

## ADJUDICATION

## APPLICABILITY OF ADMINISTRATIVE LAW PRINCIPLES IN THE CONTEXT OF STATUTORY ADJUDICATION

In August 2020, T Kuhendran, Susan Tan Shu Shuen, and Noor Sumaeya Sofea Shamsudin from our Construction Dispute Resolution practice group have successfully obtained an order to enforce an adjudication decision granted in favour of the Main Contractor (“**Plaintiff**”) in the sum of MYR10,053,537.15 and resisted the Employer’s (“**Defendant**”) application to set aside the same.

This article discusses the facts, issues, and judgment of the case *PJ Midtown Development Sdn Bhd v Pembinaan Mitrajaya Sdn Bhd and another summons [2020] MLJU 1432, High Court*.

**FACTS OF CASE** As a matter of background, by way of a letter of award, the Plaintiff was appointed by the Defendant as the Main Contractor for a project involving the construction of a serviced apartment in Kuala Lumpur (“**Project**”).

There were disputes and differences that arose between the parties in respect of the construction of the Project, and as a result, the Defendant failed to pay the Plaintiff in respect of several interim certificates pursuant to the contract. The Plaintiff then initiated adjudication proceedings against the Defendant and obtained an Adjudication Decision in its favour.

According to the Adjudication Decision, the Defendant is required to amongst others, pay the Plaintiff the Adjudicated sum of MYR10,053,537.15 (“**Decision**”). Dissatisfied with the Decision, the Defendant filed an application to set aside the same, while the Plaintiff applied to enforce the Decision.

**ISSUES** The issues to be determined by the Court were as follows:

- a) Whether the Adjudicator’s refusal to hold an oral hearing (notwithstanding a specific request by the Defendant) amounted to a breach of natural justice;
- b) Whether the Adjudicator has acted in excess of jurisdiction in the narrow sense by having decided on issues which were neither pleaded nor raised in the Plaintiff’s payment claim nor adjudication claim; and
- c) Whether the Adjudicator has acted in excess of jurisdiction in the broad sense by having committed errors of law based on the judicial review cases relied on by the Defendant.

**FINDINGS OF THE COURT** Upon considering the submissions advanced by counsels for the Plaintiff and the Defendant, the Court made the following findings in respect of each of the issue above:

- a) *Whether the Adjudicator’s refusal to hold an oral hearing (notwithstanding a specific request by the Defendant) amounted to a breach of natural justice*

It was the Defendant’s position that an oral hearing is necessary for the Architect to be heard on the allegations of its lack of independence and conspiracy by the Plaintiff. In this respect, the learned High Court Judge held that the Adjudicator had not denied the Defendant natural justice by refusing to hold an oral hearing as requested on the following grounds:

- i) The Adjudicator had allowed the parties to make clarification submissions to him, and there was no limitation fixed by the Adjudicator on what can or cannot be submitted by parties;
- ii) The Defendant could in the circumstance serve a statutory declaration of the Architect or relevant contemporary documents or both to respond to the lack of independence and mal-administration of the contract by the Architect as alleged by the Plaintiff; and

- iii) There was no contemporaneous attempt by the Defendant to apply to the Adjudicator at the material time for an extension of time to serve the statutory declaration of the Architect or additional relevant documents if that was indeed the difficulty encountered.

b) Whether the Adjudicator has acted in excess of jurisdiction in the narrow sense by having decided on issues which were neither pleaded nor raised in the Plaintiff's payment claim nor adjudication claim, but raised in the adjudication reply

The High Court held that the new issues raised in the adjudication reply were made in rebuttal to the imposition of liquidated ascertained damages raised by the Defendant in its adjudication response. Therefore, the Adjudicator has acted within the purview of Section 27(1) of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) notwithstanding that the issues were not raised in the Plaintiff's payment claim and adjudication claim.

c) Whether the Adjudicator has acted in excess of jurisdiction in the broad sense by having committed errors of law based on the judicial review cases relied on by the Defendant

On this issue, the learned High Court Judge held as follows:

- i) The meaning of the word “jurisdiction” in CIPAA must be interpreted in the context of the jurisprudence of statutory adjudication. The administrative law meaning of the word “jurisdiction” which encompasses jurisdictional errors of law in the decision making has no place in statutory adjudication. The reasoning given was because judicial review under administrative law concerns final decisions made by public bodies, whereas in contrast, statutory adjudication decisions made by private adjudicators are only binding, but not

final as provided under Section 13 of CIPAA;

- ii) Since adjudication decisions are not final and correctable finally by arbitration or civil litigation in court, errors of law committed in the making of adjudication decisions will therefore not attract the administrative law principle of jurisdictional errors of law;
- iii) It is not fatal for an adjudicator to make a wrong answer including making an erroneous interpretation or application of law in the adjudication decision so long the right question has been identified and addressed; and
- iv) Therefore, the Adjudicator did not act in excess of his jurisdiction in the broad sense by reason that the Defendant's challenge premised on administrative law has no relevance to statutory adjudication.

Consequently, the Court dismissed the Defendant's application to set aside the Adjudication Decision and allowed the Plaintiff's application to enforce the same.

**SIGNIFICANCE** This is the first case wherein the Court has made a clear distinction between decisions made in the context of judicial review cases, and statutory adjudication cases. As can be observed from the above, the distinction can be seen from two aspects, namely the finality of the decision and nature of the decision maker. To illustrate:

Description	Judicial Review Cases	Statutory Adjudication Cases
Finality of Decision	Final	Not final and is only binding
Nature of Decision Maker	Made by public bodies	Made by private adjudicators

The distinguishing factors above therefore disqualify the application of administrative law principles in judicial review cases, to cases in relation to statutory adjudication. It is now apparent that jurisdictional errors of law in decision making has no place in statutory adjudication and that as long as the right question has been identified and addressed by the Adjudicator, the Adjudication Decision stands and remains enforceable despite that the Adjudicator may have fallen into error in arriving at his legal conclusions.

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