

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. W-02(NCC)-1132-2011

ANTARA

QIMONDA MALAYSIA SDN BHD

(No. Syarikat: 186133-V)

(Dalam Likuidasi)

(Dalam Jagaan Likuidator-Likuidator

Dato' Gan Ah Tee dan Mok Chew Yin) .. PERAYU

DAN

1. SEDIABENA SDN BHD

(No. Syarikat: 085679-H)

2. APC CORPORATE HOLDINGS SDN BHD

(No. Syarikat: 559314-K) .. RESPONDEN-RESPONDEN

(Dalam perkara mengenai Guaman No. D-22NCC-1170-2010

Dalam Mahkamah Tinggi Malaya di Kuala Lumpur

Antara

1. SEDIABENA SDN BHD

(No. Syarikat: 085679-H)

2. APC CORPORATE HOLDINGS SDN BHD

(No. Syarikat: 559314-K) .. PLAINTIF-PLAINTIF

Dan

QIMONDA MALAYSIA SDN BHD

(No. Syarikat: 186133-V)

(Dalam Likuidasi)

(Dalam Jagaan Likuidator-Likuidator

Dato' Gan Ah Tee dan Mok Chew Yin) .. DEFENDAN)

CORAM: **ZAINUN ALI, HMR**
 RAMLY HJ ALI, HMR
 ZAHARAH IBRAHIM, HMR

JUDGMENT OF THE COURT

The Appeal

1. The present appeal before this court is against the decision of the learned High Court judge dated 22 April 2011 in allowing the Respondents' application for a declaration that the retention sum held by the Appellant under the relevant contract is held on trust by the Appellant in favour of the Respondents and granting injunctive reliefs as prayed with costs of RM25,000.00. The Appellant was the Defendant and the Respondents were the Plaintiffs at the court below.

Factual Background

2. The parties have agreed to the following facts which are stated in the Statement of Agreed Facts:
 - (a) the Respondents and the Appellant company entered into a contract dated 22 August 2007 for a project known

as the 'Design and Build for Qimonda Global Module House Project at Senai, Johor' ("the Contract");

- (b) the 1st Respondent was the Design and Build contractor of the said project to design, construct and maintain the Global Module House at Lot 1, Airport Logistic Park, Sultan Ismail International Airport, 81259 Johor ("the Works"). The 1st Respondent was the contractor for their part of the works (CSA Package) under the Contract while the 2nd Respondent was the nominated sub-contractor for their part of the works (MEP Package) under the Contract;
- (c) under Clause 22.1.3 of the Contract, the retention monies were to be deducted for value of work already and actually done and materials supplied as certified in the payment certificates;
- (d) pursuant to Clause 23.1 of the Contract, the Appellant company shall release one half of the retention monies to the Respondent upon the issuance of the Handing Over Certificate. Clause 23.2 of the Contract further states

that the Appellant company shall release the second half of the retention sum monies to the Respondents upon the issuance of the Maintenance Certificate or after the issuance of the Certificate of Statutory Completion for the Works by the relevant authority, whichever is the later;

- (e) to date, the retention monies of RM6,127,884.50 has not been paid by Appellant company to the Respondents;
- (f) the Global Module House was handed over to the Defendant company on 30 June 2008. A Certificate of Practical Completion was also issued by the Architect on 17 July 2008. To date, the Respondents have not obtained the Certificate of Statutory Completion;
- (g) the Appellant company's records contain a copy of a letter from Advanced Engineering (Asia) Pte Ltd dated 10 February 2009 recommending the full release of the retention monies for MEP Package and 1st half retention monies for CSA Package in the sum of RM4,515,192.25;
- (h) on 9 April 2009, the Directors of the Appellant company passed a board resolution and declared that the

Appellant company could not, by reason of its liabilities, continue its business. They decided to voluntarily wind up the Appellant company. A provisional liquidator, Dato' Gan Ah Tee was appointed over the Appellant company;

- (i) a meeting of the members and the creditors of the Appellant company was held on 23 April 2009 and Dato' Gan Ah Tee and Mok Chew Yin were jointly and severally appointed as the liquidators of the Appellant company;
- (j) the Respondents have submitted their proof of debt in Form 77 to the Appellant company on 14 September 2009;
- (k) the defect liability period under the Contract had expired on 30 June 2010; and
- (l) prior to the liquidation of the Appellant company, the Respondents had never requested the Appellant company to appropriate and set aside the retention sum into a separate trust fund account.

