

**SUMMARY JUDGEMENT: TRIABLE ISSUE AS A DEFENCE**

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SUMMARY JUDGEMENT: TRIABLE ISSUES AS A DEFENCE.

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*To my beloved Mama, Abah and my three little brothers  
for their endless love, care and support.....*

*To my best friends Akmaleena,  
thank you for always be my side*

*Thank you so much. I love you guys.*

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***NORHAZREN IZATIE MOHD***

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## ABSTRACT

Litigation under civil takes a long time to complete, there are many stages need to be started from pleading, pre-trial discovery, trial and judgment, appeal and enforcement. Normal average time taken is three years. The RHC contains a mechanism that can cut short the time and completion called Summary Judgment under Order 14 RHC. Summary Judgment can be used where the Defendant has no valid defence. However, the Defendant may prevent Summary Judgment by raising triable issue as defence. Triable issues are defences that rose by the defendant, as subject to a legal trial capable of being brought under judicial prosecution or determination. When triable issue successfully arises then Summary Judgment should not be granted, means Triable issue can be a defence against Summary Judgment. Therefore, this research has been conducted to determine triable issues in various contracts related to the construction industry. To achieve the objective of this research 18 cases were selected to be analyzed by using qualitative method analysis. From this case found that there are eight (8) points of issues that can be a triable issue as defence which are claimed for interest, contractual issue, certificate, final account, work done, set-off, obligation and liability and the last issues related to liquidated ascertain damages (LAD). Overall, triable issues can arise from any other issues but need to prove that there are disputed issues on the facts or on the law, as disclosed in the pleadings read together with the affidavit or affidavits.

## ABSTRAK

Litigasi di bawah undang-undang sivil mengambil masa yang lama untuk diputuskan, ini kerana terdapat banyak peringkat yang perlu diikuti bermula daripada peringkat rayuan, pra-perbicaraan, perbicaraan, penghakiman dan rayuan serta pelaksanaan. Secara puratanya peringkat ini mengambil masa selama 3 tahun untuk dilengkapkan. Namun begitu, di bawah Undang-undang Mahkamah Tinggi terdapat satu mekanisma yang dapat menjimatkan kos dan mengurangkan masa perbicaraan dikenali sebagai Penghakiman Terus di bawah Oder 14. Penghakiman Terus merupakan satu alternatif yang digunakan oleh pihak plaintif apabila pihak defendan tidak mempunyai pembelaan ke atas tuntutan yang telah dibuat. Walau bagaimanapun, Penghakiman Terus boleh disekat apabila pihak defendan berjaya menimbulkan isu yang perlu dibicarakan sebagai pembelaan. Apabila isu yang perlu dibicarakan berjaya ditimbulkan permohonan terhadap Penghakiman Terus akan ditolak oleh mahkamah. Ini menunjukkan isu yang perlu dibicarakan boleh dijadikan sebagai suatu pembelaan terhadap Penghakiman Terus. Oleh itu, kajian ini telah dijalankan untuk menentukan apakah isu-isu yang boleh dibicarakan di pelbagai kontrak yang berkaitan dalam industri pembinaan. Untuk mencapai objektif penyelidikan ini 18 kes telah dipilih dan dianalisis dengan menggunakan kaedah kualitatif. Hasil daripada analisis yang diperolehi mendapati bahawa terdapat lapan (8) isu-isu penting yang boleh dijadikan sebagai isu yang perlu dibicarakan sebagai pembelaan kepada penghakiman terus iaitu tuntutan ke atas kadar faedah, pembentukan kontrak, sijil perakuan, penyata akaun akhir, kerja-kerja yang dilakukan, *set-off*, obligasi dan ganti rugi kerosakkan (*LAD*). Secara keseluruhan, isu-isu yang boleh dibicarakan boleh timbul daripada mana-mana isu tetapi perlu dibuktikan bahawa terdapat unsur pertikaian ke atas fakta-fakta atau mengenai undang-undang, seperti yang dinyatakan dalam rayuan dan dibaca bersama dengan affidavit.

