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Usahasama SPNB-LTAT Sdn Bhd v ABI Construction Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C(ARB)-38–08 OF 2017
DARRYL GOON JC
11 JUNE 2018

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Arbitration — Award — Setting aside — Plaintiff sought to set aside interim award handed down by arbitrator under ss 37 and 42 of the Arbitration Act 2005 — Whether s 37 of the Arbitration Act 2005 applicable — Whether arbitrator could interpret order of court contrary to its expressed words — Whether learned arbitrator was correct in interpreting order of High Court — Arbitration Act 2005 ss 37 & 42

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The parties had entered into a construction contract but subsequently, the plaintiff terminated the contract. The defendant then referred the matter to the arbitration. On 2 June 2015, the plaintiff applied to the arbitrator under s 18(3) of the Arbitration Act 2005 ('the AA') contending that the arbitration

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was premature. Nevertheless, the arbitrator dismissed the application and held that he had jurisdiction to hear and decide the case. The plaintiff's appeal to the High Court against the decision of the arbitrator was allowed vide court's order dated 15 March 2016. Thereafter, guided by the said decision, the defendant referred the matter to the plaintiff's managing director ('the MD') who had

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decided on the matter. The defendant was dissatisfied with the MD's decision, hence, the defendant issued fresh notice of arbitration. Dato' Mah Weng Kwai was appointed as the arbitrator for the second arbitration. The plaintiff then applied to dismiss the defendant's claim on the ground that the defendant's cause of action had accrued more than six years before the commencement of

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the second arbitration and was accordingly barred under s 6(1)(a) of the Limitation Act 1953 ('the LA'). Via the interim award, the learned arbitrator dismissed the plaintiff's application to dismiss the defendant's claim. The learned arbitrator observed that the learned judge in the High Court clearly had s 30 of the LA in mind when he made the order of 15 March 2016. In the

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present action, the plaintiff sought to set aside the said interim award pursuant to ss 37 and 42 of the AA as well as the inherent jurisdiction of the court. The plaintiff had posed four questions of law: (a) whether the learned arbitrator could interpret an order made by the High Court by arriving at an interpretation which contradicted the express terms of the order; (b) whether

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the learned arbitrator had applied and/or considered the correct and/or relevant governing principles of law and/or interpretation of an order in arriving at his decision; (c) whether an award, which contradicted the express terms of an order made by the High Court and which was arrived by considering and/or applying wrong and/or irrelevant principles of

interpretation of an order, was valid and/or could be allowed to subsist; and (d) whether the learned arbitrator could decide that an order made by the High Court was per incuriam.

Held, setting aside the interim award in whole with costs of RM10,000:

(1) The filing of one application invoking both the provisions under ss 37 and 42 of the AA, per se, posed no legal problem. What the court ought to be mindful of was not to mix the provisions and to deal with them together as if the factors to be considered in respect of both these provisions were the same (see para 56).

(2) In determining the issue placed before the learned arbitrator by the plaintiff, it was necessary for the learned arbitrator to consider if the order of the High Court of 15 March 2016 had excluded any period of time for the purposes of reckoning the applicable limitation period. Thus, whether the decision arrived at by the learned arbitrator in his interim award was correct or not, it could not be said that the interim award either: (a) 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' under s 37(1)(a)(iv) of the AA; or (b) '... contains decisions on matters beyond the scope of the submission to arbitration' under s 37(1)(a)(v) of the AA (see paras 59–60).

(3) The construction of the order and grounds of judgment of the High Court of 15 March 2016 and 29 April 2016 respectively, was a question of law. In interpreting, and hence, construing the order and grounds of judgment of the High Court, what the learned arbitrator was doing was to determine their true import. For this purpose, this exercise was no different from the construction of any document that may be tendered in evidence to be construed by a court of law or arbitrator (see para 67).

(4) The plaintiff's application to the learned arbitrator that resulted in the interim award was not an appeal against the decision of the learned High Court judge's order of 15 March 2016. Therefore, it was not for the arbitrator to conclude in the interim award that, 'With the greatest respect, I am of the considered view that the learned judge's further orders to exclude time from 2.6.15 only and not from 12.2.14 per incuriam in the circumstances of this case' (see paras 74–74).

(5) It was simply not for the learned arbitrator to deem what was stated in the learned High Court judge's order of 15 March 2016 to be other than what was expressly stated therein. The order of the court of 15 March 2016 was not intended or worded to exclude the applicability of any limitation period that might have set in. The said order was directed merely to exclude a specific period of time expressly stated therein. The learned High Court judge's order of 15 March 2016 was clear beyond

peradventure. It would be plainly wrong in law to interpret an order of the court by ignoring its expressed words. Therefore, the court answered all the four questions of law in the negative (see paras 76, 78, 88, 90 & 92).

