

CASE UPDATE:

PERBADANAN PERWIRA HARTA MALAYSIA v KUNTUM MELOR SDN BHD [2021] MLJU 1593

Introduction

Kuntum Melor Sdn Bhd was awarded a sum of RM918,103.27 with interest and costs in a claim for loss of profits vide adjudication proceedings commenced under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA Award”). The claim arose out of a terminated Contract in a Project known as the Proposed Development of the Pengkalan Udara Sendayan- Negeri Sembilan (Package 6B- External Works).

The Setting Aside Application

Perbadanan Perwira Harta Malaysia (PPHM) applied to set aside the CIPAA award on *inter alia* the following grounds:-

- a) That Kuntum Melor failed to comply with the mandatory provisions of Section 5(2) CIPAA ie to set out the due date for payment and to sufficiently describe the work/ services that the claim relates to;
- b) That the learned Adjudicator acted in breach of natural justice when he failed to consider PPHM’s defences in relation to the claim for loss and expense on the ground of estoppel;
- c) That the learned Adjudicator failed to answer the question upon which Kuntum Melor’s claim was premised ie that there has been a breach of contract on the part of PPHM;
- d) That the learned Adjudicator ignored Clause 44 of the Contract and gave his own definition of loss and expense in total disregard of the contractual provisions.

Court’s Findings

The learned Judge in allowing PPHM’s application to set aside the CIPAA Award held, as follows:-

- a) The word ‘date’ in Section 5(2)(a) CIPAA must be given its plain and ordinary meaning ie calendar date. Terms such as ‘immediate’ ‘instantly’, ‘promptly’ would not suffice;
- b) The learned Judge found on the facts of the case that a reasonable person in the position of PPHM who reads the bare 1 ½ page Payment Claim would not be able to understand the claim made in the Payment Claim because of the lack of sufficient particulars to describe the works or services to which the payment claim relate;

- c) The validity of the Payment Claim must be determined on the face of the Payment Claim itself and not by reference to documents subsequently produced in adjudication proceedings;
- d) The Adjudicator's finding of estoppel was based on the legal submissions made by Kuntum Melor in its Adjudication Reply which was premised on Section 115 Evidence Act 1950. This is against the express provisions of CIPAA which states that the Evidence Act 1950 shall not apply to adjudication proceedings under CIPAA;
- e) The Adjudicator did not apply his mind to the issue of breach of contract once he accepted Kuntum Melor's submissions that PPHM was estopped by conduct from denying the merits of the loss and expense claim;
- f) The Adjudicator had failed to consider the pre-requisites under Clause 44 in relation to the entitlement of Kuntum Melor to bring a claim for loss and expense.

If you are interested to find out more about CIPAA, please contact Anilraj Verdamanickam (anilraj@atlaw.com.my) or Michelle Lim (michelle@atlaw.com.my).