

## SKRINE

# Statutory Adjudication:

## *Adjudicator's Frolic is a Breach of Natural Justice*

WRITTEN BY SHANNON RAJAN AND JOCELYN LIM YEAN TSE

### 05 January 2023

The Court of Appeal in the case of *JKP Sdn Bhd v Anas Construction Sdn Bhd and another appeal* [2022] 10 CLJ 528 emphasised the importance for adjudicators to uphold the principles of natural justice established in the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2019] 5 CLJ 479 and to afford parties the opportunity to comment or submit on unpleaded issues before making a decision on the same. Further, the Court of Appeal approved the test to determine the issue of breaches of natural justice in adjudication cases as outlined in *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another case* [2016] 5 CLJ 882.

### Brief Facts

The appellant appointed the respondent as the main contractor for

a project. A dispute arose between the parties regarding the construction works, and the construction contract was ultimately terminated. The respondent commenced several adjudication proceedings against the appellant under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") for payments under the construction contract. The appeals before the Court of Appeal were in relation to the respondent's claim for reimbursement of professional fees and charges payable to its consultants.

The payment claim and the adjudication claim specifically pleaded clauses 28, 55 and 56 of the construction contract as the basis of the respondent's claim against the appellant. On the other hand, the appellant, in its adjudication response, contended that the respondent did not invoke clause 36.5

which was the most relevant provision pertaining to the respondent's claim.

The adjudicator allowed part of the respondent's claim based on clause 36.6 of the construction contract, a provision which was neither pleaded by the respondent nor raised by the appellant in its adjudication response. Further, the adjudicator did not invite the parties to comment or submit on clause 36.6.

### Issues

The following issues were raised before the Courts:

1. Whether the adjudicator had, by his conduct, acted in excess of jurisdiction; and
2. Whether there was a denial of natural justice in making the adjudication decision in favour of the respondent.

### Decision of the High Court

The High Court found that the adjudicator did not act in excess of his jurisdiction as the material facts relating to the construction contract were pleaded.

### Decision of the Court of Appeal

The Court of Appeal disagreed with the learned High Court Judge and allowed the appellant's appeals to set aside the adjudication decision and the High Court's decision allowing the respondent to enforce the adjudication decision.

### Whether the adjudicator had acted in excess of his jurisdiction

On the first issue, the Court of Appeal held that the adjudicator had acted in excess of his jurisdiction when he decided on matters that were never raised and pleaded in the payment claim, payment response and all the adjudication pleadings. The Court of Appeal found that clause 36.6 which was not relied upon in the payment claim was a statutory non-compliance with section 5(2)(b) of CIPAA which requires the "details

to identify the cause of action including the provision in the construction contract to which the payment relates" to be included in the payment claim.

Referring to **View Esteem Sdn Bhd v Bina Puri Holdings Bhd** [2019] 5 CLJ 479 where the Federal Court made it clear that adjudication pleadings are pivotal, the Court of Appeal held that the failure to plead clause 36.6 in the adjudication claim was fatal to the respondent's case.

#### **Whether there was a denial of natural justice**

On this issue, the Court of Appeal was of the view that the adjudicator had breached the principles of natural justice by unilaterally relying on the unpleaded clause 36.6 of the construction contract in making out a case for the respondent.

The Court of Appeal approved the test applied by the High Court in **Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd & another**

**case** [2016] 5 CLJ 882 (following the English case of **Cantillon Ltd v Urvasco Ltd** [2008] EWHC 282) to determine the issue of breaches of natural justice in adjudication cases, namely that the breach of natural justice must be material (i.e. decisive or of considerable potential importance to the outcome of the dispute) and is not peripheral or irrelevant. The Court of Appeal found that the adjudicator had gone on a frolic of his own and failed to apply the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on the unpleaded clause 36.6 of the construction contract, which was the basis of his decision to allow the respondent's claim, without allowing the parties the opportunity to comment or to take their respective stands.

#### **Conclusion**

This decision reminds claimants in adjudication proceedings under

CIPAA to comply with section 5(2) of CIPAA. It also reminds adjudicators to uphold the principles of natural justice and not to decide on issues that have not been raised by either party in the adjudication unless parties have been given the opportunity to submit on the same. In the event that there is a need for clarification, adjudicators should direct parties to submit on the particular issue that requires clarification before making a decision on such issue.

Case Note by [Shannon Rajan](#) (Partner) and [Jocelyn Lim Yean Tse](#) (Partner) of the Construction and Arbitration Practice of Skrine.

*This alert contains general information only. It does not constitute legal advice nor an expression of legal opinion and should not be relied upon as such. For further information, kindly contact [skrine@skrine.com](mailto:skrine@skrine.com).*

## **About the authors**



#### **Shannon Rajan**

Shannon is a dispute resolution partner, and his portfolio includes aviation, infrastructure, construction and engineering, and environmental law. He is a Fellow of the CI Arb (UK) and is a panel arbitrator in AIAC, HKIAC and THAC. He has acted as a sole arbitrator and as counsel under ICC, SIAC and AIAC rules and in ad-hoc cases. As a mediator, he is empanelled with the Malaysian and Singaporean international mediation centres. He is the former Chair of the SCL Malaysia and Deputy Chair of the CI Arb Malaysia and is presently the Deputy Chair of Malaysian Society of Adjudicators.



#### **Jocelyn Lim Yean Tse**

Jocelyn is a dispute resolution partner, focusing on real estate, construction and engineering disputes. She acts for clients involved in all aspects of the construction industry. She is well-versed with all major standard forms of construction and consultancy contracts. Apart from representing clients in court, arbitration and adjudication proceedings, Jocelyn sits as an arbitrator and adjudicator and she is an accredited mediator.