

Puncak Niaga Construction Sdn Bhd

v

Mersing Construction & Engineering Sdn Bhd

Court of Appeal – Civil Appeal No. W-02(C)(A)-98-01/2021
Azizah Nawawi, S Nantha Balan and Ahmad Zaidi Ibrahim JJCA

August 8, 2022

***Contract** – Adjudication decision – Setting aside – Respondent unilaterally rectified interim payment claim without getting it certified from appellant as per contract – Whether adjudicator exceeded jurisdiction by adjudicating upon rectified claims – Whether rectified claims could be construed as new claims – Construction Industry Payment and Adjudication Act 2012, ss 4, 5, 5(1), (2), 9, 15(d), 25(m), (n)*

The appellant in Appeal Nos. W-02(C)(A)-98-01/2021 ("appeal 98") and W-02(C)(A)-100-01/2021 ("appeal 100") had filed two separate appeals against the decisions of the High Court dated December 24, 2020 dismissing its application under s 15(d) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") to set aside the decision of the adjudicator dated August 4, 2020 made in favour of the respondent ("adjudication decision"); and allowing the respondent's application and granting an order to enforce the adjudication decision. Pursuant to a letter of award dated August 30, 2016 ("LOA"), the appellant had appointed the respondent as a subcontractor for a project in Kuala Lumpur ("project"). It was common ground that the LOA constituted the construction contract for purposes of s 4 of the CIPAA. The respondent served a payment claim dated January 21, 2020 for a sum of RM2,723,839.04 (excluding interest) ("payment claim") per s 5 of the CIPAA for inter alia failing to pay for the work done, delayed payments etc. The appellant did not serve any payment response. The respondent then issued a notice of adjudication on February 12, 2020 pursuant to s 9 of the CIPAA and commenced adjudication proceedings against the appellant ("adjudication proceedings"). The said interim claims were not certified and unpaid by the appellant. The respondent later discovered that there were errors in the interim claims ("impugned items") which it unilaterally rectified without resubmitting them to the appellant for verification/certification as per the terms and conditions of the LOA. In support of its appeal, the appellant contended that since the respondent had bypassed the claims verification/certification process according to the terms and conditions of the LOA, these claims were premature and are therefore, not due. Hence, the respondent was not an "unpaid party" and the appellant

1 was not a non-paying party as per s 4 of the CIPAA. Essentially, the adjudicator had exceeded his jurisdiction in adjudicating the impugned items contained in the rectified claims.

5 The respondent in turn contended that the adjudicator did have the necessary jurisdiction to adjudicate upon claim including the impugned items which had been stated in the payment claim. The impugned items had in substance been submitted by the respondent as part of the previous
10 interim progress claims to be certified by the appellant. Further, given that the payment claim came within the requirements of s 5(1) and (2) of the CIPAA, the payment claim is valid rendering the respondent to be an "unpaid party" under the CIPAA.

15 **Issue(s)**

1. Whether the adjudicator exceeded his jurisdiction by adjudicating upon
20 the rectified claims.

2. Whether the rectified claims could be construed as new claims.

Held, dismissing appeal 98 and appeal 100; appellant to pay costs of
25 RM20,000.00 subject to allocatur in respect of appeal 98 and no order as to costs for appeal 100

1. (a) A payment claim based on claims which are premature and not due
30 (*in futuro*) are not claims which comply with the definition of payment claim as per s 5 of the CIPAA. However, that was not the case in the present matter. As was held in *Syarikat Bina Darul Aman Bhd & Anor (collectively referred to as BDB-Kery (joint venture)) v Government of Malaysia* [2017] 4 AMR 477, "... Once he has the
35 jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced". Thus, the adjudicator's decision relating to the particular claim does not
40 go to the jurisdiction of the adjudicator but is one which concerns the merits of respondent's claim. This involves the exercise of power by the adjudicator under s 25(m) and (n) of the CIPAA by which the adjudicator may review or revise any certificate to be issued or to decide or declare on any matter notwithstanding no certificate has been issued. As the respondent's progress claim and the interim payment certificates were not final nor conclusive, any error in the progress claims was capable of being rectified by the respondent before the completion of works under the project. The certification process was not at an end and the same would have attained finality

when the final certificate would have been issued. [see p 255 para 51; p 258 para 61] 1

- (b) In the premises, there would be an element of assessment of judgment in the interim claims and with that the errors will be subject to adjustment and verification. Hence, despite the appellant's non-certification of the respondent's monthly claims, the adjudicator was nevertheless statutorily empowered to adjudicate upon the items which made up the payment claim. It was for the adjudicator to decide whether to allow the whole or any part of the amounts stated in the payment claim. [see p 255 para 52 - p 256 para 52; p 256 para 54; p 258 para 63] 5 10 15

2. The rectified claims were merely a "refinement" of the previously submitted monthly claims. Thus, if it was not a new claim and was merely a refinement of a claim which had previously been submitted to the employer, then it was valid for purposes of adjudication proceedings. A mere refinement or pruning of a claim under a construction contract which had been previously submitted to the employer, and being then included as part of the payment claim, does not constitute a new claim, or pre-mature claim, or in future claim, such that it affects the adjudicator's jurisdiction. Consequently, the appellant's objection vis-à-vis the rectified claims was highly technical and tactical. [see p 256 para 57 - p 257 para 58; p 258 para 64] 20 25 30

Case(s) referred to by the court

AMEC Civil Engineering Ltd v Secretary of State for Transport [2005] BLR 227, CA (UK) (ref) 35

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] 4 AMR 565; [2015] 8 CLJ 728, HC (ref)

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (UK) (ref)

Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA (Civ) 1757, CA (UK) (ref) 40

OSC Building Services Ltd v Interior Dimensions Contracts Ltd [2009] EWHC 248 (TCC), QBD (UK) (ref)

