
LOW KAH KIET
v.
EISCON CONSTRUCTION SDN BHD & ANOTHER CASE

High Court Malaya, Shah Alam
Wong Kian Kheong J
[Originating Summons No: BA-24C-30-05/2021 & BA-24C-66-10/2021]
6 November 2022

Case(s) referred to:

Alpha Galaxy Sdn Bhd v. Euro Destar (M) Sdn Bhd & Another Case [2021] MLRHU 539; (refd)
Encorp Iskandar Development Sdn Bhd v. Konsortium Ipmines Merz Sdn Bhd & Another Case [2020] MLRHU 1242 (refd)
Genting Malaysia Berhad v. PLM Interiors Sdn Bhd & Another Case [2020] MLRHU 224 (refd)
Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 1 MLRA 207; [2019] 2 MLJ 362; [2019] 2 CLJ 229; [2018] 8 AMR 655 (refd)
Kurniaan Maju Sdn Bhd v. HSA Setiamurni Sdn Bhd [2021] 6 MLRH 484; [2020] 9 MLJ 103; [2020] 3 AMR 276 (refd)
MKP Builders Sdn Bhd v. PC Geotechnic Sdn Bhd Another Case [2020] MLRHU 1510 (refd)
Otis Elevator Co (M) Sdn Bhd v. Castmet Sdn Bhd [2020] MLRHU 1793 (refd)
Syarikat Bina Darul Aman Berhad & Anor v. Government of Malaysia [2017] 4 MLRH 506; [2018] 4 CLJ 248; [2017] 4 AMR 477 (refd)
Uzma Engineering Sdn Bhd v. Khan Co Ltd [2020] MLRHU 992 (refd)
View Esteem Sdn Bhd v. Bina Puri Holdings Berhad [2018] 1 MLRA 460; [2018] 2 MLJ 22; [2019] 5 CLJ 479; [2017] 8 AMR 167 (refd)

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss 5, 6, 10, 12(1), (7), (8), 13(c), 15(a), (b), (c), (d), 16(1)(b), 24(c), 25(d), (i), 27, s 28(1), (2)

Counsel:

For Low: Ng Kee Way; M/s Ng Kee Way & Co
For Eiscon: Kong Chee Wah; M/s Lim Fung Yin & Co

[Order accordingly.]

JUDGMENT

Wong Kian Kheong J:

(2 Originating Summonses)

A. Introduction



[1] Mr Low Kah Kiet (Mr Low) is the sole proprietor of a business named "Fortu Nace Enterprise" (FNE). Pursuant to the name of FNE, Mr Low does, among others, construction and engineering works.

[2] This judgment concerns the following two originating summonses (2 OS) which are heard together:

(1) Mr Low has filed Amended OS No BA-24C-30-05/2021 (Mr Low's Amended OS) against Eiscon Construction Sdn Bhd (Eiscon) for, among others, leave of court under s 28 of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) to enforce an adjudication decision made on 19 April 2021 by an adjudicator, Ar. Khor Weng Liang (Adjudicator), in favour of Mr Low against Eiscon (AD); and

(2) Amended OS No BA-24C-66-10/2021 (Eiscon's Amended OS) has been filed by Eiscon against Mr Low for, among others, the following orders:

(a) an order to set aside the AD (Setting Aside Application); and

(b) if the Setting Aside Application is dismissed, an order to stay the enforcement of the AD (Stay Application) pending the disposal of an arbitration between Eiscon and Mr Low (Arbitration).

B. Background

[3] Eiscon had appointed Mr Low (through FNE) to do sub-contract works in a sewerage treatment plant in Papan, Kinta District, Perak, by way of the following four contracts:

(1) a "Letter of Award" (LA) dated 22 May 2018 (Contract A) with regard to "HDPE (High Density Polyethylene) Works" [Works (Contract A)];

(2) a "Works Order" dated 15 June 2017 (Contract B) in respect of "Precast Manhole Construction and Caisson Works" [Works (Contract B)];

(3) LA dated 1 April 2017 (Contract C) regarding "200 mm and 400 mm Diameter Force Main DN Ductile Iron Pipe and Associated Works" [Works (Contract C)]; and

(4) LA dated 1 March 2017 (Contract D) concerning "Open Cut, Force Main and Precast Manhole Works" [Works (Contract D)].

[4] Mr Low (through FNE) had served on Eiscon a "Payment Claim" (PC) under s 5 CIPAA. According to Mr Low's PC, Eiscon had not paid the



following sums of money to FNE:

- (1) an amount of RM676,897.35 for Works (Contract A) which had been performed by FNE; and
- (2) a sum of RM242,222.52 was outstanding for Works (Contract B) which had been completed by FNE.

[5] Eiscon had served a "Payment Response" (PR) on FNE. According to Eiscon's PR, among others, Eiscon denied owing any sum of money to FNE for Works (Contract A) and Works (Contract B) due to the following reasons:

- (1) with regard to the Works (Contract A), Eiscon had purchased materials and equipment for FNE in a sum of RM79,656.47 [Alleged Eiscon's Purchases (Contract A)];
- (2) FNE had overclaimed an amount of RM513,260.16 from Eiscon for Works (Contract A) [Alleged FNE's Overclaim (Contract A)];
- (3) Eiscon counterclaimed from FNE for an amount of RM1,014,049.20 for defects regarding works performed by FNE [Eiscon's Counterclaim (FNE's Defective Works)]; and
- (4) FNE had failed to complete Works (Contract A). As such, Eiscon counterclaimed for damages for FNE's delay in respect of the Works (Contract A) [Eiscon's Counterclaim (FNE's Delay)].

