IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: 02(f)-124-12/2018(W)

BETWEEN

IREKA ENGINEERING & CONSTRUCTION SDN BHD

(COMPANY NO: 381566-U) ... APPELLANT

AND

PWC CORPORATION SDN BHD

(COMPANY NO: 233329-T) ... RESPONDENT

[In The Matter Of Civil Appeal No: W-02(C)(A)-2160-10/2017

And Heard Together With Civil Appeal No:W-02(C)(A)-2233-11/2017

In The Court Of Appeal Of Malaysia At Putrajaya

Between

Ireka Engineering & Construction Sdn Bhd

(Company No: 381566-U) ... Appellant

And

PWC Corporation Sdn Bhd

(Company No: 233329-T) ... Respondent]

[In The Matter of The High Court Of Malaya At Kuala Lumpur

(Civil Division)

Originating Summons No: WA-24C-118-07/2017

In the matter of the Adjudication Proceedings between PWC Corporation Sdn Bhd as Claimant and Ireka Engineering & Construction Sdn Bhd as Respondent pursuant to the Construction Industry Payment and Adjudication Act 2012

And

In the matter of the Adjudication Decision dated 13.06.2017 by an Adjudicator, Chine Wai Ting, Jacky

And

In the matter of Section 28 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Orders 7 and 28 of Rules of Court 2012

Between

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Plaintiff

And

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Defendant

Heard Together With

Originating Summons No: WA-24C-127-07/2017

In the matter of the Adjudication Proceedings between PWC Corporation Sdn Bhd as Claimant and Ireka Engineering & Construction Sdn Bhd as Respondent pursuant to the Construction Industry Payment and Adjudication Act 2012

And

In the matter of the Adjudication Decision dated 13.06.2017 by an Adjudicator, Chine Wai Ting, Jacky

And

In the matter of Section 15 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Order 7 of Rules of Court 2012

Between

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Plaintiff

And

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Defendant]

Heard Together With

IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.: 02(f)-125-12/2018(W)

BETWEEN

IREKA ENGINEERING & CONSTRUCTION SDN BHD
(COMPANY NO: 381566-U) ... APPELLANT

AND

PWC CORPORATION SDN BHD
(COMPANY NO: 233329-T) ... RESPONDENT

[In The Matter Of Civil Appeal No: W-02(C)(A)-2070-10/2017
And Heard Together With Civil Appeal No:W-02(C)(A)-2069-10/2017
In The Court Of Appeal Of Malaysia At Putrajaya

Between

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Appellant

And

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Respondent]

[In The Matter Of The High Court Of Malaya At Kuala Lumpur
(Civil Division)
Originating Summons No: WA-24C-107-06/2017

In the matter of the Adjudication Proceedings between PWC Corporation Sdn Bhd and Ireka Engineering & Construction Sdn Bhd as Respondent under the Construction Industry Payment and Adjudication Act 2012

And

In the matter of an Adjudication Decision dated 05.06.2017 issued by an Adjudicator, Cheng Ho Wah @ Roland

And

In the matter of Section 28 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Order 7 of Rules of Court 2012

Between

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Plaintiff

And

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Defendant

Hear Together With

Originating Summons No: WA-24C-117-07/2017

In the matter of the Adjudication Proceedings between PWC Corporation Sdn Bhd as Claimant and Ireka Engineering & Construction Sdn Bhd as Respondent pursuant to the Construction Industry Payment and Adjudication Act 2012

And

In the matter of an Adjudication Decision dated 05.06.2017 by an Adjudicator, Cheng Ho Wah @ Roland

And

In the matter of Sections 15 and 16 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Order 7 of Rules of Court 2012

Between

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Plaintiff

And

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Defendant]

Heard Together With

IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.: 02(f)-126-12/2018(W)

BETWEEN

IREKA ENGINEERING & CONSTRUCTION SDN BHD
(COMPANY NO: 381566-U) ... APPELLANT

AND

PWC CORPORATION SDN BHD
(COMPANY NO: 233329-T) ... RESPONDENT

[In The Matter Of Civil Appeal No: W-02(C)(A)-1983-10/2017
And Heard Together With Civil Appeal No:W-02(C)(A)-1982-10/2017
In The Court Of Appeal Of Malaysia At Putrajaya

Between

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Appellant

And

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Respondent]

[In The Matter Of The High Court Of Malaya At Kuala Lumpur
(Civil Division)

Originating Summons No: WA-24C-98-06/2017

In the matter of Adjudication between
PWC Corporation Sdn Bhd and Ireka

Engineering & Construction Sdn Bhd under Construction Industry Payment and Adjudication Act 2012

And

In the matter of an Adjudication Decision dated 18.5.2017 issued by Steven Seah Shu Keen, Adjudicator

And

In the matter of Section 28 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Orders 7 and 28 of the Rules of Court 2012

Between

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Plaintiff

And

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Defendant

Heard Together With

Originating Summons No: WA-24C-124-07/2017

In the matter of the Adjudication Proceedings between PWC Corporation Sdn Bhd as Claimant and Ireka Engineering & Construction Sdn Bhd as Respondent pursuant to the Construction Industry Payment and Adjudication Act 2012

And

In the matter of an Adjudication Decision dated 18.5.2017 issued by Steven Seah Shu Keen, Adjudicator

And

In the matter of Sections 15 and 16 of the Construction Industry Payment and Adjudication Act 2012

And

In the matter of Order 7 of the Rules of Court 2012

Between

Ireka Engineering & Construction Sdn Bhd
(Company No: 381566-U) ... Plaintiff

And

PWC Corporation Sdn Bhd
(Company No: 233329-T) ... Defendant]

CORAM

RICHARD MALANJUM, CJ
AHMAD MAAROP, PCA
AZAHAR BIN MOHAMED, FCJ
ALIZATUL KHAIR OSMAN KHAIRUDDIN, FCJ
IDRUS HARUN, FCJ

GROUNDS OF JUDGMENT

PRELIMINARIES

[1] We heard these 3 appeals together given the commonality of issues in the questions of law raised for our determination. In simple terms, the common issues invite an obvious and identical question of whether the Construction Industry Payment and Adjudication Act 2012 ("the CIPAA" for short) which came into force on 15.4.2014 is to be construed as having a retrospective or prospective operation. Quite apart from this question, however, one matter deserves early mention, which is that in these appeals there are several other questions of law raised by the appellant in respect of which this Court had allowed their application for leave to appeal. Tan Sri Cecil Abraham, learned counsel for the appellant in Civil Appeal No. 02(f)-126-12/2018(W) (the 126 Appeal), at the outset had indicated to this Court that submission would be made on the 126 Appeal

only since Civil Appeal No: 02(f)-124-12/2018(W) ("the 124 Appeal") and Civil Appeal No: 02(f)-125-12/2018(W) ("the 125 Appeal") involved identical issue and he would deal with the question in connection with this common issue first. If it is determined that the CIPAA is intended to be prospective, all other questions of law will be rendered academic. Upon hearing all learned counsel on this question, we adjourned for deliberation and intimated that the detailed grounds of our decision would be given later. We propose to give reasons for our decision in these appeals at the same time in one judgment, that is, in the 126 Appeal.

[2] One note-worthy feature of these appeals which also merits early mention is that the instant appeals were heard back-to-back with 2 other separate appeals involving parties who were not the parties herein. These 2 appeals concern the same issue as highlighted above raising in consequence arguments which are similar in almost every detail by both learned counsel for the respective parties. The appeals in question are **Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd Civil Appeal No: 02(f)-58-07/2018(B)** and **Civil Appeal No: 02(f)-59-07/2018(B)**. The decision of the Court of Appeal is reported in **Bauer (Malaysia) Sdn Bhd v Jake-In Pile (M) Sdn Bhd and another Appeal [2018] 4 AMR 425**. We shall refer to **Bauer (Malaysia) Sdn Bhd**, supra, in this judgment where necessary.

[3] Before proceeding further, it is appropriate to emphasise at this stage that this judgment is delivered pursuant to section 78 of the Courts of Judicature Act 1964 due to the retirement of Richard Malanjum, CJ (as His Lordship then was). This is therefore a decision of the remaining members of the panel which is reached unanimously.

QUESTIONS OF LAW FOR DETERMINATION

[4] The relevant questions of law in respect of this issue in the 124 Appeal and the 126 Appeal are found in Question 4 in each appeal which are similarly expressed in the following terms:

> "Whether CIPAA 2012 gives rise to substantive rights and is consequently not retrospective in nature, making the Adjudication Decision liable to be set aside?"

In contrast, the question of law in the 125 Appeal, which is Question 1, is formulated in slightly different terms and it reads –

> "Whether the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") which came into force on 15.4.2014 is retrospectively applicable to a subcontract that was signed and dated prior to the enforcement date, or will it render the entire Adjudication proceedings, including the Adjudication Decision, void?"