**TABLE OF CONTENTS**

<b>CONTENTS</b>		<b>PAGE</b>
<b>TITLE</b>		<b>i</b>
<b>DECLARATION</b>		<b>ii</b>
<b>DEDICATION</b>		<b>v</b>
<b>ACKNOWLEDGEMENT</b>		<b>vi</b>
<b>ABSTRACT</b>		<b>vii</b>
<b>ABSTRAK</b>		<b>viii</b>
<b>TABLE OF CONTENTS</b>		<b>ix</b>
<b>LIST OF CASES</b>		<b>xv</b>
<b>LIST OF FIGURES</b>		<b>xix</b>
<b>LIST OF ABBREVIATIONS</b>		<b>xx</b>
<b>CHAPTER I</b>	<b>INTRODUCTION</b>	
1.1	BACKGROUND OF RESEARCH	1
1.2	PROBLEM STATEMENT	5
1.3	RESEARCH OBJECTIVE	8
1.4	SCOPE AND LIMITATION OF THE RESEARCH	8
1.5	SIGNIFICANT OF STUDY	9
1.6	PREVIOUS RESEARCH	9
1.7	RESEARCH METHODOLOGY	10

<b>CONTENTS</b>		<b>PAGE</b>
<b>1.8</b>	<b>CHAPTER ORGANIZATION</b>	
1.8.1	Chapter I – Introduction	13
1.8.2	Chapter II – Summary Judgment	13
1.8.3	Chapter IV – What are Triable Issue	13
1.8.4	Chapter V – Triable issue as defence	14
1.8.5	Chapter VI - References and Bibliography	14
<b>CHAPTER II          SUMMARY JUDGEMENT</b>		
2.1	INTRODUCTION	15
2.2	THE IMPORTANCE OF ORDER 14	18
2.3	PROCEDURE	
2.3.1	Summary Judgment by Plaintiff	20
2.3.2	Summary Judgment by Defendant	24
2.3.3	Summary Judgment for third Party	26
2.4	ORDER AVAILABLE FOR SUMMARY JUDGMENT	28
2.5	TEST FOR ENTERING SUMMARY JUDGMENT	29
2.5.1	Burden of Proof	31
2.5.2	Complex Claim	32
2.6	CONCLUSION	34



<b>CONTENTS</b>		<b>PAGE</b>
<b>CHAPTER III WHAT ARE TRIABLE ISSUE</b>		
3.1	INTRODUCTION	35
3.2	DEFENCES FOR SUMMARY JUDGMENT	
	3.2.1 Strong Defence	37
	3.2.2 Weak Defence	38
3.3	TYPE OF TRIABLE ISSUE	
	3.3.1 Dispute of Fact	40
	3.3.2 Issues of material facts	41
	3.3.3 Evidence	41
3.4	WHAT ARE CONSIDERED AS TRIABLE ISSUE	
	3.4.1 Cross claimed unconnected with the claim	44
	3.4.2 Counterclaims links to claim	45
	3.4.3 Set-off	45
3.5	CONCLUSION	46

<b>CONTENTS</b>		<b>PAGE</b>
<b>CHAPTER IV</b>	<b>TRIABLE ISSUE AS A DEFENCE</b>	
4.1	INTRODUCTION	47
4.2	WHAT ARE TRIABLE ISSUE	49
<b>4.2.1</b>	<b>Claim for interest rate or change</b>	
4.2.1.1	Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd	49
4.2.1.2	PJDCP Malta Sdn. Bhd. v Lau Eng San and Anor	51
4.2.1.3	Southern Finance Bhd (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor	53
<b>4.2.2</b>	<b>Contractual Issue</b>	
4.2.2.1	Iasb Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd	56
4.2.2.2	Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor	58
4.2.2.3	KM Quarry Sdn BHD v Ho Hup Construction Co Bhd	60
<b>4.2.3</b>	<b>Certificate</b>	
4.2.3.1	Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor	62
4.2.3.2	Uniphone Telecommunications Berhad v Bridgecon Engineering Sdn Bhd and Anor	64

<b>CONTENTS</b>	<b>PAGE</b>
<b>4.2.4 Final Account</b>	
4.2.4.1 Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad	67
<b>4.2.5 Work done</b>	
4.2.5.1 CYL Builders Sdn Bhd v Welepeq Sdn Bhd	68
4.2.5.2 Liew Yin Yin Construction Sdn Bhd v Tan Teck Seng	70
4.2.5.3 Matang Integrated Sdn Bhd v Usahasama SPNB-LTAT Sdn Bhd	71
4.2.5.4 CM Indah (previously known as Chai Mio Constructions Sdn Bhd) v UB Ushabina Sdn Bhd	74
<b>4.2.6 Set-off</b>	
4.2.6.1 Jetera Sdn Bhd v Maju Holdings Sdn Bhd	74
4.2.6.2 Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd	77
4.2.6.3 Ooi Boon Teong (Trading As Mitsu-Da Construction) v MBF Construction Sdn Bhd	79
4.2.6.4 Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd	81

