

SUB-CONTRACTORS' REMEDIES UPON THE BREACH OF THE MAIN  
CONTRACT

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*To my beloved Daddy David Ejau Epoi and Mummy Mary Sian,  
Joyce Evelyn and Joel Pengiran,  
And Mohamad Fiqri Hamiz*

*For Their Never Ending Love and Support*

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## ABSTRACT

In any construction industry, it always involves various work activities be it just a simple house renovation up to the construction of a mega project and the work need to be sub-contract to others. Sub-contractors enter into a contract with the main contractor to take up portion of the work. In the industry it consists of two categories of sub-contractor which are the nominated sub-contractor and the domestic sub-contractor. In the event of breach of the main contract, the sub-contractors would be one of the many parties who is affected due to this circumstances. Albeit there are standardised forms such as PWD 203N and CIDB Model Terms which is readily available for the use of the sub-contractors, is it really helpful in seeking remedy. It seems that these sub-contractors are playing David against Goliath since they are just a small party going against a powerful party. This research is trying to find out what are the types of contractual, non-contractual and equitable remedies that are available for the sub-contractors to claim due to the breach of the main contract. This research has been done based on cases which have similar circumstances in which there is breach of main contract. The outcome from analysing the cases are, it reaffirms the objective of this research. It can be seen from over the years that the remedies granted to the claimant are liquidated and unliquidated damages, Mareva injunction, specific performance, rescission and restitutionary. Based on the case analysis, there are more claims made based on contractual and equitable remedy. With this also it proves that court exercising equity in ensuring justice can be done. Apart than that, most remedy that had been granted by the court is due to there is a clear relationship such as the assignment of tasks. The result out of the outcome gives an impression that these sub-contractors do still have the right to claim for what is own to them.

## ABSTRAK

Dalam mana-mana industri pembinaan, ianya sentiasa melibatkan pelbagai aktiviti kerja sama ada hanya pengubahsuaian rumah yang mudah sehingga pembinaan projek mega. Disebabkan ini menjadi satu keperluan untuk sub-kontrakan kerja kepada pihak yang lain. Sub-kontraktor memasuki kontrak dengan kontraktor utama untuk mengambil sebahagian daripada kerja. Di dalam industri ianya terdiri daripada dua kategori sub-kontraktor iaitu sub-kontraktor yang dinamakan dan domestik sub-kontraktor. Sekiranya berlaku pelanggaran kontrak utama, sub-kontraktor akan menjadi salah satu daripada pihak-pihak yang terjejas disebabkan oleh keadaan ini. Walaupun terdapat bentuk yang seragam seperti JKR 203N dan CIDB Model Syarat yang sedia ada untuk penggunaan sub-kontraktor, adakah ia benar-benar membantu dalam mencari penyelesaian? Ia seolah-olah bahawa sub-kontraktor bermain Daud melawan Goliat kerana mereka adalah hanya sebuah parti kecil menentang pihak berkuasa. Kajian ini cuba untuk mengetahui apakah jenis remedi kontrak, bukan kontrak dan saksama yang disediakan untuk sub-kontraktor untuk menuntut daripada pelanggaran kontrak utama. Kajian ini telah dilakukan berdasarkan kes-kes yang mempunyai keadaan yang sama di mana terdapat pelanggaran kontrak utama yang menimpa. Hasil daripada analisis kes-kes yang sedia ada, ia mengukuhkan objektif kajian ini. Ia boleh dilihat dari jangka masa beberapa tahun terdapat pelbagai remedi yang telah diberikan kepada pihak yang menuntut. Berdasarkan analisis kes itu, terdapat lebih banyak tuntutan yang dibuat berdasarkan remedi kontrak dan saksama. Dengan ini juga ia membuktikan bahawa mahkamah menjalankan ekuiti dalam keadilan dan ia menunjukkan bahawa ia boleh dilakukan. Selain daripada itu, kebanyakan remedi yang telah diberikan oleh mahkamah adalah kerana terdapat hubungan yang jelas seperti tugas tugas. Hasil daripada keputusan itu memberi gambaran bahawa sub-kontraktor masih lagi mempunyai hak untuk menuntut apa yang terhutang kepada mereka.

