

**IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: 02(f)-3-01/2023(P)**

BETWEEN

ANAS CONSTRUCTION SDN BHD ... APPELLANT

AND

JKP SDN BHD ... RESPONDENT

[In the matter of the Court of Appeal Malaysia
(Appellate Jurisdiction)
Civil Appeal No. P-02(C)(A)-831-07/2020]

Between

JKP Sdn Bhd ... Appellant

And

Anas Construction Sdn Bhd ... Respondent

(In the matter of the High Court of Malaya at Pulau Pinang)
Originating Summons No. PA-24C-12-10/2019

Between

Anas Construction Sdn Bhd ... Plaintiff

And

JKP Sdn Bhd ... Defendant



Between

JKP Sdn Bhd

... Plaintiff

And

Anas Construction Sdn Bhd

... Defendant

CORAM

ABDUL RAHMAN SEBLI, CJSS

MARY LIM THIAM SUAN, FCJ

NORDIN HASSAN, FCJ

THE MAJORITY JUDGMENT OF THE COURT

[1] Anas Construction Sdn Bhd (“the appellant”) filed two appeals before this Court against the decisions of the Court of Appeal. Civil Appeal No. 02(f)-3-01/2023(P) is against the decision of the Court of Appeal to set aside the decision of the High Court to allow the enforcement of the Adjudication Decision dated 12.9.2019 under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). Civil Appeal No. 02(f)-4-01/2023(P) is against the decision of the Court of Appeal in setting aside the decision of the High Court in dismissing the respondent’s application to set aside the said Adjudication Decision.

[2] This Court on 3.1.2023 had granted the appellant’s leave to appeal on the following questions of law, namely:



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- (i) Do the strict rules of pleadings, as applicable in civil claims before the Malaysian Courts, apply in adjudicating proceedings under the Construction Industry Payment and Adjudication Act 2012?
- (ii) Whether the dicta in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22* prohibit an adjudicator from referring to a specific clause in a construction contract when allowing the claim when the said clause was not specifically stated in the Payment Claim and Adjudicating Claim by the claiming party?
- (iii) In a CIPAA Award, does the adjudicator's consideration of a specific clause in the construction contract, not specifically stated in the Payment Claim or Adjudication Claim, without inviting parties to further submit on the said clause, amount to a breach of natural justice or an act excess in the jurisdiction, such that the said Award ought to be set aside?

The Background Facts

[3] JKP Sdn Bhd (“the respondent”) appointed the appellant as the main contractor for the construction and completion of a project, for a sum of RM67,994,500 under a Construction Contract dated 9.4.2015 (“**the Contract**”). The project was 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 (“**the Project**”)

[4] In carrying out the Project, the appellant had engaged independent professional consultants, Perunding Kejuruteraan MSY and Perunding ZNA to provide a report in regards to cracked beams and a safety report. The consultants’ fees incurred by the appellant were RM 855,074.21 (inclusive of GST 6%). However, the respondent allegedly had failed, neglected, or refused to pay the said amount resulting the matter being brought to the Adjudicator for adjudication under CIPAA.

[5] The Payment Claim dated 6.3.2019 was served on the respondent by the appellant under section 5 of CIPAA for the sum of RM855,074.21, the amount claimed under the Payment Claim.

[6] In the Payment Claim, the appellant pleaded clauses 28, 55 and 56 of the Contract to establish its cause of action against the respondent. Paragraphs 32 and 33 of the Payment Claim states as follows:

*“32. The Amount Claim under this Payment Claim is due and payable to the Unpaid Party since 9 July 2017 read together with **clauses 55, 56, 28 of the P.W.D Contract** and pursuant to Section 36(3) and (4) of the CIPA Act 2012. In the absence of a contractual provision of time of payment, the amount claimed can be deemed due and payable within thirty [30] days from the date of submission of the Unpaid Party’s revised Final Claim.”*



33. TAKE NOTICE that you, being the Non-Paying Party are required to remit to the Unpaid Party the sum of RM855,074.21 being the amount claimed under this Payment Claim and this Payment Claim is made pursuant to section 5 of CIPA Act 2012.