3. The parties also have agreed on the following issues to be tried:

- (a) whether the retention monies which had not been paid by the Appellant company to the Respondent under the Contract amounting to RM6,127,884.50 are trust monies held by the Appellant company in favour of Respondents;
- (b) whether the Respondents are estopped from asserting that the retention monies are in fact trust monies due to their action of submitting the proof of debt via form 77 of the Companies Act, 1965 in relation to the said monies; and
- (c) in the event this court finds that the said monies are trust monies held by the Appellant company in favour of the Respondents, whether the Respondents at this stage of the liquidation process of the Appellant company are entitled to be granted the reliefs prayed for by the Respondents in the Writ of Summons filed herein.

4. The relevant provisions in the Contract for the purpose of the present case are Clause 22 (on progress payments) and Clause 23 (on the release of the retention monies).

5. Clause 22.1 provides that the Respondents as contractor were to submit an application for payment for progress payment to the Appellant's representative supported by relevant documents which shall include the detailed monthly progress report and shall contain information on the value of the design in accordance with the Schedule of Fees as shown in the contract documents; the value of works executed (including variations) and materials and the amount to be deducted as retention monies. Clause 22.2 provides that within 21 days of the receipt of the application for progress payment the Appellant's representative shall issue an Interim Payment Certificate. Clause 22.4 of the Contract provides that the Appellant (as employer) shall pay the amount certified as due to the Respondents (as contractor) in the Interim Payment Certificate within the time period set out in Appendix 1 of the contract agreement from the date of receipt of such Interim Payment Certificate subject to the employer's rights to deduct

any sum or damages against the contractor under the Contract. With regard to the deduction that the employer can make from the sum certified in the Interim Payment Certificate, it includes the deduction for the retention monies as provided under clause 22.1.3 of the Contract.

6. Clause 22.1.3 of the Contract provides:

“an amount to be deducted as retention sum, calculated by reference to the percentage of retention as set out in Appendix 1 in relation to the total of the amounts under clauses 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1. In this case the total amount of sum retained pursuant to the above clause is RM6,127,884.50”.

7. Clause 23 of the Contract deals with the release of the retention monies. Clause 23.1 provides that after the issue of the Handing Over Certificate the employer shall release one half of the retention monies to the contractor subject to the employer's right to withhold such amount as may be appropriate to reflect the minor outstanding works still uncompleted at the time of the issue of the Handing Over Certificate. But the employer shall not be require to release

the first half of the retention monies unless the contractor has submitted all the relevant drawings required to be submitted under the Contract. Clause 23.2 of the Contract provides that after the issue of the Maintenance Certificate or after the issue of the Certificate of Statutory Completion for the Works by the relevant authority whichever is the later, the employer shall release the second half of the retention monies to the contractor less any costs of completing any minor outstanding works or costs of rectification of defects or loss of value of works.

The Appellant's contentions

8. The Appellant's opposed the Respondents' claim and had taken the stand that the Appellant is not obliged to release the retention monies upon its liquidation for the following reasons:
 - (a) there is no express provision in the Contract stipulating that the retention monies are trust monies;
 - (b) the retention monies were not aside in a separate account as trust monies prior to the Appellant's liquidation;

- (c) the Respondents did not request for the retention monies to be set aside in a separate account prior to the Appellant's liquidation;
- (d) after the Appellant had gone into liquidation, the 1st Respondent's representative (PW1) attended creditors meeting and was nominated to the committee of inspection; and
- (e) the 1st Respondent had filed a proof of debt in respect of the retention monies.

