

CIPAA 2012 : Examining the Limits of Cross-Claims in Adjudication

TERA VA SDN BHD V AYAM BINTANG ISTIMEWA SDN BHD [B-02(C)(A)-1948-11/2023 & B-02(C)(A)-1949-11/2023]

27th November 2024

ISSUES

It is common for a respondent to raise a set off or cross claim as a defence to a Payment Claim issued under Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”). There could also be instances where the set off / cross claim are much larger than the original claim in the Payment Claim.

In such circumstances, does the adjudicator have the jurisdiction to award a net amount in favour of the Respondent for a cross claim raised in response to the Payment Claim? If a net amount is awarded to the Respondent in such circumstances, would the adjudicator be acting in excess of their jurisdiction?

These questions were answered in the recent Court of Appeal decision of **Tera VA Sdn Bhd v Ayam Bintang Istimewa Sdn Bhd [B-02(C)(A)-1948-11/2023 & B-02(C)(A)-1949-11/2023]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) Via an agreement embodied in 2 quotations (“**Contract**”) signed by Ayam Bintang Istimewa Sdn Bhd (“**ABI**”), ABI appointed Tera VA Sdn Bhd (“**TVA**”) to supply, deliver and install a Solar Photovoltaic Solution (SPS) at a factory in Kuantan, Pahang for the total contract sum of RM613,000.00.
- (b) The performance of the Contract was divided into 2 phases i.e. Phase 1 for 1683 KWp at RM393,000.00 and Phase 2 for 109.89 KWp for RM220,000.00.
- (c) According to TVA, TVA had completed the work for Phase 1 but was only paid RM98,250.00. Subsequently, TVA contended that ABI had breached the Contract by failing to pay the remaining amount of RM294,750.00.

- (d) ABI countered that TVA had refused and/or omitted to fulfill / complete its duties and obligations in the Contract, particularly *“failed to perform the duty of care during the installation and/or construction of the solar panel at the premise”*, leading to structural damage to the zinc roof panels measuring the size of 20,565 square feet.
- (e) On 16.12.2022, TVA issued Payment Claim against ABI for unpaid work done of RM294,750.00 and ABI issued its Payment Response on 30.12.2022. On 09.01.2023, TVA initiated adjudication by issuance of its Notice of Adjudication.
- (f) In ABI’s Adjudication Response, ABI raised set off / counterclaim of RM695,580.00, which included the cost to replace existing damaged roofing, which ABI also said that ABI had to engage its contractors to observe and rectify the damage suffered.
- (g) The Learned Adjudicator handed down a decision, where the Claimant was not successful in its overall claim. The breakdown of the Learned Adjudicator’s decision is as follows:-

Item	Description of Works Done	Amount (RM)	Total Amount (RM)
1.	Outstanding work-done	294,750.00	
2.	<u>Cross-claims</u>		
	a) Replacement of metal roofing works	(286,780.00)	
	b) Supply materials and labours to repaint warehouses_	(15,800.00)	
	Outstanding amount due to Claimant		(7,830.00)

PROCEEDINGS BEFORE THE HIGH COURT

Pursuant to the Adjudication Decision, TVA filed an application to set aside, and ABI filed an application to enforce the Adjudication Decision.

The setting aside application made by TVA was premised on fraud and denial of natural justice under Section 15(a) and (b) of CIPAA 2012.

The learned Judicial Commissioner (“**JC**”) found that the Adjudicator was not misled into believing that the entire roof had been damaged and that ABI had replaced the roof and paid for the costs. This is because the photographs purported to show no replacement work and minimal damage were taken at an above eye-level with no clarity and no digital dates marked on the photographs. Thus, the Learned JC found that the claim that the photographs were taken on 17.08.2023 was unsubstantiated.

The Learned JC also considered TVA's claim on fraud and accepted ABI's position by holding that "*being a tenant of a property does not mean that one can cause damage to the property and not bear the responsibility for the same only because one does not own the property...*"

Further, the JC also held that the Adjudicator had used all information made available to arrive at the conclusion that TVA was not denied the right to be heard before dismissing TVA's setting aside application.

Guided by the decision of the Court of Appeal in **Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd** [2019] 2 CLJ 229, the Learned JC allowed ABI's enforcement applications upon finding that the following conditions have been satisfied:-

- (i) Adjudication decision is in favour of the party applying to enforce;
- (ii) The party whom the adjudication decision is made has failed to pay;
- (iii) There is no prohibition on the court's discretionary power to grant leave to enforce; and
- (iv) Setting aside application was dismissed.

PROCEEDINGS BEFORE THE COURT OF APPEAL

The main questions that were posed to the Court of Appeal were as follows:-

- (i) Whether the learned Judicial Commissioner erred in law and in fact in failing to consider that ABI had concealed facts from the Adjudicator and these concealment amount to willful acts of dishonesty and are therefore fraudulent;
- (ii) Whether there has been a breach of natural justice when the Adjudicator considered 3 issues which were not raised by either party in coming to her conclusion; and
- (iii) Whether ABI's cross claims can exceed TVA's claims, thereby making ABI the substantive claimant.