(emphasis added)

[7] The respondent in its Payment Response dated 22.3.2019, which was made under section 6 of CIPAA and served on the appellant's solicitor, disputed 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. Further, it was contended that in the Revised Final Draft Claim, the Professional Fees and Charges for Perunding Kejuruteraan MSY and Perunding ZNA had been deleted. This is stated at paragraph 4 of the Payment Response as follows:

*"4. In reply to paragraph 15 of the Payment Claim, the non-paying party contends that there is a **latest Revised Final Draft Claim** issued by JUBM whereby the Professional Fees and Charges for the Perunding Kejuruteraan MSY and Perunding ZNA for **the sum of RM855,074.21 have totally been deleted.**"*

(emphasis added)

[8] Further, in the Adjudication Claim served by the appellant on the respondent pursuant to section 9(1) of CIPAA, the appellant again at paragraph 63, relied on clauses 28, 55 and 56 of the Contract to support its claim for the professional consultants' fees.



[9] In the Adjudication Response served by the respondent on the appellant under section 10(1) of CIPAA, the respondent contended that the relevant clause in relation to the appellant's claim would be clause 36.5 of the Contract which was not relied upon by the appellant.

[10] On 12.9.2019, pursuant to section 12(2) of CIPAA, the Adjudicator handed down the Adjudicator Decision which allowed the appellant's claim. The adjudicator found that the appellant has proved its case on the balance of probabilities and ordered the following:

- (i) the respondent is to pay the appellant the outstanding amount of RM806,673.78 (excluding the GST) as sought in the Payment Claim within 14 days from the date of the Adjudication Decision in the manner of the Banker's Cheque;
- (ii) interest of 5% per annum on the Adjudication Sum;
- (iii) the respondent is to pay the appellant the costs of the adjudication in the sum of RM11,070.88 within 14 days from the date of the Adjudication Decision in the manner of Banker's Cheque;
- (iv) the respondent is to pay party-to-party costs in the sum of RM20,000 within 14 days from the date of the Adjudication Decision in the manner of the Banker's Cheque.



[11] In coming to the Adjudication Decision to allow the appellant's claim, the Adjudicator relied on clause 36.6 of the Contract rather than clauses 28, 55, and 56 of the Contract as submitted by the appellant in the Payment Claim and the Adjudication Claim. The Adjudicator in his Adjudication Decision found that clause 36.6 is most applicable to the appellant's claim and not even clause 36.5 as submitted by the respondent.

[12] At the High Court, the application by the appellant to enforce the Adjudication Decision under section 28 of the CIPAA was allowed by the learned High Court Judge who consequently dismissed the respondent's application to set aside the Adjudication Decision. In her decision, the learned High Court judge found that the Adjudicator did not act beyond his jurisdiction and acted fairly and independently.

[13] However, on appeal to the Court of Appeal, the decision of the High Court was set aside on the ground that the Adjudicator had acted in excess of his jurisdiction when deciding the adjudication on the clause of the Contract that was not relied upon by the appellant in its Payment Claim and Adjudication Claim to support its cause of action. Further, the omission of the Adjudicator to invite parties to submit on clause 36.6 of the contract relied upon by the Adjudicator to support his decision is a denial of natural justice. The High Court's decisions in dismissing the respondent's application to set aside the Adjudication Decision and in allowing the enforcement of the Adjudication Decision were set aside.



[14] Aggrieved with the Court of Appeal decisions, the appellant appealed against the decisions and is now before this Court for determination.

The Appeal

[15] Counsel for the appellant submitted that strict rules of pleadings should not apply to CIPAA proceedings which are designed to be informal, speedy, and accessible to the layman for interim and temporary reliefs. The imposition of strict rules of pleadings is incorrect on *inter alia*, the following grounds:

- (i) section 8(3) of CIPAA allows parties to be self-represented in CIPAA proceedings or be represented by laypersons such as architects or claim consultants or non-lawyers;
- (ii) section 13 of CIPAA states that CIPAA Proceedings is designed only as an interim forum;
- (iii) a Payment Claim is merely to be issued to kickstart the claim under the CIPAA regime, and not necessarily be a document to be referred to or before the Adjudicator in determining the claim. What is eventually referred to in the substantive adjudication is merely the dispute arising from the Payment Claim and Payment Response as envisaged under section 7(1) of CIPAA;



- (iv) there is no requirement under section 9(1) for the claimant to raise in the Adjudication Claim specific references, submissions, and clauses applicable in the construction contract.

