IN THE HIGH COURT OF MALAYA AT SHAH ALAM

IN THE STATE OF SELANGOR DARUL EHSAN, MALAYSIA

[ORIGINATING SUMMONS NO: BA-24C(ARB)-2-02/2020]

BETWEEN

KNM PROCESS SYSTEMS SDN BHD

(Co. No.: 200140-X) **... PLAINTIFF**

AND

CYPARK SDN BHD

(Co. No.: 477910-K) **... DEFENDANT**

JUDGMENT

(Court enclosure nos. 1, 3, 28 and 35)

A. Introduction

[1] By consent of parties, this originating summons in court enclosure no. 1 (**OS**) and three applications in court enclosure nos. 3, 28 and 35 ("**Enc. 3**", "**Enc. 28**" and "**Enc. 35**") had been disposed of by way of "*Skype*". This was because one of the two bank guarantees involved in this case (**2 BG's**) would lapse on 31.3.2020 during the enforcement of the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 (**PCID**). Encs. 3, 28 and 35 will be collectively referred to in this judgment as "**3 Encs.**".

[2] This OS and 3 Encs. concern the exercise of the court's discretion to grant interim injunctions to restrain the Defendant's rights under the 2 BG's pursuant to s. 11(1)(a) and/or (b) of the Arbitration Act 2005 (**AA**) pending the commencement and disposal of arbitration which had been agreed to by the parties in this case (**Arbitration**). The novel issue that arises is whether the court may grant interim injunctions regarding the 2 BG's on a condition that the party who has caused the issuance of the 2 BG's shall ensure that the 2 BG's are renewed and can be enforced until the issuance of the final arbitral award in the Arbitration (**Final Award**). In this regard, has the Arbitration (Amendment) (No. 2) Act 2018 (**Act A1569**) narrowed the scope of the court's discretionary power to grant interim measures pursuant to s. 11(1)(a) to (e) AA?

B. Background

[3] The plaintiff company (**Plaintiff**) and "*Hitachi Zosen Corporation of Japan*" (**Hitachi**) have formed a consortium named "*SHK Consortium*" (**Consortium**).

[4] There is a project, "*Solid Waste Modular Advanced Recovery and Treatment Systems Waste Management Solutions*" at Ladang Tanah Merah, Negeri Sembilan (**Project**). The defendant company (**Defendant**) has awarded a contract to perform a portion of the Project, "*Engineering, Procurement, Construction and Commissioning*", to the Consortium (**Contract**).

[5] According to the Contract, among others:

(1) the Plaintiff is responsible for the "*onshore*" portion of the Contract (with a total value of RM137,013,083.50) (**Onshore Portion**) while Hitachi is responsible for its

"*offshore*" part (with a value of JPY¥3,761,355,000.00) (**Offshore Portion**); and

(2) the Plaintiff is required to provide the following 2 BG's to the Defendant -

(a) an "*Advance Payment Guarantee*" in a sum of RM13,300,000.00 (**APG**) is provided by the Plaintiff to the Defendant because the latter has paid in advance RM13,300,000.00 to the former. The APG was first issued by Malayan Banking Bhd. to the Defendant on 3.12.2015 and lapsed on 7.11.2016. A second APG was issued by BNP Paribas Malaysia Bhd. (**BNP**) to the Defendant on 1.11.2016 and would lapse on 31.3.2020; and

(b) a performance guarantee for an amount of RM13,300,000.00 (**PG**) was given by Affin Bank Bhd. (**ABB**) to the Defendant and would lapse on 30.9.2022.

[6] The Plaintiff has alleged, among others, as follows:

(1) sometime in January 2016, the Plaintiff encountered shallow hard rock on the work site (**Hard Rock Problem**) which prevented the Plaintiff from proceeding with piling works within the meaning of "*Milestone 3*" in the Contract;

(2) due to the Hard Rock Problem, the Plaintiff applied to the Defendant for an extension of time (**EOT**) but this was refused by the Defendant [**Defendant's Refusal (EOT)**]. The Defendant then imposed damages for the Plaintiff's delay in performing the Contract in a sum of

RM12,150,000.00 (**Delay Damages**). The Plaintiff has disputed the Defendant's claim for Delay Damages;

(3) by a letter dated 6.4.2018, the Consortium decided to suspend work under the Contract (**Suspension Notice**). The Defendant has claimed that the Suspension Notice amounts to a breach of the Contract by the Consortium for which the Defendant has reserved its right to take action. Upon receipt of the Suspension Notice, the Defendant did not however terminate the Contract;

(4) due to the Delay Damages, the Plaintiff could not pay its sub-contractors, suppliers and consultants. Hence, the Plaintiff entered into an "*Additional Advance Amounts*" arrangement with the Defendant (**Arrangement**) wherein -

(a) the Defendant paid a sum of RM1,747,791.42 to the Plaintiff; and

(b) the Defendant paid directly to the Plaintiff's sub-contractors, suppliers and consultants [**Defendant's Payments To Plaintiff's Creditors (Arrangement)**]. In this manner -

(i) the Defendant had arrogated to itself an "*absolute entitlement*" as to when, how and which sub-contractors, suppliers and consultants of the Plaintiff should be paid by the Defendant under the Arrangement; and

(ii) the Defendant had "*effectively*" taken over the performance of the Onshore Portion from the Plaintiff by way of "*micromanagement*";

(5) the Plaintiff had completed work in respect of "*Milestone 9*" on 14.3.2019. However, the Defendant had recommended in "*Work Done Certificate*" no. 12 (**Certificate 12**) a negative sum of RM21,455,941.30. In other words, according to Certificate 12, the Defendant did not recommend any payment for the Plaintiff's completion of Milestone 9 and instead the Plaintiff owed RM21,455,941.30 to the Defendant;

(6) the Defendant attempted to recoup the Defendant's Payments To Plaintiff's Creditors (Arrangement) by having recourse to the 2 BG's. The Plaintiff objected to such an attempt. Consequently, the Defendant relented and did not call on the 2 BG's as a method to recoup the Defendant's Payments To Plaintiff's Creditors (Arrangement);

