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Practical Tips & Must Have Records for Contractors to Succeed in CIPAA

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Overview

- Legal Burden
- Common Problems faced by Contractors for Documentation
- Claims for work done by Contractors
- Defences by Employers
- Adjudication Award in favour of Contractors

Legal Burden

- Success in Adjudication requires the cooperation of lawyers, claims consultants and the clients themselves to work as a team
- Primary factor is however the strength of the documentary evidence. It is Records, Records and Records.
- Legal Burden is on the Claimant to prove its claims.
- No claims consultant or lawyers can work miracles.





Legal Burden

Claimant's Burden

Even though Adjudication process favours Claimants, the legal burden still rests with Claimant to prove its claims

Brunsfild Construction S/B v LDE Aluminium Industries S/B [2019] MLJU 516

The court said “the respondent as claimant, bears the burden of proving each and every item in Progress Claim 27”.

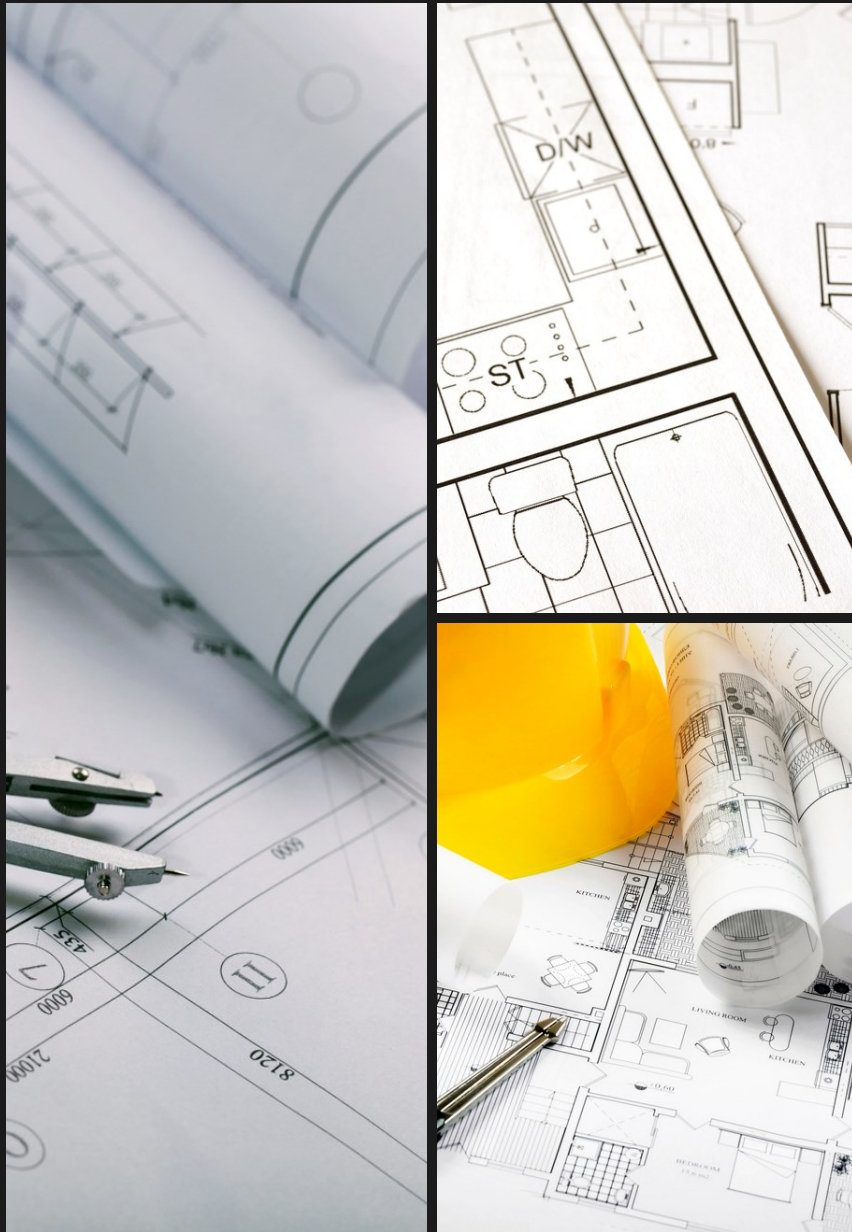
Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd [2021] 1 LNS 1526

The court said “it is trite that he who asserts must prove”.



Common Problems Faced by Contractors

- Very common for projects to set up a single point of contact or specific persons in charge of specific sections/trade of works.
- Said personnel then leaves –
 - i. Leaves with the records saved in laptop/computer/HP/notebooks/site diary
 - ii. No way of contacting
 - iii. Loss of information in handover – not everything handed over
- Solution?



Common Problems Faced by Contractors

- But any system is only as good as the data entry person
- Establish site practices/template documents
- Ensure accurate and sufficient detailed information is recorded. Can 3rd party understand?

Claims for Work Done

CIPAA allows for claims for payment of work done and services rendered
– S.5(1) read with S.4 of CIPAA.

Certified works

Claim for certified works are usually dependent on the Interim Payment Certificate issued by the unpaid party.