Similar to the Learned JC at the High Court, the Court of Appeal had to consider the 2 issues raised under fraud, i.e. disclosure of ownership of the factory and ABI's claim to have replaced the roof and have incurred costs in doing so.

Alleged concealment that ABI was not the owner of the premise but a tenant

For this 1st allegation of fraud, the Court of Appeal find the issue of ownership as opposed to tenancy to be irrelevant and held as follows:-

"[40] Further, we agree that ABI being the tenant has a duty under article 14 of the TA (encl. 11/101) to keep the premise in clean and good condition and at the end

of tenancy, to restore it to the condition it was. **This means that any damage arising in the course of tenancy has to be made good by ABI.**

[41] In any event, as tenant, it is trite that ABI has exclusive possession of the premise... Hence possession carries with it the right to bring a cross-claim for cost of repairs to the damaged roof."

[Emphasis added]

Alleged misrepresentation on the damage

In discussing the issue of ABI's alleged misrepresentation on the damage to the roof, the Court of Appeal held that reliance on quotation by ABI does not amount to fraud:-

*"[49] This Court had raised the issue whether there can be fraud to claim the cost of repair based on a quotation. Here, ABI had relied on the quotations in encl. 11/54-55. We find that this does not amount to fraud and refer to the Federal Court decision of **Chong Nge Wei & Ors v Kamajuan Masteron Sdn Bhd [2022] 3 MLJ 135 where a quotation was accepted as proof of damages.** At pages 150, 151 and 154, this was said:*

*"[43] There is no question that the appellants must prove their losses and 'it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it'. (Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 at p 178). That is also trite law. **But the appellants' claim for damages does not suffer from that infirmity. They have provided proof of the damages by producing a quotation prepared by a building contractor to support their claims** for the cost of replacing the flexcore with autoclaved aerated concrete building block.*

*[59] Applying the principles in the two cases to the facts of the present case, **the appellants were prima facie entitled to the cost of replacing the flexcore with autoclaved aerated concrete building block as would put them in a position to have the building material they contracted for, and the quotation provided prima facie proof of the sum 'which will meet the costs' of the remedial works, which includes dismantling of the existing walls.**"*

[Emphasis added]

Breach of natural justice

TVA further alleged that they have been deprived of the opportunity to address the Adjudicator on 3 issues namely thickness of roof; insulation; and the length and brand of the roof. In this regard, the Court of Appeal held that there cannot be a breach of natural justice as the Adjudicator did not deprive both parties the right to deduce evidence and to submit on any issue:-

"[55] ABI's rate was already available to TVA. As noted by the Adjudicator, ABI had notified TVA the cost of replacement was RM12 psf. The Adjudicator too had not come across any letter from TVA to ABI on any quotation prior to the proceeding. TVA had never in its adjudication claim and adjudication reply stated that the quotation was from the contractor who had originally installed the roof at the premise and failed to explain that the original roof was 0.35mm. It had also not explained that the quotation included insulation. This contrasts with that of ABI's rate which clearly stated it included installation. Hence the Adjudicator stated that "Considering the limited information given by the Claimant, I will adopt the rate provided by the respondent as the cost of the rectification".

[56] This cannot be a breach of natural justice in the sense that the Adjudicator did not hear both sides of the dispute. Here the Adjudicator had not deprived both parties the right to adduce evidence and to submit on any issue. It is only after the adjudication proceeding that TVA is saying it should have been given the opportunity to explain further its rate when it did not address the adjudication that its quotation came from the original contractor...

[59] We add that pursuant to section 25(d) CIPAA, the Adjudicator shall have the power to draw on his own knowledge and expertise."

[Emphasis added]

Therefore, the Court of Appeal found that TVA has not proven that the adjudication decision was improperly procured through fraud under Section 15(a) of CIPAA 2012 or that there has been a denial of natural justice under Section 15(b) of CIPAA 2012.

ABI's cross-claim

Based on the findings of the Adjudicator, the question arose as to whether ABI, being the respondent, in responding to TVA's adjudication claim, can file a cross claim and if so, whether the cross claim can exceed TVA's claim thereby making ABI the substantive claimant.

