

PAID BUT NOT OWNED: WHO BEARS THE LOSS WHEN THE CONSTRUCTION SUPPLY CHAIN BREAKS?

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PAID BUT NOT OWNED: WHO BEARS THE LOSS WHEN THE CONSTRUCTION SUPPLY CHAIN BREAKS?

This article examines who bears the loss when a supplier at the bottom of a construction supply chain is left unpaid, even though the employer at the top has already paid for the goods. This article draws on the BicTok #49 panel session organised by the Borneo International Centre for Arbitration and Mediation (BICAM) titled: “Retention of Title Clauses in Construction Contracts: Practical Implementation and Challenges”, held on 07.10.2026 and organised by the at which our Partner, Sudharsanan Thillainathan, spoke on risk management and payment obligations in retention of title disputes.

The discussion centred on the Court of Appeal’s decision in **Kraas Solutions Sdn Bhd v. Konsesi Kota Permatamas Sdn Bhd** [2018] 6 MLJ 202 (CA) (“**Kraas**”), in which an employer that had paid its main contractor for the delivery of goods was nonetheless ordered to pay an unpaid supplier with whom it had never contracted.

Retention of Title: The Basics

A retention of title clause allows a seller to deliver goods to a buyer while keeping

ownership of them until the price is paid. Possession moves; ownership does not. Such clauses are also known as Romalpa clauses, after the English Court of Appeal decision in **Aluminium Industrie Vaasen BV v. Romalpa Aluminium Ltd** [1976] 1 WLR 676 (CA).

The clause is necessary because the default position under Malaysian law points the other way. Section 20 of the Sale of Goods Act 1957 (“**SOGA**”) provides:

“Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.”

Parties may, however, agree otherwise. Under Section 19 of the SOGA, property passes when the parties intend it to pass, and Section 25 permits a seller to reserve the right of disposal of the goods until certain conditions are fulfilled. A supplier that reserves title in this way is protected if its buyer becomes insolvent. Rather than queuing alongside other unsecured creditors, it may reclaim its goods. That protection, however, lasts only while

the goods remain separate goods. Once they are affixed to the land, the clause will generally cease to be effective, as discussed below.

Why Construction is Different

Construction projects are particularly exposed to competing claims over the same materials. Standard form contracts commonly provide for materials on site to be paid for in interim valuations, and for those materials to become the employer's property on delivery, on payment or on incorporation into the works. Those provisions, however, are promises made by the main contractor. The supplier at the bottom of the chain is not a party to the main contract and is not bound by them.

Where a party in the middle of the chain defaults, two innocent parties may claim the same goods: an employer that has paid, and a supplier that has not been paid.

Factual Background

Konsesi Kota Permatamas Sdn Bhd ("**Konsesi**") held a concession to build the Universiti Teknologi MARA campus in Rembau, Negeri Sembilan, and to supply its furniture. Konsesi appointed Tech Art Sdn Bhd ("**Tech Art**") as its main contractor. Tech Art subcontracted the furniture package to Novanexus Design

Studio, which, together with Novanexus Design and Build Sdn Bhd (collectively, "**Novanexus**"), purchased the furniture from Kraas Solutions Sdn Bhd ("**Kraas Solutions**"). Konsesi did not know that Kraas Solutions existed.

Clause 9 of the supply contract provided that title would pass "upon delivery to the Project site, and upon payment of The Contract Sum". Kraas Solutions delivered the furniture between July and September 2016. Konsesi paid Tech Art approximately RM6.04 million of its RM6.8 million contract sum, but Kraas Solutions was never paid the RM920,494.86 due to it. When Kraas Solutions threatened to repossess the furniture, Konsesi commenced proceedings. The High Court found in favour of Konsesi. Kraas Solutions appealed.

Decision of the Court of Appeal

The Court of Appeal allowed the appeal.

First, because Kraas Solutions was never paid, title never passed to Novanexus, and no party above it in the chain acquired title. Applying the principle that one cannot pass a title one does not have, the Court held that "the respondent could never acquire title".

Second, Kongsesi's payment to Tech Art was no defence to the claim. Kongsesi's remedy lay against Tech Art.

Third, Kraas Solutions was entitled to recover from Kongsesi under Section 71 of the Contracts Act 1950, notwithstanding the absence of any contract between them. As the Court observed, "Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship".

Kongsesi was ordered to pay Kraas Solutions RM920,494.86 together with costs. In practical terms, Kongsesi paid for the same furniture twice.

