21 November 2019.

[16]Both OS 1 and OS 2 were fixed for hearing before me on 10 July 2020. The parties have at the out-set agreed that if OS 1 is refused, OS 2 will be allowed as a matter of course and vice versa. After having read the written submissions filed by the parties as well as the oral arguments of counsel, I deferred my decision to deliberate on the arguments advanced by them.

[17]Now having done so, I give my decision below together with the supporting grounds.

Contentions and Findings

[18]In a nutshell, Mr Sanjay Mohanasundram of counsel for ***PJ Midtown*** contended that Mitrajaya's claim in the adjudication proceedings is limited in scope and confined to interim payment certificates nos. 28 to 33 totalling to RM10,053,537.15 as reflected in its payment claim and adjudication claim.

[19]However and according to him, Mitrajaya further raised the following new issues in its adjudication reply:

(i) There was malicious conspiracy concocted by ***PJ Midtown*** and its architect Messrs GRA Architects Sdn Bhd ("Architect"); hence the Architect did not act independently;

(ii) There was mal-administration of the Contract by ***PJ Midtown*** and ***PJ Midtown*** prevented Mitrajaya from carrying out its work;

(iii) The deduction of liquidated and ascertained damages by ***PJ Midtown*** was wrongful;

(iv) There was uncertainty in the pre-requisite of the Certificate of Compliance;

(v) The Architect failed to assess the extension of time; and

(vi) There was interference by ***PJ Midtown*** on the date of practical completion of the works and assessment of extension of time.

[20]*PJ Midtown* accordingly requested for an oral hearing to enable the aforesaid new issues to be properly heard in opposition. Consequently, the Architect would have to be heard on the allegations of its lack of independence and malicious conspiracy by Mitrajaya. These are serious charges striking at the Architect's integrity and professionalism.

[21]The Adjudicator however rejected ***PJ Midtown***'s request and directed the parties to make written submissions instead to him.

[22]According to Mr. Sanjay, the Adjudicator's refusal to hold an oral hearing amounted to a material breach of natural justice as the aforesaid new issues warranted the Adjudicator to hear the Architect in an oral hearing. Specific reliance has been made by ***PJ Midtown*** on the Court of Appeal case of *Guangxi Dev. & Cap Sdn Bhd v Sycal Bhd & Another Appeal* [2019] 1 CLJ 592.

[23]That notwithstanding, the Adjudicator went ahead to deliberate and decided against ***PJ Midtown*** on the various new issues raised by Mitrajaya in its adjudication reply.

[24]As a result, Mr. Sanjay contended that the Adjudicator, besides having denied ***PJ Midtown*** natural justice, has further acted in excess of jurisdiction in the narrow and broad sense.

[25]In respect of the former, he contended that the Adjudicator acted in excess of jurisdiction in the narrow sense by having decided on issues which were neither pleaded nor raised in Mitrajaya's payment claim nor adjudication claim. In other words, the Adjudicator acted in breach of s. 27 of the CIPAA, particularly s. 27(1) which reads:

> *"**27. Jurisdiction of adjudicator***
>
> (1) *Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.*
>
> (2) *The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.*
>
> (3) *Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).*"

In this regard, reliance has been made on the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 and the Court of Appeal case of *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd And Another Case* [2017] 8 MLJ 708.

[26]Moreover according to him, this right of challenge on excess of jurisdiction as provided in the CIPAA evolved from the Supreme Court administrative law case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 3 CLJ 777 where it was held that a tribunal acted without jurisdiction when it was not entitled to enter on the inquiry in question. This is supported by the later Federal Court administrative law case of *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* *[1999] 2 MLJ 337* where it was held that a tribunal acted in excess of jurisdiction when the tribunal made a decision it had no power to make or the tribunal asked itself the wrong question.

[27]As to the latter, Mr. Sanjay contended that the Adjudicator also acted in excess of jurisdiction in the broad sense by having committed errors of law because it is presumed that Parliament never intended a decision maker who derived his jurisdiction from statute to have the right to commit errors of law following the Court of Appeal judicial review cases of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* *[1995] 2 MLJ 317* and *Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* *[1995] 3 MLJ 369*. In other words, if the tribunal makes an error of law, then the tribunal exceeds its jurisdiction by having committed a jurisdictional error.

[28]Finally, Mr. Sanjay contended that the Adjudicator made material mis-directions in failing to appreciate the facts, evidence and law in respect of the issuance of certificate of practical completion, assessment of Mitrajaya's extension of time applications, ***PJ Midtown***'s entitlement to liquidated and ascertained damages and ***PJ Midtown***'s rights of set off.