[16] Thus, Question 1, it was submitted, ought to be answered in the negative.

[17] Next, counsel for the appellant submitted that there is no prohibition for an Adjudicator from referring to a specific clause in the Contract not stated in the Payment Claim and Adjudication Claim in allowing the claimant's claim. Therefore, the answer to Question 2 should be in the negative.

[18] Further, it was contended by counsel for the appellant that the Adjudicator's consideration of reliance on a specific clause not mentioned in the Payment Claim and the Adjudication Claim in allowing the claim without inviting parties to submit on the application of the said clause does not amount to a breach of natural justice or an act in excess of jurisdiction. Question 3 should also be answered in the negative.

[19] In the circumstances, it was submitted that both appellants' appeals should be allowed.



[20] In response, counsel for the respondent in essence, submitted that the Adjudicator's jurisdiction is provided under section 27(1) of CIPAA and limited to matters found in sections 5 and 6 of the same Act. In other words, the Adjudicator's jurisdiction is to adjudicate matters in the Payment Claim and the Payment Response and any changes in this rule of engagement would need written consent between the parties as provided under section 27(2) of CIPAA. In this case, clause 36.6 was never relied upon by the appellant in the Payment Claim which has been the basis for the Adjudicator to allow the appellant's claim. As such, it was argued that the Adjudicator had acted in excess of his jurisdiction.

[21] In addition, the respondent contended that the Adjudicator's failure to invite parties to submit on the issue relating to clause 36.6 of the Contract which was the basis of the Adjudicator's decision, amounted to a breach of natural justice. This is also grounds to set aside the Adjudication Decision as provided under section 15(b) of CIPAA.

The Decision of This Court

[22] In determining the present appeal before us, the main issue here is the jurisdiction of an Adjudicator as provided under CIPAA. Statutory provisions under CIPAA have provided among others the jurisdiction of an Adjudicator which is spelled out under section 27(1) as follows:

"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.***”

(emphasis added)

[23] The wording of section 27 of CIPAA is plain and unambiguous and as such, must be given its literal and ordinary meaning by the court. The intention of Parliament in its clear wording of the statute must be given its effect.

[24] This court in *PP v Sihabduin Haji Salleh & Anor [1981] CLJ 39; [1980] 2 MLJ 273* explained this principle of law as follows:

*“... to paraphrase the words of Lord Diplock at page 541 in, *Duport Steels Ltd v. Sirs*, ‘the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral;...”*

(emphasis added)



(see also *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173 (FC); *Abdul Hakim bin Abdul Wahid v Mas Ermieyati binti Samsudin & Another Appeal* [2023] 6 CLJ 667 (FC)]

[25] The plain meaning of section 27(1) of CIPAA is that the jurisdiction of an Adjudicator is limited to matters referred to by parties to the Adjudicator pursuant to sections 5 and 6 of the same Act. Section 5 relates to the Payment Claim whilst section 6 relates to the Payment Response. For ease of reference, sections 5 and 6 of CIPAA are reproduced below:

(i) Section 5

“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.*

(ii) Section 6

“6. Payment Response



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- 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

(emphasis added)

[26] Section 5(b) requires the claimant to include in the Payment Claim the cause of action and the provision under the contract to which the payment relates. Thus, the claimant must identify the cause of action and the provision under the Contract that supports the cause of action. If not, the phrase ‘...including the provision in the construction contract..’ under the said subsection will be meaningless or otiose. Certainly, the Parliament does not legislate in vain

(see *Tony Phua Kiam Wee v Government of Malaysia & Another Appeal* [2020] 1 CLJ 337 (FC); *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri & Other Appeals* [2017] 9 CLJ 595 (FC))



[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.

[29] This court in ***Nasri v Mesah [1971] 1 MLJ 32*** had explained succinctly the meaning of cause of action and cause of action in relation to a contract in the following words:

A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in Read v. Brown [1888] 22 QBD 128, 131). In Reeves v. Butcher [1891] 2 QB 590, 511 Lindley LJ said:

*This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in Hemp v. Garland LR 4 QB 509, 511 decided in 1843, that the **cause of action arises at the time when the debt could first have been recovered by action.** The right to bring an action may arise on various*



events, but it has always been held that the statute runs from the earliest time at which an action could be brought.