[5] Before we go more closely into the matter, it is certainly noteworthy that the respondent was awarded subcontracts by the appellant which took place before the CIPAA came into force on 15.4.2014. The appellant in the 124, 125 and 126 Appeals is the main contractor for 3 projects and these are –

(a) Package 3 – Proposed Completion Works to the Hotel Development on Part of Lot-Lot 203, (New Lot No. 364) Seksyen 72 (Lot G), Mukim Kuala Lumpur, Wilayah

Persekutuan for a contract sum of RM427,359.00." (the KL Sentral Project);

(b) Cadangan Membina Sebuah Bangunan Komersil 26 Tingkat yang mengandungi Kompleks Membeli-belah, Ruang Tempat Letak Kereta, Pusat Konvensyen/Kemudahan-Kemudahan Dan Bilik-Bilik Hotel Di Atas Sebahagian Lot T.L. 077579394 (LA 20-01070435), Sandakan Harbour Square, Daerah Sandakan, Bandar Sandakan, Sabah untuk ICSD Venture Sdn Bhd" (the Sandakan Project); and

(c) Cadangan Pembangunan Perdagangan yang mengandungi : 2 Blok Menara Pejabat 17 dan 31 Tingkat, 1 Blok Kompleks Membeli-Belah 4 Tingkat dengan Kemudahan Rekreasi, di atas Tempat Letak Kenderaan Bawah Tanah dan Ruang Perdagangan 4 Tingkat Di Atas Lot PT 17741 (Sebahagian Lot 21755), Jalan Kiara, Mont Kiara, Mukim Batu, Kuala Lumpur untuk: Tetuan Ireka Land Sdn Bhd." (the Mont Kiara Project).

[6] We would necessarily mention at this point that the subcontract works awarded by the appellant to the respondent for the KL Sentral Project, the Sandakan Project and the Mont Kiara Project are the subject matter of the 124, 125 and 126 Appeals respectively. For better appreciation of the issues involved in these appeals we shall state the material facts of each appeal briefly.

RELEVANT FACTS

The 126 Appeal

[7] The respondent is the subcontractor appointed by the appellant pursuant to a Letter of Award dated 15.9.2009, for the Mont Kiara Project to carry out subcontract work for the "supply and installation of Aluminium Composite panel to isolated columns at basement P1 and podium retail areas Lot PT 17741, Jalan Kiara, Mont Kiara, Mukim Batu, Kuala Lumpur" with a total subcontract value of RM170,954.00 (the agreement). The respondent carried out the works and the total final amount claimable was RM545,170.85.

[8] It is an express term of the agreement that the appellant has the right to set-off any sum of money due to the respondent with any other sums the respondent is liable to pay, either under the agreement or any other contract between the parties. The appellant had paid the respondent the sum of RM387,060.42 for the work completed under the agreement. However, the balance sum of RM134,869.25 remained outstanding. The appellant did not dispute the respondent's entitlement to the outstanding sum.

[9] Beside this subcontract, there were other subcontract works awarded by the appellant to the respondent. In fact pursuant to a Letter of Award dated 6.7.2010, the appellant appointed the respondent as a subcontractor *vide* subcontract reference no. IECSB/Sandakan/136/3.1/091-SO (the "Sandakan Sub-Contract"). The respondent failed to complete the Sandakan Sub-Contract within the contracted time and consequently liquidated damages was imposed on the respondent for a delay of 438 days amounting to RM3,723,000.00. This sum remained outstanding from the respondent to the appellant.

[10] Further, in accordance with Letter of Acceptance dated 24.8.2011, the appellant appointed the respondent as a subcontractor *vide* subcontract reference no.: IECSB/KL Sentral Pkg 3/140/3.1/1022-HQ for the KL Sentral Project (the KL Sentral Sub-Contract). It is relevant to mention that in respect of the KL Sentral Sub-Contract, the sum of RM17,790.45 being an overpayment is due and owing by the respondent to the appellant.

[11] The respondent initiated adjudication proceedings against the appellant by serving the payment claim dated 6.12.2016 for the sum of the purported non-payment of the outstanding sum of RM134,869.25. The appellant, in its payment response dated 22.12.2016 stated that it did not dispute the outstanding sum in question. However, the appellant expressly stated that it had a right of set-off pursuant to clause 13.1 of the agreement, the said outstanding sum amounting to RM17,790.45 arising from the KL Sentral Sub-Contract and liquidated ascertained damages in the sum of RM3,723,000.00 which the respondent is liable to pay in respect of the Sandakan Sub-Contract (collectively referred to as "the cross-contract set-offs").

[12] By way of a letter of appointment dated 13.3.2017, Steven Seah Shu Keen was appointed as the adjudicator. Pursuant to the adjudicator's appointment, the respondent served an adjudication claim dated 6.4.2017 on the appellant. The appellant *vide* its adjudication response, once again stated that it did not dispute the outstanding sum. The appellant further challenged the jurisdiction of the adjudicator as there was no dispute to be adjudicated.

[13] The adjudicator delivered his decision on 18.5.2017 and awarded the respondent the outstanding sum. In the High Court, the respondent filed an application to enforce the adjudication decision whilst the appellant filed an application to set aside the said adjudication decision. On 28.8.2017, the High Court dismissed the appellant's application and correspondingly allowed the respondent's application to enforce the adjudication decision. On 26.9.2017, the appellant appealed to the Court of Appeal against the whole of the two decisions of the learned High Court Judge. On 11.4.2018, the Court of Appeal unanimously dismissed the appellant's appeals. The consequent appeal from the aforesaid decision is filed to this Court.

The 124 Appeal

[14] Insofar as it concerns the KL Sentral Project, pursuant to a Letter of Acceptance dated 14.3.2012, the appellant appointed the respondent as a subcontractor *vide* subcontract reference no.: IECSB/KL Sentral/Pkg3/140/3.1/053-SO for the "supply, fabrication and installation of glass canopy and skylight roof" (the KL Sentral Sub-Contract). The subcontract sum is a fixed price lump sum of RM427,359.00.

[15] It is an express term of the KL Sentral Sub-Contract in clause 13 that the appellant has the right to set-off any money due to the respondent with any sum the respondent is liable to pay, either under the KL Sentral Sub-Contract or any other contract between the parties. The respondent had completed the subcontract work and submitted a claim in the sum of RM424,892.16. However, the appellant had paid the respondent the sum of RM362,313.27 for the work completed under the subcontract. The

balance sum which remained outstanding is RM62,578.89. The appellant did not dispute the said outstanding sum.

[16] Pursuant to a Letter of Award dated 6.7.2010, the appellant had also appointed the respondent as a subcontractor *vide* subcontract reference no.: IECSB/Sandakan/136/3.1/091-SO (the Sandakan Sub-Contract in the 125 Appeal). The respondent failed to complete the Sandakan Contract within the contracted time and consequently liquidated damages was imposed on the respondent for a delay of 438 days amounting to RM3,723,000.00. This sum remained outstanding from the respondent to the appellant.

[17] Pursuant to a Letter of Acceptance dated 24.08.2011, the appellant had also appointed the respondent as a subcontractor *vide* subcontract reference no.: IESB/KL Sentral Pkg 3/140/3.1/022-HQ ("the KL Sentral Sub-Contract"). In respect of the KL Sentral Sub-Contract, the respondent had an outstanding sum of RM17,790.45 due and owing to the appellant.

[18] The respondent initiated adjudication proceedings against the appellant by serving the payment claim dated 6.12.2016 for the sum of the purported non-payment of RM62,578.89. The appellant, in its payment response dated 21.12.2016 stated that there was no dispute with respect to the payment claim. However, the appellant stated that it had a right to set-off the amount claimed by the respondent being an overpayment amounting to RM17,790.45 arising from the KL Sentral Sub-Contract and liquidated damages in the sum of RM3,723,000.00 which the respondent is liable to pay in respect of the Sandakan Sub-Contract.

[19] On 18.1.2017, the respondent served a Notice of Adjudication on the appellant to initiate the adjudication process. By way of a notice of appointment dated 24.2.2017, Ching Wai Thing, Jacky was appointed as the adjudicator. Pursuant to the adjudicator's appointment, the respondent then served an adjudication claim dated 16.3.2017 on the appellant seeking for the sum of RM62,578.89, late payment interest at the rate of 8% on the said amount from the date of the payment claim until the date of full and final statement and costs. The appellant on 4.4.2017 served its adjudication response on the respondent in which it was stated once again that it did not dispute the outstanding sum and immediately raised the jurisdictional challenge against the adjudicator as there was no dispute to be adjudicated. The appellant in its adjudication response cross-claimed based on the cross-contract set-offs.

[20] Notwithstanding the appellant's position, the adjudicator delivered her decision on 13.6.2017 and awarded the respondent the outstanding sum of RM62,578.89. In the High Court, the appellant filed an application to set aside the adjudication decision whereas the respondent filed an application to enforce the said adjudication decision.

[21] On 13.10.2017, the High Court dismissed the appellant's application and allowed the respondent's application. The appellant subsequently appealed to the Court of Appeal against the whole of the said two decisions of the learned judge. On 31.7.2018, the Court of Appeal dismissed the appeals against which dismissal, the appellant filed this appeal before this Court.

The 125 Appeal

[22] Pursuant to a Letter of Award dated 6.7.2010, the appellant appointed the respondent as a subcontractor *vide* subcontract reference no: IECSB/Sandakan/136/3.1/091-SO (the Sandakan Sub-Contract) as the subcontractor for the execution and completion of the Design, Fabrication, Supply and Installation of Aluminium Glazed Windows & Doors, Louvres Panels, Feature Fins and Canopies. The subcontract is a fixed price lump sum of RM3,380,000.00. It is an express term of the Sandakan Sub-Contract in clause 9.1 that the appellant has the right to set-off any money due to the respondent with any sum the respondent is liable to pay, either under the Sandakan Sub-Contract or any other contract between the parties.

[23] The subcontract work was scheduled to be completed on 28.2.2011. In the meantime, the appellant had instructed the respondent to carry out additional works which did not form part of the scope of work under the Sandakan Sub-Contract. The respondent failed to complete the subcontract work and the additional work pursuant to the Sandakan Sub-Contract by 28.2.2011. The respondent had not applied for any extension of time. In light of the above, the appellant issued a certificate of non-completion dated 1.3.2011 to the respondent. The respondent only accomplished practical completion of the subcontract work of the additional work on or about 11.5.2012. There was thus a delay of 438 days.