Puncak Niaga Construction Sdn Bhd v Mersing Construction & Engineering Sdn Bhd (and 2 Other Originating Summonses) [2022] 1 AMR 249; [2021] MLJU 1824, HC (ref)

Syarikat Bina Darul Aman Bhd & Anor (collectively referred to as BDB-Kery (joint venture)) v Government of Malaysia [2017] 4 AMR 477; [2018] 4 CLJ 248, HC (ref)

- 1 *Tidalmarine Engineering Sdn Bhd v Conlay Construction Sdn Bhd (and Another Originating Summons)* [2017] 8 AMR 75; [2018] 2 CLJ 376, HC (ref)
Usima Sdn Bhd v Lee Hor Fong (berniaga di bawah nama dan gaya Pembinaan LH Fong) [2017] 6 AMR 652; [2017] 5 MLJ 273, HC (ref)
- 5 *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 8 AMR 167; [2018] 2 MLJ 22, FC (ref)
William Verry (Glazing Systems) Ltd v Furlong Homes Ltd [2005] EWHC 138 (TCC), QBD (UK) (ref)
- 10 *Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC); [2011] CILL 3090; 139 Con LR 1; [2011] BLR 707; [2011] TCLR 8, QBD (UK) (ref)

15 **Legislation referred to by the court**

Malaysia

- Construction Industry Payment and Adjudication Act 2012, ss 4, 5, 5(1), (2),
20 (2)(a), (b), 6, 9, 10, 15, 15(d), 25(m), (n), 27, 27(1)

Solicitors

- Tan Tiam Poh* (Belden) for appellant
- 25 *Alvin Lai Kok Wing and Pang Kwong Hang* (Justin Voon Chooi & Wing) for respondent

- Appeal from High Court, Kuala Lumpur – Originating Summons No. WA-24C-181-08/2020*
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Judgment received: September 21, 2022

35 **S Nantha Balan JCA** (*delivering the judgment of the court*)

The issue

- 40 [1] In Appeal No. W-02(C)(A)-98-01/2021 ("appeal 98"), Puncak Niaga Construction Sdn Bhd ("Puncak Niaga") is appealing against the decision of the learned judge ("judge") dated December 24, 2020 dismissing Puncak Niaga's application under s 15(d) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") to set aside the decision of the learned adjudicator ("adjudicator") dated August 4, 2020 made in favour of Mersing Construction & Engineering Sdn Bhd ("Mersing") (Adjudication Ref No. AIAC/D/ADJ-3070-2020) ("adjudication decision") via Originating Summons No. WA-24C-181-08/2020 ("OS 181"). The application to set aside the adjudication decision was predicated on the grounds that the adjudicator had exceeded his jurisdiction.

[2] In this case, Mersing's payment claim under the CIPAA consisted of inter alia, interim claims which had been previously submitted to Puncak Niaga as per the terms and conditions of the construction contract between Mersing and Puncak Niaga for certification and payment. But, the said interim claims were not certified and not paid by Puncak Niaga. Mersing then discovered that there were errors in the interim claims. They unilaterally rectified the amounts stated in the interim claims without resubmitting them to Puncak Niaga for verification/certification as per the terms and conditions of the underlying construction contract.

[3] Puncak Niaga contends that Mersing cannot bypass the claims verification/certification process as per the terms and conditions of the construction contract and pursue these claims as part of the payment claim under the CIPAA. Puncak Niaga contends that since Mersing had bypassed the claims verification/certification process as per the terms and conditions of the construction contract, these claims are "*premature*" and are therefore not due. As such, Mersing is not an "*unpaid party*" and Puncak Niaga is not a "*non-paying party*" as defined in s 4 of the CIPAA.

[4] There is another appeal before us, namely, Civil Appeal No. W-02(C)(A)-100-01/2021 ("appeal 100") by which Puncak Niaga is appealing against the decision of the High Court dated December 24, 2020 in Originating Summons No. WA-24C-182-08/2020 ("OS 182") in allowing the application by Mersing and granting an order to enforce the adjudication decision. It follows that if appeal 98 is dismissed, then appeal 100 shall likewise be dismissed, and vice versa.

[5] Based on the adjudication claim, the adjudicator decided that:

- (a) Puncak Niaga is to pay to Mersing:
 - (i) the sum of RM2,549,140.57 ("adjudication amount"); and
 - (ii) the cost of the adjudication proceeding comprising an amount of RM19,205.73 for the adjudicator's fee and expenses, Asian International Arbitration Centre's ("AIAC") administrative fee and sales and service tax and RM10,000 being Mersing's cost of preparation for the adjudication; and
- (b) the adjudication amount and the cost of the adjudication proceeding ("adjudicated sum") shall be paid by Puncak Niaga to Mersing on or before August 18, 2020.

[6] The judgment of the High Court pertaining to the judge's decision to dismiss OS 181 and in allowing OS 182 is reported as *Puncak Niaga Construction Sdn Bhd v Mersing Construction & Engineering Sdn Bhd*

1 (*and 2 Other Originating Summonses*) [2022] 1 AMR 249; [2021] MLJU 1824,
HC.

[7] On August 8, 2022, we dismissed appeal 98 with costs of RM20,000.
5 Consequently, we also dismissed appeal 100. We made no order as to costs in
respect of appeal 100. These are our reasons for dismissing appeal 98. For
convenience, we shall refer to the appellant and respondent in appeal 98 as
"Puncak Niaga" and "Mersing" respectively.

10 **The facts**

[8] Pursuant to a letter of award dated August 30, 2016 ("LOA"),
Puncak Niaga appointed Mersing as a sub-contractor under a project known
15 as "Pakej D44 – Pembinaan Rangkaian Paip Pembetulan di Bunus, Kuala
Lumpur" ("the project") for an original contract sum of RM74,691,666.34 and
which was adjusted to RM75,017,396.34 through a certificate of variation of
works No. 1. It is common ground that the LOA constitutes a "Construction
20 Contract" for purposes of s 4 of the CIPAA.