*In Board of Trade v. Cayzer, Irvine & Co. [1927] AC 610, 617. Viscount Dunedin described "cause of action" as that which makes action possible. Now, **what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from the breach (per Field J in Gibbs v. Guild [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see Bolo's case LR 57 IA 325).***"

(emphasis added)

[30] Section 27(1) of CIPAA expressly limits the jurisdiction of an Adjudicator to adjudicate matters referred to the Adjudicator to sections 5 and 6 of the same Act. This had also been acknowledged by this court in ***View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22*** where Zulkefli PCA said this:

*"[54] The principle that jurisdiction is about subject-matter applies to every statute. Thus, the CIPAA applies only to 'construction contracts' as defined under the Act (see [ss 2](#), [3](#), and [4](#)), and that the 'payment dispute' must arise under a construction contract. **These are fundamental jurisdictional premises for the CIPAA to apply. Sections 5 and 6 of the CIPAA relate to this.** Section 5 of the CIPAA speaks of a 'payment pursuant to a construction contract'. By s 4 of the CIPAA, 'payment' is defined as 'payment for work done ... under the express terms of a construction contract'. The response under s 6 of the CIPAA has to be in relation to the 'payment' claim under ss 4 and 5 of the CIPAA as to whether it is admitted or disputed.*



[55] By s 27(1) of the CIPAA, the arbitrator’s jurisdiction ‘is limited to the matter referred to adjudication’ pursuant to ss 5 and 6 of the CIPAA. It refers to the ‘identification of the cause of action’ in relation to the construction contract as required under [s 5\(2\)\(b\)](#) of the [CIPAA](#). In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA.

[56] In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the 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 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 the 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 the [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 the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim.”

(emphasis added)

[31] In the *View Esteem* case, as alluded to above, emphasis was made by this court on the need to identify the applicable clause of the construction contract which relates to the cause of action.

[32] The issue of the Adjudicator’s jurisdiction was also aptly observed by the learned High Court Judge (as she then was) in *WRP Asia Pacific*



**Sdn Bhd v NS Bluescope Lysaght Malaysia Sdn Bhd & other case
[2015] 1 LNS 1236 as follows:**

*“[27] Subsection 27(1) **restricts** the jurisdiction of the Adjudicator to the matters found in sections 5 and 6. In short, the Adjudicator takes jurisdiction from the payment claim and the payment response; not from the adjudication claim, adjudication response, or even the adjudication reply. This is materially significant and important as this brings to bear the whole scheme of CIPAA 2012; that the adjudication proceedings is to deal with or resolve a payment dispute. That dispute is then referred to adjudication with the payment claim and payment response reduced into the formal forms as set out in sections 7 to 10. Because the parties are already in dispute mode and are aware of or familiar with their varying positions, the payment dispute is focused and intense. **The Adjudicator’s sole task is to resolve that dispute for the reasons already made known between the parties; and nothing else. Any change to those rules of engagement requires a written consent between the parties and that is clear from subsection 27(2).** Were it otherwise, there would be no fair play and ultimately, no confidence in the mechanism that has been so elaborately set up by Parliament. It makes no difference if there is no payment response; as the lack of a payment response simply means that the claimant who bears the burden of proving its claim anyway, has just got to get on with proving its claim.”*

(emphasis added)

[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.



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[34] Having considered the law, I now revert to the present case. As alluded to earlier, the appellant in its Payment Claim, at paragraphs 32 and 33 claims the unpaid sum of RM855,074.21 based on clauses 28, 55 and 56 of the Contract. For ease of reference and understanding, it is pertinent to reproduce the said clauses which are as follows:

(i) Clause 28 – PAYMENT TO CONTRACTOR AND INTERIM CERTIFICATES

28.1- When the contractor has executed work including delivery to or adjacent to the works of any unfixed materials or goods intended for incorporation into the works in accordance with the terms of this contract and their total value of work thereof has reached the sum referred to in Appendix, the SO shall at that time make the first valuation of the same.

28.2 – Thereafter, once (or more often at the discretion of the SO) during the course of each succeeding month the SO shall make a valuation of the works properly executed and of unfixed materials and goods delivered to or adjacent to the site, provided that the total value of work properly executed and the value of unfixed materials and goods as specified in clause 28.4 hereof, delivered to the site intended for incorporation into the works in each subsequent valuation shall not be less than the sum referred in the Appendix.