[24] Between January 2011 to October 2014, the respondent issued sixteen (16) progress claims including its final claim in respect of the subcontract work and the additional works that it had completed. The total

sum claimed by the respondent amounted to RM4,159,783.08. The appellant paid the sum of RM3,254,360.70.

[25] Upon the completion of the subcontract work and the additional work, the appellant carried out a re-measurement exercise on the site and from the as-built drawings to measure the actual quantity of work completed by the respondent. In this respect, the original sum was subsequently revised from RM3,380,000.00 to RM3,732,588.55.

[26] The appellant had also deducted a sum of RM47,000.00 from the Sandakan Sub-Contract sum as the respondent had failed to rectify the defective works and had failed to provide warranty from manufacturers and as-installed drawings which were required in the Provisional Bill of Quantities. The appellant contends that the balance sum payable to the respondent was RM431,277.85 for which the appellant further contends that the respondent is not entitled to the said sum by virtue of the cross-contract set-offs pursuant to clause 9.1 of the Sandakan Sub-Contract.

[27] The respondent initiated adjudication proceedings against the appellant by serving the payment claim dated 22.11.2016 for the sum of RM889,229.01. On 6.1.2016, the appellant had served its payment response to deny the respondent's payment claim. Additionally, the appellant made a cross claim based on the cross-contract set-offs and raised the defence of set-off against the respondent being the liquidated damages amounting to RM3,723,000.00 for the delay of 438 days in the completion of the subcontract works and the additional works under the Sandakan Sub-Contract and overpayment amounting to RM17,790.45 under the KL Sentral Sub-Contract.

[28] By way of letter of appointment dated 13.3.2017, Cheng Ho Wah @ Roland was appointed as the adjudicator. On 14.3.2017, the respondent had served its adjudication claim on the appellant. The appellant then served its adjudication response on the respondent on 28.3.2017 and disputed the entirety of the respondent's claim. On 3.4.2017, the respondent had filed its adjudication reply.

[29] On 5.6.2017, the adjudicator delivered his decision and awarded, amongst others, as follows:

(a) the appellant to pay the respondent the sum of RM889,229,01;
(b) the appellant's claim for set-off based on liquidated and ascertained damages is dismissed;
(c) the appellant's claim for set-off based on defective works is dismissed; and
(d) the appellant's claim for cross-contract set-off is dismissed.

[30] In the High Court, the appellant filed an application to set aside the adjudication decision dated 5.6.2017 and in the alternative, if the setting aside prayer is refused, an order to stay the enforcement of the whole adjudication decision until the disposal of the arbitration between the parties. In the meanwhile, the respondent sought leave to enforce the adjudication decision dated 5.6.2017.

[31] On 26.9.2017, the High Court dismissed the appellant's application and correspondingly allowed the respondent's application to enforce the adjudication decision.

[32] Dissatisfied with the decision of the High Court, the appellant subsequently appealed to the Court of Appeal against the whole of the two decisions of the High Court. On 7.5.2018, the Court of Appeal dismissed the appeals. This is an appeal against the said decision of the Court of Appeal.

COMMON FEATURES OF THE APPEALS

[33] It is important to highlight at this juncture that one aspect of these 3 appeals show a common feature in that they share common facts and backgrounds. Firstly, the appellant and the respondent in the appeal herein (the 126 Appeal) are also the parties in the 124 Appeal and the 125 Appeal each in like capacity. Secondly, while the respondent in the 124 Appeal was appointed by the appellant as a subcontractor to undertake a subcontract work namely the KL Sentral Sub-Contract on 24.8.2011 for the KL Sentral Project, they were also appointed by the appellant as a subcontractor to carry out another subcontract work that is, the Sandakan Sub-contract on 6.7.2010 for the Sandakan Project. Thirdly, the subcontract agreements in the 124 and 125 Appeals also contain an express term in clause 13.1 and clause 9.1 respectively equipollent to clause 13.1 of the agreement in that the appellant has the right to set-off any money due to the respondent with any sum the respondent is liable to pay, either under the respective subcontract agreement or any other contract between the appellant and the respondent.

DECISION

[34] On the facts of the present case, it is an incontrovertible fact that the agreement dated 15.09.2009 in clause 13.1 provides the appellant with a

right to the cross-contract set-offs and that the CIPAA came into force on 15.04.2014, approximately $3^{1/2}$ years after the agreement was entered into by the appellant and the respondent.

[35] In accordance with the bargain entered into between the parties, the appellant now seeks to apply for the cross-contract set-offs, a right which according to the appellant, they have acquired by virtue of clause 13.1 of the agreement. Clause 13.1 of the agreement is central to the issue for our determination and it stipulates as follows:

> "13.1 Notwithstanding any other provisions in the Sub-Contract, the main contractor shall be entitled to deduct from or set-off any money due or becoming due to the Sub-Contractor (including any Retention Money) any sum or sums which the Sub-Contractor is liable to pay the Main Contractor whether under this Sub-Contract or otherwise or any other contract between the parties".

The point of relevance that can be discerned from the above mentioned clause is that the appellant clearly has a right of set-off for any cross-claim it has against the respondent.

[36] However, in determining the validity of clause 13.1 of the agreement, the adjudicator, by relying on section 5 of the CIPAA, declined to exercise jurisdiction over disputes arising out of contracts before 2 separate adjudicators for which they would be deciding. Both the High Court and subsequently the Court of Appeal saw nothing wrong in the adjudicator declining to exercise jurisdiction and had relied on the wordings of section 5 of the CIPAA in deciding that firstly, the section referred to a construction contract, secondly, they were only able to make determination on a single construction contract and thirdly, they were not empowered to decide on multiple construction contracts. The Court of

Appeal in the 125 Appeal, in fact agreed with the learned High Court judge on His Lordship's interpretation of the expression of 'a construction contract' in section 5 of the CIPAA when it held that this "is consistent with the rule of purposive interpretation found in section 14A (*sic*) of the Interpretation Acts 1948 and 1967 [Act 388]". Following the decisions of the courts below us, the appellant cannot now rely on the cross-contract set-offs provision in respect of the outstanding sum.

[37] It is necessary to highlight that the question for our determination in these appeals was not the issue ventilated before the High Court. By contrast, this issue was initially raised before the Court of Appeal in the 125 Appeal in which it was held that whether section 5 of the CIPAA operated retrospectively or prospectively was not really a material consideration. Instead, the Court of Appeal adopted the view that independent of section 5, "on the facts, the adjudicator and the learned judge were right to hold that it would not be appropriate for the adjudicator to decide on the set-off from the KL Sentral Project when the very issue, as admitted by learned counsel for the appellant, was pending before another adjudicator in another adjudication proceedings."

[38] Hence, there is no decision made by the Court of Appeal on the issue in contention in this appeal. It is also noteworthy that the Court of Appeal did not provide grounds of judgment in respect of the 124 appeal as well as the instant appeal.

[39] Section 5 of the CIPAA provides as follows:

"**Payment claim**

5. (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to **a construction contract**.

(2) The payment claim shall be in writing and shall include –

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act." [our emphasis]

By limiting the application of the CIPAA to a single construction contract, the Court of Appeal and the High Court had clearly and unarguably denied the appellant its right to rely on an express term of clause 13.1 of the agreement which allows a claim based on multiple construction contracts. Subsection 5(1) of the CIPAA, in particular the expression 'a construction contract' we apprehend, has been construed by both courts to mean a single construction contract and not multiple construction contracts.

[40] At the core of the appellant's reasoning is their belief that the approach adopted by the courts below us is erroneous. That belief, we noticed allows for their forceful argument that the agreement was entered into before the coming into force of the CIPAA and that clause 13.1 of the agreement which provides for the contractual set-off is a substantive right acquired pursuant to the agreement driving home their crucial point that the CIPAA is prospective in its operation. The parties, additionally, have arranged their contractual affairs so as to allow for the cross-contract set-offs. Accordingly, learned counsel submits, absent any express provision in the agreement to the contrary, the bargain entered into between the parties must be upheld.

[41] On the other hand, the salient points in the argument urged on behalf of the respondent is that the CIPAA applies retrospectively. Learned counsel gives the following reasons in support of this argument:

(a) the statutory provisions of the CIPAA itself renders the application of the CIPAA retrospective;
(b) statutory adjudication under the CIPAA provides merely another venue, forum or mechanism for construction dispute resolution which is procedural, not substantive;
(c) regard must be paid to the purpose of the CIPAA in that the legislative intent of Parliament is to provide a mechanism for speedy dispute resolution and remedies for the recovery of payment in the construction industry;
(d) the CIPAA is "social legislation" and a liberal, purposive and retrospective interpretation ought to be given to it; and
(e) the decision of the High Court in **UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor [2015] 11 MLJ 499** was upheld in the Court of Appeal and not overruled by the Federal Court in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22**.

[42] The whole of these appeals turn upon a pure question of law. In fact, the disagreement which results from opposing arguments raises a question as to the true interpretation of the CIPAA which is whether the CIPAA is a statute of general application or confined in its operation only to construction contracts made after the commencement of the CIPAA. The appellant clearly advances an argument of substance which undoubtedly emerges from clause 13.1 in question. Clause 13.1 which provides rights for the cross-contract set-offs in light of correct legal

principles that are to be applied to a case like the present appeal, in our view, concerns with substantive rights, which rights the parties have acquired pursuant to the agreement. Such acquired existing rights under the agreement existed before the CIPAA came into force on 15.4.2014. Section 5 of the CIPAA which takes away the substantive rights of parties cannot be applied retrospectively, in the absence of a plain legislative intention of the same expressed with clarity of language therein. The trite general principle is that an Act of Parliament is not intended to have a retrospective operation unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction. Another principle of statutory interpretation which applies with equal force is that legislation to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the existing law (**Q.C. Thornton: Legislative Drafting, Fourth Edition**, page 135).