[6] The Adjudicator delivered the following AD, among others:

- (1) Eiscon was adjudicated to pay a total sum of RM919,119.87 (Adjudicated Amount) to FNE for Works (Contract A) and Works (Contract B);
- (2) Eiscon shall pay to FNE interest at the rate of 5% per annum on the Adjudicated Amount from 10 September 2020 (date of FNE's service of "Notice of Adjudication" on Eiscon) until full payment of the Adjudicated Amount;
- (3) a sum of RM22,277.19 (Total Adjudication Costs) shall be paid by Eiscon to FNE as the total amount of Adjudicator's fees, various fees imposed by Asian International Arbitration Centre (AIAC) and Adjudicator's expenses; and
- (4) Eiscon shall bear service tax imposed by the Service Tax Act 2018 in a sum of RM213.88 (Service Tax).

[7] Eiscon sent a letter dated 7 May 2021 to the Adjudicator [Eiscon's Letter (7 May 2021)] which was copied to FNE's solicitors. According to Eiscon's Letter (7 May 2021), among others-



(1) Eiscon had previously paid an amount of RM10,901.04 to AIAC which constituted "Advance Security Deposit" and Service Tax [Eiscon's Previous Payment (AIAC)]; and

(2) pursuant to s 12(7) CIPAA, Eiscon applied to the Adjudicator to correct the Total Adjudication Costs and Service Tax in the AD so as to reflect Eiscon's Previous Payment (AIAC) {Eiscon's Application [Section 12(7) CIPAA]}.

[8] The Adjudicator did not reply to Eiscon's Application [Section 12(7) CIPAA].

C. Judicial Approach

[9] As explained in *Otis Elevator Co (M) Sdn Bhd v. Castmet Sdn Bhd* [2020] MLRHU 1793 at [7], I will decide the 2 OS as follows:

(1) with regard to Eiscon's Amended OS:

(a) the court will first determine the Setting Aside Application; and

(b) after the disposal of the Setting Aside Application, the court will decide the Stay Application; and

(2) lastly, the court will determine Mr Low's Amended OS.

D. Issues

[10] The following questions arise in these 2 OS:

(1) in respect of the Setting Aside Application:

(a) whether the Adjudicator had jurisdiction under ss 2, 3 and 40 CIPAA to adjudicate Mr Low's PC. If the answer to this issue is in the affirmative, did the Adjudicator exceed his jurisdiction to adjudicate Mr Low's PC within the meaning of s 15(d) read with ss 5, 6 and 27(1) CIPAA?;

(b) whether the Adjudicator had breached the second rule of natural justice (2nd Rule) under s 15(b) read with s 24(c) CIPAA when:

(i) the Adjudicator failed or refused to adjudicate on the defences, set-off and/or counterclaim raised by Eiscon (Eiscon's Defences/Set-Off/Counterclaim) in Eiscon's PR and "Adjudication Response" (AR);



(ii) Eiscon's Defences/Set-Off/Counterclaim were rejected by the Adjudicator;

(iii) the Adjudicator erroneously took a restrictive view regarding his jurisdiction to decide Eiscon's Defences/Set-Off/Counterclaim;

(iv) the Adjudicator did not decide on Eiscon's Application [Section 12(7) CIPAA]. This is a novel question which involves a construction of ss 12(7), (8), 13(c) and 15(a) to (d) CIPAA; and

(v) the Adjudicator gave reasons in the AD which were not submitted by Eiscon and Mr Low. This question concerns the Adjudicator's powers under s 12(1) CIPAA read with-

(va) s 25(d) CIPAA (the Adjudicator could draw on his own knowledge and expertise in making the AD); and

(vb) s 25(i) CIPAA (the Adjudicator could inquisitorially take the initiative to ascertain the facts and the law required for the AD); and

(c) could Eiscon oppose Mr Low's PC by relying on-

(i) Works (Contract C) which was not the basis for Mr Low's PC?; and

(ii) Eiscon's counterclaim amount which exceeded the sum claimed in Mr Low's PC?;

(2) if the Setting Aside Application is dismissed, should the court exercise its discretion under s 16(1)(b) CIPAA to allow the Stay Application?; and

(3) if the court dismisses Eiscon's Amended OS, whether the court should allow Mr Low's Amended OS.

E. Did Adjudicator Have Jurisdiction To Adjudicate Mr Low's PC?

[11] Sections 5, 6, 15 and 27 CIPAA provide as follows:

"Payment claim

s 5(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 [CIPAA].

Payment response

s 6(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.

Improperly procured adjudication decision

s 15 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.



Jurisdiction of adjudicator

s 27(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 ss 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 ss 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 s 15 or to oppose the application to enforce the adjudication decision under s 28(1)."

[Emphasis Added]

[12] As decided in *MKP Builders Sdn Bhd v. PC Geotechnic Sdn Bhd* [2020] MLRHU 1510, at [13] and [14], there are two distinct grounds to set aside an AD, namely:

(1) an adjudicator has no jurisdiction to adjudicate the matter under CIPAA (Lack of Jurisdiction Argument); or

(2) an adjudicator has jurisdiction to adjudicate the matter pursuant to s 27(1) read with ss 5 and 6 CIPAA but has exceeded such a jurisdiction under 15(d) CIPAA (Excess of Jurisdiction Argument).

[13] In *Uzma Engineering Sdn Bhd v. Khan Co Ltd* [2020] MLRHU 992, at [22(1) and (2)], I have explained that an adjudicator only has jurisdiction to adjudicate a claimant's PC against a respondent (Jurisdiction) if:

(1) four conditions regarding the Jurisdiction as laid down in s 2 CIPAA [4 Conditions (Jurisdiction)] are fulfilled cumulatively; and

(2) ss 3 and 40 CIPAA do not apply.

