

CIPAA 2012 : Money Due Or Payable – The Over-arching Pre-Condition for Direct Payment From Principal?

JDI BUILTECH (M) SDN BHD V DANGA JED DEVELOPMENT MALAYSIA SDN BHD [J-02(C)(A)-1066-06/2022]

24th April 2024

ISSUES

To trigger direct payment under section 30 of the Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”), the successful Claimant will have to serve a written request on the principal for direct payment of the adjudicated amount pursuant to section 30(1) of CIPAA 2012.

Section 30(2) of CIPAA 2012 then provides that, the principal “*shall*” serve a written notice on the unsuccessful party in the adjudication (the principal’s main contractor) requesting for proof of payment to the successful claimant / subcontractor and inform the unsuccessful party / main contractor that direct payment will be made if it fails to provide proof of payment.

In the absence of the proof of payment, section 30(3) of CIPAA 2012 stipulates that the principal “*shall pay the adjudicated amount*” to the successful party / subcontractor. On the other hand, section 30(5) also provides that “*This section shall only be invoked if money is due or payable*” by the principal to the unsuccessful party at the time the principal received the successful party’s written notice.

Would the absence of proof of payment renders the principal liable to make direct payment in every circumstances? Or would the direct payment provisions be subject to an overarching pre-condition that there should be money due or payable in the first place?

These questions were answered in the recent Court of Appeal case of **JDI Builtech (M) Sdn Bhd v Danga Jed Development Malaysia Sdn Bhd [J-02(C)(A)-1066-06/2022]**.

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) On 20.10.2020, the Employer (“**Principal**”) terminated the main construction contract (“**Main Contract**”) allegedly due to various breaches by its main contractor (“**Main Contractor**”), including wrongful suspension of works, failure to proceed with the works regularly and diligently and failure to complete the works within time.
- (b) The Principal contends that there is a sum of approximately RM41.4 million due and payable from the Main Contractor for various heads of claim following termination. The Employer had a contemporaneous Quantity Surveyor Report dated 12.01.2021 to justify the amount.
- (c) Following the termination of the Main Contract, the subcontract (“**Subcontract**”) between the Main Contractor and its subcontractor (“**Subcontractor**”) was also terminated.
- (d) The Subcontractor obtained an adjudication decision in its favour against the Main Contractor and applied for direct payment from the Principal under Section 30 of CIPAA 2012.
- (e) In its affidavit in support, the Subcontractor deposed its belief that there is money due or payable from the Principal to the Main Contractor as the Subcontractor’s work done was for the ultimate benefit of the Principal and as such, there is an expected sum owing from the Principal to the Main Contractor for the same work done.
- (f) The Principal does not dispute its contractual relationship with the Main Contractor but denied owing the Main Contractor money due to the aforesaid claims of approximately RM41.4 million. However, the Principal did not initiate any suit / claim against the Main Contractor and the Main Contractor likewise did not initiate any claim against the Principal.
- (g) Having heard parties, the High Court dismissed the Subcontractor’s Direct Payment application and the Subcontractor appealed to the Court of Appeal.

THE PARTIES’ SUBMISSIONS

The parties’ main submissions are:-

- (1) The Principal submits that there is no money due or owing as to the Main Contractor but instead, a sum of approximately RM41.4 million is due and payable from the Main Contractor to the Principal following the termination of the Main Contract.
- (2) The Principal also submitted that the fundamental pre-condition for section 30 of CIPAA 2012 to apply is that there must first be money due or payable from the Principal to the Main Contractor when the Principal received the Subcontractor’s written request for direct payment. The Subcontractor cannot stand in a better position than the Main Contractor if there is no money due or payable.

- (3) On the other hand, the Subcontractor submits that Section 30 of CIPAA 2012 creates an independent obligation for direct payment “with no liberty to apply any set-off by the principal as against its main contractor” as CIPAA is to facilitate cash flow for the party that has done work and the Principal can always recover the amount paid from its Main Contractor as a debt.

DECISION OF THE COURT OF APPEAL

OVERARCHING PRE-CONDITION – MONEY DUE OR PAYABLE

Having examined the provisions of section 30 CIPAA 2012, the Court of Appeal held that the overarching pre-condition for section 30 of CIPAA 2012 to apply is as contained in section 30(5) of CIPAA 2012, i.e. there first be money due or payable by the Principal to the losing party in adjudication (Main Contractor) at the time the Principal received the successful party / Subcontractor’s written request:-

*“[18] The immediate question to ask is when s 30 CIPAA would be applicable and the answer stares at us in the face in that s 30(5) provides that “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).” (emphasis added) It is thus the over-arching pre-condition before any of the subsections of s 30 may be utilised. By “This section” in the opening words of s 30(5) is meant the whole of s 30. Thus s 30(5) is the foundation and base for the deployment of the other subsections in s 30.”*

The Court of Appeal held that the Principal’s failure to give notice to its Main Contractor under Section 30(2) of CIPAA 2012 and the failure of the Main Contractor to show proof of payment does not automatically render the Principal liable to make direct payment as this would bypass the requirement of Section 30(5) of CIPAA 2012:-.

