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CIPAA 2012 : LIMITS TO ADJUDICATOR'S ROLE AS MASTER OF PROCEDURE AND DISTINCTION BETWEEN CERTIFIED & UNCERTIFIED CLAIMS

PUNG TIONG GEE & ANOR V FORTUNE FACADE TREATMENT SDN BHD [W-02-(C)(A)-1131-06/2025]

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ISSUES

Adjudicators are often described as the "*master of procedure*". However, are such procedural powers without limits? Can an adjudicator's procedural directions override a party's statutory rights under the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**")?

It is also not uncommon for a claimant to pursue its claims through different modes of proceedings. In the context of res judicata, can an earlier legal proceeding bars a subsequent adjudication claim?

More specifically, can a party pursue certified sums in winding up proceedings and later pursue uncertified claims separately under CIPAA, when those uncertified claims had already fallen due at the time the winding up proceedings were initiated? Would the position be different where the winding up proceedings were resolved by way of settlement without any determination on the merits?

These questions were answered in the recent Court of Appeal case of **Pung Tiong Gee & Anor v Fortune Facade Treatment Sdn Bhd** [W-02-(C)(A)-1131-06/2025].

BRIEF FACTS

The brief facts of the case are as follows:-

- Fortune Facade Treatment Sdn Bhd ("**FFT**") was the main contractor for a project in Kuantan, Pahang, whilst Pung & Tee Aluminium Work ("**PT**") was appointed as subcontractor for the facade works.

- In June 2023, PT issued a statutory demand for approximately RM143,779.02 based on certified works done ("**Certified Claims**"). A winding up petition was subsequently filed against FFT.

- The parties later settled the winding up proceedings through a settlement agreement, following which the winding up petition was discontinued.

- In March 2024, PT commenced a separate adjudication under CIPAA for RM243,527.10, comprising Interim Claim No. 18R and retention sums ("**Uncertified Claims**"). These amounts were due before the earlier winding up petition was filed, but were not included in the statutory notice, winding up petition or settlement agreement.

- During the adjudication proceedings, the adjudicator directed that FFT would be *"barred from submitting an Adjudication Response"* unless the advance security deposit was paid.

- FFT nevertheless submitted what it described as a *"bare and incomplete"* Adjudication Response dated 24.07.2024 in an attempt to formally comply with section 10 of CIPAA.

- The adjudicator subsequently issued a further direction requiring parties to file submission in relation to the earlier direction barring FFT from submitting its Adjudication Response.

- On 01.08.2024. PT confirmed that it had no objection to the admission of FFT's Adjudication Response so as to avoid any issue of breach of natural justice, biasness or prejudice.

- On 02.08.2024, FTT placed on record that it had *"been barred from submitting an Adjudication Response, and by extension, from participating in the proceedings"*, as it had only filed a bare Adjudication Response and had not exercised its rights under CIPAA to make any applications.

- On 03.08.2024, the adjudicator admitted FFT's Adjudication Response and further directed parties to respond to the submissions filed in relation to the earlier procedural directions.

- FFT subsequently applied for leave to file a supplementary or fresh Adjudication Response, and also sought interrogatories. PT indicated that it had no objection to FTT being allowed to file a supplementary or fresh Adjudication Response.

- The adjudicator rejected FFT's request for interrogatories and within 1 working day thereafter, issued the adjudication decision in favour of PT. FFT's application for leave to submit a supplementary or fresh Adjudication Response was not addressed.

PROCEEDINGS BEFORE THE HIGH COURT

FFT applied to set aside the adjudication decision pursuant to section 15 of CIPAA on grounds of breach of natural justice, lack of impartiality, and excess of jurisdiction.

PT, on the other hand, sought enforcement of the adjudication decision under section 28 of CIPAA. The High Court accepted FFT's contention that there had been a denial of natural justice.

The learned High Court Judge held that there was no provision under CIPAA or the AIAC Adjudication Rules permitting an adjudicator to bar the filing of an Adjudication Response solely because of non-payment of the advance security deposit.

Importantly, the High Court also found that the adjudicator failed to properly consider FFT's application to submit a supplementary or fresh Adjudication Response. In this regard, the adjudicator was found to have effectively reached a concluded view whilst, at the same time, failing to afford FFT a meaningful opportunity to fully present its defence.

Separately, the High Court also accepted FFT's res judicata argument, finding that the adjudication claim overlapped with matters arising from the earlier winding up proceedings, as the Uncertified Claim had already fallen due when the winding up proceedings were initiated.

PROCEEDINGS BEFORE THE COURT OF APPEAL

The Court of Appeal considered the two main issues of breach of natural justice and res judicata.

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LIMITS TO ADJUDICATOR'S ROLE AS MASTER OF PROCEDURE

Before the Court of Appeal, PT argued that the adjudicator was entitled to control the conduct of the proceedings as the "master of procedure", relying primarily on Rule 9(4) of the AIAC Adjudication Rules.