(7) the Plaintiff, through the Consortium, had pursued many pressing issues with the Defendant regarding the Onshore Portion;

(8) by a letter dated 8.2.2020, the Defendant terminated the Contract with the Consortium. On the following day, 9.2.2020, the Defendant closed the work site. By way of letters dated 10.2.2020 to BNP and ABB, the Defendant issued calls on the 2 BG's (**Defendant's 2 Calls**); and

(9) the Defendant's 2 Calls were unconscionable and/or fraudulent because the Defendant had deliberately "*engineered*" an excuse for the Defendant's 2 Calls as follows -

(a) the Defendant wrongfully refused to pay the Plaintiff for work done with regard to the Onshore Portion;

(b) if not for the Arrangement, the Plaintiff would have been entitled to seek a release of the APG;

(c) the Defendant's unlawful termination of the Contract and Defendant's 2 Calls were designed to prevent the Plaintiff from obtaining Work Done Certificates from the Defendant in respect of Milestones 10 and 11; and

(d) the Defendant had also called on the BG's provided by Hitachi (**Hitachi's BG's**). The combined values of Hitachi's BG's are approximately the same as the 2 BG's. The total value for the 2 BG's and Hitachi's BG's is RM53,200,000.00. The Defendant had only paid a total of RM59,496,440.30 to the Plaintiff [excluding the Defendant's Payments To Plaintiff's Creditors (Arrangement) and Delay Damages]. In other words, if the Defendant's 2 Calls are allowed by this court, the Defendant would recoup substantially all the payments made by the Defendant to the Plaintiff.

[7] The Defendant denied the above averments by the Plaintiff and contended as follows, among others:

(1) the Defendant's Refusal (EOT) was irrelevant in this case because the Plaintiff only applied for EOT until 21.8.2019. The Contract was terminated on 8.2.2020 and the Onshore Portion remained incomplete on that date. Hence, even if the Defendant had granted an EOT, there was still a delay of 171 days on the Plaintiff's part [delay from 21.8.2019 (lapse of EOT sought by the Plaintiff) until 8.2.2020 (date of Defendant's termination of the Contract)];

(2) to ease the Consortium's cash flow problem and purely out of goodwill, the Defendant had paid directly a total sum of RM40,545,657.40 to the Consortium's sub-contractors, suppliers and consultants [**Defendant's Payments To Consortium's Creditors**];

(3) the Defendant had overpaid a sum of RM55,542,025.99 to the Consortium. Even if the Defendant had issued Work Done Certificates for Milestones 10 and 11, there was still an overpayment of RM34,262,025.99 by the Defendant to the Consortium;

(4) the Defendant did not recoup substantially all the payments made by the Defendant to the Consortium by calling on the 2 BG's and Hitachi's BG's. This is because there is at least a sum of RM76,281,411.68 which is payable by the Defendant to complete the outstanding work left by the Consortium under the Contract. This sum does not include -

(a) the cost to be incurred by the Defendant in rectifying all the defects in the work by the Consortium; and

(b) the Defendant's overpayment to the Consortium;

(5) even if there is an "*excess*" from the proceeds of the 2 BG's and Hitachi's BG's which is due to the Consortium, the Consortium has to recover this excess by way of arbitration as agreed in the Contract;

(6) the Defendant could not have acted fraudulently and/or unconscionably regarding the Defendant's 2 Calls because -

(a) the Consortium had committed various breaches of the Contract which led to the Defendant's

termination of the Contract. Such breaches by the Consortium entitled the Defendant to call on the PG's provided by the Consortium. The purpose of the PG's is to enable the Defendant to use the proceeds of the PG's to rectify the breaches of the Contract which have been committed by the Consortium; and

(b) the purpose of the APG's is to guarantee the Consortium's repayment of advance payments made by the Defendant to the Consortium (**Advance Payments**). In view of the Defendant's termination of the Contract, the Defendant has no choice but to call on the APG's so as to recoup the Advance Payments;

(7) the fact that Hitachi has not disputed the Defendant's 2 Calls, means that the Defendant's 2 Calls have been lawfully made; and

(8) this OS should be struck out because the Contract is entered into between the Consortium and Defendant. Hence, any action regarding the Contract should be filed in the names of both the Plaintiff and Hitachi.

C. Proceedings

C(1). OS and Enc. 3

[8] The Plaintiff prays for the following relief in this OS, among others:

(1) an injunction to restrain the Defendant from -

(a) making any call on the 2 BG's; and

(b) receiving any of the proceeds of the APG and PG from BNP and ABB respectively;

(2) a declaration that the Defendant's 2 Calls are "*wrong in law, fraudulent, unconscionable and/or null and void in law*"; and

(3) damages shall be assessed by the court and shall be paid by the Defendant to the Plaintiff.

[9] In Enc. 3, the Plaintiff applies *ex parte* for an interlocutory injunction to restrain the Defendant from making any call on the 2 BG's or from receiving any proceeds from the 2 BG's until the disposal of the OS.

[10] On 14.2.2020, with regard to Enc. 3, I granted an *ex parte* interlocutory injunction in the Plaintiff's favour.

[11] When learned counsel for the Plaintiff and Defendant appeared in this court on 24.2.2020 -

(1) both parties consent for the OS and Enc. 3 to be heard together; and

(2) I granted an *ad interim* interlocutory injunction in the Plaintiff's favour pending the disposal of the OS and Enc. 3.

[12] On 23.3.2020, after I have perused the written submission of the Plaintiff and Defendant as well as after hearing their oral submission (through Skype), I made the following order, among others (**1st Order**):

(1) two injunctions (**2 Injunctions**) are granted to restrain the Defendant from -

(a) making any call on the 2 BG's; and

(b) receiving any proceeds from the 2 BG's;

(2) the following two declarations (**2 Declarations**) are made -

(a) the Defendant's 2 Calls are unconscionable [**Declaration (Unconscionability)**]; and

(b) the rightful party to call on the 2 BG's is Cypark Smart Technology Sdn. Bhd. (**CST**) to whom the benefit of the 2 BG's has been assigned by the Defendant; and

(3) costs of RM25,000.00 shall be paid by the Defendant to the Plaintiff [**Costs (OS and Enc. 3)**] with 5% interest per annum on the Costs (OS and Enc. 3) from 23.3.2020 until the full payment of the Costs (OS and Enc. 3).

