

CIPAA ADJUDICATION – WHAT HAS CHANGED SINCE *VIEW ESTEEM SDN BHD v BINA PURI HOLDINGS BHD*

by Foo Joon Liang

Almost 4 years into the implementation of the Construction Industry Payment and Adjudication Act 2012, commonly referred to by its abbreviation of CIPAA, the Federal Court delivered its decision in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2017] 1 LNS 1378** declaring the law on 3 parts of the Act. Two of these parts – concerning the jurisdiction of the adjudicator and the stay of an Adjudication Decision – reverses a body of jurisprudence developed in those 4 years, as well as the general understanding and practice of the industry. This article outlines the impact of **View Esteem**.

THE LAW BEFORE VIEW ESTEEM

Before **View Esteem** (unless expressed otherwise, this is in reference to the Federal Court's decision), the legal position on the adjudicator's jurisdiction was as clearly and unambiguously provided for in CIPAA itself. Three sections of the Act, whichever way read – whether literally or purposively – tell us that the jurisdiction of the adjudicator is limited to matters raised in the Payment Claim and Payment Response.

Sections 27(1) and (2) provide:

*“(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.”*

Section 5 sets out the requirements of a Payment Claim. Section 6 deals with the Payment Response. Of relevance, Section 6(2) expressly provides that any reasons for a dispute by the non-paying party to a claim must be set out in a Payment Response. Section 6(2) is the only sub-section that deals with a situation where a Payment Response is issued.

It is clear that the only avenue to expand on that jurisdiction is to have parties agree to do so – Section 27(2).

Thus, a claim not made in a Payment Claim is outside the jurisdiction of the adjudicator, and cannot be determined in that adjudication before him. Likewise, and more relevant in the present discussion, defences or reasons to dispute a claim that are not set out in a Payment Response cannot be considered by an adjudicator. There is certainty in this approach.

This is for good reason, particularly when one considers the intent and regime of CIPAA. The intention of a speedy resolution to a payment dispute can quite possibly be derailed if a non-paying party to an adjudication (i.e. the respondent) is permitted to ambush the claimant with defences and voluminous documents to make out new defences at the stage of the Adjudication Response. We know that CIPAA only permits the claimant 5 working days to respond to an Adjudication Response, beyond which there is no right to further submissions whether in terms of evidence or legal submissions.

As far as a stay under Section 16 is concerned, the legal position was that exceptional circumstances must be shown. This is more stringent than in an application to stay a judgment of the courts, and again for good reason. The adjudication is meant as an interim resolution, with the possibility of re-opening the payment dispute in a subsequent arbitration or court action expressly safeguarded by CIPAA. Put another way, the Adjudication Decision is temporarily binding.

And so, a respondent was only permitted to withhold payment if it could show that there is a real risk, on objective evidence, that the claimant would be unable to repay those sums at the conclusion of the arbitration / court action, or when a challenge to the adjudication decision becomes successful eventually. Hence, Section 16(1) provides:

*“(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 section 15 has been made; or***
- (b) **the subject matter of the adjudication decision is pending final determination by arbitration or the court.**”*

If there is no challenge, or if there is no arbitration / court action that seeks to revisit the Adjudication Decision, there can be no reason to withhold payment of the adjudicated sum.

A stay, if granted in a lesser case, will completely defeat the intent and purpose of CIPAA.

These principles are in line with approaches in countries practising statutory adjudication. The likes of the United Kingdom, Singapore, the various states of Australia and New Zealand had implemented statutory adjudication some time before we have, and therefore have had the benefit of a developed body of case law in that respect. Whilst these countries have differing adjudication processes, the intent and purpose of their legislation for an expeditious payment disputes resolution in the construction industry, as well as their provisions to limit what the adjudicator can and ought to consider, are no different from ours.

Thus, before View Esteem, our courts have considered and applied decisions from other comparable jurisdictions. See the Singapore Court of Appeal’s decision in **WY Steel Construction Pte. Ltd. v. Osko Pte. Ltd. [2013] 3 SLR 380**, to cite an example close to home.

