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Adjudicator's Duty Of Impartiality – *Itramas Technology Sdn Bhd v Savelite Engineering Sdn Bhd & Other Cases*

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In *Itramas Technology Sdn Bhd v Savelite Engineering Sdn Bhd & Other Cases* [2021] MLJU 1382, the High Court held that it is of paramount importance that an adjudicator adheres to the principles of impartiality and natural justice in delivering an adjudication decision. Failure to adhere to these principles may risk the decision being set aside pursuant to Section 15(b) and/or Section 15(c) of the Construction Industry Payment and Adjudication Act 2012 (CIPAA).

Brief Facts

A dispute arose between Savelite Engineering Sdn Bhd (Savelite) and Itramas Technology Sdn Bhd (Itramas) in respect of a construction project. Savelite claimed to have completed the works for Itramas and alleged that a sum of RM2,577,081.62 was due (Claimed Sum). However, Itramas contended that due to Savelite's delay, Itramas was entitled to impose liquidated damages.

Adjudication Proceedings

This resulted in adjudication proceedings being commenced by Savelite, whereby after the submission of the adjudication claim to the Adjudication Reply, a key issue that the Adjudicator faced was whether:

- To accept Itramas's copy of the Schedule 17 of the contract which contained the rate of liquidated damages; or
- To accept Savelite's copy of the Schedule 17 which is signed and initialed by parties but does not state the rate for the liquidated damages.

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In this regard, the Adjudicator made the following orders:

- a) On 23.3.2020, the Adjudicator issued an “Inquisitorial Order to Ascertain The Facts and Law of Schedule 17 – LD” to Itramas only and required Itramas to revert within 1 day from the date of the Adjudicator’s Order dated 23.3.2020.
- b) On 24.3.2020, Itramas’s solicitors responded and stated amongst others that it is impossible for them to comply with the order given the short deadline and also due to the Movement Control Order (MCO) which is imposed in the country.
- c) On 24.3.2020, the Adjudicator subsequently issued to Savelite only an “Inquisitorial Order to Ascertain The Facts and Law of Schedule 17 – LD” principally for Savelite to provide its reply to the Adjudicator within 2 days from the Adjudicator’s Order dated 24.3.2020, i.e. by 26.3.2020.
- d) On 25.3.2020, Savelite’s solicitors sought an extension of time till 27.3.2020 to provide its written reply to the Adjudicator. This was allowed by the Adjudicator.
- e) On 27.3.2020, Savelite’s solicitors sent in their written reply to the Adjudicator.
- f) On 28.3.2020, the Adjudicator had sent an email to both parties and stated, amongst others, that Itramas has failed to prove that the Schedule 17-LD contains the calculation of delay damages as per the document inserted in the Adjudication Response and that access to the physical copy of the bound volume contract documents by Itramas is unnecessary as such an important signed contract document should have been submitted by Itramas under its payment response and/or Adjudication Response instead of the Inquisitorial Order.
- g) On 13.4.2020, the Adjudicator delivered his Adjudication Decision wherein he had allowed the Claimed Sum to Savelite (together with interests and costs).

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The above events subsequently led Itramas to amongst others, file an application to set aside the Adjudication Decision on grounds that the Adjudicator had acted in breach of natural justice and had not acted impartially pursuant to Section 15(b) and Section 15(c) of the CIPAA 2012.

Distinction Between 1st Rule Of Natural Justice And Adjudicator's Duty To Act Impartially

In determining the issue, the High Court firstly referred to the United Kingdom's Court of Appeal case of *AMEC Capital Projects Ltd v Whitefrairs City Estates Ltd* [2005] 1 All ER 723 which had provided for two rules of natural justice which apply to adjudicators, namely:

- a) An adjudicator is to be unbiased in an adjudication (1st Rule).
- b) All parties have a right to prior notice and an effective opportunity to make representation before an adjudicator makes an adjudication decision (2nd Rule).

The High Court went on to state that the 1st Rule (though overlapping with the duty to be impartial) is in fact distinct with the duty to be impartial given that:

- a) Parliament has expressly provided for the 1st Rule in Section 15(b) and Section 24(c) the CIPAA 2012.
- b) The duty to be impartial is required by the legislature in Sections 15(c), 24(b) and 24(d) the CIPAA 2012.

Biasness Of Adjudicator

The High Court held that Itramas had successfully proven that the Adjudicator had breached the 1st Rule in fact and in the objection perception of a fair minded and informed observer.

In this regard, the High Court found that there was actual bias on the Adjudicator's part as:

- a) The Adjudicator had issued the Inquisitorial Order only to Itramas, requesting for them to revert within 1 day

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during the period when the MCO was in force. This is notwithstanding that Itramas, which is not part of the “essential services”, was not able to access its office premises to obtain the necessary contractual documents as requested by the Adjudicator.

- b) The Adjudicator only gave one day for Itramas to comply with the Adjudicator’s Order dated 23.3.2020. An unbiased adjudicator would not have given such an extremely short time period for Itramas to comply with the Order.
- c) Further, when Itramas had sent the letter dated 24.3.2020 to the Adjudicator explaining its circumstances, the Adjudicator should have accepted the contents of Itramas’ letter as an unbiased adjudicator.

Whether Adjudicator Had Breached The Duty To Be Impartial?

Insofar as Section 15(c) of the CIPAA 2012 is concerned, the High Court held that the Adjudicator had acted partially against Itramas in favour of Savelite as the Adjudicator gave only one day for Itramas to respond to its Adjudicator’s Order dated 23.3.2020 but gave two days for Savelite to reply to the Adjudicator’s Order dated 24.3.2020.

The High Court further held that an impartial adjudicator should have treated both claimant and respondent equally and fairly. There is no reason why Savelite should be treated by the Adjudicator partially vis-à-vis Itramas by having an additional day to reply to the Adjudicator’s Order.

Due to the reasons above, the High Court allowed Itramas’ application to set aside the Adjudication Decision.

Conclusion

Accordingly, adjudicators ought to be reminded that they have to act impartially to both parties and that they ought not to impose unreasonable deadlines on either parties. This is particularly if either party would be severely prejudiced or handicapped by the Adjudicator’s order or if there are any

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circumstances which would prevent parties from making its case e.g. the Movement Control Order being imposed.

Further, from the perspective of the adjudication parties, it can be seen that in the event the adjudicators had acted partially against any party, the same can be set aside pursuant to both Section 15(b) and Section 15(c) of the CIPAA 2012.

Authored by Clament Tay, an associate from the firm's Dispute Resolution practice.

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