According to *Uzma Engineering*, the 4 Conditions (Jurisdiction) are as follows:

(a) there is a genuine and valid "construction contract" between the claimant and respondent [1st Condition (Jurisdiction)]. Section 4 CIPAA has provided a wide definition of "construction contract";

(b) the construction contract is made in writing [2nd



Condition (Jurisdiction)];

(c) the construction contract relates to "construction work" which is defined widely in s 4 CIPAA [3rd Condition (Jurisdiction)]; and

(d) the construction work under the construction contract is carried out wholly or partly within the territory in Malaysia [4th Condition (Jurisdiction)].

[14] The Adjudicator had Jurisdiction in this case because:

(1) the 4 Conditions (Jurisdiction) had been fulfilled as follows:

(a) Mr Low's PC was premised on genuine and valid Contract A and Contract B. Hence, the 1st Condition (Jurisdiction) was satisfied regarding Mr Low's PC;

(b) the 2nd Condition (Jurisdiction) was met because Contract A and Contract B were made in writing;

(c) "construction work" (within the meaning in s 4 CIPAA) had been carried out by Mr Low (through FNE). The 3rd Condition (Jurisdiction) was therefore fulfilled; and

(d) the 4th Condition (Jurisdiction) was satisfied as Mr Low (through FNE) carried out construction work for Eiscon in Malaysia; and

(2) ss 3 and 40 CIPAA do not apply to Mr Low's PC.

In view of the above evidence and reasons, I cannot accept Lack of Jurisdiction Argument in this case.

F. Whether Adjudicator Had Exceeded Jurisdiction

[15] I am not able to accept Excess of Jurisdiction Argument as advanced by Eiscon's learned counsel in this case. My reasons are as follows:

(1) the Adjudicator had only adjudicated on matters raised in Mr Low's PC and Eiscon's PR. According to s 27(1) read with ss 5 and 6 CIPAA, the Adjudicator had Jurisdiction to adjudicate on matters raised in Mr Low's PC and Eiscon's PR; and

(2) the Adjudicator did not adjudicate on any matter beyond Mr Low's PC and Eiscon's PR.

G. Had Adjudicator Breached 2nd Rule In This Case?



[16] I reproduce below s 24(c) CIPAA:

"Duties and obligations of the adjudicator

s 24**The adjudicator shall at the time of the acceptance of appointment as an adjudicator make a declaration in writing that:**

...

(c) he shall comply with the principles of natural justice;..."

[Emphasis Added]

[17] I decide that the Adjudicator had not breached the 2nd Rule in this case. This decision is premised on the following reasons:

(1) the 2nd Rule only confers a right on parties in adjudication proceedings to adduce evidence and to submit on any issue which arises in the adjudication proceedings - please refer to the Court of Appeal's judgment delivered by David Wong Dak Wah JCA (as he then was) in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & another appeal* [2016] MLRAU 499, at [20]. In this case, the Adjudicator had given Eiscon its right to adduce evidence and to submit on all matters raised in the adjudication proceedings;

(2) the Adjudicator was only required by the 2nd Rule to consider Eiscon's Defences/Set-Off/Counterclaim as raised in Eiscon's PR and AR. It is decided in *Prestij Mega Construction Sdn Bhd v. Personal Representative of Estate of Vinayak Pradhan Prabhakar (Deceased) and other cases* [2021] 3 MLRH 666, at [69], as follows:

"[69] Firstly, View Esteem, at [65], [66] and [74], has decided that an adjudicator would have breached the 2nd Rule if the adjudicator did not consider a defence raised in the adjudication proceedings. View Esteem did not however decide that an adjudicator must address each and every submission made by parties in the AD. This is understandable because by virtue of s 12(2)(a) to (c) CIPAA, an adjudicator has to deliver an adjudication decision within a tight timeline. Furthermore, the Object (CIPAA) can only be attained if adjudicators deliver AD's expeditiously so as to ensure that parties who perform construction work are not deprived of cash flow in the form of payment for their construction work."

[Emphasis Added]

In the present case, the Adjudicator had considered but rejected Eiscon's Defences/Set-Off/Counterclaim [Adjudicator's Rejection (Eiscon's Defences/Set-Off/Counterclaim)] as follows:



- (a) in paras 3.3 to 3.3.6 AD, the Adjudicator had given reasons why the Alleged FNE's Overclaim (Contract A) was not accepted by him;
- (b) the Adjudicator had explained in paras 3.4 to 3.4.3 AD regarding why he had dismissed the Alleged Eiscon's Purchases (Contract A);
- (c) Eiscon's Counterclaim (FNE's Defective Works) was rejected based on reasons stated in paras 3.5 to 3.5.8 AD; and
- (d) in paras 3.6 to 3.6.5 AD, the Adjudicator had explained why he dismissed Eiscon's Counterclaim (FNE's Delay).

In view of the Adjudicator's Rejection (Eiscon's Defences/Set-Off/Counterclaim), I am unable to accept the contention by Eiscon's learned counsel that the Adjudicator had failed or refused to consider Eiscon's Defences/Set-Off/Counterclaim; and

(3) the Adjudicator's Rejection (Eiscon's Defences/Set-Off/Counterclaim) cannot be tantamount to a breach of the 2nd Rule - please refer to *Mudajaya Corporation Bhd v. KWSL Builders Sdn Bhd & another case* [2022] MLJU 1931, at [34(2)].

[18] Eiscon's learned counsel has relied on Lim Chong Fong J's decision in the High Court case of *Genting Malaysia Bhd v. PLM Interiors Sdn Bhd* [2020] MLRHU 224. *Genting Malaysia* can be easily distinguished from this case on the ground that in *Genting Malaysia*, at [33], the adjudicator had decided on the respondent company's termination of employment of the claimant company as the respondent company's contractor (Termination Issue) which had not been raised by the parties in the adjudication proceedings. It is clear in *Genting Malaysia* that the adjudicator had breached the 2nd Rule by not affording the parties their right to adduce evidence and to submit on the Termination Issue.