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**LIST OF ABBREVIATIONS**

CD	JCT Standard Form of Building Contract with Contractor's Design
CIDB	Construction Industry Development Board
CIPAA	Construction Industry Payment and Adjudication Act
DOM/2	BEC Domestic Sub-contract for use with JCT CD 81
FCEC	Federation of Civil Engineering Contractors
ICE	Institution of Civil Engineers
IEM	Institution of Engineers Malaysia
JCT	Joint Contracts Tribunal
JCT	Joint Contracts Tribunal
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department
S.O.	Superintending Officer

**LIST OF CASES**

*Chuang Eng Khong v Malayan Banking Bhd* [1997] 3 MLJ 173

*Cud v Rutter* (1720) 1 P Wms 570

*Dawber Williamson Roofing Ltd v Humberside CC* (1979) 14 BLR 70

*Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors* [2009] MLJU 198

*Dial Singh a/p Tara Singh v Mann Foong Realty Sdn Bhd* [1977] 3 WLR 818, HL

*ER Dyer Ltd v Simon Build/Peter Lind Partnership* (1982) 23 BLR 23

*Fee (J&J) Ltd v Express Lift Co Ltd* [1993] CILL 840

*Gerbang Perdana Sdn Bhd v MTD ACPI Engineering Berhad & Anor* [2015] MLJU 1176

*Hadley v Baxendale* (1854) 9 Exh 341

*Hampton v Glamorgan CC* [1917] AC 13

*Ikatan Inovasi Sdn Bhd v KACC Construction Sdn Bhd* [2007] MLJU 780

*Kerajaan Malaysia v Tanjung Teras Sdn Bhd* [2014] 8 MLJ 259

*Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd & Anor* [2012] 8 MLJ 573

*Lau Geok Fah lwn Tee Ah Kaw @ Tey Hock Soon* [2001] 8 MLJ 149

*Lim Foo Yong & Sons Realty Sdn Bhd v Datuk Eric Taylor* [1990] 1 MLJ 168, SC

*Lord Wilberstone Johnson v Agnew* [1980] AC 367

*Madujaya Enterprise Sdn Bhd v Kosbina Konsult (K) Sdn Bhd* [2015] MLJU 364

*Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd* (1984) 29 BLR 31

*Mawar Awal (M) Sdn Bhd v Kepong Management Sdn Bhd & Anor* [1998] 4 AMR 4110

*Ng Lay Choo Marion v Lok Lai Ooi* [1995] 3 SLR 221

*O'Toole v Ferguson* (1912) 5 DLR 868

*Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133

*Pritchett and Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch 515

*Robinson v Harman* (1848) 1 Ex 850

*Twiddle v Atkinson* (1861) 1 B & S 393

*Usahasama SPNB-LTAT Sdn Bhd v Borneo Synergy (M) Sdn Bhd* [2009] 2 MLJ 308

## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of Study

In any developing countries such as Malaysia, construction industry plays a vital role where the industry provides the buildings and infrastructures which help to attained to the country economic growth.

Construction incorporates an extensive variety of work activities from a basic remodel works of a home to a development of an enormous development ventures<sup>1</sup>. Mostly in any construction projects, the specialty contractors which is also commonly referred to as sub-contractors carries a significant role<sup>2</sup>. It is said by Palmer (1993) that numerous building contract would be incapable of performing if ever the contractor has no authorities to sub-contract the work as certain tasks in the construction require a specific specialization<sup>3</sup>. Therefore, it is a norm and necessary to sub-contract. A sub-contractor is one of the party who involves in the construction stage who is engaged by a main contractor in which they agree to perform a portion or all of the obligations of the other party (main contractor) where they (main

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<sup>1</sup> Essays, UK, "Sub-Contractors Readiness on The Malaysian Security Contract Law Essay".

<sup>2</sup> Jimmie Hinze and Andrew Tracey, "The Contractor-Subcontractor Relationship: The Subcontractor's View. *Journal of Construction Engineering Management*, 1994, 120(2): 274-287

<sup>3</sup> Norman Palmer, "Sub-Contracting". Butterworths, 1993, pp.49.



contractor and sub-contractor) are bound by a separate contract (main contract) to presumably an employer. This sometimes creates friction as these two contracts may not be compatible with each other due to the doctrine of privity of contract.

It is basically a bread and butter in the construction industry for having all these scenarios where these small sub-contractors to carry out the work for the big contractors. In practice, there are two types of sub-contractors, in particular, domestic sub-contract and nominated sub-contract. Both domestic and nominated sub-contractor comes into a contract with the main contractor and remains fully reliable towards him. The only difference was that the domestic sub-contractor is appointed by the main contractor himself while nominated sub-contractor is engaged to the main contractor which is appointed by the employer at his discretion. The purpose of nominated sub-contractor is to give the employer the assurances with regards to the quality of performance he gets from the sub-contractor without relinquishing his own privileges against the main contractor should the performance prove defective<sup>4</sup>.

