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## Non-Application Of The Construction Industry Payment And Adjudication Act 2012

*Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd [2021] MLJU 1964*

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The Construction Industry Payment and Adjudication Act 2012 (CIPAA) confers an important statutory right to parties of construction contracts. It was designed to facilitate regular and timely payment. Additionally, it also aims to provide a mechanism for speedy dispute resolution through adjudication and remedies for the recovery of payment in the construction industry. Essentially, the CIPAA was meant to solve cash flow issues which have plagued the construction industry.

The CIPAA applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government. However, when does the CIPAA not apply?

The CIPAA does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for personal occupation. The Kuala Lumpur High Court in *Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd* [2021] MLJU 1964 clarifies the non-application of the CIPAA.

### Facts

This case concerned a dispute between an individual, Tan Sri Dato' Yap Suan Chee (Plaintiff) and a construction company named CLT Contract Sdn Bhd (Defendant). The Plaintiff engaged the Defendant for works described as "Supply Install Plaster Ceiling Work" (Works) by way of Work Order No. 9 dated 6.5.2015 (Contract).

The Defendant claimed that it had executed and completed all of the Works including all variation orders pursuant to the

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Contract but the Plaintiff had failed, refused and/or neglected to make full payment for the total outstanding sum of RM149,661.74. The Defendant then commenced adjudication proceedings in accordance with the CIPAA. An adjudicator was appointed. However, on 26.2.2021, the Plaintiff's solicitors wrote to the adjudicator inviting her to withdraw as the adjudicator as she does not have the requisite jurisdiction to decide on the dispute as the adjudication proceedings was allegedly invalidly commenced and is prohibited by virtue of section 3 of the CIPAA, which is set out below:

*"This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation."*

The adjudicator replied on 1 March 2021, stating that:

- (a) It is common for parties to raise objections on jurisdiction in adjudication proceedings but that does not mean that the adjudicator has to withdraw whenever such an objection is raised.
- (b) The jurisdiction objection warrants full arguments and responses for proper consideration.
- (c) The Plaintiff is invited to fully ventilate the jurisdiction objection with authorities and evidence to support its contention in the adjudication response and the Defendant can respond to the same in the adjudication reply.
- (d) The prior directions given are maintained with liberty to the parties to apply for an extension of time.

This led to the Plaintiff filing a civil suit at the High Court seeking the following:

- (a) A declaration that the adjudication proceeding is null and void.
- (b) The notice of adjudication dated 13.3.2020 issued by the Defendant be set aside.

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- (c) The adjudication be stayed until the disposal of the civil suit by way of originating summons.

In response to these questions, during the hearing, the parties agreed that:

- (a) The Contract is a “construction contract” as defined in Section 4 of the CIPAA.
- (b) The nature of the Works falls within the meaning of “construction work” in Section 4 of the CIPAA.
- (c) The statutory requirements as stipulated in Section 3 of the CIPAA, namely that:
  - (i) The construction contract was entered into by a natural person.
  - (ii) The construction work is in respect of a building which is less than four storeys high.
  - (iii) The construction work wholly intended for the occupation of the natural person, is to be read cumulatively i.e. for a construction contract to come within the excluded class of contracts, it must satisfy the three requirements in Section 3 of the CIPAA and in the event that one criteria is absent, the adjudicator has jurisdiction to adjudicate the dispute between the parties under the provisions of the CIPAA.
- (d) The Contract was entered into by Plaintiff who is a natural person.

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## Issues Before The Court

The main issue before the High Court was whether the construction contract entered into by the Plaintiff for the construction work is in respect of a building which is less than four storeys high and wholly intended for the Plaintiff's occupation within the meaning of Section of the CIPAA, such that the adjudication proceedings commenced by the Defendant against the Plaintiff is null and void. The Court divided this issue into 2 issues as follows:

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## About Us

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1. Whether the construction work is in respect of a building which is less than four storeys high.
2. Whether the construction work is wholly intended for the Plaintiff's occupation.

## Determination

The construction plans showed that the building had two basement levels and three other floors and the work covered the two basement levels. The court accepted that the level of a building is akin to a floor and in this case, there is a plan for each floor including the basement. The court was satisfied that the construction is for a building that has 5 storeys and thus, the adjudicator had jurisdiction to hear the dispute here.

The court further held that the Plaintiff had failed to satisfy one of the three requirements for Section 3 of the CIPAA to apply in order for the contract to be excluded from the application of the CIPAA i.e. that the works in respect of a building which is less than four storeys high.

## Conclusion

Traditionally, the words "four storeys high" in Section 3 of the CIPAA were construed to mean levels above ground level. However, the case of *Tan Sri Dato' Yap Suan Chee* clarifies that storey means the level of a building or a floor, which includes the basement levels, not only the levels above ground level. This case provides welcomed clarity to the non-application of the CIPAA.

Authored by Shaun Tan, a Senior Associate with the firm's Construction and Arbitration practice.

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