**VIEW
ESTEEM –
THE
SALIENT
FACTS**

View Esteem is the developer of a block of condominiums in the heart of Kuala Lumpur. Bina Puri was the appointed contractor. Payment disputes had arisen from Interim Certificate No.23. This was before CIPAA came into force. Bina Puri took View Esteem to court on Interim Certificates Nos.23 to 26R, and obtained summary judgment on Interim Certificates Nos.23 to 25 and on the first moiety of the retention sums. The remaining claim on Interim Certificate No.26R was stayed under s.10 of the Arbitration Act 2005, for reference to arbitration.

Some time after conclusion of those court proceedings, Progress Claim No.28 was submitted. This was not certified by the architect. By this time, CIPAA had come into force. Bina Puri then issued a Payment Claim on Progress Claim No.28. A Payment Response was issued, and certain reasons were given to dispute this claim. Thus, this was a Section 6(2) situation.

The adjudication took its course. When the Adjudication Response was issued, View Esteem sought to introduce 3 new reasons to dispute the claim – the “3 Defences”. These were not raised in the Payment Response.

On an objection taken by Bina Puri, the Adjudicator applied s.27(1) to refuse jurisdiction to consider the 3 Defences. Bina Puri’s claim was eventually allowed by the Adjudicator, to the tune of about RM17 million, inclusive of interest.

View Esteem applied to set aside the Adjudication Decision on various grounds which included the alleged bias of the Adjudicator in accepting Bina Puri’s arguments and not that of View Esteem. View Esteem also raised the argument that natural justice had been breached as the Adjudicator did not consider the 3 Defences. In parallel, View Esteem also applied for a stay of the Adjudication Decision, pending arbitration. A Notice of Arbitration was issued the moment the Adjudication Decision was delivered.

The High Court rejected View Esteem’s challenges as well as its stay application. In respect of the argument that natural justice had been breached, the High Court considered the interpretation of Sections 5, 6 and 27(1) of CIPAA, as well as the intent and purpose of the Act, and found that the Adjudicator had correctly limited his jurisdiction to matters raised in the Payment Claim and Payment Response, as is provided for by Section 27(1). In the course of this, the High Court Judge made the observation that View Esteem had the opportunity to raise all its reasons to dispute the claim in its Payment Response, did not do so, and gave no reasons for this omission. The application for a stay was also rejected as there was no exceptional circumstance – View Esteem had not shown that Bina Puri would not be in a position to repay the adjudicated sums should View Esteem succeed in the arbitration.

The Court of Appeal upheld the decision of the High Court, and supplemented the grounds of the High Court with its own.

Leave was granted by the Federal Court to View Esteem for an appeal against the decision of the Court of Appeal. This was the first case arising from CIPAA to reach the Federal Court.

THE DECISION OF THE FEDERAL COURT

JURISDICTION

On the jurisdiction of the adjudicator, the Federal Court held that “Section 27(1) of CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim”. Instead, the Federal Court was of the view that any matter concerning the “cause of action” of the claim raised in a Payment Claim, is within the jurisdiction of the adjudicator. In this connection, the Federal Court found support from 2 other aspects of CIPAA.

First, they were of the view that in the absence of a prohibitory clause which prohibits the adjudicator from considering matters not raised in a payment response, as is provided for in section 15(3) of the Singapore Act 2006 and in section 20(2B) of the legislation of New South Wales, there is no impediment for an adjudicator in Malaysia to consider all the grounds of claim in an Adjudication Claim under section 9 of CIPAA, and all the grounds of defence in an Adjudication Response under section 10 of CIPAA notwithstanding that the latter grounds were not raised in a Payment Response.

Second, the Federal Court turned to section 6(4) of CIPAA. According to the Federal Court, this provision lends support to the proposition that a respondent is not prevented from submitting any defence available to him by way of an Adjudication Response. In this regard, the Federal Court cited page 150 of the academic writing of Lam Wai Loon and Ivan Y.F. Loo in *Construction Adjudication in Malaysia* (KL CCH Asia 2013).

Labelling the Adjudication Claim, Adjudication Response and Adjudication Reply as “adjudication pleadings”, the Federal Court was of the view that these, particularly the Adjudication Response in that case, must not be given less prominence. The Federal Court did not view that the expediency of a CIPAA adjudication would be compromised if a respondent is permitted to raise matters in the Adjudication Response which it had not done in the Payment Response.

