

## Section 30 of CIPAA – A Road Less Travelled, Now Widened

*“The Construction Industry Payment and Adjudication Act 2012 (CIPAA) has been legislated to facilitate cash flow in the construction industry.”<sup>1</sup>* – a sentiment readily resonated nationally amongst judges and legal practitioners in the construction industry alike, amongst others.

Whilst most companies who have obtained an adjudication decision in their favour would more commonly choose to apply for the said decision to be enforced via section 28 of the CIPAA, the road less travelled of demanding payment for the adjudication decision via section 30 of the CIPAA is now proving to be another effective recourse for payment. One such traveler is Chong Lek Engineering Works Sdn Bhd (“CLE”) who recently obtained an order from the High Court pursuant to section 30 of the CIPAA<sup>2</sup>.

### A Tale of Two Certificates

CLE was appointed as the sub-contractor by the main contractor, Dekinjaya Builder Sdn Bhd (“DBSB”) of a project. In the course of the project, CLE issued two payment certificates, amongst others for work done. This was subsequently met with partial or no payment being made by DBSB. CLE then brought two adjudication proceedings against DBSB (one for each certificate) and was eventually successful.

Nevertheless, CLE was faced with non-payment from DBSB and so sought to enforce the adjudication decisions in the High Court pursuant to section 28 of the CIPAA. In a parallel vein, DBSB sought to set aside and stay the adjudication decisions and hence applied for the same in the High Court.

Whilst these applications were still pending at the High Court, CLE, with two adjudication decisions in tow, proceeded to make a written application for direct payment pursuant to section 30 of the CIPAA to the principal of DBSB, PFCE Integrated Plant and Project Sdn Bhd (“PFCE”). In response, PFCE stated:

*“Kindly be informed that at the time of the receipt by us of your letter, there is no money due or payable by us to Dekinjaya Builder Sdn Bhd.”*

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<sup>1</sup> Dekinjaya Builder Sdn Bhd v Chong Lek Engineering Works Sdn Bhd and another case [2020] MLJU 2455, para 20.

<sup>2</sup> Chong Lek Engineering Works Sdn Bhd v PFCE Integrated Plant and Project Sdn Bhd and another case [2020] MLJU 2389.

CLE, in its response made via its solicitors, stated that PFCE's aversion was a bare statement, and demanded that PFCE do forward to CLE's solicitors, payment applications by DBSB to PFCE, and all interim valuations issued by the Quantity Surveyor to DBSB, amongst others. This was subsequently met with further denials made by PFCE that any sums were due by PFCE to DBSB and that PFCE was obligated to comply with CLE's demand. Thus, CLE's application for direct payment pursuant to section 30 of the CIPAA, ensued.

## The High Court's Decision

Section 30 of the CIPAA reads as follows:

### ***Direct payment from principal***

*“(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).”*

## Conditions for Direct Payment

The Learned High Court Judge, Wong Kian Keong J, held that PFCE was obligated as DBSB's principal to pay the sums awarded under the adjudication decisions. His Lordship's judgment was premised on CLE's application having satisfied four conditions. These are, that:

- (1) DBSB had failed to pay the adjudicated amount to CLE;
- (2) CLE had made a written request for PFCE to pay the adjudicated amount directly to CLE;
- (3) there is a sum of money due from PFCE to DBSB; and,
- (4) PFCE failed to comply with CLE's written request and did not pay the adjudicated amount directly to CLE.

The Learned High Court Judge held that CLE had satisfied the first, second and fourth conditions above, on a balance of probabilities. In so far as the third condition is concerned, His Lordship found that PFCE had failed to discharge the evidential onus to prove that no amount of money was 'due' or 'payable' from PFCE to DBSB at the time of PFCE's receipt of CLE's two demands. His Lordship's finding in this regard was premised on several factors, not the least of which being that PFCE had failed to exhibit proof of payment by PFCE to DBSB on the invoices issued by the latter to the former. These invoices showed that the retention sum held by PFCE, should have been released to DBSB.

