

Adjudication Proceedings in Construction Contracts: An Overview of *Anas v JKP* [Civil Appeal No: 02(f)-4-01-2023(P)]

The recent Federal Court case of **Anas Construction Sdn Bhd v JKP Sdn Bhd** raises interesting perspectives on the efficiency of adjudication. Parties aspire for expeditious resolution of disputes; however, where a stringent and literal approach to the construction of contractual clauses may sometimes thwart the expeditious resolution of disputes.

Brief Facts

Anas Construction (“the Appellant”) was the main contractor for a 24-storey flat construction project appointed by JKP (“the Respondent”); a PWD standard form contract applied. Several disputes relating to professional fees arose. The Appellant terminated the contract on 15 May 2017. Adjudication ensued. Conflicting decisions by the High Court (“HC”) and the Court of Appeal (“CA”) in respect of the adjudication, were handed down.

Adjudication Process

The Appellant submitted a Payment Claim; it was denied by the Respondent, resulting in adjudication. The Adjudicator's Decision favoured the Appellant, prompting applications from both parties — the Appellant sought enforcement; the Respondent applied to set aside the decision, citing a denial of natural justice and excess of jurisdiction.

Issues before the Federal Court

At the Federal Court, the court was posed with three questions of law that arose in relation to the **Construction Industry Payment And Adjudication Act 2012** (“CIPAA 2012”):

1. Do the strict rules of pleadings apply in adjudication proceedings under CIPAA 2012?
2. Does the dicta in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd** [2018] 2 MLJ 22 preclude an adjudicator

Arbitration Update

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from relying on a specific clause not referenced in the Payment Claim and Adjudication Claim?

3. Does consideration of such a clause amount to a breach of natural justice or an act excess in jurisdiction, where parties are not invited to submit on the clause?

Federal Court's Majority Judgment

The majority emphasised the limitations of the adjudicator's powers under section 27 of CIPAA 2012. Under this provision, jurisdiction is limited to sections 5 and 6 of CIPAA 2012, which deal respectively with the Payment Claim and Payment Response.

The majority found that the adjudicator's determination of the issue based on clause 36.6, which was not in the Payment Claim, was in excess of jurisdiction. Further the failure to invite submissions on clause 36.6 breached natural justice.

Minority Judgment Position

In contrast, the minority, led by Mary Lim FCJ, argued against strict pleading requirements in adjudication, asserting that the entire contract, including clause 36.6 was "*pleaded*".

Her Ladyship also contended that the CA misconstrued the principle in **View Esteem v Bina Puri**, clarifying that an adjudicator's jurisdiction extends beyond the subject matter of the claim.

The minority further rejected the claim that there was a breach of natural justice due to the adjudicator's decision on clause 36.6 without inviting submissions. Clause 36.6, the minority held was, technically speaking, already before the parties, resulting in no breach of natural justice.

Conclusion

The majority of the Federal Court took a strict and narrow approach towards the need to plead in an adjudication claim. This raises concerns about the efficiency of adjudication. The minority view, however, emphasises practical considerations, suggesting a more liberal and less technical approach to adjudication proceedings. The tension between timely dispute resolution and comprehensive consideration of contractual terms remains a challenge in adjudication proceedings.

This case reflects the tensions in applying CIPAA 2012 and raises pertinent questions for adjudicators as to the ambit of the reference to them. An expeditious adjudication

overturned by a lengthy court challenge detracts from an expeditious determination. This case underscores the ongoing need for clarity and consistency in adjudication processes within the construction industry.

This Arbitration Update is prepared by [Hiral S Sanghvi](#).

Restrictions on the High Court to Exercise Interim Measures against Third parties/Non-parties under section 11 of the **Arbitration Act 2005**

Section 11 of the **Arbitration Act 2005** ("AA 2005") governs the High Court's jurisdiction to issue interim measures for specific orders. In the Court of Appeal case of **Damai City Sdn Bhd v MCC Overseas (M) Sdn Bhd**¹, the issue arose when the High Court exercised its jurisdiction to restrain a third party who was not a signatory to the contract or agreement. The Court of Appeal held that for the High Court to exercise said jurisdiction, the arbitration clause in the contract's conditions must be clear and specific to encompass the third party.

The Background

Damai City Sdn Bhd ("Damai City") was the employer for a project with MCC Overseas (M) Sdn Bhd ("MCCO") as its main contractor for the construction of three high-rise towers and a retail podium. MCCO procured Malayan Banking Bhd ("MBB") to issue a performance bond ("the bond") for the sum of RM71.4m. Damai City issued a notice of assignment of the bond to Maybank Investment Bank Bhd ("MIBB"). In its notice to MCCO, it was informed that MBB had transferred its rights and benefits, in an assignment to MIBB. This was acknowledged by MCCO.

MCCO defaulted in executing and completing the works in accordance with the Letter of Acceptance and the Conditions of Contract. Consequently, Damai City issued a notice of default to MCCO and a notice of determination, which MCCO treated as a notice of repudiation.

Damai City made a demand on the bond and requested MBB to demand the bond. However, MBB was not able to meet the call due to the assignment of the bond. Damai City wrote to MIBB to make a claim on the bond. MIBB issued the demand wherein it was stated that the performance bond of RM71.4m was to be released to a designated account bearing the account name Infinite Holding Sdn Bhd.

