

CIPAA 2012 : Direct Payment from Principal and Judicial Management Order

CONCRETE EMPIRE SDN BHD V TURNPIKE SYNERGY SDN BHD [WA-24C-116-06/2022] [2023]

22nd November 2023

ISSUES

When the losing respondent does not make payment for the Adjudicated Sum under the Adjudication Decision to the claimant, the claimant may request for direct payment from the respondent's principal pursuant to section 30 of the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”).

On the other hand, section 410 of the Companies Act 2016 (“**CA 2016**”) provides that no proceedings and execution or other legal process shall be commenced or continued against company making an application for judicial management order from “the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application...”

In view of section 410 of CA 2016, would the claimant still be entitled to request for direct payment against a principal who applied for judicial management order?

Would section 410 of CA 2016 bar the direct payment under section 30 of CIPAA 2012? Or would section 30 of CIPAA 2012 takes precedence?

These questions were answered in the recent Kuala Lumpur Construction High Court case of **Concrete Empire Sdn Bhd v Turnpike Synergy Sdn Bhd [WA-24C-116-06/2022]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) The Plaintiff is the contractor appointed by one Panzana Enterprise Sdn Bhd (“**Panzana**”) whereas the Defendant is Panzana's principal.
- (b) The Plaintiff obtained an adjudication decision against Panzana (“**Panzana AD**”) and was awarded, among others, the Adjudicated Sum of RM1,308,958.30 and total costs of RM47,164.40 (“**Awarded Sum**”). Panzana did not pay the Awarded Sum.

- (c) On 27.10.2021, the Plaintiff requested for direct payment from the Defendant under Section 30 of CIPAA 2012. In response, the Defendant contended that there is no money due or payable by the Defendant to Panzana.
- (d) On 14.12.2021, Panzana obtained an adjudication decision against Defendant for the sum of RM28,457,038.75 (“**Turnpike AD**”). Arising from the same, there is money due and / or payable by the Defendant to Panzana (which is not disputed).
- (e) On 20.12.2021 and 06.01.2022, the Defendant requested Panzana to furnish proof of payment to the Plaintiff pursuant to section 30(2) of CIPAA 2012, failing which the Defendant will be constrained to make direct payment to the Plaintiff pursuant to section 30(3) of CIPAA 2012.
- (f) On 18.02.2022, the Plaintiff again demanded the Defendant to make direct payment of the Adjudicated Sum of RM1,308,958.30 (both notices dated 27.10.2021 and 18.02.2022 will be referred to as the “**2 Notices**”).
- (g) As no direct payment was made, the Plaintiff initiated the present suit. In response, the Defendant applied to interplead as the Defendant is holding the sum of RM1,356,122.70 (Awarded Sum) as stakeholder and is a disinterested party in the proceedings.
- (h) To support the interpleader application, the Defendant relied, amongst others, on the ground that the it has filed a Judicial Management Application at the Shah Alam Court on 22.11.2021 (“**JM Application**”).
- (i) Panzana claimed that the Defendant has made payment of RM24,470,570.04 to Panzana pursuant to the Turnpike AD but has yet to release the sum of RM3,986,468.71.

SUBMISSIONS BEFORE THE HIGH COURT

The Defendant took a neutral stance in the matter and stated that it will abide with the Court's Order.

The Plaintiff opposed the Interpleader on the following grounds:-

- i. there are no competing claims,*
- ii. the Defendant's JM Application is irrelevant*
- iii. the Defendant is statutorily obligated to make payment of the Adjudicated Sum to the Plaintiff”*

On the other hand, Panzana contended as follows:-

- "i. there is no amount due and payable by the Defendant to Panzana at the time the 2 Notices were received by the Defendant*
- ii. the 2 Notices are invalid under sections 410 and 426 of the Companies Act 2016 ("CA")"*

Having found that there were monies due or payable by the Defendant to Panzana, the High Court went on to consider the effect of the JM Application on the Plaintiff's application to seek for direct payment pursuant to Section 30 CIPAA 2012.