The Respondents' Contentions

9. The Respondents on the other hand, contended that:
- (a) the retention monies are, by their nature and purpose, trust monies;
 - (b) the presence of an express trust clause in the Contract is not a precondition to the creation of a trust; trust can be created by operation of law;

- (c) the retention monies held by the Appellant as trustee for the Respondents must be held in its capacity as a fiduciary to the trust;
- (d) there is no issue of preferential treatment if the retention monies are found to be trust monies because the retention monies do not belong to the Appellant in the first place;
- (e) the fact that the retention monies were not separated from the common funds of the Appellant prior to its liquidation, did not change the fact that the retention monies are trust monies;
- (f) the Appellant's contention that the Respondents are estopped from claiming that the retention monies are trust monies when the Respondents filed the proof of debt vide Form 77 dated 11 September 2009, is an afterthought and non-issue; such contention was only raised after the defence was filed;

- (g) the filing of the proof of debt by the Respondents was done without prejudice to the Respondents' right to claim for the retention monies as trust monies; and
- (h) therefore the Respondents are entitled to their claim herein.

Findings of the High Court

10. In allowing the Respondents' claim the learned High Court judge made *inter alia* the following findings:
 - (a) that the retention monies held by the Appellant under the Contract belong to the Respondents and it is implied that the monies are held by the Appellant on trust for the Respondents and payable to the Respondents if the Appellant (as employer) does not make any claim on the monies in accordance with the terms of the Contract;
 - (b) that the Respondents are not estopped from asserting that the retention monies are trust monies although they had submitted the proof of debt in relation to the sums; this is because the Respondents' representative (PW1)

who attended the first creditors' meeting of the Appellant (after its liquidation) had asserted that the retention monies are trust monies; and

- (c) in view of the above findings, the Respondents are entitled to be granted the reliefs prayed for in the Writ of Summons. Accordingly, the Respondents' claim was allowed with costs fixed at RM25,000.00.

Findings of this Court

11. Clause 22 of the Contract provides for the deduction or payment to be made for the retention monies; and clause 23 provides for the release of the retention monies. It is a common feature found in many construction contracts where a percentage of the amount certified in interim payments is to be deducted by the employer as retention monies. These monies are held over by the employer until all defects have been satisfactorily rectified by the contractor. In the event that the contractor fails to rectify the defects properly, this amount can be used towards the disbursement of expenses incurred by the employer in rectifying the defects. The remaining portion of the

- monies is usually released on the expiry of the defects liability or maintenance period. (see: **Law and Practice of Construction Contracts by Chow Kok Fong, 3rd Edition at page 344**).
12. There are a number of authorities to suggest that until such time when the retention monies are actually disbursed to the employer for the rectification of defects, the property in the monies, even while they are being held by the employer, reside with the contractor. On the terms of the relevant Contract, while the employer may have recourse to the retention monies to meet claims against the contractor under the Contract, the beneficial interest of the contractor in the retention monies remains. The employer's interest in the retention monies is "fiduciary" in nature, in the sense that the employer is the trustee for the contractor in respect of the monies in question. (see: **F.R. Absalom Ltd v. Great Western Garden Village Society [1933] A C 592**; and **Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd [1988] 1 MLJ 444**).
13. In the present case the first question which arises for determination is whether a trust can be implied where the

