Hiform (M) Sdn Bhd v Tsr Bina Sdn Bhd and another summons [2020] MLJU 808

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ALIZA SULAIMAN, J

ORIGINATING SUMMONS NO.: WA-24C-107-06/2019 AND NO.: WA-24C-115-07/2019

30 April 2020

Christopher Yeo Wee Choon (Angie Tan Yi Chyuin with him) (David Gurupatham And Koay) for the applicant in O.S. No. WA-24C-107-06/2019 and the Defendant in O.S. No. WA-24C-115-07/2019.
Aniz Ahmad Amirudin (Shabana Amirudin with him) (Cecil Abraham & Partners) for the respondent in O.S. No. WA-24C-107-06/2019 and the Plaintiff in O.S. No. WA-24C-115-07/2019.

Aliza Sulaiman J:

GROUNDS OF JUDGMENT

[1]This case involves the typical dispute between a main contractor and its sub-contractor over payment for works in a construction project. TSR Bina Sdn Bhd ('TSR') is the main contractor for the project known as "*The Proposed Construction and Completion of Public Residential Consisting of 2 Blocks of 19 Storeys Condominium (Block A – 182 Units And Block B – 176 Units), 1 Block of 5½ Storeys Multilevel Car Park Block, Surau, Common Facilities, Upgrading Works for Jalan P11, Associated Infrastructure And Landscape Works And 2 Blocks Of 18 Storeys Condominium (Block C – 166 Units And Block D – 172 Units), 1 Block Of 5½ Storeys Multilevel Car Park Block, Common Facilities, Upgrading Works For Existing Reserved Drain And Retention Pond, Associated Infrastructure And Landscape Works At Precint 11 Zone 8A, Putrajaya For Putrajaya Home Sdn. Bhd.*" ('said Project').

[2]By way of a Letter of Award ('LoA') dated 16.8.2016, Hiform (M) Sdn Bhd ('Hiform') was appointed by TSR to undertake the sub-contract works to supply labour, materials and all necessary machineries and equipments and tools for the execution and completion of reinforced concerete works for the said Project ('Sub-Contract') in the sum of RM56,867,637.81 ('Sub-Contract Sum'). Clause 1.1 of the LoA states that the Sub-Contract Sum shall be in provisional quantities with fixed rates as per the Bills of Quantities ('BQ') in **Appendix II** to the LoA.

[3]Further, Clause 11.2 LoA provides that the commencement date for the Sub-Contract is 15.11.2016 whilst the completion date is 14.3.2018.

[4]TSR terminated the Sub-Contract vide its letter to Hiform dated 25.2.2019.

[5]Hiform alleged that the sum of RM7,752,592.89 is due and owing in relation to Progress Claim No. 25 dated 28.11.2018 and it accordingly commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 [*Act 746*] ('CIPAA') whereby the Payment Claim under s 5 CIPAA dated 9.1.2019 was served on TSR but TSR did not serve a Payment Response on Hiform.

[6]Hiform then served a written Notice of Adjudication dated 25.1.2019 pursuant to sub-s 8(1) CIPAA and this was followed by the service of the adjudication pleadings, in particular, the Adjudication Claim dated 8.3.2019, Adjudication Response dated 27.3.2019 and Adjudication Reply dated 3.4.2019.

[7]By a letter dated 19.2.2019, the Asian International Arbitration Centre ('AIAC') appointed Ms. Tan Swee Im as Adjudicator under sub-s 23(1) CIPAA and this appointment was duly accepted.

[8]In the course of considering the evidence submitted by the parties, the learned Adjudicator had invited the parties' views on two specific matters via her e-mail dated 27.5.2019 to which the parties had responded.

[9]The learned Adjudicator delivered the Adjudication Decision on 3.6.2019 ('Adjudication Decision') that TSR shall pay to Hiform within 30 calendar days from the date of the Adjudication Decision:

> "
>
> a) *the sum of RM7,435,044.98;*
>
> b) *together with the interest on the sum of RM7,435,044.98 at the rate of 5% simple interest per annum from the date the payment became due, that is 28 January 2019, until the date of realisation of Adjudication Decision; and*
>
> c) *costs of adjudication proceedings in the sum of RM60,989.00.*"

(hereinafter referred to as the 'Adjudicated Sum').

[10]Dissatisfied with the Adjudication Decision, TSR filed Originating Summons ('O.S.') No. WA-24C-115-07/2019 on 2.7.2019 seeking orders, *inter alia*, that –

(a) the Adjudication Decision be set aside and/ or declared a nullity as there has been a denial of natural justice and/ or the Adjudicator has acted in excess of her jurisdiction pursuant to s 15*(b)* and/ or *(d)* CIPAA ('Setting Aside Application'); and

(b) the Adjudication Decision be forthwith stayed pending the hearing, disposal and/ or final determination of O.S. No. WA-24C-115-07/2019; and the final determination by arbitration on the subject matter of the Adjudication Decision pursuant to para 16(1)*(a)* and/ or *(b)* CIPAA ('Stay Application').

[11]Hiform had earlier filed O.S. No. WA-24C-107-06/2019 on 27.6.2019 for an order that the Adjudication Decision be enforced as if it is a judgment of the High Court under sub-s 28(1) CIPAA since TSR had failed, neglected and/ or omitted to pay the Adjudicated Sum ('Enforcement Application').

[12]By consent of the parties, the Setting Aside Application, Stay Application and Enforcement Application were heard together whereupon after reading the Affidavits and written submissions filed, since learned counsels chose to rely on the same without the need for any oral submissions, the Court dismissed the Setting Aside Application and Stay Application with costs of RM5,000.00, and allowed the Enforcement Application with costs of RM5,000.00. The orders as to costs are subject to the payment of the allocator fees.

[13]The following are my full grounds of decision.

O.S. No. WA-24-115-07/2019(A) The Setting Aside Application

[14]TSR relied on the provisions which have become the norm for applications to set aside adjudication decisions, namely s 15*(b)* and/ or *(d)* CIPAA which states:

> "***Improperly procured adjudication decision***
>
> *15. An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:*
>
> *…*
>
> *(b) there has been a denial of natural justice;*
>
> *…*
>
> *(d) the adjudicator has acted in excess of his jurisdiction.*".

[15]The burden thus lies on TSR to establish its case for setting aside the Adjudication Decision on either or both of the grounds that it has chosen and as expressly provided in s 15 CIPAA. In this pursuit, TSR has narrowed down four instances where the manner in which the findings were made by the learned Adjudicator has purportedly breached natural justice and/ or exceeded her jurisdiction.

[16]Before I proceed to discuss the four aspects in detail, it bears mentioning that TSR had, at the outset, submitted that (i) the Setting Aside Application is not meant to dispute the merits of the Adjudication Decision and/ or the dispute between the parties, which is reserved for the proper forum i.e., arbitration, and as such, TSR will not address any factual disputes raised by Hiform in relation to the Sub-Contract and/ or those that had been the subject matter of the adjudication proceedings; and (ii) Hiform's repetitious contentions that TSR is misleading the Court and is abusing the court process is unfounded, vehemently denied and strongly opposed. More will be said of the former whilst as regards the latter, I expressed my agreement with Mr. Aniz's submission on behalf of TSR in the Reply Submission dated 22.11.2019 that the usage of words such as "*mala fide*", "*manipulate*", "*mislead*", "*deliberate and conscious*", "*highly questionable*", "*ulterior motive*", "*disguise*", "*abuse*", "*take advantage of their own wrong doing*", "*did not come to this honourable court with clean hands*", etc. throughout the Affidavits and written submissions, and all in UPPER CASE, **bold** and underlined amount to strong accusations which were loosely hurled at TSR. Learned counsel appearing for Hiform was advised to refrain from making repeated allegations in such manner in future and even if a certain message was intended to be conveyed, saying it once in a carefully worded sentence would suffice.

Adjudication Claim and Issues at the Adjudication Proceedings

[17]In order to comprehend TSR's four pronged attack against the Adjudication Decision in its proper context, it is useful to refer to the parts in the Adjudication Decision where the learned Adjudicator had summarised the remedies sought by Hiform, TSR's reasons for denying Hiform's claim and the issues which arose for her determination.

[18]In para 18 of the Adjudication Decision, the Adjudicator had listed TSR's claim in a table as shown below:

Item	*Description*	*Amount (RM)*	*Supporting Document*
a.	*Outstanding amount as claimed in Progress Claim No. 25*	*RM 7,752,592.89*	*Progress Claim No. 25*
b.	*Claimant's legal advice cost*	*RM 70,000.00*	
c.	*Interest of 8% per annum on outstanding amount calculated from due date till date of this Adjudication Claim.Due date is on 25 December 2015*	*RM 110,447.90*	
d.	*Registration of Adjudication with AIAC*	*RM 265.00*	
e.	*Appointment of Adjudicator by AIAC*	*RM 424.00*	
f.	*Adjudicator's Fee*	*RM 25,000.00*	
g.	*AIAC Administrative Fee*	*RM 5,300.00*	
	TOTAL	*RM 7,964,029.79*	

[19]Further in para 24 of the Adjudication Decision, the Adjudicator summed up the Adjudication Claim in the following manner:

> "
>
> a) *The Claimant had submitted Progress Claim No. 25 dated 25 November 2018, which included variation orders but to date the Respondent had not issued their Interim Payment Certificate ("IPC");*
>
> b) *The 2 main factors in this dispute are:*
>
> (i) *The difference between quantities in the Provisional Bills of Quantities and the actual quantities of work done on site; and*
>
> (ii) *Variation orders not certified.*".