Legal Implications

Employers: paying the contractor is not enough

Kraas makes clear that delivery of goods to site does not make the employer their owner, and neither does payment to the main contractor. Employers should consider the following measures:

- For high value items, contract with the supplier directly, or pay the supplier directly.
- Obtain the supplier's written agreement that title passes once the main contractor is paid.

- Require the main contractor to flow the same title provisions down into every subcontract and supply order.
- Act on warning signs. If you know the supplier remains unpaid, do not assume that payment to your contractor is enough. Check the payment chain before certifying or paying for the materials.

Contractors stand in the same position one level down, and should ensure that their suppliers are paid before claiming for those suppliers' materials.

A shift towards suppliers?

Kraas did not create a new rule. It applied an old one strictly: a party cannot pass a title it does not have. English courts reached the same result decades earlier in Dawber Williamson Roofing Ltd v. Humberside County Council (1979) 14 BLR 70 and W Hanson (Harrow) Ltd v. Rapid Civil Engineering Ltd (1987) 38 BLR 106. What is notable in Kraas is the use of Section 71 of the Contracts Act 1950 to allow a supplier to recover from an employer with whom it had no contract.

Kraas has since been followed in Galvaco Industries Sdn Bhd v. Neu Estate Sdn Bhd (dahulu dikenali sebagai NPO Land Sdn Bhd) [2022] MLJU 1740 (HC). Whether Kraas will be applied with

equal force against employers that have paid in full remains to be seen.

Konsesi also sought to rely on Section 30(2) of the SOGA, which protects, in certain circumstances, a buyer who receives goods in good faith. The Court of Appeal held, however, that the SOGA did not apply as between Konsesi and Kraas Solutions, as there was no privity of contract between them.

Once goods are built in

A retention of title clause is generally effective only until the goods are incorporated into the works. As the English court put it in Appleby v. Myers (1867) LR 2 CP 651, at 659, “Bricks built into a wall become part of the house.” Once goods are fixed to the land, they lose their separate identity, and taking them back would require breaking the works. The supplier’s money claim may nonetheless survive. Kraas concerned loose furniture, which could be carried away.

The same logic applies to a contractor that seeks to retain title against an employer. Such a clause is possible in law, but of limited practical value once materials are built in. The contractor’s real remedy is payment, whether under the contract or by way of adjudication under the Construction

Industry Payment and Adjudication Act 2012 (“CIPAA”).

Kraas and CIPAA

Kraas and CIPAA both deal with the same problem: an unpaid party at the bottom of a construction chain looking to someone further up for payment. CIPAA answers that problem with a statutory direct payment mechanism, carefully limited by Parliament. Kraas answers it through property law and Section 71 of the Contracts Act 1950, with no equivalent limits. The two routes therefore sit uneasily side by side.

Section 30 of CIPAA allows a party that has obtained an adjudication decision, but has not been paid, to request payment directly from the principal of the defaulting party. That right is subject to Section 30(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).”

In JDI Builtech (M) Sdn Bhd v. Danga JED Development Sdn Bhd [2024] 4 MLJ 29 (CA) (“JDI Builtech”), the Court of Appeal treated Section 30(5) as the gateway to the whole of Section 30, holding that “The CIPAA does not

transfer the risk to the principal” and that to order payment merely upon the main contractor’s default “would be to make the principal a guarantor”.

The contrast with Kraas is stark in three respects. First, CIPAA protects an employer that owes its contractor nothing; Kraas does not. Konsesi had already paid Tech Art and was ordered to pay again. Second, direct payment under CIPAA reaches only the principal of the defaulting party. Had Kraas Solutions adjudicated against Novanexus, it could have looked only to Tech Art, not to Konsesi. Third, CIPAA preserves a party’s “other rights and remedies” (Section 31(2)), so a supplier may in principle pursue both routes at once. No reported decision has yet addressed how double recovery across the two routes is to be prevented.

Drafting Points for Suppliers

Suppliers seeking to rely on a retention of title clause should ensure that:

- the clause is incorporated into the signed supply contract;
- the goods are stored separately and marked as the supplier’s property;
- the supplier retains a contractual right to enter the site and recover the goods; and

- the buyer is prohibited from incorporating the goods into the works until payment is made.

Conclusion

Kraas did not change the rules. It showed who pays when the chain breaks. For employers, the lesson is to pay for ownership, not merely for delivery. For suppliers, a properly drafted and incorporated retention of title clause, coupled with Section 71 of the Contracts Act 1950, may provide a route to recovery that reaches well beyond the party with whom they contracted.

This article was written by our General Civil and Commercial Litigation Team, Sudharsanan Thillainathan, with the assistance of Daniel Lim (Pupil). It contains general information only. It does not constitute legal advice or an expression of legal opinion and should not be relied upon as such.