S.5 of CIPAA provides the criteria that needs to be included.

- a. Amount claimed and due date for payment of the amount claimed
- b. Details to identify cause of action
- c. Description of work/services to which payment relates
- d. Statement that it is made under the Act.

Claims for Work Done

- Other criteria/information/document
 - Ensure due date is accurately computed.
 - Some bespoke contracts requires the due date to be computed from the date of the presentation of the invoice
-
- Interesting Case- Can amend Payment Claim?
 - Sunrise case

Uncertified / Under-certified Works



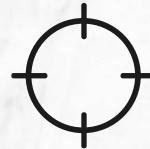
Ask yourself a practical question.
Was the non-certification/under-
certification due to lack of
documentation?



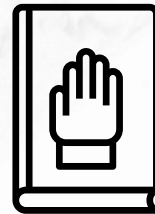
If yes, then whether you should still
attempt CIPAA?



What are the records available?



Expert evidence? Presentation of claims.



How to make use of statutory
declarations in tying up the records?

The repercussions in giving false
declaration – will be charged and shall
be punished with imprisonment and
liable to a fine pursuant to the Statutory
Declarations Act 1960.

Variations

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What amounts to a Variation?

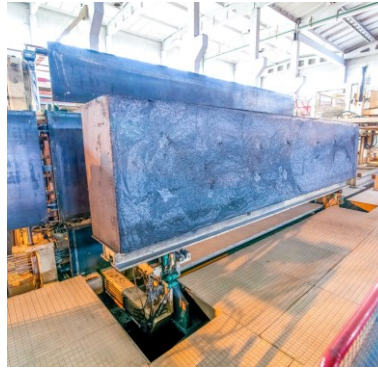
It varies depending on the wording of the contracts

Normally it relates to the change in the scope of work, additional scope of work, reduction in the scope of work, change in the sequence of work etc

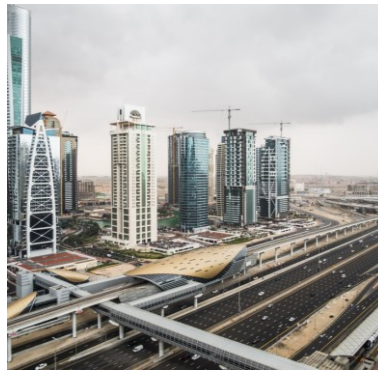
The form of variation to be instructed – letter, e-mail, minutes of meeting, site memo

Variations

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Is instruction given through WhatsApp or WeChat valid?

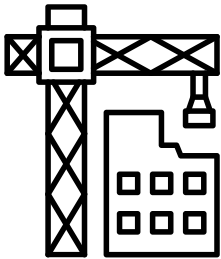


Is audio recording in WhatsApp or WeChat valid?

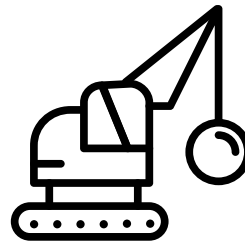


What to do if contractors faced with this situation? Carry out the work but under protest?

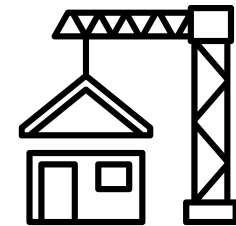
Loss and expense



Uncertainty whether L&E is claimable under CIPAA



Recent High Court decision dictates it is not claimable as it is not work done
– Integral Acres v BCEG



Therefore, need to plan ahead whether or not to claim L&E through CIPAA



Loss & Expense

- How to mount a L&E claim in CIPAA?
- Since L&E is tie up with delay, what are the must have documents in proving delay?

Delay Damages

- Typically used by the non-paying party as a set-off
- Relatively easy to raise – only need to prove that there is a LAD clause and that there is a breach of contract
- How to disprove and defend LAD claim?
 - (1) Delays are caused by non-paying party;
 - (2) Unreasonable
 - (3) Uncertainty in the LAD clause
- Need to engage delay expert? Any cost impact?



Defects Rectification & Violation of HSE or Environmental Regulations

Typically used by the non-paying party as a set-off

Complaint can come in the form of defects list or
photographs

How effective photographic evidence can be?

Examples of poor photographic evidence



Undated, lacking clarity



Location unknown



Unable to differentiate the workers belong to which subcontractor

Incomplete Works

- Typically used by the non-paying party as a set-off
- How to prove otherwise, that the works were in fact completed?
- What other options available if drawings cannot help?
 - Photographic evidence of actual work done
 - Google Street
 - Statutory Declaration



Illegally or Improperly Obtained Documents

- Example documents obtained from someone who works in the counterparty company, recording of a discussion between the parties
 - Admissibility : in Malaysia, illegally or improperly obtained evidence is admissible as long as those evidence are relevant. (Saminathan v PP)
 - However, forgery or made-up evidence is not admissible
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Post-CIPAA Award

- Be prepared that Employers may still challenge the Adjudication Decision. Do not expect to get payment immediately after the issuance of the award.
- What are post CIPAA Award steps?
 - S.28
 - S.29
 - S.30
- Presentation of winding up petition—Likas Bay
- Settlement??



Thank you!



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