

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN PELAKSANAAN)
GUAMAN NO. WA-37G-57-07/2020**

ANTARA

HSL GROUND ENGINEERING SDN BHD

(No. Syarikat 201001018895 (902602-M)) ...PEMIUTANG PENGHAKIMAN

DAN

CIVIL TECH RESOURCES SDN BHD

(No. Syarikat 201601013421(1184352-H)) ...PENGHUTANG PENGHAKIMAN

DAN

1. CIMB ISLAMIC BANK BERHAD

(No. Syarikat: 200401032872 (671380-H))

2. UNITED OVERSEAS SDN BHD

(No. Syarikat: 199301017069 (271809-K))

3. TRITERRA METROPOLIS SDN BHD

(No. Syarikat: 201501024518 (1149847-W))

...ORANG-ORANG

YANG DIGARNIS

DAN

QINGJIAN HOLDING GROUP (M) SDN BHD

(No. Syarikat: 1075810-P)

...PIHAK KETIGA



Di Dengar Bersama

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN PELAKSANAAN)
GUAMAN NO. WA-37G-206-09/2021**

ANTARA

**HSL GROUND ENGINEERING SDN BHD
(No. Syarikat 201001018895 (902602-M))...PEMIUTANG PENGHAKIMAN**

DAN

**CIVIL TECH RESOURCES SDN BHD
(No. Syarikat 201601013421(1184352-H))...PENGHUTANG PENGHAKIMAN**

DAN

**1. CIMB ISLAMIC BANK BERHAD
(No. Syarikat: 200401032872 (671380-H))**

**2. UNITED OVERSEAS SDN BHD
(No. Syarikat: 199301017069 (271809-K))**

**3. TRITERRA METROPOLIS SDN BHD
(No. Syarikat: 201501024518 (1149847-W))**

**...ORANG-ORANG
YANG DIGARNIS**

DAN



GROUND OF JUDGMENT

(Enclosure 123)

- [1] Enclosure 123 is an Appeal filed by the Third Party therein, Qingjian Holding Group (Malaysia) Sdn Bhd ("**Qingjian**") in Civil Appeal No. WA- 37G- 57-07/2020 (Appeal 57) against the decision of the learned Senior Assistant Registrar ("**SAR**") given on 21.12.2022 which ordered Qingjian to immediately pay HSL Ground Engineering Sdn Bhd, the Judgment Creditors ("**JC**") the sum of RM 2,340,844.47 and costs of RM5,000.00.
- [2] Enclosure 47 is another appeal filed by Qingjian under Civil Appeal No. 37G-206-09/2021 (OS 206), the Third Party therein against the decision of the learned Senior Assistant registrar ("**SAR**") given on 6.3.2023 under enclosure 26 with costs which inter alia dismissed Qingjian's application to intervene in the said OS 206 and set aside the Order Absolute dated 4.10.22 against Triterra Metropolis Sdn Bhd ("**Triterra**") for the sum of RM465,727.61.
- [3] Qingjian had submitted in Appeal 57 that the JC, HSL Ground Engineering Sdn Bhd ("**HSL**"), had wrongfully applied for the Garnishee Application against Civil Tech Resources Sdn Bhd ("**CTR**") the JD, on the ground that the monies owed by the 3rd Garnishee, Triterra to CTR were held on trust by Triterra on behalf of Qingjian,



and as such the monies garnished by HSL belongs to Qingjian and ought not to be garnished by HSL.

- [4] In the midst of the Appeal herein being heard by this Court, the Court of Appeal had on 20.5.2024 affirmed part of the High Court Order (OS 871 Order) under Originating Summons No WA-24NCVC-871-04/2021 (OS 871) that the Consent Judgments, as stated in this Court's grounds below, and which formed part of the issue at the Court of Appeal, were set aside but the said Appellate Court had ordered that the issue and status as to the true nature of the monies garnished herein be determined in this proceedings. Thus to surmise, the Court of Appeal had only set aside the part of the OS 871 Order pertaining to the issue that there was no assignment.
- [5] For the record, Qingjian had attempted to filed in a Third Party Supplementary Submission dated 13.8.2024 together with a Supplementary Bundle of Authorities vide their solicitors Vin Cheng & Co's letter dated 13.8.2024 in both matters. These documents were objected to by the solicitors for the JC on the grounds that they were filed after this Court had heard the parties orally on 2.7.2024.
- [6] I have in the circumstances decided not to refer to the aforesaid documents as it was filed without leave of this Court and after oral submissions had concluded where Qingjian through their lawyers were given ample opportunity to submit on their appeal. To allow Qingjian to rely on these newly filed documents would be prejudicial to the JC and amount to giving Qingjian a second bite at the cherry.