[19] In the High Court case of *Syarikat Bina Darul Aman Bhd & Anor v. Government of Malaysia* [2017] 4 MLRH 506; [2018] 4 CLJ 248; [2017] 4 AMR 477 at [70], Lee Swee Seng J (as he then was) has decided that if an adjudicator refuses to adjudicate on a matter which has been raised in the adjudication, the adjudicator has breached the 2nd Rule by erroneously taking a restrictive view regarding his jurisdiction over that matter. Eiscon cannot rely on *Syarikat Bina Darul Aman* because the Adjudicator had not failed or refused to decide on Eiscon's Defences/Set-Off/Counterclaim. On the contrary, the Adjudicator's Rejection (Eiscon's Defences/Set-Off/Counterclaim) had been made.

H. Did Adjudicator Breach S 12(7) CIPAA When Adjudicator Did Not Decide Eiscon's Application [Section 12(7) CIPAA]?



[20] Sections 13(c), 12(7) and (8) CIPAA state as follows:

"Effect of adjudication decision

s 13 The adjudication decision is binding unless:

...

(c) the dispute is finally decided by arbitration or the court.

Adjudication and decision

S 12(1)

...

(7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

(8) The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7) and any correction made is deemed take effect from the date of the original adjudication decision."

[Emphasis Added]

[21] Eiscon's learned counsel had invited this court to set aside the AD on the ground that the 2nd Rule was breached by the Adjudicator when he did not decide Eiscon's Application [Section 12(7) CIPAA].

[22] It is decided in *Encorp Iskandar Development Sdn Bhd v. Konsortium Ipmines Merz Sdn Bhd & another case* [2020] MLRHU 1242, at [25], as follows:

"[25] My research is unable to find any previous Malaysian case which has dealt with the above submission. **I am of the following view regarding s 12(7) CIPAA:**

(1) so long as the AD contains a "computational or typographical error", an adjudicator may correct the AD pursuant to s 12(7) CIPAA by one or both of the following means:

**(a) "on the adjudicator's own initiative" (1st Limb);
and/or**

(b) at the request of any party (2nd Limb);

(2) in view of an adjudicator's tight timeline of 45 Working Days' Period, it is understandable that an AD may contain



computational and/or typographical errors. Hence, the need for the 1st and 2nd Limbs;

(3) the wording of the 1st Limb clearly implies that an adjudicator may correct any computational or typographical error in the AD without informing the parties and without considering any response from the parties. If an adjudicator is obliged to inform the parties of the adjudicator's intention to correct any computational or typographical error in the AD and is further bound to obtain the parties' response to such an intention, the 1st Limb will be rendered redundant. It is trite law that Parliament has not provided for the 1st Limb in vain - please refer to the judgment of Augustine Paul FCJ in the Federal Court case of *All Malaysia Estates Staff Union v. Rajasegaran & Ors* [2006] 1 MELR 44; [2006] 2 MLRA 61; [2006] 6 MLJ 97; [2006] 4 CLJ 195; [2006] 5 AMR 585, at 600-601;

(4) even if it is assumed that an adjudicator has erroneously amended the AD pursuant to the 1st and/or 2nd Limbs, the corrected AD is only temporarily final according to s 13(c) CIPAA and such an error can be easily corrected by subsequent litigation or arbitration between the parties. In other words, there is no prejudice to any party if an adjudicator has mistakenly amended the AD regarding any computational or typographical error in the AD pursuant to s 12(7) CIPAA without giving any party a right to be heard; and

(5) the legislature has used the term "any" in s 12(7) CIPAA. The employment of such a wide term means that an adjudicator may correct the AD pursuant to the 1st and/or 2nd Limb as many times as are necessary to correct all computational and/or typographical errors in the AD. It is to be emphasized that s 12(7) CIPAA merely empowers an adjudicator to correct computational and/or typographical errors in the AD. Section 12(7) CIPAA does not permit an adjudicator to make any substantive amendment to the AD."

[Emphasis Added]

[23] I am not able to find a previous Malaysian case where an adjudicator has failed or refused to decide an application made by a party in an adjudication for the adjudicator to correct a computational or typographical error (Computational/Typographical Error) in the AD pursuant to the second limb of s 12(7) CIPAA [Section 12(7) Application].

[24] I am of the view that an adjudicator's failure or refusal to determine a s 12(7) Application, cannot be a ground for the court to set aside an AD. This opinion is based on the following reasons:



(1) as explained in *Encorp Iskandar Development*, at [25(5)], the employment of a permissive term "may" in s 12(7) CIPAA, evinces Parliament's intention to confer a discretion on an adjudicator to decide a s 12(7) Application or otherwise. In other words, an adjudicator may exercise his or her discretion pursuant to s 12(7) CIPAA to refuse to determine a s 12(7) Application;

(2) the opening words in s 12(8) CIPAA [The enforcement of the adjudication decision shall not be affected in any way by a request for correction under subsection (7)] support the above view. If I have accepted the above contention by Eiscon's learned counsel, this will render redundant the above wording in s 12(8) CIPAA;

(3) the legislature has not provided in s 13(a) read with s 15(a) to (d) CIPAA for the court to set aside an AD merely on the ground that an adjudicator has failed or refused to decide a s 12(7) Application; and

(4) if an AD contains a Computational/Typographical Error and if an adjudicator does not determine a s 12(7) Application, there is no prejudice caused by the Computational/Typographical Error. This is because by virtue of s 13(c) CIPAA, all AD's are only temporarily final and the Computational/Typographical Error can be easily corrected in the subsequent litigation or arbitration between the parties (Litigation/Arbitration).

[25] Premised on the reasons stated in the above para 24, I cannot set aside the AD on the ground that the Adjudicator had breached the 2nd Rule when he did not decide Eiscon's Application [Section 12(7) CIPAA].

I. Whether Adjudicator Could Give Reasons For AD Which Had Not Been Submitted By Parties

[26] I reproduce below ss 12(1), 25(d) and (i) CIPAA:

"12(1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under s 25.