[13] The Defendant has filed two appeals (in respect of the OS and Enc. 3) to the Court of Appeal against the 1st Order (**Defendant's Appeals**).

C(2). Encs. 28 and 35

[14] In Enc. 28, the Defendant applies for, among others, the following order:

(1) the Plaintiff shall ensure the validity and enforceability of the 2 BG's until three months after the final disposal of the Defendant's Appeals [**1st Prayer (Enc. 28)**];

(2) if the court grants the 1st Prayer (Enc. 28) and if the Plaintiff does not ensure the validity and enforceability of the 2 BG's until three months after the final disposal of the

Defendant's Appeals, the 2 Injunctions and Declaration (Unconscionability) shall be deemed to be discharged; and

(3) pending the disposal of the Defendant's Appeals, both the Plaintiff and Defendant shall have liberty to apply to this court for any further order.

[15] The Defendant prays for the following relief, among others, in Enc. 35:

(1) the Plaintiff shall ensure the validity and enforceability of the 2 BG's until three months after the issuance of the Final Award [**1st Prayer (Enc. 35)**];

(2) the 2 Injunctions and Declaration (Unconscionability) shall be discharged upon the issuance of the Final Award;

(3) if the court grants the 1st Prayer (Enc. 35) and if the Plaintiff does not ensure the validity and enforceability of the 2 BG's until three months after the issuance of the Final Award, the 2 Injunctions and Declaration (Unconscionability) shall be deemed to be discharged; and

(4) pending the issuance of the Final Award, both parties shall have liberty to apply to this court for any further order.

[16] After perusing the parties' written submission and after hearing oral arguments by the parties' learned counsel on 28.3.2020 (through Skype), I vary the 1st Order as follows (**Amended Order**):

(1) the 2 Declarations are set aside;

(2) the 2 Injunctions are granted pending the issuance of the Final Award;

(3) the 2 Injunctions -

(a) shall be subject to a condition the Plaintiff shall ensure at all times that the 2 BG's are valid and enforceable until the issuance of the Final Award (**Condition**); and

(b) shall lapse if the Condition is not fulfilled by the Plaintiff;

(4) the Plaintiff and Defendant shall have liberty to apply to this court -

(a) to vary the 2 Injunctions; and/or

(b) for any further interim relief;

(5) Costs (OS and Enc. 3)] shall be paid by the Defendant to the Plaintiff with 5% interest per annum on the Costs (OS and Enc. 3) from 23.3.2020 until the full payment of the Costs (OS and Enc. 3); and

(6) costs for Enc. 28 and 35 amounting to RM10,000.00 shall follow the event of the Defendant's Appeals.

[17] After I had orally pronounced the Amended Order on 28.3.2020, the Plaintiff's learned counsel made an oral application to stay the enforcement of the Condition pending the disposal of the Plaintiff's appeal to the Court of Appeal against the Amended Order (**Plaintiff's Stay Application**).

[18] Learned counsel for both parties submitted orally on the Plaintiff's Stay Application. I dismiss the Plaintiff's Stay Application and the reasons for this decision will be given in Part L below.

[19] Two appeals have been lodged by the Plaintiff (in respect of Encs. 28 and 35) to the Court of Appeal against the Amended Order (**Plaintiff's Appeals**).

D. Issues

[20] The following questions arise in this OS and 3 Encs.:

(1) as the Contract is made between the Defendant and Consortium, can the Plaintiff file this OS without including Hitachi as a co-plaintiff? This is a novel issue;

(2) whether the court can grant declarations and/or damages in an application for interim measures under s. 11(1) AA;

(3) how should the court exercise its discretion under s. 11(1)(a) and (b) AA in respect of a call made on a BG? In this regard -

(a) whether the court should grant the 2 Injunctions pending the issuance of the Final Award on the following grounds -

(i) the Defendant's 2 Calls have been fraudulently made; **and/or**

(ii) it is unconscionable to make the Defendant's 2 Calls; and

(b) if the court grants the 2 Injunctions pending the issuance of the Final Award, can and should the court impose the Condition?; and

(4) pending the disposal of the Plaintiff's Appeals, whether the court should stay the execution of the Condition

pursuant to s. 73 of the Courts of Judicature Act 1964 (**CJA**) and r. 13 of the Rules of the Court of Appeal 1994 (**RCA**).

E. Disposal of OS and 3 Encs. by Skype

[21] In this case, the Defendant has filed a certificate of urgency to hear OS and Enc. 3 before the lapse of APC on 31.3.2020. After the 1st Order was made, the Defendant filed Encs. 28 and 35 on two certificates of urgency. To the credit of the Plaintiff's learned counsel, the Plaintiff consented to a hearing of disposal of OS and 3 Encs. by Skype (**Skype Hearing**). I have decided in *SS Precast Sdn Bhd v. Serba Dinamik Group Bhd & Ors* [2020] 3 AMR 615, at [21], that parties may consent to a Skype Hearing of notices of application (**NA**).

[22] Even if the Plaintiff had objected to a Skype Hearing of OS and 3 Encs., I would still have exercised my discretion under O. 28 r. 9, O. 32 rr. 10 and 11 read with O. 1A and O. 2 r. 1(2) of the Rules of Court 2012 (**RC**) to conduct the Skype Hearing. O. 1A, O. 2 r. 1(2), O. 28 r. 9, O. 32 rr. 10 and 11 RC provide as follows:

> "***Regard shall be to justice***
>
> *O. 1A* ***In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules****.*
>
> *O. 2 r. 1(2)* ***These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective****.*

Order for hearing *or trial*

O. 28 r. 9 Except where the Court disposes of a cause or matter begun by originating summons or orders it to be transferred to a Subordinate Court or makes an order in relation to it under rule 8 or other provisions of these Rules, ***the Court shall, on being satisfied that the cause or matter is ready for determination, make an order for the hearing*** *or trial thereof in accordance with this rule.*

Reference of matter to Judge

O. 32 r. 10 The Registrar may refer to a Judge any matter which he thinks should properly be decided by a Judge, and ***the Judge may*** *either* ***dispose of the matter*** *or refer it back to the Registrar, as the case may be,* ***with such directions as he thinks fit****.*

Power to direct hearing in Court

O. 32 r. 11(1) ***A notice of application*** *or an appeal* ***shall be heard in Chambers, subject to*** *any express provision of these Rules, any written law,* ***any direction of the Court*** *or any practice direction for the time being issued by the Chief Judge.*

(2) Any matter heard in Court in accordance with paragraph (1) may be adjourned from Court into Chambers."