For PFCE's director to assert in his affidavit that no sums were due and payable by PFCE to DBSB was, in His Lordship's decision, inherently improbable in light of the above, amongst others. Accordingly, His Lordship drew an adverse inference against PFCE for suppressing all material evidence concerning the third condition.

### **Lifting of the Corporate Veil**

Whilst DBSB and PFCE are separate entities, the question arose here as to whether the court should lift the corporate veil between the two entities. Drawing from the Federal Court's judgments in the cases of *Solid Investment Ltd v Alcatel Lucent (M) Sdn Bhd*<sup>3</sup>, *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors*<sup>4</sup>, and *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor*<sup>5</sup>, the Learned High Court Judge here held that such an exercise would be permitted where two conditions are satisfied, namely:

- (1) There exist special circumstances to pierce or lift the corporate veil such as –
  - a) There has been commission of actual fraud or Common Law fraud;
  - b) Equitable fraud or constructive fraud has been committed;
  - c) To prevent an evasion of liability; or
  - d) The prevent an abuse of corporate personality; and
- (2) The piercing or lifting of a corporate veil is in the interest of justice.<sup>6</sup>

The Learned High Court Judge here held that the two conditions have been satisfied as there existed special circumstances, i.e. the corporate veil should be lifted to prevent PFCE from evading its statutory liability to CLE under section 30 of the CIPAA. Further, there was evidence to show that there was little to no distinction between DBSB and PFCE.

<sup>3</sup> [2014] 3 CLJ 73.

<sup>4</sup> [2015] 1 MLJ 773.

<sup>5</sup> [2015] 9 CLJ 537.

<sup>6</sup> See also: *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 and *Tan Guan Eng v Ng Kweng Hee & Ors* [1992] 1 MLJ 487.

However, His Lordship concluded his judgment in holding that such sums payable under the adjudication decisions do not include the adjudication costs awarded. In His Lordship's decision, the expression "adjudicated amount" in sections 30(1) and 30(3) and 12(5) of the CIPAA, differed from the expression "costs of the adjudication proceedings" employed in section 18(1), and the expression employed by Parliament in section 28(1) and 28(2) of the CIPAA, whereby leave may be granted to "enforce the adjudication decision."

In view of the disparity in the wording employed across these various sections, His Lordship opined that Parliament did not intend for the principal to pay the entire sum awarded in an adjudication decision in section 30(3) of the CIPAA. In His Lordship's judgment, had Parliament intended for this to be the case, Parliament would have expressly stated in section 30(3) of the CIPAA that the principal shall pay both the adjudication amount and adjudication costs, or used the same wording in sections 28(1) and 28(2) of the CIPAA.

## Comment

Parliament in drafting section 30 of the CIPAA has employed the words "may" in section 30(1) of the CIPAA and "shall" in sections 30(2) and 30(3) of the CIPAA. A discretionary narrative appears to have been adopted in section 30(1) of the CIPAA as opposed to the mandatory narrative under sections 30(2) and 30(3) of the CIPAA. It stands to reason that Parliament had intended to give the unpaid party the discretion of choosing to make an application under section 30 of the CIPAA for direct payment. However, where the unpaid party has chosen to do so, the principal would have a mandatory obligation abide by the statutory requirements of sections 30(2) and 30(3) of the CIPAA.

At the time of writing, this case is pending an appeal at the Court of Appeal. Nevertheless, the High Court's decision demonstrates that courts are inclined to read section 30 of the CIPAA to give CIPAA its bite.

It is also worth noting here that in addition to CLE's application here under section 30 of the CIPAA, CLE's enforcement applications under section 28 of the CIPAA as aforementioned, were successful.<sup>7</sup> Thus, the choices for an unpaid party to make in so far as enforcement of adjudication decisions obtained in their favour are concerned, would not be an either-or situation, as both the enforcement application under section 28 of the CIPAA and the application for direct payment under section 30 of the CIPAA, can be pursued simultaneously.

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<sup>7</sup> *Dekinjaya Builder Sdn Bhd v Chong Lek Engineering Works Sdn Bhd and another case* [2020] MLJU 2455.