28.3 – Within fourteen (14) days from the date of any such valuation being made and subject to the provision mentioned in clause 28.1, the SO shall issue an Interim Certificate stating the amount due to the contractor. PROVIDED THAT the signing of this contract shall not be a condition precedent for the issue of the first Interim Certificate (and no other) so long as the Contractor has returned the Letter of Acceptance of tender duly signed and has deposited with the SO or the relevant insurance policies under clauses 15 and 18 hereof.



28.4 – *The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to payment by stages, be the estimated total value of the work properly executed and up to ninety percent (90%) of the value of the unfixed materials and goods delivered to or date the valuation was made, less any payment (including advance payment) previously made paid under this Contract. PROVIDED THAT such certificate shall only include the value of the said unfixed materials and goods as and from such time as they are reasonably and properly and not prematurely delivered to or adjacent to the site and adequately protected against weather, damage, and deterioration.*

28.5 – *This clause shall not apply to any unfixed materials and goods which are supplied and delivered by the Nominated Suppliers for which payment shall be made for the full value of the unfixed materials and goods.*

28.6 – *Within a number of days as stated in Appendix (or if none stated then within thirty (30) days of the issue of any such Interim Certificate), the Government shall make a payment to the Contractor as follows:*

(a) *where the Performance Bond is in the form of a Banker's, Insurance, or Finance Company Guarantee, payment shall be made on the amount certified as due to the contractor in the said Interim Certificate; or*

(b) *where the Performance Bond is in the form of a Performance Guarantee Sum; payment of the ninety percent (90%) on the amount certified as due to the contractor shall be made with the remaining ten percent (10%) being retained by the Government as a Performance Guarantee Sum. PROVIDED THAT when the sum retained is equivalent to five percent (5%) of the contract sum then in any subsequent Certificate, payment shall be made on the full amount certified as due to the Contractor.*

(ii) **Clause 55 – EVENT AND CONSEQUENCES OF DEFAULT BY GOVERNMENT**

Default of Obligations



(a) Events of Default

If the Government without any reasonable cause fails to perform or fulfil any of its obligations which adversely affects the Works,

then the Contractor may issue a notice specifying the default of the Government and requiring the Government to remedy the same within the period specified therein taking into account the nature of the remedy to be carried out by JKP Sdn Bhd or such other period as may be agreed by both Parties from the date of receipt of such notice.

(b) Termination

If JKP Sdn Bhd fails to remedy the default period specified in such notice issued under clause 55 (a) within the stipulated time therein, the Contractor shall have the right to forthwith terminate this Contract by giving written notice to the effect.

(c) Consequences of Termination

If this Contract is terminated under clause 55(b)

(i) JKP Sdn Bhd shall pay to the Contractor –

- (a) the value of the Works carried out up to the date of termination;*
- (b) the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;*
- (c) the cost of materials or goods reasonably ordered for the Works which have been delivered to the contractor or of which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Government upon such payment being made to the Contractor); and*



(d) *a sum being the amount of any expenditure reasonably incurred by the Contractor in so far as such expenditure has not been recovered by any other payments referred to in this sub-clause.*

(ii) *For the avoidance of doubt, the Parties hereby agree that the Contractor shall not be entitled to any other form of losses including loss of profit, damages, claims, or whatsoever upon termination of this contract.*

(iii) **Clause 56 – CERTIFICATE OF TERMINATION COSTS**

56.1 - As soon as the arrangements for the completion of the Works made by the JKP Sdn Bhd enable the SO to make a reasonable accurate assessment of the ultimate cost of completing the Works following the termination of the Contractor's employment and the engagement of other contractors or persons, and the amount of direct loss and/or damage caused to the Government due to the termination has been ascertained by the SO, then the SO may issue a certificate (hereinafter referred to as the "certificate of Termination Costs") stating the completion Cost (herein defined) and the Final Contract Sum (hereinafter defined).

56.2 – The Completion Cost comprises the following sums, cost or expenditure:

(a) the sums previously paid to the Contractor by JKP Sdn Bhd;

(b) the sums paid or payable to other contractors or persons engaged to complete the Works;

(c) any sums paid to sub-contractors or suppliers under clause 61

(d) any costs or expenditures incurred or to be incurred including On-Cost Charges incurred by JKP Sdn Bhd in completing the Works; and



(e) the amount of direct loss and/or damage caused to JKP Sdn Bhd due to the termination.