[20]As is to be expected, TSR denied the above mentioned items of claim on the grounds as set out in brief in para 25 of the Adjudication Decision that:

> "*…*
>
> a) *the process and procedure for adjustment or remeasurement of the provisional quantities could only be invoked in the stage of preparation of the final account. But there was no practical completion as the Claimant's employment was determined on 25 February 2019 and the final account will only be prepared after the eventual completion of the Sub-Contract Works. Progress Claim No. 25 was not submitted in accordance with the terms and conditions and the Respondent had exercised its right not to issue an interim certificate;*

b) *there is a difference in the certified amount and the amount claimed in Progress Claim No. 25 in that the Claimant claimed for adjusted and/or remeasured quantities that are unilaterally imposed and not agreed mutually by the parties;*

c) *save for variation claims expressly admitted, there are no variation orders and/or instructions issued by the Respondent for the carrying out of the variation works alleged;*

d) *arising from Claimant's breach and/or defaults there is no practical completion of the Project and the Claimant's employment was determined on 25 February 2019;*

e) *Claimant shall pay or allow Respondent RM12,285,000 as LAD as at the date of the Adjudication Respondent and still continuing;*

f) *Respondent is not bound to make any further payment to the Claimant until after the completion of the Sub-Contract Works*".

The Issues in the Setting Aside Application(i) Total value of work done and/ or re-measured work- TSR's Submissions

[21]TSR submitted that one of the highly contested issue at the adjudication was the total value of work done and/ or re-measured work for the period ending 25.11.2018. In this respect, the learned Adjudicator was given an opportunity to analyse three different reports, namely:

(a) Progress Claim No. 25 (upon which Hiform's claim was premised);

(b) QSP Consultant Sdn Bhd Report ('QSP Report') (prepared unilaterally by Hiform); and

(c) IPC No. 26 (prepared by TSR).

[22]It was further submitted that despite the QSP Report being mere summaries of the re-measured work and not substantiated by detailed computation, supporting documents and/ or construction drawings, the learned Adjudicator found that the QSP Report to be more reasonably grounded and that there is cogent reason to accept the remeasurement findings of the QSP Report over that of either party. However, notwithstanding the above, the learned Adjudicator preferred the lower figure claimed by the Claimant in Payment Claim No. 25.

[23]Mr. Aniz argued that applying the legal principles as laid down in the case of *Cantillon Ltd v Urvasco Ltd* [2008] 117 ConLR 1, there are clear and unequivocal errors on the part of the learned Adjudicator which are tantamount to material breaches of the rules of natural justice since it involved matters which are of considerable potential importance to the outcome of the dispute, the errors being the learned Adjudicator –

(a) failed to give reasons to elaborate the "*cogent reasons*" for accepting the QSP Report in the first place;

(b) made an inconsistent ruling in proceeding with the Progress Claim No. 25 regardless of her earlier decision to accept the QSP Report over Progress Claim No. 25;

(c) failed to give reasons in electing the Progress Claim No. 25 other than she preferred the lower figure claimed by Hiform in the Payment Claim; and

(d) failed to give proper weight to the evidence before her as Progress Claim No. 25 was only for work done until November 2018 whereas the QSP Report was for the entire Sub-Contract works. The difference in the periods covered by both these reports was undisputed and as such, the "*lower figure*" would actually be the QSP Report if the percentage of work done as at November 2018 was applied to it, resulting in a difference of RM2.3 million, and not the Progress Claim No. 25. Moreover, the learned Adjudicator herself pointed out in para 50 of the Adjudication Decision that "*The QSP Report sets out*

a direct comparison between the Sub-Contract BQ and QSP's remeasurement, including on items which may not be in the Sub-Contract BQ but measured by QSP.". Therefore, it was contended that the total quantity of Sub-Contract works is totally different from the QSP Report.

- Hiform's Submissions

[24]Mr. Christopher Yeo firstly submitted that the learned Adjudicator had adhered to the principles of natural justice since both parties were given equal opportunities to be heard and cogent reasons are provided in the Adjudication Decision.

[25]Secondly, and specifically as regards the QSP Report, it was contended that TSR's submission amounts to essentially disputing the quantum and/ or value of the Sub-Contract works done, which involves a finding of facts. It is trite that the weight of evidence is a finding of facts going to the merits of the case and this is irrelevant in a setting aside proceeding. Hiform contended that TSR's allegation is flawed on the grounds that –

(a) the QSP Report was prepared based on a list of documents in Appendix O in the adjudication;

(b) the Adjudicator has taken notice of the documents as stated in the QSP Report; and

(c) TSR has failed to adduce any documentary evidence to rebut the QSP Report.

[26]It was further argued that the Adjudicator's decision in not adopting the amount claimed in Progress Claim No.25 is not inconsistent with her finding on the credibility of the QSP Report because –

(a) the QSP Report was tendered as a guide provided by an independent external Quantity Surveyor to gauge the material actually used and percentage of completion of the said Project to support the sum claimed in Progress Claim No. 25; and

(b) Progress Claim No. 25 is the basis of the Payment Claim as explained in the Adjudication Decision and therefore, the amount claimed in Progress Claim No.25 is the cause of action and the subject matter of the adjudication.

[27]In addition, TSR had never pleaded that Progress Claim No. 25 is higher than the amount in the QSP Report but belatedly brought this issue up after the Adjudication Decision was delivered. In translating the QSP Report from quantities to monetary value, TSR is alleged to have unilaterally reduced the material's unit rate with a glaring reduction of 11.71% to 15.67% as compared to the Sub-Contract.

[28]Finally, Hiform submitted that even if the Adjudicator committed any errors on finding of facts, such error does not go to the jurisdiction of the Adjudicator and ought not to be a reason to set aside the Adjudication Decision, which is merely of temporary finality and any errors are to be corrected in an arbitration or civil proceeding.

- Findings of the Court

[29]The guidelines laid down by Akenhead J in *Cantillon Ltd* (*supra*), the case which was cited by TSR's counsel, as to what constitutes breach of natural justice, have been widely adopted and applied by the Malaysian Courts in the context of CIPAA (see among others *Wong Huat Construction Co v. Ireka Engineering & Construction Sdn Bhd* [2018] 1 CLJ 536*; [2017] MLJU 739, Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd* [2016] 5 CLJ 882; [2017] 7 MLJ 732*, Ranhill E & C Sdn Bhd v. Tioxide (M) Sdn Bhd and other appeals* [2015] 1 LNS 1435; ; [2015]

MLJU 1873, *Syarikat Bina Darul Aman Berhad & Anor v. Government of Malaysia* [2018] 4 CLJ 248; [2017] 4 AMR 477, *ACFM Engineering & Construction Sdn Bhd v. Estar Vision Sdn Bhd and another appeal* [2016] 1 LNS 1522; [2016] MLJU 1776). These guidelines are that:

(a) it must first be established that the adjudicator failed to apply the rules of natural justice;

(b) any breach of the rules must be more than peripheral; they must be material breaches;

(c) breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;

(d) whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by the judge;

(e) it is only if the adjudicator goes off on a frolic of his own, that is deciding a case upon a factual or legal basis which has not been argued or put forward by either side, or put in further evidence without giving the parties an opportunity to comment, that the type of breach of the rules of natural justice which may warrant the setting aside of the decision (see *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* [2002] BLR 288); and

(f) it follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

[30]Quite apart from the excerpts from the Adjudication Decision in paras 49 - 51 and 53 as quoted by TSR's counsel in his submission, it is my view that the Adjudication Decision must be read in its entirety, of course with greater attention being given to the parts therein which are the subject of challenge in the Setting Aside Application, in order to determine whether the learned Adjudicator had run afoul of the principles of natural justice and to appreciate the learned Adjudicator's thought process in the treatment of the issues before her in the adjudication.

[31]In this regard, it is noted that before the learned Adjudicator began her analysis in respect of the question as to "*Whether the remeasurement report by QSP Consultants Sdn Bhd ought to be relied upon*", she had duly considered the submissions by both parties on issues concerning the "*Difference between quantities in the Provisional Bills of Quantities and the actual quantities of work done on site*" and "*Whether there was any agreement between the parties on remeasurement of quantities*", and concluded that:

(a) Clauses 13.1 and 13.2 LoA require that the amount of work done by Hiform be valued and certified every month and thus, there is no requirement to wait until the stage of preparation of the final account as contended by TSR, before TSR values the work done by Hiform and include these in the Interim Certificates;

(b) Progress Claim No. 25 was submitted in accordance with the terms and conditions of the Sub-Contract and TSR ought to have issued an Interim Certificate following valuation of the work done by Hiform; and

(c) even though some limited agreement was reached between the parties as to the difference between the amount claimed by Hiform and the amount included in TSR's Interim Certificates, no comprehensive agreement was sealed in respect of the remeasurement of quantities. Hence, the work done by Hiform "*falls be valued and the*

amount to be included in the Interim Certificates to be ascertained, specifically in respect of Progress Claim No. 25 dated 25 November 2018" (refer para 44 in the Adjudication Decision).

