

MRCB ENGINEERING SDN BHD v TRIUMPHANT GALLERY SDN BHD AND ANOTHER CASE

CaseAnalysis
| [2022] MLJU 770

[MRCB Engineering Sdn Bhd v Triumphant Gallery Sdn Bhd and another case \[2022\] MLJU 770](#)

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HIGH COURT (KUALA LUMPUR)

LIM CHONG FONG J

ORIGINATING SUMMONS NO WA-24C-176-10 OF 2021 AND WA-24C-202-11 OF 2021

15 March 2022

Selva Mookiah (Sajitha Suresh with him) (Selva Mookiah & Assoc) for the plaintiff in OS 1 and defendant in OS 2.

David Gurupatham (Venothani a/p Raja Gopal with him) (David Gurupatham & Koay) for the defendant in OS 1 and plaintiff in OS 2.

Lim Chong Fong J:

GROUND OF DECISION

Introduction

[1] These are cross applications to set aside as well as to enforce an adjudication decision made pursuant to the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”).

[2] The Plaintiff in Originating Summons no. WA-24C-176-10/2021 (“OS 1”) and the Defendant in Originating Summons no. WA-24C-202-11/2021 (“OS 2”) is a private limited company involved in the provision of engineering and construction services business.

[3] The Defendant in OS 1 and the Plaintiff in OS 2 is also a private limited company involved in the heavy and civil engineering construction business.

[4] For ease of referencing, the parties will be described as MRCBE and TG respectively.

Background and Preliminary

[5] MRCBE is the main contractor for the construction and completion of the Aman Desaru Club House and 46 Units of Club House Suites Mukim Pantai Timur, Daerah Kota Tinggi, Johor Darul Takzim (“Project”).

[6] By a letter of award dated 26 February 2015, MRCBE appointed TG as its sub-contractor to undertake the internal wall, external wall, roof, windows, doors & ironmongery, floor finishes, ceiling finishes, sanitary wares & fittings, painting & decoration, swimming pool and external works of the Project (“Works”).

[7] TG completed the Works and made its claim against MRCBE for non-payment of work done amounting to RM2,099,868.28.

[8] However MRCBE failed, refused or neglected to pay TG accordingly.

[9] Consequently TG on 1 June 2020 issued to MRCBE its payment claim under the CIPAA.

[10] MRCBE on 15 June 2020 issued its payment response to TG under the CIPAA.

[11] By reason that TG is dissatisfied with the payment response, TG hence on 28 September 2020 issued its notice of adjudication under the CIPAA.

[12] The director of the Asian International Arbitration Centre thereafter appointed the adjudicator on 14 April 2021 who then proceeded to conduct the adjudication proceedings in accordance with the CIPAA.

[13] After having received and reviewed the adjudication claim, adjudication response and adjudication reply produced by the respective parties, the adjudicator on 22 September 2021 decided in favour of TG in that MRCBE shall pay TG the amount of RM1,915,548.28 together with interest thereon at 5% from 25 May 2021 until the date of full payment as well as all the costs of the adjudication proceedings of RM173,475.45 plus GST as applicable on proof of payment ("Decision").

[14] MRCBE is dissatisfied with the Decision and has on 4 October 2021 filed OS 1 to set aside the Decision.

[15] The affidavits which were filed for purposes of OS 1 are as follows:

- (i) MRCBE's affidavit in support affirmed by Lok Ngai Hey dated 4 October 2021;
- (ii) TG's affidavit in reply affirmed by Mohd Aziz bin Mahadi dated 1 November 2021;
- (iii) TG's notice of intention to use affidavit dated 1 November 2021;
- (iv) MRCBE's affidavit in reply affirmed by Lok Ngai Hey dated 24 November 2021; and
- (v) MRCBE's notice on intention to use affidavit dated 24 November 2021.

[16] By reason that MRCBE has again failed, refused and or neglected to pay TG pursuant to the Decision, TG on 22 November 2021 filed OS 2 to enforce the Decision.

[17] The affidavits which were filed for purposes of OS 2 are as follows:

- (i) TG's affidavit in support affirmed by Mohd Aziz bin Mahadi dated 22 November 2021;
- (ii) MRCBE's affidavit in reply affirmed by Lok Ngai Hey dated 13 December 2021;
- (iii) TG's affidavit in reply affirmed by Mohd Aziz bin Mahadi dated 17 December 2021; and
- (iv) TG's further affidavit affirmed by Venothani a/p Raja Gopal dated 14 January 2022.

[18] The hearings of OS 1 and OS 2 were fixed before me on 9 March 2022. The parties consented that if OS 1 is allowed, then OS 2 would be automatically dismissed and *vice versa*.

[19] After having read the written submissions of the parties and heard oral arguments advanced by counsel, I allowed OS 1 with costs of RM2,500.00 subject to the usual allocator. Accordingly, I dismissed OS 2 also with costs of RM2,500.00 subject to the usual allocator.