Terms of the LOA

25 [9] The contractual terms relating to submission of claims for certification
and payment per the LOA are as follows:

8.1 The Sub-Contractor shall submit to the Main Contractor its claim for Works
done on a monthly basis (on or before 25th of each calendar month). The
30 claim must include a detailed breakdown of the particulars of the
Sub-Contractor's claim and supported by the relevant and appropriate
invoices, documentation, etc. Any item of claim lacking in particulars can be
rejected by the Main Contractor.

35 8.2 The P.D. or his authorized representative shall verify the sub-contractor's
claim and certify if the Sub-Contract Works have been properly executed by
the Sub-Contractor within 14 working days from the complete submission of
the sub-contractor progress claim. The certification by the P.D. or his
40 authorized representative shall be based on and upon the valuation and
measurement of the Sub-Contract Works by the employer i.e. Jabatan
Perkhidmatan Pembetulan (PP).

8.3 All progress payments shall be subject to the provisions of Clause 9.0 below.

8.4 Payment shall be made to the Sub-Contractor within 30 days from main
contractor's certification of the Sub-Contractor's claims.

8.5 To facilitate cashflow of the Sub-Contractor and upon request by the
sub-contractor, the main contractor may, at its absolute discretion, consider
and allow the sub-contractor to submit fortnightly progress claim and the
Main Contractor will verify and certify the Sub-Contractor's claims within

seven (7) working days from the complete submission of the Sub-Contractor's claims and make payment within two (2) weeks after the said certification. For avoidance of doubt, in the event main contractor rejects the Sub-Contractor's submission of fortnightly progress claims, this decision shall not be held against the main contractor under this Sub-Contract.

The CIPAA provisions

[10] The following provisions of the CIPAA are relevant for the present purposes:

4. *Interpretation*

"non-paying party" means a party against whom a payment claim is made pursuant to a construction contract;

"payment" means a payment for work done or services rendered under the express terms of a construction contract;

"unpaid party" means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

5. *Payment claim*

(1) An *unpaid party* may serve a *payment claim* on a *non-paying party* for payment pursuant to a construction contract.

(2) The payment claim shall be in writing and shall include –

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

6. *Payment response*

(1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.

(2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.

(3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.

- (4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

15. *Improperly procured adjudication decision*

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

- (a) the adjudication decision was improperly procured through fraud or bribery;
- (b) there has been a denial of natural justice;
- (c) the adjudicator has not acted independently or impartially; or
- (d) *the adjudicator has acted in excess of his jurisdiction.*

25. *Powers of the adjudicator*

The adjudicator shall have the powers to –

- (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;
- (b) order the discovery and production of documents;
- (c) set deadlines for the production of documents;
- (d) draw on his own knowledge and expertise;
- (e) appoint independent experts to inquire and report on specific matters with the consent of the parties;
- (f) call for meetings with the parties;
- (g) conduct any hearing and limiting the hearing time;
- (h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;
- (i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;
- (j) issue any direction as may be necessary or expedient;
- (k) order interrogatories to be answered;
- (l) order that any evidence be given on oath;
- (m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

- (n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter; 1
- (o) award financing costs and interest; and
- (p) extend any time limit imposed on the parties under this Act as reasonably required. 5

27. *Jurisdiction of adjudicator*

- (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.* 10
- (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. 15
- (3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1). 20

Mersing's payment claim

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[11] Mersing served a payment claim dated January 21, 2020 for a sum of RM2,723,839.04 (excluding interest) ("the payment claim") per s 5 of the CIPAA. Puncak Niaga did not serve any payment response. The brief details of the payment claim (consisting of 26 claim items) are as stated in the table at pp 3 to 8 attached to Mersing's letter dated January 21, 2020. 30

[12] The payment claim was predicated on the following complaints: 35

- a. Puncak Niaga failed to make payment for work done and certified in IPC No. 35, and thereby contravening Section 8.4 of the letter of award which requires Puncak Niaga to make payment within 30 days of their certification of Mersing claim; 40
- b. Puncak Niaga breached Section 8.4 of the LOA by paying beyond the due date on some of the past interim payment certificates;
- c. Puncak Niaga failed to issue IPC Nos. 36, 37, 38, 39 and 40, corresponding to Mersing's monthly interim payment claims Nos. 38, 39, 40, 41 and 42 submitted on 25 August, September, October, November and December 2019 respectively;
- d. According to Mersing, Puncak Niaga's non-certification is a breach of Section 8.2 of the LOA which requires them to certify Mersing's claim within 14 days of their interim monthly submissions.

1 **Mersing's notice of adjudication**

[13] Mersing then issued a notice of adjudication on February 12, 2020 pursuant to s 9 of the CIPAA and commenced adjudication proceedings
5 against Puncak Niaga ("the adjudication proceedings").

[14] Mersing's claim included 26 claim items, for works related to pipe jacking, jacking in the rock, pit, rock excavation, manhole construction, mill and pave, relocation of TNB cable, CCTV inspections, varied works (under
10 certificate of variation of works No. 1) and sewer connection. I turn now to the problem at hand. They relate to five (5) out of the 26 items under the payment claim.

15 **The problem**

[15] The problem here is confined to items 12, 13, 14, 20 and 21 ("the impugned items") of the payment claim. There is no dispute that
20 Mersing had previously submitted the impugned items to Puncak Niaga as part of the monthly claims. But *Puncak Niaga never certified the impugned items*. And no payment was made in respect of the impugned items.

[16] Thereafter, Mersing discovered that there were errors in the amounts claimed in the impugned items. But they did not re-submit the impugned
25 items per clause 8.1 of the LOA. At any rate, it was necessary for the amounts in the impugned items to be rectified because of the errors in the amounts which had been previously submitted by Mersing as part of the monthly
30 claims. Mersing unilaterally made the necessary corrections and presented the impugned items as part of the payment claim. The erroneous amounts and the rectified amounts were properly identified in the payment claim. The
35 value of the impugned items is RM93,577.70. They shall be referred to either as "*the impugned items*" or "*the rectified claims*".

