

# CIPAA 2012 : Limitation to an Adjudicator's Jurisdiction

## ANAS CONSTRUCTION SDN BHD V JKP SDN BHD & ANOTHER APPEAL [02(F)-3-01/2023(P) / 02(F)-4-01/2023(P)]

27<sup>th</sup> March 2024

### ISSUES

If an Adjudicator made a decision based on contract provision not cited or relied upon by the Appellant in the Payment Claim or Adjudication Claim, would the Adjudicator be considered to act in excess of his jurisdiction? And if the Adjudicator did not provide the opportunity for the parties to submit on the uncited contract provision, would that be considered as a breach of natural justice to warrant the Adjudication Decision to be set aside?

These questions were answered in the recent Federal Court decision of **Anas Construction Sdn Bhd v JKP Sdn Bhd & Another Appeal [02(F)-3-01/2023(P) / 02(F)-4-01/2023(P)]**.

### BRIEF FACTS

The brief facts of the case are as follows:-

- (a) JKP Sdn Bhd ("**Respondent**") appointed Anas Construction Sdn Bhd ("**Appellant**") as the main contractor for the construction and completion of a project known as "*Cadangan Membina dan Menyiapkan Satu (1) Blok Pangsapuri 24 Tingkat Rumah Pangsa Kos Sederhana (392) Unit di atas Tanah Tebusguna Kerajaan, Kampung Pisang Awak, Seksyen 4, Bandar Jelutong, Daerah Timur Laut, Pulau Pinang*" ("**Project**") for a sum of RM67,994,500 under a construction contract dated 09.04.2015 ("**Contract**").
- (b) In carrying out the Project, the Appellant engaged independent professional consultants, Perunding Kejuruteraan MSY and Perunding ZNA to provide a report regarding cracked beams and a safety report and had incurred the consultant fees of RM855,074.21 (inclusive of GST 6%).
- (c) However, the Respondent allegedly failed, neglected or refused to pay the said amount, resulting in the Appellant initiating an adjudication proceeding under Construction Industry Payment and Adjudication Act 2012 ("**CIPAA 2012**") against the Respondent by issuance of a Payment Claim dated 06.03.2019 ("**Payment Claim**").

- (d) The Appellant cited clauses 28, 55 and 56 of the Contract in its Payment Claim to establish its cause of action against the Respondent.
- (e) In response, the Respondent issued a Payment Response against the Appellant on 22.03.2019, disputing the Appellant's claim on the basis that the Appellant's claim does not fall within the meaning of "construction contract" under Section 5(1) of CIPAA 2012.
- (f) In the Adjudication Claim, the Appellant again relied on clauses 28, 55 and 56 of the Contract to support its claim for the professional consultant fees.
- (g) In the Adjudication Response, the Respondent contended that the relevant clause in relation to the Appellant's claim is clause 36.5 of the Contract, which was not relied upon by the Appellant.
- (h) On 12.09.2019, the Adjudicator allowed the Appellant's claim in the Adjudication Decision and ordered, amongst others, for the Respondent to pay the outstanding amount of RM806,673.78 (excluding GST 6%) within 14 days from the date of the Adjudication Decision.
- (i) In coming to the Adjudication Decision, the Adjudicator had relied on clause 36.6 of the Contract rather than clauses 28, 55 and 56 which were relied upon by the Appellant in its claim.
- (j) At the High Court, the application to enforce the Adjudication Decision by the Appellant was allowed and consequently, the application to set aside the Adjudication Decision by the Respondent was dismissed.
- (k) However, the Court of Appeal reversed the High Court's decision. The Appellant obtained leave and appealed against the Court of Appeal's decision.

### THE COURT OF APPEAL'S FINDINGS

The Court of Appeal set aside the decision of the High Court on the following grounds:-

- (a) The Adjudicator acted in excess of jurisdiction in deciding the adjudication based on Clause 36.6 of the contract, which was not relied upon by the Appellant in the Payment Claim and Adjudication Claim; and

- (b) The omission of the Adjudicator to invite parties to submit on Clause 36.6 of the Contract, which the Adjudicator relied upon to support the Adjudication Decision, is a denial of natural justice.