The Court of Appeal agreed with parties that ABI can file a cross claim in responding to TVA's claim and agreed with the High Court in **Mudajaya Corporation Bhd v KWSL Builders Sdn Bhd & other cases** [2022] MLJU 1931 that cross claims can only reduce or zeroise TVA's claims:-



[68] *As to whether the cross-claim can exceed the claim we are of the view (subject to our conclusions in paragraphs 79,81, 83 and 84 herein) that the cross-claim can only reduce or zeroise TVA’s claim. We were referred to **Mudajaya Corporation Bhd v KWSL Builders Sdn Bhd & other cases [2022] MLJU 1931** where at paragraph 29 the learned High Court Judge stated as follows:*

“[29] ... Even if it is assumed that a respondent can set off and/or counterclaim against a claimant in an adjudication proceedings based on the same construction contract (which is the basis for the claim in the adjudication proceedings), I am of the view that the respondent, at the most, can only zeroise the claim but cannot counterclaim from the claimant for an amount which exceeds the sum claimed in the adjudication proceedings.

My reasons are as follows:

- (1) the wording in s 6(2) CIPAA only allows a respondent to, at the most, dispute “wholly” the claim in an adjudication proceedings;*
- (2) by virtue of s 27(1) CIPAA, an adjudicator’s jurisdiction is “limited” to matters referred to adjudication by the parties in, among others, the PR. If a respondent, at the most, can only zeroise a claim in an adjudication proceedings under s 6(2) CIPAA, according to s 27(1) CIPAA, the adjudicator cannot then have jurisdiction to adjudicate a counterclaim by the respondent which exceeds the amount in the PC;*
- (3) s 10(1) CIPAA only allows a respondent to serve an AR which “shall answer” an AC. There is nothing in s 10(1) CIPAA which permits a respondent to counterclaim from the claimant for a sum which exceeds the sum claimed in the adjudication proceedings; and*
- (4) the Object (CIPAA) is to assist the cashflow of parties who have performed construction work. It is not the purpose of CIPAA to enable parties to claim for damages for breach of construction contracts and/or torts regarding construction work. The Object (CIPAA) is not attained if a respondent is permitted to counterclaim from the claimant for a sum which exceeds the amount claimed in the adjudication proceedings.*



This is because if an adjudicator is allowed to adjudicate a respondent's counterclaim sum which is in excess of the amount claimed in the adjudication proceedings, this will result in a protracted and costly adjudication proceedings."

*[69] We agree with and approve the reasoning of the High Court as set out above and find them to be cogent reasons supported by legal basis as to why a cross-claim can only reduce or zeroise a claim. Other than the legal basis, the object of CIPAA as per its preamble to facilitate regular and timely payment and as is usually said, to ease the cash flow, will not be attained. Protracted and costly adjudication proceedings will ensue when a cross-claim in excess of the claim is allowed. **The efficacy of adjudication proceedings will be frustrated.** Under the circumstances, ABI can never be the substantive claimant."*

[Emphasis added]

The Court of Appeal also held that the cross claim by ABI must be within the jurisdiction of the Adjudicator pursuant to Section 27(1) of CIPAA 2012, in which the Adjudicator must only adjudicate the subject matter pursuant to Section 5 (Payment Claim) and Section 6 (Payment Response) of CIPAA 2012.

The Court of Appeal observed that the Payment Claim was premised on total value of work done in Phase 1 of the Contract and the Payment Response was premised on failure to observe and perform the contractual obligations and duties. In this regard, the Court of Appeal held as follows:-

*"[78] Even if was for negligence, **it arose out of the same transaction and is closely connected with the payment claim for the installation work.** In equity, ABI has a right to set off the cross-claim where it arises out of the same transaction..."*

[79] We find that ABI would have satisfied the requirement of connection between the claim and cross-claim as both are related to the claim on completion of work and arises from the same Contract. It would also be unjust that ABI would have to incur the cost arising from TVA's negligence. This is subject to the cross-claim not exceeding the claim"

[Emphasis added]

Despite finding that the Adjudicator has exceeded its jurisdiction by finding that there is an outstanding amount of RM7,830.00 due to ABI, the Court of Appeal dismissed TVA's appeal on the ground that the "excess of jurisdiction" was not pleaded in the setting aside application and was also not raised in the Memorandum of Appeal:-



***“[83] In this instance, there was jurisdiction for the Adjudicator to consider the issue of cross-claim but not to render an award where the cross-claim exceeded the claim itself. Although we had allowed the issue of whether the cross-claim can exceed the claim as a legal point to be raised, this ultimately resulted in an excess of jurisdiction situation, which ground however, was not pleaded for a setting aside.*”**

[84] Further, the issue of excess of jurisdiction was not raised in the Memorandum of Appeal.

[Emphasis added]

Arising from the above, the Court of Appeal dismissed both the appeals with costs.

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) Crossclaim can only reduce or zeroise the Claimant’s claim but cannot to exceed the sum claimed in the Payment Claim;
- (b) An adjudicator would have exceeded his / her jurisdiction by awarding a net amount in for a crossclaim, raised in response to the Payment Claim; and
- (c) A quotation is a valid proof of damages in adjudication and the adjudicator’s reliance of the same *“does not amount to fraud”*.

If you have any questions or comments on this article, please contact:-

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