

SUMMARY JUDGMENT IN CONSTRUCTION CONTRACT

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DEDICATION

For

My parents,

Sapeciay Hussin and Salasiah Ahmad

With love and respect

For

My family,

Norhafizah Abd Razak & Amirah Hazirah Zulkfli

With love

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ABSTRACT

The construction contract has built-in potential for conflicts and disputes to arise between the contracting parties. Disputes if not promptly resolved, will lead to losses and it is necessary for the parties to use the best method of dispute resolution to resolve their disputes. Litigation is one of the methods but the process takes substantial period to come to determination. Therefore, most disputes in construction contract are resolved by arbitration or mediation. In litigation process, there is a procedure that allows a litigant to obtain quick judgment without going to trial. It is known as summary judgment procedure. However, it is available only in limited circumstances. Furthermore, it appears that it is not frequently used in construction contract cases. Therefore, this master project intends to identify the circumstances, limited as it may, that allow summary judgment to be available to the parties in a building contract. This research was carried out mainly through analysis of cases reported in law journals, such as Malayan Law Journal, Building Law Report, etc. The result showed there were four circumstances where the summary judgment has been made available to the parties in a building contract in Malaysian construction cases. All these four circumstances were related to claims for progress payments that the employers (or the main contractors) refused or failed to pay to the main contractor (or the subcontractor as the case may be). In conclusion, it can be said that this summary judgment procedure is only suitable for actions claiming undisputed payment.

ABSTRAK

Risiko dan potensi kepada konflik dan pertikaian di kalangan pihak berkontrak sememangnya wujud sejak mula kontrak pembinaan itu dimetrai. Sekiranya pertikaian ini tidak dapat diselesaikan secepat mungkin, ia akan mengakibatkan kerugian. Oleh itu, pihak yg berkontrak perlu mencari kaedah terbaik untuk menyelesaikan pertikaian antara mereka. Pendakwaan di mahkamah merupakan salah satu cara tetapi ianya mengambil masa yang lama kepada penyelesaian. Oleh itu, kebanyakan pertikaian di dalam kontrak binaan diselesaikan dalam kaedah timbangtara atau perantaraan. Di dalam proses pendakwaan, terdapat kaedah yang membenarkan pendakwa boleh mencapai keputusan penghakiman lebih cepat tanpa menunggu perbicaraan. Ia dipanggil penghakiman terus (summary judgment) tetapi ianya hanya dibenarkan kepada keadaan yg terhad. Ia juga jarang didapati didalam kes-kes perbicaraan kontrak pembinaan. Oleh itu, penyelidikan ini bertujuan untuk mengenalpasti keadaan yang terhad ini di mana penghakiman terus boleh dikeluarkan untuk pihak di dalam kontrak pembinaan. Projek ini dijalankan melalui analisis kes-kes di dalam laporan undang-undang seperti *Malayan Law Journal*, *Building Law Report*, dan sebagainya. Hasil kajian mendapati bahawa terdapat empat keadaan di mana penghakiman terus boleh dikeluarkan untuk pihak kepada sesuatu kontrak pembinaan di dalam kes-kes pembinaan di Malaysia. Kesemua keadaan-keadaan ini berkaitan kepada tuntutan pembayaran kemajuan kerja dimana pihak majikan (atau kontraktor utama) enggan atau gagal membuat pembayaran kepada kontraktor (atau sub-kontraktor). Kesimpulannya, kaedah penghakiman terus sesuai digunakan untuk tuntutan bayaran tunggakan yang harus diterima.

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CHAPTER 1

INTRODUCTION

1.1 Background of Topic

Conflicts and disputes have always arisen between contracting parties in construction industry. The disputes between employers, main contractors and nominated sub-contractors are resolved either by court proceedings, arbitration proceedings and some alternative dispute resolution methods. Normally, disputes in construction contract are referred to arbitration. However, some dispute disputes are tried in the courts by litigation for determination¹.

