CIPAA 2012: Is Retention Sum "Money Due or Payable" by the Principal Post-Termination of the Main Contractor?

KINU SDN BHD V KERAJAAN MALAYSIA (JABATAN KERJA RAYA MALAYSIA) W-01(C)(A)-523-08/2024

30th July 2025

ISSUES

Section 30 of the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA 2012**") enables a subcontractor to request direct payment from the principal or employer if the main contractor fails to pay the adjudicated amount in favour of the subcontractor, and where there is money due or payable by the employer to the main contractor. However, would the employer still be considered a "principal" for the purposes of Section 30 if the main contract restricts the main contractor from awarding the subcontract in the first place?

Upon receipt of a written request for direct payment from the subcontractor, the principal is required, under section 30(2) of CIPAA 2012, to serve a notice on the main contractor to show proof that payment has been made for the adjudicated amount. Would the principal's failure to issue such a notice be fatal, or would it attract an adverse inference?

Where the main contractor has been terminated and is subject to claims by the employer for costs of completion or defect rectification, would the retention sum under the main contract still be considered "money due or payable" for the purposes of Section 30 of CIPAA 2012?

These questions were addressed in the recent Court of Appeal case of **Kinu Sdn Bhd v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia)** [W-01(C)(A)-523-08/2024].

BRIEF FACTS

The brief facts of the case are as follows:-

(a) The Respondent, Government of Malaysia / Jabatan Kerja Raya ("**GOM**" / "JKR**")** appointed NSB as the Main Contractor for the construction of a hospital in Dungun, Terengganu ("**Project**") under the PWD Form DB (Rev.1/2010) standard form of contract ("**PWD Contract**").

(b) NSB subsequently appointed the Appellant, Kinu Sdn Bhd ("**KSB**"), as the subcontractor for the Project.

(c) The last interim payment certificate ("**IPC**") under the Project was IPC No. 84 dated 24.06.2022, which reflected a negative sum of RM1,788,581.24 as the recommended amount for payment by GOM to NSB, the main contractor.

(d) A Notice of Termination dated 14.07.2022 was issued to NSB, stating that the progress of work had reached 99.86%.

(e) KSB obtained an adjudication decision against NSB pursuant to CIPAA 2012.

(f) Through its solicitors, KSB issued a written request dated 11.09.2023 to JKR, as the principal, seeking direct payment of the adjudicated sum.

(g) After several exchanges of correspondence in which JKR disputed KSB's request for direct payment, KSB filed an application under Section 30 of CIPAA 2012 for direct payment against GOM / JKR, on the basis that GOM / JKR was the principal (employer), and KSB was both NSB's subcontractor and the successful claimant in the CIPAA proceedings.

(h) Amongst other grounds, JKR disputed the application on the basis that no money was due or payable to the main contractor, NSB. JKR further contended that it did not recognise KSB as the subcontractor, nor the subcontract itself, as it had been entered into without JKR's written consent, in breach of Clause 40 of the PWD Contract.

DECISION BEFORE THE HIGH COURT

The High Court held that the *"liability of the principal to pay if there is a debt due or payable from it to the main contractor is irrespective of whether the subcontractor is recognised or approved by the principal as this is not a requirement under s 30 of the CIPAA".*

However, the High Court dismissed KSB's application, among other grounds, on the basis that there was no money due or payable, as the last IPC, i.e. IPC No. 84, reflected a negative sum of RM1,788,581.24.

Dissatisfied with the High Court's decision, KSB appealed to the Court of Appeal.

PROCEEDINGS BEFORE THE COURT OF APPEAL

In the Court of Appeal, KSB submitted, among other grounds, that the High Court had erred in failing *"to consider that the Performance Guarantee sum carved out from the IPCs due from JKR to its main contractor to the sum of 5% of contract sum of the Project was money "payable" within the meaning of s 30(5) CIPAA".*

- **Written Consent for Subcontracting**

At the outset, the Court of Appeal agreed with the High Court that the principal's written consent to the appointment of a subcontractor is not required for section 30 of CIPAA to apply.