The Court of Appeal rejected such a broad interpretation. The Court held that Rule 9(4) could not be interpreted so broadly as to extinguish a party's statutory right to file an Adjudication Response under CIPAA, even in the case of non-payment of security deposit.

> *"37. **We would not think that Rule 9(4) should be given such a broad interpretation as to allow the Adjudicator to bar the filing of the Adjudication Response which is a statutory right**..*
>
> *40. In any event, these CIPAA provisions, respectively, allow the procedure to be set, directions to be issued as may be necessary or expedient, and orders to be made as may be deemed fit in the event of non-compliance. **They do not, in our view, negate FFT's statutory right to file its Adjudication Response on account of its non-payment of the security deposit.**"*

The Court further observed that the proper course available to the adjudicator was either to invite the opposing party to pay the security deposit or to withhold delivery of the adjudication decision pending payment. What the adjudicator could not do was unilaterally bar the filing of the Adjudication Response altogether.

> *"41. The proper way forward was to invite the other party to pay the deposit, or to withhold the AD until payment is made."*

The Court also placed considerable emphasis on the adjudicator's failure to determine FFT's application to file a supplementary or fresh Adjudication Response, despite PT having expressly indicated that it had no objection to the application.

In the circumstances, the Court found that there is a breach of natural justice and that the adjudicator did not act impartially. Accordingly, the Court affirmed the High Court's decision in setting aside of the adjudication decision.

> *"43. After eventually deciding to admit FFT's Adjudication Response, the Adjudicator then directed the parties to make belated submissions. **The direction suggests that the Adjudicator had actually already made up his mind, and was intended to provide support for his "admission" of the Adjudication Response, which would be another breach of natural justice**...*
>
> *47. **Crucially, the Adjudicator failed to make a decision on the application, though PT had no objection**.*
>
> *48. **The Adjudicator's failure to consider or give FFT its right to present its case properly was a clear denial of natural justice. In this regard, the Adjudicator did not act impartially too.** See section 15(c), CIPAA."*

RES JUDICATA: BETWEEN CERTIFIED AND UNCERTIFED WORKS

Although the Court agreed that the adjudication decision ought to be set aside, it disagreed with the High Court's finding that the second legal claim was res judicata.

The Court drew an important distinction between the earlier certified claims pursued in the winding up proceedings and the later uncertified claims pursued in adjudication. Importantly, the Court of Appeal found that the winding up proceedings had been discontinued without any determination on merits.

> *"50. All that said, **we do not agree with the High Court that the 2™ Legal Claim was res judicata since the winding-up petition - premised on certified sums - was discontinued with no decision on the merits of the 1st Legal Claim.***
>
> *51. Moreover, **the cause in the 2™ Legal Claim was about uncertified claims**."*

The Court held that uncertified claims are fundamentally different in nature from certified claims and cannot automatically be treated as analogous to claims previously pursued in other proceedings. In particular, the Court observed that uncertified sums would ordinarily not be suitable for disposal in winding up proceedings.

> *"53. However, in the present case, **the 1st Legal Claim concerned certified sums whereas the 2nd Legal Claim concerned uncertified sums which would not be suitable for disposal in winding-up proceedings. The nature of the uncertified sums is different, such that the uncertified sums cannot be classified as analogous or part of the certified sums in the winding-up proceedings**."*

The Court of Appeal further found that the settlement agreement entered into following the earlier winding up proceedings did not concern the uncertified sums, and that there had been no adjudication on the merits of the uncertified claims.

> *"55. In addition, the settlement agreement here did not concern the uncertified sums, and there was no adjudication on merits. See the decision of the Court of Appeal in **Ang Game Hong & Anor v Tee Kim Tiam & Ors [2018] 4 MLJ 432**."*

DECISION OF THE COURT OF APPEAL

Notwithstanding its disagreement with the High Court on the issue of res judicata, the Court of Appeal affirmed the High Court's decision to set aside the adjudication decision under Section 15(b), (c), and (d) of CIPAA.

KEY TAKEAWAY

Following the decision, the following points should be noted:-

(a) **Adjudicator's procedural powers are not absolute.** Whilst adjudicators are often described as *"masters of procedure"*, procedural directions cannot override statutory rights under CIPAA, including the right to file an Adjudication Response and the right to be heard.

(b) **Natural justice remains central in adjudication proceedings**. A mere technical or bare opportunity to be heard may not suffice where, in substance, a party has been deprived of a meaningful opportunity to present its case.

(c) **Certified and uncertified claims are not necessarily interchangeable**. A prior proceeding involving certified sums does not automatically bar a subsequent adjudication involving uncertified claims, particularly where there has been no determination on the merits.

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