<b>CONTENTS</b>	<b>PAGE</b>	
<b>4.2.7</b>	<b>Obligation and Liability</b>	
4.2.7.1	Mahkota Technologies Sdn Bhd v Panflex Sdn Bhd & Anor	82
<b>4.2.8</b>	<b>Liquidated Ascertain Damages</b>	
4.2.8.1	Iasb Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd	83
4.2.8.2	Renofac Builder (M) Sdn. Bhd. v Chase Perdana Berhad	85
4.3	CONCLUSSION	86
<b>CHAPTER V</b>	<b>CONCLUSION</b>	
5.1	INTRODUCTION	87
5.2	SUMMARY OF RESEARCH FINDINGS	87
5.3	PROBLEM ENCOUNTER DURING RESEARCH	93
5.4	FUTURE RESEARCH	93
5.5	CONCLUSION	94
<b>REFERENCE</b>		<b>95</b>
<b>BIBLIOGRAPHY</b>		<b>97</b>

<b>LIST OF CASES</b>	<b>PAGE</b>
<i>Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd</i> [1974] 2 MLJ 94	81
<i>Architect of Wine Ltd v Barclays Bank plc</i> [2007] EWCA Civ 239	39
<i>Chai Cheon Kam v Hua Joo Development Co Sdn Bhd</i> [1989] 2 MLJ	22
<i>CM Indah (previously known as Chai Mio Constructions Sdn Bhd) v UB Ushabina Sdn Bhd</i> [2006] MLJU 426	74
<i>Cow v Casey</i> [1949] 1 KB 474	33
<i>CYL Builders Sdn Bhd v Welepeq Sdn Bhd</i> [2010] MLJU 1870	68
<i>Drake and Fletcher Ltd v Bachelor</i> (1986) 130 SJ 285	45
<i>E.D. and F. Man Liquid Products Ltd v Patel</i> (2003) EWCA Civ 472	31
<i>Gadang Engineering (M) Sdn Bhd v Bluwater Developments Berhad</i> [2010] MLJU 367	66
<i>Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd</i> [1974]	80
<i>Gold Ores Reduction Co v Parr</i> [1892] 2 QB 14	22
<i>Hanak v Green</i> [1958] 2QB 9)	46
<i>Heller Factoring Sdn. Bhd. v Metalco Industries</i> [1995] 2 MLJ 153	58

<b>LIST OF CASES</b>	<b>PAGE</b>
<i>Iasb Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd</i> [2012]MLJU 31	56,83
<i>Jacobs v. Booth Distillery Co.,</i>	19
<i>Jetera Sdn Bhd v Maju Holdings Sdn Bhd</i> [2006] MLJU 4	74
<i>KM Quarry Sdn BHD v Ho Hup Construction Co Bhd</i> [2006] MLJU 157	60
<i>Lee Guat Eng v Seet Tiam Hock</i> [1974] 1 MLJ 178	24
<i>Liew Yin Yin Construction Sdn Bhd v Tan Teck Seng</i> (2003) No: 12-138-03	70
<i>Mahkota Technologies Sdn Bhd (Formerly Known As The General Electric Co (M) Sdn Bhd) v BS Civil Engineering Sdn Bhd</i> [2000] 6 MLJ 505	28
<i>Mahkota Technologies Sdn Bhd v Panflex Sdn Bhd &amp; Anor</i> [2003] MLJU 110	82
<i>Matang Integrated Sdn Bhd v Usahasama SPNB-LTAT Sdn Bhd</i> [2010] MLJU 937	71
<i>Miller v Garton Shires</i> [2006] EWCA Civ 1386.	39