> *"[13] …the definition of "principal" in s 4 of the CIPAA has no reference to the need for the subcontractor to be one that the principal has consented in writing to its appointment by its main contractor.*
>
> *[14] The fact that the JKR had contracted with the main contractor NSB is admitted by JKR. JKR is ordinarily liable to pay its main contractor for work done for the Project. The main contractor had in turn contracted with and is liable to pay its subcontractor in a chain of construction contracts.* ***There is no reference to nor requirement that the principal must first have given its written consent to the main contractor appointing its subcontractor.****"*
>
> [Emphasis added]

Amongst other findings, the Court of Appeal held that the PWD Contract's prohibition on subcontracting without JKR's express consent is a contractual arrangement between the employer and main contractor, and cannot override specific statutory provision such as CIPAA 2012.

> *"[21] We are thus in agreement with the High Court when it held at paragraph [24] - [25] that JKR comes within the definition of "principal" under s 4 of the CIPAA application and that JKR is the principal of NSB which in turn had contracted with KSB, the plaintiff, as its subcontractor. The High Court further held at paragraph [26] that* ***Clause 40.2 of the Contract is merely a contractual arrangement between NSB and JKR and that cannot override a specific statutory provision like s 4 of the CIPAA and if we may add, for that matter s 30(5) of the CIPAA****."*
>
> [Emphasis added]

- **Section 30(2) Notice Requirement**

Having examined the mandatory language of section 30(2) CIPAA 2012, the Court of Appeal held that a principal's failure to issue a Section 30(2) notice is not *"fatal in all cases".* However, non-compliance of this requirement will be a factor to be considered in determining whether there is money *"due or payable"*, and to draw an adverse inference where the circumstances justifies:-

> *"[59] We would not go so far as to hold that the failure of the principal to give a written notice under s 30(2) is invariably fatal in all cases. However, the use of "shall" in s 30(2) in that upon receipt of the written request under subsection (1)* ***, "the principal shall serve a notice in writing"*** *on its main contractor against whom the subcontractor had obtained an adjudication decision, does convey a certain mandatory need to comply. A non-compliance would be a factor to be taken into consideration in considering if there is money "due or payable" from the principal to the main contractor and where circumstances justify, to even draw an adverse inference against the principal under s 114(g) Evidence Act 1950."*
>
> [Emphasis added]

The Court of Appeal observed that such an approach strikes a middle ground between the two lines of cases of whether the non-issuance of the Section 30(2) Notice is fatal:-

> *"[60] Such an approach would strike a middle ground between 2 sets of cases stating categorically that a non-compliance by the principal with s 30(2) on service of a written notice on its main contractor would be fatal and cases falling on the other side stating that it is not fatal and that the precondition of money "due or payable" from the principal to the main contractor must first be met."*

The Court of Appeal also proposed a *"modified"* form of a Section 30(2) notice, whereby the principal could write to the main contractor stating that no money is *"due or payable"*, with the expectation that the main contractor may respond to dispute principal's position or even to support the subcontractor's direct payment application:-

> *"[62]* ***The principal need not slavishly follow the scenario set out in s 30(2) if the principal has no money "due or payable" to the main contractor, in which instance it would give notice to the main contractor to state so and the main contractor may respond to dispute that assertion of the principal.*** *The main contractor may choose to intervene in the proceedings when filed or alternatively to file an affidavit in support of the subcontractor's claim for direct payment from the principal, as a direct payment from the*

principal would obviate the need for the main contractor to pay the subcontractor."

[Emphasis added]

The failure to issue a section 30(2) Notice, whether in its original or modified form, coupled with the absence of any explanation for such failure, is a factor the Court will consider in determining whether there is money *"due or payable"* from the principal to the main contractor and whether an adverse inference should be drawn against the principal:-

"[63] ***In the absence of the principal giving a notice under s 30(2) or in its modified form to the main contractor****, the Court would have to be* ***satisfied if there is credible evidence to show that there is no money "due or payable" from the principal to the main contractor. Whether or not the Court would be drawing an adverse inference would depend on the circumstances*** *of each case including whether there is reason for the principal to suppress any evidence not to its favour. See s 114(g) Evidence Act 1950.*

[64] ***It is certainly a factor to be taken into consideration in the absence of an explanation from the principal as to why it had not served a written notice on its main contractor*** *to elicit a confirmation or otherwise as to whether the main contractor had paid the subcontractor the adjudicated amount and more so when the plaintiff had specifically drawn the principal's notice to s 30(2) CIPAA."*

[Emphasis added]

Nevertheless, the Court of Appeal reiterated that the failure to issue the Section 30(2) Notice is not fatal. However, in such cases, the principal must independently satisfy the Court, through credible and cogent evidence, that there is no amount owing to the main contractor.

