

**IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR**

**CIVIL DIVISION**

**CIVIL SUIT NO. S6-22-801-2007**

**BETWEEN**

**SHINEI GEOTECHNIQUE (M) SDN BHD**

**.....PLAINTIFF**

**AND**

**YEUNG SIU TONG DEVELOPMENT  
SDN BHD**

**.....DEFENDANT**

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**GROUND OF JUDGMENT**

This is the Defendant's application under 0 18 r 19 (1) (d) RHC to strike out the Plaintiff's claim on grounds that:

- a) This action is multiplicitous of other proceedings which have been instituted by the Plaintiff against the defendant;
- b) This action constitutes an abuse of court's process.

## **Background**

There are various actions instituted by the Plaintiff against the Defendant in relation to an office project in Jalan Tun Razak, Kuala Lumpur whereby the Plaintiff is the contractor and the Defendant is the Employer. The actions instituted are as follows:

### 1. This Suit S6-22-801-2007

In the suit herein, the Plaintiff seeks to obtain relief in relation to the deposit of the retention Monies with interest by the Defendant into a fixed deposit account on the purport that the same constitutes as trust monies until disposal of the arbitration proceedings.

On 21.11.2008 the court dismissed the Plaintiff's application for an injunction to restrain the defendants amongst other things, from utilizing or disposing Monies.

### 2. R1 Proceedings:

In another action (referred to as R1 proceedings) instituted by the Plaintiff, the Plaintiff had applied for a Mareva Injunction restraining the Defendants from dealing with its assets to the amount of RM 20,000,000.00 pending disposal of arbitration between the Plaintiff as the claimant and the Defendant as the Respondent.

There was an ad interim injunction granted by the court on 22 May 2008 which restrained the Defendant from dealing with its assets to

the amount of RM 20,000,000.00. This restraint on the Defendant was to remain in place until 29.9.2008.

### 3. The Arbitration Proceedings

The issues for determination in the Arbitration Proceedings inter alia, are:

- a) The Plaintiff's (as the main contractor) failure to complete the Specified Substructure Works by the extended completion date of 31.3.1999 which was certified by the architects in relation to the Project. The Plaintiff as a main contractor was employed by the Defendant on the Land of which the Defendant was the registered proprietor. The Land has since been sold by the Defendant to a company known as Star Residence.
- b) The Defendant's entitlement to impose liquidated and ascertained damages (LAD) and to set off the same against the certified amount payable to the Plaintiff under Interim Certificate No. 29 which was in turn certified having regard to the Retention monies.
- c) The Defendant's exercise of such set off.
- d) The Defendant's purported refusal in releasing the Retention Monies to the Plaintiff.

### The D6 Proceedings:

This proceeding was instituted 3 months after the R 1 proceedings.

The Plaintiff's claim against the Defendant in the D6 Proceedings is for, amongst other things, the sum of RM 25, 000, 000.00.

In the D6 proceedings, the plaintiff alleges amongst other things that:

- The Defendant would utilize funds from a project known as La Grande Kiara Project to revive the Project to resolve the Plaintiff's claim.
- The Land would remain in the Defendant's ownership as security for the Plaintiff's claim.
- As in the R1 proceedings the Plaintiff had filed for a Mareva Injunction for the sum of RM 25,000,000.00 in the D6 proceedings. An Ex parte Order restraining the Defendant from dealing with the sum of RM 25, 000,000.00 was in fact obtained by the Plaintiff on 6.7.2007 and the same has lapsed. There is as matters presently stand, no subsisting injunction order in the D6 proceedings.

O/S R1-24-19-2008

On 27.2.2008 the defendant had instituted proceedings against the Plaintiff.

An order for ex parte relief was obtained by the Defendant on 21.4.2008 which restrains the arbitration proceedings.

On 19.9.2008, an order restraining the arbitration proceedings was obtained by the Defendant pending disposal of the O/S therein.

### **The Courts Findings:**

- a) In the suit herein the Plaintiff seeks to claim relief as to the Retention Monies to be deposited by the Defendant into a deposit account on the ground that the said monies constitutes as trust monies until disposal of arbitration proceedings.
- b) In the arbitration proceedings it is an issue to be determined as to whether the Defendant is entitled to impose LAD and whether LAD to be deducted from the Retention Monies

If the court is to make an order that the Retention Monies is to be deposited into a deposit account pending arbitration proceedings that would be tantamount to the court prejudging the Defendant's entitlement to deduct LAD from the Retention Monies.

The Defendant's claim for LAD exceeds the amount of the Retention Monies in the sum of RM 1,492,136.79.

The Plaintiff's claim in the arbitration proceedings is in the sum of RM 9,958,620.42 as the amount of unpaid value of works done.

The Defence of the Defendant and its counterclaim is:

- a) Denies that there is unpaid value of works done by the Plaintiff;
- b) Remedial works had to be carried out by third party contractors as a result of the Plaintiff's failure to carry out the works.

c) Defendant claims LAD in the sum of RM 6,146,000.00 against the Plaintiff.

The total claim by the Defendant against the Plaintiff is for the amount of RM 2,032,364.87.

From the facts the R1 proceedings were filed in respect of relief pending disposal of the arbitration proceedings. Similarly in the suit herein it was filed for reliefs pending disposal in arbitration proceedings. Therefore the Plaintiff could have raised and sought relief with regards to the Retention Monies in the R1 proceedings.

The Plaintiff had admitted in his affidavit that part of the Plaintiff's claim in the arbitration proceedings is for the release of the retention Monies and interest thereon to the Plaintiff.(refer to paragraph 7.3 in Enclosure 4).

In all the 3 actions, i.e. the Suit herein, the R1 proceedings and the D6 proceedings, the Plaintiff s sought restraining order against the Defendant from dealing with the proceeds of the sale of the Land tom Star Residence, obtained by the defendant.

Therefore there is a clear multiplicity of proceedings in relation to the claims by the Plaintiff against the Defendant.

It is an abuse of process of the court to raise in a subsequent proceedings matters which ought to have been raised and litigated in an earlier proceedings.

Therefore the application by the Defendant is allowed with costs.

Datin Zabariah Mohd Yusof

Tarikh : 11.6.2009

Bagi Pihak Plaintiff : H.E. Wan

Tetuan G.H.Tee & Co

Bagi Pihak Defendant : Cik Janoce Yap

Tetuan Ranjit Ooi & Robert Low