[Bahasa Malaysia summary

Pihak-pihak telah memasuki kontrak pembinaan tetapi berikutan itu, plaintif telah menamatkan kontrak tersebut. Defendan kemudian telah merujuk perkara itu kepada timbang tara. Pada 2 Jun 2015, plaintif telah memohon kepada penimbang tara di bawah s 18(3) Akta Timbang Tara 2005 ('AT tersebut') menegaskan bahawa penimbangtaraan itu adalah pramatang. Walau apa pun, penimbang tara telah menolak permohonan itu dan memutuskan bahawa beliau mempunyai bidang kuasa untuk mendengar dan memutuskan kes itu. Rayuan plaintif kepada Mahkmah Tinggi terhadap keputusan penimbang tara telah dibenarkan melalui perintah mahkamah bertarikh 15 Mac 2016. Selepas itu, berpandukan keputusan tersebut, defendan telah merujuk perkara itu kepada pengarah urusan plaintif ('MD') yang telah membuat keputusan berhubung perkara itu. Defendan berasa tidak puas hati dengan keputusan MD itu, justerum defendan mengeluarkan notis timbang tara yang baharu. Dato' Mah Weng Kwai telah dilantik sebagai penimbang tara untuk timbang tara kedua. Plaintif kemudian memohon untuk menolak tuntutan defendan atas alasan bahawa kausa tindakan defendan telah terakru lebih dari enam tahun sebelum timbang tara kedua bermula dan dan sewajarnya dihalang di bawah s 6(1)(a) Akta Had Masa 1953 ('AHM'). Melalui award interim, penimbang tara yang bijaksana telah menolak permohonan plaintif untuk menolak tuntutan defendan. Penimbang tara yang bijaksana memerhati bahawa hakim yang bijaksana di Mahkamah Tinggi jelas mempunyai s 30 AHM dalam fikirannya apabila beliau membuat perintah 15 Mac 2016. Dalam tindakan ini, plaintif memohon untuk mengetepikan award interim tersebut menurut s 37 dan 42 AT tersebut dan juga bidang kuasa sedia ada mahkamah. Plantif mengemukakan empat persoalan undang-undang: (a) sama ada penimbang tara yang bijaksana boleh mentafsirkan perintah yang dibaut oleh Mahkamah Tinggi dengan membuat tafsiran yang bertentangan dengan terma-terma nyata perintah itu; (b) sama ada penimbang tara yang bijaksana telah memohon dan/atau mempertimbangkan prinsip-prinsip undang-undang dan/atau tafsiran yang betul dan/atau relevan yang mengawal prinsip-prinsip undang-undang dan/atau tafsiran suatu perintah untuk tiba kepada keputusannya; (c) sama ada suatu award, yang bertentanan dengan terma-terma nyata suatu perintah yang dibuat oleh Mahkamah Tinggi dan yang telah dibuat dengan mempertimbangkan dan/atau menggunakan prinsip-prinsip tafsiran suatu perintah yang salah dan/atau tidak relevan, adalah sah dan/atau boleh dibenarkan untuk wujud; dan (d) sama ada penimbang tara yang bijaksana boleh memutuskan bahawa suatu perintah yang dibuat oleh Mahkamah Tinggi adalah *per incuriam*.

Diputuskan, mengetepikan award interim secara keseluruhan dengan kos RM10,000:

(1) Pemfailan satu permohonan menggunakan kedua-dua peruntukan di bawah ss 37 dan 42 AT tersebut, per se, tidak menimbulkan apa-apa masalah perundangan. Apa yang patut mahkamah sedar adalah untuk tidak mencampurkan peruntukan-peruntukan itu dan untuk menangani kedua-duanya sekali seolah-olah faktor-faktor yang perlu dipertimbangkan berkaitan kedua-dua peruntukan tersebut adalah sama (lihat perenggan 56).

(2) Dalam menentukan isu yang dikemukakan di hadapan penimbang tara yang bijaksana oleh plaintif, ia adalah perlu untuk penimbang tara yang bijaksana mempertimbangkan jika perintah Mahkamah Tinggi 15 Mac 2016 telah mengecualikan mana-mana tempoh masa bagi tujuan perhitungan tempoh had masa yang terpakai. Oleh itu, sama ada keputusan yang telah dibuat oleh penimbang tara yang bijaksana dalam award interimnya adalah betul atau tidak, ia tidak boleh dikatakan bahawa award interim itu adalah: (a) 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' di bawah s 37(1)(A)(iv) AT tersebut; atau (b) '... contains decisions on matters beyond the scope of the submission to arbitration' di bawah s 37(1)(a)(v) AT tersebut (lihat perenggan 59–60).

(3) Pembinaan perintah dan alasan penghakiman Mahkamah Tinggi 15 Mac 2016 dan 29 April 2016 masing-masingnya, adalah persoalan undang-undang. Dalam mentafsir, dan justeru, mentafsir perintah dan alasan penghakiman Mahkamah Tinggi, apa yang dilakukan oleh penimbang tara adalah untuk menentukan penyampaian sebenarnya. Bagi tujuan ini, amalan tersebut tiada beza daripada pembinaan apa-apa dokumen yang boleh ditenderkan sebagai keterangan untuk ditafsirkan oleh mahkamah undang-undang atau penimbang tara (lihat perenggan 67).

(4) Permohonan plaintif kepada penimbang tara yang bijaksana yang menghasilkan award interim bukan suatu rayuan terhadap keputusan perintah 15 Mac 2016 hakim Mahkamah Tinggi yang bijaksana. Oleh demikian, ia bukanlah untuk penimbang tara untuk membuat kesimpulan dalam award interim itu bahawa, 'With the greatest respect, I am of the considered view that the learned judge's further orders to exclude time from 2.6.15 only and not from 12.2.14 per incuriam in the circumstances of this case' (lihat perenggan 74–75).