[29]In a nutshell in opposition, Mr Kuhendran Thanapalasingam of counsel for Mitrajaya contended that the Adjudicator acted within his jurisdiction when he decided on the new issues raised by Mitrajaya in its adjudication reply following *Bertam Development Sdn Bhd v R & C Cergas Teguh Sdn Bhd* [2017] 1 LNS 1556, *Asal Construction Sdn Bhd v Insan Makmur Sdn Bhd* [2018] 1 LNS 1569 and *SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd* [2019] 2 CLJ 704.

[30]Moreover, he contended that the Adjudicator did not deny ***PJ Midtown*** natural justice because he afforded the parties the opportunity to make submission with case authorities, furnish documents and provide evidence and the Adjudicator had thereafter duly considered them in totality.

[31]In consequence, he contended that the Decision is and remains binding as well as enforceable at all material times until the disputes and differences between the parties are finally determined by way of arbitration notwithstanding any mis-directions made by the Adjudicator as contended by ***PJ Midtown***, but which are all denied by Mitrajaya. The proper recourse is for ***PJ Midtown*** to pay up the adjudicated sum as per the Decision swiftly and pursue its grievances in arbitration following *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 10 CLJ 801 and *Ceylon Builders Sdn Bhd v Ultimate Pursuit Sdn Bhd & Another Case* [2018] 1 LNS 2128.

[32]The relevant provisions for purposes of OS 1 and OS 2 are ss.15 and 28 of the CIPAA which read:

> *"**15. Improperly procured adjudication decision***
>
> *An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:*
>
> (a) *the adjudication decision was improperly procured through fraud or bribery;*
>
> (b) *there has been a denial of natural justice;*
>
> (c) *the adjudicator has not acted independently or impartially; or*
>
> (d) *the adjudicator has acted in excess of his jurisdiction."* and
>
> *"**28. Enforcement of adjudication decision as judgment***
>
> (1) *A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.*
>
> (2) *The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.*
>
> (3) *The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court."*

[33]In respect of setting aside an adjudication decision pursuant to s. 15 of the CIPAA, it is now trite from the cases that came before the courts since the inception of the CIPAA that setting aside is the exception rather than the norm within the fact sensitivity and circumstances of each case.

[34]Based on the submissions advanced before me, ***PJ Midtown*** has principally challenged that the Adjudicator denied ***PJ Midtown*** natural justice when he refused to hold an oral hearing notwithstanding a specific request was made to him by ***PJ Midtown***.

[35]The Adjudicator held as follows in his Decision:

> *"M. HEARING/MEETING/SITE VISIT*
>
> *The Respondent requested for a hearing and further submissions but was objected by the Claimant. Since parties did not agree for a hearing, meeting or further submissions, I therefore decided that there was no need for a meeting or hearing to be held for this Adjudication. However, I had agreed for parties to submit clarifications to the concerns highlighted by the Respondent's Legal Representative. Parties were each given five (5) working days to make their clarification submission."*

[36]In ***Guangxi Dev. & Cap Sdn Bhd v Sycal Bhd & Another Appeal*** **(supra)** relied upon by ***PJ Midtown***, Harmindar Singh Dhaliwal JCA (now FCJ) held as follows with emphasis added by me:

> ***"[24]*** *In this respect, we agree that any application for an oral hearing must be considered on its merits. The power to do so can be found in s. 25 CIPAA 2012. A request for an oral hearing cannot be denied purely on the ground that time is limited especially in a case where the application to do so had been made at the earliest opportunity. If all applications for an oral hearing are rejected on the timeline argument, then the power to order oral hearings under s. 25(g) of CIPAA 2012 would be rendered illusory.*
>
> *[25] We would also observe that unlike the case of Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101 *where the request for an oral hearing was made six days before the dateline to deliver the adjudication decision, the request for an oral hearing in the instant case was made one day after the service of the adjudication reply. So there was ample time to conduct the hearing which hearing can be limited by the adjudicator as the case demands.* ***Instead of conceding to an oral hearing, the adjudicator could also order parties to put in written submissions with documents included as was done in the Martego case.****"*