(emphasis added).

There are three reasons for me to conduct a Skype Hearing of OS and 3 Encs., namely:

(1) the Defendant has a constitutional right to have access to justice as guaranteed by Article 5(1) of the Federal Constitution (**Fundamental Right of Access to Justice**) - please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 3 CLJ 507, at [4];

(2) if the court does not conduct a Skype Hearing of OS and 3 Encs., this will be contrary to the Defendant's Fundamental Right of Access to Justice. It is decided in **SS Precast**, at [43], as follows -

> "*[43]* ***If I have decided that the court cannot hold a VC if a party (X) applies for the VC and the opposing party does not consent to the VC, this will not only cause an injustice to X but will also render illusory X's fundamental right under Article 5(1) FC to have access to justice***."
>
> (emphasis added); and

(3) if this OS and Enc. 3 were not disposed before 31.3.2020, the APG would have lapsed. In such an event, the Defendant would be irreparably prejudiced even before the commencement of the Arbitration. It was therefore only just to conduct a Skype Hearing of OS and Enc. 3 as mandated by O. 1A and O. 2 r. 1(2) RC. In the interest of justice -

(a) NA's may be disposed of by the court through Skype pursuant to O. 32 rr. 10 and 11(1) RC - please refer to **SS Precast**, at [40]; and

(b) the court has a discretion to hear OS by way of Skype under O. 28 r. 9 RC (*the Court shall, on being satisfied that the cause or matter is ready for determination, make an order for the hearing*).

F. Can Plaintiff file this OS without joining Hitachi as co-plaintiff?

[23] I am not able to accede to the contention by the Defendant's learned counsel that since the Contract is entered into between the Consortium and Defendant, the OS should be struck out because the Plaintiff has failed to join Hitachi as a co-plaintiff in this case (**Non-Joinder of Hitachi**). My reasons are as follows:

(1) the Consortium is not a legal entity which is competent to contract. The Contract is made between the Plaintiff and Hitachi on one part and the Defendant on the other part. More importantly, the Contract has demarcated the Onshore Portion (which involves the Plaintiff) from the Offshore Portion (which concerns Hitachi). In other words, the Plaintiff can file this OS regarding the Onshore Portion without joining Hitachi as a co-plaintiff;

(2) O. 15 r. 6(1) RC provides as follows -

> "*Misjoinder and* ***non-joinder of parties***
>
> *O. 15 r. 6(1)* ***A cause or matter shall not be defeated by reason of the*** *misjoinder or* ***non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter***."

(emphasis added).

It is clear from O. 15 r. 6(1) RC that the OS and Enc. 3 "*shall not be defeated by reason*" of the Non-Joinder of Hitachi - please refer to *Mohd Hairie Haiqal Bhadif Sagas v. Mohd Zani Bin Che Din & Ors* [2020] AMEJ 260, at [17]; and

(3) according to O. 1A and O. 2 r. 1(2) RC, the RC [including O. 15 r. 6(1) RC] shall be administered with regard to the "*overriding interest of justice*". I fail to see how the Defendant is prejudiced in any manner by the Non-Joinder of Hitachi.

G. Scope of court's discretion under s. 11(1) AA

G(1). The postion before introduction of Act A1569

[24] Act A1569 came into effect on 8.5.2018. Prior to the enforcement of Act 1569, s. 11 AA provided as follows:

"*Arbitration agreement and* ***interim measures by High Court***

11(1) ***A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for****:*

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) appointment of a receiver;

(e) securing the amount in dispute;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) ***an interim injunction or any other interim measure****.*

(2) ***Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application****.*

(3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia."

(emphasis added).

[25] Arbitration (Amendment) Act 2011 (Act A1395) has only amended a part of s. 11(1)(e) AA and introduced a new subsection 11(3) AA.

[26] In the United Kingdom (**UK**), s. 44 of the Arbitration Act 1996 [**AA (UK)**] provides for the court's power "*in support of arbitral proceedings*". Section 44 AA (UK) states as follows:

"***Court powers exercisable in support of arbitral proceedings****.*

44(1) ***Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings****.*

(2) Those matters are -

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings -

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) ***the granting of an interim injunction*** *or the appointment of a receiver.*

(3) ***If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral***

proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) ***If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties***.

(5) ***In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively***.

(6) ***If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order***.

(7) ***The leave of the court is required for any appeal from a decision of the court under this section***."

(emphasis added).

[27] *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652 concerned an application for a Mareva injunction to aid an arbitration under the previous s. 11(1) AA (before the enforcement of Act A1569) [**Previous s. 11(1) AA**]. I have decided in **Bumi Armada Navigation**, at [44], that the Previous s. 11(1) AA is different from s. 44 AA (UK). The Court of Appeal has affirmed the decision in **Bumi Armada Navigation**.