### **SUBMISSION BEFORE THE FEDERAL COURT**

The Appellant submitted that the strict rules of pleadings should not be applicable in CIPAA 2012 proceedings on the following grounds:-

- (i) Section 8(3) of CIPAA 2012 allows parties to be self-represented in CIPAA proceedings or to be represented by laypersons such as architects or claim consultants or non-lawyers;
- (ii) Section 13 of CIPAA 2012 states that CIPAA 2012 proceedings is designed only as an interim forum;
- (iii) A Payment Claim is merely issued to “kickstart” the claim under CIPAA and not necessarily a document to be referred to or before the Adjudicator in determining the claim; and
- (iv) There is no requirement under Section 9(1) of CIPAA 2012 for the claimant to raise specific references, submissions and clauses applicable in the construction contract in the Adjudication Claim.

Further, the Appellant also submitted that the Adjudicator’s reliance on a specific clause not mentioned in the Payment Claim and Adjudication Claim without inviting parties to submit on the application of the clause does not amount to breach of natural justice.

On the other hand, the Respondent submitted that the Adjudicator had acted in excess of jurisdiction by relying on clause 36.6 (which was never relied upon by the Appellant in the Payment Claim) as an Adjudicator’s jurisdiction is to adjudicate matters in the Payment Claim and the Payment Response. Any changes in this rule of engagement would require written consent from the parties as per Section 27(2) of CIPAA 2012.

Additionally, the Respondent contended that the Adjudicator’s failure to invite parties to submit on issues relating to clause 36.6 amounted to breach of natural justice, which is a ground to set aside the Adjudication Decision under Section 15(2) of CIPAA 2012.

### **MAJORITY JUDGEMENT OF THE FEDERAL COURT**

The Federal Court by a majority of 2-1 dismissed the appeal.

In so deciding, the Federal Court studied the provisions relating to an Adjudicator's jurisdiction, principally under Section 27(1) of CIPAA 2012 and held that an Adjudicator's jurisdiction is limited to matters referred to the Adjudicator pursuant to sections 5 and 6 of CIPAA 2012:-

*"[27] If this court were to accede to the appellant's argument that it did not have to identify the provision in the Contract that supports its cause of action, the question may then be asked: Does the law, procedural or substantive, allow the appellant to disregard subsection 5(2)(b) which mandatorily ('shall') requires it to include in its payment claim the provision in the Contract to which the payment relates? I do not think so. Effect must be given to the clear intention of Parliament.*

*[28] In any event, **the cause of action in a contract must relate to a provision or provisions in the said contract to support the claim.** The cause of action arises when there is a breach of a provision of the said contract or the payment becomes due under the provision of the contract. Therefore, **the cause of action is subject to the agreed provisions in a contract.** Thus, that is the rationale behind section 27(1) which requires the relevant provision in the contract...*

*[33] At the risk of repetition, **it is settled law that the Adjudicator's jurisdiction is limited to matters referred to the Adjudicator pursuant to sections 5 and 6 of CIPAA.** An adjudication beyond the matters referred to needs written consent from the parties as required under subsection 27(2) of the same Act."*

*[emphasis added]*

Premised the above, the Federal Court found that the Adjudicator had acted in excess of jurisdiction by relying on a clause under the Contract which was not relied upon by the Appellant in the Payment Claim nor mentioned by the Respondent in the Payment Response:-

*"[37] Reading the paragraphs of the Adjudication Decision alluded to above, it is undoubtedly that the Adjudicator had relied on clause 36.6 of the Contract in allowing the appellant's claim. **This clause was not relied upon by the appellant in the Payment Claim filed under section 5 to establish its claim, nor mentioned by the respondent in the Payment Response filed under section 6 of CIPAA.** In addition, having perused the Adjudication decision, there is nowhere to show that the Adjudicator relied on clauses 28, 55, or 56 of the Contract which were the provisions relied upon by the appellant in its Payment Claim to establish its cause of action.*

*[38] As the Adjudicator's jurisdiction is limited to matters referred to the Adjudicator under sections 5 and 6, and the cause of action based on clause 36.6 was not relied upon in the Payment Claim, **the Adjudicator had exceeded his jurisdiction in deciding the dispute based on clause 36.6 of the Contract.***