[32]As for the issue on the remeasurement report by QSP Consultants Sdn Bhd, the learned Adjudicator firstly acknowledged that the Adjudication Claim is based on Progress Claim No. 25 dated 25.11.2018, which is included as Appendix E in the Adjudication Claim. Next, the Adjudicator stated that Progress Claim No. 25 has been valued by TSR by way of IPC No. 25 and IPC No. 26 but these IPC were not issued to Hiform. The Remeasured Work values, excluding Preliminaries and Variation Orders ('VO'), based on Progress Claim No. 25, the QSP Report, IPC No. 25 and IPC No. 26 were then considered and summarised by the Adjudicator in the following table as set out in para 48 of the Adjudication Decision:

Date	***Document***	***Remeasured Work***	***Period***
25 Nov 2018	*Progress Claim No. 25 Adjudication Claim / App E*	*42,800,227.36*	*Period ending November 2018*
6 Dec 2018	*QSP Consultant Report Adjudication Claim / Appendix K / pages ES/6 and SUM/1*	*47,578,497.16*	*Not stated, but report dated 6 Dec 2018 so cannot exceed Period ending November 2018*
2 Jan 2019	*IPC No. 25 RBD(1)-40*	*?*	*Period ending October 2018*
Undated	*IPC No. 26RBD(1)-51/Items 2.0 and 3.0*	*38,811,091.90*	*Period ending November 2018*

[33]Thereafter the learned Adjudicator said this:

"*49. From an examination of the documents submitted in this adjudication, read with the explanations of circumstances surrounding their respective Remeasured Work values of each party, I consider that the QSP Report to be the more reasonably grounded.*

50. The QSP Report sets out a direct comparison between the Sub-Contract BQ and QSP's remeasurement, including on items which may not be in the Sub-Contract BQ but measured by QSP. For example at Adjudication Claim / Appendix K / page TOWER A/2/items 1(165mm Thick Ground Slab), L (125mm Thick apron) and N (150mm Thick mass concrete).

51. There is cogent reason to accept the remeasurement findings of the QSP Report over that of either party.".

[34]The Adjudicator had also given due weight to TSR's pleadings in the Adjudication Response when she found that:

"*52. The Respondent has set out their challenges to the QSP Report in the Adjudication Response / paragraphs 23-26. However –*

a) *I had found above that there is no requirement to wait until the stage of preparation of the final account;*

b) *the Respondent is obliged by the Sub-Contract to value the work done by the Claimant and include the same in Interim Certificates every month. The work forming the subject matter of Claimant's Progress Claim No. 25 was completed end November 2018 and it should have been valued by the Respondent a month later but in any event prior to the termination of the Sub-Contract on 25 February 2019;*

c) *the QSP Report does set out the details of remeasurement as well as the documents upon which it is based;*

d) *provisional sums is not an issue in this adjudication, only provisional quantities; therefore I see no need to consider the Respondent's arguments about provisional sums.*".

[35]As for the reason in preferring Hiform's claim in Progress Claim No. 25 over the QSP Report, this can actually be found in the last two paras in the Adjudicator's analysis of the issue pertaining to the QSP Report as follows:

> "*53. Be that as it may, taking into account that the Claimant's Progress Claim No. 25 is dated within 2 weeks of the QSP Report, and that the Payment Claim and this adjudication is premised upon Claimant's Progress Claim No. 25, I prefer the lower figure claimed by the Claimant in the Payment Claim*.
>
> *54. In view of the aforesaid I find that the Claimant is entitled to the remeasurement value in the sum of 42,800,227.36*".

[36]The function of the Court in an application to set aside an adjudication decision such as the present was made clear by the Court of Appeal in *Hiform ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 in the following passages, with my added emphasis, from the judgment delivered by David Wong JCA (as he then was):

> "***[21]*** *… 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 at 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.*
>
> *[22] … Suffice for us to refer to* ***the decision of the Court of Appeal in Carillion Construction*** *…*
>
> > *86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels of "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of the adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his subcontractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting legitimate cash-flow requirements of contractors and their subcontractors.* ***The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions****. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme. ...*
> >
> > *87. In short,* ***in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position****. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense*
> >
> > *...*".

[37]Since the coming into operation of CIPAA, the Malaysian jurisprudence on the requirements of natural justice in the context of s 15*(b)* CIPAA has seen a steady development with no shortage of cases which have expounded on the legal principles associated thereto. In this

case, Hiform has chosen to rely on several judgments by Lee Swee Seng J (as His Lordship then was). For present purposes, it is suffice for me to cite His Lordship's judgment in *Euroland & Developments Sdn Bhd v Tack Yap Construction (M) Sdn Bhd and other appeals* [2018] MLJU 1453 where emphasis was laid on the fundamental principle that it is not the function of the Court to delve into the merits of a case:

> "***[40]*** *At the end of the day* ***the above findings of the Adjudicator are findings of mixed fact and law and this Court would not interfere. Suffice to say that the Adjudicator's reasons are clear and though the matter may be argued afresh at the trial, for the moment there is no breach of natural justice in the Adjudicator arriving at the decision that he did****.*
>
> ***[41] Natural justice does not require the Adjudicator to arrive at a decision that favours a particular party. All that it requires is that the Adjudicator considers all the relevant matters before him as produced and submitted by the parties and arrives at a reasoned Decision****.*
>
> ***[42]*** *Otherwise in all cases where a party is aggrieved the argument could be mounted that had the Adjudicator considered all material documents and issues properly, he would have arrived at a Decision in favour of the aggrieved party. That would be harnessing and hijacking the ground of breach of natural justice to set aside a Decision merely because one is not happy with the outcome!*
>
> ***[43]*** *As stated in many an occasion* ***all that natural justice requires is that the Adjudicator must accord procedural fairness to the parties before him and that the way he went about hearing the parties and making a decision is not manifestly unfair****.*
>
> ***[44]*** *Parliament appreciates the fact that* ***errors in findings of facts and in interpreting the relevant clauses and the law may creep into the Decision but that can be corrected at the trial or arbitration****.*
>
> *…*
>
> ***[50]*** *At any rate* ***matters such as weight to be attached to certain evidence or that the Adjudicator had failed to judicially appreciate certain arguments are not the stuff that has anything to do with natural justice but rather with the merits of the case****. This Court must restrain itself from and resist every temptation to going down the broad road of an appeal by way of rehearing on merits that can only lead to destruction of the very design of Adjudication which is to produce a result of interim finality where the immaculate fullness can be had in a decision after trial where witnesses are called or an award in arbitration.*
>
> *…*
>
> ***[52]*** *Merely because the Adjudicator had disagreed with the Employer, that does not mean that the rules of natural justice must have been breached. Natural justice is not a magic wand to be waved each time one is unhappy with an Adjudication Decision!* ***To categorize and castigate a failure to judicially appreciate certain material evidence as a breach of natural justice would be an abuse of its hallowed principles****.*"
>
> (emphasis added).

[38]From my scrutiny of the Payment Claim, Adjudication Claim, Adjudication Response, Adjudication Reply and the aforequoted paras in the Adjudication Decision, I am satisfied that the learned Adjudicator had not breached the principles of natural justice since she had asked the correct questions surrounding the issue of remeasurement of quantities including the enquiry related to the QSP Report. The Adjudicator had also accorded equal opportunities to TSR and Hiform to be heard on the issues arising.

[39]Following thereto, the learned Adjudicator gave her views on the QSP Report, where contrary to TSR's contention, she did give reasons in initially preferring to accept the remeasurement findings of the QSP Report over that of either party as can be seen in paras 49,

50 and 52(b) of the Adjudication Decision. Nevertheless, the Adjudicator further explained in para 53 as to why, in the end, she allowed the remeasurement value of RM42,800,227.36 as per Progress Claim No. 25 as opposed to RM47,578,497.16 in the QSP Report, which in any event is a lower amount. While the reasons may not be as elaborate as TSR may wish them to be, they are reasons all the same and I do not think that there is any contradiction in the decision as submitted by TSR.

[40]Furthermore, TSR challenged the weightage placed by the Adjudicator on the evidence placed before her when it is trite that the weight of evidence involves finding of facts going to the merits of the case which is within the province of the Adjudicator. Even if the Adjudicator's finding of fact is faulty, the Court ought not disturb the same as long as she has asked the correct question and given reasons for preferring to ultimately accept the remeasurement value in Progress Claim No. 25. The matter of sufficiency or otherwise of the evidence is for the Adjudicator to decide, and not this Court: see *Ireka Engineering and Construction Sdn Bhd v PWC Corp Sdn Bhd and another appeal* [2019] MLJU 35.

[41]Although TSR's argument on this issue is centered on breach of natural justice allegedly committed by the learned Adjudicator in the course of the adjudication, which to my mind cannot be sustained, Hiform nonetheless expanded its submission to cover the point of jurisdiction as well by contending that even if the Adjudicator committed any errors on finding of facts, such error does not go to the jurisdiction of the Adjudicator and should not to be a reason to set aside the Adjudication Decision.

[42]The Payment Claim in the instant case is unquestionably related to Progress Claim No. 25 and so, applying the principle as established in *View Esteem Sdn Bhd v. Bina Puri Holdings Berhad* [2018] 2 MLJ 22, the jurisdiction of the Adjudicator must be limited to this Progress Claim and nothing else. In choosing the figure as claimed by Hiform in the Payment Claim, the Adjudicator certainly acted well within her jurisdiction as provided in sub-s 27(1) CIPAA, namely, "*… limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.*"; sections 5 and 6 CIPAA being the provisions which govern "*Payment Claim*" and "*Payment Response*", respectively.

(ii) rials Purchase on behalf" and "Machineries Paid on behalf"- TSR's Submissions

[43]Moving on to the second complain that TSR harbours against the Adjudication Decision, it is again premised on the learned Adjudicator's so-called failure to consider and/ or give proper weight to the evidence before her when she allowed the Adjudicated Sum based on the preliminaries as well as the alleged materials purchased on behalf, and machineries paid on behalf, as included in Progress Claim No. 25.

[44]Mr. Aniz argued that the deduction for materials purchased on behalf, and machineries paid on behalf, should have been in the sum of RM29,118,623.63 as certified by TSR in IPC No. 26 for the period ending November 2018, and not the alleged amount as stated in the Payment Claim. The difference between these two sums is RM1,645,044.47.

