

CIPAA 2012 : Setting Aside – Res Judicata & Excess of Jurisdiction. Can a new Adjudication be initiated and decided based on the same Adjudication papers?

MERIDIAN CONTRACTS SDN BHD V BAUER (MALAYSIA) SDN BHD [WA-24C-137-07/2022]

28th June 2023

ISSUES

It is not uncommon for a claimant to initiate more than one adjudication under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”) in the same project, albeit for different claims.

What happens if the Respondent raises the same crossclaim / counterclaim that was dismissed in a prior adjudication? Does the principle of res judicata apply to the Respondent’s crossclaim / counterclaim? If so, can the subsequent adjudication decision be set aside on the ground of excess of jurisdiction for res judicata if the crossclaim / counterclaim was allowed?

If the Adjudication Decision in favour of the Respondent is set aside under such circumstances, can the Claimant reinitiate adjudication based on the same Payment Claim / Response as well as the same Adjudication Claim, Adjudication Response and Adjudication Reply, without restarting the process from Payment Claim again? Should the adjudicator’s fees be refunded?

These questions were answered in the recent decision of the Kuala Lumpur Construction High Court in Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd [WA-24C-137-07/2022].

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Defendant is the main contractor for the Piling and Basement Carcass Works in a project consisting, amongst others, the construction of 260 service apartment units, a hotel with 96 rooms and 222 apartment units (“**Project**”). The Defendant then appointed the Plaintiff as the subcontractor for the Basement Carcass Works (“**Works**”).
- (b) The original completion date for the Works falls on 09.01.2017 but this was subsequently revised to 26.08.2017.

- (c) On 01.12.2017, the Architect issued the Certificate of Practical Completion (“**CPC**”) to the Defendant certifying practical completion of the Defendant’s works on 25.11.2017 and that the Defects Liability Period for the Defendant’s works shall expire on 24.11.2019.
- (d) On 11.04.2019, the Plaintiff served a Payment Claim on the Defendant, claiming for RM7,494,014.17, consisting of both claim for work done and the 1st moiety of the Retention Sum. The Defendant disputed the claim, amongst others, on the ground that there is a set off amounting RM5,188,402.91 (“**1st Adjudication**”).
- (e) On 31.10.2019, the 1st Adjudicator allowed, amongst others, the sum of RM5,311,360.51 in favour of the Plaintiff. Crucially, the 1st Adjudicator also allowed the Defendant’s set off amounting to RM142,238.60 out of RM5,188,402.91 (“**1st AD**”).
- (f) The Defendant initiated arbitration and applied to set aside and stay the 1st AD. The setting aside and stay applications were dismissed by the High Court and the 1st AD was enforced as a judgment of the High Court on 04.05.2020 (“**High Court Decision**”). Dissatisfied with the outcome, the Defendant appealed to the Court of Appeal (“**Appeals**”).
- (g) Meanwhile, the Plaintiff vide Payment Claim dated 29.12.2020 claim for the 2nd moiety of the Retention Sum amounting to RM1,088,420.35 (“**2nd Adjudication**”) after the issuance of the Certificate of Making Good Defects (“**CMGD**”) on 18.07.2020.
- (h) Vide Payment Response dated 12.01.2021, the Defendant disputed the claim, amongst other, on the ground that it is entitled to set off / cross claim amounting to RM5,188,402.91, i.e. the same set off claim in the 1st Adjudication, as well as Liquidated Ascertained Damages (LAD) of RM3,913,000.00.
- (i) The Plaintiff commenced adjudication thereafter and the relevant adjudication papers were served and exchanged between parties. Meanwhile, the Appeals were dismissed by the Court of Appeal on 15.10.2021.
- (j) On 15.11.2021, the 2nd Adjudicator determined and allowed the Defendant’s set-off in the sum of RM3,913,000.00 out of RM5,188,402.91. Arising from the same, the Plaintiff’s claim of RM1,088,420.35 was dismissed in toto (“**2nd AD**”).
- (k) Against this backdrop, the Plaintiff applied to the High Court to set aside the 2nd AD.

