

## CIPAA 2012 : “Adjudicated Amount” under Section 30 – Interest and Costs, Included or Otherwise?

### PALI PTP SDN BHD V BOND M&E SDN BHD & ANOTHER APPEAL [W-02(C)(A)-314-02/2021 / W-02(C)(A)-399-02/2021]

27<sup>th</sup> September 2023

#### ISSUES

Where a Principal is ordered to make payment of the “*adjudicated amount*” pursuant to Section 30 of Construction Industry Payment and Adjudication Act 2012 (“CIPAA”), is the “*adjudicated amount*” limited only to the principal sum awarded in the Adjudication Decision or does it also include the interest and costs awarded in the Adjudication Decision together with the principal sum?

These questions were answered in the recent Court of Appeal decision of **Pali PTP Sdn Bhd v Bond M&E Sdn Bhd & Another Appeal [W-02(C)(A)-314-02/2021 / W-02(C)(A)-399-02/2021]**.

#### BRIEF FACTS

The brief facts of the case are as follows:-

- (a) In 2019, Bond M&E Sdn Bhd (“**Bond**”) initiated an adjudication proceeding under CIPAA against one JEKS Engineering Sdn Bhd (“**JEKS**”) and obtained an adjudication decision in its favour. JEKS was ordered to make the following payment to Bond:-
  - (i) the sum of RM3,387,425.44, being the adjudicated amount;
  - (ii) the sum of RM42,404.08, being interest at the rate of 7.70% per annum (Maybank Base Lending Rate at 6.7% + 1%), calculated from the due date of each certificate (as claimed by the Plaintiff) up to 27.07.2019 (date of each payment claim);
  - (iii) continuing interest at the rate of 7.70% per annum (Maybank Base Lending Rate at 6.70% + 1%) on RM3,390,881.44, calculated from 23.07.2019 to 03.09.2019;

- (iv) continuing interest at the rate of 7.70% per annum (Maybank Base Lending Rate at 6.70% + 1%) on RM3,390,881.44, calculated from 04.09.2019 until full settlement; and
- (v) the sum of RM83,979.08, being the costs of the adjudication proceedings.

**(“Bond’s Adjudication Decision”)**

- (b) In the same year, JEKS also commenced adjudication proceedings under CIPAA against Pali PTP Sdn Bhd (“**Pali**”) where JEKS obtained an adjudication decision in its favour amounting to RM8,512,737.03 (“**JEKS’ Adjudication Decision**”).
- (c) Thereafter, JEKS filed an application to the High Court to enforce JEKS’ Adjudication Decision and in response, Pali in turn applied to stay and set aside the same.
- (d) JEKS’ Adjudication Decision was enforced in part, whereby Pali was ordered to pay JEKS the sum of RM3,368,919.69 together with interest at the rate of 7.75% per annum and costs amounting to RM60,929.00.
- (e) Meanwhile, JEKS failed to make payment to Bond pursuant to the Bond’s Adjudication Decision and thereafter, Bond issued a notice to Pali, as Principal of JEKS, on 17.02.2020 pursuant to Section 30(1) of CIPAA requesting for direct payment (“**Notice of Direct Payment**”).
- (f) However, Pali by way of its solicitors denied any obligation to make payment to Bond on the basis that there was no money due and owing by Pali to JEKS via a letter dated 07.04.2020.

**PROCEEDINGS BEFORE THE HIGH COURT**

- (a) Bond subsequently filed an Originating Summons (No.: WA-24C-121-06/2020) (“**OS 121**”) pursuant to Section 30 of CIPAA at the Kuala Lumpur High Court.
- (b) The Learned Judge of the High Court found in favour of Bond and ordered Pali to pay Bond the principal sum of RM3,387,425.44 together with costs of RM10,000.00. However, Pali was not ordered to make payment of the costs and interests awarded in Bond’s Adjudication Decision (“**Judgement**”).
- (c) Following the Judgement, Pali and Bond filed 2 appeals, which were heard together:-

- (i) Civil Appeal No.: W-02(C)(A)-314-02/2021 (“**Appeal 314**”) where Pali was the Appellant and Bond was the Respondent; and
  - (ii) Civil Appeal No.: W-02(C)(A)-399-02/2021 (“**Appeal 399**”) where Bond was the Appellant and Pali was the Respondent.
- (d) Pali lodged Appeal 314 against the Judgement ordering Pali, being the Principal of JEKS, to pay directly to Bond the principal sum under the Bond’s Adjudication Decision, which was due and owing to Bond by JEKS pursuant to Bond’s Adjudication Decision.
- (e) On the other hand, Bond lodged Appeal 399 against part of the Judgement which excluded the interest and costs from the “*adjudicated amount*” granted to Bond in Bond’s Adjudication Decision.

### DECISION OF THE HIGH COURT

The Learned Judge of the High Court (“**HCJ**”) held that Bond had fulfilled all the conditions entitling it to invoke the remedy in Section 30 of CIPAA.

The HCJ also held that Pali, being a party that appointed JEKS as its main contractor, was liable to make payment to JEKS by virtue of JEKS’ Adjudication Decision. Further, JEKS had contracted with Bond and was liable to make payment to Bond pursuant to Bond’s Adjudication Decision.