[28] In **Bumi Armada Navigation**, at [46] and [47], I have expressed the following view regarding the court's discretionary powers under the Previous s. 11(1) AA:

> *"[46]* ***I am mindful of s. 8 AA which embodies a "minimalist" approach by our courts as explained by David Wong JCA in the Court of Appeal case of Capping Corp Ltd & Ors v. Aquawalk Sdn Bhd & Ors*** *[2013] 6 MLJ 579, at 588-589.* ***Section 8 AA has been amended by the Arbitration (Amendment) Act 2011 (2011 Amendment Act) and now reads as follows****:*
>
> > *"****No court shall intervene in matters governed by [AA] except where so provided in [AA]****."*
> >
> > *(emphasis added).*
>
> *In my opinion, s. 11(1) AA expressly allows judicial "intervention" in a very limited form - the court may grant interim (and not permanent) relief pending the disposal of arbitration. The court's power to grant interim relief, does not -*
>
> *(a) deprive parties of their freedom to contract and to agree to resolve disputes by way of arbitration; and*
>
> *(b) usurp the role and function of an "arbitral tribunal" [defined in s. 2(1) AA as "a sole arbitrator or a panel of arbitrators"] to decide the merits of the dispute in question.*
>
> *[47]* ***Despite the width of s. 11(1) AA, I am of the opinion that an applicant for interim relief under s. 11(1) AA before the commencement of any arbitral***

***proceedings, should satisfy the court of the 5 following matters (5 Matters)**:*

(a) ***the applicant must have a cause of action against the party whom interim relief is sought**. ...;*

(b) ***there must be an "arbitration agreement" as understood in ss. 2(1) and 9(1) to (5) AA**;*

(c) ***the relief sought must be interim in nature and cannot be permanent in effect - Metrod (Singapore) Pte Ltd**. ...*

(d) ***the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings - Metrod (Singapore) Pte Ltd. If arbitral proceedings are not subsequently commenced or if the interim relief in question does not support, assist, aid and/or facilitate the proposed arbitral proceedings -***

(i) ***the application for and the granting of interim relief may constitute an abuse of court process**. ...*

(ii) ***the interim relief granted may oppress the party who is the subject matter of the interim relief**. ...*

(e) ***arbitral proceedings should be commenced within a reasonable time. Any unreasonable delay in the commencement and/or conduct of arbitral proceedings may -***

(i) ***constitute an abuse of court process; and/or***

(ii) ***oppress the party who is the subject matter of the interim relief****.*

The applicant for interim relief from court, should adduce affidavit evidence to show reasons -

(1) ***why arbitral proceedings cannot be commenced within a reasonable time and hence, the need to apply to court for interim relief under s. 11(1) AA; or***

(2) ***if arbitral proceedings have already been instituted, why the applicant is not able to apply for interim relief from the arbitral tribunal and needs to apply to court for such relief****."*

(emphasis added).

G(2). Effect of Act 1569

[29] Act A 1569 has substituted subsection 11(1) AA as follows:

"***Arbitration agreement and interim measures by High Court***

11(1) ***A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to -***

(a) ***maintain or restore the status quo pending the determination of the dispute****;*

> *(b)* ***take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process****;*
>
> *(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;*
>
> *(d) preserve evidence that may be relevant and material to the resolution of the dispute; or*
>
> *(e) provide security for the costs of the dispute.*"
>
> (emphasis added).

[30] Firstly, the present s. 11(1)(a) to (e) AA [**Present s. 11(1) AA**] is worded differently from s. 44 AA (UK). Hence, UK cases on s. 44 AA (UK) have to be read with caution with regard to the Present s. 11(1) AA.

[31] Regarding the Present s. 11(1) AA, I am of the following view:

(1) the court had wide powers under the Previous s. 11(1) AA, especially in its paragraph (h) (the court could award "*an interim injunction or any other interim measure*"). In contradistinction to the Previous s. 11(1) AA, the court's power to grant interim measures pursuant to the Present s. 11(1) AA is confined to any one or more of its paragraphs (a) to (e). In other words, the scope of the court's power under the Present s. 11(1) AA is narrower as compared to its power pursuant to the Previous s. 11(1) AA. As such, Malaysian cases decided under the Previous s. 11(1) AA may not necessarily apply to the Present s. 11(1) AA;

(2) the use of the word "*may*" in the Present s. 11(1) AA clearly shows that the court has a discretion to grant any interim measure under s. 11(1)(a) to (e) AA. Needless to say, from the view point of the *stare decisis* doctrine, the court's decision on the exercise or non-exercise of its discretion under the Present s. 11(1) AA does not constitute a binding legal precedent;

(3) as expressly provided in the Present s. 11(1) AA, the court may grant interim measures "*before or during arbitral proceedings*";

(4) according to s. 11(3) AA, the court may grant interim measures pursuant to the Present s. 11(1) AA before or during an "*international arbitration*" [as understood in s. 2(1)(a) to (c), s. 2(2)(a)(i) and (ii) AA];

(5) the court cannot decide on the merits of the dispute between the parties under the Present s. 11(1) AA because the parties have agreed in their *"arbitration agreement"* [as understood in ss. 2(1) and 9(1) to (5) AA] that all legal and factual issues which arise from their dispute shall only be decided by the "*arbitral tribunal*" [as defined in s. 2(1) AA]. This is fortified by s. 11(2) AA which provides that where a party applies to court for any interim measure after an arbitral tribunal has made a finding of fact, the court "*shall*" treat the factual finding as "*conclusive*' for the purposes of the application under the Present s. 11(1) AA.

Although the court cannot decide on the merits of a dispute under the Present s. 11(1) AA, in deciding an application under the Present s. 11(1) AA, the court has to assess the

evidence and decide the following two matters [**Court's Decision (Interim Measure)**] -

(a) whether an applicant for interim measure has met the requirements for seeking the interim measure as laid down in s. 11(1)(a) to (e) AA; and

(b) whether the court should exercise its discretion to grant the interim measure sought for.

The reasons and reasoning of the Court's Decision (Interim Measure) do not bind the arbitral tribunal in any manner. Nor are parties bound or estopped in the arbitral proceedings by the reasons and reasoning of the Court's Decision (Interim Measure);

(6) based on the words "*interim measure*" in the Present s. 11(1) AA, the court may only grant interim measure and not permanent or final relief. This is understandable because since the arbitral tribunal is the sole arbiter of the dispute between the parties [please refer to the above sub-paragraph (5)], final relief should only be given by the arbitral tribunal in the form of a Final Award and not by the court;

(7) an applicant for interim measure under the Present s. 11(1) AA has the legal and evidential burden to satisfy the court to exercise its discretionary power to grant any interim measure under s. 11(1)(a) to (e) AA; and

(8) after the court has granted any interim measure under the Present s. 11(1) AA, parties may apply to court to vary or discharge the interim measure if there is a subsequent and material change of relevant circumstances (**Subsequent**

Event). In **Bumi Armada Navigation**, at [47(d) and (e)], I have given examples of a Subsequent Event for the court to vary or discharge the interim measure.