Albeit the importance of subcontractors in order to a successful construction project, not much study has been done and these various issues which require much attention are seldom acknowledged and discussed<sup>5</sup>. Arditi and Chotibhongs (2005) have highlighted some of the issues in subcontracting practice which are as follows:

- i. payment,
- ii. retainage withheld by general contractor,
- iii. bidding,
- iv. bonding,
- v. insurance,
- vi. safety,
- vii. partnering, and
- viii. productivity.

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<sup>4</sup> Norman Palmer, "Sub-Contracting". Butterworths, 1993, pp.155.

<sup>5</sup> David Arditi and Ranon Chotibhongs, "Issues in Subcontracting Practice". Journal of Construction Engineering and Management, 2005, pp.866-876.

Typically, the chain of risk links the three primary parties (employer, main contractor and sub-contractor) by two separate connections: one exists between employer and main contractor and the other between main contractor and sub-contractor<sup>6</sup>. Outstandingly, the absence of a direct relation between the employer and sub-contractor in this chain provides the main challenges. Therefore, a sub-contractor cannot proceed to go against the employer to recover payment for goods or services supplied by him and the mere fact that the employer accepts work performed, or good supplied, by the sub-contractor does not justify there is a contract exist between them<sup>7</sup>.

The issues which have been brought forward by Ardit and Chotibhongs (2005) where it states out the issues such as payment, retainage withheld by general contractor and so forth leads to the application of claim. Indeed, claims in construction contracts are unavoidable. Sometimes contracting parties may not have a solid fundamental basis on the principle of the contract and they may not know their rights and obligations as provided in the contract in order to tackle the problem of claims more effectively.

A breach of contract is one of the many reasons which leads to the application of claim. When one or both of the party to the contract fails or refuse to perform their obligation as provided in the contract, the aggrieved party is at a position to prove that the other party is in default. Aggrieved party due to breach of contract may bring action and seek the court's interference and determination for their entitlement.

A claim arising out of or in connection with the contract relates to a claim arising not under, but out of or in connection with, the contract, where the remedy is not designated in the contract and the claimant needs to invoke a provision of the

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<sup>6</sup> Wai Fan Wong and Charles Y.J. Cheah, "Issues of contractual chain and sub-contracting in the construction industry". *In: Khosrowshahi, F (Ed.), 20th Annual ARCOM Conference*, 1-3 September 2004, Heriot Watt University. Association of Researchers in Construction Management, Vol. 1, 671-80.

<sup>7</sup> *Ibid.*

applicable law to obtain a remedy<sup>8</sup>. A claim is a demand by the aggrieved party for an appropriate remedy or redress for abusing that right under the contract by the other party.

As defined by the Oxford Dictionary, “remedy” means to cure<sup>9</sup> and legally, remedy means, to achieve justice in any matter in which legal rights are involved<sup>10</sup>. Remedies may be ordered by the court, granted by judgment after trial or hearing, by agreement (settlement) between the person claiming harm and the person he/she believes has caused it, and by the automatic operation of law.

The function of remedy is to compensate the innocent party and to restore back its rights in place. There are different kinds of remedies available which are rescission, damages, specific performance, injunctions, restitutionary remedies, and as well equitable remedies. The type of each of these remedies will be further explained in the next chapter of this research.

## **1.2 Problem Statement**

The issue which brings about the problem into the limelight is when a breach of the main contract occurs which could lead to the termination of the main contract and the sub-contract falls together with it. Are there any possibilities that the sub-contractors gain anything out of it? Where the party to the main contract is the employer and the main contractor and the sub-contractors are not privy in the contract, it seems that these construction players is playing David against Goliath where they seem to have no say or right in any of the matter.

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<sup>8</sup> Dr. C.S.Suryawanshi. Analysis of Claims Based on Provisions in 4th Edition of FIDIC Contracts, Sr Techno Legal Consultant Mumbai, (2010).

<sup>9</sup>See The Concise Oxford English Dictionary, 10<sup>th</sup> edn (Oxford: Oxford University Press, 2002).

<sup>10</sup> Lawdictionary.com

There are various standard form of contract established for 'nominated' sub-contract works but none are published for 'domestic' sub-contracts<sup>11</sup>. The Construction Industry Development Board Malaysia (CIDB) understood the issues and problems and were mooted to have a draft of Model Terms of Construction Contracts for Sub-contract for the purpose to protect the 'domestic' sub-contract works in Malaysia. However, none of this model terms were taken up or agreed by the industry. Most of the available standard form currently in use contain detailed provisions on the legal rights and on termination. However, there is no provision which enables these sub-contractors to claim for something that is outside of the ambit of the contract, for instance on the loss of future profits.