*“[41] With respect to learned counsel for the appellant/subcontractor, we find it difficult to accept that in any and every situation, whenever a notice is given by the subcontractor to the principal for direct payment under s 30(1) and the principal is then required to give a notice to its main contractor under s 30(2) and if there is no proof of payment by the main contractor to the subcontractor, then invariably and immediately the principal must make payment to the subcontractor. **Such an argument bypasses s 30(5) which has first to be satisfied before a direct payment may be ordered.**”*

[Emphasis added]

The Court of Appeal also affirmed the test in **Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor** [2020] 1 LNS 187 as well as explanations in **LTK Façade Specialist Sdn Bhd V. Sri Mutiara Development Sdn Bhd** [2021] 1 LNS 1030 by **Wong Kian Kheong J.** (now JCA).

SECTION 30 OF CIPAA 2012 IS NOT MEANT TO TRANSFER NON-PAYMENT RISK TO THE EMPLOYER

The Court of Appeal held that Section 30 CIPAA 2012 is not meant to transfer the risk of payment to the Principal where the Principal have to make direct payment of unpaid amount to the Subcontractor under an adjudication decision in every circumstances:-.

“[101] We do not read in the scheme of direct payment under s 30 CIPAA as that for so long as a party is the principal to its main contractor, then whatever sum the principal is called upon to make a direct payment to the subcontractor arising from an adjudication decision, then ipso facto the principal would have to pay without question as the amount claimed has not been paid by the main contractor to its subcontractor here.

*[102] The law on privity of contract has not been displaced by s 30 CIPAA and the subcontractor and main contractor take upon themselves the risk of entering into the contractual relationship and must take each other as they found each other. **The CIPAA does not transfer the risk to the principal and neither was it designed to improve the position of the subcontractor to the detriment of the principal.** All that CIPAA does in line with its prophylactic properties is to **help parties pursue payments due without causing prejudice to anyone affected by the process.***

*[103] **To make the principal pay merely upon its main contractor failing to make the payment lawfully demanded by its subcontractor would be to make the principal a guarantor of all payments due from its main contractor to the subcontractor.** Whilst s 30 CIPAA may be a separate statutory and independent obligation to pay, that **obligation does not arise until it has been shown that there is money due and payable by the principal to the main contractor** and if it is so proved, then only so much of it as may be so proved would be the amount for the principal to make direct payment to the subcontractor... “*

[Emphasis added]

SECTION 30(4) OF CIPAA 2012 IS NOT A JUSTIFICATION FOR DIRECT PAYMENT IN THE ABSENCE OF MONEY DUE OR PAYABLE



Whilst section 30(4) of CIPAA 2012 provides the Principal with a mode of recovery / set off for direct payment made to the Subcontractor, this is not a justification for direct payment in cases where there is no money due or payable by the Principal to the Main Contractor. This is especially if the Main Contractor is in liquidation:-

*[100] The Court must also have regard to the fact that an adjudication decision is of interim finality only and in a case of money paid under a direct payment remedy by the principal to the subcontractor where the main contractor is already in liquidation, **any recovery of the money paid in the event of a final determination in favour of the principal either via litigation or arbitration between the principal and main contractor would be practically impossible...***

[105] That sum so paid under a direct payment remedy or order may be recovered by the principal from its main contractor as a debt under s 30(4) for it is a payment made on behalf of the main contractor. As a debt, that amount may be set off from any money due or payable by the principal to its main contractor, which is the party against whom the adjudication decision was made.

*[106] **The recovering of the “debt” by the principal from its main contractor is no justification for saying that even if there is no money due or payable by the principal to its main contractor, the principal would still have to pay as the work done by the subcontractor is for the ultimate benefit of the principal.** As stated the CIPAA would be making the principal a guarantor of all payments which its main contractor fails to make to the subcontractor.”*

[Emphasis added]

KEY TAKEAWAY

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

- (a) The overarching pre-condition to apply for direct payment from the principal under section 30 of CIPAA 2012 is that there must first be money due or payable when the principal receives the written notice for direct payment from the successful party (the subcontractor) in the adjudication;
- (b) The principal’s failure to give notice to its main contractor under section 30(2) of CIPAA 2012 and the failure of the main contractor to show proof of payment does not automatically render the principal liable to make direct payment as this would bypass the requirement of section 30(5) of CIPAA 2012; and

(c) Whilst the principal may recover / set off the direct payment made against amount owing to the main contractor under section 30(4) of CIPAA 2012, the mode of recovery is not a justification for direct payment in cases where there is no money due or payable by the principal to the main contractor.

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

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