

Adjudication Cases – Major Developments in 2021/2022

Adrian See

CIPAA Adjudicator
FCIArb, FAiADR

www.beldenlex.com





Cases

1

Sunshine Construction Sdn Bhd v Marvelane Sdn Bhd
& Ors cases

[2022] MLJU 428

2

Ou Yang Chow Min (trading as Ou Yang Architect) v
Green Venture Capital Sdn Bhd & Anor Case

[2022] MLJU 480

3

MN Global Venture Sdn Bhd v CB Bersatu Sdn Bhd

[2022] MLJU 998

Points decided



- Sunshine v Marvelane
- High Court
- KK Wong J
- PAM 2006 contract

- New proposition on s5 CIPAA.
- Departs from HC case, Terminal Perintis [2017] & Giatreka [2019]



- Ou Yang v Green Venture Capital
- High Court
- KK Wong J
- Architect's contract

- Re Court's powers in a setting aside application.
- Expressed views on a tort of abuse of adjudication proceedings.



- MN Global v CB Bersatu
- High Court
- KK Wong J
- P.O's with back-to-back payment term

- Re s35 CIPAA
- Prohibition on conditional payment is not confined to adjudication proceedings.
- Disagrees with HC case, Bond v Isyoda [2017].

Sunshine v Marvelane

Facts:

- PAM 2006 contract
- Marvelane - Employer
- Sunshine - Contractor
- Claim for certified sums.
- Sunshine succeeded in Adjudication.
- Sunshine applied for enforcement.
- Marvelane applied for setting aside and stay.

Marvelane's submission in setting aside:

- Breach of s5(2)(b) CIPAA - no cause of action in Payment Claim
- Adjudication Decision in excess of jurisdiction

Held (1):

- No breach of s5(2)(b) CIPAA.
- But if there was a breach (i.e., no cause of action disclosed), Adjudicator has 3 options. Option 1 – dismiss the adjudication claim on grounds of no jurisdiction. Option 2 – complete the adjudication under s.27(3). Option 3 is where Adjudicator may inquire whether the Claimant wishes to amend Payment Claim. If so, subject to objection from Respondent and Adjudicator may allow amendment. All parties have right to adduce evidence and submit on the amended Payment Claim.
- If Adjudicator delivers final Adjudication Decision in favour of Claimant, Respondent may raise same objection during setting aside/enforcement hearing and Court may consider afresh the issue afresh.
- Departs from HC case, Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242 on non-intervention. Court may consider afresh the Respondent's evidence and submission that the Claimant has in fact no contractual cause of action. If Adjudicator made error on whether there was a cause of action, it would deprive Adjudicator of jurisdiction and Adjudication Decision should be set aside.

Sunshine v Marvelane



Held (2):

- No breach of s5(2)(a),(c),(d) CIPAA. ("technical breaches")
- (Obiter) But if there was a breach, it does not oust the Adjudicator's jurisdiction or nullify the Adjudication Decision. It is a mere irregularity that can be cured under s26(1) CIPAA.
- Departs from HC case, Giatreka v SGW Engineering [2019] MLJU 1477 (that s5(2) requirements are strict and mandatory).

Held (3):

- CI 25.4(d) PAM 2006 (allowing Employer to withhold payment till completion if the Contract had been prematurely terminated) is void under s35(1) CIPAA.



Ou Yang v Green Venture Capital & Anor

Facts:

- Ou Yang commenced CIPAA proceedings and succeeded.
- Ou Yang applied to High Court to enforce.
- GVC & Anor applied for declaratory reliefs to declare Payment Claim, adjudication proceedings and adjudication decision invalid/void and to set aside Adjudication Decision.

GVC & Anor's submissions:-

- Payment Claim is in breach of s5 CIPAA and Adjudicator had no jurisdiction.

Held (1):

- s5 CIPAA is satisfied and Adjudicator had jurisdiction.
- (Obiter) If Adjudicator had no jurisdiction, Adjudication Decision must be set aside.
- However, Court has no discretionary power under s41 Specific Relief Act and Order 15 rule 16 Rules of Court to allow the declaratory prayers sought by GVC & Anor.
- CIPAA provides temporary finality. Post-adjudication, the rights and liabilities of parties can only be finally determined in arbitration (or litigation) but not through a s15 setting aside application.
- Proviso to s41 Specific Relief Act (i.e., no declaratory relief if substantive relief is possible) bars GVC & Anor from applying to court for declaratory relief in a s15 setting aside application.
- O15r16 refers to 'binding declarations of right'. Not possible under s15 application. Only possible through final dispute resolution process.
- Court has no power to allow assessment of damages or costs and fees of the adjudication as ss13(a) and 15 CIPAA only allows for Court's power to set aside and nothing else.

Ou Yang v Green Venture Capital & Anor



Held (2):-

- (Obiter) on tort of abuse of adjudication process under CIPAA.
- Difficult to envisage a tort of abuse of adjudication process unless all these factors exist:-

(a) adjudication claim was dismissed/if adjudication claim was allowed, Adjudication Decision was set aside by High Court and affirmed by Court of Appeal and Federal Court;

(c) final dispute resolution not commenced or has resolved in favour of Respondent;

(d) Respondent has sustained loss due to dismissal of adjudication claim or setting aside process. (Not loss from final dispute resolution as that may be claimed through a separate cause of action/forum).



MN Global Venture v CB Bersatu

Facts:-

- Appeal from Sessions Court (non-CIPAA proceeding)
- Purchase Orders, with 'back-to-back payment term'
- Defendant - Sub-contractor
- Plaintiff - Sub-sub contractor

Court's Question:-

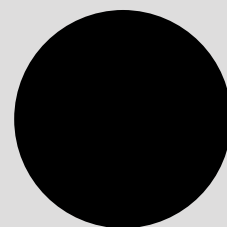
- Whether the back-to-back payment term was void under s35 CIPAA.

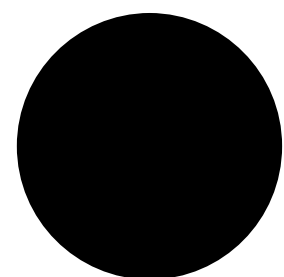
Parties' Submission:-

- s35 CIPAA only applies to adjudication proceedings (common position of both parties).
- Relied on HC case, Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, Intervener) [2017] MLJU 376.

Held:

- Back-to-back payment term is void under s35 CIPAA.
- Application of s35 is not limited to adjudication proceedings.
- Placement in Part VI (General) CIPAA shows Parliament intended general application, irrespective whether adjudication proceedings instituted or not.
- Contrary intention could have been easily expressed in s35.
- Use of word "any" in s35 excludes limitation (Metramac).
- Contracts Act is of general application. CIPAA is specific for construction contracts. The specific provision in CIPAA overrides general provisions of Contracts Act.
- No necessity to amend Contracts Act for s35(1) to apply when no adjudication proceedings are afoot.
- Departs from Bond v Isyoda.





thank you

belden

www.beldenlex.com