G(3). Whether court can grant interim injunction regarding a BG

[32] I am of the following opinion regarding the question of whether a party to an arbitration agreement (**X**) may apply to court for an interim injunction to restrain a beneficiary of a BG (**Y**) from making a call on the BG or from receiving any proceeds from the BG pending the commencement and disposal of an arbitration between X and Y (**Interim Injunction**):

(1) the court has a discretion under s. 11(1)(a) and/or (b) AA to grant the Interim Injunction in any one or more of the following three circumstances (**3 Circumstances**) -

(a) the Interim Injunction is granted pursuant to s. 11(1)(a) AA to "*maintain*" the status quo pending the disposal of the arbitration;

(b) the Interim Injunction is ordered under s. 11(1)(a) AA to "*restore*" the status quo pending the disposal of the arbitration; **or**

(c) by reason of the second limb of s. 11(1)(b) AA [**Section 11(1)(b) (2nd Limb)**], Y is refrained by the Interim Injunction from "*taking action that is likely to cause current or imminent harm or prejudice to the arbitral process*"; and

(2) X has the burden to satisfy the court of the following eight matters (**8 Matters**) when X applies for an Interim Injunction against Y (**X's Application**) -

(a) X has a valid and arguable cause of action against Y (**X's Cause of Action**). X is only required to show to the court a valid and arguable X's Cause of Action because only the arbitral tribunal can finally decide on the existence of X's Cause of Action - please see the above sub-paragraph 31(5).

The Present s. 11(1) AA does not expressly require a valid and arguable X's Cause of Action as a condition for X's Application. However, such a requirement is necessarily implied in the Present s. 11(1) AA. This is because if there is no valid and arguable X's Cause of Action, X has no right to commence arbitral proceedings against Y. In such a case, X's Application is frivolous, vexatious and/or constitutes an abuse of court process for which Y can apply to the court to strike out X's Application;

(b) the existence of one or more of the 3 Circumstances;

(c) there are four possible grounds for X to challenge Y's call on a BG (**Y's Call**), namely -

(i) Y's Call is fraudulent (**1st Ground**);

(ii) Y's Call is unconscionable (**2nd Ground**);

(iii) Y's Call is contrary to the contract between X and Y (**3rd Ground**); **and/or**

(iv) Y's Call does not comply with the BG (**4th Ground**).

If X relies on the 1st and 2nd Grounds (**1st Two Grounds**), X has to satisfy the court by applying one of the following two tests, namely -

(ci) X has a "*seriously arguable case that the only realistic inference*" is Y's Call is fraudulent or unconscionable; **or**

(cii) X has adduced a "*strong prima facie case*" that Y's Call is fraudulent or unconscionable.

There is a third test if X is relying on the 2nd Ground, namely X must satisfy the court that the "*events or conduct are of such degree such as to prick the conscience of a reasonable and sensible*" person.

The above three tests (**3 Tests**) have been laid down by the Federal Court in a judgment delivered by Abdull Hamid Embong FCJ in *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, at [33], [36] and [39], as follows -

> "*[33]* ***It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary***.
>
> ...

[36] We are also in agreement with Mohamad Ariff bin Md Yusof JC in the case of Focal Asia Sdn Bhd when he expressed this opinion on these two exceptions and the test to be applied:

> *If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.*
>
> ...

[39] We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned judicial commissioner in Focal Asia is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a

'strong prima facie case' was utilised by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden now rested on the shoulder of Sumatec:

> ***As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.***

We are in agreement with those propositions."

(emphasis added).

If X relies on the 3rd and 4th Grounds, X should adduce a "*strong prima facie case*" to support those two grounds;

(d) the remedy of damages is not an adequate remedy for X;

(e) the "*balance of convenience*" or the "*balance of justice*" lies in favour of the grant of the Interim Injunction;

(f) X has provided an undertaking to court to pay damages to Y if the Final Award is in Y's favour and if Y has suffered any loss due to the Interim Injunction (**Undertaking**). In exceptional circumstances, the court has a discretion to exempt X from furnishing the Undertaking;

(g) X has complied with all the procedural requirements as laid down in O. 29 r. 1 RC; and

(h) there is no policy or equitable consideration which militates against the grant of the Interim Injunction.

H. Is Plaintiff entitled to declarations and damages?

[33] It is not disputed that there is an arbitration agreement between the Plaintiff and Defendant (**Arbitration Agreement**) that any dispute between them regarding the Contract (**Dispute**) shall be decided by way of arbitration.

[34] As explained in the above sub-paragraph 31(5), in view of the Arbitration Agreement, the merits of the Dispute can only be decided by an arbitral tribunal and not by the court. As such, I should not have made the 2 Declarations in the 1st Order.

[35] When Encs. 28 and 35 were heard by me, I posed, among others, a question to learned counsel for the Plaintiff and Defendant on whether I should set aside the 2 Declarations in the 1st Order because the merits of the Dispute could only be decided by the arbitral tribunal at the Arbitration.

[36] In the finest tradition of the Bar, learned counsel for both parties conceded that the 2 Declarations in the 1st Order should not have been made. Consequently, I varied the 1st Order by setting aside the 2 Declarations.

[37] I should add that the 1st Order had been perfected but the *functus officio* doctrine does not prevent the court from amending the sealed 1st Order by setting aside the 2 Declarations. This is because the 2 Declarations were clearly contrary to the Present s. 11(1) AA - please see the Federal Court's judgment delivered by Alizatul Khair Osman FCJ in *Malayan Banking Bhd v. Gan Bee San & Ors and another appeal; SKS Foam (M) Sdn Bhd (Intervener)* [2019] 1 CLJ 575, at [18] to [21].

[38] For reasons expressed in the above sub-paragraph 31(6), the court cannot grant any final relief in the OS. Hence, I have not acceded to the Plaintiff's prayer for damages in this case.