- agreement or contract does not contain an explicit provision that the retention monies be held on trust by the employer.
14. In **Re Kayford Ltd [1975] 1 All ER 604**, Megarry J. had pointed out that it is well settled that a trust can be created without using the word “trust” or “confidence” or the like : the question is whether in substance a sufficient intention to create a trust has been manifested.
15. The Supreme Court (comprised of Harun Hashim SCJ, Mohamed Yusof SCJ and Gunn Chit Tuan SCJ) in the case of **Geh Cheng Hooi & Ors. v. Equipment Dynamics Sdn Bhd and Other Appeals [1991] 1 MLJ 293** had expressed the following:
- “Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed.”*
16. The court must consider the circumstances concerning the relationship between the parties. A trust (as in the case of **Geh Cheng Hooi** as well as in the present case) can be implied

even where the agreements themselves do not contain an express clause as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties to create one. The court must look into the arrangements as to how the monies were deducted from the progress payments under the Contract, held and treated by the parties. The court cannot reject the Respondent's claim just because they did not choose to enter into an agreement with specific trust clause.

17. The retention monies are monies already earned by the Respondents (as contractor) for the works already done under the Contract. These monies are part of the progress payments claimed and certified for payment to the Respondents (as contractor) under Clause 22 of the Contract concerned. Under Clause 22.1.3 of the said Contract, the retentions monies are *"calculated by reference to the percentage of retention as set out in Appendix 1 in relation to the total amounts under Clauses 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1"*.

18. The purpose of the deduction is to make provision for making good the defects only. If they are not applied for that purpose, it was understood that they would be returned to the contractor after the expiry of the defect liability period. The usage of the word “deduction” for the creation of the retention monies from the certified sum under Clause 22 of the Contract further support the fact that the parties recognized that the retention monies are contractor’s monies. All the requisites of a valid trust were present and the parties had manifested a clear intention to create a trust since from the outset, the whole purpose of what had been done had been to ensure that the monies remained in the beneficial ownership of the Respondents; and a trust is the obvious means of achieving this. As such the retention monies held by the Appellant (employer) do not belong to the Appellant (employer).

19. The learned High Court judge was 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. (see: **ABB Transmission & Distributions Sdn Bhd v. Sri Antan Sdn Bhd & Anor [2008] 10 CLJ 1 (C.A)** and **Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd [2003] 4 CLJ 709**).

20. The Appellant contended that the Respondents are not entitled for an order to set aside or release of the retention monies, since no part of the retention monies had been set aside prior to the liquidation of the Appellant. With respect the court cannot agree with the Appellant on this point. The court is of the considered view that, once it is established that the retention monies are, in fact, trust monies, it matters not whether the monies were set aside prior to liquidation. The monies may have been mixed in the common fund of the Appellant; but they can still be determined and traceable. On this issue, the court is in full agreement with the Supreme

Court in the case of **Geh Cheng Hooi (supra)** where it was held:

“The learned judge also held that money for the goods paid by a customer became trust money to be held in trust by the licensor. The money was also intended to be banked in a common fund and this did not have the effect of the money losing its character of being trust money. As such, it is traceable.”

21. 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. This point was made clear by Megarry J in **Re Kayford Ltd (supra)**, where he said:

“Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.”

22. Thus, the retention monies cannot from 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. The failure to separate the retention monies from the common funds of the Appellant prior to the Appellant's liquidation did not, and cannot defeat the trust. (See: **Re Kayford Ltd (supra)**; **Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd (S6-24-1169-2001) (unreported)** and **Merino O.D.D. Sdn Bhd v. PECD Construction Sdn Bhd [2009] MLJU 671**).
23. The setting aside, release or preservation of the retention monies where the Appellant is under liquidation does not amount to a preferential payment under section 223 of the Companies Act 1965 for the simple reason that the said monies are trust monies and do not belong to the Appellant in the first place.

24. On this issue, the court is in agreement with Azmel Maamor J in **Syarikat Pembinaan Woh Heng Sdn Bhd (supra)** where he said:

“Secondly, on the Defendant’s argument that since there is currently winding-up proceedings against the Defendant this action taken by the Plaintiff for the preservation of the retention monies would tantamount to a preferential payment and as such would be prohibited by section 223 of the Companies Act 1965. In respect of this argument I fully agree with the submission of the counsel for the Plaintiff in that section 223 of the Companies Act 1965 is inapplicable because the retention monies do not belong to the Defendant at all. The retention monies are held on trust in a fiduciary capacity by the Defendant as the employer for the benefit of the Plaintiff who was the contractor. Hence this argument by the Defendant had no merits whatsoever.”