[45]In respect of the preliminaries, TSR had certified a sum of RM7,658,682.03 in its IPC No. 26 whilst Hiform had claimed a sum of RM8,149,318.75 in its Progress Claim No. 25. It was submitted that this resulted in an over claim by Hiform in the sum of RM490,636.71.

[46]Although IPC No. 26 was submitted to the learned Adjudicator together with the Adjudication Response, TSR contended that there was no discussion and/ or analysis on the same in the Adjudication Decision, and in fact, the learned Adjudicator, without any reasoning, erroneously

concluded that "*the other items in the calculation to derive the claimed sum of RM7,752,592.89 has not been disputed by either party.*".

- Hiform's Submissions

[47]Mr. Christopher Yeo submitted that TSR never raised and/ or disputed the amount of materials purchased on behalf of TSR in the adjudication proceeding. TSR's conduct in raising this new allegation is said to tantamount to adducing fresh evidence where this cannot be construed as a breach of natural justice. Reference was made to the High Court decision in *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2016] MLJU 1054.

[48]Moreover, Hiform contended that TSR's dissatisfaction again goes to the merits of the Adjudication Decision as opposed to a denial of natural justice. Therefore, this does not justify the intervention by this Court, especially when TSR had failed to adduce any solid evidence to support its bare assertion, as held in the case of *Kuasatek (M) Sdn Bhd v HCM Engineering Sdn Bhd and other appeals* [2018] MLJU 1919.

- Findings of the Court

[49]The particulars of claim as tabulated in the Payment Claim shows the total value of works claimed in the sum of RM52,362,877.06 with a total deduction of RM44,610,284.17, out of which "*Materials Purchase on behalf*" constitute the amount of RM24,462,211.28 and "*Machineries Paid on behalf*" making up the amount of RM3,011,367.88. The "*Supporting Documents*" for the total value of works are the Progress Claim No. 25 dated 28.11.2018 including VO whilst for the deductions, IPC No. 24 as certified by TSR for the period ending October 2018.

[50]In the Adjudication Response, TSR stated that:

> "*35. The Respondent avers that it has completed the evaluation of the Claimant's Progress Claim No. 25 and finalized interim payment certificate no.26 (which overs (sic) the sub-contract period up to end of November 2018) that is not issued to the Claimant …*
>
> *36. Based on the Respondent's evaluation, the net amount certified including GST shall be RM561,038.69. …*
>
> *37. The Respondent avers that there is a difference in the certified amount and the amount claimed in progress claim no.25, in that the Claimant had claimed for the adjusted and/or remeasured quantities that were unilaterally imposed and not agreed mutually by the parties in its progress claim no.25*".

[51]In the section of the Adjudication Decision with the sub-heading "*Summary Mathematics of this Adjudication Decision*", the learned Adjudicator said:

> "*164. The only items in contention are in respect of –*
>
> a) *the Remeasured Work Values (excluding Preliminaries and VO) where the Claimant had claimed the sum of 42,800,227.36, which I had allowed; and*
>
> b) *Variation Orders 1 – 8 where the Claimant had claimed the sum of RM1,054,230.95 for which I had found that the Claimant is entitled to the sum of RM736,683.04. This is a reduction of RM 317,547.91 as compared to the claimed amount.*
>
> *The other items in the calculation to derive the claimed sum of RM 7,752,592.89 has not been disputed by either party.*".

[52]I have perused the Adjudication Response and I find that even though IPC No. 26 was submitted to the learned Adjudicator with the Adjudication Response –

(a) TSR itself admitted that the said IPC "*is not issued to the Claimant*"; and

(b) the difference in the certified amount and the amount claimed by Hiform by virtue of Progress Claim No. 25 is stated to be attributable to the "*adjusted and/or remeasured quantities that were unilaterally imposed*" by Hiform in its Progress Claim No. 25.

The contentions as now raised by TSR in the Setting Aside Application were never brought to the attention of the learned Adjudicator.

[53]In the premises, this lends credence to Hiform's argument that TSR's submissions are afterthoughts, and it would be an affront to the established legal principles in a setting aside application if TSR is allowed to rely on a ground which it could, and should, have placed before the Adjudicator directly, but for reasons only known to itself, had omitted to do.

[54]In *Gazzriz* (*supra*), the respondent in the adjudication did not file a Payment Response nor an Adjudication Response. However, Hiform's reliance on the following excerpt from the judgment of the High Court in that case is still appropriate since TSR, in attempting to argue the issue surrounding the amounts that should be deducted for "*Materials Purchase on behalf*" and "*Machineries Paid on behalf*" when it did not do so at the adjudication, is in effect re-opening the adjudication proceeding after the delivery of the Adjudication Decision:

> "***[31]*** *The Respondent has totally misconceived the ground of natural justice in its attempt to set aside the Adjudication Decision. To begin with,* ***even if there be some truth in the Respondent's assertion that the amount owing to the Claimant should be a very much less amount of RM 603,981.32, that so-called error of the Adjudicator cannot be attributed to a breach of natural justice. To be clear, these so-called fresh evidence was not before the Adjudicator****. Surely the Adjudicator cannot reopen the Adjudication Proceeding after the delivery of his Adjudication Decision and neither would this Court at this stage of setting aside the Adjudication Decision under the limited grounds of section 15 CIPAA allow the so-called fresh evidence to be admitted. There is simply no room for that altogether as this application is not an appeal.*
>
> ***[32]*** *The requirements of natural justice is that both sides must be heard before a tribunal hands down its decision. …*
>
> *…*
>
> ***[34]*** *It is clearly not a case of the Adjudicator refusing to hear the Respondent but that there was nothing forthcoming and filed by them and nothing to contradict the Claimant's claim. The Adjudicator was thus entitled to come to the decision that he did and it would be an abuse of the Court's process to now say that there had been a breach of natural justice just because the Adjudicator decided in favour of the Claimant based on the documents submitted.*
>
> ***[35]*** *This is not a case of an Adjudication Decision given in default as it were, but one arrived at after the Adjudicator had perused the documents filed by the Claimant and was satisfied in the absence of rebuttal evidence to the contrary by the Respondent, the Claimant had proved their payment claim.* ***The Respondent's dissatisfaction with the weight of evidence given by the Adjudicator in the absence of documents to the contrary submitted by the Respondent is not a matter that this Court can intervene and much less interfere since it has nothing to do with natural justice and certainly not a ground countenanced under section 15 CIPAA; this being not an appeal****."*
>
> (emphasis added).

[55]Based on the foregoing, I am satisfied that TSR's challenge on this ground has no legs to stand on. The Adjudicator had observed the requirements of procedural fairness and it is TSR that did not draw the attention of the Adjudicator to the alleged discrepancy in the computation of the amounts deductible for "*Materials Purchase on behalf*" and "*Machineries Paid on behalf*" and make full and proper submissions for the consideration of the Adjudicator.

(iii) Variation Orders- TSR's Submissions

[56]Proceeding to the next ground relied upon by TSR, it was contended that in deciding on VO Nos. 4, 5, 6, 7 and 8, the learned Adjudicator failed to give proper weight to the facts and the relevant contractual requirements.

[57]More particularly, as regards to VO Nos. 4, 5, 6 and 8, despite acknowledging that TSR's allegations "*…on the lack of compliance with the Sub-Contract / Appendix III / paragraph 15.4 only goes towards the evaluation of the amount payable*", the learned Adjudicator concluded to the contrary that TSR "*has not challenged the quantum claimed in any manner*"; while in respect of VO No. 7, the learned Adjudicator's finding that TSR "*…has also not challenged the amounts claimed by the Claimant, only denying that they are due at all*" is both erroneous and inconsistent.

- Hiform's Submissions

[58]Learned counsel for Hiform submitted that the Adjudicator's findings on the value of the variation order is basically findings of facts which are not open for re-examination in the Setting Aside Application as enshrined in the case of *Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another summon* [2019] MLJU 369.

[59]Mr. Christopher Yeo went through the Adjudicator's examination of the VO in question to support the argument that the Adjudicator did not arbitrarily dismissed TSR's defence but had supported her decision with cogent reasons. Moreover, the fact that TSR merely reproduced its defence in the Adjudication Response in the current application goes to show that TSR is disputing the merits of the Adjudication Decision under the disguise of a breach of natural justice.

[60]Hiform reiterated its earlier submissions that natural justice does not mandate that the Adjudicator must arrive at a decision in a particular way; so long as she has heard both parties, she cannot be faulted as having denied natural justice to the party whom she had ruled against.

- Findings of the Court

[61]The learned Adjudicator's approach on the issue of "*Variation orders not certified*" can be seen in para 55 until para 98 of the Adjudication Decision. She had analysed the VO by grouping VO Nos. 4 and 5; and VO Nos. 6 and 8 together, and taking VO Nos. 1, 2, 3 and 7 separately on their own. For purposes of the Setting Aside Application, TSR took issue with only VO Nos. 4, 5, 6, 7 and 8. In this respect, I observed that in the Adjudication Decision, the Adjudicator had, in turn, first discussed Hiform's case, followed with TSR's position on the VO concerned, before making her findings known.