[43] There is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used, or unless a contrary intention appears (**Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1; Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749**). In other words, there is, so to speak, a presumption that legislation speaks only as to the future (**West v Gwynne [1911] 2 Ch 1**).

[44] As a necessary reminder, lest we forget, in construing a statute, it is also relevant to consider our own interpretation statute namely Act 388 in particular subsection 19(1) which provides –

"19.1 (1) The commencement of an Act or subsidiary legislation **shall be the date provided in or under the Act** or subsidiary legislation **or, where no date is so provided, the date immediately following the date of its publication** in pursuance of section 18." [our emphasis]

[45] The requirement of the aforesaid provisions is further made clear and reinforced by subsection 43(a) of Act 388 which states in peremptory terms that –

"43. A power to appoint a date on which a written law shall come into operation **does not include power to appoint** –

(a) **a date prior to the date on which the instrument of appointment is published**; or
(b) different dates for provisions of that law,

unless express provisions is made in that behalf." [our emphasis]

In addition to these provisions, subsections 2(1) and (3) of Act 388 are also equally relevant. It is provided as follows:

"2. (1) Subject to this section, Part I of this Act shall apply for the interpretation of and otherwise in relation to –

(a) this Act and all Acts of Parliament enacted after 18 May 1967;
-
-
-
(3) PART I shall not apply where there is –
(a) express provision to the contrary;".

[46] It is pertinent to note that both subsections 19(1) and 43(a) of Act 388 are found in PART I thereof. The sections without doubt apply to the

CIPAA as firstly it is a post-1967 piece of legislation and secondly, the CIPAA does not contain any express provision contrary to Part I of Act 388 so far as it relates to the issue of its retrospective or prospective operation. In this regard, Parliament is the sole authority which is vested with the legislative power to enact a law with retrospective effect. Such power is manifested clearly in Article 66 Clause (5) of the Federal Constitution which provides –

> "(5) A Bill becomes law on being assented to by the Yang di-Pertuan Agong...but no law shall come into force until it has been published, without prejudice however, to the Power of Parliament...**to make laws with retrospective effect**." [our emphasis]

[47] The provisions of Act 388 referred to above are indeed a manifestation of the common law position which is statutorily embodied in the said Act. The combined effect of the above provisions plainly shows that Act 388 applies to all Acts of Parliament enacted after 18 May 1967 for the purpose of their interpretation. Accordingly, the interpretation of the CIPAA is governed by Act 388. As a general rule, a date of commencement of an Act, including the CIPAA, with retroactive operation is not allowed unless it is clearly intended by Parliament and such intention is evinced in the Act by express provisions in that behalf. It is particularly noteworthy and relevant that, from a perusal of the CIPAA, we cannot find an express provision from which we can safely say that Parliament has manifestly intended that the CIPAA shall operate retrospectively. That being the position, the application of section 5 of the CIPAA to the agreement in the present circumstances would exclude and impair the appellant's express rights under the agreement which is the right to multiple construction contracts vis-a-vis the cross-contract set-offs.

Such construction would inflict a detriment on the appellant and have the effect of altering the construction contract in particular clause 13.1 in the sense that an act allowed at the time of doing it is now forbidden by a new statute namely the CIPAA. For these reasons, the express term of the agreement in clause 13.1 must prevail over any provision in the CIPAA, as this is an express term of the construction contract that was agreed upon by the parties well before the CIPAA was enacted by Parliament.

[48] If we need to look at the principle of law on this point, the Federal Court's decision in **Kamarstone Sdn Bhd**, supra, clearly sums up the above proposition at pages 755-756 in language that certainly merits our special mention –

> "[5]... Still, we could take this opportunity to uphold that **it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute** (*Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1* per Lord Brightman, delivering the advice of the Board).
>
> [6] In *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99*, Gunn Chit Tuan CJ (Malaya) said:
>
> > On the retrospective operation of Acts, the *presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears*. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the *UK Court of Appeal in EWP Ltd v Moore [1992] 1 All ER 880* at p 891:

> ...that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset...
>
> Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v Kenderaan Bas Mara [1983] 1 MLJ 1* at p 2:
>
> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in regard to events already past.

[7] If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673 per Steve Shim CJ (Sabah & Sarawak)*. If the **legislature intends an amendment to have retrospective application**, it **must expressly and clearly say so** (see *Puncakdana Sdn Bhd v Tribunal* for Housebuyers Claims and another application *[2003] 4 MLJ 9* per *Md Raus J*, as he then was)." [our emphasis]

[49] Now we must turn to the case which the respondent principally relies upon to support their position that the CIPAA operates retrospectively. This is the case of **UDA Holdings Bhd**, supra. We would mention that what has emerged from the submission of the respondent's counsel is that their position as summarised in the salient points of his argument earlier in our judgment relies to a large extent on the decision in **UDA Holdings Bhd**. What comes sharply into focus is the High Court's decision there at page 576 that the CIPAA was retrospective in effect. In coming to its decision, the High Court (and the Court of Appeal subsequently) in **UDA Holdings Bhd**, in a comprehensive albeit lengthy judgment, had

commendably considered several provisions and the objective of the CIPAA and reviewed a catenation of relevant authorities to show that the CIPAA was retrospective in its operation. However, the High Court had failed to and did not appear to appreciate fully the statutory provisions of Act 388 and the common law position that absent clear and express words to such effect, the CIPAA cannot be applied retrospectively. It is necessary to note that the Court of Appeal in dismissing the appeal in **UDA Holdings Bhd** did not provide grounds of judgment for its decision.

[50] By way of emphasis, we would say with respect that there are errors in the High Court's interpretation of the CIPAA in **UDA Holdings Bhd**. To highlight such errors we would start off by giving our focus on Parliament's intention in enacting the CIPAA. The High Court's findings on this point can be summarised as follows:

(a) the CIPAA was enacted to ease cash flow problems in the construction industry by facilitating regular and timely payment, providing speedy dispute resolution through adjudication which is also about payment or to provide remedies for the recovery of payment in the construction;
(b) the objective of CIPAA was to offer a simple, fast and cheap mechanism for resolving payment problems and payment disputes faced in the construction industry as opposed to the existing dispute resolution through arbitration or the courts; and
(c) the CIPAA was intended to remedy an existing problem in the construction industry.

[51] From the above, the third finding made by the High Court in examining Parliament's intention that the CIPAA was intended to remedy

an existing problem is important. This problem relates to the problem over payments experienced by the construction industry which is either there is non-payment, late payment or insufficient payment. In fact, the High Court in **UDA Holdings Bhd** deliberated at length over the parliamentary debates on the Construction Industry Payment and Adjudication Bill when it referred to paragraphs [92], [95], [98] and [100] of the said Hansard of Parliament. The fact that Hansard of Parliament referred to by the High Court in **UDA Holdings Bhd** contains the said revelation on the existing problem in question in the Deputy Minister's speech at the second reading of the Bill to introduce the CIPAA both at Dewan Rakyat and Dewan Negara, clearly highlights that Parliament was already aware of the problem facing the construction industry. Notwithstanding the same, we find that Parliament in its wisdom elected, and in fact did not find it necessary to insert a provision that the CIPAA was to be applied retrospectively in order to cover the existing problem in the industry.

[52] Thus, in the absence of any such provision, it is apparent that Parliament has not evinced any intention that the CIPAA is to be applied retrospectively. Whilst part of the reason the CIPAA is enacted is to remedy an existing problem, which the law making body is aware of, Parliament is silent on whether such a remedy was to be applied retrospectively. If Parliament had intended for the CIPAA to be applied retrospectively, given its full awareness of the existing problem, it would have expressly included a provision to that effect. Parliament does not though, and instead in accordance with subsection 1(2) of the CIPAA, it came into operation on 15.4.2014 without express provision to the effect that the CIPAA shall come into operation on a date prior to the date on which the instrument of appointment is published which is 15.4.2014 as

required under subsection 43(a) of Act 388 or shall apply to construction contracts entered into on or before its commencement date.

[53] Notwithstanding the above, the High Court in **UDA Holdings Sdn Bhd** had inexplicably concluded that it was the undoubted intention of Parliament that the CIPAA was to be applied retrospectively and that it applied to all construction contracts regardless of the dates those construction contracts were made as well as the payment disputes that arose under those construction contracts. In our judgment, the reasons we have discussed above expose the fallacy and demonstrate the relative weakness of the cogency of the finding made by the High Court in **UDA Holdings Bhd** as well as the argument urged on behalf of the respondent. Neither the CIPAA nor Hansard of Parliament expressly provide that it is to be applied retrospectively. We accept that the intention of Parliament is to provide a speedy resolution to payment disputes in the construction industry. However, such intention without more does not in any way lead to the conclusion that Parliament had intended for the CIPAA to be applied retrospectively.

[54] The High Court in **UDA Holdings Bhd** and the respondent in their submission also considered similar statutory adjudication regimes in other jurisdiction such as –

(a) the Housing Grants, Construction and Regeneration Act 1996 (Unite Kingdom);
(b) the Construction Contracts Act 2002 (New Zealand);
(c) the Building and Construction Industry Security of Payment Act 2005 (Singapore);

(d) the Building and Construction Industry Security of Payment Act 1999 (New South Wales);

(e) the Building and Construction Industry Security of Payment Act 2004 (Queensland);

(f) the Construction Contracts Act 2004 (Western Australia); and

(g) the Construction Contracts (Security of Payments) Act 2004 (Northern Territory of Australia).