"[66] ***All is not lost by the principal if it had not so served the notice under s 30(2) on its main contractor*** *as it must then independently and upon credible and cogent evidence, satisfy the Court that there is nevertheless no amount owing from it to the main contractor for the reasons given."*

[Emphasis added]

- **Adverse Inference for Non-Issuance of Certificate of Termination Costs**

The Court of Appeal found that a sum of RM6,269,518,98 had been retained by JKR under the PWD Contract as retention sum or performance guarantee. This was not disputed by either party. Upon termination, JKR notified the main contractor that it would be liable for all additional costs incurred due to the termination, and that the *"performance guarantee sum would be forfeited in accordance with Clause 10.7 of the Contract."*

The Court of Appeal noted that, from the date of termination on 14.07.2022, when the Project was reportedly 99.86% completed, until the date the Request for Direct Payment was served on 11.09.2023, JKR had yet to issue the Certificate of Termination Costs. This certificate, provided for under the JKR Contract, is used to ascertain the Completion Costs and Final Contract Sum.

While the Court of Appeal acknowledged that JKR may be contractually entitled to forfeit the performance guarantee sum, the Court of Appeal held in a section 30 direct payment application, the onus is on the principal (JKR) to account for the retained monies and demonstrate that all sum due to the main contractor had been settled-and that it was, in fact, the main contractor who owed money to the principal. The principal would be expected to issue a notice of demand to the main contractor, or at least produce a final statement of account to supporting documentations:-

> *"[79]* ***Whilst contractually JKR may forfeit the performance guarantee sum, it must give an accounting of it when challenged by KSB*** *who only needs to show that there is money "due or payable" to NSB by JKR on the balance of probabilities.* ***JKR, being the party that has knowledge of this amount, must bear the evidential burden of substantiating what it said that with respect to all money "due or payable", that has been paid to NSB and that it is NSB that owes it money.*** *If that is so one would have* ***expected JKR to issue a notice of demand to NSB*** *or* ***at least produce its Final Statement of Account with documents substantiating the balance due from the main contractor.***"
>
> [Emphasis added]

The Court of Appeal drew an adverse inference against JKR on the basis that no cogent explantion was offered as to why the Certificate of Termination Costs could not be finalised or produced, even after 18 months from the date of termination, particularly in the absence of any evidence of a list of defects or rectification costs:-

> *"[74] No explanation was forthcoming in JKR's affidavits as to why this Certificate of Termination Costs could not be prepared. The need to produce this Certificate of Termination Costs becomes more acute and relevant when*

there was no evidence of any List of Defects exhibited nor the costs of defects rectification incurred…

[83] ***In the absence of cogent reasons why JKR had not been able to finalise or had not exhibited the Certificate of Termination Costs after some 18 months had passed since it terminated the PWD Contract with NSB, this Court must draw an adverse inference against JKR****…"*

[Emphasis added]

In the upshot, the Court of Appeal concluded that *"JKR had not discharged its evidential burden of proving that there is no money "due or payable" to the main contractor from the retention sum."*

- **Retention Sum in Section 30 Application**

In addition to its earlier findings, the Court of Appeal held that there is another approach to deal with retention sums and potential set off under a Section 30 CIPAA 2012 application.

Drawing an analogy from garnishee proceedings, the Court of Appeal held that the principal may only set off amounts from the retention sum where there is an *"actionable debt in existence and payable"* by the main contractor at the time the principal receives the written request from the subcontractor. If the main contractor's debt to the principal is contingent or only arises in the future, it is not relevant to the direct application.