[62]The reference to the pleadings of the parties on the VO in issue can be summed up as follows:

Pleadings/VO	Adjudication Claim	Adjudication Response	Adjudication Repl y
In general	Para 38	Paras 27 & 28	Para 21
No. 4 - *Block A Ground Slab completed with formwork (area 5a-6/A-D)*No. 5 - *MBFRoom Sump Pit*	Para 40:TSR gave verbal instructions to carry out the works; no official written instruction from TSR confirming the	Para 30:Denial; put to strict proof.No instructions in writing for the additional works.Non-compliance with para 15.4 in Appendix – III	Para 23:Work has been carried out on the site and will be reflected in the as-built drawing and be re-measured.

	same.Sketches provided by Hiform are attached as Appendix N.	Standard Terms & Conditions in the LoA.	
No. 6 - *Normal Ready Mixed to Pump Mixed Concrete*No. 8 - Supply of *Concrete Pump Truck Service*	Paras 41 - 43: TSR gave verbal instruction to use pump mixed concrete instead of normal ready mixed concrete and the order was through TSR.The monthly summary of the Delivery Order ('DO') is attached as Appendix P.Proof of rental of the truck is attached as Appendix Q and was charged back to Hiform.	Para 31:Denial.No instructions in writing for the additional works.Non-compliance with para 15.4 in Appendix – III Standard Terms & Conditions in the LoA.	Para 24: Change and purchase of the item is within TSR's full knowledge.Copies of DO are attached as Appendix H1.The truck was hired by TSR.The Sub-Contract is based on provisional quantities subject to re-measure-ment of work done on site. Hiform considers this change of item as a VO as it was not in the original BQ.
No. 7 – *Temporary Supply of Mobile Crane for replacement of Tower Crane 1 & 2*	Paras 44 & 45: Three letters from Hiform to TSR regarding the deployment of these cranes are attached as Appendix R. TSR did not reply to these letters. Receipts of the rental charged are attached as Appendix S.	Paras 32 & 33: Pursuant to the tender clarifications, it is an understanding that all quoted rates shall include mobilization and demobilization of machineries, tools and equipment including tower cranes.In the BQ, the rental of tower cranes was for 16 months for the sum of RM2,432,000.00No delay in the deployment of the tower cranes. Even if there was, it was Hiform's fault.Hiform deployed the mobile cranes without TSR's approval.No instructions in writing for the additional works.Non-compliance with para 15.4 in Appendix – III Standard Terms & Conditions in the LoA.	Para 25:2 additional mobile cranes were deployed for Condominium Blocks A & B because there was delay in the installation of the tower cranes for these Blocks.Rates in the preliminaries spelt out machineries, tools and equipment to be mobilised in terms of numbers.16 months rental is based on the tower cranes coming into operation on the commencement date of the Sub-Contract.

[63]For ease of reference, Clause 13.2 LoA and para 15.4 Appendix – III Standard Terms & Conditions in the LoA as mentioned in the adjudication pleadings and Adjudication Decision are quoted in full below:

(a) Cluase 13.2 LoA:

> "*Upon receipt of the Sub-Contractor's details and particulars, the Main Contractor shall carry out valuation on the work done by the Sub-Contractor and issue an Interim Certificate, and the Sub-Contractor shall be entitled to payment thereafter within the Period of Honouring Certificates stated in Clause 13.4.*".

(b) para 15.4 Appendix – III Standard Terms & Conditions in the LoA:

> "*The Sub-Contractor shall submit all necessary documents contain all up to date details and drawings, details of all quantities (for provisional quantities and/or variation order), rates and prices and other supported documents for the evaluation of the Main Contractor. The Sub-Contractor shall keep contemporary records to substantiate all his Variation's claims and in order for the Main Contractor to verify and approve the Sub-*

Contractor's Variations, the Sub-Contractor shall allow the Main Contractor to have access to all books, documents, papers and/or records. All supporting documents shall be verified and signed by the Main Contractor's Site Management.".

[64]In relation to VO No. 4 and 5, the Adjudicator made a determination that:

"*65. On the evidence before me, I find as a matter of fact, that on the balance of probabilities the work had been instructed by the Respondent and carried out by the Claimant. The alleged lack of compliance with the Sub-Contract / Appendix III/ paragraph 15.4 only goes towards the evaluation of the amount payable for this work, and not to the work itself having been carried out.*

66. LOA/ Clause 13.2 requires the Respondent to "carry out valuation on the work done by the Claimant and issue an Interim Certificate" upon which the Claimant shall be entitled to payment. Therefore, the Claimant is entitled to payment for the work instructed by the Respondent and carried out by the Claimant.

67. The Respondent has not challenged the quantum claimed in any manner, nor offered any alternative calculation for VO4 and VO5. In the face of the Respondent's lack of challenge, and on a perusal of the Claimant's evidence in support of the quantum of this claim for VO4 and VO5, I am of the view that on the balance of probabilities the quantum claimed is reasonable and supported.

68. Therefore, I find that the Claimant is entitled to –

a) *VO4 – in the sum of RM4,221.00;*

b) *VO5 – in the sum of RM2,158.33*

as claimed in progress Claim No. 25 dated 25 November 2018.".

[65]As for VO Nos. 6 and 8 for the supply of *Concrete Pump Truck Service*, the Adjudicator's findings in paras 76 - 78 are identical to paras 65 - 67 except that the words "*VO4 and VO5*" are substituted with the words "*VO6 and VO8*" wherever they appear. This was followed with the Adjudicator's conclusion viz. –

"*79. Therefore, for VO6 I find that the Claimant is entitled to the sum of RM303,484.64 as claimed in Progress Claim No. 25 dated 25 November 2018.*

80. And for VO8, I find that the Claimant is entitled to the sum of RM74,766.31 as claimed in Progress Claim No. 25 dated 25 November 2018 and being the total of the Respondent's Debit Notes in Adjudication Claim/Appendix Q.".

[66]Finally, as regards VO No. 7, the Adjudicator decided that:

"*93. On the evidence before me, I find as a matter of fact, that on the balance of probabilities, the Claimant was aware at the time of signing the LOA, that the tower cranes would only be available by 30 June 2017. Therefore, the Claimant would have had to take that into consideration when planning their work and resources.*

94. Although the Respondent states that there was no delay in the deployment of the tower cranes, nevertheless they have not denied the date of deployment of 1 September 2017 indicated in the Adjudication Claim / paragraphs 44 - 45 and Adjudication Claim / Appendixes R and S.

95. The Respondent has also not challenged the amounts claimed by the Claimant, only denying that they are due at all.

96. In the premises, on the evidence before me, I find as a matter of fact, that on the balance of probabilities the Claimant is

a) *not entitled to the full period claimed; but*

b) *is entitled to the deployment of additional mobile cranes for the period between 30 June2017 when the tower cranes were to have been deployed, and 1 September 2017 when the tower cranes were in fact deployed.*

97. Therefore the Claimant's claims in the following sums are allowed –

a) *Mobile Crane BKM 3871*

July 2017 – RM35,488.80

August 2017 – RM37,237.80

b) *Mobile Crane RP9811*

July 2017 – RM30,887.12

August 2017 – RM31,758.66

The total is RM135,372.38.

…".

[67]Based on the summarised version of the adjudication pleadings as tabulated and extracts from the Adjudication Decision which are quoted in extenso, it is evident that the learned Adjudicator had considered the respective submissions by the parties, including the defence raised by TSR, and reasons were given for each conclusion that she made. Since TSR's pleadings in respect of VO Nos. 4 and 5; and VO Nos. 6 and 8 are similar i.e., premised on non-compliance with the Standard Terms & Conditions in the LoA, the Adjudicator found that this goes to the evaluation of the amount payable for the variation works but does not detract from the fact that the works were indeed carried out by Hiform.

[68]Reading the relevant paras in the Adjudication Decision on this matter, it seems to me that when the learned Adjudicator said that TSR "*has not challenged the quantum claimed in any manner*", she meant challenge in the sense of offering evidence which supports a different computation of the amounts for VO Nos. 4, 5, 6 and 8 than that as claimed by Hiform.

[69]Turning to VO No. 7, judging from TSR's Adjudication Response, the learned Adjudicator's statement in para 95 of the Adjudication Decision cannot be said to be erroneous and inconsistent since TSR's pleading and submissions were largely concentrated on the aspect of its liability to pay for the two additional mobile cranes as opposed to the quantum as claimed by Hiform.

[70]TSR's repeated submissions on the Adjudicator's failure to give proper weight to the evidence has been dealt with in para 40 above.

[71]In these circumstances, I do not see how the principle of natural justice has been breached. The parties were given an equal opportunity to be heard. The decision on the five VO in issue was made after taking into account Hiform's and TSR's respective stance and involves a mixed finding of fact and law that cannot be challenged under the disguise of an alleged breach of natural justice.

[72]As an end note to this segment of the judgment, parties are well reminded that the Court will read the Adjudication Decision in full, and so the device of selective quotations therefrom, divorced from other parts in the Adjudication Decision which would provide contextual meaning to the quoted sentences or passages, as a means to advance one's stance on the respective issues will inevitably be seen through.

(iv) Extension of Time and Time At Large- TSR's Submissions

[73]The final issue brought up by TSR relates to a jurisdictional point, namely that the learned Adjudicator had exceeded her jurisdiction and went on a frolic of her own by applying her knowledge in finding that the time for completion had been set at large, without inviting the parties to submit on the same.

[74]TSR contended that "time at large" does not relate to the disputes that were referred to the learned Adjudicator and was not submitted to her for determination. In fact, the learned Adjudicator herself stated "*I am cognisant of the fact that neither party has specifically argued the principle of "time at large"*" and that "*it is not within my purview in this adjudication to assess what that reasonable time to complete may be*". Yet, the learned Adjudicator proceeded to conclude that time was set at large despite her statements to the contrary.

[75]On the assumption that the learned Adjudicator erred and/ or exceeded her jurisdiction in concluding that the time for completion was set at large, Mr. Aniz argued that there should be an exact date of default for non-completion by Hiform to calculate when Liquidated Ascertained Damages ('LAD') starts to run. As such, TSR's right to claim LAD ought to remain unaffected as opposed to the Adjudicator's finding that such right "*is lost*" (para 147 in the Adjudication Decision).