Sub-contractors typically prefer to opt for nominated sub-contracts as it gives them the direct relationship with the employer, consultants and the terms in it are more equitable for them as compared to domestic sub-contract works (Yik *et. al.*, 2006). Since the nominated sub-contractor have a standard form that gives them the direct relationship with the employer it placed them on a better footing. However, for the domestic sub-contractors it seems to be in a different world on its own since they have no standard form that could protect their interest. The question is, are they being treated differently?

The model terms were introduced to make the domestic sub-contractors at a better footing but it has not been acceptable. Therefore, these standardize form does not have the necessary provision which makes it compulsory to use it. In addition, although the nominated sub-contracts are having the same template as the main contract is the term in the contract fair enough for the nominated sub-contractor or is it lopsided? Albeit the existence of these said standardized contracts, these sub-contractors still suffers from it. These standardized contracts do not seem to act its purpose of protecting these sub-contractors. Due to these issues, there is a need to determine what are the remedies available to these sub-contractors. This research will be determining what are the contractual, non-contractual and equitable remedies

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<sup>11</sup> CIDB. *CICC Model Terms of Construction Contract for Subcontract Work 2007*. 3rd print, CIDB. (2007).

that are sought after by the sub-contractors that are prevalent in the construction industry if the main contract was terminated.

Upon the breach of a contract, the claimant may seek his relief out of this circumstances. Therefore, this study is embarked on these questions which are (a.) what sorts of remedies are the parties looking for, (b.) what determine the application for these remedies, (c.) is there any other option given to the claimant or is it a situation where a status quo have been normalised and put back in its rightful place. It is also a question whether is the remedy granted to him is what is required by him and is it satisfactorily enough to him. These questions lead to an area which needs illumination.

The significance of the research is to highlight the availability of remedies to the sub-contractor upon the breach of the main contract. This research is trying to look at whatever remedies that are available due to various causes of breach to help positioned this sub-contractor at a better footing.

### **1.3 Aim of the Research**

The aim of this research is to identify what are the available remedies in the context of contractual, non-contractual and equitable that the law has to offered towards these sub-contractors and/or suppliers when a sub-contract fails due to the breach of the main contract which could lead to termination so that they know what can they claim for out of this circumstances.

## **1.4 Objectives of Research**

In order to meet the study aim, the following are the objective: -

1. To identify the type of remedies available to the sub-contractor to claim upon the breach of the main contract.

## **1.5 Scope of Research**

This entire research will focus on the sub-contractors who enter into an agreement of sub-contract work with the main contractor within the constraint of Malaysian construction industry. This industry player is linked together with the main contract where the sub-contract will fall together when the main contract is terminated between the employer and the main contractor.

