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The First Case Decided After View Esteem: EUROLAND & DEVELOPMENT SDN BHD V TACK YAP CONSTRUCTION (M) SDN BHD [2018] 1 LNS 896

The Salient Facts

The Plaintiff is a developer of a condominium project and appointed the Defendant as their Main Contractor vide the Defendant's letter enclosing a duly filled bill of quantities with pricing for tendering the superstructure of the Project read together with the Letter of Award.

The complaint of the Defendant was that the Plaintiff only paid approximately 75% of the amount stated in the certificates leaving a huge balance unpaid and the Plaintiff further failed to certify some of the progress claims. The Defendant contended that there was continuing and contumelious breach on the part of the Plaintiff to pay less than the certified amount and so the Defendant terminated the Contract vide a letter. The Defendant then initiated a suit in the Kuala Lumpur High Court against the Plaintiff on 25.4.2017. On 5.12.2017, the Defendant initiated Adjudication Proceeding against the Plaintiff under CIPAA.

On 4.1.2018, the Plaintiff filed an Originating Summon to declare that the CIPAA is inapplicable to the present dispute and also prayed for an injunction to stay the adjudication proceeding on the sole ground of a purported existence of an oral agreement which the Plaintiff contended that it brought the Contract outside the ambit of CIPAA.

In Light of View Esteem

Just about a month ago before the present

case, the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22* ("View Esteem") has handed down its judgment on the mechanism staying and setting aside an adjudication proceeding pursuant to CIPAA. The Court has declined to adopt the restrictive test that has been adopted in the United Kingdom, Australia and Singapore, but rather has decided to allow some degree of flexibility to the Courts to stay an adjudication. The litmus test for staying a decision is no longer limited to financial impecuniosity but is now extended to instances where 'clear errors' are found.

In doing so, the Federal Court in *View Esteem* made a distinction between a matter where an adjudicator has jurisdiction to hear the matter but where in deciding the adjudicator has exceeded his jurisdiction and one where the adjudicator has no jurisdiction to begin with. The latter was termed as the 'absolute lack of jurisdiction' and it was held that such jurisdictional challenge may be made at any time and not only be made upon a section 15 CIPAA application.

Injunction or Stay Pending Adjudication

In the present case, which is the first case decided after *View Esteem*, Lee Swee Seng J following *View Esteem*, has made the same distinctions on the two different jurisdictional challenge and further held that whilst dealing with core or original

jurisdiction, also termed as ‘absolute lack of jurisdiction’, an application to challenge a pending adjudication may be brought under a separate and standalone application for a declaration to that effect and even an application to stay the adjudication proceeding if the circumstances of the case so demand.

However, His Lordship emphasised that the instances under which the Court would injunct or stay pending adjudication proceeding would be rare. His Lordship held;

“[34] However whilst the procedure is available, it does not mean that in every instance that a challenge is made involving the core or original jurisdiction of the adjudicator, the High Court must then invariably consider the challenge on its merits and rule accordingly and in the meanwhile to stay the adjudication pending decision and thereafter to stay it altogether after the decision that the adjudicator has no jurisdiction to proceed as the CIPAA does not apply.”

In the present case, the injunction or stay application was not granted, as His Lordship held that it was not a matter plain and obvious in the Payment Claim that there was no jurisdiction. Furthermore, the second half of His Lordship judgment has also deliberated on the meaning of ‘construction contract made in writing’ in section 2 CIPAA held that the alleged oral agreement cannot possibly bring the contract outside the ambit of CIPAA, in view of a written contract existing between the parties.

Moving Forward

The upshot is that the Federal Court in View Esteem has decided, inter alia, that a separate stay application can be made against an adjudication decision without coming under section 15 CIPAA; whilst in the present case, Lee Swee Seng J has taken it one step further holding that a separate injunction or stay application can be made to challenge a pending adjudication.

In effect, this would mean that things have gotten a bit more complicated, as the Court can now injunct or stay an adjudication proceeding whilst it is still ongoing.

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