[37]Unlike in the ***Guangxi Dev. & Cap.*** case as well as in the case of *Sinlexion Construction & Decoration Sdn Bhd v BCB Berhad* *[2020] MLJU 610* where the respondent was denied the opportunity to respond altogether, the Adjudicator here allowed the parties to make clarification submissions to him on the new issues raised in Mitrajaya's adjudication reply. There was no limitation fixed by the Adjudicator on what can or cannot be submitted by them. Consequently, I find that ***PJ Midtown*** could in the circumstances serve a statutory declaration of the Architect (see *Kayangan Kemas Sdn Bhd v TMT Solutions Sdn Bhd* [2019] AMEJ 1339) or relevant contemporary documents or both to respond to the lack of independence and mal-administration of the Contract by the Architect as alleged by Mitrajaya. It is thereafter up to the Adjudicator upon the receipt of the aforesaid statutory declaration and/or contemporaneous documents to re-consider whether to hold an oral hearing as empowered under s. 25(g) of the CIPAA if he felt the need to hear out the Architect, especially if the circumstances as disclosed are unclear or uncertain to him or to otherwise proceed to deliver his Decision based on the all the materials already adduced before him. He chose the latter course and he should not be faulted in my view. The material consideration is that ***PJ Midtown*** has been afforded the opportunity to be heard.

[38]I am mindful that ***PJ Midtown*** has now argued that the 5 working days granted by the Adjudicator to make clarification submissions was insufficient for ***PJ Midtown*** to rebut Mitrajaya's new issues raised in the adjudication reply, particularly since they concerned the Architect which is a non party to the adjudication proceedings. However, I find this feeble and unconvincing because there was no contemporaneous attempt by ***PJ Midtown*** to apply to the Adjudicator at the material time for an extension if time to serve the statutory declaration of the Architect or additional relevant documents if that was indeed the difficulty encountered.

[39]I am further aware that ***PJ Midtown*** has in reliance on the cases of *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj*

Zainuddin (interveners) [2007] 5 MLJ 501 and *Yap Seong Yee v Eureka Property Management Sdn Bhd and Another Appeal* [2018] 6 MLJ 799 cautioned on the undesirability of the Adjudicator having made adverse findings against the Architect which is a non party to the adjudication proceedings. I have carefully read these cases but I find that they are plainly distinguishable on their own facts. They are mainly also final determination court cases where a trial was held and the third party could be subpoenaed to attend and testify in court. The case of *Bina Jati Sdn Bhd v Sum-Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433 also relied by ***PJ Midtown*** is a stay application to refer the action to arbitration which is unconnected with the adjudication of the dispute in itself. These cases are, in my view, unhelpful to bolster ***PJ Midtown***'s contentions that natural justice was denied to ***PJ Midtown***.

[40]Consequently, I find that the Adjudicator had not denied ***PJ Midtown*** natural justice by refusing to hold an oral hearing as requested.

[41]Moving to ***PJ Midtown***'s challenge that the Adjudicator acted in excess of jurisdiction, I find ***PJ Midtown*** has in gist contended that the new issues raised in Mitrajaya's adjudication reply were not stated in the payment claim as well as adjudication claim; thus they are not adjudicatable.

[42]In *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd* [2017] 1 LNS 177, Lee Swee Seng J (now JCA) held as follows:

> *"[71] There are many senses in which the word "jurisdiction" may be understood. We need only to differentiate between core jurisdiction, competence jurisdiction and contingent jurisdiction.*
>
> ...
>
> *[74] In a case of contingent jurisdiction, it would be a case where for there to be jurisdiction, there must be further compliance with the requirements of the Act as in that the dispute must be one falling within the matters raised in the Payment Claim and the Payment Response as provided for under section 27(1) CIPAA. In that example the word "jurisdiction" is used in the sense of the scope of the dispute that is before the Adjudicator for decision. So for example an Adjudicator may not be able to decide on the defence of set-off arising out of costs of rectifying defective works if this has not been raised in the Payment Response. If he so decides, then this Court may set it aside as been made in excess of jurisdiction."*

[43]Generally, the scope of an adjudicator's contingent jurisdiction has to be discerned and ascertained from the causes of action and defences pursued by the parties as set forth in the payment claim and payment response which may be amplified in the adjudication claim, adjudication response and adjudication reply. This is distilled from the later Federal Court case of ***View Esteem Sdn Bhd v Bina Puri Holdings Berhad*** **(supra)** and applied in the case ***SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd*** **(supra)**. Jurisdiction is therefore not confined to matters raised by the claimant in the payment claim and adjudication claim only.