[20] I now furnish below the grounds of my decisions.

Contentions and Findings

[21] Dato' Selva Mookiah, of counsel for MRCBE advanced 7 grounds to justify setting aside the Decision pursuant to [s. 15](#) of the [CIPAA](#) which provides:

15. Improperly procured adjudication decision

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially; or
- (d) the adjudicator has acted in excess of his jurisdiction.

[22] Nevertheless, he concentrated on the principal ground that the adjudicator decided to dismiss MRCBE's backcharges claim on the basis that it was not pleaded in MRCBE's payment response relying on the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2019] 5 CLJ 479.

[23] However, Dato' David Gurupatham, of counsel for TG retorted that the Decision has been properly procured at all material times and must be enforced accordingly.

[24] I will deal first with the principal ground of MRCBE in respect of the effect on the decision when the adjudicator refuses to entertain a cross claim pleaded in the adjudication response against the adjudication claim but not prior pleaded in the payment response to the payment claim.

[25] This necessarily involves interpreting the interplay amongst [ss. 5, 6](#), and [27](#) of the [CIPAA](#) which provide:

5. Payment claim

- (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
- (2) The payment claim shall be in writing and shall include-
 - (a) the amount claimed and due date for payment of the amount claimed;
 - (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
 - (c) description of the work or services to which the payment relates; and
 - (d) a statement that it is made under this Act.

6. Payment response

- (1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.
- (2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.
- (3) A payment response issued under [subsection \(1\)](#) or [\(2\)](#) shall be served on the unpaid party within ten working days of the receipt of the payment claim.
- (4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

27. Jurisdiction of adjudicator

- (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and [6](#).
- (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.
- (3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

[26] As I see it particularly in view of [ss. 27\(1\)](#) and [s. 6\(4\)](#) of the [CIPAA](#), if the non-paying party fails to respond at all to the payment claim by not submitting a payment response, then that party is only entitled to challenge the validity and/or veracity of the unpaid party's payment claim but is precluded from raising any cross claim particularly set off to resist the payment claim in the adjudication proceedings. If the payment response is served by the non-paying party, then that non-paying party is restricted just like the unpaid party to pleas made in their respective payment response and payment claim accordingly in the adjudication proceedings. This is critical in view of the

swift nature of the adjudication proceedings wherein there should not be surprises sprung in the adjudication claim and adjudication response.

[27] However in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd (supra)**, Zulkefli Ahmad Makinudin PCA held as follows with emphasis added by me:

“[39] The High Court agreed with the adjudicator and held that ss. 5 and 6 of CIPAA are determinative of jurisdiction, and that the adjudicator’s jurisdiction did not extend to matters in the adjudication claims and the adjudication response or even the adjudication reply found in ss. 9 to 11 of CIPAA. (See para. 60 of the High Court judgment).

[40] The High Court justified its conclusion by reasoning out that the adjudication pleadings under ss. 9 to 11 of CIPAA are merely “manifestations” of the matters in ss. 5 and 6 of CIPAA. In the words of the High Court:

the whole adjudication process that takes place after that from the appointment of the Adjudicator to the filing of the Adjudication Claim, the Adjudication Response and the Adjudication Reply are substantially formal manifestations of the dispute containing greater details of the claim, response or reply, as the case may be of the first Payment Claim and Payment Response.

The Court of Appeal agreed fully with the High Court.

[41] With respect to the above reasoning of the High Court, it is untenable to reduce the adjudication pleadings in ss. 9 to 11 of CIPAA to mere “formal manifestations” of the dispute. If it were so, and speed is the overriding consideration under CIPAA, it would be easier for the legislative draftsman to dispense altogether with adjudication pleadings and proceed purely on the statements contained in the payment claim and the payment response under ss. 5 and 6 of CIPAA.

[42] We are also doubtful if mere changes in the adjudication pleadings from the time of the first documents under ss. 5 and 6 of CIPAA would delay the process because of the strict timeline of a ten-day period for parties to respond to each other’s pleadings, and of the adjudicator’s timeline to deliver his decision within 45 working days from the last date of the documents being filed.

[43] It should also be noted that while the payment response under s. 6(2) of CIPAA requires the non-paying party to merely state “amount disputed and the reasons for the dispute” the adjudication response under s. 10 of CIPAA on the other hand requires the respondent to “answer the adjudication claim”. The latter, in our view is in the nature of a legal response with the obligation to “answer” imposed by a statute, to mean a real opportunity to defend a claim, and not something illusory.

[44] It should be noted that on the claimant’s side, the adjudication claim under s. 9(1) of CIPAA requires the unpaid party to state “the nature and description of the dispute and the remedy sought” whereas the preceding payment claim under s. 5 of CIPAA merely requires him to state the amount claimed and the contract involved sufficient to “identify the cause of action.”