Puncak Niaga's adjudication response

40 [17] In their adjudication response dated June 3, 2020 (per s 10 of the CIPAA), Puncak Niaga took the following position in regards to the rectified claims:

Rectification of Sums Claimed in Progress Claim in Payment Claim

41. Further to the above, the Claimant had also acknowledged in both its Payment Claim and Adjudication Claim that some of the sums it is pursuing in this adjudication are in fact sums that are arising from mistakes

in the previous Progress Claims submitted by the Claimant and only corrected in the Payment Claim. They relate to the following items of claim:

	<i>Claimed Item in Adjudication</i>		<i>Claimed Sum in Adjudication (RM)</i>	<i>Remarks made by Respondent</i>
a.	Claim item No. 12	Pit at MH3-3B-1	17,476.00	Mistake in IPA 30, rectified in this payment claim
b.	Claim item No. 13	Rock excavation at Pit at MH3-8D	65,514.90	Mistake in IPA 38, rectified in this payment claim
c.	Claim item No. 14	Manhole Construction for MH3-49	4,918.80	Mistake in IPA 39, rectified in this payment claim
d.	Claim item No. 20	CCTV Inspections at MH3-37D to MH3-38D	2,835.00	Mistake in IPA 29, rectified in this payment claim
e.	Claim item No. 21	CCTV Inspections at MH3-38D to MH3-39D	2,833.00	Mistake in IPA 29, rectified in this payment claim
	<i>Total</i>		<i>93,577.70</i>	

42. With regards to the above, it is clear by the Claimant's own admission that the rectification to the claims are only made in the Payment Claim itself. Therefore, prior to the Claimant's submission of its Payment Claim, the Claimant had never submitted the corrected claims to the Respondent for certification and payment at any material point in time.
43. Under the circumstances, the Claimant cannot be said to be an unpaid party within the definition of Section 4 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") in respect of the abovementioned claims totalling the sum of RM93,577.70.
44. Therefore, these claims ought to be dismissed by the Learned Adjudicator in any event as they are brought prematurely to adjudication.

1 Puncak Niaga's objection

[18] The gravamen of Puncak Niaga's objection vis-à-vis the adjudicator's jurisdiction is that the impugned items consisted of claim amounts which Mersing had unilaterally "rectified" without any prior reference to Puncak Niaga. Essentially, Puncak Niaga's complaint is that the adjudicator exceeded his jurisdiction in adjudicating on the rectified claims. Puncak Niaga contends that the rectified claim should have been first submitted to them per clause 8.1 of the LOA.

[19] Puncak Niaga's complaint is that the rectified claims were never presented to Puncak Niaga for certification and payment at any point in time prior to Mersing's issuance of the payment claim and was only corrected or rectified via the payment claim, thus *bypassing* the said contractually agreed claim and certification process.

[20] Puncak Niaga contended that since Mersing had admitted that the rectified claim was only made for the first time in the adjudication proceedings therefore the rectified claim is one which did not adhere to the contractually agreed claim and certification process per the LOA.

[21] Further, Puncak Niaga contends that when the claimed sum for the respective items in the previous progressive claims is wrong, it necessarily follows that Mersing cannot assert that they are due under the previous progressive claims when they are clearly superseded by the subsequent rectification or correction by Mersing. According to Puncak Niaga, when the sums claimed for the items in the previous progressive claims were wrong, Mersing ought to have first gone back to the contractual claim procedure (clause 8.1 of the LOA) and rectify its claim in the consequent progressive claim.

[22] Thus, according to Puncak Niaga, without doing so, Mersing cannot now make a positive assertion in the payment claim that the sums claimed for the said items were due premised on a calculation which runs from the date of the respective progress claims (which has since been knowingly admitted to be wrong by Mersing).

[23] It was argued that Puncak Niaga's obligation to make payment for the said rectified claim under clause 8.4 of the LOA did not arise and consequently, the due date for such payment did not crystallise nor lapse. Hence, no cause of action accrues in respect of the rectified claim which would entitle Mersing to initiate the adjudication proceedings by filing the payment claim.

[24] Puncak Niaga contended that before any due date for payment arises, there must first be an obligation by Puncak Niaga to make such payment. As such, for Mersing to be entitled to such payment for its work done, Mersing needs to submit its claim (together with a detailed breakdown of the particulars and documentation) to Puncak Niaga for verification. This is in line with the contractually agreed claim and certification process under clause 8 of the LOA. And if Mersing fails to comply with clause 8 of the LOA, then Puncak Niaga has the contractual right to reject the claims.

[25] Consequently, Puncak Niaga maintains that Mersing is *not* an "unpaid party" for purposes of s 4 of the CIPAA which prescribes that it has to be a "party who claims payment of a sum which has not been paid in whole or in part under a construction contract". And under s 5(1) of the CIPAA, only an "unpaid party" can serve a payment claim on the "non-paying party". According to Puncak Niaga, Mersing is not an "unpaid party" vis-à-vis the rectified claims.

[26] In the circumstances, Puncak Niaga contends that there is *no payment dispute* between Puncak Niaga and Mersing since a payment dispute is predicated upon a request for payment and a denial of it. In the present case, there is no request for payment as the rectified claims were never made nor presented by Mersing to Puncak Niaga.

[27] As such, a payment dispute did not crystallise which would entitle Mersing to commence the adjudication proceedings. Consequently, Puncak Niaga maintained that Mersing had improperly and prematurely commenced the adjudication proceedings, by way of an invalid payment claim, which consisted of the rectified claims. Thus, Puncak Niaga took the position that the adjudicator acted beyond the prescribed parameters laid down in s 27 of the CIPAA when he considered the rectified claims. This, according to Puncak Niaga, constitutes an excess of jurisdiction within the meaning of s 15(d) of the CIPAA.

