

## **Late Payment Interest Under CIPAA: Court of Appeal Clarifies the Jurisdictional Line In Mayfair Ventures**

The Court of Appeal has drawn a clear jurisdictional line under CIPAA: late payment interest cannot stand on its own. Once the principal sum has been paid, interest cannot be pursued independently in adjudication. Instead, it is recoverable only where it is ancillary to a valid claim for unpaid work or services rendered.

### **INTRODUCTION**

Ever since certain Malaysian High Court decisions affirmed that claims arising from the express terms of a construction contract are claimable under CIPAA, industry players, beyond claims for actual work or services performed, have increasingly sought to enforce their entitlements through CIPAA proceedings, given that adjudication under CIPAA is designed to resolve “payment” disputes expeditiously. In addition to claims for contractual loss and expense, most standard form construction contracts also expressly provide for late payment interest, which contractors are entitled to pursue in the event of default by the employer.

Late payment remains a persistent reality in the construction industry, and delayed payment carries significant financial consequences for contractors. The critical issue, however, is whether late payment interest may properly be advanced as a standalone claim in adjudication proceedings under CIPAA 2012.

The Court of Appeal’s recent decision in ***Mayfair Ventures Sdn Bhd v Setiakon Builders Sdn Bhd and another appeal***<sup>1</sup> offers a timely and much needed clarity on whether CIPAA permits such claims. At its core, the decision reminds legal practitioners and industry players to pause and ask a fundamental question:

*Why adjudication exists, and what is the purpose it was designed to achieve?*

### **‘PAYMENT’ SITS AT THE HEART OF CIPAA**

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<sup>1</sup> [2025] MLJU 3699

CIPAA is not a general dispute resolution mechanism, its focus is deliberately narrow. Section 4 of the CIPAA defines “payment” as:

*“payment for work done or services rendered under the express terms of a construction contract”*

The adjudication process is triggered by a payment claim and payment response (if any) under Sections 5 and 6. Section 27 further limits the adjudicator’s jurisdiction to the parties’ dispute pursuant to those provisions. Taken together, these sections make it clear that CIPAA is concerned only with unpaid work. Not every monetary entitlement that may arise under a construction contract.

Although Section 25 (o) empowers an adjudicator to decide on interest, that provision does not operate as a vacuum. Instead, it assumes the existence of a dispute that is already properly within the adjudicator’s jurisdiction. The question addressed in *Mayfair Ventures* was precisely whether late payment interest, standing on its own, satisfies that requirement.

## **THE DISPUTES IN MAYFAIR VENTURES**

The underlying contract in *Mayfair Ventures* was a PAM 2006 (With Quantities) contract (“**PAM Contract**”) between Mayfair Ventures Sdn Bhd (“**Mayfair**”), as employer, and Setiakon Builders Sdn Bhd (“**Setiakon**”), as contractor. Clause 30.17 of the PAM Contract entitled the contractor to claim interest at Maybank’s Base Lending Rate plus 1% on certified sums not paid within the prescribed period.

Most of the interim certificates issued under the contract were eventually paid by Mayfair, albeit late. Nevertheless, Setiakon commenced adjudication against Mayfair, claiming, among others, late payment interest accrued on Interim Certificates Nos 1 to 46. When the Payment Claim was issued by Setiakon, the principal sums under the majority of those Interim Certificates (except for Certificate 44R and Certificate 46) had already been settled by Mayfair.

The adjudicator allowed Setiakon's late payment interest claim. The High Court upheld the adjudication decision by allowing Setiakon's application to enforce the adjudication decision and dismissing Mayfair's application to set aside the adjudication decision.

On appeal, the critical issue to be determined was whether the adjudicator had jurisdiction to award late payment interest in respect of the Interim Certificates where no principal sum remained unpaid.

### **“JURISDICTION” IS NOT THE SAME AS “POWER”**

A recurring theme in CIPAA jurisprudence is the distinction between an adjudicator's jurisdiction and an adjudicator's powers. The Court of Appeal took the opportunity in *Mayfair Ventures* to reinforce this distinction.

Jurisdiction concerns what an adjudicator may decide, whereas powers concern how an adjudicator may decide it. Section 25 (o), which refers to interest, falls squarely into the latter category. It allows an adjudicator to award interest as a matter of consequence and fairness.

What Section 25(o) does not do is expand the scope of disputes that may be adjudicated in the first place. Interest cannot be used as a jurisdictional foothold where none exists.