(5) Ia bukan untuk penimbang tara yang bjaksana untuk mengandaikan apa yang dinyatakan daam perintah 15 Mac 2016 hakim Mahkamah Tinggi adalah selain daripada apa yang dinyatakan dengan jelas di dalamnya. Perintah mahkamah bertarikh 15 Mac 2016 itu tidak diniatkan atau

dinyatkaan untuk mengecualikan pemakaian apa-apa tempoh had masa yang mungkin telah bermula. Perintah tersebut telah diarahkan hanya untuk mengecualikan tempoh masa spesifik yang dinyatakan dengan jelas dalam perintah tersebut. Perintah 15 Mac 2016 hakim Mahkamah Tinggi yang bijaksana adalah jelas mengabaikan nyatanya. Adalah salah dari segi undang-undang untuk mentafsirkan suatu perintah mahkamah dengan tidak menghiraukan kata-kata nyatanya. Oleh demikian, mahkamah menjawab semua empat persoalan undang-undang secara negatif (lihat perenggan 76, 78, 88, 90 & 92).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2021–2107.

Cases referred to

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)

Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (refd)

Sans Souci Ltd v VRL Services Ltd [2012] UKPC 6, PC (refd)

Te Whakakitenga O Waikato Incorporated v Tania Eris Martin [2016] NZCA 548, CA (refd)

The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 18(3), (8), (10), 37, 37(1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(b)(ii) (3), 42

Limitation Act 1953 ss 6(1)(a), 30, 30(5)

Limitation Act [UK] s 34(5)

T Kuhendran (R Kalaiarasan with him) (Zul Rafique & Partners) for the plaintiff. Irzan Iswat (Haniff Khatri) for the defendant.

Darryl Goon JC:

[1] The plaintiff in this case, Usahasama SPNB-LTAT Sdn Bhd, seeks to set aside an interim arbitration award that was handed down on 29 June 2017 ('interim award').

[2] This application is brought by the plaintiff invoking ss 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi), 37(1)(b)(ii) and 42 of the Arbitration Act 2005 ('the Arbitration Act') and the inherent jurisdiction of the court.

[3] Central to the interim award is a contention by the plaintiff before the learned arbitrator that the defendant's claim is barred by reason of the provisions under the Limitation Act 1953 ('the Limitation Act'). A

[4] The defendant, ABI Construction Sdn Bhd, on the other hand, maintained that its claim was not time-barred under the Limitation Act. This is because the High Court in a previous action had catered for the issue of limitation under s 30(5) of the Limitation Act in its order of 15 March 2016. The respondent further maintains that it had adhered strictly to that order of the High Court. B C

[5] The learned arbitrator's interim award then turned on an interpretation of what the High Court had decided and whether the said order of the High Court had indeed rendered the plaintiff's limitation argument unmaintainable. D

[6] To better appreciate the context of the interim award in question, the proceedings which led to it need be considered. They are set out with clarity by the learned arbitrator in the interim award and they are largely adopted and set out below with minor variations. E

BACKGROUND

[7] On 17 February 2006, the parties entered into a construction contract ('contract'). F

[8] On 19 February 2008, the contract was terminated by the plaintiff.

[9] A dispute arose between the parties and a notice of arbitration dated 12 February 2014 was issued by the defendant ('first arbitration'). G

[10] On 15 May 2014, one Mr Chong Pick Eng was appointed as the arbitrator for the dispute between the parties by the Director of the then KLRCA. H

[11] On 17 September 2014, Mr Chong Pick Eng withdrew as the arbitrator.

[12] On 4 March 2015 one Mr Bhag Singh was appointed by the director of the then KLRCA, as the new arbitrator. I

[13] On 2 June 2015, the plaintiff applied to Mr Bhag Singh under s 18(3) of the Arbitration Act contending that the arbitration was premature. The

A plaintiff maintained that based on cl 54 of the contract, the dispute between the parties must first be referred to the managing director of the plaintiff for a decision. It is only thereafter that the dispute may then be referred to arbitration. As such, the plaintiff maintained that the notice of arbitration of 12 February 2014 is premature and, accordingly, the learned arbitrator B Mr Bhag Singh had no jurisdiction to arbitrate and decide on the dispute between the parties.

[14] The learned arbitrator Mr Bhag Singh heard the application on C 24 September 2015 and on 7 December 2015, he dismissed the plaintiff's application and held that he had jurisdiction to hear and decide on the parties' dispute.

[15] On 17 January 2016, being dissatisfied with the learned arbitrator's D decision, the plaintiff appealed to the High Court under s 18(8) of the Arbitration Act vide Kuala Lumpur High Court, Originating Summons No WA-24C(ARB)-1–01 of 2016.

[16] On 15 March 2016, the High Court allowed the plaintiff's appeal and E gave its grounds for its decision on 29 April 2016.

[17] On 18 March 2016, the defendant issued a letter referring the dispute between the parties to the managing director of the plaintiff pursuant to cl 54 of the contract. F

[18] By its letter of 30 March 2016, the plaintiff through its solicitors wrote to the learned arbitrator Mr Bhag Singh maintaining that the latter is functus officio by reason of the High Court's order of 15 March 2016.