[44]In ***Bertam Development Sdn Bhd v R & C Cergas Teguh Sdn Bhd*** **(supra),** Lee Swee Seng J (now JCA) further held as follows with emphasis added by me:

> *"[49] The Adjudicator had set out the factors he took into consideration in allowing the set-off of the LAD and claim for late delivery damages by third parties Purchasers to be raised in the Adjudication Proceedings at para h) page 38 of his Decision. The Adjudicator derived his confidence in following this approach from the comments made by Justice Prasad Abraham JCA (now FCJ) in View Esteem(supra) at para 43 as follows:*
>
> *"The Appellant should have moved the adjudicator formally to allow matters not raised under the payment response pursuant to s. 26(2)(b)/(c) of the said section. The adjudicator would have had to deal with that question and rule accordingly and such a ruling would not in my view be reviewable …"*
>
> *[50] Such an exercise of an Adjudicator's discretion, as observed above, is cushioned from any interference from the Court in a section 15 CIPAA application. Once that Defence of set-off is allowed to be raised, then it is well within the Adjudicator's jurisdiction to decide on whether the whole of the LAD had been proved or that only so much of it should be allowed taking into consideration an EOT that should be allowed.*
>
> *[51] This is a case where to decide on one matter i.e. the LAD would inextricably relate to another matter, the EOT that*

ought to be given. Thus the LAD claimed by the Respondent may be appropriately reduced if the corresponding factor of an EOT ought to have been granted.

[52] Once the issue of an LAD claim is raised as a Defence of set-off then the Adjudicator would have to consider the related issue of the application for EOT as that would invariably have an effect on the number of days of LAD that the Respondent could claim. It is like the flip side of the same coin with one impinging on and inextricably affecting the outcome of the other.

[53] It was held in Cantillon Ltd v. Urvasco Ltd [2008] 117 ConLR 1 as follows:

"[67] … As the authorities established that the responding party can put forward any arguable defence in adjudication, … it must follow that the adjudicator can rule not only on that defence but also upon the ramifications of the defence to the extent that it is successful in so far as it impacts upon the fundamental dispute." (emphasis added)

[54] ***It would be grossly unfair if the Respondent be allowed to raise the Defence of a set-off for the first time in its Adjudication Response pursuant to an application under section 26 CIPAA but that the Claimant cannot raise in its Adjudication Reply to be considered the reasons why its second EOT application should be allowed****."*

Furthermore in ***Asal Construction Sdn Bhd v Insan Makmur Sdn Bhd*** **(supra)**, See Mee Chun J held as follows with emphasis also added by me:

"[18] Here the set off of LAD was raised in the Defendant's Adjudication Response whereby the Plaintiff in its Adjudication Reply responded by producing its expert report.

[19] The expert report had been properly "pleaded" in the Adjudication Reply. It need not and cannot be included in the Adjudication claim as it is confined to payment claims. ***The sufficiency of the EOT was put in issue in the adjudication defence relying on the Architect's no EOT grant and that required rebuttal by an expert which was included in the Adjudication Reply. The Adjudicator was entitled to reject the expert's report and maintain the Architect's no EOT after having considered it but not to reject it outright from consideration****."*

[45]On the facts here, the new issues raised by Mitrajaya in its adjudication reply are similarly made in rebuttal to the imposition of liquidated and ascertained damages raised by ***PJ Midtown*** in its adjudication response. In the premises, I find that the Adjudicator has been amply clothed and armed with jurisdiction and powers to deal with them as he saw fit within the purview of s. 27(1) of the CIPAA notwithstanding that they have not been raised in Mitrajaya's payment claim and adjudication claim respectively. Furthermore, the defence of estoppel raised by ***PJ Midtown*** that Mitrajaya was fully aware of the grounds of denial of payment against the interim certificates due to Mitrajaya and should therefore state the new issues in its payment claim and adjudication claim is misconceived. The reliance by ***PJ Midtown*** on the estoppel cases of *E & O Trading Sdn Bhd v Americk Singh Sidhu & Ors* *[2018] MLJU 532* and ***Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor*** **[1997] 2 MLJ 565** are consequently of no assistance notwithstanding that the facts therein are also wholly distinguishable.

[46]There is therefore no doubt that the Adjudicator did not act in excess of his jurisdiction in the narrow sense as so contended by ***PJ Midtown*** and I so find and hold accordingly.

