

CIPAA 2012 : Exceptional Circumstances for Conditional Stay of Adjudication Decision pending Litigation / Arbitration

MUDAJAYA CORPORATION BHD v KWSL BUILDERS SDN BHD AND ANOR CASE [BA-24C-52-08/2022 & BA-24C-56-08/2022]

19th April 2023

ISSUES

The Federal Court in the case of **View Esteem Sdn Bhd v Bina Puri Holdings Bhd** [2019] 5 CLJ 479 (“**View Esteem**”) held that a stay under section 16 of the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”) may be granted “*where there are clear errors, or to meet the justice of the individual case*”.

If the Court dismisses the formal application for stay under section 16 of CIPAA 2012, can the applicant still orally apply for a conditional stay thereafter?

If so, does the View Esteem test of clear errors or meeting justice of the individual case also apply to an application for conditional stay under section 16 of CIPAA 2012?

These questions were answered in the recently published grounds of judgment of the Shah Alam Construction High Court case of **Mudajaya Corporation Bhd v KWSL Builders Sdn Bhd and Anor Case** [BA-24C-52-08/2022 & BA-24C-56-08/2022].

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Plaintiff (“**MCB**”) appointed the Defendant (“**KWSL**”) to carry out the following Sub-Contract works (“**Works**”) in the same construction project (“**Project**”):-
 - (i) Acoustic element works vide Letter of Award (“**LA**”) dated 20.07.2016 (“**Acoustic Elements Works**”);
 - (ii) Infrastructure works vide LA dated 30.08.2016 (“**Infrastructure Works**”);
 - (iii) Supply and install reinforced concrete walkway vide LA dated 18.10.2016 (“**Walkway Works**”);
 - (iv) Architectural works vide LA dated 18.10.2016 (“**Architectural Works**”);

- (v) Supply manpower services for the Project vide LA dated 28.03.2017 (“**Manpower Supply**”).
- (b) Following disputes between MCB and KWSL, MCB filed a High Court Suit against KWSL (“**MCB’s Suit**”);
- (c) On the other hand, KWSL commenced adjudication against MCB and obtained several adjudication decisions in its favour:-
 - (i) In relation to the Walkway Works, KWSL obtained an adjudication decision dated 19.01.2022 for the adjudicated sum of RM500,736.24 [**“Adjudicated Amount (19.01.2022)”**] with interest and costs [**“Adjudication Decision (19.01.2022)”**];
 - (ii) KWSL also obtained an adjudication decision dated 02.03.2022 for the adjudicated sum of RM490,881.76 [**“Adjudicated Amount (02.03.2022)”**] with interest and costs [**“Adjudication Decision (02.03.2022)”**];
 - (iii) In relation to the Acoustic Elements Works, KWSL obtained an adjudication decision dated 21.03.2022 for the adjudicated sum of RM2,342,148.98 [**“Adjudicated Amount (21.03.2022)”**] with interest and costs [**“Adjudication Decision (21.03.2022)”**].

[Collectively referred to as “**3 Previous Adjudication Decisions**”]

- (d) KWSL applied to enforce the 3 Previous Adjudication Decisions and MCB applied to set aside and for an absolute stay of the same pending disposal of MCB’s Suit;
- (e) Those applications came before the same Court as this matter. The enforcement applications were allowed for all 3 Previous Adjudication Decisions and the setting aside and absolute stay applications were dismissed.
- (f) Apart from the 3 Previous Adjudication Decisions, KWSL also obtained another adjudication decision dated 29.07.2022 in its favour [**“Adjudication Decision (29.07.2022)”**].
- (g) MCB filed the present application to set aside the Adjudication Decision (29.07.2022) or in the alternative, an Absolute Stay pending disposal of MCB’s Suit. On the other hand, KWSL applied to enforce the Adjudication Decision (29.07.2022). These applications form the subject matter of this case;
- (h) The application to enforce the Adjudication Decision (29.07.2022) was allowed and the applications for setting aside and Absolute Stay pending MCB’s Suit were dismissed;
- (i) Upon the dismissal of the Absolute Stay application, counsel for MCB orally applied for a stay on condition that the adjudicated sum of the Adjudication Decision (29.07.2022) would be deposited in an interest-bearing bank account in the name of KWSL’s solicitors pending the disposal of MCB’s Suit.



NOVEL ISSUES ARISING FROM THIS CASE

The oral application for conditional stay presented the following novel issues for the Court's consideration and determination:-

- (2) *in an application for an absolute stay of the enforcement of an adjudication decision (**Absolute Stay Application**) pending the disposal of litigation or arbitration between the parties [**Litigation/Arbitration**], can the court consider an oral application by learned counsel for a "conditional stay" of the enforcement of the adjudication decision pending the outcome of Litigation/Arbitration (**Conditional Stay Application**)?; and*
- (3) *in the exercise of the court's discretion to decide a Conditional Stay Application, whether the court may consider the fact that there were previous court orders under s 28(1) and (2) CIPAA which have allowed the enforcement of three earlier adjudication decisions between the same parties involved in the Conditional Stay Application."*

CAN THE COURT CONSIDER AN ORAL APPLICATION FOR CONDITIONAL STAY UPON DISMISSAL OF A FORMAL APPLICATION FOR ABSOLUTE STAY?