Mersing's response

[28] It was submitted on behalf of Mersing that adjudicator's jurisdiction is derived from matters referred to adjudication by the parties through the payment claim (s 5 of the CIPAA) and the payment response (s 6 of the CIPAA). Therefore, on the face of the facts herein, the adjudicator did in fact have the necessary jurisdiction to adjudicate upon claim including the impugned items which had been stated in the payment claim. The impugned items had in substance been submitted by Mersing as part of the previous interim progress claims to be certified by Puncak Niaga.

[29] In essence, claim item Nos. 12, 13, 14, 20 and 21 are related to the following interim progress claims which had been previously submitted by

1 Mersing to Puncak Niaga. It was submitted that based on the payment claim,
it can be clearly seen that what is sought to be rectified in the payment claim
is to adjust and reduce the claim amounts in the progress claims submitted
by Mersing previously as can be summarised as follows:

5 (i) Item No. 12: the amount claimed in interim claim No. 30 has been
reduced from RM42,320 to RM17,476;

10 (ii) Item No. 13: the amount claimed in interim claim No. 38 has been
reduced from RM109,761.30 to RM65,514.90;

15 (iii) Item No. 14: the amount claimed in interim claim No. 39 has been
reduced from RM43,042 to RM30,744;

(iv) Item No. 20: the amount claimed in interim claim No. 29 has been
reduced from RM2,910 to RM2,835; and

20 (v) Item No. 21: the amount claimed in interim claim No. 29 has been
reduced from RM2,923 to RM2,883.

25 [30] The rectified/adjusted claim amounts formed parts of the progress
claim previously submitted by Mersing to Puncak Niaga as the actual
quantity/value of the work had been adjusted and reduced and are not
completely new claims. Further, since the "rectified claims" or "amount
30 claimed" are for a lower sum compared to the sum claimed through the
progress claims, it was submitted that Puncak Niaga is not prejudiced in any
way.

35 [31] The adjudicator ruled that it is acceptable for Mersing to have the errors
rectified in the payment claim and the fact that errors were made in the
progress claims did not preclude Mersing from making a claim under the
CIPAA nor did it disqualify Mersing as an unpaid party within the definition
of s 4 of the CIPAA.

40 [32] The impugned items were due for payment when the payment claim
was served on January 21, 2020. Counsel focused on the words "unpaid
party" and "non-paying party" as defined in s 4 of the CIPAA. An "*unpaid
party*" means a party who claims payment of a sum which has not been paid
in whole or in part under a "construction contract". A "*non-paying party*"
means a party against whom a payment claim is made pursuant to a
"*construction contract*".

[33] The word "*payment*" is defined under s 4 of the CIPAA as "*a payment for
work done or services rendered under the express terms of a construction contract*".
There is no dispute that Mersing did undertake work for the benefit of
Puncak Niaga pursuant to a construction contract (i.e. the LOA).

[34] Therefore, it was submitted that Mersing is an "unpaid party" as defined under s 4 of the CIPAA, and Puncak Niaga is a "non-paying party" who was served with a valid payment claim. In the present case, the payment claim came within the requirements of s 5(1) and (2) of the CIPAA as the cause of action has been identified by Mersing in the payment claim including the "amount claimed" and due date for payment of the amount claimed. Therefore, the payment claim is valid and this renders Mersing to be an "unpaid party" under the CIPAA.

[35] Counsel made reference to the decision of the High Court in *Tidalmarine Engineering Sdn Bhd v Conlay Construction Sdn Bhd (and Another Case)* [2017] 8 AMR 75; [2018] 2 CLJ 376, HC, at p 92 (AMR); p 392 (CLJ) where Justice Lee Swee Seng (as he then was) said:

[80] Once a payment claim comes within the requirements of s. 5(2) CIPAA with respect to a construction contract, then the adjudicator would have the jurisdiction to adjudicate the dispute. A claim premised on a statement of final accounts issued by the superintending officer though disputed by the respondent as a non-paying party would be within the jurisdiction of the adjudicator to decide based as it is on the meaning of a "payment claim" being a claim for work done or services rendered under the express terms of a construction contract and further capable of fulfilling the requirements of s. 5(2) CIPAA.

[36] Thus, it was submitted for Mersing that the adjudicator has been clothed with the necessary jurisdiction as there exists a valid payment claim in relation to a construction contract under the CIPAA. Reference was made to the Federal Court's decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 8 AMR 167; [2018] 2 MLJ 22, FC, p 185 (AMR); p 41 (MLJ) where the Federal Court held:

[53] The significance of the divide between "jurisdiction" and "powers" lies in the fact that "jurisdiction" relates to "the types of subject matter which the court may deal with" whereas its powers may be exercised only in relation to that jurisdiction ... As long as the claim items have been identified in the Payment Claim, the Adjudicator will have the jurisdiction to consider the claim.

[37] By s 27(1) of the CIPAA, the arbitrator's jurisdiction "is limited to the matter referred to adjudication" pursuant to ss 5 and 6 of the CIPAA. It refers to the "identification of the cause of action" in relation to the construction contract as required under s 5(2)(b) of the CIPAA. In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA. Counsel emphasised that s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the "cause of action" identified by the claimant by reference to the applicable clause of the construction contract.

[38] Thus, if the payment claim relates to progress claim No. 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No. 28. It was submitted for Mersing that the adjudication decision relating to the rectified claims did not go to the jurisdiction of the adjudicator, but relates only to the merits of Mersing's claim and/or the exercise of the adjudicator's powers under s 25(m) and/or (n) of the CIPAA i.e. to review and revise any certificate to be issued, or to decide or declare on any matter notwithstanding that no certificate has been issued.