<b>LIST OF CASES</b>	<b>PAGE</b>
<i>Munn v North West Water Ltd</i> (2000) LTL 18/7/2000	40
<i>National Company for Foreign Trade v Kayu Raya Sdn Bhd</i> [1984] 2 MLJ 300	20
<i>Ooi Boon Teong (Trading As Mitsu-Da Construction) v MBF Construction Sdn Bhd</i> [1994] 3MLJ 413	79
<i>Pembinaan Leow Tuck Chui &amp; Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd</i> [1995] 2 MLJ 57	6,7,77
<i>PH Grace Pte Ltd v American Express International Banking Corp.</i> [1987] 2 MLJ 437 at p 438	24
<i>PJDCP Malta Sdn. Bhd. v Lau Eng San and Anor</i> [2010] MLJU 1692	51
<i>Public Trustee v Williams</i> (2000) LTL 10/2/2000	42
<i>Renofac Builder (M) Sdn. Bhd. v Chase Perdana Berhad</i> [2000] MLJU 752	85
<i>Ribaru Bina Sdn Bhd &amp; Anor v Bakti Kausar Development Sdn Bhd &amp; Anor</i> [2003] MLJU 385	58,62
<i>Rotheram v Priest</i> (1879) 41 LT 558	44

<b>LIST OF CASES</b>	<b>PAGE</b>
<i>Santosh Kumar vs Bhai Mool Singh 1958 (1958) AIR 321, 1958 SCR 1211</i>	36
<i>Selvaduray v Chinniah [1939] MLJ 253 CA</i>	32
<i>Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd [2003] EWHC 2118 (Comm), LTL 1/8/2003</i>	40
<i>Sheppards &amp; Co v Wilkinson &amp; Jarvis [1889] 6 TLR 13</i>	24
<i>Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267</i>	24
<i>Southern Finance Berhad (formerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd &amp; Anor [2006] 6MLJ 673</i>	33,53
<i>Swain v Hillman [2001] 1 All ER 91</i>	30
<i>Tansa Enterprise Sdn Bhd v Temenang Enginerring Sdn Bhd [1994] 2 MLJ 353</i>	50
<i>Uniphone Telecommunication Bhd v Bridgecon Engineering Sdn Bhd &amp; Anor (2011) [2011] 5 MLJ 875</i>	5,64
<i>Wong Bing Seng v Joseph Tang Chock Chung (2006) Bankruptcy No. 29-116-2006</i>	27



**LIST OF FIGURE**

<b>FIGURE NO.</b>	<b>TITLE</b>	<b>PAGE</b>
1.1	Flow Chart of research methodology	12
2.1	Summary of procedure for application of Summary Judgment by plaintiff.	23
2.2	Summary of procedure for application of Summary Judgment on counter claim by defendant.	25
2.3	Summary of third party application in Summary Judgment	27

**LIST OF ABBREVIATIONS**

AC	Law Reports: Appeal Cases
AIR	All India Report
All ER	All England Law Reports
AMR	All Malaysia Reports
BLR	Building Law Report
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
ER	England Law Report
EWCA	England and Wales High Court
FMSLR	Federated Malay States Law Reports
HL	House of Lords
PWD	Public Works Department
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department (Malaysia)
QB	Queen' Bench
RIBA	Royal Institution of British Architects
RHC	Rules of High Court
SCR	Supreme Court Report
SLR	Singapore Law Report
WLR	Weekly Law Report

## CHAPTER 1

### INTRODUCTION

#### 1.1 BACKGROUND OF RESEARCH

The construction industry is one of the mainstays of a country's economic progress and can be used as a barometer to measure the performance of the country's economy.<sup>1</sup> However, it is also true to say that the construction industry is a fertile source of disputes.<sup>2</sup> Construction disputes are fairly common, and they vary in their nature, size, and complexity. A construction industry dispute is thus one which is technically complex, tedious in the appreciation of the facts and, in given the fact that the number of contracts awarded now are quite a bit; the amount in dispute in a construction industry dispute can also be quite large.

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<sup>1</sup> Oon Chee Kheng, *Resolution of Construction Industry Disputes- An Overview, The Institution of Engineers, Malaysia (Negri Sembilan Branch), on 24 May 2003.*

<sup>2</sup> Oon Chee Kheng, *Resolution of Construction Industry Disputes- An Overview, The Institution of Engineers, Malaysia (Negri Sembilan Branch), on 24 May 2003.*

Construction disputes, when not resolved in a timely manner, become very expensive because it involves in terms of finances, personnel, time, and opportunity costs. The expenses involve the visible expense and less visible costs. The visible expenses such as attorneys, expert witnesses, the dispute resolution process itself are significant. Cost of company resources assigned to the dispute, lost business opportunities was less visible costs. Other than that the intangible costs such as damage to business relationships, potential value lost due to inefficient dispute resolution are also considerable, although difficult or impossible to quantify.<sup>3</sup>

Over the past two decades there are a lot of efficient methods of dispute prevention and resolution has been developed in the construction industry. In fact, experts often refer to the construction industry as the innovative edge regarding dispute resolution.<sup>4</sup> Means by which disputes in the construction industry can be brought to their resolution which are<sup>5</sup> Mediation, Adjudication, Arbitration, Negotiation, Mini-trial, Litigation, Dispute review board, and others.