¹ John Uff (1991). *Construction Law. Law and Practice Relating to the Construction Industry. 5th Edition.* Sweet & Maxwell

There are some perceptions about arbitration, where in construction industry, contrary to popular believed the arbitration in building contract matter is generally slower, more expensive and less certain than litigation.² Furthermore, in comparing main features of dispute resolution process in construction dispute, Noushad Ali Naseem (2006) stated that there are similar features between litigation and arbitration process in term of basic resolution, duration and cost.³

Normally, litigation is the final stage in the dispute resolutions. It comes about when other dispute resolution or alternative dispute resolution (ADR) have failed to work or when the arbitration clause are not incorporated in the contract, or when the nature of the conflict, characteristic of the dispute, or the relationship between the parties does not allow for intermediate step.⁴

When the parties refer the dispute to the court, it has always been the case that building contract litigation tends to take a substantial period of time to come to trial. It is not uncommon for a case to take a year or more before a pleadings are complete and even waiting for trial date, in substantial case, the delay as much as three years.⁵

In view of the time taken to resolve the dispute, in an appropriate case, the plaintiff may apply to the court for judgment on his claim or the defendant for judgment on his counter claim on the ground that there is no sufficient defence. In Malaysia Under

² Robert Fenwick Elliott (1985). *Building Contract Litigation*. 2nd Edition. Longman Professional.

³ Noushad Ali Naseem Ameer Ali (2006). *A Construction Industry Payment and Adjudication Act: Reducing Payment-Default and Increasing Dispute Resolution Efficiency In Construction*. Master Builders.

⁴ Feniosky Pena-Mora, Carlos E. Sosa, D. Sean.McCone (2003). *Introduction to Dispute Resolution*. " 1st Edition. Peason Education

⁵ Feniosky Pena-Mora, Carlos E. Sosa, D. Sean.McCone (2003). *Introduction to Dispute Resolution*. " 1st Edition. Peason Education

order 14, Rules of The High Court 1980⁶, the plaintiff may apply for summary judgment on the claim or some particular part of the claim, on the ground there is no defence to it. If the defendant fails to satisfy the court that there is an issue, which ought to be tried, the plaintiff will be entitled to immediate judgment on the claim or part of it, as the case may be.

Frequently, the only dispute on an application for summary judgment under Order 14 is whether the defendant can establish a credible counterclaim, which he is entitled to set-off against the sum otherwise due. Order 14 entitles the court to give summary judgment on a point of law that does not merit a full hearing⁷.

Summary Judgment is defined in the Dictionary of Law as: “*Procedure where the court decides a claim or particular issue against claimant or defendant without trial*”⁸. It means that a plaintiff may at an early stage of proceedings try to obtain judgment on his claim or part of his claim without going to trial. It will save in term of time and cost for trial and hearing process⁹.

In Malaysia, there are four standard forms of construction contract being use such as PWD 203A, PAM 98, CIDB 2000 and IEM 1989 Forms. Each standard form usually indicate the type of dispute resolution to be use in the event that any disputes or differences arise between the employer, or the architect on his behalf, and the contractor, either during the progress or after completion or abandonment of the Works.

⁶ Ravindran Nekoo (2004). *Practical Guide to Civil Procedure in Malaysia*. International Law Book Services.

⁷ John Uff (1991). *Construction Law. Law and Practice Relating to the Construction Industry*. 5th Edition. Sweet & Maxwell

⁸ L.B Curzon (2004). *Dictionary of Law*. 2nd Edition. International Law Book Services.

⁹ Nasser Hamid, S. S. Ravichandran (1993). *Summary Judgment*. Central Law Book Corporation

PAM 98 and CIDB 2000 standard forms allow the employer and contractor to choose either arbitration¹⁰ or mediation¹¹ to resolve any disputes that arise between them. However, in PWD 203A and IEM standard form stated only arbitration¹² process are covers any dispute or difference touching on the construction of the contract.

Legally, right to litigation is precluded if there is an arbitration clause in the contract. As provided in section 6 Arbitration Act 2006, it may be use to challenge an arbitrator's award although only on very limited grounds.¹³ However, in limited circumstances, the court may allow a party to an arbitration agreement to refer a dispute direct to court. For example, the dispute matters beyond limitation of arbitrator jurisdiction or there is no dispute among the parties.

Through this litigation procedure, the plaintiff or defendant may apply to the court for judgement for his claim or counterclaim on the ground that there is no sufficient defence.