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[19] On 29 April 2016, the plaintiff's managing director gave his decision on the dispute referred to him under cl 54 of the contract.

[20] By its letter of 12 May 2016, the defendant's solicitors wrote to the H managing director of the plaintiff registering its dissatisfaction with the decision and giving notice of its intention to refer the dispute to arbitration.

[21] The defendant's solicitors then issued a fresh notice of arbitration dated I 10 June 2016 ('second arbitration').

[22] On 6 September 2016, Dato' Mah Weng Kwai accepted his appointment by the director of the then KLRAC as the arbitrator for the dispute in the second arbitration.

[23] On 29 November 2016, the plaintiff applied to dismiss the defendant's claim on the ground that the defendant's cause of action had accrued more than six years before the commencement of the second arbitration and is accordingly barred under s 6(1)(a) of the Limitation Act.

[24] By the interim award, after considering the order and grounds of judgment of the High Court dated 15 March 2016 and 29 April 2016 respectively and the submissions of the counsel for the parties, the learned arbitrator dismissed the plaintiff's application to dismiss the defendant's claim.

ORDER OF THE HIGH COURT OF 15 MARCH 2016

[25] The order of the High Court of 15 March 2016 in Kuala Lumpur High Court, Originating Summons No WA-24C(ARB)-1–01 of 2016 states as follows:

> *ADALAH DIPERINTAHKAN* bahawa Rayuan Plaintif mengikut seksyen 18(8) Akta Timbang Tara 2005 terhadap keputusan Bhag Singh, penimbang tara yang bijaksana, yang diberi pada 7.12.2015 *dibenarkan* dengan kos sebanyak RM4,000.00 dibayar oleh Defendan kepada Plaintif.
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> *DAN ADALAH JUGA DIPERINTAHKAN* bahawa masa tidak akan berjalan mengikut Akta Had Masa 1953 dari tarikh permohonan Plaintif di bawah seksyen 18(3) Akta Timbang Tara 2005 bertarikh 2.6.2015 sehingga tamat dua tempoh masa empat puluh lima (45) hari yang disebut di dalam fasal 54 (c) Kontrak bertarikh 17.2.2006, dengan syarat bahawa rujukan kepada Pengarah Urusan Plaintif mengikut fasal 54 (a) Kontrak tersebut diisukan oleh Defendan dalam masa empat belas (14) hari dari tarikh perintah ini.

THE HIGH COURT'S GROUNDS OF JUDGMENT

[26] In regard to the issue of limitation, the pertinent part of the grounds of judgment of the High Court in Kuala Lumpur High Court, Originating Summons No WA-24C(ARB)-1–01 of 2016, is found in para [45] and it states as follows:

> [45] The defendant (also the defendant in this case) was anxious that limitation might have set in bearing in mind s 30 of the limitation Act 1953. This court appreciates the anxieties assailing the defendant. The plaintiff's counsel was, agreeable that limitation should not run during the period of reference to the SO. Therefore this court in ruling that the arbitrator has no jurisdiction until compliance with cl 54(a) and (b) PWD 203 contract, would also hold that time does not run with respect to the Limitation Act 1953 from the date the application on this preliminary issue was made before the arbitrator on 2 June 2015 until the expiry of the two tranches of 45 days referred to in cl 54(c) PWD contract provided that the relevant notice under cl 54(a) is issued by the claimant to the plaintiff herein within 14 days from today. If need be, the claimant/defendant may have to resort to

s 45 Arbitration Act 2005 with respect to applying to the High Court for an extension of time to commence the arbitration.

DECISION OF THE LEARNED ARBITRATOR

[27] In the second arbitration, as indicated above, the plaintiff applied to have the defendant's claim dismissed. The plaintiff contended that the limitation period in respect of the cause of action upon which the defendant's claim was premised, had set in on 19 February 2014.

[28] The plaintiff further contended that the order of the High Court of 15 March 2016 had only excluded the period 2 June 2015–15 March 2016 for the purpose of computing the limitation period under the Limitation Act. The period excluded by the High Court was well after 19 February 2014 and therefore the fact that limitation had set in was not affected by the said order of the High Court.

[29] The defendant also relied on the order of the High Court of 15 March 2016. The defendant claimed that by this order, time was extended to allow the defendant to issue the second notice of arbitration for the second arbitration.

[30] The defendant further contended that it had complied fully with the order of the High Court and the timelines therein set out.

[31] In its interim award, the learned arbitrator first made clear that the limitation periods under the Limitation Act applied to arbitrations and that under the Limitation Act, an arbitration is deemed to have commenced when a party serves the notice of arbitration.

[32] The learned arbitrator then referred to s 30(5) of the Limitation Act which reads as follows:

> Where the High Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act or any such written law as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.

[33] The learned arbitrator observed that the learned judge in the High Court clearly had s 30 of the Limitation Act in mind when he made the order of 15 March 2016.

[34] The learned arbitrator went on to hold that in regard to s 30(5) of the

Limitation Act:

> ... once the court has decided to exercise its discretion to make further orders on the exclusion of time, then the only period of time that can be excluded by the court for the computation of time must be from the date of commencement of the arbitration to the date of the order and none other.