Most construction contracts it usually indicates the type of dispute resolution needs to be used in the event if any disputes arise between parties that involved in construction contract. The PWD 203A 2010<sup>6</sup> and IEM<sup>7</sup> standard form clearly indicate that if there is any dispute arise among the contractual parties only arbitration process will resolve this matter. However PAM 2006<sup>8</sup>

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<sup>3</sup> Michel, H. L. 1998. "The Next 25 Years: The Future of the Construction Industry." *Journal of Management in Engineering*, 14 (5), 26-31.

<sup>4</sup> *Engineering News-Record*. 2000. "Arbitrators Found on the Web." *Engineering News-Record*, 245 (7), 37.

<sup>5</sup> The list is by no means exhaustive and other methods of dispute resolution are available.

<sup>6</sup> Clause 66, *Standard Form of Contract (P.W.D Form 203A 2010)*

<sup>7</sup> Clause 55, *I.E.M Standard Form of Contract*

<sup>8</sup> Clause 34 & 35, *The PAM Standard Form of Contract 2006*

and CIDB 2000<sup>9</sup> standard form allow the employer and contractor to choose either arbitration or mediation to resolve any dispute between them.

Arbitration is often stated as a comparison *vis-à-vis* litigation, will often include privacy, confidentiality, cost effective, speedy resolution, flexibility, finality and, with special reference to construction contracts.<sup>10</sup> The parties to a dispute still free to choose a method of resolving it. However in limited circumstances, the court may allow a party to an arbitration agreement to refer a dispute directly to court.<sup>11</sup> This only happens if there is in fact no dispute matter between the parties with regard to the matters or that the agreement is null and void, inoperative or incapable of being performed<sup>12</sup> then this matter should be brought to court.

The case of *Lembaga Pelabuhan Kelang v Kuala Dimensi Sdn Bhd & another Appeal*<sup>13</sup> seems to give rise to a further ground for not granting a stay of court proceedings in rare circumstances where estoppels will arise. Although the general rule under section 10 Arbitration Act 2005 still stands, when parties subsequently displaced their original discretion to refer their disputes to arbitration by expressly submitting to the jurisdiction of the court, the doctrine of estoppels may be invoked to prevent a party from asserting otherwise.

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<sup>9</sup> Clause 47, *CIDB Standard Form of Contract 2000*

<sup>10</sup> Clause 34 & 35 of PAM '06 Standard Building Form; Clause 55(h) of IEM Conditions of Contract for Works of Civil Engineering Construction; Clause 47.3(d) of CIDB Standard Form of Contract for Building Works (2000 Edition) and Clause 66 of JKR 203A Standard Form of Contract.

<sup>11</sup> Zulkfli Sapeciay (2007). *Summary Judgments in Construction Industry*

<sup>12</sup> Under section 10 Arbitration Act 2005

<sup>13</sup> (2010) 9 CLJ 532

Under order 14, RHC 1980<sup>14</sup>, if the defendant does not have any sufficient defence, then the plaintiff may apply for summary judgment on the claim or some particular part of the claim, when there is no defence against the claim. If the defendant fails to satisfy the court that there is an issue that should be tried, the plaintiff will be entitled to immediate judgment on the claim or part of it, as the case may be.

Summary judgment can be defined as a decision made on the basis of statement and evidence presented for the record without a trial. The dictionary of law defined summary judgments as: “*Procedure where the court decides a claim or particular issues against a claimant or defendant without trial*”<sup>15</sup>. It means that the plaintiff can obtain judgment on his claim without going to trial. It will save in term of time and cost for trial and hearing process<sup>16</sup>. Summary judgment only can be used when there is no dispute as to the facts of the case, and the party entitled to judgments as a matter of law.

This procedure is only available when the defendant has no hope of success and any defence raises merely would give the effect of delaying judgment. In *British and Commonwealth Holdings Plc v Quadrex Holdings Inc*,<sup>17</sup> Browne Wilkinson VC said that ‘*Order 14 procedure is for clear cases and not for complicated cases which absorb many days to unravel*’. A plaintiff should resort to an application under Order 14 where there are no substantial issues of fact or of law-involved.<sup>18</sup>

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<sup>14</sup> Ravindran Nekoo (2004). *Practical Guide to Civil Procedure in Malaysia*. International Law Book Services.