...

Powers of the adjudicator

25The adjudicator shall have the powers to:

...

(d) draw on his own knowledge and expertise;

...



(i) **inquisitorially take the initiative to ascertain the facts and the law required for the decision;...**"

[Emphasis Added]

[27] According to Eiscon's learned counsel, the Adjudicator had given reasons in the AD which had not been submitted by both parties in the adjudication proceedings. I am not able to accede to this submission due to the following reasons:

(1) it is clear that an adjudicator is not bound by any contention made by parties in the adjudication proceedings. A fortiori, an adjudicator can give reasons for his or her AD which have not been submitted by the parties in the adjudication;

(2) by reason of s 12(1) read with s 25(d) CIPAA, adjudicators may draw on their own knowledge and expertise in making the AD's. The contents of s 25(d) CIPAA are in *pari materia* with s 21(3)(b) of the Arbitration Act 2005 (AA) which reads as follows:

"Determination of rules of procedure

s 21(1)...

(3) The power conferred upon the arbitral tribunal under subsection (2) shall include the power to:

(a)...

(b) draw on its own knowledge and expertise;..."

[Emphasis Added]

In the Federal Court case of *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd* [2020] 6 MLRA 124; [2021] 1 MLJ 1 at [3], [34], [54], [62] to [64], [78], [82], [90], [91] and [99] to [102]; [2020] 9 CLJ 466, Abdul Rahman Sebli FCJ has decided that by reason of s 21(3)(b) AA, an arbitrator may draw on his or her "own knowledge and expertise" to make an arbitral award; and

(3) unlike judges and arbitrators, adjudicators have the power under s 12(1) read with s 25(i) CIPAA to "inquisitorially take the initiative to ascertain the facts and the law" required for their AD's - please refer to *Ireka Engineering & Construction Sdn Bhd v. Tri Pacific Engineering Sdn Bhd* [2020] MLRHU 342, at [12].

J. Could Eiscon's Defences/Set-Off/Counterclaim Rely On Works (Contract C) Which Were Not Subject Matter Of Mr Low's PC?



[28] Section 10 CIPAA provides as follows:

"Adjudication response

s 10(1) **The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.**

(2) The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).

(3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1)."

[Emphasis Added]

[29] In the adjudication proceedings before the Adjudicator (Adjudication), Eiscon's Defences/Set-Off/Counterclaim had relied on Works (Contract C). The Works (Contract C) were not the basis of Mr Low's PC in the Adjudication. I am of the view that Eiscon cannot rely on Works (Contract C) to resist Mr Low's PC. It is decided in *Mudajaya Corporation*, at [26] and [27], as follows:

"[26] **The Adjudication Proceedings (OS No 20) were based on the LA (Manpower Supply). MCB's learned counsel had however opposed the Adjudication Proceedings (OS No 20) by raising set-off and/or counterclaim based on the following contracts which were not the subject matter of KWSL's claim in the Adjudication Proceedings (OS No 20):**

...

[27] **When a claimant (Y) commences adjudication proceedings under CIPAA for payment due to Y [Y's Claim (Contract Y-Z)] from the respondent (Z) for construction work performed by Y under a particular construction contract between Y and Z [Contract (Y-Z)], I am of the opinion that Z cannot resist Y's Claim (Contract Y-Z) by:**

- (1) raising a set-off and/or counterclaim based on other contracts between Y and Z [Other Contracts (Y-Z)]; and**
- (2) making any counterclaim against Y's Claim (Contract Y-Z) based on any tort allegedly committed by Y with regard to the construction work in question (Alleged Y's Tort).**

My view remains the same even though the Other Contracts (Y-Z)



and/or Alleged Y's Tort may concern the same construction project as that provided in Contract (Y-Z). The reasons for the above opinion are as follows:

(a) in the Federal Court case of *Ireka Engineering & Construction Sdn Bhd v. PWC Corp Sdn Bhd and other appeals* [2019] 6 MLRA 1; [2020] 1 MLJ 311; [2020] 1 CLJ 193; [2019] 7 AMR 309, at [34] to [36], Idrus Harun FCJ has decided as follows:

"[34] On the facts of the present case, it is an incontrovertible fact that the agreement dated 15 September 2009 in cl 13.1 provides the appellant with a right to the cross-contract set-offs and that the CIPAA came into force on 15 April 2014, approximately 3 ½ years after the agreement was entered into by the appellant and the respondent.

[35] In accordance with the bargain entered into between the parties, the appellant now seeks to apply for the cross-contract set-offs, a right which according to the appellant, they have acquired by virtue of cl 13.1 of the agreement. Clause 13.1 of the agreement is central to the issue for our determination and it stipulates as follows:

13.1 Notwithstanding any other provisions in the Sub-Contract, the main contractor shall be entitled to deduct from or set-off any money due or becoming due to the Sub-Contractor (including any Retention Money) any sum or sums which the Sub-Contractor is liable to pay the Main Contractor whether under this Sub-Contract or otherwise or any other contract between the parties.

The point of relevance that can be discerned from the above mentioned clause is that the appellant clearly has a right of set-off for any cross-claim it has against the respondent.

[36] However, in determining the validity of cl 13.1 of the agreement, the adjudicator, by relying on s 5 [CIPAA], declined to exercise jurisdiction over disputes arising out of contracts before two separate adjudicators for which they would be deciding. Both the High Court and subsequently the Court of Appeal saw nothing wrong in the adjudicator declining to exercise jurisdiction and had relied on the wordings of s 5 [CIPAA] in deciding that firstly, the section referred to a construction contract, secondly, they were only able to make determination on a single construction contract and thirdly, they were not empowered to decide on multiple construction contracts. The Court of Appeal in the 125 Appeal, in fact agreed with the learned High Court judge on His Lordship's interpretation of the expression of 'a



construction contract' in s 5 [CIPAA] when it held that this 'is consistent with the rule of purposive interpretation found in s 14A of the Interpretation Acts 1948 and 1967 [Act 388]'. Following the decisions of the courts below us, the appellant cannot now rely on the cross-contract set-offs provision in respect of the outstanding sum."