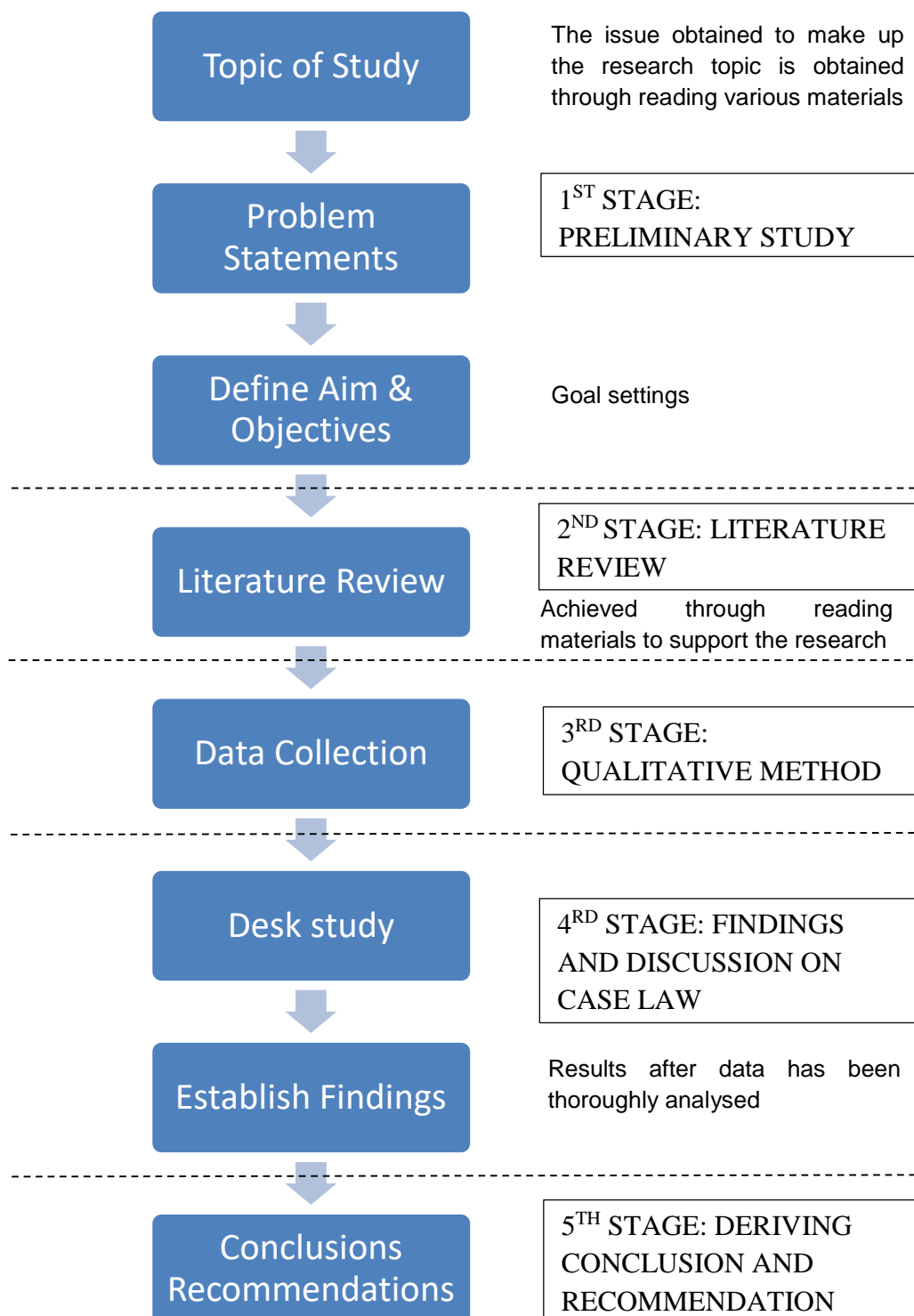
This study will also cover on the case law which is available in Malaysia which relates to the contractual link between the termination of the main contract and sub-contract. Generally, this research would be a desk study on the rights and remedies available to the sub-contractor.

## **1.6 Significant of Research**

The significant of this study is to provide a better insight and to understand the issue towards the rights of the sub-contractors upon the termination of the main contract. This research hopes it could provide knowledge to industry player especially sub-contractors. This research is also expected to be able to assist the sub-contractors in understanding their rights to claim apart than the terms stated in the sub-contract when the main contract falls. Hopefully, this study would be an added value to the knowledge bank as well.

## 1.7 Research Methodology

Following are the methodologies used in this research:



**Figure 1.1 Research Methodology Flowchart**



## 1.8 Structure of The Thesis

This paper shall be organized into 5 chapters. The chapters are as follows:

### Chapter 1: Introduction

Chapter 1 will be the introductory section where it will present the gist of the research topic and how it is embarking on to the reader. It will briefly illuminate on the aim of this research, the research objective, what are the significant of this study to the construction industry, scope of study that had been set upon and the stages of research methodology to be undertaken.

### Chapter 2: Literature Review

Chapter 2 is on the literature review where it is a survey and documentation of published and unpublished work which discussed on various motion which is related to the scope of this research study. It will cover the different types of sub-contractors, the privity of contract between the party, the defaults of the employer and the main contractors which leads to the breach of the contract and last but not least on the different kind of remedies which are available.

### Chapter 3: Research Methodology

Chapter 3 will discuss on what builds up this research study where it will cover on the formulation of the research aim and objectives, the research on literature review, data collection and conclusions as well recommendations (if any) of this research study.

## Chapter 4: Data Collection and Analysis

In Chapter 4 of this research study, it focuses on different cases which have been filtered out based on the relevancy to the research scope, to be reviewed and to comprehend on what ground did the court granted or dismissed the various remedies applied by the sub-contractors' out of the circumstance of the breach of the main contract.

## Chapter 5: Conclusion and Recommendation

Chapter 5 will be the discussions on the finding and data interpretation based on the gathered data which is the case law. Other than that the outcome will be concluded and some recommendation will be put forward by the author (if any).

### **1.9 Conclusion**

Termination of a contract is indeed something which is unfortunate to happen in any construction industry. However, the aggrieved party may claim for remedy to reinstate back his legal rights as if the contract is pursued. It come to a consent that with a better equipped knowledge on the matter relating to the rights and obligations of party to a contract any kind of breach could be minimize to reduce the chances that would lead to the termination of a contract. The sub-contractor especially need to know their rights and obligations if ever this matter of circumstances were to arise and they wanted to claim what is owed to them.

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