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Retention Sums in Construction Contracts Not Impliedly Held on Trust

SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (In Creditors' Voluntary Liquidation)^[1]

Geohan Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (In Creditors' Voluntary Liquidation)^[2] (FC)

Retention sums are usually provided in construction contracts to be held by an employer to secure due performance of the contract by the contractor. In practice, a certain proportion of such retention sum is released when the works are substantially complete, and the remainder is retained until any subsequently discovered defects in the works are properly remedied.

There was uncertainty on whether retention sums under a construction contract are held on trust, in light of two conflicting Court of Appeal decisions in *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor*^[3] and *Pembinaan Legenda Unggul Sdn Bhd (in liquidation) v Geohan Sdn Bhd*^[4] dealing with insolvency of the employer. The former said that there was a trust while the latter held otherwise.

Recently, the Federal Court affirmed the approach in *Geohan* and decided that:

- (a) there is no implication under law that retention sums are held on trust by the employer for the benefit of the contractor;
- (b) whether such a trust exists will therefore depend on the interpretation of the contractual terms; and
- (c) retention sums must be segregated into a separate trust account before a trust can be said to exist.

Contractors would be well advised to adopt clear and unambiguous contractual language providing for the retention sum to be held on trust and kept in a segregated account. In the absence of this, they run the

risk of being merely unsecured creditors for such sums in the event the employer becomes insolvent.

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- [\[1\]](#) Appeal No 02(f)-130-11/2017(W)
 - [\[2\]](#) Appeal No 02(f)-131-11/2017(W)
 - [\[3\]](#) [2012] 3 MLJ 422
 - [\[4\]](#) [2018] MYCA 64