It is certainly worthy of note that these relevant statutes apply only to construction contracts which are entered into on or after the commencement of these Acts. This fact has prompted learned counsel for the respondent to submit that in taking the position that the CIPAA takes effect retrospectively, the court should study the provisions of the CIPAA in juxtaposition with comparable regimes for statutory adjudication of other jurisdiction. Learned counsel's reasoning assumes, as we understand it, that since these statutes provide for their application to construction contracts entered into after the same came into force and the CIPAA does not have such provisions, Parliament therefore has intended the CIPAA to be applied retrospectively.

[55] We find no difficulty in accepting that the High Court in **UDA Holdings Bhd** correctly noted that in other jurisdictions, the statutory adjudication regimes specifically stated that it was to be applied to construction contracts made after these Acts had come into force. However, the conclusion reached by the High Court in paragraph [149] and the submission of the respondent's counsel on this point involved with respect, a fallacious reasoning in which such conclusion had undoubtedly been assumed from the above argument which was not supported by clear evidence. The fact that Parliament could have inserted similar

provisions on the applicability of the CIPAA but had chosen not to do so, does not, in itself lead to clear and unavoidable interpretation that the CIPAA operates retrospectively. Furthermore, such conclusion by the High Court is essentially circular. One may similarly argue that if Parliament has intended the CIPAA to be applied retrospectively, Parliament could have inserted such a provision. Such provision however is conspicuously absent from the CIPAA.

[56] This argument, moreover, cannot be upheld for the simple reason that the commencement point of the CIPAA is 15.4.2014 which is prescribed by the Minister in accordance with subsection 1(2) thereof and subsection 19(1) of Act 388. Learned counsel for the respondent does not seem to realise that by virtue of subsection 19(1) and subsection 43(a) of Act 388, the commencement date of operation shall be the date provided in or under the CIPAA and that the power to appoint a date on which the CIPAA shall come into operation does not include the power to appoint a date prior to the date on which the instrument of appointment is published unless there is an express provision therein which points to the effect. Therefore, the CIPAA is not silent as to its commencement date. As such, in accordance with the trite rules of statutory interpretation, absent an express provision to the contrary, it is plain that Parliament had intended that statutory adjudication under the CIPAA should apply prospectively. The ministerial prescription as aforementioned clearly shows that the prospective operation of the CIPAA began on 15.4.2014. It necessarily follows that any construction contract entered into before the commencement of the CIPAA and any payment dispute arising out of such construction contracts are not governed by the CIPAA. Needless to say, it is not for the courts to infer Parliament's intention when, upon

careful scrutiny of the wording of the CIPAA to glean legislative intention therefrom, no such intention is evidenced.

[57] The High Court in **UDA Holdings Bhd** also found that the CIPAA was intended to provide an alternative forum to supplement the existing court and arbitration processes. In fact this is also the stance adopted by the respondent in their submission. The High Court in **UDA Holdings Bhd** treated adjudication offered on a statutory framework in the CIPAA as an additional alternative to existing payment dispute resolution forums such as the court and arbitration specially and specifically for the construction industry (see paragraphs [136], [160], [161] and [170] of the judgment). The High Court there held that the change in law was merely a change of forum and such a change of law operates retrospectively as such legislation was in character, in truth and substance procedural and adjectival legislation. The choice of forum was a matter of procedure and not a substantive right. The CIPAA, the High Court said was essentially the choice of forum citing the Federal Court decision in **Westcourt Corporation Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203** which held that the establishment of The Homebuyer Claim Tribunal was a creation of another forum and that the choice of forum is a matter of procedure and not a matter of substantive right and as such the Housing Developers (Control and Licensing) (Amendment) Act 2002 which provided for a change of forum from the court to tribunal operated retrospectively.

[58] The argument of the respondent on the application of **Westcourt Corporation**, supra, by the High Court in **UDA Holdings Bhd** is clearly misconceived and the said case is distinguishable. **Westcourt Corporation** was concerned with the Tribunal for Homebuyer Claims set

up under the Housing Developers (Control and Licensing) (Amendment) Act 2002 which amended the Housing Developers (Control and Licensing) Act 1966. The amendment of the Act in question was merely concerned with a change of forum. Accordingly, the Federal Court found that the amendment of the Housing Developers (Control and Licensing) Act 1966 was merely procedural and did not concern the substantive rights of parties. On this basis, the Federal Court held that the amendment therein was retrospective in nature.

[59] The CIPAA is not merely about a change of forum. It is entirely a new piece of legislation. This is acknowledged by the High Court in **UDA Holdings Bhd** itself when it rightly pointed out at paragraph [193] that "over and above all the other considerations discussed, CIPAA is entirely new legislation". There can be no doubt that the introduction of the CIPAA gives parties a third option or avenue for parties to take legal action, which is to refer their dispute to adjudication. Before the CIPAA was enacted, in the event there was a dispute, the parties to a construction contract had two options open to them which are to litigate or arbitrate. The CIPAA is not a plain manifestation of a change of forum only, neither is it merely procedural in nature. There are provisions in the CIPAA which affect the substantive rights of parties. To illustrate our point, besides section 5 of the CIPAA, section 35 can be identified as another provision which deals with substantive rights. Section 35 of the CIPAA prohibits any conditional payment arrangements or provisions in construction contracts. As noted by the High Court in **UDA Holdings Bhd** in paragraph [86], section 35 prohibits any conditional payment provisions in construction contracts and such provisions are void.

[60] It is a common feature in any construction contract to have a 'pay-when-paid' clause which makes the obligation of the main contractor to pay a subcontractor conditional upon the main contractor having received payment from the principal. What needs to be emphasised for the purpose of our deliberation on the issue of the change of forum, is that the prohibition of this conditional payment under section 35 is not a mere procedural matter. It is certainly a substantive right acquired pursuant to the construction contract. It manifestly affects parties' freedom to contract. Under the statutory adjudication regime a clause on conditional payments in the construction contract will not be applicable. Accordingly, if the CIPAA is held to be retrospective in its operation, there is, we would say, more than just a grain of truth to the appellant's contention that the prohibition will inevitably have a significant effect on existing construction contracts and thus affect the right of parties to the construction contract since by virtue of such statutory prohibitions, the conditional payment clause cannot be enforced thereby frustrating the bargain entered into by the parties. We cannot on this point accept the simplistic approach adopted by the High Court in **UDA Holdings Bhd** that section 35 of the CIPAA is declaratory in nature in that it declares that any conditional payment provision in a construction contract as void and that such provision can operate retrospectively.

[61] Furthermore, the implication which follows where an adjudication decision has been made is that such decision can be enforced in accordance with PART IV of the CIPAA such as sections 13 and 28 to 30 which will inevitably have a profound impact on and affect the right of parties. Under section 13, the adjudication decision is binding. Section 28 allows an adjudication decision to be enforced as if it is a judgment of the High Court whereas section 29 allows a party to suspend performance

or reduce the rate of progress of performance of any construction work or construction consultancy services of any construction contract where the adjudicated amount has not been wholly paid or has been partly paid. Section 30 on the other hand allows for direct payment from the principal of the party against whom any adjudication decision is made and who has failed to make payment of the adjudicated amount. Although sections 28 to 30 relate to remedies and provisions post issuance of an adjudication decision, they are triggered or activated as a consequence of the enforcement of the CIPAA retrospectively which affects the substantive rights of the appellant.

[62] Besides, we agree with the Court of Appeal's decision in **Bauer (Malaysia) Sdn Bhd** that with the advent of the CIPAA, the claimants in the construction industry now have an additional avenue, a new regime or an additional alternative access to existing dispute resolution forums to claim for their contractual fees. This new avenue of access to justice is in anyone's view a substantive right. At paragraph 29 of the judgment, the Court of Appeal is fully aware that within the CIPAA there exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime created by the CIPAA is nothing but the by-product or the consequence of the substantive right created by the CIPAA. Thus, adopting the Court of Appeal's approach in **Bauer (Malaysia) Sdn Bhd** on this point, it would be correct for this Court to hold that sections 28 to 30 being part of this regime are in actuality the extension of the substantive rights created by the CIPAA. Consequently, the CIPAA is not merely concerned with a change of forum. It cannot be denied that the CIPAA impacts parties to a construction contract significantly. The entire basis has changed. The financial structures used previously are now prohibited and the entitlement to exercise the right of

cross-contract set-offs and pay-when-paid contractual arrangement even though provided for in the construction contracts are now prohibited.

[63] Reliance by the respondent on **Westcourt Corporation** therefore is typically on the basis of faulty misunderstanding of the CIPAA and obvious failure to grasp the inevitable consequence on the parties' rights under a construction contract if the CIPAA is held to be a statute of general application.