Thus, when the Adjudicator refused to consider the 3 Defences not raised in the Payment Response, the Adjudicator had wrongly restricted his jurisdiction. This was a breach of natural justice given that defences properly run by the respondent in its Adjudication Response were not considered. The Adjudication Decision was set aside.

The decision of the Federal Court reduces the significance of the Payment Response. A respondent to a claim in adjudication may now submit a scanty Payment Response outlining some but not all of its reasons to dispute the claim. In fact, a respondent is now emboldened to leave out its core defences from a Payment Response, for strategic reasons, so as to ambush the claimant come time for the Adjudication Response.

For as long as the matters raised in the Adjudication Response are related to the “cause of action” raised in the Payment Claim – and this would encompass defects in the claimant’s works, damages for delays in the works and contractual defences such as the claimant’s failure to meet conditions precedent for its claims, all of which require a substantial factual investigation and possibly a technical response of an expert – the Respondent is entitled to raise them in an Adjudication Response. The claimant is then obliged to address these in its Adjudication Reply, the final document which it is entitled under CIPAA to lodge, all within 5 working days.

It is not difficult to see how this will prejudice a claimant. It is also not difficult to see how this might derail an adjudication process, in which CIPAA envisages the Adjudication Reply to be the last submission (barring the adjudicator exercising his power to allow further submissions).

Further, given that a CIPAA adjudication was brought in by legislation to offer an expedited alternative to payment dispute resolution for the construction industry, to then draw parallels to traditional court processes by labelling the Adjudication Claim, Response and Reply as adjudication pleadings is inappropriate.

As for Section 6(4), this provision concerns a situation where no Payment Response is issued. Unlike in other jurisdictions where the regime expressly allows a claimant to proceed with the adjudication claim in the absence of a payment response (known as a payment schedule in some jurisdictions), Section 7(1) of CIPAA only allows the claimant to proceed with the adjudication where there is a dispute. Thus, where the respondent does not issue a Payment Response to dispute the claim, Section 6(4) deems there to be a dispute to enable the claimant to proceed with his claim in a CIPAA adjudication. Section 6(4) is not a blank cheque for an indolent respondent; that would be entirely inconsistent with the expressed intent and purpose of CIPAA.

In this connection, when the Federal Court relied on the academic writing of Lam Wai Loon and Ivan Y.F. Loo in *Construction Adjudication in Malaysia* (KL CCH Asia 2013), it had inadvertently referred to the views of the authors on Section 6(4). In the same book, the authors had expressed a clear view that where a Payment Response under Section 6(2) is issued, the respondent is restricted to the reasons for dispute set out in its Payment Response.

It is, with the greatest respect, incorrect to dismiss case law from other jurisdictions practising statutory adjudication because the legislation in those jurisdictions contain differing provisions to CIPAA. One must consider the regime in those legislations in totality, and not the provisions in isolation. The regime in the various jurisdictions – the United Kingdom, Singapore, the various states of Australia and in New Zealand – similarly aim for the expedient resolution of payment disputes in the construction industry. This is to facilitate cash flow to the contractor.

Thus, in Singapore, Sections 17(3) and (3) of the Building and Construction Industry Security of Payment Act limits the adjudicator to considering only matters raised in the payment response. This achieves the same aim as Section 27(1) of CIPAA. Likewise in the United Kingdom, New South Wales, Queensland, South Australia and New Zealand, under their respective legislation for statutory adjudication. In CIPAA, there is no necessity for an express provision prohibiting the adjudicator from considering disputes not found in the Payment Response as Section 27(1) operates to limit his jurisdiction to considering disputes raised in the Payment Response. These may be 2 different approaches, but their purpose are not any different – to limit what the adjudicator may consider. The regime does not differ with these other countries. The approach taken in cases such as *WY Steel* ought therefore to be relevant to us in Malaysia.