[45] It needs to be emphasised here that the adjudication response under s. 10(1) of CIPAA requires the non-paying party to “answer the adjudication claim” meaning the “nature and description of the dispute and the remedy” as claimed by the claimant in its adjudication claim. It is also significant to note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as “the claimant”, and the non-paying party as “the respondent”, by which terms they are thereafter respectively referred to. It comes about after the “initiation of adjudication” under s. 8 of CIPAA where an adjudicator is appointed signifying the start of the adjudication process. The adjudication pleadings under ss. 9 to 11 of CIPAA comes after this and before the adjudication hearing begins under s. 12 of CIPAA.

[46] We are of the considered view that the scheme of the two-stage process under CIPAA does not warrant giving a reduced importance to the adjudication pleadings and a greater, if not overriding, significance given to the initial documents under ss. 5 and 6 of CIPAA.

...

[56] In short, s. 27(1) of CIPAA refers to the subject matter of the claim under s. 5 of CIPAA, which is the “cause of action” identified by the claimant by reference to the applicable clause of the construction contract. Thus if the payment claim

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relates to Progress Claim No. 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to Progress Claim No. 28.

[57] It can thus be said that the appellant's case regarding the jurisdiction referred to in s. 27(1) of [CIPAA](#), is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract. By s. 27(2) of [CIPAA](#), the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of [CIPAA](#) has nothing to do with the grounds of the claim or the reasons for opposing the claim.

...

[60] The impact of s. 6(4) of [CIPAA](#) should also be considered. The provision states that if a non-paying party fails to respond to the payment claim served on him he is "deemed to have disputed the entire payment claim". The High Court in the present case treated s. 6(4) of [CIPAA](#) as something equivalent to an anti-default judgment provision which merely gives "comfort" to the respondent (see para 67 of judgment). With respect, we are of the view that the approach of the High Court fails to give due regard to the section as a "deeming" provision in legislation. The word "deemed" used in a statutory provision is a legislative presumption of something having happened although it did not. It is a statutory fiction given reality by law. In *St. Aubyn (L.M.) & Ors. v. Attorney General (No. 2)* [1951] 2 All ER 473, Lord Radcliffe observed at p. 53:

The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

*In relation to something not done, the word "deemed" would have the meaning given by James LJ in *Ex p Walton* [1881] 17 Ch. D 746 which read as follows:*

When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

[61] **We are of the considered view that the High Court has wrongfully reduced the significance of the "deeming" effect in s. 6(4) of [CIPAA](#).** Further, the interpretation that s. 6(4) of [CIPAA](#) would only entitle the respondent to dispute the claim as it stands, and not raise any positive defence, is to whittle down the effect of the deeming provision.

...

[65] **We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice.** This point arose in *Pilon Ltd. v. Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature...

[66] **Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s. 27(1) of [CIPAA](#) in refusing to consider all the defences raised in the adjudication response. Therefore such a decision by the adjudicator cannot stand.**"

[28] With regard to MRCBE's backcharges claim raised in set off against TG's claims, the adjudicator held as follows in the Decision:

(119) *The Respondent informed that it has incurred cost of RM250,272.27 as a result of the engagement of the third-party contractor.*

(120) **The Claimant informed that the works carried out by the third party were related to defective works by the structural contractor, Al-Ambia Sdn Bhd. As evidence, it had submitted five (5) RFIs on the 7th of April 2015 with regards to plastering works.**

a) RFI/2015/0047 – Need to be hack as per defect work by Al-Ambia Sdn Bhd.

b) RFI/2015/0048 – Need to be hack as per defect work by Al-Ambia Sdn Bhd.

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- c) RFI/2015/0049 – Need to be hack as per defect work by Al-Ambia Sdn Bhd.
- d) RFI/2015/0050 – Need to rectify before plastering as defect work by Al-Ambia Sdn Bhd.
- e) RFI/AD/2015 – Need to hack as per defect by AL-Ambia Sdn Bhd

In reviewing the documents submitted, I note the following:

- a) That I have no jurisdiction to view the counterclaims set before me as it is not within my jurisdiction, i.e. this matter was not raised by the Respondent under its Payment Response under Section [6 CIPAA](#) as a specific defence.
- b) The issue of counter claim was only raised by the Defendant for the first time in the Adjudication Response.

(121) I therefore decide that the Respondent is not entitled to counterclaim for the amount of Rm250,272.27 from the Claimant in this instance. However, the onus should then be for the Respondent to qualify these counterclaims within the meaning of payment under section 4 and [5 of the Act](#).

[29] Albeit I have my views as set out in paragraph [26] above, I am however by virtue of the doctrine of *stare decisis* bound by the decision of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* (supra); see *Dalip Bhagwan Singh v Public Prosecutor* [1997] 4 CLJ 645 FC.