<sup>15</sup> L.B Curzon (2004). *Dictionary of Law 2. 2<sup>nd</sup> Edition*. International Law Book Services.

<sup>16</sup> Nasser Hamid, S.S Ravichandran (1993). *Summary Judgment*. Central Law Book Corporation.

<sup>17</sup> [1989] 3 All ER 492

<sup>18</sup> Nasser Hamid, S. S. Ravichandran (1993). *Summary Judgment*. Central Law Book Corporation

Summary judgment is generally sought, and often granted, in three types of cases<sup>19</sup>:

- a) where the claim or defence is damaged in law, or not clear;
- b) where the claim or defence is too weak to be justified in a trial;
- c) where the case turns on the question of law or construction.

However if the defendant manages to prove that there is triable issue from that claim, then the summary judgement must be denied as to that cause of action. In the case of *ED & F Man Liquid Products v Patel [2003]*<sup>20</sup> it is stated that:

*“A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable”.*

## 1.2 PROBLEM STATEMENT

As mention earlier, triable issues are issues that the court cannot decide without hearing the dispute, it means must have defences and evidences from both parties<sup>21</sup>. If it is faulted, it will cause injustice to the defendant. In case of *Uniphone Telecommunication Bhd v Bridgecon Engineering Sdn Bhd & Anor (2011)*<sup>22</sup>, the appellant had succeeded in raising triable issues and the court held that there were bona fide triable issues. It means if the other party has triable issues, then he can stop the other party from obtaining the summary judgment.

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<sup>19</sup> The Hon. Mr. Justice Moore-Bick, Commercial Court, London “*“Fast-Track” Judgments - A survey of the principles and practice adopted in England under the Civil Procedure Rules*” UCL; London Global University (2003)

<sup>20</sup> [2003] EWCA Civ 472 at [8]

<sup>21</sup> [2003] EWCA Civ 472 at [8]

<sup>22</sup> [2011] 5 MLJ 875

However what amount to triable issue is not an easy defence to be rising. If the defendant raises any triable issues, the court will determine whether the triable issues are valid or not. In the case of *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd*<sup>23</sup> the employer state that there are triable issues which contented that:

- a) The employer was *entitled to set-off the contractor's claim* by its claim for damages.
- b) The employer was *entitled to challenge the correctness* of the payment certificate.
- c) The employer wanted to *refer the dispute to arbitration* as provided in an arbitration clause of the contract.

Hence, the High Court held in favour of the employer, giving it unconditional leave to defend, on the ground that the employer's affidavit evidence had disclosed triable issues, which required determination at trial, and the contractor appealed.

However, on appeal the court revised the decision and allowed the appeal. The court allowed the contractor's appeal and setting aside the previous judgment and substituting that summary judgment in favour of the contractor for the sum certified to be due and payable to under the penultimate progress payment certificate.<sup>24</sup> It is mean that in this case there is no valid triable issue can be defence on behalf the employer.

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<sup>23</sup> [1995] 2 MLJ 57

<sup>24</sup> Zulkfli Sapeciay (2007). *Summary Judgments in Construction Industry*



In the case of *Mahkota Technologies Sdn Bhd (Formerly Known As The General Electric Co (M) Sdn Bhd) v BS Civil Engineering Sdn Bhd*<sup>25</sup> the sub-contractor make an application for summary judgment to seek payment held by the main contractor. The sub-contractor try to adopt the principle in *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd*.<sup>26</sup> However, the facts on the issues raised by the sub-contractor were triable issues and contrary to the situation in Dr Leela's case. The plaintiff then contended that the defendants' allegations were baseless and ought to be dismissed on two grounds:

a) The *common-law right of set-off in building contracts* of this nature had been extinguished and thus is no longer available to the defendants; and

(b) The *defendants did not have any evidence to support their counterclaim*. It was also contended that in order to succeed on their claim, the defendants, as provided in the sub-contract, was required to produce the architect's certification that there was delay and/or shoddy work. No such certificate was ever produced at the hearing of the application.

The senior assistant registrar dismissed the plaintiff's application for summary judgment against the defendants. The defendants appealed but the court dismissed the appeal. The judge, agreed with the decision of the learned senior assistant registrar in allowing unconditional leave to defend because **there was a triable issue in relation to the plaintiff's claim**.