Background

- [7] This Garnishee suit is based on 2 judgment sums (including associated allocator fees) obtained by the JC against the Main Con.
- [8] The garnished debt (the “**Debt**”) is an amount owing by Triterra to CTR under a building main contract between them.
- a) The Main Contract is evidenced by a Letter of Award dated 22 May 2017 from Triterra to CTR in relation to the project known as “Site Clearance, Earthworks, Bored Pile, Contiguous Bored Pile And Basement Construction For Cadangan Pembangunan 2 Blok Bangunan Perdagangan Berstrata Yang Mengandungi I) Menara A 42 Tingkat Pejabat (356 Unit) II) Menara B 30 Tingkat Pejabat (132 Unit) Di Atas 8 Tingkat Podium Tempat Letak Kereta Serta 1 Tingkat Aras Bawah Tanah Dan 2 Tingkat Besmen Letak Kereta Dan M&E Di Atas Lot 68313, Jalan Dutamas 2, Mukim Batu, Wilayah Kuala Lumpur Untuk Tetuan Triterra Metropolis Sdn Bhd (formerly known as Keystone Impetus Sdn Bhd)”.
- [9] The Order to Show Cause was granted on 6 August 2020 (Encl. 4), and served on Triterra on 27 August 2020.
- [10] After the Garnishee Show Cause Order, while the Garnishee Proceedings were ongoing and unknown to the Judgment Creditor at that time:



- a) CTR had a subcontractor, Qingjian—who in Nov 2020 made a claim direct against Triterra for the Debt.
- b) In reply, Triterra said its payments were to CTR only (not to Qingjian) and informed Qingjian of this pending Garnishee suit freezing payment of the Debt in any event.
- c) On 20 December 2020, Qingjian filed KL High Court Originating Summons No. WA–24NCvC–2364–12/2020 (“OS 2364”) for the purpose of excluding 95% of the Debt from being garnished by the Judgment Creditor. This was evident from the reliefs sought therein as follows:-
 - i. declaration that 95% of the main contract sum payable by Triterra to CTR had been assigned by CTR to the Qingjian; and
 - ii. Triterra and CTR shall pay Qingjian a sum of RM4,413,222.91 (being 95% of the Debt).

[11] Qingjian did not intervene in the same but instead filed OS 2364 in December 2020. In February 2021, Qingjian surfaced and intervened in this suit, and filed an affidavit herein disclosing OS 2364 to the Judgment Creditor.

[12] Subsequently, Qingjian requested to postpone the garnishee hearing to enable OS 2364 to be disposed of first and the learned Garnishee Registrar on 19 March 2021 allowed the Subcon’s request.

[13] The Judgment Creditor applied to intervene in OS 2364 however, the intervention application was postponed and Orders were recorded in



OS 2364 (the “2364 Orders”) declaring that the Debt had been assigned, without hearing the Judgment Creditor.

- [14] Subsequently, the Judgment Creditor filed KL High Court Originating Summons No. WA-24NCvC-871-04/2021 (“OS 871”) to set aside the 2364 Orders and to seek a declaration that the Debt was not assigned and was available to be garnished by the Judgment Creditor.
- [15] Both the setting aside and the declaration were allowed by the High Court on 18 August 2022.
- [16] Thereafter, this Suit continued. On 28 Sept 2022, Qingjian changed solicitors to its current solicitors.
- [17] On 2 December 2022, Qingjian alleged that the Debt is held on trust by Triterra for Qingjian. Qingjian also applied for a stay of this suit pending the outcome of its appeal against the 871 Order.
- [18] The learned SAR on 21 December 2022 dismissed the stay application and granted the Garnishee Order Absolute. Qingjian on 27 December 2022 filed an appeal against the Garnishee Order Absolute (i.e. this appeal), but not the dismissal of its stay application.