[64] In further support of its conclusion that the CIPAA is to be applied retrospectively, the High Court in **UDA Holdings Bhd** also relied on the fact that the CIPAA being a legislation which encourages dispute to be resolved in a forum other than the court system must be construed as a social legislation and the choice of an additional forum of resolution should surely be offered to all unless there is clear provisions that it is not. Since there are no such provisions to allow for such an interpretation, the CIPAA is retrospective. The High Court in coming to the above finding relied on the decision of the Supreme Court of India in **New India Insurance Co Ltd v Smt Shanti Misra AIR 1976 SC 237**. It is necessary to mention that this is also the argument taken before us by learned counsel for the respondent. At paragraph [171], the High Court described the CIPAA in the following manner:

> "[171] Even if this court is in error in considering CIPAA as procedural legislation, this court will nevertheless consider CIPAA as falling within the category of 'social legislation' as described by the Court of Appeal and affirmed by the Federal Court in Westcourt Corp Sdn Bhd. **While there is no definition of what exactly 'social legislation' is, it would be fair and reasonable to say that it would refer to legislation which is for the good and benefit of society.**" [our emphasis]

[65] After giving much consideration to this finding, we take the view that learned counsel for the respondent is so caught up in his argument that the CIPAA merely involves the change of forum that he is unable to grasp the real purpose for which the CIPAA is enacted. There is absolutely no doubt that the application of the CIPAA is limited to construction contracts only. The main purpose underlying the enactment of the CIPAA is to ease cash flow problems in the construction industry. As noted in Hansard –

> "Susulan daripada itu Rang Undang-Undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 telah diwujudkan oleh Kementerian Kerja Raya selepas mengadakan beberapa siri perbincangan dan dialog bersama agensi pekerjaan, penggiat industri, pihak-pihak berkepentingan *stakeholders* dan badan professional yang berkaitan".

[66] In **Westcourt Corporation**, the Federal Court was concerned with the Tribunal for Homebuyer Claims. The amendments of the Housing Developers (Control and Licensing) Act 1966 is intended to provide an avenue for homebuyers to bring claims of late delivery of homes. There is, therefore, a wider social element prevailing. The said piece of legislation is applicable to the wider public. The same however cannot be said of the CIPAA. The Act was enacted following discussions between the key stakeholders within the construction Industry. The CIPAA is limited and confined to the construction industry only hence, such limitation suggests the absence of wider social element. The CIPAA is not a piece of legislation for the good and benefit of society at large, it is only for the benefit of the construction industry. The plain truth is that the construction industry is just one segment of society. Therefore, we consider the submission of learned counsel on behalf of the respondent on this point as one which is eminently unsustainable.

[67] The High Court in **UDA Holdings Bhd** delved into the issue of substantive rights in deciding whether the CIPAA is retrospective or prospective. The High Court there approached the subject by laying emphasis in paragraphs [133], [134] and [136] that the CIPAA is a legislation focused on payment procedure as opposed to substantive rights. It says –

> "[133] Here, I am once again reminded of what May LJ said in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* of how it is in the nature of construction contracts to 'generate disputes about payment'. Where there are 'delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due'. This diametrically opposing stance unfortunately does no one any good; including for instance the innocent purchaser of the property; or the owner of the property being developed. This impasse was recognised as stifling the lifeblood of the industry that policy intervention through legislation was seen fit. **CIPAA is intended to provide an intervening provisional decision or 'a temporary balance...in appropriate circumstances...in favour of those who claim payment, at the temporary expense if necessary of those who pay'. These adjudication decisions, 'being quick and dirty'**, also 'provide a quick enforceable interim decision under the rubric of 'pay now, argue later' are necessary so as to give 'life' back to the enterprise or underlying contract which had reached an impasse or stalemate. It is in the very nature of the scheme or mechanism that the substantive issues relating to the payment can still be argued at a later point; or taken concurrently at separate proceedings initiated in court or at arbitration.
>
> [134] **It is absolutely vital, if not imperative, that this ethos of adjudication focused on a payment procedure or mechanism is fully appreciated before one can address the issue of the operation and application of the Act**. Without this understanding or full appreciation of the intention of

Parliament insofar as CIPAA is concerned runs the risk of giving the Act a sterile and literal interpretation. This, in turn, may undermine, frustrate or render futile to the extent of emasculating the efforts of Parliament in this regard.

...

[136] **Seen in its proper perspective, it cannot be denied that adjudication is nothing more than a dispute resolution mechanism. It is a regime, process or procedure before which the parties' disputes or differences over payments claimed by one party against the other party will be determined by an adjudicator**. That adjudicator's decision (as opposed to an award or an order), though enforceable, is only provisional for the intervening period, commonly referred to as 'temporary finality'..." [our emphasis]

[68] It is necessary to stress that we have been very careful in perusing through the judgment in **UDA Holdings Bhd**, but upon reading it one thing is very clear to us, that is that, the High Court is of the view that adjectival or procedural law operates retrospectively, the change of forum is a change of adjectival or procedural law and not a change of a substantive law and since the CIPAA is a procedural legislation, it is to be applied retrospectively. With respect, this is not an accurate legal position in this country neither is it a correct approach in construing whether an Act of Parliament is retrospective or prospective. It is important to highlight on this aspect that whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive.

[69] We consider that the correct and proper approach to the construction of a statute in order to determine whether a statute is retrospective in its effect is expounded by the Privy Council in **Yew Bon Tew & Anor** at page 5 to the following effect:

"Apart from the provisions of the Interpretation Statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions "retrospective" and "procedural", though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and **an Act which is procedural in one sense may in particular circumstances do far more that regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself**.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.

-

-

-

Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to

see **whether the statute, if applied retrospectively** to a particular type of case, **would impair existing rights and obligations**". [our emphasis]

[70] Likewise, the Court of Appeal in **Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292** in the judgment of Gopal Sri Ram JCA (as His Lordship then was) reiterated a similar sentiment on the trite legal position when His Lordship at page 296-297 expressed the following view –

> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, **in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective**.
>
> -
>
> -
>
> -
>
> **The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another**, depending upon the context in which it is being construed: *Maxwell v Murphy (1957) 96 CLR 261*; *In the Estate of Fuld (No 3) [1968] P 675* at p 695*; [1965] 3 All ER 776* at 779; *[1966] 2 WLR 717* at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper (1950) 52 Bom LR 625.* It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v Lakshamanan Chettiar [1963] 1 Mad LJ 46* at p 50.
>
> In our judgment, **the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the**

enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights".
[our emphasis]

[71] From the above authorities, it is clear to us that in the absence of express words to such effect, a statute, notwithstanding whether it is procedural or substantive, cannot be applied retrospectively to impair a substantive right. This settled legal position, we would say, accords well with and further amplifies those statutory provisions of the interpretation statute namely Act 388. To reiterate our point, what is important to note is that the CIPAA in itself does not contain any provision stating that it has retrospective application. Parliament therefore clearly does not exercise its legislative power pursuant to Article 66 Clause (5) of the Federal Constitution and subsections 2(3), 19(1) and 43(a) of Act 388 to enact the CIPAA with retrospective effect.

[72] That said, the undisputed facts cannot be ignored. The parties have agreed with the cross-contract set-offs provision in the agreement. However, pursuant to section 5 of the CIPAA which allows a single construction contract, the appellant is now prohibited from relying on an express term of the construction contract relating to the cross-contract set-offs. Section 5 as it stands surely will have a significant impact on the cross-contract set-offs provisions in the construction contracts existing before the CIPAA was enacted. Thus, fully cognizant of the test in **Yew Bon Tew & Anor**, the question we need to ask is whether a retrospective application of the CIPAA (absent express words by Parliament to glean its legislative intention to that effect) would substantially affect or impair the rights of the parties to the construction contract. We have no difficulty whatsoever in holding that the answer should be in the affirmative and

consequently the CIPAA should be prospective and not retrospective in operation.

[73] This is in line with the Court of Appeal's decision in the case of **Bauer (Malaysia) Sdn Bhd** where the Court of Appeal was called upon to decide whether section 35 of the CIPAA applied to the construction contract with the result of avoiding clause 11.1 therein. In **Bauer (Malaysia) Sdn Bhd**, clause 11.1 of the construction contract stipulates that all payments to the respondent shall only be made within 7 days from the date the appellant received their related progress payments from the employer. With the enactment of the CIPAA, this pay-when-paid mode of payment is no longer allowed as section 35 thereof prohibits such conditional payment provision in a construction contract. The High Court held that the CIPAA was retrospective in its operation. That decision was reversed by the Court of Appeal when it decided that the CIPAA took effect prospectively. We entirely agree with the judgment of the Court of Appeal in **Bauer Sdn Bhd** from which we can clearly discern and accept the conclusion that –

(a) the applicability of section 35 of the CIPAA depends on whether it was intended to have a retrospective operation. There is no express provision in the CIPAA excluding or including construction contracts made prior to the commencement of the CIPAA, consequently, the CIPAA is prospective in nature;

(b) unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. If the legislation is procedural in nature that

legislation must be given retrospective effect unless there are clear words to the contrary;

(c) prior to the CIPAA, claimants in the construction industry could only resort to either the courts or arbitral tribunals to settle their disputes. Access to the courts and arbitral tribunals were the only legal rights available to the claimants to claim for their contractual fees. With the advent of claim for their contractual fees, the CIPAA has in effect created a new regime in which claimants in the building industry can claim their contractual fees;

(d) access to justice is in anyone's view a substantive right. The CIPAA has created and given a new avenue of access to justice to claimants in the construction industry. Hence the CIPAA is in essence a legislation relating to a substantive right. Within the CIPAA, there also exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime is nothing but a by-product or the consequence of the substantive right created by the CIPAA;

(e) in the context of section 35 it relates to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs subject of course to any prohibitions recognised by law. Section 35 in essence takes away the right of the parties to have their payment regime regulated by a "pay when paid" mode. Here, there is no dispute that prior to the adjudication process, the respondent only received payments

when the appellant had been paid by ITD Vertex. Hence the contention by learned counsel for the appellant that it is totally unfair that the respondent can now rely on section 35 of the CIPAA to void clause 11 of the construction contract; and

(f) there is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched right of individuals retrospectively unless with clear words within the statute. There are no such clear words in the CIPAA. That being the case, there is no hesitation on our part to conclude that the CIPAA is prospective in nature. In so far as section 35 is concerned, clause 11 of the construction contract remains afoot and valid.