[35] The learned arbitrator then cited the following passage from *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd 1989 at p 197, para 3 on the exclusion of time under s 34(5) of the English Limitation Act (which is said to be in pari materia to s 30(5) of our Limitation Act):

> ... The policy of the section is plain. If the award or the arbitration were set aside, the claimant might find that by the time the Court had dealt with the matter and had in effect caused the existing arbitration proceedings to disappear, it would be too late for him to start fresh proceedings without becoming time-barred.
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> Accordingly the statute provides that the running of time is *interrupted between the moment when the claimant commenced the original arbitration, and the moment when the court makes the order setting the award or the arbitration aside*. In effect the claimant is left with such time for starting a fresh arbitration as remained to him when he gave his original notice to arbitrate ... (Emphasis added.)

[36] Referring to the above passage from *The Law and Practice of Commercial Arbitration in England* the learned arbitrator went on to state in para 10 of the interim award as follows:

> 10. Significantly, it will be observed that the above passage states that the 'running of time is *interrupted between the moment when the claimant commenced* the original arbitration, and ...' and not between any other moment, such as the filling of an application to set aside an award of the arbitrator, and the moment when the Court makes the order setting the award or the arbitration aside.

[37] In light of the foregoing, the learned arbitrator concluded as follows:

> 12. Hence, in this case as the learned Judge had decided to exercise his discretion to make the further orders to exclude a certain period in the computation of time, it ought to be implied by law at the least, that the only period that can be excluded from the computation of time shall be from the date of the First Notice of Arbitration (12.2.14) to the date of the Order (15.3.16). With the greatest of respect, I am of the considered view that the learned Judge's further orders to exclude time from 2.6.15 only and not from 12.2.14 is per incuriam in the circumstances of this case.

[38] The learned arbitrator then went on to note that if the plaintiff was not satisfied with the further orders of the learned judge, the plaintiff ought to have appealed against the decision. Though, with respect, whether this is possible in light of s 18(10) of the Arbitration Act is arguable.

[39] Pursuant to the learned judge's order of 15 March 2016 the learned arbitrator stated that:

> d. It is not disputed that the Claimant (the respondent in this case) did, on 18.3.16 (ie three days after the Order of 15.3.16) issue a Notice of Reference of the dispute to the SO pursuant to the clause 54(a) of the Contract, to proceed with its claim against the Respondent (plaintiff in this case).
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> e. The SO gave his reply pursuant to clause 54(c) of the Contract on 29.4.16 (ie on the 43rd day form the date of Notice of Reference).
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> f. Being dissatisfied with the SO's reply, the Claimant (the defendant in this case) issued a Second Notice of Arbitration to the Respondent (the plaintiff in this case) pursuant to clause 54(c) of the Contact on 10.6.16 (ie on the 42nd day from the date of the SO's reply).

[40] The learned arbitrator then stated that, '... it is patently clear that the Claimant (the defendant in this case) had fully and religiously complied with the further orders on the timelines stipulated by the learned Judge on 15.3.2016'.

[41] To the plaintiff's argument that the learned judge had merely stopped time running from 2 June 2015 (ie the date of the application by the plaintiff to remove the learned arbitrator Mr Bhag Singh) and not from 19 February 2014 (ie the date limitation is said to have set in), the learned arbitrator held as follows:

> 18. The Respondent's (the plaintiff in this case) argument no doubt is a persuasive argument but with respect, I am of the view and hold, on the reasons stated above, that *the further orders of the learned Judge ought to have and are implied by law, to refer to 12.2.2014*, the date of commencement of the arbitration proceedings. (Emphasis added.)

In addition the learned arbitrator went on to state as follows:

> 19. Giving a literal reading and interpretation of the Order of the learned Judge, it simply means that the Claimant could continue with its arbitration proceedings if it was so minded to do, provided the Claimant complied with the learned Judge's further orders on the stipulated timelines. The Claimant was made to believe and understand that if it complied with the stipulated timelines, it could proceed with the arbitration proceedings accordingly.
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> 20. It would appear to be extremely unfair to the Claimant that even with its' full compliance to the stipulated timelines as further ordered by the learned Judge, the Claimant's claim would nonetheless be time barred. An inclusion of time from 12.2.14 to 2.6.15 into the computation of the limitation period would render the entire order of the learned Judge wholly academic and futile to the Claimant. By allowing time to the Claimant to issue the Notice of Reference within 14 days of the Order to the SO and to be followed by the issuance of a Notice of Arbitration, if necessary, all within the 90 day period, it can be construed that it was implicit that the Claimant was allowed by the further orders to continue the arbitration

proceedings within time. A finding to the contrary would mean that the Claimant would be led up the garden path only to have the gate slammed in its face!

21. I agree with the submissions of Counsel for the Claimant in the Claimant's Written Clarification, where it was submitted that the Order dated 15.3.16 'must be read in a manner in which it allows the Order to be harmoniously effective on the basis that it is a fundamental principle that a Court of Law would not make an order in futility or which has no utility.

22. The further orders in the Order of 15.2.16 would be wholly futile and of no utility to the Claimant if the limitation period is taken to have set in by 19.2.14 (*See Te Whakakitenga O Waikato Incorporated v Tania Eris martin* [2016] NZCA 548, cited by the Claimant).