[39] According to counsel for Mersing, both progress claims and interim certificates are neither final nor conclusive, and any error of the sum claimed in the progress claims can be rectified by Mersing at any time before full completion of the works and issuance of the final certificate. In this case, the works under the project have not been fully completed. As rightly pointed out by the adjudicator (at paragraph [118] of the adjudication decision) the certification process has not been concluded until the final certificate is issued, and progress claims and interim progress claims are interim in nature and the errors in the progress claims submitted by Mersing are subject to review and correction. See *Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong)* [2017] 6 AMR 652; [2017] 5 MLJ 273, HC.

[40] Thus, counsel for Mersing argued that the adjudicator clearly has power to "review and revise" under s 25(m) of the CIPAA to assess the work done by Mersing and Puncak Niaga's objection is really a challenge on the merits of the adjudication decision which was made by the adjudicator within his jurisdiction. In short, there is no excess of jurisdiction by the adjudicator.

[41] Counsel referred to *Syarikat Bina Darul Aman Bhd & Anor v Government of Malaysia* [2017] 4 AMR 477; [2018] 4 CLJ 248, HC (at p 489 (AMR); p 259 (CLJ)) where the High Court said:

[48] *The powers under s. 25 are vast powers granted to an adjudicator so that he can decide on a dispute effectively and efficiently. Before he can exercise any of the powers given to him under s. 25, he must first have the jurisdiction to hear the dispute under s. 27. Once he has the jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced. There is nothing to state that he can only exercise his powers upon request of the parties either in their payment claim as in this case when there was no prayer for the certificate to be reviewed or revised. For instance his power under s. 25(b) to order the discovery and production of documents need not be premised upon an application by a party but that he may on his own initiative do so consistent with his powers under s. 25(i) to inquisitorially take the initiative to ascertain the facts and the law required for the decision. (Emphasis added.)*

[42] Thus, counsel for Mersing submitted that although Puncak Niaga is relying on s 15(d) of the CIPAA, Puncak Niaga's contentions largely revolve around the actual merits of the case and not on the issue of "jurisdiction" of the adjudicator. In this regard, counsel for Mersing argued that the courts should not delve into the merits of the case to review the adjudication decision because an application under s 15 of the CIPAA is not an appeal, and whether or not adjudicator has erred in his findings is irrelevant and does not amount to a valid and/or sufficient ground to set aside nor stay the adjudication decision. See *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 4 AMR 565; [2015] 8 CLJ 728, HC at pp 571-572 (AMR); p 733 (CLJ).

[43] Counsel for Mersing referred to s 5 of the CIPAA which provides that:

5. *Payment Claim*

- (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
- (2) The payment claim shall be in writing and shall include –
 - (a) the amount claimed and due date for payment of the amount claimed;
 - (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
 - (c) description of the work or services to which the payment relates; and
 - (d) a statement that it is made under this Act. (Emphasis added.)

[44] The only complaint by Puncak Niaga here is that the rectified claim in the payment claim is not "the amount claimed" as provided in s 5(2)(a) of the CIPAA. Counsel said that there is no definition of the words "amount claimed" in the CIPAA. Thus, "the amount claimed" includes any part of the amount already claimed by the claimant/unpaid party from the non-paying party prior to the payment claim being served on the non-paying party. Pursuant to s 5(1) of the CIPAA, a payment claim can only be served by an "unpaid party" on a "non-paying party". Both "unpaid party" and "non-paying party" have been defined in s 4 of the CIPAA. Since an "unpaid party" can claim for payment of a sum which has not been paid in whole or in part under a construction contract, it was submitted that the unpaid party is entitled to claim for a part of the amounts claimed in the payment claim or make a partial claim in the payment claim.

[45] In this case, Mersing (unpaid party) included the partial sums of the amounts already claimed in the previous progress claim i.e. claim item Nos. 12, 13, 14, 20, 21 and 22 into the payment claim. Thus, it was submitted

1 that Mersing as the unpaid party is fully entitled to do so because an unpaid
party can freely choose to claim for a full sum or partial sum of the "amount
claimed".

5 [46] According to counsel for Mersing there is nothing wrong for Mersing to
rectify, refine or reduce the amount claimed in the previous progress claim
and merely make a partial claim in the payment claim and logically, even if
10 an unpaid party included the whole amount claimed in the progress claim
into the payment claim, the adjudicator would still have the jurisdiction and
power to reduce or adjust the amount claimed in the adjudication decision.
Thus, the inclusion of rectified amounts in a payment claim in fact does not
15 invalidate the payment claim, as there is no legal requirement in the first
place that the issuance of a payment claim must be based on exact amounts
claimed by the unpaid party prior to the issuance of the payment claim.
Mersing's position is that an adjustment on the amount claimed should be
20 allowed so long as the claim has been in substance submitted to the
non-paying party prior to the issuance of the payment claim.

High Court

25 [47] In the High Court, the judge agreed with Mersing's contention and
concluded that the rectified claims are not "*new claims*". The judge found that
the rectified claims had been previously submitted to Puncak Niaga as part
of the monthly claims. Puncak Niaga did not certify the monthly claims with
reference to the impugned items. Mersing then discovered that there were
30 errors in the amounts claimed in the impugned items. They then rectified the
amounts claimed in the impugned items and submitted them as part of the
payment claim.

35 [48] The judge's reasons (paragraphs [35]-[41]) for dismissing OS 181 are as
follows:

40 [35] I have perused Schedule 2 – Summary of Outstanding Payments and
Appendices O, P, Q, W and X, which are the relevant documents corresponding to
claim item Nos. 12, 13, 14, 20 and 21, respectively, and I find that these claim items
are related to the interim claims which had been previously submitted by MCE to
Puncak Niaga, namely:

- (a) Claim item No. 12 – interim claim No. 30 submitted on December 31, 2018;
- (b) Claim item No. 13 – interim claim No. 38 submitted on August 25, 2019;
- (c) Claim item No. 14 – interim claim No. 39 submitted on September 25, 2019;
and
- (d) Claim item Nos. 20 and 21 – interim claim No. 29 submitted on December 4,
2018.

