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# IJM CONSTRUCTION SDN BHD v LINGKARAN LUAR BUTTERWORTH (PENANG) SDN BHD

CaseAnalysis | **[2018] 7 MLJ 341**

## *IJM Construction Sdn Bhd v Lingkaran Luar Butterworth (Penang) Sdn Bhd [2018] 7 MLJ 341*

Malayan Law Journal Reports · 9 pages

HIGH COURT (SHAH ALAM)

SEE MEE CHUN J

ORIGINATING SUMMONS NO BA-24C(ARB)-1-01 OF 2017

4 July 2017

## Case Summary

**Civil Procedure — Arbitration — Res judicata — Plaintiff applied for defendant to deposit retention monies into separate fixed deposit account — Plaintiff earlier application to arbitrator dismissed — Whether plaintiff's application rendered res judicata**

**Trusts and Trustees — Trusts — Trust monies — Plaintiff applied for defendant to deposit retention monies into separate fixed deposit account — Whether retention monies being trust monies were required to be kept in separate fixed deposit accounts**

The plaintiff was the contractor appointed by the defendant for work on the Butterworth Outer Ring Road. There were three separate contracts awarded under sections 1, 2 and 3 of Package 1B of the project. The present application by the plaintiff ('encl 1') was for an order for the defendant to deposit retention monies into a separate fixed deposit account in three separate fixed deposit certificates. The defendant submitted that the present application by the plaintiff was rendered res judicata due to its earlier application to the arbitrator being dismissed and thus, s 11 of the Arbitration Act 2005 ('the Act') precluded the making of such application. The issue for consideration was whether retention monies being trust monies were required to be kept in separate fixed deposit accounts.

**Held**, dismissing encl 1:

(1) The plaintiff was entitled to file the present application pursuant to s 11(1)(e), (f) and (g) of the Act even though the arbitrator had dismissed the plaintiff's application in the arbitration proceedings. Section 11(2) of the Act allows the High Court to grant any interim measure where an arbitral tribunal has already ruled on the same application. Thus, the application made by the plaintiff under s 11 of the Act after the arbitrator refused its application under s 19 of the Act was in order. Res judicata could not be applied to the extent of nullifying or defeating the express provisions of ss 11 and 19 of the Act (see paras 10-11 & 13). [*342]

(2) There must be grounds advanced to necessitate the keeping of separate accounts. The winding up proceedings against the defendant was not ground for keeping the monies in separate accounts as the retention monies could be traceable. In conclusion, although the retention monies were trust monies it did not necessarily mean the monies must be kept in separate accounts (see paras 25-26 & 30).

Plaintif adalah kontraktor yang dilantik oleh defendan untuk kerja berhubung Jalan Lingkaran Luar Butterworth. Terdapat tiga kontrak berasingan yang diawardkan di bawah seksyen 1, 2 dan 3 Pakej 1B projek tersebut.

Permohonan ini oleh plaintif ('lampiran 1') adalah untuk perintah agar defendan mendepositkan wang pengekalan dalam akaun deposit tetap berasingan dalam tiga perakuan deposit tetap berasingan. Defendan berhujah bahawa permohonan ini oleh plaintif merupakan res judicata akibat permohonan terdahulunya kepada penimbang tara yang telah ditolak dan oleh itu, s 11 Akta Timbang Tara 2005 ('Akta tersebut') menghalang permohonan tersebut dibuat. Isu untuk dipertimbangkan adalah sama ada wang pengekalan yang merupakan wang amanah perlu disimpan dalam akaun deposit tetap yang berasingan.

**Diputuskan**, menolak lampiran 1:

(1) Plaintif berhak memfailkan permohonan ini menurut s 11(1)(e), (f) dan (g) Akta tersebut meskipun penimbang tara telah menolak permohonan plaintif dalam prosiding timbang tara. Seksyen 11(2) Akta tersebut membenarkan Mahkamah Tinggi memberikan apa-apa langkah interim di mana tribunal timbang tara telahpun memutuskan permohonan yang sama. Oleh itu, permohonan yang dibuat oleh plaintif di bawah s 11 Akta tersebut selepas penimbang tara menolak permohonannya di bawah s 19 Akta tersebut adalah teratur. Res judicata tidak boleh terpakai setakat mana membatalkan atau menggagalkan peruntukan nyata ss 11 dan 19 Akta tersebut (lihat perenggan 10-11 & 13).