[42] Despite an invitation by counsel for the plaintiff to consider the transcript of the notes of proceedings before the learned judge in Kuala Lumpur High Court, Originating Summons No WA-24C(ARB)-1–01 of 2016, the learned arbitrator declined to do so.

[43] It was said that the transcript would show that the learned judge was of the view that if limitation had set in before 2 June 2015 (and the plaintiff was entitled to raise the issue of limitation) the learned judge could not assist the defendant.

[44] The learned arbitrator gave three reasons for declining to consider the notes of proceedings.

[45] First, because an arbitral tribunal should only consider and interpret the order that was made by the learned judge ex facie and not to sit in judgment of the order as an appellate court would where notes of proceedings would be considered part of the record of appeal.

[46] Second, (and in any event) the order and written grounds of judgment of the learned judge did not make any reference to the transcript of the notes of proceedings as referred to above.

[47] Third, the transcript was attached to the plaintiff's further submission and not to any affidavit filed.

[48] On the foregoing bases, the learned arbitrator dismissed the plaintiff's application to have the respondent's claim dismissed on the ground that the limitation period had set in to bar its claim.

A THE PLAINTIFF'S APPLICATION UNDER SS 37 AND 42 OF THE ARBITRATION ACT

[49] As stated in above, in making this application, the plaintiff has invoked ss 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii) of the Arbitration Act.

[50] Sections 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii) of the Arbitration Act states as follows:

> 37(1) An award may be set aside by the High Court only if —
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> (a) the party making the application provides proof that—
>
> (i) ...
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
>
> (b) the High Court finds that —
>
> (i) ...
>
> (ii) the award is in conflict with the public policy of Malaysia.

Section 37 sub-s 3 states as follows:

> (3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[51] In addition, the plaintiff has also invoked s 42 of the Arbitration Act which states as follows:

> 42(1) Any party may refer to the High Court any question of law arising out of an award.

[52] In this application, the plaintiff has posed four questions of law. They are the following:

> (i) Whether the learned arbitrator can interpret an Order made by the High Court by arriving at an interpretation which contradicts the express terms of the Order?

(ii) Whether the learned arbitrator had applied and/or considered the correct and/or relevant governing principles of law and/or interpretation of an Order in arriving at his decision?

(iii) Whether an award, which contradicts the express terms of an Order made by the High Court and which was arrived by considering and/or applying wrong and/or irrelevant principles of interpretation of an Order, is valid and/or can be allowed to subsist?

(iv) Whether the learned arbitrator can decide that an Order made by the High Court is per incuriam?

[53] It is contended by the defendant that an application made to the court may not invoke both the provisions under ss 37 and 42 of the Arbitration Act.

[54] However, this contention does not accord with legal authorities on this issue. In *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403, Hamid Sultan Abu Backer JCA stated that:

> In challenging an award related to domestic arbitration it has now become a common practice to file the application under ss 37 as well as 42. There are case laws to support such an approach. However, for proper management of issues under ss 37 and 42, the application must be separately dealt with as the jurisprudence involved in dealing with the applications varies. I will explain this further in the judgment.

[55] In addition, Prasad Sandosham Abraham JCA in *Petronas Penapisan* held as follows:

> The learned judge dealt fairly exhaustively and methodically the challenge mounted by the plaintiff in particular relation to ss 37 and 42 of the said Act. Section 34 (art 34(1) of the Model Law) which allows recourse to court against an arbitral award may only be made by an application to set asidethe same. We agree with the learned judge that s 37(1)(a)(v) would constitute the relevant provision to apply in the light of the challenge being mounted by plaintiff. It is our view that s 37 only allows the court to set aside the award save for the limited exception under s 37(3) of the said Act. As the learned judge exercised her powers to vary the arbitral award, the court could only proceed under s 42 of the said Act (see the decision of this court in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617). *The learned judge dealt with s 42 of the Act and the approach of the learned judge was to treat applications under both sections as not being mutually exclusive*. We refer to the decision of the New Zealand Court of Appeal in *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 where the court held and we quote:
>
> > Held: 1 *The processes under cl 5 of the Second Schedule to the Arbitration Act 1996 (appeals on questions of law) and art 34 of the First Schedule (applications to set aside) were not mutually exclusive*. There was *no reason why an appeal under cl 5 could not put in issue errors of process by the arbitrator as well as errors of substantive law (both grounds for setting aside under art 34)*. However, questions of abuse of

process or issue estoppel might arise if a party seeks successively to argue the same error of law under both art 34 and cl 5.

We are therefore in agreement with the views of the learned judge expressed on this point.

[56] Therefore, the filing of one application invoking both the provisions under ss 37 and 42 of the Arbitration Act, per se, poses no legal problem. What the court must be mindful of is not to mix the provisions and to deal with them together as if the factors to be considered in respect of both these provisions are the same.

[57] Indeed, I would add that compelling a party to file two separate applications so that provisions under ss 37 and 42 may be invoked separately does not stand to reason. There is simply nothing wrong in making one application that invokes both provisions. Whether either is allowed is another matter.

THE APPLICATION UNDER S 37 OF THE ARBITRATION ACT

[58] The crux of the plaintiff's complaint is fundamentally that the learned arbitrator had been wrong in his interpretation of the order of the High Court of 15 March 2016.