*The cause of action under clause 36.6 was not the appellant's case in the Payment Claim or the respondent rebuttal in the Payment Response...*

*[42] On this ground of want of jurisdiction alone, **the Adjudication Decision cannot stand**. The Adjudicator had acted in excess of his jurisdiction and ground to set aside the Adjudication Decision under section 15(d) of CIPAA..."*

*[emphasis added]*

The Federal Court further held that the adjudicator's omission to give parties opportunity to submit on the issue of cause of action under clause 36.6 (identified by the Adjudicator) tantamount to a denial of natural justice:-

*"[47] Reverting to the present case, it is undisputed that **parties were not given the opportunity to submit the cause of action under clause 36.6 of the Contract before the Adjudication decision was handed down**. Besides the principle of the right to be heard, the submission by parties as highlighted in the Pacific Forest case, may persuade the judge or in the present case, the Adjudicator, to decide differently. **The principle of natural justice includes allowing parties to present their case effectively...***

*[49] In the circumstances, I find, the non-giving of the opportunity by the Adjudicator for the parties to submit or canvass the issue of cause of action under clause 36.6 before making the decision, is a denial of natural justice."*

*[emphasis added]*

## **DISSENTING JUDGEMENT OF THE FEDERAL COURT**

In the Dissenting Judgment, Mary Lim Thiam Suan FCJ observed that Section 5(2)(b) of CIPAA 2012 is only illustrative of the details required in the Payment Claim and disagreed that non-citing or citation of a wrong clause or provision will render an Adjudicator bereft of jurisdiction:-

*"[65] In my view, the inclusion of the words "including the provision in the construction contract to which the payment relates" in section 5(2)(b) is **actually intended to be illustrative of what those details may be**. **The reason why the cause of action has to be identified is so that the non-paying party is able to respond to the claim for work done or services rendered**. Consequently, the details set out should be "sufficient for the respondent to meaningfully verify or reject the claim"; that the details are "adequate" to enable the respondent to respond to the Payment Claim. And, as already pointed out, **the respondent had absolutely no difficulty at any stage, be it at payment response or adjudication response...***



[67] Section 27 states that the jurisdiction of the adjudicator in relation to any dispute is limited to the matter referred to adjudication pursuant to sections 5 and 6. **The matter in dispute which was referred to adjudication in these appeals was the claim for professional fees due under a terminated contract.** That is as clear as daylight and the respondent was fully aware of that being the real and sole issue. Furthermore, it was totally able to give a meaningful response to that claim.

[68] In my view, non-citing or even the citing of a wrong clause or provision of a construction contract does not and cannot render the adjudicator bereft of jurisdiction. It is the absence of a matter in dispute between the parties which may have that effect but that is not at all the case here. As mentioned, the matter in dispute in the present appeals is the payment for the professional fees; the appellant asserting that this payment is due and payable on a terminated contract while the respondent denies the same. It is this lack of consensus or put another way, the presence of a dispute or a matter in dispute which forms the appellant's cause of action for payment for professional fees under a terminated contract.

[69] An examination of the payment claim and even the ensuing documents confirms the above analysis. In fact, I must add that all along, **clause 36.6 was already cited in the payment claim and adjudication claim.** Had these documents been properly examined, the Court of Appeal would clearly not have come to the decision that it did."

[emphasis added]

Her Ladyship also held that since several letters (which cited clause 36.6 of the Contract) were attached to the Payment Claim, the letters and its contents form part of the Payment Claim. Therefore, clause 36.6 was considered "pleaded" before the Adjudicator:-

"[80] A fuller picture of the dispute and the concerns raised emerges when one examines the correspondence exchanged, especially the letters sent by the appellant – see paragraph [72] above. In my opinion, **these letters are necessarily part of the payment claim and adjudication claim and due and proper regard must be given to them. When examined, it puts paid to the respondent's complaints about clause 36.6, supposedly referred to by the adjudicator "unilaterally".** This is actually incorrect on the facts.

[81] The letters show that the appellant had actually invoked clause 36.6 of the Construction Contract amongst several other provisions - see letters dated 16.1.2017 and 17.1.2017...