[47]As to the Adjudicator having acted in excess of jurisdiction in the broad sense by having committed errors of law as contended by ***PJ Midtown***, it is plain that this challenge has been premised on administrative law principles based on the cases of ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*** **(supra)** and ***Ho Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*** **(supra)**.

[48]Again in ***Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd*** **(supra)**, Lee Swee Seng J (now JCA) held as follows with emphasis added by me:

"[69] It can be appreciated that statutory adjudication, being a creature of statute, there must be strict compliance with respect to activating the Adjudication Proceedings. However, not every non-compliance goes towards jurisdiction and one must look at the legislative intent.

[70] ***In the application of our CIPAA, we are free from the shackles of the language of administrative law and***

judicial review. The word "jurisdiction" is used in section 15(d) as in the Adjudicator having acted in "excess of his jurisdiction" as a ground for setting aside an Adjudication Decision. *It is also used in section 27(1) with respect to an Adjudicator's jurisdiction being limited to the matters raised in the Payment Claim and the Payment Response. Then there is a reference to it in section 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the Payment Claim and Payment Response. Finally there is the reference to a "jurisdictional" challenge, which when raised, does not prevent the Adjudicator from proceeding and completing the Adjudication without prejudice to the rights of any party to set it aside under section 15 or to oppose its enforcement under section 28."*

[49]I share Justice Lee's views. The meaning of the word "jurisdiction" in the CIPAA must be interpreted in the context of the jurisprudence of statutory adjudication. The administrative law meaning of the word "jurisdiction" which encompasses jurisdictional errors of law in the decision making has no place in statutory adjudication. This is because judicial review under administrative law concerns final decisions made by public bodies whereas, in contrast, statutory adjudication decisions are made by private adjudicators that are only binding but not final as provided in s. 13 of the CIPAA which reads:

*"**13. Effect of adjudication decision***

The adjudication decision is binding unless-

(a) *it is set aside by the High court on any of the grounds referred to in section 15;*

(b) *the subject matter of the decision is settled by a written agreement between the parties; or*

(c) *the dispute is finally decided by arbitration or the court.*

[50]It is plain that since the adjudication decisions are not final and correctable finally by arbitration or civil litigation in court, errors of law committed in the making of adjudication decisions will therefore not attract the administrative law principle of jurisdictional errors of law. This is supported by the case of *BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd & Another Case* [2016] 1 LNS 1096 where Lee Swee Seng J (now JCA) held as follows with emphasis added by me:

"[62] I agree with learned counsel for MISB that even if there was a failure to take into account of payment made to the NSCs, it is merely an error of findings of facts/law. Such an error does not require the Adjudication Decision to be set aside. There will not be a denial of natural justice if the Adjudicator had addressed all the right issues even in the wrong way. ***The adjudicator's decision will nevertheless be temporary binding. It is only when the adjudicator has answered the wrong issues that his decision will be a nullity. See*** *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041*; *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728*.*

[63 ***In Bouygues (UK) Ltd's case, the Court of Appeal in UK laid down the following tests with respect to determining if an adjudicator has acted within jurisdiction though arriving at a so-called wrong decision. Alluding to the scheme of statutory adjudication in UK Chadwick LJ gave this helpful guide at pp 1047-1048:***

"26. The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract.

27. The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties subject always to the limitation contained in s. 108(3) and in paras 4 and 31 of the Model Adjudication Procedure to which I have referred. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Knox J put it in Nikko Hotels (UK) Ltd v. MEPC plc [1991] 2 EGLR 103 at 108, in the passage cited by Buxton LJ, if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.

28. I am satisfied, for the reasons given by Buxton LJ, that in the present case the adjudicator did confine himself to the determination of the issues put to him. This is not a case in which he can be said to have answered the wrong question. He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties.""

[51]It can be plainly discerned that it is not fatal for an adjudicator to make a wrong answer including making an erroneous interpretation or application of law in the adjudication decision so long the right question has been identified and addressed.

[52]Consequently, I have no qualms to hold that the Adjudicator did not act in excess of jurisdiction in the broad sense by reason that this principle which has been imported from administrative law has no relevance here.