PROCEEDINGS BEFORE THE HIGH COURT

Apart from applying to set aside the 2nd AD, the Plaintiff, who is the Claimant in the 2nd Adjudication, also applied for the following declaratory reliefs:-

“(b) a declaration that the Plaintiff be entitled to re-commence adjudication proceedings from the Notice of Adjudication dated 1.4.2021 with a new adjudicator to be appointed by the Director of Asian International Arbitration Centre (AIAC);

(c) a further declaration that the newly appointed adjudicator shall deliver the decision based on the payment claim, payment response, adjudication claim, adjudication response and adjudication reply which had been submitted in the Adjudication Proceedings No. AIAC/D/ADJ- ADJ-3720- 2021; and

(d) a declaration that the learned Adjudicator shall refund all payments and fees made to him as the adjudicator for the earlier adjudication to both Plaintiff and Defendant respectively as Claimant and Respondent in the Adjudication Proceedings No. AIAC/D/ADJ- ADJ-3720-2021.”

Having perused the Plaintiff’s grounds for setting aside, which are predicated mainly on the principle of res judicata, the Learned Judge found that the application can be decided on the sole ground of whether the 2nd Adjudicator had acted in excess of his jurisdiction.

EXCESS OF JURISDICTION : RES JUDICATA

The crux of the Plaintiff’s submission on excess of jurisdiction is as follow:-

“the 2nd Adjudicator had acted in excess of his jurisdiction by –

- (i) making findings as to the merit of the 1st AD which had fully adjudicated the Defendant’s set-off of RM5,188,402.91; and*
- (ii) making a decision that contradicted the findings in the 1st AD that had already been enforced as a judgment or order of the High Court and affirmed by the Court of Appeal, which effectively denied the Plaintiff of finality in the 1st Adjudication...”*

In rebuttal, the Defendant submitted that the 2nd Adjudicator made “essentially a finding of fact as the 2nd Adjudicator has taken the view that res judicata does not apply due to the specific facts of the case, namely that there was incomplete determination of the issue of delay set-off by the 1st Adjudicator.”

The Learned Judge noted that the Plaintiff raised the issue of Res Judicata in the Adjudication Claim in relation to the set-off amounting to RM 5,188,402.91 and in response, the Defendant impressed upon the 2nd Adjudicator to consider the merit of the set-off, inter alia, on the following grounds:-

- “a. In the event the Court of Appeal set aside the Adjudication Decision dated 31.10.2019, it would mean that all findings made by the 1st adjudicator will be set aside.*
- b. Thus, Bauer’s set off will still be a live issue...”*

On 22.10.2021, the 2nd Adjudicator requested for clarification from parties (“**Clarification Submission**”) and the Plaintiff informed the Adjudicator that the Court of Appeal dismissed

the Appeals on 15.10.2021. However, in addressing the issue of res judicata, the 2nd Adjudicator “did not allude to the fact that the Court of Appeal affirmed the High Court Decisions”.

The Learned Judge held that res judicata applies by virtue of the Court of Appeal affirming the High Court Decisions:-

[44] *In my view, with the pronouncement of the decision of the Court of Appeal, the decision of the 1st Adjudicator is res-judicata and is binding until and unless the matter is finally resolved in the arbitration proceeding. The binding effect of an adjudication decision is automatic unless any of the events stated in s 13(a) to (c) CIPAA has occurred (see paras 34 - 35 of the judgment in Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362 at pp 372 - 373)."*

The Learned Judge also found that it is not open to the 2nd Adjudicator to decide whether the crossclaim / counterclaim was determined on merits in the 1st Adjudication because the Court of Appeal's decision put to rest the issue of whether there was final determination in the 1st AD:-

[49] *With respect, the learned counsel's submission is flawed. **The decision by the Court of Appeal has put to rest that the Defendant has not established the "Delay Set-Off"** (the term as utilised by the 2nd Adjudicator, see subpara 55(i) of the 2nd AD). The decision in the 1st Adjudication is final as between the parties for purposes of adjudication proceedings under the CIPAA until the dispute is definitively decided by the arbitral tribunal. **The set-off which was raised in the 2nd Adjudication must be accepted as having been decided on its merits by the 1st Adjudicator.**"*

[50] *As alluded to previously, the Defendant itself, in para 61 of the Adjudication Response, acknowledged that if the Court of Appeal set aside the 1st AD, all findings made by the 1st Adjudicator will be set aside and the Defendant's set-off will still be a live issue. Conversely, since the Court of Appeal did not reverse the High Court Decisions and thereby the 1st AD is not set aside, the Defendant's set-off is no longer a live issue."*

(Emphasis added)

In the upshot, the 2nd AD was set aside on the grounds of excess of jurisdiction.