25. The Appellant, relied on the English case of **Rayack Construction Ltd v. Lampeter Meat Co Ltd [1979] 12 BLR 34**, to support its contention that whether or not a trust was created of the retention monies is predicated upon whether or not the retention monies were set aside prior to liquidation. In that case (**Rayack Construction Ltd**) the court held that the express trust provision in the contract, without having set aside

- the funds in a separate account, is insufficient to safeguard the contractor's beneficial interest in the funds in the event the employer goes into liquidation.
26. The above decision in **Rayack Construction Ltd** was not followed by the Malaysian court. The Malaysian Supreme Court in **Geh Cheng Hooi (supra)** affirmed the decision of the High Court where it was held that "*money for the goods paid by a customer became trust money to be held in trust by the licensor; the money was also intended to be bank in a common fund and this did not have the effect of the money losing its character of being trust money, and as such, it is traceable*". This decision is a clear indication that the Malaysian apex court recognized the principle as decided in **Re Kayford Ltd (supra)** that payment into a separate bank account, is by no means conclusive indication of an intention to create a trust; and there is nothing to prevent the parties from binding themselves by a trust even if there are no effective banking arrangements. (The above decision was also followed in **Syarikat Pembinaan Woh Heng Sdn Bhd (supra)** and **Merino O.D.D Sdn Bhd (supra)**).

27. The position in **Rayack** case also does not sit well with the case in **Re Kayford Ltd (supra)**, where the Chancery Court decided that the monies obtained by Defendant company for goods not yet delivered to its customers were held in trust by the Defendant company in favour of the customers, even after the liquidation of the Defendant company; and the setting up of a separate fund was not a necessary condition for the creation of a trust. The decision in **Re Kayford Ltd** has been followed by the Malaysian courts.
28. The English Court in the **Rayack Construction** case has imposed an extremely high obligation upon the contractors to safeguard the retention funds during the performance of the contract, and more often than not, the proposition does not reflect the commercial reality of the construction industry, particularly in the Malaysian context. The reported case laws in Malaysia would reveal that there were only a handful of cases where a contractor had actually applied for the preservation of the retention monies during the pendency of the contract, and was done so after the Defendant had gone into liquidation. There could be many reasons why the fund

- was not set aside; the obvious ones being that the contractor would not want to jeopardize the commercial relationship of the parties when the contract was still subsisting; the contractors would not really apply their minds to taking such action to preserve the retention funds especially when the employer was paying monies under the payment certificates; and so on.
29. The **Rayack Construction** case also failed to consider the fact that a trust, once created, would survive the company's liquidation. This is obvious – the monies held in trust were not it's monies in the first place, and the status of the trust does not change by virtue of the company's liquidation. Once it is found that the retention monies are trust monies, the question of preferential treatment to the Respondents does not arise as the monies do not belong to the liquidation fund in the first place.
30. Therefore with respect, the court agrees with the submission of the Respondents' counsel that the decision in **Rayack Construction** case should not be preferred in the present appeal.

31. On the issue of estoppel, the Appellant contended the Respondents are estopped from claiming that the retention monies are trust monies when the Respondents filed the proof of debt vide Form 77 dated 11 September 2009 with the liquidators of the Appellant.

32. The court agrees with the Respondents' counsel that the argument on estoppel is an afterthought, and was only raised after the defence was filed on 16 July 2010. The Appellant did not at any material time, after the filing of the proof of debt raise at the issue of estoppel in any of its letters in reply to the Respondents' letters stating that the retention monies are trust monies. In any event, whether or not estoppel applies would depend on the facts and circumstances of each particular case. Different facts may lead to different conclusion.