Judicial Management and Direct Payment under Section 30 CIPAA 2012

The Learned Judge noted that the JM was filed subsequent to the Panzana AD and that the Defendant is claiming that the section 30 CIPAA 2012 pursuant to the Panzana AD is invalid as it is contrary to sections 410 and 426 of CA 2016.

The Learned Judge examined the provisions of sections 410 and 426 of CA 2016 as well as section 30 of CIPAA 2012 and found that sections 410 and 426 of the CA 2012 are, on the face of it, in direct contradiction with section 30 of CIPAA 2012:-

"[22] Section 410 of the Companies Act 2016 states:

During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application:

- (a) no resolution shall be passed or order made for the winding up of the company;*
- (b) no steps shall be taken to enforce any charge on or security over the company's property or to repossess any goods in the company's possession under any hire purchase agreement, chattels leasing agreement or retention of title agreement, except with leave of the Court and subject to such terms as the Court may impose; and*
- (c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose*

[23] Section 426 of the Companies Act 2016 provides:

- (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts as the debts become due, from the company's own money in favour of any creditor or any person in trust of any creditor with the intention to give such creditor a preference over other creditors shall be void in the event of the company being placed under judicial management on an application for a judicial management order presented within six months from the date of making, taking, paying or suffering the transfer, mortgage, delivery of goods, payment, execution and every such act.
- (2) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.
- (3) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the company placed under the judicial management

[24] The above sections would on the face of the same be in direct contradiction to the provision in Section 30 of CIPAA which reads:

- (1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.
- (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.
- (3) in the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.
- (4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.
- (5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1)."

Applying the maxim of *generalibus specialia derogant* (the specifics derogate from the general), the Learned Judge found that sections 410 and 426 of CA 2016 must be read subject to section 30 of CIPAA 2012:-

*“[25] Applying the maxim of generalibus specialia derogant , **I hold that sections 410 and 426 of the CA must be read subject to section 30 CIPAA as the former sections in the Companies Act 2016 are general sections on the powers of the Court at the hearing of the JM as compared to section 30 CIPAA which is a specific section on the powers of this Court in a construction industry claim under CIPAA**, which is itself an Act which deals with specifically construction industry claims only, to grant the party who obtained an adjudication decision under CIPAA in its favour, being the Plaintiff herein, to make a written request for payment of the adjudicated amount direct from the principal of the party, i.e the Defendant, against whom the Panzana AD is made i.e Panzana.”*

[Emphasis added]

CIPAA 2012 is a Specific Legislation

By reference to the Federal Court case of **Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and Anor appeal [2020] 6 MLJ 224** and the Court of Appeal case of **CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2020] 1 CLJ 75**, the Learned Judge also held that section 30 CIPAA 2012 is a separate and distinct statutory obligation and must take precedent over sections 410 and 426 of CA 2016:-

“[27] It must be borne in mind that CIPAA was enacted for the very specific purpose of enabling the construction industry to realise cashflow issues affecting contractors who had difficulty to resolve payment disputes and that these disputes have to be quickly resolved in a cost- effective manner to ensure the smooth execution of the construction projects.

...

*[30] Following from the above, **I hold that section 30 CIPAA is thus a separate and distinct statutory obligation** imposed on the principal to make payment under an adjudication decision on behalf of the losing party in the Adjudication proceedings to the Plaintiff herein as the winning party and must **take precedence over the general sections 410 and 426 of the CA in the matter before this Court.**”*

[Emphasis added]

DECISION OF THE HIGH COURT

In the upshot, the High Court allowed the Plaintiff's application and held that:-

"...the JM Order will have no effect on section 30 CIPAA as it is a separate and distinct statutory obligation imposed on the principal to make payment under an adjudication decision and should thus take precedence over the general sections 410 and 426 of the CA in the matter before this Court on the reasons I have already stated above."

KEY TAKE AWAY

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

- (a) A judicial management order *"will have no effect on section 30 CIPAA as it is a separate and distinct statutory obligation imposed on the principal to make payment under an adjudication decision."*
- (b) Section 30 of CIPAA 2012, being a specific legislation, will take precedence over the general sections 410 and 426 of CA 2016.

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