[53]Finally and in respect of the Adjudicator's material mis-directions as alleged by ***PJ Midtown***, I find that they ultimately concerned the cross claim of liquidated and ascertained damages of ***PJ Midtown*** in its adjudication response and the new issues in response thereto raised by Mitrajaya in its adjudication reply. These issues have been considered and dealt by the Adjudicator systematically and meticulously in paragraphs N.3 to N.11 of his Decision, culminating in the following summarized conclusions at the end of paragraph N.11:

"In conclusion, having reasoned the Claimant's and Respondent's submissions and clarifications and having dealt with the issues of EOT, LAD and section 75 of the Contracts Act in the above sections, I concur with the Claimant that the Respondent LAD setting-off and or cross claim is flawed and therefore the setting-off and or cross claim defence by the Respondent is not enforceable on the following grounds:

1. *The EOT assessed by the Architect is not in accordance to clause 23.8 of the PAM Form of Contract 2006 since the Architect has not considered all of the relevant events in assessing the Claimant's EOT.*
2. *The QLASSIC application by the Respondent before the Certificate of Practical Completion (CPC) issuance would deem the project has been completed to the satisfaction of the Architect on the date of the QLASSIC application was made since CIDB would only assess completed projects. This raised the true date of the CPC.*
3. *LAD calculation imposed by the Architect is flawed as the Architect did not consider the Partial Handing over by the Claimant.*
4. *LAD imposed is not in accordance with section 75 of the Contracts Act and does not comply with the landmark Federal court case of "Selvakumar" and the more recent Federal Court case of "Cubic Electronics".*
5. *The Respondent's deduction of LAD on the 12.04.2019 after the Notice of Adjudication was served on the Respondent on the 10.042019 appears to be an afterthought.*
6. *The Claimant has shown that the Architect had not acted independently in assessing the EOT application and LAD calculation.*
7. *It is irregular for the Architect to issue Certificate of Compliance and Completion (CCC) before the Certificate of Practical Completion (CPC).*
8. *It is also for the Claimant to be imposed the pre condition of obtaining the CCC approval as it is a statutory provision laid on the Architect by law and it is the Architects duty to submit Borang G to the local authority in compliance to the Certificate of Fitness for Occupation (CFO) certification.*
9. *The failure by the Architect to take into consideration the Respondent's partial taking over of the works and granting of vacant possession as partial occupation by the Respondent pursuant to Clause 16 of the PAM Conditions."*

It can be discerned that the Adjudicator never made any determination on the issue of malicious conspiracy against the Architect. He has basically disagreed with the opinion and certification of the Architect on the assessment of extension of time and practical completion as well as the imposition of liquidated and ascertained damages for late completion by ***PJ Midtown***.

[54]I am cognizant that ***PJ Midtown*** is dissatisfied with the Decision, particularly in the Adjudicator affirming the

new issues as raised by Mitrajaya in its adjudication reply to deny the imposition of liquidated and ascertained damages by ***PJ Midtown***. In other words, ***PJ Midtown*** is questioning the merits of the Decision. However, it is trite that the setting aside provision in s. 15 of the CIPAA is not an appeal. In the Court of Appeal case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and Another Appeal* [2016] MLJU 1776, David Wong Dak Wah JCA (later CJSS) held as follows with emphasis added by me:

> *"[21] There were no complaints by the Appellant that the adjudicator had got the disputes on a completely wrong footing.* ***In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. If we were to consider the complaints of the Appellant, we would be looking into the merits of the decision of the adjudicator. In the context of section 15 of CIPPA 2012, it cannot be the function of the Court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The Court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the Appellant****. In the context of this case, the complaints of the Appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us."*

[55]I therefore find and hold that ***PJ Midtown***'s alleged material mis-directions are irrelevant and inconsequential here for purposes of setting aside the Decision.

[56]For completeness, I have noticed ***PJ Midtown*** has averred in its affidavit in support that it has not received Mitrajaya's payment claim and that ***PJ Midtown*** only became aware of the adjudication proceedings when Mitrajaya served its notice of adjudication. However, I find this non-receipt of the payment claim (if any) was neither pursued in ***PJ Midtown***'s written submissions nor during oral arguments on 10 July 2020 before me. I therefore consider that this is not an issue or waived if it is in issue.

[57]Consequently, I find and hold that ***PJ Midtown*** has not made out a meritorious application to set aside the Decision.

[58]As consented by the parties (see paragraph [16] above), the enforcement of the Decision must accordingly be allowed. The enforcement of the Decision is also consistent and in compliance with the principles set out in *Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd* [2018] 1 LNS 428 and the Court of Appeal case of *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229.

Conclusion

[59]For the foregoing reasons, OS 1 is hence disallowed with costs of RM10,000.00 subject to 4 % allocator and OS 2 is allowed with costs of RM10,000.00 subject to 4 % allocator.

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