### **THE COURT OF APPEAL'S REASONING AS TO WHY LATE PAYMENT INTEREST CANNOT BE CLAIMED ON ITS OWN**

The Court of Appeal approached the issue by examining the true character of late payment interest. Although such interest may be contractually agreed, it does not represent payment for work done or services rendered. Rather, it compensates a party for being kept out of money that ought to have been paid on time.

In that sense, late payment interest is a form of damages arising from breach of contractual obligation to make timely payment. It is secondary to, and dependent upon, the underlying payment obligation. Once the principal sum has been paid, what

remains is no longer a dispute over payment for work, but a claim for damages arising from late payment.

CIPAA was never intended to cover such damages claims. Its purpose, is to facilitate cash flow by ensuring timely payment for work carried out, not to provide a fast-track dispute resolution mechanism for the recovery of contractual damages that are already “divorced” from any outstanding work.

The High Court’s decision was that because interest accrued due to late payment, the failure to pay the interest amounted to non-payment under the construction contract. The Court of Appeal disagreed as this approach blurred the line between contractual rights and statutory adjudication. The appellate court was of the view that while a contractor may well have a contractual right to claim late payment interest, that does not automatically translate into a right to adjudicate the claim under CIPAA. By treating late payment interest per se as a “payment”, the adjudicator had inadvertently enlarged the scope of CIPAA beyond its statutory limits, rendering the adjudication decision vulnerable to being set aside under Section 15 (d) of CIPAA.

## **KEY TAKEAWAYS FROM MAYFAIR VENTURES**

The Court of Appeal’s decision in *Mayfair Ventures* has provided much needed certainty and highlights some implications for CIPAA adjudication:

- (a) Late payment interest cannot be pursued as a stand-alone claim under CIPAA once the principal sum has already been paid.
- (b) Interest remains recoverable in adjudication only where it is ancillary to a valid claim for unpaid work.
- (c) Payment Claims ought to be drafted with care, ensuring that interest is properly framed as a consequential relief ancillary to a valid claim for unpaid work rather than as a stand-alone claim.

- (d) Where late payment interest falls outside of CIPAA's scope, it can still be pursued through arbitration or litigation, as expressly preserved by Section 13 (c) of CIPAA.

## **POTENTIAL CHALLENGES AND BROADER IMPLICATIONS ARISING FROM MAYFAIR VENTURES**

As *Mayfair Ventures* was not appealed to the Federal Court, it currently stands as authoritative guidance. It is therefore foreseeable that parties will increasingly rely on this decision to resist the enforcement of adjudication decisions that include late payment interest. Claims for late payment interest under similar provisions in other commonly used standard form contracts<sup>2</sup> may also be susceptible to jurisdictional challenge if pursued through CIPAA adjudication.

A practical question arises concerning the scope of the late payment interest claims. Even where a contractual provision allows for late payment interest, it is unclear whether late payment interest can be claimed on amounts that were already paid in a previous progress claim but are subsequently included in a later unpaid progress claim. This issue goes to the heart of CIPAA's scope, as it raises the broader question of whether such claims qualify as "payment for work done or services rendered" under Section 4, or whether they fall outside the statutory ambit. Although this point is not yet settled, it is likely to be significant in future adjudication challenges.

The reasoning adopted by the Court of Appeal in *Mayfair Ventures* also raises a broader question extending beyond late payment interest itself. This decision invites a reconsideration of the unresolved debate on the adjudicability of contractual loss and expense claims that is commonly characterised as damages arising from delay or disruption. The existing authorities on loss and expense claims remain divided. In *Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia*<sup>3</sup>, loss and expense was treated as part of the valuation of work done where the contract

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<sup>2</sup> Clause 58.3 of the IEM Form of Contract (IEM CE 2011), Clause 42.9 of the CIDB Standard Form of Contract for Building Works (2022 Edition), and Clause 14.8 of the FIDIC Conditions of Contract for Construction

<sup>3</sup> [2017] MLJU 673

expressly incorporated it into the final account. By contrast, cases such as *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd*<sup>4</sup> have characterised loss and expense as non-work-related damages falling outside Section 4 of CIPAA.

Would the reasoning in *Mayfair Ventures* indicate that loss and expense claims, although expressly provided for in the contract, could be challenged under CIPAA if they are viewed as secondary to the primary obligation to pay for work done or services rendered?

Time will eventually tell.

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<sup>4</sup> [2021] MLJU 1889