The Learned Judge found that the High Court can consider such oral application premised on the general prayer for relief:-

- "18. *Prayer 4 of MCB's OS has applied for any relief which the court finds appropriate and fit (**MCB's General Prayer For Relief**)...*
20. *Premised on MCB's General Prayer For Relief and the above appellate cases, this court may consider MCB's Oral Application (Conditional Stay). Furthermore, by virtue of O 1A and O 2 r 1(2) RC, in the court's administration of RC so as to achieve justice in these 2 OS, the court is not shackled by any technical non-compliance with RC. O 1A and O 2 r 1(2) RC provide as follows..."*

VIEW ESTEEM CONCERNS ABSOLUTE STAY NOT CONDITIONAL STAY

In determining the application for conditional stay, the Learned Judge found that the issue of conditional stay pending disposal of litigation / arbitration did not arise in View Esteem's case:-

- "21. *Firstly, **View Esteem** concerns the court's discretionary power to grant an absolute stay of enforcement of an adjudication decision pending the disposal of Litigation/Arbitration. The issue regarding the exercise of the court's discretion pursuant to s 16(1)(b) and (2) CIPAA to grant a conditional stay of enforcement of an adjudication decision pending the disposal of Litigation/Arbitration did not arise in View Esteem."*

TEST FOR CONDITIONAL STAY

Consequently and as far as the test for Conditional Stay is concerned, the Learned Judge is of the view that the general rule is that the Courts will not exercise the discretion to allow a

Conditional Stay (“**General Rule**”). The exception to the General Rule is where the applicant has demonstrated exceptional circumstances for the Court to exercise judicial discretion in departing from the General Rule (“**Exception**”).

The Learned Judge also held that the exercise of such judicial discretion is dependent on the exceptional circumstances of the individual case and the consequent written judgment cannot constitute a binding legal precedent in terms of the doctrine of stare decisis.

The relevant part from the Grounds of Judgment on the test is reproduced below:-

23. *I am of the following view regarding the exercise of the court’s discretion to allow or not a Conditional Stay Application:*

(1) *the burden to persuade the court to grant a Conditional Stay Application rests solely on the party against whom an adjudication decision is delivered (X). The party in whose favour an adjudication decision is made (Y) has no onus to satisfy the court to dismiss a Conditional Stay Application;*

(2) *as a general rule, the court should not exercise its discretion to allow a Conditional Stay Application (**General Rule**). The reason for the General Rule is because the object of CIPAA [**Object (CIPAA)**] is to ensure that parties who have performed “construction work” (as defined in s 4 CIPAA), are paid for the construction work and are not deprived of cash flow (the life-blood of the construction industry) - please refer to the Long Title to CIPAA (CIPAA is to “facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry”) and the judgment of the Federal Court delivered by Mohd. Zawawi Salleh FCJ in **Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal** [2019] 5 AMR 516, at [51].*

If a Conditional Stay Application is allowed as a matter of course, this will defeat the Object (CIPAA);

(3) *X has to persuade the court that there exist exceptional circumstances for the court to depart from the General Rule and to grant a Conditional Stay Application (**Exception**); and*

(4) *if X can show the existence of exceptional circumstances to warrant the exercise of the court’s discretion to allow a Conditional Stay Application, namely, the Exception may be resorted to by the court, the exercise of such a judicial discretion is necessarily dependent on the exceptional circumstances of the case and the consequent written judgment cannot thereby constitute a binding legal precedent from the view point of the doctrine of stare decisis.*

DECISION OF THE COURT

Premised on the facts of the case, the Learned Judge was satisfied that the Applicant has discharged the burden to demonstrate exceptional circumstances, namely:-

- (1) There are 3 Previous Adjudication Decisions where all 3 had been enforced by the High Court;
- (2) With the combined adjudicated amounts of the 3 Previous Adjudication Decisions plus interest and costs awarded, KWSL's cash flow would not be disrupted if the Court invokes the Exception in this case;
- (3) Correspondingly, the granting of the Conditional Stay is not contrary to the object of CIPAA 2012.

The Learned Judge also emphasized that the only reason for the granting of Conditional Stay is because the Learned Judge was persuaded to apply the Exception due to the enforcement of the 3 Previous Adjudication Decisions.

On a side note, the Learned Judge in granting the Conditional Stay, also stayed the commencement of winding up proceedings based on the Adjudication Decision (29.07.2022):-

*“(1) all forms of execution of the Adjudication Decision (29.7.2022) and **commencement of winding up proceedings based on the Adjudication Decision (29.7.2022) are stayed on the condition** that MCB shall deposit a total of -*

- (a) the Adjudicated Amount (29.7.2022);*
- (b) all interest on the Adjudicated Amount (29.7.2022) [as determined in the Adjudication Decision (29.7.2022)] as at 1.12.2022; and*
- (c) adjudication costs as stipulated in the Adjudication Decision (29.7.2022)...*
[Sum (Conditional Stay Order)]

shall be deposited by MCB in an interest-bearing bank account in the name of KWSL's solicitors on or before 5 pm, Friday, 23.12.2022 and KWSL's solicitors shall hold the Sum (Conditional Stay Order) (Condition) as a stakeholder until the disposal of MCB's Suit;”

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) Where a formal application for an Absolute Stay under section 16 CIPAA 2012 is dismissed, the Court can consider an oral application for a Conditional Stay if there is a general prayer for relief, i.e. a prayer for “any relief which the court finds appropriate and fit”.
- (b) The Federal Court decision of View Esteem only concerns Absolute Stay and the issue of Conditional Stay did not arise.
- (c) The General Rule is that the Courts will not allow a Conditional Stay. The Courts will only exercise judicial discretion to depart from the General Rule where there are exceptional circumstances.
- (d) In granting conditional stay, the Court may also stay the commencement of winding up proceedings based on the adjudication decision.

If you have any questions or comments on this article, please contact:-

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