

ADJUDICATORS' JURISDICTION IN CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION (CIPA)

Introduction

The growth of the construction industry in Malaysia equally gives rise to construction related disputes. Such disputes often involve project payments within the construction phase which, if not resolved expeditiously, could lead to work progress being hindered.

In view of this, the Construction Industry Payment & Adjudication (CIPA) Act 2012 was enacted and came into operation on 15.04.2014. Through it came a mechanism to resolve payment related disputes faster as compared to Court action or arbitration. Through the CIPA Act 2012, an adjudication would be decided by an appointed Adjudicator within approximately 109 working days from its initiation through a Payment Claim.

The Role of Adjudicators and Their Jurisdiction

Another integral factor which sets adjudication proceedings apart from Court proceedings or arbitration is that an Adjudicator need not have legal background. A person having work experience of at least 7 years in the building and construction industry in Malaysia or any other recognised fields is qualified to be an Adjudicator subject to receiving the relevant certification.

Given the above, *Section 27* of the CIPA Act 2012 generally limits the jurisdiction of an Adjudicator to matters referred to adjudication by parties through their Payment Claim and Payment Response. If an Adjudicator acts in excess of jurisdiction, an aggrieved party may apply to Court to set aside the Adjudication Decision under *Section 15* of the CIPA Act 2012.

Thus, an Adjudicator's jurisdiction is a pertinent issue in adjudication. In the recent case of

Anas Construction Sdn Bhd v JKP Sdn Bhd Civil Appeal No.: 02(f)-3-01 /2023 (P) the Federal Court provided clarification on the jurisdiction of Adjudicators which will give impact to future adjudications. This article aims to highlight the key points of the case for the benefit of potential parties in adjudication.

Background of the Case

The case of *Anas Construction* involved a claim made by a main contractor against a project owner for consultants' fees incurred in a construction project. The main contractor referred the dispute for adjudication and the Adjudicator allowed its claims. In its Adjudication Decision. The Adjudicator made reference to a clause in the construction contract which was not specified by the parties in the Payment Claim or Payment Response.

Thereafter, two applications were brought before the High Court. One by the main contractor to enforce the Adjudication Decision and the other by the project owner to set aside the Adjudication Decision. The main contractor's application was allowed while the project owner's application was dismissed.

In the Court of Appeal, the High Court's decisions were reversed. The Court of Appeal found that the Adjudicator had acted in excess of jurisdiction. This is because the Adjudicator had decided the dispute based on a clause which was not relied upon by the main contractor in its Payment Claim and Adjudication Claim.

The Federal Court's Analysis

The Federal Court's decision in *Anas Construction Sdn Bhd (supra)* was not a unanimous one. Vide the majority decision. Justice Nordin bin Hassan (FCJ) and Justice Abdul Rahman bin Sebli (CJSS) decided that the Adjudicator had indeed acted in excess of jurisdiction. Justice Mary Lim Thiam Suon (FCJ) dissented.

In considering the 3 questions of law before them, the Federal Court considered how best to interpret the CIPA Act 2012 and *Section 27 (1)* therein. In the majority judgment, the need to apply the literal meaning of provisions and to give effect to the intention of Parliament was emphasised.

Taking this into account, the Federal Court held that the plain meaning of *Section 27(1)* is that the jurisdiction of an Adjudicator is limited to matters referred to in the Payment Claim and Payment Response.

The minority decision however took a different approach. Justice Mary Lim (FCJ) stressed on

the necessity to give effect to the purpose of the CIPA Act 2012 as well as its unique features including that Adjudicators are not necessarily legally qualified.

Her Ladyship's minority judgment also highlights numerous key points such as how the strict rule of pleadings (which requires parties to specify all the main facts which it will rely upon) should not apply to adjudication which is not Court proceedings.

It is worth noting that reference was also made to the Federal Court case of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd & Another Appeal* [2021] 1 MLJ 1 where the Court concluded that in arbitration, the arbitrator is entitled to draw from his own expertise in coming to a decision.

Another provision heavily discussed in both majority and minority judgments was *Section 5 (2) (b)* of the CIPA Act 2012 which states that a Payment Claim shall be in writing and shall include details to identify the cause of action including the provision in the construction contract to which the payment relates. Justice Nordin stressed that *Section 5 (2) (b)* of the CIPA Act 2012 makes it mandatory for a party to include in its Payment Claim the relevant provisions of the construction contract for the identification of the cause of action.

Specifically, his Lordship stated as follows at para 27 of the majority judgment:

" ... 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 ... "

In contrast, Justice Mary Lim opined that the words "including the provision in the construction contract to which the payment relates" in *Section 5 (2) (b)* are meant to be illustrative as to what sort of details would be necessary for a Payment Claim.

All in all, the Federal Court's decision as per the majority decision is that *Section 27 (1)* and *Section 5 (2) (b)* of the CIPA Act 2012 must be read literally to give effect to the intention of Parliament. As the majority held that the Adjudicator had acted in excess of its jurisdiction, the Adjudication Decision was set aside under *Section 15 (d)* of the CIPA Act 2012.

Conclusion

The recent decision of the Federal Court in *Anas Construction Sdn Bhd (supra)* involved an interesting discussion by the Learned Justices on an Adjudicator's decision. It serves as a reminder to potential claimants and respondents that in referring or opposing a claim for adjudication, the proper clauses of the relevant contract must be specifically stated.

Moving forward, it is advisable that parties analyse all relevant clauses in the construction contract and other relevant documents and ensure that all matters are laid out in the Payment Claim and Payment Response in order to ensure that the Adjudicator may consider the same.

Written by:



Izzat Asyraf Zamri
Partner
izzate@azmilaw.com



Ammera Hadi
Senior Associate
ammera@azmilaw.com

Corporate Communications

Azmi & Associates

21 February 2024