- Hiform's Submissions

[76]Learned counsel for Hiform traced the inception of this issue to the time when TSR's alleged that Hiform shall pay or allow TSR a sum of RM12,285,000.00 as LAD. Hiform responded by saying that TSR had failed, neglected and/ or omitted to consider Hiform's application for extension of time ('EoT') which was premised on events beyond Hiform's control and/ or omission by TSR.

[77]Mr. Christopher Yeo cited the case of *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 in submitting it is trite that the legal principle as to whether time is at large is intertwined with TSR's claim for LAD and hence, it is well within the mandate of the Adjudicator to decide a matter of a consequential and ancillary nature necessary to complete the exercise of her jurisdiction as conferred by the Payment Claim and Payment Response. Additionally, the Adjudicator is empowered to draw on her own legal knowledge and expertise as well as to take the initiative to ascertain the law required for her to make a decision as stipulated in section 25 *(d)* and *(i)* CIPAA.

[78]Hiform further emphasised that all material facts directed to the issue of "time at large" had been pleaded. Thus, Hiform who was not legally represented at the adjudication, and is unfamiliar with the legal jargon, cannot be penalised for not using the precise terminologies.

[79]In any event, the Adjudicator had, vide her e-mail dated 27.5.2019, invited the parties to submit on the issue of "time at large". TSR did not raise any issue as regards the Adjudicator's jurisdiction back then and in fact attached additional documents for the Adjudicator to consider. Further, TSR attempted to distinguish the case of *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25 where the Supreme Court held that the facts showed the employer handed over the site late which led to the delay on the part of the contractor to complete the works and therefore, the employer should not be entitled to liquidated damages under the contract because by his omission to give possession of the site in time, the time for completion becomes at large and there was no date from which damages could be assessed.

- Findings of the Court

[80]Zulkefli PCA in delivering the judgment of the Federal Court in *View Esteem* (*supra*) at pp 32 - 33 elucidated on the term "*jurisdiction*" as used in CIPAA in these words:

> "***[15]*** *We are of the view in substance, the 'jurisdiction' spoken of in s 15(d) of the CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction. Thus, by s 27(2) of the CIPAA the parties may by consent extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. This is possible only if the term 'jurisdiction' is used in the sense of CIPAA being applicable in the first place.*
>
> *[16] The term 'jurisdiction' under the CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of the CIPAA. On this point, in Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 *Lee Swee Seng J observed as follows (at para [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 s 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 s 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 s 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 s 15 or to oppose its enforcement under s 28 … Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim*
> >
> > *…*
>
> *[17] The learned judge also made note of the various types of jurisdictional complaints within the CIPAA which may be categorised as core jurisdiction, competence jurisdiction and contingent jurisdiction. The common feature in all of them is the presupposition that the CIPAA applies to determine if the adjudicator had kept within his jurisdiction.*"
>
> (emphasis added).

[81]TSR's Setting Aside Application pursuant to s 15*(d)* CIPAA is premised on the contention that the Adjudicator's decision has gone beyond the dispute originally referred to her. In order to determine whether this is so, I return yet again to the adjudication pleadings.

[82]Apart from subpara 38(3) in the Adjudication Response as cited by Hiform's counsel where TSR pleaded that "*In any event, the Respondent avers that no payment shall be made to the Claimant in that: … (3) As at the date of this Adjudication Response, the Claimant shall pay or allow the respondent a total sum of RM12,285,000-00 (as at to-date, still continuing) as LAD …*", I find that subparas 3(1) - (3) also shows that TSR had averred that Hiform failed to complete the Sub-Contract works by the Completion Date and TSR had given notice to pay LAD for each day of delay to Hiform. The said subparas are re-produced below:

> "*3. In reply to paragraph 6 of the Adjudication Claim, the Respondent avers that:*
>
> (1) *Pursuant to clause 11.2 of the Letter of Award, the sub-contract period shall commence on 15 November 2016 and complete on 14 March 2018 ("Completion Date");*
>
> (2) *In breach of the said clause 11.2, the Claimant had failed to complete the Sub-Contract Works by the Completion Date;*
>
> (3) *By a letter dated 30 April 2018, the Respondent had given notice in writing to the Claimant who fails to complete the Sub-Contract Works and put the Claimant on notice that it shall pay or allow the Respondent liquidated damages of RM32,500-00 for each day of delay from the Completion Date to practical completion ("LAD")*

…;

…".

[83]Hiform gave a lengthy response to the above quoted allegations and the issue of EoT in the Adjudication Reply (refer paras 4 and 31 - 35).

[84]On 27.5.2019, the learned Adjudicator sent an e-mail to Hiform and the solicitors representing TSR inviting them to provide their views no later than 5 p.m. on 31.5.2019 on two matters, namely –

"*1. The first is with respect the Respondent's contention that the Claimant should pay or allow the Respondent LAD, following the issuance of the Certificate of Non Completion. In this regard, the following may have relevance:*

Thamesa Designs Sdn Bhd & Ors V Kuching Hotels Sdn Bhd [1993] 3 MLJ 25

Where the Supreme Court held that the facts the employer handed over the site late which led to the delay on the part of the contractor to complete the works and therefore it patently clear that the employer should not be entitled to claim for liquidated damages under the said contract, because by his omission to give possession of the site in time, the time for completion becomes at large and there was no date from which the damages could be assessed.

2. The second is with respect to the Respondent's contention that in view of the termination on 25 February 2019, they are not bound to make any further payment to the Claimant until after the completion of the Sub-Contract Works. …".

[85]Hiform submitted its "*Reply to Matters Raised by Adjudicator*" on 30.5.2019. In the attempt to convince the Adjudicator that the issue of imposition of LAD should not be taken into consideration in the adjudication proceeding, Hiform compiled the chronology of events from the issuance of the LoA until the determination of the Sub-Contract by TSR and contended that the events show that TSR has deliberately failed to address the issue of Hiform's application for EoT. In para 7.0 of Hiform's Reply, it averred that "*…the Contract is at large as the time taken to issue the Certificate of Non-Completion from the original date of completion is more than eight months not to mention that no due consideration was given to the application for EOT and a lame reason to dismiss the EOT.*".

[86]Thereafter, TSR submitted the "*Respondent's Clarification (1)*" on 31.5.2019 wherein it sought to distinguish *Thamesa*'s case and referred to paras 170 and 172 in the judgment in *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2018] MLJU 871 touching on the prevention principle. TSR then submitted that:

"*8. Based on aforesaid, it is the respondent's submissions that:*

(1) ***Thamesa*** *is not directly relevant to the issue at hand and it is distinguishable from the present case;*

(2) *'Prevention principle' does not apply to the present dispute where there is an express clause governing extension of time in cl. 18.1;*

(3) *In any event, the Claimant in the present case, had failed, neglected and refused to comply with cl. 18 in its application for extension of time and it is not entitled to any extension of time … in that:*

(a) *cl. 18.1 requires the claimant to give prompt notice of delay and such clause serve a valuable purpose, it enables matters to be investigated while they are still current: see* ***Daya CMT Sdn Bhd*** *…;*

(b) *The claimant had failed to forthwith give notice of the cause or causes of the delay to the respondent upon which it becoming reasonably apparent that the completion of the Sub-Contract would be delayed pursuant to cl. 18.1 of the Letter of Award;*

(c) *there was never an issue of late site possession and the alleged extension of time at [Appendix A1 of Adjudication Reply] was only made **after** the Completion Date in April 2018;*

(d) *the alleged handover (not admitted) of the site possession allegedly took place in December 2016 yet the notice was given approximately sixteen (16) months later;*

(e) *In **City Inn Limited v Shepard Construction Limited** 2003 SLT 885, the employer contended that the contractor was not entitled to any extension of time because the contractor had not complied with clause 13.8 of the contract in relation to notices. The court held that the contractor could not obtain extension of time if it did not comply with the notice provision; and*

(f) *There could never be a situation where the claimant could set time at large at his option.*".

[87]In view of the above pleadings, request for clarification and submissions, the learned Adjudicator rightly looked into the issues as set out under the sub-headings of "*Extension of Time ("EoT")*" and "*Liquidated Damages for Delay ("LAD")*" in the Adjudication Decision. The Adjudicator's extensive analysis of the former runs from paras 123 to 143, and the latter, from paras 144 - 151 in the Adjudication Decision.

[88]For present purposes, the key passages from the Adjudication Decision are as follows:

"*132. What the evidence before me does indicate, is that on the balance of probabilities –*

a) *delayed completion in piling which is outside the Claimant's scope of works, would likely cause a delayed commencement to at least some parts of the high-rise superstructure works of the Sub-Contract;*

b) *the temporary site offices and wash trough, and the tower cranes would likely cause obstruction to the completion of the Sub-Contract works, in view of their respective locations indicated on the site plan at Adjudication Reply / App E1.*

133. ***Therefore, on the evidence before me, I find on the balance of probabilities that completion by the Claimant is "likely or has been delayed by any cause reasonably beyond the control of the Sub-Contractor" or by acts of prevention****.*

134. However, on the evidence before me, I find that the Respondent has failed to address the events of delay until late in the day with the substantive denials being made only after the CIPAA Payment Claim.