I. Whether Plaintiff has satisfied court of 8 Matters

I(1). Does Plaintiff have valid and arguable cause of action against Defendant?

[39] I am satisfied that the Plaintiff has a valid and arguable cause of action in the form of the Defendant's breach of the Contract as follows:

(1) it is arguable that the Defendant has breached the Contract by imposing Delay Damages; and

(2) arguably, the Defendant's termination of the Contract is unlawful.

I(2). Whether 3 Circumstances exist

[40] The Plaintiff has shown that all the 3 Circumstances are present in this case as follows:

(1) the 2 Injunctions are ordered under s. 11(1)(a) AA to "*maintain*" the status quo pending the commencement and disposal of the Arbitration;

(2) the 2 Injunctions are granted pursuant to s. 11(1)(a) AA to "*restore*" the status quo pending the commencement and disposal of the Arbitration because the Defendant's 2 Calls have already been made on BNP and ABB; **and/or**

(3) the Defendant is restrained by the 2 Injunctions from "*taking action that is likely to cause current or imminent harm or prejudice*" to the Arbitration within the meaning of Section 11(1)(b) (2nd Limb).

I(3). Has Plaintiff satisfied 3 Tests?

[41] Firstly, I find there is no "*seriously arguable case that the only realistic inference*" is the Defendant's 2 Calls are fraudulent. Nor is this court satisfied that there is a "*strong prima facie case*" to show that the Defendant's 2 Calls are fraudulent.

[42] This court is satisfied that despite the Defendant's many averments as elaborated in the above paragraph 7, there is a "*seriously arguable case that the only realistic inference*" is the Defendant's 2 Calls are unconscionable as against the Plaintiff. This decision is premised on the following evidence and reasons:

(1) despite the Hard Rock Problem -

(a) the Defendant refused to grant an EOT to the Plaintiff; and

(b) the Defendant imposed Delay Damages on the Plaintiff;

(2) as a result of the Delay Damages -

(a) the Plaintiff had completed work for Milestone 9 but the Defendant did not recommend any payment for Milestone 9 in Certificate 12 because the Defendant had purportedly claimed for Delay Damages; and

(b) the Plaintiff was deprived of payment by the Defendant under the Contract. Consequently, the Plaintiff could not pay its sub-contractors, suppliers and consultants. The Plaintiff was therefore constrained to enter into the Arrangement with the Defendant;

(3) the Arrangement had the following unconscionable effect on the Plaintiff -

(a) if not for the Arrangement, the Plaintiff would have been entitled to seek for a release of the APG from the Defendant; and

(b) the Arrangement allowed the Defendant to take over effectively the performance of the Onshore Portion from the Plaintiff;

(4) the Plaintiff had completed work for Milestones 10 and 11. However, the Defendant refused to issue Work Done Certificates for Milestones 10 and 11 because the Defendant had purportedly terminated the Contract; and

(5) the Defendant had also called on Hitachi's BG's. The combined value for the 2 BG's and Hitachi's BG's is RM53,200,000.00. The Defendant had only paid a total of RM59,496,440.30 to the Plaintiff [excluding the Defendant's Payments To Plaintiff's Creditors (Arrangement) and Delay Damages]. If the court does not grant the 2 Injunctions in this case, the Defendant would have recouped substantially all the payments made by the Defendant to the Plaintiff even before the commencement of the Arbitration!

[43] Additionally or alternatively, I am persuaded by the evidence and reasons stated in the above paragraph 42 that there exists a "*strong prima facie case*" that the Defendant's 2 Calls are unconscionable.

[44] Lastly, this court is satisfied that the sequence of events and the Defendant's conduct as explained in the above paragraph 42 cannot be co-incidental but are of such a nature and degree which pricks the "*conscience of a reasonable and sensible*" person.

[45] Initially, I thought the Defendant had assigned all its rights under the 2 BG's to CST. Hence, the court granted a second declaration in the 1st Order that the rightful party to call on the 2

BG's was CST and not the Defendant (**2nd Declaration**). There was however no assignment of the Defendant's rights under the 2 BG's to CST. Hence, the 2nd Declaration was set aside and the 1st Order was varied accordingly.

[46] The Plaintiff's learned counsel has contended that the Defendant's 2 Calls could not name CST as the recipient of the proceeds of the 2 BG's (**Recipient**). I have perused the 2 BG's. There is nothing in the 2 BG's which prevents the Defendant from naming CST as the Recipient, especially when the Recipient has a concession from the Government regarding the Project and CST has provided 100% financing to the Defendant for the Project.

I(4). Whether damages is a sufficient remedy for Plaintiff

[47] I am satisfied that damages is not an adequate relief for the Plaintiff in this case. Firstly, in view of the Defendant's conduct as explained in the above paragraph 42, the Plaintiff had been deprived of cash flow. In fact, the Defendant's conduct in this case had caused the Plaintiff to resort to the Arrangement for the Defendant to pay the Plaintiff's sub-contractors, suppliers and consultants. If the 2 Injunctions are not granted to preserve the status quo pending the commencement and disposal of the Arbitration, the Plaintiff will suffer irreparable prejudice by not being financially able to commence and dispose of the Arbitration. In other words, if the 2 Injunctions are not ordered in this case, the Defendant would have "*won by default*" even before the commencement of the Arbitration.

I(5)] Where does balance of convenience lie?

[48] In the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, at 270-271, Mohd. Jemuri Serjan CJ (Borneo) has decided that where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice. If the granting of an interim restraining injunction carries a lower risk of injustice than a refusal of the interim restraining injunction, the balance of convenience lies in favour of granting the interim restraining injunction. Conversely, if the granting of an interim prohibitory injunction carries a higher risk of injustice than a refusal of the interim prohibitory injunction, the balance of convenience lies against the granting of the interim prohibitory injunction.