[59] It was the plaintiff who had made an application to the learned arbitrator to have the respondent's claim in the second arbitration dismissed. In its application the plaintiff invoked the Limitation Act. In determining the issue placed before the learned arbitrator by the plaintiff, it was necessary for the learned arbitrator to consider if the order of the High Court of 15 March 2016 had excluded any period of time for the purposes of reckoning the applicable limitation period. This is because the High Court had specifically made reference to, and made the order of 15 March 2016 with, s 30(5) of the Limitation Act in mind.

[60] Therefore, whether the decision arrived at by the learned arbitrator in his interim award is correct or not, it cannot be said that the interim award either:

(a) 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration' under s 37(1)(a)(iv) of the Arbitration Act; or

(b) '... contains decisions on matters beyond the scope of the submission to arbitration' under s 37(1)(a)(v) of the Arbitration Act.

[61] In this case, I do not think the learned arbitrator ever proceeded on a

frolic of his own (see: *Petronas Penapisan* at para [13]).

[62] As for s 37(1)(a)(vi) of the Arbitration Act, it is difficult to see how that subsection even comes into place in this application.

[63] So too with the invocation of s 37(1)(b)(ii) of the Arbitration Act, I do not see how it can be made out that the learned arbitrator's interim award may be said to be in breach of any public policy.

[64] Indeed, counsel for the plaintiff quite candidly stated that he was not pressing the contentions offered under s 37 of the Arbitration Act.

THE APPLICATION UNDER S 42 OF THE ARBITRATION ACT

[65] In essence, the questions of law posed turns on whether the learned arbitrator was correct in interpreting the order of the High Court of 15 March 2016.

[66] In relation to the test applicable in respect of s 42 of the Arbitration Act, the recent decision of the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 is of assistance:

> *Test Under s 42*
>
> [117] Under s 42(1), any party may refer to the High Court 'any question of law arising out of an award'. And under s 42(1A), 'The High Court shall dismiss a reference made under sub-s (1) unless the question of law substantially affects the rights of one or more of the parties'. The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.
>
> [118] An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s 42, that is the only ground for the court to intervene.

[67] I agree with counsel for the plaintiff that the construction of the order and grounds of judgment of the High Court of 15 March 2016 and 29 April 2016 respectively, is a question of law. In interpreting, and hence, construing the order and grounds of judgment of the High Court, what the learned arbitrator was doing was to determine their true import. For this purpose, this exercise is no different from the construction of any document that may be tendered in evidence to be construed by a court of law or arbitrator.

[68] In this regard, the Federal Court's decision in *Far East Holdings Bhd* is

again of assistance:

> Is The Construction Of A Document A Question Of Law?
>
> It must be more than settled that the construction of a document is a question of law. In *Munusamy v Public Services Commission* [1964] 1 MLJ 239, where on the construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, Thomson LJ said 'That question of construction is a question of law ...'. In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759, Yong Pung How CJ said: 'we must approach the construction of the document, which is a question of law, untrammelled by any concession as to the meaning of the agreement that might have been given by the court below'. 'It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd and another v Threadgold* [1974] 1 WLR 1514 (HL)' (*Bintulu Development Authority v Pilecon Engineering Bhd* [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). In *Bahamas International Trust Co Ltd and another v Threadgold*, Lord Diplock said 'that the construction of a written document is a question of law', which was followed in *Tan Suan Heoh v Lim Teck Ming & Ors* [1987] 2 MLJ 466, *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, *Padiberas Nasional Bhd v Kontena Nasional Bhd* [2010] 3 MLJ 134, and *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 and *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2017] 9 MLJ 1). In *Desa Teck Guan Koko Sdn Bhd v Sykt Hap Foh Hing (suing as a firm)* [1994] 2 MLJ 246, Ian Chin J opined that '... a question of construction is (generally speaking) a question of law'. In *Intelek Timur Sdn Bhd v Future Heritage* [2004] 1 MLJ 401, the Federal Court followed *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, where the Supreme Court adopted the following passage in *Halsbury's Laws of England* (4th Ed) Vol 2 p 334 para 623, which stated that a question of construction is a question of law:
>
> > ... and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law ...

[69] The same view was expressed by the Federal Court in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423 at para 34:

> [34] As for item (b), the Supreme Court in Ganda Edible Oils did state that construction is, generally speaking, a question of law. In our view all matters regarding the construction of a document is a question of law. It may very well be that in some cases, other matters are brought up for consideration which may involve questions of fact, but where the matter solely referred to is the construction of a document, it must be said to be solely a question of law. In our view, the words 'generally speaking' used by the Supreme Court are to cater for the above situation where questions of fact are involved.

[70] Similar views were also expressed by the Federal Court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743.

[71] In his interpretation, the learned arbitrator has given a meaning to the order of the High Court of 15 March 2016 one that is different from the expressed words found in the order itself.

[72] Against the expressed words used, the learned arbitrator has deemed that the order should be read to mean what is to be found in s 30(5) of the Limitation Act. That is to say, the order of 15 March 2016 is to be read and interpreted as having excluded the period of time from the commencement of the arbitration to the date of the order ie from 12 February 2014–15 March 2016, contrary to what is set out in the order itself.