Analysis & Findings

- [19] I have noted the 2 consent judgments dated 30.3.2021 and 16.4.2021 (“**Consent Judgments**”) respectively which was recorded at the Kuala Lumpur High Court in Originating Summons No. WA-24NCVC-



2364-12/2020 (OS 2364) was in respect of a suit commenced by Qingjian against Triterra and Civil Tech Resources Sdn Bhd (“CTR”) the JD in both the matters before me.

[20] For the record, exhibit ZJY-4 in enclosure 21 which was supposed to be evidence of the said Consent Judgments, was in fact an undated Consent Judgment which appears in the said exhibit ZJY 4 and shows that the same has been signed and approved by all the parties to the OS 2364. It is however only a draft which contains the date 20.1.2021 and that it does not show that the Senior Assistant Registrar or the Court has endorsed and approved the said draft.

[21] Be that as it may, the JC had filed an application to set aside the Consent judgments which were allowed by the High Court i.e the OS 871 Order on the grounds they were made in breach of natural justice and there was no assignment of the debt made by CTR to Qingjian. I have since viewed the OS 871 Order found at enclosure 82 exhibit LKS -1.

[22] Based on the decision of the Court of Appeal on 20.5.2024, this Court is now to decide in this proceedings the true nature of the monies garnished. Thus, the issue that Qingjian is bound by the OS 871 Order declaring that there was no assignment and whether the Debt is available to be garnished is now a live issue before this Court.

[23] This Court will also have to deal with the point on whether Qingjian is barred from raising the alleged trust as that was not raised in OS 871 by the principle of wider res judicata and abuse of power as contended by the JC.



- [24] I have found that OS 2364 was filed on 20.12.2020 by Qingjian which was subsequent to the Garnishee Order to Show Cause granted on 6.8.2020 and served on 27.8.2020 on the employer, Triterra who is the 3rd Garnishee in Appeal 57. It is also apparent to this Court, from the evidence before me, that Qingjian did not at this stage intervene in Appeal 57 but opted to filed OS 2364 without naming the JC as a party to OS 2364.
- [25] It was only in February 2021 did Qingjian intervene in Appeal 57 and filed its affidavit affirmed on 17.2.2021 disclosing the existence of OS 2364.
- [26] I have noted that Qingjian had filed a Stay of Appeal 57 (Stay Application) pending the outcome of the appeal against the OS 871 Order. I have however not seen any evidence before this Court that Qingjian had filed any appeal against the dismissal of the Stay Application.
- [27] I have also accordingly viewed the Notice of Assignment dated 24.8.2017 which can be seen in exhibit ZJY02 of enclosure 21. I have also taken into account the various contentions raised by the JC such as inter alia there was no written notice of assignment and that clause 5 of the CLOA was a conditional payment. I have further observed, as per enclosure 37 of Appeal 57, that the alleged assignment dated 21.5.2018 (Alleged Assignment) is the main trust of the matter in both OS 2364 ad OS 871 and that it is itself premised on the Conditional Letter of Award dated 18.5.2017 between Triterra and CTR.



Trust Issue

[28] As a starting point to determine if there was indeed a trust created, this Court would have to examine the Conditional Letter of Award (CLOA) given by CTR to Qingjian, which is found in exhibit ZJY 1 of enclosure 21 of Appeal 57. From the CLOA, I have observed that:

28.1 there is no amount specified as the Contract Sum;

28.2 clause 5.1 therein provides that Qingjian was to be entitled to 95% of the Contract Sum and all other payments payable to CTR as the Main Contractor in the Main Award dated 22.5.2017 between Triterra, the employer and CTR as the Main Contractor;

28.3 the arrangement states that the 95% of the Contract Sum and all other payments payable to Qingjian shall be paid into a bank account that is to be opened by CTR for receiving such payments which shall be operated by 2 joint signatories, one each from CTR and Qingjian, with an irrevocable standing instruction to transfer the 95% to another bank account held/nominated by Qingjian with the balance 5% to a bank account nominated by CTR.

[29] From the facts before me, I have also found at exhibit ZJY 3 of the same enclosure 21 that Qingjian has shown to this Court that they have completed the works on 15.3.2019 when the Certificate of Practical Completion (CPC) was issued by the Architect.