[30] In the premises, I find and hold that the adjudicator committed a breach of natural justice by refusing to entertain MRCBE's backcharges claim that justified the Decision to be set aside.

[31] Consequently, it is unnecessary for me to delve into the other grounds advanced by MRCBE to set aside the Decision. That notwithstanding, I will deal with them briefly.

[32] Firstly, MRCBE contended that the adjudicator denied MRCBE natural justice as well as acted partially towards TG by suggesting to TG to apply for an extension of time and thereafter granted an extension of time to TG to file its adjudication claim after TG failed to submit the same within the original stipulated time.

[33] TG basically rebutted that the extension of time was necessitated by reason of the Movement Control Order no. 3 and the Hari Raya festive break and that MRCBE's solicitors had no objection to the same upon the request for an extension of time made by TG's solicitors. This is however disputed by MRCBE's solicitors.

[34] It is clear that the adjudicator is the master of the procedure as conferred by s. 25(a) of the [CIPAA](#) which includes the power to extend time as conferred by s. 25(p) of the [CIPAA](#). The grant or refusal of extending time is the exercise of discretion of the adjudicator which would rarely be questioned by the court unless the exercise of discretion is perverse; see also *AMT Engineering Services v Ah Design Communication Sdn Bhd and another appeal* [\[2018\] MLJU 1860](#). In addition, the resultant prejudice caused to the other party is a relevant consideration too.

[35] In the circumstances herein, I am not satisfied that the adjudicator acted perversely by having granted the extension of time to submit the adjudication claim by TG. Additionally, I could not see any prejudice caused to MRCBE as well.

[36] Secondly, MRCBE further contended that the adjudicator again denied MRCBE natural justice as well as acted partially towards TG by refusing to grant MRCBE an extension of time to submit its adjudication response.

[37] TG responded that the adjudicator refused the extension of time because MRCBE had prior thereto already been granted extension of time twice by the adjudicator to submit its adjudication response. Furthermore, MRCBE's solicitors gave the impression to both the adjudicator and TG's solicitors that it was ready to submit the adjudication response by the expiry of the second extended date.

[38] In the circumstances herein, I am similarly not satisfied that the adjudicator acted perversely in refusing the further grant of the extension of time to submit the adjudication response by MRCBE. Moreover, I could not see any prejudice caused to MRCBE as well because the adjudication response was submitted and ultimately considered by the adjudicator. The case of *Itramas Technology Sdn Bhd v Savelite Engineering Sdn Bhd and other cases* [\[2021\] MLJU 1382](#) relied by MRCBE which advocates that an impartial adjudicator should have treated both claimant and respondent equally and fairly is distinguishable on its own facts.

[39] Thirdly, MRCBE contended that the adjudicator took an inconsistent position in deciding TG's scope of work and as the result made a factually wrong finding.

[40] However, TG retorted that MRCBE is effectively appealing against the Decision which cannot be entertained in a setting aside application under s. 15 of the [CIPAA](#).

[41] After reviewing the Decision and the contentions of both parties, it is trite and hence plain to me that the nature of this complaint by MRCBE is an appeal on the merits of the Decision which is impermissible; see *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728 and a host of other cases thereafter.

[42] Fourthly, MRCBE contended that the adjudicator erred in failing to make a valid evaluation by accepting TG's variation work claim.

[43] This is similarly retorted by TG that MRCBE is effectively appealing against the Decision which cannot be entertained.

[44] Again after reviewing the Decision and the contentions of both parties, it is plain to me that the nature of this complaint by MRCBE is an appeal too that cannot be allowed.

[45] Fifthly and finally, MRCBE also contended that the adjudicator made an exorbitant cost order particularly on the legal fees in favour of TG.

[46] TG responded that this involves the exercise of discretion of the adjudicator who correctly determined that costs followed the event pursuant to s. 18(1) of the [CIPAA](#) after hearing both parties with substantiation provided by TG.

[47] In this respect, I find that the court would not interfere unless the adjudicator acted on wrong principles; see *BM City Realty & Construction Sdn Bhd v Merger Insight (M) Sdn Bhd and another case* [\[2016\] MLJU 1567](#). I am however not satisfied that the adjudicator made an erroneous exercise of discretion on the costs.

Conclusion

[48] I am mindful that the backcharges claim of MRCBE amounting to RM250,272.27 which was not considered by the adjudicator would not extinguish the whole principal amount of RM1,915,548.28 determined adjudicator.

[49] However and since TG has not prayed for setting aside the Decision in part as was permitted in *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd & Another Case* [2018] 1 LNS 459, I therefore, by reason of my findings in paragraphs [22] to [30] above set aside the whole of the Decision.

[50] It is for the foregoing reasons that I allowed OS 1 and dismissed OS 2 as so ordered.