[73] The learned arbitrator made the point that the learned High Court judge had clearly intended to address the issue of limitation when he made the order of 15 March 2016. The order can therefore be construed such as to have implicitly allowed the respondent to continue the arbitration proceedings as if it was within the limitation period.

[74] It needs to be stated that the plaintiff's application to the learned arbitrator that resulted in the interim award was not an appeal. It was not an appeal against the decision of the learned High Court judge's order of 15 March 2016.

[75] Therefore, with respect, it is not for the learned arbitrator to conclude as he had done at one point in the interim award that, 'With the greatest of respect, I am of the considered view that the learned Judge's further orders to exclude time from 2.6.15 only and not from 12.2.14 is per incuriam in the circumstances of this case'.

[76] With the greatest of respect, it also follows that it is simply not for the learned arbitrator to deem what is stated in the learned High Court judge's order of 15 March 2016 to be other than what is expressly stated therein.

[77] An interpretation such as is adopted by the learned arbitrator may be understandable if the said order was vague on the period that is excluded or unclear in any material respect. However, that is not the case here.

[78] The learned High Court judge's order of 15 March 2016 is clear beyond peradventure. The expressed intention in the order is reinforced by the grounds of decision of the learned High Court judge where it is stated in para [45] as follows:

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> [45] ... Therefore, *this court* in ruling that the arbitrator has no jurisdiction until compliance with cl 54(a) and (b) PWD 203 contract, *would also hold that time does not run with respect to the Limitation Act 1953 from the date the application on this preliminary issue was made before the arbitrator on 2 June 2015 until the expiry of the two tranches 45 days referred to in cl 54(c) PWD contract* provided that the relevant notice under cl 54(a) is issued by the claimant to the plaintiff herein within 14 days from today. (Emphasis added.)

B

[79] Referring to the grounds of decision of the learned Judge to verify or for assistance to interpret an order made, seems an obvious thing that one might want to do. If any precedent be required for doing so, it may be found in the judgment of the Privy Council in *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 where, in para [13], Lord Sumption expressed the following view:

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> [13] ... the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an over and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve.

E

[80] The language used by the learned High Court judge, both in his grounds of judgment and the order made, leaves no issue open to question as to the period that was meant to be covered. As Lord Sumption said in *Sans Souci Ltd*, at para [14]:

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> [14] It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.

H

[81] In the order, the period of time excluded is subject to a proviso being complied with. Therefore, even with compliance with the proviso, the period excluded for the purposes of limitation remains that from 2 June 2015 onward until the expiry of the two tranches of 45 days referred to in cl 54(c) of the contract.

I

[82] The intention of the learned judge expressed in para [45] of his grounds of judgment is clearly reflected in the order of 15 March 2016. It was submitted that the intention of the learned High Court judge is found in the first sentence in para [45] of his grounds of decision.

[83] That may be true. However, there was no manifest intention to preclude reliance on limitation as a defence altogether. The manifest intention was that, '... time does not run with respect to the Limitation Act 1953 from the date the application on this preliminary issue was made before the arbitrator on 2 June 2015 until the expiry of the two tranches of 45 days referred to in cl 54(c) PWD Contract provided ...'.

[84] As the learned arbitrator expressed, it is trite law that whether the order of the High Court of 15 March 2016 is thought to be correct in law or otherwise, it remains valid until and unless it is set aside.

[85] Citing *Te Whakakitenga O Waikato Incorporated v Tania Eris Martin* [2016] NZCA 548, the learned arbitrator observed that the order of 15 March 2016 would be rendered 'wholly futile and of no utility' if limitation were to be taken as having set in by 19 February 2014.

[86] It is not clear from the grounds of judgment of the learned judge whether a different period of time was sought by the defendant to be excluded for the purposes of limitation but was refused.

[87] Yet, if the expressed intention of the learned judge was to only exclude the period expressly stated in his grounds of judgment and this accords with the order that was made, it cannot be said that the order did not meet the objective of the court.

[88] It also bears emphasising that the order of the court of 15 March 2016 was not intended or worded to exclude the applicability of any limitation period that might have set in. The said order was directed merely to excluding a specific period of time expressly stated therein.

[89] Equally important is the fact that for the purposes of computing time under the Limitation Act, the order of court of 15 March 2016 clearly did not exclude, '... the period between the commencement of the arbitration and the date of the order of the Court' as prescribed under s 30(5) of the Limitation Act.

[90] What this court is now asked to do, is to read into the order of the court of 15 March 2016 words that are simply not there. That is something this court cannot do in the circumstances of this case. Harsh though the consequence may be, it would be plainly wrong in law to interpret an order of the court by ignoring its expressed words.

A CONCLUSION

[91] For the reasons set out above I hold that the plaintiff's application under ss 37(1)(a)(iv), 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii) are not made out.

B **[92]** I further hold that the answers to the four questions of law referred to the court under s 42 of the Arbitration Act are all in the negative.

[93] Accordingly, the interim award is hereby set aside in whole.

C **[94]** Having heard submissions from counsel for the parties, I ordered costs to the plaintiff of RM10,000.

Interim award set aside in whole with costs of RM10,000.

D Reported by Dzulqarnain Ab Fatar

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