Arbitration proceedings then commenced between Damai City and MCCO pursuant to the arbitration clause found in the Conditions of Contract.

Clause 34.5 of the Conditions of Contract stated as follows:

"Disputes referred to arbitration"

*34.5 In the event that any dispute or difference arises between the **Employer** and **Contractor**, either during the progress or after completion or abandonment of the Works regarding;*

34.5(a) any matter of whatsoever nature arising under or in connection with the Contract;

34.5(b) any matter left by the Contract to the Discretion of the Architect;

34.5(c) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to;

34.5(d) the right and liabilities of the parties Under cl 25.0, 26.0, 31.0 or 32.0 or

34.5(e) the unreasonable withholding of Consent or agreement by the Employer or Contractor,

then such disputes or differences shall be referred to arbitration.”

MCCO commenced proceedings in the High Court for an injunction to restrain the payment and/or receipt of payment under said bond pending the disposal of the arbitration proceedings. MCCO also filed an interlocutory application and was allowed with an order in terms.

On appeal, Damai City asserted that the High Court made an error by issuing an order that restricted a third party, not party to the agreement. Damai City contended that the third party was not explicitly and clearly identified in the wording of the Conditions of Contract.

Main Issue

The main issue in this proceeding related to MCCO's application to the High Court under section 11(1) (a) & (b) of the AA 2005 for an interim injunction to preserve the status quo, which the High Court granted including the call on the performance bond. On appeal, Damai argued that the High Court had no jurisdiction to grant an order in terms under the above-stated section against the third party as MBB was a non-party to the arbitration agreement in the Conditions of Contract between Damai City and MCCO.

Discretionary Power of Courts: Examining Interim Measures under Section 11 of the AA 2005

The preceding two paragraphs examine the High Court Judge's reasoning and thought process in coming to the decision. Emphasizing the Court's role in providing interim remedies that bolster arbitration rather than definitively settling disputes, the High

Court Judge employed this line of reasoning to determine that the application in question satisfied the threshold requirement of section 11(1) of the AA 2005.

The High Court Judge referred to various legal authorities, such as **KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC**². The case highlighted that the court will judiciously use its discretionary power, limiting itself to granting interim remedies with a primary focus on supporting and facilitating the arbitration process.

The High Court Judge highlighted that section 11(1) of the AA 2005 grants discretionary power to the High Court, emphasising its role in granting interim remedies that support or aid arbitration rather than definitively determining disputes. As such, the High Court Judge found that the application met the threshold requirement of section 11(1) of the AA 2005, particularly as it aimed to preserve the status quo during arbitration between the parties involved.

Interim Measures Exclusively for Parties in Arbitration Agreements

Arbitration is a consensual process. Arbitration can only take place if both parties to the dispute agree to resolve it through this process. The High Court can only exercise its jurisdiction over those who are immediate parties to the agreement to arbitrate. The High Court does not have the authority to issue an order to restrain a third party, who is not mentioned/involved in the agreement.

The Court of Appeal in addressing the issue of the High Court's jurisdiction referred to the Federal Court case of **Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd**³, where the person appealing was not part of the arbitration agreement, and therefore the appellant could not start arbitration proceedings. This strengthens the clear limitation of the High Court's authority under section 11(1) of the AA 2005, highlighting that it only applies to parties involved in the arbitration agreement.

The Court of Appeal highlighted that the primary purpose of section 11 of the AA 2005 is to facilitate parties engaged in arbitration, emphasizing its limited scope beyond such scenarios. The Court concluded that the provision does not extend its reach to include non-parties in the arbitration proceedings.

The call on the performance bond did not fall within the purview of the arbitration agreement. The performance bond and the Conditions of Contract are two separate documents. The High Court's jurisdiction is confined to the parties to the Conditions of Contract.

Clear and Specific Inclusion of Third Party in the Agreement

There must be clear and specific words to make a non-party, a party to the arbitration clause. In coming to its decision, the Court of Appeal scrutinised the contractual language as present in clause 34.5 Conditions of Contract (*see above*) and was of the view that the contract does not explicitly say that MBB, the bank, is involved in the arbitration. The Court of Appeal highlighted that the third party must be seen to have expressly agreed to arbitrate.

Conclusion

In conclusion, the Court of Appeal in the case of **Damai City Sdn Bhd v MCC Overseas (M) Sdn Bhd**⁴ underscores the limitations on the High Court's authority to issue interim measures which involved non-parties under section 11 of the AA 2005. The central principle emanates from the consensual nature of arbitration, where both parties must agree to resolve disputes through this process. The High Court's jurisdiction is confined to immediate parties involved in the arbitration agreement, and it cannot issue orders against third parties not explicitly included in the agreement.

The case also highlights the necessity of clear and specific language to make a non-party part of the arbitration clause. The Court of Appeal's scrutiny of the contractual language in the Conditions of Contract revealed that the bank, MBB, was not explicitly stated in the arbitration clause. This decision aligns with the broader scope of section 11(1) of the AA 2005, emphasizing its limited application to parties directly engaged in the arbitration agreement.

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¹ [2023] 1 MLJ 258.

² [2020] MLJU 85; [2020] 1 LNS 479.

³ [2019] 5 MLJ 1.

⁴ [2023] 1 MLJ 258.