[74] The next point in the argument urged on behalf of the respondent is that the Federal Court in **View Esteem**, supra, in paragraphs [9] and [10] had considered and cited **UDA Holdings Bhd.** Whilst learned counsel for the respondent concedes that the Federal Court in **View Esteem** did not expressly approve the judgment of the High Court in **UDA Holdings Bhd**, he submits that it is particularly pertinent to note that **UDA Holdings Bhd** was not overruled or declared bad law by the Federal Court in **View Esteem**. In our judgment, the Federal Court's decision in **View Esteem** cannot be read as an affirmation of the High Court's decision in **UDA Holdings Bhd**. Let us now turn to the relevant excerpts from the Federal Court's decision in **View Esteem** which referred to **UDA Holdings Bhd** –

"[9] The application of s 41 of the CIPAA had been earlier considered and decided by the High Court in the case of *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5*

CLJ 527 which held that the CIPAA as a new act applied retrospectively. The High Court held that the CIPAA applies to construction contracts entered into before the coming into force of the CIPAA and also to payment disputes that arose before the enforcement of the CIPAA.

[10] It is significant to note that in the case of *UDA Holdings* Bhd the KLRCA as the body designated by the CIPAA as 'the adjudication authority' (see s 32) had itself propounded that this new Act should apply only to payment disputes that arise after the CIPAA has come into force. The High Court in *UDA Holdings Bhd* held that CIPAA has a full retrospective effect to cover both construction contracts and payment disputes that arose before CIPAA came into force. In the result, it would appear that s 41 of the CIPAA is not only a 'saving provision' but also a 'transitional provision' as the CIPAA has been declared by case law to apply retrospectively to pre-existing payment disputes".

[75] The above excerpts relate to the Federal Court's decision in respect of Questions 1 and 2 in **View Esteem** and these are –

> (1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') can be made any time by way of an application or whether such an application can only be made upon the application to set aside an adjudication award under section 15 of the CIPAA;
>
> (2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or arbitration prior to the coming into force of the CIPAA;"

[76] It is apposite to note from the above passages that the Federal Court had merely mentioned **UDA Holdings Bhd** in passing. But the fact remains that the Federal Court did not decide on the correctness or

otherwise of the decision in **UDA Holdings Bhd**. Leave questions 1 and 2 in **View Esteem** were not concerned with whether the CIPAA is retrospective or prospective in nature. It is concerned with the respondent's claim of which arbitration proceedings were commenced before the CIPAA came into operation. The Federal Court decided that section 41 of the CIPAA as a savings provision applied to exclude the respondent's claim as arbitration in respect of the same had been commenced before the CIPAA came into operation. Nowhere did the Federal Court decide that since court and arbitration proceedings relating to payment disputes under a construction contract are saved by section 41, it follows that the CIPAA applies to construction contracts entered into before the commencement of the CIPAA. Thus, the issue of whether the CIPAA was retrospective or prospective was not a live issue to be decided in **View Esteem**. Accordingly, it is simply incorrect to assert that the Federal Court in **View Esteem** affirmed the decision of the High Court in **UDA Holdings Bhd**.

[77] It does not escape our notice that the High Court in its decision in **UDA Holdings Bhd**, apart from arriving at the conclusion that the CIPAA amounted to procedural or social legislation, also relied on the general provision of section 2, the exclusion provision found in section 3 and the savings provision in section 41 of the CIPAA to arrive at the conclusion that the CIPAA had retrospective application. For the purpose of our deliberation on the effect of these sections, it is necessary to set out the provisions in full –

> "**Application**
>
> **2.** This Act 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.

Non-Application

3. 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.

Savings

41. Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act."

[78] The High Court in **UDA Holdings Bhd** was of the view that construing sections 2, 3 and 41 of the CIPAA together, Parliament had in fact expressed its intention on the issue of application and non-application of the CIPAA to construction contracts entered into before the enactment of the Act. This view is expressed in paragraphs [143] and [144] of the judgment wherein the conclusion reached is that the CIPAA "applies to all construction contracts made in writing regardless of when those contracts were made so long as those construction contracts are to be carried out wholly or partly within the territory of Malaysia". In paragraphs [146] and [147] of the grounds of judgment, the High Court arrived at the conclusion that the effect of section 41 read together with sections 2 and 3 of the CIPAA would mean that proceedings commenced before 15.4.2014 are expressly excluded or preserved from the effect of the new law. The relevant paragraphs of the decision are reproduced below –

"[146] The effect of s 41 is to save or exclude those proceedings relating to any payment dispute under a construction contract which have already been commenced in any court or arbitration before 15 April 2014 from the operation

or operative effect of the application provision in s 2. Those proceedings are expressly excluded or preserved from the effect of the new law; and are expected to continue as if the Act never came into force for the related payment dispute...

[147] As a corollary, it may be said that if there was no savings provision inserted, there may just have been some room to begin an argument for an interpretation of prospective application of CIPAA. However, given that there is a clear specific savings provision in s 41, that possible argument must now be put to rest."

[79] Learned counsel for the respondent has argued that section 2 of the CIPAA prescribes a wide ambit for the application of the Act when it provides that the CIPAA" applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia". Given the generality of the provisions in the said section as evident by the use of the word 'every' taken in conjunction with the legislative intent of the CIPAA to remedy the injustices of non-payment of vulnerable subcontractors in the construction industry, the CIPAA, it is submitted, applied to all construction contracts notwithstanding whether it was made before or after its commencement. He also emphasises that it would be absurd for Parliament to have enacted the CIPAA with the knowledge that it would only serve its purpose a few years later and that the unpaid and vulnerable subcontractors in the construction industry suffering from the ill and mischief of non-payment from construction contracts entered into prior to the CIPAA would continue to languish under the previous system prior to the CIPAA. This mischief that the CIPAA is intended to remedy necessitates a retrospective application of the CIPAA. He further submits that the glaring silence in the CIPAA in respect of the time for commencement of the application of the CIPAA as well as the

adjudication regime and the generality of section 2 implies that Parliament, in its wisdom has opted not to prescribe such a commencement point for statutory adjudication.

[80] Turning now to section 41, in our view, the savings provisions in section 41 of the CIPAA, does not and cannot amount to an express statement by Parliament for the CIPAA to apply retrospectively. With due respect to learned counsel for the respondent, the interpretation ascribed to section 41, as it is clear to us, is completely fallacious. On a plain reading of section 41 of the CIPAA, there is no real doubt that all that is provided is that litigation and arbitration proceedings commenced prior to 15.4.2014 are not impacted by the introduction of the CIPAA. The operation of section 41 is only confined to and restricted to litigation and arbitration proceedings commenced prior to the commencement date of the CIPAA. It cannot be construed to mean, as the learned judge had done in **UDA Holdings Bhd**, that since construction contracts entered into before the commencement of the CIPAA are not included in sections 3 and 41 and in view of the generality of section 2, it follows that the CIPAA applies to them. Such interpretation is, in our view, somewhat bizarre and bordering on absurdity.

[81] We need only say on this aspect that if the legislative intention is for the CIPAA to have a retrospective effect, Parliament would have included express provisions to that effect instead of providing for limiting provisions in sections 3 and 41 and the general provision of section 2 and leaving it to the court to imply or infer from these provisions that the CIPAA consequently applies retrospectively to all construction contracts entered into before the CIPAA was enacted. Accordingly, we cannot accept the conclusion reached by the High Court in **UDA Holdings Bhd** and the

respondent's position that the CIPAA, in view of sections 2, 3, and 41, operates retrospectively, as it was posited on the false premise that the generality of section 2, the exclusion provision of section 3 and the savings provisions in section 41 as the only limiting provisions have put to rest the argument that the CIPAA is prospective in its operation. The plain fact is, there are no clear and express words in the CIPAA providing for its retrospective operation. This Court must give effect to every word used in a statute and determine the meaning which emanates from it since there is a presumption that Parliament does not legislate and in fact does nothing in vain. As earlier stated, Parliament has fully appraised the problems by the construction industry and is fully aware of the mischief the CIPAA seeks to overcome, yet it has elected not to include a clear and express provision that the CIPAA is to be applied retrospectively.

[82] We would further add that the High Court in **UDA Holdings Bhd** did not fully appreciate the impact on the parties when they have acted on their vested rights in the context of section 41 of the CIPAA. The issue in these appeals concerns section 5 of the CIPAA which takes away the rights of the appellant for the cross-contract set-offs under clause 13.1 of the agreement. It would cause gross injustice and unfairness if the CIPAA and in particular sections 5 and 35 thereof could be applied retrospectively when the parties had not only agreed to those terms as stipulated in clause 13.1 of the agreement herein or 11.1 of the agreement in **Bauer (Malaysia) Sdn Bhd** but had during the course of the contract applied the same and had not disputed the application of this contractual provision.

[83] A consideration of the House of Lords decision in **Wilson v First County Trust Ltd [2003] 4 All ER 97** confirms the view that has been

expressed above. At page 142 of the grounds of judgment, Lord Scott made the following observation:

> "[153] It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. **But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect** (see Maxwell on Interpretation of Statutes (12th edn, 1969) p 215 and Bennion Statutory Interpretation (4th edn, 2002) pp 265-266 and 689 – 690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is not more than a starting point." [our emphasis]

[84] We accept that Parliament has the power to pass legislation to impair contractual rights. In fact, there are statutes which affect rights recognised in law which would have been in existence but for these statutes. In dealing with the issue of existing rights, **UDA Holdings Bhd** adopted the law as explained by Lord Rodgers in the House of Lords' decision of **Wilson v First County Trust**, supra, in coming to its decision on this issue. In his speech, Lord Rodgers at page 15, referred to the

speech made by Buckley LJ in the Court of Appeal decision of **West v Gwynne [1911] 2 Ch 1** in which he observed –

> "But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B. As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning."