56.3 – The Final Contract Sum comprises of the following amounts or sums:

(a) the amount which would have been payable under the Contract on the completion in accordance with the Contract, allowing any variations or other matters which would have resulted in an adjustment of the original Contract Sum; and

(b) any other sums which JKP Sdn Bhd might be entitled under the terms of the Contract to deduct from the original Contract Sums,

had the Contractor's employment not been terminated.

56.4 The certification of Termination Costs shall state the difference between the Final Contract Sum and the Completion Cost. If the Final Contract Sum is less than the Completion Cost, the difference shall be the debt payable by the Contractor to the Government to the Contractor.

56.5 – The Certificate of Termination Costs shall be binding and conclusive on the Contractor as to the amount of such loss or damage specified therein.

56.6 - In the event the completion of the Works being undertaken departmentally, allowance shall be made, when ascertaining the amount to be certified as costs and expense incurred by the Government, for cost of supervision, interest, and depreciation on plant and all other usual overhead charges and profit as would be incurred if the works were completed by other contractors or persons.

[35] However, the Adjudicator in this case, in his Adjudication Decision held that the most applicable clause for the appellant's claim against the respondent is clause 36.6 of the Contract and allowed the claim based on



the said clause. In the Adjudication Decisions at paragraphs 100⁷ and 101 this was said:

*“100. The respondent argued that the correct and crucial provision of the Contract is Clause 36.5 of the COC and that the Claimant has not invoking (sic) this provision in support of its claim. However, in my considered opinion, **Clause 36.6 of COC are the one most applicable to the Claimant’s claim.** Clause 36.6 of COC which provides as below:*

*“36.6 Notwithstanding anything in clause 36.5, **if the Contractor carries out any further test as required by the SO pursuant to clause 36.2 and the result of such test shows the workmanship or materials is not in accordance with the provisions of the Contract, then the cost of such test shall be borne by the Contractor. But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by JKP Sdn Bhd. (emphasis added).**”*

*101. **Clearly and certainly, in order to succeed the claim pursuant on the above clause, the burden is on the Claimant** to show a cogent proof of whether the Claimant has received any instruction or direction by the Respondent or Respondent’s consultants under the Contract at the material time.”*

[36] Further, at paragraphs 104 and 105 of the Adjudication Decision, the Adjudicator states this:

“104. As the Independent Consultants i.e. the Professional Engineer has certified and endorsed the building is safe and this would have meant that the Claimant has carried out the construction work are in accordance with the Contract. This is opposing to what allegation put forth by the Respondent that the construction



works carried out by the Claimant are not in accordance with the Contract and that had compromised the safety of the building. **Therefore, pursuant to Clause 36.6 of the COC** which further provides as below:

“But if the result of such test shows the workmanship or materials comply with the provisions of the Contract, then the cost of such test shall be borne by the JKP Sdn Bhd.”

.....

105. By foregoing reason and considering all the facts and circumstances available to me, I am hold (sic) to determine that the Claimant has proved, on the balance of probabilities, and that the Respondent shall pay the cost of the Independent Consultants which engaged by the Claimant in produce the relevant report as instructed by the respondent’s consultants.

(emphasis added)

[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.

[39] In our neighbouring country, Singapore, the Adjudicator is also clothed with the same limited jurisdiction as provided under section 17(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). In explaining the application of the said provision, Sundaresh Menon CJ in ***WY Steel Construction Pte Ltd v Osko Pte Ltd*** [2013] SGCA 32 said this:

"46. This subsection sets out what an adjudicator is permitted to consider and expressly provides that he "shall only have regard to [those] matters"

[40] Likewise in the present case, section 27(1) has expressly limited the Adjudicator to adjudicate only matters pursuant to sections 5 and 6, not any other matters which have been discussed earlier.

[41] Moreover, both parties have not given written consent to extend the Adjudicator's jurisdiction to adjudicate the matters relying on the cause of action established in clause 36.6 of the Contract as required under section 27(2) of CIPAA. In my view, if the Adjudicator finds that the cause of action was established under a different clause of the Contract, as in the present



case, the matter should be brought to the attention of the parties and if agrees, written consent be issued under section 27(2) to clothe the Adjudicator with the jurisdiction to adjudicate the matters based on the cause of action under clause 36.6.