…

137. ***Although the invitation was aimed at the Respondent's claim for LAD, nevertheless the Respondent's reply to my invitation of 27 May 2019 for views, touched on the prevention principle in light of extension of time clauses. Essentially the Respondent argued that the prevention principle does not apply in the present dispute*** *where there is an express clause governing extension of time in Clause 18.1 of the LOA, and where the Claimant did not comply with the notice provisions.*

138. ***I reviewed the Respondent's reply and the cases they relied on, and on the factual evidence before me, and find on the balance of probabilities that –***

a) *although there is an express clause governing extension of time in Clause 18.1 of the LOA;*

b) *neither the Claimant nor the Respondent adhered closely to the those Sub-Contract provisions for EOT;*

c) *therefore the delays by causes reasonably beyond the control of the Sub-Contractor or by acts of prevention, were left unaddressed by the Respondent.*

139. ***I cannot agree with the Respondent that the prevention principle does not apply simply because there is an express clause governing extension of time. A reading of the cases reveal that there must also have been an appropriate extension certified****.*

140. In this regard, the case of Daya CMT … quoted by the Respondent is instructive. …

141. ***That being so, and in the absence of any EOT having been allowed by the Respondent despite there being delays by causes reasonably beyond the control of the Sub-Contractor or by acts of prevention, I find that the time for completion has been set "at large"****.*

142. ***With time for completion having been set "at large", the Claimant would be entitled to a reasonable time to complete. However, it is not within my purview in this adjudication to assess what that reasonable time to complete may be****.*

143. ***I am cognisant that neither party has specifically argued the principle of "time at large". However, the Respondent has argued for the imposition of LAD as a defence to the Claimant's claim, and therefore the matter of the date for completion, thereby the date for commencement of LAD, is directly relevant to this adjudication and a matter of a consequential and ancillary nature necessary to exercise or complete the existence of the jurisdiction conferred.***"

(emphasis added).

[89]At para 143 above, the learned Adjudicator acknowledged that neither party has specifically argued the principle of "time at large", however from TSR's defence that LAD ought to be imposed on Hiform, the Adjudicator opined that "time at large" is ancillary and consequential to the complete exercise of the jurisdiction conferred on her to decide on the dispute between the parties.

[90]Among the vast powers conferred on the adjudicator in s 25 CIPAA are the powers to "*(d) draw on his own knowledge and expertise*" and "*(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision*". "Time at large" was specifically mentioned by both Hiform and TSR in their response to the Adjudicator's e-mail dated 27.5.2019 and is a matter that is intertwined with the issues sparked off by the Adjudication Response relating to Hiform's application for EoT, alleged delay in completing the said Project and TSR's entitlement to impose LAD for the purported delay.

[91]In this regard, I have no hesitation in agreeing with the submissions by Hiform that the issue of imposition of LAD must necessarily involve a scrutiny on aspects concerning time for completion, delay and EoT, and the learned Adjudicator did not exceed her jurisdiction in arriving at the conclusions as she did since these matters flowed mainly from the Adjudication Response. In *View Esteem* (*supra*, at p 43), it was held that "*… the 'duty and obligation of the adjudicator' as spelt out in s 24(c) of the CIPAA that 'he shall comply with the principles of natural justice' would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartialit*y.". Hence, the learned Adjudicator in the instant case was duty bound to consider TSR's defences as pleaded in its Adjudication Response, failing which, this by itself could provide TSR with another ground to set aside the Adjudication Decision.

[92]Hiform had accordingly took pains to respond to TSR's defences in the Adjudication Reply, and later, the parties put in their respective submissions to the Adjudicator as well as further clarifications as required by the Adjudicator. In light of these facts, TSR's contention that it was not given any opportunity to provide its views on the issue of "time at large" is completely unfounded.

(B) The Stay Application- TSR's Submissions

[93]Mr. Aniz submitted that in line with the expansion principle of s 16 CIPAA as expounded in *View Esteem,* the perturbing financial status of Hiform should be a factor to be considered by

the Court in considering the Stay Application. Despite Hiform's contention that it is a going concern, its audited financial reports indicate financial difficulties since 2013. It was contended that Hiform's averment that TSR will not be in a financial position to repay Hiform if the latter is to succeed in the arbitral proceedings is baseless when the copy of the CCM Search in exhibit **"LWC-002"** in Hiform's Further Affidavit affirmed by its Manager on 23.8.2019 (Enclosure 30) shows otherwise. Moreover, TSR has repeatedly stated that it is prepared to pay the Adjudicated Sum to its solicitors as stakeholder should the Court so directs.

[94]Additionally, TSR has satisfied both limbs under sub-s 16(1) CIPAA whereby apart from having filed the Setting Aside Application, TSR had served a Notice of Arbitration to Hiform on 18.6.2019 and submitted a commencement request for arbitration proceedings to the AIAC on 24.6.2019 based on the same subject matter in the adjudication.

- Hiform's Submissions

[95]Mr. Christopher Yeo forcefully argued that to deprive Hiform of the Adjudicated Sum would not only be detrimental to Hiform's ability to accept larger construction contracts, but also defeat the intention of Parliament in enacting CIPAA. The Adjudicated Sum is payment for work done by Hiform which invariably includes out-of-pocket expenses by Hiform and it is unconscionable to deprive Hiform from the very benefits as to why Hiform resorted to CIPAA in the first place.

[96]It was futher emphasised that Hiform is an on-going concern with a collectible debt that is due to Hiform flowing from the outstanding active projects, outstanding retention sum and/ or sale of products. Hiform's financial stability is further strengthened by the fact that a banking institution was willing to provide fresh facility to Hiform on or about 21.5.2019.

[97]Learned counsel also highlighted the fact that before the Sub-Contract was entered into, the Auditor had commented that Hiform's ongoing concern was "*in significant doubt*" since the year 2013 but TSR did not raise any issues about Hiform's financial stability at that time. The Sub-Contract was for the amount of RM56,867,637.81 with LAD up to RM12,000.00 per day and yet TSR exempted Hiform from the need to furnish a performance guarantee. This, it was submitted, tends to show that TSR's allegation surrounding Hiform's financial standing is a mere afterthought and it should be estopped from relying on the same to deprive Hiform of its fruits of litigation as was pointed out in the case of *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818.

[98]Alternatively, it was contended that if the Court opines that Hiform is not in a healthy financial position, then this is attributable wholly or significantly by TSR's failure to pay the Adjudicated Sum.

- Findings of the Court

[99]TSR's Stay Application is premised on para 16(1)*(a)* and/ or *(b)* CIPAA which provides that:

> "*(1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:*
>
> (a) *an application to set aside the adjudication decision under section 15 has been made; or*
>
> (b) *the subject matter of the adjudication decision is pending final determination by arbitration or the court.*".

[100]Undoubtedly, TSR has fulfilled the threshold requirements as set out above. In *Mecomb Malaysia Sdn Bhd v. VST M&E Sdn Bhd* [2018] 8 CLJ 380, Lim Chong Fong J held at p 386 that:

"***[25]*** *First and foremost, I am satisfied that the defendant has met the stay threshold requirement set out in s. 16(1)(b) of the CIPAA by having filed the suit which is presently still pending completion. Nevertheless, there is no provision in the CIPAA that the enforcement of the decision under s. 28 of the CIPAA is either automatically stayed or that the plaintiff is estopped from so enforcing after the defendant has commenced the suit to have the disputes and differences finally determined pursuant to s. 16 of the CIPAA.*".

[101]In order to answer the question as to whether this is an appropriate case for an order to be made to stay the Adjudication Decision as prayed by TSR, mainly in prayer 3 of the O.S., guidance can be obtained from the leading authority on the legal principles in respect of an application under s 16 CIPAA namely, *View Esteem*. The Federal Court held at pp 47 - 49 that:

"***[79]*** *... Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.*

…

[82] *We are in agreement with the contention of the appellant that* ***a more liberal reading of s. 16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case****. It is accepted that* ***a stay of the award ought not be given readily and caution must be exercised when doing so****.…*

…

[84] *The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect we are of the view that* ***the correct approach for the High Court under s 16 of CIPAA would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor****.*

[85] *… We are of the view that the Court of Appeal fell into error here when it failed to consider that the application for stay was made under s 16(1)(b) and not s 16(1)(a) of the CIPAA. In any event, s 16(1)(a) specifically provides that the parties may apply for a stay once an application to set aside an award under s 15 of the CIPAA has been made. It does not say that the application must be made separately. It is clear that the provision is there in aid of an application under s 15.*"

(emphasis added).

[102]In applying the test as laid down by the apex court to the facts of this case, I am satisfied that there has been no clear and unequivocal errors on the part of the learned Adjudicator in arriving at the Adjudication Decision for reasons which have been elaborated earlier. Thus, what is left to be considered is whether an order for stay of the Adjudication Decision should nevertheless be made in order to meet the justice in this particular case.

[103]In TSR's Affidavit In Support ('AIS'; Enclosure 3), apart from the reasons averred in para 83 that the Adjudication Decision ought to be stayed in the interest of justice because the Adjudicator made a wrongful decision; a s 15 CIPAA application has been made; the subject matter of the Adjudication Decision is pending final determination in the arbitration; and a stay of the Adjudication Decision is consistent with the LoA, it was also affirmed that Hiform's financial position is not attributable to TSR's non-payment of the adjudicated amount to Hiform and –

"*85. Based on the CCM Search Report dated 13/6/2019 and RAMCI Credit Track dated 14/6/2019, the latest date of tabling for the Defendant's audited financial statement was on 28/2/2018 for financial year end 31/8/2017 wherein it shows that Defendant is suffering from cumulative losses of about RM2.98 million which resulted in a deficit in shareholders' fund about RM1.98 million. Alternatively, the documents further shown that the Defendant unlikely be able to pay the total*

liabilities of about RM18.5 million based on recorded assets of RM16.6 million. I further state that the Defendant had also failed to submit the audited financial statements for financial year ending 31/8/2018 by February 2019 as reflected in the searches.

…".