The decision of the House of Lords in **Wilson v First Country Trust** draws a clear distinction between existing rights and vested rights. At page 153 of Lord Rodgers's speech the following was explained:

> "The presumption is against legislation impairing rights that are described as 'vested'. The courts have tried, without conspicuous success to define what is meant by "vested rights" for this purpose. Although it concerned a statutory rule resembling s 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v Minister For Lands [1895] AC 425* is often regarded as a starting-point for considering this point. There Lord Herschell LC indicated (at page 431), that, **to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed.**" [our emphasis]

[85] It is apparent from the above passages that where the parties have acted on their contractual rights in respect of a particular clause such as

the pay-when-paid clause in **Bauer (Malaysia) Sdn Bhd** and the cross-contract set-offs in the instant appeals, sections 35 and 5 of the CIPAA respectively should not have retrospective effect on the contract between the parties in order to interfere with those contractual rights which have already been vested and exercised by the appellant. We would go further to say that in such situation any interpretation that the statute operates retrospectively would prejudicially affect vested rights or the legality of the transaction which predators the legislation.

[86] Accordingly, once a party has acted on its contractual rights at a time when such contractual provisions were permissible, the presumption against retrospection is strong. In the case of **Mithilesh Kumari & Anor v Prem Behari Khare 1989 AIR 1247** the Indian Supreme Court was of the following view:

> "We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly at the time of the Act, or arises by necessary and distinct implication. A retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively the Court has to be satisfied that the statute is in fact retrospective. **The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed**." [our emphasis]

[87] It is therefore clear that courts will be slow in concluding that a statute would have retrospective effect if such construction will

consequently impact vested rights, contracts, transactions or impose new duties and obligations in relation to past transactions for to do so would be contrary to the presumption that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. The basis of this presumption in this area of the law is no more than simple fairness, which ought to be the basis of every general rule. It should be observed that this is another dimension or a broader presumption in the approach in determining whether legislation has retrospective application. It will be remembered we have earlier referred to that Lord Scott's judgment in **Wilson v First Country** in paragraph [153] which succinctly stated that "there is a common law presumption that a statute is not intended to have retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect".

[88] In our judgment, the fact that Parliament does not expressly state that legislation will be retrospective would be the starting point and thereafter other factors such as fairness and hardship will also be considered. Apart from **Wilson v First Country**, we would also refer to the English Court of Appeal's decision in **Secretary of State For Social Security and another v Tunnicliffe [1991] 2 All ER 712** wherein Staughten LJ on the issue of fairness said –

> "In my judgment the true principle is that **Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them**, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree-the

greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended." [our emphasis]

(see also **L' Office Cherifien des Phosphates and another v Yamashita-Shinnihon Steamship Co Ltd (The Boucraa) [1994] 1 All ER** at page 30). We would add that it is also manifestly unjust if the effect of a statute is to deprive a person such as the appellant herein of a defence or remedy available to him before the commencement of the statute (**Yew Bon Tew & Anor**, supra).

[89] A perusal of the appeal record clearly shows that not only that the agreement was made before the CIPAA was enacted which conferred existing right to the parties to claim for the cross-contract set-offs, but also the payment dispute giving rise to a claim for the cross-contract set-offs arose before the commencement of the CIPAA. To support our finding, the issue of liquidated damages in the sum of RM3,723,000.00 arose due to the delay on the part of the respondent to complete the subcontract work in respect of the Sandakan Sub-Contract. The appellant had issued the Certificate of Non-Completion dated 1.3.2011 to the respondent. Clearly the dispute arose before the commencement of the CIPAA which entitled the appellant to rely on the right of the cross-contract set-offs. In our judgment, once parties have acted upon their contractual rights and taken steps in that regard, this means that the parties have exercised their contractual rights. It would be grossly unfair to the appellant if the CIPAA is construed to apply retrospectively. In our view, it is unlikely that Parliament could have intended that the CIPAA is to be applied in this way. The law expects that Parliament will make it clear if that is intended. Precisely, it cannot be and should not be the case that the CIPAA ought

to operate retrospectively which consequently after the act has taken place will render such act void and the right extinguished.

[90] Given that the CIPAA impacts parties' substantive rights, a retrospective application of the CIPAA would have the effect of interfering with the basic principle of freedom of contract. Accordingly the bargain entered into by the parties on the cross-contract set-offs as manifested in clause 11.1 of the agreement should not be ceded to section 5 of the CIPAA. There is no such clear and express provision in the CIPAA by which it could have been ordained that the respondent's stance that the CIPAA operates retrospectively should receive favourable consideration from us. In our judgment, sections 5, 28, 29, 30, 35, 36 and 37 impact parties' substantive rights and for this reason it cannot be said that the CIPAA is only limited to procedural or social matters. For the reasons that we have given, we would hold that a holistic interpretation and construction ought to be given and since there are various provisions in the CIPAA that impact parties' substantial rights, it must be that the CIPAA in its entirety should have prospective application only. It cannot be the case that some parts of the CIPAA have retrospective application whereas the other parts are held to have prospective application.

[91] The last remaining point concerns the respondent's argument that a construction that will promote the purpose underlying the CIPAA shall be preferred to justify the retrospective application of the CIPAA. The principle of purposive interpretation of statute is provided in section 17A of Act 388. The High Court in **UDA Holdings Bhd** at paragraphs [220] to [225] relied on section 17A of Act 388 and referred to the Federal Court case of **Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449** to advance the argument that the CIPAA is retrospective in its

operation. There is no doubt that the object and purpose of the CIPAA is expressly stated in the long title thereof. However, such purposive approach in our judgment in no way diminishes the general presumption of prospectivity of a statute. It ought to be emphasised that the only issue in this case is whether the CIPAA is to have a retrospective application. Therefore, section 17A of Act 388 must be read subject to the said general presumption and sections 19(1) and 43 of Act 388 which require clear and express intention to apply the CIPAA retrospectively. In any event, we would say that it is incorrect for the purposive approach to be applied in this case as the underlying purpose of the CIPAA, as correctly found by the High Court in **UDA Holdings Bhd**, is sufficiently plain, unambiguous, and not disputed in these appeals. The duty of the court, and indeed its only duty, is to expound the language of the Act in accordance with the settled rules of construction. To put it in another way, such construction is limited to the words used by the legislature and to give effect to the words used by it (see **Vacher & Sons Ltd v London Society of Compositors [1913] AC 117-18**; **Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang [2007] 2 MLRA 187**]. Regard to the purpose of an Act of Parliament under section 17A of Act 388 shall only be had when the meaning of a statutory provision is not plain (**Andrew Lee Siew Ling**, supra). We would in this regard reiterate our finding that there is no clear and express provision that the CIPAA operates retrospectively. The respondent's argument on this point is obviously otiose and untenable.

CONCLUSION

[92] We see no reason, in the light of our deliberation, to be persuaded by the respondent's argument that the CIPAA is a legislation of general application. The provisions of the CIPAA undoubtedly affect the

substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the appellant besides being an essential component of the rule of law. Consequently, the entire Act ought to be applied prospectively. Contrary to the Court of Appeal's decision in the 125 Appeal that the issue of prospectivity or retrospectivity of the CIPAA is not really a material consideration, in our judgment, the issue is crucial and relevant since any interpretation that the CIPAA takes effect retrospectively inhibits the exercise of the appellant's vested right in accordance with the bargain entered into between the parties. The outcome, as earlier indicated, is that Question 4 in this appeal should be answered in the following manner –

> Q: Whether the CIPAA 2012 gives rise to substantive rights and is consequently not retrospective in nature, making the Adjudication Decision liable to be set aside?
>
> A: Yes. The CIPAA gives rise to substantive rights and is consequently not retrospective in nature.

However, with respect to the 125 Appeal, our answer to Question 1 is in the negative in that the CIPAA is not retrospectively applicable to a subcontract that was signed prior to the commencement date of the CIPAA. In the upshot, the entire adjudication proceedings including the adjudication decision are rendered void. The glaring conclusion which emerges is that the respondent is unsuccessful in all of their contentions. Absent any express intention by Parliament that the CIPAA is to be applied retrospectively, the CIPAA can only be applied prospectively. The adjudication decision therefore ought to be set aside. In view of our decision, the remaining questions of law for determination have thereby become academic and need not be answered. Accompanying this

conclusion is our unanimous decision that the 124 to 126 Appeals are allowed with costs. We set aside the decisions of the Court of Appeal and the High Court and correspondingly allow the appellant's application to set aside the adjudication decisions and dismiss the respondent's application to enforce the said adjudication decisions.

(IDRUS BIN HARUN)
Federal Court Judge
Malaysia

Dated: 16 October 2019

Solicitors For The Appellant:

Cecil W M Abraham, Aniz Ahmad Amirudin & Syukran Syafiq
Tetuan Wajdi Mohamad Yusri & Co
L9-8, Menara Sentral Vista,
150 Jalan Sultan Abdul Samad,
KL Sentral East (Brickfields)
50470 Kuala Lumpur

Solicitors For The Respondent:

Oon Chee Kheng, Daniel Lau & TJ Lee
Tetuan CK Oon & Co
L3A-3A, Wisma BU8
No.11 Lebuh Bandar Utama
Bandar Utama Damansara
47800 Petaling Jaya
Selangor