(2) Harus ada alasan yang dikemukakan untuk memerlukan akaun-akaun berasingan. Prosiding penggulungan terhadap defendan bukan alasan untuk menyimpan wang dalam akaun-akaun berasingan kerana wang pengekalan itu boleh dikesan. Kesimpulannya, walaupun wang pengekalan itu adalah wang amanah ia tidak semestinya bermaksud wang itu perlu disimpan dalam akaun-akaun berasingan (lihat perenggan 25-26 & 30).]

Notes

For cases on arbitration in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2251-2267.

[*343]

For cases on trusts in general, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3574-3620.

Cases referred to

*Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action* [2010] MLJU 2140; [2010] 1 LNS 1834, HC (refd)

*Concorde Construction Co Ltd v Colgan Co Ltd* (1984) 29 BLR 120, HC (refd)

*ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674, CA (refd)

*Benson Elletson v Pillers, In Re* [1899] 1 Ch 39, ChD (distd)

*Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 11, 11(1), (1)(e), (1)(f), (1)(g), (2), 19, 19(1)(d)

*GH Tee (GH Tee & Co) for the plaintiff.*
*Faisal Moideen (Nereen Kaur with him) (Moideen & Max) for the defendant.*

## See Mee Chun J:

INTRODUCTION AND PARTIES

**[1]**Enclosure 1 is an application by the plaintiff for, inter alia, an order for the defendant to deposit retention monies into a separate fixed deposit account in three separate fixed deposit certificates.

**[2]**The plaintiff was the contractor appointed by the defendant for work on Butterworth Outer Ring Road. There were three separate contracts awarded under sections 1, 2 and 3 of Package 1B of the work.

BACKGROUND FACTS

**[3]**The retention monies in question comprises the following:

(a) retention money under section 1 contract — RM1,782,533.10;

(b) retention money under section 2 contract — RM1,704,250; and

(c) retention money under section 3 contract — RM927,500.

Exhibits 'PA.3.1, 3.2 and 3.3' show the amounts.

**[4]**There is a pending arbitration between parties where the plaintiff claimed, inter alia, for the release of the retention monies. In its defence and counterclaim the defendant had in its para 15 admitted to retaining [*344] RM1,782,533.10 and in para 49 to retaining RM1,704,250 and stated in those aforesaid paragraphs any amount found to be payable shall be subject to set off and counterclaim. The set off and counterclaim are essentially for defects in the plaintiff's work, failure to complete within time and the defendant's entitlement to liquidated and ascertained damages.

**[5]**The plaintiff had applied to the arbitrator in the arbitration proceedings for an order the retention monies be maintained in separate fixed deposit accounts. This was refused by the arbitrator in his decision dated 22 July 2016 ('exh PA9').

**[6]**There is also a winding up petition filed by the plaintiff against the defendant arising from a separate suit. The winding up is on a demand made pursuant to a consent judgment dated 17 October 2013. the defendant's applications to set aside the consent judgment and strike out the winding up petition were dismissed by the High Court and the appeals are pending.

APPLICATION OF S 11 OF THE ARBITRATION ACT 2005

**[7]**It was firstly the defendant's contention the present application by the plaintiff was rendered res judicata due to its earlier application to arbitrator being dismissed and *s 11* of the *Arbitration Act 2005* ('the AA') thus precludes the making of such an application.

**[8]**The present application is made by the plaintiff pursuant to *s 11(1)*, *11(1)(e)*, *(1)(f)* and *(1)(g)* of the *AA*. The aforesaid provision states as follows:

> Arbitration agreement and interim measure by High Court 11(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and High Court may make the following orders for:

…

(e) securing the amount in dispute;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

…

Pursuant to the above aforesaid provision it is clear the High Court has jurisdiction and power to make the order which the plaintiff now seeks.

**[9]**The power of arbitrator to order interim measures is conferred by *s 19* of [*345] the *AA*. Specifically *s 19(1)(d)* states as follows:

19 Power of arbitral tribunal to order interim measures

(i) Unless otherwise agreed by the parties, a party may apply to the arbitral tribunal for any of the following orders:

…

(d) the preservation, interim custody or sale of any property which is the subject-matter of the dispute.