[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 which states:

“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.”***

(emphasis added)

[43] The next issue before this Court is whether there was a denial of natural justice when parties in the present case were not given the right to be heard on the application of clause 36.6 which was the Adjudicator’s



basis for allowing the appellant's claim. The denial of natural justice is also a ground to challenge the Adjudication Decision provided under section 15(b) of CIPAA.

[44] The concept of natural justice is well settled that parties must be given the right to be heard before a decision is made. A judge should not decide on an issue which was not pleaded and it is not the duty of the court to create a cause of action under the guise of doing justice. This court in ***Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 CLJ 430*** reiterated this principle as follows:

*"[16] The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put forward by the respective counsel. A good counsel is one who produces authorities to support the statement of law he is relying upon. The authorities can be in the form of reported judgments, text books, or even published law articles. In fact, according to etiquette, he is supposed to even bring to the attention of the court authorities which favour his opponent's case. Of course, in such an instance, he would then distinguish the facts of the case before the court to the case in the authority. **It is therefore dangerous and totally inadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point. There have been instances where a judge may already form some opinion on certain issues, legal or otherwise, but***



after hearing submissions and views expressed by a party, he may conclude differently.

[17] The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the latin maxim audi alteram partem, which literally means, to hear the other side, a basic principle of natural justice.”

(emphasis added)

[45] The same principle was acknowledged by this Court in ***Dato’ Tan Chin Woh v Dato’ Yalumalai V Muthusamy [2016] 8 CLJ 293*** and further said this:

“[21] It is thus clear that whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This is fundamental in the adversarial system that we practice in this country.”

(emphasis added)

[46] Further, on the concept of natural justice, Tengku Maimun CJ in ***Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750*** at page 825 said this:

[188] In simpler terms, natural justice which encapsulates the twin concepts of nemo judex in causa sua (the rule against bias) and audi alteram partem (the right to be heard), are integral features of a written constitution which protects



fundamental liberties. Both rights are equally important but for the purpose of this judgment, particular emphasis is given to the right to be heard. On that right, Bhagwati J observed in Maneka Gandhi that ‘the soul of natural justice is fair-play in action and that is why it has received the widest recognition throughout the democratic world’.

(emphasis added)

[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.

[48] In an old case, ***Semtex v Gladstone [1954] 2 All ER 206 at page 212***, Finnemore J said this:

“Natural justice requires that the appellant be given a full and adequate hearing, and opportunity to give evidence on behalf of himself if he so desires and to call such witnesses as he considers necessary for his case...Natural justice is not something which any one of us can define in our own terms. It is basic.

(emphasis added)



[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.

[50] In the present case, the main question is whether the applicant's cause of action established under any of the clauses in the Contract and pleaded in the Payment Claim are matters adjudicated by the Adjudicator as mandated under section 27(1) of CIPAA. The issue of strict rules of pleading in civil claims to be complied with does not arise and is misplaced as section 27(1) has underlined the limited jurisdiction of the Adjudicator to adjudicate matters referred to the Adjudicator under section 5, that is the Payment Claim and section 6, which is the Payment Response. The answer to this main question is in the negative.

[51] Based on the analysis and views mentioned above, I find it unnecessary to answer the questions posed by the appellant for me to decide on this appeal.

Conclusion

[52] In the circumstances, both the appellant's appeals are dismissed and the decisions of the Court of Appeal are affirmed. The appellant is to pay costs to the respondent in the sum of RM60,000.00 subject to



payment of the allocator. The Chief Judge of Sabah and Sarawak (CJSS) has read this judgment in the draft and has agreed to it. My learned sister Justice Mary Lim Thiam Suan is dissenting.

Dated 8 January 2024

- sgd -

(DATO' NORDIN BIN HASSAN)

Judge

Federal Court of Malaysia

Counsel:

For the Appellant:

Ong Yu Shin Ong

**(Lee Hooi Ying & Lim Wooi Ying
with him)**

[Messrs. The Chambers of Yu Shin Ong]

For the Respondent:

Dato' Seri Mahinder Singh Dulku

**(Dato' Abdul Fareed bin Abdul
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[Messrs. Ezrilaw Firm]



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