[Emphasis Added]

It is clear from the Federal Court's judgment in *Ireka Engineering & Construction* that the wording of s 5(1) CIPAA (a construction contract) empowers an adjudicator to adjudicate solely on Y's Claim (Contract Y-Z) and not on:

- (i) Z's set off and/or counterclaim for any sum due from Y to Z pursuant to the Other Contracts (Y-Z) [Z's Set-Off/Counterclaim (Other Contracts)]; and/or
- (ii) Z's counterclaim for any amount of money for which Y is liable to Z due to the Alleged Y's Tort [Z's Counterclaim (Alleged Y's Tort)];

(b) by reason of s 6(2) CIPAA, Z only has a statutory right to serve a PR which disputes Y's Claim (Contract Y-Z) "either wholly or partly". The words in s 6(2) CIPAA only allow Z to dispute Y's Claim (Contract Y-Z) based on the provisions of Contract (Y-Z) which confer a right on Z to set off and/or counterclaim against Y under the Contract (Y-Z). The wording in 6(2) CIPAA does not allow Z's PR to contain:

- (i) Z's Set-Off/Counterclaim (Other Contracts); and
- (ii) Z's Counterclaim (Alleged Y's Tort);

(c) the narrow scope of s 6(2) CIPAA [as explained in the above subparagraph (b)] is contrasted with the wide ambit of O 15 r 2(1) of the Rules of Court 2012 (RC) which allows a defendant in a suit to counterclaim from the plaintiff "in respect of any matter (whenever and however arising)". I reproduce below O 15 r 2(1) RC:

"Counterclaim against plaintiff

O 15 r 2(1) Subject to r 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he shall add the counterclaim to his defence."



[Emphasis Added];

(d) according to s 27(1) CIPAA, an adjudicator's jurisdiction is "limited" to the matters referred to the adjudication by, among others, PR. Reading together ss 6(2) and 27(1) CIPAA, an adjudicator does not have jurisdiction to adjudicate on:

(i) Z's Set-Off/Counterclaim (Other Contracts); and

(ii) Z's Counterclaim (Alleged Y's Tort);

(e) s 10(1) CIPAA only allows Z to serve an AR which "shall answer" Y's AC [based on Y's Claim (Contract Y-Z)]. Z has no right under s 10(1) CIPAA to serve an AR which contains:

(i) Z's Set-Off/Counterclaim (Other Contracts); and

(ii) Z's Counterclaim (Alleged Y's Tort); and

(f) I have decided as follows in *Integral Acres Sdn Bhd v. BCEG International (M) Sdn Bhd* [2021] 6 MLRH 540, at [12]:

"[12] I am of the following view regarding the Object (CIPAA):

(1) Part 1 of the Interpretation Acts 1948 and 1967 (IA) applies to CIPAA by virtue of s 2(1)(a) IA (CIPAA is enacted after 18 May 1967). According to s 17A IA (in Part 1 of IA), an Act of Parliament should be construed in a manner which would promote the object of the Act (Purposive Interpretation) - please see the Federal Court's judgment in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 MLRA 137; [2005] 3 MLJ 97; [2004] 2 CLJ 265; [2004] 4 AMR 202. Accordingly, a Purposive Interpretation should be applied for all the provisions in CIPAA so as to attain the Object (CIPAA);

(2) according to s 13(c) CIPAA, an adjudication decision regarding a claim for payment for construction work is subject to a final decision of the court or arbitral tribunal (if parties have agreed to an "arbitration agreement") regarding the same claim (Litigation/Arbitration) - please refer to *MRCB Builders v. Wazam Ventures* [2020] 5 MLRH 138; at [13(1)(d)]. Hence, any injustice, error and/or omission in an adjudication decision is not fatal and



may be remedied subsequently in a Litigation/Arbitration;

(3) to achieve the Object (CIPAA), adjudication proceedings should be:

- (a) simple;
- (b) speedy (as stated in the Long Title); and
- (c) economical

for claimants and respondents. The following reasons do not support a legalistic, cumbersome, technical and/or costly approach to be adopted in adjudication proceedings:

(i) adjudicators are required to deliver adjudication decisions within the time periods stipulated in s 12(2)(a) or (b) CIPAA [unless the parties agree to an extension of time for the adjudicator to deliver the adjudication decision under s 12(2)(c) CIPAA]. Any non-compliance with s 12(2)(a) to (c) CIPAA will render the adjudication decision void - please see s 12(3) CIPAA. If adjudication proceedings are legalistic, cumbersome and technical, adjudicators may have an onerous task to deliver their adjudication decisions within the strict time-lines prescribed by s 12(2)(a) to (c) CIPAA;

(ii) by reason of s 12(9) CIPAA, the Evidence Act 1950 (EA) does not apply to adjudication proceedings. It is therefore clear that Parliament has intended for adjudication proceedings to be speedy and unencumbered by questions regarding admissibility and "relevancy" of evidence [as understood in s 5 read with Chapter 2 (ss 6 to 55) EA] which has been presented to adjudicators; and

(iii) CIPAA does not require an adjudicator to be legally qualified.



Nor does CIPAA require an adjudicator to have experience in legal practice regarding construction matters. As such, adjudicators who do not have legal qualification and legal experience in construction disputes, may face difficulties in conducting adjudication proceedings which are legalistic in nature; and

(4) if adjudication proceedings are legalistic, cumbersome, technical and/or costly, this may impede, if not frustrate, the claimants' statutory right to adjudicate their claims under CIPAA and this in turn may defeat the Object (CIPAA)."