1.2 Problem Statement

As discussed above, there are various forms of dispute resolution to resolve a claim or dispute. Most disputes in construction contract are resolved by arbitration and

¹⁰ Clause 34, The PAM Standard Form of Building Contract 1998 & Clause 46 *CIDB Standard Form of Contract for Building Works (2000)*

¹¹ Clause 35, The PAM Standard Form of Building Contract 1998 & & Clause 47 *CIDB Standard Form of Contract for Building Works (2000)*

¹² Clause 54, *Standard Form of Contract (P.W.D. Form 203A (Rev.10/83)* & Clause 55, *I.E.M. Condition of Contract For Mainly of Civil Engineering Construction (1989)*

¹³ Robert Fenwick Elliott (1985). *Building Contract Litigation. 2nd Edition*. Longman Professional.

mediation. There are few cases are resolved by litigation because it is believe that arbitration and mediation methods are generally faster and less expensive than a court action.¹⁴ As a result, litigation is used only as a last option in settling the disputes.

After done some literature review, it is found that under litigation, the parties can settling the dispute especially in non-payment issue by the application for summary judgment. However, most parties in Malaysian construction industry do not acknowledge the function of this procedure and not even know it can use to resolve the disputes.

In view that only a few construction cases related to application for summary judgment, it shows that summary judgment only allowed in limited circumstances. The question is what are those circumstances? Hence, it is important and necessary for us to understand the circumstances, which are limited, and the procedures that will be available to the parties to a building contract.

With the knowledge, parties in the building contract would have an idea on how could succeed in the application for summary judgment and when they can apply and how to apply for summary judgement. Thus, the above-mentioned question forms the basis for this project paper, which intends to identify the closest answers of it.

¹⁴ Stuart H Bartholomew (2001). *Construction Contracting, Business and Legal Principles*. 2nd Edition. New Jersey: Prentice Hall.

1.3 Objective of Research

From the problem statement, the following is the objective of the study: -

1. To identify the circumstances those allow a party in a litigation to obtain summary judgment in construction contract litigation cases.

1.4 Scope of Research

The following are the scopes for this study: -

1. The circumstances discussed are those arising there under, in connection therewith and related to the building contract.
2. Only cases related to building contract will be discuss in the study.

1.5 Importance of Research

The importance of this study is to give an insight of the litigation-dispute resolution process, i.e. summary judgment, available in construction contract especially set-off and counter claim. After this study, the disputes parties will know when the summary judgment will be available to them and the outline of the summary judgment application under civil procedure in Malaysia can be referred. Both the successful and unsuccessful applications for summary judgment will be discussed based on relevant cases.

1.6 Research Process and Methods of Approach

Research process and method of approach will be used as guidelines so that the research could be done in a systematic way to achieve the research objective. The research process generally consists of 4 stages, i.e. 1st stage: initial study and fixing research topic, objective, scope and outline, 2nd stage: data collection and recording, 3rd stage: data analysis and interpretation and 4th stage: writing and checking.

1.6.1 1st Stage

The first stage of research involves initial study, which is discussion with friends, and lecturers regarding the research topic and initial literature review to get an idea of the research topic. The objective and scope of the research will be determined after the initial study and the outline will be prepared in order to identify the type and sources of data related to the research.

1.6.2 2nd Stage

The 2nd stage of research process is data collection which consists of primary data and secondary data. Data will be collected mainly through documentary analysis and it will be recorded systematically.

1.6.2.1 Primary Data

Primary data will be collected from Malayan Law Journal, Singapore Law Report, Building Law Report, Construction Law Report and other law journals through the LexisNexis law database and Current Law Journal online database. The cases relating to the research topic will be collected and only important cases will be used for the analysis at the final stage.

1.6.2.2 Secondary Data

Secondary data is data obtained from research done by third parties other than the writer. Sources of secondary data consist of books, act, articles and seminar papers. These sources are important to complete the literature review chapter.

(i) Books

Books are the main secondary data sources. Books relating to summary judgement and building contract litigation will be referred for this research.

(ii) Seminar Papers and Articles

Seminar papers and articles will be used to support the theories stated in the relevant books.

(iii) Act

Act is an important source to support the literature review chapter and analysis done. Act used is mainly the Rules of the High Court 1980 (RHC) and Subordinate Court Rules 1980 (SCR).