However, the HCJ held that the phrase “*adjudicated amount*” in Section 30(1) of CIPAA does not include interest and costs:-

*[28] The learned HCJ found that since the phrases 'adjudication decision', 'adjudicated amount', 'interest' and 'costs' are used differently throughout the statute, namely sections 12(5), 18(1), 25(o), and 28(2) CIPAA, the legislature must have intended for those phrases to be construed in isolation and refer to different matters. Reliance was made on the case of **Lee Lee Cheng v. Seow Peng Kwang [1960] 1 MLJ 1 FC** which decided that “When different words are used by the legislator in a statute, those different words in the statute are intended by the legislature to refer to different matters”.*

*[29] The learned HCJ’s finding was also premised on her ladyship’s reliance on the cases of **CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2020] 1 CLJ 75 CA** and **Cabnet Systems (M) Sdn Bhd v. Dekad Kaliber Sdn Bhd & Ors [2020] 1 LNS 187** in that if interest and costs are intended to be included within the meaning of the phrase ‘adjudicated amount’ in sections 30(1) and (3) CIPAA, express words to that effect would have been inserted therein as ‘interest’ and ‘costs’ are separately used in the other parts of the CIPAA.”*

Arising thereof, the HCJ allowed Bond's application in OS 121 and ordered Pali to pay the principal sum of RM3,387,425.44, with the exclusion of costs and interests awarded in Bond's Adjudication Decision together with costs of RM10,000.00 in favour of Bond.

## DECISION OF THE COURT OF APPEAL

### Appeal 314

The Court of Appeal deliberated and dismissed Appeal 314, amongst others, on the basis that there was no necessity for Bond to provide evidence that JEKS had not been making payment prior to Bond's written request for direct payment from Pali:-

*"[35] After hearing submissions by both parties, we are of the view that **there is no necessity for the unpaid party Bond to provide affirmative evidence that Bond has not been paid by JEKS. Based on sections 30(1) and (2) CIPAA read together as a whole, we construe that this non-payment is presumed and Bond only has to assert the same in the Notice of Direct Payment. The onus is accordingly shifted to Pali to enquire from JEKS whether Bond has been paid. Since Pali has failed to do so, we conclude that Bond has not been paid by JEKS following PCOM Pacific Sdn Bhd v. Apex Communications Sdn Bhd & Anor (supra); see also HSL Ground Engineering Sdn Bhd v. Civil Tech Resources Sdn Bhd (and Another Originating Summons) [2020] 5 AMR 757.**"*

[Emphasis added]

From the facts and circumstances of this case, the Court of Appeal also found that there was indeed money due and payable by Pali to JEKS pursuant to JEKS' Adjudication Decision:-

*"[36] We are also satisfied from the evidence adduced that **there were monies due or payable by Pali to JEKS at the material time based on the adjudication decision in the adjudication proceeding between JEKS and Pali. Hence the adjudicated amount in the Adjudicated Decision must be paid directly by Pali to Bond as principal pursuant to section 30 CIPAA.**"*

[Emphasis added]

### Appeal 399

In Appeal 399, the Court of Appeal reviewed the decision of the HCJ and found that the HCJ had erred in construing "adjudicated amount" in Section 30 by excluding interest and costs.

The Court of Appeal finds that, in circumstances where there is a word and/or phrase in a statute that is unclear or ambiguous, the word and/or phrase would be interpreted in light of the purpose and object of the statute, as provided under Section 17A of the Interpretation Act 1948 and 1967.

Hence, in the absence of the definition of "adjudicated amount" in CIPAA, the Court of Appeal had resorted to a purposive interpretation of the phrase, where it ought to include interest and costs, in order to protect and/or safeguard the rights of small contractors and sub-contractors.

In the upshot, the Court of Appeal provides further reasoning as follows in allowing Appeal 399:-

**"[51] That notwithstanding, we find that *if the phrase 'adjudicated amount' did not include interest and costs, then the unpaid Bond would in the factual circumstances here necessarily have to seek recovery twice, once against Pali for the principal claim sum awarded and then again against JEKS separately for interest and costs only. This cannot in our view be contemplated by the legislature.***

*[52] In the premises, we find the learned HCJ erred by excluding interest and costs from 'adjudicated amount' in section 30 CIPAA which warranted our appellate intervention."*

[Emphasis added]

## **MOVING FORWARD**

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

- (a) Based on section 30(1) and 30(2) of CIPAA 2012, the non-payment by the party against whom an adjudication decision was made is presumed once the party who obtained adjudication decision in his favour asserts the same in the Notice for Direct Payment. The onus shifts to the Principal to prove otherwise.
- (b) In the event that a word and/or phrase in a statute is unclear or ambiguous, it will be interpreted based on the purpose and object of the statute i.e. the purposive interpretation.
- (c) The phrase "adjudicated amount" in Section 30 of CIPAA is interpreted to include interest and costs alongside the adjudicated sum in order to protect and/or safeguard the rights of small contractors and sub-contractors.



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

**CONTACT**



**ANDREW HENG YENG HOE**  
Partner

+603 6207 9331  
+6012 222 8412  
✉ [andrew@zainmegatmurad.com](mailto:andrew@zainmegatmurad.com)



**ATIQAH YASMIN SEDEK**  
Associate

+603 6207 9331  
+6012 732 7567  
✉ [atiqahsedek@zainmegatmurad.com](mailto:atiqahsedek@zainmegatmurad.com)

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**ZAIN MEGAT & MURAD**

D2-5-1 to D2-5-3A, Block D  
Solaris Dutamas No.1, Jalan Dutamas 1,  
50480 Kuala Lumpur, Malaysia

+6 03 6207 9331

+6 03 6207 9332

✉ [zmm@zainmegatmurad.com](mailto:zmm@zainmegatmurad.com)