[30] This Court is also satisfied on a balance of probabilities via the Statement of Final Account dated 27.7.2020 under the Main Contract that the sum due and payable to CTR as the JD is the sum of RM4,645,497.80. It is however alleged by Qingjian that no monies have been paid in satisfaction of the said amounts due.

[31] For a trust to exist, 3 elements are to be established, which are:

- a. Certainty of intention;
- b. Certainty of subject matter; and
- c. Certainty of objects.

[32] The above is evident following the seminal case of *Knight v. Knight* [1840] 49 ER 68 which was adopted in *Fawziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996. See also Halsbury's Laws of Malaysia, 2009 Reissue, 11(1), (310.004) and *Pembinaan Lagenda Unggul Sdn Bhd v Geohan Sdn Bhd* [2018] MLJU 196.

[33] I hold on a balance of probabilities, which is the standard of proof required as determined by the Court of Appeal in *Ong Kong Beng & Anor v Ong Kong Leong & Ors* [2022] MLJU 482 and after considering and analyzing the facts and evidence before this Court, that the Notice of Assignment did inform Triterra to disburse the monies accordingly and that there was in place an arrangement as to how the said monies were to be paid to Qingjian as aforementioned. This in my decision is, evidence of the certainty to create a trust and certainty of subject matter.



[34] I have after due consideration of the present matter, also accepted Qingjian's contention that Qingjian is the actual beneficiary of the monies in mentioned in the said clause 5.01 of the CLOA as Triterra is in my considered view only a trustee of the monies and was holding the same on behalf of Qingjian. Thus, the fact of Qingjian being the beneficiary of the trust is evidence that there is certainty of objects.

[35] *Perman Sdn Bhd v European Commodities Sdn Bhd* [2005] 4 CLJ 750, which is a Court of Appeal case had held that:

"When the case was first argued before the earlier Bench, it occurred to me that the issue of whether there was a trust or a debt was not the central issue in this case. The real question is: who was the true owner of the Fimaly shares? For it is only the owner of property who may declare himself as trustee."

[36] Following from the above cited case, it was submitted by counsel for the JC that the owner of the trust property is the employer being Triterra, the 3rd Garnishee. With respect, I disagree as the owner of the trust property i.e the monies to be paid and received, is in fact CTR. From the affidavit affirmed by Lim Kok Keong on 6.10.2020 on behalf of Triterra before me at enclosure 6 of Appeal 57, Triterra had affirmed that the Statement of Final Account showed that the sum was due to Qingjian. To corroborate this point further, CTR as the JD had also admitted that a trust exists between the JD and Qingjian.

[37] Even if I am wrong on the issue of the existence of an express trust, I hold that a constructive trust has been created on the grounds of



justice and good conscience as per *Fernrite Sdn Bhd v Perbadanan Nasional Bhd* [2011] 6 CLJ 8.

Payment Made to JC by Triterra

[38] It was submitted by Triterra that the monies due under the 2 Garnishee Orders herein have been paid to the JC in the amount of RM2,278,557.47, and I find that there is no dispute on that fact before this Court.

[39] Based on the aforesaid and from settled law, Triterra would thus be fully discharged of its liability to the JC. Authority for this can be found at Order 49 rule 8 of the Rules of Court 2012 and *RT Telecom Sdn. Bhd v Telefleet Trading Group Sdn. Bhd.* [2019] MLJU 1888.

Decision

[40] Accordingly, I hereby allow the Appeal as per enclosure 123 in OS 57 and direct that the sums paid to the JC be refunded and/or paid to Qingjian.

Dated: 19th day of August 2024

sgd.

NADZARIN WOK NORDIN

HIGH COURT JUDGE

CONSTRUCTION COURT 1



S/N eDexFIMKo0GiladjBIYRg

**Note : Serial number will be used to verify the originality of this document via eFILING portal

COUNSEL FOR THE JUDGMENT DEBTOR:

Chen Mian Kuang

(Messrs M.K. Chen & Leong]

COUNSEL FOR THE 3rd GARNISHEE:

Mark Ho

(Messrs Chellam Wong)

COUNSEL FOR THE 3rd PARTY:

Kelvin Ng

(Messrs Vin Cheng & Co.)



S/N eDexFIMKo0GiladjBIYRg

**Note : Serial number will be used to verify the originality of this document via eFILING portal