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Res judicata and declarations relating to CIPAA adjudication

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The High Court recently decided on two issues in *Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd*:¹

- If an adjudicator had only allowed a portion of the set-off claim in an earlier adjudication, could the next adjudicator allow for the remainder of the set-off claim in a subsequent adjudication?
- In seeking to set aside an adjudication decision, can a party seek declaratory reliefs against third parties?

Facts

The plaintiff was a sub-contractor employed by the defendant to carry out the basement carcass works for a construction project.

1 [2023] MLJU 1047.



In 2019, the plaintiff commenced the first adjudication against the defendant for a sum of 7,494,014.17 Malaysian ringgits. This sum consisted of progress claim No. 26 (the penultimate) and the first moiety retention sum, less the payments received. Meanwhile, the defendant had disputed the claim and stated that there was a set-off of 5,188,402.91 Malaysian ringgits. On 31 October 2019, the first adjudicator delivered the first adjudication decision (AD) and decided that the defendant would pay the sum of 5,311,360.51 Malaysian ringgits (the first AD) to the plaintiff. The first adjudicator had allowed a sum of 142,238.60 Malaysian ringgits out of the defendant's set-off claim.

On 13 December 2019, the defendant issued a notice to arbitrate, and the arbitrator was later appointed on 5 March 2020. In the meantime, on 4 May 2020, the High Court enforced the first AD.

Thereafter, the defendant issued the Certificate of Making Good Defects (CMGD) to the plaintiff. This was then followed by a payment claim from the plaintiff seeking release of the second moiety retention sum of 1,088,420.35 Malaysian ringgits. The defendant asserted in its payment response that it was entitled to set-off and/or cross claim the sum of 5,188,402.91 Malaysian ringgits, which included a sum of 3,913,000.00 Malaysian ringgits for liquidated ascertained damages (LAD). The plaintiff, by way of a notice of adjudication dated 1 April 2021 commenced

the second adjudication.

On 15 November 2021, the second adjudicator determined that the defendant's set-off for the LAD was allowed and dismissed the plaintiff's claim for the second moiety retention sum (the second AD).

Decision

The plaintiff applied to the High Court to set aside the second AD and sought that:

- the plaintiff be entitled to re-commence adjudication proceedings from the notice of adjudication dated 1 April 2021;
 - the newly appointed adjudicator deliver the decision based on the:
 - payment claim;
 - payment response;
 - adjudication claim;
 - adjudication response; and
 - adjudication reply submitted in the second adjudication; and
 - the learned adjudicator for the second adjudicator refund all payments and fees made to him in the second adjudication.
- The issue before the High Court was summarised into one question, namely whether the second adjudicator acted in excess of his jurisdiction by making:
- findings as to the merit of the first AD, which had fully adjudicated the defendant's set-off of 5,188,402.91 Malaysian ringgits; and
 - a decision that contradicted the findings of the first AD that had been enforced as a judgment or order of the High Court and affirmed by the Court of Appeal.

Res judicata

The High Court found that the second adjudicator had acted in excess of his jurisdiction by deciding on the defendant's entitlement to the LAD, which effectively rendered the plaintiff's claim in the second adjudication to be dismissed as a whole. The defendant's set-off (including the LAD) raised in the second adjudication had to be accepted as having been decided on its merits by the first adjudicator.

Further, the Court of Appeal had put to rest the dispute regarding the first AD given that the appeal against the first AD had been dismissed. The High Court noted that the second adjudicator had not alluded to this fact in his decision despite having been addressed by both the plaintiff and defendant in the adjudication claim and adjudication response respectively. Thus, the decision in the first AD was final as between the parties for purposes of adjudication proceedings under the CIPAA until the dispute is definitively decided by the arbitral tribunal.

The High Court accepted the defendant's submissions and dismissed the plaintiff's application for declaratory reliefs.

First, the declaratory reliefs sought for by the plaintiff involved third parties such as:

- the director of the Asian International Arbitration Centre (AIAC);
- the to-be appointed adjudicator; and
- the second adjudicator.

Section 42 of the Specific Relief Act 1950 provides that a declaration is only binding upon parties to the suit.

Second, by the declaratory reliefs sought for, the plaintiff was attempting to bypass section 34(1) of the CIPAA, which provides for immunity of the adjudication and the AIAC. The acts sought for were not statutorily provided under the CIPAA and are not expressly provided for in the CIPAA.

Lastly, section 19(5) of the CIPAA specifies only one scenario where an adjudicator would not be entitled to their fees (ie, when they fail to make a decision within the period set out in section 12(2) of the CIPAA). Thus, a refund of

their fees in any other scenario would not be allowed.

Comment

In this case, the first adjudicator had decided on the set-off claim of 5,188,402.91 Malaysian ringgits in the first AD by allowing a portion of the claim. However, if the first adjudicator had refused to decide on the set-off claim, due to an issue of jurisdiction, or decided not to allow any amount claimed as set-off, would a defendant be bound to the decision of the first adjudicator in a subsequent adjudication? In doing so, would the defendant's hands be fairly tied?

This case also serves as a reminder to adjudicators

to take extra precaution in their adjudication decisions to mention any notable or significant facts. In this case, the decision of the Court of Appeal was significant. Had the adjudicator referred to the decision of the Court of Appeal and provided his reasons for doing so, perhaps the High Court would not have set aside the second AD as this would have arguably been a finding of fact by the second adjudicator.

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About the author:

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Tasha's practice is Dispute Resolution with a focus on disputes relating to construction, engineering, infrastructure and projects. She has appeared and assisted in court, arbitration, and adjudication matters. Her portfolio includes amongst others, property development, professional negligence, supply of telecommunications equipment and services, and railway disputes.

Prior to joining Gan Partnership and being co-editor of "The Toolbox", a newsletter published by the firm's Engineering, Construction and Energy Practice, Tasha was with the construction team of a large firm for two years. She has also previously worked as a Research Assistant for Dr Sarah Tan Yen Ling, focusing on ASEAN Environmental and Energy Law.

An Old Frees' Association scholar and AFS returnee, Tasha read Law at the University of Malaya. Throughout her time at university, she had participated in a number of moot competitions both national and international which include among others, Philip C. Jessup International Law Moot Court Competition (JESSUP), Asia Cup Moot Competition, Tun Suffian Moot Competition, Gandhi Memorial Moot Debate, and the Novice Arbitration Mooting Competition (NAMCO). During the national JESSUP rounds, Tasha was named as the Best National Oralist for that year.