[49] I am of the view that the balance of convenience lies in favour of granting the 2 Injunctions with the Condition. This decision is premised on the following reasons:

(1) if the 2 Injunctions with the Condition are not granted in this case, there will be a grave injustice to the Plaintiff as explained in the above paragraph 47; and

(2) if this court orders the 2 Injunctions with the Condition, there is a less risk of injustice to both the Plaintiff and Defendant because -

(a) if the Final Award favours the Defendant, the Defendant can still enforce the 2 BG's; and

(b) the Defendant is restrained by the 2 Injunctions from receiving the proceeds of the 2 BG's pending the commencement and disposal of the Arbitration. Consequently, until the Final Award is pronounced by the arbitral tribunal, the Plaintiff is given some

"*breathing space*" to commence and dispose of the Dispute by way of the Arbitration.

I(6). Should Plaintiff provide Undertaking?

[50] In view of the Condition, I exercise my discretion to exempt the Plaintiff from furnishing any Undertaking for the 2 Injunctions.

I(7). Has Plaintiff complied with procedural requirements?

[51] I am satisfied that the Plaintiff has not failed to fulfil all the requirements of O. 29 r. 1 RC.

I(8). Whether grant of 2 Injunctions is contrary to policy and Equity

[52] In this case, there is no policy or equitable consideration which militates against the grant of the 2 Injunctions with the Condition.

I(9). Has Plaintiff satisfied court of 8 Matters?

[53] Premised on the evidence and reasons elaborated in the above Parts I(1) to I(8), the Plaintiff has discharged the onus to satisfy the court of the 8 Matters for a grant of the 2 Injunctions with the Condition.

J. Can court impose Condition?

[54] I am of the view that in the exercise of the court's discretion to grant the appropriate interim measure under s. 11(1)(a) to (e) AA, the court may impose any condition in the interest of justice

with regard to the interim measure. There is nothing in s. 11(1)(a) to (e) AA which prevents the court from attaching any condition to the interim measure to be ordered by the court. More importantly, the purpose of the interim measure to be granted by the court pursuant to s. 11(1)(a) to (e) AA may be attained by way of the court's imposition of a specific condition with regard to the interim measure in question. Hence, a literal and purposive construction of s. 11(1)(a) to (e) AA supports the court's discretionary power to attach any just condition to the interim measure to be ordered by the court.

[55] In this case, it is in the interest of justice for the court to order the Condition. This is because if the Condition is not imposed by the court and if the Final Award is made in the Defendant's favour, there will be an injustice in the following manner:

(1) the Defendant will be deprived of all its rights under the 2 BG's; and

(2) the Plaintiff is allowed to evade its obligations to furnish the 2 BG's under the Contract.

[56] The Condition does not cause any injustice to the Plaintiff because this OS cannot relieve the Plaintiff's obligations to furnish the 2 BG's under the Contract. As stated in the above sub-paragraph 31(6), the court can only grant interim relief under s. 11(1)(a) and/or (b) AA in this OS. This court cannot therefore grant any final relief in the form of an exemption of the Plaintiff's obligations to furnish the 2 BG's under the Contract. I am unable to see how the Condition oppresses the Plaintiff in any manner when the Plaintiff has agreed in the Contract to furnish the 2 BG's in favour of the Defendant.

K. Outcome of OS and 3 Encs.

[57] Premised on the above evidence and reasons, the Amended Order is made. In view of the 2 Injunctions with the Condition, Enc. 28 does not serve any purpose.

L. Whether Plaintiff's Stay Application should be allowed

[58] I reproduce below s. 73 CJA and r. 13 RCA:

> "*s. 73 CJA*
>
> ***An appeal shall not operate as a stay of execution*** *or of proceedings under the decision appealed from* ***unless the court below*** *or the Court of Appeal* ***so orders*** *and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.*
>
> *r. 13 RCA*
>
> ***An appeal shall not operate as a stay of execution*** *or of proceedings under the decision appealed from* ***unless the High Court*** *or the Court* ***so orders*** *and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.*"
>
> (emphasis added).

[59] I cannot accede to the Plaintiff's Stay Application because -

(1) the Plaintiff has failed to discharge the onus to satisfy this court that there exists special circumstances regarding the execution of the Condition so as to justify a stay of execution of the Condition pending the disposal of the Plaintiff's Appeals - please refer to the Federal Court's

judgment delivered by Augustine Paul JCA (as he then was) in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, at 10, 14, 17 and 18; and

(2) if I have allowed the Plaintiff's Stay Application -

(a) this will cause an injustice to the Defendant as explained in the above sub-paragraph 55(1); and

(b) the Plaintiff can unlawfully evade its obligations to furnish the 2 BG's under the Contract - please refer to the above paragraphs 55(2) and 56.

M. Summary of court's decision

[60] In brief -

(1) by virtue of O. 15 r. 6(1) RC, the OS and Enc. 3 shall not be defeated by the Non-Joinder of Hitachi, especially when the Defendant has not suffered any prejudice due to the Non-Joinder of Hitachi;

(2) the court's discretion to grant interim measures under the Present s. 11(1) AA has been curtailed by Act A1569 as compared to the Previous s. 11(1) AA;

(3) the court cannot make the 2 Declarations and award damages in this OS;

(4) the Plaintiff has satisfied the 8 Matters for the court to grant the 2 Injunctions pursuant to s. 11(1)(a) and/or (b) AA, in particular the Plaintiff has fulfilled the 3 Tests that the Defendant's 2 Calls are unconscionable;

(5) in the court's exercise of its discretion to grant the 2 Injunctions under s. 11(1)(a) and/or (b) AA, it is only just for the court to attach the Condition with the 2 Injunctions; and

(6) the court cannot stay the execution of the Condition pending the disposal of the Plaintiff's Appeals because special circumstances do not exist with regard to the execution of the Condition.

(WONG KIAN KHEONG)
Judge
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

Dated: 4 JUNE 2020

COUNSEL:

For the plaintiff - Michael Chow Keat Thye; M/s Michael Chow

For the defendant - Nitin Nadkarni, Darshendev Singh & Leong Chee Weng; M/s Lee Hishammuddin Allen & Gledhill

Legislation referred to:

Arbitration Act 2005, s. 11(1)(a) and/or (b)(e)

Courts of Judicature Act 1964, s. 73

Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 2 r. 1(2), O. 28 r. 9, O. 29 r. 1 RC, O. 32 rr. 10 and 11