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<sup>25</sup> [2000] 6 MLJ 505

<sup>26</sup> [1995] 2 MLJ 57

From the discussion above, the conclusion had been made that in order to restrain summary judgment; a defendant must raise valid triable issues as defence against summary judgment. The question is what are triable issues? Hence, it is important to determine and understand those triable issues, order to restrain summary judgment.

### **1.3 OBJECTIVE OF RESEARCH**

The objective of this research is to determine what triable issues are as defence in order to restrain summary judgment to be granted.

### **1.4 SCOPE AND LIMITATION**

The following are the scopes for this study:

1. Type of triable issue discussed based on court interpretations that arise under a construction contract.
2. This study is conducted by literature law cases using *e-electronic* sources from Lexis Malaysia to find out the information from Malayan Law Journal (MLJ), Malayan Law Journal unreported (MLJu), Malayan Law Journal Articles (MLJA) and articles from Journal of Surveyor, seminar papers and previous research.

## 1.5 SIGNIFICANCE OF THE STUDY

Basically, this study was conducted to give insight of the triable issues which are part of the summary judgment process, in order to help dispute parties will know their rights if they want to restrain summary judgment order. In accordance with that, all criteria and circumstances were analyzed based on the interpretation and judgments by the court. The results from this research will determine what triable issues are as a defence against summary judgment.

## 1.6 PREVIOUS RESEARCH

An extensive research on summary judgment was done by **Zulkfli Sapeciay (2007)**, entitled – (*Summary Judgments in Construction Industry Payment Issues*). General principles of Summary judgement were discussed in the research. The author had also identified the circumstances that allow a party in litigation to obtain summary judgment in construction contract litigation cases.

## **1.7 RESEARCH METHODOLOGY**

The process and method of approach as a guideline in guiding this research could be done in a systematic way to achieve the research objective. The methods of study can be divided into fourth stages, which involved initial study, data collection, data analysis and completion.

### **1.7.1 Initial Study**

During the initial stage, literature review was undertaken to study and understand the problems of payment dispute in the construction industry and review the remedy and alternative dispute resolution methods in relation to payment in a building contract. It was carried out using published journals, books and Standard form of contract i.e. PWD 203A 2010, PAM 2006, CIDB 2000 and IEM.

Besides that, discussion with supervisors, lecturers, and friends were conducted so that more ideas and knowledge related to the topic could be collected. After the issues or idea of research was obtained, the objective and scope of research were identified. Then the outline of the research was prepared in order to identify what kind of data and sources will be needed.