**[10]**The opening sentence of s 11(1) expressly provides that the application to the High Court for interim measures may be made 'before or during arbitral proceedings'. *Section 11(2)* of the *AA* then provides that 'Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application'. Therefore, the plaintiff is entitled to file this application pursuant to s 11(1)(e), (f) and (g) of the AA even though the arbitrator has dismissed the plaintiff's application in the arbitration proceedings. Section 11(2) of the AA allows the High Court to grant any interim measure where an arbitral tribunal has already ruled on the same application.

**[11]**In *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd and another action* [2010] MLJU 2140; [2010] 1 LNS 1834 the court stated the grounds for interim measures in s 11 of the AA overlaps with the grounds found in s 19. The court then stated at p 9:

> Thus there is a clear overlap between s 11(1)(a), (b), (c) and (f) with s 19(1)(a), (b), (c) and (d). Going by the basic principles as stated earlier, where there is a concurrent jurisdiction, a party should first apply before the arbitral tribunal, unless there are countervailing factors, since the role of the High Court is to 'support arbitration' …

Thus the application made by the plaintiff under s 11 of the AA after the arbitrator refused its application under s 19 of the AA is in order.

**[12]**There is nothing in AA which stipulates that the arbitrator's exercise of powers under s 19 shall be to the exclusion of the court's exercise of powers under s 11, nor any statutory provision to the effect that the arbitrator's decision under s 19 is final and binding upon the court. Section 11(2) by specifically limiting the conclusiveness to the arbitrator's findings of fact, would imply that the part of the arbitrator's ruling or decision on interim measure other than the findings of fact are open to reconsideration and fresh decision by the High Court under a s 11(1) application.

[*346]

**[13]**It follows this court has the power to hear the application under s 11 and res judicata cannot be applied to the extent of nullifying or defeating the express statutory provisions of ss 11 and 19.

WHETHER RETENTION MONIES CONSTITUTE TRUST MONIES AND WHETHER IT OUGHT TO BE KEPT IN SEPARATE FIXED DEPOSIT ACCOUNTS

**[14]***Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422 is clear authority a trust can be created even in the absence of an express provision for trust and that retention monies by their very nature and purpose are trust monies. Refer to p 432 where the Court of Appeal stated:

> … right in law and in fact in holding that the retention monies by their very nature and purpose, are trust monies, held by the appellant as trustee for the respondents. The respondents are the beneficial owner of the said monies. The monies are held back by the appellant (as employer) only for a specific purpose, and not on the basis whether there was an express provision for trust. In the circumstances, the retention monies held by the appellant must be held in its capacity as a fiduciary to the trust for the respondents …

It was also not disputed by the defendant counsel retention monies are trust monies but rather whether it be kept separately.

**[15]**The larger issue is whether the retention monies being trust monies are required to be kept in separate fixed deposit accounts.

**[16]**Date of practical completion for section 1 work was 18 October 2005 and date of expiry of defects liability period ('DLP') was 18 October 2007, for section 2 work practical completion was 27 January 2006 and expiry of DLP was 27 January 2008 and for section 3 work practical completion was 9 May 2006 and expiry of DLP was 9 May 2008 (exhs 'PA 4.1, 4.2 and 4.3').

**[17]**The respective contracts for sections 1, 2 and 3 work had an identical clause on retention monies as per cl 65(e). Clause 65(g) further provides that one half of the retention monies shall become due on issuance of certificate of practical completion of the whole work and the balance one half on the expiry of DLP for the whole work.

**[18]**The plaintiff had relied primarily on *Qimonda*, *Concorde Construction Co Ltd v Colgan Co Ltd* (1984) 29 BLR 120 and *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; [2004] 4 CLJ 674 as authorities that an employer who holds the retention monies is under a duty to deposit the trust monies in a separate trust account.

