

CIPAA 2012 : Forbearance, Estoppel and Ouster by Contract

CHUA HENG HONG & ORS V S LITE ELECTRICAL AND ENGINEERING SDN BHD & ANOR [2023] 1 LNS 335

30th August 2023

ISSUES

If a party has agreed to forbear payment for construction work, can such forbearance be a basis to apply to the Court to stop the said party from proceeding with adjudication? Given such forbearance, is the said party estopped from initiating / proceeding with adjudication?

More importantly, can the right to statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 be ousted by contractual agreement?

These questions were answered in the recent Penang High Court decision in **Chua Heng Hong & Ors v S Lite Electrical and Engineering Sdn Bhd & Anor [2023] 1 LNS 335**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The 1st and 2nd Plaintiffs (“**P1**” and “**P2**” respectively) were the directors of the 3rd Plaintiff, Hong Poh Engineering Construction Sdn Bhd (“**P3**”). P1 is also the sole shareholder of P3.
- (b) The 2nd Defendant (“**D2**”) is the founding director and one of the shareholders of the 1st Defendant, S Lite Electrical and Engineering Sdn Bhd (“**D1**”).
- (c) Sometime in 2016, P1 and P2 invested in and became 50% shareholders of D1 and there was a mutual understanding between P1, P2 and D2 that all works secured by P3 will be directly and exclusively subcontracted to D1.
- (d) Premised on this understanding, P3 subcontracted several construction projects to D1 (“**Sub-Contracts**”).

- (e) Subsequently, P1 and P2 decided to divest their investment in D1, resulting in them resigning as directors of D1 and selling their 50% shares in D1 to D2.
- (f) On 13.10.2020, P1 and P2 as well as D1 and D2 entered in a Share Sale Agreement (“SSA”). P3 is not a party to the SSA.
- (g) The SSA provides, amongst others, that:-
 - (1) There is an outstanding sum of RM2,912,637.88 due and payable by P3 to D1 for the projects listed in Appendix A therein (“**Outstanding Sum**”);
 - (2) The project owners, where the aforesaid Outstanding Sum arose from, have defaulted in payment to P3 and P3 would commence legal action to recover the amount outstanding. D1 also agreed to absorb 50% of P3 legal fees in recovering these outstanding;
 - (3) Critically, clause 9.3 of the SSA provides as follows:-

“The Parties agree that the Outstanding Sum or any part thereof less the portion of the costs agreed at Clause 9.2 above will only be repaid by Hong Poh to the Company upon recovery and receipt of the amount from the owner(s) of the Project(s).”

For context, Hong Poh is P3 whereas the Company is D1.

- (h) Notwithstanding the execution of the SSA, D1 initiated 6 adjudications against P3 where all 6 of them were heard by different adjudicators. 5 adjudications were in favour of D1 whilst 1 was still pending decision at of the hearing of this case.
- (i) P3 raised the issue of the SSA, specifically clause 9.3 therein in all these adjudications but it did not find favour with all the 5 adjudicators. In fact, the 1st adjudication decision had already been enforced (OS 25) and the setting aside application (OS 24) had also been dismissed pursuant to sections 28 and 15 of CIPAA 2012 respectively.

PROCEEDINGS BEFORE THE HIGH COURT

Against this backdrop, the Plaintiffs filed the present application, amongst others, to apply for:-

- (i) A declaration that the aforesaid 6 adjudication proceedings are void and in breach of Clause 9 of the SSA;

- (ii) An order to stay all execution and enforcement premised on any of the 6 adjudications;
and
- (iii) An order preventing D1 from claiming / commencing proceedings against P3 for the Outstanding Sum in line with Clause 9 of the SSA.

The cornerstone of the Plaintiffs' case is that D1 had consented to the manner of recovery and repayment of the Outstanding Sum, as stipulated under Clause 9 of the SSA and that the Defendants should be bound by their obligations thereunder not to sue P3, as P1 and P2 had complied with a major portion of the obligations under the SSA to the benefit of the Defendants.