33. In the present case, it is clear from the sequence of events before, at the time and after the filing of the proof of debt that the First Respondent has clearly maintained its stand that the retention monies are trust monies. During cross examination, SD1 (one of the joint liquidators) had also clearly agreed that

- he knew of the fact that the First Respondent had not given up its claim that the retention monies are trust monies. Therefore, the Appellant cannot be said to have been led to believe by the First Respondent's filing of the proof of debt that the First Respondent has given up its right to pursue the retention monies as trust monies. The Respondents' witness, SP1, had also testified that the filing of the proof of debt was only a precautionary measure by the Respondents to safeguard their position and was done without prejudice to the Respondents' right to claim for the retention monies as trust monies.
34. The Appellant's counsel had in fact, during the stage of submission after full trial at the High Court, abandoned the argument on the issue of estoppel. This is reflected in the Appellant's written submissions filed at the High Court and the audio recording of the proceedings (page 678-682 – Appeal Records).
35. For the above reason, the Court finds that the issue of estoppel raised by the Appellant has no merit and must be disregarded for the purpose of the appeal.

Conclusion

36. Based on the above considerations, the Court makes the following findings:

- (a) the retention monies are by their nature and purpose, trust monies held by the Appellant for the Respondents for specific purpose i.e. for payment on the costs incurred by the Appellant to rectify defective works by the Respondents or to complete the works left uncompleted by the Respondents;
- (b) the Appellant's consulting Engineer had issued a Certificate of Practical Completion, and that no claim has been made for any rectification costs;
- (c) the fact that the retention monies were not separated from the Appellant's common fund prior to its liquidation did not change the status of the retention monies as trust monies;
- (d) there is no issue of preferential treatment to the Respondents if the retention monies are found to be trust

monies because the monies do not belong to the Appellant in the first place right from the outset when they were deducted from the progress payment due and payable to the Respondents under clause 22 of the Contract;

- (e) to allow the retention monies to become part of the general funds of the Appellant would only result in the other creditors of the Appellant being unjustly enriched;
- (f) the filing of the proof of debt in Form 77 by the Respondents in the circumstances and the facts of the case herein, does not affect the Respondents' right to claim for the retention monies as trust monies; and
- (g) the Respondents' were therefore entitled to their claim for a declaration that the retention monies totaling RM6,127,884.50 are monies held in trust by the Appellant for the Respondents; for the release of the same by the Appellant to the Respondents as the beneficiaries of the retention monies.

37. Therefore, the Court unanimously dismisses the appeal with costs of RM20,000.00 to the Respondents. The decision of the learned High Court judge is affirmed. Deposit to the Respondents on account of costs.

Dated: **12 July 2011**

sgd.

RAMLY HJ. ALI
JUDGE, COURT OF APPEAL
MALAYSIA

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Messrs. Skrine **.. for the Respondents**

Cases Referred to:

1. **F.R. Absalom Ltd v. Great Western Garden Village Society**
[1933] A C 592
2. **Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd [1988] 1**
MLJ 444

3. **Re Kayford Ltd [1975] 1 All ER 604**
4. **Geh Cheng Hooi & Ors. v. Equipment Dynamics Sdn Bhd [1991] 1 MLJ 293**
5. **ABB Transmission & Distributions Sdn Bhd v. Sri Antan Sdn Bhd & Anor [2008] 10 CLJ 1 (C.A)**
6. **Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd [2003] 4 CLJ 709**
7. **Syarikat Pembinaan Woh Heng Sdn Bhd v. Meda Property Services Sdn Bhd (S6-24-1169-2001) (unreported)**
8. **Merino O.D.D. Sdn Bhd v. PECD Construction Sdn Bhd [2009] MLJU 671**
9. **Rayack Construction Ltd v. Lampeter Meat Co Ltd [1979] 12 BLR 34**

Legislation Referred to:

Companies Act 1965: section 223

Other Referred to:

Law and Practice of Construction Contracts by Chow Kok Fong,

3rd Edition at page 344