[88] Whilst the Court in a setting aside application under section 15 of CIPAA is not concerned with the substantive merits of the reliance on any of the provisions of the underlying contract and also findings of fact by the adjudicator, and this will include



*clause 36.6, the fact remains that clause 36.6 was actually cited in the “pleaded” claim and was not plucked out of the air by the adjudicator, whether through cherry-picking or any frolic. It is also important to note that the respondent never disputed that reliance; whether in the payment response or adjudication response; or even in its correspondence.*

*[89] Thus, on the facts, the Court of Appeal was clearly in error when it concluded that clause 36.6 was not raised or “pleaded”; that the adjudicator had unilaterally relied on clause 36.6 and had gone on a frolic of his own thus acting without jurisdiction and committed a material breach of natural justice. On the contrary, **the payment claim clearly complied with the statutory requirements and the respondent was not in any way impaired or unable to respond to the claim.**”*

*[emphasis added]*

Her Ladyship further deliberated on the Court of Appeal’s reliance on the decision of View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22 and explained the effect of that decision:-

*“[98] The effect of this Court’s decision in View Esteem in respect of section 27 is simply this – that the adjudicator’s jurisdiction in relation to any dispute is limited to the matter of the claim which was referred to adjudication under sections 5 and 6. The subject of the claim is the limiting factor. This was explained by the Federal Court to refer to the cause of action identified by reference to the applicable clause of the construction contract.*

*[99] An example was given to illustrate what this meant, that if the payment claim relates to progress claim No. 28, then adjudicator’s jurisdiction is limited to this progress claim “and nothing else”. The payment response is likewise limited to an answer to this progress claim and no other. The details of the subject of the claim are those provided under section 5(2)(a) to (d). The Federal Court added that “section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons to oppose the claim”. **I understand “grounds of the claim” to be the supporting basis for the claim; and the insufficiency or absence of grounds do not deprive of the adjudicator of jurisdiction.**”*

*[emphasis added]*

In totality, Her Ladyship found no breach of natural justice on the basis that the Adjudicator is entitled to rely on in his inquisitorial powers and look into the whole of clause 36 as well as the rest of the Contract:-

*“[138] Clause 36.6 which is part of clause 36 was drawn to the adjudicator’s attention by the respondent itself. Clause 36 has subclauses 36.1 to 36.6. **It is artificial and***



***totally impractical if not naïve to claim that the adjudicator cannot, with his inquisitorial powers under section 25, make his observations about some other subclauses of clause 36, including 36.6. The adjudicator is entitled to look at the whole of clause 36, and the rest of the Construction Contract. Such an examination is entirely permitted under the remit of View Esteem. The Court of Appeal had recognised the use of such powers in Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd & Ors and Another Suit [2018] 1 LNS 2078 earlier acknowledged in WRP Asia Ltd v NS Bluescope Lysaght Malaysia Sdn Bhd [supra], and I agree to the proposition that adjudication proceedings involve inquisitorial inquiries and not adversarial process. The learned adjudicator was therefore not in breach of any rule of procedural fairness when he did not invite the parties, especially the respondent to comment on clause 36.6...***

*[140] In Discaim Project Services Ltd v Opecprime Development Ltd [2000] BLR 402, it was recognised that for the statutory regime or system to work in practice, “some breaches of the rules of natural justice which have no demonstrable consequence are disregarded”. Clearly, **the complaint of breach of natural justice by the respondent in the present appeals is of no demonstrable consequence and must be disregarded.***

*[emphasis added]*

## **DECISION OF THE FEDERAL COURT**

In the upshot, the Federal Court by a 2 to 1 majority, dismissed the appeals and affirmed the Court of Appeal’s decision.

## **KEY TAKEAWAY**

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

- (a) An Adjudicator’s jurisdiction is limited to matters referred to the Adjudicator pursuant to Sections 5 and 6 of CIPAA 2012 where an Adjudication Decision must be made pursuant to the cause of action established by parties;
- (b) The Adjudicator would be acting in excess of jurisdiction in the event that the Adjudicator render a decision relying on a clause that is not cited in the Payment Claim or the Payment Response; and
- (c) Further, the failure of an Adjudicator to provide parties the opportunity to submit on contract clauses relied upon in the Adjudication Decision, but were not referred to by either party, tantamount to a breach of natural justice.





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