DECLARATORY RELIEF

The Learned Judge dismissed the application for declaratory relief, inter alia, for a new adjudication to recommence with the same Notice of Adjudication and for the Director of AIAC to appoint a new adjudicator to decide the dispute based on the same Payment Claim and Response as well as the same Adjudication Claim, Response and Reply in the 2nd Adjudication.

The Learned Judge accepted the Defendant's submissions that the declaratory relief should not be granted as they involved 3rd parties:-

“(a) the declaratory reliefs sought by the Plaintiff involves third parties namely, the Director of AIAC, the new adjudicator to be appointed by the Director of AIAC and the 2nd Adjudicator. However, s 42 of SRA provides that –

“42. A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, those parties would be trustees.”

(emphasis added).”

The Learned Judge further reasoned that the declaratory relief sought is an attempt to bypass **Section 34(1) of CIPAA 2012**, which provides immunity to the adjudicator and AIAC:-

“(b) by including prayers 2, 3 and 4 in the O.S., the Plaintiff is attempting to bypass sub-s 34(1) CIPAA which provides for the immunity of the adjudicator and KLRCA/ AIAC in these terms:

“No action or suit shall be instituted or maintained in any court against an adjudicator or the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.”

If the application for declarations as sought by the Plaintiff is allowed, it would effectively require the Director of the AIAC, the 2nd Adjudicator and the newly appointed adjudicator to carry out certain acts. This is not allowed under the CIPAA and moreover, the Director of the AIAC can only perform his function as statutorily provided under the CIPAA and as for the 2nd Adjudicator, he was merely carrying out his duty in adjudicating the dispute between the parties. Furthermore, the right to such declaratory orders are not expressly provided in the CIPAA...”

Lastly, the Learned Judge also disallowed the declaration / prayer for the adjudicator to refund for all payments and fees paid by parties as the Learned Judge found that there is only one scenario where the adjudicator is not entitled to his fees:-

“(c) sub-s 19(6) CIPAA stipulates that “An adjudicator is not entitled to any fees or expenses relating to the adjudication if the adjudicator fails to decide the dispute within the period specified under subsection 12(2) except when the delay in the

delivery of the decision is due to the failure of the parties to deposit the full payment of the adjudicator's fees and expenses with the Director of the KLRCA under subsection (5)." Clearly, the provision governs only one scenario when the adjudicator is not entitled to his fees i.e. when he fails to decide the dispute within the period as set out in sub-s 12(2) CIPAA. This, therefore, implies that the relief for a refund of adjudicator fees is excluded in all other scenarios including in an application made pursuant to s 15 CIPAA."

In the upshot, the Learned Judge disallowed all 3 prayers for declarations.

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) If the Adjudicator in a subsequent adjudication allows the Respondent's crossclaim / counterclaim notwithstanding that the same crossclaim / counterclaim was dismissed in a prior adjudication and renders a decision in favour of the Respondent, such decision can be set aside on the ground of excess of jurisdiction arising from res judicata.
- (b) However, even if the decision is set aside under such circumstances, the Court will not allow a declaration to enable the Claimant to reinitiate adjudication based on the same Payment Claim / Response as well as the same Adjudication Claim, Adjudication Response and Adjudication Reply, without restarting the process from Payment Claim again.
- (c) The Claimant who successfully set aside the adjudication decision based on res judicata / excess of jurisdiction is also not entitled to seek a refund of payments and fees from the adjudicator.

If you have any questions or comments on this article, please contact:-

CONTACT



ANDREW HENG YENG HOE
Partner

+603 6207 9331
+6012 205 8413

andrew@zainmegatmurad.com

[The content of this article is not meant to and does not constitute a legal advice. It is meant to provide general information and specific advice should be sought about your specific circumstances. Copyright in this publication belongs to Zain Megat & Murad / ZMM]

ZAIN MEGAT & MURAD

D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia

+6 03 6207 9331

+6 03 6207 9332

zmm@zainmegatmurad.com