[*347]

**[19]**However *Qimonda* does not support the proposition that retention monies as trust monies must be kept in a separate account. What was actually held was this at p 433:

> There is no requirement that the retention monies held by the appellant must be kept in a separate bank account. It does not change the status of the said monies as trust monies held for the specific purpose. There is also no requirement that the respondents (as contractor) must request for the monies to be kept in a separate bank account …

**[20]**In *Concorde*, the plaintiff relied on the following passage at p 133 where it was stated:

> I do not think that an employer is entitled to have recourse on the trust fund of retention monies simply on the strength of his own belief that he has a good claim which entitles him so such monies. The court cannot countenance a situation where the employer would, in effect, be the judge in his own cause and able to say when he would make deductions from the retention monies …
>
> As a matter of common sense, the employer can only permitted to deduct substantiated claims for liquidated amounts from the retention monies. How the employer will substantiate his claims depends on the circumstances.
>
> …
>
> Certainly, the employer has an arguable case, judging from the material so far before the Court, but, nonetheless, its contentions about the main contractor's responsibility for defects and in relation to the other disputed matters are 'speculative', in the sense that it is a matter for speculation whether the employer will ultimately succeed in proving its contentions. In the *Rayack* case, the court would not allow what it described as a 'speculative' set-off to defeat the contractor's request that the retention monies should be set aside as a separate trust fund.

**[21]**The views in that aforesaid passage from *Concorde* was adopted in *ESPL* in p 696. According to the plaintiff, this coupled with the proprietary right to the trust monies meant that the plaintiff was entitled to the application sought. At p 697 it was stated:

> It is a principle of general application in a Court of Equity that specific relief will not be granted where monetary compensation is a sufficient remedy. However, as an exception, once an equitable proprietary title under a trust is established, equity presumes that monetary compensation is inadequate and will grant specific relief, even if the subject matter of the trust consists of pure personalty or a promise to create a trust. The decision in *Fletcher v Fletcher* [1844] 67 ER 564 amply exemplifies this approach.

> … The plaintiff here was, beyond a doubt, under an obligation to pay into account No 1 all monies it received from Henz. That obligation was enforceable in Equity as a trust. The fact that it may have a mere contractual right of a set off against the the defendant can make no dent in the cast iron armour of the trust imposed upon the [*348]
> plaintiff's conscience. That is a monetary claim that must await adjudication by the court.

**[22]**However as correctly pointed out by the defendant counsel, *Concorde*, *ESPL* and the other cases relied on by the plaintiff, the contracts in question contained a clear provision creating a trust.

**[23]**In *Concorde* the relevant provision in condition 30(4) stated:

> (a) The Employer's interest in any amounts so retained shall be fiduciary as trustee for the Main Contractor (but without obligation to invest), and the Main Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this Contract to deduct from any sum due or to become due to the Main Contractor.

**[24]**In *ESPL* cl 27.1 stipulated that:

> 27.1 Sub-contractor will receive the payments made by Contractor and will hold the right to receive such payments as a trust fund to be applied first to the payment of labourers, suppliers, Sub-Sub-Contractors and others responsible for the Work justifying such payments, and all taxes and insurance applicable thereto; and Sub-Contractor will so apply the payments from Contractor.

**[25]**Thus it is not as a matter of course that the retention monies by virtue of being trust monies must be kept in separate accounts. *Qimonda* being a later case to *ESPL* has made the position clear. There must be grounds advanced to necessitate the keeping of separate accounts.

**[26]**The winding up proceedings against the defendant is not ground for keeping the monies in separate accounts as the retention monies can be traceable. As *Qimonda* at p 433 stated:

> [22] Thus, the retention monies cannot form part of the general assets of the appellant. In an appropriate case, the court can still order for the preservation or release of the retention monies even after winding up proceedings have been presented against the appellant or the appellant is in the process of liquidation …

**[27]**It is also relevant to note the winding up proceedings were initated by the plaintiff itself. It follows the plaintiff would be able to take steps to protect its interest in the course of any winding up proceedings.

**[28]**The defendant's set off and counterclaim have to be allowed to run its course in the arbitration proceedings and it is not for the court to now say it is speculative (as per *Concorde*) or otherwise.

[*349]

**[29]**The plaintiff had also relied on *In Re Benson Elletson v Pillers* [1899] 1 Ch 39 that even where the trust has ceased trust property ought to be preserved pending the disposal of the dispute. This does not in any way support its proposition that trust monies must be kept in separate accounts. Further that case did not deal with retention money.

CONCLUSION

**[30]**Although the retention monies are trust monies it does not necessarily mean the monies must be kept in separate accounts. For the reasons given above, the plaintiff's application in encl 1 was dismissed.

*Enclosure 1 dismissed.*

Reported by Dzulqarnain Ab Fatar

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