DECISION OF THE HIGH COURT

In dismissing the Plaintiffs' application, the Learned Judge found that:-

- (1) The adjudicators in the 6 adjudications had core jurisdiction to adjudicate the claims as the claims were all payment claims in relation to construction contracts. As such, the complaint does not warrant interference of the Court.
- (2) P3 is not privy to the SSA and cannot rely on the same.
- (3) The Plaintiffs are barred by laches.
- (4) Right to adjudication cannot be ousted by contract.

- **Jurisdiction**

The Learned Judge recognized that the Plaintiffs' case is essentially predicated on estoppel arising from Clause 9.3 of the SSA where there was a promise of forbearance by the Defendants. However, the Learned Judge was of the considered view that "*these are not issues which relate to the issue of core jurisdiction of the learned Adjudicator warranting intervention*" by the Court.

The Learned Judge also recognised that the recourse available to the Plaintiff in these circumstances is to apply to set aside the adjudication decisions under section 15 of CIPAA 2012 and not via the present application for declaration.

Further, the Learned Judge noted that the issue arising from Clause 9 had been ventilated before the 6 different adjudicators and as such, the recourse available to the Plaintiffs is to apply to set aside the adjudication decision(s) instead of seeking for declarations in this application.

- Privity

Although P3 stood to benefit from the provision of Clause 9.3, the Learned Judge found that P3 is not privity to the SSA and cannot rely on the same.

The Learned Judge also observed that some of the adjudicators in the 6 adjudications had highlighted that P3 is not a party to the SSA and thus the SSA cannot be relied upon by P3 in defending those adjudications.

- Laches

In short, the Defendants' contentions are that the Plaintiffs had slept on their rights in making this application as it should have been taken upon when the first adjudication claim was being presented and not after these claims had been adjudicated. The Learned Judge found merit in this submission and held that:-

"[37] In my considered view, there is merit in the Defendants' contention that the Plaintiffs ought to have taken out this application upon the first adjudication claim being presented and not now belatedly after all the adjudication claims have been proceeded with and awards handed down after the effect of clause 9 of the said SSA being ventilated unsuccessfully in each of them. No explanation has been given by the Plaintiffs for this delay. It is certainly prejudicial to D1 to have participated in all the adjudication proceedings and succeeded in them (including the proceedings in OS 24 and OS 25) to have to then defend these proceedings again on the same arguments. It is in my view an attempt by the Plaintiffs to have the proverbial second bite of the cherry which the law does not allow. [See the Federal Court case of Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1]."

- Ouster by Contract

The Defendants also resisted the application on the premise that the statutory right to adjudication cannot be ousted by contract as the statutory right to adjudication prevails over any contractual agreements to the contrary between parties.

In relation to this, the Learned Judge held that D1's statutory right to adjudication cannot be ousted by Clause 9.3 of the SSA and that a right given by a statute can only be taken away by statute:-

*"[41] Whilst **Martego (supra)** dealt with the issue of whether the existence of an arbitration clause ousted adjudication, the principle to be applied is the same and I would conclude that the Defendants' statutory right to refer its payment claims to adjudication cannot be ousted by clause 9.3 of the said SSA."*



[42] Further, in the recent decision of the Federal Court in the case of *Rohasassets Sdn Bhd (formerly known as Wisma Perkasa Sdn Bhd) v. Weatherford (M) Sdn Bhd & Anor* [2020] 1 MLJ 557, the Federal Court had the opportunity to consider a right of a landlord to double rent as provided by **Section 28(4) (a) of the Civil law Act 1956** and had held that a right given by statute can only be taken away by statute.

[43] As such, I am of the firm view that the Defendants' statutory right to refer its payment claims to adjudication was not ousted by clause 9.3 of the said SSA."

MOVING FORWARD

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

- (a) The issues of estoppel and forbearance do not affect the core jurisdiction of the adjudicator and hence would not warrant the Court's interference on the conduct of the adjudication.
- (b) A party should act expeditiously if it intends to file any application(s) that has effect of restraining the conduct of adjudication.
- (c) The statutory right to adjudication cannot be ousted by way of contractual agreement to the contrary.

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

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