- [36] Further, what is sought to be rectified in the payment claim is to adjust and reduce the amounts claimed in the interim claims previously submitted by MCE to Puncak Niaga whereby for: 1
- (a) Claim item No. 12, the amount claimed in interim claim No. 30 has been reduced from RM42,320 to RM17,476; 5
 - (b) Claim item No. 13, the amount claimed in interim claim No. 38 has been reduced from RM109,761.30 to RM65,514.90;
 - (c) Claim item No. 14, the amount claimed in interim claim No. 39 has been reduced from RM43,042 to RM4,918; 10
 - (d) Claim item No. 20, the amount claimed in interim claim No. 29 has been reduced from RM2,910 to RM2,835; and 15
 - (e) Claim item No. 21, the amount claimed in interim claim No. 29 has been reduced from RM2,923 to RM2,883.
- [37] In addition, the summary of payment claim which was attached to the payment claim, shows that the five claim items have been due for payment when the payment claim was served on January 21, 2020, specifically on: 20
- (a) February 14, 2019 for claim item No. 12; 25
 - (b) October 9, 2019 for claim item No. 13;
 - (c) November 9, 2019 for claim item No. 14; and
 - (d) January 18, 2019 for claim item Nos. 20 and 21. 30
- [38] Based on the affidavit evidence, I am satisfied that the amounts claimed in claim item Nos. 12, 13, 14, 20 and 21 are not completely new claims but they form part of the interim claims which had previously been submitted by MCE to Puncak Niaga as the value of works completed. It is observed that for claim item No. 14, a sum of RM25,825.20 was certified in IPC No. 32 and paid by Puncak Niaga. 35
- [39] MCE has merely rectified the errors in the amounts as stated in interim claim Nos. 29, 30, 38 and 39, in the payment claim. The adjudicator has rightly decided that it is acceptable for MCE to have the errors corrected in the payment claim and the fact that errors were made in the progress claims does not preclude MCE from making a claim under the CIPAA. Progress claims and interim certificates are neither final nor conclusive and the adjudicator has the power to review and revise any certificate issued or to be issued under s 25(m) of the CIPAA and to decide or declare on any matter notwithstanding that a certificate has not been issued under s 25(n) of the CIPAA (see *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] 4 AMR 565). 40
- [40] I am thus satisfied that MCE is an "unpaid party" and Puncak Niaga is a "non-paying party" as defined under s 4 of the CIPAA and that the requirements

of subsection 5(1) and (2) of the CIPAA as to what constitutes a payment claim have been fulfilled.

[41] In the upshot, this court accepts the submissions by MCE that the adjudicator did not act in excess of his jurisdiction when he considered MCE's rectified claims in relation to claim item Nos. 12, 13, 14, 20 and 21 in the adjudication proceedings.

Our decision

[49] The question here is whether, the adjudicator exceeded his jurisdiction for having adjudicated on Mersing's payment claim which included the rectified claims. At the outset, we may state that it is our finding that the payment claim that was submitted by Mersing is not premature and comes within s 5(2) of the CIPAA as it is in respect of claims which are due under a construction contract.

[50] As such, the adjudicator has the requisite jurisdiction to deal with and determine the claim on its merits. The rectified claims were part of the payment claim and there are therefore within the jurisdiction of the adjudicator.

[51] Of course, a payment claim which is based on claims which are premature and not due (in futuro) are not claims which comply with the definition of payment claim per s 5 of the CIPAA. But that is not the case here. As the High Court observed in *Syarikat Bina Darul Aman Bhd* (supra), "... Once he has the jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced." Consequently, the adjudicator's decision relating to the particular claim does not go to the jurisdiction of the adjudicator but is one which concerns the merits of Mersing's claim. This involves the exercise of power by the adjudicator under s 25(m) and (n) of the CIPAA by which the adjudicator may review or revise any certificate to be issued or to decide or declare on any matter notwithstanding no certificate has been issued. Mersing's progress claim and the interim payment certificates are not final nor conclusive. As such, any error in the progress claims is capable of being rectified by Mersing before the completion of works under the project. The certification process is not at an end and attains finality when the final certificate is issued.

[52] Therefore, as rightly submitted by Mersing, as these are interim claims, the amount cannot always be a wholly exact exercise as at that stage, there will be an element of assessment of judgment and with that the errors will be subject to adjustment and verification. Here, Mersing made the necessary adjustments and rectified the impugned items and presented it as part of the

payment claim. We agree that this does not go to the jurisdiction of the adjudicator.

[53] In this regard, if in the ordinary course, the monthly claims which had been submitted by Mersing had been verified and certified by Puncak Niaga per clause 8.1 of the LOA, then errors may have been picked up by Puncak Niaga. But that did not happen as the monthly claims were just not certified. The employer's failure or refusal to certify the claim does not take the matter out of the ambit of the CIPAA. There is no doubt at all that in the adjudication proceedings, the adjudicator has statutory power under s 25(m) to "review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute" and under s 25(n) to "decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter".

[54] Hence, despite Puncak Niaga's non-certification of Mersing's monthly claims, the adjudicator is nevertheless statutorily empowered to adjudicate upon the items which make up the payment claim. It is for the adjudicator to decide whether to allow the whole or any part of the amounts stated in the payment claim.

[55] It was contended on behalf of Puncak Niaga that since Mersing had bypassed the claims submission and verification route via clause 8.1 of the LOA, there was no amount that was due and Mersing had no cause of action vis-à-vis the impugned items. There is no merit in this argument. In our view, given the circumstances of non-certification and non-payment by Puncak Niaga, the full details of claim have been stipulated in the payment claim, it is clear that Mersing was "unpaid party" and Puncak Niaga a "non-paying party" under the CIPAA, entitling Mersing to lodge a payment claim under the CIPAA, albeit part of it consisted of the rectified claim.