[104]A second CCM Search Report dated 19.7.2019 and RAMCI Credit Track dated 19.7.2019 were exhibited in TSR's Affidavit In Reply ('AIR'; Enclosure 29) as **"TSR-3"** and **"TSR-4"** to show that there is a second "*Open Charge*" on Hiform by Public Islamic Bank Berhad ('PIBB') which remains "*Unsatisfied*", and Hiform's cumulative losses has increased from RM2.98 million to RM4.64 million, respectively. Copies of Hiform's Audited Financial Statements and Reports for the financial year ending 2015, 2016 and 2017 were additionally exhibited as **"TSR-5"** as evidence that Hiform has been facing difficulties even before the Adjudicated Sum became due and owing by TSR.

[105]TSR's exhibits in relation to the issue of Hiform's financial position were considered alongside the following documentary evidence as exhibited by Hiform in its Reply, Further and Supplementary Affidavits (Enclosures 28, 30 and 31) in support of the contention that Hiform is a going concern:

(a) exhibit **"LWC 001"** – copies of the Letter of Awards and latest Interim Payment Certificates ('IPC') between third parties and Hiform;

(b) exhibit **"LWC 003"** – copies of the Work Orders for Hiform's sales of end products for the year 2019 amounting to RM2,175,157.46;

(c) exhibit **"LWC 005"** – copies of Hiform's Audited Financial Statements and Reports for the financial year ending 2013, 2014, 2015, 2016, 2017 and 2018 to ilustrate that they carry the same comment by the Auditor that the premise upon which the Auditor has prepared the Financial Statements is by applying the "*going concern assumption*" notwithstanding that Hiform had deficiencies in capital, and its current liabilities exceeded its current assets "*thereby indicating the existence of a material uncertainty which may cost significant doubt*" about Hiform's ability to continue as a going concern, and therefore debunks TSR's allegations; and

(d) exhibit **"ATYC 001"** – documents to show that there is an outstanding amount of up to RM10,187,227.65 from active projects, retention sum and/ or sale of end products which have not been collected by Hiform.

[106]In this regard, I agree with Hiform that despite the Auditor's comments in the Financial Statements and Reports for the financial year ending 2013, 2014, 2015, 2016, 2017 and 2018, Hiform has managed to carry on its business and maintain its status as an ongoing concern by having active projects and even obtaining a banking facility from PIBB in 2019. The fact that a banking institution is willing to provide its financial services to Hiform strengthens Hiform's case that its state of affairs is not as dire as TSR makes it out to be to the extent that Hiform would be unable to repay the Adjudicated Sum, or as ordered by the arbitral tribunal.

[107]There are two other factors which work in Hiform's favor. Firstly, at the time when the LoA was issued i.e., 16.8.2016, the *Independent Auditors' Report* in Hiform's *Financial Statements For Year Ended 31 August 2015* states the following:

"*Emphasis of Matter*

Without qualifying our opinion, we draw attention to Note 17 in the financial statements which discloses the premise upon which the Company has prepared its financial statements by applying the going concern assumption, notwithstanding that the Company had a deficiency in capital of RM1,014,784 as at 31 August 2015, and as of that date, the Company's current liabilities exceeded its current assets by RM1,721,964 thereby indicating the existence of a material uncertainty which may cast significant doubt about the Company's ability to continue as a going concern.".

[108]In the premises, Hiform's current financial status is the same as, or similar to, its standing at the time when the Sub-Contract was entered. Nonetheless, TSR carried on with the award of the Sub-Contract to Hiform, an indicia that TSR was not unduly alarmed by Hiform's overall financial health.

[109]Secondly, Hiform's Manager averred in the Further Affidavit (Enclosure 30) that substantial discrepancies between the Provisional BQ and the actual quantities used to complete the Sub-Contract had been pleaded in the adjudication. This fact together with TSR's failure to carry out remeasurement resulted in Hiform having to bear the cost of any additional construction material as compared with the Provisional BQ and at the same time, these additional materials were not certified in TSR's IPC. In effect, Hiform had to finance the differences between the actual quantities used to complete the Sub-Contract and in the Provisional BQ, which is lower, without receiving payment from the Plaintiff up until the time when construction works were 90% completed.

[110]Hiform further averred that as the result of the under-certification and/ or TSR's conduct in manipulating the Provisional BQ and IPC, the Defendant's account had shown a loss of RM1,354,872.00 in 2017 and RM3,033,246.090 in 2018. In the Adjudication Claim, Hiform had pleaded –

(a) in para 20 that it noticed the amount certified by TSR varied substantially against its progress claim for February 2017 with a difference of RM1,130,576.34;

(b) in para 21 that the differences in the amount claimed by Hiform as against the amount certified fluctuated in excess of RM1 million in December 2017 before the matter was sorted out in January 2018;

(c) in para 22 that in the subsequent months, Hiform realised that the quantities in the Provisional BQ are inaccurate because the quantities ordered for certain items exceeded the quantities in the BQ;

(d) in para 27 that the difference in terms of the amount claimed in May 2018 with the amount certified was RM4,748,340.04, including the VO.

[111]Hiform had prepared a table to show its profits, losses and cash flow for the years 2013 to 2018 which is depicted below:

Tahun	***Keuntungan/Kerugian***	***Aliran Wang***
2013	*RM 627,272*	*RM 2,122,700*
2014	*RM 471,783*	*RM 986,029*
2015	*(RM 579,797)*	*RM 251,640*
2016	*RM 387,032*	*RM 1,173,385*
2017	*(RM 1,354,827)*	*RM 358,864*

2018	*(RM 3,033,246)*	*RM 562,701*

[112]The aforesaid averments by Hiform were not rebutted in any affidavit filed by TSR. Hence, I am inclined to accept Hiform's submission that any financial difficulties that it is facing at the moment may well have been contributed by TSR's conduct.

[113]Furthermore, it is settled law that a pending arbitration, without more, is not a ticket to qualify for a stay of the Adjudication Decision. In *Subang Skypark* (*supra*) at p 830 it was held that:

> "***[27]*** *... That is not to say that simply because the dispute or subject matter of the adjudication decision is now in the arbitration mode regime, the grant of stay is automatic. It is not, let alone as of right or as a matter of course. Being in arbitration merely puts the plaintiff's case as one within s 16 for consideration; or one which has crossed the threshold. The existence of concurrent proceedings merely prequalifies the plaintiff for this application.*
>
> ***[28]*** *… Upon overcoming the threshold set in sub-s 16(1), the plaintiff still has to show how the discretion is to be exercised in its favour.*".

[114]Later, in the case of *PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and another appeal* [2018] MLJU 152, the Court opined that:

> "***[118]*** *To allow a Stay merely on ground of a pending arbitration in the absence of special circumstances would be to defeat the purpose of the CIPAA as all that the Respondent needs to do is to commence Arbitration with serving on the Claimant a Notice to Arbitrate. That would be to send the wrong message to the* ***construction industry*** *that a Stay of an Adjudication Decision is granted as of right the moment there is a pending Arbitration or Litigation.*
>
> ***[119]*** *That would* ***undo*** *all that the* ***construction industry*** *had sought to do including changing the culture and mindset of deliberate or designed delay in making payments to the Contractor the Work already done and to do so with impunity. That would be to turn back the hands of the clock to pre-CIPAA regime and it would be a great disservice done to the CIPAA.*".

[115]As for TSR's submission that its claim in the arbitration proceedings are estimated in the region of RM22 million and far exceeds the Adjudicated Sum, I am inclined, in the circumstances of this case, to lean in support of the oft quoted phrase "*pay now, argue later*" associated with the philosophy of statutory adjudication. Since an order that an amount equivalent to the Adjudicated Sum be deposited with TSR's solicitors as stakeholder would have the same effect as a stay of the Adjudication Decision, and the arbitration proceeding is still at its infancy, I am of the view that justice in this case would be met by dismissing the Stay Application as Hiform should not be deprived of the fruits of its adjudication for a longer period than what it has had to endure.

O.S. No. WA-24C-107-06/2019: The Enforcement Application

[116]Pursuant to the Adjudication Decision, the learned Adjudicator has ordered TSR to pay Hiform the Adjudicated Sum together with the interest thereon and the cost of adjudication proceedings within 30 calendar days from the date of the Adjudication Decision, namely by 3.7.2019.

[117]Section 13 CIPAA provides for the effect of an adjudication decision in these terms:

> "***13.*** *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.*".

[118]The Enforcement Application was filed on 27.6.2019 which is five days before the time for payment lapsed. No payment was forthcoming from TSR and thus, Hiform's Enforcement Application is made pursuant to sub-s 28(1) CIPAA which allows a party to apply to the High Court for an order to enforce an adjudication decision as if it is a judgment or order of the High Court. By virtue of sub-s 28(2) and (3) CIPAA, 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, and such order may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

[119]Hiform submitted, with reference to the case of *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362 that, until and unless the Adjudication Decision is stayed or set aside, the Enforcement Application should be allowed in order to give effect to Parliament's intention underlying CIPAA, namely, to facilitate cash flow in the construction industry.

[120]As a result of the decision of this Court as discussed above that TSR's Setting Aside Application and Stay Application are untenable and must be dismissed, the Adjudication Decision is therefore binding on the parties and there is only one possible order left to be made i.e., for Hiform's Enforcement Application to be allowed.

Conclusion

[121]In the premises, Hiform's application in O.S. No. WA-24C-107-06/2019 is allowed with costs and TSR's application in O.S. No. WA-24C-115-07/2019 is dismissed with costs.

[122]Mr. Christopher Yeo sought costs of RM10,000.00 for each O.S. while TSR's counsel countered that RM5,000.00 for each O.S. is more reasonable since TSR had narrowed down the issues and in view of the premature filing of the Enforcement Application five days before the time for payment actually lapsed. The Court was inclined to agree with TSR in this respect and costs of RM5,000.00 to Hiform for each O.S. was thus ordered, subject to allocatur.

End of Document