The decision of **View Esteem** has set us apart from the practice in these other countries. As an upshot, there has been a wave of cases in which the adjudication decisions were set aside on account of the adjudicator refusing jurisdiction on matters not raised in the Payment Response. **Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd & Another Case [2017] LNS 183** (this is the report of the High Court's decision) was one of those. At the time of writing, leave had been granted by the Federal Court in the case of **Milsonland** to revisit the interpretation of Section 27(1) and this issue of jurisdiction in **View Esteem** (incidentally a day after the

application to review *View Esteem* was dismissed by the Federal Court). Several other cases are pending before the Federal Court, awaiting the outcome in **Milsonland**.

STAY

The Federal Court was of the view that the approach of the High Court and Court of Appeal – in requiring exceptional circumstances to be shown – was too strict. Although it accepted that a stay ought not be granted readily, the Federal Court held that “*a more liberal reading of section 16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case*”. On the facts of **View Esteem**, the Federal Court found that the breach of natural justice was such an error.

Two observations. Where there is a breach of natural justice, the Adjudication Decision will fall in a Section 15(b) challenge. There would be no necessity for a Section 16 stay. It is inconceivable that a party contending a breach of natural justice would simply apply for a stay and not launch a Section 15(b) challenge to have the Adjudication Decision set aside. What then amounts to a “clear error”? The Federal Court did not limit these to Section 15 grounds; to do so would of course not make sense as the Adjudication Decision would already be unsustainable if the Section 15 grounds exist. Thus, it is arguable that the “clear error” would include an error on the merits. This opens the proverbial floodgates; what error is “clear” is never clear.

Second observation. The Adjudication Decision is only temporarily binding. Bearing in mind the intent and purpose of CIPAA, and we must, there is no conceivable rationale to expand the grounds for a stay beyond the need to preserve the adjudicated sum. This is in a situation where there is a challenge on the Adjudication Decision or a pending arbitration / court action that may result in the adjudicated sums having to be returned to the respondent. This is the observation I made earlier in this article.

INTERIM CERTIFICATES IN THE CONSTRUCTION INDUSTRY ARE CUMULATIVE

There is another aspect of **View Esteem** worth mention. As we have seen earlier, Interim Certificates Nos.23 to 26R were the subject of Bina Puri’s claim in earlier court proceedings. Progress Claim No.28 was brought to adjudication. The Federal Court held, citing Julian Bailey’s text *Construction Law Vol.1*, that “*in the construction industry progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate stand-alone compartments*”.

Notwithstanding that the sum claimed in Progress Claim No.28 expressly excludes earlier certified sums (i.e. all interim certificates including Interim Certificates Nos.23 to 26R), the Federal Court then concluded that Bina Puri was barred by s.41 CIPAA from bringing this claim to adjudication given that this claim was the subject of prior court proceedings.

Now, without going into the interpretation of Section 41, whether progress claims are cumulative or not is a question of fact and not law. The High Court had found as a matter of fact (which the Court of Appeal did not disturb) that Progress Claim No.28 did not contain claims under Interim Certificates Nos.23 to 26R. It appears that the Federal Court reversed this on the strength of the academic text of Julian Bailey’s *Construction Law Vol.1*. It remains to be seen if this part of **View Esteem** will be taken as a legal precedent that “*in the construction industry progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate stand-alone compartments*”.

**MOVING
FORWARD**

The Federal Court's decision in **View Esteem** was delivered on 6th November 2017. According to the statistics of the Asian International Arbitration Centre, there were 711 adjudications registered in 2017. On a rough basis that these were spread equally throughout that year, at least 100 adjudications would have commenced in 2017 post-**View Esteem**. For 2018, the AIAC anticipates 850 adjudications. **Milsonland** is scheduled for hearing before the Federal Court in November 2018. By that time, I would assume that a great number of those 850 adjudications would have proceeded beyond the stage of a Payment Response.

If **Milsonland** reverses the legal position on Section 27(1), parties who had relied on **View Esteem** and had issued an insufficient Payment Response will find themselves restricted in their defence to the claim in adjudication, and their position compromised. Whilst a court may declare any decision made to be prospective (and thus not affecting matters that had proceeded on the basis of **View Esteem**), there is a compelling argument that an interpretation of Section 27(1) or indeed any provision(s) of CIPAA must necessarily take effect from the birth of that Act since it is a declaration of what the Act provides.

Put another way, in these days of uncertainty, it is prudent to be comprehensive in your Payment Response.