[56] It is quite obvious that the rectified claim relates to work done, for which claims had previously made to Puncak Niaga which were not certified. Thus, when the rectified claim was made as part of the payment claim, *they were not new claims* but a *scaled down version of an earlier claim* which contained erroneous figures. Puncak Niaga's objection is that the impugned items consisted of claim amounts which Mersing had unilaterally "rectified" without any prior reference to Puncak Niaga. The "rectification" of the amounts was due to errors in the amounts previously claimed by Mersing in the monthly claims. The value of the five items is RM93,577.70.

[57] In our view, the rectified claims were merely a "refinement" of the previously submitted monthly claims. Thus, if it is not a new claim and is merely a refinement of a claim which had previously been submitted to the

1 employer, then it is valid for purposes of adjudication proceedings. See
2 *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* [2005] EWHC 138
3 (TCC), and *OSC Building Services Ltd v Interior Dimensions Contracts Ltd* [2009]
4 EWHC 248 (TCC).

5 [58] In the context of the present appeal it is I think relevant to refer to the
6 decision of the English High Court in *Witney Town Council v Beam*
7 *Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC); [2011] CILL 3090; 139
8 Con LR 1; [2011] BLR 707; [2011] TCLR 8, HC where Akenhead J said that the
9 refinement of a pre-existing dispute does not take that dispute out of the
10 jurisdiction of the adjudicator. This is how the judge put it:

11 23. In some cases, a referring party might decide to cut out of the reference some
12 of the pre-existing matters in dispute and to confine the referred dispute to
13 something less than the totality of the matters then in dispute. *So long as that*
14 *exercise does not transform the pre-existing dispute into a different dispute, such a*
15 *pruning exercise is clearly permissible.*

16 However, a party cannot unilaterally tag onto the existing range of matters in
17 dispute a further list of matters not yet in dispute and then seek to argue that the
18 resulting "dispute" is substantially the same as the pre-existing dispute.

19 [59] In the same case Justice Akenhead made reference to *Cantillon Ltd v*
20 *Urasco Ltd* [2008] EWHC 282 (TCC), *AMEC Civil Engineering Ltd v Secretary*
21 *of State for Transport* [2005] BLR 227 and *Collins (Contractors) Ltd v Baltic Quay*
22 *Management (1994) Ltd* [2004] EWCA (Civ) 1757 on "how and when a dispute
23 can arise". Based on these cases, Justice Akenhead drew the following
24 propositions:

25 (a) *Courts (and indeed adjudicators and arbitrators) should not adopt an over*
26 *legalistic analysis of what the dispute between the parties is.*

27 (b) *One does need to determine in broad terms what the disputed claim or*
28 *assertion (being referred to adjudication or arbitration as the case may be) is.*

29 (c) *One cannot say that the disputed claim or assertion is necessarily defined or limited*
30 *by the evidence or arguments submitted by either party to each other before the*
31 *referral to adjudication or arbitration.*

32 (d) *The ambit of the reference to arbitration or adjudication may unavoidably be widened*
33 *by the nature of the defence or defences put forward by the defending party in*
34 *adjudication or arbitration.*

Conclusion

35 [60] For the reasons stated above, we are impelled to the view that the
36 rectified claims which were part of the payment claim are not new claims.
37 Indeed, Puncak Niaga does not even contend that the rectified claims are

new claims. They are plainly and patently part of previous monthly claims which Puncak Niaga chose not to verify and certify. These are in any event, interim claims, and are by definition, "not final". Hence, they are capable of adjustment, refinement and pruning.

[61] We agree that a payment claim which consists of a premature claim or a in futuro claim is not one which complies with ss 4 and 5 of the CIPAA. But that is not the case here. The fact that Mersing did not re-submit the rectified claims through the route of clause 8.1 of the LOA is not an impediment to the impugned items being submitted as part of the payment claim because the claims are in fact, for work done under a construction contract and the claims had already been submitted previously to Puncak Niaga and all that has happened is that these same claims have been "*refined*" or "*pruned*" by way of discarding erroneous amounts before being submitted as a payment claim.

[62] Indeed, instead of refining or pruning the amounts, Mersing could well have chosen to leave the original amounts pertaining to the impugned items intact and not make any refinement or pruning prior to the submission of the payment claim. What would have then happened is that during the adjudication proceedings, Mersing could have dropped or abandoned that part of the impugned items which they concede as being erroneous. If they could do it during the adjudication proceedings, we see no reason why the refinement or pruning cannot be done earlier and be made as part of the payment claim.

[63] Further, the adjudicator had the requisite statutory power to determine the correctness of the amounts which are due and payable after taking into account the adjudication response and submissions of the parties in the adjudication proceedings.

[64] Thus, at first blush, Puncak Niaga's objection appeared to be attractive and worthy of consideration. However, upon further reflection especially in light of the principles enunciated by the cases referred to earlier, we are of the view that a mere refinement or pruning of a claim under a construction contract which had been previously submitted to the employer, and being then included as part of the payment claim, does not constitute a new claim, or premature claim, or in future claim, such that it affects the adjudicator's jurisdiction. In the result, we find that Puncak Niaga's objection vis-à-vis the rectified claims is highly technical and tactical, to say the least. We find no merits in the stand that was taken by Puncak Niaga.

Result

[65] In the result, it is our view that there was no misdirection or error on the part of the judge in dismissing OS 181 and in allowing OS 182. As such, we

1 find no merits and appeal 98 and appeal 100 are hereby dismissed. We order
Puncak Niaga to pay costs of RM20,000 (subject to allocatur) in respect of
appeal 98. We make no order as to costs for appeal 100.

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