[Emphasis Added]

If I have accepted the submission of MCB's learned counsel that MCB is entitled to resist the Adjudication Proceedings (OS No 20) by way of MCB's Claim (Architectural Works), MCB's Claim (Infrastructural and Walkway Works) and MCB's Claim (LD), this will be contrary to the Object (CIPAA) because adjudication proceedings will then be lengthy, legalistic, cumbersome and costly."

[Emphasis Added]

K. Whether Eiscon's Counterclaim Sum Could Exceed Amount Claimed In Mr Low's PC

[30] In the Adjudication, Eiscon counterclaimed from Mr Low for a sum which exceeded the amount claimed in Mr Low's PC. Such a counterclaim is not countenanced under CIPAA for the following reasons stated in *Mudajaya Corporation*, at [29]:

"[29] As explained in the above para 27, MCB's Counterclaim could not have been lawfully made under ss 6(2), 10(1) and 27(1) CIPAA because MCB's Counterclaim was based on contracts other than the LA (Manpower Supply). Even if it is assumed that a respondent can set off and/or counterclaim against a claimant in an adjudication proceedings based on the same construction contract (which is the basis for the claim in the adjudication proceedings), I am of the view that the respondent, at the most, can only zeroise the claim but cannot counterclaim from the claimant for an amount which exceeds the sum claimed in the adjudication proceedings. My reasons are as follows:

(1) the wording in s 6(2) CIPAA only allows a respondent to, at the most, dispute "wholly" the claim in an adjudication



proceedings;

(2) by virtue of s 27(1) CIPAA, an adjudicator's jurisdiction is "limited" to matters referred to adjudication by the parties in, among others, the PR. If a respondent, at the most, can only zeroise a claim in an adjudication proceedings under s 6(2) CIPAA, according to s 27(1) CIPAA, the adjudicator cannot then have jurisdiction to adjudicate a counterclaim by the respondent which exceeds the amount in the PC;

(3)s 10(1) CIPAA only allows a respondent to serve an AR which "shall answer" an AC. There is nothing in s 10(1) CIPAA which permits a respondent to counterclaim from the claimant for a sum which exceeds the sum claimed in the adjudication proceedings; and

(4) the Object (CIPAA) is to assist the cashflow of parties who have performed construction work. It is not the purpose of CIPAA to enable parties to claim for damages for breach of construction contracts and/or torts regarding construction work. The Object (CIPAA) is not attained if a respondent is permitted to counterclaim from the claimant for a sum which exceeds the amount claimed in the adjudication proceedings. This is because if an adjudicator is allowed to adjudicate a respondent's counterclaim sum which is in excess of the amount claimed in the adjudication proceedings, this will result in a protracted and costly adjudication proceedings."

[Emphasis Added]

L. Should Court Set Aside AD Due To Breach Of 2nd Rule?

[31] I will now assume that the Adjudicator has breached the 2nd Rule in this case [Breach (2nd Rule)]. Notwithstanding the Breach (2nd Rule), this court will not exercise its discretion under ss 15(b) and 24(c) CIPAA to set aside the AD. This decision is premised on the following reasons:

(1) Eiscon has not satisfied this court that there is a "real possibility" that without the Breach (2nd Rule), the Adjudicator would have reached a different decision in the Adjudication - please refer to the Court of Appeal's judgment delivered by Harmindar Singh JCA (as he then was) in *Guangxi Dev & Cap Sdn Bhd v. Sycal Bhd and another appeal* [2019] 6 MLRA 710; [2019] 1 CLJ 592, at [32]; and

(2) as explained by Mary Lim Thiam Suan J (as she then was) in the High Court in *Ranhill E & C Sdn Bhd v. Tioxide (M) Sdn Bhd* [2016] 5 MLRH 472, at [82], the Breach (2nd Rule) is neither "decisive" nor "material" to the AD so as to persuade me to set aside the AD.

M. Nature And Scope Of Court's Power Under S 15 CIPAA



[32] Eiscon's learned counsel has submitted a list of errors and omission on the part of the Adjudicator in the AD (Alleged Adjudicator's Errors/Omission).

[33] I have decided as follows in *Alpha Galaxy Sdn Bhd v. Euro Destar (M) Sdn Bhd* [2021] MLRHU 539; at [26]:

"[26] This case serves as a reminder of the nature of the court's power in deciding an application under s 15 CIPAA (Setting Aside Application). I am of the following view regarding a Setting Aside Application:

(1) an adjudication decision is provisional under s 13(a) to (c) CIPAA. The High Court may set aside an adjudication decision:

(a) if the adjudicator has no jurisdiction to adjudicate the matter - please refer to *Uzma Engineering Sdn Bhd v. Khan Co Ltd* [2020] MLRHU 992, at [22]; and/or

(b) there is proof of any one or more of the circumstances stipulated in s 15(a) to (d) read with s 13(a) CIPAA; and

(2) a Setting Aside Application is not an appeal to the High Court against an adjudication decision. Nor is a Setting Aside Application a Judicial Review of an adjudication decision. Accordingly, the court in a Setting Aside Application cannot review the merits of an adjudication decision and cannot set aside an adjudication decision merely on any one or more of the following grounds:

(a) an error of law has been committed by an adjudicator (unless the adjudicator has answered a "wrong" question of law which does not arise from the dispute to be adjudicated upon) - please see the judgment of Lee Swee Seng J (as he then was) in the High Court case of *Econpile (M) Sdn Bhd v. IRDK Ventures Sdn Bhd & another case* [2016] MLRHU 212; [2017] 7 MLJ 732; [2016] 5 CLJ 882; [2016] AMEJ 0983, at [71];

(b) an adjudicator has interpreted erroneously a provision in the construction contract - *Econpile*, at [67];

(c) an adjudicator has misconstrued relevant documents;