### **1.7.2 Data Collection**

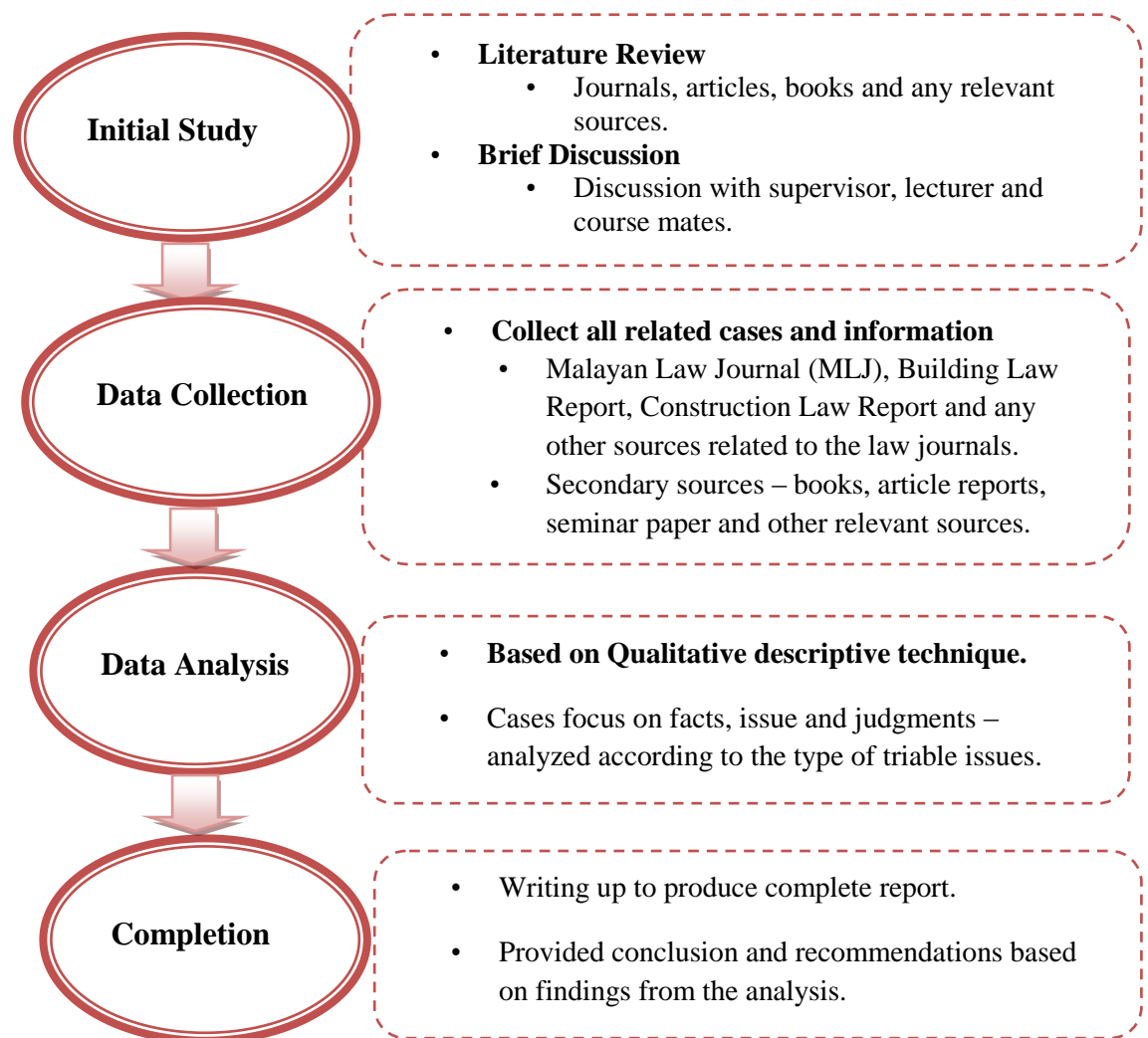
At this stage data have been collected through relevant sources and information especially in documentary analysis. All collected data and information have been recorded. The main sources for this research are collected from Malayan Law Journal (MLJ), Singapore Law Report, Building Law Report, Construction Law Report and other law journals. Besides that, secondary also have been collected from books, the article reports, seminar paper, newspapers and articles from the internet.

### **1.7.3 Data Analysis**

After data have been collected, the data have been analyzed based on Qualitative descriptive technique. At this stage, 18 cases had been analyzed and all the relevant information has been converted into information that is useful for the research. All 18 cases had been reviewed, with focus on facts, issues and judgments. After that all information, ideas, opinion and comments will be arranged, analyzed and interpreted. All data were converted into information that is useful for the research. The proper arrangement of data tends to streamline the process of writing up.

### **1.7.4 Completion**

This is the final stage of the research process. In this stage involved the process of writing up to produce a complete report. Besides that the process of reviewing the whole process of research and identify whether the research objective has been achieved will be done at this stage. Lastly, conclusion and recommendations had been made based on the findings from the analysis of data.



**Figure 1: Flow Chart of research methodology**

## **1.8 ORGANIZATION OF THE THESIS**

### **1.8.1 Chapter 1 – Introduction**

This chapter contains a discussion on the issues which are related to the method of settling dispute arise in construction and methods to resolve disputes in the construction industry. Besides that in this chapter also shows the development process of research, start from the objective, scope and methodology.

### **1.8.2 Chapter 2 – Summary Judgment**

This chapter explains about the general principle of summary judgment. Discussion in detailed about the procedure and related cases regarding to the application and the implication of summary judgement in the construction industry have been made in this chapter.

### **1.8.3 Chapter 3 – Triable issues in Summary Judgment**

This chapter explains about the general principles of triable issue. Discussion in detailed on the types, characteristic and test have been made in order to make triable issue as a defence in summary judgment and also related cases regarding triable issue have been discussed and the implication of triable issues in summary judgement also have been highlighted.

#### **1.8.4 Chapter 4 – Triable issues as a defence**

This chapter focuses on the analysis of 18 cases in Malaysia construction industry. The analyses only focus on what are triable issues and the category for each triable issue.

#### **1.8.5 Chapter 5 – Conclusion**

The last chapter explained about the summaries all major findings, recommendations and conclusion of the study.



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