

CIPAA: adjudicators' powers to order remedies and interest when payment clause is unenforceable

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Introduction

Section 25 of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 lists adjudicators' extensive powers in adjudication proceedings, including the power to award financing costs and interest. The recent high court decision in *First Commerce Sdn Bhd v Titan Vista Sdn Bhd and another case*⁽¹⁾ examined the extent of an adjudicator's powers to determine remedies and interest in unique circumstances where a payment clause was void and the default statutory implied payment provision in the CIPAA was pleaded.

Facts

First Commerce Sdn Bhd was appointed as the main contractor by the employer of a project to build and complete the super structure of the project. Upon being notified by the employer, the architect directed First Commerce to appoint Titan Vista Sdn Bhd as its nominated subcontractor to perform part of the project. Accordingly, First Commerce issued a letter of award to Titan Vista for such work. The letter stated that the terms and conditions of the Malaysian Institute of Architects (PAM) Nominated Subcontract 2006 were incorporated into the contract between the parties. Further, Clause 9 of the letter of award provided that the payment for the certified amounts had to be paid in the form of cheques from the employer within 45 days from the date of the architect's certificates.

In the course of executing the contracted work, Titan Vista commenced an adjudication against First Commerce pursuant to the CIPAA to recover payment for four unpaid interim certificates. Specifically, Titan Vista claimed an outstanding sum of approximately RM2.37 million and late payment interest. Titan Vista's adjudication reply also stated that its claims were based on Clause 9 of the letter of award and pleaded that the default payment provisions in Section 36 of the CIPAA would apply if Clause 9 of the letter of award was found to be a conditional payment prohibited by Section 35 of the CIPAA.

After hearing both parties, the adjudicator decided in favour of Titan Vista. The adjudicator found that Clause 9 of the letter of award was unenforceable as it was a conditional payment provision prohibited by Section 35 of the CIPAA. The adjudicator referred to the "Period of Honouring Certificates" found in Clause 30 of the Appendix to the PAM Nominated Subcontract 2006, instead of Section 36 of the CIPAA as had been pleaded; he ordered First Commerce to pay the amounts certified and claimed by Titan Vista within 21 days from the date of each interim certificate.

Dissatisfied with the adjudication decision, First Commerce relied on Sections 15(1)(b), 15(1)(c) and 15(1)(d) of the CIPAA to set aside the adjudication decision at the high court. Titan Vista, on the other hand, filed an originating summons pursuant to Section 28 of the CIPAA at the high court to enforce the adjudication decision as a judgment when First Commerce failed to pay in accordance with the adjudication decision. Both applications were heard on the same day before the same court.

Issue

At the high court, First Commerce's main contention was that the adjudicator had erred in ordering it to pay

AUTHORS

[Min Lee Tan](#)



[Yuen Wah Foo](#)



the amounts certified and claimed by Titan Vista based on the due dates which he had set (ie, within 21 days of the date of the interim certificates) as opposed to the due dates pleaded by Titan Vista (ie, within 45 days of the date of the interim certificates pursuant to Clause 9 of the letter of award). This, in turn, had resulted in excessive interest being awarded to Titan Vista.

Decision

Justice Lim Chong Fong found that Titan Vista had not specifically confined its claims to Clause 9 of the letter of award as it had requested payment of the interim certificates to be based on either:

- Clause 9 of the letter of award; or
- Section 36 of the CIPAA if Clause 9 of the letter of award was void in contravention of Section 35 of the CIPAA.

Hence, the adjudicator had acted within his jurisdiction based on the disputes referred to him. The judge also held that adjudicators are not bound by the disputes referred to them in the exact way as pleaded by the parties, especially with regard to the remedies sought. In the present case, the judge ruled that the adjudicator, having decided that Clause 9 of the letter of award was void and unenforceable, need not decide on the issue of interest based on Section 36 of the CIPAA as pleaded by Titan Vista because Section 25(o) of the CIPAA authorises adjudicators to decide on issues of interest, including the date of accrual, as they see fit. It was therefore justified for the adjudicator to adopt the express provision found in PAM Nominated Subcontract 2006 which binds both parties in lieu of Section 36 of the CIPAA.

Comment

The high court decision is a welcome judgment for the construction industry, especially unpaid parties as they are not strictly bound by their pleaded case, particularly with regard to the remedies sought. However, this decision should not be used as a general principle for unpaid parties to broaden their claim against non-paying parties, bearing in mind the application of Section 27(1) of the CIPAA.

An appeal against this decision is pending before the Court of Appeal.

For further information on this topic please contact [Tan Min Lee](#) or [Yuen Wah Foo](#) at Gan Partnership by telephone (+603 7931 7060) or email (minlee@ganlaw.my or fyw@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) [2021] MLJU 376.

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