"[101] Likewise, under a s 30 CIPAA application, ***when a written request is made*** *on the principal under s 30(1) CIPAA to pay direct to the subcontractor,* ***at that point the principal must have an actionable debt in existence and payable to the principal from the main contractor from which it may set off what it owes the main contractor under the retention sum of performance guarantee sum****. There is no evidence of an ascertained sum arising from either defects to be rectified and additional costs required to employ the rescue contractor for the balance 0.14% of the works before one may know how much of the performance guarantee sum is needed to be utilised for this purpose.*

[102] ***Even if there is such a debt due some time in the future, that is not relevant as we are concerned with the point when the written request for direct payment was made by the subcontractor on the principal****. At that point in time there was already an existing debt owing by the principal to the main contractor that is attachable. It does not matter if that debt is payable on a deferred date because there is already in existence a present debt and not a contingent debt."*

[Emphasis added]

In essence, for the purposes of a direct payment application, any set off for completion or defect rectification costs should be based on an actionable debt in existence and payable, at the point the principal received the request for direct payment.

The Court of Appeal reiterated that under section 30 CIPAA 2012, the obligation to pay may arise when a debt is payable, and not merely when it becomes due. The Court of Appeal held that a debt is considered payable if there is a present obligation to pay, even if the actual payment is deferred pending issuance of a certificate:-

> *"[110] **So long as the debt is present and existing that would more than satisfy the requirement that it is "payable" quite apart from the fact that it would also be due** as it is not a contingent debt. In the case of a contingent debt the existence of the debt is dependent on a contingency that may or may not happen and so there is no present obligation to pay. **A debt is payable when the obligation to pay exists and the money is effectively owed even if the payment due date may be in the future as in awaiting the certificate of making good defects or the certificate of practical completion**."*

[Emphasis added]

The Court of Appeal held that the subcontractor was entitled to the release of its retention sum, as it had no role in the termination of the main contractor and there are no allegations of defective work. If the direct payment results in a negative balance in favour of the principal, CIPAA 2012 allows the principal to recover the excess from the main contractor under section 30(4). However, such negative balance must first be ascertained, typically through the issuance of a Certificate of Termination Costs.

> *"[114] **Upon the main contractor terminating the subcontractor for the reason that the principal had terminated the main contractor, the subcontractor has the right to demand for the release of the retention sum** of RM927,300.00 which sum was allowed by the adjudicator in the adjudication decision…*
>
> *[115] KSB as the subcontractor who did the IBS deserves to have the retention sum released because **there has been no complaint of any defective works and has no role in the 0.14% of the uncompleted Works. Parliament had thus allowed so much of the amount payable from the principal to the main contractor to be attached for direct payment to the subcontractor**.*

> *[116] The reason why Parliament had provided a* ***recourse in s 30(4) of the CIPAA for the principal to recover the amount paid under s 30(3) as a debt or set off*** *the same from any money due or payable by the principal to the main contractor envisages and anticipates that there may well be instances when after payment out to the subcontractor* ***there may finally be a negative amount in that it is the main contractor that owes the principal. This can only be ascertained if there is a Certificate of Termination Costs issued*** *which for reasons best known to JKR it is not prepared to share in its affidavits opposing the s 30 CIPAA application. Such a negative amount may be claimed by the principal as a debt from the main contractor or to set off the same against any money "due or payable" from the principal to the main contractor."*
>
> [Emphasis added]

DECISIONS OF THE COURT OF APPEAL

In the upshot, the Court of Appeal found that JKR *"had not discharged its evidential burden of showing that there is no money "due or payable" to the main contractor NSB"* and accordingly allowed the subcontractor's appeal for direct payment from JKR.

KEY TAKEAWAY

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

(a) In determining whether a party qualifies as a principal for the purposes of direct payment under section 30 of CIPAA 2012, any contractual arrangement between the employer and the main contractor that seeks to restrict subcontracting does not override the statutory definition of *"principal"* in CIPAA 2012.

(b) Although the principal's failure to issue a Section 30(2) Notice to the main contractor (whether in its original or modified form) is not fatal, it remains a relevant factor in determining whether there is money *"due or payable"*. In the appropriate circumstances, such failure may justify an adverse inference being drawn against the principal.

(c) The retention sum under a terminated main contract may be subject to direct payment if the employer / principal does not have an *"actionable debt in existence and payable"* by the main contractor to set off against such sum, as at the time the subcontractor's written request for direct payment is received.

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

CONTACT

ANDREW HENG YENG HOE
Senior Partner

+6016 222 8412
andrew@zainmegatmurad.com

ATIQAH YASMIN SEDEK
Associate

+6012 732 7567
atiqahsedek@zainmegatmurad.com