(d) relevant evidence has been wrongly excluded by an adjudicator;

(e) an adjudicator has erroneously admitted irrelevant evidence;

(f) an adjudicator has failed to attach due weight to relevant



evidence, oral or documentary;

(g) undue weight has been given by an adjudicator to any piece of evidence;

(h) an adjudicator has assessed erroneously the evidence presented to the adjudicator;

(i) a plain error regarding a finding of fact has been made by an adjudicator;

(j) an adjudicator has omitted to make a finding of fact which can be adequately supported by evidence;

(k) an erroneous finding of mixed fact and law has been arrived at by an adjudicator - please refer to Lee Swee Seng J's decision in the High Court in *Syarikat Bina Darul Aman Bhd & Anor v. Government of Malaysia* [2017] 4 MLRH 506; [2018] 4 CLJ 248; [2017] 4 AMR 477 at [60];

(l) an adjudicator has made a wrong inference from the evidence;

(m) an adjudicator has erroneously omitted to make the right inference from the evidence;

(n) errors have been made in the reasons given by an adjudicator in support of the adjudication decision; and

(o) an adjudicator has erred in his or her reasoning with regard to the adjudication decision.

The above errors and omission by an adjudicator can be remedied by an arbitration or litigation (whichever the case may be) regarding the dispute in question [as provided in s 13(c) CIPAA] - *Econpile*, at [67]."

[Emphasis Added]

Premised on *Alpha Galaxy*, I cannot set aside the AD pursuant to s 15(a) to (d) CIPAA based on the Alleged Adjudicator's Errors/Omission. Furthermore, by reason of s 13(c) CIPAA, the Alleged Adjudicator's Errors/Omission can and should only be remedied at the Arbitration.

N. Outcome Of Setting Aside Application

[34] As explained in the above Parts E to M, I have no hesitation to dismiss the Setting Aside Application.

O. Should Court Allow Stay Application?



[35] Section 16 CIPAA provides as follows:

"Stay of adjudication decision

s 16(1)A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under s 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit."

[Emphasis Added]

[36] In the Federal Court case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2018] 1 MLRA 460; [2018] 2 MLJ 22; [2019] 5 CLJ 479 at [65], [66] and [74]; [2017] 8 AMR 167, Zulkefli PCA has decided that the court may exercise its discretion under s 16(1)(b) CIPAA to grant a stay of the enforcement of an AD pending the disposal of Litigation/ Arbitration when:

(1) there is a clear and unequivocal error in the AD [1st Ground (*View Esteem*)]; or

(2) it is in the interest of justice for the court to stay the execution of the AD [2nd Ground (*View Esteem*)].

[37] The Adjudicator had not made any error in the AD - please refer to the above Parts E to M. Accordingly, there is no room for the court to invoke the 1st Ground (*View Esteem*) in this case.

[38] This court decides that it is in the interest of justice to refuse the Stay Application. The reasons for this decision are as follows:

(1) as a result of Eiscon's failure to pay Mr Low in this case for the Works (Contract A) and Works (Contract B), Mr Low has been deprived of cash flow and is still deprived of the same. As such, it is only just for the court to dismiss the Stay Application; and

(2) if:

(a) there is no stay of enforcement of the AD;

(b) the Adjudicated Amount with interest and Total



Adjudication Costs (referred collectively in this judgment as the "Total Adjudicated Sum") is paid by Eiscon to Mr Low; and

(c) the Arbitration is decided in favour of Eiscon against Mr Low:

there is no real risk or likelihood that Mr Low is unable to repay the Total Adjudicated Sum to Eiscon because:

(i) no evidence had been adduced by Eiscon in the Stay Application to show that FNE (as a business) is commercially insolvent in the sense that FNE is unable to pay its debts when these debts fall due for payment. It is therefore clear that FNE is still an on-going business concern;

(ii) no bankruptcy petition has been presented against Mr Low; and

(iii) no suit has been filed against Mr Low by his financiers, creditors, sub-contractors, suppliers, clients or employees for any debt due from FNE to them.

[39] It has been decided in *Kurniaan Maju Sdn Bhd v. HSA Setiamurni Sdn Bhd* [2021] 6 MLRH 484; [2020] 9 MLJ 103; [2020] 3 AMR 276, at [14], that Eiscon has the onus to satisfy the court to exercise its discretion under s 16(1)(b) CIPAA to allow the Stay Application. Based on the evidence and reasons stated in the above paras 37 and 38, I find that Eiscon has failed to discharge such a burden.

P. Mr Low's Amended OS

[40] I reproduce below s 28(1) and (2) CIPAA:

"s 28. **Enforcement of adjudication decision as judgment**

(1) **A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.**

(2) **The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable."**

[Emphasis Added]



[41] In the Court of Appeal case of *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 1 MLRA 207; [2019] 2 MLJ 362; [2019] 2 CLJ 229; [2018] 8 AMR 655, at [24] to [26], Mary Lim Thiam Suan JCA (as she then was) has decided that the court may exercise its discretion to grant leave under s 28(1) and (2) CIPAA to enforce an AD if the following three conditions [3 Conditions (Enforcement)] are fulfilled:

- (1) the AD has been made in favour of the party applying for leave under s 28 CIPAA;
- (2) the party against whom an AD is made, has failed to pay the adjudicated amount on the date specified in the AD; and
- (3) there is no prohibition on the court's discretionary power to grant leave to enforce the AD.

[42] I am of the view that the 3 Conditions (Enforcement) have been fulfilled in this case. Hence, Mr Low's Amended OS is allowed.

Q. Court's Decision

[43] Premised on the above evidence and reasons:

- (1) Eiscon's Amended OS (Setting Aside Application and Stay Application) is dismissed;
- (2) Mr Low's Amended OS is allowed; and
- (3) one set of costs for the 2 OS shall be paid by Eiscon to Mr Low.