1.6.3 3rd Stage

3rd stage of research involves data analysis, interpretation and data arrangement. This process is to process and convert the data collected to information that is useful for the research. Arrangement of data tends to streamline the process of writing of the paper.

1.6.4 4th Stage

The last stage of the research is writing up and checking of the writing.

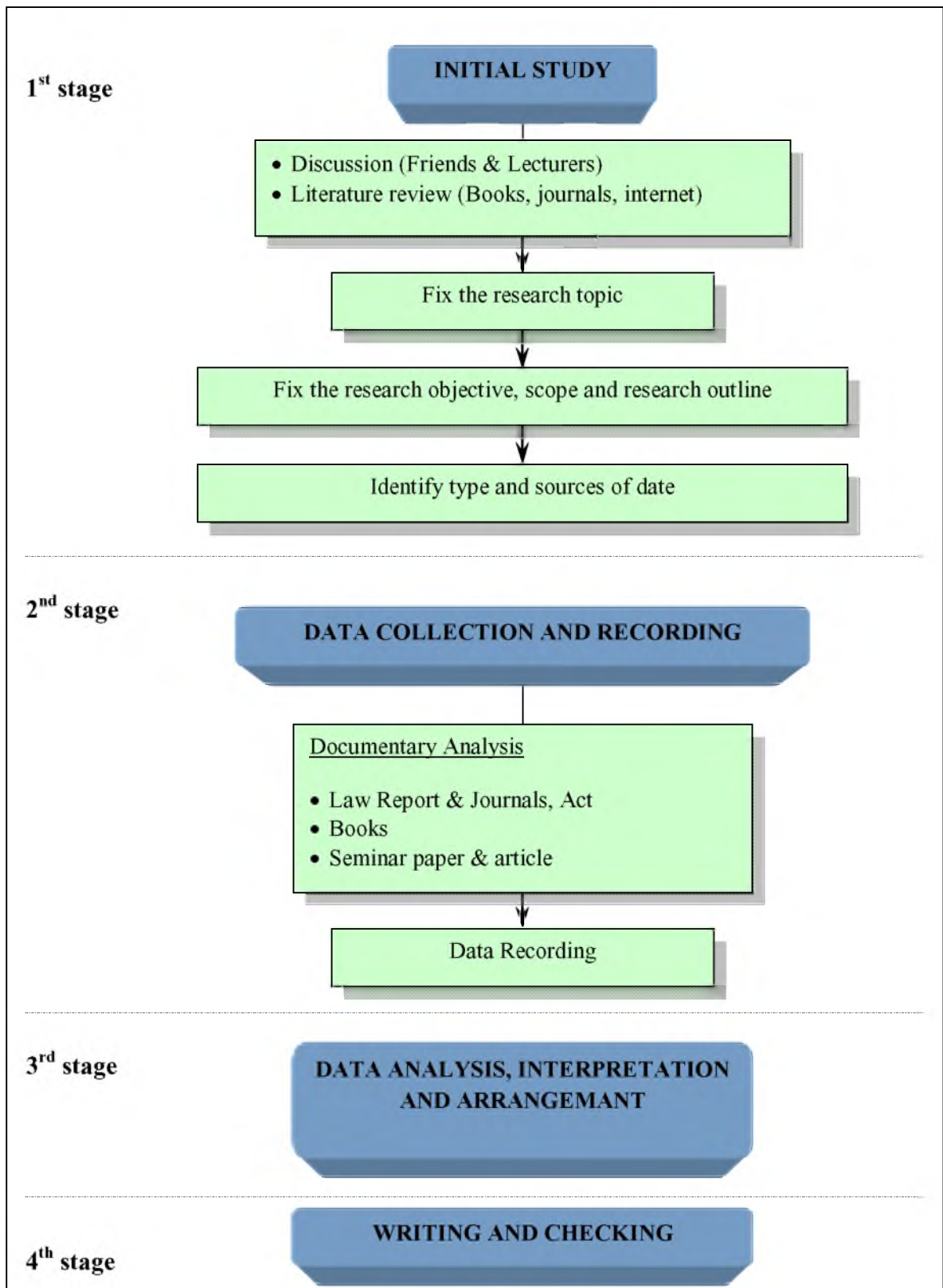


Figure 1.1: Research Process and Methods of Approach

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